[2019] IEHC 918

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 866 JR]

BETWEEN

MICHAEL MURPHY

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice MacGrath delivered on the 20th day of December, 2019.

1. This is an application for an order of *certiorari* quashing the decision made on 14th November, 2019, by the learned Circuit Court Judge O'Kelly who had presided over the initial trial to refuse to recuse himself in respect of the retrial of the applicant following the first trial in which the jury did not reach a verdict. The application is brought on the ground of objective bias. The applicant makes it clear that he does not allege subjective bias.

2. The applicant was tried before Waterford Circuit Court in May, 2019 on charges relating to the holding and disposing of waste likely to cause environmental pollution and under the Finance Act, 1999.

3. The first trial lasted 15 days, eight of which were taken up by a voir dire in which the admissibility of evidence procured in searches of certain premises was challenged. The focus of the challenge related to the powers of entry employed by An Garda Síochána, Revenue Officers and Local Authorities Officers.

4. Counsel for Mr. Murphy made application to the trial judge to withdraw the case from the jury on the basis of the decision in *The People (Director of Public Prosecutions) v. J.C.* [2017] 1 I.R. 417 that it would be an afront to the administration of justice to permit the case to go to the jury because of the alleged unlawful actions of the prosecution witnesses in obtaining the evidence. The applicant maintains that because it was necessary for the learned trial judge, in considering the application to exclude evidence, to make determinations of fact relating to the credibility, reliability, honesty, integrity and motivation of a number of those witnesses, and having determined those issues in favour of prosecution, it would be inappropriate for the same Judge to preside over the trial where such issues are once again likely to arise and upon which rulings are likely to be required. One of the allegations which had been made was that a member of An Garda Síochána had deliberately misled a District Court Judge when seeking a warrant. Another issue relates to an allegation that a Revenue Officer had attempted to mislead the trial judge. In essence, the applicant made the case that such evidence ought to have been excluded on the basis that the admission of such evidence would bring the administration of justice into disrepute. It is fair to characterise the defence which was put forward on behalf of the applicant as robust.

5. In delivering his ruling, the learned trial judge rejected the challenge made by the applicant. The trial judge found that there was nothing in the evidence to impugn the

garda's honesty or good faith in applying for the search warrant; or the truthfulness of the evidence given to the District Judge. He also stated that he was satisfied that there was nothing in the garda's testimony to suggest that she was indifferent to the truth or that she displayed a willingness to convey a wholly untenable position to the District Judge.

6. While a number of applications were made by counsel for the accused/applicant in the absence of the jury, the first related to the warrant and was rejected by the trial judge. Of this application, the judge said that counsel had:-

> *"put it to the detective garda that she not only misled the District Judge, but she did so deliberately, and that she did not convey the truth to him. These are quite astounding allegations. They appear to be based on a number of vague suggestions of mala fides which, quite frankly, I find absurd."*

The learned trial stated that there was nothing in the evidence to impugn the Detective Garda's honesty or good faith in applying for the search warrant or the truthfulness of her evidence to the District Court judge.

7. Later in the judgment, the trial judge stated that it was disingenuous for counsel to state that two questions asked by the District Judge were in exactly the same terms as those disclosed in the sworn information and, the learned trial judge clearly disagreed with counsel's characterisation of what had occurred. He continued:-

> *"that wording alone makes nonsense of the suggestion that the Detective Garda had misled the judge into thinking the information had been provided to her, either directly or impliedly, by another person."*

Therefore, on this issue, the trial judge was satisfied that the District Judge had asked appropriate questions in arriving at his opinion as to the existence of a reasonable basis for suspicion, thereby leading him to grant the warrant. The judge stated he was satisfied that there was nothing in the Detective Garda's testimony to suggest she was indifferent to the truth or that she displayed a willingness to display a wholly unattainable position to the District Judge. He therefore concluded that there was no basis to strike down the warrant. It is important that it is acknowledged that the applicant's position is that there was nothing disingenuous about the submissions made on his behalf and that all submissions were properly made. Reference was made by counsel to various extracts from the transcript of evidence in support of the applicant's contention in this regard.

8. A second objection concerned the search of premises. It was contended that the warrant did not authorise entry to a portion of the property. This application having been carefully considered by the trial judge, in some detail, was rejected. In the course of this particular application and ruling, considerable emphasis was placed on an argument regarding the absence of a Garda notebook. The judge described this as regrettable, but was satisfied that it certainly did not make the trial so unfair that it should be stopped, or the evidence excluded. The notebook would assist in obviating errors of recollection, but it was not a

reason to exclude the evidence gathered. Further, the judge queried what personal rights were being asserted given that a lease on the property had been taken in the name of the company. In this context, the judge stated that he was not impressed with the length of time that was spent cross examining witnesses and commented that asking witnesses to give word for word verbatim statements of what was said five and a half years previously was seeking the impossible. In any event, the trial judge was satisfied that there was no breach of the Judge's Rules. The judge also described as unpersuasive, and as not affecting the legal position, an argument by counsel for the defendant that he won concessions from witnesses that they had not exercised their statutory powers but had entered simply at the invitation of the Garda. The judge also referred to the fact that witnesses had been excluded, while others had given evidence. He noted that it had been put to the witnesses that a previous witness had accepted that they had been invited onto the premises by Garda invitation, but described this as disingenuous in circumstances where the earlier witnesses had also claimed they were exercising statutory powers of entry, something which was not referred to in later cross examination. The judge observed that the problem had become so acute by the cross examination of one witness that he was worried that there was a real risk of unfairness:-

> *"I intervened, and had to take the unusual and unfortunate step of interrupting the cross examination until agreement was reached between counsel as to what exactly … had actually said. Even then, the DAR had to be played and replayed to establish what was said and when a short transcript was prepared, it was not put in full to the witness."*

Later, the judge stated that he did not accept that another witness had given false or fabricated evidence because he was present in court when counsel had indicated there was a problem with the warrant.

9. At p. 14 of the transcript of the judge's ruling, he stated:-

> *"I find nothing to impugn the Revenue actions on either the 15th or 18th of November, 2013. While the celebrated and much referenced case of JC has played a major part in Mr. O'Lideadha's submissions, I do not find it is necessary to apply the test set out in the judgment of Clarke J., for the reasons I have previously given. However, it has been helpful to read again of the high constitutional value to ensuring that all potentially relevant evidence is available to the jury."*

Having further analysed the evidence in careful detail he ruled that the officials had the power to lawfully select samples and he rejected the defence contention that it had been established that he would not receive a fair trial, that his rights to natural justice had been infringed or that his legal or constitutional rights had been denied to him.

10. Thus, the judge did not find anything unlawful about the entry onto the premises but he noted that there was another, what he described as *"discrete objection to any of the evidence herein*" namely, that because it was claimed that one of the Revenue officers had admitted to making a number of false claims, the court must protect itself from

abuse. It was argued that to permit the trial to proceed would bring the very administration of justice into disrepute. This too was rejected by the judge following his detailed assessment of the officer's evidence. In the course of an exchange between counsel on this point, the trial judge stated that he:-

> *"pointed out that it was my function to assess the evidence and draw whatever conclusions were appropriate from same and it was up to me to form my own view on what the witness said."*

In the light of the submission of counsel for the accused on this issue and arising from his concerns regarding fairness to the accused, counsel was permitted to resume cross examination. The judge continued "*what then transpired was nothing short of extraordinary as a witness became completely confused in her evidence*." It seems that she was working from a different version of a statement than that which had been provided to both legal teams. The judge acceded to an application for a full copy of the correspondence between the Revenue's law office and the officer to be made available. Emerging from this correspondence, counsel raised a further objection that the administration of justice had been brought into disrepute. Having assessed the evidence, the judge was satisfied that it was very clear that the witness was not directed to state anything specific in her statement. Again, this was subject to detailed analysis by the judge and he concluded that that there was no question that the officer engaged in anything underhand, such as for example doctoring an existing statement. He was not satisfied that there was anything in the disorganised state of her evidence to suggest that she was being deliberately deceitful or attempting to pass as factual, anything which she knew to be untrue. With regard to counsel's complaint that there had been inadequate disclosure, the judge ruled that it would not be appropriate for it to be disclosed at first instance as it had contained sections of legal advice. Nevertheless, he found that there should have been disclosure of each of the different versions of the statement which she had made. On this, he stated *"the whole confusion of the 26th April, 2019 is certainly not of such toxic effect that it contaminates the entire prosecution case or the trial process*." Having alluded to *JC*, he said that the relevant question was at what point did the trial fall short of one in due course of law because of the manner in which the evidence had been obtained; "*When does the admission of the evidence itself bring the administration of justice into disrepute?*" This was not a problem of how or why the evidence had been gathered, rather one of the officer committing to statement form the evidence which she wished to communicate some days before the trial began. What he found disturbing about the officer's evidence was not her ability to remember what she had done over a half decade previously, rather her inability to explain what she had done two weeks previously. On this point, the learned trial judge ruled that the officer's evidence became more unsatisfactory and less credible. Its integrity and probative value had been significantly diminished and her inability to explain clearly why she made numerous statements was unacceptable. He continued:-

> *"in those circumstances a point has been reached whereby I must express the courts disquiet whereby excluding from the trial the evidence which she sought to*

give about the events on the 15th November 2013 and the 18th November 2013, together with the exhibit evidence of her sketches and the photographs which she took on the day. I am doing this despite my findings that the sketches and the photographs were both lawfully made, and at least insofar as the sketches are concerned, as I have not seen the photographs, they were genuine attempts to accurately depict the scene she found. However, that is all that I am doing."

The judge observed that the officer may have had some other involvement with the investigation beyond the two dates to which his ruling related and he stated:-

"I am not extending the sanction to exclude any further evidence at this stage, only the evidence on the two dates referenced in the statements of 26th April 2019. Having carefully observed Ms. Dwyer's demeanour in her time in the witness box and particularly her manner during the most uncomfortable parts of her cross examination, I am satisfied that she was not deliberately deceitful or reckless of the oath which she took, nor was she acting in a reckless or grossly negligent disregard of Mr. Murphys right to a fair trial. She was confused, and her competence and credibility were badly damaged. I believe my ruling to be a proportionate and robust response to this. It would be quite wrong to direct the jury to acquit Mr. Murphy because of the incompetence of one witness in a voir dire or prohibit the trial from continuing on such a narrow issue. To adopt the words of Clarke J, as he then was, in JC: "It should not, in my view, be assumed that diverting the criminal process into the side roads of issue not materially connected with guilt or innocence is always an appropriate course to follow." To prohibit this trial or exclude all of the evidence gathered in the 15th and 18th November 2013 would be striking a totally inappropriate balance between the right of Mr. Murphy to have a fair trial and the right of society to have the question of his guilt or innocence determined by a proper examination of the remaining evidence gathered herein. I do not accept the proposition put forward by the defence that there is an enormous crisis of truth in this case. Subject to the exclusion of Ms Dwyers evidence for the 15th and 18th of November 2013, the State are entitled to lead the remainder of the evidence contested in this voir dire."

11. The applicant maintains that if the judge in the initial trial rehears the case and is requested to rule on issues arising in the re-trial, a reasonable observer would have reasonable grounds to apprehend that he had pre-determined matters of facts such as the credibility and motivation of specific witnesses. It is submitted that it would be impossible for a reasonable observer not to be concerned that the judge would be unconsciously affected by evidence, and his own assessment of evidence, from the first trial. In summary, it is submitted that if the trial judge made the same determinations in the pre-trial on the same or similar evidence as adduced in the original trial, it would appear to a reasonable objective observer that he had pre-determined the matters.

12. The application is grounded upon the affidavit of the applicant verifying the contents of the statement of grounds and also on that of his solicitor, Mr. Lanigan who avers:-

"I say and believe that in light of the significant legal rulings made by the judge at original trial and the various findings of fact, a reasonable objective observer would reasonably conclude that the learned trial judge would be influenced by or unconsciously act in accordance with his previous determination of fact or assessments of witnesses thereby giving rise to a reasonable apprehension in the mind of a reasonable person having knowledge of the proceedings that the application would not receive a hearing of a fair trial in the applications in the voir dire by reason of pre judgment on the part of the learned trial judge."

13. Counsel for the applicant places reliance on a number of decisions including that of the Supreme Court in *Dublin Wellwoman Centre v. Ireland* [1995] 1 I.L.R.M 408 where Denham J. stated at p. 421:-

> *"But the test is objective; not whether the Learned High Court Judge considered she was or was not biased; nor whether the appellant considered the Judge was or was not biased; but whether a person in the position of the appellant in this case, a reasonable person, should apprehend that his chance of a fair and independent hearing by reason of the actions by the Learned High Court Judge in her capacity as Chairwoman of the Commission on the Status of Women would prevent a completely fair and independent hearing of the issues which arise. The apprehension of the reasonable person in the position of the appellant is what has to be considered."*

The "*actions of the judge"* in that case did not concern prior involvement in the case nor did they concern anything that might have been said during the case, rather they were concerned with activities engaged in by the judge in a different capacity.

14. Reliance is also placed on *dicta* of Irvine J. in the *Commissioner of An Garda Síochána & Ors. v. Penfield Enterprises Limited and Anor* [2016] IECA 141; the defendant being the publishers of the Phoenix Magazine. There, the High Court Judge had refused to recuse himself from hearing a committal motion. Irvine J. described the core of the appeal as being the circumstances in which a judge should yield to such an application. On a prior *ex parte* application, the trial judge had described the actions of the defendant as being reckless and irresponsible and an article that it had published as amounting to reckless and irresponsible journalism. He also invited the Chief State Solicitor to bring a motion for contempt should there be any repetition by the publisher. The trial judge refused to recuse himself from hearing the substantive issue. On appeal, Irvine J. was satisfied that the appellants had met the threshold for objective bias. She stated:-

> *"Accordingly, I am satisfied that a reasonable and fair-minded objective observer, who was not unduly sensitive, but who was in possession of all of the relevant facts, might reasonably apprehend that there was a risk that the High Court judge might not afford the appellants a fair and impartial hearing on the contempt motion. I am also satisfied that the reasonable person, when considering the statements made by the High Court judge in the context of an upcoming contempt motion, might reasonably apprehend that he had already prejudged the issue he*

was about to determine or was prejudiced to the point that he might not be in a position to afford a fair and impartial hearing."

15. The court has also been referred to the decision of Clarke J. (as he then was) in *A.P. v. His Honour Judge Donnacha McDonough & Ors* [2009] IEHC 316. There, the trial judge refused to recuse himself following an application made in the light of comments which he had made in a family law matter. A settlement had been entered into with which the Circuit Court Judge did not agree and would not approve. There was some dispute as to what was in fact said in court but it was submitted that the judge had indicated an intention to make a particular order notwithstanding that no evidence had yet been given by one of the parties. Clarke J. reiterated *dicta* of Lord Hewart C.J. in *Rex v. Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256 that justice should not only be done but should manifestly and undoubtedly be seen be done. This passage had been quoted with approval in *Bula Limited v. Tara Mines Limited* (No. 6) [2000] 4. I.R. 412 where the Supreme Court held that it was necessary to show that there would be a real danger of bias in order to have a judge disqualified. The test was an objective one and during the course of the decision, at p. 441, Denham J. stated:-

"… the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person."

16. At para. 6.10 of his judgment, Clarke J. stated:-

"It seems to me, therefore, that amongst the factors which a court should have regard to is the effect which an ambiguous statement by an adjudicator might reasonably have on persons connected with the proposals. If an adjudicator makes a statement which is reasonably capable of being interpreted by an objective and informed bystander and implying that prejudgment exists, then that is a factor to be weighed significantly in a challenge to the continued role of the adjudicator in question in the process under challenge."

17. Counsel for the applicant also relies on the decision of Meenan J. in *Midnight Entertainment Ltd. v. Director of Public Prosecutions (at the suit of Sergeant Brendan Padraic Moore)* [2019] IEHC 429. The facts of that case are instructive. The applicant, a limited company, was prosecuted in the District Court for selling or exposing for sale alcohol without a licence. A similar prosecution had previously been brought against a director of the company and during the course of the hearing the District Judge stated that if the premises were a genuine casino then it must have a liquor licence. She proceeded to convict the director and impose the maximum permissible sentence of six months imprisonment which was suspended. The conviction was subsequently overturned on appeal.

18. When the company prosecution came before the same judge of the District Court, the solicitor for the applicant informed the District Judge that a similar prosecution had been before her previously in relation to the director arising from the same premises. The solicitor made the District Judge aware that comments which she had made prior to convicting the director and made application that she recuse herself. This application was refused. The District Judge stated that the very nature of the District Court area for which a judge has responsibility, is that he or she would have the same people coming in time and time again and therefore a judge should not stand aside easily, as he or she could be asked to stand aside every day of the week. Applying the test in *Bula Ltd. v. Tara Mines*, Meenan J. observed that the question is what a reasonable person would think. The charges brought in 2015 were identical to those before the District Court in 2017, the only difference being that one was brought against the company director and the other against the company. He referred to EPI v. the Minister for Justice, Equality & Law Reform [2009] 2 I.R. 254 where Hedigan J. stated:-

> *"Judges should not lightly recuse themselves of their responsibility to hear cases that come before them. As was stated by Denham J. in Bula Ltd & Ors v Tara Mines Ltd & Ors, a judge has a duty to sit and hear a case. Nevertheless, as was held by Keane CJ in Rooney v Minister for Agriculture [2001] 2 ILRM 37 at p 40, the "established and prudent practice" for a judge is to disqualify himself if he has any reservations about the matter."*

19. In *EPI*, Hedigan J. recused himself because he felt there was a substantial basis for a reasonable perception that the grounds upon which the applicants brought their case had been adjudicated by the same judge who was due to hear the substantive action. Meenan J., in granting the reliefs sought, relied on the *dicta* of Hedigan J. in *EPI*. He stated:-

> *"In reaching this decision, the Court is mindful of the fact that District Judges bear an extremely heavy workload and that it is often the case that the same persons appear before them on a regular basis. It does not follow that when this occurs that District Judges are obliged to recuse themselves. In this particular case, however, the charges were the same with the only difference being that on the first occasion the charges were brought against a director of the applicant company whereas on the second occasion the same charges were brought against the company itself."*

20. It is to be noted and observed that in that case, the claim was made against a District Judge who is the trier not only of matters of law but of issues of fact.

21. The court has also been referred to the decision of the privy council in *Stubbs (Appellant) v. The Queen* [2018] UK PC 30. There the court was required to consider whether a judge who has presided at an aborted trial by jury ought to have recused himself from sitting on an appeal against conviction by jury following a further trial on the same charges in which he had played no part. Lloyd Jones L.J. accepted as correct the submission made by counsel that the fact that a judge has previously made a decision adverse to the interest of the litigant is not of itself sufficient to establish the appearance

of bias. The fair minded and informed observer does not assume that because a judge has taken an adverse view of a previous application or applications, he or she will have pre-judged, or will not deal fairly with, all future applications by the same litigant. Nevertheless, Lord Lloyd Jones also observed that "*however different considerations apply when the occasions for further rulings do not arise in the same proceedings, but in a separate appeal*." He observed that at the time of the Court of Appeal's ruling upon recusal that the issues on which the judge was required to rule at the second trial were to some extent revisited in the grounds of appeal. Ultimately the Privy Council decided that the decisions of the judge in question made during a second trial would lead the fair minded and informed observer to conclude that there was a real possibility that he had prejudged issues which fell for consideration on the *appeal* to the Court of Appeal.

22. Counsel for the applicant in these proceedings accepts that no general rule exists that a judge who has heard a particular issue or a particular case ought to be precluded from rehearing the case. However, he maintains that where issues regarding credibility have been ruled upon in the first hearing, then the judge is obliged to recuse himself on the retrial. In the alternative, it is argued that it is a question of degree and the nature and extent of the judges' involvement in the determination of the issues, the nature of those issues, any observations which the judge might have made, or phraseology used is relevant in considering whether he ought to be obliged to recuse himself. It is to be observed, however, that counsel was particularly careful to emphasise that he did not wish to require to rely on any phraseology or expressions used during the course of the judgment, in support of his application, as a sole ground, but nevertheless it was a matter to be taken into consideration by the court.

23. No allegation is made that the trial judge subjectively or objectively, displayed bias at the original trial.

24. The respondent opposes the application and submits:

    (1) Unlike in most of the cases to which the court was referred by the applicant, the trial judge was not the trier of fact in the case, the jury was.

    (2) It is submitted that the whole premise of *voir dire* is that it is desirable for legal matters to be freely litigated, without giving rise to prejudice in the eyes of the jury by reference to matters that might suggest guilt.

    (3) It is well established that judges by their training and experience are better capable than juries of putting potentially prejudicial evidence out of their minds.

    (4) Juries are entitled to come to a different conclusion on the evidence to that which a judge may have formed in a *voir dire*. The respective functions of the judge and jury are highlighted in this regard. Matters litigated during a *voir dire*, in the absence of a jury, by definition, are questions of law.

25. The respondent also submitted that the court should exercise its discretion to refuse relief on the grounds of delay and that not all matters, including the order of the court, were produced before the court on the application.

26. This latter objection was rectified at this expedited hearing, which commenced eight days following the initial *ex parte* application before the court. The matter was particularly expedited given that the case has been listed for retrial on the 15th January, 2020. The transcript of the recusal application was not available on the first day of the hearing and the court, of its own motion, requested the parties to obtain a copy of the transcript and, having done that, invited them to make any such further submissions as they thought proper once the transcript was to hand. The transcript was obtained and the matter came before the court for further argument on 17th December, 2019.

27. While counsel for the respondent raised the issue of delay, having considered the transcript and the papers, I do not believe that this arises. It appears to me that there are two separate issues regarding delay. The first relates to any delay in the making of the application to the trial judge to recuse himself. Having considered the transcript of the recusal application, I am satisfied that no issue was raised by the prosecution and that no issue of delay in making the application to the trial judge arises on the facts. It is clear that delay did not form part of his reasoning. The second relates to a delay in bringing this application. I do not believe that any delay of significance took place and that any lapse of time that may have occurred does not constitute delay in the legal sense. To be fair to counsel for the respondent, Ms. Egan B.L., she accepted that the delay with which she was concerned was referable to the failure of the applicant to make the application to the trial judge in the first instance. I am satisfied that the parties were in communication with regard to the timing of the application before the trial judge and that any time lapse does not amount to a delay sufficient for this Court to take into account.

28. Insofar as it is contended that there was a failure on part of the applicant to bring certain matters to this court's attention, including the court order, these have clearly been rectified within a short period of the application and again I am satisfied that no prejudice has arisen to the respondent or to the court as all of these matters have been put before the court and have been fully ventilated.

29. Finally, it is submitted that the applicant did not open all of the relevant law on recusal to the learned Circuit Court Judge when moving the application, on 14th November, 2019 and while there may have been subsequent correspondence between the parties regarding additional precedence which the court may have found relevant, the matter was not reopened. Counsel for the appellant made it clear that at all times his client was willing to do this, and this willingness had been communicated to the Circuit Court registrar and the prosecution, but felt that it would be inappropriate to return to court on the basis that the trial judge had already determined the issue and it may have appeared to be an attempt to request the judge to change his mind on something upon which he had already ruled. In this regard, on the recusal application, the applicant and the

prosecution were represented by counsel, both of whom relied on various authorities. It seems to me that these were legal matters and counsel for both the respondent and the applicant were as equipped as each other to bring all of the authorities that might had been considered relevant before the court. Again, I do not believe that this is a ground upon which the court should exercise a discretion to refuse the relief, if the court was disposed to grant relief in the first place.

30. The context in which this application is made is important. The application made by the applicant to the trial judge to withdraw the case from the jury was made on the limited grounds based on the principles expounded by the Supreme Court in *JC*. Such applications are unlikely to be free from difficulty. It seems to me that the defendant was required to discharge a heavy burden if he was to succeed in contending that the case ought to be withdrawn from the jury on the basis contended for.

31. The function of the judge in deciding whether the case should be permitted to go to the jury or should be withdrawn involves the trial judge in determining the issue as a matter of law. Indeed, on the recusal application the judge made the observation that he was no longer the trier of fact of the guilt or innocence of the accused as he had been when he had been a judge of the District Court. The same issue may be aired again in front of the jury whose members are the ultimate arbitrators of fact. While the functions of the judge and jury in criminal trials are different, I am not satisfied that the division of roles and responsibilities on the type of application which was required to be addressed by the trial judge necessarily leads to a conclusion that the principles upon which this Court should operate in the determination of bias as referred to in the decisions opened to the court, are not any the less relevant. The trial judge is required to perform a significant function. His rulings as to admissibility of evidence, as a matter of law, have the potential to bear upon an ultimate finding of guilt by the jury (where the evidence is deemed admissible) or not guilty (where the evidence is deemed inadmissible). But the determinations are in truth different. The trial judge generally decides whether evidence is admissible or capable of being believed as a matter of law, the jury determine whether is to be believed or accepted. Nevertheless, in determining the issues as a matter of law the judge in this case was required to, and did, assess the evidence of witnesses and made findings on their honesty.

32. While in written submissions, counsel for the respondent had submitted that it was not good use of court time for the same legal issues to be litigated repeatedly by different judges, I do not believe that by so stating, it was thereby being accepted that the trial judge would *necessarily* arrive at the same conclusion on a retrial on any particular issue. It was perhaps more in the context of familiarity with the issues that such observation appears to me to have been made. Indeed, it is clear that no question of estoppel arises.

33. No allegation of subjective bias is made on this application. It is not contended that bias was displayed by the learned trial judge when arriving at his conclusions and ruling in respect of the matters that were addressed during the course of the *voir dire*. It is not part of the applicant's case that a judge who presided over a first trial should necessarily

or automatically be precluded from presiding over a retrial. I am also satisfied that it cannot be the law because a judge has determined issues of credibility on a previous case, that this should automatically lead to the judge being required to recuse him or herself on any further case involving the same person or parties. However, when the matter to be tried relates to the very same issues as between the same parties with the potential to centre on the same issue, then different considerations *may* arise.

34. It appears to me that it will always be a question of degree as to whether the circumstances are such that the trial judge should, as a matter of law recuse himself from a further hearing. Counsel for the applicant was reluctant to rely upon any expressions or phraseology used by the learned Circuit Court Judge in his ruling in the *voir dire,* nevertheless, he has not abandoned his concern at the wording employed by the judge and to which reference was made above. When the recusal application was made to the trial judge, counsel did not refer to the phraseology or words employed by the judge in describing and categorising the applications made by counsel. He accepted in this court that perhaps he ought to have raised this with the trial judge. But having heard counsel on this I am satisfied that the fact that it was not done was borne more from deference, rather than an attempt to hold anything back. Having said that it may have been preferable if all cards had been placed on the table before the trial judge. Whether he might have taken a different view of the application in those circumstances, remains unknown and uncertain. But given the manner of the presentation of the issue before this court, I am also satisfied that any expression used in the ruling should not in the circumstances be placed front and centre on my consideration of this application. They are but a factor.

35. While the judge was entitled to make such observations as he did and is not to be criticised for having done so, it is not suggested that the employment of the phraseology is evidence of bias in so far as the ruling itself is concerned. In making this observation, however, this court should not be taken as suggesting that counsel made anything other than proper submissions to the trial judge in accordance with his instructions.

36. It is also clear from the judge's rulings that they were not all one way. Although counsel for the applicant does not believe that such ruling was significant in the overall context of the issue now raised, the fact remains that the judge excluded certain evidence. Further, counsel does not suggest that rulings made were not ones that were within his jurisdiction to so make.

37. There is a further matter which was brought to the court's attention concerning the ruling by the trial judge on the application to recuse himself. He stated that he had no interest in the proceedings. If he had he would recuse himself and would certainly not have heard the case in the first place. Taken on its own and out of context, one might have thought that the trial judge had applied the wrong test in mistaking a consideration of a personal *"interest"* (a case which was not made) with the test which requires consideration of whether an objective and informed bystander and reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have

a fair hearing from an impartial judge on the issues. As Denham J. stated *"[t]he test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person."* That, however, would be an unfair conclusion as it is apparent from the entirety of the transcript that the judge made express reference to the appropriate test on more than one occasion. It must also be acknowledged that counsel for the applicant has not sought to advance this as a discreet or significant ground but relies on the ruling in its entirety.

38. On the resumed hearing, counsel for the respondent drew the court's attention to the recent decision of the Supreme Court in *E.R. v. DPP* [2019] IESC 86. The first hearing failed to produce a verdict and, on a retrial, the trial judge indicated that on a plea of guilty a non-custodial sentence might be imposed. A guilty plea was made but the appellant sought to vacate the plea, an application which was dismissed by the trial judge. The decision was found to be within the discretion of the trial judge. While it may have been better had the trial judge not intervened, it did not violate the fundamental right to a fair trial under the Constitution. The accused had the benefit of legal advice and the prosecution had stated, before the plea of guilty, that it may appeal the sentence. The accused was aware of this before entering the guilty plea. In his decision, Charleton J. highlighted what he described as the exceptional circumstances required to exempt a case from the general prohibition from taking judicial review in the course of a criminal trial. While the trial judge's intervention was undesirable, this was not a case where the trial judge was the decider of fact. Thus, his intervention would not have set up any feeling in the mind of the accused, that the judge had already formed the view that he or she was guilty. Rather, it was an error for him to have mentioned the matter at all, but this did not mean that the plea of guilty which had been entered by the accused was wrong. Although this case does not concern an application that a trial judge ought to recuse himself because of previous involvement in the original trial, in my view, it does emphasise the important distinction between the role of the judge and the jury in a criminal trial such as this. It also suggests that in an application while a criminal trial is ongoing, the bar in judicial review proceedings is high. Charleton J. concluded:-

> *"Since only circumstances of fundamental denial of the entitlement of the accused and the prosecution to have a criminal trial in due course of law justify resort to judicial review, the prosecution were entitled to argue the availability of that remedy on this appeal, despite that not having been raised in the High Court. Whether then argued or not, as applicant for judicial review, ER took on the burden of showing a deprivation of the constitutional structure of her trial. This has failed."*

39. But the claim of the applicant here is that because of the perceptions and apprehensions which he fears, that he will be deprived of a fundamental constitutional right, which is to have his trial heard by an impartial judge presiding over an impartial jury in the eyes of an objective observer. It seems to me that if the applicant is correct in his concerns that objective bias exists then the high bar indicated in *ER* will have been reached. It does not

appear to me that this important decision is directly on point to the issue which this court must consider.

40. What concerns the court is the *perception of pre-judgment*. Nothing which emerges from the ruling of the judge in the original trial, nor the phraseology employed, could be said to give rise to the perception of prejudgment in *that* trial and, as stated, no such case is made. But if the same or similar points or arguments are made or raised before the same judge by the same counsel in a *voir dire* in a retrial of the same issues regarding the credibility of the same witnesses or the admissibility of the same evidence, what would an objective and informed reasonable bystander apprehend the judge might conclude. He might very well conclude that the same outcome is likely, but that is not the test. He might also conclude that a fresh ruling of the judge might be influenced by what has gone before. Again, although perhaps approaching the boundary of the test, it does not seem to me that that would be sufficient to satisfy the necessary test which looks at apprehension of prejudgment, rather than influence as such, although it is an important factor. What this court has to consider is whether such person might reasonably apprehend that despite the undoubted ability, experience and expertise of the judge's mind to compartmentalise and apply itself in a fresh manner on a fresh day to the same or similar issue concerning the credibility and admissibility of the same evidence or witness, that there is a risk that the matter may be, has been, or is likely to be, prejudged? As deposed to in the affidavit of the solicitor for the applicant, that is the view of experienced solicitor and counsel of many years standing, a view which cannot be dismissed lightly.

41. Nevertheless, the jury is the ultimate arbitrator of the guilt or innocence of the accused. That seems to me to be a significant factor. No question of estoppel arises should an issue be determined one way or another in a *voir dire*. While it may be wise for a trial judge to step aside in view of a previous involvement, that is not to say that a failure to do so amounts to an error of law on his part. In this case, no issue arises concerning the legality of prior rulings. This too is an important consideration. In all of the circumstances, and not without some hesitation, and bearing in mind the test which is applicable, I do not believe that the trial judge erred in law in his ruling nor do I believe that objective bias has been established.