Neutral Citation Number: [2009] IEHC 110

THE HIGH COURT

2008 134 JR

BETWEEN:

ROBERT BALAZ

APPLICANT

AND

HIS HONOUR JUDGE ANTHONY KENNEDY and THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice Hedigan, delivered on the 5th day of March, 2009

1. The applicant is a national of the Czech Republic and works for a traffic management company. He has a wife and is the father of four young children.

2. The first named respondent is a Judge of the Circuit Court assigned to the Midlands Circuit.

3. The second named respondent is the authority responsible for the prosecution of criminal offences in Ireland. His statutory authority to carry out this function is derived from the Prosecution of Offences Act 1974.

4. The applicant seeks an order of certiorari, by way of judicial review, quashing the decision of the first named respondent dated the 5th of February 2008 to affirm the conviction and sentence imposed by the District Court on the respondent on the 28th of June 2007.

I. Factual and Procedural Background

5. The applicant was charged with the following series of offences under the Criminal Justice (Theft and Fraud Offences Act) 2004 ('the 2004 Act'):

(a) Handling stolen property contrary to s. 18 of the 2004 Act on the 15th of September 2006. The charge sheet listed the relevant property as a cheque which was the property of one Gerry McCabe;

(b) Possession of a false identification card contrary to s. 29 of the 2004 Act on the 7th of October 2006;

(c) Possession of a false driving licence contrary to s. 29 of the 2004 Act on the 7th of October 2006;

(d) Burglary contrary to s. 12 of the 2004 Act on the 14th of January 2007.

6. On the 28th of June 2007, the applicant pleaded guilty to all four charges before Longford District Court and received the following sentences: 6 months' imprisonment in respect of the s. 18 charge; 4 months' imprisonment in respect of each of the s. 29 charges to run concurrently with the imprisonment for the s. 18 charge; and 10 months' imprisonment in respect of the s. 12 charge to run consecutive to the other sentences.

7. The applicant subsequently appealed to the Circuit Court against the sentences imposed in respect of the s. 29, s. 12 and s. 18 charges. These matters came before the first named respondent on the 6th of November 2007 at which point the applicant sought leave to change his plea in respect of the s. 12 and s. 18 charges. The applicant claimed that that he had been under great stress when he had pleaded guilty in the District Court and had simply wished to dispose of the matters quickly. He had not appreciated the seriousness of the charges until sentence was imposed. The first named respondent granted the application on this basis and adjourned the case until the 18th of December 2007, to allow the prosecution to arrange for the attendance of witnesses.

8. On the 18th of December 2007, the matter was again adjourned owing to the unavailability of witnesses until the 15th of January 2008. On that date, the first named respondent considered the sentences imposed in respect of the two s. 29 charges and decided to impose two fines of €200 to be paid within 30 days and two concurrent sentences of 4 months' imprisonment, two months of which had already been served and the remainder to be suspended upon the applicant entering into a bond. The applicant's appeals in respect of the s. 12 and s. 18 matters were once again adjourned, despite objections on his behalf, as certain witnesses were not present.

9. The applicant's appeals against conviction and sentence in respect of the s. 12 and s. 18 charges were ultimately heard on the 5th of February 2008 by the first named respondent. The first named respondent requested that the solicitor appearing for the second named respondent should provide him with copies of the witness statements in respect of both appeals. He did so on the basis that having copies of the statements would save him from having to make extensive notes during the hearings. These statements were provided to the first named respondent who promptly retired for approximately twenty minutes. Subsequent correspondence between the applicant and the second named respondent's solicitor has revealed that the first named respondent was given a copy of all witness statements in respect of both charges, save for the statement of one witness in relation to the s. 12 charge who was not present in court and those of the custody Gardaí whose evidence was not in issue.

10. Before the hearings commenced, the first named respondent noted a technical difficulty with the s. 12 matter, relating to the court file. Specifically, the first named respondent was of the opinion that the sentence of 10 months'

imprisonment which had been imposed for that offence was consecutive to a sentence which was spent and was therefore a nullity. On this basis, he decided to let the matter stand until the conclusion of the s. 18 matter, at which point the s. 12 matter was ultimately adjourned generally with liberty to re-enter.

11. During the course of the appeal hearing in respect of the s. 18 conviction, the prosecution called Mr. Gerry McCabe as a witness. Mr. McCabe gave evidence that he was a director of McCabe Construction Ltd. and on the 15th of September 2006 had become aware that certain cheques were stolen from the premises of that company. Mr. McCabe further testified that he and his wife were the sole shareholders in the company, that he was the sole signatory on the cheque in question and that he was the true owner of the property therein. There is a conflict of evidence as to the extent, if any, to which Mr. McCabe resiled from the assertion that he was the owner of the cheque on cross-examination. The applicant claims that Mr. McCabe accepted that the cheques were drawn on the account of the company and that they were the property of that company. He further asserts that this evidence was not challenged on re-examination. The respondents reject this suggestion, claiming that Mr. McCabe's position was at all times that he was the owner of the cheque.

12. The nature of the cheque stolen and the circumstances of its acquisition by the applicant were unclear. No prosecution witness was able to confirm that the cheque found in the applicant's possession was actually one which was stolen, different witnesses ascribed different values to the cheque and no evidence was adduced as to the number or date on the stolen cheque. It was also accepted that cheques which had not been stolen had previously been made out to the payee in the same amount as the stolen cheque. Following this evidence, the applicant sought a direction which was refused by the first named respondent who stated that the company cheque was the property of Mr. McCabe. Thereafter, more uncertainty prevailed as the applicant gave evidence that he had been given the cheque by a Romanian man in a car park of a local supermarket. The applicant claimed that while he knew this man to see previously, he had never spoken to him and does not know his name. The applicant also maintained that he had negotiated a deal with the man whereby he had agreed to give him a watch in return for which he received the cheque.

13. After hearing the evidence, the first named respondent affirmed the conviction and, following a plea in mitigation also affirmed the sentence which had been imposed on the applicant by the District Court of 6 months' imprisonment. The first named respondent did, however, defer the execution of the committal warrant for one week until noon on the 8th of February 2008. This was done at the applicant's request in order to allow him to make certain domestic arrangements.

14. On the 7th of April 2008, leave to apply by way of judicial review was granted by McMahon J. in the High Court who also issued a stay on the execution of the committal warrant pending the determination of these proceedings. The applicant now seeks to quash the decision of the first named respondent.

II. The Submissions of the Parties

(a) Bias

15. The applicant submits that the only logical inference from the conduct of the first named respondent in retiring with the prosecution witness statements in his possession is that he did so for the purpose of considering them. He claims that this assumption is supported by the fact that, on the resumption of the hearing, the first named respondent expressed concerns in relation to the s. 12 appeal. The respondents suggest that there is no reason, based on the evidence or indeed the manner in which the appeal proceeded, to suspect that the first named respondent had even read the material relating to the s. 12 charge, let alone allowed it to colour his assessment of the separate charge under s. 18 of the 2004 Act.

16. The applicant further asserts that the consideration of witness statements and interview notes in private by the trial judge before any sworn testimony has been tendered in open and public court creates a real concern that the trial judge's assessment of such evidence as was called in due course may have been prejudged. The applicant argues that the documents which the first named respondent possessed in chambers prior to hearing the applicant's appeal included statements by witnesses in an appeal which ultimately did not proceed before the Court. These documents, in his submission, alleged a serious criminal offence and were hearsay statements, irrelevant to the appeal which did in fact proceed before the first named respondent. He submits that they were of no probative value and were purely prejudicial to the applicant.

17. In all, the applicant submits that the trial was conducted in such a manner which would give rise to a perception that the first named respondent was considering the case in chambers prior to sitting to hear the appeal and that therefore, there was a prejudgment of the case prior to the evidence being aired in open court. This, he suggests, does not accord with the trial process envisaged by Articles 34 and 38 of the Constitution.

18. The respondents submit, by way of a preliminary objection to this particular ground of review, that in failing to express any concerns which he possessed in relation to bias at the time of the hearing of the appeal, the applicant has waived his right to subsequently impugn the conduct of that appeal on judicial review.

19. The respondents submit that the significance of the first named respondent's conduct must be considered in the circumstances of the case as a whole and contend that all other aspects of the conduct of the proceedings weigh against any possibility of an appearance of bias. The respondents emphasise the fact that the applicant was permitted to call such evidence, seek such directions and make such submissions as he felt appropriate during the conduct of the trial.

(b)Error of Law

20. The applicant submits that the first named respondent had no jurisdiction to convict him for the offence under s. 18 of the 2004 Act as the actus reus of the offence charged had not adequately been made out. He contends that the stolen cheque specified on the charge sheet was clearly the property of McCabe Construction Ltd., as opposed to the principal of that company, Mr. Gerry McCabe. In those circumstances, he submits that the first named respondent's decision to affirm his conviction was in disregard of the principle of separate legal personality developed in the seminal decision of Salomon v. Salomon and Company Ltd. [1897] AC 22 and was therefore an error of law which vitiated jurisdiction.

21. The respondents argue that the first named respondent was entitled to conclude from the evidence presented at trial that the cheque was in fact the property of Mr. McCabe. In the alternative, they submit that there are circumstances in which the corporate veil must be pierced in the interests of justice and that a case in which an accused person would escape punishment for an offence which is otherwise proven amounts to such a situation of supervening necessity.

III. The Court's Assessment
(a) Bias

22. In the present case, no evidence was presented to the Court which proved whether or not the first named respondent did, in fact, consider the witness statements which he requested from the solicitor. I am willing to proceed on the basis that he did so, as that seems to me to be the most reasonable interpretation of what transpired.

23. The respondents have made the case that since the applicant failed to raise his concerns in relation to the first named respondent's impartiality at the time of the hearing, he is prohibited from seeking judicial review on such a basis. This is a submission with which I am inclined to agree. It is clear that a party's entitlement to rely on certain procedural infirmities of a criminal trial being challenged on judicial review may be waived where he failed to object to the particular practice at the time of the trial itself. In D.P.P. v. O'Donnell [1995] 2 IR 294, Geoghegan J. accepted that there might be circumstances in which a failure to challenge a tribunal's jurisdiction to consider a particular matter would constitute a waiver of the right of objection, although such did not arise on the facts before the High Court in that case.

24. In Vakauta v. Kelly [1989] HCA 44, a case involving the assessment of damages for personal injury, the trial judge, before hearing the evidence of the appellant's medical witnesses, referred to them as "an unholy trinity." He continued by stating that that they belonged to "the usual panel of doctors who think you can do a full week's work without arms or legs;" whose "views are almost inevitably slanted by the [Government Insurance Office] by whom they have been retained consciously or unconsciously." Toohey J., delivering the judgment of the majority of the High Court of Australia, stated as follows at paragraph 16 of the judgment: -

> *"There is no reason why, in authority or in principle, a litigant who is fully aware of the circumstances from which ostensible bias might be inferred, should not be capable of waiving the right later to object to the judge continuing to hear and dispose of the case. That is not to say that the litigant in such a position must expressly call upon the judge to withdraw from the case. It may be enough that counsel make clear that objection is taken to what the judge has said, by reason of the way in which the remarks will be viewed. It will then be for the judge to determine what course to adopt, in particular whether to stand down from the case. For counsel to invite the judge to withdraw from the case may be quite premature, particularly if the judge acknowledges the apparent bias in what has been said and thereafter takes steps to dispel that apprehension. But, as Dawson J. noted in Re J.R.L.; Ex parte C.J.L. [1986] HCA 39; (1986) 161 CLR 342, at p 372, suspicion of bias based on preconceptions existing independently of the case "may well be ineradicable". In that situation there will be no option but to ask the judge to disqualify himself. In any event objection must be taken: see Re McCrory; Ex parte Rivett, at p 6. It was not taken in the present case."*

25. Dawson J., dissenting on a separate issue, also concurred on this point. He stated at paragraph 10:-

> *"There can, I think, be no doubt that an objection upon the ground of bias can be waived. Even where it is a question of the public apprehension of bias, the parties themselves must be competent to waive the objection. Although justice must manifestly be seen to be done, where a party, being aware of his right to object, waives that right, there will be little danger of the appearance of injustice. In the case of a criminal prosecution where the public is directly interested in the outcome, it may be different, but even in such a case, Isaacs J., in Dickason v. Edwards [1910] HCA 7; (1910) 10 CLR 243, was clearly of the view that a party may waive the objection. At p 260 he said:*
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> *"So that the principle seems to me to be this - that, if the person whose presence is challenged can fairly be said to be biassed, either by reason of his necessary interest or by reason of some pre-determination he has arrived at in the course of the case, then he ought not to act unless there is something to relieve him from these disqualifications. Even in a public prosecution a party may waive the objection. One of the strongest examples of this is the case of Wakefield Local Board of Health v. West Riding and Grimsby Railway Co. ((1865) 6 B & S 794 (122 ER 1386)). There the Statute provided that the justices should be disinterested parties, but the words were held not necessarily to prevent waiver. A distinction has been drawn between public judicial tribunals and private judicial tribunals, but I am not satisfied that that is a sound distinction."*

26. I find the reasoning expressed by the High Court of Australia in Vakauta convincing. I do not think that a party, who is fully apprised of all the facts necessary to mount an objection on the grounds of objective bias of the relevant judge, should be permitted to keep such a challenge in reserve, in case the result of trial is not in his favour. In the present case, the applicant contends that it was immediately apparent from the actions of the first named respondent that he had considered papers in an appeal which was not ultimately going to proceed. He made no objection or comment on this and proceeded to defend against the other charge in the usual manner. On this basis, I am satisfied that he has waived his right to challenge the ostensible impartiality of the first named respondent. Whilst this disposes of the case, it seems to me that I should proceed to consider the arguments in relation to bias and error of law since they were fully opened to me in argument and in the written submissions.

27. No allegation is made of actual bias on the part of the first named respondent therefore it falls for consideration whether a claim of objective bias has been made out. The test for this kind of prejudgment has received considerable judicial attention in this jurisdiction. In Bula Ltd. v. Tara Mines Ltd. (No. 6) [2000] 4 IR 412, the Supreme Court considered the issue. Denham J. stated at page 449:-

> *"A judge has a duty to sit and hear a case. However, in certain circumstances it is appropriate that he or she disqualify himself or herself from a particular case. The test is not whether that judge believes he or she would be impartial. Nor is it whether the judge or judges on a motion to set aside such a judgment believes the judge was or would be impartial. Nor is it whether the parties consider the judge impartial. The test is objective. This has been analysed by the Constitutional Court of South Africa: President of the Republic of South Africa v. South African Rugby Football Union 1999 (4) S.A. 147 at para. 48:-*
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> *"…the correct approach to this application for the recusal of members of this Court is objective and the onus of*

establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

28. It is clear that a case of objective bias may be made out on the basis of a previous connection of a decision-maker with a particular party or issue but also by the conduct of the adjudicator during the hearing itself. This latter aspect was recently considered in Fogarty v. O'Donnell [2008] IEHC 198. In that case, the District Judge had used the word "irrefutable" to describe some of the prosecution's evidence before the proceedings had concluded and before the defence case had fully been made. However, the Judge had then gone on to dispose of the remainder of the case in the usual way. McMahon J. stated the following:-

"What is important, indeed vital, however, is that the judge does not in such circumstances make a definitive determination before all the evidence has been heard. To do so would be in clear breach of fair procedures and in particular would be contrary to the basic principle audi alterem partem. Moreover, it is important also that the judge does not give the appearance that he has prejudged a decision and in this respect he should take great care when expressing himself during the course of the trial that he does not express himself in language which would suggest that he has come to a hasty decision in the matter.

Whether the language used by a judge during the course of a trial is such that it indicates bias in the sense that it shows that the judge has made up his mind before he has heard all the evidence, depends on the facts and circumstances of each case. The use of an infelicitous word or phrase during the trial by the judge should not always compel such a conclusion. To define bias one must look at the overall picture and in the present case one must contrast the use of that single word with the action of the respondent, in insisting that a further witness should be called to give evidence on the sequence of the traffic lights. Such action does not speak of bias... It is clear also that he was not impressed with the applicant's evidence. Nevertheless he listened to the defence's arguments and counsel for the applicant was successful in preventing the judge from making a final determination on the matter on that day. Clearly, having listened to the applicant/defendant's evidence he harboured some doubt in relation to the sequencing of the traffic lights and, rather than dispose of the matter without investigating this aspect of the case, he called for another witness and adjourned the matter for another day. This, in my view, was not the action of a man who had made a premature decision that was tainted with bias."

29. Applying the principles derived from the authorities above, it seems to me that any limited perception of prejudgment which could be said to arise from the first named respondent's consideration of the witness statements is heavily outweighed by the overall manner and fairness with which the trial was conducted. The Judge in effect dismissed the s. 12 charge of his own motion. In the trial of the charges which did proceed, the applicant was given every opportunity to make his case, through cross-examination of prosecution witnesses, the giving of his own evidence and the making of submissions through his legal representatives. In the circumstances, it seems to me that the Judge conducted the case with scrupulous fairness and no possible bias could have been perceived by any reasonable observer.

(b) Error of Law

30. In considering the applicant's case on this ground, the Court must remain acutely aware of its function in judicial review proceedings. It is not the purpose of this unique and special remedy to empower the High Court to act as an appellate body, which may review findings of fact and critically assess in minute detail the legal principles applied by the original tribunal. In a criminal case, such as the present one, the Court has no authority to re-evaluate the evidence on its own terms. There are good reasons for the imposition of such limits on the Court's capabilities; I have not had the opportunity to hear from any witnesses and examine their demeanour, nor to inspect any exhibits and consider their probative effect. In Truloc Ltd. v. McMenamin [1994] 1 ILRM 151, O'Hanlon J. stated at page 155:-

"I do not consider that it is part of the function of the High Court, on an application for judicial review, to examine in detail the evidence tendered in support of a prosecution in the District Court for the purpose of assessing whether, in the opinion of the High Court judge, that evidence was sufficient to support the conviction which has been entered against a defendant."

31. Moreover, in Roche v. Martin [1993] ILRM 651, the High Court held that a judge in a criminal trial will not be deemed to have exceeded jurisdiction, unless the conclusion which he reaches as to the satisfaction of a particular proof is not supported by any evidence. Murphy J. stated:-

"In different appellate procedures insufficiency of evidence may be a ground for reversing a decision of a court of first instance but insufficiency of evidence - save in the most extreme case – does not deprive the… Judge of jurisdiction to reach a decision on the matter before him."

32. It is clear in the present case that the drawer of the cheque was the company and that the payee was an unnamed third party. The cheque may well have been considered, in those circumstances, to be in the possession of Mr. McCabe. There was quite patently some confusion as to who actually had property in the cheque. The first named respondent took the view that the cheque in reality belonged to Mr. McCabe. I am of the opinion that this was a finding of fact and is therefore not reviewable. Moreover, the decision as to the legal status of the cheque was made within jurisdiction and cannot be impugned on judicial review.

IV. Conclusion

34. In light of the foregoing, I am satisfied that the applicant's conviction on the s. 18 charge was not secured in breach of natural justice or, indeed, by virtue of a fundamental error of law. In those circumstances, I will refuse the relief sought.