Neutral Citation Number: [2010] IEHC 287

THE HIGH COURT

JUDICIAL REVIEW

2009 197 JR

BETWEEN

PHELIM DOYLE

APPLICANT

AND

JUDGE MURROUGH CONNELLAN AND

THE DIRECTOR OF PUBLIC PROSECUTION

RESPONDENTS

JUDGMENT of Kearns P. delivered the 9th day of July, 2010

By Order of the High Court (Charleton J.) made on the 23rd February, 2009, the applicant was given leave to apply by way of an application for judicial review for an order of *certiorari* quashing the Order of the first named respondent made on the 14th October, 2008, convicting the applicant of an offence under s. 49(1) and (6)(a) of the Road Traffic Act, 1961 (hereinafter to be referred to as "the Act of 1961, as amended") as inserted by s. 10 of the Road Traffic Act 1994, as amended by s. 18 of the Road Traffic Act 2006.

The principal ground upon which relief is sought is the assertion on behalf of the applicant that the conduct of the trial by the first named respondent amounted to a breach of the fundamental tenets of constitutional justice so as to deprive the applicant of a trial in due course of law and that the proceedings, when considered in the light of all of the complaints made by the applicant, were so fundamentally flawed that they are susceptible to judicial review and an order of *certiorari*.

BACKGROUND

The application is grounded on the affidavit of David Tarrant, the applicant's solicitor, sworn on the 20th of February, 2009, wherein he deposes that on the 2nd November, 2007, the applicant was stopped by Garda Seamus O'Brien of Wicklow Garda Station at Ballinabarney, Rathnew, County Wicklow. On the occasion in question, Garda O'Brien had been on duty as an observer in a patrol car when he formed the opinion that the applicant had performed a "power slide", or had used the handbrake to skid around a roundabout. He was also of the opinion that the applicant's car was travelling at speed. He and his colleague pursued the applicant's vehicle and the same came to a halt. On approaching the vehicle, Garda O'Brien in his affidavit deposed that the applicant was exhibiting signs of intoxication. He gave evidence before the respondent that the irises of the applicant's eyes were unusually large and that he exhibited slowness of movement. He also gave evidence that he smelt cannabis emanating from the vehicle.

It is common case that Garda O'Brien then carried out a search of the vehicle pursuant to s. 23 of the Misuse of Drugs Act 1977 (as amended) as he suspected that the applicant was in possession of controlled drugs. In the course of this search, he found a yellow cannabis grinder with traces of what appeared to be cannabis on it. Garda O'Brien gave evidence of a conversation with the applicant in which he admitted ownership of the cannabis grinder and admitted having consumed cannabis within the previous twenty-four hours. From the answers received, Garda O'Brien formed the opinion that an offence had been committed.

In his statement of proposed evidence, Garda O'Brien said he then formed the opinion that Mr. Doyle had committed an offence under s. 14(2) of the Road Traffic Act 1994, as amended. However, his evidence in court was to the effect that in his opinion the applicant had committed an offence contrary to s. 49 of the Act of 1961, as amended, on the basis of the manner of driving, the appearance and manner of the applicant.

In his statement of proposed evidence, Garda O'Brien further stated that having informed the applicant of his opinion that an offence under s. 14 of the Road Traffic Act 1994 had been committed, he then invited the applicant to accompany him to Wicklow Garda Station and informed the applicant that if he did not do so voluntarily he would arrest him under s. 14(3) of the Act. His statement of proposed evidence goes on to relate that the applicant declined to accompany him and as a result Garda O'Brien arrested the applicant under s. 14(3) of the Road Traffic Act 1994. However, in court Garda O'Brien gave evidence that he effected the arrest of the applicant under s. 49(8) of the Act of 1961, as amended.

Following arrest, the applicant was brought to the Garda Station where a blood sample was taken which resulted in a negative result for alcohol but a positive result for cannabis.

In his affidavit, Mr. Tarrant states that he cross-examined Garda O'Brien with a view to determining whether Garda O'Brien had carried out a sobriety test of any nature, or otherwise satisfied himself as to what degree the applicant was under the influence of an intoxicant. In reply, Garda O'Brien stated that he was satisfied as to the state of the applicant's intoxication from the manner of his driving, the fact that his irises were dilated and from the admission that he had consumed cannabis within the previous twenty-four hours. He did, however, concede in cross-examination that he had carried out no other tests such as inviting the applicant to walk a white line, nor did he give any evidence that the applicant displayed any physical signs of intoxication by way of slurred speech, unsteadiness or otherwise.

At the conclusion of the prosecution case, Mr. Tarrant applied for a direction for a number of reasons, including that the law did not prohibit the applicant having drugs in his system while driving, but rather prohibited him from driving with drugs in his system to such an extent that he was incapable of having proper control of the vehicle. He submitted there was no such evidence. He further submitted that if an offence had been committed under s. 14 of the Road Traffic Act 1994, that is to say, a failure on the part of the applicant to accompany a Garda to the station when required to do so for the purpose of giving a sample to determine whether drugs

are in his or her system, the relevant power of arrest was under s. 14(3) of the Act of 1994 and not under s. 49(8) of the Act of 1961, as amended. It was further submitted that no caution had been given prior to questioning the applicant as to ownership of the cannabis grinder, or his consumption of cannabis.

The applicant did not give evidence and thereafter the first named respondent proceeded to convict the applicant on the charge under s. 49(1) of the Act of 1961, as amended. Mr. Tarrant in his affidavit states that in so convicting, the first named respondent stated:-

> *"The legislator has graded alcohol so it is possible to deal with 'drunk driving' by virtue of the amount of alcohol as dictated by the blood, urine or breath test. Because the legislator did not grade the quantity of drugs in one's system it was obvious that it was the intention of the legislature that a conviction must follow where drugs are found in a person's system..."*

In those circumstances he disqualified the applicant from driving for four years and imposed a fine of €2,500.

In the course of the hearing before this Court, both Mr. Tarrant and Garda O'Brien were cross-examined on their recollection of what transpired in the District Court. Garda O'Brien in the course of cross-examination stated that the reference in his statement of proposed evidence to an arrest under s. 14 of the Act of 1994 was erroneous and that his evidence in court was that he had effected the arrest under s. 49(8) of the Act of 1961, as amended. He believed his evidence was sufficient to enable the first named respondent to form a view as to whether or not the applicant was capable or otherwise of driving a motor vehicle on the occasion in question.

Mr. Tarrant for his part remained adamant that the first named respondent made no reference either to the applicant's manner or appearance on the night of the alleged offence or to his manner of driving. He also referred to the attendance notes and court reports prepared by both himself and Ian Bracken, an apprentice solicitor in his firm, in relation to the proceedings which he contended supported his recollection of events on all material points.

In the course of his detailed court report, Mr. Tarrant refers to the remarks made by the first named respondent at the conclusion of the case, to the effect that it appeared to the respondent that it was the intention of the legislature that a conviction "must follow" where drugs are in the system and as far as he was concerned, he was accepting the Garda evidence that the defendant had consumed an intoxicant to such an extent as to be incapable to have proper control of a mechanically propelled vehicle. Mr. Tarrant then asked the respondent to state a case on this point but the respondent declined to do so. Recognisances were fixed in the event of an appeal in the applicant's own bond of €300 and one independent surety of €600.

SUBMISSIONS

On behalf of the applicant it was submitted that the proceedings, taken in their entirety, were fundamentally flawed and thus susceptible to judicial review by way of *certiorari* in that the first named respondent's interpretation of s. 49(1) of the Act of 1961, as amended, failed to recognise that there were two ingredients in the offence and not one. There had to be evidence that the accused was both under the influence of an intoxicant and also that such influence was to such an extent as to cause the accused to be incapable of having proper control of a mechanically propelled vehicle. Reference was made to a passage from de Blácam, *Drunken Driving and the Law* (3rd Edition), (Dublin, 1995) at para. 2.05 which emphasises that the prosecution's case is not made out where there is evidence only that a defendant was under the influence of an intoxicant. To sustain a conviction, the evidence must go further: it must be shown that a defendant was under the influence to such an extent as to be incapable of having proper control of his vehicle.

In response, it was submitted that the arguments advanced on behalf of the applicant were an invitation to this Court to revisit the evidence before the first named respondent and to re-examine the adequacy of such evidence. This was not the proper subject matter of a judicial review application because it is a fundamental principle of judicial review that it is not available as an appeal against a decision of an inferior court or tribunal unless in extreme circumstances.

It was further argued that the gravamen of the applicant's complaint related to issues concerning the adequacy of the evidence. The various complaints did not relate to any conduct on the part of the respondent which went beyond jurisdiction or which rendered the proceedings so fundamentally flawed as to deprive the applicant of a trial in due course of law.

Furthermore, Garda O'Brien had given evidence of intoxication, stating that the applicant's irises were unusually large, that he exhibited slowness of movement, and that he, Garda O'Brien, obtained a smell of cannabis from the vehicle. There was also evidence of the observations made of the vehicle whilst being driven by the applicant, who was both unable to maintain control of the car and was driving at an unsafe speed. It was submitted that in those circumstances the first named respondent was entitled to hold that the second named respondent had discharged the evidential burden.

Garda O'Brien was entitled to take into account the admissions made by the accused when forming an opinion as to whether or not the applicant had committed an offence under s. 49 of the Act of 1961, as amended. He formed such an opinion under s. 49(8) of the Act of 1961, as amended and was thus empowered to arrest the applicant which he duly did.

It was further submitted, that the applicant was guilty of delay in seeking judicial review. The impugned Order was made on the 14th October, 2008 and the judicial review was only sought on the 23rd February, 2009.

DECISION

I am quite satisfied that the present application for relief cannot succeed. In my view the appropriate remedy for the applicant was to proceed by way of appeal as this case manifestly falls to be considered as one which revolves entirely around the question of the adequacy of the evidence adduced in the District Court. Where that is the true position, I do not believe a judicial review remedy should be granted save in cases where the proceedings are fundamentally flawed by reason of some inherent unfairness or impropriety in the hearing taken in its entirety. This was the view adopted by Hederman J. in *Sweeney v. Brophy* [1993] 2 I.R. 202 when he stated at 211:-

> *"In my judgment certiorari is an appropriate remedy to quash not only a conviction bad on its face or where a court or tribunal acts without or in excess of jurisdiction but also where it acts apparently within jurisdiction but where the proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law. I take this opportunity of emphasising that certiorari is not appropriate to a routine mishap which may befall any trial;*

the correct remedy in that circumstance is by way of appeal." (Emphasis added)

In *Buckley v. Kirby* [2000] 3 I.R. 431, Geoghegan J., at p. 433 identified four quite separate situations which can arise when considering the question of alternative remedies of appeal and judicial review, the fourth of which is relevant to the instant case:-

> *"4. the applicant has not brought an appeal at all but has gone the route of judicial review in circumstances where an appeal is much the more appropriate remedy though it would be open to a court to grant leave for judicial review." (Emphasis added)*

In *Buckley*, the complaint was that the evidence was inadequate to support the applicant's conviction for larceny. He prosecuted an appeal and a judicial review. Geoghegan J. at p. 435 dealt with the situation (as in the instant case) where an appeal has not been prosecuted:-

> *"In a case where an appeal would clearly be the more appropriate remedy, an applicant ought not necessarily be granted leave to bring judicial review proceedings merely because he has not in fact appealed. If he ought to have appealed, the court in its discretion may refuse leave."*

He concluded, at p. 436, that in cases where the adequacy of the evidence is an issue, the appropriate remedy is an appeal:-

> *"Since this is a case of an alleged incorrect assessment of the evidence or lack of it, an appeal is quite obviously the appropriate remedy."*

In *Lennon v. District Judge Clifford* [1992] 1 I.R. 382, O'Hanlon J. at p. 385 quoted with approval the following passage from *Halsbury's Laws of England*, (3rd Edition) Vol. 11 at para. 119 which is also applicable here:-

> *"Where the proceedings are regular on their face and the inferior tribunal had jurisdiction, the superior court will not grant the order of certiorari on the ground that the inferior tribunal had misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it… misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction… Certiorari will not be granted to quash the decision of an inferior tribunal within its jurisdiction on the ground that the decision is wrong in matters of fact, and the Court will not hear evidence impeaching the decision on the facts… If there is any evidence, the Court will not examine whether the right conclusion has been drawn from it."*

Even if the first named respondent misdescribed the proofs required in cases of this nature (and I do not believe this has been established on the facts), I would rely on the foregoing observations of O'Hanlon J to hold that the appropriate remedy was, and remains, an appeal to the Circuit Court. In those circumstances I do not feel I need to form any view as to whether the argument raised on behalf of the respondent to the effect that the respondent's refusal to state a case should have led to an application for an order of *mandamus* rather than *certiorari* is correct. In my opinion neither remedy was appropriate on the view I have taken of this case

Even if the seeking of such a remedy were to be seen as appropriate, I believe that the delay in seeking leave in this case was excessive. Order 84 r. 21(1) of the Rules of the Superior Courts, 1986 provides:-

> *"An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made."*

None of the affidavits sworn on the applicant's behalf deals with the issue of delay, notwithstanding that two affidavits were sworn on the applicant's behalf following the filing of the statement of opposition in which lack of promptness was explicitly pleaded. Neither of those affidavits gives an explanation for the lack of promptness in seeking leave. Moreover, it is clear from the attendance prepared by Mr. Tarrant on the date of the impugned Order that all options, including a possible application to the High Court, were being considered from the outset. This is perhaps the most surprising aspect of this entire case, given the very clear dissatisfaction which Mr. Tarrant, an experienced and highly esteemed solicitor, felt at the conclusion of the hearing. In all the circumstances therefore, I would refuse the relief sought both for the reason stated and on the ground of delay.

By way of comment I would add that I derived little assistance from the cross-examination of Garda O'Brien and Mr. Tarrant as to their recollection of events in the District Court. I would be firmly of the view that cross-examination of witnesses in applications of this nature is best avoided unless absolutely necessary.