[2020] IEHC 475

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 567 JR]

BETWEEN

SHANE JACKSON

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 18th day of September, 2020

Background

1. These judicial review proceedings arise out of the prosecution of the applicant for an offence contrary to s. 107 of the Road Traffic Act 1961 (as amended) (the Act of 1961). The events that gave rise to this offence are set out in an affidavit sworn by Garda Olivia Fenlon. She states that, on 16 February 2018, she had been following a motor vehicle on the M7 near Portlaoise whilst driving a marked patrol car. The said vehicle overtook the Garda car at speed. It was estimated that the vehicle was travelling in excess of 200 kilometres per hour for approximately 50 kilometres. When the vehicle approached the roadworks which were then on the M7, the vehicle was abandoned. At this point, the driver was observed jumping into the back of the vehicle where there were two other occupants. As a result, Garda Fenlon was unable to establish who was the driver of the vehicle. Garda Fenlon made a requirement of the applicant under s. 107 of the Act of 1961 requiring him to state who was driving at the time. The applicant refused.

2. The applicant appeared before the District Judge sitting in Naas District Court on 17 July 2019. He was represented by Solicitor and Counsel. The applicant pleaded guilty to the charge. The District Judge had given custodial sentences of two months to two others on a previous date who had been charged with the applicant with the same offence but were represented by different Solicitors. The applicant was advised by Counsel, as was the Court, that there was no custodial penalty attaching to the said offence. Having heard the facts and evidence of previous convictions, the District Judge indicated that he would also be imposing a custodial sentence on him.

3. In the course of the hearing on 17 July 2019, Counsel, on behalf of the applicant, informed the District Judge that the offence did not carry a custodial penalty, that the section had been amended by the Road Traffic Act 2010, such that the maximum penalty permitted was a fine of €2,000. The District Judge questioned this and directed that the matter be adjourned to 25 July 2019 and that the relevant legislative provisions be provided on that date.

Hearing in District Court on 25 July 2019

4. Given the basis for these judicial review proceedings, I will set out in full the relevant part of the transcript of the hearing that took place on this date (the transcript, as exhibited in the proceedings, refers to "*Solicitor for the defence*" whereas it should be "*Counsel for the defence*").

5. Counsel for the applicant sought to hand into the Court a copy of the relevant section of the Act of 1961 (as amended): -

> "SOLICITOR FOR THE DEFENCE: Judge, I have a copy of the act. There is a substitute section. I can hand it in. I spoke with Sergeant Kelly and he is in agreement with me. I spoke with Garda Fenlon this morning and she is in agreement with me. So --
>
> …
>
> SOLICITOR FOR THE DEFENCE: Well, I'll hand in the section.
>
> JUDGE: …together…
>
> SOLICITOR FOR THE DEFENCE: Well there is an answer. It's in front of you there, Judge, on the --
>
> JUDGE: No, it's not. This is just a copy. I need the real act with the… information that…
>
> SOLICITOR FOR THE DEFENCE: Well, Judge --
>
> JUDGE: So I won't accept a copy. I need the real act, give me the full act.
>
> …
>
> JUDGE: I'm not going to pass sentence today.
>
> SOLICITOR FOR THE DEFENCE: Well, it's listed today for sentence.
>
> JUDGE: Well, I'm not going to pass. I want to know what my powers are.
>
> SOLICITOR FOR THE DEFENCE: Well, Judge --
>
> JUDGE: So I'm not prepared to take your word for it. You say I don't have the power to impose a custodial sentencing. They say they're not sure. So I'm waiting for the DPP to tell me what the correct sentence is.
>
> …
>
> JUDGE: …okay. I can't proceed until the DPP tells me what the sentencing is in this. I'm not prepared to take your word for it. That's it. Amen. Let the DPP come back and say, 'Judge, it's only a fine' or, 'There's three months'. I need to know. I need to know because at the end of the day I'll make an order. If my order is wrong you'd only be shooting me okay. You won't be shooting the Sergeant and you won't be shooting the DPP. So I need protection. So if I have it in writing from the DPP I'll proceed on that basis. Then ultimately if it was wrong they will contest it. They won't be running for cover. Okay."

The matter of sentencing was further adjourned. It should also be noted that the point was made to the District Judge that the applicant would have to take another day off work for the purposes of being in attendance for sentence.

Judicial Review Proceedings

6. By Order of the High Court of 31 July 2019 (Noonan J.), the applicant was granted leave to apply by way of judicial review for, *inter alia*, the following reliefs: -

    (1) An order of *mandamus* compelling the respondent to finalise the applicant's case as referred to in the grounding affidavit of the applicant when it is next listed in the District Court; and

    (2) An order that a District Judge other than the one who sat in Naas District Court on 17 and 25 July 2019 deal with the applicant's case once it is remitted to the District Court.

    Amongst the grounds relied upon by the applicant are that the District Judge acted irrationally and unreasonably in repeatedly refusing to accept the submissions of the applicant's Counsel on the penalties available to him following a plea of guilty to an offence under s. 107 of the Act of 1961 (as amended) and appeared biased against the applicant by conducting himself in an unfair and impartial manner.

Submissions of the Parties

7. The applicant's principal submission concerned the manner in which the District Judge conducted the hearing on 25 July 2019. The relevant legislative provisions were clear. Section 107 of the Act of 1961, as amended, did not provide for a custodial sentence by way of penalty. Despite this, it was submitted, the District Judge refused to accept the submissions of the applicant's Counsel, who was supported by documentation to this effect. It was submitted that this amounted to objective bias on the part of the District Judge.

8. Ms. Kathleen Leader SC, on behalf of the applicant, relied upon the judgment of Morris J. in *Dineen v. Judge Delap* [1994] 2 I.R. 228 where he stated that the conduct of the judge was such as to "*reasonably give rise in the mind of an unprejudiced observer to the suspicion that justice was not being done*". Ms. Leader further submitted that as this was a summary offence in respect of which the applicant had pleaded guilty, he was entitled to have the matter dealt with expeditiously (see *State (Healy) v. Donoghue* [1976] I.R. 325). It was accepted that the first adjournment of 17 July 2019 was reasonable but submitted that the adjournment of 25 July 2019 was unreasonable and arose because the District Judge would not accept that the penalties available for an offence under s. 107 of the Act of 1961 (as amended) did not include a custodial sentence.

9. Counsel for the respondent, Mr. David Staunton BL, submitted that no objective bias had been established on the part of the District Judge. He submitted that the District Judge was entitled to be fully satisfied as to the provisions of s. 107 of the Act of 1961 (as amended) before concluding the matter. In the course of his submissions, Mr. Staunton relied upon the decision of the Court of Appeal in *O'Mahoney v. Hughes* [2018] IECA 264.

This was an appeal from a decision of the High Court refusing an order of certiorari quashing the conviction and sentence of the appellant for drunk driving. The appellant had alleged that the import of a number of exchanges between her Counsel and the District Judge in the course of the prosecution amounted to objective bias on the part of the Judge. The Court of Appeal dismissed the appeal. The judgment of the Court was given by Edwards J. In the course of his judgment, he set out, in some detail, the transcript of the proceedings that had taken place in the District Court. It appeared from this transcript that there were a number of robust exchanges between Counsel for the appellant and the District Judge. Edwards J. stated: -

"69. It cannot be gainsaid that certain of the District Judge's remarks proffered from the bench, such as that relating to counsel not being in a Dublin court, and the implication that he was treating the court as a salad bar, were intemperate, gratuitous and unnecessary. However, having carefully considered the context in which they were made, it seems to me that while they may be illustrative of judicial impatience with counsel's persistence in pressing points with which the judge was unimpressed, and indeed some frustration on the judge's part that counsel appeared to be rowing back on an earlier ostensible concession, they are neither suggestive in their terms, nor in the context in which they were made, of bias on the part of the judge. I am therefore not persuaded that an impartial observer would have been concerned about bias. An impartial observer might well have regarded the remarks in question as unfortunate in the sense that they were intemperate and arguably unjudicial utterances, but in my view neither the remarks in question, nor the judge's overall conduct of the case, bearing in mind that the judge's exchanges and engagements were with an experienced professional advocate in the context of a trial, could reasonably have given rise to a concern about bias. …"

and: -

"74. It has been argued that the merits of the substantive case were beside the point in terms of the case for judicial review. I accept that in general that is so. However, relief by way of judicial review is discretionary. In so far as the appellant may have made out a case that her counsel was unfairly prevented from making an argument that he wished to make, a relevant consideration in terms of whether relief should be granted is whether innocence was truly at stake by reason of the unfairness in question, or whether the unfairness was going to be incidental to but not determinative of any outcome or potential outcome. I consider that the unfairness of which the appellant complains would not have impacted adversely on the outcome of the trial in circumstances where the argument which counsel was inhibited from fully developing was one that was manifestly ill-founded. In the circumstances the unfairness complained of, while it should not have occurred, was not so far reaching as to justify the granting of relief by way of judicial review."

Consideration of Issues

10. In my view, the central issue in this application is whether the District Judge demonstrated objective bias during the hearing of this matter on 25 July 2019. The applicant had pleaded guilty so the only issue was the sanction to be imposed by the Court. The District Judge was minded to impose a custodial sanction and, indeed, had given a sentence of two months to others who had been charged with the applicant for the same offence. However, the offence under s. 107 of the Act of 1961 (as amended) did not permit this but what was permitted was a fine of up to €2,000. The applicant is a scaffolder and was clearly at risk of a substantial fine being imposed.

11. The test for objective bias is that referred to by Morris J. in *Dineen v. Judge Delap* [1994] 2 I.R. 228. I would also refer to the following passage from the judgment of Denham J. (as she then was) in *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412: -

> "…it is well established that 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."

The test requires that the Court decide whether a reasonable person who might have been in the District Court on the 17 and 25 July 2019, listening to and observing the proceedings, would have a reasonable apprehension that the applicant would not have a fair hearing from the District Judge on the imposition of a penalty for an offence under s. 107 of the Act of 1961 (as amended) to which he had pleaded guilty.

12. As for the hearing on 17 July 2019, the District Judge was informed that a custodial sentence did not attach to the offence charged as the section in question had been amended. Apparently, on a previous occasion, the District Judge had imposed a two-month prison sentence on the applicant's co-accused who were also charged under s. 107 of the Act of 1961 (as amended). From the transcript it would appear that the Judge was not convinced that the offence in question no longer attracted a custodial sentence, and sought further information. In my view, this was a reasonable course of action for the District Judge to take.

13. On 25 July 2019, matters were very different. I set out the relevant portions of the transcript of the hearing on that date at para. 5 above. The District Judge made clear that he did not accept the submission of Counsel for the applicant that the offence no longer carried a custodial sentence. However, the District Judge went further and stated, not once but twice, to Counsel "*I'm not prepared to take your word for it*". As if to drive home the point, the District Judge went further and stated that he was "waiting for the DPP to tell me what the correct sentence is". In my view, any reasonable person would readily reach the conclusion that, for no stated reason, the District Judge was not prepared to accept the word of Counsel, a professional person bound by a code of conduct. A reasonable person could only conclude that, without any stated reason or explanation, the

word of Counsel was being called into question and, thus, the applicant was not getting a fair hearing. I am satisfied that this establishes objective bias on the part of the District Judge.

14. If a reasonable person had any doubt on the matter of objective bias, it would have been dispelled by the statement from the District Judge that he was waiting for the DPP to tell him what the correct sentence was. Thus, the District Judge was, for no stated reason or explanation, favouring the word of one party's legal representative over another's.

15. The conduct of the District Judge cannot be excused by the fact that, apparently, what was being handed in was an extract from the Act of 1961 (as amended) and not the full Act. It is almost invariably the practice that extracts from the relevant legislation rather than the full Act are handed into court by Counsel/Solicitors in the course of a hearing.

16. I am satisfied that the facts of this case can readily be distinguished from the facts of O'Mahoney v. Hughes, referred to above. In giving the judgment of the Court of Appeal in that case, Edwards J. considered in detail the transcript. It is clear from the transcript that there were, to say the least, robust exchanges between Counsel and the District Judge. However, unlike this case, at no stage was the professional integrity of Counsel gratuitously called into question nor was there any statement from the District Judge that he was waiting for, and going to rely upon, the prosecuting party to give a correct statement of the law.

17. It follows from the above that the matter of sentence ought to have been concluded on 25 July 2019 and there was no good reason for the matter to be adjourned. Therefore, in my view, the applicant did not get the speedy trial to which he was entitled.

Conclusion

18. By reason of the foregoing, I will make the following Orders: -

    (a) An Order remitting the matter to the District Court for the purpose of sentence; and

    (b) An Order that a District Judge other than the District Judge who presided in this matter on 17 and 25 July 2019 deal with the applicant's case.

19. I will hear the parties as to whether any other order is required, including in relation to the matter of costs. As this judgment is being delivered electronically, the parties have fourteen days within which to deliver written submissions should they so wish.