



THE COURT OF APPEAL

Neutral Citation Number IECA 205

Record Number: 2019/33

High Court Record No: 2016/843JR

**Baker J.
McGovern J.
McCarthy J.**

BETWEEN/

**JUDGE BRENNAN, THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE, THE
ATTORNEY GENERAL & IRELAND**

RESPONDENTS

- AND -

DONA SFAR

APPLICANT/APPELLANT

JUDGMENT of the Court delivered by Mr. Justice McCarthy on the 28th day of February 2019

1. This is an appeal from the judgment and Order of Binchy J. of the 13th December, 2018 whereby he refused certain declaratory relief to the effect that thirteen convictions for offences under the Animal Health and Welfare Act, 2013 were a nullity. The convictions were the subject of an appeal to the Circuit Court by notice of the 21st July, 2016 and certainly at the date of the said judgment and order those appeals were still pending. The hearing ultimately giving rise to the judgment and order was a so-called "telescoped hearing". The applicant/appellant asserts that the District Court Judge could have adjourned the trial to a later date or, if he was not satisfied that the applicant/appellant was ill and unable to attend Court he could have requested medical evidence to be produced at a later date (which would be the same thing in substance as an adjournment of the trial), could have issued a Bench Warrant for her arrest (a rare step in a case such as the present) or proceeded with the trial in her absence, which would, in her contention, be a breach of the principle of *Audi alteram partem* and would render the convictions a nullity. She further contends that the first named defendant should not have proceeded with the trial in her absence because she had previously applied (or so she contended) in writing to adjourn the proceedings, had previously requested, in writing, that the first named respondent should recuse himself on the grounds of objective bias and that she did not agree to the trial proceeding in her absence, even though there were circumstances in which it would be lawful so to do. She relied upon the proposition that

she had sought an adjournment from the District Court Clerk and/or he should have done so.

2. As referred to above, prior to the trial the applicant wrote to the District Court Clerk on the 8th of March asserting that in the interests of justice the proceedings should not be tried by the first named respondent, i.e., that he should recuse himself on the basis of objective bias and, in particular, because he had adjudicated in the past on proceedings involving the applicant and convicted her of certain offences which were the subject of appeals, which were successful.
3. The applicant relies upon the provisions of the European Convention on Human Rights, the European Charter of Fundamental Rights (which she says is relevant because of her contention that the act under which she was prosecuted was enacted to implement certain directives under European law) and that there was a breach of her rights under Articles 38.1, 40.3.1 and 43 of the Constitution. Art. 43 of the Constitution, as rightly held by Binchy J., is of no relevance to the present case as he correctly held that the prosecution of offences under the Act of 2013 was an entirely separate matter to the seizure of her animals which was the subject of certain civil proceedings arising out of the same facts. Of course, the District Court Clerk had no power to adjourn the charges and it is clear from the transcript that he did not purport to do so. No one can be in any doubt as to the principles applicable to fair trials under the provisions referred to.
4. An application for leave to seek a stay on the proceedings was refused by Kearns P. on the 4th November, 2015. His Order was the subject of an appeal to this Court but such appeal was unsuccessful. Later, the proceedings having been before the District Court on a number of occasions subsequent to the order of Kearns P., a further application, which has been characterised as duplicating that heard by Kearns P., was rejected by Humphries J. on the 5th April, 2016. The present proceedings were instituted, similarly, ex parte but when they came before Humphries J. he ordered that the respondents should be put on notice and that the application be heard by way of what is commonly known as a "telescoped" hearing.
5. The first issue which arose on this appeal was whether the High Court judge was correct in his conclusion that the application was out of time and, if so, whether or not the time should be extended.
6. Order 84, rule 21(1) (as amended) is to the effect that applications for leave to apply for judicial review must be made within three months from the date when the grounds for the application first arose and under O. 84, r. 21(3) time may be extended where there is "good and sufficient reason" for doing so, when the circumstances that resulted in the failure to make the application within the three month period were either outside the control of, or could not reasonably have been anticipated by, the applicant for such extension.
7. In the present case the application was outside the time contemplated by the rules because of the fact that the orders the applicant seeks to nullify were entered on the 7th

July, 2016. She asserts that the grounds only arose on the 21st of September, thereafter when the application to set aside the order of the 7th of July was unsuccessful or that since an appeal was entered in the Circuit Court on the 21st July, 2016, the orders were stayed as a consequence of which they did not come into effect. These propositions are plainly unstateable on their face. One need hardly quote authority for the rudimentary proposition that if one seeks to quash or otherwise condemn orders it is from the date upon which such convictions were entered up that one must move for judicial review. So far as the point is advanced that the stay which became operative when the appeal was lodged postpones, in effect, the running of time an appeal, is quite a different thing from an application for judicial review. Indeed, if anything, the fact of an appeal can be fatal in a given case to an application for the latter relief. The proposition advanced accordingly amounts to this: that whenever an appeal is entered within time such as to give rise to a stay the time does not begin to run from the date upon which the grounds arose, namely, when the impugned orders were entered up, but only, as a matter of logic, after the final disposition of the appeal. This cannot be correct since the stay is a consequence of the appeal which does not affect in any way the validity of the original order.

8. I can see no evidence which would show good and sufficient reason for an extension and certainly none which was outside the control of, or could not reasonably have been anticipated by the applicant. I accordingly consider that Binchy J. was correct.
9. The core issue on the merits which arises here is the fact that the trial and the consequent convictions in the District Court proceeded or were entered on the 7th July, 2016 in the applicant's absence. Binchy J. had the benefit of a transcript of the hearing on each day upon which the proceedings were before the District Court and hence there was no basis for any disputation about any material fact as to the sequence of events in court. As set out by him (and this would appear to be correct on the evidence and orders before this court) the summonses were first listed at Dundalk District Court on the 3rd September, 2015 and thereafter on the 3rd March, 2016, the 7th April, 2016 and the 7th July, 2016. On the first occasion the matter appears to have been adjourned without incident to the 3rd March 2016 and in the intervening period the first application for judicial review was refused on the 4th November (the appeal from that refusal being subsequently dismissed by this Court on the 13th June, 2016). Following the adjournment of the 3rd March, 2016 the second application for judicial review was refused on the 5th April, 2016 in circumstances where the matter was to proceed on the 7th. Whilst it appears that the case might not have been reached upon that day – it was listed for trial – it was in the event adjourned to the 7th of July *inter alia* it appears because of the then pending appeal to this Court. Binchy J. states that the matter was adjourned to the latter "for hearing" and "by consent".
10. On the 6th of July it seems that the applicant attended at Dundalk District Court with a view to seeking the adjournment of the hearing of the charges for medical reasons and in particular that her state of health necessitated her attendance on the 7th July, in the afternoon, at a clinic in Northern Ireland. She asserted that it was because of that clash with the hearing in the District Court that she attended there on the 6th. She made no

application to the Court although she asserts that the District Court judge noticed her and was acquainted with her. It appears that when she approached the District Court Clerk she was informed that the matter was not being dealt with on that day and that she ought to make an application the following day. She informed him that she would not be in court and it appears that at one point the District Court Clerk said "Well I will put it with your application tomorrow", the applicant responding "Okay". It appears that the clerk further stated that "I will put that with your summons tomorrow". It seems proper to infer, as did the learned High Court judge, that he was referring to documentary material pertaining to her medical appointment.

11. When the case was called, exchanges took place. Counsel for the respondent said that his understanding was that the applicant had written to the Court to say that she would not be present, that she had written to his instructing solicitor "at the eleventh hour" on the 4th of July indicating that she would not be in court, that the applicant had visited his office on the 6th of July and indicated that she would not be in court (handing him a copy of a document showing that she had a medical appointment); thereafter he said that he telephoned her to indicate that it would be necessary for her to produce some form of certification that she would be unable to attend court but that she had replied that she would not have such a thing. The judge commented that "She was in Court yesterday and she never said a word to me". Counsel for the prosecutor also informed the Court that if there was "a genuine medical emergency" he would not insist on proceeding but submitted that the applicant was attempting to "circumvent the proceedings" (to use Binchy J.'s words) now that the judicial reviews had been dealt with.
12. The applicant said that she did not receive notice of the hearing relating to the date in question, that she had understood that the judge had agreed on the 6th to adjourn the matter and that she had no knowledge that the hearing was to go ahead on the 7th. Binchy J. concluded, by reference to the transcript, that, in fact, no application was made to the first named respondent at any time for an adjournment and her sole communication appears to have been with the District Court Clerk who, she contends, was the person who dealt with Court lists, as far as she was concerned (including questions pertaining to adjournments).
13. There are a number of decisions concerning trials held in the accused's absence. *Lawlor v. District Judge Hogan* [1993] I.L.R.M. 606 is authority for the proposition that if an accused person consciously decides to absent himself from the trial absent the necessity for him to be present for some particular reasons (e.g. to make his election to be tried summarily or on indictments in the case of an indictable offence) the judge is entitled to exercise his discretion to proceed in the accused's absence. The case of *O'Brien v. District Judge John Coughlan* [2018] 2 IR 270 is authority for the proposition that in his discretion a trial judge may proceed with a summary trial in the accused's absence if he knew of the date and he was represented by a solicitor. There was no question of a prison sentence such that adjournment was not necessary for the purpose of imposing sentence. Whilst undoubtedly the absence of representation by solicitor or counsel on the day in question in circumstances where it must have been obvious that the applicant was

a litigant in person is a relevant consideration it cannot be decisive in a summary trial in circumstances where there could not by definition have been the slightest doubt in the applicant's mind but that the matter was proceeding, and when she failed to make an application to the judge.

14. Binchy J. in addressing the facts as found by him, applied the relevant principles of law correctly to them and I am satisfied also that on this point the applicant must fail.
15. With respect to the question of recusal and objective bias Binchy J. understandably said that he was not aware of any case in which the mere fact that a person has previously been convicted by a District Judge or otherwise found against, constitutes a sufficient ground to sustain a claim for objective bias. He pointed out also that the applicant had not referred him to any such cases.
16. The applicant apparently relied upon a passage in "*Judicial Review of Criminal Proceedings*" (Derek Dunne, Round Hall 2011) at para. 6.80 where it is said that objective bias (and hence a basis for a recusal) cannot be inferred merely from the fact that the same accused had appeared before the same judge on prior occasions, subject to this qualification: –

"There may be occasions where it would not be appropriate for a judge to deal with an accused in circumstances where the accused has appeared before the same judge on previous occasions. For example, in circumstances where an accused is charged with an offence to which the accused pleads not guilty and if the trial judge is aware that the accused has previous convictions for the same or similar offences."

On the authority of *R. v. Metropolitan Stipendiary Magistrate, ex parte Gallagher* [1972] 136 J.P. 80. There, Lord Widgery C.J. said that –

"It is no doubt desirable that in many instances an accused person should come before a magistrate who does not have an intimate knowledge of his record. But that desirability cannot be elevated to a proposition of law sufficient to deprive the magistrate of jurisdiction and thus to justify an order of prohibition going in a case of this kind. Having said that the Court would however stress the desirability that a magistrate should not try on information where he has an intimate knowledge of an accused's background, and no doubt in this case consideration would be given to the possibility of some other magistrates dealing with the matters in question."

17. It seems to me that Binchy J. rightly concluded that the qualification to the general proposition advanced in the text is "a proposition only" and is "somewhat at odds with what he [the author] has already stated [that is that there could be no objection even though an accused has appeared before the same judge on prior occasions]."
18. Binchy J. considered that recusal could arise only where the judge has "an intimate knowledge of the accused's background", in my view he rightly concludes that even if that

proposition is correct “mere knowledge of the fact that an accused person had convictions for the same or similar offences” is insufficient to give rise to recusal, or needless to say to justify relief in the event that a judge fails to do so.

19. In fact, it seems to me that Binchy J., in giving countenance to the observations of Lord Widgery C.J. – which are of course merely of persuasive authority in this jurisdiction, may have gone too far; trained judges who have made their declarations under the Constitution, as every well-informed objective observer must know, in no case would be capable of actual bias or, it would be hard to conceive of circumstances where it might be so (and certainly not here) and having regard to the test for objective bias, no question of objective bias arises. “Intimate knowledge” of, say, an accused’s family circumstances or as a consequence of bad character due to multiple previous successful prosecutions in the same courts would certainly not be enough.
20. Binchy J. also dealt with a complaint by the applicant that contrary to the directions of Judge Hamill (who was sitting on one of the occasions when the matter was listed), she was not notified in advance of the witnesses who would be called by the prosecutor, at least one month in advance (such notice was given to her, apparently some three days before the trial); she did not raise this as a ground for an adjournment and I think that, accordingly, Binchy J. was right in rejecting such complaint.
21. I would therefore dismiss this appeal.