An Chúirt Uachtarach

The Supreme Court

MacMenamin J
Charleton J
Baker J

Supreme Court appeal number: 358/2009
[2020] IESC 000
High Court record number 2006/1195JR
[2009] IEHC 444

Between

Kevin Tracey
Applicant/Appellant

- and -

District Judge David Anderson, Kevin Grogan and the Director of Public Prosecutions
Respondents

Judgment of Mr Justice Peter Charleton delivered on Monday 21 December 2020

1. This is the last direct appeal to this Court from several judicial reviews which Mr Tracey has taken in the High Court. Judicial review is about process: in particular, an allegation that a court or administrative tribunal exceeded jurisdiction, legally or through such fundamental lack of rationality as flies in the face of fundamental reason and common sense, or failed to afford to an applicant the minimum of fair procedures. That involves facts on the ground. Increasingly, judges are presented with affidavits and with materials and it is for the trial judge to make findings of fact as to what that evidence discloses; that is, apart from situations where consideration of evidence at the appellate level becomes necessary due to a dispute as to the assertion of events directly relevant to the issue in question. Where actual evidence is given, the trial judge's decision as to who is more accurate or who is telling the truth binds any appellate court. While the rule is well known, because Mr Tracey is an unrepresented litigant, it bears repetition.

2. The principles to be applied by the appellate courts in considering the argument that a trial judge was incorrect in making a finding of fact based on oral evidence were set out in *Hay v O'Grady* [1992] 1 IR 210, 217 by McCarthy J as follows:-

> 1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.
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> 2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.
>
> 3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. … I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate court is in as good a position as the trial judge.

3. For the purposes of clarity, these principles can be more concisely stated as follows:

> 1. Findings of fact supported by credible evidence are not to be disturbed.
>
> 2. Inferences of fact derived from oral evidence can be reconsidered, but an appellate court should be slow to do so.
>
> 3. Inferences drawn from circumstantial evidence can be more readily put aside by an appellate court since that court is in as good a position to draw its own inferences as the court of trial.

4. These principles apply in all appeals, save in: appeals which are a complete rehearing of the evidence; District Court appeals to the Circuit Court; and civil cases started in the Circuit Court which are appealed to the High Court. For example, the ruling in *Hay v O'Grady* was applied by the Supreme Court in *O'Connor v Bus Átha Cliath* [2003] 4 IR 459, 467. Here the Supreme Court found that there was credible evidence on which the trial judge could have concluded that, although the plaintiff had exaggerated his injuries, he believed what he was saying and was an honest person. In these circumstances, it was not open to the Court to put these findings aside. As Denham J, at 466-467, stated:

> It is quintessentially a matter for the jury (or a trial judge acting in place of a jury) to hear and consider the evidence of a plaintiff or witness and to determine the credibility and reliability of that person and to determine the consequent facts of a case. It is only in exceptional circumstances that an appellate court would intervene in such a determination.

5. A variant applies to facts concluded from evidence on affidavit and from the materials, contracts or correspondence etc, thereby exhibited. Clearly, however, the principles set out in *Hay v O'Grady* are of less strict application where affidavit evidence is concerned; see *O'Donnell v Governor & Company of the Bank of Ireland* [2015] IESC 14 at paragraph 36 per Laffoy J. There, commenting on the judgment of *Hay v O'Grady*, Laffoy J stated that:

> … to a large extent the subsequent observations of McCarthy J. as to the role of this Court on an appeal, in reality, are of no relevance, except, perhaps, that, by analogy to the statement that, in the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge, in determining issues that arise on affidavit evidence alone, an appellate tribunal is similarly in as good a position as the trial judge.

6. There are specific findings in this case and, as an appellate court, they bind this appeal. To a degree, the findings of Ó Néill J in the High Court constitute a decision predicated on the basis of what is an amalgam of affidavit and live evidence, and also a clear concession by Mr Tracey. That must make harder the task of Mr Tracey in meeting the burden of proof set out by this Court in *Ryanair v Billigfluege.de GmbH and others* [2015] IESC 11 whereby, to succeed, an appellant must demonstrate that the trial judge was incorrect in choosing one set of facts over another. That case is also authority for appropriate deference being shown to the analysis at first instance; see the judgment of Charleton J at para. 5.

The reliefs sought

7. This particular part of the cases involving Mr Tracey all started when Mr Tracey was returning to his residence and was stopped for driving without due care and attention and then summonsed. At this stage, this is only an allegation in respect of which Mr Tracey is presumed to be innocent. That was back in 2005, and the summonses were returnable, or were due to be heard because of various delays, the following year. That emerges from the reliefs sought by Mr Tracey in his judicial review application, and for which Peart J granted him leave to proceed. These are:

> 1. An order of certiorari by way of application for a judicial review to quash the rulings or orders made by the First Named Respondent on 14th August, 2006 at Richmond District Court No. 51 in the hearing dealing with preliminary issues in the matter of Sergeant Kevin Grogan versus Kevin Treacy and which rulings or orders (a) refused the Applicant's application that Garda witness Kevin Grogan be excluded from the court while his colleague, Deirdre Ryan, was giving evidence; (b) unfairly frustrated the Applicant's efforts to properly cross-examine a Garda witness, Deirdre Ryan, regarding the purported service of a summons (and this is related to a ruling by the same Respondent on 19th June, the first hearing denying the Applicant a copy of the declaration of service of the same summons); (c) refusing to consider and exhibit (Garda report via Dáil written answer 423) being handed up by Applicant to show the relevance of cross-examination questions; (d) allow the DPP to represent Kevin Grogan and to substitute him as prosecutor although having no hand in the bringing of the charge; (e) allow the DPP solicitor to wrongly maintain that the Courts Act 1991 had amended the Petty Sessions (Ireland) Act 1851; (f) refused to allow the Applicant to read from or argue the statute (Courts Act 1991) being used in legal aid argument by the DPP solicitor; (g) refused to state a case on the matter of service with regard to the Petty Sessions (Ireland) Act 1851 to the High Court; (h) deemed service of the summons to be good; (i) prevented the garda named on the summons, Kevin Grogan, from giving evidence and being cross-examined although he was available and ready for that purpose such that no sworn evidence of the complaint, charge or issuing of summons is as yet before the

District Court and the preliminary issues arising therefrom have not been dealt with; (j) demanded that the Applicant plead to charges not properly before the court and over which the court had no jurisdiction; (k) proceeded with such undue haste that the Applicant had no time to follow what was happening and make application for a Gary Doyle Order; (l) set the matter for hearing on the 10th October, 2006; (m) in general denied the Applicant's right to a fair hearing.

2. An order for interim or interlocutory injunction placing a stay on further District Court proceedings in the matter of *Sergeant Grogan v. Kevin Treacy* arising from two summonses returnable for 19th June, 2006 (failing to stop careless driving) pending the decision of this High Court and any eventual appear therefrom.

3. An order of Mandamus such that the District Court will be directed to (a) provide Applicant with a true copy of the declaration of service of the summons; (b) heard sworn evidence in each charge prior to making any decision in relation to jurisdiction; (c) allow the Applicant a proper and full hearing of the preliminary issues arising.

5. A recommendation that the Attorney General Scheme for legal costs be applied to assist the Applicant with the further conduct of the case which will seek to vindicate fundamental constitutional and other rights relating to fair hearing and trial and such that it will include the cost of one senior counsel.

6. Any further orders as may be urged by or on behalf of the Applicant during the hearing of these proceedings, and finally an order for costs.

8. Mr Tracey complains that he was very badly treated by the judge in the District Court, and that his wife became ill as a result of the run of proceedings. A legally unqualified friend who was assisting Mr Tracey was arrested during the luncheon interval by gardaí on an unrelated alleged offence. Mr Tracey argues that, cumulatively, this amounts to a denial of legal assistance and an unlawful interference with his rights under Article 6 of the European Convention on Human Rights. Anyone would admire Mrs Tracey for her kindness towards her husband. But, what is involved here is legal process.

9. To put the proceedings into context, two matters must be noted. What allegedly happened in court was not, first of all, a trial of fact, much less a hearing on the substantive allegations in the summonses. Instead, the District Court was in a routine way considering various summonses about various parties and fixing dates for hearing. Mr Tracey believed that the gardaí were out to disrupt his life and that, to that end, were prepared to forge summonses. Enormous stress is laid by him on peripheral matters; but these are not smoke showing fire or straw demonstrating the drift of the wind. What are here sought to be overturned are, instead, procedural decisions designed to get cases to court so that a hearing of what is at issue in a case can be decided. It is also hard to escape the feeling, in Mr Tracey's application, that almost everything which might demonstrate to a litigant such good faith as to quieten suspicion is laid aside and undue emphasis is focused on what is peripheral and, in terms of court procedure, beside the point. The point being the charge on which he was arrested. This gives rise to the issue: was there evidence as to Mr Tracey's driving or other alleged misconduct? That was for the trial but because of a lengthy procedural submission from Mr Tracey and the

consequent judicial review of these procedural rulings, this has been delayed for over fifteen years.

District Court

10. What happened in the District Court was merely a preliminary hearing., the purpose of which was to find out was Mr Tracey pleading guilty or not guilty or would a particular trial date suit him and other parties, particularly any witnesses. This is set out in the affidavits and in the findings of fact of Ó Néill J. This preliminary application was 19 June, 2006. Mr Tracey was there. So, it was not legally possible for him to claim that the summonses were somehow fraudulent, which he claims to believe, as the sole purpose of a summons is to get a defendant to court so arrangements can be made for a hearing. His submission in objection was based on service of the summonses, alleged to have occurred on 27 October 2005. At the preliminary hearing and having answered to the summonses on the date specified in them, he argued fraud: that the information on the summons was false by deceitful Garda backdating so as to conceal that the summonses were issued after 5 May, 2006 and hence were out of time. The judge drew his attention to the declaration of service on one such summons which stated that it had been served on 29 May 2006. Mr Tracey then announced to the judge a challenge to the service of the summons. Two gardaí were the servers, according to the documentation, but were not then in court; this kind of thing being totally unexpected. The court adjourned to 6 July 2006. The purpose was to enable Mr Tracey to call these officers. There was a further adjournment to 14 August 2006. On that date, and before lunch, one of the gardaí was called to give evidence, swearing to having served the summons on Mr Tracey near a court on a particular date by tipping him with an envelope containing the summonses after her attempt to hand him the summons had failed. Had she done more, what might have happened? How more exact must evidence be and what was the point of this?

11. Mr Tracey cross-examined the officer before the District Court. Ó Néill J, who appraised all of the papers and submissions, found that there was no challenge to the officer having served the summons, nor a contest as to the time, place, manner and fact of service. But, having started what became a cross-examination at large, the questions ranged outside service and became beside the point. The judge in the District Court sought to rein this in, and rightly so.

12. All this took time, precious to a court but in a context where what is relevant will be listened to, if not unduly repetitive. By then time was passing. Mr Tracey wanted to make a submission; he considered it important so the court put matters back to 14:00 hours. On resumption, the judge asked Mr Tracey if he wanted to give evidence. He did not. Instead he asked the judge to state a legal case for the assistance of the High Court. On what, it might be asked, had any genuine legal issue emerged? The judge declined Mr Tracey's request. A date was fixed for hearing of the substance of the summonses, in other words the actual case, by the District Court in October 2006. Instead of attending the hearing and dealing with the summonses and what was there alleged, Mr Tracey came to the High Court with this complaint. In addition to these matters as to service, the arrest of his friend, his wife being ill, among many complaints, as the statement of grounds set out above indicates, there were other allegations including that of the judge signalling a witness by nodding. The application for judicial review of the District Court was rejected by Ó Néill J in a judgment of 23 July 2009.

High Court findings on judicial review

13. The nod alleged was somehow linked, or proposed to generate an inference, that the gardaí's arrest of Mr Tracey's friend was a consequence of the assistance provided by that friend to Mr Tracey in the District Court, such assistance amounting to help with notes and documents and the provision of unqualified legal advice. The High Court judge made the following findings of fact. Firstly, as to the interruptions to the wide-ranging cross-examination:

> Having carefully considered the conduct of the proceedings in the District Court by the Respondent, I am quite satisfied that there was no want of fairness to the Applicant. Every judge is entitled to control proceedings to ensure that the Rules of Evidence are observed and that the proceedings are confined to relevant matter. In this respect the interventions of the Respondent to restrain the cross-examination of Garda Ryan were entirely appropriate as it was apparent, and indeed as the various matters raised were probed it became even more apparent, that the issues sought to be explored by the Applicant had no relevance to the matter in issue, i.e. the service of the summons, and the inferences arising therefrom as to the date of issue of the summons.

14. Then, it was argued that the judge was wrong, how so it is hard to see, in not stating a case for the High Court. Ó Néill J ruled against this point:

> In this case the Respondent refused a case stated for that very reason. In my opinion that conclusion was made within jurisdiction, was manifestly correct and cannot be reviewed by this court. The decision to fix the date for the hearing was the inevitable outcome of the decisions already taken in the proceedings which now cannot be impugned and hence this decision too cannot be displaced by this court.

15. And then there was the allegation concerning the arrest of Mr Tracey's friend. That did not happen in the dramatic way that he alleges. Ó Néill J dealt with this thus:

> The foregoing conclusions would be sufficient to dispose of the issues raised in the Applicant's Statement of Grounds were it not for an extraordinary turn of events which occurred at the outset of the hearing of the judicial review application on 7th November, 2008. At the start of the hearing, the Applicant sought to file a fresh affidavit. The affidavit in question appeared to have been sworn on 7th November, 2007 and furthermore it was stated just beneath the jurat that the affidavit had been filed on 7th November, 2007. However, the Applicant accepted that the affidavit had been sworn on 7th November, 2008, the day of the hearing case. In paragraphs 5, 6 and 7 of this affidavit it was averred as follows: "5. Amongst those rights was my right to have a McKenzie friend. In the middle the hearing of preliminary issues on 14th August, 2006 at a certain point in the hearing, Judge Anderson nodded to the Garda who were present in the court and eight gardaí approached my McKenzie friend and seized him physically. They removed him from the courtroom into a Garda car and transported him to a prison where he was detained without bail for approximately three weeks. One of the gardaí took all of my McKenzie friend's

> notes and belongings which included notes that were prepared jointly by him and me for my case being heard by Judge Anderson. Judge Anderson allowed this to happen without comment. During the recess I returned to the court. After seeing my McKenzie friend being put in the Garda car, I was totally shaken by what had transpired and I was fearful for my own safety and the safety of my pregnant wife who was present in the court. Referring to the incident, I asked Judge Anderson for protection which he denied stating he did not have power to make such an order. I was of necessity forced to continue that afternoon without my McKenzie friend and so denied due process in law. I was denied equality of arms (where each party must be afforded a reasonable opportunity to present his case, including his evidence) which is enshrined in Article 6 of the European Convention on Human Rights. As a lay litigant I was denied any semblance of fair balance vis-à-vis my opponents who were represented by professional legal counsel. In addition, per force my fundamental constitutional rights enshrined in Article 40 of the Constitution were violated. 7. The removal of my McKenzie friend on 14/08/06 deprived me of my notes on many other preliminary issues I had intended raising." Notwithstanding the lateness of the application to file this affidavit, that is the affidavit of 7th November, 2008, and because of the serious nature of the allegations made, for the integrity of the administration of justice I permitted the filing of the affidavit. This necessitated the adjournment of the hearing. I directed that the proceedings and this affidavit be served on the Respondent. In due course a fresh date was fixed for 26th February, 2009. An affidavit was sworn by the Applicant on 11th November, 2008 and filed on the same day. At paragraphs 4 and 5 of that affidavit the following averments are made: "3. There was no allegation made in lines 2, 3 and 4 of paragraph 5 of my affidavit dated 7th November 2007 of any wrongdoing by Judge Anderson. 4. The words in lines 2, 3 and 4 of paragraph 5 were intended to convey and do convey a description of two events in the District Court on 14th August 2006, two events that happened sequentially. They were not intended to convey and they do not convey in that the second event was the consequence of the first. As pointed out in the judicial review hearing, if something happens after one event it cannot be assumed that this first event caused the second event. Such a fallacy is known as post hoc non propter hoc or "after this" does not mean "because of this". 5. There was no allegation either intended or written in the words "at a certain point in the hearing Judge Anderson nodded to the gardaí who were present in the court and eight gardaí approached my McKenzie friend and seized him physically." As stated in the judicial review hearing "I am not alleging that the nod of the judge caused the gardaí to do what they did." I further add that I am not alleging that the nod of the judge was ever intended to have such an effect."

16. An extensive quote has been necessary because it provides the context whereby the burden of proof moves from an appellant demonstrating that an unreasonable view had been taken of affidavits and their exhibits, the *Billiofluege* test, to an appellant demonstrating that, as to a finding based on oral evidence, the judge acted on no evidence at all or made a finding entirely and completely against the evidence, the *Hay v O'Grady* test. Oral evidence was called as to what had happened about this incident. Ó Néill J made his findings after careful consideration and again a lengthy quote is necessary:

As was readily apparent there was a conflict of fact between the affidavits of Garda O'Mara and Mr. Dean and the affidavit of the Applicant and his wife as to what happened on 14th August, 2006 in relation to the allegation of the Applicant that his McKenzie friend, Eoin Rice, was removed from the court. To resolve this conflict, cross-examination of the deponents on their affidavits was necessary and for that purpose at the request of the Applicant Mr. Dean and Garda O'Mara and Mr. Taylor were available for cross-examination. The Applicant was in court but his wife was not available to come to court during the day. This necessitated a further adjournment of the case. The cross-examination of Mr. Dean did proceed as he was likely to be unavailable at a later date. In due course the matter came on again for hearing in May of 2009 when Mrs. Karen Treacy was presented for crossexamination. Unfortunately as soon as the cross-examination began, Mrs. Treacy was suddenly taken ill, collapsed and was removed by ambulance to hospital. As a consequence the case had to be adjourned again. Finally the matter came on for hearing on 16th and 17th July 2009 when Mrs. Treacy, Garda O'Mara and Mr. Taylor were cross-examined on their affidavits. Having carefully considered the affidavits filed, the transcript of the proceedings in the District Court on 19th June, 2006 and the transcript of the proceedings in the District Court on 14th August, 2006 and the answers given by the witnesses cross-examined, I have come to the following conclusions on the disputed facts relating to the events in the District Court on this date. Firstly I cannot but be concerned about the delay of two years, in excess of two years from the commencement of these proceedings on 9th October, 2006 until 7th November, 2008 before there was any intimation or suggestion concerning the allegation that emerged in paragraphs 5, 6 and 7 of the Applicant's affidavit sworn on 7th November, 2008 to the effect initially that the Respondent had by a nod signalled to the Garda to arrest Eoin Rice, the Applicant's McKenzie friend, in court in front of the Respondent while sitting in court and thereafter to remove him together with the Applicant's papers in the case with the result that the Applicant was deprived of evidence in the case and the assistance of his McKenzie friend. At the very least it is extraordinary that this allegation emerged at such a late stage in the proceedings, i.e. on the morning of the full hearing. I am mindful in this regard that the Applicant in an affidavit sworn on 11th November, 2008 sought to distance himself from the clear import of the allegation concerning the Respondent by the pedantic assertion that "post hoc non propter hoc". At paragraph 5 of this affidavit the Applicant does unequivocally say: "I am not alleging that the nod of the judge caused the gardaí to do what they did." I will return to this matter later. I accept the evidence of Garda O'Mara that he arrested Eoin Rice in the corridor away from the courtroom on foot of a warrant issued by Judge Mary Fahey in the District Court in Galway in 2004 for the arrest of Eoin Rice in connection with a public order offence. He became aware of the existence of the warrant as a result of a perfectly lawful and indeed reasonable search in relation to Eoin Rice on the Garda Pulse system. Having become aware of the warrant and knowing or believing that Eoin Rice would be in court on the day in question, he rightly took the view that it was his duty as a member of An Garda Síochána to execute the warrant having regard to the fact that Eoin Rice was resident outside the jurisdiction and was not a national of this State. I believe Garda O'Mara when he says that he did not know whether or not Eoin Rice would be returning to the court and hence he felt obliged to effect the arrest before he left the building as otherwise there was a risk that he would elude the execution of the warrant.

accept Garda O'Mara's evidence that because of Eoin Rice's history of resistance to authority he, Garda O'Mara, perceived a real risk that Eoin Rice might resist arrest and hence three or four other gardaí had been alerted to assist if needs be. believe Garda O'Mara when he tells me that no request was made by Eoin Rice or the Applicant for the return of papers used in the District Court case and I am quite satisfied that no protest or complaint in regard to these papers was made at the time. Having regard to the proceedings that had taken place as set out in the transcript in the morning and in the afternoon, it is difficult to see what papers of any consequence could have been involved. Certainly no evidential papers were included for the simple reason that apart from the summons and the envelope containing it or copies of these, no other papers were relevant to the case in respect of which the proceedings were concerned. In the afternoon the Applicant made his application without any difficulty insofar as papers were concerned and notably did not make any complaint in that regard to the Respondent or seek any adjournment because of any difficulty caused by the arrest of Eoin Rice. I am quite satisfied that the arrest of Eoin Rice took place in the manner described by Garda O'Mara and not as alleged by the Applicant and his wife. In this regard, the evidence of Mr. Dean, which I accept, supports the evidence of Garda O'Mara. He emphatically rejected the suggestion that the arrest took place in the courtroom. The transcript which everybody who was involved on 14th August, 2006 agrees is an accurate record of the proceedings is revealing in this regard. At page 22 line 18 the following is said by the Applicant: "Before the recess, I returned to this court and made application." In my view the clear inference to be drawn from this is that the events that caused the Applicant to return to the court occurred away from the court. Later at lines 25 to 27 the following is said by the Applicant: "My McKenzie friend was hauled off by Garda O'Mara who is not here, Garda Rellins and eight gardaí from Ballyfermot immediately on leaving this court." A clear inference from this statement is that the arrest of Eoin Rice took place outside of the courtroom. In spite of all the affidavits that have been filed in these proceedings, an amazing omission is any affidavit from Eoin Rice deposing to these events. Furthermore notwithstanding the fact that all of the deponents were made available for cross-examination, the Applicant took advantage of the fact that a formal order directing his cross-examination was not made and after a break to consider the matter, he refused to submit to cross-examination. In resolving the disputed issues of fact in that case, I am entitled to take these matters in account. I have come to the conclusion that I must reject in its entirety the evidence of the Applicant and of Karen Treacy as to how and where the arrest of Eoin Rice was accomplished. Having regard to the manner in which the allegations of the Applicant in this regard came into the case at a late stage and the disingenuous manner in which the Applicant sought to resile from the allegation made concerning the Respondent once the seriousness of it was made apparent to him, I regretfully am compelled to the conclusion that these allegations of the Applicant were a deliberate fabrication. As alluded to earlier it is quite clear from the transcript that no evidence was taken amongst the papers in Eoin Rice's rucksack. Secondly, it is equally clear that the Applicant was not at all disadvantaged by the absence of Eoin Rice in continuing as he did with the proceedings in the afternoon without any indication of difficulty being given to the Respondent in this regard. Also in this regard it must be borne in mind that the proceeding in the District Court on 14th August, 2006 was a preliminary step of a procedural nature and not the hearing of the substantive charges. I am therefore satisfied that I must dismiss the Applicant's case in it entirety.

17. These are primary findings of fact. The High Court judge had evidence, which he considered. There is no suggestion that the consideration given to what was deposed to on affidavit and sworn to on oral evidence before him was anything less than careful. For the sake of fitting these proceedings within the ordinary disposal of a judicial review case, and, in consequence, outside the conspiracy alleged by Mr Tracey on a simple hearing of a response to summons date in the District Court, a few final comments may assist.

Procedural matters

18. Firstly, this was not a trial in the District Court, it was a procedural preliminary. There was no basis for impugning what had occurred since the trial had not concluded. No stateable case for judicial review had thus been disclosed. It is not possible, save in the rarest of circumstances, to interrupt a criminal process for the purpose of impugning rulings in the course of a trial. That rule and the exceptions are set out in *ER v. The Director of Public Prosecutions* [2019] IESC 86. The principle remains as set out by Fennelly J in *Blanchfield v. Hartnett and others* [2002] 3 IR 207, 218:

> The correct approach, as appears from cases such as *Clune v. Director of Public Prosecutions* [1981] I.L.R.M. 17, is that the superior courts should presume until the contrary is demonstrated that the proceedings at a criminal trial will be properly and fairly conducted. *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60 was, contrary to the applicant's submission, an authority for the proposition that applications for *certiorari* in the course of a criminal trial would be entertained only in the most exceptional circumstances.

19. Secondly, it may be commented that there was nothing to state a case on here and no basis of law whereby any legal uncertainty could require to be pronounced on by the High Court. The submissions of Mr Tracey were, and are, entirely at odds with the relevant statutory provision, which is s 52(1) of the Courts (Supplemental Provisions) Act 1961, which as amended provides that a District Court judge:

> shall, if requested by any person who has been heard in any proceedings whatsoever before him (other than proceedings relating to an indictable offence which not being dealt with summarily by the court) unless he consider the request frivolous, and may (without request) refer any question of law arising in such proceedings to the High Court for determination.

20. In consequence, and as a basic rule, there has to be something to state, some uncertainty in the law or lack of clarity in a statute whereby there would be a benefit to the High Court pronouncing on a case stated. It is contrary to the principle of good administration for what may be clearly written in a text book or the plain meaning of a statute, or a point of law already decided, to be referred to the High Court. In any event, here the dispute was procedural, something grist to the mill of everyday practice in the District Court. There was no legal uncertainty or point requiring legal clarification.

21. Thirdly, it is alleged that Ó Néill J should not have heard the judicial review because, in some tangential way, that might have involved the Courts Service. At that time, Ó Néill J sat on the board. This is apparently a claim of objective bias against the High Court judge. This is based on a complete misunderstanding. The courts are not directed by the Courts Service; the opposite is the case, the administration being there to serve the

courts. How the connection might arise, in any event, is simply lacking in reality. There are no cases which place bias on such a completely untenable basis. The test is: would a reasonable person with full knowledge of the facts reasonably fear or apprehend that a judge might be influenced because of that judge's connection with a party to the case or, exceptionally, with an issue in the case; see *Reid v IDA* [2015] 4 IR 494 and, more recently, *O'Driscoll (a minor) v. Michael Hurley and the HSE* [2016] IESC 32. Examples from decided cases include *The People (AG) v Singer* [1975] IR 408 and *Goode Concrete v CRH Plc* [2015] 3 IR 493, dealing with a jury member who was one of many victims of the incident of fraud being tried, and a possible financial connection between the judge and the issue in the case, respectively. Also, what might establish objective bias could be holding positions on a deciding authority and being one of the experts advising; *Reid v IDA*. Personal animosity may show bias, as in judging someone whom the judge has recently had a fisticuffs with; *R v Handley* (1921) 61 DLR 656. Another might be having very strong views, like anti-alcohol views of an evangelical kind when adjudicating on drink licences; *R v Halifax Ex parte Robinson* (1912) 76 JP 233. Another example could be expressing supposedly funny but in fact deeply perturbing views about the ethnicity of a party; *El-Farargy v El-Farargy* [2007] EWCA Civ 1149. It is unnecessary to proceed further as no authority supports Mr Tracey's argument.

22. Fourthly, this entire affair was generated out of a contention about the service of a summons. This is a legal document asking a defendant to appear before the District Court on a particular date. Failure to appear may result in arrest. Fundamentally, the purpose is to get a person to court by proper notice; that person, Mr Tracey, was there. He proceeded to make the summons, a mechanism for securing his attendance, part of the case. It is not and could not be; *AG v Burke* [1955] IR 30. Henchy J made this clear in *DPP v Clein* [1983] ILRM 76 in stating:

> A summons, after all, is only a written command issued to a defendant for the purpose of getting him to attend court on a specified date to answer a specified complaint. If he responds to that demand by appearing in court on the specified date and by answering the summons when it is called in court, he cannot be heard to say that he was not properly summoned if the complaint set out in the summons is a valid one.

23. Fifthly, there is the reining in of Mr Tracey's cross-examination by the judge in the District Court. This was within the judge's duty of controlling the court procedure. A court proceeding carries absolute privilege: no one can sue any other person for defamation based on a statement in court which is relevant to any fact in issue or which is a question reasonably impacting potentially on the creditworthiness of a witness. That privilege exists to enable litigants to speak freely and without fear as to legal consequence from conducting their case. As a principle, however, the existence in court of absolute privilege does not give litigants a free hand. Litigants have to focus. Cross examinations have to be to the point. No litigant has an entitlement to making irrelevant and damaging declarations, stating, for instance, on a civil suit about dry cleaning a coat that a particular politician is accepting bribes, or that a particular minister of religion is a serial abuser of children. If these are relevant to the case, it may be another matter and may be a relevant issue to which the court must listen and then consider. Entirely extraneous and irrelevant comments to the proceedings do not carry absolute privilege. Courts are very conscious of keeping proceedings focused; of not allowing more public time and expense to be devoted to a case than its complexity and importance merits. All judges are conscious of not allowing litigants to use the mere fact of having the attention of the court, and

perhaps the media, to enable them perhaps to settle scores, proclaim political rhetoric, or engage in character destruction. It is not claimed that Mr Tracey did this but he certainly did go off the point. The principle of control, focussing on what is relevant and excluding irrelevant material is part of the authority of every judge. Hence, a cross-examination or a submission may be reined in and directed to what is germane. That is central to the judicial function. The Garda officer being questioned had been called as to the service of a summons. When Mr Tracey ranged into other topics, as to the conspiracy which he more generally considered was being waged against him and his family, the judge called on him to be relevant. This is pleaded as a denial of rights. It is not.

23. Finally, there is the matter of the arrest of Mr Tracey's friend. The High Court heard oral evidence on this point as well as considering affidavit evidence. That was a question of fact and has been decided by the High Court. Such findings of fact bind this Court.

Result

24. In the result, the appeal should be dismissed and the order of the High Court declining any order in judicial review affirmed.