



THE COURT OF APPEAL

Birmingham P  
Edwards J.  
Kennedy J

Neutral Citation Number: [2019] IECA 258

Record No: 2019 8

High Court Record No. 514/2018 JR

REGINALD CARROLL

APPELLANT

V

JUDGE MARY FAHY

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

**JUDGMENT of the Court delivered the 21th of October 2019 by Mr. Justice Edwards.**

**Introduction**

1. This is an appeal against an order of Noonan J in the High Court made on the 22<sup>nd</sup> of October 2018 refusing to grant leave to the appellant to apply by way of judicial review for various reliefs sought by him in an ex-parte application moved on that date.
2. Specifically, the appellant had sought the reliefs set forth in paragraph (D) of the Statement filed on the 25th of June 2018, and signed by the appellant, as required by Order 84, rule 20(2)(a) of the Rules of the Superior Courts, on the grounds set out at paragraph E of the said Statement.
3. We have not been provided with any record or transcript of the judgment in the court below, merely the order of the court as perfected. It is understood that such reasons as were given were given *ex tempore*. Be that as it may, in circumstances where the appellant's application for leave to apply for judicial review was refused it is not necessary for this court to have regard to the terms of the judgment of the court below because the appeal before this court takes the form of a full rehearing.

**Nature of the leave sought**

4. It is clear from the Statement dated 25th of June 2018 that the appellant claims reliefs by way of judicial review in respect of two entirely separate matters. His application is grounded upon an affidavit sworn and filed by him on the same date, i.e., the 25th of June 2018.
5. In the first instance he seeks leave to apply for an Order of Certiorari quashing the decision of the second named respondent, i.e. the Director of Public Prosecutions (DPP), not to prosecute certain parties on foot of complaints made by the appellant concerning incidents of alleged harassment, assaults, trespasses to his property, and threats to kill him. The parties in question are two named neighbours of the appellant. It appears that

the decision of the DPP was communicated to the appellant in a letter dated the 2nd of November 2016. It further appears that the appellant, as was his entitlement, upon receiving notice of the DPP's said decision requested a summary of the DPP's reasons for her decision not to prosecute. This request which was dated the 28th of November 2016 was responded to by the DPP by means of a letter dated the 30th of November 2016 which cited "insufficient evidence" as the reason for the decision not to prosecute. In addition to seeking the said Order of Certiorari as his primary relief, the appellant also seeks an Order of Mandamus to compel the DPP to initiate prosecutions at this point.

6. The second matter in respect of which the appellant claims relief by way of judicial review relates to certain criminal proceedings before Clifden District Court, presided over by the first named respondent. The appellant complains that the first named respondent was, on two occasions, i.e., on the 22nd of February 2018 and on the 26th of April 2018, requested to recuse herself on the grounds of alleged bias but that she refused to do so. It is understood that on the 25th of October 2018, being three days after the date of the *ex parte* application before the High Court in the present judicial review proceedings, the criminal proceedings in question, which involved a summary prosecution of the appellant for alleged dangerous driving, and also for driving without insurance, on the 12th of April 2017 at Mweenish, Carna, County Galway, were part heard before the first named respondent at Clifden District Court, following which they were adjourned with respect to hearing the balance of the case to a date in January 2019. It is further understood that since then the said proceedings have been further adjourned from time to time and remain adjourned pending the outcome of this appeal.
7. In respect of that ongoing prosecution the appellant seeks leave to apply for judicial review for various reliefs including an Order of Prohibition preventing the proceedings from continuing before the first named respondent. Further, or in the alternative, the appellant seeks an Order of Mandamus requiring the District Court to facilitate a request by him to be afforded a trial by jury. His statement also seeks various other orders by way of ancillary relief including discovery of documents from the named respondents but also from various third parties; orders that the named respondents and various third parties be investigated and/or prosecuted and/or have other (unspecified) action taken against them; and an order that certain financial charges levied against him in connection with the impounding of his vehicle be refunded to him.

**The test to be applied at the leave stage**

8. It is well settled law that the test to be applied at the leave stage in judicial reviews generally is that set forth in the decision of the Supreme Court in *G v Director of Public Prosecutions* [1994] 1 I.R. 32, which requires:
  - (a) that the applicant has sufficient interest in the matter to which the application relates to comply with Order 84 rule 20(4);
  - (b) that the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground in the form of relief sought by way of judicial review;

- (c) that on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks;
- (d) that the application has been made promptly and in any event within the three months or six months time limit provided for in Order 84 rule 21(1), or that the court is satisfied that there is a good reason for extending the time limit;
- (e) that the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure.

#### **The special protection enjoyed by the DPP**

9. A further legal consideration relevant to the first set of reliefs claimed by the appellant and directed at the second named respondent is that under Irish law the DPP enjoys a partial immunity from judicial review. While in some circumstances a decision to prefer charges, or sometimes not to prefer charges, can be challenged, such circumstances are not the norm and where they arise they represent an exception to the general rule which is that in most cases such decisions are not reviewable.
10. In the case of *DC v The Director of Public Prosecutions* [2005] 4 IR 281 Denham J stated the general position in these terms:
 

“The Constitution and the State, through legislation, have given to the respondent [the DPP] an independent role in determining whether or not the prosecution should be brought on behalf of the people of Ireland. The respondent having taken such a decision, the courts are slow to intervene.”
11. Indeed, as the current Chairman of the Bar Council, Mr. Micheál O’Higgins SC, remarked in an erudite paper on this subject delivered to the 9th Annual Prosecutors Conference in 2008 (see: [https://www.dppireland.ie/app/uploads/2019/03/PAPER\\_-\\_Micheal\\_OHiggins\\_BL.pdf](https://www.dppireland.ie/app/uploads/2019/03/PAPER_-_Micheal_OHiggins_BL.pdf)), up until the 1980’s it was widely believed that decisions of the DPP, either to prosecute or not to prosecute, were simply unreviewable. That absolutist position, namely, that the DPP could not be challenged when exercising his/her prosecutorial discretion, was reflected in cases such as *The State (Killian) v. The Attorney General* [1957] 92 ILTR 182; *Judge v. The Director of Public Prosecutions* [1984] ILRM 224 and *Savage v The Director of Public Prosecutions* [1982] ILRM 385.
12. However, in *The State (McCormack) v. Curran* [1987] ILRM 225 the Supreme Court held that the DPP’s decision can, in certain circumstances, be subject to review. In his judgment in that case, Finlay CJ, made clear that the Supreme Court envisaged those circumstances as being quite limited. While the court did not seek to list exhaustively the situations in which the courts might intervene, it is manifest from the former Chief Justice’s judgment that an applicant seeking a judicial review of the exercise of the DPP’s discretion has to demonstrate something like mala fides, an improper motive or the application of an improper policy, and that if the evidence adduced on the application for

judicial review does not exclude the reasonable possibility of a proper and valid decision by the DPP then he/she cannot be called upon to explain that decision or to give the reasons for it. Finlay CJ stated:

“In regard to the DPP I reject also the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. If, of course, it can be demonstrated that he reaches a decision *mala fide* or influenced by an improper motive or improper policy then his decision would be reviewable by a court. To that extent I reject the contention again made on behalf of this respondent that his decisions were not as a matter of public policy ever reviewable by a court.

In the instant case, however, I am satisfied that no *prima facie* case of *mala fides* has been made out against either of the respondents with regard to this matter. Secondly, I am satisfied that the facts appearing from the affidavit and documents do not exclude the reasonable possibility of a proper and valid decision by the DPP not to prosecute the appellant within this jurisdiction and that that being so he cannot be called upon to explain his decision or to give the reasons for it nor the sources of the information upon which it was based.”

13. This position, subject to the qualification mentioned in the next paragraph, has been reiterated again and again by the superior courts at various levels, e.g., in *H v. The Director of Public Prosecutions* [1994] 2 ILRM 285; in *Eviston v. The Director of Public Prosecutions* [2002] 3 IR 260; in *Dunphy (a Minor) v. The Director of Public Prosecutions* [2005] 3 I.R. 585; in *Monahan v. The Director of Public Prosecutions* (unreported, High Court, Charleton J, 14th March 2007); and more recently in *Murphy v Ireland* [2014] 1 IR 198; in *The Director of Public Prosecutions v. H* [2018] IESC 32 and in *Marques v Minister for Justice and Equality* [2019] IESC 16, amongst other cases.
14. In *Murphy v Ireland* [2014] 1 IR 198 at 218, O’Donnell J observed that it was necessary to qualify the rule as expressed in *The State (McCormack) v. Curran* so as to provide that a decision of the DPP is reviewable “if it can be demonstrated that it was reached *mala fides* or influenced by an improper motive or improper policy, *or other exceptional circumstances*.” However, as so qualified, the decision in *The State (McCormack) v. Curran* has remained the law.
15. In the *Monahan* case Charleton J elaborated on some of the policy reasons for the special protection enjoyed by the DPP. He stated:

“In fulfilling his function, the Director of Public Prosecution is not to be obliged to give reasons for his decision as to whether to prosecute or not unless it can be demonstrated that such a decision was made in bad faith or under the influence of an improper motive or policy; *The State (McCormack) v. Curran* [1987] I.L.R.M.

225. Partly, the reasoning behind the series of decisions which later upheld that principle may be based on public policy in the sense that for reasons to be given as to why a prosecution should not be initiated, for instance due to lack of evidence, or the loss of evidence, such a declaration might undermine the presumption of innocence in favour of the accused. In addition, an extra administrative burden might be unjustifiably thrust upon the office of The Director of Public Prosecutions in explaining, and then defending, every decision made pursuant to the powers vested in the office by the Prosecution of Offences Act, 1974. Once there is a reasonable possibility that a valid decision has been made by the Director not to prosecute, or to prosecute, a decision by the Director is not reviewable by the High Court; *H v. D.P.P.* [1994] 2 I.L.R.M. 285. The Director is not exempt from the general constitutional requirements of fairness and fair procedures. The proof of the absence of such principles in any decision made by the Director of Public Prosecutions cannot be gathered through a speculative application for discovery; *Dunphy [a minor] v. D.P.P.* [2005] I.E.S.C. 75. There must be, at the least, evidence suggestive of an impropriety before the court would allow a proceeding for discovery to be initiated against the Director of Public Prosecutions."

#### **Application of the principles outlined to the circumstances of this case**

##### *The leave being sought against the second named respondent*

16. It is convenient to deal in the first instance with the claim for leave to apply by way of judicial review for reliefs against the DPP. It seems to me that the appellant must be refused leave on three separate bases, and that the High Court was correct to do so.
17. The first problem which the appellant has not adequately addressed in his grounding affidavit is his failure to apply for judicial review within six months of the decision that he seeks to impugn in so far as he is seeking Certiorari, and within three months of that decision in the case of the other relief that he seeks. The DPP's letter communicating her decision not to prosecute is dated the 2nd of November 2016, and it may be strongly argued that time ran from that date. However, I accept, without deciding the point, that it might also be argued in circumstances where there was a follow up request for reasons that time did not start to run until the date on which those reasons were provided. Nevertheless, even if one adopts the most favourable interpretation of the facts, from the appellant's point of view, it is clear that the time limit for seeking Certiorari would have expired at the end of June in 2017, whereas the time limit for seeking other kinds of relief would have expired at the end of March 2017. Despite this, the appellant did not file an application seeking leave to apply for relief by way of judicial review until the 25th of June 2018. While Order 84 rule 21A allows a court to extend the time for the making of such an application where it is satisfied that there is a good reason for extending the time limit, the appellant's affidavit does not provide any basis on which the court could do so. There is no express engagement with the problem of delay, and no explanation is offered for the failure to comply with the requisite time limits. I therefore consider that on that ground alone the claim seeking leave to proceed against the DPP by way of judicial review must be refused.

18. However, quite apart from the time limits problem, it is also clear from the appellant's affidavit that the circumstances of his case are not such as would justify the intervention of a court on an exceptional basis. His affidavit discloses that his claim is that, notwithstanding complaints by him to An Garda Síochána on numerous occasions concerning incidents of alleged harassment, assaults, trespasses to his property, and threats to kill him by certain of his neighbours, and notwithstanding Garda investigations and the transmission of a file by Gardai to the Director of Public Prosecutions, the DPP has decided not to prosecute those against whom the appellant has made complaints on the basis that there is "insufficient evidence."
19. The appellant seemingly cannot understand this decision in circumstances where he has made statements of complaint, in circumstances where there was a Garda investigation, and in circumstances where in the aftermath of certain of the alleged incidents there was an attendance at the alleged crime scene by members of An Garda Síochána trained in scene of crime investigation techniques who examined the scene and, in his belief, recovered certain physical evidence. In addition, the appellant claims to have supplied certain photographs, which he has exhibited with his affidavit, to An Garda Síochána, which he claims show the two neighbours of whom he complains standing close to his boundary and contends that, in the case of one of them, the photographic evidence shows that individual to be holding a long object which the appellant asserts was later used as a weapon against him.
20. There are several contextual details that are also apparent from the affidavit evidence, and the exhibits thereto. I feel it important to mention these because, as will become apparent, a decision to prosecute or not to prosecute does not take place in a vacuum. The DPP must consider both the public interest in prosecuting and the issue of sufficiency of evidence and context may influence the view taken of either or both of these considerations. For example, if a case comes down to a complainant's word against that of the alleged perpetrator, and contextual information suggests that the credibility and/or reliability of the complaint may be significantly in doubt, or susceptible to serious challenge, then notwithstanding that the complainant's statement taken at face value might quantitatively offer sufficient evidence that a crime has been committed, a view might nevertheless be taken, upon qualitative assessment, that the available evidence was not sufficiently cogent or robust to justify embarking on a prosecution.
21. The evidence before us indicates that there is a history of poor relations between the appellant and the neighbours against whom he has made complaints. Moreover, although the appellant believes that this is entirely the fault of his said neighbours, it is clear that there may be two sides to the story in as much as the neighbours in question have also made complaints to An Garda Síochána about the appellant, and indeed the dangerous driving prosecution against the appellant which is at hearing before the first named respondent, and the further prosecution of which he seeks to have prohibited, arises out of one such complaint by one of his said neighbours. The appellant contends that the neighbour in question has made a false complaint against him, and indeed has given false evidence against him on oath, but to date there has been no adjudication on this conflict.

22. A further contextual detail is that the appellant has a history of disputes with members of An Garda Síochána, and has asserted for some time that certain members of An Garda Síochána have fabricated complaints against him, and have procured his prosecution for a series of road traffic offences and other offences that he says he never committed, and claims that the gardai concerned have done this because they bear an animus against him arising from the fact that they are allegedly friends with, or acquaintances of, the neighbours with whom he is in dispute; and also because he is English and they are, in his belief, racist towards him on that account.
23. Whether these assertions are true or not, it is undoubtedly the case, having regard to documents provided to this court by the appellant, that he himself has been the subject of several arrests and Garda investigations; that he has been the subject of summary criminal prosecutions on a number of occasions (although the evidence as presented to us is silent as to whether he was ever convicted of anything); that he has had bench warrants issued against him; and that on one occasion, when he was detained under s.4 of the Criminal Justice Act 1984 for the proper investigation of the offence of alleged dangerous driving (a different incident to that the subject matter of the present proceedings) and criminal damage to a Garda car by deliberately reversing into it, he could not be interviewed because a doctor who saw him while he was detained suspected him to be suffering from mental illness and refused to certify him as fit to be interviewed, apparently maintaining that he needed to see a psychiatrist instead.
24. It is also clear from the documentation supplied by the appellant that he further claims to have been the victim of various forms of garda harassment, and that his alleged mistreatment at the hands of certain rank and file gardai, whom he names, has been condoned and encouraged by members of garda management, whom he also identifies by name in correspondence and other documents supplied to the court, from an Assistant Commissioner down to officers at Superintendent and Inspector level. Moreover, this is contextually relevant because he alleges failure on the part of rank and file gardai to properly investigate his complaints against his neighbours and alleges that members of garda management have been complicit in this neglect of duty by their subordinates, alternatively have turned a blind eye to it. He further alleges that the DPP is part of a conspiracy to do him down and that she has ignored her own Guidelines for Prosecutors, 4th edition, 2016, in the matters (i) of her failure to prosecute the neighbours against whom the appellant has made complaints; and (ii) in maintaining what he contends are inappropriate prosecutions against him.
25. The appellant has also provided this court with, and has asked us to have regard to, correspondence between himself and court officials on a variety of issues, and which it is suggested implicitly is evidence of widespread establishment bias against him. Much of it is intemperate in tone, in one instance accusing a court official of "*conspiracy to pervert the course of justice, abuse of process and malfeasance in public office*"; referring to a "*disgraceful conspiracy to ensure my defence is severely compromised and misdeeds of corrupt police officers hidden*"; and asserting to the same court official that "*you have not the right to abuse a legal system as if justice was merely a toy to ensure your own*

*remain in the ascendancy and assist a provincial police force who are out of control, to abuse a person's rights and evade exposure for their harassment and malicious prosecution."* In the same correspondence, the legal aid solicitor who had been assigned to represent the appellant was referred to as *"the compliant stooge appointed by the Judge to no doubt betray me"*.

26. I acknowledge that the information which this court has concerning the background and history to the present proceedings is almost certainly incomplete. The matters that have been mentioned, and which it must be emphasised comprise information supplied by the appellant himself, are part of that background and history, but there may be other aspects to it. Moreover, it is no function of this court to make any assessment of the credibility and reliability of the claims and counterclaims that have been made, merely to note that they have been made and that they are part of an intricate tapestry of seemingly hotly disputed facts.
27. Because the State was not represented before us in circumstances where the appellant made his application *ex parte*, we simply do not know what exactly was contained in the file understood to have been submitted to the DPP. Even if the State had been represented it would not have been obliged to disclose this to the court, and legal professional privilege might well have been asserted, although equally such privilege could have been waived and the information provided. Be that as it may, it does seem reasonable to assume that the file submitted would at a minimum have contained the statements of complaint made by the appellant, an account of the scene of crime examination that was conducted and any forensic results deriving therefrom, as well as any other statements taken by the gardai in the course of their investigation, including statements (if any) taken from those concerning whom the appellant has complained setting out their side of the story. As to how much (if any) of the background and history of relations between the appellant and his neighbours, and between the appellant and the gardai and other actors in the criminal justice system, might have been provided to the DPP; that is simply not known and it is something incapable of being inferred with precision. However, it may reasonably be presumed that at least some background information would have been supplied as an aid to the directing officer in assessing the sufficiency and quality of the available evidence.
28. Be all of that as it may, the fact remains that we do not know exactly what the file contained. All that we know is that the DPP took the view that she ought not to prosecute due to insufficiency of evidence.
29. What typically happens when the DPP's office receives an investigation file from An Garda Síochána is described in documentation in the public domain and published by the second named respondent on her website, to which some allusion has been made by the appellant in his submissions to this court, and in particular in the public information document entitled *"How we make prosecutions decisions"* ([https://www.dppireland.ie/app/uploads/2019/03/ENGLISH\\_How\\_we\\_make\\_prosecutions\\_decisions.pdf](https://www.dppireland.ie/app/uploads/2019/03/ENGLISH_How_we_make_prosecutions_decisions.pdf)) and the practitioner guidance document entitled *"Guidelines for Prosecutors – 4th Ed, October*



2016" ([https://www.dppireland.ie/app/uploads/2019/03/Guidelines\\_for\\_Prosecutors\\_4th\\_Edition\\_-\\_October\\_2016.pdf](https://www.dppireland.ie/app/uploads/2019/03/Guidelines_for_Prosecutors_4th_Edition_-_October_2016.pdf)).

30. The public information document "*How we make prosecutions decisions*", describes the envisaged process in the following general terms:

"We must be satisfied that the evidence is strong enough before we decide to prosecute. This means that we examine the evidence to see if it is:

- admissible (allowed in court);
- reliable; and
- sufficient to show that the suspect has committed a criminal offence.

We must also consider, based on the available evidence, if there is a reasonable chance of conviction. The evidence needs to be strong enough so that a jury could decide beyond a reasonable doubt that the suspect is guilty of the offence they are charged with. To be able to prove a case 'beyond a reasonable doubt' is a very high standard to achieve. In looking at the strength of the evidence, we must consider a number of factors. As every case is different, we cannot give a full list of everything that can be taken into account, but some examples of what we consider are:

- differences in the evidence given by witnesses;
- whether there is independent evidence to support what a witness says;
- whether the account of a witness is reliable;
- if the witnesses are available to give evidence in court;
- if identification of a suspect is an issue, whether the evidence of the witness who claims to identify the suspect is reliable;
- if the available evidence is admissible (allowed) in court."

31. All of this is reiterated and elaborated on in much greater detail in the document entitled: "*Guidelines for Prosecutors – 4th Ed, October 2016*", to which the appellant has made reference in his submissions to this court. We consider paragraphs 4.10 to 4.13 of that document to be of particular importance, and that they justify quotation in full:

"4.10 A prosecution should not be instituted unless there is a prima facie case against the suspect. By this is meant that there is admissible, relevant, credible and reliable evidence which is sufficient to establish that a criminal offence known to the law has been committed by the suspect. The evidence must be such that a jury, properly instructed on the relevant law, could conclude beyond a reasonable doubt that the accused was guilty of the offence charged.

4.11 In considering the strength of the evidence the existence of a bare prima facie case is not enough. Once it is established that there is a prima facie case it is then necessary to give consideration to the prospects of conviction. The prosecutor should not lay a charge where there is no reasonable prospect of securing a conviction before a reasonable jury or a judge in cases heard without a jury. The question of what is meant by a reasonable prospect of conviction is not capable of

being answered by a precise mathematical formula. It is not the practice to operate a rule under which conviction would have to be regarded as more probable than acquittal. But it is clear that a prosecution should not be brought where the likelihood of a conviction is effectively non-existent. Where the likelihood of conviction is low, other factors, including the seriousness of the offence, may come into play in deciding whether to prosecute.

4.12 In evaluating the prospects of a conviction, the prosecutor has to assess the admissibility, relevance, sufficiency and strength of the evidence which will be presented at the trial. This involves going beyond a superficial decision as to whether a statement, or a group of statements, amounts to a prima facie case. The prosecutor must consider whether witnesses appear to be credible and reliable. Accusations of criminal wrongdoing can be unreliable for all sorts of reasons. They can be unfounded or inaccurate without being deliberately manufactured. They may be the result of human error or they can be made maliciously. Statements cannot therefore simply be accepted at face value and acted upon without considering their credibility. In evaluating the prospects of a conviction the prosecutor must remember that the onus is on the prosecution to satisfy the jury of the guilt of the accused beyond a reasonable doubt. This burden, which is higher than mere probability, must be borne in mind in considering whether to prosecute.

4.13 It is not sufficient if the evidence is likely to go no further than to show on a balance of probabilities that it was more likely than not that the suspect committed the offence but does not go so far as to establish guilt beyond a reasonable doubt. For this reason it is important to know if there is independent evidence which supports the complaint. This could be evidence from another witness, or forensic evidence such as fingerprints or DNA evidence from body tissue. This makes the case stronger than one based on one person's word against another. Even where the prosecutor accepts the victim's account the evidence may simply not be strong enough to convince a jury beyond a reasonable doubt. The evaluation of prospects of conviction is a matter of judgment based on a prosecutor's experience. This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed it is inevitable that some will fail. However, this does not mean that only cases perceived as 'strong' should be prosecuted. The assessment of the prospects of conviction should also reflect the central role of the courts in the criminal justice system in determining guilt or innocence. A preconception on the part of the prosecutor as to views which may be held by a jury about the subject of the offence is not a material factor. The prosecution must assume that the jury will do its duty and act impartially."

32. In addition, at paragraph 4.14 the DPP recites a long, but non exhaustive, list of specific factors (which it is not considered necessary to quote) which may be taken into account in assessing the strength of the evidence.

33. It is manifest that while the decision to prosecute or not to prosecute in any case involves many different considerations, sufficiency of evidence is crucial. In this instance the DPP has decided not to prosecute and her stated reason is "insufficient evidence". This must be taken at face value unless the appellant is in a position to demonstrate something like *mala fides*, an improper motive, the application of an improper policy by the DPP or some other exceptional circumstance that would justify interference by a court. In my assessment the appellant has failed to do any of these things. While the decision of the DPP may seem inexplicable to the appellant, he has not excluded the reasonable possibility of a proper and valid decision by the DPP. In so far as can be gleaned from his affidavit it is his word against that of the alleged perpetrator(s), and that against a lengthy background of hostility and disputes *inter partes*. The crucial events do not appear, from the appellant's own account, to have been independently witnessed. While a scene of crime examination was apparently conducted by Gardai, in the course of which it is suggested certain physical evidence was noted and, in some instances, seized, it is completely unclear and uncertain as to what the probative value of that evidence might have been. For example, an implement found *ex post facto* at the scene might well be consistent with the complainant's account, but that mere fact would not of itself serve to prove the truth and reliability of that account. Hypothetically, the complainant, or somebody else, could have introduced such an implement to the locus after the fact and before it was examined. For its finding to be significantly probative it would require some linkage to the alleged perpetrator, eg., that its use was actually independently witnessed, or perhaps recorded on CCTV or some other media, alternatively through the finding of a fingerprint on it belonging to the alleged perpetrator, or a DNA trace belonging to the alleged perpetrator, or some other trace evidence to link it to the alleged perpetrator. The appellant has not suggested that such a linkage was available to be made. In the circumstances, the appellant has not successfully foreclosed on the entirely reasonable possibility that the DPP, having evaluated such evidence as was made available to her, legitimately regarded such evidence as being insufficient to justify a prosecution.
34. Accordingly, I do not consider that the appellant has demonstrated that the circumstances of this case were such as to justify a departure from the general rule, which is: that absent evidence sufficient to expressly demonstrate, or give rise to an inference of, *mala fides*, improper motive, or the application of an improper policy by the DPP, or the existence of some other exceptional circumstance that would justify intervention, a decision of the DPP on whether or not to prosecute is not reviewable.
35. Even if the special protection enjoyed by the DPP did not apply, I would not grant leave to apply for judicial review on this aspect of the case. Although the general threshold set forth in *G v Director of Public Prosecutions* is recognised as being a low one, I do not believe that the facts averred to in the appellant's affidavit would be sufficient, if proved, to support a stateable ground for obtaining relief by way of judicial review. Accordingly, the appellant has not met the general threshold, low though it be,

36. In the circumstances, and for all of the above reasons, I would not be disposed to grant leave to the appellant to apply for judicial review against the second named respondent in respect of her failure to prosecute the appellant's neighbours.

*The leave being sought against the first named respondent.*

37. At this point it is necessary to move to the claim for leave to apply for relief by way of judicial review against the first named respondent. In that regard, both the appellant's Statement for the purposes of Order 84, rule 20(2)(a) of the Rules of the Superior Courts and his grounding affidavit sworn on the 25th of June 2018 are extremely vague as why it would have been appropriate, as he claims, for the first named respondent to have recused herself. It is necessary to deal with each in turn.
38. The Statement alleges, at (d) 3 thereof, that the first named respondent *"has refused to recluse (sic) herself twice from these proceedings on 22.2.18 and 26.4.18. She has also stated she will appoint a local solicitor who will undoubtedly betray my interests doing her compliant bidding."* Further, at (d) 5 there is a reference to the first named respondent's *"extensive abuse of process"* and *"demonstrable prior malevolence/bias as noted herein. She having been asked to recluse (sic) herself on 22.2.18 and 26.4.18 and refused."* However, the Statement does not identify on what basis the first named respondent had been asked to recuse herself on the dates specified.
39. It is reasonable to expect that where a refusal to recuse forms the basis of a claim for leave to apply by way of judicial review for prohibition and ancillary reliefs, and the reason why such an application or applications was/were made has not been disclosed in the Statement (which it ought to have been), that the reason for requesting recusal would at least be specified and adequately particularised in the grounding affidavit. However, the appellant's affidavit does not satisfactorily do so. While some bald assertions are made they are not adequately explained or elaborated upon.
40. In that regard, the appellant's grounding affidavit refers, at paragraph 6, to *"Galway court service/Judge Mary Fahy who have acted with Maldives (sic) and perverted the course of justice by removing Notice of Motion/Affidavit from file to facilitate hearing in contravention of JR788/14 stay."* Later in the affidavit, at paragraph 8 thereof, there is a reference to a bench warrant having been *"falsely issued on 23.3.17 by Judge Fahy who had 3mths earlier lost JR 370/16 in HC for previous 12.5.16 false issue of bench warrant contrary to JR 788/14 stay."* Apart from that there are two oblique references (in the sense of not naming the first named respondent) elsewhere in the affidavit, on pages 8 and 9 respectively, to *"Public court official/judge removing JR stay Notice/Affidavit from files to pervert course of justice in contempt of High Court JR 788/14"* and to an *"Exposed history of abuse of powers, supported by DC and Galway abuse of powers, supported by DC and Galway court service."* Finally, the affidavit refers, in an unnumbered paragraph on page 10 thereof, to *"The District court protecting the police who clearly have serious irredeemable fabrications in their statements within a motoring case from 23.4.13. Refusing to recognize these and going around a High Court JR stay by removing Notice/Affidavit from files to allow falsely a hearing/bench warrant to proceed."*

41. That is the full extent of the sworn testimony provided by the appellant, although he has also produced and made available to the court a booklet of what he characterises as “exhibits”. I must point out that the documents in this booklet have not been exhibited in the correct fashion in that they are not explicitly referred to within the body of the affidavit, nor have they been marked as exhibits and signed appropriately by the appellant prior to the swearing of his affidavit. However, speaking for myself, I am prepared on this occasion to stretch a procedural point in circumstances where the appellant is a lay litigant and this is merely a leave application, and to treat them as though they had been properly exhibited. If leave is granted, the procedural irregularity can be addressed prior to any substantive hearing.
  
42. Amongst the documents he exhibits is a course of e-mail correspondence with Galway District Court office which appears to be of relevance, and which sheds some light on the matter. The exhibits provided suggest that, as alluded to earlier in this judgement, the appellant was the subject of another dangerous driving prosecution in the Galway District Court area, quite separate from the one which is the subject matter of the present proceedings. He was seemingly successful in obtaining leave from the High Court to apply by way of judicial review for an order of prohibition in respect of those other proceedings, and the High Court judge in granting leave placed a stay on the proceedings before the District Court. These are understood to have been High Court proceedings bearing record no JR 788/14. However, as the exhibited correspondence reveals, the stay was subject to satisfaction by the appellant of certain conditions, namely lodgement of his Notice of Motion in the High Court proceedings seeking relief by way of judicial review by close of business on 10/02/2015, with service of the said Notice of Motion, and the relevant verifying affidavit, on the Galway District Court Clerk, by the same date, failing which the stay was to lapse. It does not appear that any particular form of service was specified, and in default of that the appropriate form of service would have been that specified in the Rules of the Superior Courts. The correspondence reveals that the appellant may have informally transmitted scanned copies of his Notice of Motion and verifying affidavit to the Galway District Court clerk by means of e-mail on 30.1.15; and further that this e-mail also asserted that a *“true copy [was] left by hand at Galway courthouse on 31.01.15”*. However, subsequent e-mail correspondence from the Galway District Court office to the appellant, dated the 19th of April 2016, which was also exhibited, indicates that the District Court clerk did not consider she had been properly served in the required manner. Perhaps tellingly, in terms of how things ultimately panned out, the Galway District Court office had nevertheless acknowledged in an earlier email to the appellant dated the 6th of February 2015 that they had “received documents relating to your case.” Be that as it may, it appears that notwithstanding the acknowledged receipt of some documents, the view was taken in the Galway District Court office that what the High Court’s order had required, if the stay was not to lapse, was formal service in accordance with the rules and within the required time; and that as formal service had not been effected, the condition attaching to the stay had not been complied with and consequently the stay had lapsed. In the circumstances the prosecution was listed for hearing before the first named respondent on the 12th of May 2016 at 10.30 am, and the appellant was notified of this,

informed that his attendance was required, and further informed that it was considered that any stay granted by the High Court had lapsed.

43. While the documentation is vague as to what precisely happened next, it appears to have been the case that the appellant returned to the High Court at some point and apprised it of the up to date position. There is a suggestion in the papers that a bench warrant may have been issued for the appellant by the first named respondent on the 12th of May 2016, presumably because he did not turn up. Whether this occurred before or after the appellant had returned to the High Court is not clear. Moreover, as the appellant's affidavit contains a reference to yet another set of High Court judicial review proceedings, i.e., JR 370/16, it is possible that the appellant may have sought to have the bench warrant quashed in parallel proceedings. However, it is impossible to be certain about this because the history provided by the appellant is so regrettably vague.
44. Be that as it may, the High Court, in so far as I have been able to glean from the papers supplied by the appellant, appears to have been satisfied that adequate service had in fact been effected and either confirmed that the stay had not lapsed, alternatively reinstated it. While it is understood that the prosecution of the appellant did not in fact proceed on the 12th of May 2016, the paperwork is silent as to what may have happened to it thereafter. If the appellant's account is correct the prosecution was most likely stayed pending the outcome of the judicial review proceedings, and presumably the bench warrant that had issued was subsequently vacated, or was quashed, but we are in the dark as to what exactly was the ultimate outcome of judicial review proceedings JR 788/14, and as to what happened to the prosecution. The appellant, and this is not intended to be a personal criticism of him, is unfortunately a poor historian, and neither his affidavit nor his submissions provide a complete chronology or shed adequate light on what occurred, although the obligation and responsibility to do so is his as the moving party. He does, however, appear to suggest in his submissions that the prosecution case may have been withdrawn or at least that it was not proceeded with, but again he is vague in that regard.
45. Be that as it may, the appellant seems to have interpreted the stance taken by the Galway District Court office on service, and whether or not the High Court's stay had lapsed, as being improperly motivated, and as exhibiting a bias towards him. Further, he sees the hand of the first named respondent as having been behind it, or that she was at least complicit in it. It is unclear what the reference to *"removing Notice of Motion/Affidavit from file to facilitate hearing in contravention of JR788/14"* refers to precisely. This assertion, which is repeated several times by the appellant, is entirely unexplained. We are not told what Notice of Motion and Affidavit he is referring to, or for what purpose it was lodged, or when it was lodged or by whom. We are not told what file he is referring to, or on what basis he alleges that the Notice of Motion and Affidavit in question was removed from that file. Neither are we told how this removal, if it in fact occurred, could have facilitated a hearing in contravention of JR 788/14. Nevertheless, it seems reasonable to infer that the appellant interpreted the position taken by the District Court office, i.e., that there had been inadequate formal service, as representing an

attempt by that office, and at the judge's behest, to deny that documents had been received from him, and to sidestep the stay granted by the High Court. It is clear, however, that informal receipt of some documents was at all times acknowledged. Moreover, there is no cogent evidence tending to suggest that the concern raised by the District Court office was anything other than a genuine one, even though it was not ultimately upheld.

46. I am satisfied, on the limited information provided by the appellant, that in so far as the appellant has interpreted the initial stance taken on the stay issue, by the District Court clerk and/or by the first named respondent, as being motivated by prejudice against him or bias, there is not a scintilla of evidence to support that. There is simply no objective evidence of any abuse of process, or of an attempt to pervert the course of justice, or of an attempt to circumvent a stay granted by the High Court in contempt of that court's order. I am satisfied that the appellant was, and is, clearly wrong in believing that this is what occurred and that his concerns are baseless.
47. I am reinforced in this view by the fact that amongst the other "exhibits" that have been provided by the appellant is a transcript of the part heard proceedings before Clifden District Court on the 25th of October 2018, the continuation of which the appellant seeks to prohibit. This transcript reveals that the appellant was dealt with at all stages by the first named respondent courteously and respectfully and that the first named respondent exhibited scrupulous fairness. The judge demonstrated considerable patience and allowed the appellant, who was representing himself, full rein within the rules of evidence to cross-examine the witnesses called against him and made it clear to him that he would in due course be afforded the opportunity to give evidence himself if he wished to do so. The appellant did in fact give evidence himself later during the day. Towards the close of proceedings on that day the appellant indicated a desire to have a solicitor and barrister to make closing arguments on his behalf, and he was facilitated with an adjournment of the balance of the case until a day to be fixed in January 2019 to enable him to make arrangements in that regard, and also to produce certain documents. The way these proceedings were conducted throughout this partial hearing is entirely contradictory of any suggestion that the first named respondent was motivated by ill will of any sort against the appellant or that she was or is biased against him in any way. She was entirely right not to have recused herself, as there was no basis for her having to do so. Moreover, she gave the appellant a scrupulously fair hearing.
48. In the circumstances the appellant has, it seems to me, again failed to satisfy the low threshold specified in *G v Director of Public Prosecutions* in so far as he seeks leave to apply for relief by way of judicial review against the first named respondent.

#### **Decision**

49. For all the foregoing reasons, I would dismiss the appeal.