Neutral Citation: [2014] IEHC 228

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 46 J.R.]

BETWEEN

PATRICK FARRELL

APPLICANT

AND

DISTRICT JUDGE BRIDGET REILLY

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of O'Neill J. delivered the 2nd day of May 2014

1. The applicant seeks an order of *certiorari* quashing the conviction and sentence imposed by the first named respondent upon the applicant on 1st November 2012, at Bridewell District Court for the offence of driving without an approved policy of insurance. The applicant contends that his hearing in the District Court was not in the due course of law and that his rights under Article 38 and Article 40 of the Constitution have been breached.

Background

2. The applicant appeared before the respondent District Judge on 1st November 2012, for the offence of driving without an approved policy of insurance contrary to s. 56 of the Road Traffic Act 1961, as amended. It is accepted by both parties that prior to the hearing of the case, the applicant was informed by Garda Aidan Noonan, the prosecuting garda, that there was a record of the applicant having received a previous conviction for the same offence in 2003. Under the relevant statutory provisions, a mandatory two-year disqualification must be imposed for a second conviction for driving without insurance. Section 65 of the Road Traffic Act 2010 provides–

> *". . the court may, in the case of a first offence under the section concerned, where it is satisfied that a special reason (which it shall specify when making its order) has been proved by the convicted person to exist in his or her particular case to justify such a course –*
>
> *(i) decline to make a consequential disqualification order, or*
>
> *(ii) specify a period of disqualification in the consequential disqualification order of less than 1 year."*

3. In his affidavit sworn on 25th January 2013, the applicant states that when evidence of the previous conviction from 2003 was provided to the court by the prosecuting garda, he disputed it and informed the court that the 2003 conviction did not relate to him. At the hearing of the present application before this court, it was accepted that the applicant did not dispute the previous conviction before the District Court and did not give any evidence to the District Court in relation to that conviction. A further affidavit sworn by the applicant on the 13th January 2014 was produced wherein the applicant provides a different version of events. He avers that "*I did not dispute the matter in open court before the Judge, and my previous affidavit was incorrect in this regard, what I meant to say was that I did dispute the matter strenuously with Garda Noonan before court*." He says that he assured Garda Noonan that he had not even begun driving by 2003. He denies that Garda Noonan advised him to consult a solicitor or to seek an adjournment if there was any ambiguity in relation to the previous conviction. The applicant avers that he was not legally represented when he discussed this issue with Garda Noonan or when the matter was heard by the first named respondent.

4. In Garda Aiden Noonan's affidavit sworn on 27th June 2013, he avers that the applicant was initially summonsed to Court 46, Chancery Street, Dublin 7 on 15th June 2012, for the offence of driving with no insurance and that the applicant appeared in court on this date and spoke to Garda Noonan personally. He avers that the applicant informed him that he had an approved policy of insurance in place at the time of the alleged offence and the matter was therefore adjourned until 11th October 2012, to allow the applicant time to produce proof of this. The applicant failed to appear on that date and a Bench Warrant was issued. This Bench Warrant was executed on 1st November 2012, and the applicant was brought before the first named respondent. Garda Noonan avers that on that date, the applicant produced a certificate of insurance in his girlfriend's name which did not cover the applicant for the date and vehicle in respect of the offence for which he had been summonsed. Garda Noonan further avers that when he informed the applicant of the record of his previous conviction from 2003, the applicant stated that he was not sure if this conviction was correct. Garda Noonan says he told the applicant that he could seek to have the matter adjourned so that he could consult a solicitor in relation to any doubts or ambiguity affecting the 2003 conviction. Garda Noonan avers that the applicant told him he did not want legal representation and wanted the matter to be heard on that date. The applicant subsequently entered a guilty plea and was fined €750 and disqualified from driving for two years.

5. The applicant subsequently engaged the services of a solicitor and instructed him to challenge the 2003 conviction on the grounds that it did not relate to him, and also to challenge the sentence imposed in respect of the second conviction on the basis that the respondent had made her decision and imposed sentence based on factually incorrect information. An application was subsequently made to the District Court to have the 2003 conviction set aside, and this was done on consent on 6th March 2013. Sergeant Ian Lamb, prosecuting Garda in respect of the 2003 offence, provided an affidavit to the court wherein he averred that his official garda notebook records that on 2nd December 2002, he took details from a driver who identified himself as Mr. Patrick Farrell with a date of

birth and address identical to the applicant. However, Sergeant Lamb stated that as this was his only dealing with any person of that name, until the applicant in the present case attended at Kevin Street garda station prior to the set aside proceedings in March 2013, he was not in a position to give evidence to the District Court that the person he stopped in December 2002 was the applicant.

6. Counsel for the applicant argues that the decision of the first named respondent and the sentence imposed on the applicant was based on a fundamental mistake as to fact *i.e.* the first named espondent operated on the basis of the applicant having a previous conviction for driving with no insurance when this was not correct. As a result, the applicant submits that he was given a mandatory two-year disqualification and was denied the opportunity to present special reasons to the court which he would otherwise have been able to do in relation to a first conviction. It is contended by the applicant that once he put Garda Noonan on notice that the 2003 conviction was in dispute, it was the duty of the garda, as prosecutor, to bring this to the attention of the District Judge before sentencing, and to provide specific proof of this offence. The applicant submits that the matter should be remitted for a full rehearing in which the applicant is treated as having no previous conviction for driving without insurance, thus enabling the District Judge to consider the full range of sentencing options in exercising her discretion pursuant to s. 65 of the Road Traffic Act 2010.

7. Counsel for the respondent submits that the applicant's claim, as set out in his initial statement of grounds, is fundamentally different to the case that has been made to this court, and for that reason, the relief sought should be refused. It was submitted that there are a number of material inaccuracies in the applicant's affidavits as well as a lack of candour warranting the dismissal of the applicant's case. In addition, counsel for the respondent submits that the first named respondent did not fall into error, either of law or fact, and did not exceed her jurisdiction. It is further submitted that the applicant acquiesced to the evidence of the prosecuting garda and that he subsequently failed to avail of an alternative remedy. For those reasons, the respondent contends that the relief sought should be refused.

8. I will now turn to consider each of these issues in greater detail.

Duty of Prosecution
9. The duties of a prosecutor in relation to sentencing are set out in para. 8.14 of the Director of Public Prosecutions' 'Guidelines for Prosecutors' (2007). Of particular relevance to the present case are sub-paragraphs (a), (c), and (d) which state as follows:

> *"(a) to ensure the court has before it all available evidence relevant to sentencing, whether or not that evidence is favourable to an accused person;*
>
> *(c) in addition, to ensure that the court has before it all relevant evidence available to the prosecution concerning the accused's circumstances, background, history, and previous convictions, if any, as well as any available evidence relevant to the circumstances in which the offence was committed which is likely to assist the court in determining the appropriate sentence;*
>
> *(d) to ensure that the court is aware of the range of sentencing options available to it."*

10. Counsel for the applicant submits that the applicant disputed the 2003 conviction prior to the case being heard by the respondent, and that once Garda Noonan was put on notice that this conviction was in dispute, there was a duty on him, as prosecutor, to inform the court of this. It is submitted that the prosecutor's duty in this regard was heightened by the fact that the applicant was not legally represented. In *the People (DPP) v Ramachchandran* (Unreported, 27th January 2000), it was held that "*. . . . when a criminal trial is proceeding and when the appellant such as Mr. Ramachchandran is in a position where he is totally incompetent to defend himself there is an even greater burden on the trial Judge to ensure that the trial is in all respects above reproach*." In addition, counsel for the applicant argues that the garda's evidence to the court in relation to the 2003 conviction was hearsay evidence and therefore inadmissible, whereas specific proof of this conviction was necessary. A number of authorities were relied upon in support of this argument. In the *State (Stanbridge) v Mahon* [1979] I.R. 214, Gannon J. held that:

> *". . . in respect of each and every alleged previous conviction, the prosecutor in each case should have been given an opportunity of admitting or denying it before putting the information before the court. The photo-copy extract from the Garda record would afford a convenient method of presenting the information personally to the convicted person but, in respect of any conviction disputed by him, proper evidence would be required to put the fact of such conviction before the court-such as production of a court order. Otherwise, his own express admission would suffice. This should have been done before the solicitor for each prosecutor addressed the court."*

11. In *The People (DPP) v McDonnell* [2009] 4 I.R. 105. Kearns J. (as he then was) held:

> *". . . hearsay evidence of character, antecedents, and as to the background to the particular offence being dealt with, including the extent of the role played therein by an accused, might, at the discretion of the sentencing judge, be received, subject to the requirement that if a particular fact assumed specific significance or was disputed, the court's findings should require strict proof. It was a matter for the sentencing judge to decide what weight should be attached to such hearsay evidence as was received, noting any objection taken thereto and any arguments or evidence offered in rebuttal"*

12. It is submitted that the manner in which the prosecuting garda was required to prove the 2003 conviction is set out in s. 18 of the Prevention of Crimes Act 1871, which states:

> *"A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted.*
>
> *A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned."*

13. It is submitted that this procedure was not followed by Garda Noonan and that, consequently, the District Court determined the applicant's sentence on the basis of factually incorrect information. Counsel for the applicant contends that had Garda Noonan been

required to specifically prove this previous conviction, he would have been unable to do so.

14. Counsel for the second named respondent submits that the District Judge did not make any errors of law or fact, and did not act outside her jurisdiction, as claimed in the applicant's statement of grounds. It is submitted that at all relevant times, a previous conviction for driving without insurance was recorded against the applicant and that because it had not been set aside at this stage, Garda Noonan could have provided the formal order in respect of this conviction to the court had he been required to do so. It is further submitted that Garda Noonan discharged his prosecutorial obligations by informing the applicant of the record of the previous conviction, and by advising the applicant to seek an adjournment or to seek legal advice in relation to any doubt or ambiguity surrounding that conviction.

New Grounds raised by the Applicant and Lack of Candour

15. Counsel for the second named respondent argues that the applicant's claim in relation to any procedural shortcomings or a breach of prosecutorial duties on the part of Garda Noonan is an entirely new ground which goes far beyond the grounds upon which leave was granted. The applicant's first affidavit, sworn on 25th January 2013, makes no reference to a conversation between the applicant and Garda Noonan prior to the case being heard. Instead, the applicant states that when Garda Noonan gave evidence of his previous conviction, he "*disputed this and informed the court that this previous conviction did not relate to me*". It is submitted that the applicant's original statement of grounds impugned errors or an *ultra vires* action on part of the respondent District Judge whereas the applicant's case before this court is entirely different and alleges a dereliction of prosecutorial duty on the part of Garda Noonan.

16. Counsel for the second named respondent submits that the Supreme Court has stressed that the statement of grounds in judicial review proceedings should be specifically particularised and that the applicant is prevented from raising new matters. In *AP v DPP* [2011] 1 I.R. 729, Denham J. held:

> *"[17] When an applicant seeks leave to apply for judicial review he does so on specific grounds stated in the statement required. On the ex parte application for leave the High Court Judge may grant leave on all, or some, of the grounds sought or may refuse to grant leave. The order of the High Court determines the parameters of the grounds upon which the application proceeds. The process requires the applicant to set out precisely the grounds upon which the application is to be advanced. On any such application the High Court has jurisdiction to allow an amendment of the statement of grounds, if it thinks fit. Once an application for leave to appeal has been granted the basis for the review by the court is established.*
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> *[18] In this case the ground upon which the relief was sought is as set out previously. This then is the scope of the review to be made by the court.*
>
> *[19] The High Court, in a wide ranging judgment, refused the application. In the analysis by the High Court Judge he addressed issues outside the grounds granted for the judicial review, in the absence of any order, or consent, to amend the statement of grounds. In this he fell into error. A court, including this court, is limited in a judicial review to the grounds ordered for the review on the initial application, unless the grounds have been amended. In this case the grounds for review are limited, essentially that a fourth trial would be an abuse and unfair, and were not amended."*

17. In the same case, Murray C.J. stated:

> *"[5] In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought.*
>
> *[6] It is not uncommon in many such applications that some grounds, and in particular the ultimate ground upon which leave is sought are expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea, and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted, particularly when such a ground is invariably accompanied by a list of more specific grounds.*
>
> *[7] Moreover, if, in the course of the hearing of an application for leave, it emerges that a ground or relief sought can or ought to be stated with greater clarity and precision then it is desirable that the order of the High Court granting leave, if leave is granted, specify the ground or relief in such terms.*
>
> *[8] There has also been a tendency in some cases, at a hearing of the judicial review proceedings on the merits, for new arguments to emerge in those of the applicant that in reality either go well beyond the scope of a particular ground or grounds upon which the leave was granted or simply raise new grounds.*
>
> *[9] The court of trial of course may, in the particular circumstances of the case, permit these matters to be argued, especially if the respondents consent, but in those circumstances the applicant should seek an order permitting any extended or new ground to be argued. This would avoid ambiguity if not confusion in an appeal as to the grounds that were before the High Court. The respondents, if they object to any matter being argued at such a hearing because it goes beyond the scope of the grounds on which leave was granted, should raise the matter and make their objection clear. Although it did not arise in this particular case, it is also unsatisfactory for objections of this nature to be raised by the respondents at the appeal stage when no objection had been expressly raised at the trial or there is controversy as to whether this was the case."*

18. Counsel for the second named respondent submits that the Supreme Court decision is underpinned by the change in the Judicial Review Court Rules introduced by S.I. 691 of 2011 Rules of the Superior Court, O. 84 (20)(3), which states:

> *"It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."*

19. Counsel for the second named respondent submits that no application has been made by the applicant to amend the statement of grounds in this case, and that *certiorari* cannot be granted on grounds that are not validly before this court. The applicant argues that no application to amend the statement of grounds has been made, as the original statement of grounds amply pleads the issues which this court must consider. It is submitted on behalf of the applicant that there is no material difference between the two

versions of events, as set out in the applicant's first and second affidavits, and that the order made by the first named respondent was a bad order made in excess of jurisdiction, as pleaded in the original statement of grounds.

20. In addition to the respondents' submission that the applicant has impermissibly raised new grounds which were not set out in the applicant's statement of grounds, it is argued that there has been a lack of candour on the part of the applicant, such as to disentitle him to the relief sought. It is submitted that there are a number of material inaccuracies in the applicant's evidence. The applicant initially stated that he disputed the 2003 conviction in the District Court, and claims, in his statement of grounds, that the respondent judge "*acted unreasonably by refusing to adjourn the matter*". He subsequently accepted that he did not dispute the conviction in open court. In addition to this, in para. 6 of his first affidavit, the applicant states that he did not receive a summons to appear in court on 15th June 2012, and that they were not served on him. Garda Noonan states that the applicant did attend court on that date and spoke to him personally. The applicant also failed to appear in court on 11th October 2012, and a Bench Warrant was issued.

21. The respondent argues that a failure to disclose material facts and a lack of candour on the part of an applicant in an application to bring judicial review can give the respondent the right to seek to set aside leave or can amount to a ground for refusing relief in judicial review. In *Dean v. DPP* [2008] IEHC 87. Hedigan J. held-

> *"Leave to seek Judicial Review was granted by O'Sullivan J. on 9th May 2005. It is agreed that statements made by the applicant to the Gardaí in the course of their investigations, and which admitted to dumping, but denied knowledge of the unlicensed nature of the site, were not brought to the notice of the Judge. These statements were, it seems to me, important parts of the factual matrix forming the basis of the criminal proceedings brought in this case.*
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> *Mr. McGrath in his book on Judicial Review at paragraph 27.46 sets out the fairly basic rules in relation to the requirements of full disclosure in an ex parte application:*
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> > *'An application for leave should be made on a Monday to the Judge assigned to hear ex parte Judicial Review applications. However, if the matter is urgent or the time limit to make the application is about to expire it can be made on another day to a Judge assigned to the Judicial Review list.*
>
> *It is important to emphasise that given that the application is made ex parte the applicant has a duty of uberrimae fides, that is the utmost of good faith, and must put all relevant facts and law before the Court, even if it does not support a grant of leave. If an applicant fails to do so then this may provide a basis for an application to set aside the grant of leave.*
>
> *I cannot over emphasise the importance of this principle. The 'leave to apply' provision in the rules is an essential part of the system of Judicial Review and is what makes it all work. But without confidence on the part of any Judge hearing the application that all relevant matters and law both for and against the application are before him or her the essential ex parte nature of the "leave to apply" system cannot continue.*
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> *I have considered very carefully overnight the significance of the failure to bring those statements to the attention of O'Sullivan J. I do not consider that the applicant or his legal advisers acted in bad faith. Nonetheless it seems to me that were the making and the contents of those statements by the applicant brought to the Judge's attention they might have led him to refuse leave to apply. I have come to this conclusion on the basis that whilst all other matters required to convict might well have been related to the question as to whether the Applicant did or did not know of the unlicensed nature of the site at Whitestown, Landfill Four and as to whether he did or did not know that he was disposing of waste in a manner likely to cause environmental damage, nonetheless, it would be a central part of any criminal case that the applicant did in fact dump on the site and was familiar with it.*
>
> *Indeed I do not think I need even go that far because it seems to me that when any part of the factual matrix of a case is omitted from the matters presented to a Judge on an ex parte basis the test as to whether this amounts to a material non-disclosure should be whether the information was relevant. If it was then it should have been brought to the attention of the Judge, who may weigh the actual importance of that information to the case. In my view the statements made were highly relevant.*
>
> *I note that no application was brought by the Director of Public Prosecutions to set aside the grant of leave. This, however, should not prevent the Court from acting proprio motu as it must be the master of its own procedures.*
>
> *I therefore refuse the relief sought on the basis of the nondisclosure of relevant information to the Court on the application for leave to apply'."*

22. It was also held by O'Keeffe J. in *Buckley v Judge Hammill* [2011] IEHC 261, that the failure by an applicant to be accurate with all the facts was a key factor in his decision to refuse the relief sought. In *McDonagh v District Judge Anne Watkins & Ors.* (Unreported, 20th December 2013), Kearns P. held:

> *". . . there was a non-disclosure which was of a very serious type and which arose from a lack of seriousness on the part of both the applicant and her solicitor about the process being undertaken. The failure to approach this application with due care and regard for the process further warrants in my view the decision to refuse to grant the relief now sought".*

23. Counsel for the applicant argues that the applicant, in his second affidavit, corrected his error and accepted that he had not challenged the conviction in open court. It is submitted that there was no deliberate attempt made to mislead the court and that applicant did not wilfully lie. In *Oboh & Ors. v. The Minister for Justice, Equality and Law Reform & Ors.* [2011] IEHC 102, Hogan J. referred to the case of *The State (Vozza) v O'Flionn* [1957] I.R. 227 and stated that:

> *"Since his conviction was held to be bad law by reason of such a failure on the part of the District Judge in question, it was quashed by the Supreme Court which held – if only by implication – that he was not to be deprived of his right to relief by reason of an alleged lack of candour in relation to an issue which was not central to the ground on which he has succeeded".*

Acquiescence
24. Counsel for the second named respondent relies on the case of *Ward v. Governor of Castlerea Prison* (Unreported, 11th May 2006) as authority for the argument that the applicant cannot store up a point and then seek to rely on it at a later stage, having failed to raise it in the District Court. It is submitted that Garda Noonan informed the applicant that he would be bringing the record of the 2003 conviction to the attention of the District Judge, and that by remaining silent and failing to seek an adjournment or legal advice, despite being advised to do so by Garda Noonan, the applicant acquiesced to evidence of this conviction being admitted. In *Ward,* the applicant made an Article 40 application seeking his release from custody on the grounds that his application for bail in the District Court had been refused. The District Court hearing was apparently conducted in a relatively informal manner and no formal evidence was given on Oath. At the conclusion of the hearing, the District Judge asked the solicitor for the applicant for a decision in the matter, and the solicitor requested that the Judge should determine the bail application. No objection was made at this stage to the manner in which both sides put relevant evidence to the court. Bail was refused and the applicant brought Article 40 proceedings in the High Court where relief was refused by Clarke J. The Supreme Court held that the applicant had acquiesced to the manner in which the hearing was conducted and could not raise this issue at a later stage to challenge the decision of the District Judge.

25. Counsel for the applicant submits that the facts in *Ward* are substantially different, as the applicant in the present case did raise a dispute with the prosecuting garda and was also unrepresented in court. Had the applicant been represented, it is argued that his solicitor would undoubtedly have sought an adjournment in order to require the garda to prove the conviction, which, it is submitted, he would have been unable to do. It is also submitted that the second named respondent's submissions in relation to acquiescence are based on a misunderstanding or disregard of the duties of the prosecutor, as set out in *Stanbridge* and *McDonnell*, as outlined above.

Failure to avail of Alternative Remedy
26. Counsel for the respondent submits that the applicant has failed to avail of a simple and efficient alternative remedy, and that judicial review proceedings were taken for the purposes of being granted a stay on the sentence. It is submitted that the applicant can appeal this matter to the Circuit Court and have a full appeal on all issues of law and fact, against either the sentence imposed or the conviction and sentence. It is argued that relief should be refused on this ground. In *The State (Abenglen) v. Corporation of Dublin* [1984] 1 I.R. 392, O'Higgins C.J. summarised the law in this area as follows:

> *"The remedy of certiorari first emerged in the early years of the seventeenth century as the means by which the Court of King's Bench assumed a superintendence and control over the exercise of their jurisdiction by justices of the peace. The court was concerned that these justices would exercise their functions properly and that there would be a uniform administration of the law throughout the country. For that reason it was open to anyone—even a stranger to the proceedings—to make complaint of irregularity and to seek to have the proceedings quashed. From early on, however, the court exercised a discretion as to whether the relief should be granted. In the case of a stranger to the proceedings, the court exercised this discretion cautiously and was guided not only by the nature of the irregularity but also by the character and conduct of the complainant. Where, however, the person complaining had an interest in the proceedings and had suffered as a consequence of what had taken place, the court exercised its discretion freely and acted, it was said, ex debito justitiae. However, a distinction was quickly drawn as to the circumstances in which the court would interfere. This was "between acts done without jurisdiction, which might be collaterally impeached in civil proceedings brought against the justices for trespass and which could be quashed by a writ of certiorari, and erroneous acts done within jurisdiction, which could not ordinarily be impugned in collateral proceedings and which were immune from the reach of certiorari unless an error was apparent on the face of the 'record'."—see De Smith's Judicial Review of Administrative Action (4th ed., p. 93).*
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> *From this emergence three centuries ago of the means by which the Court of King's Bench controlled the judicial process of lower courts, the remedy of certiorari has been developed and extended to reach far beyond the mere control of judicial process in courts as such. To-day it is the great remedy available to citizens, on application to the High Court, when any body or tribunal (be it a court or otherwise), having legal authority to affect their rights and having a duty to act judicially in accordance with the law and the Constitution, acts in excess of legal authority or contrary to its duty. Despite this development and extension, however, certiorari still retains its essential features. Its purpose is to supervise the exercise of jurisdiction by such bodies or tribunals and to control any usurpation or action in excess of jurisdiction. It is not available to correct errors or to review decisions or to make the High Court a court of appeal from the decisions complained of. In addition it remains a discretionary remedy . . .*
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> *In the vast majority of cases, however, a person whose legal rights have been infringed may be awarded certiorari ex debito justitiae if he can establish any of the recognised grounds for quashing; but the court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief or, I may add, if the relief is not necessary for the protection of those rights. For the court to act otherwise, almost as of course, once an irregularity or defect is established in the impugned proceedings, would be to debase this great remedy.*
>
> *The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."*

27. In *The State (Stanbridge) v. Mahon*, it was held that an appeal to the Circuit Court was the appropriate remedy and the relief sought was refused. It is submitted by the second named respondent that, in the absence of a breach of fair procedures, or some action in excess of jurisdiction, the remedy of *certiorari* is not available to correct errors in the District Court, and that the High Court is not a Court of Appeal from the District Court.

28. The applicant contends that the case of *Sweeney v. Brophy* [1993] 2 I.R. 202, is authority for the proposition that an order of a lower court can be quashed, even though the court acted ostensibly within jurisdiction but where the hearing of the matter was flawed as being fundamentally unfair, or where the principles of natural justice were not applied.

Decision
29. At the outset, it is necessary to consider the facts in this case, and in particular, the evidence given on affidavit by the applicant, on the basis of which he moved an *ex parte* application for this judicial review.

30. Paragraphs 5 and 6 of the applicant's grounding affidavit, in which he sought to set out the history of how he came to be before the District Court on the charge of driving without insurance, are plainly untrue and this departure from the truth cannot be explained away or excused on the basis of innocent mistake. The applicant must have known that he was in the Court 46 on 15th June 2012, and that the case was adjourned to 11th October 2012, to enable the applicant to produce proof that he had insurance, as he had assured Garda Noonan. In his supplemental affidavit, sworn after the filing of Garda Noonan's affidavit, he does not dispute the averments contained in para. 3 of Garda Noonan's affidavit. It could be said that his lack of candour on this topic should not bar the relief he claims, as this topic i.e the history of how he came to be in the District Court 44 on 1st November 2012, is not relevant to the core issue in these proceedings, namely, what happened outside Court 44 on that occasion and what happened in the course of the hearing before the first named respondent in court.

31. In his grounding affidavit, and also in his statement of grounds, the applicant presented an account of what happened in the court hearing which was untrue in a material way. He averred that the in court, he told the first named respondent that the 2003 previous conviction did not relate to him, and despite this, the first named respondent did not require formal proof of the conviction but proceeded to sentence him on the basis that he had this previous conviction. The applicant, in his supplemental affidavit, expressly accepted that this did not happen, and that he did not, notwithstanding that he addressed the court on his personal circumstances, raise any dispute with regard to the previous conviction.

32. He does, in his supplemental affidavit, dispute the averments contained in the affidavit of Garda Noonan concerning the conversation they had outside Court 44 on the 1st November 2012. Specifically, he denies that Garda Noonan suggested to him that the case could be adjourned to enable him to get legal advice on the validity or otherwise of the previous conviction, and that he said that he [the applicant] did not want legal representation or an adjournment and that he wanted the case determined that day.

33. As there was no cross-examination on the affidavits, it is not possible for me to resolve this dispute. However, the failure of the applicant to give a truthful account of what happened in court in his grounding affidavit is of direct relevance to issues to be determined in the judicial review.

34. In his grounding affidavit and in his statement of grounds, the applicant clearly makes the case that the first named respondent ignored the dispute he raised concerning the validity of the previous conviction, and proceeded to sentence him on the basis of that conviction being a valid conviction, in circumstances where that conviction, having been disputed, was not proved in accordance with law. Hence, he made that the case that first named respondent had exceeded her jurisdiction, breached the applicant's right to fair procedures and denied him a trial in due course of law, as required by Article 38 of Bunreacht na hÉireann.

35. When the full truth of the matter was eventually permitted to come to the surface, it transpires that she did nothing of the kind. The applicant, when obviously given an ample opportunity to make his case, said nothing at all about the previous conviction, an extraordinary omission, even allowing for the fact that he did not have legal representation. All he had to say was that the conviction was not his, a point he certainly raised with Garda Noonan outside Court 44. I am quite satisfied that the failure to tell the truth in his grounding affidavit on this matter cannot be explained or excused as an innocent mistake, and as his lack of candour in this regard is directly relevant to the case he made originally in his statement of grounds and grounding affidavit, and in accordance with established jurisprudence, as set out above, it cannot be ignored. I am satisfied this lack of candour would require this court to exercise its discretion to refuse the relief sought, if the applicant was otherwise entitled to that relief.

36. Faced with the damage to his original case, wrought by the true facts, the applicant adroitly shifts ground, and at the hearing of the these proceedings, and in written submissions, he now makes the case that Garda Noonan was the cause of the entire mishap, by failing, in his duty as a prosecutor, to have alerted the court to the fact that the applicant disputed the 2003 conviction, and to have sought an adjournment to enable the conviction to be proved in accordance with law.

37. As is clear, in making this case, the applicant is radically changing the case he originally made in his statement of grounds. Whereas, in his statement of grounds, he complains solely about the manner in which the first named respondent discharged the duties of her office as a District Judge in hearing his case. At the hearing of these proceedings, he makes no complaint about the actions of the first named respondent. His complaint now is that Garda Noonan, as prosecutor, misled the court by failing in his duty as a prosecutor to have told the court of the dispute concerning the validity of the 2003 conviction.

38. In my opinion, this latter case is fundamentally different to the original case in respect of which leave was granted to pursue this judicial review. I am quite satisfied the leave granted did not contemplate the challenge to the order of the first named respondent now sought to be advanced, and that being so, following the judgements of the Supreme Court in the case of *A.P v The D.P.P.* [2011] 1 I.R 729, I am prohibited, in the absence of consent of the second named respondent [clearly not there] from adjudicating on this new case made by the applicant, without the leave of this court in that regard having been obtained by the applicant in the ordinary way.

39. For the sake of completeness, however, I would add that there is no merit in the applicant's complaint against Garda Noonan. He was entitled to, indeed obliged, to raise the previous conviction in the sentencing hearing. Before doing so, he had alerted the applicant to this previous conviction. There is no doubt that the applicant queried the validity of the conviction in the discussion outside Court 44. In summary, proceedings such as these, having alerted the applicant in advance, it was not unreasonable for Garda Noonan to allow the applicant to raise any dispute concerning this conviction. Indeed, on the basis of the averments in the applicant's supplemental affidavit concerning that discussion, Garda Noonan could hardly be faulted if he expected the applicant to raise the matter, and likewise, he could hardly be blamed for accepting the applicant's silence on this matter as indicating that the applicant did not wish to pursue any such dispute. I am quite satisfied that the applicant has not established that Garda Noonan failed in his duty as a prosecutor or that such alleged failure led the court to proceed as it did, bearing in mind that the applicant remained mute when one short sentence from him would have prevented the mischief which he claims occurred.

40. It appropriate to note, although it may be so obvious as to not require explicit statement, that the first named respondent, in hearing this matter, clearly acted within jurisdiction. Insofar as the applicant claims that the court proceeded on the basis of a mistake of fact, that was an error within jurisdiction and not amenable to judicial review, but was one that could have been corrected on appeal, a remedy that was readily available to the applicant at the relevant time, but which he either failed to take or chose not to take.

41. There is no doubt that in an appeal, a full rehearing of the matter, any error of fact or law could have been corrected. The

question here is whether the availability of an appeal should move this court to exercise its discretion to deny the applicant the remedy he seeks, that is, if he had good grounds for obtaining such remedy in the first place. In this case, the first named respondent did not act in excess of her jurisdiction in any way and it is clear that the applicant was given a full and fair hearing by the first named respondent. Furthermore, the applicant has never [nor indeed could he] raised any dispute as to the jurisdiction of the first named respondent to try the issues that were before her. His decision not to mention his concern about the previous conviction, when given an ample opportunity by the first named respondent to address her on his circumstances, cannot undermine the essential fairness of the hearing he was afforded by the first named respondent. This is not a case in which the grievance of which the applicant now complains can be attributed to any deficiency in the conduct of these proceedings by the first named respondent which would warrant the suggestion that the trial was not one in due course of law as required by Article 38 of Bunreacht na hÉireann. Hence, in my view, the error of which is at the heart of the applicant's grievance [if indeed there was at that time any error] was one which would not attract the great remedy of judicial review, as it has been described by O'Higgins C.J. in *State [Abenglen] v. The Corporation of Dublin],* where there is an adequate alternative remedy available, as there is in this case.

42. The final question which arises is whether the applicant acquiesced in the manner in which the case was dealt with in the District Court, so that he cannot now be heard to complain about that to which he acquiesced. There is no doubt that the applicant was made aware in advance that Garda Noonan was going to raise the previous conviction. There is equally no doubt the applicant did not mention to the first named respondent any concern or dispute concerning this conviction as he had apparently done outside the Court to Garda Noonan. It is also clear he was given an ample opportunity by the first named respondent to speak on his own behalf and, specifically, to tell her of his personal circumstances. It is difficult to understand why it is, that if he really wished to dispute this conviction, or if he merely had a real concern as to whether it applied to him, that he did not say to the first named respondent that this conviction did not relate to him, or that he believed that to be the case. If he had made that very simple utterance, it is highly probable that first named respondent would not have proceeded to impose a penalty, but would have adjourned the matter so that that issue could be clarified. In my opinion, the applicant's silence in these circumstances amounted to acquiescence in the manner in which the matter was dealt with by the first named respondent and would be a further factor moving this Court to exercise it's discretion against granting the relief sought.

43. For all of the reasons set above, I refuse the relief sought.