Neutral Citation: [2016] IEHC 606

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 598 JR]

BETWEEN

PATRICIA O'MAHONEY

APPLICANT

AND

DISTRICT JUDGE SEAMUS HUGHES

FIRST RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECTIONS

SECOND RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 26th October, 2016

1. On 13th October, 2014 leave to apply for judicial review was granted to the applicant (Peart J.) for an order of *certiorari* quashing her conviction and sentence on foot of Summons No. 2014/43091 at Mullingar District Court on 2nd October, 2014 by the first named respondent. The grounds upon which leave was granted may be summarised as follows:

> (1) The first named respondent acted in breach of fair procedures by enquiring from defence counsel prior to the commencement of the case:
>
> (a) What the nature of the applicant's defence was;
>
> (b) Whether counsel was on a "fishing expedition" or whether he could shorten the evidence that was proposed to be given by the investigating garda. (Grounds (i), (ii) and (iii)).
>
> (2) The first named respondent erred in law and acted in excess of jurisdiction by stating, after defence counsel had indicated that he would need to hear all of the evidence, that he would remember this when defence counsel was making submissions later in the case. It was submitted that this comment would lead an objective person to believe that the first named respondent was biased, or had come to a view as to the merits of the case prior to the conclusion of the evidence or was going to or was likely to reject any submissions made by defence counsel as a result of his not informing the court as to the specific nature of the applicant's defence (Ground (iv)).
>
> (3) The first named respondent made comments during the course of the hearing which indicated or tended to indicate that he did not have an open mind in the matter and had made up his mind about the guilt of the applicant without hearing the defence case in its entirety or the final legal submissions on behalf of the defence (Ground (v)).
>
> (4) The first named respondent interrupted defence counsel's cross-examination excessively and obliged him to make submissions on points of law while defence counsel was still cross-examining the investigating garda in relation to the particular point in issue (Ground (vi)).

2. An order was made granting access to the digital recording of the District Court proceedings which was exhibited in the grounding affidavit.

The District Court Hearing

3. A copy of the transcript of the District Court hearing was available to the court and was relied upon by both sides.

The Fishing Expedition – Grounds (i), (ii),(iii) and (iv)

4. The learned District Judge made reference to a "fishing expedition" at the outset of the case. It arose as follows:

> Judge: Now can I ask you and I always do when it comes to drunk driving cases, are you on a fishing expedition? What I mean by that is, do you want to hear each and every aspect of the entire case, or are you concerned about some aspect of the case?
>
> Counsel: I think I need to hear the vast majority if I can deal with issues …
>
> Judge: Well that means you have an interest in each and every aspect of it.
>
> Counsel: Potentially, there are certain issues which I may not have and I will expedite matters as much as I can. If I don't need to hear a particular piece of evidence, I will indicate to the court that I have no difficulty with that piece of evidence. I am not going to elongate the matters in any way.
>
> Judge: No but the very giving of the evidence by the arresting guard can take some time in itself and it follows a format.
>
> Counsel: Yes I understand that, unfortunately I think I will need to hear the vast majority. It may be that I …
>
> Judge: Well, I will be particularly interested in your submissions later then.
>
> Counsel: Very well.

Judge: Okay, come on, let's start.

5. I am not satisfied that the reference to "fishing expedition" of itself could be taken as an indication of unfairness on the part of the learned judge. He has to have regard for the extremely busy lists to be administered in the District Court. His remarks may be regarded as an appeal for focus during the course of the evidence and an indication to counsel that he would appreciate it if counsel indicated the course of the case and whether certain matters were not in issue. Counsel may raise any defence which is appropriate during the course of a criminal trial at any level of the criminal justice system. However, expedition and efficacy are to be encouraged and that is very often achieved by an indication by the defence that the admissibility of certain evidence is accepted or that a particular state of affairs is accepted as a matter of fact. Indeed, under s. 22 of the Criminal Justice Act 1984 an accused may admit any fact in the proceedings and the admission may be made orally at the hearing through his counsel or solicitor. I am not satisfied that these grounds have been established.

6. I do not consider that the comment that the judge made about his interest in later submissions could or should be interpreted as a threat of some kind of consequence that might be visited upon the applicant if a "full" defence were made or an indication of bias on his part. As with a number of extracts from the transcript, remarks in the course of a hearing may later be the subject of differing interpretations.

Cross-Examination – Ground (v) and (vi)
7. The applicant was charged with driving a mechanically propelled vehicle in a public place on the 12th September, 2013 while there was present in her body a quantity of alcohol such that within three hours after so driving the concentration of alcohol in her breath exceeded a concentration of 9 micrograms of alcohol per 100 ml of breath contrary to s. 4(4)(b) and s. 5 of the Road Traffic Act 2010.

8. Garda Antoinette Kerins gave evidence on behalf of the prosecution. At approximately 8:30pm on 12th September, 2013 at Newdown, The Downs, on the Killucan to Mullingar Road she observed the applicant who was driving a vehicle slowly and erratically. The car approached a roundabout and failed to indicate. The car took a very wide berth while taking the roundabout and left by the first exit. It then approached a second roundabout and again failed to indicate and drove slowly and erratically around it. The car "sort of swerved much wider than would be normal when taking a roundabout". The garda activated the blue lights on the patrol car and the applicant's car slowed and stopped. Garda Kerins spoke to the driver who identified herself as the applicant. The garda stated that there was a strong smell of alcohol from her breath, as a result of which, she decided to do a breath test. She outlined that she was a trained operator in the use of the Drager Alcometer. She retrieved one from the patrol car and required the applicant to provide a specimen of her breath. The specimen provided "resulted in a fail". The garda then stated that she formed the opinion that the applicant had consumed an intoxicant and she arrested her pursuant to s. 4(8) of the Road Traffic Act for an offence under s. 4(1), (2), (3) and (4) and cautioned her in the normal way. The garda's colleague drove the applicant's vehicle back to Mullingar Garda Station and the witness conveyed the applicant to the garda station in the patrol car. They arrived at 8:50pm.

9. Garda Kerins then described how the applicant was processed as a person arrested on suspicion of a drink driving offence and all relevant details were taken and entered in the custody record. The garda then introduced herself officially to the applicant as the trained operator of the Evidenzer IRL machine and explained that for a period of twenty minutes she would observe the applicant and that she was not allowed to eat, drink or smoke in order to enable a valid test. While under observation the witness said that the applicant's eyes were bloodshot and red. There was a strong smell of alcohol and she was quite upset. She admitted to having a few glasses of wine. She was coherent and polite. At 9:24pm the garda brought the applicant to the doctor's room where the Evidenzer IRL machine was located.

10. The garda was about to state how she made a requirement of the applicant to provide a sample for use in the machine. At that point counsel indicated that it was accepted that this requirement was made and that there was no issue in relation to this evidence. Counsel indicated that the next contentious element of the evidence arose at the end of the test since the requirement was acknowledged as validly made. Therefore he stated: "If the garda just wants to go to the end of the test that is fine". This was taken to mean by the learned judge to be that stage of the test relating to "the issuing of the result". This was accepted. Two specimens were supplied by the applicant at 9:28pm and 9:31pm. A result of 57mg per 100ml of alcohol was obtained.

11. At this stage, the witness indicated that she returned the applicant to the custody suite. The prosecution inspector intervened and asked whether the witness had the s. 13 certificate. Counsel indicated that he had seen a copy of the certificate. The inspector then asked Garda Kerins to restate to the court the opinion she had formed before she arrested the accused. She answered:

> "I formed the opinion that Ms. O'Mahoney had consumed an intoxicant which made her incapable of driving a mechanically propelled vehicle … meaning intoxicating liquor … I just want to specify, judge, that I had made a lawful demand for Ms. O'Mahoney to produce her driving license because she is treated as a specified driver …"

Counsel indicated that there was no issue in relation to that matter. The evidence-in-chief concluded.

12. In the course of cross-examination an issue emerged as to the extent to which the reading obtained from the Drager Alcometer contributed to the formation of the requisite opinion leading to the arrest of the applicant. This course of cross-examination was quite legitimately directed or calculated to the issue of the lawfulness of the applicant's arrest with a view to challenging the lawfulness and/or constitutionality of her detention and the procedures subsequently followed at the garda station with a view to having such evidence excluded. This would support an application that the case should be dismissed because there was no case to answer. There were three exchanges in relation to this matter involving counsel and the learned trial judge.

13. At p. 7 of the transcript the following exchange occurred:

> Q. And I think you performed a test and I think on the basis of that test and failure you formed your opinion; is that correct?
>
> A. Well, between that and my own observation of Ms. O'Mahoney.
>
> Q. Okay?
>
> A. Using both, I would have made my opinion.
>
> Q. Right. And if she had not failed the Drager would you still have arrested her?

A. No, judge.

Judge: That's speculation anyway.

Q. Mr. Clarke: Yes but I am just asking, so it was the Drager test that formed your opinion in relation to effecting the arrest; would that be fair?

A. It was secondary to my initial observations of Ms. O'Mahoney and the strong smell of intoxicating liquor from her breath.

Q. But you have indicated that, if she hadn't failed, that you wouldn't have arrested her. So it was the Drager that was I suppose the catalyst for helping you form that opinion; would that be fair enough to say?

A. Well, secondary to my initial opinion.

Q. Very good. …"

14. Counsel then cross-examined concerning the operational procedure applicable to the use of the Drager Alcometer. In particular, it was suggested that a garda should wait for twenty minutes prior to actually administering the Drager test when somebody has recently consumed alcohol. This was accepted. The judge intervened to indicate that this was only advisable. Mr. Clarke indicated that he intended to rely on High Court precedent. The judge indicated that the Drager was only a screening device and continued:

"Judge: And you have heard her evidence saying that it was only a secondary to her physical observations of your client.

Counsel: Yes I heard that judge but …

A.: Judge, if I did not have a Drager Alcometer in the patrol car at that time I would have arrested Ms. O'Mahoney on the basis of

Judge: That is my understanding of the totality of your evidence, yes

Counsel: It is not quite what you said but in any event?

Judge: Well that is my understanding of her evidence. That is what she did say, okay?

Counsel: I can address the court …

Judge: No, no I don't want confusion to be arising and leave everything till the end, I am happier to deal with matters as they arise.

Counsel: Very good …

Judge: I am fresher, and I have heard her evidence only moments ago.

Counsel: Yes.

Judge: … and she said it was a secondary aid to her initial opinion and her primary reasons for arresting was the physical characteristics that were apparent from your client."

15. The learned judge then suggested that the witness had said that she used the breathalyser as a screening device to copper fasten or endorse her opinion. He expressed the view that this was "the totality and effect" that he took from her evidence. Counsel then stated:

"I accept that much except that the garda when I asked her specifically would she have arrested her, she said no"

Judge: Well I didn't get that now.

Counsel: That is something that the court has to take consideration.

Judge: Sorry, is that the situation?

A. If I had breathalysed Ms. O'Mahoney and it had come back pass, it is a possibility judge. But there was a very strong …

Q Judge: It is a possibility what?

A. That I wouldn't have arrested her.

Q Judge: Go on?

Counsel: I think she put it

Judge: Let her finish her sentence.

A. I could have dealt with the situation differently but the Drager did come back with a result of fail.

Counsel: That is the point I am trying to get across, judge. I don't know whether … maybe I was not making it correctly.

Judge: It is only apparent to me now that what the garda said, "it's a possibility that I may not have arrested her".

Counsel: Yes that is …

Judge: It is only a possibility, it is not a probability.

Counsel: Yes that is the point I am trying to get across. That it appears from her evidence that it was the Drager, the failure on the Drager that was the catalyst for effecting the arrest.

Judge: Exactly

Counsel: That is fine.

Judge: That is why I used the word copper fasten

Counsel: Very good, thank you judge."

16. The court returned to this issue later on in the trial at p. 14 of the transcript.

"Counsel: My second submission would be in relation to the *Marie Quirke* case which is a case in relation to the Drager. I know the court has indicated a particular position in relation to that, that it is only a guideline, but the *Quirke* case states that, if a Garda has concerns that alcohol has been consumed in a recent past, that a period of twenty minutes should be used prior to administering the Draeger. That was not done in this particular case which indicates that the particular detection of the Drager may not have been valid and it certainly appears, I know the court questioned the Garda further in relation to that, that it appears that that was what, I suppose, convinced her to effect the arrest. She indicated when I asked her in cross examination she said she wouldn't have arrested her if she hadn't failed. And then I think when the court asked her again ..

Judge: No, she said it was a possibility.

Counsel: When I asked her initially she said she wouldn't …

Judge: Yes, but she is entitled to clarify her evidence and the totality of her evidence is that it was a possibility that she may not have arrested her.

Counsel: Yes.

Judge: You are picking out bits. And when it was further clarified, I must take the totality of the evidence.

Counsel: Yes, I understand that, but that's my job, judge, is to take the evidence and present it to the court as I am doing.

Judge: Yes, ok, and my job is to take the totality of the evidence.

…

Judge: And then make a decision of the totality of the evidence."

16. Counsel submitted that in cross examining the garda she indicated that she asked the applicant whether she had been drinking. The applicant replied in the affirmative. She said that she had come from her friend's house and had consumed a few glasses of wine. On that basis the garda would have been alerted to the fact that alcohol could have been consumed within a very recent period of time. It was submitted that because the question was asked and an answer was given it was advisable to wait twenty minutes before the Drager was applied. The judge replied at p. 16 of the transcript:

"Judge: I'll still come back to you, she only uses it as a screening device. She gave the clear impression to the court that that only copper fastened her totality of the situation as not only was it the physical characteristics that the driver displayed, but together with that and the administration of the breath test she decided to proceed further."

17. Counsel submitted that it was apparent that the arrest only took place after the failed reading which indicated that it was the failed reading that led to the arrest. The garda did not have to actually perform a Drager test to form the requisite opinion. Thus if the garda were satisfied on other available evidence or observations prior to the administration of the test he/she does not have to administer the test. The transcript continues:

Judge: That's right. You carried out a superfluous test that was not necessary for you to carry out?

A. No judge.

Q Judge: Yes. The impression from your evidence is that you had sufficient physical characteristics and driving characteristics .. ?

A Yes judge.

Q Judge: … To have proceeded without administering the Drager okay?

Counsel: Well that's essentially my point, judge.

Judge: Well you made your point. Any other point?

Counsel: Well I don't know if the court is with me. The court ..

Judge: No I'm not with you."

Further down the following exchange occurred:

Counsel: Well it isn't, judge because I don't know. The court seems to have gone with me in terms of asking the garda

why she was carrying out a superfluous test.

Judge: I didn't go with you at all. I just made the observation to the garda that it was superfluous, having regard to the evidence she has already given, for her to administer the Drager. I'm not criticising her that she subsequently administered the Drager and she said it is a possibility that she may not have arrested, but she actually … it is what she did is what counts, not what she may or may not have done.

Counsel: Yes."

18. A number of interjections made by the trial judge during the course of cross-examination are said to have been crucial and calculated to weaken and undermine the defence. It is said that Garda Kerins' testimony was improperly interrupted at a stage when she had stated that she would not have arrested the applicant had she not failed the Drager road side test. This was characterised as "speculation" by the learned judge.

19. The second significant interruption occurred during cross-examination concerning the garda's use of the Drager and in particular the suggested advisability of waiting 20 minutes prior to administering the Drager if the subject admits to having recently consumed alcohol. She conceded that she was "supposed to wait for 20 minutes" prior to administering this test in those circumstances. The judge intervened to emphasise the non-mandatory nature of the test. I do not accept that this, of itself, is something for which the learned judge could be criticised.

20. Garda Kerins, during further questioning and exchanges with counsel and the judge appeared, in the applicant's submission, to revise her evidence as previously given as a result of the judge's intervention. She now stated that she would have arrested the applicant if she had not had the Drager device. To this the judge said "that's my understanding of the totality of your evidence, yes". The judge emphasised repeatedly that the evidence was that the Drager device was only secondary to Garda Kerins physical observations. While Garda Kerins had given evidence of the somewhat erratic driving of the applicant, the only observation she had made in relation to her physical attributes was that she discerned a smell of alcohol from the applicant.

21. Garda Kerins gave evidence in response to further questions from the judge that if she breathalysed the applicant and she had passed the test it was possible that she would not have arrested her. Of course, the applicant failed the test that was administered.

22. This Court is most reluctant to engage in a protracted review of testimony given in the course of a criminal trial. Judicial review is not an appeal. The applicant must establish such a default of fundamental procedures as results in an unfair trial or one that is not in accordance with law to succeed on these grounds.

23. The applicant bears a significant burden to establish that the nature and level of the intervention by a trial judge is such as to vitiate the lawfulness of the trial. In *The People (D.P.P.) v. McGuinness* [1978] I.R. 189 the Court of Criminal Appeal considered interruptions made by a trial judge in a rape trial which, it was submitted, were not confined to clarifications of answers given by witnesses or the resolution of ambiguities. In finding that the interventions of the trial judge caused the trial to be unsatisfactory and that there should be a retrial, Kenny J. delivering the judgment of the court noted that during the complainant's cross-examination there were 423 questions, 123 of which were put by the judge directly to the complainant. These did not include 60 remarks and directions to counsel. The interventions by the judge sometimes included a number of consecutive questions. The court was satisfied that these interventions were not confined to clarifying answers already given or clearing up ambiguities. The court held that the number of questions and the many interventions by the trial judge made it impossible for counsel to conduct a cross-examination along the lines he considered would be most effective and could have had the effect of causing the jury to believe that the judge had formed a definite opinion as to the credibility of the complainant. The court cited with approval *R. v. Clewer* (1953) 37 Cr. App. R. 37 and *Jones v. National Coal Board* [1957] 2 Q.B. 555. In the latter civil action case, Denning LJ. stated as p. 65:

> "… Now it cannot, of course, be doubted that a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross examination. It is only by cross examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross examination lies in the unbroken sequence of question and answer. Further than this, cross examining counsel is at grave disadvantage if he is prevented from following a preconceived line of enquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross examining counsel from the course which he had intended to pursue, and to which it is by no means easy sometimes to return".

The court, in addressing the particular cross-examination in *McGuinness*, stated at p. 190 as follows:

> "Counsel for the accused will be severely handicapped if he is diverted from his plan. When the defence to such a charge is consent, the cross-examination of the complainant is the most important evidential part of the trial. It may be long, but counsel should be allowed to return to matters he has already dealt with if he has succeeded in showing that on other matters the witness is not to be believed. The judge must be patient and confine his interventions to the minimum necessary for a fair trial. The judge should intervene only when cross-examining counsel mis-states evidence already given or asks a question which the witness may not understand, or when the judge thinks that the witness has misunderstood the question. …"

Having reviewed the authorities cited above, Kenny J. stated at p. 193:

> "… We consider also that an active participation by a judge in the examination-in-chief of witnesses is undesirable. It may give the impression to the accused or to the jury of a lack of impartiality on his part."

24. The assessment of a challenge based upon judicial intervention in cross examination depends very much on the facts of a particular case, the nature and extent of the interruptions of which complaint is made, their potential or actual effect on the flow of cross-examination and, if it is readily discernible, on the answers given by the witness. These matters may also give rise to an apprehension of bias on the part of an accused. I consider the rule to have equal application in all criminal trials. That does not mean that the functional reality, the cut and thrust and shorter nature of summary trial in the District Court as opposed to trial on

indictment are irrelevant to the court's assessment of complaints concerning judicial interruption. Each case, at whatever level of the court system, depends on its own facts. However, for the most part the adversarial nature of the proceedings should be left to the advocates and the judge should be sparing in his/her interruption of cross examination.

25. The overriding principles set out in *McGuiness* may also be considered with the judgment of Lynch J. in *Gill v. Connellan* [1987] I.R. 541. In the course of a trial before the District Court, the applicant's solicitor attempted by his cross-examination of a prosecuting Garda to establish that the statutory procedure for the taking of a blood sample had not been complied with but was interrupted by the respondent who said "it does not matter what you say, the act is complied with". The applicant's solicitor submitted that he was entitled to make his argument, to which the respondent replied "you can go on and on for all the good it will do you. I am not interested in it". The applicant's solicitor persisted in his submission but the respondent interrupted saying that he did not care and was not interested and invited him to call any witnesses he wished. The applicant's solicitor determined that it would be pointless to call witnesses and the applicant was convicted. In granting an order of *certiorari*, Lynch J. held that the High Court in deciding whether a court of local and limited jurisdiction was acting within its jurisdiction must examine whether the accused was deprived of any of the basic rights of justice applicable to a criminal trial. The learned judge was satisfied that the applicant's solicitor sought to raise an arguable point before the District Court but had not been given a proper opportunity of putting that point for due consideration and decision. It was emphasised that, though judicial review could not be regarded as a readily available alternative to an appeal to the Circuit Court, in that particular case neither the facts nor the law had been adequately heard in the District Court and therefore any appeal would have been a first hearing and not a re-hearing to which the respondent would have been entitled. Lynch J. stated at p. 547:

> "… it seems to me that the applicant's solicitor sought to raise an arguable point but was never given a proper opportunity of putting that point before the respondent for due consideration and decision by him. The solicitor found himself trying to cross-examine the arresting garda and make legal submissions as to relevance and further legal submissions as to the propriety of the manner of taking the blood sample all at the same time and as a result of this none of these tasks could be properly accomplished by the solicitor. The factual points which the solicitor was endeavouring to elicit from the arresting garda raised not merely one but a number of legal and possibly also constitutional issues which would have to be decided before a conviction could ensue, if at all. …
>
> The applicant's solicitor was not given an opportunity of making any of the foregoing points adequately in the case of the first two points or at all in the case of the other two points, nor were they considered by the respondent adequately in the case …"

26. The learned judge was satisfied upon the application of the principles set out in *The State (Healy) v. Donoghue* [1976] I.R. 325 (at p. 348 and 349) concerning the panoply of rights to be observed in the administration of justice in a criminal trial which included right to hear and test by examination the evidence offered by or on behalf of the accuser, that the decision should be quashed.

27. The respondent submits that the learned judge was engaged in a "focused enquiry" when making interventions in the course of the trial as discussed by Hedigan J. in *DPP v. Kulimushi* [2011] IEHC 476. In that case the district judge questioned the reasonableness of the opinion formed by a prosecuting garda which had not been challenged by the defence in cross examination but which was relevant to the lawfulness of the accused's arrest. The prosecuting garda was not recalled to address the point raised by the learned judge who held that the arrest was not valid due to the inadequacy of the evidence of the garda's opinions. Finnegan J. held that in the absence of a "focused enquiry" by a district judge during the currency of a trial it was not open to him to dismiss a case against an accused on the basis that the prosecuting garda did not validly form the opinion necessary to ground an arrest. If the judge had a doubt as to the nature of the opinion formed he should have recalled the garda and questioned him as to those concerns. If the garda formed his opinion on a *bona fide* basis rather than capriciously or arbitrarily the low threshold required had been passed. That decision little relevance to this case. This case concerns the nature of the interruptions of cross examination by defence counsel during the course of a focused cross examination. It is not a case in which there was no challenge and in which the district judge was raising a point of his own.

28. The thrust of the cross-examination concerning the garda's opinion was that a reliance upon the result of the Drager device was wrong. It was claimed that having been informed that the applicant had consumed alcohol recently and having accepted in evidence that it was therefore advisable to wait some 20 minutes before administering the test, her opinion which formed the basis of the arrest was undermined. In that regard it was proposed to rely upon *The DPP v. Quirke* [2003] IEHC 141 which had adopted the approach of the House of Lords, *DPP v. Carey* [1970] A.C. 1072 to the same issue.

29. In *Quirke* the accused was arrested following the application of an alcolyser test. At the time the Garda had not established whether the accused had consumed alcohol within a period of 20 minutes prior to the administration of the test as then recommended. He was aware that the reason for this recommendation was to ensure the reliability of the test. The arrest was based on a suspicion reached partially on the basis of the negative result of the test and partly on the Garda's observation of the accused. The District Court dismissed the charge on the basis that the Garda was aware that the accused may have consumed alcohol within the previous 20 minutes but did not ask the applicant when she had done so. On a case stated to the High Court the District Judge asked whether the Garda was entitled to rely upon the result of the test and his prior observations when aware that the result of the alcolyser test may be unreliable because of the possibility that the accused had consumed alcohol within the previous 20 minutes.

30. O'Caoimh J. held that the facts of the case disclosed that the Garda was not given any information in respect of the accused indicating that he had knowledge or reasonable cause to suspect that the accused had consumed intoxicating liquor within a period of 20 minutes prior to the administration of the test. While the possibility must always exist that an accused had done so there was nothing in the materials to suggest that the test was unreliable. He stated at pp. 17 to 18 as follows:

> "I believe that the approach taken by the House of Lords in *Director of Public Prosecutions v. Carey* [1970] A.C. 1072 is the appropriate approach, namely, unless the garda knows or has reason to suppose that the suspect has consumed alcohol within the preceding 20 minutes, then there is no necessity for him to await the period of 20 minutes before he can form a *bona fide* opinion based on the alcolyser test. As indicated by Viscount Dilhorne at p. 1085:
>
> > "If, acting *bona fide* and reasonably on what is known by him at the time and when he has no reason to suspect the consumption of alcohol within the 20 minutes, the police officer does not delay the carrying out of the test, that test is not, in my view, invalidated by proof at the hearing of the information that he had had a drink within that time; nor, in my opinion, does such proof convert an arrest under [the section] into a wrongful arrest."
>
> I am satisfied that the learned district judge had no basis of knowing whether the accused had or had not consumed intoxicating liquor within the previous 20 minutes. I believe that the standard applied by the learned judge was incorrect

> in law as it is not sufficient to hold that the test was potentially unreliable especially where this conclusion was based upon the fact that the garda had failed to enquire whether the respondent had consumed alcohol within the period of 20 minutes prior to the administration of the test. As indicated, the garda had no authority to compel any person to answer a question as to when they last consumed intoxicating liquor. …
>
> Accordingly, I am satisfied that the learned judge … erred in law in his determination. With regard to the particular question posed in the case stated, I am satisfied that the same should be answered in the positive. The issue is not whether the result is reliable but rather whether the opinion formed by the garda upon which the arrest is made is a *bona fide* opinion which is reasonable. I am satisfied on the basis of the material in the case stated herein that there was no basis upon which the learned judge of the District Court could have concluded that the opinion formed was other than a reasonable and *bona fide* opinion."

31. The respondent submits that the question is not whether the result of the roadside test was reliable but whether the arrest was based on a *bona fide* opinion of the garda which was reasonable. As that was the issue before the court it is submitted that the learned judge in this case was correct in concluding that the arrest was lawful as the opinion formed by the arresting garda was reasonable and *bona fide*. Garda Kerins believed at the time of the arrest that she had sufficient grounds to form the necessary opinion. It was submitted that the evidence indicated that the applicant had admitted drinking alcohol on the night. There was no evidence as to when she had last consumed alcohol prior to the roadside test and the specific question was not posed to her. There was evidence of erratic driving by the applicant and that there was a smell of alcohol from her breath.

32. I am satisfied, that whatever about the advisability of waiting 20 minutes before administrating the Drager test, there was ample evidence upon which the learned judge could conclude beyond reasonable doubt that Garda Kerins had a *bona fide* suspicion sufficient to justify an arrest. There was a challenge to the use of the Drager test as part of the evidence given by Garda Kerins but having regard to the decision in *DPP v. Cash* [2010] 1 I.R. 609 it is doubtful whether any such challenge could have achieved the exclusion of the evidence.

33. The applicant's counsel wished to construct the defence around the *Quirke* decision and a submission that the arrest would not have occurred but for the negative result from a test which ought on the facts to have been delayed because of the possibility that it might be unreliable. Apart from the strength of that argument the applicant submits that counsel was precluded from exploring that issue fully and fairly without interference from the bench in a manner calculated to remove the issue from the case by inducing the witness to alter her evidence and confine or restrict her opinion to matters of observation rather than one based upon a flawed test result alone or upon observation of the applicant with the test as a secondary and/or superfluous matter.

34. The authorities are clear that the essential requirement of the opinion formed by the garda is that it be *bona fide*. It may have derived from his/her own observation. It may be "scanty" in nature (per Finnegan J. in *DPP v. O'Driscoll* [2010] IESC 42). As stated in *DPP v. Farrell* [2009] IEHC 368:

> "... Once the actions of the garda are reasonable and *bona fide* and there is no evidence of abuse of power or arbitrary behaviour, the courts should be very slow to put technical procedural obstacles in the way of the day to day investigation of crime."

35. The learned judge on the 'totality' of the evidence was satisfied that the opinion formed by Garda Kerins upon which the arrest was made was *bona fide* and reasonable.

36. The applicant also relies on the decision of Morris J. (as he then was) in *Dineen v. Judge Delap* [1994] 2 I.R. 228. Morris J. granting an order quashing the conviction. stated at page 234:

> "In my view there are two parts of the respondent's conduct in the course of the hearing of this case for which I am unable to find any justification. Firstly, I can find no justification for the respondent telling Garda Mullaney not to bother responding to counsel and that counsel was only trying to trip him up. In my view the objection taken by counsel to the garda reading from a prepared statement was a valid objection. I make no criticism of the respondent for the fact that his judgment on the objection was wrong. To identify counsel's role as being that of trying to trip up the garda and directing the garda not to bother responding is, in my view, an unwarranted interference with counsel in the performance of his duty and responsibility of making his defence. The suggestion that the garda would be recalled by the respondent in the event of his making a slip is again improper and would cause an impartial observer to recognise that the judge hearing the case was prepared to support the prosecution to the extent of filling gaps which their evidence might leave.
>
> Secondly, I am unable to identify any justification for the respondent requiring to hear the evidence of Garda Sheehan when he had already ruled against counsel on his application for a dismiss. The only possible explanation for the respondent calling the additional witness which the prosecution had not called was to lend assistance to the prosecution by copper-fastening his previous decision."

The learned judge was satisfied that the District Judge's conduct in that case could reasonably give rise in the mind of an unprejudiced observer to the suspicion that justice was not being done and therefore breached the fundamental rule that not only should justice be done but should be seen to be done.

37. I am not satisfied that the threshold identified by Morris J. in *Dineen* and Lynch J. in *Gill* has been reached in this case. There was undoubtedly a robust exchange between the judge and counsel in respect of the evidence given, its nature and extent, the inferences to be drawn from it, and the legal significance of any such inferences. The learned district judge also frequently intervened in cross examination. However, I am not satisfied to conclude that the learned judge was striving or endeavouring to get the witness to change her testimony or acting in a manner which gave rise to a perception of bias on his part thereby rendering the trial unfair. In addition, I am not satisfied to infer that the exchanges between counsel and the judge in respect of the suggested "concessions" made in respect of what occurred later in the garda station give rise to an apprehension of bias though they were undoubtedly somewhat brusque.

Right of Appeal

38. The applicant had a right of appeal to the Circuit Court and a complete rehearing of the charge against her as noted by O'Hanlon J. in *The State (Daly) v. Ruane* [1988] IRLM 117 at page 124:

> "The relief by way of *certiorari* is only appropriate in a limited category of cases. Generally speaking it involved the applicant in showing that the inferior Court or Tribunal acted without jurisdiction, or in excess of jurisdiction or in disregard

> of fair procedures, so that the applicant's rights to natural or constitutional justice were violated. Entitlement to the remedy may also arise were there is an error on the face of the record, or where an order has been obtained by collusion or fraud.
>
> What must be stressed is that the *certiorari* procedure cannot be utilised to convert the High Court into a court of appeal from all decisions of the District Court, with the court being required to embark upon a re-examination of the evidence given before the lower Court and a reassessment of all submissions made during the course of the hearings in the lower Court".

I am satisfied that this is exactly the exercise which the court in this case was invited to undertake. In *Balaz v. Judge Kennedy* [2009] IEHC 110 Hedigan J. stated:

> "In considering the applicant's case on this ground, the court must remain acutely aware of its function in judicial review proceedings. It is not the purpose of this unique and special remedy to empower the High Court to act as an appellate Court, which may review findings of fact and critically assess in minute detail the legal principles applied by the original tribunal."

39. The court is satisfied that there was an effective and convenient legal remedy available to the applicant in this case by appeal to the Circuit Court. Undoubtedly the Circuit Court can deal with the merits of the case and all of the legal arguments which might arise on the evidence established in the course of the appeal.

Conclusion

40. The applicant was very well represented in the District Court by counsel who demonstrated skill, patience, and determination. While the interventions of the learned judge may have presented some difficulties for counsel during the hearing, I am not satisfied they reached a threshold such as to give rise to a breach of fundamental requirements as to justify the granting of an order of *certiorari* in this case.