[2018] IEHC 72

THE HIGH COURT

2017 No. 167 JR

Between:

DANIEL KONADU

APPLICANT

– AND –

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 5th February, 2018.

I

Overview

1. On 9th February of last year, Mr Konadu was convicted by the District Court of certain offences under the Road Traffic Acts. He now comes to court seeking, *inter alia*, an order by way of *certiorari* quashing his convictions and a declaration that his trial was unfair to the extent that it was not a trial in 'due course of law' as required by Art.38.1 of the Constitution.

II

Background Facts

2. Mr Konadu was charged with three offences by Garda Keith Cassidy. These matters were listed for hearing on 9th February, 2017. Three charges were listed; one was withdrawn; the remaining charges were (i) a charge of 'drink driving' contrary to s.4 of the Road Traffic Act 2010; and (ii) a charge of failure to stop at the scene of an accident brought under s.106 of the Road Traffic Act 1961. [Section 106 of the Act of 1961, as amended, provides, *inter alia*, as follows:

> *"(1) Where injury is caused to person or property in a public place and a vehicle is involved in the occurrence of the injury (whether the use of the vehicle was or was not the cause of the injury), the following provisions shall have effect:*
>
> *(a) if the vehicle is not stationary after the occurrence, the driver of the vehicle shall stop the vehicle;*
>
> *…*
>
> *(3) A person who contravenes subsection (1)…of this section shall be guilty of an offence".]*

3. In the District Court there were three witnesses: Mr Jordan Donaghue; Garda Cassidy; and Garda Carolan (the garda who operated the 'Evidenzer' breath-testing machine). Nothing of relevance to the within application arises from the evidence of Garda Carolan.

4. Alleged before the District Court was that Mr Konadu: crashed into the rear of a car being driven by Mr Donaghue, at a point in time when Mr Donaghue had stopped at a set of traffic lights; and then drove from the scene of the accident, parking at a different location around half an hour later. Mr Donaghue followed Mr Konadu from the scene of the accident and pointed him out to Garda Cassidy when Garda Cassidy arrived on the scene. Garda Cassidy approached Mr Konadu who, by this time, had gotten out of his car. Garda Cassidy noticed that Mr Konadu was unsteady on his feet, formed the suspicion that Mr Konadu was incapable of having control of a car, and arrested him pursuant to s.4(8) of the Act of 2010 (the provision under which a garda may arrest a person who in the opinion of the garda is committing or has committed an offence under s.4 (which is concerned generally with 'drink driving')). For the purpose of the within application, nothing arises from the correctness or otherwise of the suspicion for the arrest.

5. Subsequently, Mr Konadu instructed his counsel that he had been involved in the collision, that he had driven away, that he had not been drinking at the time of the accident, and that, after parking the car and leaving the scene of the accident, he had gone to a nearby shop, purchased some alcohol and consumed it prior to the arrival of Garda Cassidy. Thus he did not dispute the fact that he was intoxicated when Garda Cassidy arrived, merely that he had not been intoxicated at the time of the collision. One now gets to the nub of the complaint which has led to the within application. Mr Konadu's statement of grounds describes what happened before the District Court:

> "5. *During the course of cross-examining Mr Donaghue, counsel for the Applicant* [*i.e.* Mr Konadu] *began putting these instructions to the witness. In particular, he was exploring the possibility of whether Mr Donaghue may have seen the Applicant go into the shop and/or consume alcohol. This was done as Mr Donaghue had stated in his direct evidence that he had sight of the Applicant at all times. During this process the Judge interrupted and asked whether the Applicant would be giving evidence in his defence. Counsel for the Applicant replied that that remained to be seen and it would depend on any ruling the Court made in relation to an application for a direction. The Court repeated the question and pressed counsel for an answer, to which counsel said 'no'. Having indicated that the Applicant would not be going into evidence, the trial Judge directed that this line of questioning could not continue. In those circumstances, counsel continued with cross-examination on other aspects of the case.*
>
> *6. While cross-examining Mr Donaghue it was put to him that the Applicant's car had come to a stop after the collision. This was accepted by Mr Donaghue. In his evidence in chief he had given evidence that he had gotten out of his car and walked back to the Applicant's car.*
>
> *7. While making an application for a direction, counsel for the Applicant relied on the fact that it had been established that the Applicant's car had come to a stop after the collision. Section 106(3) of the Road Traffic Act 1961 provides that a person who contravenes subsection (1) or (2) shall be guilty of an offence. As was set out in the charge sheet, it was alleged that the Applicant had contravened subsection (1)(a), which provides:*
>
> > "Section 106(1) – Where injury is caused to person or property in a public place and a vehicle is involved in the occurrence of the injury (whether the use of the vehicle was or was not the cause of the injury), the following provisions shall have effect:

(a) if the vehicle is not stationary after the occurrence, the driver of the vehicle shall stop the vehicle."

8. Counsel for the Applicant submitted that as it had been accepted that the Applicant's car was stationary after the collision, this particular section of the Act did not apply and therefore the Applicant was entitled to a directed acquittal. At no stage did the prosecuting solicitor apply to amend the charge sheet, nor did the Court do so acting on its own motion.

9. The judge rejected that submission without hearing from the prosecuting solicitor and without giving any reasons for the decision. He merely stated that he didn't agree with the point. [The absence of reasons, as will be seen, is disputed.]

10. The Judge proceeded to convict the Applicant and imposed a €100 fine in relation to the s.4 offence and a €25 fine in relation to the s.106 offence. He also disqualified the Applicant from driving for three and four years respectively."

6. Arising from the foregoing, Mr Konadu claims in the within application that (1) the trial judge erred in law (i) in enquiring, during the prosecution evidence, whether Mr Konadu would be giving evidence in his defence; (ii) in refusing to allow counsel for Mr Konadu to put his instructions to the prosecution witnesses; (iii) in refusing to allow counsel for Mr Konadu to 'test the evidence' by way of cross-examination of the prosecution witness in relation to matters contained in his client's instructions; (iv) in refusing the application for a direction in relation to the s.106 charge; and (v) in failing to give reasons for why he refused the application for a direction in relation to the s.106 charge; and (2) the overall manner in which the trial judge conducted the trial was unfair and contrary to the constitutional rights of Mr Konadu.

III

Case-Law and Commentary

(i) Overview.

7. The court has been referred to a number of cases and some learned commentary. These are considered hereafter and followed by a summary of applicable principle.

(ii) Case-Law

I. *Gill v. Connellan*

[1987] I.R. 541

8. *Gill* was prayed in aid by counsel for Mr Konadu in support of the contention that there was not a proper hearing of Mr Konadu's case by the District Court and that what Mr Konadu is entitled to is not just a re-hearing of his case by the Circuit Court on appeal but also an adequate first hearing by the District Court (which Mr Konadu claims not to have received).

9. The judicial review application in *Gill* followed on what seems to have been an eventful day at Longford District Court on 21st July, 1987. Mr Gill was before the District Court on that day to answer a charge of drink driving. At the hearing of the prosecution, Mr Gill's solicitor attempted by his cross-examination of the prosecuting garda to establish that the statutory procedure for the taking of the blood sample had not been complied with, but was interrupted by the District Judge who betrayed complete pre-judgment of the matter before him, stating 'It does not matter what you say, the Act was complied with.' When Mr Gill's solicitor submitted that he was entitled to make his argument, the District Judge replied 'You can go on for all the good it will do you. I am not interested in it'. When Mr Gill's solicitor persisted, he was rewarded with the answer 'I do not care. I am not interested. Do you want to call any witnesses?' The demeanour of the District Judge was such that Mr Gill's solicitor decided that it would be pointless to call any witnesses and his client was convicted.

10. The behaviour of the District Judge in *Gill* was so extreme that, before proceeding to consider the judgment of Lynch J. in that case, it is necessary for the court to emphasise, lest a contrary impression might otherwise arise, that when it comes to the learned District Judge in the case that is the subject of the within application (i) it has not been suggested that he engaged in anything like or approaching the type of behaviour which so marred the District Court proceedings in *Gill*, and (ii) unlike the trial judge in *Gill*, he never said anything like 'It does not matter what you say', 'I am not interested', or 'I do not care', tell-tale sentences which shriek of pre-judgment. Nonetheless there are unfortunate consequences to the learned District Judge's intervention in the case at hand, to which the court will return later below. For now the court pauses merely to note that in quashing Mr Gill's conviction, Lynch J., *inter alia*, offered the following observations, at 548-9:

"In the present case…both facts and law are in issue. Neither the facts nor the law have been adequately heard in the District Court. On an appeal to the Circuit Court, therefore, the appeal could hardly be said to be by way of rehearing – the case would more truly be heard for the first time. The applicant and his solicitor would be deprived of the possible advantage of having gone over the whole facts and law and of having heard the submissions and cross-examination by the prosecuting Superintendent in the District Court.

The order of the respondent in this case does not show any want of jurisdiction on its face and the Road Traffic Acts undoubtedly confer on the respondent jurisdiction to convict of the offence charged. However, in deciding whether or not an order of certiorari should be made in this case I have to bear in mind the decision of the Supreme Court in The State (Healy) v. Donoghue *[1976] I.R. 325, and in particular the two passages from the judgment of Gannon J. in the High Court which are quoted with approval by O'Higgins C.J. in the Supreme Court at pp. 348 and 349. Those two passages are as follows*:–

'Before dealing with the submissions on the grounds on which the conditional orders were made, I think I should say at the outset that it appears to me that the determination of the question of whether or not a court of local and limited jurisdiction is acting within its jurisdiction is not confined to an examination of the statutory limits of jurisdiction imposed on the court. It appears to me that this question involves also an examination of whether or not the court is performing the basic function for which it is established — the administration of justice. Even if all the formalities of the statutory limitation of the court be complied with and if the court procedures are formally satisfied, it is my opinion that the court in such instance is not acting within its jurisdiction if, at the same time, the person accused is deprived of any of his basic rights of justice at a criminal trial.

Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence

offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. By mentioning these I am not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence.'

I have come to the conclusion that the applicant is entitled to an order of certiorari in the circumstances of this case and I accordingly make such order on the grounds on which it is sought."

II. *O'Broin v. District Justice Jarlath Ruane*

[1989] I.R. 214

11. *O'Broin* was prayed in aid by counsel for Mr Konadu for like reason to *Gill*. In *O'Broin*, the eponymous applicant was tried in the District Court, having been charged with a 'drink driving' offence under the Road Traffic (Amendment) Act 1978. When Mr O'Broin's solicitor sought to cross-examine the prosecuting garda as to the procedures which had been followed in the garda station regarding the taking of specimens, the District Judge ruled that in the absence of a specific allegation as to non-compliance with a particular statutory provision, such cross examination was prohibited under s.21 of the Act of 1978. Thereafter, Mr O'Broin was convicted. An application for *certiorari* ensued on the grounds, *inter alia*, that the conviction had been made in excess of jurisdiction and contrary to natural and constitutional justice. Lynch J., who had also, of course, decided *Gill*, held that the District Judge had erred in law in refusing to allow the questioning, but that the ruling had been made in the exercise of his jurisdiction to decide what evidence was admissible and what sort of cross-examination might be pursued, and that the District Judge's error was not "*so gross*" as to oust jurisdiction. Notable too, in Lynch J.'s judgment, are his observations as to potentially purposeless 'fishing cross-examinations', observations which have a certain resonance in the within proceedings where the fact that the accused was not in any event going to give evidence was urged on this Court as bestowing a certain purposelessness on the cross-examination, even had it proceeded in full.

12. In the course of his judgment, Lynch J. observes, *inter alia*, as follows, at 216-7:

"It is clear that the applicant's solicitor was not in a position to show any particular non-compliance with the requirements of s. 21 unless something should turn up or be elicited on a general cross-examination as to what in fact were the procedures followed in the garda station. It follows from that, therefore, the cross-examination was clearly, to use the expression used by the solicitor for the prosecution, 'a fishing cross-examination'. But why should it not be so? It seems to me that it is wrong not to allow some general enquiry as to what occurred in the garda station. If a defending solicitor may only ask questions couched in a specific form as to, for example, whether the garda offered one of the sealed containers to the accused or not or whether the doctor divided the specimen into two parts and into two sealed containers or not, such form of questioning suggests the obvious answer: 'Yes, of course I did', or 'Yes, he did', as the case may be.

It seems to me, therefore, that the defending solicitor is entitled to enquire in a general way as to what happened to his client from the time he was brought to the garda station, in relation to the taking of specimens and the treatment of such specimens, in order to see whether compliance with s. 21 was observed. I think he may do this in a general way without having to mention the specific steps set out in sub-sections 1, 2 and 3. A person might have no recollection whatever of even being in the garda station, much less as to what procedures he underwent whilst there, whatever the reason might be for his absence of recollection. If in the case of such a person there was total non-compliance with the procedures required by s. 21, there would be a serious danger that that person might be wrongly convicted.

Of course, on the other hand, the district justice must be entitled to control cross-examination and keep it within reasonable bounds. If, for example, the general sort of cross-examination seemed to go on repetitively, the district justice would clearly be entitled to say: 'That's enough of that. You have made your point.' But he must allow some reasonable general enquiry as to what procedures were in fact done and followed in the garda station so that the defending solicitor, even in the absence of any specific allegation of a contravention of the requirements of s. 21, may ensure that those requirements were complied with.

I have come to the conclusion, therefore, that the respondent erred in this case in acceding to the objection by the prosecuting solicitor and rejecting the applicant's solicitor's submissions. However, that error prima facie is an error within the jurisdiction of the respondent. It is part of his function as the presiding justice to decide what evidence is admissible and to decide what sort of examination-in-chief and cross-examination may be pursued. Unless the error was so gross as to oust jurisdiction, which can be so in some exceptional cases, the error would not justify making an order of certiorari.

In my opinion the error in this case was clearly an error within jurisdiction and not of so gross a nature as to oust the jurisdiction of the respondent in this case. That being so, the application must fail. In deciding that the error was not such as to oust jurisdiction, I am of the same view in regard to the error not giving rise to a want of proper procedures and a breach of natural justice.

That being so, I must refuse the application for certiorari…".

III. *Buckley v. Kirby*

[2000] 3 I.R. 431

13. *Buckley* was cited by counsel in support of the proposition that it is settled law that *certiorari* will not be granted merely on the grounds of an absence of evidence to support a finding in the District Court, the appropriate remedy being appeal to the Circuit Court. The law, as identified in *Buckley*, is more comprehensively stated than as just identified. However, it is only fair to note that counsel for Mr Konadu, in his submissions, was contending in truth for the rather different point that the learned District Judge in this case strayed, *inter alia*, into *Gill* territory, depriving Mr Konadu of a hearing in the District Court, to which failure a re-hearing in the Circuit Court, if it could properly be described as a 're-hearing', would not be a complete answer.

14. In *Buckley*, the applicant was convicted of certain offences before the District Court. Prior to the hearing of the appeal, Mr Buckley sought leave to apply by way of judicial review for an order of *certiorari* quashing the decision of the District Judge. This application was refused in the High Court and the subsequent appeal dismissed by the Supreme Court. In his judgment for the court, Geoghegan J. distinguished between four scenarios that can present and made certain related observations:

Scenario	*Comment*

1. Applicant appeals and brings judicial review proceedings. At the stage of the judicial review the appeal has been fully or partly heard.	1. Per *State (Roche) v. Delap* [1980] I.R. 170, as (i) the order could be corrected on appeal and (ii) the appeal had already opened, *certiorari* ought not to issue.
2. Applicant appeals and brings judicial review proceedings. Either remedy is appropriate but at the time of the judicial review the appeal is still pending.	2. Per *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497, the High Court is not bound to refuse leave merely because an appeal is pending. The true question is which is the more appropriate remedy considered in the context of common-sense, the ability to deal with the questions raised and the principles of fairness, provided the applicant has not gone too far down one road as to be estopped from changing his mind.
3. Applicant appeals and brings judicial review proceedings, in circumstances where an appeal is more appropriate.	3. Per Geoghegan J., at 434-5: "[T]*his is not a case where either remedy would have been equally appropriate. Judicial review in this case would appear to be singularly inappropriate as compared with an appeal….It has been long established that certiorari will not be granted merely on the grounds of an absence of evidence to support a finding….It is…wrong to grant leave for judicial review merely on the grounds that there was a lack of evidence to support the judge's decision. The proper remedy is appeal."*
4. Applicant brings judicial review proceedings in circumstances where an appeal is more appropriate but leave for judicial review can be granted.	Per Geoghegan J., at 435, *"In a case where an appeal would clearly be the more appropriate remedy, an applicant ought not necessarily* [to] *be granted leave to bring judicial review proceedings merely because he has not in fact appealed. If he ought to have appealed, the court in its discretion may refuse leave."*

IV. *Sweeney v. District Judge Fahy*

[2014] IESC 50

15. *Sweeney* was cited by counsel for the respondent principally for its reiteration of the general principle that that it is settled law that *certiorari* will not be granted merely on the grounds of an absence of evidence to support a finding in the District Court, the appropriate remedy being appeal to the Circuit Court. Additionally, and counsel did not suggest otherwise, *Sweeney* offers a comprehensive insight into the current thinking of the Supreme Court as to when judicial review is appropriate where an appeal might otherwise lie.

16. In *Sweeney*, the applicant was challenging a conviction for driving while under the influence of a drug. Among the points advanced by counsel for the DPP was that all or some of the points made by Mr Sweeney in his judicial review application concerned the assessment of evidence before the District Court and that, this being so, an appeal to the Circuit Court was the more appropriate remedy (with the result that relief by way of judicial review properly did not lie). The observations of Clarke J., as he then was, under the heading "*Is Judicial Review Appropriate?",* made by reference to previous case-law, are spread over several pages and are too lengthy to quote in their entirety in the within judgment. What follows is a summary of same.

A. Role of High Court.

(1) The High Court does not act as a court of appeal from decisions of other tribunals. (Para.3.1).

(2) Article 34.3.1° of the Constitution confers full original jurisdiction on the High Court over all questions of law or fact, civil or criminal. Even where exclusive jurisdiction is conferred on some other person, body or court, the role conferred on the High Court by Art.34.3.1° can still be invoked to ensure that the hearing and determination is done in accordance with law. (Para.3.3).

(3) It follows that the overall role of the High Court in judicial review is concerned with determining the lawfulness or otherwise of a decision-maker's decision that affects legal rights arising from the law that empowers the decision-maker to make such decision. (Para.3.4).

B. Judicial Review.

(4) Judicial review is fundamentally concerned with the lawfulness of decisions taken affecting legal rights, whether by persons, bodies or courts having statutory jurisdiction. Judicial review is not concerned with the correctness of those decisions. (Para.3.6).

(5) Judicial review is concerned with whether the decision-maker whose action is sought to be reviewed has acted within jurisdiction. (Para.3.2).

(6) A decision-maker may exceed jurisdiction if it acts in breach of *e.g.*, the requirement to adopt constitutionally fair procedures. (Para.3.2).

C. Matters of Jurisdiction.

(7) The term 'jurisdiction' in this context can be confusing. It is used in a wider sense than the narrow issue of whether the decision-maker has a power to embark on the relevant decision-making process at all. (Para.3.2).

(8) The phrase 'error within jurisdiction' emphasises the distinction between (i) issues which can give rise to judicial review and (ii) issues which can only be pursued by appeal. Where (a) a body has the power to decide and (b) the circumstances yielding the power to decide present, then (c) any ensuing decision made by such body within the parameters of applicable law is *prima facie* valid. (Para.3.3).

D. Absence or Inadequacy of Evidence.

(9) The absence of evidence of a fact which must exist for a court to have jurisdiction in the first place may well provide a ground for judicial review. (After all, if the decision-maker did not have jurisdiction to make the order in the first place, it was clearly an unlawful decision). (Para.3.7).

(10) There is a clear distinction between evidence of facts which are a necessary pre-condition to the exercise of any jurisdiction, and evidence of facts which are relevant to the way in which a decision-maker exercises a jurisdiction shown to exist. (Para.3.7).

(11) Save in an extreme case, it is not for the High Court, in considering whether to quash a conviction, to inquire into the merits of the decision and whether, on the facts before her or him, the District Judge was right or wrong in the course he took. (Para.3.7).

(12) Absence of a lawful power to make a decision will render a decision unlawful. Save in an extreme case, absence of sufficient evidence as to the merits of a decision would only render the decision incorrect and thus not amenable to judicial review. (Para.3.8).

E. Availability of Appeal.

(13) The default position as concerns judicial review versus appeal is as follows. *Certiorari* is an appropriate remedy (i) to quash a conviction bad on its face, (ii) where a court or tribunal acts without or in excess of jurisdiction, (iii) where a court or tribunal acts within jurisdiction but the proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law. *Certiorari* is not appropriate to a routine mishap which may befall any trial; the correct remedy in such circumstances is appeal. (Para.3.9).

(14) To state that a person who has been deprived of a proper first instance hearing at all has, as her or his remedy, an appeal, is to miss the point. What the law allows is a first hearing and an appeal. In such an instance of deprivation, judicial review lies to ensure that such person at least gets a first instance hearing which is constitutionally proper and against which s/he can, if s/he wishes, appeal on the merits in due course. (Para.3.14).

(15) Where a person has had a constitutionally fair first-instance hearing and where her/his complaint is that the decision-maker was wrong, there are strong grounds for suggesting that an appeal, if it be available, is the appropriate remedy. (Para.3.15).

(16) There may be instances where judicial review will not lie against a first instance or initial decision but where it might lie against a similar decision of a body from which no appeal or further appeal lay. (Para.3.16).

V. Connors v. District Judge James Faughnan

[2017] IECA 196

17. The decision of the Court of Appeal in *Connors* was relied upon by counsel for the respondent as authority for the proposition that brevity of reasoning is not fatal to the validity of a District Court judgment. In his judgment for the court, Hedigan J., following a consideration of applicable case-law, summarises the position as follows, at para.14:

> *"(a) District Court judges must give their rulings in such a fashion as to indicate which of the arguments are accepted and which are rejected.*
>
> *(b) So far as is practicable in the time available, District Court judges should give their reasons for rejecting or accepting those arguments.*
>
> *(c) The extent to which District Court judges are required to give reasons for their decisions depends upon the nature and circumstances of the case and the nature of the remedies that flow from such a decision. The simpler the case, the less the reasoning is required.*
>
> *(d) There may be cases so straightforward that merely indicating that the evidence is sufficient to satisfy the District Court judge that there is a case to answer or to convict will be adequate reasoning. A clear statement of rejection of one side's evidence and acceptance of the other may suffice. There is no need to elaborate on the obvious.*
>
> *(e) Those convicted must know of what they have been convicted and why. Legal submissions considered by the District Court judge to be weak or unstateable, particularly when assessed in the light of the evidence, may be answered adequately by a simple statement that they are rejected."*

(iii) Commentary.

18. In addition to the foregoing, counsel for Mr Konadu has referred the court to learned commentary in the form of Professor O'Malley's text, *The Criminal Process* (2009), and McGrath on Evidence (2nd ed., 2014).

19. Professor O'Malley writing of the process of cross-examination states, *inter alia*, as follows, at 493-4:

> *"The right to cross-examine one's accusers has been described as fundamental to our system of criminal procedure; it plays a pivotal role*

within the adversarial process. It was included among the basic elements of fair procedures established in the leading case Re Haughey [[1971] I.R. 217, 263]. [While the Constitution does not expressly articulate a right of cross-examination per se during a criminal trial, such a right flows self-evidentially from the right to trial in due course of law enshrined in Art.38.1 of the Constitution. Worth noting too in this regard is Art.6(3)(d) of the European Convention on Human Rights which lists, as one of the minimum rights of a person charged with a criminal offence, the right "*to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him*".] *Judicial interventions, except perhaps for brief clarification purposes, should be avoided unless the person conducting the cross-examination is being unduly repetitive, or is dwelling on patently irrelevant issues or being gratuitously abusive or insulting to the witness. What must be rigorously avoided is the possibility that interventions might lead a jury to believe that the judge has taken a particular view of the case or that he clearly believed or disbelieved a particular witness. Jurors, being lay persons usually unfamiliar with court proceedings and procedures, may be unduly influenced by what they perceive, rightly or wrongly, to be the judge's assessment of the case. Cross-examination is well accepted as being one of the more skilful aspects of the advocate's art, which requires careful preparation. In asking questions which at first sight may appear rather irrelevant to the main issue, the advocate may be building up to a point where he can get the witness to make an important admission. If a judge were to intervene or persist in intervening at that point, the advocate's legitimate purpose must be entirely frustrated, with the risk of considerable injustice to his client. By the same token, failure by the judge to intervene when counsel strays into prohibited areas by, for example, expressing personal opinions about the veracity of the witness under cross-examination, may lead jurors to suspect or believe that both judge and counsel are displaying a justified scepticism or hostility towards the witness in question. This, of course, must be avoided."*

20. Mr Mc Grath, under the heading "*Limits on Cross-Examination*" observes, *inter alia*, as follows, at 117-18:

"The central feature of cross-examination, which distinguishes it from examination-in-chief, is that the cross-examining party is permitted to ask leading questions….A cross-examiner is also permitted to put questions based on information that is inadmissible or that he or she is unable to prove except through cross-examination and to 'pursue any hypotheses that is honestly advanced on the strength of reasonable inference, experience or intuition' [R. v. Lyttle (2004) 180 CCC (3d) 476 at [46]-[48]]. *However, it is important to note that there are limits to the form, content and length of questioning that is permissible on cross-examination….*

A trial judge exercises a general supervisory jurisdiction in relation to the cross-examination of witnesses and may disallow questions which he or she considers to be improper….

Similarly, a trial judge may disallow questions which he or she regards as vexatious or irrelevant to any matter at issue. A trial judge may also curtail cross-examination which is repetitive or excessive in length if the judge is satisfied that the cross-examiner has been given an adequate opportunity to ask relevant questions of the witness….

However, given the importance and constitutional basis of the right to cross-examine, the discretion of trial judges to disallow questions or otherwise curtail cross-examination is somewhat circumscribed and a trial judge should not rule out a line of questioning unless it is clearly irrelevant or otherwise objectionable."

IV

Summary of Applicable Principle

21. It seems to the court that, at the least, the following principles of relevance to the application at hand, can be identified in the cases just considered:

a. Role of High Court.

(1) The High Court does not act as a court of appeal from decisions of other tribunals. (*Sweeney*).

(2) Article 34.3.1° of the Constitution confers full original jurisdiction on the High Court over all questions of law or fact, civil or criminal. Even where exclusive jurisdiction is conferred on some other person, body or court, the role conferred on the High Court by Art.34.3.1° can still be invoked to ensure that the hearing and determination is done in accordance with law. (*Sweeney*).

(3) It follows that the overall role of the High Court in judicial review is concerned with determining the lawfulness or otherwise of a decision-maker's decision that affects legal rights arising from the law that empowers the decision-maker to make such decision. (*Sweeney*).

(4) The determination of the question of whether or not a court of local and limited jurisdiction is acting within its jurisdiction is not confined to an examination of the statutory limits of jurisdiction imposed on the court. It involves also an examination of whether or not the court is performing the basic function for which it is established, being the administration of justice. (*Healy*).

b. Role of Court of Local and Limited Jurisdiction.

(5) Even if all the formalities of the statutory limitation of a court of local and limited jurisdiction be complied with and if the court procedures are formally satisfied, the court in such instance is not acting within its jurisdiction if, at the same time, the person accused is deprived of any of his basic rights of justice at a criminal trial. (*Healy*).

(6) It is part of the trial judge's function to decide what evidence is admissible and to decide what sort of examination-in-chief and cross-examination may be pursued. Unless the error within that jurisdiction is so gross as to oust jurisdiction, which can be so in some exceptional cases, the error would not justify making an order of *certiorari*. (*O'Broin*).

c. Judicial Review.

(7) Judicial review is fundamentally concerned with the lawfulness of decisions taken affecting legal rights, whether by persons, bodies or courts having statutory jurisdiction. Judicial review is not concerned with the correctness of those decisions. (*Sweeney*).

(8) Judicial review is concerned with whether the decision-maker whose action is sought to be reviewed has acted within jurisdiction.

(*Sweeney*).

(9) A decision-maker may exceed jurisdiction if it acts in breach of *e.g.*, the requirement to adopt constitutionally fair procedures. (*Sweeney*).

d. Matters of Jurisdiction.

(10) The term 'jurisdiction' in this context can be confusing. It is used in a wider sense than the narrow issue of whether the decision-maker has a power to embark on the relevant decision-making process at all. (*Sweeney*).

(11) The phrase 'error within jurisdiction' emphasises the distinction between (i) issues which can give rise to judicial review and (ii) issues which can only be pursued by appeal. Where (a) a body has the power to decide and (b) the circumstances yielding the power to decide present, then (c) any ensuing decision made by such body within the parameters of applicable law is *prima facie* valid. (*Sweeney*).

e. Absence or Inadequacy of Evidence.

(12) The absence of evidence of a fact which must exist for a court to have jurisdiction in the first place may well provide a ground for judicial review. (After all, if the decision-maker did not have jurisdiction to make the order in the first place, it was clearly an unlawful decision). (*Sweeney*).

(13) There is a clear distinction between evidence of facts which are a necessary pre-condition to the exercise of any jurisdiction, and evidence of facts which are relevant to the way in which a decision-maker exercises a jurisdiction shown to exist. (*Sweeney*).

(14) Save in an extreme case, it is not for the High Court, in considering whether to quash a conviction, to inquire into the merits of the decision and whether, on the facts before her or him, the District Judge was right or wrong in the course he took. (*Sweeney*).

(15) Absence of a lawful power to make a decision will render a decision unlawful. Save in an extreme case, absence of sufficient evidence as to the merits of a decision would only render the decision incorrect and thus not amenable to judicial review. (*Sweeney*).

f. Availability of Appeal.

(16) The default position as concerns judicial review versus appeal is as follows. *Certiorari* is an appropriate remedy (i) to quash a conviction bad on its face, (ii) where a court or tribunal acts without or in excess of jurisdiction, (iii) where a court or tribunal acts within jurisdiction but the proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law. *Certiorari* is not appropriate to a routine mishap which may befall any trial; the correct remedy in such circumstances is appeal. (*Sweeney*).

(17) To state that a person who has been deprived of a proper first instance hearing at all has, as her or his remedy, an appeal, is to miss the point. What the law allows is a first hearing and an appeal. In such an instance of deprivation, judicial review lies to ensure that such person at least gets a first instance hearing which is constitutionally proper and against which s/he can, if s/he wishes, appeal on the merits in due course. (*Sweeney*).

(18) Where a person has had a constitutionally fair first-instance hearing and where her/his complaint is that the decision-maker was wrong, there are strong grounds for suggesting that an appeal, if it be available, is the appropriate remedy. (*Sweeney*).

(19) There may be instances where judicial review will not lie against a first instance or initial decision but where it might lie against a similar decision of a body from which no appeal or further appeal lay. (*Sweeney*).

g. Right to Hearing and Re-Hearing.

(20) Where both facts and law are not adequately heard in the District Court, an appeal to the Circuit Court can hardly be said to be by way of rehearing; the case is, more truly, being heard for the first time, wrongly depriving the accused of having the whole facts and law, submissions and cross-examination gone over in the District Court. (*Gill*).

h. Rights of Accused.

(21) The natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy include but are not limited to the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. (*Healy*).

(22) Some level of fishing cross-examination is permissible to determine non-compliance with law. On the other hand, the District Judge must be entitled to control cross-examination and keep it within reasonable bounds, e.g., where such cross-examination becomes repetitious. (*O'Broin*).

i. Extent of Obligation on District Judge to Give Reasons.

(23) District Court judges must give their rulings in such a fashion as to indicate which of the arguments are accepted and which are rejected. (*Connors*).

(24) So far as is practicable in the time available, District Court judges should give their reasons for rejecting or accepting those arguments.

(*Connors*).

(25) The extent to which District Court judges are required to give reasons for their decisions depends upon the nature and circumstances of the case and the nature of the remedies that flow from such a decision. The simpler the case, the less the reasoning is required. (*Connors*).

(26) There may be cases so straightforward that merely indicating that the evidence is sufficient to satisfy the District Court judge that there is a case to answer or to convict will be adequate reasoning. A clear statement of rejection of one side's evidence and acceptance of the other may suffice. There is no need to elaborate on the obvious. (*Connors*).

(27) Those convicted must know of what they have been convicted and why. Legal submissions considered by the District Court judge to be weak or unstateable, particularly when assessed in the light of the evidence, may be answered adequately by a simple statement that they are rejected. (*Connors*).

j. Cross-Examination.

(28) The right to cross-examine one's accusers is fundamental to our system of criminal procedure; it plays a pivotal role within the adversarial process. (*O'Malley*).

(29) Judicial interventions, except perhaps for brief clarification purposes, should be avoided unless the person conducting the cross-examination is being unduly repetitive, or is dwelling on patently irrelevant issues or being gratuitously abusive or insulting to the witness. (*O'Malley, McGrath*).

(30) What must be rigorously avoided is the possibility that interventions might yield the belief that the judge has taken a particular view of the case or that he clearly believes or disbelieves a particular witness. (*O'Malley*).

(31) In asking questions which at first sight may appear rather irrelevant to the main issue, the advocate engaged in cross-examination may be building up to a point where s/he can get the witness to make an important admission. If a judge were to intervene or persist in intervening at that point, the advocate's legitimate purpose must be entirely frustrated, with the risk of considerable injustice to his client. (*O'Malley*).

(32) By the same token, failure by the judge to intervene when counsel strays into prohibited areas may yield the suspicion or belief that the judge is displaying scepticism or hostility towards the witness. This too must be avoided. (*O'Malley*).

(33) A trial judge exercises a general supervisory jurisdiction in relation to the cross-examination of witnesses and may disallow questions which he or she considers to be improper. (*McGrath*).

(34) A trial judge may disallow questions which he or she regards as vexatious or irrelevant to any matter at issue. (*McGrath*).

(35) Given the importance and constitutional basis of the right to cross-examine, the discretion of trial judges to disallow questions or otherwise curtail cross-examination is somewhat circumscribed: a trial judge should not rule out a line of questioning unless it is clearly irrelevant or otherwise objectionable. (*McGrath*).

V

Some Observations

(i) The Judge's Impugned Interventions.

22. Three points might be made concerning the learned District Judge's impugned interventions in the case at hand:

– first, it is a fundamental requirement of a criminal trial that the defence is not required to indicate to the court before the close of the prosecution case whether or not any evidence will be called on its behalf. It is only after all the prosecution evidence has been heard that an accused can make a proper and informed decision as to whether s/he wishes to give evidence. There was a clear breach of this basic premise.

– second, during the course of a criminal trial, counsel for an accused person must be permitted to cross-examine witnesses for the prosecution in accordance with an accused's instructions; counsel for Mr Konadu was cut short in this regard.

– third, as a general rule, a refusal by a lower court to hear relevant evidence tendered by either the prosecution or the defence is a clear breach of the rules of fair procedures. *(State (Howard) v. District Justice Donnelly* [1966] I.R. 51). The difficulty arising in this regard is that if the court acts otherwise it breaches the principle of *audi alteram partem*: both sides of a case must be heard. It seems to the court that, save in those instances where a judge is properly exercising her or his supervisory jurisdiction *vis-à-vis* the questioning of a witness, there is no relevant distinction to be made between a judge refusing to hear evidence- in-chief (as in *Donnelly*) and a refusal to allow cross-examination. Here, as the court has indicated, the learned District Judge stepped outside the proper exercise of his supervisory jurisdiction, yielding a breach of the *audi alteram partem* principle.

(ii) Failure to Stop.

23. Counsel for Mr Konadu submitted to the learned District Judge that as it had been accepted that Mr Konadu's car was stationary, however briefly, after the collision, s.106(1) of the Act of 1961 did not apply and that Mr Konadu was therefore entitled to an acquittal. The learned District Judge rejected that submission without hearing from the prosecuting solicitor, stating that he (the District Judge) did not agree with the point made. It is contended by counsel for Mr Konadu that (i) the evidence did not support the learned District Judge's finding and (ii) the judge erred in law in failing to give reasons. As to (i), sufficiency of evidence is not a matter for judicial review. (See e.g., *Buckley v. Kirby* in this regard). As to (ii), the court does not accept this criticism to hold true. If one recalls the principles in *Connors*, as set out previously above:

(i) it was clear what argument was being rejected;

(ii) it was clear why it was being rejected (the learned District Judge obviously did not consider it correct as a matter of law);

(iii) it was a simple point that did not require a complex response or an elaboration on the obvious;

(iv) Mr Konadu and his counsel were left in no doubt as to why Mr Konadu was being convicted; and

(v) the learned District Judge may have considered the point being made to be so weak, particularly when assessed in light of the evidence before the court as to be met by a simple rejection of same.

24. The court notes too that the judge was speaking in response to the submissions made by counsel. He was not speaking in a vacuum. It seems to the court to be completely unnatural in that context, as a matter of linguistic or legal analysis, to focus solely on what was said by the learned District Judge and not to focus also on what was said *to* him. What may seem a short or even terse response if the focus is solely on the answer, may seem adequately fulsome when one has regard to, and marries such answer as is given by a District Judge with such utterances as preceded it, placing all in the fuller context in which the answer is given.

VI

Conclusion

25. The current default position as concerns judicial review versus appeal is that *certiorari* is an appropriate remedy, *inter alia*, where a court acts within jurisdiction but the proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law. For the reasons stated previously above, the court considers that the learned District Judge in this case has, doubtless inadvertently, so deprived Mr Konadu. At issue in the within application is not a routine mishap which may befall any trial. And for the respondent to contend that Mr Konadu, having been deprived of a proper first instance hearing can, as his remedy, bring an appeal to the Circuit Court and receive a *de novo* hearing there, is, as Clarke J. states in *Sweeney*, para. 3.14, "*to miss the point*", Clarke J. continuing in *Sweeney* as follows:

> "[W]*hat the law allows is a first hearing and an appeal. If there has, in truth, been no proper first hearing at all, then the person will be deprived of what the law confers on them by being confined, as a remedy, to an appeal. In such a case, judicial review lies to ensure that a person at least gets a first instance hearing which is constitutionally proper and against which they can, if they wish, appeal on the merits in due course."*

26. The foregoing being so, the court will grant the order of *certiorari* and the declaration sought in Mr Konadu's notice of motion.