Neutral Citation Number: [2010] IEHC 452

THE HIGH COURT

JUDICIAL REVIEW

2010 25 JR

BETWEEN

JOHN BURKE

APPLICANT

AND

JUDGE DAVID ANDERSON AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Ms. Justice Irvine delivered on the 23rd day of November, 2010

1. The applicant in these proceedings is a farmer who resides at Duncummin House, Emly, Co. Tipperary.

2. By order of the High Court dated 13th January, 2010, the applicant was granted leave to apply for judicial review in respect of certain proceedings and rulings made by the first respondent ("the District Judge") at Kilmallock District Court on 11th January, 2010. The applicant was granted leave to apply for an order of *certiorari* or mandamus on the grounds set out at para. E of his statement of grounds.

3. At the outset, it should be stated that in his affidavit of 13th January, 2010, the applicant seeks to make a number of arguments which were not contained in the grounds set out in his statement to ground his application for judicial review. Further, in the course of the hearing before me on 21st October, 2010, the applicant sought to argue additional points not referred to in either his statement of grounds or grounding affidavit.

4. The second respondent delivered its statement of opposition on 5th March, 2010, and Mr. Aidan Judge, State Solicitor for the County of Limerick, has sworn an affidavit dated 2nd March, 2010, setting out in detail what he states occurred in the District Court on 11th January, 2010. Based upon this affidavit and the statement of opposition, the second respondent maintains that the applicant has disclosed no basis for the relief sought.

Factual Background

5. The applicant is the subject matter of three separate tranches of summonses being prosecuted by the Director of Public Prosecutions in relation to the alleged mistreatment of animals owned by the applicant. On 5th June, 2008, the applicant was convicted by Judge O'Halloran in the District Court of a number of offences under the Protection of Animals Act 1911, the Protection of Animals kept for Farming Purposes Act 1984 and the Control of Dogs Act 1986.

6. The applicant later sought judicial review of the convictions to which I have just referred. That application was treated as an application for an order of *certiorari* seeking to quash the convictions with a consequential order that the proceedings be referred back to the District Court for a further trial. He sought to quash the convictions based upon his assertion that he had not been allowed to dismiss his legal team in the course of the proceedings in the District Court.

7. The applicant was successful in the aforementioned proceedings and the court, having quashed the convictions, referred the proceedings back to the District Court for a fresh trial.

8. It is the trial that then took place before the District Judge in the District Court that is the subject matter of the within challenge. The trial commenced at Kilmallock District Court on 11th January, 2010 and was then adjourned until 14th January, 2010. However, on 13th January, 2010, the applicant sought leave to issue the within proceedings seeking judicial review and in the course of his application, was not only granted leave to apply for judicial review but was also granted a stay on the further prosecution of the District Court proceedings pending the outcome.

Summary of Submissions of the Applicant

9. The applicant submits that in circumstances where his conviction was quashed by Clarke J. in the High Court that he has now been placed in double jeopardy in the proceedings pending before the District Judge. This he maintains is contrary to the European Convention on Human Rights.

10. The applicant maintains that he was denied fair procedures through a failure on the part of the District Judge to determine, as a preliminary issue, the validity of the summonses in circumstances where the same were not also issued against his wife, Monica Burke, who was a joint owner of the relevant animals.

11. The applicant maintains that given that Judge O'Halloran at the original hearing had directed that a stenographer be in attendance, that the failure of the District Judge to direct the presence of a stenographer at his request on 11th January, 2010, was to deny him fair procedures.

12. The applicant maintains that the District Judge was biased against him and that this bias was demonstrated in the course of an exchange wherein the trial judge directed him to put back on a jacket which he had removed.

13. The applicant submits that he was not afforded fair procedures in that the duration of his cross examination of a veterinary surgeon, Mr. Joseph Carroll, was curtailed and that he was also wrongfully restrained by the District Judge from using the word "lie" in

the course of his cross examination.

14. The applicant complains that he was not afforded a fair trial in circumstances where the District Judge failed to rule on a preliminary legal submission made by him to the effect that he could not be summonsed in respect of the relevant offences due to the legal consequences of a regulation 7 notice issued under the European Communities (Protection of Animals Kept for Farming Purposes) Regulations 2000 (S.I. No. 127 of 2000)("the Regulations"), which had been served on himself and his wife. He maintains that as a result of that notice and an order of the Circuit Court made on 1st November, 2005, the animals were not under his control but were under the control of the Department of Agriculture, Food and Rural Development ("the Department") at the time of the offences alleged against him.

Summary of the Respondent's Submissions
15. The respondents maintain that the rule against double jeopardy is of no application. The applicant's original conviction was quashed and the effect of that order was to create a new trial *ab initio*.

16. In respect of the applicant's complaint that the District Judge should have dealt with his submission that the summonses were invalid due to the fact that they had not also been addressed to Monica Burke, the second respondent submits that the District Judge acted within jurisdiction in postponing a decision on that issue until he had heard the evidence.

17. In relation to the applicant's claim that he was denied fair procedures by virtue of the refusal of the District Judge to direct the presence of a stenographer at the State's expense, the second respondent submits that the applicant has no legal entitlement to the services of a stenographer at the State's expense and that the absence of a stenographer did not render the proceedings unfair.

18. In relation to bias allegedly demonstrated by the District Judge in asking the applicant to put his jacket back on, it is submitted that the judge was acting within jurisdiction and that a judge is entitled to make such directions as he believes appropriate for the purposes of maintaining decorum in the course of the proceedings.

19. As to the applicant's assertion that the District Judge curtailed the nature and duration of his cross-examination, the second respondent maintains that all matters regarding the admissibility of evidence are matters for the trial judge and that fair procedures merely require the trial judge to afford the applicant a period of time which is reasonable, in the context of the case, to challenge the evidence led against him. The second respondent submits that in this regard, the applicant was afforded fair procedures. As to the District Judge's direction that the applicant should not use the word "lie", that direction did not preclude the applicant challenging the truthfulness of the evidence given by any witness using other more acceptable language nor his right to produce evidence to rebut the evidence of any of the prosecution witnesses.

20. The second respondent submits that the District Judge acted within jurisdiction in deferring, until after the hearing of the evidence, any ruling on the validity of the summonses by virtue of the issue of the regulation 7 notices. The fact that the District Judge decided that he would rule on this submission after he had heard the evidence does not give rise to any issue as to the fairness of the trial.

The Law
21. Having regard to the conclusions that I have reached in the present case, it is probably necessary to restate briefly the nature of the remedy of *certiorari*. In *The State (Daly) v. Ruane* [1988] I.L.R.M. 117, a decision recently followed by Charleton J. in *O'Neill v. Judge Patrick McCartan and Director of Public Prosecutions* [2007] IEHC 83, (Unreported, High Court, 15th March, 2007) O'Hanlon J. at p. 124 described relief by way of *certiorari* in the following manner:-

> "Relief by way of *certiorari* is only appropriate in a limited category of cases. Generally speaking it involves the applicant in showing that the inferior Court or tribunal acted without jurisdiction, or in excess of jurisdiction or in disregard of fair procedures, so that the applicant's rights to natural or constitutional justice were violated…"

22. An application for an order of *certiorari* cannot be used as a method to appeal decisions or rulings of a lower court or as a means of embarking upon a re-examination of the evidence or submissions made in the course of those proceedings.

23. In *Costigan v. Judge Brady* (Unreported, High Court, 20th February, 2004), Quirke J. restated the function of the court on a judicial review application:-

> "It is not the function of this court in an application for a judicial review of the order of Judge Brady to consider or revisit the merits of the application made to him.
>
> It is the function of this court to consider whether the order made by judge Brady was lawful or was, as contended on behalf of Ms. Costigan, made without jurisdiction, or in excess of jurisdiction or in breach of principles of natural and constitutional justice."

24. In relation to the role of the court on a judicial review application it is of course true that the court must distinguish between questions of fact and questions of law dealt with by a lower court. Decisions of fact which are based on evidence are invariably left to the primary decision-maker and the court is not engaged as to the correctness of the decision made. An alleged error of law on the other hand may be subjected to scrutiny for its correctness. For example, the misinterpretation of a statue material to a decision of a lower court may result in a conviction under the provisions of that statute being quashed.

25. Finally, judicial review is a discretionary remedy and even where an applicant establishes a legal basis for quashing a decision, the court retains a discretion nonetheless on the facts of the given case to refuse the relief sought.

The Court's Assessment
26. I reject the applicant's submission that his trial in the District Court following the order of *certiorari* obtained by him in the High Court can be considered to offend the rule against double jeopardy. That rule operates so as to prohibit the retrial of anyone who has already been finally acquitted or convicted of a particular offence. Indeed, the applicant's claim that he should not be retried as a result of the order of *certiorari* made by Clarke J. is in stark contrast to the submission he made to the High Court in those judicial review proceedings and which is noted by the District Judge at para. 5 of his judgment. The relief he sought in the High Court was an order quashing the original trial in the District Court and proposing that a new hearing of the case would be held in the higher court. However, the effect of the decision of Clarke J. was not to bring finality to this matter. His determination was to the effect that the initial conviction before the District Court was suspect because the applicant had not been permitted to defend himself, as had been his wish. The order of *certiorari* had the effect of restoring the applicant to his original position and affording him a new trial. It was

accordingly open to the District Judge to accept jurisdiction in the matter.

27. I am not satisfied that the applicant has any grounds to complain that he received an unfair trial due to the decision of the District Judge not to rule upon a legal point raised by him to the effect that the summonses were defective as they were solely addressed to him as opposed to both himself and his wife as co-owners of the animals. The applicant was not denied a right to make this legal argument. It is not contested that the District Judge advised him that prior to reaching a determination on his guilt or innocence, he would hear this legal argument. Accordingly, the District Judge acted within jurisdiction. The applicant, had he awaited the conclusion of the evidence, would have been entitled to raise this legal point. If the point was decided against him he had an alternative remedy, namely an appeal to the Circuit Court.

28. I have, in the course of my decision in the case of *Burke v. Judge Ray Fulham and Director of Public Prosecutions* (Unreported, High Court, Irvine J., 23rd November, 2010) concluded that an accused person cannot contend that they have not been afforded a trial which accords with the principles of natural justice and fair procedures merely by virtue of the absence of an stenographer in the course of those proceedings. The stenographer takes no part in the decision-making process and is not engaged with the court proceedings in any way. In truth, it is the applicant's contention that he requires a stenographer to be present to enable him to challenge rulings made against him in the court of first instance before another court. However, in circumstances where the applicant has a full appeal against any conviction in the District Court, his claim that the absence of a stenographer's note has interfered with his right to fair trial is unsustainable. Further, as was confirmed by Cooke J. in *Tracey v. Judge Malone & Anor* [2009] IEHC 14, (Unreported, High Court, Cooke J., 20th January, 2009) any litigant enjoys the right to take notes himself or to ask another person appointed on his behalf to take a note of the proceedings which can then be used by him in the course of the original proceedings or in the event of him feeling that he has grounds upon which to challenge the lawfulness of anything that occurred in the course of that hearing.

29. The applicant complains that the request by the District Judge that he put back on his jacket and the ensuing exchange between them regarding his attire demonstrated bias on the part of the District Judge to the point that this Court should conclude that the District Judge could not be presumed to be prepared to afford him a fair trial. In order to demonstrate bias such that a court would reach such an adverse conclusion against a trial judge, the applicant would have to demonstrate that the District Judge's behaviour departed from the requisite standard of open-mindedness and would have to satisfy the test laid down by McGuire C.J. in *The State (Hegarty) v. Winters* [1956] I.R. 320 at 336 where he stated that bias is demonstrated where the conduct of the arbitrator could "reasonably give rise in the mind of an unprejudiced onlooker to the suspicion that justice was not being done". It is the Court's assessment that mere requests that the applicant put back on his jacket to maintain the decorum of the Court are not sufficient to demonstrate bias to the point that the Court would suspect that justice was not being done. I accordingly reject this aspect of the applicant's claim.

30. The applicant claims that he was curtailed in his right to cross-examine one of the prosecution witnesses. However, in *O'Broin v. District Justice Ruane* [1989] I.R. 214, the wrongful refusal by a district judge to allow a line of cross-examination was characterised as an error within jurisdiction and so was not capable of remedy on an application for judicial review. However, that situation must be contrasted with a refusal on the part of a trial judge to allow cross-examination in circumstances where that refusal becomes an infringement of the *audi alteram partem* rule. There is clearly an onus upon a judge to provide a fair hearing and to afford an accused person a reasonable opportunity to ask such questions as are material to his defence but that right is not open-ended and the trial judge retains a significant discretion in this regard.

31. It is the determination of this Court that the cross examination of Mr. Carroll for four and a half hours, which is not denied by the applicant, offered the applicant ample time to ask all questions relevant to the issues pending before the court and it concludes that the District Judge did not, in his curtailment of the cross examination, interfere with the applicant's *audi alteram partem* rights.

32. As to the applicant's complaint that he was denied fair procedures insofar as the learned District Judge refused to make a ruling on the legal effect of the service upon himself and his wife of notices under regulation 7 of the Regulations, I am entirely satisfied that the learned District Judge acted within jurisdiction in deciding to postpone ruling on any such legal argument until such a time as he had heard the evidence. The District Judge did not deny the applicant the opportunity to make any legal points which he wished to make in his defence. These could have been made at the conclusion of the evidence. If the District Judge found against him on the legal point and he was convicted, he had an automatic remedy available to him by way of an appeal which would have permitted him a complete rehearing.

33. For whatever reason, the applicant, prematurely and in the absence of any valid grounds of complaint, moved the High Court to stop the proceedings against him in the District Court. Having regard to his extensive experience of judicial review proceedings, I am surprised that the applicant at this stage still seems not to understand that it is only in exceptional cases that the High Court will interfere and grant an order of *certiorari* in criminal proceedings taking place in a lower court and that any such intervention will be less likely again in circumstances where the proceedings are in the District Court, where an aggrieved party automatically enjoys the benefit of a full appeal upon conviction. In *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60 at p. 89, O'Flaherty J. endorsed "everything that Carney J. said about the undesirability of people repairing to the High Court for judicial review in relation to criminal trials at any stage (and certainly not during their currency)…" and cited with approval, at pp. 88-89, the dictum of Ó Dalaigh C.J. in *The People (Attorney General) v. McGlynn* [1967] I.R. 232 at 239:-

> "The nature of a criminal trial by jury is that, once it starts, it continues right through until discharge or verdict. It has the unity and continuity of a play. It is something unknown to the criminal law for a jury to be recessed in the middle of a trial for months on end, and it would require clear words to authorise such an unusual alteration in the course of a criminal trial by jury."

34. O'Flaherty J. in the course of his judgment referred to this aspect of the judgment of the learned Chief Justice and added as follows, at p. 89:-

> "While this statement applies to criminal trials with a jury, it should be regarded as a precept that should, as far as practicable, be followed in respect of all criminal trials subject to the jurisdiction of courts to grant cases stated on occasion."

35. Finally, the within proceedings were heard by me during a two week period when I heard four other applications for judicial view also brought by this applicant. This has given me a unique opportunity to assess the applicant's approach to litigation in every jurisdiction. I have also considered the judgment of my colleague, Edwards J., in further judicial review proceedings involving the applicant, namely, *Burke v. Judge Mary Martin and Director of Public Prosecutions* [2009] IEHC 441 (Unreported, High Court, Edwards J., 9th October, 2009).

36. I am concerned that the proceedings which were heard before me, when taken in conjunction with the proceedings before Edwards J. are only consistent with a deliberate and sustained intention on the part of the applicant to thwart the administration of justice and make it impossible for judges in the District and Circuit Courts to deal with cases concerning the applicant which are listed before them. He seems to believe that his access to the courts is unfettered. In the course of every case he seems to hold the view that any ruling made against his interests entitles him to go to a higher court to stop the proceedings in the lower court. In the alternative, if a judge in a lower court postpones a ruling, that decision also becomes the subject matter of an application for judicial review in the High Court normally accompanied by consequential application to stay the proceedings in the lower court pending the outcome of those High Court proceedings. Any restriction or time limit imposed by the trial judge on the duration of his examination of witnesses leads to an equivalent effort to stop the proceedings in their tracks as does any ruling as to the areas which may be canvassed by him in the course of such examination. These are but a few examples of the matters which the applicant has sought to litigate in the course of the proceedings before me.

37. Whilst every litigant enjoys a right of access to the courts, a point in time must come where that access should be subjected to much greater scrutiny. I would urge the applicant, who has chosen to represent himself, as his right, to reconsider his approach to litigation.

38. For all of the aforementioned reasons, I will dismiss this application.