THE HIGH COURT

[2015 No. 702 JR]

BETWEEN

AHMED AYADI

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 20th day of January, 2017.

1. This is an application by way of judicial review seeking, *inter alia*, an order of *certiorari* quashing the conviction and sentence of the applicant dated the 29th September, 2015. The applicant was convicted and sentenced by Judge O'Donnell, in the District Court, sitting at the Criminal Courts of Justice in Dublin on that date, in respect of an offence of handling stolen property contrary to s. 17 of the Criminal Justice (Theft and Fraud) Offences Act, 2001. The grounds on which the relief is sought are essentially: (1) that the District Court Judge failed to give adequate reasons for his refusal to accede to legal submissions made on behalf of the applicant during the giving of evidence and in the course of an application for a direction at the close of the prosecution case, (the "reasons" ground), (2) that the manner in which the District Court Judge conducted the hearing breached fundamental principles of fairness and constitutional justice (the "fair procedures" ground) and (3) that the manner in which the District Court Judge conducted the hearing would lead an objective person to believe that the Judge was biased or had come to a view of the merits prior to the case concluding (the "objective bias" ground).

2. The trial of the applicant took place with that of a co-accused in a District Court sitting in the Criminal Courts of Justice in Dublin on the 29th September, 2015. The sole charge was one of handling stolen property, namely an iPhone, contrary to s. 17 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. Three witnesses were called by the prosecution. The first witness was one Mr. Cathal Mooney, who gave evidence that after socialising in a nightclub on Abbey Street, Dublin, which he left between 12.30 a.m. and l a.m. of the date in question, he noticed that his iPhone was missing. As it happened, Mr. Mooney was himself a network systems engineer with a degree in information and communications technology. He had been working in his field of internet protocol and telecommunications since 1999. He had installed an app on his iPhone, called "iCaughtU Pro" [hereinafter: "the app"], which sent him an email when someone tried to access or shut down his phone. The app also took a photo of the person in possession of the phone and emailed it to Mr. Mooney by way of attachment. Mr. Mooney had not, of course, been involved in any way in the design of the app itself, having merely purchased the app online and set it up on his phone, although he did say in cross-examination that he had tested it because it would not be any use if it did not work. Mr. Mooney said that when he realized he did not have his phone, he went to his computer to check his emails. He found that he had received some emails originating from the app, which showed that people had tried to switch off the phone up and down Abbey Street, in the proximity of where he had been. He had his laptop in court and he also produced a number of printouts which showed the emails he had received and photographs contained therein. These showed that attempts had been made both to switch off his phone and to unlock the device a number of times between 1.01 a.m. and 1.10 a.m. on the date in question. He subsequently furnished these to An Garda Síochána. No other witness was called by the prosecution to deal with the app.

3. The second prosecution witness was a Garda who had been furnished with the photos in question and identified the two accused from them. As a result of this identification the two accused were arrested and evidence of this was given by the third prosecution witness, one Garda Mairead Murphy.

4. Garda Murphy gave evidence that she obtained search warrants for the homes of the two men identified from the photographs, and that the applicant had been arrested and detained pursuant to s. 4 of the Criminal Justice Act, 1984. She gave evidence that he was questioned during his detention. The following exchanges then took place concerning these interviews, Mr. McCarthy being the solicitor for the applicant:-

> **A:** Judge, I obtained search warrants for both mens' home - unfortunately - in order to locate the telephone, the phone was not recovered. Both men were arrested and detained under s. 4 of the Criminal Justice Act, Judge, and questioned.
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> **Judge O'Donnell:** Yes.
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> **A:** Neither of whom made any admissions.
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> **Judge O'Donnell:** Made no admissions.
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> **A:** No admissions, Judge. They could not explain as to why their photographs were -
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> **Mr. McCarthy:** They are not obliged to explain.
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> **Judge O'Donnell:** Ah, Mr. McCarthy.
>
> **Mr. McCarthy:** No Judge, if they retain their right to silence their interview.
>
> (inaudible).
>
> **A:** They weren't silent.
>
> **Judge O'Donnell:** They weren't silent, they made no admission
>
> **Mr. McCarthy:** Well, I wasn't given a copy of -
>
> **A:** Yes, you were. The original folder had the memo of interviews, the photographs, the downloads, everything. Judge, this matter has been in for hearing twice already, so these matters were given (inaudible).

Judge, when asked why their photographs were on this application on the phone, they could not explain it. Judge, they were both asked had they found the mobile phone and had they been accessing it in an effort to locate the owner, if that had been the case, and if they had not been successful why did they not hand the phone into Gardai or to the nightclub worker, any other authorised person, Judge, they were unable to answer that question.

Mr. McCarthy: They were not obliged to answer any questions.

Judge O'Donnell: So you keep telling me, Mr. McCarthy.

Mr. McCarthy: She shouldn't be giving this evidence, or it should be disregarded, judge.

Judge O'Donnell: Right.

Mr. McCarthy: In my submission, Judge.

Judge O'Donnell: Submission noted.

Mr. McCarthy: Thank you, Judge.

5. I have examined the memorandum of interview and it appears that the applicant in the present case answered "no comment" to almost all of the questions during the interview in question. There were two exceptions. He was asked: "what would you do if you found somebody's mobile phone?", to which he replied, "no comment, what would you do?". He was also asked "although your family is from Tunisia you have spent 20 years in the country, you're a 20 year old Dub. You know the clubs and pubs in the city centre", to which he replied "are you calling me a Dub?". Neither of these two answers were of any probative value as regards the charge of handling the particular iPhone. This was therefore an interview which should have been dealt with within the parameters of the Supreme Court decision in *D.P.P. v. Finnerty* [1999] 4 IR 365. In other words, the correct description of the interview is that nothing of probative value had emerged from it. Thereafter, the interview should have been disregarded by the District Court Judge. Instead, what was conveyed to the Court, by the Garda, was that this was an interview during which the applicant had not remained silent (and must therefore have given answers of some kind) and yet had been unable to explain why his photo was taken by the phone. While the evidence by the Garda was misleading in this regard, the District Judge's attitude to the solicitor's objection at this point was also unsatisfactory; if he had looked at the memo of interview for even a few seconds, he would immediately have seen that the solicitor was correct and that the applicant had exercised his right to silence throughout, with the two exceptions referred to. Further, the Judge's comment of "so you keep telling me" is open, on one interpretation, to being construed as a failure to accept that the right to silence is a fundamental principle of Irish criminal law which renders a "no comment" interview valueless in probative terms, unless one is dealing with questioning pursuant to one of the special legislative "adverse inference" provisions, which was not the case here. Also, the phrase "submission noted" failed to indicate whether the judge accepted the correctness of the submission or not, and was, in effect, a failure to rule at all. The overall impression from this passage is that the Judge had no interest in ascertaining precisely what the applicant had or had not said during the interview, did not consider it important to ascertain whether the interview was legally probative or not and was dismissive of the right to silence. Subsequently, in a passage set out later in this judgment, the Judge said, "...your clients were shown the photographs, and they couldn't explain them". In effect, therefore, he appeared to consider their failure to answer questions as probative evidence, and therefore must have implicitly decided to rule against the applicant on the issue of the right to silence, although he never actually explicitly ruled on the issue at all.

6. At the conclusion of the State's case, the solicitor on behalf of the applicant indicated that he had a number of submissions to make in support of an application for a directed acquittal. These were: (1) that the prosecution had produced insufficient evidence to prove the *mens rea* of the offence of handling, (2) that the prosecution could not rely upon the emails and photos produced by the app in the absence of expert evidence about the design of the app and (3) that the prosecution had failed to prove that the iPhone, was handled by the applicant "otherwise than in the course of stealing", which was a necessary ingredient of the offence. The applicant now complains that the manner in which these submissions were dealt with was so defective that, taken in conjunction with the manner in which the right to silence was dealt with, the conviction should be quashed. Accordingly, it seems appropriate and indeed necessary to set out the relevant portion of the transcript in full:

Mr. McCarthy: Yes, Judge, I have a couple of submissions for a direction to dismiss at this stage on grounds that there is insufficient evidence to convict either accused.

Section 17 quite simply requires evidence to prove that either accused had handled the goods knowing that it was stolen or being reckless as to whether or not it was stolen. Section 16(2) I think assists the Court in listing that the circumstances within which the accused came into possession of the property can be taken in relation to the *mens rea* element of the offence. There is no evidence that either party knew it was stolen. There was nothing proffered in that regard. There is quite simply no evidence that either party was reckless as to whether or not it was stolen. Reckless is defined in s. 16(2) in Irish law in *Cunningham and Caldwell*, et cetera, and *Director of Public Prosecutions v. McEoin* indicates that it would have to be proved in evidence that either co-accused consciously disregarded a substantial risk that this property was stolen.

We have absolutely no evidence about the circumstances within which either party has come into possession of the property *sic*. In the circumstances, Judge, I think it behoves the Court to dismiss in the absence of that evidence, as it doesn't meet the charge sheet *sic*.

Judge O'Donnell: That's your only application?

Mr. McCarthy: Em, unless the Court finds against me.

Judge O'Donnell: It is perfectly clear that both defendants were in possession of this phone at a very early period on the 18th March of this Year. They both made numerous attempts to turn off the phone, which would enable them to decode it. Their photographs were taken by the phone. Your application for a direction is refused.

Mr. McCarthy: Secondly, then Judge -

Judge O'Donnell: I thought you said you had no more applications.

Mr. McCarthy: I said unless, Judge. I don't propose to make five or six applications, if the Court would agree with me in

relation to one, but if the Court refuses, my second application would be on the basis that *actus reus* has not in fact been proved. The only evidence suggesting that either party came into contact with the phone is this photographic evidence.

Judge O'Donnell: Yes

Mr. McCarthy: Which was, it is suggested was obtained by virtue of the use of this anti-theft device.

Judge O'Donnell: Yes.

Mr. McCarthy: I respectfully submit to the Court for that evidence to be admissible that the anti-theft device itself would have to be proved, and it could only be proved by the person who in fact designed it, Judge. It was purchased by this person who gave evidence that he knows a lot about computers, et cetera, but he is not a good or expert witness in relation to the actual device and what it is supposed to do. This is an absolutely and fundamental necessary proof in relation to proving exactly where the photos came from, Judge. He simply purchased the device. He is relying on information provided to him by the experts in creation of that device and the persons who designed the device. In those circumstances, absent that person being in court, I cannot cross-examine in relation to the accuracy of that evidence.

Judge O'Donnell: Sure you didn't cross-examine any witnesses, Mr. McCarthy.

Mr. McCarthy: I didn't need to cross-examine that person because he is not an expert witness. He wasn't the person who created the device. He purchased it. He said he purchased it. He also gave evidence that the person, from whom he purchased it, is not present in court, and we haven't heard any evidence from that person or body.

I would submit, Judge, that they would have to be in court in order to prove the device. If they are not here then the evidence has to be ruled inadmissible on the basis that it is hearsay. In those circumstances, the photographs must come out, Judge. There is no evidence at all linking either party to the offence.

Judge O'Donnell: Okay, I disagree with you, Mr. McCarthy. You have the case to answer. Are you going to go into evidence?

Mr. McCarthy: Could you tell me, Judge, why you disagree with me?

Judge O'Donnell: I disagree, Mr. McCarthy, because it is crystal clear that these two defendants handled this phone on the night in question.

Photographs of them were taken by the app, and I don't need the person that manufactured or made the app to be here to tell me that

Mr. McCarthy: Judge, while -

Judge O'Donnell: That's my ruling, Mr. McCarthy.

Mr. McCarthy: Can I make a submission in relation to it?

Judge O'Donnell: You have already made a submission in relation to it and I have told you I am not accepting it.

Mr. McCarthy: Can I respond, Judge

Judge O'Donnell: Ah, Mr. McCarthy, please.

Mr. McCarthy: I simply wish to respond.

Judge O'Donnell: Mr. McCarthy, you have made your application on that point I have rejected it.

Mr. McCarthy: I haven't finished it, Judge. I am entitled to respond, if the Court makes a ruling, I am entitled to make a submission, Judge. You have indicated that the reason you disagree with my submission was on the basis that the phone took photos of these persons. I am saying that we cannot get that far unless we rule in relation to whether or not those photographs, which it is suggested allegedly identify the co-accused, are in fact admissible. At the stage of the submission that I am making, we haven't even seen these photographs, because we need to decide whether or not the evidence -

Judge O'Donnell: You were shown the photographs and your clients' were shown the photographs, and they couldn't explain them.

Mr. McCarthy: Well, Judge, they made no comment and they are entitled to do that. There is no onus of proof on the accused.

What I am saying, Judge, is that I am asking the Court to disregard the photographs on the basis that they are inadmissible on grounds of hearsay, by virtue of the fact that-

Judge O'Donnell: How can you possibly stand there and make that

application?

Mr. McCarthy: Because-

Judge O'Donnell: How can it be hearsay?

Mr. McCarthy: Because the person who allegedly -

Judge O'Donnell: Ah, Mr. McCarthy, you're stretching credibility now. Mr. McCarthy, that's an outrageous suggestion. Now are you going into evidence?

Mr. McCarthy: I have another submission, judge. There is a case called *the People (Director of Public Prosecutions) v. O'Neill,* I think it is a 1995 Irish Reports case, Judge, a Court of Appeal ease, where I think the appeal was based around a set of circumstances where a person was charged with robbery and handling stolen property and the person was acquitted of the robbery but convicted of the handling charge. In essence, I believe, that the ratio from that case in the Court of Appeal, Judge, was that it is incumbent upon the prosecution to positively disprove that the person who is charged with handling was in fact, could not have been the person who committed the theft, either or. Section 17 reads that you can only be convicted of a handling charge under s. 17 if you had handled it otherwise than in the course of stealing. The witness, I understand, or in the injured party, gave evidence that -

Judge O'Donnell: The section , if my memory serves me right, Mr. McCarthy, is knowing it is to be stolen or reckless as to whether it was stolen or not.

Mr. McCarthy: Yes, that's the *mens rea* element of it, Judge, but the person has to handle the goods otherwise than in the course of stealing, and that's the very sentence that was litigated in *the People (Director of Public Prosecutions) v. O'Neill* and, indeed, in *the People (Director of Public Prosecutions) v. Fowler* in the same year, Judge. In essence, they cannot be convicted of a handling charge unless it is proved that they handled otherwise than in the course of stealing. The evidence that was offered today by the alleged injured party in relation to the photographs was that "I presume these people had either come into the possession of it or taken it, presumably it was the person who had tried to turn off the phone"; that's an either or answer, Judge. The State -

Judge O'Donnell: Garda Murphy said she didn't know whether they were involved in the theft or not.

Mr. McCarthy: Yes.

Judge O'Donnell: Right. There is no evidence that they were involved in the theft, but we do know that the phone disappeared and they were handling it.

Mr. McCarthy: The injured party gave evidence when he was asked-

Judge O'Donnell: Sure, he doesn't know.

Mr. McCarthy: But, Judge, we can only - we can't make, presumptions or suppositions. We can only base any decision based on the evidence given. Garda Murphy said she didn't know who stole it, and that's fair enough.

Judge O'Donnell: Yes.

Mr. McCarthy: The injured party had said presumably it was someone who came into possession of the phone or who had taken it. Unfortunately, from the State's point of view, it is incumbent upon the prosecution to positively disprove the possibility that it was handled otherwise than in the course of stealing. That's what s. 17 reads and that's exactly what *Fowler* and *O'Neill* had said, and they had to overrule the conviction. If the Court wishes for the matter to be left standing, I can get those cases, but that's exactly on point.

Judge O'Donnell: No, Mr. McCarthy, I am ruling against you on that point as well. Now are you going into evidence?

Mr. McCarthy: Will you explain to me Judge, why you're overruling?

Judge O'Donnell: Ah, Mr. McCarthy, I have already explained *ad nauseam.*

Mr. McCarthy: No, I am entitled to reasons, Judge.

Judge O'Donnell: I am holding against you on the points. Now, are you going into evidence?

Mr. McCarthy: Will you give me a reason as to why you are finding against me on the O'Neill point, Judge.

Judge O'Donnell: Mr. McCarthy, there was no question of the member having been involved in the theft. They handled it regardless of whether it was stolen or not. They had their photographs taken. Now, Mr. McCarthy, please.

Mr. McCarthy: Bear with me a second, please, Judge?

Judge O'Donnell: No, Mr. McCarthy, are you going into evidence or not?

Mr. McCarthy: If you'll allow me a few seconds to read my notes, Judge, I will give you an answer. Please, just allow me a few seconds. I will take an instruction in that regard, please. We won't be going into evidence.

Judge O'Donnell: Sorry?

Mr. McCarthy: No, Judge, we won't be going into evidence.

Judge O'Donnell: Right, I am satisfied that both these defendants were involved in handling a stolen phone. Convict both of them. Previous convictions?

7. Counsel on behalf of the respondent relies upon authorities such as *Lennon v. District Judge Clifford* [1992] 1 I.R. 382, *Roche v. District Judge Martin* [1993] ILRM 651, *Truloc v. District Judge McMenamin* [1994] 1 I.L.R.M. 151 and *Stokes v. O'Donnell* [1996] 2 I.L.R.M. 538, to remind the Court that it does not have the function of reviewing the merits of the respondent's decision or providing some kind of appeal forum in respect of errors of law, even if there were any (which is not accepted by the respondent). The Court, of course, accepts the fundamental proposition that judicial review is concerned "not with the decision but with the decision making process", as it was pithily put by Lord Brightman in *Chief Constable v. Evans* (1982) 3 All ER 141 . The Irish authorities have repeatedly emphasised that the scope for challenge is limited to matters such as want or excess of jurisdiction, error on the face of

the record or a clear departure from fair and constitutional procedures. Counsel also submitted that it was necessary for the Court to look at the trial as a whole in order to determine whether it was fair, citing *Khan v. U.K.* (2000) 31 EHRR 45 on the whether a trial was Article 6 -compliant in the context of the European Convention on Human Rights.

The obligation to give reasons

8. Counsel on behalf of the applicant relied upon a number of decisions regarding the obligation to give reasons. Although there are numerous decisions in this area, it seems to me that, for present purposes, the most relevant are those which concern decisions of District Judges ruling on applications for directions or other legal submissions. The District Court has to deal with numerous cases in a compressed period of time and the superior courts in judicial review proceedings have sought to maintain a careful balance between, on the one hand, a recognition of the practical realities of the pressures faced by District Judges dealing with busy lists, and, on the other, the need for a District Judge to state the essence of the reason for his or her decision.

9. An important case in this regard is *O'Mahony v. Ballagh* [2002] 2 I.R. 410. The applicant was tried in the District Court for the offence colloquially known as "drunk driving". At the conclusion of the prosecution case, counsel on behalf of the applicant made an application for a non-suit on the basis that the arrest and re-arrest of his client had been unlawful by reason of a failure to inform him of the reason for arrest, which arguments were supported by authorities which were opened to the Judge. The District Judge rejected the submission, saying simply "He was drunk, wasn't he?". The applicant then went into evidence. At the conclusion of the evidence, counsel then renewed his application for a non-suit. The Judge made no specific rulings on the submissions and proceeded to convict. The applicant was refused an order of *certiorari* by the High Court but was successful on appeal to the Supreme Court. It was held that the failure of the District Judge to rule on the arguments supporting the application for non-suit led him into unconstitutionality, as it was essential for the defence to know what arguments were accepted when deciding whether or not to go into evidence. Murphy J. said that it was not possible to know whether the Judge made the comment because he was satisfied that the applicant must have known the reason for his arrest, or if it is was a general rejection of all strands of the argument presented on behalf of the applicant; if it was the latter, this would be "wholly unsatisfactory". He went to say:

> "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" to use the words of Henchy J. in *The State (Holland) v. Kennedy* [1977] I.R. 193 at P. 201. In those circumstances it seems to me that the appeal must be allowed and the matter remitted to the District Court for rehearing."

10. In *Lyndon District Judge Mary Collins* [2007] IEHC 487, the applicant was in a car in circumstances where it was obvious to the Garda who saw him that he was intoxicated. Three submissions were made at the conclusion of the prosecution case: (1) that it had not been proved that the offence took place in a "public place", (2) that there was insufficient evidence of a 20 minute observation period prior to the test and (3) that the applicant was not in charge of the vehicle. On the first issue, the District Judge said she was entitled to take judicial notice of the fact that Marlborough Street was a public street. Secondly, that she was satisfied that there had been observation of the accused for a 20 minute period. In relation to the third matter, she simply used words to the effect that she rejected the defence case and was satisfied that the prosecution had made out its case. Rejecting an application for *certiorari*, Charleton J. said:

> "Now, I do not think that it is necessary, as was said by Mr. Justice Murphy in his Supreme Court judgment in *O'Mahony v. Ballagh* that it is essential that district judges give reserved decisions or in every case to giver reasons to a high standard of academic excellence. What is essential, however, is that people know going out of any district criminal court what they have been convicted for and why they have been convicted, and in this instance I think it is clearly implied in what the learned district judge said that she was convicting the accused because of the fact that she completely rejected his testimony and accepted instead the testimony of the prosecution."

11. In *Smith v. Judge Ni Chonduin and D.P.P.* [2007] IEHC 270, McCarthy J. granted an application for *certiorari* of an order of the District Court convicting the applicant of drunk driving on the basis that the judge failed to give reasons. At the close of the prosecution case, counsel on behalf of the applicant had submitted there was no case to answer. The submission pointed to the conflict of evidence between the two gardaí who had given evidence, in relation to two matters connected with the breath test that had been administered, namely, (1) the order in which the Intoxilyser machine-generated statement had been signed by the persons at the scene, and (2) whether there had been a 20 minute observation period prior to the administration of the test. This grounded a submission that s. 17 of the legislation had not been complied with. The submission also raised the issue of whether the statutory presumption under section 21(1) had been rebutted, as well as a submission that the prosecution case in its totality was so tenuous or contradictory that no judge properly applying the law could convict. In response, the judge said: "Quite simply I am inclined to convict. I am taking a simple view, a simple perspective on this. I am satisfied that each Guard completed his function. I have no qualms with the section 17 certificate. I am going to convict". On an application to the High Court for *certiorari*, of the District Judge's decision, McCarthy J. granted the relief sought. In the course of his judgment, he referred to *O'Mahony v. Ballagh*, and said that he did not believe the Supreme Court intended the need to give reasons to be restricted to cases where the an accused needed them to decide whether or not to give evidence:

> "He would be entitled to them also to decide whether or not he should seek to avail of a case stated or seek judicial review and indeed to assist him in any decision as to whether to appeal or not. This is to say nothing of the fact that there is a free standing basis in fair procedures that an accused person knows why he has been convicted. Reasons of course may be express or implied and they are both here. Their extent will also depend, especially in a court of summary jurisdiction, on the nature of the case."

He also went onto say:

> "Contesting prosecutions for what is commonly called drunk driving frequently involves particularly close analysis of evidence and consideration of net questions of law in an area of the law notorious for a myriad of narrow legal issues.
>
> I do not think that the necessity recognised by the Supreme Court for avoiding undue imposition on the District Court in terms of giving reasons, as emphasised by Murphy J. is undermined by the necessity to deal with arguments in a fairly specific way where such evidential or legal issues arise whatever the nature of case.

> No real point is taken here about the fact that the Respondent Judge used the words, 'I am inclined to convict' even though the matters raised were on a submission of no case to answer. She would have been perfectly entitled to prefer one Garda witness's recollection over another or, having found that a requisite period of observation had taken place, find that the expert evidence was irrelevant since it was based on hypothesis not borne out by evidence on deciding on the verdict.
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> At the intermediate stage, she had to ask herself whether or not any of the contingencies contemplated in Barnwell or Galbraith arose. I think that the reasons were not adequate in the light of what she said. She did say that she was satisfied that each Garda completed his function. This can only mean that she thought there was sufficient evidence of the fact of the requisite observation from Garda Mulcahy since this was his function. But, at the same time, whilst she said that Garda Kenny had completed his functions, or words to that effect, there was a fundamental dichotomy in their evidence.
>
> As to the statement or certificate, and I think that this ought to have been addressed in clearer terms and having regard to the background principles set out in Barnwell I think that it would have been necessary for her to analyse the evidence and submissions in somewhat greater detail in order that the Applicant could be quite clear as to the basis upon which he was rejecting the several submissions which I have referred to and also the several issues which I have identified.
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> Now I want to emphasise again the fact that this is a court of summary jurisdiction. No great detail was required. No Reserved Judgment was required. Dare I say it, perhaps a little more would have been sufficient. What was required was that those issues which I have identified were specifically referred to and, again, I think there was too high a level of generality in relation to the manner in which she gave reasons."

12. In *Delaney v. Judge Donnchadh O'Buachalla* and another [2011] IEHC 138, the applicant had been convicted of driving with an excess of alcohol in her urine. The evidence was that a man left his friend's house and as he walked towards his car, saw that another car had scraped along the side of his car. The applicant was sitting in the other car with her ignition still running and he switched off the ignition and turned off the lights of the other car and went to call the Gardai. There was evidence that the level of alcohol in the applicant's urine greatly exceeded the statutory limit. An application for a direction was made on the grounds there was no evidence the applicant was "driving". The District Judge refused the application and asked the applicant if she was going into evidence. The solicitor for the applicant asked for the reasons for the refusal and the Judge said that he had "heard all the evidence". The applicant did not give evidence and was convicted. An application for certioriari was brought to the High Court and McMahon J. refused the relief sought. In a passage subsequently cited with approval by the Supreme Court in *Kenny v. Coughlan,* he said:

> "33. It is an inherent element of fairness and justice that when a person is convicted of a crime he should be furnished with the reasons and an adequate explanation for the conviction. He or she must know not only what the court's decision was but also the reasons why the court reached its decision. Confidence in the judicial process is based on the assumption that decisions are based on rational foundations and are not arbitrarily arrived at. Moreover, public confidence is best secured when the reasons for the decision are explained and furnished.
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> 34. The onus which this places on a particular judge will vary in any given case. Clearly, it is more important in the higher courts where the issues may be complex and numerous, where frequently the parties have made written submissions and where the decisions are reserved by the judge for further consideration before being finally delivered. At this level, too, the reasons for the decision are very relevant for the parties and their advisers who have to consider whether an appeal should be taken or not. In contrast, in the lower courts, and in the District Court in particular, where heavy lists and crowded schedules do not always afford the district judge the luxury of reserving judgments, the judge does not always have the time to compose an articulate, orderly and expansive exposition of the reasons for the judgment. It is essential even in such cases, however, that the accused when leaving the court knows what he has been convicted of. There is no room for uncertainty in that aspect of the matter. In my view, it is also essential that the reasons for the conviction are likewise clear, although the judge may not have had the time to fully or comprehensively articulate the reasoning. In some cases, the reasoning may be obvious and may not require elaboration This would particularly be the case where the judge prefers the evidence of one witness over the evidence of another on a critical matter or where the issue for determination is a single factual issue e.g. whether the defendant was driving at a speed which exceeded the permitted speed limit. There is no requirement for the judge in such situations to elaborate the obvious. A pragmatic view must be taken of the time pressures imposed on the district judge by heavy lists. Moreover, detailed reasons are less important where the appeal available from the District Court is a full *de novo* hearing. Finally, is already noted, the remedy of judicial review is always available in exceptional cases where the district judge falls into serious error. This may be so even when the district judge starts within jurisdiction but during the trial 'fall[s] into an unconstitutionality'. Such cases are, however, exceptional and relatively rare."

McMahon J. concluded that the District Judge in the present case refused the direction on the basis that he had "heard all the evidence", and that it was clear therefore that he was prepared, to find that the applicant was "driving" and that the other elements of the offence were present. There could have been no confusion on the part of the accused and that there was no such unfairness as to have led the District Judge into unconstitutionality. He distinguished the case before him from *O'Mahony v. Ballagh* on the basis that the remark in *O'Mahony* was open to different interpretations, whereas there was no ambiguity in the few remarks of the District Judge in the present case.

13. In *Kenny v. Coughlan* and others [2014] IESC 15, the Supreme Court dismissed an appeal against a refusal of *certiorari* by the High Court. The case involved a prosecution in the District court for driving at a speed in excess of the speed limit. The prosecuting Garda gave evidence that he was on duty operating a speed check with a speed gun; that he stopped the car being driving by the applicant because the speed gun showed him driving in excess of the speed limit, which was 50 kph; and that there was a 50kph speed limit sign on the road where he was standing. He said that upon his return to his office, he inputted the details from his Garda notebook into a handheld device, which uploaded the information on to a computer. This information was sent electronically to the Fixed Charge Processing Centre and that an outside agency was responsible for issuing the Fixed Charge Penalty Notices. He said that the fixed charge fine had not been paid and that the summons had then issued. Counsel for the applicant submitted at the close of the prosecution case: (1) that the only evidence of speed was the uncorroborated evidence of the Garda and (2) that the Garda had not served or caused the fixed charge notice to be served. The Judge refused the application without giving reasons. The applicant was then called to give evidence and gave evidence that he believed that he was in a 60kph zone and that he did not in any event think he was going at the speed of 72kph recorded. Counsel for the applicant repeated his submissions. The Judge said he was satisfied with the evidence and went on to convict. In the course of delivering the judgment of the Supreme Court, Denham C.J. said:

> "The case before the District Court was a speeding offence. The elements of the offence are simple. The Gardai had a

> device which recorded the speed at which the appellant was driving, which is presumed correct unless the contrary is shown. The appellant was shown the monitor on the device which recorded the speed at which the appellant was driving.
>
> The fact that the nature and ingredients of the offence are straightforward is an important factor".

She also quoted with approval above passage from the judgment of McMahon J. in *Delaney v. Judge Donnchadh O'Buachalla and anor*. [2011] IEHC 138 and referred to a number of European Court of Human Rights decisions, before saying:

> "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. In this case the offence was simply that of speeding and the mode of trial was summary. This was one of hundreds of such cases that come before the District Court routinely every day of the week. There had been a clear presentation of the issues by the parties, in adversarial proceedings. The District Court Judge indicated that he preferred the evidence given on behalf of the prosecution. The District Court Judge said that he was accepting the evidence of the prosecution. In the circumstances that was sufficient reason. There was no requirement for the trial judge in such a situation to elaborate on the obvious."

14. In *Oates v. District Judge Browne and D.P.P.* [2016] IESC 7, Hardiman J. delivered judgment in relation to an appeal from the judgment and order of the High Court (Charleton J.). The applicant was charged with an offence of driving while there was present in his body a quantity of alcohol above the permitted limit. When the case came on for hearing in the District Court, his solicitor sought an opportunity to have an expert on his behalf examine the Intoxilyser machine which had analysed the breath specimens and produced a certificate indicating the concentration of alcohol in the breath. He also sought certain documentation relating to the machine, its calibration, its servicing and its maintenance. In making this request, he relied upon the case of *McGonnell v. Attorney General* [2007] 1 I.R. 400, and in particular the High Court judgment of McKechnie J. The Superintendent who was prosecuting the case said that he believed the *McGonnell* case had been "superseded" and the District Judge said that there was a more recent case which overturned it, and he adjourned the matter. On the next date, the applicant's solicitor had a copy of the Supreme Court decision in *McGonnell*, which affirmed the High Court decision. *McGonnell* was a case in which there had been a challenge to the constitutionality of the statutory provisions concerning evidential breath samples on the basis that there was no possibility of independent testing; the challenge was unsuccessful but the *ratio* of the decision depended on the finding that a defendant had a right to apply to the District Court for inspection of the Intoxilyser. Murray C.J. had pointed out that where the method of testing was breath, the person in question was in a significantly different position from the individual who had been requested to give blood or urine, as the latter person had the opportunity of having a portion of a single specimen independently assessed. This opportunity was "critical to fair procedures and constitutional justice". The Judge refused the solicitor's application for documents and inspection facilities without giving reasons. The solicitor pressed the judge for a reason but was not given any answer. There were numerous subsequent adjournments of the case, during which the solicitor continued to press his point about inspection facilities, but ultimately his client was convicted. At para. 39 of his judgment in the Supreme Court, Hardiman J. noted that there was uncontradicted evidence that the District Judge had given no reasons for his refusal of the application for inspection and documentation. He said that the case therefore presented a somewhat unusual feature among the authorities on the obligation to give reasons for a decision, namely that the Judge not only ignored the request and gave no reasons but did so while he laboured under a misapprehension that the case which was the lynch -pin of the application had been overturned and no longer represented the law which was binding on him. He said that in those circumstances, any attempt to establish by some form of inference the reasons which actually operated on his mind was "an exercise akin to trying to put the tail on the chalked figure of a donkey while blindfolded". He went on to refer to the extensive jurisprudence on the giving of reasons and to examine a number of the most relevant cases He discussed, *inter alia*, the decision in *O'Donoghue v. An Bord Pleanala* [1991] ILRM 750, where Murphy J. said that the purpose of the obligation to give reasons was two fold; "first, to enable the Courts to review it and secondly to satisfy the reason having recourse to the Tribunal that it has directed its mind adequately to the issue before it". Hardiman J. said that he agreed with that formulation and added:-

> "It is a practical necessity that reasons be stated with sufficient clarity that if the losing party exercises his or her right to have the decision reviewed by the Superior Courts, those Courts have the material before them on which to conduct such a review. Secondly, and perhaps more fundamentally, it is an aspect of the requirement that justice must not only be done but be seen to be done that the reason stated must "satisfy the persons having recourse to the tribunal, that it has directed its mind adequately to the issue before it". He went on to discuss more recent authorities, all supporting and explaining the duty to give reasons.

Application to the present case

15. I now turn to the present case, in light of the authorities referred to above. A point which may be made at the outset is that the offence of handling stolen property is not a "simple offence", such as driving at an excessive speed, this being a matter which was referred to as a factor of importance by Denham C.J. in *Kenny v. Coughlan*. On the contrary, it is a complex offence involving several ingredients, including alternative *mens rea* options of intention and recklessness, and the various ingredients of the offence interact with each other.

16. The first submission made by the applicant's solicitor at the conclusion of the prosecution case was to the effect that there was insufficient evidence of *mens rea*. Having regard to what the Judge said in response to this application, it seems to me that the Judge did address the submission and referred to two aspects of the evidence in rejecting the submission; first, the fact that the applicants were in possession of the phone, and secondly, the fact that the phone had taken photos of them. While his rejection was expressed in very terse terms, this has to be read in the context of the evidence that had preceded it, namely that the app only took a photo of a person if an attempt was made either to shut down or to activate the phone. While one may or may not agree whether this evidence was sufficient to constitute the *mens rea* of the offence of handling in the circumstances, this is not the issue before the court today; rather the issue is whether the Judge addressed the submission made and gave reasons for his conclusion. In my view, he did, although the reasons set out were very much on the minimal side.

17. The second submission made at the conclusion of the prosecution case was that the evidence of the photos should not have been admitted without expert evidence as to the operation of the app. This, unlike the first submission, was in essence an argument as to the admissibility of evidence, rather than its sufficiency. Perhaps surprisingly, it was raised at the close of the prosecution case rather than before the evidence itself was given, which is the usual time for an admissibility application, but in any event it was raised at the close of the prosecution case in the form of submission that the evidence should not be relied upon because it had not been properly proved. The submission that electronic evidence, i.e. the photo produced by the app, should not be admitted or relied upon unless there is appropriate expert evidence before the court, is a submission of a technical kind which has arisen in a number of cases

on indictment involving evidence which has come from electronic or computer sources; including *D.P.P. v. Murphy* [2005] 2 I.R. 125, *D.P.P. v. Meehan* [2006] 3 I.R. 468, both of ,which concerned telephone evidence, *D.P.P. v. Kirwan* [2015] IECA 228, and most recently, *D.P.P. v. McD* [2016] IESC 71, both of which concerned CCTV footage. These authorities discuss the difference between hearsay electronic evidence and "real" electronic evidence, and the proofs which are required in respect of each type of electronic evidence. In the present case, the Judge said, when pressed for his for rejecting the submission: "I disagree, Mr. McCarthy, because it is crystal clear that these two defendants handled this phone on the night in question. Photographs of them were taken by the app, and I don't need the person that manufactured or made the app to be here to tell me that". Therefore, the Judge's response to the technical argument was, in essence, that the photos were probative. When pressed further, he said: "You were shown the photographs and your clients were shown the photographs, and they couldn't explain them." Thus, in rejecting the technical submission about the admissibility of the evidence, he not only relied on what he saw as the intrinsic probative value of the photos, but also appeared to rely on the applicant's "failure to explain" the photos, which was in breach of the prohibition on drawing adverse inferences from silence.

18. If I am correct that these were errors on the part of the Judge, the question then arises, were they errors of law within jurisdiction which should properly lead to an appeal rather than relief by way of judicial review? It may sometimes be difficult to draw the dividing line between an error of law, on the one hand, and a breach of fair procedures and a failure to give reasons on the other. On this particular issue, it seems to me that, having regard to the exchanges as a whole, the Judge did not address the admissibility argument in any meaningful manner. He repeatedly interrupted the solicitor who was trying to make the submission; he expressed incredulity at the submission being made at all; and described the submission as "outrageous". When pressed for reasons, he gave examples of why he thought the evidence was probative, whereas the question in issue was whether the evidence should be relied upon at all, not the weight that should be placed on it, which suggests that he did not address the issue raised in any meaningful way. This is not to say that, if the Judge had properly addressed the legal submission being made, he might not have correctly reached the legal conclusion that the evidence had been properly proved, but it seems to me that what occurred was that he dismissed, out of hand, the solicitor's submission without hearing the submission in full, and that this was in breach of fair procedures.

19. The third submission made at the conclusion of the prosecution case was that there was insufficient or no evidence that the iPhone, if handled by the applicant, was handled "otherwise than in the course of stealing", which is an essential ingredient of the offence. Here, when asked for a reason for his rejection of the submission, the Judge initially said that he had already given his reasons *ad nauseam*. With respect, this seems to overlook the fact that this was a different submission from the previous submissions. He also said, when pressed again for reasons: ".... They handled it regardless of whether it was stolen or not...": His use of the word "regardless" in this sentence seems to indicate that he was treating the matter as a question of whether the two accused were reckless or not, which unfortunately was not the focus of the third submission. Again, it can be difficult to draw the dividing line between an alleged error of law and a failure to consider a submission at all and/or give reasons for decisions. I consider the situation regarding this third submission quite borderline in this respect. However, the decision in *Oates* appears to me to support the view that a failure to consider a submission is a breach of fair procedures, and I am inclined to consider that in this aspect also, there was a failure on the part of the Judge to consider the submission in any meaningful way, and not merely an alleged error of law in the manner in which he dealt with the submission. However, I do not consider the matter to be determinative of my overall conclusion.

20. A. further matter to be considered is the manner in which the Judge dealt with the applicant's Garda interview, to which I have referred earlier. It is clear that he failed to explicitly rule on the submission that the failure of the applicant to explain the photos in interview was not probative (although it is clear from his later treating of the failure to explain as probative that he implicitly ruled against the solicitor on the point) and it follows that he failed to give reasons for his rejection of the submission.

21. I also have regard to the overall tenor of the Judge's remarks throughout the hearing, which indicated an impatience with the fact that the applicant's solicitor was making multiple submissions; which required the solicitor to press him repeatedly to give reasons for the various rulings; and which involved the Judge repeatedly pressing the solicitor on the issue of whether he was going "into evidence". It appears that the solicitor was given no time at all to consult with his two clients on whether they could give evidence after the prosecution case had concluded and the application for a direction had been summarily refused. It seems to me that, unfortunately, the Judge's understandable desire to move the case along had the effect of compromising some of the essential features of a fair trial.

22. Having regard to the cumulative effect of how the Judge dealt with (a) the right to silence and the interviews of the applicant, (b) the technical submission at the close of the prosecution case on the admissibility of the photographic evidence produced by the app and (c) the submission at the close of the prosecution case on the insufficiency of evidence regarding the ingredient of "otherwise than in the course of stealing", together with the overall approach of the Judge throughout the hearing, I have reached the conclusion that what took place in this case was more than a series of "mere" alleged errors of law and that, rather, the Judge fell into unconstitutionality by failing to give proper consideration to a number of the submissions made, and failing to give reasons for his rulings.

Objective bias

23. As regards the issue of objective bias, counsel on behalf of the D.P.P. relied on *Corrigan v. Land Commission [*1977] I.R. 317 and *Duggan v O'Leary and anor*. [2015] IEHC 223, for the proposition that the issue could not now be raised when it had not been raised before the District Judge himself. I am not persuaded that objecting on this basis would be a practical reality in such a case, but I do not consider it necessary to rule on the point by reason of my view on the second argument on objective bias. This was the argument of counsel on behalf of the D.P.P., relying on *Orange v. Director of Telecoms* [2000] 4 I.R. 159 for the proposition that the mere fact that a decision maker makes errors in the decision making process does not of itself provide evidence of bias or pre-judgment, and that bias must arise from circumstances outside the actual decision in the case and the manner in which the case was conducted. Further, *in Spin Communications Ltd. v. I.R.T.C.* [2001] 4 IR 411, it was held that the manner in which a process is conducted is to be assessed by reference to fair procedures, whereas bias relates to factors external or extraneous to the decision making process. In the *Spin* case, Murray J said:

> "In my view there is clearly a distinction to be drawn between the existence of factors external or extraneous to the decision making process in which an adjudicator is engaged and the manner in which that process is conducted on the basis of factors which are relevant or material to the decision to be made. External factors should not affect the decision nor should they appear to affect the decision so as to give rise to a reasonable apprehension of bias. Obviously factors relevant to the decision may affect it but the decision must be arrived at fairly."

As Barron J. stated in the same judgment at p. 225:-

> "There is a duty upon the decision makers to carry out the process leading to the decision in a particular way. Not to do

so may make the process unfair or otherwise invalidate it, but that is not bias."

Keane C.J. agreeing in his judgment with Barron J.'s approach said at p. 189 that:-

> "A judge may conduct a case in such a manner as to violate the requirements of natural justice or fair procedures. If he does so, his decision will be set aside on that ground, whether the failure was due to fatigue in the hearing of a case at the end of a long and crowded list, an innate and sometimes regrettable irreversible tendency to rudeness or bad manners, or hostility, overt or covert, to one of the parties based on race, religion or gender or simply because the judge did not like the appearance of the litigant in question. No doubt, the last two examples will readily attract the description of 'bias'. But in any such instance the decision is set aside, not on the ground of objective or even actual bias, but because, under our constitution and law, natural justice and fair procedures must at all times be observed in the administration of justice and in proceedings before quasi-judicial tribunals, and the Superior Courts will not tolerate breaches of these canons, whatever the motive and whether indeed any particular motive on the part of the adjudicating tribunal which has fallen into error has been established. My understanding of the judgments of Keane C.J. and Barron J. is that should a decision maker pursue a line of inquiry concerning a matter relevant to the decision to be made in a tendentious or unfair manner, this does not in itself permit, as a matter of law, the decision to be impugned on the grounds of bias but rather it falls to be reviewed in accordance with the requirements of fair procedures or natural justice. This is because the 'factor' involved is internal and not external or extraneous to the decision making process."

24. In the present case, there is no suggestion whatsoever that the District Judge was labouring under the influence of any external connection to the case or bias of any kind, or that there was even the appearance of such. The Judge's impatience with the submissions on behalf of the applicant appears to have been entirely generated by reason of his view of the evidence, namely that the case was "open and shut". In those circumstances, it does not appear to me that the concept of "objective bias" is the appropriate prism through which to view the defects in the process, and I confine my conclusions to the "reasons" and the "fair procedures" grounds argued.

25. In the circumstances, I will grant the relief of *certiorari* and remit the matter to the District Court for a fresh hearing.