THE HIGH COURT

[2024] IEHC 316

JUDICIAL REVIEW

RECORD NO. JR HJR 2024 359

BETWEEN

LINDA ROGERS

APPLICANT

V.

DPP, FINBARR THOMPSON, LORCAN COWEN, SONIA BUGGY, ADRIAN O'REILLY, ADRIAN KILDEA, DAVE FREEMAN, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, MINISTER FOR CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH OF IRELAND, NATIONAL DISABILITY AUTHORITY, THE SUPERIOR COURTS COMMITTEE, PRESIDENT OF THE HIGH COURT, THE COURTS SERVICE, DISTRICT JUDGE JOHN HUGHES, JUDICIAL CONDUCT COMMITTEE, IRISH HUMAN RIGHTS AND EQUALITY COMMISSION, GARDA OMBUDSMAN, GARDA SIOCHANA INSPECTORATE, THE OFFICE OF PUBLIC WORKS

RESPONDENTS

JUDGMENT of Ms. Justice Hyland delivered on 16 May 2024

Introduction

1. This is an application for leave to seek judicial review in relation to the conviction of the applicant in the District Court on 1 February 2024 for two public order offences, where she received a 3 month sentence, suspended for 2 years on specified conditions. She has appealed her conviction to the Circuit Court. The applicant is not legally represented.
2. The principles applicable to such an application are well established. The decision in *G v. DPP* [1994] 1 I.R. 374 indicates that an applicant's arguments must simply reach the threshold of arguability. That threshold has been discussed in the recent decision of the Supreme Court in *O'Doherty & Anor v Minister for Health & Ors* [2022] IESC 32, where the Court held as follows at paragraph 39:

> *"It is clear that the threshold of arguability in G. v. DPP is a relatively low bar, but, as Birmingham P. said in the Court of Appeal, it is not a non-existent threshold…. The threshold is a familiar one in the law. It is, in essence, the same test which arises when proceedings are sought to be struck out on the grounds that they are bound to fail, or the test that is normally required in order to seek an interlocutory injunction. It must be a case that has a prospect of success (otherwise it would not be an arguable case) but does not require more than that.*"

3. *G v. DPP* also requires that the Court should consider whether judicial review is the only effective remedy, or if there be an alternative remedy, that the application by way of judicial review is a more appropriate form of procedure. In this case, as identified above, an appeal against conviction has been brought in the Circuit Court. The principles that apply to an application for judicial review in the context of a criminal trial where there is an entitlement to an appeal, or an appeal in being, were articulated

in *Sweeney v. District Judge Brophy and the Director of Public Prosecutions* [1993] 2 I.R. 202. There, Hederman J observed as follows:

> *"In my judgment certiorari is an appropriate remedy to quash not only a conviction bad on its face or where a court or tribunal acts without or in excess of jurisdiction but also where it acts apparently within jurisdiction but where the proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law. I take this opportunity of emphasising that certiorari is not appropriate to a routine mishap which may befall any trial; the correct remedy in that circumstance is by way of appeal. However, if there is a breach of the fundamental tenets of constitutional justice in the hearing or failure to hear the evidence in the case the trial can properly be categorised as one that has not been held in due course of law and any conviction arising therefor should be quashed so as to entitle the defendant to plead autrefois acquit."*

4. In the case of *Sweeney v District Judge Fahy* [2014] IESC 50, McKechnie J. considered the same issue, noting as follows:

> *"68. The District Judge was thus faced with evidence which might be considered as inconsistent, if not conflicting …. The issue, which confronted the judge, and one which the appellant wishes to re-litigate in these proceedings, is therefore clearly "an assessment of evidence" issue. That being so, I am quite satisfied that judicial review is an inappropriate remedy to address any such grievance which the appellant may have in that regard.*
>
> *69. The case law fully supports this viewpoint. The High Court, when exercising its judicial review jurisdiction, is not a court of appeal, save as provided by statute, and should not lend this jurisdiction to second guessing the adequacy or sufficiency of the evidence given at trial: Murphy J. in Roche v. District Judge*

Martin [1993] I.L.R. M. 651 described the making of such a case "as virtually impossible". Nor should the Court minutely comb the evidence as given to test the conclusions reached: Truloc Ltd. v. District Judge Liam McMenamin and Donegal County Council (Notice Party) [1994] 1 I.L.R.M. 151…. See also Flynn v. District Judge Kirby (Unreported, High Court, 19th December, 2000, O'Higgins J.).

70. I respectfully agree with these decisions and would only add the observation that in rare cases, it may be possible to mount a judicial review challenge, even where an appeal may be an option, where the proceedings have been so fundamentally flawed as to breach an important tenet of natural or constitutional justice: Sweeney v. District Judge Brophy and Director of Public Prosecutions [1993] 2 I.R. 202. Nothing remotely of this kind has occurred in this case. In my view therefore, the appellant, having lodged a notice of appeal, should have pursued that remedy, and should not have embarked upon these proceeding."

Facts of the case

5. The applicant was charged with two offences – the first was that on 15 March 2023 at Store St. Garda station, she acted contrary to the provisions of S.6 of the Criminal Justice (Public Order) Act 1994 and, having been directed by Garda Cowen to leave immediately the vicinity of the place concerned in a peaceable and orderly manner, did without lawful authority or reasonable excuse fail to comply with the direction given by the member of the Garda Siochana. The second offence was that on 15 March 2023 at Store St. Garda station, the applicant used or engaged in threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being

reckless as to whether a breach of the peace might have been occasioned contrary to s. 6 of the Criminal Justice (Public Order) Act 1994 as amended.

6. At the hearing of the leave application the applicant accepted that she had been offered and accepted legal representation in the usual way but that she had dismissed her solicitor as they were, in her own words "ineffective and obstructionist".

7. The trial took place in the District Court over 3 days, being 29 January, 31 January, and 1 February. The applicant received a term of imprisonment of three months, suspended on the following conditions:

    - good behaviour
    - that she not commit any offence,
    - report to probation within 48 hours and attend all appointments,
    - attend a course of psychotherapy and a course of education,
    - not to attend or loiter outside Store St Garda station save in emergency or with written permission of the superintendent;
    - no contact, direct or indirect including electronic means, with specified members of the Gardai.

8. The applicant appealed this decision to the Circuit Court. An order for disclosure has been made by Judge Dunphy. It is listed for mention in the Circuit Court on 4 July. The applicant filed papers seeking leave to apply for judicial review on 11 March 2024. The application for leave came before me on the usual *ex parte* basis on 13 May.

Arguments of the applicant

9. In the applicant's Statement of Grounds, she has sought 289 different reliefs from the court. Unfortunately, there is a great deal of repetition in those reliefs, and many of them are not reliefs known in law. Nonetheless, I have tried to extract from the

multiplicity of reliefs the core reliefs and the grounds upon which those reliefs are based upon.

10. As identified above, the applicant is seeking to quash the decision to convict her and seeks to have the matter remitted for rehearing in the district court. She also seeks a stay on her Circuit Court appeal until the outcome of the judicial review. Her many other reliefs disclose the following complaints.
11. She identifies that on 29 March 2023, Judge Smith of the District Court made a disclosure order to seek and preserve evidence in this case. She indicates that she submitted photos of the location of 8 CCTV cameras inside and outside Store St. Garda station and sought footage from those cameras for 15 March 2023 both before and after her arrest. She says she only received footage from 1 CCTV camera out of 9 such cameras and that the CCTV footage that she was provided with was cut from 60 minutes to 6 minutes.
12. She argues that there was a failure to comply with the order of 29 March and no full disclosure. She identifies 26 questions that she says require to be answered in relation to the CCTV footage (paragraph 43 of her Statement of Grounds).
13. She argues that she is entitled to 8 sworn statements in writing from 8 different identified members of An Garda Siochana and that she wishes such statements to build a defence (paragraph 56 of her Statement of Grounds). She seeks a précis of evidence at the criminal trial from the same 8 Gardai. She seeks a copy of sworn information in writing from Gardai Cowan.
14. She seeks an order of mandamus requiring witnesses to attend for cross examination, being the same 8 Gardai.
15. She seeks missing pages of a custody report including. She seeks an order of mandamus requiring the disclosure of grounds as to why various Gardai failed to provide material

evidence that she identifies at paragraph 84. She said she ought to have been provided with material evidence and was not so provided.

16. She argues that her right to a fair trial under Article 6 of the ECHR has been undermined.

17. She argues that the District Judge who heard her case was biased, prejudiced, interrupted her, breached her rights, acted *mala fides*, and breached the Bangalore principles of judicial conduct. She argues that she ought to have been entitled to her emotional support person and/or her Mackenzie friend sitting beside her and that this was not permitted. She says that the judge impermissibly restricted her right to cross examination by placing restrictions on the questions she could ask and the time she had to ask them. She complains of only being given 2 hours to cross-examine Garda Cowen. She alleges that the District Judge repeatedly directed her to move on with the next question and said that if she didn't move on, he was going to end the cross examination and move to the next witness. She alleges that he failed to organise the attendance of witnesses for her defence and failed to provide adequate time and facilities for the preparation of her defence and failed to serve a witness summons to Garda Thompson but issued a summons for Peace Commissioner Patricia Loughman.

18. She complained of her criminal trial not being run with 2 other persons, Mr Carl Fallon and Mr Pavels Konosonok, both of whom were arrested at the same time as her.

19. The applicant identifies herself as a person with a disability and carries a JAM card. She argues that she was not provided with a disability access officer and that the Judge failed to allow a disability access officer to be present in court. She also complains of the absence of a disability access officer in the CCJ and in Store St. Garda station. She refers to the Disability Act 2005, relying upon s. 26 of same.

20. She complains about the conditions that were imposed on her suspended sentence as identified above, arguing *inter alia* that the obligation to attend probation within 48 hours was disproportionate.

21. She relies upon various case law including *Stirling v District Court Judge Collins* [2014] IESC 13, *Dunnes v DPP* [2002] IR, *Braddish v Director of Public Prosecutions* [2001] IESC 45 and *McHugh v Director of Public Prosecutions* [2009] IESC 15. The last of these cases concerned a charge of stealing from a Lidl store. The accused had been identified only after Gardai and staff reviewed CCTV footage. That footage was no longer available. The Gardai propose to give identification evidence by reference to the now non-existence CCTV footage and by proffering some still photographs preserved from the CCTV for dig. The court reviewed the photographs and decided they did not commit any conclusion to be reached as to whether not the accused has engaged in the activity alleged. The Supreme Court therefore upheld the High Court's decision to prohibit the trial. The applicant also refers to the decision in *O'Donoghue v. DPP* [2024] IECA 74. This is an important case in the context of this application and I consider it below.

Complaints in respect of evidence

22. A significant proportion of the applicant's complaints relate to the alleged inadequacy of evidence before the District Court including the lack of CCTV footage, the lack of sworn statements, the fact that she was not permitted to cross examine the Gardai to her satisfaction (although in fact as identified below she had an opportunity to cross examine some Gardai extensively) and the lack of identified material such as a full copy of the custody report. All of these complaints can and should be dealt with in the context of her appeal to the Circuit Court. It is notable in this case that there are no conflicting allegations as to what happened. Nowhere does the applicant identify her version of

events or contend that the behaviour that was the subject of the conviction did not happen. Nor is this a case where there was either no evidence, or meagre evidence, aside from the evidence that is said to be missing. In cases such as *Stirling, McDonogh*, and *McHugh*, the CCTV evidence was critically important in linking the accused to the crime. But here the offence took place in the Garda station. There is no uncertainty about the identity of the applicant.

23. However, more significantly, all of the applicant's complaints about evidence can be addressed in the course of her Circuit Court appeal, as per the observations in *Sweeney*, cited above. Indeed, that fact is amply demonstrated by one of the cases cited by the applicant, *O'Donoghue v DPP*. That was an appeal to the Court of Appeal from a conviction in the Circuit Court, where the appellant successfully quashed his conviction on the basis of a complaint regarding the failure of the trial judge to direct an acquittal. Burns J. held it was an established duty of Gardai to seek out and preserve CCTV. She said that highly relevant CCTV had been available to the Gardai which they were aware of, yet had not harvested. There had been conflicting allegations by the respective parties in the case and therefore there was an onus on Gardai to acquire the CCTV from the outset. In the circumstances the conviction was quashed. The decision in *O'Donoghue* makes it manifest that any complaints that the applicant has about the quality of evidence available to her can be dealt with in the context of her appeal to the Circuit Court. Judicial review is therefore not the appropriate way to deal with complaints about evidence, or the lack of same.

Conduct of the trial

24. In relation to the allegedly unfair treatment of her by the trial judge in the conduct of the trial, the evidence disclosed by the applicant does not identify even an arguable basis for asserting that, in the words of McKechnie J., the proceedings have been so

fundamentally flawed as to breach an important tenet of natural or constitutional justice and thus are appropriate to be heard by way of judicial review rather than the usual route of an appeal against the decision of the District Court.

25. Indeed, the facts as disclosed by the applicant indicate quite the opposite. She was charged with two public order offences and, following conviction, she received a 3 month sentence, suspended for 2 years on conditions. Despite the relatively minor nature of the offences and sentence, the case was heard over three days in the District Court. Indeed, the latitude which she was afforded is demonstrated inter alia, by her complaint in the Statement of Grounds that she was only allowed two hours to cross examine Garda Cowen. She says she had 16 pages of questions and had only asked 3 pages in two hours. On that basis, had she been entitled to complete her pages of questions, she would have had roughly another 10 hours. In other words, she was proposing to cross examine just one Gardai for 3 days.

26. It is well established that a trial judge is entitled to control the trial process as per the decision of Charleton J. in *Talbot v. Hermitage Golf Club* [2014] IESC 57. In that case, Charleton J. observed as follows:

> *"Among the unenumerated rights in Article 40.3 of the Constitution is the right to have access to the courts for the purpose of litigation. This was described by the Supreme Court in Tuohy v Courtney [1994] 3 IR 1 at 45 as "the right to achieve by action in the courts the appropriate remedy upon proof of an actionable wrong causing damage or loss as recognised by law." The resources of the courts are there for litigants. Those resources are not, however, unlimited. No litigant is entitled to more than what is reasonably and necessarily required for the just disposal of a case within the context of the other demands on court time. Whether it is an unrepresented litigant or not, the resources which the*

courts decide to assign to a case must depend upon: the importance of the legal issues involved; the gravity of the wrong allegedly suffered by the moving or counterclaiming party; the monetary sum involved; and the public interest in the outcome of the case. Courts are entitled, and indeed are required, to foster their resources."

27. Those comments were made in the context of civil proceedings. However, the underlying principle applies in all proceedings, including criminal trials. Judges are entitled to control the process, including directing unrepresented defendants as to the questions that may be asked and setting reasonable time limits for cross-examination of a prosecution witness by an unrepresented defendant. The applicant's primary complaint about the trial judge appears to be that he sought to control her cross examination of prosecution witnesses and to move the trial along. She criticises him for repeatedly directing her to move on with the next question and for indicating that if she did not move on, he was going to end the cross examination and move to the next witness. But these are the normal actions of a judge seeking to manage a trial, particularly where a litigant has chosen to be unrepresented despite having been assigned a solicitor, and who therefore requires assistance in the conduct of her defence. In those circumstances, the argument that the trial judge acted in breach of law by controlling the trial and asking her to move along with the trial does not disclose – even judged by the low threshold of arguability – a fundamental breach of fair procedures. Equally, I do not consider the applicant has established arguable grounds that such actions are *prima facie* evidence of bias, prejudice, breach of the Bangalore principles etc.

28. Similarly, a decision by the trial judge to regulate the conduct of the trial by giving directions in relation to McKenzie friends or emotional support persons cannot be

treated as arguably demonstrating a fundamentally flawed approach. Again, directions on such matters are well within the range of actions that a trial judge might legitimately take to control the trial process.

29. In summary, in order for her Circuit appeal not to be an adequate remedy, the applicant would have to persuade me that her trial was so unfair that she should be allowed to judicially review the conviction rather than proceeding with her appeal. None of the material she has put before the Court, or her oral submissions at the leave hearing, have so persuaded me.

Disability Access Officer

30. At the hearing of the leave application, I asked the applicant what she contended the Judge and/or the CCJ and/or the Store St. Gardai were obliged to do under the Disability Act 2005. She argued that a disability officer has to be on the premises and from her pleadings, she is clearly making the case that there was an obligation for an officer to individually assist her both at Store St Garda station and at the hearing before the District Court (in fact she pleads that she was entitled to such assistance post-trial). The applicant did not open the Act as part of her leave application but because she is unrepresented I have identified the relevant section that she relies upon. That is s.26 and it provides in relevant part as follows:

> *(1)* "*Where a service is provided by a public body, the head of the body shall—*
>
> *(a) where practicable and appropriate, ensure that the provision of access to the service by persons with and persons without disabilities is integrated,*

(b) where practicable and appropriate, provide for assistance, if requested, to persons with disabilities in accessing the service if the head is satisfied that such provision is necessary in order to ensure compliance with paragraph (a), and

(c) where appropriate, ensure the availability of persons with appropriate expertise and skills to give advice to the body about the means of ensuring that the service provided by the body is accessible to persons with disabilities.

(2) Each head of a public body referred to in subsection (1) shall authorise at least one of his or her officers (referred to in this Act as "access officers") to provide or arrange for and co-ordinate the provision of assistance and guidance to persons with disabilities in accessing its services."

31. The applicant's claim is that the law was breached because she sought the assistance of an access officer while she was in Store St. Garda station and because the District Judge failed or refused to provide a disability access officer at the criminal trial post-trial stage (see paragraph 22 of the her Statement of Grounds). However, she has not in my view identified an arguable ground that there was a breach of law justifying a quashing of her conviction on the basis that she was entitled to the assistance of an access officer while in Store St. Garda station or post-trial before the District Judge or in the CCJ. First, she does not explain how the absence of an access officer in Store St. Garda station goes to the legality of her arrest or charge or how the absence of an access officer in the CCJ or post-trial could affect the legality of her conviction. She offers no justification for the proposition that breach of a statutory obligation by a public body – if same were established - could undermine the legality of her conviction. Furthermore

– and separately - the wording of s.26 does not in my view support, even to the standard of arguability, a contention that an accused person is entitled to individual assistance by an access officer in their prosecution, or that a person is so entitled in the context of an arrest and charge by the Gardai.

Suspended sentence

32. The applicant has identified no case law in support of her contention that judicial review is the appropriate way to challenge the conditions upon which her sentence is suspended in the circumstances of her case. She is not challenging the legislation pursuant to which conditions were imposed. Rather she is challenging the specific orders made, arguing they are not appropriate to her own factual situation. That seems to me a matter particularly suitable to an appeal.

Conclusion

33. In conclusion, I have decided to refuse the applicant leave to seek judicial review on the basis set out in this judgment: that insofar as the applicant makes complaints that are known to law, those complaints are more appropriately ventilated in the context of her appeal against conviction. None of the grounds identified by her demonstrate, even to the low standard of arguability, that the proceedings in the District Court were so fundamentally flawed as to deprive her of a trial in due course of law.
34. The applicant requested that this matter be put in for mention after delivery of the judgment. In fact, no submissions are required from the applicant either in respect of costs or the form of the order, since I am simply refusing leave to seek judicial review and propose to make no order as to costs. However, in ease of the applicant, I will put this matter in for mention on the next available judicial review date being **4 June 2024**.