Neutral Citation Number: [2009] IEHC 337

THE HIGH COURT

2009 495 SS

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857, AS EXTENDED BY SECTION 50(1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF GARDA GARETH O'BRIEN)

PROSECUTOR

AND

DAVID HOPKINS

ACCUSED

JUDGMENT of Mr. Justice Hedigan delivered the 7th day of July, 2009

1. This is an appeal by way of Case Stated by District Judge Angela Ní Chondúin pursuant to s. 2 of the Summary Jurisdiction Act 1857, as extended by s. 50(1) of the Courts (Supplemental Provisions) Act 1961, on the application of the prosecutor who was dissatisfied with the determination of the learned District Judge as being erroneous in point of law.

2. The opinion of the High Court is sought in relation to the following questions:-

(a) Does the failure by the doctor who administers a blood alcohol test to record on the label of the blood container provided to the accused, the date on which the specimen was taken amount to a breach of s. 18 of the Road Traffic Act 1994 ('the 1994 Act')?

(b) Having concluded that there was a breach of s. 18 of the 1994 Act, was the learned District Judge entitled as a matter of law to dismiss the charge in the absence of any explanation or excuse offered in evidence by the prosecution for the breach?

(c) In order to decide whether to dismiss the charge on the basis of a breach of s.18 of the 1994 Act, was the learned District Judge obliged to consider whether the accused had been prejudiced as a result of the breach?

(d) If evidence of prejudice is in fact required, was the evidence before the learned District Judge sufficient to justify the dismissal of the charge?

I. Factual and Procedural Background

3. At a sitting of the District Court in Wicklow Town on the 19th of May, 2008, the accused appeared to face a charge under ss. 49(2) and 49(6)(a) of the Road Traffic Act 1961 ('the 1961 Act'), as inserted by s.10 of the 1994 Act and amended by s. 23 of the Road Traffic Act 2002. The summons in question specified that the accused had, on the 6th of May, 2007, driven his vehicle in a public place such that within three hours after so driving, the concentration of alcohol in his blood had exceeded a concentration of 80 milligrammes of alcohol per 100 millilitres of breath.

4. During the course of the hearing, the prosecuting member of An Garda Síochána, Garda Gareth O'Brien, gave evidence that he was fully trained in the use of the Draeger Alcometer and the Lion Intoxilyser. He explained that at around 00.40 on the 6th of May, 2007, the accused had been stopped at a mandatory alcohol testing checkpoint which had been duly authorised pursuant to s. 4 of the Road Traffic Act 2006 ('the 2006 Act'). The accused was required to provide a breath specimen pursuant to s. 4(4)(a)(i) of the 2006 Act and the potential consequences of non-compliance were explained to him. The accused complied with this lawful demand and the test on the Draegon Alcometer returned a result of 'fail'. Garda O'Brien formed the opinion that the accused may have committed an offence contrary to s. 49 of the 1961 Act. He arrested the accused and cautioned him in the usual terms.

5. Garda O'Brien gave further evidence that the accused was transported to Store Street Garda Station and introduced to the Member in Charge. A custody record was completed in respect of the accused. The Notice of Rights was then read to the accused, who signed the custody record to acknowledge receipt of those rights. At approximately 01.00, Garda O'Brien took the accused to an interview room to begin a period of observation. During the course of this period, the accused explained that for medical reasons he would be unable to provide a specimen of breath. Garda O'Brien arranged for a doctor to be contacted, who arrived at the Garda station within a short period. Garda O'Brien required the accused, pursuant to s. 13(1)(b) of the 1994 Act to provide a sample of either urine or blood and informed him of the potential consequences of non-compliance. The accused opted to provide a blood sample, which was taken by the doctor using a specialised blood kit provided by Garda O'Brien. The sample was divided into two parts, each of which were placed within a sealed container. The accused was given the option, pursuant to s.18(2) of the 1994 Act, to retain one of the containers and chose to do so. On the label of this container, where the doctor should have recorded the date of taking the sample, he inadvertently recorded the date of birth (incorrectly) of the applicant. He was then released from custody. The container which Garda O'Brien had retained was delivered to the Medical Bureau of Road Safety on the 8th of May,

2007. It was tested and returned a reading of 106 milligrammes of alcohol per 100 millilitres of blood.

6. Under cross-examination by counsel for the accused, the specimen container which had been provided to the accused was shown to Garda O'Brien. He confirmed that it was one of the two containers from the night in question as it bore the same serial number. He also confirmed that the sample was sealed and labelled with the name of the accused. He agreed that the specimen container also bore a date of birth of the 30th of March, 1938. It was put to him that the accused's actual date of birth, as specified on the custody record was the 30th of March, 1948. The contents of a letter from Claymon Laboratories, a private pathology laboratory based in Dublin, were then put to Garda O'Brien. The letter stated that the laboratory would not be willing to examine the specimen on the basis that the date listed on the specimen container was not the correct date of birth of the accused. It is important to note that this letter was never formally introduced in evidence, nor were its contents proven.

7. Having heard extensive submissions from both sides, which are set out below, the learned District Judge concluded that the error on the label of the specimen container amounted to a breach of s.18 of the 1994 Act. She further held that no explanation for this error had been advanced by the prosecution. On this basis, she dismissed the case against the accused.

II. The Submissions of the Parties

8. The prosecutor contends that the error which occurred in the present case was of a minor or trivial nature. Such an error, in his submission, should not require a proven explanation in a prosecution of this kind and ought not to have formed the basis for the dismissal of the charge against the accused in the absence of specifically proven prejudice.

9. The prosecutor argues that there was no doubt at trial as to the identity of the person from whom the specimen had been taken, or indeed the date on which it was supplied. He therefore submits that the error on the accused's specimen container does nothing to undermine the admissibility of the certificate prepared pursuant to s.19 of the 1994 Act, which was the central item of proof in the prosecution.

10. The prosecutor emphasises the fact that the letter from Claymon Laboratories, upon which the accused seeks to rely for one aspect of his submissions before the court, did not form part of the evidence in the case. Moreover, the prosecutor asserts that the letter is of no probative value since it has been produced out of context, in that neither the letter requesting that the sample be tested nor the referral from the accused's general practitioner have been produced. Furthermore, in his submission, the precise basis upon which the laboratory refused to examine the specimen remains unclear and the accused has not provided any detail of his attempts to convince the laboratory to examine the specimen and/or seek an examination of it from another laboratory. In all, the prosecutor submits that suggestions of prejudice in the case amount to nothing more than speculation and conjecture, upon which this Court is not entitled to rely.

11. The accused submits that the error which arose in the present case was, of itself, sufficient to rebut the presumption arising under s. 21(3) of the 1994 Act that the certificate prepared under s. 19 of that Act should be admissible in evidence. He argues that the error is one which requires a specifically proven explanation, something which he contends was not provided by the prosecution in the present case.

12. The accused further submits that he was not required to show that any prejudice had arisen as against him in order to seek a dismissal of the charge in the present case based on the labeling error. However, in the alternative, he submits that even if such proof of prejudice is required, the refusal of Claymon Laboratories to examine his sample is sufficient in this regard. In his view, this was a reasonable stance for the laboratory to have taken, in light of the labeling error. He emphasises that the repeated references to the letter of refusal, made by the District Judge in the case stated, are clear evidence that it was an admissible piece of evidence, of which she took account in considering the case.

III. The Decision of the Court

13. Section 18 of the 1994 Act, as amended, details the procedure for the taking of specimens of blood or urine, during the course of an arrest for drink driving. It provides as follows:-

> "(1) Where under this Part a designated doctor or designated nurse has taken a specimen of blood from a person or has been provided by the person with a specimen of his or her urine, the doctor or nurse shall divide the specimen into 2 parts, place each part in a container which he or she shall immediately seal and complete the form prescribed for the purposes of this section.
>
> (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."

14. Section 19 of the 1994 Act, as amended, prescribes the correct procedure at the Medical Bureau of Road Safety, upon receipt of a specimen. It provides:-

> "(1) As soon as practicable after it has received a specimen forwarded to it under *section* 18, the Bureau shall analyse the specimen and determine the concentration of alcohol or (as may be appropriate) the presence of a drug or drugs in the specimen.
>
> (2) Where the Bureau receives 2 specimens of blood so forwarded together in relation to the same person or 2 specimens of urine so forwarded together in relation to the same person, it shall be sufficient compliance with *subsection (1)* for the Bureau to make an analysis of and determination in relation to one of the 2 specimens of

blood or (as may be appropriate) one of the 2 specimens of urine.

(3) As soon as practicable after compliance with *subsection (1)*, the Bureau shall forward to the Garda Síochána station from which the specimen analysed was forwarded a completed certificate in the form prescribed for the purpose of this section and shall forward a copy of the completed certificate to the person who is named on the relevant form under *section 18* as the person from whom the specimen was taken or who provided it.

(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."

15. Section 21 of the 1994 Act creates certain evidentiary rules relating to certificate evidence in a prosecution for drink driving. Section 21(3) covers certificates produced by the Medical Bureau of Road Safety. It provides:-

"(3) A certificate expressed to have been issued under *section 19* shall, until the contrary is shown, be sufficient evidence in any proceedings under the Road Traffic Acts, 1961 to 1994, of the facts stated therein, without proof of any signature on it or that the signatory was the proper person to sign it, and shall, until the contrary is shown, be sufficient evidence of compliance by the Bureau with the requirements imposed on it by or under this *Part* or *Part V* of the Act of 1968."

16. In the present case, the court is obliged to consider the significance of the labeling error made by the doctor to whom the blood specimen was provided and the effect which it should have on a prosecution of this kind. A number of matters must be noted at the outset. Firstly, it is clear and undisputed that the specimen container which was in the possession of the accused was one of the two containers used on the night of the alleged offence. The serial numbers are identical and it is accepted that both specimen containers were sealed and affixed with the name of the accused. Secondly, the certificate prepared under s. 19 of the 1994 Act is free from defect on its face and, but for the error on the accused's specimen container, the certificate would amount to an admissible piece of evidence.

17. The jurisprudence under the Road Traffic Acts is replete with instances in which errors in the completion of forms, certificates or labels have been raised. In *DPP v. Somers* [1999] 1 I.R. 115, the Supreme Court considered the consequence of an error in the preparation of a form prepared pursuant to s. 18 of the 1994 Act. The doctor had taken a blood sample but had failed to delineate, by omitting to cross out the word urine on the prescribed form, that it was this method which had been employed, as opposed to a urine test. O'Flaherty J. stated as follows:-

"It seems to me that at most what happened here was that the doctor made a technical slip by not filling out the second paragraph of the prescribed form. There could be no confusion in anyone's mind, on reading the document as completed, but that it was a blood sample that was to be forwarded to the Medical Bureau of Road Safety.

The certificate issued by the Bureau specified that there had been a concentration of 270 milligrams of alcohol per 100 millilitres of blood found in the specimen. That is over three times the permitted limit.

If courts were to allow such flimsy points as this to govern cases, the administration of justice would most likely be brought into disrepute. It is true that in general the law expects strict compliance with the wording of statutes, especially in a penal context. But this is so that the purposes and objects of the legislation are observed. It is impossible to seek perfection at all stages of life and when there is a tiny flaw in the filling out of a document such as this, which flaw is of no significance and cannot possibly work any injustice to an accused and is not in discord with the purposes and objects of the legislation, then the courts are required to say that such a slip, as we have here, cannot be allowed bring about what would be a manifest injustice as far as the prosecution of this offence is concerned."

18. In *DPP v. O'Neill* (Unreported, Supreme Court, 30th July, 1984), the completion of the doctor's form was challenged on the basis that it had failed to specify whether the time at which the specimen was taken was in the morning or at night. In a judgment delivered by Hederman J., the Supreme Court held that this omission was not relevant to the prosecution since the time at which the sample was provided could be independently established by other evidence. The accused had not been left in any doubt as to what this piece of evidence sought to establish, nor was his defence prejudiced in any way.

19. Another decision which considered the relevance of a minor flaw in a certificate was *DPP v. Barnes* [1005] IEHC 245. In that case, the arresting Garda had incorrectly typed the sub-section for which the Intoxyliser certificate was being prepared, when entering the data into the machine. O'Neill J. explained the balancing test which was required in such circumstances. He stated:-

"A court therefore confronted with an application such as was made by […] the solicitor for the accused in the District Court must approach the matter on the basis of being satisfied that there has been a strict compliance with the relevant statutory provision before admitting the statement into evidence against an accused.

On the other hand, where objection has been taken to the statement on the basis of an error in it, if the error is of such an obvious or trivial or inconsequential nature so that it could not be said that it gave rise to any confusion or misleading of the accused or imposed any prejudice on him or in any way exposed him to any injustice then the court should conclude that the error in question did not detract from the due completion of the statement in question and it should be admitted and permitted the force and effect provided for by, as in this case s. 21 (1).

In essence therefore what has to be decided in this case is whether the error that was made is one which was plain or palpable or clear and which did not mislead or confuse or cause prejudice or injustice to the accused bearing in mind that […] the accused is entitled to certainty as to the nature of the offence and the nature of the evidence

with which he is confronted."

20. The "absence of prejudice or injustice to the accused" principle applied by O'Neill J. in *Barnes*, were also applied by Dunne J. in the case of *Ruttledge v. Judge Clyne* [2006] IEHC 146. There, the prosecuting Garda had inadvertently substituted his own name for that of the accused on the form prepared pursuant to s. 17 of the 1994 Act. Dunne J. held that this error did not vitiate the proceedings. She observed that it was of:-

> "such an obvious or trivial or inconsequential nature that it could not have given rise to any confusion or misleading of the accused or indeed imposed any prejudice on him or any injustice."

21. It is clear, however, that not all errors of a technical nature will be excused in the absence of some adequate explanation. In *DPP v. Croom-Carroll* [1999] 4 I.R. 126, the doctor had divided the blood sample into two parts, placing each into one of two glass bottles. These were not sealed, but were secured by means of a screw cap, one of which was then placed in a cylindrical cardboard box to which a seal was affixed and which was then posted to the Medical Bureau of Road Safety. The Supreme Court ultimately held that this was of no consequence as the cardboard box, and not the glass bottle, was the container referred to in s. 18 of the 1994 Act, which the designated doctor was required to seal. However, in addition to this primary issue, the certificate issued by the Bureau pursuant to s. 19 of the 1994 Act had also caused some difficulty. It had been completed so as to state that the accused was in fact the person from whom the specimen had been taken, but had gone on to specify that this name had not been obtained from the official container, but rather from the specimen bottle. Barrington J. made the following *obiter* remarks-

> "It appears to me that this direct conflict between the form completed by the designated doctor under section 18 and the certificate issued by the Medical Bureau under section 19 is sufficient to defeat the statutory presumption of regularity and to call for an explanation from the prosecution in a criminal case."

22. More recently, in *DPP v. Freeman* [2009] IEHC 179, the High Court considered the validity of an Intoxyliser certificate in circumstances where the arresting Garda had signed the form after the accused, rather than before him as mandated by s. 17 of the 1994 Act. He noted that the accused was unable to show any prejudice on the facts of the case and was instead relying on a strict constuction of the legislation. He stated:-

> "There is no suggestion at all that what happened here perpetrated any substantive injustice on the accused. The point raised can only be described as wafer thin. The accused has no "merits" as such. The point only arises in the most technical of senses. There is no evidence that anyone was confused or misled. While the statement may have been signed in the incorrect sequence, it was otherwise "duly completed". It had ultimately been signed and countersigned. While it may not have been (to quote the section) "sufficient evidence", I am not convinced the form was […] "inadmissible evidence". Pursuant to the statutory provision, (section 21) the duly completed statement is to be both: "*sufficient evidence without the necessity of proof of any signature on it*", and, that "*the signatory was the proper person to sign it*". Taken in isolation from its statutory context, this would not necessarily indicate that, the sequencing of the signature procedure was an essential aspect of a statutory intent, or a fundamental requirement for the protection of the rights of the citizen as evinced by the intent of the Oireachtas in the text of the Act. But the proviso is that these cases must be judged in their procedural, statutory, and evidential context. Here statutory context is of particular importance." (Emphasis in original)

MacMenamin J. engaged in an extensive review of the case-law on the application of the mandatory provisions of the 1994 Act. He concluded that strict compliance with the mandatory provisions in s. 17 was necessary for a prosecution to be successful. He stated the following:-

> "I have not been persuaded that the provision should be interpreted in the manner considered in the decision of the Supreme Court in *DPP v. Moorehouse* [2006] 1 I.R. 421. To interpret these provisions in question in a "purposive" way would to my mind constitute judicial legislation. A court should lean against the creation or extension of penal liability by extension. I do not think s. 17(3) which creates the offence can be divorced or looked at in isolation from the strict procedures for compliance laid down in s. 17 as a whole, or from the regulations to which reference has been made. The imposition of a penal liability for failure of compliance by an accused to my mind renders the provision penal. The duty is to be construed mutually – it cannot be "penal" for an accused, but not "penal" for a member of An Garda Síochána who administers the test. Section 17(3) cannot be legitimately divorced or "ringfenced" from s. 17(1) and (2). The "statement aforesaid" referred to in subs. (3) is linked to the "duly completed" statement produced by the apparatus under section 17(2). All the subsections and the regulation are to my mind so interlinked in their statutory context, that to seek to divorce one from the other, to say one subsection is penal and one is not, would be an impermissible exercise in linguistic analysis."

23. Applying the above principles to the present case, it seems to me that the correct approach to be taken where the objection is of such a technical nature is one requiring the accused to demonstrate some form of prejudice. The present case can be distinguished from the decision in *Freeman*, in which prejudice was not required, in that the technical flaw complained of in that case related to the central piece of evidence in the prosecution of the accused, namely the certficate produced by the Intoxyliser machine pursuant to s.17 of the 1994 Act. The analagous position on the present facts would be a situation whereby a flaw existed in the certificate which was returned by the Medical Bureau of Road Safety under s. 19 of the 1994 Act. That, however, is not the issue with which the court is faced.

24. As such, it is incumbent on the accused in the present case to show that he would somehow be appreciably hampered in his defence, or otherwise significantly prejudiced, were the technical flaw in the labeling of the specimen containers to be overlooked. The primary matter to which the accused has directed attention in this regard is the refusal of Claymon Laboratories to examine the specimen which he retained, on the basis that it did not bear his correct date of birth. However, I am unable to construe this refusal as an instance of prejudice against the accused for a number of reasons. Firstly, it seems clear to me that the letter of refusal was never formally proven in evidence. On this basis, it did not form part of the case at the time when the charge was dismissed and this Court is therefore not entitled to rely upon it.

25. However, even were that not so, the probative value which the letter from Claymon Laboratories held before the

District Court was extremely limited. The letter was produced outside of any form of contextual framework; no evidence as to the nature of the request for analysis was produced, nor of any efforts to either convince the laboratory as to the authenticity of the sample or to obtain an analysis from any other pathology laboratory. Finally, there was no evidence before the District Court jusifying such a rigorous protocol; had the container been labelled properly, it would have borne the date on which the sample was taken and not the accused's date of birth. Thus, in order to uphold their protocol, the laboratory would need to obtain independent verification of the date of birth of every drink driving suspect who approaches them seeking an analysis. There is no good reason on the facts of this case why the laboratory would have refused to accept such independent verification.

26. In considering the issue of prejudice, the court is obliged to examine any tangible and credible impediment which might arise as against the accused, in the conduct of his case, as a result of the error made by the relevant authorities. It must do so however by reference to evidence properly before the court. This obligation to have regard to the evidence of the case, as opposed to speculation, is well established. In *R. v. Sang* [1980] A.C. 402, Scarman L.J. made the following remarks:-

> "When asked to rule, [judges] should bear in mind that it is their duty to have regard to the legally admissible evidence, unless in their judgment the use of the evidence would make the trial unfair. The test of unfairness is not that of a game; it is whether… the evidence, if admitted, would undermine the justice of the trial… For the conviction of the guilty is a public interest, as is the acquittal of the innocent. In a just society, both are needed."

This statement of principle was quoted with approval in this jurisdiction by Ó Caoimh J. in *DPP v. Clifford* [2002] 4 I.R. 398.

27. Similarly, and in the context of a prosecution for drink driving, the Supreme Court has held that allegations of prejudice based on technical slips by the authorities must be supported by the evidence. In *DPP v. Collins* [1981] ILRM 447, the applicant sought to challenge his conviction on the basis of evidence that an unknown white substance had been present in the specimen containers used to store his blood sample. Henchy J. stated as follows:-

> "The mere suggestion of counsel for the defendant that the unspecified white substance could possibly have produced a false analysis to the extent of showing the offence charged to have been committed, when in fact it had not been committed, is not sufficient to discharge the evidential burden of proof which lay on the defendant as to this issue. To suggest that something <u>may</u> have happened, or <u>may</u> have produced a particular result, is one thing; to adduce evidence pointing in the direction of that possibility is another matter. The law acts on the latter, but not on the former. Where, as in this case, the prosecution have adduced evidence showing the existence of all the elements necessary for the commission of the offence, and the defence wish to controvert or cast the necessary doubt on the prosecution case by suggesting the existence of a factor which would justify an acquittal, the evidential burden as to that factor passes to the defence." (Emphasis in original)

In the present case, nothing has been put before the court which would indicate that the labeling error had such a bearing on the fairness of the blood specimen procedure as to render any of the evidence obtained thereunder inadmissible.

IV. Conclusion

28. In light of the foregoing, I am satisfied that the breach of the provisions of s. 18 of the 1994 Act which did occur was a purely technical one. Thus, it did not require a specific explanation from the prosecution at trial because the fact that the the error constituted a mere slip was patently evident from the circumstances of the case. The learned District Judge, therefore, ought to have considered whether any real prejudice arose from the breach of s. 18 before deciding to dismiss the charge. On the facts, it is clear that none of the admissible evidence disclosed any such prejudice and, therefore, the learned District Judge erred in law in dismissing the charge against the accused.