Neutral citation No: [2010] IEHC 233

THE HIGH COURT

2009 2072 SS

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857, AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR/APPELLANT

AND

BERNARD EGAN

RESPONDENT

JUDGMENT of Kearns P. delivered the 11th day of June 2010

This is an appeal by way of consultative case stated by District Judge John O'Neill pursuant to s. 2 of the Summary Jurisdiction Act 1857 as extended by s.51 of the Courts (Supplemental Provisions) Act 1961 arising out of the prosecution of the accused on a charge of drunken driving contrary to s.49(3)(a) and (6)(a) of the Road Traffic Act 1961, as inserted by s.10 of the Road Traffic Act 1994 as amended by s.18 of the Road Traffic Act 2006.

FACTUAL BACKGROUND

The facts which led to the prosecution of the respondent are set out by District Judge O'Neill at paragraph 3 of the case stated. In summary, a mandatory alcohol testing checkpoint was set up on Whitehall Road West, Dublin, on the night of the 2nd December, 2007, pursuant to an authorisation from Inspector Reynolds of Terenure Garda Station. The respondent was stopped at the checkpoint and was requested to provide a sample of his breath to be tested for alcohol, in accordance with s. 4(4) of the Road Traffic Act 2006. He complied with but failed the test and was arrested by the garda manning the checkpoint, Garda Kelly. The respondent was then conveyed to Crumlin Garda Station and a doctor, Dr. Lone, was called. When Dr. Lone arrived at the station he met with the respondent and with Garda Kelly. The respondent was told by Garda Kelly that he was being required to permit Dr. Lone to take from him a blood or urine sample, at his option, under s. 13(1)(b) of the Road Traffic Act 1994, as substituted by s.1 of the Road Traffic and Transport Act 2006. Garda Kelly indicated to him that if he failed or refused to comply with that requirement that he would be guilty of an offence under s. 13(3) of the Road Traffic Act 1994 as substituted by s.1(b)(ii) of the Road Traffic and Transport Act 2006, as amended by s. 18 of the Road Traffic Act 2006 and he outlined the penalties for this offence to him. The respondent chose to provide a specimen of urine. This sample was sent to the Medical Bureau of Road Safety ("MBRS") for testing. A summons was issued against the respondent on the 11th February, 2008, in respect of offences contrary to s.49(3) and (6)(a) of the Road Traffic Act 1961, as inserted by s.10 of the Road Traffic Act 1994, as amended by s.18 of the Road Traffic Act 2006. The summons stated inter alia that the concentration of alcohol in the respondent's urine exceeded a concentration of 107 milligrammes of alcohol per 100 millilitres of urine, the legal limit.

The prosecution took place at District Court 54, Richmond Hospital, Dublin, on the 5th March, 2009. There, the prosecutor was represented by Mr. Declan Keating, solicitor, and the accused was represented by Mr. counsel instructed by Mr. Kevin Tunney, solicitor. Garda Kelly and Dr. Lone gave evidence for the prosecution. The evidence given by Garda Kelly as to the provision by the respondent of a sample of blood or urine is set out in subparagraph (d) of paragraph 3 of the case stated as follows:-

> *"(d) At 22.36pm, Dr Lone arrived at the station. The accused was conveyed to the doctor's room and Garda Kelly introduced him to Dr Lone. Under Section 13(1)(b), Garda Kelly informed the accused that he was now being required under Section 13 (1)(b) of the Road Traffic Act 1961-2006 (as amended) to permit Dr Lone, a designated doctor, to take from him a specimen of blood or urine, at his option. He also informed him that if he failed or refused to comply with the requirement, he would be guilty of an offence under Section 13 (3) of the Road Traffic Act 1961-2006, as amended and would be liable on summary conviction to a term of imprisonment not exceeding six months or to a fine not exceeding €5,000 or to both. The accused opted to give a sample of urine. Garda Kelly handed in the Section 18 Doctor's form as evidence to the Court. A copy of the Section 18 form, which forms part of this case stated, is attached at Annex 3. Garda Kelly said he had received the certificate from the Medical Bureau of Road Safety relating to the sample provided by the accused, certifying that the specimen on analysis contained a concentration of 351 milligrams of alcohol per 100 millilitres of urine. The Section 19 certificate from the MBRS was submitted by Garda Kelly in evidence and a copy, which forms part of this case stated, is attached at Annex 4."*

The evidence of Dr. Lone, which was accepted by District Judge O'Neill, follows at subparagraphs (e) and (f) of paragraph 3:-

> *"(e) … He [Dr. Lone] confirmed he was the Designated Doctor for the purposes of the Act and that he was called to the station to take a sample from the accused. He took a urine sample from the accused. The sample was divided into two parts. Each part was put into a bottle from the Medical Bureau of Road Safety (MBRS) blood kit. Dr Lone put a lid on both bottles and he put a plastic strip over the bottles. Using the plastic strip, he sealed the bottles and he wrote details on the stickers. Using the red seal provided, he sealed the bottles. The bottles were put into the containers from the MBRS blood kit. Dr Lone accepted that he did not label the container but he did label the glass bottles. Dr Lone completed the Doctor's form as prescribed under Section 18 of the 1994 Act, with the name and address of the accused. He filled out the details on the form and then signed it. Dr Lone handed the Garda the two containers in the presence of the accused. Dr. Lone confirmed that he was completely satisfied that the sample referred to in the MBRS certificate was the same sample as that taken from the accused.*
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> *(f) Mr. Staunton BL cross-examined Dr. Lone as regards the steps taken under Section 18 of the 1994 Act. Dr. Lone outlined the steps taken as above and accepted that he failed to label and/or seal the outer container with any details relating to the accused. He further accepted that he could not offer an explanation or reason for failing to do this. Dr. Lone also confirmed that he had referred to contemporaneous notes, made on the night, during his direct evidence. Having sought permission from the court to view the notes, Mr. Staunton questioned Dr. Lone as to when they had in fact been made. Dr. Lone stated he had made the notes on the night he had been called to*

the station and that he was referring to a carbon copy under sheet of his original notes. He stated that he furnished Garda Kelly with the original top copy. Dr. Lone could not explain how the serial number of the MBRS labels from the urine kit had been written onto the carbon copy under sheet, distinctly, with a biro. He accepted that the notation of the serial number was not contemporaneous to the night in question. He stated that he could not recall when the details of the serial number had been recorded on the carbon copy under sheet."

At the close of the prosecution case counsel for the respondent applied for a direction in favour of his client. He submitted, in the first place, that no evidence of compliance with the procedure set forth in s.18 of the Road Traffic Act 1994 had been adduced i.e. evidence of the procedures to be followed with the urine specimen after it has been provided by an accused. He relied on a passage from De Blacam Drunken Driving and the Law, 3rd Ed. (Dublin, 2003) which deals with the case of McCarron v. Groarke (Unreported, High Court, Kelly J., 4th April, 2000). He argued that there was a breach of the procedure contained in s.18 of the Act of 1994, in that there was a direct conflict between the details on the form completed by the designated doctor under s.18 of the Act of 1994 (which stated that the two containers had been labelled with the name of the person and the date) and the certificate issued by the MBRS pursuant to s.19 of Act 1994 (which stated that there was no name on the container) and he referred to the case of Director of Public Prosecutions v. Croom-Carroll [1999] 4 I.R. 126 in this regard, arguing that this conflict defeated the statutory presumption of regularity. He contended that Dr. Lone had not complied with the statutory procedures nor satisfactorily explained why he did not put the name on the container.

Mr. Keating, for the appellant, denied that he was required to lead evidence in relation to compliance with the procedures set out in s.18 of the Act of 1994 and he argued that he was entitled to rely on the presumption contained in s.18(4) of the Act of 1994. He noted that Garda Kelly had not been cross-examined regarding s.18 of the Act of 1994 and he contended that the situation would have been different had this occurred. He pointed out that this had occurred in the McCarron case. As to the second submission he stated that where the presumption set out in s.19 of the Act of 1994 is rebutted, the Croom-Carroll case established that the prosecution was permitted to provide an explanation.

District Judge O'Neill asked for the prosecution to respond again in relation to the second submission made on behalf of the respondent. Counsel, relying on an extract from the judgment of O'Neill J. in Weir v. Director of Public Prosecutions [2008] I.E.H.C. 268 submitted that it was not correct to say that a garda had to be cross-examined in circumstances where no evidence in relation to the mandatory alcohol testing authorisation had been produced. Mr. Keating, in reply, stated that the Weir case was not relevant as there was no presumption in the legislation regarding mandatory alcohol testing. He referred to McCarron again and submitted that in that case the garda was cross-examined by the defence, which rebutted the presumption.

At paragraph 7 of the case stated District Judge O'Neill indicated that he did not give a ruling on the respondent's second submission. He found as a fact, as stated in paragraph 8 of the case stated, that s.18 of the Act of 1994 had not been complied with and that at no stage in his evidence did Garda Kelly refer to s.18 of the Act of 1994. He held that he could not be satisfied that the proper procedures under s.18 were complied with and went on, for this reason, to dismiss the drunken driving charge against the respondent.

At the request of the appellant, District Judge O'Neill stated the following question for the opinion of this Court:-

"I. Having found as a fact that the Prosecution failed to satisfy me that Section 18 was complied with, was I correct in law in dismissing the charge?"

THE APPELLANT'S CASE

Ms. Brennan B.L., for the appellant, submitted that there is a clear statutory presumption contained in s.18(4) of the Act of 1994 that the procedures contained in s.18 shall be presumed to have been complied with "unless the contrary is shown" and, she contended, the contrary had not been shown in the instant case. She pointed out that Garda Kelly was not cross-examined in respect of the evidence he gave relating to s.18 of the Act of 1994 and that no evidence had been adduced by the accused to demonstrate that the procedures in s.18 of the Act of 1994 had not been complied with. In her submission it was not open to the District Judge to dismiss the prosecution on this ground unless there was actual evidence before him of non-compliance with that section.

Ms. Brennan referred to several authorities dealing with the effect of statutory presumptions in the context of drunken driving cases which, in her submission, demonstrated that the prosecution did not have to lead evidence of compliance with a statutory presumption and that it is for the defence to prove the issue of non-compliance either through cross-examination or through direct evidence. She noted the dicta of O'Higgins C.J. in The State (Murphy) v. Johnston [1983] I.R. 235, describing the effect of the statutory presumption introduced by s. 23(1) and (2) of the Road Traffic (Amendment) Act 1978. She submitted that the decision was authority for the proposition that a form completed by a medical practitioner and a certificate issued by the MBRS, were in themselves, without any other evidence, sufficient evidence of the matters therein. She noted that this decision was followed by this Court (O'Higgins J.) in Director of Public Prosecutions v. Syron [2001] 2 I.R. 105, which concerned the statutory presumption contained in s.21(1) of the Act of 1994 regarding certificates issued under s.17 of the Act of 1994, setting out the intoxilyser readings. Ms. Brennan submitted that the court found there that an accused may question or test the evidence in a s.17 certificate but, in the absence of such testing or questioning, the certificate was evidence of the facts in it until the contrary was proved. She stated that the latter two cases were followed in Director of Public Prosecutions v. Adrian Daly (Unreported, High Court, Kelly J., 20th December, 2001).

Ms. Brennan argued that McCarron v. Groarke (Unreported, High Court, Kelly J., 4th April, 2000) was not relevant as in that case the clear finding of fact that s.18(2) of the Act of 1994 had not been complied with was made in the context of evidence having been led by the defence, in examination in chief and in cross-examination. She referred also to the judgment of Ó Caoimh J. in Director of Public Prosecutions v. Reville (Unreported, High Court, 21st December, 2000) where it was held that the failure by a garda to state specifically in examination in chief that he had provided a statement in writing to the accused, as he was required to do under s.18(2) of the Act of 1994, was not sufficient to prove that he did not provide it or to rebut the presumption contained in s.18(4) of the Act of 1994. In Ms. Brennan's submission Weir v. Director of Public Prosecutions [2008] I.E.H.C. 268 was not relevant to the determination of the issue in this case either as the court in that case was concerned with the issue of valid authorization for mandatory alcohol testing where no statutory presumptions arose.

If the District Judge was not satisfied that the procedures contained in s.18 of the Act of 1994 were not complied with it was not in any event, Ms. Brennan argued, open to him to dismiss a prosecution solely on these grounds. She referred to the recent decision of Director of Public Prosecutions v. Hopkins [2009] I.E.H.C. 337, in which Hedigan J found that a District Judge must outline the non-compliance with the statutory procedure and consider its effect in terms of possible prejudice to the defence before dismissing a prosecution.

THE RESPONDENT'S CASE

Ms. O'Malley S.C., for the respondent, argued that the appellant was effectively seeking to reverse a decision on the merits in these proceedings rather than confine himself to a point of law, having failed to satisfy the District Judge that there had been compliance with the procedures under s.18 of the Act of 1994. She submitted that s.2 of the Summary Jurisdiction Act 1857, as extended by s.51 of the Courts (Supplemental Provisions) Act 1961 allows for an appeal by on a point of law only and she cited the following authorities to outline the limited nature of the case stated procedure: Director of Public Prosecutions v. Nangle [1984] I.L.R.M. 171; Director of Public Prosecutions v. Noonan (Unreported, High Court, 16th December, 2002) and Fitzgerald v. Director of Public Prosecutions [2003] 3 I.R. 247.

Ms. O'Malley submitted that the District Judge was entitled to find as a fact that s.18 of the Act of 1994 had not been complied with and she relied on McCarron v. Groarke (Unreported, High Court. Kelly J., 4th April, 2000), Director of Public Prosecutions (Bermingham) v. Reville (Unreported, High Court, Ó Caoimh J., 21st December, 2000) and Director of Public Prosecutions v. James Greeley [1985] I.L.R.M. 320 in that regard. An identical scenario arose, she further contended, in Director of Public Prosecutions v. Croom Carroll [1994] 4 I.R. 126, in that the MBRS in that case had received a specimen and had issued a s.19 certificate indicating the relevant concentration of alcohol but the certificate recorded that the container had not been labelled. She pointed out that Dr. Lone had accepted in evidence that he had failed to comply with s.18 of the Act of 1994. In her submission it was sufficient for the District Judge to find as a fact that s.18 had not been complied in a relevant particular.

She also submitted that s.18 of the Act of 1994 should be strictly interpreted as it is part of a criminal legal provision although she acknowledged that it did not actually contain a penal sanction. She relied on Director of Public Prosecutions v. Freeman [2009] I.E.H.C. 179 in support of this argument.

THE LAW

Section 2 of the Summary Jurisdiction Act 1857, as extended by s.51 of the Courts (Supplemental Provisions) Act 1961 states:-

> *"After the hearing and determination by a Justice of any proceedings howsoever heard and determined (other than proceedings relating to an indictable offence which was not dealt with summarily by the court), either party to the proceeding before the said Justice or Justices may if dissatisfied with the said determination as being erroneous in point of law, apply in writing within fourteen days after the same to the said Justice or Justices, to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of the High Court; and such party, hereinafter called the appellant, shall within three days after receiving such case, transmit the same to the Court … first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding … hereinafter called the respondent."*

Section 18 of the Act of 1994 provides as follows:-

> *"18.—(1) Where under this Part a designated doctor has taken a specimen of blood from a person or has been provided by the person with a specimen of his urine, the doctor shall divide the specimen into 2 parts, place each part in a container which he shall forthwith seal and complete the form prescribed for the purposes of this section.*
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> *(2) Where a specimen of blood or urine of a person has been divided into 2 parts pursuant to subsection (1), a member of the Garda Síochána shall offer to the person one of the sealed containers together with a statement in writing indicating that he may retain either of the containers.*
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> *(3) As soon as practicable after subsection (2) has been complied with, a member of the Garda Síochána shall cause to be forwarded to the Bureau the completed form referred to in subsection (1), together with the relevant sealed container or, where the person has declined to retain one of the sealed containers, both relevant sealed containers.*
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> *(4) In a prosecution for an offence under this Part or under Section 49 or 50 of the Principal Act, it shall be presumed until the contrary is shown that subsections (1) to (3) have been complied with."*

DECISION

It seems to me the critical piece of evidence in this case is the acceptance by Dr. Lone that he failed to comply with the requirements of s. 18 of the Act of 1994.

That being so, it was clearly open to the District Judge to find, as he did, that s. 18 of the Act of 1994 had not been complied with and for that reason to dismiss the case.

I accept the submission advanced by Ms. O'Malley on behalf of the respondent that an identical scenario arose in this case as arose in the case of Director of Public Prosecutions v. Croom-Carroll [1994] 4 I.R. 126. That was a case in which the MBRS had received a specimen and had issued a section 19 certificate indicating the relevant concentration of alcohol but the certificate recorded that the container had not been labelled.

The judgment of O'Higgins C.J. in Director of Public Prosecutions v Kemmy [1980] I.R. 160 indicates how important it is for statutory provisions of this kind to be applied carefully and exactly, the learned former Chief Justice stating as follows at p 164:-

> *"Where a statute provides for a particular form of proof or evidence on compliance with certain provisions, in my view it is essential that the precise statutory provisions be complied with. The Courts cannot accept something other than that which is laid down by the statute, or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field. This applies to all statutory requirements; but it applies with greater general understanding to penal statutes which create particular offences and then provide a particular method for their proof"*

It follows that the requirements of s. 18 of the Act of 1994 are to be strictly complied with. In the instant case the learned District Judge had before him conflicting lines of evidence on some important factual issues which to my way of thinking was sufficient to lift

or remove the presumption and to entitle the District Judge to find as he did.

I would therefore answer the question posed in the affirmative.