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THE HIGH COURT
JUDICIAL REVIEW

[2001 No. 678 JR]

BETWEEN

MICHAEL GORDON

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS AND
DISTRICT JUDGE OLIVER McGUINNESS

RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 9th day of November 2005.

1. On the 18th September, 2001 the applicant was convicted in the District Court sitting at Easkey Co. Mayo of driving while there was a quantity of alcohol in his urine in excess of the limits prescribed by the Road Traffic Acts as amended. On 27th October, 2001 Butler J. granted leave to apply by way of judicial review for an order of certiorari, quashing the District Court Order, coupled with an injunction to prevent the first respondent from prosecuting him further. The factual and legal basis for that application are precisely the same as those herein.

2. On 26th November, 2001, on the application of the respondents the order of Butler J. was set aside by the High Court (Kearns J.). It is unnecessary for the purposes of this judgment to go into the reasons therefor.

3. By notice of appeal dated 18th December, 2001, the applicant sought to appeal that order. The Supreme Court (Murphy, Geoghegan and Fennelly JJ.) heard the appeal on 10th May, 2002. In its judgment on 7th June, 2002 that court allowed the appeal against the order of Kearns J. and thereafter the judicial review proceedings recommenced in the High Court on foot of the original order of Butler J. Since that time the matter has appeared in the judicial review list on a number of occasions but did not proceed to hearing due to pressure on court time. The matter ultimately came before this court on the 25th of October 2005.

Factual background

4. At approximately 3.25 on the morning of 27th May, 2001, the applicant was arrested by Garda Pauline Murray and brought by garda car to Ballina Garda Station. On arrival some 30 minutes later, the applicant was taken to the day room where his details were entered on the custody record. A short time later Dr. Maura Irwin arrived at the station.

5. The applicant, Dr. Irwin, Garda Pauline Murray, and Garda Padraig Prendergast went to a small room in the garda station known as the doctor's room. It is not contested in these proceedings that this room is very small. It is contended on behalf of the applicant that at no time were all four people in the room and that, in fact, the room would barely hold four people.

6. The applicant was asked to elect between giving a blood sample and a urine sample. He opted for the latter. Having done so, he was brought by Garda Prendergast to another room in another part of the garda station in which there were located toilets. In the presence of Garda Prendergast, the applicant gave a urine sample which Garda Prendergast brought back to the doctor's room where he in turn handed the sample to Dr. Irwin. She dealt with the sample in the prescribed manner and prepared it to be sent for analysis.

7. The applicant was ultimately charged with having committed an offence contrary to s. 49(3) and (6)(a) of the Road Traffic Act, 1961, as amended.

8. When the charge came on for trial before the second named respondent at Easkey District Court on 18th September, 2001 the prosecution was conducted by Inspector Kevin Moynihan. The sole witness for the prosecution was Garda Pauline Murray of Swinford Garda Station. Garda Prendergast was not present in court. Garda Murray gave evidence of having arrested the applicant and of having brought him to Ballina Garda Station.

9. The case made on behalf of the applicant is based on the contention that the sworn evidence which Garda Murray gave in relation to the provision of the urine sample was seriously at variance with, what is now undisputed, in fact occurred. The applicant states that in the course of evidence that the garda stated the urine sample was provided in a toilet in the doctors room itself at Ballina Garda Station. She specifically stated that the toilet was situated in a room or cubicle at the end of the medical room, also known as the doctor's room. She further testified that Dr. Irwin was present while the applicant was providing the urine sample. She said that the only other person present was herself, and that she was in the medical room. In fact as is now accepted, the applicant was taken from the room along two corridors to the toilet in the ground floor of the Garda station. He was accompanied by a Garda Prendergast. Whilst in the urinal he provided a urine sample, gave this sample to Garda Prendergast, who in turn gave it to Dr. Irwin when had both the applicant and Garda Prendergast had returned to the medical room

10. The applicant submits that the Garda Inspector charged with presenting the prosecution case was aware that these aspects of the evidence by Garda Murray were false. Whilst he was present in court throughout the time that Garda Murray was giving evidence, at no stage did he intervene to correct the evidence as to where and by whom the sample was taken or make any attempt to prevent that evidence being so tendered.

11. It is accepted however that the applicant's solicitor, Mr. Flynn, cross examined Garda Murray. In the course of this cross examination she accepted she was incorrect in her description of what occurred. She said that she had confused the layout in Ballina with another Garda Station. Mr. Flynn then applied to the second named respondent for a direction to acquit. The case made was that there was a break in the chain of the evidence and that the sample had not been provided in the manner contended for by Garda Murray. The second named respondent refused to grant a direction. The applicant did not go into evidence: He was convicted of an offence contrary to s. 49(3) and (6)(a) of the Road Traffic Act as inserted by s. 10 of the Road Traffic Act, 1994, fined €150 and disqualified from driving for two years with an order that the particulars of the conviction be endorsed on his driving licence.

12. No application for adjournment was made either by the applicant's solicitor or by Inspector Moynihan during the course of the proceeding for the purpose of obtaining further information or instructions, or indeed to arrange for the presence of Garda Prendergast.

13. As notices to cross-examine were served, it is necessary to deal briefly and in more detail with the oral evidence adduced in this court.

14. In the course of such evidence, the applicant himself recollected that he was seated in the court and that his solicitor was some two benches ahead of him. He had no communication with his solicitor during the course of the hearing. At the end of the prosecution case his solicitor made submissions on the basis of what he contended were the imperfections in the chain of evidence. When asked, the applicant himself was unable to recollect whether he had given evidence owing to the elapse of time since the District Court proceedings, but in fact it is common case that he did not do so.

15. The applicant's solicitor, Mr. Flynn, testified that after the hearing in the District Court he entered into correspondence with the prosecuting Inspector. Mr. Flynn contended therein, to the effect that the Inspector had knowingly participated in, and allowed a prosecution to proceed on evidence that he knew was untrue. The thrust of this correspondence will be dealt with below.

16. It must be emphasised here that the allegedly "untrue" evidence was that of Garda Murray. Inspector Moynihan did not give evidence in the District Court. It is only fair to emphasise this fact as a report in one national newspaper at the time of the original application for leave to bring judicial review before Butler J. stated:

> " … In particular, it was being alleged the Garda Inspector acting on behalf of the DPP 'knew well that the evidence was perjured'." It was correctly pointed out in these proceedings that this allegation was a serious reflection on the integrity of the Inspector even though he had not testified in the District Court."

18. It is necessary then to deal Inspector Moynihan's evidence as to the state of his own knowledge as to the nature of the evidence in the District Court, the layout of the garda station in question, and his recollection of the District Court proceeding as a whole.

19. In the course of evidence to this court, Inspector Moynihan stated that from 9th January until 18th September, 2001 he was stationed in Ballina and answerable to the Superintendent stationed there. His work involved him in the supervision of six garda districts. It was necessary for him to liaise closely with the superintendent who was working in Ballina but was, at the time, deskbound owing to incapacity.

20. Inspector Moynihan stated that he would have gone into the superintendent's office in Ballina Garda Station two or three times a week. In doing so, he passed the doctor's room on a number of occasions. His own office was on the first floor. Insofar as he had to use a toilet, he used one installed on the first floor of the garda station. No part of his regular duty involved him having to go to the toilets on the ground floor of Ballina Garda Station. He accepted that there was no urinal or toilet in the doctor's room of the station. Instead, one proceeded out of that room and by way of a series of right-hand turns, down a corridor to the urinal on the ground floor.

21.. The Inspector stated that at the time of the proceedings in the District Court he was not aware as to the absence of a toilet in the doctor's room. He had previously had no reason to examine the room in question and in particular did not know anything about the back of the room and as to whether or not it connected with any toilet facilities in the garda station. Furthermore, he said his attention was more particularly directed to ensuring that Garda Murray's evidence complied with the necessary proofs in such a prosecution and was not directed to the specific issue herein.

22. It was not his understanding that the District Judge was under any misapprehension as to what had occurred. In fact, he stated that the evidential issue, which is at the centre of these judicial review proceedings, was made clear to the District Judge by virtue of the applicant's solicitor's cross-examination and application for a duration to dismiss. At the conclusion of this cross-examination, he said, it was clear to the District Judge that the sample was provided in the urinal section of the toilet in the garda station and then had been brought back to the doctor by Garda Prendergast. At the time such direct evidence was given he himself did not know that such evidence was erroneous. He did not know whether there was a connection between the doctor's room and the toilet. Finally, as stated, the District Judge was well aware of the point as the issue had been raised in cross-examination of Garda Murray.

23. In cross-examination of Inspector Moynihan in these judicial review proceedings it was firmly put to him that he knew the layout of the garda station, or must have known it, and that in possession that imputed knowledge he wrongfully failed to intervene in the proceedings. He denied both suggestions. On this evidence alone it was submitted on behalf of the applicant that it was open to this Court to infer that the Inspector knew the lay out of the station, or ought to have done so.

24. On the premise that such evidence were accepted, it is contended that there was an absence of fair procedures, in that the applicant was denied the right to properly prepare his defence; and that there was an inequality of arms in that the State authorities allowed a prosecution to proceed on a false basis while there was knowledge within their possession as to the falsity of the evidence tendered which should have been put before the District Court. In the absence of corrective steps having been taken, the applicant submits the integrity of the prosecution process was tainted.

25. Central to these proceedings, however, there are issues of fact, that is whether the Inspector knowingly allowed or permitted false evidence to be adduced in the course of the prosecution and whether the conviction was obtained thereby. Inspector Moynihan was meticulously cross-examined on this issue by Mr. Anthony Collins S.C., on behalf of the applicant. In the course of submissions Mr. Collins accepted that the onus was upon him to demonstrate that the inspector knowingly permitted false evidence to be adduced. Such a proposition would of course, have to be established on the basis of the balance of probabilities. It is only fair to state clearly in this judgment that the applicant has not adduced evidence sufficient in anyway to show that the Inspector conducted himself in an improper fashion in the course of the prosecution. In particular, no satisfactory evidence has been adduced that the inspector knew, or even ought to have known, that perjured evidence was adduced during the course of the prosecution in which he represented the State authorities. I do not incidentally accept that the test for this purpose can on the facts be whether he ought to have known that the evidence was wrong. This case does however demonstrate that the process of adducing and tendering evidence even in cases which might be described as "routine" must be carried out with care and therein particular evidence must be given by rate.

26. I find that, Inspector Moynihan did not know that the evidence adduced by Garda Murray was inaccurate. Any such confusion as did arise was clarified before the District Judge made his ruling. No evidence has been adduced as to any error of understanding on the part of the District Judge. Indeed the applicant concedes that at all stages the District Court Judge acted in accordance with law and fair procedures. The applicant has not shown the conviction was obtained on foot of perjury or concealment.

27. It is hardly necessary to reiterate that when the issue arose in the District Court, no application was made to adjourn the matter in order to clarify the point at issue. It was not suggested that the urine sample was not that of the accused. The applicant himself was not called to give evidence on the question as to where the sample was given or with regard to any break in the chain of evidence. The applicant did not proceed by way of appeal, although no issue of time expiry arose. This Court is invited to hypothesise as to what might have been the outcome of the case in the absence of Garda Prendergast. Such a process is insufficient to discharge the onus of proof to a level of probability.

Relevant Authorities

28. *The authority of R (Burns) v. County Court Judge of Tyrone* [1961] N.I. 167 is cited for the propositions that the Superior Courts will exercise their supervisory function over lower courts with the aim of promoting the due administration of justice and that there may be cases where the order of a lower court will be set aside where it has been obtained by false testimony. However one must closely examine this, and kindred judgments with a view to establishing the narrow parameters with which such supervisory function will be exercised in this particular area.

29. In *Burns* affiliation proceedings were heard at Strabane Petty Sessions on 12th March, 1959. The complainant failed to adduce corroborative evidence as required and the resident magistrate dismissed her application at the conclusion of her case without calling upon the defendant. The complainant then appealed. This appeal was heard by a County Court Judge on 14th April, 1959. At that hearing the complainant called three witnesses in support of her case who had not given evidence at Petty Sessions. On foot of that evidence, as corroborated, the County Court Judge gave a decision on 1st May, 1959 wherein he found that the complainant's evidence was corroborated and ordered the defendant to make a payment of maintenance.

30. The defendant did not make the payments ordered and the question of his committal arose. This in turn directed attention to the testimony of two of the corroboration witnesses and the police commenced enquiries, which resulted in both being charged with perjury and the complainant being charged with subornation in respect to the perjury of one of the witnesses. These charges came on for trial on 1st February, 1960. The two corroboration witnesses then pleaded guilty to having committed perjury at the Quarter Sessions. The complainant pleaded not guilty and the jury were directed to acquit her on the ground that there was no satisfactory corroboration of the charge against her.

31. The following facts were therefore relevant to the decision in *Burns*.

32. First, two of the corroborating witnesses had been convicted of perjury. Second, the applicant for the order was herself charged with subornation of perjury but was acquitted. Third the matter had been dealt with at first instance and on final appeal to the County Court prior to the making of the application for *certiorari*.

33. In the course of his judgment Lord McDermot L.C.J. stated at p. 172 of the judgment

> "Here we have an order undoubtedly obtained by the perjured testimony to which I have referred, and it is clearly in the interest of the due administration of justice that it should not stand. The supervisory jurisdiction of this court is not at large; but the general aim of that jurisdiction is to promote the due administration of justice and if a distinction is to be drawn between cases where a decision is procured by perjury and cases where a decision is procured by perjury to which one of the parties is privy", (an issue which arose in the course of argument in Burns) "it ought to rest on some basis of principle. I am unable to discern any such basis here. Litigation between the parties, whether civil or criminal, does not necessarily mean that there are not others anxious or interested to sway the issue one way or the other, and it would, I think, be a grave defect in the procedure of this court if one of these forms of fraud could be noticed but not the other. I can find no rational ground for the sort of discrimination which must prevail if we are to accede to the submission under discussion. If certiorari does not lie in such circumstances there is no other redress and an order undoubtedly founded on perjury remains effective. In my view this court is not bound to accept that situation merely because of a lack of authority."
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> 34 Thus it will be observed that *certiorari* was held to lie in Burns because there was no other procedural redress available.

35 The question of prosecution conduct in court also arose in *The State (Patrick O'Regan) v. District Justice Plunkett* [1984] I.L.R.M. 347. Again the facts of that case must be carefully considered as they do not rely on the issue of false testimony.

36. There, the prosecutor was arrested under s. 49(6) of the Road Traffic Act, as amended in August 1982. He gave a specimen of his blood and received a corresponding specimen. In early September of that year the gardaí became aware that the copy certificate of the analysis of the specimen carried out by the medical bureau had been returned to the bureau by the post office without reaching the applicant. In late October 1982 the gardaí served a summons on the applicant charging him with the offence to which the certificate related. On 21st December, 1982 the District Justice granted a garda request for an adjournment on being informed by the gardaí that the copy certificate had not been delivered. The District Justice refused an application to have the charge dismissed for want of the delivery of the certificate. On 25th January, 1983 the date to which the hearing had been adjourned, the prosecuting garda handed a copy certificate to the applicant immediately before the hearing began. The District Justice then ruled against a defence submission that the copy certificate had not been forwarded by the medical bureau as soon as practicable after analysis of the blood specimen and convicted the applicant.

37. In the course of his judgment, Gannon J. stated at p. 349:

> "The following facts were disclosed on this hearing and are so found by me namely: the Gardaí and the State Solicitor were aware that the copy certificate required by statute to be forwarded to the prosecutor in fact had been forwarded but had not in fact reached him; in that knowledge the proceedings were commenced where the conviction of the prosecutor of an offence against section 49 of the Road Traffic Act, as amended, in respect of which the contents of the certificate was an essential proof; the Gardaí had retained the copy certificate intended for the prosecutor up to the return date on the summons which had been served and during the period of adjournment after issue had been taken upon its absence."

38. Continuing Gannon J said : "The following passage from the judgment of the President of the High Court in *The State (Walshe) v. Murphy [1981]* I.R. 275 at p. 293 was cited in this court and is apposite:

> "I am satisfied that there is an obligation on the prosecuting authorities in a charge under section 49 of the Road Traffic Act where they become specifically aware that the person charged has not received a copy of the certificate and requires one, to supply him with one in such good time as to provide him with a realistic opportunity to have the specimen which he has retained analysed and to contest the validity or correctness of the certificate which was issued. It does not seem to me that the possibility of an adjournment (which was not sought in this case and which the first respondent says he would have granted) cures a failure to comply with that basic requirement of natural justice where the hearing of the charge is almost two years later than the taking of the original specimen."
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> "I accept the contention made on behalf of the prosecutor that this court has no way of knowing whether a specimen

taken in August 1979 would be capable of any accurate or probative analysis in May 1981 and that therefore there is a fundamental want of fair procedure in the refusal or failure of the prosecuting authorities to supply a copy of the certificate upon demand and request – and I emphasise the necessity for that in order to invoke the concept of natural justice. On this ground alone, even if all other grounds urged on behalf of the prosecutor had failed, I would have been satisfied to disallow the cause shown."

39. The decision in *O'Regan* therefore was based on the deliberate and conscious acts of the prosecution in or about which the conduct of the court proceeding were held to give rise to a finding of want of fairness in procedure.

40. That issue also arose in the case of *Regina v. Leyland Justices, ex parte, Hawthorne* (1979) 1 Q.B. at p. 283. The applicant was the driver of a car which collided with another car being driven in the opposite direction. Two witnesses gave statements to the police, but those statements were not disclosed to the applicant who did not know of the existence of the witnesses. The applicant was charged with driving without due care and attention, contrary to s. 3 of the United Kingdom Road Traffic Act, 1972. The prosecution did not call the witnesses to give evidence and the applicant was convicted. His insurers then received the police report on the accident which referred to the witnesses' statements. It was held by Lord Widgery L.C.J., (with whom Maye and Tudor-Evans JJ. Agreed):

> "… There is no doubt that an application can be made by certiorari to set aside an order on the basis that the tribunal failed to observe the rules of natural justice. Certainly if it were the fault of the justices that this additional evidentiary information was not passed on no difficulty would arise. But the problem – and one can put it is a sentence – is that certiorari in respect of breach of the rules of natural justice is primarily a remedy sought on account of an error of the tribunal, and here of course we are not concerned with an error of the tribunal; we are concerned with an error of the police prosecutors. Consequently amongst the arguments to which we have listened in argument has been that this is not a certiorari case at all on any of the accepted grounds.
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> We have given this careful thought over the short adjournment because it is a difficult case in that the consequences of the decision either way have their unattractive features. However, if fraud, collusion, perjury and such like matters not affecting the Tribunal themselves justify an application for certiorari to quash the conviction, if all those matters are to have that effect, than we cannot say that the failure of the prosecution which in this case has prevented the Tribunal from giving the defendant a fair trial should not rank in the same category.
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> We have come to the conclusion that there was here a clear denial of natural justice. Fully recognising the fact that the blame falls on the prosecutor and not on the Tribunal, we think that it is a matter which should result in the conviction being quashed".

41. Thus it may be seen that in certain limited category of situations, certiorari may lie arising from false testimony or the conduct of the prosecutor or prosecution in court as opposed to any want of in the seeking out and obtaining and preserving of evidence relevant or potentially relevant to a prosecution (see *Braddish v. D.P.P.* [2001] 3 I.R. p. 127; *Dunne v. D.P.P.* [2002] 2 ILRM p 241; *Murphy v. D.P.P.* [1989] ILRM p. 71). In Burns, certiorari was permitted upon the basis of a finding of perjury and in circumstances where there had been a concluded decision of a Court of Final Instance from which no further appeal lay. In *The State (O'Regan)*, it was held that *certiorari* would lie where the copy certificate, an essential proof in the case, had been deliberately withheld until the last minute, even though it was known that delivery of it was required so as to avoid prejudice. In the absence of such delivery, to proceed with the prosecution gave rise to a failure of natural justice. In R. v. Leyland Justices ex parte Hawthorne, there had been a failure on the part of the police as prosecuting authorities to notify the defence of the existence of additional relevant and material witnesses. In addition there was before the Divisional Court the information in brief statements of evidence, establishing that such evidence might be helpful to the applicant as tending to exonerate him of the charges preferred against him. Thus certiorari lay because there had been a clear denial of natural justice arising from the conduct of the prosecution and the failure to disclose relevant evidence which was known to the prosecution at the time.

42. Applying these authorities, it will be seen that the instant case hinges on the state of the Inspector's knowledge. Has even any mala fides been established? I am not so persuaded even on the basis of the applicant's case. As has been indicated earlier in this judgment the applicant has failed to satisfy the court that the prosecution knowingly, or even recklessly, engaged in conduct which was tantamount to any perjury or concealment of evidence. I do not consider that the evidence here demonstrates that the Inspector knowingly stood over incorrect evidence tendered at one stage of the District Court case by Garda Murray. There is no sufficient evidence before this court from which an inference may be drawn as to any mala fides on the part of the Inspector. More essential to the true test to be applied, no evidence has been adduced that the conviction in suit was obtained upon the basis of perjury or concealment of evidence.

43. In addition, the court must have regard to the additional factors earlier identified and encompassed in the absence of any application for an adjournment (see *Dawson v. Hamill* [1990] ILRM 257). Indeed the evidence does not even disclose that the District Judge was asked to break for a moment in order to allow the applicant's solicitor to confer with his client, so as to confirm the factual position as to locale and thus to avoid any doubt or uncertainty as to his instructions.

44. I am satisfied on the facts, therefore that any alleged break in the chain of evidence was the subject of cross examination and submissions by the applicant's solicitor. Thus the point was sufficiently apprehended by the District Judge in order to allow him to rule thereon and to reject the application on the part of the applicant.

45. And as been pointed out above it has not been demonstrated on the balance of probability that the conviction in issue was obtained by perjury or concealment of evidence in the District Court proceedings. On these substantive grounds the court will decline the application for judicial review.

Remedy by Way of Appeal?

46. Subsequent to the District Court hearing correspondence took place between the applicant's solicitor and the Inspector. It was contended there had been *mala fides* on the evidential issue: however such correspondence was curtailed by the bringing of these judicial review proceedings. But the evidence establishes that the issue was present to the mind of the applicant's solicitor, actually in the course of the District Court proceeding. He subsequently wrote to the Inspector on the 27th September, 2001, again referring to the point, the matter having being disposed of in the District Court on the 18th of that month. Clearly therefore the issue of an appeal was still a live one in the mind of the applicant's advisors and it might be contended that any deficiency or flaw in the evidence might have been remedied by appeal. The question arises therefore as to whether, having regard to the availability of an appeal, judicial review would be at all in this case (see *The State (Abenglen Properties) v. Dublin Corporation* [1984] I.R. 381). It is unnecessary to resolve this issue as to discretion however, as, having regard to the findings of fact made, it is clear that the court

should in any case decline to grant judicial review on the substantive issue raised, that is whether there was on the evidence any misconduct on the part of the prosecution such as would give rise to a want of fair procedure. This has not been shown. The court will therefore decline the application for judicial review.