Neutral Citation Number: [2009] IEHC 343

THE HIGH COURT

JUDICIAL REVIEW

2008 722 JR

BETWEEN

JOHN BURKE

APPLICANT

AND

JUDGE MARY O'HALLORAN AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Clarke delivered on the 10th July, 2009

1. Introduction

1.1 The applicant ("Mr. Burke") appears as a litigant in person. On the 5th June, 2008, Mr. Burke was convicted following a hearing by the first named respondent ("the District Judge") of a significant number of offences under the Protection of Animals Act 1911, the Protection of Animals kept for Farming Purposes Act 1984, and the Control of Dogs Act 1986. Sentence was adjourned until the 4th September, 2008. However, in the meantime, on the 30th June, 2008, Mr. Burke applied to and obtained leave from this Court (MacMenamin J.) to seek judicial review of the conviction to which I have referred. The substantive judicial review application came on for hearing before me and this judgment is directed towards the issues which were raised at it.

1.2 It is not a criticism of Mr. Burke, given that he appears as a litigant in person, when I say that it was not overly clear from the documents which he filed as to the precise basis on which he sought to challenge his conviction as a matter of law. However, the issues became a lot clearer in the course of the argument which was conducted before me. In reality, at the end of the day, it would seem that Mr. Burke's true complaint comes down to one issue. Mr. Burke says that he requested the learned District Judge to allow him to dispense with the services of the solicitor who was then representing him so as to permit him to continue with his defence personally. That solicitor, Mr. Devane, had been assigned to represent Mr. Burke under the Legal Aid Scheme. Mr. Burke says that the learned District Judge refused to allow that application (which, he asserts, was supported by the solicitor in question). In those circumstances he says that his trial, and consequently his conviction, was conducted in breach of his right to be represented in whatever way he might choose which, he says, includes a right to represent himself.

1.3 However, before going on to address that issue it is important to analyse the various points raised by Mr. Burke so as to demonstrate that the issue which I have just identified was, in truth, the only real issue in the case. In that context it is appropriate to turn first to the statement of grounds.

2. The Statement of Grounds

2.1 It is, of course, the case that, ordinarily, a party seeking judicial review will be confined, at the substantive hearing of the judicial review proceedings, within the parameters of the relief claimed and grounds set out within the statement of grounds, which formed the basis for the giving of leave to seek a judicial review. The reason for this is obvious. In order that a party be entitled to pursue a judicial review claim before the courts, such a party has to persuade the court that there is a sufficient case to warrant a judicial review. The parameters within which the party concerned can be said to have persuaded the court to that effect are to be found in the order giving leave which will normally be formulated by reference to all (or in some cases some only), of the reliefs and grounds set out in the statement of grounds.

2.2 In any event, the only relief sought by Mr. Burke is to the effect that "the original order of trial be quashed and I propose that a new hearing of the case be held in a higher court". I pointed out to Mr. Burke in the course of the hearing that he would be entitled, in the ordinary way, to appeal the decision of the learned District Judge to the Circuit Court so that he had an entitlement, in any event, to a re-hearing before a higher court. However, Mr. Burke argued that, if he was correct in his assertion that his trial before the District Court was conducted in breach of his entitlement to represent himself, then it followed that that conviction should be set aside and he should be entitled to a new hearing which, he accepted, would have to be before the District Court.

2.3 In those circumstances it seemed to me that it was appropriate to treat his application as one in which he sought an order of *certiorari* seeking to quash the conviction of the learned District Judge with a consequential order that the matter be referred back to the District Court for a further fresh trial.

2.4 In the grounds for review set out in the grounding statement, Mr. Burke sets out some 22 paragraphs. The substance of the matters contended in the course of those paragraphs seem to me to be the following:-

A. That in the course of a number of pre-trial hearings (when the proceedings were adjourned) it is said that the learned District Judge made prejudicial comments against Mr. Burke blaming him for delays;

B. That Mr. Burke's solicitor had not taken adequate instructions from him prior to the hearing date;

C. That difficulties were encountered by Mr. Burke in giving adequate instructions to his solicitor during the hearing;

D. That some of the summonses which were tried by the learned District Judge had not been served on Mr. Burke;

E. That the learned District Judge declined to allow Mr. Burke to dispense with Mr. Devane as his solicitor and continue with the case himself; and

F. That Mr. Devane did not properly question a number of witnesses either called on behalf of the second named respondent ("the D.P.P."), or who had been subpoenaed by Mr. Burke. In some cases where Mr. Burke had subpoenaed witnesses he complains that the witnesses concerned were not allowed to be called at all.

2.5 In the context of that general description of the basis set out in the statement of grounds for seeking to have Mr. Burke's conviction quashed, it is next necessary to turn to the hearing before the learned District Judge.

3. The Hearing

3.1 Subject to the question concerning Mr. Burke's attempt to dispense with the services of Mr. Devane and continue with the proceedings himself (which allegation has the potential to colour much of what subsequently happened at the hearing), it did not seem to me that Mr. Burke could point to any aspect of the hearing which could be regarded as unsatisfactory.

3.2 A transcript of the hearing had been produced and was exhibited in evidence before me. Mr. Burke had expressed certain concerns as to the accuracy of that transcript and had, at a previous application determined by O'Neill J., sought production of the underlying tapes. That application was refused. However, it did not seem to me that, in any event, there was any significant controversy as to those parts of the transcript which were potentially relevant to the issues which I had to decide. In that context I did not understand Mr. Burke to disagree with any of the factual assertions which I am about to note.

3.3 Firstly, it is clear that Mr. Devane, on behalf of Mr. Burke, made clear that no objection was being taken to the learned District Judge conducting the trial. In those circumstances it is impossible to entertain the suggestion that the learned District Judge had made comments in advance of the hearing such as would entitle Mr. Burke to have the learned District Judge's decision quashed on the grounds of prejudice.

3.4 As will be seen from the above, a number of the other grounds specified in the statement of grounds related to contentions concerning the manner in which Mr. Devane conducted the defence, starting with an allegation that no proper instructions were taken and continuing to the questioning and calling of witnesses. Reference appeared on the transcript to an assertion by Mr. Devane, which Mr. Burke accepted in argument before me was accurate, to the effect that Mr. Burke had failed to turn up for a consultation on the afternoon immediately before the hearing date of the proceedings before the learned District Judge. As I understood Mr. Burke's argument, he was of the view that one afternoon would have been insufficient to allow him to give adequate instructions to Mr. Devane because, he asserts, Mr. Devane was a "city man" with no understanding of livestock matters. In those circumstances it is asserted by Mr. Burke that he would have needed a much greater period of time to properly instruct Mr. Devane. Be that as it may, it is clear that Mr. Burke did not give Mr. Devane the opportunity to see if it was possible for him to obtain adequate instructions by attending the consultation concerned. I have no doubt but that Mr. Devane, as an experienced defence solicitor, would have been more than able to reach a proper professional assessment, having conducted an appropriate consultation, as to whether he was adequately instructed. If there were a proper basis for Mr. Devane being a position to assert that he was unable to properly conduct the defence because of the inadequacy of his instructions, I have little doubt but that he would have argued such a proposition before the learned District Judge. He was not, of course, given an opportunity to mount any such argument, because Mr. Burke had not attended the arranged consultation. In those circumstances it would not have been open to Mr. Devane to make an argument (which he could otherwise have made) that he had arranged what seemed to him to be an adequate consultation but that it had proved impossible to take sufficient instructions during that consultation to adequately inform himself about the case and put himself in a position to properly defend Mr. Burke's interests. It was Mr. Burke's failure to attend the consultation concerned that deprived Mr. Devane of the opportunity to make any such argument. In those circumstances it did not seem to me that there was any basis for that aspect of Mr. Burke's claim.

3.5 So far as the questioning and calling of witnesses is concerned, it again did not seem to me that there was any proper factual basis for Mr. Burke's contention. It would appear that a number of witnesses, who had been subpoenaed by Mr. Burke, were not, in fact, called by Mr. Devane. However, it is absolutely clear from the transcript that the learned District Judge invited Mr. Devane to call any witnesses which he, as an experienced solicitor with duties not only to Mr. Burke but also to the court, considered had relevant evidence to give. While solicitor and/or counsel instructed on behalf of the defence in a criminal trial are bound by their clients instructions, that position is limited by the obligation which the law places on such persons not to abuse their position by knowingly seeking to raise with witnesses issues which are irrelevant to the proceedings, or which are not permitted by the law of evidence to be pursued. The same applies to the calling of witnesses who do not have relevant evidence to give. It would be impossible, and indeed wholly inappropriate, to attempt to conduct a review of the manner in which Mr. Devane conducted the defence. Suffice it to say that from having had some explanation given to me by Mr. Burke, in the course of the hearing before me, as to matters which he would have wished Mr. Devane to pursue, whether in cross examination or by the calling of witnesses, I am satisfied that at least in a significant number of cases it would have been wholly wrong of Mr. Devane to pursue the matters concerned, for same would not have been permitted lines of questioning and would, doubtless, have been properly and quickly ruled out by the learned District Judge. To the extent, therefore, that there may be some arguable areas where Mr. Devane might or might not have pursued other lines of questioning, I am not satisfied that the evidence goes anywhere near the undoubtedly high threshold that would need to be established before a person could be entitled to mount an argument that they had effectively been denied a proper defence, by reason of the manner in which that defence was conducted.

3.6 All cases involve many judgment calls by advocates representing parties. The extent to which a party may be able to demand a retrial because of the adequacy of their defence (especially where, as here, the defence is provided on legal aid) is a matter which has not yet been clearly established in our jurisprudence. However, before any such case could conceivably be successful (if at all), it would be necessary that there be a total failure to meet proper standards for the conduct of the defence concerned by the lawyer or lawyers appointed. It would be necessary to displace any realistic possibility that legitimate judgment calls were made. Just because a case is conducted, for legitimate reason, on one tactical basis which turns out to be unsuccessful, could not entitle the party concerned to a retrial. In all the circumstances it did not seem to me that there was any realistic factual basis for the contentions raised by Mr. Burke concerning the manner in which Mr. Devane conducted his defence.

3.7 Indeed, in the course of argument Mr. Burke seemed to accept as much by indicating that he accepted that Mr. Devane was in an impossible position.

3.8 It was for those reasons that it became clear in the course of the hearing that, in truth, the real point at the heart of Mr.

Burke's challenge, concerned his attempt to represent himself, to which I will shortly turn.

3.9 Before doing so I should also deal with the only other distinct complaint made by Mr. Burke in his statement of grounds, which concerned the hearing of charges raised in certain summonses which, he maintains, were not served on him. As Mr. Burke was present in court (and indeed represented by a solicitor), there is no basis for suggesting that the learned District Judge did not have jurisdiction to entertain the summonses concerned. Obviously, if the fact that particular summonses were going to be tried had not properly been brought to Mr. Burke's attention then, while the proceedings would have properly been before the learned District Judge, the interests of justice would have required an adjournment of the trial of those charges to afford Mr. Burke an adequate opportunity to present his defence. However, no application for such an adjournment was made. In the circumstances, there does not seem to me to be any legal basis for the suggestion that the learned District Judge acted incorrectly in proceeding to hear the summonses concerned.

3.10 Having dealt with all of those issues which go beyond the central contention made by Mr. Burke to the effect that the learned District Judge ought to have allowed him to dispense with the services of Mr. Devane, and should have permitted him to continue with his defence personally, I now return to those questions.

3.11 It is clear from the transcript (p. 8), that Mr. Devane was experiencing very great difficulty, at an early stage in the proceedings, in conducting the defence because of interruptions from Mr. Burke, his client. At lines 24 – 26 of p. 8 the following is said:-

> "MR. DEVANE: No, Judge, I was not imputing that at all. I am imputing that every two seconds that I am getting –
>
> JUDGE: Well I understand that, that you are getting a lot of instructions."

3.12 Again at p. 11, line 28, Mr. Devane complains that it is most difficult for him to manage the case and the learned District Judge says that Mr. Devane will have to control his own client. The matter appears to become even more serious in a passage set out in the transcript at p. 30 (in that context it is important to note that the entire transcript runs to some 215 pages, so that what transpires at pp. 28/43 occurs at a relatively early stage in the proceedings). At line 9 on p. 30, Mr. Devane complains that it is virtually impossible and very frustrating. There then follows a brief exchange between the learned District Judge and Mr. Devane which is followed, at line 19, by Mr. Devane saying (obviously to Mr. Burke) "sit down…sit down". The judge follows by inviting Mr. Burke to sit down as "your solicitor tells you now". There followed a number of similar interventions until, at p. 41 the transcript notes Mr. Burke as saying "can I say anything?". Mr Burke then goes on, at line 21, to ask "can I represent myself?" to which the learned District Judge says "you cannot represent yourself at the moment, you have a solicitor here". There then follows a debate in which Mr. Burke makes a complaint about the absence of consultation, but Mr. Devane says, at line 13 on p. 42 "he was given all of yesterday afternoon for the purposes of consultation, time was set aside and he did not turn up". Then at line 26 on p. 42, Mr. Burke says "I wish to dispose of the use of Mr. Devane". The learned District Judge is then quoted as saying "sorry sir, would you please stop it. I am not listening to what you are saying; you will get your turn in due course in the witness box. That is the place where your evidence will be given. Now please stop."

3.13 This is followed by Mr. Burke asking to cross examine the witness who was then in the witness box, followed by the judge saying "stop it sir", and Mr. Devane asking if he could be excused. The learned District Judge then intervenes by noting that the case had been going on for a long period of time and that she could not accede to Mr. Devane's request. The learned District Judge then states:-

> "It is the position of this Court and has been for the last sixteen years that I am on the bench in this district, that parties would have legal representation."

3.14 Further interventions involving Mr. Burke then followed, during which Mr. Burke complained that he was not getting a fair trial because of the inadequacy of the instructions obtained by Mr. Devane. The learned District Judge insisted that the case continue with Mr. Devane representing Mr. Burke.

3.15 It is against that factual background that it is necessary to characterise the various passages from the transcript to which I have referred. In particular, it is necessary to assess the nature of the application made by Mr. Burke and the learned District Judge's response to it.

4. Mr. Burke's Application

4.1 It is entirely possible that there was some element of cross purposes between Mr. Burke, the learned District Judge and, indeed, Mr. Devane during the relevant part of the hearing. I have the greatest conceivable sympathy for the situation with which the learned District Judge was faced. It is abundantly clear that what was going in court before her was extremely fraught. Mr. Devane was not being afforded any reasonable opportunity to concentrate on the job in hand (that is the cross examination of witnesses being presented on behalf of the D.P.P.). Likewise, Mr. Burke was clearly dissatisfied with the way in which the defence was being conducted. It is impossible for me to pass any comment on the merits or otherwise of the positions of Mr. Burke and Mr. Devane in that context.

4.2 It would certainly seem from the comments of the learned District Judge, as noted at p. 43 of the transcript, that she was concerned about dispensing with the services of Mr. Devane in circumstances where she believed that it would then have been necessary to appoint another solicitor from the Legal Aid Panel to replace Mr. Devane. However, it is important to note that amongst the matters raised by Mr. Burke (at p. 41, line 21), was to inquire whether he could represent himself. The answer which the learned District Judge gave to that questions was, of course, correct so far as it goes. At that time Mr. Burke was represented by Mr. Devane. A party to litigation cannot have it both ways. A party is either represented or is not. If a party continues to be represented then the proper and orderly conduct of any proceedings requires that the case be presented by that parties advocate and not by that party themselves.

4.3 However, it seems to me that what transpired over the next short number of minutes (as set out from pp. 41-43 of the transcript) is coloured by Mr. Burke's initial request to be allowed to represent himself. While, for entirely understandable reasons, that aspect of his request may have become somewhat lost in the undoubtedly fraught circumstances before the court, it does not seem to me to be fair to characterise Mr. Burke's request as being anything other than one in which he sought to dispense with the services of Mr. Devane and continue with the trial himself. Nor is there anything in the transcript to suggest that Mr. Burke indicated or would have suggested that it was necessary that the case be adjourned to allow him to continue and represent himself.

4.4 In summary, therefore, I am satisfied that the proper characterisation of what transpired during the hearing was that Mr.

Burke applied to discharge his solicitor and to continue to with the case himself and did not, in that context, suggest that the case would have to have been adjourned in order to facilitate him with continuing with his defence on a personal basis. In coming to that view, I feel I must comment that the persistent criticism by Mr. Burke of Mr. Devane in relation to the absence of consultation was disingenuous in circumstances where Mr. Burke had, as he told me in the course of the hearing, deliberately decided, for tactical reasons, not to attend a consultation the previous afternoon with Mr. Devane. To the extent that there may have been crossed purposes between Mr. Burke and the learned District Judge as to the precise nature and basis of Mr. Burke's application, Mr. Burke has to bear a significant portion of the blame. If, instead of disingenuously complaining about the absence of a consultation with Mr. Devane, he had made it clear that what he wished was to continue, on that day, with his defence by himself, then it might well be that any cross purposes which in fact occurred could have been avoided.

4.5 Be that as it may, it is next necessary to turn to the legal consequences of the refusal by the learned District Judge to accede to the application which Mr. Burke made.

5. The Consequences

5.1 That an accused person in criminal proceedings has a right to represent him or herself seems to me to be axiomatic. While accused persons have the right to be represented and, in certain circumstances, to have a legal representative provided by the State, the corollary of that right is that an accused person is, *prima facie*, entitled to conduct his or her own defence. A question might, however, arise as to whether such a right is absolute or whether there may be any limitation on that right. For reasons which I will address it does not, however, seem to me that it is necessary to decide whether, and if so to what extent, any such limits may exist in the context of these proceedings.

5.2 There might, for example, be circumstances where the rights of an opposing party, such as the D.P.P., might have to be taken into account. Where, for example, proceedings had been before the courts for a considerable period of time such that an adjournment would not be appropriate in all the circumstances, there might well be a case to be made that an accused who wished then to dispense with the services of his lawyers in circumstances where the case could not immediately continue, might not have an absolute and unconditional right in that regard. In those circumstances there may be cases where it would be appropriate for the accused to have to elect between continuing with the services of the lawyers concerned or being prepared, with whatever limitations that might impose, to continue immediately with the conduct of the defence him or herself. There may well be other circumstances where, on the particular facts of an individual case, some limitation or conditionality as to the absolute right to represent one's self might properly be identified.

5.3 However, it does not seem to me that the facts of this case show any of the special or unusual circumstances which would justify a departure from the general rule that a party is entitled to represent themselves. The comment of the learned District Judge that it was her position that parties in her court would have legal representation is most admirable. However, it can not be that legal representation can be imposed on parties who do not wish to have it.

5.4 In making this last comment I am more than mindful of the fact that all judges experience from time to time very great difficulty in having to handle proceedings where parties decide to represent themselves. While courts have, for good reason, always been mindful to ensure that parties who do represent themselves are not unfairly prejudiced by that fact, it nonetheless has to be recorded that proceedings where parties represent themselves frequently become difficult to handle. Understandably lay litigants do not always understand the rules of procedure or evidence or the law applicable the case in which they are involved. Such parties frequently become frustrated when the court, even allowing some reasonable laxity in the application of those rules or that law, prevents them from doing of saying things that they wish in the course of the proceedings. These and many other factors often lead to such proceedings becoming disjointed, difficult and frequently much more lengthy than they would otherwise be. Be that as it may those factors, true as they are, do not justify depriving a party who wishes to represent him or herself from that opportunity.

5.5 In saying that, it does have to be noted that a party who chooses to represent themselves is no less bound by the laws of evidence and procedure and any other relevant laws, and by the rulings of the court in that regard, than any other party. Where a party chooses to represent themselves and where that party fails to abide by directions of the court concerning the manner in which the case should be conducted in accordance with procedural, evidential and any other relevant law, then the court must take whatever action is appropriate to deal with any such failure.

5.6 In addition, it does not seem to me that the right of an individual to represent him or herself in a criminal defence is any the less in the case of a person who has initially obtained legal representation, whether privately or through the Legal Aid Scheme. Accused persons are entitled to change their mind. If at all, it would require some very significant countervailing circumstance indeed before a trial judge could legitimately refuse an accused an application to dispense with the services of that accused lawyers and continue with the defence personally. It does not seem to me that any such circumstances can be said to exist on the facts of this case.

6. Conclusions

6.1 I have very considerable sympathy with the learned District Judge for the very fraught circumstances which clearly arose at the hearing of these proceedings before her. Nothing in this judgment should be taken as a criticism of the manner in which the proceedings where handled. However, I have come to the view that, properly characterised, Mr. Burke did make an application to dispense with the services of Mr. Devane and continue with the proceedings himself. In those circumstances it does not seem to me that it was open to the learned District Judge to refuse that application, at a minimum in the absence of some very weighty countervailing factor. It would, of course, have been open to the learned District Judge to explore with Mr. Burke as to the parameters of the continuing conduct of the proceedings. There is no reason to believe that Mr. Burke was not ready and willing to continue with the case as it stood. Questions which might otherwise have arisen in relation to an adjournment by virtue of the dispensing with the services of Mr. Burke's legal representative would not, therefore, in all probability have arisen. No other legitimate legal reason for not acceding to Mr. Burke's application seems to me to have been present. The fact that the continuing conduct of the proceedings would, almost certainly, have been much more difficult with Mr. Burke defending himself is not, of itself, a reason for preventing him from defending himself.

6.2 In all the circumstances it seems to me that Mr. Burke was correct when he asserted that his entitlement to conduct his defence himself was impermissibly interfered with by the learned District Judge. In those circumstances it does not seem to me that this is the kind of case where an appeal would be an adequate remedy. The point which Mr. Burke makes is one which establishes that he did not have a trial in the District Court in which he was permitted to present his defence, within the law, as he wished. In those circumstances it does not seem to me that an appeal would be an adequate remedy.

6.3 In all the circumstances, it seems to me to be appropriate to make an order of *certiorari* quashing the conviction of the

learned District Judge and referring the matter back to the District Court for a fresh trial.