

THE HIGH COURT

JUDICIAL REVIEW

[2020] IEHC 328

[2019 No.294 J.R.]

BETWEEN

FRANK BRASSIL

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 3rd day of July, 2020

1. Introduction

1.1 This is another case in which the time taken by a doctor to attend a garda station is said to amount to a delay sufficient to render the arrest of the Applicant unlawful and, as a consequence, to render the evidence of two road traffic offences inadmissible. The phrase “fruits of the poisoned tree” was used in argument in order to describe, in a well-recognised phrase, the doctrine which it is argued should lead to the quashing of these convictions.

1.2 This Applicant was seen driving erratically at about 3.30am on Laurence Street in Drogheda and he was followed by a garda vehicle. When a garda approached his Range Rover as it was stopped at a yield sign, the car circled the roundabout 5 times and then drove away, reaching speeds of up to 220 km per hour during the pursuit that followed. Having stopped the vehicle and formed the opinion that the driver, the Applicant, was drunk, the garda who had followed his vehicle arrested him at 4.10am and brought him to a garda station. There,

the garda was unable to access the relevant apparatus to test his breath, the Evidenzer, as it was locked away and the key could not be found. A doctor was contacted at 5.35am, he indicated that he would be there 5 minutes later but did not arrive until 6.30am. The Applicant refused to provide blood or urine samples. He was charged with failing to provide a sample under s. 12 of the Road Traffic Act 2010, as amended and dangerous driving under s. 53 of the Road Traffic Act 1961, as amended.

1.3 The Applicant was convicted in the District Court and appealed both convictions. The Circuit Court hearing included submissions as to the legality of the Applicant's detention insofar as it might affect the evidence supporting the offence of failing to provide a sample. He was convicted, fined and disqualified from driving for 6 years in respect of both offences.

2. Delay and Procedural Rules: Three Objections

2.1 The Respondent objects to the Court granting relief on three preliminary grounds, all of which could be described as procedural arguments. The first is the delay of the Applicant in seeking High Court leave to quash the Circuit Court decision. The second is the Applicant's failure to lodge a copy of the Court Order sought to be quashed before the hearing commenced, as required by court rules. The third is the failure of the Applicant, when arguing his case in the Circuit Court, to raise the arguments now made in respect of his dangerous driving conviction. The focus of counsel's submissions at that stage was solely on the conviction for failure to provide a blood sample for analysis.

2.2 The Rules of the Superior Courts [RSC] provide detailed rules as to how court proceedings must be prepared, presented and processed. The procedural arguments involving the RSC are dealt with first, and the argument in respect of raising a new issue is discussed later, as part of the overall substantive argument that in either or both offences, the Trial Judge relied on evidence gathered while a suspect was in unlawful detention.

3. Delay in applying for Judicial Review

3.1 Order 84 of the RSC sets out the court rules governing the procedural requirements in judicial review cases. Rule 21, which sets the time limit for initiating proceedings, reads:

*“21. (1) An application for leave to apply for judicial review **shall be made within three months** from the date when grounds for the application first arose...*

*(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, **but the Court shall only extend such period if it is satisfied that:—***

*(a) **there is good and sufficient reason for doing so, and***

(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by the applicant for such extension.

(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.

*(5) An application for an extension referred to in sub-rule (3) **shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant’s failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.***

(6) Nothing in sub-rules (1), (3) or (4) shall prevent the Court dismissing the application for judicial review on the ground that the applicant's delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub-rule (3)) has caused or is likely to cause prejudice to a respondent or third party..."

3.2 The Circuit Court Order affirming the convictions of the Applicant in respect of both offences was made on the 19th December, 2018. In both cases, a fine of €100 was imposed. The Circuit Court Judge also disqualified the Applicant from driving for a period of six years in respect of both offences, which disqualification was stayed until 19th May, 2019. The Applicant obtained leave on the 20th May 2019, over five months later, and the day after his disqualification period was due to commence. The Applicant did not serve the papers on the Respondent within the time prescribed by the Order and obtained two extensions of time for the same purpose in July and in August of 2019. There was no affidavit to ground an application seeking an extension of time within which to make the application. Nor was a copy of the impugned Order before this Court, which issue is dealt with below.

3.3 The Respondent relies on the case of *Kennealy v. The Director of Public Prosecutions*, [2010] IEHC 183 [2010] 5 JIC 1802 in this regard, although it is a prohibition case, in which the timing issues are different, by definition: the prohibition application is made to prevent an injustice, not to correct one. There, the charge was one of refusal to permit a designated medical practitioner take a blood sample in circumstances where an attempt had been made to take her blood but had not succeeded. Two days before her trial, that applicant sought to prohibit her criminal trial. In that application, she raised, for the first time, an issue as to whether the partial blood sample in question had been retained by the prosecution. The applicant contended that she could not obtain a fair trial as it had not been retained.

3.4 Mr. Justice Hedigan J. stated that:-

"The obligation to move promptly for prohibition is of particular importance in criminal matters. Any delay in determining criminal charges is to be deprecated. Order 84, r. 21 of the Rules of the Superior Courts requires an application, such as this, to be made within three months from the date when grounds for the application first arose and, in any event, promptly... Any delay of any kind needs the clearest explanation. No explanation is provided for the delay in question. This application, therefore, fails, on either the three month requirement or the requirement to act promptly."

3.5 In this case, unlike that of Ms. Kennealy, there are explanations, although not on affidavit, as is required by the rules. The Applicant has referred in written and oral submissions to Christmas, Covid 19, family difficulties of his former solicitor, a death in the family of that solicitor and a final consultation date which was never revealed to the Court, having been left blank in the written submissions. The letters of the former solicitor, the latest dated 6th February 2019, are exhibited in the affidavit grounding the application for leave, to show that the Applicant had been advised that he had no appeal. This, it is said, excuses his failure to apply for judicial review within 3 months. The following statement appears in the Applicant's submissions: *"Had he been made aware of the Rules Of the Superior Courts he would have complied therewith."*

3.6 Before looking at the substance of the issue, therefore, the Respondent argues that this application was too late and that there has not been an adequate explanation for the delay.

3.7 The decision of the Supreme Court in *People (DPP) v. O'Kelly*, [1980] 2 I.R. 90 makes it clear that *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd*, [1955] I.R. 170, which applies to civil cases, does not apply to applications for an enlargement of time in a criminal case. The Court must consider what the justice of the case requires, in all the circumstances. There, it was clear that Mr. O'Kelly had not formed an intention to appeal, indeed he had absconded during his trial. However, his co-accused successfully obtained a ruling on appeal

that the circumstances of his interview had led to an involuntary confession and his conviction was overturned. Mr. O’Kelly was permitted an extension of time of over two years within which to argue that the same investigative team had subjected him to similar pressure which led to his confession and conviction. The delay in this case is much shorter and the circumstances less dramatic. The Applicant relies on the argument that the Respondent is not prejudiced. In many cases, these arguments might be sufficient. However, the reasonableness of the explanation for the delay and the substance of the argument sought to be made are both important factors in considering whether or not to extend time.

3.8 The reasons offered to explain the delay are weak. They comprise a combination of personal misfortune on the part of one of the solicitors involved and the claim that a new solicitor took a different view of the case. The change of advice was pressed as the more pertinent reason, supported by references to the former solicitor’s letters, to explain why the Applicant did not immediately seek to review the decision to affirm his convictions.

3.9 This explanation, that two solicitors took a different view of the merits of the case, has been explored and rejected by Ryan J., as he then was, in *Broe v. The Director of Public Prosecutions*, [2009] IEHC 549. As Ryan J. pointed out, a solicitor is a “single entity” in terms of her carriage of a case. The fact that there has been a change of solicitor does not excuse any delay in prosecuting an appeal or initiating proceedings such as these. He quoted Henchy J., who explained (albeit in a very different context), in *The State (Byrne) v. Frawley*, [1978] I.R. 326 at page 350:- “*What has been lost in the process of events is not the right guaranteed by the Constitution but the prisoner’s competence to lay claim to it in the circumstances of this case.*”

3.10 Ryan J went on in *Broe*, at paragraph 41, to comment:

“The explanation that the issue was only discovered when the new solicitor came into the case does not, in my opinion, materially affect the situation. The solicitor should normally be considered as a single entity not dependent on an individual person. As a general rule, a change

of solicitor should not make a situation better or worse for a party to litigation. The fact that a party's legal advisor did not think at a particular time of a point that later occurred to him is not an excuse for delay in raising it earlier. I consider the change of solicitor from one who did not, for whatever reason, raise the timing of the charge to one who did so to be essentially similar. I do not therefore find that the change overcomes the delay.”

3.11 This Court adopts that conclusion and reasoning without hesitation. If a change in solicitor could reset the clock, so to speak, then a change of solicitor would operate to turn back time in every case. Every decided case, whether criminal or civil, could be reopened if the solicitor was changed, thus providing an incentive for unscrupulous lawyers to conduct a trawl through the papers in order to identify a new argument. This is not intended to be a comment on the legal team in this case, but is intended to follow such an argument to one logical conclusion in order to show how dangerous the potential consequences might be if such an argument were to succeed. There are very strong policy grounds to discourage a litigant from relying on such an explanation, without more, to successfully excuse delay.

3.12 There was a reference in argument to the previous solicitor having misled the Applicant, albeit not deliberately, in explaining why the Applicant did not process his case quickly. It is important to note the general position as regards legal representation: barristers and solicitors represent clients to the best of their ability and ensure that they know the applicable laws, including court procedures, that apply to their clients' cases. By its nature, which is adversarial, our system allows for arguments to be made about the applicability of the law to particular, factual scenarios. Lawyers, as a result of this system, and no doubt as a result of training which includes the examination of all views of a particular argument, may disagree as to what the law is and how it should be applied. However, one of the main objectives of the system of justice is that the law is clear enough in its terms that citizens can predict, to the greatest extent possible, what the outcome of any case, taken by or against

them, will be. This is particularly important in criminal law cases. It is not at all unusual that one lawyer might disagree with another as to what the law is, yet it is still a legal imperative to ensure that the law is as certain as may be. A disagreement amongst lawyers is not sufficient to explain a failure to meet a deadline under the RSC, or indeed under any legislation. If a client dislikes her advice, she is entitled to seek another lawyer but she should move promptly to do so. If she then receives advice she likes better, it does not necessarily mean that her first lawyer was wrong. This conclusion is supported by the rationale of the Supreme Court in *The Director of Public Prosecution v. Buck*, [2020] IESC 16, where Charleton J. considered the position of a litigant in person who later queried decisions taken by his legal team, and where the Court concluded, at para 26:-

“An advocate is not to be distinguished from the accused on whose behalf he or she acts... Delicate situations can occur whereby it may be troublesome or unsavoury to have to put to witnesses allegations derived from the accused's instructions, or otherwise to make a point, but consistent with respect for human dignity, an advocate's task is to pursue that course. Situations can arise where there may be a lack of trust between an accused and his advisors. At all times, the accused has the choice of dismissing those representing him or her. The decision rests with the accused as must the responsibility, since advisors and accused in court speak as one.”

3.13 The delay in the case is insufficiently explained and the procedural rules for obtaining an extension of time were not followed. In deciding whether or not this is fatal to the application, however, the other arguments and the substance of the case must be considered as the justice of the case, considering all the circumstances, is the overriding factor.

4. **The Impugned Order**

4.1 Order 84 of the Rules of the Superior Courts sets out the court rules governing the procedural requirements in every judicial review case. Rule 27 states:

“(1) On the hearing of an application [for judicial review], any person who desires to be heard in opposition to the application, and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the application.

*(2) Where the relief sought is or includes an order of certiorari to remove any proceedings for the purpose of quashing them, **the applicant may not question the validity of any order, warrant, committal, conviction, inquisition or record, unless before the hearing of the motion or summons he has lodged in the High Court a copy thereof verified by affidavit or accounts for his failure to do so to the satisfaction of the Court.** If necessary, the court may order that the person against whom an order of certiorari is to be directed do make a record of the judgement, conviction or decision complained of.”*

4.2 It is clear from the rules, therefore, that the order sought to be impugned must be before the Court and, if it is not, the applicant must account for his failure on affidavit before the hearing of the motion. There was no copy of the Order made by the Circuit Court Judge before the Court when this application for review of that order was made. No affidavit was received explaining why the Order had not been lodged. The Respondent exchanged written submissions with the Applicant, in which this rule was quoted in full and the authority of *Cash v Halpin*, [2014] IEHC 48, [2014] 1 IR 328, relied upon in a submission that the Applicant could not obtain judicial review in respect of an order which was not before the Court.

4.3 Despite the terms of the rule itself and despite the fact that this issue had been raised in submissions, it was suggested in oral argument that the Applicant understood that the rule would not be relied upon by the Respondent (there appears to have been an exchange about formal proofs, including a difficulty in obtaining a copy of the custody record, which culminated in a reference to further affidavits not being required). The Respondent disputed that there was any such agreement. A copy of the order was forwarded to the registrar after

the hearing. No affidavit was filed in this regard and the explanation offered was that the Applicant understood that the reference to the Order was a reference to the Order of the High Court granting leave to review the Circuit Court Judge's Order.

4.4 In *Cash*, a District Court Judge imposed three, partly suspended, consecutive sentences. The issue before the High Court was how the applicant should serve consecutive sentences which were partly suspended and yet ordered to be served consecutively. There, as in this case, the original orders were not before the court but there, the applicant agreed with the respondents' submission that the High Court could not quash an order that was not before it and Baker J. therefore confirmed what was effectively a joint submission in the case. The warrants of execution were before the Court and Baker J. could and did, therefore, deal with the case on that basis.

4.5 The case of *Cash* is thus one which did not include a full consideration, after legal argument, of the position of an applicant who has failed to include this formal proof as part of her application. Here, every party knows and agrees upon the terms of that Order, the Applicant argues that no injustice is done if the Court grants certiorari and the Circuit Court Order has now been furnished, after the hearing but before judgment was due to be delivered. It is submitted that an injustice will be done if relief is refused on this ground.

4.6 The *Cash* case, while it can be distinguished on its facts as to the conclusion reached, is very helpful in considering this argument, which can be described as one dealing with formal proofs in judicial review cases. Baker J. commented, in dealing with the issue of delay:

“20. Further, I am persuaded by the statement in Dunne, Judicial Review of Criminal Proceedings, (Dublin, 2011) at para. 14.47 where he says that the fact that judicial review in criminal matters invariably concerns constitutional rights, the courts

‘are slow to refuse to entertain judicial review applications on the grounds of delay or non-compliance with the prescribed time limits where...there is a real and serious risk of an unfair trial.’

*21. Still more it seems to me the court will be slow to refuse an applicant judicial review where matters of his personal liberty are at stake. This applicant finds himself in the unusual circumstances that when he first made the application to the High Court for an inquiry, the question of whether his status as a prisoner on temporary release was such as to preclude him from seeking an inquiry pursuant to Article 40.4.2 had not been authoritatively decided... Further the applicant also found himself in another unchartered territory, now clarified by the Supreme Court in *Ryan v. Governor of Midlands Prison* [2014] IESC 54, as to the scope of the jurisdiction under Article 40.4.2 itself.*

22. Accordingly, were I to refuse an extension of time it seems to me that the applicant would be denied a remedy for reasons of the form of the application where the legal landscape was changing and in those unusual circumstances I accept that the applicant is entitled to an extension of time for bringing this application.”

4.7 Applying that logic to the present case, it seems that the form of the application for review, which requires the lodging of a copy of the impugned Order before the Court, might not in itself be fatal to an application to review a criminal conviction if the justice of the case requires that the application be granted. It will fall to be considered as one more circumstance in the case in which the overriding factor must be the justice of the case as a whole.

4.8 To consider that, the Court must consider the substantive argument made. This argument was one made under the doctrine of the exclusionary rule sometimes referred to as “the fruits of the poisoned tree”. It was submitted that the doctor was so late that the Applicant, who had been lawfully detained, was, by the time of his arrival, in unlawful detention and thus any evidence obtained thereafter was obtained in breach of his

constitutional right to liberty and was inadmissible. The exclusionary rule relied upon was reconsidered by the Supreme Court in *The People (Director of Public Prosecutions) v J.C.*, [2015] IESC 31, [2017] 1 IR 417. There, a majority of that Court rejected the absolute exclusionary rule as expressed by the United States Supreme Court in *United States v. Leon*, (1983) 468 U.S. 897, and overturned a line of authority exemplified in the decision of *The Director of Public Prosecution v. Kenny*, [1990] 2 IR 110. The doctrine, as currently applied, permits of exceptions to the exclusionary rule, while maintaining a role for the courts in applying the principles outlined in *Kenny*. This is clear from the Supreme Court case of *Criminal Assets Bureau v. Murphy*, [2018] IESC 12, [2018] 3 I.R. 640. That case involved property seized by the Criminal Assets Bureau and the status of such evidence, if seized pursuant to an invalid search warrant. In a judgment with which the other members of the Court concurred, and in following the case of *The People (Director of Public Prosecutions) v J.C.*, [2015] IESC 31, [2017] 1 IR 417, Ms. Justice O'Malley commented (paras 9-10):

“The question that the court should address is whether the constitutional principles underpinning the exclusionary rule have any application in proceedings of this nature such that the State should, in all or in any circumstances, be denied the benefit of an action taken by its agents in breach of an individual’s constitutional rights.

... I think it preferable, for present purposes, to confine consideration of the issue to litigation involving the State and to illegality and breach of rights arising from the actions of State agents. This is because the instant case involves, as do most such cases, the use of the coercive powers conferred upon elements of the force publique.”

4.9 The cases relied upon in argument all concerned detention periods in circumstances where there was a delay, usually due to the late arrival of a doctor. The most recent was *The Director of Public Prosecution v. Brehon*, [2019] IEHC 63, in which the line of authorities in such cases was examined and the period of time in question, 44 minutes, held not to have

rendered the detention unlawful. This judgment followed the various cases in this line of authority, notably *Finn*, [2003] IESC 11, [2003] 1 IR 372, where a quotation from Mr. Justice Hardiman refers to the specific evidence from a doctor which will be necessary in a case where the reasonableness of a delay was challenged, and which might “*render a period of time which seemed excessive reasonable*”. It was submitted that this principle should apply to both convictions such that they should be quashed as, unlike the facts in *Brehon*, here, while the search for the Evidenzer explained the initial delay, there was no evidence as to what had delayed the doctor. This last argument is one that was not made in the Circuit Court as regards the dangerous driving conviction and, accordingly, I will deal with it first as the disposal of this issue affects how the remaining arguments in the case are addressed.

5. Fruits of the Poisoned Tree – Apples and Oranges

5.1 There is a distinction between the two convictions in this case. One was an offence of failing to provide a sample. To prove this offence, the Respondent relied entirely on evidence of events occurring after the arrival in the garda station of a doctor who had been delayed for approximately an hour. The Applicant’s case, at its height, is that the evidence gathered after that time was obtained at a time when the Applicant, who had until then been lawfully detained, was being unlawfully detained. The other conviction was one of dangerous driving. There was ample evidence in that regard and it did not depend on the detention of the Applicant being lawful as it comprised the prosecuting guard’s direct witness testimony; he had been watching as the Applicant’s car was driven in the manner which was found in the District Court, and then the Circuit Court, to be dangerous.

5.2 Nothing about the subsequent detention could alter the nature of the evidence which supported the charge of dangerous driving. The reason to exclude evidence is policy-based in that an apple from a poisoned tree cannot be used, save in circumstances suggested in *J.C.*,

in order to discourage State agents from breaching the law they are expected to uphold, i.e. to discourage them from using bad apples. If that is so, this evidence is an orange. It does not come from the same tree, so the question as to whether it was poisoned or not, does not arise, and a court can safely convict.

5.3 In *The Director of Public Prosecutions (Ivers) v Murphy*, [1999] 1 IR 98, the Supreme Court confirmed that the process whereby certificate evidence of arrest, charge and caution was given to a court was a valid one and, absent a challenge to his arrest, any procedural flaw in the mechanism whereby the accused was brought to court was answered by the appearance of the accused in court. In *The Director of Public Prosecution (McTiernan) v. Bradley*, [2000] 1 IR 420, [1999] 12 JIC 0901, McGuinness J. held, in referring to a judge's decision on whether or not an accused was validly before the court,

“this is a decision which he should make in the light of the general rule, as set out by Keane J., [in Ivers] that the jurisdiction of the District Court to embark on any criminal proceeding is not affected by the fact, if it be the fact, that the accused person has been brought before the court by an illegal process. Only if he feels that there has been a deliberate and conscious violation of the accused's rights, as in The State (Trimbole) v. The Governor of Mountjoy Prison [1985] I.R. 550, should he decline to embark on the hearing.”

5.4 Looking at the facts of *Trimbole*, where a ruse was employed by state agents in order to ensure the continued detention of a suspect so as to enable his extradition, it is clear that the facts here are a long way removed from such *colourable devices*, as deliberate breaches of the Constitution on the part of State agents are sometimes called in relevant cases and texts. It is not necessary, on the facts of this case, to go further in teasing out the implications of *J.C.* on such a case. The exclusionary rule is clearly not applicable. This Applicant, having been validly before both courts, can show no logical link between the argument that his

detention was unlawful and the conclusion that the conviction in respect of dangerous driving was in any way unsafe.

5.5 Finally, on this issue of the fruits of the poisoned tree, proceedings in both courts in this case concluded without any suggestion that the offence of dangerous driving had not been proven due to some evidential failing or constitutional infirmity. On that argument alone, it is difficult to sustain any argument challenging the second conviction; the two trial courts were not permitted to consider it. This issue was considered by the Supreme Court in *Devoy v The Director of Public Prosecutions*, [2008] IESC 13, [2008] 4 IR 235, in the context of delay, where the Court held that an accused who does not assert his rights does not waive them, but the fact will be taken into consideration in deciding where the justice of the case lies. Here, the failure to raise this argument, at any stage, in respect of the second conviction is another reason weighing against reviewing the case in respect of the dangerous driving conviction. In circumstances where that case has no logical basis, however, this conclusion is relegated to an observation on the issue, rather than an argument that disposes of the issue.

5.6 The case of *R v. The Director of Public Prosecutions*, [2018] IECA 302, in which an applicant sought to review the decision of a trial judge without appealing his decision, explores similar territory in respect of new grounds being aired in a different court. There, the Court of Appeal refused relief on the sole ground that no appeal had been lodged and discussed the development of the law in respect of evidence and legal arguments not advanced at the initial stages but permitted on appeal. Hedigan J. concluded at para 34 that:

*“The approach of the courts to allowing arguments not raised in the High Court to be opened before an appeal court has evolved somewhat in recent times. For many years the decision of *Movie News Limited v. Galway County Council* (unreported, Supreme Court, 25 July 1977) was considered to have set a high bar to such a course of action.”*

5.7 However, in the more recent case of *Lough Swilly Shellfish Growers Co-operative Society Ltd & Atlanfish Ltd v. Bradley & Ivers*, [2013] IESC 16, [2013] 1 IR 227, per O'Donnell J., at para. 27 [from which decision Hedigan J. quoted as follows];

“a certain sensible flexibility is exercised by the Court depending on the demands of the case, and a similar approach could be considered when a point is sought to be argued which was not advanced in the High Court though closely connected to points which were argued, and which would not have any implication for the evidence adduced in the High Court.”

The same principles must apply to the remedy of judicial review.

5.8 While an argument that had not been raised in earlier proceedings might, in an appropriate case, be raised in judicial review proceedings, on these facts, no argument about a doctor's delay in the garda station could taint the evidence that the Applicant drove five times around a roundabout in order to evade gardaí and then took off at speeds of up to 220 kph before being arrested. The Circuit Court Judge imposed the same penalty in respect of the conviction of dangerous driving as that imposed for failing to provide a sample: a fine and a disqualification from driving for six years. Even if the issue of illegality of detention had been raised in either Court of Trial, it could not have succeeded in respect of that second conviction. Thus, the sentence imposed would still stand and the disqualification period, which is the focus of the Applicant's case in terms of the alleged injustice done to him, would remain the same even if the first conviction was struck down by this Court.

5.9 This conclusion renders it unnecessary to consider the delay in the case by reference to the various cases cited above. It may be helpful to remark that a delay of about an hour has already been characterised by Mr. Justice Charleton in *O'Neill v. McCartan*, [2007] IEHC 83 *“as being a good service; if not a very good one”* and that this is entirely compatible with the rationale of Hardiman J. to the effect that evidence will be required where a period of time *“seemed excessive”*. At 5.30am, it is difficult to characterise an hour as excessive. It is still more

difficult to see, on the facts of this case, how it could be argued that such a delay might constitute the kind of deliberate breach of rights that renders a period in detention unlawful, even without considering the implications of *J.C.* on such a finding.

6. **The Purpose of Judicial Review**

6.1 The final point made by the Respondent in reply to this application relied on a line of authority indicating the limits of judicial review and outlining various scenarios in which a judge may err within jurisdiction. On the particular facts of this case, it is argued, it was within the jurisdiction of the Circuit Court Judge to resolve the question of delay in the way that he did. But that question, to use the phrase of the Supreme Court in *Sweeney v Fahy*, [2014] IESC 50, was a mixed question of fact and law and such matters may be open to review.

6.2 This Court has considered the quotation from *Sweeney v. Fahy*, [2014] IESC, 50 relied upon by the Respondent:

“...there are very significant limitations on the extent to which it is appropriate for the superior courts to exercise their judicial review jurisdiction arising out of allegations that the evidence before a lower court or other decision maker was insufficient to justify the conclusions reached rather than insufficient to establish that the decision maker had any lawful capability to make the relevant decision in the first place. Absence of a lawful power to make the decision would render the decision unlawful. Save in an extreme case, absence of sufficient evidence as to the merits would only render the decision incorrect and, thus, not amenable to judicial review...”

Mr. Justice Clarke, as he then was, concluded that:

“issues concerning the adequacy of evidence before a decision maker (as opposed to a complete absence of evidence of a necessary matter) will not render a decision unlawful.”

6.3 The facts of this case fit within the description of cases which concern the absence of evidence of a necessary matter. If evidence as to the reasons for the delay of the doctor was necessary, on the facts, there was an argument that neither judge should have convicted. After *J.C.*, it could not be a strong argument but *Sweeney* itself does not appear to be authority to prevent review in such circumstances. The *Sweeney* case involved a similar mixed question of law and fact and, while that applicant was ultimately unsuccessful, his argument in respect of judicial review being an appropriate remedy was upheld, despite the fact that Mr. Sweeney had not appealed the District Court conviction in his case but had proceeded directly to judicially review that decision.

7. Conclusions

7.1 The rationale and discussion in the cases of *Broe* and *Cash*, dealing with the tension between substance and form, as set out in the opening paragraphs of this judgment, have led the Court to these conclusions. A court has considerable discretion in such cases: error or misfortune can excuse what would otherwise be blameworthy delay or other procedural failures. The overriding consideration is that justice must be done in criminal cases. There is an understandable reluctance on the part of the courts to refuse relief on procedural grounds, including delay, when the applicant's personal liberty is at stake. In general, however, it is extremely important to abide by procedural rules, including time limits. If such rules were not enforced strictly, the resulting chaos would make the justice system utterly unfit for purpose. There would be no predictable end to court cases, no enforceable periods of limitation within which actions must be brought and no certainty for litigants. If an exception is to be made to any of these general rules, the reason for the exception should be clear and should be clearly explained. We often take the relatively smooth running of the courts for granted, and it will be seriously damaged if procedural rules are not enforced. In

this case, the procedural failings were significant. The Applicant delayed, without any adequate explanation, which explanation should have been supported by evidence on affidavit. He did not provide a copy of the order he sought to review, again without adequate explanation, and again with no affidavit as to the explanation that was offered.

7.2 As Baker J. concluded in *Cash*, where there is a discretion, courts are inclined to allow an applicant greater leeway if her liberty is at stake. This applies in cases where there is not only a potential custodial element for the applicant, but also where she has an arguable case on the substantive issue. If the case is a strong one, courts are slow to deny justice to an applicant who will otherwise lose her liberty due to a delay or a technical flaw in her proofs. There is no need for the same latitude in a case which involves less serious consequences, such as a fine or an award of compensation, or where the applicant's argument is spurious or even merely weak. In such a case, the policy imperatives of ensuring that court processes are certain and are applied in every case, reassert themselves and may easily override the minor injustice suffered in a case where an applicant must pay a fine or undergo some non-custodial penalty due to a late or inadequately supported application. Where the argument made is untenable, there is no injustice, minor or otherwise, and the procedural rule must be applied.

7.3 The factual position is important, therefore, in considering how to approach the delay and the technical deficiency in any case. It is only after a full consideration of the facts and the applicable law that the overall justice of the case can be determined. This Applicant's liberty is not at stake. His change of solicitor is put forward as the main event which caused the delay in applying for judicial review. This is combined with the former solicitor's personal difficulty and a change of advice which cannot assist the Applicant other than to correct a manifest injustice. A misunderstanding is advanced as the reason for his having failed to put the impugned order of the Circuit Court before this Court. While these reasons alone would not persuade a court to refuse relief if the Applicant had an otherwise meritorious claim, his substantive claim is extremely weak in respect of one offence and he has no case in respect of

the other. The penalties imposed in respect of both convictions are identical such that, in the unlikely event that he could succeed in relation to the first offence, he is bound to fail in respect of the second. There is no injustice caused by refusing to grant the application for certiorari on the preliminary grounds raised in the circumstances of the case; there is insufficient explanation for the procedural deficiencies in this case, either the delay or the failure to put the impugned order before the Court. The relief sought is refused on that basis, having considered the overall merits of the case.