

**THE HIGH COURT**

**[2024] IEHC 46**

**[Record No. 2022/328JR]**

**BETWEEN**

**PAUL CALLAN**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**JUDGMENT of Mr Justice Barr delivered on the 31<sup>st</sup> day of January, 2024**

**Introduction.**

- 1.** In this application, the applicant seeks an order of *certiorari* quashing the order of Hayes J in the Circuit Court, which affirmed a conviction that had been imposed in the District Court for driving on 15 March 2020 at Knockturnagh, Castleblaney, County Monaghan, while under the influence of intoxicating liquor, contrary to ss. 4(2)(a) and (5) of the Road Traffic Act 2010.
- 2.** Knockturnagh is a housing estate within the townland of Tullanacrunat, County Monaghan.
- 3.** The applicant's key submission was that he had been accused of a specific offence, namely that he had driven, or had attempted to drive, at Knockturnagh, Castleblaney, County Monaghan, while there was present in his blood a quantity of alcohol such that, within three hours after so driving/attempting to drive, the concentration of alcohol in his blood did exceed a concentration of 50mg of alcohol per 100ml of blood. The burden of proof rested on the prosecution to prove each constituent element or ingredient of the said offence, to the requisite standard, namely beyond all reasonable doubt.
- 4.** The evidence tendered on the hearing of the appeal, was to the effect that the appellant's van had overturned on the highway and had come to rest in a ditch opposite the entrance to the Knockturnagh housing estate. At the conclusion of the evidence on the hearing of the appeal, counsel for the applicant had submitted that the case should be dismissed because the evidence had not disclosed that the accused had been driving at the location specified in the summons. Hayes J ruled against the defence submission and proceeded to affirm the conviction that had been imposed in the District Court.

**5.** It was submitted in this application, that there was a clear defect in the summons in relation to the location at which the offence was alleged to have occurred. That being the case, it was submitted that the judge had erred in failing to amend the summons pursuant to O.38 of the Rules of the District Court. It was submitted that by failing to take that step, the judge had proceeded to deal with the matter without jurisdiction. It was submitted that the consequences of the court having convicted the applicant upon the evidence before it, were so fundamental, as to deprive the court of jurisdiction and warranted quashing the order by *certiorari*.

**6.** On behalf of the respondent, it was submitted that when one had regard to the evidence that was before the Circuit Court judge and the content of his ruling thereon, it was clear that he had found that there was no defect in the summons in relation to the specification of the location at which the offence was alleged to have occurred. Accordingly, there had been no necessity for the judge to amend the summons pursuant to O.38 of the DCR.

**7.** It was submitted that the Circuit Court judge had acted on the evidence before him and had found that the location had been correctly identified in the summons. It was not possible for the applicant to challenge that finding, by way of an application for judicial review. Accordingly it was submitted that the reliefs sought in the notice of motion should be refused.

**Background.**

**8.** The applicant was prosecuted by Garda Martin Mulligan on the following charge:

*"On the 15/03/2020 at Knockturnagh, Castleblaney, County Monaghan, a public place, in the court area of Carrickmacross, District No. 5, did drive/attempt to drive a mechanically propelled vehicle registration number 05 DL 5196 while there was present in your body a quantify of alcohol such that, within three hours after so driving/attempting to drive, the concentration of alcohol in your blood did exceed a concentration of 50mgs of alcohol per 100ml of blood, to wit 244mgs of alcohol per 100mls of blood. Contrary to section 4(2)(a) and (5) of the Road Traffic Act 2010."*

**9.** The applicant was convicted in the District Court on 21<sup>st</sup> July 2021. He appealed to the Circuit Court. The appeal was heard by Hayes J on 25<sup>th</sup> January 2022.

**10.** Garda Mulligan was the sole prosecution witness. He gave evidence of receiving a call from Control in relation to an overturned van at Tullanacrunat, Castleblaney, County Monaghan. Upon attending at the scene, he spoke to the applicant, who was seated in the rear of an ambulance.

**11.** Garda Mulligan gave evidence that the applicant stated that he was the owner of the overturned van and that he was driving same when it overturned at approximately 15.40 hours. The applicant also admitted that he had been drinking the night before.

**12.** Having observed the applicant's appearance, Garda Mulligan stated that he formed the opinion that the applicant had consumed intoxicating liquor and made a demand of the applicant under s.9(2) of the Road Traffic Act 2010, as amended to administer a road side breath test. Garda Mulligan gave evidence that the applicant complied with that demand. The roadside breath test administered tested positive for alcohol.

**13.** Garda Mulligan stated that he then formed the opinion that the applicant was under the influence of an intoxicant to such an extent as to be incapable of having proper control of a mechanically propelled vehicle, and having informed the applicant of same, he arrested the applicant under s.4(a) of the 2010 Act. The place of arrest was stated to be Tullanacrunat, Castleblaney, County Monaghan.

**14.** The applicant was conveyed to Castleblaney Garda Station, where he elected to provide a specimen of his blood for analysis. Two samples of his blood were taken by a registered nurse.

**15.** In his evidence, Garda Mulligan clarified that Knockturnagh is a small housing estate, off the road where the accident happened. It is located in the townland of Tullanacrunat.

**16.** In cross-examination, Garda Mulligan accepted that as Knockturnagh was a housing estate within the townland of Tullanacrunat, it was possible that one could be in the townland of Tullanacrunat, but not be in the housing estate at Knockturnagh. He denied that the incident had occurred 30-40 metres from the housing estate and stated that the locus of the overturned van, was on the main road directly opposite the entrance to the Knockturnagh housing estate.

**17.** At the close of the prosecution case, counsel on behalf of the accused moved an application for a direction, on the basis that the accused having been charged with intoxicating driving at Knockturnagh, there was no evidence of his driving at that location. The prosecution solicitor indicated that he may have to make an application to amend the summons. He requested time to research the law on that issue. The judge indicated that he would take time to consider the application and would deliver his ruling at 2pm. He stated that if the prosecution solicitor wished to make an application to amend the summons he could do so at that time.

**18.** At 14.00 hours, the judge went on to the bench to give his ruling. No application was made by the prosecution solicitor to amend the summons. The ruling of the judge was in the following terms:

*"Yes, in relation to this matter, I am in a position to deal with that now. This is a matter in which the appellant makes the submission that the summons specifies Knockturnagh, Castleblaney, County Monaghan as the location of the driving which is the subject of this appeal. The evidence of Garda Mulligan is that he came upon the appellant's overturned vehicle on the main road immediately opposite the mouth of Knockturnagh estate, which lies within the townland of Tullanacrunat, Castleblaney, County Monaghan. Garda Mulligan accepted the appellant's proposition that one can be in Tullanacrunat, but not in Knockturnagh. I accept Garda Mulligan's evidence in relation to location of the driving and of the overturned vehicle. In my view, the description of the location contained within the summons is so closely proximate to the location of the overturned van, being no more than a short number of metres, that the summons adequately and properly describes the location. And that to describe the driving as being at a housing estate is sufficiently precise to refer to driving on the main road at the entrance to that estate. And further, I note that the appellant does not point to any prejudice or detriment that might have been occasioned to him as a result of the alleged defect in the summons. And for those reasons, I do not accede to the application."*

**Submissions on behalf of the Applicant.**

**19.** On behalf of the applicant, it was submitted that as the judge hearing the appeal had found that there was a defect in the specification of the location of the alleged offence, as contained in the summons, it was incumbent upon him to consider whether he should exercise his discretion pursuant to O.38 of the DCR, to amend the summons. It was submitted that he had discretion to make such an amendment, if he was satisfied that it would not cause prejudice to the accused.

**20.** It was submitted that caselaw made it clear that where there was a defect in the summons, the correct procedure for the judge hearing the trial at first instance, or any appeal therefrom, was to determine whether or not amendment of the summons would cause any prejudice to the accused, and if not, the judge should then proceed to make the necessary amendment, before proceeding to deal with the matter further: see *State (Duggan) v Evans* [1978] 112 ILTR 61; *DPP v Corbett* [1992] ILRM 674; *DPP v Colfer* [1998] IEHC 20; *DPP v Winston (Unreported 25<sup>th</sup> May 1992)*; *DPP v Rafferty* [2009] 1 IR 39.

**21.** It was submitted that the learned Circuit Court judge ought to have considered whether it was appropriate to cure the defect that had arisen in relation to the specification of the location of the alleged offence in the summons, by means of making the necessary amendment.

He had failed to do that. It was submitted that by failing to take that step he had deprived himself of jurisdiction in the matter. Therefore he lacked jurisdiction to proceed to convict the appellant of the offence with which he was charged in the summons.

**Submissions on behalf of the Respondent.**

**22.** On behalf of the respondent it was submitted that the purpose of a judicial review application was concerned with the decision making process, as opposed to the decision itself. It was submitted that even if this Court disagreed with the decision, if the judge in the court below was entitled to make it, judicial review would not lie: see *ER v DPP* [2019] IESC 86; *Zadecki v DPP* [2022] IEHC 602.

**23.** It was submitted that in this case, the caselaw in relation to amendment of a summons was not relevant, because it was clear from the ruling that had been made by Hayes J on the application made on behalf of the applicant, that he had made a finding on the evidence that he had heard in relation to the location of the overturned van and its proximity to the entrance to the Knockturnagh housing estate, that the location of the alleged offence as stated in the summons, had been adequately described. Accordingly, it was submitted that the judge had held that there was no defect in the summons; therefore there was no necessity for him to consider any amendment of it.

**24.** It was submitted that insofar as the judge had referred to the issue of any possible prejudice to the accused, that had merely been in the context of a comprehensive ruling, whereby he had noted that the appellant had not pointed to any prejudice or detriment that might have been occasioned to him as a result of the "alleged defect" in the summons. It was submitted that it was quite proper for the judge to have noted that in his ruling.

**25.** It was submitted that the learned Circuit Court judge had dealt with the application in a comprehensive ruling; he had reached his conclusion on the evidence that had been tendered both in chief and on cross-examination by Garda Mulligan; it was a conclusion that he was entitled to reach on that evidence; and accordingly there were no grounds on which this Court could overturn the conviction.

**Conclusions.**

**26.** It is trite law that an application by way of judicial review, is not an appeal from the decision under challenge. That was made clear in the decision of the Supreme Court in *ER v DPP*, where Charleton J stated as follows at para. 17:

*"As will emerge from the section which follows, 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."*

**27.** In *Zadecki v DPP*, Phelan J stated as follows at para. 25:

*"The position is summarized succinctly in Dunne's Judicial Review of Criminal Proceedings, Second Edition, where it is stated at 1-225:*

*"The starting point in cases where it is alleged that the evidence before the lower court was insufficient to support the decision is that it is a cardinal principle of judicial review that judicial review is not concerned with the correctness of decisions. There is a fundamental distinction between unlawfulness, which can result in the remedy of judicial review, and incorrectness, which cannot. The issue of whether an accused person is guilty of an offence is a question of fact (or, in many cases, a mixed question of law and fact) to be decided by the court on the evidence. As set out above, a finding of unreasonableness... will not be made unless there is a complete absence of evidence to support a finding. Given the burden and standard of proof in criminal matters, the circumstances in which there will be no evidence whatsoever to support a verdict in a criminal case will be rare. Further, as discussed elsewhere in this text, the court will not grant certiorari in respect of a conviction and sentence on the basis of an alleged insufficiency of evidence to support the finding of the court on the merits. In situations where it is alleged that there was insufficient evidence to support a finding of guilty in a criminal matter, the appropriate remedy is an appeal."*

**28.** It is against that background that the court must approach the application in this case. The court has had the benefit of reading the entire transcript of the evidence that was heard before the Circuit Court on the hearing of the substantive appeal. The court is satisfied that on a correct reading of the ruling of Hayes J on the application, which has been quoted in its entirety

earlier in the judgment, it is clear that the learned judge found that there was no misdescription of the location of the alleged offence in the summons before him. The judge was entitled to reach that conclusion having regard to the evidence that had been given by Garda Mulligan.

**29.** In these circumstances, where the judge had found that there was no defect in the summons, he was not obliged to consider any amendment of it. The fact that the judge referred to the lack of any prejudice having been asserted by the accused as a result of the "alleged defect", does not affect the content of his ruling, which was to the effect that the location at which the alleged offence was said to have occurred, being at Knockturnagh, was adequately described, given that he accepted the evidence of Garda Mulligan that the overturned van had been at the side of the road, across the road from the entrance to the Knockturnagh estate. That was a finding that the judge was entitled to make on the evidence before him.

**30.** In these circumstances, the court is satisfied that there is no basis on which the judgment or order of the learned Circuit Court Judge could be set aside. Accordingly, the court refuses all of the reliefs sought by the applicant in his notice of motion dated 25<sup>th</sup> August 2022.

**31.** As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

**32.** The matter will be listed for mention at 10.30 hours on 16<sup>th</sup> February 2024 for the purpose of making final orders.