APPROVED **[2022] IEHC 689**

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 930 J.R.

BETWEEN

GERARD REILLY

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 21 December 2022

INTRODUCTION

1. These judicial review proceedings relate to a prosecution before the District Court in respect of a road traffic offence. One of the principal issues for determination in this judgment is whether certain interventions on the part of the trial judge resulted in the accused receiving an unfair hearing which cannot be corrected by way of an appeal to the Circuit Court.

NO REDACTION REQUIRED

JUDICIAL REVIEW OR APPEAL

2. An application for judicial review will not normally be appropriate where an applicant has an adequate alternative remedy by way of an appeal. This is especially so in the context of a criminal conviction entered in the District Court or the Circuit Court. This is because an appeal to the Circuit Court or the Court of Appeal, respectively, will generally represent an adequate alternative remedy. Indeed, an appeal is almost always the *preferable* remedy from an accused's perspective because of the inherent limitations on the judicial review jurisdiction.

3. Judicial review is concerned principally with the legality of the decision-making process, and not with the underlying merits of the decision under challenge (save in cases of irrationality). Put otherwise, the function which the High Court exercises in determining judicial review proceedings is far more limited than that which the Circuit Court and the Court of Appeal, respectively, would exercise in determining an appeal against conviction and sentence.

4. The inherent limitations on the High Court's judicial review jurisdiction have been described, in more eloquent terms, by the Supreme Court in *E.R. v. Director of Public Prosecutions* [2019] IESC 86 as follows (at paragraph 17):

> "[…] an accused in a criminal trial who is advised to forego an appeal and instead pursue a judicial review, faces a burden different to an argument as to right and wrong. Judicial review is not about the correctness of decision-making, nor is it the substitution by one court of a legal analysis or factual decision for that of the court under scrutiny. On judicial review, where successful, the High Court returns the administrative or judicial decision to the original source and, implicitly in the judgment overturning the impugned decision, requires that it be redone in accordance with jurisdiction or that fundamentally fair procedures be followed. If the decision-maker has no jurisdiction, that may be the end of the matter but the High Court never acts as if a Circuit Court case were being reconsidered through a

> rehearing, which is a circumstance where a court will be entitled to substitute its own decision. Judicial review is about process, jurisdiction and adherence to a basic level of sound procedures. It is not a reanalysis."

5. The Supreme Court judgment goes on, in the next paragraph, to emphasise that an applicant for judicial review in criminal proceedings has the "*substantial burden*" of showing the deprivation of a right. It is not enough to ground a successful application for judicial review that the trial judge might have made an error of fact, nor even an incorrect decision of law.

6. The circumstances in which judicial review may be appropriate, notwithstanding the availability of a right of appeal, have been summarised as follows by Clarke J. (as he then was) in *Sweeney v. District Judge Fahy* [2014] IESC 50 (at paragraphs 3.14 and 3.15):

> "Thus, it is clear that a court may refuse to consider a judicial review application where it is apparent that the complaint made is one which is more appropriately dealt with by means of a form of appeal which the law allows. There can, of course, be cases where the nature of the allegation made is such that, if it be true, the person concerned will have, in substance, been deprived of any real first instance hearing at all or at least one which broadly complies with the constitutional requirements of fairness. To say that someone, who has been deprived of a proper first instance hearing at all, has, as their remedy, an appeal is to miss the point. In such circumstances what the law allows is a first hearing and an appeal. If there has, in truth, been no proper first hearing at all, then the person will be deprived of what the law confers on them by being confined, as a remedy, to an appeal. In such a case, judicial review lies to ensure that the person at least gets a first instance hearing which is constitutionally proper and against which they can, if they wish, appeal on the merits in due course.
>
> Where, however, a person has had a constitutionally fair first instance hearing and where their complaint is that the decision maker was wrong, then there are strong grounds for suggesting that an appeal, if it be available, is the appropriate remedy."

7. These, then, are the principles to be followed in deciding whether to grant judicial review in this case.

FACTUAL BACKGROUND

8. The criminal prosecution arose out of events said to have occurred on 28 September 2018. It is alleged that, on that date, the applicant (hereinafter *"**the accused**"*) had driven a mechanically propelled vehicle under the influence of alcohol. An alleged offence of this type is often referred to colloquially as *"drunken driving"*.

9. The criminal prosecution ultimately came on for hearing before the District Court on 10 October 2019. Having regard to the run of the evidence, the principal issue which arose for determination by the trial judge was whether the prosecution had failed to establish one of the crucial proofs, namely that the breath specimen relied upon had been taken from the accused within three hours of his having been driving. One of the ingredients of the relevant offence under Section 4 of the Road Traffic Act 2010 is that the concentration of alcohol in the driver's breath had exceeded the prescribed threshold within three hours after their driving or attempting to drive.

10. The nature of the proof required is correctly summarised as follows in D. Staunton, *Drunken Driving* (Round Hall, 2nd edition, 2021) at §2-21:

> "The fact and the time of the occurrence of driving or attempting to drive are essential proofs in a prosecution for driving in excess of the prescribed limit for alcohol or drugs. These facts may be established by the evidence of a garda, another witness or by other admissible evidence. There will, of course, be scenarios where the driving, or time at which it occurred, is not witnessed by a garda, another witness or by other admissible means. In those instances, the prosecution may rely on a lawfully obtained admission by an accused relating to driving or attempting to drive. An admission

> against self-interest is generally admissible unless it fails to satisfy the voluntariness test. However, an admission may be excluded by virtue of a failure to observe the Judges' Rules or where the admission was taken in circumstances that were fundamentally unfair."
>
> *Footnotes omitted

11. In the present case, the prosecuting garda had given evidence before the District Court to the effect that the accused had informed him that the accident had occurred some ten minutes prior to the arrival of the garda on the scene. The dispute before the District Court reduced itself to the question of whether this statement by the accused had been spontaneous, or, alternatively, had been made in response to a direct question by the garda.

12. At the close of the prosecution case, the solicitor for the accused had sought to have the charges dismissed on the basis that the evidence was to the effect that the accused's oral statement in respect of the time of driving had been in response to a question, and that the failure to administer a caution in advance rendered the answer inadmissible.

TRANSCRIPT OF HEARING BEFORE THE DISTRICT COURT

13. A transcript of the digital audio recording (*"DAR"*) of the hearing before the District Court has been exhibited in these judicial review proceedings. The issue of the timing of the driving was addressed as follows in the prosecuting garda's evidence in chief:

> "[…] I was then approached by a male who identified himself as Gerard Reilly. Gerard Reilly informed me, Judge, that while he was driving his vehicle [Registration details redacted] he lost control while he was looking at his mobile phone. He also informed me that the accident happened approximately ten minutes before I arrived which was –

> JUDGE: Sorry, I'm making a few notes. 'I was looking at mobile'?
>
> While he was looking at his mobile phone
>
> JUDGE: And what time did he say?
>
> He said the accident happened approximately ten minutes before I arrived, which was 3.08 am. Judge, I observed his vehicle was on its roof blocking both lanes. I cautioned Mr. Reilly: 'You're not obliged to say anything unless you wish to do so. Anything you do say will be taken down in writing and may be given in evidence'. Mr. Reilly was offered medical attention and he refused. While speaking to Mr. Reilly I got a strong smell of alcohol from his breath."

14. The garda's evidence continued to the effect that he had then required the accused to provide a preliminary specimen of his breath. Thereafter, having formed the opinion that the accused was under the influence of an intoxicant to such an extent to be incapable of having proper control of a mechanically powered vehicle in a public place, the garda arrested the accused. The accused was conveyed to the local Garda Station and a further specimen of his breath was taken.

15. The prosecuting garda was then cross-examined by the solicitor acting on behalf of the accused. In the course of this cross-examination, the garda confirmed that he had asked the accused his address; had asked whether he was the driver of the car; and had asked what time the accident had happened at.

16. The solicitor then commenced to make a submission to the effect that the admission in respect of the time of the driving of the vehicle was inadmissible in circumstances where it had been given in response to a question which had been asked without a caution.

17. Before this submission was fully elaborated upon, however, the trial judge interrupted to state that his understanding of the evidence had been that the

prosecuting garda had stated that the accused had *volunteered* the information in relation to the time of the driving. The trial judge then indicated that he was entitled to recall the prosecuting garda to clarify his evidence.

18. The prosecuting garda was further cross-examined and appears to have given contradictory evidence to the effect, variously, that the accused had volunteered the information in relation to the timing of the driving but also that the garda had asked him what time the accident occurred.

19. The solicitor submitted that the garda had three times said in evidence that he had asked the accused a question in respect of the time of the accident. The next two pages of the transcript indicate that the trial judge intervened to say that he did not think that the garda actually understood the solicitor. The judge himself then asked a series of questions of the garda, culminating with the following:

> "JUDGE: Did you – no. [The accused's solicitor] asked you three times and you answered yes to his question. Did you ask him the time and you said 'yes' three times?
>
> WITNESS: I understand that, Judge, now.
>
> JUDGE: Now would you clarify your evidence for the final time to [the accused's solicitor's] question? [The solicitor] is going to ask you: Did you ask him the time of the accident?
>
> WITNESS: No, I didn't."

20. The accused's solicitor then asked the garda why he had previously said on three occasions that he had asked the accused the question in relation to the timing of the accident. The garda commenced his answer by saying that he did not understand the way the solicitor's question had been worded. The solicitor began to ask a further question, suggesting that the garda was very experienced. The trial judge intervened again, to say that the garda was not actually that

experienced, that he was very young. In fact, the garda had fourteen years' service.

21. The trial judge stated his conclusions on this issue as follows:

> "Indeed I have to say Garda Leonard gave his evidence very well and quite fluent, but I knew it was a confusion between the way you asked him the question and what he had already stated. The dividing line is so slight as to whether somebody volunteered or whether he asked. At any rate, I understood his evidence. I'm happy to have recalled him and I stand over it. I am afraid I'm not with you. Admissions carry a lot of weight where made by a defendant not under duress. This man volunteered that, that's his problem. Accordingly I'm not with [the accused's solicitor]."

22. The trial judge then entered a conviction and imposed a monetary fine of €250 and made a consequential disqualification order declaring the accused to be disqualified from holding a driving licence for a period of two years.

DISCUSSION AND DECISION

23. There is no doubt but that judicial review of a criminal trial is a remedy of last resort. Generally, a person who is dissatisfied with the outcome of criminal proceedings is expected to exercise their right of appeal against that conviction rather than move by way of judicial review.

24. It is apparent from the transcript that the prosecuting garda's evidence was confused and inconsistent. The assessment of evidence is quintessentially a matter for the trial judge (*Sweeney v. Fahy* [2014] IESC 50). Accordingly, had the only complaint made in the judicial review proceedings been as to the assessment of that evidence, and as to the correctness of the trial judge's conclusion that the information in relation to the timing of the driving of the vehicle had been volunteered, this would not represent a good ground for judicial

review. Rather, the accused would be expected to exercise his right of appeal to the Circuit Court wherein he would be entitled to a *de novo* hearing.

25. Crucially, however, the complaint in the present case goes much further. The complaint is that the interventions of the trial judge were such as to render the hearing before the District Court fundamentally unfair.

26. Having read the transcript, I have come to the conclusion that the hearing before the District Court was, indeed, unsatisfactory. The two principal causes of concern are as follows. First, the conduct of the trial judge in interrupting the (second) cross-examination of the garda is such as to give rise to a reasonable apprehension of bias. Whereas the trial judge was entitled to have the garda recalled, and, if appropriate, to ask questions of the garda himself, the sequence of events was unsatisfactory. A reasonable observer might well be left with the impression that the trial judge had undermined the effectiveness of any cross-examination on the part of the solicitor acting for the accused. The trial judge's interventions are open to the reasonable interpretation that he coached the witness in respect of his answers on what was the crucial issue in the case.

27. Secondly, the trial judge intervened a second time to interrupt the cross-examination, saying that the garda was inexperienced. This should not have happened. Instead, the accused's solicitor should have been allowed to carry out his cross-examination unhindered. The presenting officer could then have re-examined the garda. Thereafter, if the District Court judge required any matters to be clarified, he could have asked questions himself.

28. In the event, the trial judge made an intervention at a key point in the cross-examination. The matter in dispute was very straightforward, namely whether the information as to the timing of the accident, which in turn disclosed the

timing of the driving, had been given voluntarily by the accused or by way of a response to a question asked by the garda. It was inappropriate for the trial judge to suggest that such a straightforward issue could only be understood by an experienced garda or that the prosecuting garda was confused.

29. In summary, therefore, this is one of those truly exceptional cases where judicial review is the appropriate remedy. As emphasised by the Court of Appeal in *O'Keeffe v. District Judge Mangan* [2015] IECA 31 (at paragraph 43):

> "There will be circumstances where it would not be appropriate for a trial judge to intervene. The judge is not entitled to take up a position for one side or the other in a case and to pursue a line of questioning with witnesses that is designed or may be seen or understood to be designed to achieve a particular outcome. […]"

30. The interventions of the trial judge in the present case, although undoubtedly well meant, were open to the reasonable interpretation that he was not approaching the trial impartially and had, instead, descended into the arena.

31. Finally, for the avoidance of any doubt, it should be explained that it has not been necessary for me to address, in this judgment, the separate question as to whether or not an answer given without caution would have been admissible as evidence of the timing of the driving. This issue did not arise for consideration by the trial judge because of his finding that the evidence had been given spontaneously. This is an issue which might arise for consideration in the event of the matter being remitted to the District Court for rehearing.

PLEADING POINTS

32. For completeness, it should be noted that counsel for the respondent raised two pleading points in the course of his submission, as follows. First, the verifying

affidavit was not sworn by the accused, but by his solicitor. Secondly, the order of the District Court has not been exhibited.

33. It would be inappropriate to refuse relief by reference to either of these two technical points in circumstances where same were not expressly raised by the respondent in her statement of opposition. Had the pleading points been raised, the applicant could have readily remedied same.

CONCLUSION AND PROPOSED FORM OF ORDER

34. For the reasons explained herein, I have concluded that the hearing before the District Court was fundamentally unfair. The conviction will, therefore, be set aside.

35. For completeness, it should be explained that this judgment is not authority for the proposition that an oral statement as to the time of driving is inadmissible if given in response to a question by a garda which has been asked without a prior caution having been given. This issue does not arise for determination on the facts.

36. I will hear further from the parties on 31 January 2023 at 10.30 o'clock as to whether the conviction should be quashed *simpliciter* or instead remitted to another judge of the District Court for rehearing.

37. As to costs, having regard to Part 11 of the Legal Services Regulation Act 2015, my provisional view is that the applicant, having been entirely successful in the proceedings, is entitled to his costs. If either party wishes to contend for a different form of costs order, then they will have an opportunity to do so at the hearing convened for 31 January 2023.

Appearances

Mark Harty, SC and Breffni Gordon for the applicant instructed by Walter P. Toolan & Sons
Kieran Kelly for the respondent instructed by the Chief Prosecution Solicitor

Approved