Neutral Citation Number: [2008] IEHC 198

THE HIGH COURT

2006 No. 1434 J.R.

BETWEEN

DESMOND FOGARTY

APPLICANT

AND
DISTRICT JUDGE HUGH O'DONNELL

RESPONDENT

AND
DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

Judgment of Mr. Justice Bryan McMahon delivered the 27th day of June, 2008.

1. Leave to judicially review an order of the respondent made in the Dublin Metropolitan District Court on the 6th June, 2006, was given by order of the High Court (MacMenamin J.) on the 4th December, 2006.

2. Leave to cross-examine certain witnesses who had sworn affidavits was granted by order of the High Court (Hedigan J.) on the 21st January, 2008. The matter came before this Court for final disposal on the 26th May, 2008.

Factual Summary

3. The applicant was prosecuted for careless driving in respect of a collision that occurred on the 28th August, 2004, at Ushers Quay in Dublin, 8. It was alleged that the applicant had broken a red light and collided with a motorcyclist. The applicant was driving from the south side of the city and was proceeding northwards over the Liffey. As he approached the river from the south side, his progress onto the bridge was controlled by a set of traffic lights on the south side of the river and when these lights were in his favour he could cross onto the bridge. Having crossed the bridge, again if the lights were green in his favour, he could proceed northwards away from the quays. On the day relevant to these proceedings, having crossed the bridge it is alleged that he ran a red light and collided with the motorcyclist who was proceeding in a west east direction along the quays.

4. Three independent witnesses travelling in the same direction as the motorcyclist gave evidence at the trial that they had the benefit of a green light at the time of the accident. The applicant, however, maintained that the light governing his progress was not red when he entered the intersection. An issue was raised by the defence regarding the light sequencing and the possibility that a green light governing the motorcyclist's line of traffic might coincide with an amber light in the opposite direction. No witness other than the applicant was called in relation to this. The prosecution case had closed at this point but the Court sought the assistance of an expert witness as to the light sequencing and in the absence of the defence volunteering to call such a witness, directed the prosecution to produce the attendance of a witness, named by the respondent, to deal with this issue. The matter was adjourned and the effect of the said witness's evidence was neutral in that it neither supported nor detracted from the defence or prosecution case and in the circumstances was not material to the decision ultimately made by the District Court judge. In the circumstances the respondent convicted the applicant of careless driving and imposed a fine of €300.00.

5. The applicant contends that the decision to convict was unsafe because the judge showed bias and also was in breach of fair procedures in directing an additional witness. In particular the applicant alleges that bias was shown when the respondent indicated, before the defendant had finished his case, that the evidence of the three independent witnesses' was "irrefutable". Whether this word was used was hotly disputed and the averments of various deponents were subject to cross-examination at the hearing.

6. The upshot of this was that the applicant and his solicitor at the time gave clear evidence that they heard the respondent use the word "irrefutable" on two occasions when the matter was before the District Court. The prosecuting garda gave evidence that she did not hear this word or any such similar word being used and the solicitor for the State gave similar evidence but added that he did not believe that any such word was used by the judge on that day.

7. Having heard the evidence, and noting that the garda and the State solicitor's evidence was, less emphatic, understandably, given that they were asserting a negative, I have come to the conclusion that the respondent did, on the balance of probability, use this word, or a similar word on the day in question.

8. Having made this determination I must now ask the question whether the use of this word in these circumstances indicated bias on the part of the respondent to such an extent that his order convicting the applicant must be quashed. Does the use of the word in the circumstances speak unequivocally of bias?

9. In assessing the significance of the language used by the respondent it is important to understand the nature of the decision making process engaged in by the respondent, or indeed any decision maker in a similar position, at the trial. It is not unusual in cases where a judge has to adjudicate in the adversarial process, to come to a tentative conclusion at the end of the plaintiff's case in a civil matter, and at the end of the prosecution's case in a criminal matter. The nature of the adversarial process means that the plaintiff or the prosecution goes into the evidence first and before the defence has presented its case and at that stage it would be quite normal that there will be a case to answer. It would not be unusual in these circumstances for the judge to take a tentative view on the case. Just because he does so, however, does not mean he is biased. The process is a protracted one and the judge's view may vacillate as the evidence unfolds. What is important, indeed vital, however, is that the judge does not in such circumstances make a definitive determination before all the evidence has been heard. To do so would be in clear breach of fair procedures and in particular would be contrary to the basic principle *audi alterem partem*. Moreover, it is important also that the judge does not give the appearance that he has prejudged a decision and in this respect he should take great care when expressing himself during the course of the trial that he does not express himself in language which would suggest that he has come to a hasty decision in the matter.

10. Whether the language used by a judge during the course of a trial is such that it indicates bias in the sense that it shows that the judge has made up his mind before he has heard all the evidence, depends on the facts and circumstances of each case. The use of an infelicitous word or phrase during the trial by the judge should not always compel such a conclusion. To define bias one must look at the overall picture and in the present case one must contrast the use of that single word with the action of the respondent, in insisting that a further witness should be called to give evidence on the sequence of the traffic lights. Such action does not speak of bias. At most it suggests to the reasonable observer that the judge was impressed by the three independent witnesses' evidence but was prepared to hear evidence which would undermine the assumption that informed his tentative conclusion, that is, that if the motorcyclist and the three independent witnesses had a green light in their favour, the applicant/defendant could not have had the right of passage through the intersection. The applicant challenged this assumption, but had no independent evidence to back it up. Having read the affidavits before the Court and having listened to the witness being cross-examined, I have come to the conclusion

that in using the word "irrefutable", the judge was saying no more than, that he was strongly impressed with the evidence of the three independent witnesses at that stage of the proceedings. It is clear also that he was not impressed with the applicant's evidence. Nevertheless he listened to the defence's arguments and counsel for the applicant was successful in preventing the judge from making a final determination on the matter on that day. Clearly, having listened to the applicant/defendant's evidence he harboured some doubt in relation to the sequencing of the traffic lights and, rather than dispose of the matter without investigating this aspect of the case, he called for another witness and adjourned the matter for another day. This, in my view, was not the action of a man who had made a premature decision that was tainted with bias.

11. It is significant too to note that in doing so, adjourning and calling for an independent witness on the lights sequence, the judge was making a decision in ease of the defendant. The argument about the sequencing of the lights was raised by the defendant in its defence but because he did not have an independent witness or other evidence to support this suggestion the judge was not prepared to accept it without some corroboration. He did, however, see the validity of the argument if the grounding evidence could be produced and it was for this purpose that he adjourned.

12. The test to be applied in assessing whether a judge is biased or not is an objective one. The principles in this jurisdiction are well established in a series of cases, notably *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412, *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 419 and *Dublin Wellwoman Centre Ltd. v. Ireland* [1995] 1 I.L.R.M. 408. In the latter case, the Supreme Court (Denham J.) observed at page 421:-

> "But the test is objective; not whether the learned High Court judge considered she was or was not biased; nor whether the appellant considered the judge was or was not biased; but whether a person in the position of the appellant in this case, a reasonable person, should apprehend that his chance of a fair and independent hearing by reason of the actions of the learned High Court judge in her capacity as chairwoman of the Commission on the Status of Women would prevent a completely fair and independent hearing of the issues which arise. The apprehension of the reasonable person in the position of the appellant is what has to be considered."

13. The same judge in *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412, speaking for the Supreme Court, confirmed and clarified the test. At page 449, she said:-

> "A judge has a duty to sit and hear a case. However, in certain circumstances it is appropriate that he or she disqualify himself or herself from a particular case. The test is not whether that judge believes he or she would be impartial. Nor is it whether the judge or judges on a motion to set aside such a judgment believes the judge was or would be impartial. Nor is it whether the parties consider the judge impartial. The test is objective. This has been analysed by the Constitutional Court of South Africa: *President of the Republic of South Africa v. South African Rugby Football Union* 1999 (4) S.A. 147 at para. 48:-
>
> > '…the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial'."

14. Using this standard in the present case, I do not believe that an objective and informed person in the position occupied by the applicant might reasonably apprehend that the respondent has not brought an impartial mind to bear on the adjudication on the prosecution before him. The use of the word "irrefutable", unfortunate as it may have been, does not impress me to such an extent that, in the circumstances of this case, I should conclude otherwise. In *McAuley v. Keating* (Unreported, High Court, O'Sullivan J., 8th July, 1997), an application for judicial review was brought on grounds of bias in circumstances where the investigating officer had said more than once that he had decided the applicant had committed the offence and had therefore prejudged the matter. O'Sullivan J. said:-

> "I must apply the objective test as described in the above authorities to a determination as to whether in all the circumstances the first Respondent is culpable of prejudgment bias. In my view he is not. I think a reasonable man, appraised of all the circumstances which I have set out in this judgment, might well come to the conclusion that the first Respondent had expressed himself in an infelicitous fashion, or that a legal advisor would have insisted on rephrasing the utterances relied on. I also think, however, that the same reasonable man would be obliged to take note of the careful if not elaborate preparations conducted by or at the direction of the first Respondent in advance of the oral hearing, his manifest and repeatedly stated concern to comply with the requirements of the relevant code and indeed his explicit statement to the applicant on the 25th November, 1996 that he proposed to hold an oral inquiry before coming to a final decision …. In my judgment the Applicant's apprehension of bias is not a reasonable apprehension as identified in the relevant authorities..."

15. This sentiment was clearly endorsed by O'Flaherty J. in the Supreme Court's decision of that case (reported at [1998] 4 I.R. 138).

16. In my view, the decision of the respondent to adjourn the matter until he had evidence from an expert who could give evidence on the traffic light sequence, clearly indicates that he had not pre-empted the matter. That he thereafter, on the second day, preferred the evidence of the three independent witnesses to that of the applicant only indicates an exercise of judicial function well within his entitlement.

Additional witness

17. The applicant also suggested on affidavit that the judge's intervention in relation to the additional witness amounted to advising that the prosecution's proofs and gave the prosecution an opportunity to call another witness when it had closed its case. This argument, however, was not urged on this Court with any great vigour, most reliance instead being placed on the bias point. Nevertheless, it is proper that I should comment on the argument.

18. It is established that the court has a discretion to call a witness of its own motion in a criminal prosecution. This discretion is exercised sparingly and it should always be exercised in accordance with constitutional guarantees of fair procedures.

19. In *Bates v. Brady* [2003] 4 I.R. 111, O'Keeffe J. found that it was clear from the authorities that a judge of the District Court may, in certain circumstances, of his own volition recall a witness to give formal evidence. In that case he relied on the following dictum of Flood J. in *Magee v. O'Dea* [1994] 1 I.R. 500 at page 507 where he stated, *inter alia*, as follows:-

> "Further, our system of justice is an adversarial system. The State presents its case and, as this is a quasi criminal matter, should establish the necessary proofs beyond reasonable doubt. I accept that a judge has a right to recall, or in fact call, on his own motion, a witness. All the authorities would suggest that this is a practice which should be sparingly used, and in particular, sparingly used in criminal matters, where the onus of proof is a strict onus of proof, as otherwise it may appear that he is descending into the arena and becoming partisan."

20. That the respondent has a discretion to call a witness on his own motion, a discretion which was properly exercised, in my view, in this case, was not seriously challenged by the applicant at the hearing. It is worth recalling the circumstances in which the respondent decided to exercise his discretion. When the defence raised the argument that the light was not red when the defendant entered the intersection in question, it was clear to the respondent that there was insufficient evidential basis for this defence and to assess it properly it was necessary to call a witness who would be able to give expert evidence in that matter to the Court. In these circumstances the witness was called not to further the prosecution's case but rather to provide a foundation for the defendant's argument. The respondent in the first instance requested the defence to bring forward such a witness but when the defence declined, the respondent decided to procure such a witness of his own motion and in the interests of doing justice in the case.

21. In the event the said witness's evidence was neutral and was nil in that it neither supported nor detracted from the defence or prosecution case and accordingly did not assist the respondent in reaching his decision. It is difficult to see how the applicant can complain of bias in the present circumstances where, as already noted, the respondent only called the witness of his own motion in ease of the defendant's argument and to do justice between the two parties. In these circumstances, in my view, it was not a material factor.

22. For these reasons I am not prepared to grant the relief sought by the applicant in this case.