

THE HIGH COURT

[2022] IEHC 176

RECORD NO. 2019/669JR

BETWEEN

ANTHONY CONNOR

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland delivered 28 March 2022

Summary of decision

1. This case concerns a challenge to a hearing in respect of a prosecution under s. 5(4) & (5) of the Road Traffic Act 2010 i.e. being in charge of a vehicle in a public place with intent to attempt to drive while alcohol is present. The applicant has raised many detailed complaints about the Judge's handling of the case, including the Judge's decision to make an unaccompanied visit on notice to the parties to the place where the applicant was parked, in the context of an argument advanced by the defence that the vehicle was not in a public place.
2. I have concluded for the reasons identified below that the trial Judge conducted the trial fairly and that the claim of objective bias is unfounded. Moreover, given the case law on judicial visits to the locus and the particular circumstances of this case, including the absence of any objection to the visit when the Judge announced his intention, and the opportunity given to the defence to make submissions on the Judge's observations on the visit, I conclude it was permissible for the Judge to inspect the locus, even in the absence of the parties and to rely, *inter alia*, on the knowledge gleaned from that visit.

Factual background

3. The applicant was arrested on the morning of 29 December 2018 by Garda O'Keefe under s.5(10) of the Road Traffic Act 2010 ("the RTA 2010"), having spent the night in his car in Bray, County Wicklow, on suspicion of being under the influence of an intoxicant. He was brought to Bray Garda station and breathalysed with the station Evidenzer machine. Following the test, the applicant was charged with being intoxicated in charge of a vehicle under s.5(4) and (5) of the RTA 2010. He was released on station bail to appear at Bray District Court on 21 January 2019.
4. The case was heard on 9 May and 10, 17, 20 and 24 June 2019 before the District Judge in Bray District Court. The prosecution presented the case on 9 May 2019 and at the close of the prosecution case, the applicant's solicitor made an application for various directions discussed in detail below. The trial Judge adjourned the case to consider the applications. On 10 June 2019 the trial Judge rejected certain applications for a direction. In relation to the question of whether the location was public, the trial Judge indicated he would visit the locus himself. On 17 June 2019, having visited the location unaccompanied, the trial Judge indicated that he was satisfied that the location was a public place for the purposes of the RTA 2010 and dismissed the application for a direction. The case was adjourned to allow CCTV footage to be played. On 20 June 2019 the case resumed with the applicant himself giving evidence, as well as an architect who gave evidence on his behalf. Having

heard the evidence and further submissions from the applicant's solicitor on intent to drive, the Judge adjourned the matter to 24 June 2019 to consider the various matters arising. On that date, the District Judge convicted the applicant of the charge.

5. The applicant subsequently brought an *ex parte* application for leave for judicial review which was granted by Quinn J. in the High Court on 24 September 2019. The applicant seeks *certiorari* of his conviction, *inter alia*, on the basis that the trial Judge breached the requirements of natural and constitutional justice and fair procedures, was objectively biased, formed a mistaken understanding of the evidence and erred fundamentally in law.

Relevant case law

6. A good deal of case law has been referred to by both parties and it is appropriate to briefly summarise some of the core principles. There is a long line of case law on what constitutes objective bias in a variety of different circumstances, including the decisions in *O'Neill v Beaumont Hospital Board* [1990] ILRM 419, and *Dublin Well Woman Centre Limited v Ireland* [1995] 1 ILRM 408. In *Bula Ltd v Tara Mines Ltd (No. 6)* [2000] 4 IR 412 Denham J. quoting a South African case, *President of the Republic of South Africa v South African Rugby Football Union* [1999] (4) SA 147, observed as follows:

"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."

7. In *Fogarty v O'Donnell* [2008] IEHC 198, it was alleged that a conviction was unsafe because the judge showed bias and was in breach of fair procedures, *inter alia*, in directing evidence from an additional witness. McMahon J. observed as follows:

"11. 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..."

8. A similar approach was taken by the Court of Appeal in *O'Mahoney v. Hughes* [2018] IECA 264. There the exchanges between counsel and the District Court Judge were described as "robust". However, the Court of Appeal declined to intervene noting that although the remarks were intemperate and arguably unjudicial, neither the remarks 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.
9. In *Dineen v Delap* [1994] 2 IR 228, complaint was made of the way in which the District Judge had conducted a trial where the charge was driving with an excess concentration of alcohol. There was an objection from counsel for the applicant that the Garda appeared to

be reading his evidence. The respondent dealt with the objection by saying that the Garda could read from whatever he liked and there was Supreme Court authority to this effect. The respondent went on to say that "*the days of the garda making a slip in the witness box are long gone and if he does make a slip I will recall him*". Morris J. held as follows;

"The suggestion that the garda would be recalled by the respondent in the event of his making a slip is again improper and would cause an impartial observer to recognise that the judge hearing the case was prepared to support the prosecution to the extent of filling gaps which their evidence might leave."

10. In *O'Connor v Judge O'Donoghue* [2017] IEHC 830, Faherty J. quashed a decision of a Circuit Court Judge on the basis that there had been excessive interventions by the trial Judge, noting that the question that arose for determination was whether the number of interventions of itself amounted to unfairness. Having found that the trial judge displayed no hostility towards the applicants, she rejected an argument that the amount of interventions and the nature of the questions posed by the trial judge amounted to pre-judgment on his part or that he drove the trial to a pre-determined conclusion. She equally rejected a claim of objective bias, observing that "*the examination and cross-examination of witnesses for both sides of the dispute were continually interrupted by the first respondent throughout the three day hearing*". However, in circumstances where the interventions meant counsel for the applicant could not follow a preconceived line of inquiry, particularly in relation to the second respondent, she concluded there was an inherent unfairness in the excessive interventions.
11. Turning to the case law on judicial knowledge and/or visits to relevant locations, the case of *Dougal v Mahon* [1988] IEHC 16 is particularly important, given the similarity of the facts to the instant case. There, a judge of the District Court held that the car park of a hotel was to his knowledge a public place for the purposes of the Road Traffic Acts and refused a direction on that ground. It was argued in the High Court that the District Justice had recourse to his own personal knowledge of the location described in evidence and that by doing so he had exceeded his jurisdiction. The applicant sought certiorari in the High Court but was unsuccessful. Gannon J. held as follows in relation to the use of personal knowledge by the Judge:

"In regard to the use made by him of his personal knowledge of the roads and buildings mentioned in the course of the evidence I am of opinion that in relation to such matters, obviously of notorious public knowledge, he was entitled to and properly could take account of his own knowledge of the place, unless some factor became apparent which could give rise to a doubt about the reliability of his knowledge. The definition of "public place" in the Road Traffic Act, was not discussed in argument. It seems to me that on the evidence before the respondent District Justice as indicated in the Affidavits there is nothing to give rise to a doubt about the reliability of the knowledge of the District Justice as to the applicability of that definition to the place."

12. In *DPP (Hegarty) v Gregory* [2015] IEHC 706, various questions were identified in the context of a case stated. One of those asked whether an authorisation issued under a section of a road traffic act must specify a location with more specificity than by reference to the "Putland Road", where the Court had judicial knowledge that the road was over one kilometre in length. Barrett J. in answering this question stated that;

"One must, and the court does, trust to the good sense and learning of District Judges who are eminently capable in any one instance, and given their particular knowledge of the respective District/s in which they operate, of determining whether...the "place" named in an authorisation meets the standard".

I interpret that answer as indicating that there is nothing impermissible about the use of judicial knowledge of a physical place by a District Judge.

13. In a U.K case, *Bowman v DPP* [1991] RTR 263 Watkins L.J. held as follows:

"There is no doubt that justices are entitled, when weighing up the evidence in such a matter, to use their own local knowledge of what has been going on as to the use of a particular piece of land. That is not knowledge which is called judicial knowledge or the taking of judicial notice of something or other. It is actual local knowledge gained by justices as ordinary citizens of the place in which they live and in which they from time to time dispense justice....

A justice of the peace has to be extremely circumspect in using local knowledge in reaching a decision in a case before the court. It is always wise of justices to make the fact that local knowledge is going to be used known to the defence and the prosecution so as to give those representing those parties the opportunity of commenting upon the knowledge which the justice or justices claim to have and which they aim to use for the purpose of aiding them in reaching a determination."

14. The case of *State (Hegarty) v Winters* [1956] IR 320 addresses a lack of equality of treatment between the parties in the conduct of a site visit. There, an arbitrator decided to visit the lands the subject of the arbitration but did so in the company of the engineer for the respondent County Council, in the absence of the claimant for compensation. Unsurprisingly, the Supreme Court, overturning Davitt P. in the High Court, held as follows:

"The action of the arbitrator in going upon the lands the subject-matter of the arbitration with only one of the parties might reasonably give rise in the mind of an unprejudiced onlooker to the suspicion that justice was not being done. The fundamental rule that it is necessary, not alone that justice be done, but that it must seem to be done, was broken and the award could not be allowed to stand."

15. In *DPP v O'Loughlin* [2018] IECA 25, the jury in a trial for murder requested a visit to the site where a person had died by being thrown down a chute. No objection was taken by either party. However, the judge, jury and lawyers for the prosecution went ahead with

the visit in the absence of the accused and his legal advisers, and by the time they arrived, the prosecution team had left, and the judge was leaving. Moreover, the chairperson of the jury carried out an experiment whereby he threw a stone down the chute. The Court, noting that the judge had left by the time the defence arrived, held that the visit was inconsistent with the applicable legislation that requires a visit to take place only where a request is made by the jury or the parties; and that the jury were incorrectly permitted to conduct a stone throwing "experiment", where that might have been relevant to the jury's deliberations on an important aspect of the case. Because of the unfairness involved in the visit, the Court held that it was in the interests of justice to intervene and to allow the appeal, even though the applicant had not objected to the inspection either before or after. This was despite the jurisprudence in *DPP v Cronin* (No. 2) [2006] IESC 9 suggesting that points not made before the trial judge should not be raised at appeal stage.

Functions of a judicial review court

16. When considering the evidence, I must also bear in mind that the function of the High Court in judicial review proceedings is not to act as an appellate court. Where there is an error by a District Court Justice, the appropriate way to proceed is by case stated or appeal. The applicable general principle can be found in Halsbury's Laws of England (3rd Ed.), Vol. 11 at paragraph 119, as quoted with approval in *Lennon v. District Judge Clifford* [1992] 1 I.R. 382;

"Where the proceedings are regular on their face and the inferior tribunal had jurisdiction, the superior court will not grant the order of certiorari on the ground that the inferior tribunal had misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it . . . misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction . . .

Certiorari will not be granted to quash the decision of an inferior tribunal within its jurisdiction on the ground that the decision is wrong in matters of fact, and the Court will not hear evidence impeaching the decision on the facts . . . If there is any evidence, the Court will not examine whether the right conclusion has been drawn from it."

17. Therefore, the fact of an error per se should not, without more, be treated as a manifestation of bias, or lack of fair procedures, such as to warrant quashing the conviction. Rather the error should be dealt with by way of appeal or case stated.

Arguments of the parties

18. The applicant submits that the trial was unsatisfactory and so objectively unfair that it could not safely ground a criminal conviction and further that these flaws, together with the conduct of the Court, were capable of giving rise to a reasonable apprehension of bias on the part of a reasonable bystander.
19. The complaints of the applicant include the following:

- frequent interjections by the Judge that supplemented the prosecution case;
- failure to allow the defence an adequate opportunity to ventilate its applications;
- failure to entertain an application for a direction in respect of the GPS coordinates;
- decision of the Judge to visit the locus of the offence;
- failure to permit the defence to make submissions on the visit;
- fundamental error on the part of the Judge in relation to Garda evidence on a core issue of fact i.e. whether the engine of the applicant's car was running when the Gardaí arrived, that resulted in the Court refusing the defence application for a direction;
- fundamental error in relation to burden of proof re intention to drive;
- decision in relation to intention to drive that was unsupported by evidence and unreasonable;
- conviction on foot of an incorrect charge sheet that did not correctly identify the locus;
- conviction where the Judge failed to recall that the defence had already gone into evidence.

20. The applicant relies on the line of case law identified above, including *O'Loughlin*, *Hegarty*, *Dineen*, *Bula*, and *O'Connor*, arguing that the visit to the locus had the effect of re-opening the prosecution case in circumstances where, if the prosecution evidence was deficient in respect of the locus and the public character of that locus, the correct course was to dismiss the charge. The applicant submits that the problem arises not only in relation to the decision on the direction but also in respect of the substantive stage, where the Judge rejected the argument that the locus was not public on the basis, *inter alia*, that he was able to access it and that there was nothing to stop people from going in there.
21. The applicant further argues that the visit by the Judge should not have been permitted to occur in the absence of the accused or his legal advisers, and that the way it was done was unfair and contrary to natural justice. No submissions could be made on the issue of whether it was a public place and the Judge did not have the benefit of either side pointing out relevant features of the locus. It is said that the purpose in going to the site was to act as a witness in circumstances where the Judge's thought process was not shared with other persons present and where the parties had no opportunity to understand what the Judge had taken from the visit, or to correct any misapprehensions the Judge may have formed when visiting the site. It is further argued that the situation was compounded by the fact that the trial Judge made a final decision regarding his ruling without further discussion with the parties and effectively refused to hear any complaint

regarding the visit or to give adequate clarification regarding what he had seen at the site.

22. The applicant also argued that there were inappropriate interventions from the trial Judge that prevented him from properly making his case and that questions were asked of witnesses that were favourable to the prosecution. Finally, it is contended that the Judge made a number of fundamental errors and I deal with those in detail below.
23. In opposing this application, the respondent argues that the trial Judge properly considered all the evidence arising in the case and in doing so, found that the required criminal standard of proof was met. The respondent argues that the trial Judge had the opportunity to review the evidence in its entirety, to observe the demeanour and manner of the witnesses and to consider the legal issues as they arose in the context of those particular facts. In those circumstances she argues that even if the trial Judge misdirected himself in law (which she denies), that misdirection was within his jurisdiction and as such the applicant should seek an alternative remedy either by way of case stated or a *de novo* appeal to the Circuit Court.
24. In respect of the applicant's argument that the trial Judge effectively supplemented the prosecution case of his own motion, the respondent submits that the impetus to attend the location arose from the evidence before the Court and in those circumstances the trial Judge felt it was appropriate. The respondent contends that this was entirely within the trial Judge's jurisdiction and was appropriate in the circumstances of the case. She further submits that visits to relevant locations have occurred numerous times in the District Court and no legal or jurisdictional issues arise and relies on *Dougal v Mahon* and *Bowman v DPP* in this respect.
25. The respondent argues that what was at issue was not what the Court needed to be satisfied of in relation to the name, designation or ownership of the land in question but rather whether it was any place within the trial Judge's District Court area where the public generally, and not any particular class of the public, had "*access with vehicles whether as of right or by permission and whether subject to or free of charge*". She contends that there is no fixed or inflexible meaning as to what constitutes a public place and the trial Judge was entitled to take into account his own knowledge and his observations of the place in coming to his conclusion.
26. Further, the respondent submits that at the stage at which the trial Judge visited the locus he was simply being asked to rule on a direction application and as such the evidential threshold for the prosecution to meet was far lower. The ruling did not prohibit the applicant from calling further evidence or from trying to raise a reasonable doubt as to whether the locus was a public place for the purposes of the RTA's.

Evidence and exchanges

27. On the first day of the trial, 9 May 2019, Garda O'Keefe gave evidence that a car was parked at the end of Harbour Road in Bray, being a public place. That evidence was repeated a few minutes later where the Garda said: "*Upon going up to the scene, Judge, I*

observed that there was a car parked in a gateway there at the end of the Harbour Road, a public place." When cross-examining Garda O'Keefe, the defence solicitor put an aerial photo from Google maps to him, describing it as an "aerial extraction" upon which he had marked with the letter X a place that he identified as the locus, being beside the railway line and a bridge. Garda O'Keefe agreed that this was the location. The defence solicitor also cross-examined Garda O'Keefe in relation to the entry in his notebook where the GPS coordinates were noted. Garda O'Keefe identified that the coordinates were from the Tetra GPS system that the Gardaí have on their radios. Garda O'Keefe accepted that the location of the incident was across from the Pemco factory.

28. In total, evidence was given by three Gardaí and the prosecution case then closed. An application was made for a direction by the defence solicitor on various grounds. The first of these was that there was no evidence given that there was nil by mouth. The second was that the charge sheet stated the location as Harbour Road whereas in fact the location was Strand Road. The third was that the GPS coordinates furnished to the Court by Garda O'Keefe were not the coordinates as represented by the Garda and where it was alleged the incident took place. The defence solicitor referred to an exercise done in that respect by his architect. The fourth was that the prosecution had failed to prove the offence was committed in a public place, given that the location was private, being at the curtilage of a factory. Finally, he made an application for a direction on the failure to establish intention to drive. The Judge adjourned the case until 10 June so that he could give his decision on the directions.
29. On 10 June the Judge refused the application for a direction on the nil by mouth ground and intention to drive. The following exchange then took place:

"JUDGE: So then there's the location of the scene which was Harbour Road, or Strand Road and there's a bit of confusion as to where it was, and I was shown maps and I was shown –

MR. KENNY: Well, there's no confusion, the evidence was Harbour Road, Judge.

JUDGE: Harbour Road.

MR. KENNY: Yes.

JUDGE: No, there was evidence given of –

MR. KENNY: No, no, Harbour Road. I furnished the Court with a map.

JUDGE: Yes, I know, yes coordinates, GPS coordinates, okay.

MR. KENNY: Yes, Judge, that's a separate matter, yes.

JUDGE: GPS coordinates.

MR. KENNY: Yes, a separate matter, Judge.

JUDGE: And then there was the, you made a submission under the – it was a public place, that the State have to establish that it is actually a public place. And then you said the fifth one was that the State haven't proved an intent to drive. Now, I was quite happy that they had an intention to drive, so that one's failed. But what I do want to do, I want to go down and have a look at the locus myself in the next week, okay. I know where it is but I just have never been beyond that, okay.

MR. KENNY: Very good, Judge. There's a railway bridge, it's quite distinct.

JUDGE: Yes, I mean, I've seen the photographs, the satellite photographs and everything. So, and it's just in relation to that that I want to examine the locus, okay.

MR. KENNY: Yes, Judge.

JUDGE: So, I'm going to take a pull down there at some stage this week.

MR. KENNY: Very good, Judge.

JUDGE: And I'll put it in for next Monday."

[p.1 to 2, 10 June 2019].

30. The matter was adjourned till 17 June to allow the visit take place. On 17 June the Judge identifies immediately after the case is called as follows:

"JUDGE: We'd discussions last time. Yes, I went down and looked at that place, it's just over the bridge, and there's buildings on the right and then the bridge and it's the other side of the bridge is blocked off, so if you drive your car in under the bridge you can't go any further. But it is a public place. I drove there no problem at all. So that was your only surviving matter, as it were, Mr. O'Kelly .

MR. O'KELLY: Well, Judge, can I just address you on that, Judge?

JUDGE: Yes.

MR. O'KELLY: I'd say that the Court is acting ultra vires, Judge, in going down to the location, and you did indicate on the last –

JUDGE: Acting ultra vires?

MR. O'KELLY: Yes, Judge.

JUDGE: Of going to a public place?

MR. O'KELLY: Well, Judge, you indicated in the Court on the last occasion that you wanted to satisfy yourself that it was a public place.

JUDGE: Yes.

MR. O'KELLY: And the purpose of your trip down there was to do that.

JUDGE: Yes.

MR. O'KELLY: That would mean you had some doubts, Judge.

JUDGE: No. I didn't.

MR. O'KELLY: Well, Judge...

JUDGE: I had no doubts about the fact. I mean, I saw it on the –

MR. O'KELLY: Sorry, Judge, it's not what you –

JUDGE: -- I saw it on the – look, you can take it to a different jurisdiction if you want to, Mr. O'Kelly, but I'm refusing you your application, okay?"

[p.1 to 2, 17 June 2019].

31. At the bottom of that page the Judge confirms again that he wanted to go down and have a look at the locus to satisfy himself of whether it was a public place or not. He says that he wanted to see if it was a place where anyone could get access to.
32. Near the end of the hearing on 17 June, the District Judge indicated that he was refusing the applications for a direction but agreed to put the matter back so that CCTV footage could be obtained. When the matter came back before the Court on 20 June 2019, the CCTV footage was played, and the applicant went into evidence.
33. An architect was called on behalf of the defence and gave evidence to the effect that the locus was on the Strand Road and was marked as same on the ordnance survey maps that had been handed into the Court. He then gave what was clearly hearsay evidence about the land being in the ownership of Iarnród Éireann.
34. After that evidence was given, further submissions were made as follows;

"MR. KENNY: -- but there is a – the reality, Judge, is – and specifically in relation to this Judge, but the key element is if it's private, Judge, well then the State must show evidence that the public have a right of access, but in the evidence, Judge, of Garda O'Keefe, he did not do that. That is a critical element to this.

JUDGE: But I can see myself that the public have access to it.

MR. KENNY: You can, Judge, but in Garda O'Keefe's evidence, it's part of his evidence that he must give evidence to show that the public have access to it, and he didn't give that specific evidence, and I just –

JUDGE: Mr Connor wouldn't have been able to go there unless he had access to it.

MR. KENNY: Well, not necessarily, Judge.

JUDGE: Ah now, come on. Listen –

MR. KENNY: He may not have had permission, Judge.

JUDGE: Yes, he didn't have – he just – he was able to go there. Everyone goes there. When I was up there, there were people all around there. Well, not all around there, but they were walking past it, and there's nothing to stop them from going in there.

MR. KENNY: Judge, if Garda O'Keefe has said in his evidence, this is a public – the public have access to it, it's used, there's not an issue with access.

JUDGE: No, I'm going to hold against you there, Mr. Kenny, I'm afraid. Okay?"

[p.12, 20 June 2019].

35. After further submissions and exchanges the Judge indicated that he would review the evidence over the weekend and give an answer on Monday.
36. On 24 June the Court convicted the applicant, giving him 3 years disqualification, endorsed his licence and fined him €750 with 3 months to pay.

Analysis

37. This is an application for judicial review based on the way the trial Judge conducted the trial. The best way to address the multiplicity of complaints about the trial is to order them into different categories as set out below.

Site visit

38. There are two aspects to the applicant's complaint about the site visit by the Judge. The first is that by carrying out the visit in the context of an application for a direction, the trial Judge incorrectly reopened the prosecution case and supplemented their evidence. The applicant argues that absent the evidence gleaned from the site visit, there was insufficient evidence to meet the statutory requirement to show the offence was committed in a public place. Accordingly, the trial Judge's intervention deprived the applicant of an opportunity to obtain a direction dismissing the prosecution case on the basis that public place had not been established.
39. The second complaint is that the way in which the visit was carried out was unfair, in that the trial Judge was not accompanied by any of the parties or their representatives, and therefore they had no opportunity to understand his impression of the locus and make submissions to him on it. There is a further, associated complaint to the effect that the trial Judge failed to permit submissions to be made following his visit.
40. It is important to contextualise the first complaint about the visit supplementing the prosecution evidence. Contrary to the submissions of counsel for the applicant, I find there was in fact evidence given by the prosecution that the car was parked in a public place. That evidence was given on two occasions by Garda O'Keefe. The trial Judge also had evidence that the car was parked in the locus identified and was entitled to infer from

that evidence that the applicant was able to access that place. It is true that there was an issue about whether the undisputed locus was incorrectly described as Harbour Road whereas in fact it was Strand Road in Bray. But that did not go to the question of a public place and the correct location had been identified on the map by Garda O'Keefe in the course of cross examination.

41. In those circumstances, in my view there was enough evidence before the Judge at the direction stage to refuse the application, given the very low bar that must be surmounted by the prosecution in this respect. Accordingly, I find the applicant was incorrect in his argument that the Judge was obliged to supplement the prosecution evidence on public place by his visit and that absent the visit, he would have been obliged to grant the direction sought. Nonetheless, the above extract from the transcript on the visit makes it clear that the Judge was concerned about the question of a public place and wished to view the locus himself.
42. The case law summarised above makes it clear that both in Ireland and England and Wales, judges are entitled to use their own knowledge of a physical location. I am obliged by the principle of stare decisis to follow the cases of *Dougal v Mahon* and *DPP (Hegarty)* unless there are strong reasons for departing from them, as identified in the decision in *Hughes v Worldport Communications Inc* [2005] IEHC 467. No such reasons have been identified to me.
43. The only factual difference between this case and that of *Dougal* is that, in *Dougal*, the judge already knew the area in question. He rejected the direction application exclusively on that basis. The question arises as to whether there is any difference in principle between a judge already having knowledge of a place, on the one hand, and visiting a place to acquire that knowledge, on the other. I cannot see a difference in principle such as to justify distinguishing the decision of *Dougal*. If a judge is permitted to use his or her knowledge in relation to a place when deciding upon an application for a direction – as *Dougal* decides – whether that knowledge was in place before the commencement of the case or whether it was acquired during a case by a site visit is not material.
44. The applicant has placed considerable emphasis on the argument that the Judge here supplemented the prosecution case. But a similar argument was made in *Dougal* where it appears there was no evidence other than the Judge's knowledge in respect of public place. Gannon J. summarises the argument as follows:

"It was argued in this Court in support of the application that the District Justice wrongly had recourse to his own personal knowledge of the location described in evidence when the absence of evidence as to whether it was or was not a public place was drawn to his attention. It was submitted that by doing so he substituted his personal knowledge for the missing evidence on a disputed question of fact, and that thus he had not merely erred in law but exceeded his jurisdiction."

That argument did not sway the Court and the conviction was upheld.

45. Of course, there may be situations where it may appear that a trial judge is using his or her own knowledge of a place to favour one or other side or is carrying out a site visit to advance the position of one party. That would constitute objective bias. But here I cannot discern any intention to favour the prosecution in the decision of the District Judge to visit the site. The transcript shows that the trial Judge wished to understand the nature of the locus and considered that a physical visit was the best way to do so. That rationale is not in my view evidence of a desire to favour the prosecution case. Moreover, the trial Judge already had evidence from the prosecution that the car was parked in a public place. He could have refused the direction on that ground. But he wanted to ascertain for himself the nature of the location. That cannot be interpreted as a desire to favour the prosecution so as to constitute objective bias.
46. Separately, it is said that the trial Judge failed to apply the correct legal test in relation to public place and that he failed to satisfy himself on the evidence that the public had access to the site as of right as opposed to as invitees. Even if the applicant is correct on this, this is an error within jurisdiction and does not belong within the sphere of judicial review. But leaving aside that objection for the moment, I might observe that insofar as the direction stage is concerned, it had not been put to Garda O'Keefe in cross-examination by the defence solicitor that the land where the car was parked was privately owned. The obligation on the prosecution at the close of its case was simply to establish that the car was in a public place within the meaning of s.3(1) i.e. being a public road or any street, road or other place to which the public have access with vehicles whether as of right or by permission and whether subject to or free of charge.
47. The second part of the complaint relates to the way the visit was carried out. It was said that permitting a judge to use his or her own knowledge of a location is unsatisfactory as parties cannot cross-examine on it. That is an interesting point, but the existing case law appears to be fatal to it. Permitting a judge to use their knowledge of a location means, by definition, there will not be an opportunity to cross-examine on that knowledge. Indeed, this very point was made in *Bowman*, where Watkins L.J. pointed out that a member of the bench using local knowledge must be aware of the restrictions which necessarily have to be placed upon the use of knowledge, having regard to the inability of the defendant or solicitor or counsel to challenge the claimed knowledge of the justices. He went on to explain that it is for that reason that a judge using local knowledge must inform a defendant of that locally acquired knowledge and the use to which they may seek to put it. The applicant cannot therefore prevail on this point unless I ignore all case law drawn to my attention, both Irish and British, on judicial knowledge of a physical place.
48. A further argument was made to the effect that the Judge ought to have been accompanied by the parties so that they could see what he was seeing and make submissions on same. The argument that the failure to bring the parties to the site rendered the visit unfair might have been more compelling had the Judge refused to allow the parties to accompany him. However, the trial Judge identified his intention to visit the site on 10 June and adjourned the case for that purpose. No objection was taken at that

point in the case. Matters proceeded onwards and there was further argument about other issues. The defence solicitor returned to the topic some minutes later and explicitly said that he was not questioning what the Court was going to do.

49. The defence solicitor had an opportunity to ask that he accompany the Judge to the visit but did not. The Judge could not have been left with any impression but that there was no difficulty about the visit from the defence point of view. Where the defence solicitor failed to request that he be present, it is difficult for him to complain about the visit going ahead in his absence.
50. Despite the lack of objection, following the visit, when the Court next sat on 17 June 2019, the defence solicitor mounted an objection saying that the visit had been *ultra vires*. This was an unsatisfactory approach. Objections should be made in advance. At that point the Judge could not excise his knowledge of the site.
51. At the hearing, counsel for the respondent identified the failure of the defence solicitor to raise an objection in advance of same and, relying upon Cronin, argued that the applicant was precluded from raising the issue of the visit at this stage. In Cronin the Supreme Court heard an appeal from the Court of Criminal Appeal under s.29 of the Courts of Justice Act 1924. The appeal concerned whether the Court was obligated to put a defence to the jury in circumstances where it was never raised at trial. Mahon J., in *O'Loughlin*, set out the import of the decision succinctly;

"Briefly stated, Cronin is authority for the contention that, generally, matters or issues not objected to or challenged in the course of a trial should not later be permitted to be challenged before an appellate court. It is, of course, the case that an appellate court may, in the absence of any such challenge being taken in the trial court, nonetheless, consider the merits of such a challenge in circumstances where justice requires it".

52. In fact, in *O'Loughlin*, the Court of Appeal held that the interests of justice required the point to be raised, although it had not been raised during the trial.
53. Counsel for the applicant counters that the respondent failed to plead a *Cronin* objection i.e. that the applicant could not plead the illegality of the visit because no objection had been taken to it in advance. I think the applicant is entitled to raise the alleged impermissibility of the visit, not least because there was considerable argument about the visit after it had taken place and so the position is not like *Cronin* where the point in question had not been raised at all in the trial. However, on the discrete question as to whether the visit had been rendered unfair because of the absence of the parties at the visit, I think I am entitled to consider the fact that the trial Judge flagged the visit in advance, and no request was made that the parties be present. The attitude of the defence solicitor cannot be ignored in considering the fairness of the situation overall.
54. Any disadvantage that might have accrued to the applicant by his absence from the visit was, in my view, offset by the fact that on his return, the Judge made his views on the

location known to the parties. Moreover, no submissions were sought to be made by the defence solicitor on the substantive impressions identified by the Judge and no corrections were sought to be made on those impressions. In these circumstances, I cannot see any bias or unfairness in the absence of the parties from the visit.

55. Equally, this was not a situation where only one party was present. One can readily see why that might be considered unfair or objectively biased. Examples of that may be seen in *Hegarty* and *O'Loughlin*. However here, where neither party was present, I cannot see how it was an advantage to the prosecution to have the Judge visit the site unaccompanied.
56. Finally, the applicant complains that the Judge did not give him an opportunity to make submissions on the visit. I do not agree with this. In fact, the transcript shows that submissions of considerable length were made by the defence solicitor on the visit on 10 June and 17 June. Moreover, as identified above, at the hearings on 17 and 20 June 2019, the Judge explained what he had seen. Thus, as identified in *Bowman*, the defence could have commented upon the substantive knowledge which the District Judge was intending to use to reach a determination. It is notable that there was no attempt by the defence solicitor to challenge or contradict that knowledge, or any argument made that the Judge had formed an incorrect view of the site.
57. In all the circumstances, I cannot agree that the visit to the site exceeded the jurisdiction of the District Judge such as would warrant a quashing of the conviction.

Mistakes of law by the trial judge

58. Various complaints have been made about mistakes allegedly made by the trial Judge. The first is that in deciding upon the application for a direction because of a lack of intention, the Judge described the engine of the applicant's car as having been running when the Gardaí approached him on the morning of 29 December 2018, whereas in fact Garda O'Keefe had clarified in cross-examination that he could not remember whether the engine was running or not.
59. Next, it is said the trial Judge should not have convicted the applicant where the charge sheet incorrectly referred to the locus as Harbour Road rather than Strand Road and where no application was made to amend.
60. A further mistake is said to be the Judge's characterisation of the burden of proof in relation to intention to drive, where he said on 20 June that "*he has to prove to me or to make me happy that he didn't have the intent to walk home – that he didn't have the intent to drive home*" [p. 13, 20 June 2019]. In a prosecution under s.5 of the RTA, the legal position is that it shall be presumed that the person intended to drive or attempt to drive the vehicle concerned unless he or she shows the contrary and it is for an accused person to discharge the evidential burden resting on them. Nonetheless, it is argued that although the evidential burden rests on the applicant, the legal burden remains on the prosecution and the Judge's comment did not correctly reflect the law in this regard.

61. Finally, it is said that the trial Judge was wrong in concluding that there was enough evidence to convict the applicant on intention to drive given the weight of the evidence against such an intention being present. It is well established that judicial review does not lie in respect of the weight a trial judge gives to evidence and therefore this cannot be relied upon as the basis for a quashing of the conviction.
62. In respect of alleged errors by a trial judge, the jurisdiction of the High Court in respect of judicial review is clear. Errors within jurisdiction do not give rise to a basis for quashing a decision. It is not the function of judicial review to act as an alternative appeal court. There is a delineation of functions between a court that is exercising a judicial review jurisdiction and a court exercising an appellate function. Courts exercising the former jurisdiction should not slip into exercising the latter jurisdiction. It is only if the error meets the *Wednesbury/O'Keefe* tests i.e. is fundamentally at variance with reason and common sense, that it will render a decision susceptible to being quashed in the context of judicial review.
63. The complaints identified above allege error on the part of the trial Judge. They are described as fundamental errors but, in my view, they do not approach the necessary O'Keefe threshold. Even taking the applicant's case at its highest, and assuming he is correct that they are indeed errors, none of them can be described as being fundamentally at variance with reason and common sense. Rather they are classic points of appeal. The applicant has lodged an appeal and undoubtedly those points will be raised in that context. I therefore refuse to quash the convictions on the basis of any of the above errors.
64. However, in fairness to the Judge, it should be made clear that his decision to reject the application for a direction on lack of intention to drive was based not merely on his view that the engine was running but also on the fact that the lights were on and that the applicant had been in the car at that location for 11 ½ hours when the Gardai arrived, following an argument with his girlfriend, and he was just a short pull away from home [p.3 of 10 June 2019]. Therefore, the fact that the engine was said to be running was only one part of the evidence relied upon by the trial Judge.
65. Moreover, after a decision had been given on the direction application in this respect, further submissions were made on the point by the solicitor for the applicant in the context of the substantive case. At that point it is quite clear from the transcript that the Judge was at that point clear that the engine wasn't running and made an explicit finding to that effect [p.12 to 14, 20 June 2019]. Further, the solicitor made extensive submissions on the evidence on intention to drive. At page 13 and 14, one sees the trial Judge summarised the evidence he was relying upon, being that the applicant had been there for 11 ½ hours, he had his duvet and his pillow, he had spent the night there, he was a 2 minute drive away from his home, his options were to leave the car there and trust nobody would break into it or take a 2 minute drive home, he had had some whiskey and coke and he was probably freezing [p.13 to 14, 20 June 2019]. An appeal judge might take a different view of the evidence but there is no basis upon which one

could conclude that it was manifestly unreasonable or irrational for the trial Judge to conclude there was enough evidence of intention to drive.

Refusal to determine direction in respect of GPS coordinates

66. In relation to the GPS coordinates, it is argued that the Judge refused to determine the application for a direction on this point and in this way failed to afford the applicant a fair trial. Where a court refuses to entertain and adjudicate upon an application that is central to the determination of a case, that may well amount to a breach of natural and constitutional justice such that it will result in a quashing of the decision. I accept as a matter of fact that in this case, the District Judge did not rule upon the application for a direction in relation to the GPS coordinates as requested by the solicitor for the defence. However, that refusal must be looked at in the context of this case.

67. The question of the GPS coordinates was raised in the context of whether the car was in a public place as required by the relevant statutory test. The defence solicitor cross-examined Garda O'Keefe on the coordinates in his notebook on the basis that they were not reflective of the actual location of the car. Garda O'Keefe had not relied upon the coordinates to establish location and the first time they were raised was in cross-examination. There was no dispute about where the car had been parked (although there was an issue about whether that location should be described as Harbour Rd. or Strand Rd.). An aerial photo had been handed into the Court and in cross-examination, Garda O'Keefe accepted that the relevant location was as identified by the defence solicitor on that photograph. In summary, a direction was sought on the basis that the Gardaí had failed to establish the correct location because of incorrect GPS coordinates although the location was not in controversy and the Gardaí had not relied upon the GPS coordinates as evidence of location. The following exchange on 9 May 2019 demonstrates that the Judge was satisfied in relation to the location.

JUDGE: And how's that relevant then?

COUNSEL FOR THE DEFENCE: Well Judge –

JUDGE: The GPS coordinates?

COUNSEL FOR THE DEFENCE: Well it goes to the location, Judge.

JUDGE; But sure, it's there in the photograph.

COUNSEL FOR THE DEFENCE: Yes, Judge. Judge I'd rather give you that at a later stage, Judge.

JUDGE: Right.

[p.14, 9 May 2019].

68. There was a further exchange on GPS on 10 June where the defence solicitor had an exchange with the trial Judge in relation to evidence given by the Garda. The Judge observed that he was not putting too much store in the GPS coordinates and the solicitor

said that the evidence was given by the Garda as to the locus based on GPS coordinates and that it was a very important piece of evidence. The following exchange then took place:

"JUDGE: Well, no, sorry, I thought he gave the evidence of the locus because he went down and he saw the car there, it was under the bridge".

MR FEENEY: Well, that was one arm of his evidence...

JUDGE: That's where I'll be going, okay."

[p.3, 10 June 2019].

69. After a discussion in relation to the GPS coordinates, the Judge stated some minutes later;

"JUDGE: ...I'm going down to see if it's a public place and I'm not putting any store in any GPS coordinates at all.

MR. KENNY: But, Judge, it's the evidence that was given.

JUDGE: Yes.

MR. KENNY: The Court was given evidence as to the locus by the –

JUDGE: I'm going down to have a look and see where the car was, okay. That's all I'm doing. I'm not deciding anything on GPS coordinates –

MR. KENNY: Well, I'm not questioning that. I'm not questioning what the Court is going to do –

JUDGE: Great, I'm delighted, I'm delighted by that. This day week then, okay.

MR. KENNY: Can I serve? Can I make a point Judge?

JUDGE: This day week, thank you. I'm not making any finding in relation to GPS coordinated, or otherwise."

[p.4, 10 June 2019].

70. Later, the Judge observes in relation to the GPS coordinates;

"JUDGE: Yes, I'm not – okay, for the fourth time, for the fourth time, I am not deciding anything on GPS coordinates, okay. I'm going down because I've seen satellite photographs which is, okay, you can at least with a satellite photograph you can see what's what. I don't know what GPS coordinates are, okay. I'm holding nothing in relation to that evidence.

MR. KENNY: The Court isn't going – isn't considering that application Judge.

JUDGE: Now, have you heard the – do you understand me now?

MR. KENNY: No, Judge.

JUDGE: Great. Well, you can leave it until later on, okay, because I'm not deciding anything in relation to the GPS coordinates.

MR. KENNY: I just want to be clear Judge because it's important.

JUDGE: No, I'm not saying any more in relation to this. This day week in relation to the public place aspect, thank you."

[p.5, 10 June 2019].

71. It appears to me that in substance, the trial Judge declined to rule upon the application for a direction in respect of the GPS coordinates because there was no issue between the parties as to the correct location of the car. The prosecution had not relied upon GPS evidence to establish the location of the car. The question of the coordinates was raised for the first time by the defence in cross-examination. A direction may be sought where the prosecution has not reached the necessary evidential threshold in relation to an essential element of the offence. Here, where the correct location had in fact been established through the defence solicitor's cross-examination of Garda O'Keefe, and the trial Judge had decided to inspect that location to consider the question of whether it was a public place, it is difficult to understand the relevance of the GPS coordinates in the Garda notebook. In short, the Judge declined to adjudicate upon a meaningless application.
72. It might have been better if the trial Judge had explicitly declined to rule on this basis or had declined the application for a direction. However, given that what I must consider in the context of these proceedings is whether the trial Judge has failed to ensure a fair trial, I cannot find any unfairness to the applicant in the decision not to rule upon the direction application in relation to the GPS coordinates in the above circumstances.

Conduct of the trial

73. Separately, the applicant argues that the trial Judge did not permit a fair trial in that he did not allow the defence to be heard properly, denied them the opportunity to ventilate all their arguments, intervened too much, asked questions that were favourable to the prosecution and was impatient.
74. Looking at the trial as a whole, as I must do, it is important to understand that it took place over the course of five days and took up a considerable amount of court time overall. In my view, this was largely because of the determination of the trial Judge to ensure that all questions were fully ventilated and to give himself time to consider the extensive submissions made by the defence. The first adjournment following the hearing on 9 May 2019 was so that the Judge could consider the applications for directions by the defence. He gave his decision on the applications for direction in respect of intention to drive and "nil by mouth" on 10 June 2019. He then adjourned the hearing to 17 June, so

he could examine the locus in the meantime. On 17 June, extensive submissions were made by the solicitor for the defendant and he sought an adjournment to permit the Court to view CCTV footage. The Judge acceded to this application and adjourned the matter to 20 June 2019, facilitating the applicant in relation to the time of the hearing to permit the applicant to work in the morning.

75. On 20 June 2019, having heard the defence evidence, being the applicant and an architect, as well as further extensive submissions from the defence solicitor on intention to drive, the Judge decided that rather than proceeding directly to a decision on conviction, he would review the evidence over the weekend and give an answer on 24 June 2019. The following exchange gives a flavour of the approach the trial Judge took throughout the trial:

"MR. KENNY: I think, Judge – I'd ask you to – that he deserves the benefit of the doubt on this, Judge. You have to be 100% certain and I think his evidence to the court is very clear.

JUDGE: I'll tell you what I'll do. I'll review the evidence over the weekend and I'll give you an answer on Monday. Okay?"

[p.14, 20 June 2019].

76. That sequence of events demonstrates that far from cutting off the defence, the trial Judge made every effort to ensure that the defence arguments were heard and considered. In fact, when one reads the transcripts, it is hard to avoid the conclusion that the defence solicitor was given considerable latitude by the Court. The only time that the exchanges could be said to have been a little testy was on 17 June, where the trial Judge admitted that he was impatient with the defence solicitor and explained that this was because the defence solicitor insisted on going back over the same ground when a ruling had been made on it. That impatience was understandable in the circumstances. Moreover, when the defence counsel continued to insist on seeking to revisit a point, the Judge was at pains to explain to him that he was entitled to appeal [p.4 to 5, 17 June 2019].
77. There are undoubtedly criticisms that one could make of the trial. It was not always clear at certain points in the trial whether the trial Judge was dealing with the direction applications or the substantive case. However, much of that confusion was generated by the fact that the defence solicitor continually kept trying to revisit the decisions that the trial Judge had made on earlier directions. The two most obvious examples of this are on 17 June where the defence solicitor sought to revisit both the ruling on nil by mouth and re-open case law that had already been discussed, and the ruling on intention to drive, although a ruling on the application had been made on 10 June. Even on 10 June, when the decision on intention to drive was given, the defence solicitor sought to interrogate the Judge on the substance of his decision. Rather than shutting the defence solicitor down and refusing to listen to attempts to re-open matters already decided, the trial

Judge engaged in a dialogue with him and explained again why he had made the decisions.

78. That willingness to engage at times makes for difficulties in isolating the precise point at which the applications for directions were refused; but it demonstrates that the trial Judge gave the defence solicitor every opportunity to make submissions and engaged substantively with those submissions. The trial Judge cannot be criticised for seeking to explain in full and repeatedly to the defence solicitor the decisions he had taken and why he had taken them.
79. In relation to inappropriate questioning of witnesses, there are in fact relatively few instances where the trial Judge asked questions of the witnesses. He has been heavily criticised by the applicant for asking the prosecuting Garda whether the engine of the car was running. But a trial judge is entitled to clarify factual matters with a witness. Of course, those clarifications cannot spill into making the prosecution's case for it or appearing to be less than even handed in relation to the parties to the case. But no such issues appear here. For example, the defence solicitor was able to revisit the question of the engine running in cross-examination and in fact elicited a response favourable to the defence i.e. that the Garda could not remember whether the engine was running. The Judge's intervention at this point in fact demonstrates his neutrality in that he assured the Garda that if he couldn't remember, that was fine.
80. This was not a situation like that in O'Connor where counsel could not follow a preconceived line of inquiry thus resulting in inherent unfairness due to the excessive interventions. The transcripts make it clear that the defence solicitor was able to explore all lines of inquiry he wished with the witnesses. In the circumstances, I see no evidence of a lack of a fair trial arising out of the Judge's questions or interventions and I decline to quash the trial on this ground.

Hearing on 24 June 2019

81. Finally, the applicant criticises the following comment and question of the trial Judge on the last day of the trial, i.e. 24 June 2019, where the Judge said he had considered what the defence solicitor had said and that he was rejecting his applications. After a further brief exchange with the defence solicitor, where the Judge indicates that he had refused the applications on the other matters, he then asks whether the defendant is going into evidence and upon being told he had gone into evidence on the last day, the Judge convicts him.
82. The applicant argues this question means that the trial Judge had not considered the submissions previously made to him, did not remember the case, did not remember the defendant's evidence given on 20 June and overall failed to recall the defence case. At paragraph 67 of the written submissions the applicant criticises the Judge for indicating that he was rejecting the applications, albeit that it was not clear what applications he was referring to given that the matter was listed for judgment.

83. As has been identified in the case of *Fogarty*, an infelicitous word or phrase uttered by a judge must be seen in the context of the hearing as a whole. It must be remembered, as identified above, that the purpose of the adjournment to 24 June was so that the Judge could consider the defence submissions on the evidence in respect of intention to drive. In that context, on 20 June, when summing up the evidence, the Judge had referred inter alia to the applicant having a duvet and a pillow and drinking whiskey and watching YouTube. These matters came from the evidence that the applicant had given. However, rather than convicting the applicant at that point, the Judge agreed to adjourn the matter to 24 June so that he could consider the evidence. To assume that the Judge had forgotten all of the applicant's evidence on the topic, given his previous summation of what he considered to be the relevant evidence on same, would in my view be an entirely disproportionate response to one question. Further, that question may be characterised as a slip of the tongue given that it was one that is probably posed in almost every criminal trial by the Judge.
84. Moreover, prior to asking that question on 24 June, the trial Judge referred to the fact that the applicant was going to lose his job if he was convicted. That submission had been made by the applicant solicitor on 20 June. The Judge's comment demonstrated that he was well aware of the submissions that had previously been made to him.
85. Finally, in respect of the comment in relation to rejecting the applications of the defence solicitor, this followed an extended exchange between the defence solicitor and the Judge on 20 June in relation to the question of intention to drive. It is in my view reasonable to assume that what the Judge was referring to in this context was the substantive submissions that had been made by the defence solicitor on this issue. For those reasons, I cannot accept the arguments of the applicant that the conduct of the hearing on 24 June demonstrated a failure to engage properly with the applicant's case.

Conclusion

86. Accordingly, for the reasons identified above, I dismiss this application for judicial review.