THE COURT OF APPEAL

Birmingham J
Edwards J
Hedigan J.

Neutral Citation Number: [2018] IECA 264

Record No : CA 551/16 and CA 555/16

PATRICIA O'MAHONEY

Appellant

V

DISTRICT JUDGE SEAMUS HUGHES AND DIRECTOR OF PUBLIC PROSECUTIONS

Respondents

JUDGMENT of Mr Justice Edwards delivered on the 30th of July 2018.

Introduction
1. The appellant was convicted on the 2nd of October 2014 at Mullingar District Court of an offence of driving whilst under the influence of an intoxicant pursuant to section 4(4) of the Road Traffic Act 2010. In the High Court (before McDermott J) she sought (*inter alia*) an order of *certiorari* quashing her conviction and sentence on various grounds. The appellant was refused any relief by way of judicial review by the High Court judge and the appellant now appeals against his decision.

The Relevant Facts
2. These judicial review proceedings were grounded upon the affidavit of the appellant sworn on the 13th of October 2014, and the documents therein exhibited. A replying affidavit was sworn on the 2nd of November 2015, by Garda Antoinette Kerins, on behalf of the respondents. A full transcript of the proceedings before the District Court was exhibited with the said replying affidavit as exhibit "B" thereto. The availability of this transcript has been of great assistance to this Court, as indeed it must have been to the High Court, in appreciating in full the factual background to these proceedings.

3. Garda Antoinette Kerins had given evidence in the proceedings before the District Court that at approximately 8:30 p.m. on the 12th of September 2013 she had observed the appellant driving a vehicle slowly and erratically. The car approached a roundabout and failed to indicate. It took a very wide berth while circulating the roundabout and left by the first exit. It then approached a second roundabout and again failed to indicate and drove slowly and erratically around it. Garda Kerins said the car *"sort of swerved much wider than would be normal".* The garda activated the blue lights on her patrol car and signalled to the appellant to pull in. The appellant's car slowed and stopped. Garda Kerins got out of her patrol car and approached the appellant's car and spoke to the appellant. Garda Kerins stated there was a strong smell of alcohol and she decided to conduct an alcohol screening breath test using a *Drager* Alcometer. The test resulted in a fail and Garda Kerins, having formed the view that the appellant had consumed an intoxicant, namely intoxicating liquor, which made her incapable of driving a mechanically propelled vehicle, then arrested the appellant on suspicion of having committed an offence under s.4 (1), (2), (3) and (4) of the Road Traffic Act 2010 and took her to Mullingar Garda station where she was detained for the purposes of undergoing an alcohol level breath test.

4. While in detention the appellant co-operated in supplying two specimens of her breath, at 9:28 pm and 9:31 pm respectively, both of which were tested using an Evidenzer IRL machine. A result of 57 microgrammes of alcohol per 100 millilitres of breath was obtained. The legal limit applicable in the appellant's case (as an experienced driver) was 22 microgrammes per 100 millilitres of breath.

5. The appellant was represented by both a solicitor and counsel in the District Court. The District Court judge, having noted the appearances, enquired of the appellant's counsel *"Is this a full fight?"* and received the reply *"It is, yes, judge".* The court having been so informed, the following exchanges then took place between the District Court judge and counsel:

> *judge: Now can I ask you and I always do when it comes to drunk driving cases, are you on a fishing expedition? What I mean by that is, do you want to hear each and every aspect of the entire case, or are you concerned about some aspect of the case?*
>
> *Counsel: I think I need to hear the vast majority if I can deal with issues …*
>
> *judge: Well that means you have an interest in each and every aspect of it.*
>
> *Counsel: Potentially, there are certain issues which I may not have and I will expedite matters as much as I can. If I don't need to hear a particular piece of evidence, I will indicate to the court that I have no difficulty with that piece of evidence. I am not going to elongate the matters in any way.*
>
> *judge: No but the very giving of the evidence by the arresting guard can take some time in itself and it follows a format.*
>
> *Counsel: Yes I understand that, unfortunately I think I will need to hear the vast majority. It may be that I …*
>
> *judge: Well, I will be particularly interested in your submissions later then.*
>
> *Counsel: Very well.*

6. Garda Kerins then gave her evidence in chief. In the course of doing so she was being taken by the prosecuting Garda Inspector

through the events in the Garda Station in the course of which the appellant submitted to a testing of her breath alcohol levels using the Evidenzer IRL machine. Garda Kevins was in the course of describing what had occurred and had commenced to say that she had made a requirement for Ms O'Mahony to do something, when defence counsel interrupted her in the following circumstances:

> *Garda Kerins: …When in the custody suite or in the doctor's room, judge, I made a requirement for Ms O'Mahoney –*
>
> *Counsel: It is accepted that the requirement was made and there is no issue in relation to that.*
>
> *judge: Sorry what did you say?*
>
> *Counsel: I said it is accepted that the requirement was validly made if the garda just wants to go to the end of the test, that's fine.*
>
> *judge: Okay. In other words then to the issuing of the result?*
>
> *Counsel: Yes, judge.*
>
> *judge: Thanks*

7. Very shortly after this exchange the prosecuting Garda Inspector led the following further evidence:

> *Inspector: Do you have the section 13, Ms Kearns?*
>
> *Garda Kerins: Yes*
>
> *judge: Have you got a photocopy of this, counsel.*
>
> *Counsel: Yes, judge, I have seen it.*

8. The reference to a *"section 13"* is understood to be a reference to the statement referred in s.13(2) & (3) of the Road Traffic Act 2010. The relevant provisions state:

> "(2) Where the apparatus referred to in section 12 (1) determines that in respect of the specimen of breath to be taken into account as aforesaid the person may have contravened section 4 (4) or section 5 (4), he or she shall be supplied immediately by a member of the Garda Síochána with 2 identical statements, automatically produced by that apparatus in the prescribed form and duly completed by the member in the prescribed manner, stating the concentration of alcohol in that specimen determined by that apparatus.
>
> (3) On receipt of those statements, the person shall on being requested so to do by the member—
>
> (a) immediately acknowledge such receipt by placing his or her signature on each statement, and
>
> (b) thereupon return either of the statements to the member."

9. It is understood that the *"section 13"* referred to, and that defence counsel acknowledged having seen, was entered as an exhibit before the court. At a later point in the transcript the prosecuting Garda Inspector confirms that it had indeed been entered as an exhibit.

10. During cross examination of Garda Kerins, an issue emerged as to the extent to which the reading obtained from the *Drager* Alcometer contributed to the formation of the requisite opinion to arrest the appellant. The cross examination proceeded as follows:

> *"Q. And I think you performed a test and I think on the basis of that test and failure you formed your opinion; is that correct?*
>
> *A. Well, between that and my own observation of Ms. O'Mahoney.*
>
> *Q. Okay?*
>
> *A. Using both, I would have made my opinion.*
>
> *Q. Right. And if she had not failed the Drager would you still have arrested her?*
>
> *A. No, judge.*
>
> *judge: That's speculation anyway.*
>
> *Q. Yes but I am just asking, so it was the Drager test that formed your opinion in relation to effecting the arrest; would that be fair?*
>
> *A. It was secondary to my initial observations of Ms. O'Mahoney and the strong smell of intoxicating liquor from her breath.*
>
> *Q. But you have indicated that, if she hadn't failed, that you wouldn't have arrested her. So it was the Drager that was I suppose the catalyst for helping you form that opinion; would that be fair enough to say?*
>
> *A. Well, secondary to my initial opinion.*
>
> *Q. Very good. …"*

11. Counsel then cross examined the garda concerning the operational procedure applicable to the use of the Drager Alcometer device. It was suggested that the garda was "supposed" to wait for 20 minutes prior to actually administering the test when

somebody has recently consumed alcohol. This was accepted. The judge intervened to say that a 20 minute waiting period was only advised, that it was not a mandatory requirement. The appellant's counsel indicated that there was a High Court case on the particular point, and it clear he was referring to *D.P.P. v. Marie Quirke* [2003] IEHC 141, although the case was not mentioned by name at this point. The judge responded "Yes, but it's not mandatory", and that the Drager Alcometer was "still only a screening device". The judge continued:

> *judge: And you have heard her evidence saying that it was only a secondary to her physical observations of your client.*
>
> *Counsel: Yes I heard that judge but …*
>
> *A. [Witness:] judge, if I did not have a Drager Alcometer in the patrol car at that time I would have arrested Ms. O'Mahoney on the basis of --*
>
> *Judge: That is my understanding of the totality of your evidence, yes*
>
> *Counsel: It is not quite what you said but in any event?*
>
> *Judge: Well that is my understanding of her evidence. That is what she did say, okay?*
>
> *Counsel: I can address the court …*
>
> *Judge: No, no I don't want confusion to be arising and leave everything till the end, I am happier to deal with matters as they arise.*
>
> *Counsel: Very good …*
>
> *Judge: I am fresher, and I have heard her evidence only moments ago.*
>
> *Counsel: Yes.*
>
> *Judge: … and she said it was a secondary aid to her initial opinion and her primary reasons for arresting was the physical characteristics that were apparent from your client."*
>
> *Counsel: Yes*
>
> *Judge: And she used the breathalyzer as a screening device to copper fasten or endorse or whatever way you want to put it.*
>
> *Counsel: Very good.*
>
> *Judge: That's the totality and effect I receive from your evidence.*
>
> *Counsel: I accept that much except that the garda when I asked her specifically would she have arrested her, she said no.*
>
> *Judge: Well I didn't get that now.*
>
> *Counsel: That is something that the court has to take consideration.*
>
> *Judge: Sorry, is that the situation?*
>
> *A. If I had breathalysed Ms. O'Mahoney and it had come back pass, it is a possibility judge. But there was a very strong …*
>
> *Q. Judge: It is a possibility what?*
>
> *A. That I wouldn't have arrested her.*
>
> *Q. Judge: Go on?*
>
> *Counsel: I think she put it*
>
> *Judge: Let her finish her sentence.*
>
> *A. I could have dealt with the situation differently but the Drager did come back with a result of fail.*
>
> *Counsel: That is the point I am trying to get across, judge. I don't know whether … maybe I was not making it correctly.*
>
> *Judge: It is only apparent to me now that what the garda said, "it's a possibility that I may not have arrested her".*
>
> *Counsel: Yes that is …*
>
> *Judge: It is only a possibility, it is not a probability.*
>
> *Counsel: Yes that is the point I am trying to get across. That it appears from her evidence that it was the Drager, the failure on the Drager that was the catalyst for effecting the arrest.*
>
> *Judge: Exactly*
>
> *Counsel: That is fine.*

Judge: That is why I used the word copper fasten

Counsel: Very good, thank you judge."

12. Towards the very end of his cross-examination defence counsel elicited the following further evidence:

Q: … If I can just fast forward then, you made requirements and she complied with your requirements. Just in terms of the end of the test, I know I said that you could skip to the end of the test, but can I just ask you exactly what happened after she had given the samples, just for completeness?

A: Well, the machine takes a number of minutes to process the specimen, so during that time I would have spoken to Ms O'Mahoney, or if she needed to go to the toilet she could have gone at that stage. I don't have any notes to that effect, but generally I just speak to the person who is there.

Q: And do you remember anything else happening?

A: No, judge.

13. There being no further witnesses for the prosecution, that concluded the prosecution's case. Defence counsel then proceeded to make a number of submissions to the District judge in support of an application for a direction. The application was based on three limbs.

14. The first was a submission that the prosecution had failed to satisfy an essential proof, namely to adduce evidence that Garda Kerins had signed the section 13 statement.

15. The second was that, on the evidence before the court, the failed Draeger test had been the catalyst for the arrest. However, there was also evidence that before administering the Draeger test Garda Kerins had asked Ms O'Mahoney if she had been drinking, that Ms O'Mahoney had replied "yes" and that she had stated that she had come from her friend's house. Counsel submitted that Garda Kerins therefore had reason to suspect that Ms O'Mahoney had recently been drinking and that on the authority of *D.P.P. v. Marie Quirke* she was obliged to wait for 20 minutes before administering the Draeger test, so as to outrule any possibility of a false positive result. Her failure to do meant that she could not have formed the bona fide opinion necessary to ground a lawful arrest and as a result the arrest was bad.

16. The third limb of the application was that once Ms O'Mahoney had been brought to the Garda Station, Garda Kerins was obliged, in circumstances where she was satisfied that the arrested person was "nil by mouth", to forthwith test her breath using the Evidenzer IRL machine. However, the evidence was that the test was only commenced 15 minutes after they had arrived at the Garda station. Her explanation for doing so had been that she had complied with a Garda circular furnished to her by her Sergeant which suggested that a 15 minute observation period was "best practice". Counsel submitted that Ms O'Mahoney had been detained longer than was lawfully required, and that accordingly she was in unlawful detention at the time that her breath was tested using the Evidenzer IRL machine.

17. The District judge rejected all three limbs of the submission in the following circumstances.

18. The first limb was rejected on the basis that the point was an unfair one to make in circumstances where counsel had in effect indicated that he was taking no issue with the procedural formalities associated with the administration of the Evidenzer IRL test and had stated that the witness could go straight to the issuing of the result. However, when it emerged that this was the District judge's understanding, counsel sought to dispute that he had made so extensive a concession. Moreover, he relied on the matters elicited at the end of his cross-examination (see paragraph 11 above) as supporting his belief that he had kept formal procedures in relation to the s.13 statements in issue.

19. The dispute is reflected in the following exchanges:

COUNSEL: Yes, judge, I suppose I'll start in reverse in relation to my submissions. Obviously the Court is probably familiar with the Supreme Court case Lloyd Freeman in relation to the signing of the actual documents. There's no indication whatsoever given there that the garda signed the section 13 slip. She has given no evidence whatsoever in relation —

JUDGE: Ah now, be clear, counsel, you did ask for the matter to be moved on,

okay.

COUNSEL: Well, I did, and she didn't say it and I went back and allowed her to do so. I think I was quite fair in relation to that because —

JUDGE: As far as I am concerned, you indicated quite clearly that nothing was arising from that moment on.

COUNSEL: From the requirements, which is true, but went back and I think I was quite fair in allowing her, I said, after that happened —

JUDGE: Sorry, now, sorry, sorry. Just to say to you, first of all, you are not in a Dublin court.

COUNSEL: I understand, judge.

JUDGE: If I am addressing you, you won't talk across me.

COUNSEL: I apologise, judge.

JUDGE: As far as I'm concerned, and this is my ruling on the matter, you made it, you conveyed the impression in tins court that from that moment on there was nothing turning on her evidence; okay? And then she circumvented her evidence by facilitating you; okay?

COUNSEL: Very good. Can I respond, judge?

JUDGE: You can.

COUNSEL: With respect I don't agree that that's what I said.

JUDGE: That's fine.

COUNSEL: I indicated that I have no problem with the requirement and that that was all I had no difficulty with, that a valid requirement was made and that's exactly what I said to the Court and, even if that was not what I said, I think I was very fair in relation to my cross-examination by asking her, going back through the procedure again, and asking her —

JUDGE: Okay, can I get the inspector to respond?

INSPECTOR: judge, in relation to the signing of the section 13 document, it was handed in, the original, and it stands on its own merits. It was signed by the guard, that is proof of that, that section 13 was handed in, the original —

JUDGE: There's certainly two signatures on it.

COUNSEL: Yes, but unfortunately that's not what Lloyd Freeman said which is a decision of the Supreme Court, it indicates that —

JUDGE: I'm not with you, sorry. Not with you.

COUNSEL: Just can I ask the Court why the Court isn't with me?

JUDGE: I have already given you my reason.

COUNSEL: With respect, judge, I don't think that's a correct reason because I didn't in fact say --

JUDGE: Sorry, I have made a ruling on the matter, so move on. Have you any other point to make?

COUNSEL: I do, judge, but I'm just a little concerned in relation to that particular point because I —

JUDGE: If you have a concern, [COUNSEL], take it elsewhere. I have made my ruling on the matter. I'm not with you on that. As far as I'm concerned, you gave the clear impression to the Court that once she commenced the test that you were accepting the rest of her evidence. That's my understanding of it and indeed it would appear it was the understanding of the garda because she didn't complete her evidence in that regard.

COUNSEL: She didn't, judge, but again I think we are at odds in relation to that ~

JUDGE: We are, so that's it. This is not a salad bar where you can pick and choose what you like. I've made my decision on the matter and that's final.

COUNSEL: Very good, judge. I don't think that's what I was doing, but I'll move on in any event.

20. The second limb was rejected on the basis that the District judge was not satisfied that counsel was correct that the evidence established that the failed Draeger test was the catalyst for the arrest. The District judge repeatedly interrupted counsel's submission to say that while Garda Kerins had given an answer in cross-examination suggesting that that she would not have arrested Ms O'Mahoney if she hadn't failed the Draeger test, she had later clarified this to say that it was only *"a possibility"* that she would not have done so, as the following exchanges illustrate:

JUDGE: Yes, but she is entitled to clarify her evidence and the totality of her evidence is that it was a possibility that she may not have arrested her. COUNSEL: Yes.

JUDGE: You are picking out bits. And when it was further clarified, I must take the totality of the evidence.

COUNSEL: Yes, I understand that, but that's my job, judge, is to take the evidence and present it to the Court as I am doing.

JUDGE: Yes, okay, and my job is to take the totality of the evidence. COUNSEL: Yes, judge.

JUDGE: And then make a decision on the totality of the evidence.

21. In circumstances where the judge was indicating a clear view of the evidence, albeit one that counsel disagreed with, counsel then sought to make an argument in the alternative, namely that if the judge was right, it followed that there had been no need to administer a Draeger test at all, that the arrest should have been effected ever before an unnecessary Draeger test was administered, and that in circumstances where Ms O'Mahoney was held at the scene longer than she should have been the arrest was consequently bad in any event.

22. The alternative argument on the second limb equally did not find favour with the District judge, as is reflected in the following exchanges:

COUNSEL: But as the Court will be aware, the garda does not have to actually perform a Draeger in order to effect the arrest –

JUDGE: That's right.

COUNSEL: — if the garda is satisfied with the characteristics that are evident already, if the garda is already satisfied that the person has committed the offence, they do not have to --

Q. JUDGE [Addressing Garda Kerins]: That's right. You carried out a superfluous test that was not nccessary for you to carry out?

A. No, judge.

Q. JUDGE: Yes. The impression from your evidence is that you had sufficient

physical characteristics and driving characteristics —?

A, Yes, judge.

Q. JUDGE: -- to have proceeded without administering the Draeger, okay? COUNSEL: Well that's essentially my point, judge.

JUDGE: Well, you have made your point. Any other point?

COUNSEL; Well, I don't know if the Court is with me. The Court —

JUDGE: No, I'm not with you.

COUNSEL: — hasn't indicated one way or the other.

JUDGE: No, I'm not, no.

COUNSEL: Oh well, can I ask the Court why the Court is not with me -JUDGE: I have already given my answer. It's implicit in my answer.

COUNSEL: Well, it isn't, judge, because I don't know. The Court seems to have gone with me in terms of asking the garda why she was carrying out a superfluous test.

JUDGE: I didn't go with you at all. I just made the observation to the garda that it was superfluous, having regard to the evidence she has already given, for her to administer the Drager. I'm not criticising her that she subsequently administered the Drager and she said it's a possibility that she may not have arrested, but she actually — it's what she did is what counts, not what she may or may not have done.

COUNSEL: Yes.

JUDGE: Okay.

COUNSEL: But unfortunately I wasn't there on the night so I have to elicit the questions from the garda through cross-examination and that's the only thing I can do. I can ask her whether or not, because obviously if the Draeger was the catalyst for the arrest —

JUDGE: I am not criticising any of the questions you have asked the garda. COUNSEL: Fair enough.

JUDGE: Anything else?

23. The third limb of the submission was rejected in circumstances that are uncontroversial in the context of this judicial review, and it is therefore not necessary to indicate the District judge's reasons for doing so.

Grounds of Application for Judicial Review

24. The appellant was granted leave to apply for divers relief by way of judicial review on a number of grounds, summarised by the learned High Court judge as follows:

> (1) The first named respondent acted in breach of fair procedures by enquiring from defence counsel prior to the commencement of the case:
>
> > (a) What the nature of the applicant's defence was;
> >
> > (b) Whether counsel was on a "fishing expedition" or whether he could shorten the evidence that was proposed to be given by the investigating garda. (Grounds (i), (ii) and (iii)).
>
> (2) The first named respondent erred in law and acted in excess of jurisdiction by stating, after defence counsel had indicated that he would need to hear all of the evidence, that he would remember this when defence counsel was making submissions later in the case. It was submitted that this comment would lead an objective person to believe that the first named respondent was biased, or had come to a view as to the merits of the case prior to the conclusion of the evidence or was going to or was likely to reject any submissions made by defence counsel as a result of his not informing the court as to the specific nature of the applicant's defence (Ground (iv)).
>
> (3) The first named respondent made comments during the course of the hearing which indicated or tended to indicate that he did not have an open mind in the matter and had made up his mind about the guilt of the applicant without hearing the defence case in its entirety or the final legal submissions on behalf of the defence (Ground (v)).
>
> (4) The first named respondent interrupted defence counsel's cross-examination excessively and obliged him to make submissions on points of law while defence counsel was still cross-examining the investigating garda in relation to the particular point in issue (Ground (vi)).

The Judgment of the High Court

25. Addressing the reference to a *"fishing expedition"* the High Court judge stated that he was *"not satisfied that the reference to a 'fishing expedition' of itself could be taken as an indication of unfairness on the part of the learned judge".* While acknowledging that counsel may raise any appropriate defence, the High Court judge considered that regard had to be had to the extremely busy lists to be administered in the District Court. The District Court judge's remarks *"may be regarded as an appeal for focus during the course of the evidence and an indication to counsel that he would appreciate it if counsel indicated the course of the case and whether certain matters were not in issue."* Expedition and efficacy were to be encouraged and that is very often achieved by an indication by the defence that the admissibility of certain evidence is accepted or that a particular state of affairs is accepted as a matter of fact.

26. In relation to District Court judge's later comment, i.e., *"[w]ell, I'll be particularly interested in your submissions later then"*, the High Court judge did not agree that these were properly to be interpreted as a threat that some kind of consequence might be visited upon the appellant if a 'full' defence were to be advanced on her behalf, nor did he agree that it was an indication of bias or pre-judgment on the District Judge's part." He acknowledged that remarks made during a hearing may later be subject to differing interpretations.

27. Regarding the trial judge's interjections during the cross-examination of Garda Kerins in relation to the extent to which the reading from the Drager Alcometer contributed to the formation of the Garda's requisite opinion leading to the arrest of the applicant, the High Court judge held that the appellant bore a significant burden to establish that the nature and level of the intervention was such as to vitiate the lawfulness of the trial. He referred to a number of authorities, including *The People (Director of Public Prosecutions) v. McGuinness* [1978] IR 189, and *Gill v. Connellan* [1987] IR 541. Upon reviewing the jurisprudence, he concluded that

> *"assessment of a challenge based upon judicial intervention in cross examination depends very much on the facts of a particular case, the nature and extent of the interruptions of which complaint is made, their potential or actual effect on the flow of cross examination, and if it is readily discernible, on the answers given by the witness."*

28. The High Court judge was not satisfied that the threshold identified by Morris J in *Dineen v. Judge Delap* [1994] 2 IR 228 and by Lynch J in *Gill v. Connellan*, namely that *"the District judge's conduct could reasonably give rise in the mind of an unprejudiced observer to the suspicion that justice was not being done and therefore breached the fundamental rule that not only should justice be done but should be seen to be done"* had been reached. Though the District Court judge had frequently intervened in the cross examination of Garda Kerins by the appellant's counsel, the High Court judge was not satisfied that the District Court judge was *"striving or endeavouring to get the witness to change her testimony or acting in a manner which gave rise to a perception of bias on his part thereby rendering the trial unfair."* He added: *"In addition, I am not satisfied to infer that the exchanges between counsel and the judge in respect of the suggested "concessions" made in respect of what occurred later in the garda station give rise to an apprehension of bias though they were undoubtedly somewhat brusque."*

29. In the proceedings before the High Court, the respondent had submitted that the District Court judge had been right to intervene, because the cross-examination was as to a matter of questionable relevance. The question for the District Court judge was not whether the result of the roadside screening test was potentially unreliable but rather whether the arrest was based on a *bona fide* opinion of the garda which was reasonable. The High Court judge, having reviewed the authorities cited to him, i.e., *The State (Healy) v. Donoghue* [1976] IR 325; *The People (Director of Public Prosecutions) v Kulimushi* [2011] IEHC 476; and *The People (Director of Public Prosecutions) v. Quirke* [2003] IEHC 141 which adopted the approach of the House of Lords in *Director of Public Prosecutions v. Carey* [1970] AC 1072, concluded that *"whatever about the advisability of waiting 20 minutes before administrating the Drager test, there was ample evidence upon which the learned judge could conclude beyond reasonable doubt that Garda Kerins had a bona fide suspicion sufficient to justify an arrest."*

30. Further, the High Court judge was not persuaded that the case was an appropriate one in which to grant relief by way of judicial review in circumstances where it was not the function of the High Court, in judicial review proceedings, to act as an appellate court.

31. The appellant had had the right to *"an effective and convenient legal remedy"* in the form of having an appeal heard *de novo* in the Circuit Court, whereby all the evidence would be re-examined and all submissions reassessed. The Court held that *"this is exactly the exercise which the court in this case was invited to undertake."*

32. In his ultimate conclusion the High Court judge held:

> *"The applicant was very well represented in the District Court by counsel who demonstrated skill, patience, and determination. While the interventions of the learned judge may have presented some difficulties for counsel during the hearing, I am not satisfied they reached a threshold such as to give rise to a breach of fundamental requirements as to justify the granting of an order of certiorari in this case."*

Grounds of Appeal

33. The appellant relies on eight grounds of appeal as per the notice of appeal, as follows:

> i. The trial judge incorrectly and without justification and contrary to appropriate legal principles drew inferences favourable to the respondent's case when this was against the objective evidence available by way of a transcript of the hearing in the District Court.
>
> ii. The trial judge erred in fact or in law by finding that the District judge's reference to a "fishing expedition", prior to the case commencing, was simply an appeal by the District judge for focus, as opposed to an attempt to force counsel for the appellant to reveal his defence prior to the case commencing;
>
> iii. The trial judge erred in fact or in law by finding the District judge's reference to having an interest in counsel for the appellant's later submissions, on foot of counsel not having indicated what appellant's defence was, could not have given rise to an apprehension of objective bias;
>
> iv. The trial judge erred in law by concentrating on the merits of the underlying arguments raised in the District Court as opposed to the consequences of the District judge's interventions and interruptions on foot of these arguments which rendered the trial unsatisfactory;
>
> v. The trial judge erred in law and in fact by finding that the level of interruption and intervention occasioned by the District judge were insufficient to create and apprehension of objective bias;

vi. The trial judge erred in law and in fact by finding that the interventions by the District judge were not an attempt to get the witness to change her testimony as previously elicited in cross-examination;

vii. The trial judge erred in law and in fact by disregarding significant comments and interventions made by the District judge over the course of the hearing, which, it had been argued, would have given rise to apprehension of objective bias;

viii. The trial judge erred in law and in fact by finding that an appeal to the Circuit Court would have been a more appropriate remedy when the gravamen of the case advanced had been to the effect that a fair trial had not been had in the District Court.

The Arguments

34. In an almost 10,000 word written submission to this Court, counsel for the appellant addresses the issues under headings of *"Bias"*, *"Interruptions of cross-examination and application for a direction"* and *"Appropriateness of an appeal".* It is proposed to follow the same format.

"Bias"

35. The appellant's submission refers us to *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 412 and to *Kenny v Trinity College Dublin* [2008] 2 IR 40 in support of what is said to be the legal test in respect of apprehended bias, namely whether a reasonable person in the circumstances, with knowledge of the facts, would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues.

36. It was submitted that, during the course of the appellant's trial, the level of interference, the comments and the interjections made by the District Court judge would reasonably give rise in the mind of an unprejudiced onlooker to the suspicion that justice was not being done.

37. In support of that general assertion the appellant's submission points to the reference to a *"fishing expedition".* This is said, by reference to jurisprudence relating to discovery on the civil side, to connote a practice deprecated by the courts. However, as is argued later in the submission, the practice is certainly not to be deprecated on the criminal side. On the contrary, in circumstances where the prosecution must prove the entirety of the case against an accused, and the accused does not bear the burden of proving his innocence, it is entirely legitimate for defence counsel to engage in, what was characterised in *O'Broin v Ruane* [1989] IR 214 as, *"a fishing cross-examination"*

38. The submission argues that the District Court judge's use of the expression *"fishing expedition"* had the capacity to intimidate defence counsel and inhibit him in his task of seeking to defend his client. Secondly, and importantly, the very asking of the question disclosed a most troubling mind set on the part of the District Court judge. It was said that the comment disclosed either an ignorance of, or a hostility towards, the fundamental duty of defence counsel.

39. It was further submitted that the appellant's complaints are bolstered by the additional comments made by the District Court judge on the issue. When counsel indicated that he would need to hear the entirety of the evidence, but would expedite matters as and when he could, he was informed that *"the very giving of evidence by the arresting guard can take some time in itself and it follows a format".* This, says the appellant, clearly showed that the District Court judge was attempting to contract the length of the hearing by essentially asking counsel to dispense with certain elements of the case. While it is accepted by the appellant that the District Court judge did not go as far as to tell counsel he could not run his case in this way, his final remark on the issue, namely that he would be *"particularly interested in [his] submissions later then"* is said to be particularly telling. It is suggested that it had nothing whatsoever to do with saving court time but had everything to do with possible consequences for the defendant. The appellant's submission asks rhetorically: what was the subliminal message being conveyed to counsel and any other lawyers in court? It is suggested that the message would have been clearly understood by anyone *"who has knowledge of the facts"* in the sense used by Fennelly J in *Kenny v Trinity College Dublin*, namely that it was a thinly veiled threat that there could be unspecified adverse consequences for counsel's client, and would certainly "give rise in the mind of an unprejudiced onlooker to the suspicion that justice was not being done" – per Denham J in *Bula Ltd v Tara Mines Ltd (No 6).*

40. The submission goes on to criticise the decision of the High Court judge on the issue of bias and in particular his finding that he was *"not satisfied that the reference to a 'fishing expedition' of itself could be taken as an indication of unfairness on the part of the learned judge"*. It was submitted that manifestly the District Judge was asking counsel what the nature of his defence was, and that any other interpretation was "fanciful".

41. Moreover, with respect to the High Court judge's ruling on what I have earlier referred to as the allegedly thinly veiled threat, it has been submitted that the appellant is at a loss to see how that particular exchange could be interpreted benignly and that such a benign interpretation was overly favourable to the District Court judge in this case. It was further submitted that McDermott J's interpretation of the exchange, as meaning that the District Court judge was indicating that, *"he would appreciate it if counsel indicated the course of the case and whether certain matters were not in issue"*, is at odds with the transcript.

42. The appellant, while accepting that some District Courts are exceptionally busy, submits that there was no evidence before the High Court that the first named respondent's court was exceptionally busy. Accordingly, the High Court judge's comment that regard had to be had to the extremely busy lists to be administered in the District Court, which implicitly included the first named respondent's court, lacked the necessary evidential foundation.

43. In responding submissions (of equal length to the appellant's - again almost 10,000 words), counsel for the DPP disputes the appellant's interpretation of the District Court judge's remarks in the exchange at the outset of the hearing and makes three main points on the bias issue. First, she says that the transcript is clear that the District Court judge did not ask counsel for the appellant what his client's defence was. Secondly, she says that it is difficult to maintain with credibility that the reasonable observer would be of the view that there was clear evidence of objective bias where experienced counsel did not consider the comments sufficient to ground an application for recusal. Thirdly, she contends that the High Court correctly acknowledged the reality that *"remarks in the course of a hearing may later be the subject of differing interpretations"* and submits that the District Court judge's statement that he would be particularly interested in counsel's submissions later could equally be interpreted as simply an acknowledgment by the District Court judge that he understood that almost everything was in issue and that therefore he could expect to hear detailed submissions from counsel at the appropriate time.

"Interruptions of cross-examination and application for a direction"

44. The appellant contends that in this case the level of interference and interruption by the District Court judge was such that the District Court judge was to be regarded as having sacrificed objectivity by entering the fray. We have been referred to extensive extracts from *The People (Director of Public Prosecutions) v. McGuinness* [1978] IR 189 in support of this submission. In particular, it was submitted that it was held in *McGuinness* that a judge *"should intervene only when cross-examining counsel mis-states evidence already given or asks a question which the witness may not understand, or when the judge thinks that the witness has misunderstood the question",* and that it was clear that none of these factors precipitated the interruptions and interventions in the instant case.

45. The first interruption relied upon by the appellant, which led onto the larger interruption on the same issue, resulted from defence counsel's cross-examination of Garda Kerins in respect of the grounds for the formation of her opinion relating to the arrest of the appellant. The appellant maintains that defence Counsel had just secured a clearly valuable concession from Garda Kerins when the District Court judge interrupted him. Any practitioner in the area and any experienced judge would have appreciated this. After Garda Kerins had accepted she would not have arrested the appellant had she not failed the Drager roadside test, the judge interjected to state that Garda Kerins' answer was *"speculation anyway".* It was submitted that a valid arrest for the offence with which the appellant was charged is predicated on the arresting Garda having formed the requisite legal opinion prior to effecting the arrest. Accordingly, a challenge to the formation of the opinion can form the basis of a successful submission of *"no case to answer"* at the appropriate stage in the trial. It was therefore perfectly legitimate to seek to cross-examine Garda Kerins as to the basis for her opinion.

46. It was submitted that this was an unnecessary interruption of defence counsel's cross-examination on a sensitive and important area, that it served no purpose, and that it was unnecessary to enable the District Court judge to follow and appreciate what the witness was saying. It was submitted that it could lead an objective onlooker to have concerns as to whether the District Court judge was approaching the case in a fair manner. It also confirms that the District Court judge was immediately aware of the significance of the concession.

47. The lengthier interruption that followed shortly thereafter occurred as defence counsel was beginning to cross-examine Garda Kerins in respect of her operation of the Draeger device. It was submitted that:

> "Apart from the obvious difficulties an objective observer would have with considering that interjection to be unbiased, it is clear the Judge was seeking to 'correct' the evidence of the Garda and to bolster the prosecution case. It was not a random, unfortunate, intervention. [The District Court judge] was inviting the Garda, indeed, in context, requiring her, to revise her evidence at the earliest opportunity, which she duly did."

48. It was further submitted that the interjection left counsel in the invidious position of having to conduct a legal submission in the midst of his cross-examination of a witness, with the run-on effect that the progress he had made thus far was effectively wiped out as a result. The trial judge was said to be providing a rolling Advice on Proofs to the prosecuting Garda. It was submitted that the position counsel found himself in was resonant of that in *Gill v Connellan* [1987] IR 541 at 547 where Lynch J granted certiorari on grounds including that the applicant's solicitor:

> *"found himself trying to cross-examine the arresting garda and make legal submissions as to relevance and further legal submissions as to the propriety of the manner of taking the blood sample all at the same time and as a result of this none of these tasks could be properly accomplished by the solicitor."*

49. The appellant asks this Court to note that, notwithstanding the District Court judge's constant assertions that the appellant's failure on the Drager device was only secondary to Garda Kerins' physical observations of the appellant, Garda Kerins had not in fact given any evidence as to her physical observations of the appellant, other than to state that she had detected a strong smell of alcohol. It was submitted that not only did the District Court judge assert this position on a number of occasions, he went further and stated that Garda Kerins *"said it was a secondary aid to her initial opinion and her primary reasons for arresting was the physical characteristics that were apparent from your client".* The appellant says it is clear from the transcript that Garda Kerins never gave this evidence and so the trial judge could not have had a note of it. It was an attempt by the District Court judge to bolster the prosecution case, but one which was not supported by the evidence.

50. When counsel pointed out that the judge's assertion was unsupported by the evidence, and that indeed that Garda Kerins had conceded to him in cross-examination that she would not have arrested the appellant had she not failed the Draeger test, the District Court judge had stated that he *"didn't get that now".* The appellant submits that in the light of what had transpired, and in particular the judge's interjection to say that the evidence elicited had been speculation:

> "it is difficult to see how the [District Court judge] could claim shortly afterwards that he had not ever heard that from Garda Kerins. Garda Kerins then revises her evidence again and indicates, in response to a question from the [judge] that if she had breathalysed the appellant and it had come back 'pass', it was a possibility that she would not have arrested her. The District Court judge had then stated to Counsel that this *was 'only a possibility, it's not a probability'*."

51. It was submitted that these interruptions and interjections damaged the effectiveness of the cross-examination being conducted by counsel and diverted it from the course that counsel intended to pursue. In addition, an independent observer would be suspicious that the interruptions and subsequent pronouncements had caused the prosecution witness to change her evidence and the judge to sacrifice his objectivity.

52. Moving then to the further interruptions and exchanges during defence counsel's legal submissions that there was no case to answer; including, in the middle of counsel's submissions and after the prosecution had closed its case, the addressing of further questions from the bench to the prosecution's only witness, the appellant takes issue both with the fact of these interruptions occurred, and with how her counsel was treated by the bench during the exchanges in question.

53. In relation to the exchange concerning the extent of counsel's concession with respect to the need to adduce formal proofs, while the appellant vehemently maintains that there could have been no genuine misunderstanding as to the extent of the concession actually made, her complaint now focuses primarily on how the bench dealt with counsel and it is again contended that a dispassionate observer, with knowledge of the facts, would have apprehended bias on the part of the court. The appellant contends that it is unclear from the transcript as to why the District Court judge purported to admonish counsel for speaking over him. The transcript outlines that counsel only spoke after the judge had finished and it was, in fact, the judge who interrupted counsel as opposed to the other way around. Moreover, the appellant complains that the remark about counsel not being in a *"Dublin court"* was gratuitous and inappropriate.

54. The appellant further complains that when her counsel, who had asked the District Court judge if he could respond to his (the judge's) stated concern and had been told that he could, attempted to address the court he was interrupted by the judge who cut across counsel's submission and prematurely invited the prosecuting Inspector to respond in turn to counsel. The Inspector then referred to the s.13 statement that had been exhibited and contended that *"it stands on its own merits*", i.e., submitting in effect that it was a piece of real evidence, and that as it manifestly bore a signature purporting to be that of Garda Kerins this was a matter that the court could take account of, notwithstanding that Garda Kerins had not stated in her oral evidence that she had signed the s.13 statement. When the appellant's counsel then attempted to make a further submission in rejoinder and to draw the District Judge's attention to the High Court's decision in *The People (DPP) v Lloyd Freeman* [2009] IEHC 179 (counsel had mistakenly suggested it was a decision of the Supreme Court) he was again interrupted and cut off by the bench, the District Court judge stating *"I'm not with you, sorry. Not with you".* Accordingly counsel was not allowed to complete his submission and in particular to state the effect of, or to hand in, the *Freeman* decision. The appellant maintains that the *Freeman* decision had been directly in point in relation to whether the exhibited document alone could suffice to establish that a s. 13 statement had been "duly completed" in the absence of oral evidence from Garda Kerins herself that she had signed it.

55. It was further complained that when counsel enquired as to why the judge was not with him, the District Court judge responded *"I have already given you my reason".* As this ruling was made before counsel had finished his submission, and in circumstances where he was not allowed to do so, this, it is said, was a case of clear pre-judgment by the presiding judge. When counsel attempted to persist and to suggest that the judge was mistaken in his understanding of the extent of counsel's concession he was accused, in effect and in intemperate terms, of being argumentative with the court, the District Court judge stating:

> *JUDGE: If you have a concern, [COUNSEL], take it elsewhere. I have made my ruling on the matter. I'm not with you on that. As far as I'm concerned, you gave the clear impression to the Court that once she commenced the test that you were accepting the rest of her evidence. That's my understanding of it and indeed it would appear it was the understanding of the garda because she didn't complete her evidence in that regard.*
>
> *MR CLARKE: She didn't, Judge, but again I think we are at odds in relation to that —*
>
> *JUDGE: We are, so that's it. This is not a salad bar where you can pick and choose what you like. I've made my decision on the matter and that's final.*
>
> *COUNSEL: Very good, Judge. I don't think that's what I was doing, but I'll move on in any event.*
>
> *JUDGE: No, but that's the impression you are giving to me, okay?*
>
> *COUNSEL: Very good, Judge. Well, I apologise if that's the impression I was giving --*
>
> *JUDGE: That's okay.*
>
> *COUNSEL: -- but it certainly isn't what happened.*
>
> *JUDGE: If you don't like my rulings, you might like some, there's others you mightn't like, but the bottom line is I have the function to make the decision in moment on there was nothing turning on her evidence; okay? And then she circumvented her evidence by facilitating you; okay?*

56. The appellant further complains that in relation to the second limb of her counsel's submissions, in which he attempted to place reliance on Garda Kerin's original concession that she would not have arrested the appellant if she had not failed the Draeger test, he was again interrupted by the District Court judge, who stated that, on the basis of Garda Kerin's revised evidence, this was only a possibility and that Garda Kerins was *"entitled to clarify her evidence and the totality of her evidence is that it was a possibility that she may not have arrested her."* The appellant's complaint is that the witnesses *"clarification"* came about directly as a result of the judge's interventions.

57. It is further complained that again, in relation to this limb of the submission, the Inspector was invited to respond before the appellant's counsel was finished. In addition, the District Court judge addressed further questions to the prosecution's only witness in the middle of counsel's submission, and after she had concluded her evidence and the prosecution case had closed. Moreover, it is said, the judge's questions suggested to the witness evidence that she had not in fact given up to that point:

> *JUDGE: That's right. You carried out a superfluous test that was not necessary for you to carry out?*
>
> *No, Judge.*
>
> *JUDGE: Yes. The impression from your evidence is that you had sufficient physical characteristics and driving characteristics --?*
>
> *Yes, Judge.*
>
> *JUDGE: -- to have proceeded without administering the Draeger, okay?*
>
> [emphasis added]

58. It was submitted that it was as a direct result of this inappropriate intervention and the judge's persistence that the witness acquiesced and changed her evidence. The appellant relies upon *Dineen v Judge Delap* [1994] 2 I.R. 228 as supporting this aspect of her complaint, namely that this intervention by the District Court judge crossed the line and was wholly inappropriate.

59. It is further complained that when Counsel clarified a particular part of the evidence, which was important to the submission he had made, the first-named Respondent told him that this was *"neither here nor there".*

60. The appellant maintains that the High Court Judge's ruling concerning the District Judge's interventions was erroneous. The interventions went far beyond "robust exchanges" that were "undoubtedly rather brusque", as they were characterised by the High Court judge. Quite apart from their browbeating nature they had the effect of de-railing Counsel from the course he was attempting to pursue, and were redolent of what had occurred in *Dineen v Judge Delap* [1994] 2 I.R. 228. Counsel was entitled to make his submissions in his client's interest and to have them properly assessed on their merits. This did not happen due to the trial judge's

interventions.

61. With regard to the High Court judge's remark that *"the applicant was very well represented in the District Court by counsel who demonstrated skill, patience and determination*", the appellant maintains that this was not a curative factor that somehow absolves the District Judge of conducting the proceedings unfairly. It was submitted that the High Court judge had misdirected himself as to the application of the law. The guiding principle to be extracted from the case law in this area is whether a reasonable, objective and informed observer might justly fear the judge's ability to preside over a wholly impartial hearing. Furthermore, as in *Maher v Kennedy* [2011] IEHC 207, such an observer would also fear that the judge appeared resolute in his determination to find against the appellant, irrespective of the merits of the arguments of counsel. Therefore, counsel for the appellant submitted, it is clear that the merits of the arguments made or the resolution, skill or patience of the advocate making the arguments have nothing to do with the test to be applied.

62. Finally, it is complained that several of the District Judge's interventions, upon which the appellant placed reliance, are not addressed at all by the High Court judge in his judgment. These include the gratuitous reference to counsel not being in a *"Dublin court"*, the unwarranted accusation that counsel had talked across him when that was manifestly not the case, as the transcript bears out, and the reference to the court as not being a *"salad bar where you can pick and choose what you like."*

"Appropriateness of an appeal"

63. It was disputed on behalf of the appellant that she used the High Court as a quasi-appellate court to re-run the District Court proceedings. On the contrary it had been counsel for the respondent who had attempted to re-argue the merits of the District Court case before the High Court.

64. It was submitted that the merits of the arguments made in the District Court were immaterial to the decision the High Court was required to make. It was the manner in which the hearing was conducted and how certain applications were dealt with by the District Judge that are the subject matter of the present proceedings. As the appellant claims these issues caused the District Judge to fall into an unconstitutionality, they are quintessentially a matter for judicial review.

65. That very point was made in substance in *Keegan -v- District Judge Kilrane & Anor* [2011] 3 I.R. 813, where Birmingham J stated that *"[i]n my view, in a situation where the complaint made is one of bias at first instance it is understandable that a party will wish to proceed by way of judicial review thereby achieving a fair and objectively unbiased hearing at first instance and preserving the possibility of an appeal if dissatisfied with the outcome."* It was submitted that, when the primary relief sought is based on bias and unfairness in the conduct of the proceedings to such a degree as to be a denial of due process, proceeding by way of judicial review was appropriate and warranted.

Discussion, Analysis and Decision

66. I agree with the High Court judge that the applicant was very well represented in the District Court by counsel who demonstrated skill, patience and determination. However, I do not agree with counsel for the appellant that the trial was unsatisfactory and that an impartial observer would have to have been concerned about the impartiality of the District Court judge and about whether he was truly approaching the matter with an open mind.

67. The District Court is the court which the greatest number of people comes in contact with. It is a court of summary jurisdiction and it transacts a large volume of business, often having to deal with a considerable number of cases in any one sitting. It needs to be efficient and business-like in the disposition of its business. Judges at all levels, and the District Court is no exception, must of course behave judicially, and treat litigants and others with courtesy. However, that does not mean that the court's disposition towards everyone must necessarily be the same. A judge is not expected to afford the same margin of appreciation to an experienced legal team as he/she might afford to an unrepresented litigant, or an inexperienced advocate perhaps starting out in practice, in terms of the court's expectations with respect to the efficient presentation of cases and adherence to rules and procedures. A judge is entitled to expect that the lawyers concerned will have an appreciation of, and be sensitive to, the needs of the court in terms of the efficient disposition of its list, and to be co-operative in that regard, subject of course to their need to effectively present their client's case. Exchanges between the bench and counsel in the context of litigation where the accused is represented by an experienced legal team, where the judge perceives that the case is not being progressed quickly enough, may well be brusque and even robust. If the judge exhibits impatience, he is not necessarily being, or intending to be, discourteous. Experienced lawyers, and especially experienced counsel, are expected to have broad backs in that regard. While the exchanges as recorded in the transcript between counsel in this case and the District Judge concerned were robust, it is not in my view a reasonable interpretation of them to suggest that the District Judge was attempting to intimidate and brow beat counsel. It would have been apparent to the District Judge that he was dealing with an experienced advocate who was unlikely to be susceptible to intimidation, and it is manifest from the transcript that counsel remained calm, that he was resolute in persisting with his submissions and that he was not in fact intimidated. Moreover, the expectation of an impartial observer would have been that such an experienced professional advocate would not easily be intimidated, and that counsel was not in fact intimidated would also have been readily apparent to such an observer.

68. I agree with the High Court judge that the evidence certainly does not establish actual subjective bias on the part of the District Court judge. However, it was contended in the High Court, and again on this appeal, that the District Court judge's overall conduct of the case, and in particular that certain unfortunate exchanges between the bench and counsel, raise the spectre of objective bias.

69. It cannot be gainsaid that certain of the District Judge's remarks proffered from the bench, such as that relating to counsel not being in a Dublin court, and the implication that he was treating the court as a salad bar, were intemperate, gratuitous and unnecessary. However, having carefully considered the context in which they were made, it seems to me that while they may be illustrative of judicial impatience with counsel's persistence in pressing points with which the judge was unimpressed, and indeed some frustration on the judge's part that counsel appeared to be rowing back on an earlier ostensible concession, they are neither suggestive in their terms, nor in the context in which they were made, of bias on the part of the judge. I am therefore not persuaded that an impartial observer would have been concerned about bias. An impartial observer might well have regarded the remarks in question as unfortunate in the sense that they were intemperate and arguably unjudicial utterances, but in my view neither the remarks in question, nor the judge's overall conduct of the case, bearing in mind that the judge's exchanges and engagements were with an experienced professional advocate in the context of a trial, could reasonably have given rise to a concern about bias. I therefore agree with the High Court judge's characterisations and conclusions as expressed in paragraph 37 of his judgment, where he stated:

> *"37. I am not satisfied that the threshold identified by Morris J. in Dineen and Lynch J. in Gill has been reached in this case. There was undoubtedly a robust exchange between the judge and counsel in respect of the evidence given, its*

> *nature and extent, the inferences to be drawn from it, and the legal significance of any such inferences. The learned district judge also frequently intervened in cross examination. However, I am not satisfied to conclude that the learned judge was striving or endeavouring to get the witness to change her testimony or acting in a manner which gave rise to a perception of bias on his part thereby rendering the trial unfair. In addition, I am not satisfied to infer that the exchanges between counsel and the judge in respect of the suggested "concessions" made in respect of what occurred later in the garda station give rise to an apprehension of bias though they were undoubtedly somewhat brusque."*

Accordingly, I find no error of principle in the High Court judge's overall approach on the issue of bias or excessive judicial intervention.

70. The High Court judge appears to have adopted the approach of considering each complaint made on behalf of the appellant in isolation in the first instance and to have concluded in respect of each of them that viewed on their own they didn't cross the threshold in terms of creating a sufficient degree of unfairness to justify the granting of relief by way of judicial review. He then went on towards the end of his judgment to consider the cumulative effect of the complaints made. In that regard, he concluded:

> *"While the interventions of the learned judge may have presented some difficulties for counsel during the hearing, I am not satisfied they reached a threshold such as to give rise to a breach of fundamental requirements as to justify the granting of an order of certiorari in this case".*

71. The High Court judge's conclusion was therefore that while the judge created some "difficulties" for counsel, he was not ultimately unable to present his client's case and therefore there was no fundamental unfairness in the trial. I find myself in agreement with the High Court judge's view and consider that he was correct in the conclusions that he reached. It is, however, necessary to further elaborate somewhat.

72. It was contended that counsel's efforts at cross-examination were so adversely interfered with, that he was put off his stride. It is said that he was required to make submissions in the middle of his cross-examination instead of at the end of it, that he was then prevented from fully making the submission that he wished to make and that he was not allowed to open authorities that he wished to open. Moreover, it is said that the District Judge ruled mid-submission and before counsel had concluded. It is suggested that this was not accidental. Rather it was deliberate and was intended to cut counsel off mid flow. It is further contended that when counsel enquired, entirely reasonably, as to District Judge's reasons for his ruling, the District Judge refused to elaborate stating that "I have ruled"; and that when further pressed to give his reasons counsel was then accused by the bench of being in effect argumentative with the court.

73. Having considered these complaints in the context of the transcript I would make the following observations. There is in fact no evidence that counsel was put off his stride in any meaningful way. Counsel deserves to be complimented for his resilience and his persistence in seeking to present his client's defence in the teeth of considerable, arguably unwarranted, judicial intervention. However, he was able to press on and to make his all of points, save for that based upon the *Director of Public Prosecutions v Freeman*. Moreover, in so far as it is contended that he was deprived of the opportunity of making a case based on *Director of Public Prosecutions v Freeman* it is manifest from the transcript that the point being advanced was entirely misconceived having regard to the state of the evidence. Notwithstanding *Freeman*, there was no requirement on the prosecution to adduce evidence concerning the order in which the signatures on the s.13 statement, which was an exhibit, had been applied in circumstances where s. 21 of the Road Traffic Act 1994 (the Act of 1994) created a presumption of compliance by the relevant Garda with the requirements of s.17 of the Act of 1994 in the absence of "evidence to the contrary". No evidence suggesting non-compliance had been elicited from Garda Kelly, or anybody else. The situation in the Freeman case was entirely different because in that case the court had positive evidence that the suspect had signed the statement before the Garda had signed it. Accordingly, in that case there was evidence to the contrary tending to rebut the presumption of compliance. While counsel should of course have been allowed to fully develop and conclude his submission, it cannot be ignored that it was manifestly not a good submission. On the contrary, it was one that was doomed to failure. That being so, any unfairness was not so far reaching in my view as to have vitiated the District Court judge's jurisdiction.

74. It has been argued that the merits of the substantive case were beside the point in terms of the case for judicial review. I accept that in general that is so. However, relief by way of judicial review is discretionary. In so far as the appellant may have made out a case that her counsel was unfairly prevented from making an argument that he wished to make, a relevant consideration in terms of whether relief should be granted is whether innocence was truly at stake by reason of the unfairness in question, or whether the unfairness was going to be incidental to but not determinative of any outcome or potential outcome. I consider that the unfairness of which the appellant complains would not have impacted adversely on the outcome of the trial in circumstances where the argument which counsel was inhibited from fully developing was one that was manifestly ill-founded. In the circumstances the unfairness complained of, while it should not have occurred, was not so far reaching as to justify the granting of relief by way of judicial review.

75. Finally, the High Court judge's assessment, as expressed in paragraph 38 of his judgment, was that while the application for a judicial review was dressed up as a case all about procedural unfairness, excessive judicial intervention, and alleged bias, it was in reality an attempt to re-litigate the merits of the substantive case. In that regard I agree with the High Court judge's assessment.

76. In my judgment the appellant's case did not meet the threshold for the granting of relief on account of procedural unfairness, excessive judicial intervention and bias, and the High Court was correct to so find. It remains open to the appellant to seek to pursue her ordinary entitlement to appeal, if she is so inclined.

77. I would dismiss the appeal.