Neutral Citation: [2015] IEHC 223

[2014 No. 172 JR]

THE HIGH COURT

JUDICIAL REVIEW

BETWEEN

CORNELIUS DUGGAN

APPELLANT

AND

DISTRICT JUDGE CON O'LEARY

AND

GARDA ALAN MURRAY

RESPONDENTS

JUDGMENT delivered by Ms. Justice Kennedy on 11th day of March 2015

Introduction

1. These proceedings are brought by way of judicial review by the Applicant seeking an Order of Certiorari quashing the decision of the first named Respondent of the 23rd October, 2012. This Order convicted the Applicant of an offence contrary to s. 4 of the Road Traffic Act, 2010 (as amended). The Applicant was also convicted of careless driving contrary to s. 52 of the Road Traffic Act, 1961 (as amended). Additionally, an Order of Prohibition is also sought which would prevent the second named Respondent from taking any further steps in the proceedings which are the subject matter of this particular application.

2. Leave was given to seek Judicial Review by Peart J. on the 31st March 2014 on the grounds set out at paragraph 'E' of the Statement of Grounds. The Respondents oppose this application.

3. Two bases of challenge are made by the Applicant. First, that there was an alleged error in the service of the summonses on the Applicant. Second, that there was objective bias on the part of the presiding District Judge O'Leary in relation to certain comments that it is alleged the said District Judge uttered on the same date in court; that being the 23rd October, 2012.

4. It may be appropriate to state the pertinent statutory provisions at this juncture. Section 4 (1) of the Road Traffic Act, 2010 states:-

"(1) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while he or she is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle."

Section 4 (2)(a) states:-

"(2) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his or her body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his or her blood will exceed a concentration of—

(a) 50 milligrammes of alcohol per 100 millilitres of blood…".

Section 4 (5) stating:-

"(5) A person who contravenes this section commits an offence and is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 6 months or to both."

Background

5. On the 15th January, 2012 the Applicant was arrested pursuant to s. 4 (8) of the Road Traffic Act, 2010 for drink-driving and conveyed to Fermoy Garda Station where a blood specimen was extracted from the Applicant. This sample was then analysed and the Applicant was prosecuted, *inter alia*, for drink driving contrary to ss. 4 (2) (a) and (5) of the Road Traffic Act, 2010. Initially, the offences of drink driving and dangerous driving commenced by charge sheets, but did not proceed on this basis.

6. On the 5th March, 2012 seven summonses, including the summons for drink driving, were issued against the Applicant. The Respondents claim that on the 7th March, 2012 these seven summonses were properly served on the Applicant at his home at Carrignavar, Co. Cork. A Garda Fleming is alleged to have handed the true copies of the summonses to the Applicant's son. It is alleged that Garda Fleming, the serving Garda member, made a statutory declaration of service before a Peace Commissioner. The seven summonses were then lodged to the appropriate District Court.

7. The matter first came before the Court on the 16th May, 2012 upon which date the matter was adjourned until the 3rd of October, 2012. On the 3rd of October, 2012 the Applicant's solicitor informed the District Judge that the Applicant had only received five of the seven summonses. The missing summonses pertained to offences contrary to s. 4 of the Road Traffic Act, 2010 and s. 53 of the Road Traffic Act, 1961 (as amended); the drink driving and dangerous driving offences. The Respondents argue that all seven summonses were served correctly and they were on the court file on the date in question. This being so, District Judge O'Leary satisfied himself that all the summonses had therefore been served and adjourned the matter to the 23rd October, 2012 for hearing.

8. On the 23rd October, 2012 the Applicant pleaded guilty to driving without a valid 'NCT' certificate. The District Judge fined the Applicant €500.00 for drink driving and disqualified him from driving ob public roads for a period of three years. The Applicant was also

fined €300.00 for careless driving contrary to s. 52 of the Road Traffic Act, 1961 (as amended) which, it is asserted by the Respondent, was *en lieu* of the dangerous driving allegation contrary to s. 53 of the Road Traffic Act, 1961 to which the Applicant had pleaded not guilty.

9. On the 2nd November, 2014, the Applicant appealed to the Circuit Court against his drink-driving conviction which appeal was adjourned throughout 2013 due to the Applicant's poor health. The appeal eventually came before Judge David O'Riordan at Cork Circuit Court on the 23rd January, 2014. Upon hearing argument, O'Riordan J. felt that he did not possess jurisdiction to deal with the matter and invited the Applicant to bring proceedings before the High Court by way of judicial review. An application was then brought seeking leave under Order 84, Rules 20 and 21 of the Superior Court Rules to apply for judicial review and extending time in which to bring the said application. On or about the 30th March, 2014 Peart J. granted the said application.

The Applicant's case

10. The first point of the Applicant's argument is that he was not properly served with all seven summonses at the appropriate time. The Applicant admits that on the 3rd of October, 2012, Garda Murray made photocopies of the two missing summonses and handed them to the Applicant in court. The Applicant believes that this action was contrary to Order 10, Rule 3 (2) of the District Court Rules (as amended), which states:-

"In a case of summary jurisdiction to which section 22(1) of the Courts Act 1991 relates, a summons may, subject to the provisions of that section, be served upon the person to whom it is directed—

(b) by delivery by hand, by a person (other than the person on whose behalf it purports to be issued) authorised by these Rules in that behalf, of a copy thereof in such an envelope as aforesaid."

It is the Respondents' contention that this action did not constitute service as such as these documents had already been duly served. This action was merely assisting the court and the Applicant in having the documents to hand at that time.

Bias

11. The Applicant's second argument concerns alleged bias which occurred in an interaction that is believed to have taken place on the 23rd October, 2012 when the District Judge misidentified the Applicant and suggested that he not only perjured himself, but that he also coerced a third party to perjure themselves in previous proceedings.

12. The Applicant's further argues that such bias in some way infected the Judge's decision to permit the 'service' of the documents on the Applicant on the 3rd October, 2012 and also affected the Judge's decision regarding conviction. The first Named Respondent accepts he made an error in misidentifying the Applicant and apologised for same in correspondence to the Applicant dated 2nd November, 2012.

The Respondent's case

13. The second Named Respondent rejects the Applicant's assertions. In her affidavit Garda Joanne Fleming stated that all seven applicable summonses were served on the Applicant on the 12th March, 2012 and were duly indorsed and lodged to court. The allegation of 'bad service' is also denied as averred to in the affidavit sworn by Garda Alan Murray. Essentially, it is the second named Respondent's argument that the photocopying of the files did not constitute service.

14. The Respondents assert, in relation to the bias ground, that any utterance made by the first Named Respondent, which the Applicant now claims gives rise to objective bias, came after the Applicant was convicted, not before. The Respondents also argue that the Applicant does not point to any "evidential deficit" and that as the statutory minimum three year disqualification was imposed such demonstrates that the District Judge was not operating in a manner prejudicial to the Applicant.

Analysis of issues

15. There are a number of issues which require to be analysed within their legal context, including: the issue of jurisdiction, the applicant's points of argument, waiver and delay. The first issue to be dealt with concerns the jurisdiction of this Court to deal with the matter, notwithstanding that the Applicant has already lodged an appeal in the Circuit Court.

Jurisdiction

16. Henchy J. in the Supreme Court decision in *State (Roche) v Delap* [1980] I.R. 170 relied on the decision in *R. (Miller) v Justices of Monaghan* [1948] I.R. 176 and found that once the appeal has been brought to the Circuit Court, and such appeal is not yet complete, the High Court did not have jurisdiction to grant an Order of Certiorari. On being satisfied that the conviction was bad on its face, as it did failed to disclose that the sentence was imposed in accordance with the jurisdiction conferred by s. 13 of the Criminal Justice Act, 1960 it did not follow that Certiorari would issue. In *Delap*, the Applicant permitted the appeal to be opened and did not contend that his conviction was other than correct as distinct from the sentence.

17. Henchy J. in *The Attorney General (Lambe) v Fitzgerald* [1973] I.R. 195 quoted the following dictum of Davitt J. in *The State (McLoughlin) v Shannon* [1948] I.R. 439, 449:-

"…when a defendant…takes an appeal…to the Circuit Court he seeks, and obtains, a hearing of the case *de novo*…He impliedly admits the jurisdiction of the Circuit Court to substitute its own order for that of the District Court".

18. The issue of alternative remedies of appeal and judicial review was addressed in *Buckley v Kirby* [2000] 3 I.R. 431. The Supreme Court considered a number of situations to include one whereby the applicant appeals to the Circuit Court and brings Judicial Review proceedings. A significant feature is the stage of the appeal. In *Buckley v Kirby*, Geoghegan J. considered the situation where the appeal had been fully or partly heard to have been addressed by the Court in *The State (Roche) v Delap*. Geoghegan J. was of the view that:

"….the basis of Henchy J.'s reasoning was that the defect in the order could have been corrected by the Circuit Court Judge on appeal and that as the appeal had already opened, certiorari ought not to be granted."

19. In the decision of *McGoldrick v An Bord Pleanála* [1977] 1 I.R. 497, Barron J. considered the question of whether a statutory

appeal or judicial review was appropriate where there was an allegation of a breach of fair procedures. Barron J. identified the following as being significant in such a determination, stating at pg. 509:

"The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind."

20. In *State (Abenglen Properties) v Corporation of Dublin* [1984] I.R. 439, O'Higgins, C.J. made the following observations:-

"The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the Court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice…If the decision impugned is made without jurisdiction or in breach of natural justice the, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved. The existence of such ought not to be a ground for refusing relief…."

The issue is, having regard to the legal principles in this and other well known cases, the Court must consider if justice can be done by refusing the relief sought and allowing the applicant to prosecute his appeal.

21. I must also consider the principle of *audi alteram partem* in that the Applicant contends that he was not permitted to reply to the first Named Respondent's comments. It is noted that Garda Murray states in his affidavit that there was an interaction between the first Named Respondent and the Applicant after conviction and does not state that any further evidence was called.

Service of summonses

19. Keane J. in *D.P.P. (Ivers) v Murphy* [1999] 1 I.R. 98, 113 stated that:-

"The usual methods of securing the attendance of an accused person before the District Court, so that it may investigate a charge of indictable offence made against him, is by way of arrest or by way of formal summons, but neither of these methods is essential. He could, of course, attend voluntarily, if he so wished; so far as the exercise of the Court's substantive jurisdiction is concerned, it is perfectly immaterial in what way his attendance is secured, so long as he is present before the District Justice in court at the material time. Even if he is brought there by an illegal process, the Court's jurisdiction is nonetheless effective."

20. In *D.P.P. v Clein* [1981] I.L.R.M. 465, Gannon J. stated at pg. 468:-

"When a defendant…submits to the jurisdiction of the court and to the hearing by the court of the charges laid and the evidence thereon the summons to which he responded ceases to have any significance. Neither the commencement nor the continuance of the prosecution of the charges laid in court are dependent upon the validity of the summonses nor the regularity of their use."

21. The trend of the applicable legal principle continued in *Coughlan v Patwell* [1993] 1 I.R. 31 where Denham J. (as she then was) confirmed that a summons is a mere vehicle to obtain the presence of an accused before the District Court, and, once the accused has appeared in court in answer to the summons, the charges laid are no longer dependent upon the validity of the summons and the case can proceed lawfully. In this decision, it would appear that any procedural error that may have occurred in issuing the summonses is cured by the appearance in court of the accused.

Bias

22. In *Bane v Garda Representative Association* [1997] 2 I.R. 449, 472 Kelly J. stated the elements of the test for objective bias in the decision-making process:-

"I must therefore ask myself whether a reasonable man would, in the circumstances outlined here, have a reasonable fear that the applicants would not have a fair and independent hearing of the issues which arose."

There are two elements to the test for bias which have been established by the case-law on the matter which require brief elaboration.

23. Morgan and Hogan at pg. 352 in their *Administrative Law in Ireland* review the case law on this matter and identify two strands to the bias test; namely a "reasonable suspicion" and a "real likelihood" of bias being present. It would appear that there is very little practical difference between these two concepts. The authors state that the former is the most suitable to apply in judicial proceedings. The "reasonable suspicion" strand, as Hogan and Morgan suggest, was inspired by a desire to maintain public confidence in the administration of justice within the jurisdiction.

24. In *Dublin and County Broadcasting v I.R.T.C.* (Unreported, High Court, Murphy J., May 12, 1989) at pg. 13. Murphy J. stated, in relation to the distinction to be made between the "reasonable suspicion" and "real likelihood" strands:-

"Certainly it does seem to me the question of bias must be determined on the basis of what a right-minded person would think of the likelihood, of the real likelihood of prejudice, and not on the basis of a suspicion which might dwell in the mind of a person who is ill-informed and did not seek to direct his mind properly to the facts…"

25. Further, in *O'Ceallaigh v An Bord Altranais (*Unreported, High Court, Hedigan J., October 23, 2009) Hedigan J. formulated the following principles which are to be applied in determining the presence of objective bias:

(1) Objective bias is shown where a reasonable, well informed observer would apprehend that the plaintiff would not receive a fair and impartial hearing because of the risk of bias on the part of the judge.

(2) A relationship between the judge and a party, or a witness to the proceedings, or another member of the public involved with a case, be it personal, social or professional, is not sufficient of itself to prove objective bias. It must be shown that the circumstances of that relationship and its connection with the proceedings are such that it has the capacity to influence the mind of the decision-maker.

(3) The impugned relationship between the judge and the party, witness or other relevant person must normally display a community

of interest between them which is directly related to the subject matter of the proceedings for objective bias to arise. This link must be cogent and rational. (emphasis added)

(4) Where the impugned relationship concerns a witness or other person, not a party, who does not have a stake in the outcome in the proceedings, the threshold to establish objective bias will necessarily be higher.

26. In *Bula Ltd v Tara Mines Ltd (No. 6)* [2000] 4 I.R. 412 Denham J. stated:

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

27. In *Kenny v Trinity College* [2008] 2 I.R. 40 Fennelly J. provides further analysis of the objective test for bias, when stating:-

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

Waiver

28. It must be noted that waiver, in this context, means that the Applicant's ground of bias can be lost in judicial review proceedings due to his failure to raise the issue when it first arose or was perceived to arise. In *Balaz v Judge Kennedy* [2009] I.E.H.C. 110 Hedigan J. delivered a decision which addressed the waiver issue, where it was stated:-

"It is clear that a party's entitlement to rely on certain procedural infirmities of a criminal trial being challenged on judicial review may be waived where he failed to object to the particular practice at the time of the trial itself. In *D.P.P. v O'Donnell* [1995] 2 I.R. 294, Geoghegan J. accepted that there might be circumstances in which a failure to challenge a tribunal's jurisdiction to consider a particular matter would constitute a waiver of the right of objection...."

29. The Respondents accept that the Applicant did in fact take issue with these comments at the time and pointed out to the District Judge that his comments were unwarranted. This is accepted from the contents of the letter dated the 2nd of November, 2012 from Ms. Sheil, on behalf of the first Named Respondent to the Applicant, wherein the first Named Respondent sought to apologise to the Applicant. At paragraph 10 of the Statement of Opposition, it is stated that the Applicant subsequently corresponded with and spoke to the first Named Respondent "wherein the Judge apologised". The correspondence has been exhibited and is not disputed. However, the Respondents argue that these comments were made after the Applicant had been convicted and before sentence was delivered. The Respondent submits that the Applicant failed to allege that bias was an issue. The Applicant also contends that he was denied a right to be heard subsequent to the first Named Respondent's comments.

Delay

30. Order 84 Rule 21 of the Rules of the Superior Courts provides:-

(1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.

(2) Where the relief sought is an order of certiorari in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.

(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:—

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by the applicant for such extension.

(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.

(5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.

(6) Nothing in sub-rules (1), (3) or (4) shall prevent the Court dismissing the application for judicial review on the ground that the applicant's delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub-rule (3)) has caused or is likely to cause prejudice to a respondent or third party.

(7) The preceding sub-rules are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

31. The Applicant's delay in bringing his application by way of judicial review— a period of some seventeen months— is of grave concern to the Court. What is also striking is the Applicant's failure to provide any reason for the delay which has transpired. To this concern, the Court is minded of the judgment of Denham J. in *De Róiste v Minister for Defence* [2001] 1 I.R. 190, where it was stated:-

"The onus is on the applicant to meet the conditions. It is for the applicant to show that he has made the application promptly and within the time limit or that there is good reason to extend the time within which the application may be made. The conditions are not

rigid as judicial review is a discretionary remedy. There remains in the court an inherent discretion to be exercised according to the requirements of justice in the circumstances of each case.

In analysing the facts of a case to determine if there is a good reason to extend time or to allow judicial review, the court may take into account factors such as:

> (i) the nature of the order or actions the subject of the application;
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> (ii) the conduct of the applicant;
>
> (iii) the conduct of the respondents;
>
> (iv) the effect of the order under review on the parties subsequent to the order to be reviewed;
>
> (v) any effect which may have taken place on third parties by the order to be reviewed;
>
> (vi) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished."

32. Mr. De Blacam, in the second edition of his *Judicial Review* text, acknowledges at pg. 408 that even when the delay has been both inordinate and inexcusable, the court may allow the proceedings to continue where the balance of justice lies in favour of doing so. In *McDermott and Cotter v Minister for Social Welfare* [1987] E.C.R. 1453 it was held that the time limits were not to be administered restrictively. In *State (Murphy) v Kielt* [1984] I.R. 458, Barron J. disregarded a delay of three months seeking an Order of Certiorari due to the length of the delay and the age of the applicant. Further, in *McD. v Child Abuse Commission* [2003] 2 I.R. 348, Ó Caoimh J. held that any delay would have to be considered within the context of the decision sought to be impugned.

Decision

33. Applying the cases cited, I find support for the proposition that where proceedings are flawed so as to deprive an accused of a fair trial, Certiorari is an appropriate remedy. The Court is satisfied on the unusual undisputed facts of this case that the Applicant has made out objective bias and I am satisfied that the Applicant did not have an opportunity to respond to the first Named Respondent at the appropriate time. The Court is influenced by the very usual feature of this case being the undisputed evidence that the first Named Respondent sought to apologise to the Applicant for the comments made. The key question in this instance is whether the Applicant has gone too far down the road of appeal and has deprived himself of this remedy. Applying the principles enunciated in the aforementioned decisions, I have to consider whether justice can be done by refusing the Applicant's relief. Whilst an appeal is an entire re-hearing, I am of the view that I must consider if an appeal in appropriate in light of the fact that I am satisfied that there has been a breach of natural and constitutional justice. It is undoubtedly the position that the Applicant is guilty of delay and has offered no explanation on affidavit for his delay. However, the Court is nonetheless satisfied on the unique facts of this case, to exercise its discretion in favour of the Applicant and I find in this case, that he is not disbarred on grounds of delay or on the basis that he chose to appeal.

34. I am not satisfied that he waived his right to assert bias on the facts of this case. The issue of the comments was raised immediately. Furthermore, the Respondents submitted that whilst an interaction took place between the Applicant and the first Named Respondent, this occurred after conviction. This being so, the court fails to see how the Applicant could have asked the Judge to recuse himself, the decision to convict having already been made.

35. In respect of the point raised on the service of the summonses, even if I were to accept there was a possible procedural defect, this was cured by the Applicant's appearance before the Court some twenty days later.

In summary:

> a. I am satisfied that this Court has jurisdiction to grant an Order of Certiorari notwithstanding that the Applicant's appeal is part heard on the unusual and unique circumstances of this case.
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> b. It is well settled law that a defect in serving the summonses can be rectified clearly by the attendance of the Applicant at court. The hearing was adjourned for a period of twenty days, at which point the Applicant, represented by his solicitor appeared. I am satisfied that if there was any defect in the summons, such defect was cured by appearance. I therefore do not have to decide if there was any defect in service.
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> c. I am satisfied following the principles to be applied in determining the presence of objective bias, that the issue of bias has been established.
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> d. The delay by the Applicant in bringing these proceedings by way of judicial review is a serious concern for the Court and it is deemed to be an inexcusable delay, particularly so when one bears in mind that no exculpatory evidence has been proffered for the applicant. However, applying the balance of justice test, I am satisfied in this case that the said balance lies in allowing these proceedings and ruling as outlined.

36. I consider that the impugned order should be quashed. I am not satisfied to grant an Order of Prohibition or declaratory relief.