Neutral Citation: [2014] IEHC 276

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 693 J.R.]

BETWEEN

RICHARD MCCANN

APPLICANT

JUDGE ANTHONY HALPIN

FIRST NAMED RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

SECOND NAMED RESPONDENT

JUDGMENT of Mr. Justice Cross delivered on the 27th day of May, 2014

1. The applicant seeks by way of judicial review to take up and quash the orders of conviction and sentence of the applicant for offences pursuant to s. 2 of the Criminal Damage Act 1991, which were made at Blanchardstown District Court on 25th July, 2012, by the first named respondent and for other consequential orders including an application which was made at the day of the trial to amend the grounds upon which relief was sought.

2. The applicant claims that the trial was unsatisfactory in that it is alleged that the first named respondent interrupted counsel, raised irrelevant issues, failed to give adequate reasons for his decisions made inappropriate rulings and erred in his understanding of the trial process to such an extent as to show Objective Bias and to necessitate intervention by way of judicial review of this Court. It is claimed that as a result of the respondents alleged errors that the applicant was denied a fair trial.

3. The applicant was represented in the District Court by solicitor and counsel and was prosecuted by a solicitor on behalf of the second named respondent. The case took a number of hours. I have been given the benefit of the transcript of the court which has been read by counsel for the applicant.

4. The case against the applicant was, that on the early hours of 15th February, 2011, at an address in Finglas, the applicant caused malicious damage to certain property belonging to Mr. C.M. contrary to s. 2 of the Criminal Damage Act 1991. It was alleged that after the applicant's engagement to a daughter of Mr. M. had been broken off that the applicant left a licensed premise where all had gone socialising, and some time thereafter arrived at the home of Mr. M. where Ms. B.M. (who had been at the function in which the engagement was allegedly broken off) had gone home and witnessed the applicant emerge from a vehicle described as a white taxi with an implement and caused damage to various vehicles and indeed windows and doors of the M. house. It was alleged that at the time, the taxi vehicle remained and a friend of the applicant stayed in the backseat of the taxi.

5. The applicant was identified in evidence by Ms. M. and the applicant's case was that the damage was not caused by him but that the case was made up against him because he had broken off the engagement himself to protect the honour of the M. family.

6. By way of cross examination of Ms. B.M., counsel on behalf of the applicant in the District Court sought to undermine her credibility and raise doubts by the alleged improbability of a taxi remaining at the scene when criminal damage was being caused to house and car and driving off thereafter and also due to differences in the timeline apparent in both Ms. B.M's testimony and in subsequent testimony of her mother.

The Law

7. This case is brought by way of judicial review which is not an appeal on the merits against the conviction. The applicant has chosen, as was his right, not to pursue an appeal to the Circuit Court. Whereas the respondent has indeed highlighted the availability of an alternative remedy, it is agreed between the parties that if the applicant is entitled to judicial review under the *O'Keeffe* principles then the fact that there was an appeal available to him was not an answer on behalf of the respondents as the applicant was clearly entitled to a fair trial in the District Court in the first place.

8. The applicant is entitled to a fair trial at law and not a perfect one and that it is generally inappropriate to examine transcripts with a fine comb to ascertain particular items on their own could be regarded as unfair.

9. I accept the submissions on behalf of the respondent and indeed on behalf of the applicant that the trial must be looked at as a whole.

The Applicant's Case

10. The applicant's case may be summarised as follows:-

(a) a failure to give reasons;

(b) unfair and excessive interruption;

(c) objective bias; and

(d) the inadvertent failure by the prosecution to indicate to the court that they had the evidence in support of the applicant when he stated under cross examination that at a particular time he was in fact in custody and could not have committed the crime if had occurred at that time was such to render the trial unfair.

11. In this regard, the applicant sought to amend the grounds upon which leave had been granted.

Reasons
12. In *O'Mahony v. Ballagh* [2002] 2 I.R. 410 at 415 – 416, Murphy J. stated:-

> "At the conclusion of the State's case the applicant and his legal advisors were required to decide whether they should go into evidence or not. To make that decision it was essential to know which of the arguments were accepted and which rejected.
>
> I would be very far from suggesting that judges of the District Court should compose extensive judgments to meet some academic standard of excellence. In practice it would be undesirable - and perhaps impossible - to reserve decisions even for a brief period. On the other hand it does seem, and in my view this case illustrates, that every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing. As I have already said, there is no suggestion that Judge Ballagh conducted the case otherwise than with dignity and propriety. It does seem to me, however, that in failing to rule on the arguments made in support of the application for a non-suit he fell 'into an unconstitutionality'…"

13. This line was followed in the recent case in the Supreme Court of *Kenny v. Judge Coughlan* [2014] IESC 15, where Denham C.J. stated:-

> "As the case-law of the European Court of Human Rights indicates, and as also stated earlier in this judgment, the degree and extent to which a decision of the District Court must be explained by giving reasons will depend in turn on the nature and circumstances of the case. In some cases it may be necessary to succinctly but fully explain the reasons for the decision so that the parties have a proper understanding of the reasons upon which it was based."

14. In *Sisk v. O'Neill* [2010] IEHC 96, Kearns P. stated:-

> "I am satisfied that, in the event of an application being made for a nonsuit at the conclusion of the prosecution case, the obligation on a District Judge is to consider the sufficiency of the prosecution evidence when taken as a whole and taken at its highest.
>
> I do not believe there is an obligation upon a District Judge to furnish detailed reasons, or any reason for refusing such an application once he satisfies himself that the test in *R. v. Galbraith* has been met.
>
> Thus in the instant case I do not believe the learned District Court Judge was in error in refusing to give a detailed ruling on the application that there was no case to answer."

15. At the conclusion of the prosecution, counsel on behalf of the applicant made an application for a Direction on a number of points. The first point was a submission that there was no evidence that the property was damaged without lawful excuse and this submission was rejected by the judge. Counsel went on to make a submission as to the timeframe in that Ms. M. stated she left the public house between 12:00 and 12:15, that it took some 7 – 10 minutes to return to the house and the incident occurred shortly thereafter, said she rang her mother and then rang the gardaí after that. The evidence of the gardaí was that they arrived sometime after 2am and having just got a call and that Ms. M. stated the incident had only recently happened. As the submission went on there was a series of engagements with counsel by the first named respondent, the judge accepting that there was a time differential between the various accounts indicated that the witness never said that she had checked the times with her watch and that he was not going to accept the submission and was asked by counsel why this was so and the judge replied "no you can't actually I have the luxury of not giving you…". There was further engagement and the first named respondent referring to the time difference said "yes because she is in such a state of panic I don't think she was actually sure".

16. Counsel then made a submission for a direction the basis that it was inherently improbable that a taxi would remain at the scene when the damage was being committed in plain sight. There was a discussion about whether the vehicle was or was not a taxi which will be the subject of further analysis under the heading of Bias below and counsel concluded in his application as follows "there are too many discrepancies in this case in relation to witnesses and on that basis the court has to have a doubt in relation to what actually happened and if there is a doubt it has to go towards Mr. McCann…".

17. The judge then gave his ruling:-

> "Very good. Thanks. Having heard the evidence of Ms (B.M.) and 'I was looking down at him, it was really clear' I have no doubt whatsoever that it was Mr. McCann who carried out this. No doubt whatsoever whether there was a time differential, whether it was a taxi or wasn't a taxi, she has seen him and she gave a very clear account of that so I have no doubt that it was Richard McCann…"

18. The judge proceeded to make a further comment which will be considered under the issue of bias but in this regard, I believe that the trial judge clearly gave his reasons for refusing a direction which was there was evidence which he was accepting from Ms. B.M. and accordingly, if that evidence were true, the application should fail. There was some confusion, I believe in the mind of the judge at this point as to whether counsel was making an application for direction or was addressing the court at the conclusion of the case not wishing to go into evidence and I think the precise wording that the District Judge gave was most unfortunate but I hold that sufficient reasons were given on the application for direction. I do not accept counsel for the applicant's submission that a detailed reason into the intellectual nature of the argument was necessary. The judge was stating, in effect, that he was not satisfied that the accused had met the *R v. Galbraith* test and this was all that he was required to do.

19. The argument for a Direction on behalf of the applicant was a well made one, robustly maintained but I do not see any nuisance intellectual or legal submissions that would have required anything fuller than was given.

20. Similarly, at the conclusion of the case when the defence gave evidence, the judgment of the first named respondent was clear and was as follows:-

> "B.M. – was a very credible witness, her recollection in relation to times might be somewhat at odds but I can understand the circumstances in which she found herself. She was looking out her window, shouting down to this person who threw his instrument up at her, smashing cars, I can understand that there could be a huge time difference and I must say

> especially when she said she could clearly see Richard McCann. So I have no doubt in my mind whatsoever and I am convicting…."

21. The reasons for the judge's decision was clear, he accepted B.M's evidence. The applicant must fail under this heading.

Interruption of Counsel
22. It is alleged that the first named respondent interrupted counsel to such an extent that in the words of Birmingham J. in *Power v. Doyle* [2008] 2 I.R. 69 at 84, "has sacrificed objectivity by entering the fray". The first named respondent clearly did interrupt counsel on a number of occasions, in particular in the cross examination of Ms. B.M. which apparently consisted of 82 questions, there were a significant number of interruptions by the trial judge. The interruptions in a summary trial by a judge are, of course, of a different nature than in a trial before a jury. I have read the transcript again and clearly while there were a heated exchanges between counsel and the first named respondent, I do not believe that counsel was prohibited from making the case that he made or asking the witness the questions he wished and I do not believe the interruptions were themselves without going into other matters as discussed below such as to render the trial unsafe or unsatisfactory or to warrant intervention by way of judicial review.

Bias
23. It is alleged that there was Objective Bias in the manner that the trial was conducted.

24. It is specifically alleged that the totality of the trial and a number of aspect of it were such specified by Denham J. (as she was) in *Bula Limited v. Tara Mines (No. 6)* [2004] I.R. 412 at 441, was failed:-

> "…is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person."

25. As stated by Fennelly J. in *Kenny v. Trinity College Dublin* [2008] 2 I.R. 40 at 45:-

> "The hypothetical reasonable person is an independent observer, who is not over sensitive, and who has knowledge of the facts. He would know both those which tended in favour and against the possible apprehension of a risk of bias."

26. I fully accept the submissions on behalf counsel for the respondent that isolated extracts from the transcripts cannot be viewed other than in the light of the trial as a whole. This, of course, applies both ways in that an observation which of itself would not indicate bias might when taken with the trial as a whole suggest that bias had been established.

27. I also accept the words of McMahon J. in *Fogarty v. O'Donnell* [2008] IEHC 198, when he said:-

> "Whether the language used by a judge during the course of a trial is such that it indicates bias in the sense that it shows that the judge has made up his mind before he has heard all the evidence, depends on the facts and circumstances of each case. The use of an infelicitous word or phrase during the trial by the judge should not always compel such a conclusion. To define bias one must look at the overall picture…"

28. The first allegation of bias to be dealt with is that at the conclusion of his decision in relation to the direction application quoted above, the first named respondent quoted Ms. B.M. and stated:-

> "I have no dobut whatsoever that it was Mr. McCann who carried out this. There was no dobut whatsoever whether there was a time differential, whether it was a taxi or wasn't a taxi, she has seen him and given a very clear account of that so I have no doubt that it was Richard McCann and I convict him…" (Emphasis added)

29. The above remarks on their own, as is agreed by counsel for the respondent, very unfortunate and if taken isolation could well lead a court to conclude that the first named respondent had indeed formed a view at the direction stage. I think it is clear, however, from the nature of counsel's submission at the direction stage when he referred to a doubt and to giving the benefit of it to the accused that the learned trial judge was at that point mistakenly of the view that the applicant was not going into evidence and that counsel was making his closing submissions.

30. Immediately after the remarks quoted above were made, counsel indicated that the applicant was entitled to give evidence and the judge, of course, agreed and stated he did not know whether he was calling the accused or not. I believe that the reasonable bystander who was well informed would not have formed the view that just because of that observation by the judge that he would proceed to conviction before the defence evidence was a standalone example of bias.

31. Of course, counsel on behalf of the applicant also makes the point that when assessing bias, one must look at the entirety of the trial and that individual statement which might not indicate bias taken together with the trial as a whole so that a view can be held by the court. As stated above, I accept that an analysis.

32. The applicant also makes the case bias in relation to the first named respondent's interventions when counsel on behalf of the applicant was questioning B.M. and putting it to her that her evidence was wrong and that she had a reason to blame the applicant for the particular offence due to the falling out with him and her sister. The first named respondent then intervened as stating "you are not suggesting that she is telling lies under oath" and an exchange followed in which counsel correctly maintained that he was entitled to ask the question of her and the first named respondent repeated the question as to whether the witness was telling lies under oath. This was asked a number of times and counsel, a number of times indicated that this was the case in accordance with his instructions.

33. The first named respondent then stated "that can affect the credibility of your witness, you understand that?", "yes judge I understand that" and the judge replied "that will have an affect on the way the case is dealt with".

34. It was submitted on behalf of the respondent that the judge was erroneously of the view that counsel by suggesting to a witness that she was telling lies might result in the shield in relation to previous convictions and character being lost. Counsel for the applicant makes submission in relation to this exchange under the heading of interruptions. I hold that the intervention of the first named respondent must also come to be considered under the heading of objective bias.

35. Clearly, the suggestion that the prosecution witness was telling lies could not in advance affect the credibility of the defence

witness unless the judge had made up his mind on the facts before the accused gave evidence. Secondly, whereas accusing a witness of telling lies might have a possible affect on any sentence as the respondents accept it could not in law result in the shield of the accused in relation to past character being put in jeopardy. In dealing with the above exchange, I have come to the conclusion that it is an aspect of the trial that must be taken into account when deciding on the issue of objective bias.

36. The next aspect of the trial in which bias is alleged is the long exchange between the first named respondent and counsel when counsel was cross examining B.M. as to the inherent improbability of her evidence given that she had said the accused came from a white taxi which remained at the scene with a friend of the accused sitting in the back. The first named respondent in a number of interventions indicated that he did not accept that the vehicle was in fact a taxi but rather a vehicle with the appearance of a taxi stating:-

> "It hasn't been proved that it is a taxi, there was a vehicle at this stage because any vehicle can put a taxi sign on the top."
>
> "Very good judge, I think her direct evidence was that it was a taxi and I can…"
>
> "For all intents and purposes, it would appear to be a taxi."
>
> "Yes judge…"
>
> "The evidence is that it was a taxi and we have no evidence to the contrary that it was not a taxi."
>
> (Judge) "Under the road traffic legislation and under statutory instruments in section 50 of the Statutory Instrument Governing Taxis what sign should be there. We needed to be proved for it to be a taxi. It was a vehicle that has an appearance of a taxi."

37. The above is only a summary of a fairly lengthy exchange on this point between counsel and the first named respondent. Further when dealing with counsel's submission for a direction in relation to the taxi issue, the first named respondent again reverted to his contention that there was no evidence that the vehicle was a taxi but a vehicle with an appearance of a taxi in response to a question from counsel, "I am asking how you can be satisfied it wasn't a taxi when there has been no evidence in relation…", Judge: "I want to see on the dashboard that his disc with his badge number…", "how on earth are we going to prove that to the court?", "exactly".

38. Here, I accept that the first named respondent appears to have entirely misunderstood the nature of the submissions and also the nature of the role of the defence and prosecution in this case. The prosecution witness had given evidence of seeing a white taxi from which the applicant had allegedly alighted which remained at the scene. Counsel was entitled to make submissions and question the witness as to the unlikelihood of this. The first named respondent then erroneously suggested that there was no evidence that the vehicle was a taxi when clearly there was some evidence and indicated that in effect he would not accept that the vehicle was in fact a taxi unless the defence produced a disc with the taxis badge number. It is, of course, never incumbent upon the defendant to prove any aspect of the matter and I believe that a reasonably informed observer might have on those exchanges in relation to the taxi alone have formed the view there was Objective Bias in this trial.

39. Clearly, this is a significant issue that must be taken into account by me when I come to my final decision.

40. There is a further aspect of the evidence in which the applicant claims to indicate bias is when reference was made that the defence had sought CCTV cameras on a date prior to the hearing date and the applicant alleges that the first named respondent seemed to attach something sinister to that request:-

> Judge: "The CCTV was requested because it was alleged that (B.M.) was in the pub later than she said".
>
> Garda Quill: "yes"
>
> Judge: "This is also very important in relation to if she is being accused of lying and I want to make sure that I have this very carefully, CCTV was requested because it was alleged that B.M. was in the pub later than she said. Did you look at the CCTV."
>
> Garda Quill: "I did"
>
> Judge: "Did you satisfy yourself that was the case or wasn't the case?
>
> Garda Quill: "Well the case was that she left when she said she left."
>
> Prosecution solicitor: "Do you know what time that was?"
>
> Garda Quill: "From the CCTV it was between, I believe 0018."
>
> Prosecution solicitor: "Eighteen minutes past twelve"
>
> Garda Quill: "Yes judge"
>
> Judge: "Who alleged that she had left later than she said."
>
> Garda Quill: "That was an issue brought up by the defence on the first hearing date. I was requested to obtain…I have the request."

41. When counsel questioned Garda Quill in relation to the CCTV in relation to the times that the applicant and his friend left the licensed premise, the first named respondent then returned to the request for the CCTV on the basis that it was requested to show that Ms. M. was telling lies.

42. I do not see that as a discrete issue, this exchange of itself would be sufficient to suggest bias but I do hold that this issue together with the trial as a whole – that accusing a prosecution witness of telling lies might affect the credibility of the accused, that

the requirement of the accused to prove that the vehicle was in fact a taxi and also the other matters highlighted – was of a quality that a reasonably informed observer would have concluded that the trial judge had made up his mind to convict the accused and that Ms. M. was a credible and truthful witness before hearing all the case.

43. On the grounds of bias alone, I hold that the applicant would be entitled to an order on judicial review in terms of the statement.

The application to amend the grounds on the basis of the alleged inadvertent failure of the prosecution to alert the court as to the truth of certain aspects of the evidence given by the applicant

44. The applicant's case was that there an inconsistency between the evidence of Ms. B.M. that she had arrived at her home at about 12:30 and shortly thereafter she witnessed the incident and immediately thereafter she phoned her mother and then the gardaí, the evidence of Garda Quill that the gardaí received a call at 2:10am, arrived at 2:15 and Ms. B.M. claimed that the incident had happened a few minutes previously.

45. It transpires that at some period after 1am, on that evening/morning, the applicant was arrested on another matter and taken and detained to another Garda Station. It would follow that had the incident occurred in the timeframe that Ms. B.M. had indicated to Garda Quill that the applicant could not have been responsible.

46. Garda Quill was not asked by counsel under cross examination whether he was aware that the applicant was in custody at 1am. Similarly, no direct evidence was led from the applicant to that effect either.

47. However, in cross examination the applicant indicated to the prosecution that when he left the public house he was put to a taxi by the gardaí who arrived, he went to another house in Finglas (to which evidence he agreed there was no corroboration) and in response to the prosecution's solicitors as to whether he stayed in that house for the night, he replied:-

> "No I was in Finglas Garda Station by 01:00 to 01:15, that's why the last time we were in this Court my barrister Oisin asked for custody records that are still not here."
>
> Prosecution solicitor: "So if I call Garda Quill and ask him were you Finglas Garda Station at 01:00 on 15th February, 2011."
>
> "I was brought in and even though Garda Quill said he put out a call to see if you were around the area, nobody came to say that they had any knowledge of where you were…"
>
> "I was in Finglas Garda Station…"
>
> "In total contrast to what Garda Quill said"
>
> "100% I was in Finglas Garda Station"
>
> "Do you not think that Garda Quill would be fully aware if you were in "Finglas Garda Station that he would be able tell within seconds that you were in Finglas…"
>
> "I don't know but Garda Anne-Marie something, or Garda Quill would know here name she brought me in for my own safety after M.D. was stabbed on by the avenue…the custody record will be able to prove that."
>
> "That is completely at odds you have nothing here to prove that."
>
> "The garda should have something to prove that."
>
> "You are not telling the truth and Garda Quill has given evidence to the contrary."
>
> "You know that the garda custody records – that would prove we asked for garda custody records the last time I was in court and they are not here today and that will prove I was in Finglas Garda Station before they went to the house."
>
> "Garda Quill has already given evidence to prove that that wasn't the case…"
>
> Defence counsel: "I don't think he gave evidence that that wasn't the case. He said he tried to locate Mr. McCann, he didn't say that he tried to ring all the Garda Station to say whether he was there…"
>
> Judge: "no he sent out a call didn't he."
>
> Defence counsel: "yes he sent out a call."

48. It transpired that after leave was granted for judicial review that when Garda Quill swore his affidavit on 11th January, 2013, stated:-

> "The applicant was indeed arrested at 01:20am on that night of Road, Finglas for alleged public order offences. I became aware of this after attending at the scene of the offence. On my return to Finglas Garda Station I learnt of his detention there. However, he was not in a fit state to be interviewed in relation to the offence. The applicant was subsequently arrested by me on 1st April, 2011, in relation to the incident…"

49. Accordingly at the time of the exchanges as outlined above in court and which the prosecution solicitor clearly was under a mistaken impression that Garda Quill would, in effect, be able to deny that the applicant was in custody, Garda Quill was aware that what the applicant was saying was correct.

50. Ground 5 relied on by the applicant states as follows:-

> "At all material times during its prosecution of the case herein, the second named respondent, through her representative in court, acquiesced in the breaches of natural and constitutional justice by the first named respondent and acquiesced in the manner in which he conducted the trial here. At no material time did the second named respondent comply with her obligations to prosecute the applicant herein only in accordance with the requirements of justice both in law and under

the Constitution."

51. The applicant now seeks to amend this ground by the addition of the following:-

"In part by the line taken in cross examination of the applicant in relation to his claim to be in custody."

52. I do not believe that it would fair to allow this ground un-amended to be used to entitle the issue of the prosecutor's knowledge of the truth of an aspect of the applicant's evidence. Counsel for the respondent objected to the amendment making the point that the only request for it was a day and a half prior to my hearing of the case. In response to a request by this Court, the respondents have not indicated that they needed to take any further instructions or that they want further adjournment or that they required further evidence to deal with the substance of the application.

53. In *Keegan v. An Garda Síochána Ombudsman Commission* [2012] IESC 29, the error which was sought to be corrected by amendment was known or ought to have been known to the applicant's side at the time that the leave was granted and the reason for the amendment was an oversight by the applicant's legal adviser. In the Supreme Court, Fennelly J. agreed with the reasoning of Finlay Geoghegan J. in the High Court that an oversight or error by an applicant's solicitor might, depending the facts, provide a sufficient explanation for failure to make the case in the first place. In the Supreme Court, Fennelly J. said that it was clear in that case that there was in fact an error on the applicant's legal representation and proceeded to admit the amendment of the statement of ground for judicial review and the court in allowing the amendments indicated that the balance of justice weighed clearly in favour of granting the amendment.

54. In this case, the error could not have been known to the applicant at the time that the grounds were formulated and whereas the respondents might well have been better told at an earlier stage, counsel for the applicant, Mr. McDonagh states that it was only shortly prior to the trial that when he was advised in the proofs in the matter that he adverted to the situation.

55. I accept the proposition that the interest of justice in this case would allow the amendment of the grounds and I will make that order.

56. Having made that order, allowing this amendment of the ground, I believe that had Garda Quill made known his knowledge to prosecuting solicitor, he would have disclosed this to the defence and indeed to the District Court and the court would have been aware of a quite significant piece of supportive evidence of the applicant's contention that it was not he who was the culprit. The District Court was, of course, aware that Garda Quill had not given evidence that the applicant was not in custody at around 1am but the court was left with the strong impression, contrary to the case, that Garda Quill would be able to deny that the accused was in custody if asked and that the prosecution as a whole was aware that what the accused was saying was false.

57. The first named respondent would still have been able to come to the conclusion that Ms. B.M's direct evidence as to time was correct and that her statement to the gardaí when they arrived at the scene that the incident happened only a short time previously was wrong but the District Court when coming to its conclusion ought to have being aware of the fact that if the incident had happened at a time when Ms. B.M. said it happened to the gardaí rather than the time she gave in evidence to the court that as a matter of high probability the accused could not have been the culprit.

58. Accordingly, on this discrete issue alone, the first named respondent was led to believe through inadvertence on behalf of the prosecution that the applicant's evidence under cross examination that he was in custody after 01:00 in the morning was inconsistent with the facts known to the prosecution authorities. Accordingly, I accept the submission that a mistaken view of events was portrayed to the first named respondent and accordingly, the trial cannot be regarded as a fair trial in accordance with law.

59. Had the first named respondent been appraised of the correct situation then, of course, the issue of time and the incident occurred would have arisen had great importance. In those circumstances, it would not have been sufficient for the first named respondent merely to decide that the time was not material. He would, I believe to have had come to a conclusion that the incident happened at the earlier time and not at the later time. The first named respondent did not have an opportunity to consider the importance of the time issue in the light of the corroboration of a significant aspect of the accused's evidence as given in cross examination and accordingly, the trial was unfair.

Conclusion

60. Accordingly, for the reasons as outlined above, I have come to the conclusion that the entirety of the trial was tainted by objective bias as outlined above and also that the trial was rendered unfair by reason of the failure of the prosecution authorities inadvertently to disclose the true nature of their knowledge of the circumstances of the night in question.