Neutral Citation No: [2013] NIQB 4 | *Ref:* **COG8726**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **24/01/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Director of Public Prosecutions Application [2013] NIQB 4

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY THE DIRECTOR OF PUBLIC PROSECUTIONS

DIVISIONAL COURT

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

Coghlin LJ (delivering the judgment of the court)

[I] This is an application by the Director of Public Prosecutions ("DPP") for leave to apply for judicial review of a decision by District Judge (MC) Kelly ("the respondent"), sitting at Omagh Magistrates' Court, whereby she dismissed a charge of careless driving brought against Mary McVeigh (the "notice party") on the grounds there was no case to answer. The DPP claims that this decision was irrational as it was taken by the respondent prior to the end of the prosecution case coupled with a refusal to permit the prosecutor to call further witnesses. Mr David McAlister appeared on behalf of the applicant while the respondent was represented by Mr Mark Robinson and the notice party was represented by Mr Rory Fee. The court is grateful for the assistance that it has derived from the well prepared and helpful oral and written submissions of counsel. With the benefit of counsels' submissions and oral argument we decided to grant leave and proceeded to hear the substance of the matter.

Background facts

[2] On 1 November 2011 Catherine Barrett ("the injured party") was driving back to work along the Corradina Road, Omagh after her lunch-break. As she turned

right into the entrance to her employer's premises her car was struck by the notice party who was attempting to overtake her vehicle. The car driven by the notice party then proceeded into the yard and collided with a stationary lorry driven by a Mr Thompson.

[3] The notice party was summonsed to appear at Omagh Magistrates' Court charged with driving without due care and attention contrary to Article 12 of the Road Traffic (NI) Order 1995. The notice party pleaded not guilty to the charge and the case was listed for a contested hearing on 24 April 2012. The injured party attended court on that date to give evidence on behalf of the prosecution. The prosecution evidence also included a police sketch, photographs and a police statement all of which appear to have been agreed by the prosecution and defence prior to the hearing. Mr Thompson also attended court. Mr Thompson had been sitting in the cab of his lorry parked in the yard into which the injured party intended to turn. He had been approached by an elderly man and a young boy who were interested in the lorry. In a statement taken by the police prior to the hearing Mr Thompson said that he had seen the injured party turning into the yard.

[4] At the hearing the injured party was cross examined as to whether she had checked her mirrors before attempting the right turn manoeuvre and also whether she had signalled with her indicator she was about to turn right. The cross examination included the suggestion that she had indicated her intention to make a left rather than a right turn. Following completion of the injured party's evidence and cross examination, the respondent appears to have made a number of findings of fact including;

Prior to the accident the injured party had no sense of the presence of the other vehicle on the road;

The injured party had not checked in her mirrors before starting to turn;

The injured party had not observed the other vehicle "quite a distance behind her" prior to starting her turn because that did not "correlate" with the fact of impact or the relative position of the vehicles at the point of collision.

It appears that, in such circumstances, the respondent had difficulty in accepting that the injured party had definitely applied her indicator, as she had stated in evidence, and, in the absence of any reference to an indicator in Mr Thompson's police statement, the respondent arrived at a "finding of fact" that she had not employed her indicator at all.

[5] The respondent then inquired as to whether the prosecutor intended to call any further evidence and he indicated that he intended to call Mr Thompson. At this point defence counsel stated that he agreed the police statement of Mr Thompson and permitted it to be placed before and read by the District Judge as evidence. On

the face of it this statement was silent on whether the injured party had signalled to turn right or whether she had made any specific checks of the road to the rear of her vehicle. The respondent then seems to have made further findings of fact that Mr Thompson could not assist as to whether the injured party had made any checks prior to turning right and that the notice party had been "established in an overtaking position" prior to the injured party turning right. The respondent then proceeded to dismiss the charge on the ground that there was no case to answer as she was of the opinion that the injured party had made a right turn without signalling when the notice party was established in an overtaking manoeuvre.

[6] In her affidavit sworn in these proceedings the respondent agreed that, after dismissing the charge, she expressed the view that the case was "more properly a matter for the Civil Court" explaining that she did so in an attempt "to soften the impact of the dismissal" and she accepted that she said that she was "somewhat surprised" that both drivers were not prosecuted. However the respondent is adamant that neither of these views played any part in her decision to dismiss the criminal charge. At paragraph 9 of her affidavit the respondent observed that:

> "Whilst in retrospect it may have been potentially more procedurally fairer (sic) to have heard oral evidence from Mr Thompson and have him cross examined, I am of the view that from the statement agreed by the parties from Mr Thompson he could not give any further evidence as to how the actual accident had occurred and therefore I dismissed the charges."

The grounds

[7] The grounds for judicial review of the impugned decision by the respondent contained in the Order 53 statement include:

That the refusal to allow the applicant to call Mr Thompson was contrary to natural justice;

That the refusal was unlawful and rendered the trial unfair;

That the refusal was irrational and perverse in the circumstances;

That the respondent took into account irrelevant considerations and

That the respondent failed to properly take into account the interests of the public and the injured party.

The relevant statutory framework.

[8] Section 1 of the Criminal Justice (Miscellaneous Provisions) Act 1968 as amended provides as follows;

> "(1) In any criminal proceedings to which this section applies, a written statement by any person shall, if such of the conditions mentioned in subsection (2) as are applicable are satisfied, be admissible as evidence to the like extent as oral evidence to the like effect by that person.
>
> (2) Subject to subsection (3), the said conditions are-
>
> (a) the statement shall purport to be signed by the person who made it;
>
> (b) the statement shall contain a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully said in it anything which he knew to be false or did not believe to be true;
>
> (c) not less than fourteen days before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and
>
> (d) none of the other parties or their solicitors, within seven days from the service of the copy of the statement, serves a notice on the party so proposing objecting to the statement being tendered in evidence under this section.
>
> (3) The conditions mentioned in subsection (2)(c) and (d) shall not apply if the parties agree before or during the hearing that the statement shall be tendered in evidence under this section.

(4) The following provisions shall also have effect in relation to any statement tendered in evidence under this section, namely-

(a) if the statement is made by a person under the age of eighteen years, his age shall be set forth in the statement;

(b) if it is made by a person who cannot read, it shall be read to him before he signs it and shall be accompanied by a declaration by the person who so read the statement to the effect that it was so read and that after it was so read the maker of the statement assented to it;

(c) if it refers to any other document as an exhibit, the copy served on any other party to the proceedings under subsection (2)(c) shall be accompanied by a copy of that other document or, if it is not possible to make a copy of that other document or if an exhibit other than a document is referred to in the statement, a copy of the statement served under subsection (2)(c) shall be accompanied by a notice of the time and place when the exhibit may be examined by that other party and his solicitor and any expert witness whom the party may wish to call at the trial to give evidence relating to the exhibit, or by any one or more of those persons.

(5) Notwithstanding that a written statement made by any person may be admissible as evidence under this section-

(a) the party by whom or on whose behalf a copy of the statement was served may call that person to give evidence (*Our emphasis*); and

(b) the court may, of its own motion or on the application (which application may be made before or during the hearing) of any party to the proceedings, require that person to attend before the court and give oral evidence.

(6) So much of any statement as is admitted in evidence under this section shall, unless the court otherwise directs, be read aloud at the hearing and, where the court so directs, an account shall be given orally of so much of any statement as is not read aloud.

(7) Any document or object referred to as an exhibit and identified in a written statement tendered in evidence under this section shall be treated as if it had been produced as an exhibit and identified in court, or identified, as the case may be, by the maker of the statement.

(8) Subject to section 1A and notwithstanding section 24 of the Interpretation Act (Northern Ireland) 1954, a document required by this section to be served on any person may be served-

(a) by delivering it to him or to his solicitor; or

(b) by addressing it to him and leaving it at his usual or last known place of abode or place of business or by addressing it to his solicitor and leaving it at his office; or

(c) by sending it in a registered letter or by the recorded delivery service addressed to him at his usual or last known place of abode or place of business or addressed to his solicitor at his office; or

(d) in the case of a body corporate, by delivering it to the secretary or clerk of the body at its registered or principal office or sending it in a registered letter or by the recorded delivery service addressed to the secretary or clerk of that body at that office; and in this paragraph references to the secretary, in relation to a limited liability partnership, are to any designated member of the limited liability partnership…

(9) This section shall apply to every criminal proceeding other than a preliminary investigation of

> an indictable offence conducted under the Magistrates' Courts (Northern Ireland) Order 1981."

[9] Article 22 of the Magistrates' Courts (Northern Ireland) Order 1981 (the "1981 Order") provides as follows:

> "22 (1) Where the accused appears or is represented at the hearing of a complaint charging a summary offence, the court shall state the substance of the complaint and ask whether the accused pleads guilty or not guilty.
>
> (2) The court may, after hearing the evidence and such representations, if any, as may be made to it on behalf of the parties, convict the accused or dismiss the complaint.
>
> (3) If the accused or his representative on his behalf informs the court that he pleads guilty, the court may convict him without hearing the evidence."

Discussion

[10] While Mr Thompson's police statement did not refer specifically to whether the notice party had indicated to turn right, he may not have been asked about that by the police when his statement was being taken. He certainly said that he saw the injured party turning into the yard and from his elevated position in the cab he might well have been able to assist. He told the police officer who attended at the scene that "...he believed the red Mini was turning right and that it was nearly in .." when the collision occurred. Mr Thompson was clearly able to comment on the speed and position of both respective vehicles a short time prior to the collision. His assessment was that the vehicle driven by the injured party had been some "80 yards back" and travelling "too hard" when the notice party began her turn. However, despite such material, the respondent has averred in her affidavit that "I am of the view that from the statement agreed by the parties from Mr Thompson he could not give any further evidence as to how the actual accident occurred and therefore I dismissed the charges."

[11] Unfortunately the respondent's attention does not seem to have been drawn to the provisions of section 1(5) of the 1968 Act or Article 22 of the 1981 Order by either legal representative. Clearly that legislation ought to have been taken into account. As Lowry LCJ recorded in R v Secretary of State for N.I. ex parte Wilson and McAllister (December 1983) in a defended case for the court to deny itself the advantage of hearing the oral evidence of the prosecution witnesses could turn out to be "..a most serious omission in the quest for a just outcome of the proceedings."

In Long (Superintendent RUC) v SOYE [1992] 4 NIJB 10 MacDermott LJ giving the judgment of this court observed:

> "Indeed Article 22(2) re-emphasises the elementary proposition that it is after hearing the evidence and any representations that the Court may convict the accused or dismiss the complaint."

[12] The affidavits filed disclose some difference of opinion as to the facts and observations that occurred during the hearing but we find it very difficult to understand how the respondent purported to fairly and objectively arrive at her findings of fact without hearing from Mr Thompson given the contents of his police statement. In particular we simply cannot reconcile her finding, expressed at paragraph 6 of her affidavit, that the "…alleged injured party had turned right into the Defendant's vehicle, which had already been established in an overtaking position prior to the commencement of the right hand manoeuvre, without any warning" with Mr Thompson's estimate that the vehicle was some 80 yards back when the turn to the right began. With regard to that apparent conflict alone fairness demanded that Mr Thompson's oral evidence should have been heard. The entitlement of both prosecution and defence to enjoy a fair opportunity to address all the relevant issues and materials is a fundamental principle of the adversarial process and the rule of law.

Delay

[13] The hearing before the district judge took place on the 24 April 2012 but the Notice of Motion and Order 53 statement were not lodged until 19 June 2012, some 8 weeks later. It does not appear that the letter before application required by the pre-action protocol was sent although the papers were forwarded to the respondent on the 19 June and, on the same date, a letter was written to the notice party solicitors informing them of the proceedings. The court was informed by Mr McAlister that the reason for not utilising a pre-action protocol letter was because the respondent, having delivered her decision was, by that stage *functus officio*.

[14] While the provisions of Order 53 rule 4(1) provide for judicial review applications to be made "…in any event within three months from the date when the grounds for the application first arose…" the authorities in this jurisdiction have repeatedly emphasised the importance of making an application, as the rule requires, *promptly* once time starts to run – see Re Shearer's Application [1993] NIJB 12 and Re McCabe's Application [1994] NIJB 27. In Re McHenry's Application [2007] NIQB 22 Gillen J observed at paragraph (3) of his judgment:

> "(3) For the removal of doubt, I make it clear that an application for judicial review must not only be made promptly, but even where an application is made

> within three months it may still be rejected where, for example, finality is important (see R v Bath Council ex parte Crombie [1995] COD 283)"

In the same case Gillen J approved the criteria applied by Kay J in R v Secretary of State for Trade and Industry ex parte Greenpeace Ltd [2000] Enb LR 221 which were:

> "(1) Is there reasonable objective excuse for applying late?
>
> (2) What, if any, is the damage in terms of hardship or prejudice to third party rights and detriment to good administration, which would be occasioned if permission were now granted?
>
> (3) In any event, does the public interest require that the application should be permitted to proceed?"

[15] The court has not been given any reason for the delay of 8 weeks in applying for judicial review in this case. Paragraph 13 of the affidavit sworn by the original prosecutor confirms that, at the conclusion of the hearing, both Mrs Barrett and the investigating police officer had expressed, respectively, upset and concern about the decision of the respondent. In the course of considering a potential judicial review of a judicial body the interests of the individuals concerned and the general public may sometimes be somewhat neglected. Both have a very real interest in the finality of litigation. In this case we have been provided with a medical report that indicates the notice party to be a rather vulnerable individual for whom it would be particularly important to bring this matter to a timely conclusion. While we fully accept that the applicant has not been responsible for much of the subsequent delay, in the circumstances of this case we do have concerns about the delay in instituting the application.

[16] However, in the circumstances, we are satisfied, for the reasons given, that this is a decision that must be quashed. We will make an order of certiorari accordingly and direct that the case be remitted to a different District Judge for hearing.