Neutral Citation: [2015] IEHC 709

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 596 J.R.]

BETWEEN

MARGARET MCHUGH

FIRST APPLICANT

AND

DISTRICT JUDGE GEOFFREY BROWNE

RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

[2014 No. 656 J.R.]

PAUL CORBETT

SECOND APPLICANT

AND

DISTRICT JUDGE PATRICK CLYNE

RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

[2014 No. 658 J.R.]

SHEILA KEANEY

THIRD APPLICANT

AND

DISTRICT JUDGE PATRICK CLYNE

RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Mr. Justice Michael White delivered on the 29th of October 2015

1. By order of this Court of 3rd November, 2014, the first applicant, was granted leave to apply by way of judicial review for an order of certiorari quashing the decision and order of the respondent dated 9th September, 2014, when the first applicant was convicted of an offence contrary to s. 47 of the Road Traffic Act 1961 (as inserted by s. 11 of the Road Traffic Act 2004) and s. 102 of the Road Traffic Act 1961 (as amended by s. 18 of the Road Traffic Act 2006) that on 13th December, 2013, at 10:09am at Blackacre, Tuam, Co. Galway, a public road in the said District Court area of Tuam specified in the special speed limited by-laws made by the appropriate Council under s. 9 of the Road Traffic Act 2004, drove a mechanically propelled vehicle registration No. 03-TN-2441, at a speed which exceeded the special speed limit of 50km/h as specified in the said special speed limited by-laws made by the appropriate Council.

2. The grounds relied on by the first applicant and upon which she was granted leave to bring the judicial review proceedings were that the evidence offered by Shauna McHugh, a daughter of the applicant on the date in question was sufficient to rebut the presumption contained in s. 11 of the Road Traffic Act 2002, and as a consequence the order of the respondent was *ultra vires,invalid*and/or irrational. Further that the respondent failed to take into account all relevant considerations or took into account irrelevant considerations.

3. On 10th November, 2014, the second applicant was granted leave by way of judicial review to seek an order of certiorari of the order of the respondent made on 10th October, 2014, when the accused was convicted of the offence contrary to s. 47 of the Road Traffic Act 1961 (as inserted by s. 11 of the Road Traffic Act 2004) and s. 102 of the Road Traffic Act 1961 (as amended by s. 18 of the Road Traffic Act 2006) that on 5th October, 2013, at Knockthomas, Castlebar, Co. Mayo, a public road in the said District Court area of Castlebar, he did drive a mechanically propelled vehicle registration No. 06-D-82026, at a speed in excess of the built up area speed limit of 50km/h applicable to the said road by virtue of s. 5 of the Road Traffic Act 2004.

4. The grounds upon which the second applicant relied, and on which he was granted leave to bring the judicial review proceedings were the presumption that the second applicant was driving on the date in question was rebutted by the sworn evidence of the second applicant and as a consequence thereof, the conviction imposed by the respondent was *ultra vires* and irrational in all the circumstances, or in the alternative the evidence offered on the date in question was sufficient to rebut the presumption contained in s. 11 of the 2002 Act as the consequence whereof the order made by the respondent on the date in question was *ultra vires*, invalid and/or irrational, and that the respondent failed to take into account all relevant considerations and/or to take into account irrelevant considerations.

5. On 10th November, 2014, the third applicant was granted leave to bring judicial review proceedings seeking an order of *certiorari* to quash the order of the respondent made on 10th October, 2014, contrary to s. 47 of the Road Traffic Act 1961 (as inserted by s. 11 of the Road Traffic Act 2004) and s. 102 of the Road Traffic Act 1961 (as amended by s. 18 of the Road Traffic Act 2006) that on 9th November, 2013, at R320 Gortgarve, Kiltimagh, Mayo, a public road in the said District Court area of Castlebar, she drove a mechanically propelled vehicle registration No. 05-MO 392 at a speed which exceeded the built up area speed limit of 50 kilometres per hour applicable to the said road by virtue of s. 5 of the Road Traffic Act 2004.

6. The grounds on which the applicant sought judicial review the subject of the leave order were that by reason of the sworn evidence of the third applicant and her husband, Karl Keaney, the presumption relied on by the notice party was rebutted in evidence and as a consequence thereof, the conviction imposed by the respondent was *ultra vires* and/or irrational in all the circumstances. Further, and/or in the alternative, the evidence offered on the date in question was sufficient to rebut the presumptions contained in s. 11 of the 2002 Act, as a consequence whereof the order made by the respondent on the date in question was ultra vires, invalid and/or irrational. Further, the respondent failed to take into account all relevant considerations and/or to take into account irrelevant considerations.

The Factual Evidence in Respect of the First Applicant
7. The vehicle with registration No. 03-TN-2441 was recorded driving at a speed of 69km/h in an area with a 50km/h speed limit on 19th December, 2013, at 10:09am at Blackacre, Tuam, Co. Galway. The vehicle registration was photographed. The fixed penalty notice was issued to the first applicant, of Abbeylands, Dunmore, Co. Galway, the registered owner of the vehicle. The fixed penalty notice was not paid within the prescribed time nor had any other driver been nominated within the prescribed time. At the hearing of the alleged offence, Garda Gary Begley of An Garda Síochána, Tuam, Co. Galway, gave the relevant sworn evidence. He also stated in evidence that the first applicant's daughter, Shauna McHugh, had approached him on the morning of the court and had stated that she had been driving her mother's car on 19th December, 2013, at 10:09am. There is a dispute on the exact nature of the exchange between Garda Begley and Shauna McHugh. Shauna McHugh in her affidavit of 14th October, 2014, stated that Garda Begley indicated under oath that he was happy to accept her evidence that she was driving the car on the date. Garda Begley in his affidavit sworn on 5th February, 2015, stated that he had a conversation with the first applicant's daughter, Shauna, prior to the hearing of the prosecution on 9th September, 2014. Shauna McHugh had approached him and stated that she had been driving her mother's vehicle on 19th December, 2013, at 10:09am. Garda Begley stated that he gave evidence under oath of Ms. McHugh telling him this but he did not indicate in his evidence that he was happy to accept her account as evidence. He considered it a matter for the judge to consider that evidence not him. There is no dispute that the first applicant did not attend to give evidence and that her daughter Shauna McHugh did not give sworn evidence.

The Factual Evidence in respect of the Second Applicant
8. The evidence in this application is undisputed. Garda James O'Reilly of An Garda Síochána, Garda Divisional Traffic Corp of Castlebar, in his affidavit of 27th February, 2015, stated that on 5th October, 2013, a garda speed detection van using a rear facing camera was in operation. Details of the location and the garda operator were entered in a computerised unit called a Robot Multinova Unit. This unit was connected to a rear facing camera in the garda vehicle and a flash unit which monitors traffic volumes and speed. The equipment detects all vehicles travelling in both directions in breach of the said speed limit. Camera images of offending vehicles are displayed and downloaded by the garda operating the vehicle. The image is forwarded to the office for safety camera management of An Garda Síochána in Dublin for processing. Images for prosecution are linked to the vehicle owner and a fixed charge penalty notice is issued. He stated that he gave evidence for the prosecution at the hearing of the applicant's prosecution for speeding and gave sworn evidence that he carried out the investigation in the manner described and that he was not in a position to identify the driver of the vehicle. He accepted that the second applicant had given evidence before the respondent that he had not been driving the vehicle on the date in question and that his wife, as far as he knew, had been driving the vehicle. His wife did not give evidence as the second applicant stated that she was unable to attend court. The second applicant gave evidence that a fixed charge penalty notice had issued to him but that he had not returned it. The applicant's solicitors submitted to the respondent that the evidence of the second applicant was uncontroverted and the court was therefore obliged to accept it. The respondent rejected the submission citing the fact that the applicant should have nominated the correct driver prior to the institution of the proceedings.

The Factual Evidence in respect of the third applicant.
9. The evidence is substantially undisputed. A witness from Go Safe, a private company who gathered evidence for speeding prosecutions gave evidence at the hearing on 10th October, 2014, that on 9th November, 2013, at 19:49, he observed a vehicle bearing registration No. 05-MO 392, while he was in a stationary van in Gortgarve, Kiltimagh, Co. Mayo and noted the speed of the vehicle travelling was, in excess, of the speed limit. The third applicant gave evidence denying that she was driving the vehicle on the date of the offence and stated it was her husband Karl Keaney who was driving. Mr. Karl Keaney also gave sworn evidence that he was the driver of the vehicle. The third applicant accepted she had received the fixed term notice but had not nominated her husband as the driver within the period specified in the notice concerned. The third applicant in her affidavit stated that Inspector Amanda Gaynor had accepted the evidence of both herself and her husband but Inspector Gaynor in her affidavit stated that she did not accept the evidence of the third applicant and her husband as it was not for her to accept or reject evidence but indicated that she was not in a position to dispute the evidence as there was no other evidence available.

Statutory Presumptions
10. Section 103 of the Road Traffic Act 1961 (as inserted by s. 11 of the Road Traffic Act 2002) provides for various rebuttable mandatory presumptions in prosecutions for fixed penalty offences which include the offence of speeding for which the applicant was prosecuted.

11. Section 103(10)(a) provides for a presumption that the fixed penalty notice has been served.

> "(10) In a prosecution for a fixed charge offence, it shall be presumed, until the contrary is shown that (a) the relevant notice under this section has been served or caused to be served…"

12. Section 103(10)(b) provides for a presumption that a notice has not been returned with an appropriate payment:-

> "(10) In a prosecution for a fixed charge offence, it shall be presumed until the contrary is shown that (b) that a payment pursuant to the relevant notice under this section, accompanied by the notice, duly completed (unless the notice provides for payment without the notice accompanying the payment) has not been made."

13. Section 103(11) provides that in a prosecution where the driver is not identified by the gardaí, there is a presumption that where the notice is not returned with another driver nominated, there is a presumption that the owner of the vehicle was driving the vehicle at the time of the offence.

> "(11) Where, in a case to which subsection (2)(b) of this section applies, the registered owner of the mechanically propelled vehicle concerned does not furnish in accordance with subsection (4) of this section the information specified in paragraph (i) of that subsection, then, in a prosecution of that owner for the alleged offence to which the notice under the said subsection (2)(b) relates, it shall be presumed, until the contrary is shown that he or she was driving or otherwise using the vehicle at the time of the commission of the said alleged offence."

14. The presumption at s. 103(11) is a mandatory evidential presumption. McGrath on Evidence second edition at Para 2.159 defines a mandatory presumption, as "a presumption that requires the tribunal of fact upon proof of one fact, known as the basic fact to infer the existence of another fact, known as the presumed fact." The accused can rebut the presumption on the balance of probabilities. It is a matter for the tribunal of fact to be satisfied that the offence has been established beyond a reasonable doubt. The discretion of the tribunal of fact cannot be fettered to oblige it to accept or reject evidence.

15. The registered owner of a vehicle exceeding the speed limit, cannot be convicted for that offence only on a failure to designate the driver when he or she has a legal responsibility to so designate.

16. The process of determining a factual issue is set out by Heffernan and Ní Raifeartaigh in *Evidence in Criminal Trials*, (2014 Ed.) Bloomsbury at para. 1.36 which states:-

> "The weight of the evidence (also known as its probative value) is a question of fact to be determined by the finder of fact (a jury in a jury trial or a judge in a non-jury trial). The assessment of weight is based not on legal standards but on human judgment. It may also be a matter of degree; evidence may have minimum probative value at the other end of the scale may be conclusive of a disputed fact. At the same time, it is important to recall that the finder of fact does not weigh the evidence in the abstract or using its own subjective scale but rather by reference to the burden and standard of proof. The ultimate question for the finder of fact is whether the prosecution has discharged the burden of proving all elements of the particular offence beyond a reasonable doubt."

17. The submission on behalf of all the applicants that the sworn evidence of the registered owner of a motor vehicle, to the effect, that he or she was not driving the vehicle at the time and location of the alleged offence is sufficient to raise a reasonable doubt in the absence of any clear identification of the driver obliging the tribunal of fact to dismiss is incorrect.

18. It is within the discretion of the tribunal of fact to accept or reject that evidence. For example, the tribunal of fact on hearing the evidence of the registered owner may come to the conclusion that the witness was not credible and thus reject the evidence in its entirety.

19. If the tribunal of fact relies only on the failure of the registered owner to complete and return the form designating the driver on the date and time in question, to convict then it has erred. It is entitled to take into consideration the failure to designate as part of the evidence for the prosecution.

20. The tribunal of fact has to be satisfied that all ingredients of the offence have been proved beyond a reasonable doubt.

21. In the prosecution of the first applicant, the respondent did not receive any sworn evidence from the first applicant or her daughter, Shauna McHugh. The respondent was entitled to proceed in the absence of Margaret McHugh and as the accused did not give evidence nor did her daughter who alleged she was driving the vehicle, it was within the respondent's discretion to convict or acquit the accused.

22. In the second application, the respondent was entitled to accept or reject the evidence of the second applicant.

23. In the case of the third applicant, it was again within the discretion of the respondent to reject or accept the evidence of the accused and her husband, Karl Keaney, but not to treat the offence as a strict liability offence because of the failure to designate Karl Keaney as the driver.

24. There is no cogent evidence before the court as to the reasons advanced by the respondent to ground a conviction, on the prosecution of the third applicant.

25. The applicants have not made the case to this court, nor were they given leave to argue that each of the respondents erred in law by treating the alleged offence as having been committed when a registered owner failed to complete the designated form nominating the driver.

26. While there is evidence to suggest in the case of the second applicant, that the respondent may have erred, by relying only on the fact that the second applicant had failed to return the fixed penalty notice designating the driver, this court cannot be sure that was the only fact relied on. This was not a ground upon which the second applicant was granted leave.

27. In the prosecution of the third applicant, the respondent has certainly made a decision against the weight of evidence, but this is a matter for an appeal rather than certiorari.

28. The reliefs sought by the applicants are refused.