



THE COURT OF APPEAL

JUDICIAL REVIEW

**Sheehan J.
Mahon J.
Edwards J.**

2015 No. 560 J.R.

9/2016

PATRICK TOWEY

APPLICANT/APPELLANT

V

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of the Court delivered on the 17th day of June 2016 by Mr. Justice Sheehan

1. Mr. Patrick Towey was aggrieved when District Judge Brown made what he considered to be unfriendly remarks about him, in that when Mr. Towey informed the judge at Ballaghaderreen District Court in July, 2015 that he was having difficulty in finding a solicitor to act for him in respect of an assault charge, the judge had remarked that this was possibly because solicitors might see him as a difficult case. At the following hearing, Mr. Towey asked the District Judge to recuse himself. The judge refused to recuse himself and stated that he could not even remember seeing Mr. Towey on the previous occasion, "and if I did say anything I won't hold it against you anyway." Mr Towey was not comforted by the said judge's further remarks.

2. Mr. Towey was subsequently convicted by the said judge, and immediately following his conviction he made an ex-parte application seeking leave to have his conviction quashed on the grounds that the trial judge had improperly refused to recuse himself. His application for leave to apply for judicial review, which was made on notice to the Director of Public Prosecutions, was refused in the High Court on a number of grounds, and he now appeals against that order.

3. Mr. Towey represented himself in the High Court and also on appeal to this Court, where he was given leave to have the assistance of a McKenzie friend whom he identified to the court. This assistance was limited as a result of the appellant informing the court, when asked, that he was solely concerned with the refusal of the trial judge to stand down and further that the previous judicial review case, which he had referred to in a second affidavit, was not relevant to his present application.

4. The appellant was prosecuted on foot of an allegation that he had assaulted a Mr. Paul Cuddy. On the same day as that incident, a separate incident occurred relating to the appellant's sister's dog, in which Mr. Cuddy was also a witness. In the course of his submissions on behalf of the Director of Public Prosecutions, Mr. Dwyer BL, sets out the following chronology:

- 10th April, 2015, the applicant's case was listed before Ballaghaderreen District Court for mention.
- 8th May, 2015, the applicant's case was listed for mention before Ballaghaderreen District Court for mention.
- 12th June, 2015, the applicant's case was listed before Ballaghaderreen District Court for mention.
- 10th July, 2015, the applicant's case was listed before Ballaghaderreen District Court for mention.
- 11th September, 2015, the applicant was before Ballaghaderreen District Court for mention. The applicant invited the District judge to recuse himself indicating that on a previous date he had made "wise comments" to the effect that "a solicitor would not be happy with me". The District judge replied "I don't remember saying a thing about you" and declined to recuse himself. He fixed a hearing date for the 9th October, 2015, and later added "I haven't a clue Mr. Towey to be quite honest and if I did say anything I won't hold it against you anyway".
- 9th October, 2015, the applicant was tried before the District Court. He was bound over to keep the peace.
- 12th October, 2015, the applicant moved an application ex parte for leave before the learned trial judge. The application alleged the District Court judge had exhibited bias on 11th September, 2015, in saying "solicitors may see me as a difficult case". The application was adjourned to 2nd November, 2015, to allow the respondent to be put on notice of the application.
- 2nd November, 2016, the leave application was listed before the trial judge. On the application of counsel for the Director of Public Prosecutions the trial judge directed the DAR to be released for 11th September, 2015, and 9th October, 2015. The application was adjourned to 2nd December, 2015, to allow this to take place.
- 4th December, 2015, the leave application was listed before the learned trial judge. There was an affidavit before the court sworn by Mr. Donal Forde, solicitor exhibiting a transcript of the hearing on 11th September, 2015, which indicated the impugned remarks had not been said on that day, but had been said by the applicant in the transcript to have been said on a previous day. The learned trial judge adjourned the application to 21st December and directed the release of the DAR for the previous date 10th July, 2015.
- 10th December, 2015, the applicant swore an affidavit suggesting, inter alia, the District judge was "in contempt of the High Court since October 2008, exposed in High Court case No. 2009/257J.R. and because of that treason, should not be a sitting judge".

• 21st December, 2015, the leave application was listed before the trial judge. There was an affidavit before the court indicating that the transcript of the hearing for 10th July, 2015, was unavailable as the DAR was not working on that date. The learned trial judge refused the applicant relief on three grounds.

(a) There was no stateable case of bias alleged.

(b) The applicant was out of time to seek to quash by *certiorari* the order of July 10th and had not sought an extension of time nor made any evidential basis for doing so.

(c) The affidavit filed on the 10th December, 2015 was scandalous and he was refusing relief on discretionary grounds as a result.

5. By way of further background, it is helpful to set out a transcript of the Digital Audio Recording of the hearing that took place in the District Court on the 11th September, 2015. This transcript was exhibited in the replying affidavit of Donal Forde, solicitor of the Office of the Chief Prosecution Solicitor, sworn on the 1st December, 2015.

"11th September, 2015, Ballaghderreen District Court, Registrar:

Garda McHale and Pat Towey

J: It's for mention is Pat Towey here?

PT: I am yeah.

Insp: That case is for mention today judge and is a related matter, the next on the list Catherine Towey, I think that's in for hearing.

J: That's for hearing, but what about Pat Towey, what's that?

Insp: Pat Towey is in for mention to fix a date for hearing judge.

J: OK do you have a solicitor Mr. Towey?

PT: No because the last day I can't get a solicitor to represent this crime, the case of this crime and by the way Your Honour the last day you were presiding below in this, you made wise comments towards me, so I would like you to step down now from this case.

J: Do you know something, I can't even remember seeing you, not alone saying anything, so I won't

PT: You said a solicitor wouldn't be happy with me.

J: I don't remember saying a thing about you.

PT: I have a witness there who heard you.

J: Well you can but I am not going to sit down, I am not going to recuse myself, the case is going on, I'll give you a date for hearing, what date suits.

Insp: The 9th of the 10th please judge for hearing.

J: 9th October '15 for hearing I haven't a clue Mr. Towey to be quite honest and if I did saying anything I won't hold it against you anyway."

6. For the sake of completion, it is also helpful to set out the approved ex tempore judgment of Humphreys J. :-

"1. Mr. Towey has applied for leave originally ex parte to seek judicial review of an order made by Ballaghaderreen District Court on the 9th October, 2015. When that matter came before me I directed that it be made on notice to the Director.

2. The main objection made to the order of the District Court which was an order convicting the applicant was that the learned trial judge had expressed hostility towards the applicant on a previous occasion. It is set out in the statement of grounds that the applicant informed the judge that he had difficulty in finding a solicitor who would follow his instructions. The applicant submits that the judge stated a solicitor may see him as a difficult case.

3. In the statement of grounds and in the application as originally moved it is suggested that all of this occurred on the 11th September, 2015. This turned out not to be the case following the examination of the Digital Audio Recording (DAR) for this date. The DAR documents what happened on that date. The applicant asked the learned trial judge to recuse himself and the judge refused commenting "do you know something I cannot even remember seeing you, not alone saying anything so I won't". The court then fixed a hearing date of the 9th October, 2015 and in reply to further questions from the applicant Judge Browne stated "I haven't a clue Mr. Towey to be quite honest and if I did say anything I won't hold it against you anyway". Following the hearing of this matter on the 9th October, 2015, the court convicted the applicant in relation to an assault on Mr. Paul Cuddy.

4. On foot of the production of the DAR for the 11th September, 2015, the applicant then suggested that this previous comment was in fact made on the 10th July, 2015. However, it has not been possible to obtain the DAR for that date. Regardless of the fact the DAR for this date cannot be obtained a complaint in relation to a comment on the 10th July, 2015, is out of time having regard to the fact that the application was moved and filed in the Central Office on the 12th October, 2015.

5. First, I am refusing the application on the basis that it is out of time and there is no application for an extension of time in the statement of grounds. Even if there had been an application for an extension of time I would have refused it in the

circumstances.

6. Secondly, it seems that the complaint in any event had no substance because Judge Browne clearly said that he could not remember the applicant and would not hold this alleged comment against him even if he had made it. On that basis it is hard to see how the complaint reaches even the relatively low threshold of arguability. I refuse it on that basis also.

7. Thirdly, the applicant has now filed a further document entitled Replying Affidavit of Patrick Towey which was sworn on the 10th December, 2015 and filed on the 14th December, 2015. This is clearly a scandalous document. It is an abuse of the process of the court to make scandalous allegations against individuals with whom the applicant has a grievance. Without regard to the aforementioned issues I would have refused the application in light of this new affidavit. The process of the court cannot be allowed to be used as an engine or platform for individuals to make scandalous allegations of this kind. So on any one of those three grounds independently and certainly on the basis of all three collectively I am refusing leave.

8. I will make an order in favour of the Director for the costs of the leave application including all reserved costs and there will be the usual stay of 28 days in the first instance and thereafter if an appeal is filed within that time until the determination of the appeal."

9. There are therefore three matters which this Court must concern itself with. The first issue is whether or not the appellant initiated his application for judicial review outside the three month period, assuming (as the trial judge seems to have done) that the impugned remarks were made on the 10th July, 2015. While the remarks made on the 10th July are what caused the appellant concern, the order which he seeks to set aside and which gives rise to the present application is the order made on the 10th October, 2015. The applicant seeks an order of *certiorari* quashing the order of the District Court made on that date. He initiated his judicial review proceedings in the High Court on the 12th October, 2015. It seems to me that this is the operative date and that the application is made within time. Even if it could be argued that the appellant ought to have applied for an order of prohibition once the District Court judge refused to recuse himself, then this occurred on a date in September, and if that was deemed to be operative date then the appellant is still within time in moving his application for judicial review.

10. I am satisfied that the appellant in this case moved promptly following his conviction and that he is within time, and accordingly I hold with him in this regard.

11. The next point relates to the question of recusal. Counsel for the respondent submits that the correct test to be applied to recusal applications is that described by Denham J. in *Bula Limited v Tara Mines Limited* (No. 6) [2000] 4 I.R. 412. In that case Denham J. described the test for this type of bias (at p. 441) as follows, and I quote directly from the 4th Edition of J.M. Kelly *The Irish Constitution*, Hogan and White, at para. 6.1.72:-

"Denham J. described the test for this type of bias as follows:-

'... it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicant would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person'."

12. The question of when a trial judge should consider recusing himself has also been considered by the Supreme Court in *Goode Concrete v. CRH Plc. & Ors* [2013] IESC 39 case and more recently by this Court in *Commissioner of An Garda Síochána v. Penfield and Another* [2016] IECA 141. While it is always important to acknowledge that District Judges frequently work under considerable pressure and sometimes have onerous schedules, I find myself unable to agree with the submission of the respondent to the effect that it is clear that the District Judge gave proper consideration to the matter. I also hold that a careful reading of the transcript for the 11th September, 2015, tends to suggest that that the District Judge did not address his mind to the relevant question when he was faced with the recusal application. It is also unclear from the ex tempore judgment of the trial judge as to whether or not he addressed himself to the correct question. It seems to me that the trial judge was wrong when he stated that the complaint had no substance because Judge Browne clearly said he could not remember the appellant and would not hold this alleged comment against him even if he had made it. The fact that Judge Browne did not remember what he was alleged to have said does not mean that a reasonable person might not have had an apprehension that Mr. Towey would not get a fair hearing. Indeed, the instantaneous rejection by the District Judge of the appellant's application that he recuse himself lends support to the appellant's claim, and I hold that he has an arguable case and at the very least meets the necessary threshold of arguability.

13. The appellant is on a more difficult ground when it comes to a consideration of the second affidavit, which he swore on the 10th December, 2015. In this affidavit the trial judge held that the appellant had made scandalous allegations.

14. Counsel for the Director of Public Prosecutions in particular refers to para. 5 of the appellant's second affidavit, where he stated:-

"I say that District Court Judge Geoffrey Browne is in contempt of the High Court since October, 2008, exposed in High Court case No. 2009/257 J.R. and because of that Treason should not be a sitting judge."

15. The question that arises for this Court is whether the interests of justice are such that the nuclear option of dismissing the appellant's claim outright was the correct option for the trial judge to take in these circumstances.

16. This is a case which commenced with the appellant informing the District Judge of his difficulties in finding a solicitor to represent him. Apart from the material in the second affidavit, he appears to have conducted himself properly before the High Court. Insofar as the Court of Appeal is concerned, the appellant conducted himself in a courteous manner, and I have already set out at the beginning of this judgment how he focused entirely on the sole matter at issue.

17. In considering this question as to whether the appellant's claim should be dismissed, the court notes that he is a lay litigant who has shown himself to be in need of assistance in progressing his claim. However, it is by no means clear to this Court that the person he has chosen to assist him has a clear understanding as to what is in his best interests. In a recent Supreme Court judgment, where the appellant was a lay litigant, MacMenamin J. addressed some of the difficulties that courts are now faced with when litigants represent themselves. In that case (*Kevin Tracey t/a Engineering Design and Management v. Michael Burton and Others* [2016] IESC 16) MacMenamin J. stated at para. 47:-

"... however, a court is entitled to generally have regard to the manner in which proceedings are conducted. While the jurisdiction to strike out proceedings for abuse of process, in one form or another, is to be exercised sparingly, it is a

sanction which cannot be ignored. Similarly, while parties have a right to defend proceedings, it may be necessary to identify the manner in which the defendants' rights are best vindicated. A court may, under the Constitution, take whatever proportionate steps are necessary to protect the integrity of its own processes and procedures, and the inherent right of courts, themselves, to manage their own procedures in a manner which balances the rights of litigants with the rights of the public, and other litigants."

16. In applying these principles, it seems to me that this is not one of those cases where it is necessary to dismiss the application for abuse of process in order for the court to protect the integrity of its own process. The Director of Public Prosecutions concedes that this is not a case of forum shopping. Equally, this is not an application that can be described as either vexatious or frivolous. In my view, the appellant has a stateable case. The court can adequately protect the integrity of its own procedures by directing in this case that the offending paragraphs of the appellant's affidavit be removed. That is what I propose to do. I direct that paras. 4 and 5 of the replying affidavit of Patrick Towey sworn on the 10th December, 2015, be removed and that this matter be remitted to the next judicial review list for the purpose of fixing a date for the hearing of Mr. Towey's judicial review application. This is a case where the appellant would benefit from legal representation. There is a scheme in place, and I would be happy to recommend it if the appellant chooses to avail of same.