

**THE HIGH COURT
JUDICIAL REVIEW**

[2019] IEHC 937
[2016 No. 219 JR]

BETWEEN

HUGH O'BRIEN

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 1st day of November, 2019

Background

1. On 10 February 2016, the applicant was tried before the District Court in respect of eight offences. In the course of the hearing the behaviour of the applicant was both abusive and offensive, which resulted in the District Judge excluding him from the court for a period of time. During that time the prosecution proceeded. The District Judge convicted the applicant and subsequently sentenced him to concurrent terms of five months' imprisonment to date on 10 February 2016.
2. The applicant sought relief from this court by way of an application for certiorari. I delivered judgment on the matter on 28 March 2019 and held, for the reasons stated therein, that the applicant was entitled to the reliefs sought.
3. Following delivery of the judgment, the court invited submissions from the applicant and the respondent in respect of whether the matter should be remitted to the District Court for a further hearing of the prosecution of the applicant, in respect of the charges.
4. The applicant submitted that he is entitled to rely on the special plea of *autrefois acquit* and, thus, that the matter should not be remitted for a further prosecution in respect of the said charges. In the alternative, the applicant requested that the court rely on its discretion under O. 84, r. 26(4) of the Rules of the Superior Courts, and not remit the matter. The respondent submitted that the court should make an order for remittal.

Principles to be applied

5. The court was referred to the Supreme Court decision of *Sweeney v. Brophy and Director of Public Prosecutions* [1993] 2 I.R. 202. In giving the judgment of the court, Hederman J. stated: -

"In my judgment certiorari is an appropriate remedy to quash not only a conviction bad on its face or where a court or tribunal acts without or in excess of jurisdiction but also where it acts apparently within jurisdiction but where the proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law. ... if there is a breach of the fundamental tenets of constitutional justice in the hearing or failure to hear the evidence in the case, the trial can properly be categorised as one that has not been held in due course of law and any conviction arising therefor should be quashed so as to entitle the defendant to plead "*autrefois acquit*"."

6. The issue was also considered by the High Court in *Stephens v. Connellan* [2002] 4 I.R. 321. In giving judgment McKechnie J. stated at p. 344: -

"37. Reverting to the consequences which flow from the relief granted above, could I commence by stating that in criminal law the general proposition that no person can be prosecuted twice for the same offence is correct only if on the previous or first occasion the person in question was either lawfully convicted or lawfully acquitted and as a result has available to him the special pleas of either *autrefois acquitor autrefois convict*. The underlying basis of this doctrine and the requirement or scope of establishing either plea, are matters not directly relevant to this case and neither is any consideration of issue estoppel. For a most helpful analysis of these topics see pp. 197, 213, 257 et seq of *McDermott on Res Judicata and Double Jeopardy*. For the purposes of the aforesaid general proposition the following can be stated:

- (a) A person whose conviction by a court or tribunal having competent jurisdiction is subsequently set aside by way of *certiorari* on the grounds of some impropriety, has available to him the special plea of *autrefois acquitas* the quashing of such conviction, in law, amounts to an acquittal,
- (b) ...
- (c) ...
- (d) The type of impropriety which would ground an order of *certiorari* where the court or tribunal has jurisdiction would be one "referable to the conduct of the hearing... and not one referable to a matter vitiating the jurisdiction" of such court or tribunal; ..."

Application of the principles

7. In this case the hearing was conducted before a court of competent jurisdiction but, as per the reasons stated in my judgment, the applicant was deprived of a fair hearing. Thus, applying the passage cited from Hederman J. above: "*the trial can properly be categorised as one that has not been held in due course of law and any conviction arising therefore should be quashed so as to entitle the defendant to plead "autrefois acquit".*"
8. In this case an order of *certiorari* was granted by reason of the conduct of the hearing of the prosecution and was not referable to an issue vitiating the jurisdiction of the District Court.

Conclusion

9. By reason of the foregoing, I am of the view that the applicant is entitled to rely on the special plea of "*autrefois acquit*", and, therefore, I will not remit the matter to the District Court. Given this finding, I do not believe it is open to the court to exercise what discretion it may have under O. 84, r. 26(4) of the Rules of the Superior Courts.