Neutral Citation Number [2012] IEHC 195

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 988 J.R.]

BETWEEN

JAMES O'KEEFFE

APPLICANT

AND

JUDGE JOSEPH MANGAN

FIRST NAMED RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

SECOND NAMED RESPONDENT

JUDGMENT of Kearns P. delivered the 18th day of May, 2012.

This is an application by way of judicial review to quash the order of conviction and sentence imposed by the first named respondent on the applicant on the 28th of September, 2011 at Ennis District Court in the County of Clare. On that occasion the applicant was convicted under ss. 49(1) and 49(6)(a) of the Road Traffic Act 1961, as amended, of an offence that on 1st March, 2010 in Killaloe, Co. Clare he drove a mechanically propelled vehicle while under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle.

The central point raised in the judicial review application is that the District Judge wrongly allowed a witness to be recalled following the conclusion of the prosecution case whereby he is stated to have unfairly afforded an opportunity to the prosecution to amend or add to earlier evidence in such a way as to comply with the requirements of s. 18 of the Road Traffic Act 1994 (hereafter referred to as 'the 1994 Act').

In the affidavit sworn by the applicant's solicitor Mr. Turlough Herbert, the deponent states that Garda Barriscale, who was the sole prosecution witness, gave evidence that on 1st March, 2010 she was on duty as observer in the Killaloe patrol car when, at approximately 1.10 am, she observed a motor vehicle being driven along Royal Parade in Killaloe. Garda Barriscale gave evidence that the patrol car followed this vehicle, which in her affidavit she said was driving erratically, and signalled the driver to stop by activating the blue lights on the patrol car. She then gave evidence that she spoke to and asked questions of the applicant and that she arrested him pursuant to s. 49(8) of the Road Traffic Acts. She cautioned the applicant in reply to which he stated "*I have no drink, I do not drink.*" The applicant was then conveyed to Killaloe Garda Station.

His details were entered into the custody record and a doctor was contacted to attend at the station. Dr. Harhoff arrived at 2.14 am at which point, Garda Barriscale said, that she required the applicant, pursuant to s. 13(1)(b) of the 1994 Act, to give a sample of urine, or at his option, blood. Garda Barriscale gave evidence that she informed the applicant of the penalty for failure or refusal to give a sample. The applicant opted to give a sample of urine. Garda Barriscale stated that the requirements of ss. 18(1) and 18(2) of the 1994 Act were complied with. She further gave evidence that the applicant was released from custody at 2.29 am.

She further gave evidence that she received two certificates of analysis from the Medical Bureau of Road Safety for the specimen, one dated 8th March outlining a "nil" alcohol reading for the specimen and the second dated 19th April, 2010 outlining the presence of a cannabis class drug in the specimen.

Mr. Herbert further deposes that, during the course of crossexamination, Garda Barriscale corrected her evidence in relation to the requirements of s.13 of the 1994 Act and said that she had required the applicant to give a sample of blood or at his option urine, as opposed to what she had said in her direct evidence. He says that during Inspector Galvin's examination Garda Barriscale asserted that she had complied with the requirements of s.18 of the 1994 Act. In the course of being cross-examined as to how she had complied with the requirements of the section, Garda Barriscale said that after Dr. Harhoff had taken the sample of urine he divided the specimen into two and placed each part into a container and the same was sealed. Garda Barriscale said she offered the applicant one of the sealed containers which he accepted.

The prosecution having closed its case, Mr. Herbert then proceeded to seek a direction from the first named respondent on the basis that Garda Barriscale had asked the applicant certain specific questions prior to caution. This particular point was rejected by the trial judge and was not further pursued in these judicial review proceedings.

Mr. Herbert then proceeded to seek a direction from the first named respondent on the basis that the procedures followed in taking the applicant's sample were not in accordance with the provision of the 1994

Act in that Garda Barriscale had failed to provide the applicant with a slip of paper which under the section was required to be given for the purpose of informing him of his right to retain one of the samples. He submitted that this was a specific requirement under the section and relied upon the decision of Kelly J. in *McCarron v. Groarke* (Unreported, High Court, Kelly J., 4th April, 2000).

The first named respondent proceeded to consider this point by recalling Garda Barriscale and asking her if she had given the slip in question to the applicant or not. Mr. Herbert objected to this line of questioning, submitting that the State's case had closed and that the learned trial judge could not question the witness on her proofs after completion of the State's case. The first named respondent stated that in the case of an inadvertency he could afford the witness an opportunity to "mend" her evidence.

Thereupon, Mr. Herbert states that Garda Barriscale replied that she had done so, following which reply the first named respondent proceeded to hold against the applicant's second submission. He later proceeded to record a conviction against the applicant, imposing a €500 fine and disqualifying the applicant from driving for a period of four years.

On this basis it is contended that the first named respondent, by wrongly permitting the reopening of the prosecution case on a matter of substance, had not afforded due process to the applicant and had denied him fair procedures by eliciting an absent proof.

In her affidavit Garda Jean Barriscale makes no substantial contradiction of the contents of Mr. Herbert's affidavit, other than to say that Mr. Herbert had made reference in the course of his submission to a "pink slip" whereas, given that the sample taken was of the applicant's urine, the slip in question was in fact a yellow slip. A 'pink slip' is the common name for the document used in cases involving blood samples. Garda Barriscale in her affidavit further deposes to the fact that she did give the applicant a yellow slip and explained the contents of it to him. She gave evidence of this particular fact after the prosecution case had been reopened. She describes how, when earlier asked to describe her compliance with s. 18 of the 1994 Act, she omitted the fact that she had tendered a yellow slip to the applicant.

SECTION 18 OF THE ROAD TRAFFIC ACT 1994
Section 18 of the 1994 Act provides:-

> "(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 Siochana shall offer to the person one of the sealed containers together with a statement m 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 Siochana 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."

It is appropriate at this juncture to note that s. 18 of the 1994 Act has been replaced by s. 15 of the Road Traffic Act 2010 which makes no provision for the giving of a slip.

SUBMISSIONS
On behalf of the applicant it was acknowledged that there are circumstances in which the trial judge may recall a witness to give evidence following the conclusion of the prosecution case, provided such evidence does not go to the merits of the case. It was a power which could only be used sparingly and only where the evidence to be given was of a formal or technical nature. In the instant case Garda Barriscale had been specifically asked what steps she had adopted to comply with the Act and there was no indication that her omissions in relation to her compliance with s. 18 were through inadvertence. It was only following the re-opening of the case that Garda Barriscale gave the additional evidence which enabled the first named respondent to find against the applicant on the s. 18 submission. It followed therefore that the answers given by Garda Barriscale to the District Court Judge were determinative in the first named respondent arriving at his decision.

The evidence in question could hardly be described as evidence merely of a technical nature. It was, in fact, an essential proof such that, when, as had occurred in the instant case, the presumption of regularity had been rebutted, the prosecution must fail.

In response, counsel for the respondents stated that the decision in *McCarron v. Groarke* could be distinguished from the facts of the present case. In the *McCarron* case the applicant had been prosecuted for driving with an excess of alcohol in his blood so the sample and its taking were central to the prosecution. In the instant case the applicant was prosecuted for driving while under the influence of an intoxicant, that is to say, a drug. Thus the taking of the sample was not as central to the case as it was in *McCarron*.

While the *McCarron* decision might be authority for the proposition that the offering of a slip is a required proof, that of itself does not mean that it is a proof which goes to the merits of the case. Counsel submitted that, having regard to the following factors, the evidence in question was formal in nature only:-

(a) This slip set out the applicant's rights to retain a sample. There was evidence that the applicant was told this by the garda. There is no evidence that the applicant was at any stage unaware of his right to retain a sample. He did retain the sample. There was thus no conceivable prejudice to the applicant.

(b) The evidence in question was evidence of which the applicant was on notice in advance of the trial from the statement of intended evidence of Garda Barriscale. The applicant had in fact been given the yellow slip by the garda.

(c) The evidence given is ordinarily the subject of a presumption under s. 18 (4) of the 1994 Act. Thus the issue arose *ex improviso* during the trial and its rebuttal was a mere formality.

(d) The evidence in question was not controversial nor in any way going to the merits of whether or not there was cannabis present in the sample of urine given by the applicant

DECISION
There is no doubt but that a District Court judge may in certain circumstances, even of his own volition, recall a witness to give formal evidence following the closure of the prosecution case in a summary trial. This was confirmed by Kenny J. in *Attorney General (Corbett) v. Halford* [1976] 1 I.R. 318 where he stated at p. 324:-

> "The prosecution have closed their case and the question whether that evidence may now be given was not discussed in argument. The decision of this Court in *Attorney General v. McTiernan* [1951] 87 ILTR 162 establishes that, in a prosecution in the District Court, the District Justice may allow further evidence of formal matters to be given after the State's case has been closed. He has a discretion in the matter; but he should not allow further evidence to be given if it relates to what Lord Goddard has called the merits (Price v. Humphries [1958] 2 Q.B. 353) while he should allow it if it

> relates to procedure only. I think that proof that the veterinary inspector who signed the notice had reasonable grounds for his belief that he believed the matters I have mentioned was a matter of procedure only and that, if the prosecution wished to give it, the Circuit Court Judge should allow this evidence to be given when the matter is re- listed before him."

Thus in *Bates v. Brady* [2003] 4 I.R. 111, evidence of an accused being told of the penal consequences of failure to move on when so directed by a garda in a prosecution under s. 8 of the Criminal Justice (Public Order) Act 1994 was not given. The District Judge of his own motion reopened the prosecution case and received that evidence. Ó Caoimh J. quashed the decision to do so:-

> "I am satisfied that in the instant case the essential issue is whether the evidence in question received by the respondent is of a formal nature or whether it relates to the merits. It is clear that the evidence is required to be given and this does not determine the matter. However, I am satisfied that the evidence in question is evidence which had to be given to show that the applicant knew that his actions amounted to a criminal offence. It is clear from the authorities cited by counsel that a judge of the District Court may in certain circumstances of his own volition recall a witness to give formal evidence. It is clear that this power is to be used sparingly."

It is undeniably the case that where Statutes provide for compliance with specific procedures, there is but limited opportunity for the exercise of discretion by a judge of the District Court in this regard. As was stated by O'Higgins C.J. in *Director of Public Prosecutions v. Kemmy* [1980] I.R. 160 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 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."

I would join to this consideration the public policy requirement that driving related offences require to be prosecuted and should not be thrown out willy nilly without good reason. Thus, if the substance of the statutory obligation to comply with certain steps has been complied with, the court should not automatically dismiss a case merely because some technical or formal attendant proof may not, initially at least, have been addressed in evidence. In this regard I find myself in complete agreement with the sentiment expressed by O'Flaherty J. in *Director of Public Prosecutions (O'Brien) v. Cormack* [1999] 1 ILRM 398 at p. 400 when, in relation to a prosecution under s. 49 of the Road Traffic Act 1961, he stated:-

> "Unfortunately, there is I think a certain mythology abroad that some onus rests on the prosecution to prove cases to an impossible extent so as to exclude every hypothesis that might occur to the most ingenious mind. That is not the law."

In the instant case it is clear from para. 12 of the affidavit sworn by the applicant's solicitor that, prior to the closure of the prosecution case, the prosecuting garda had explained how she had complied with the requirements of s. 18 of the 1994 Act by stating that after the designated doctor had taken the urine sample and divided the specimen into two and placed each part into a container which was sealed, she then offered the applicant one of the sealed containers which he accepted. What she failed to state was that she had provided the applicant with the yellow slip which confirmed his right to receive such a sample. It was evidence on this latter point which was given when the prosecution witness was recalled at the conclusion of the prosecution case.

In my view this case can thus clearly be distinguished from the decision of Kelly J. in *McCarron v. Groarke*, which, to begin with, was not in any way concerned with the issue of when the prosecution's case might be re-opened.

In that case, (which incidentally concerned a urine sample and not a blood sample), the evidence before the court of trial was that the relevant slip had never been furnished. Further, a dismiss was sought at the conclusion of the prosecution case on the basis that the prosecuting garda had "patently failed to recollect properly" and had been unequivocal in his evidence that he had posted two specimens to the Medical Bureau of Road Safety, whereas in fact it had been demonstrated during the hearing that he had, in fact, given one of the samples to the applicant. The report does not indicate that the garda ever gave evidence that he had complied with the provisions of s. 18 of the 1994 Act.

By contrast in the instant case it is clear that, even before Garda Barriscale was recalled, there was evidence that the particular sample had been given to the applicant. Thus the substantive requirement of the section was in fact complied with and the only omission on the part of the prosecuting garda was merely to confirm that the yellow slip to be handed over in compliance with s. 18 of the Act had, as indeed was the case, been furnished also.

In those circumstances, it is impossible to see what detriment, prejudice or compromise of any rights of the applicant could possibly have occurred.

The case therefore is in marked contrast with that addressed by Barrington J. in *The People (DPP) v. James Greely* [1985] ILRM 320 in which he stated at p. 324:-

> "I do not think that the present case should properly be regarded as a case where evidence has been obtained in breach of the defendant's constitutional or legal rights. The problem is that s. 23 of the Road Traffic Act 1978 [*now s. 21 of the 1994 Act*] makes *prima facie* evidence a certificate which, without that express statutory enactment, would not be evidence at all. But it seems to me that the system pre- supposes that the appropriate legal procedure culminating in the issue of the certificate has been followed. If the defendant can show that the correct procedure was not followed and that there was in fact no power to require him to furnish a blood specimen then it appears to me that the certificate is not a certificate of the kind contemplated by s. 23 of the Road Traffic Act 1978 and has no status as evidence in a court of law." (Emphasis added)

In the present case the court is not considering a failure to comply with statutory procedures subsequent to which a step was taken which was totally dependent on those procedures having been observed. In the instant case it is the reverse. The urine sample was properly required and obtained, the requisite sample was furnished to the applicant, and the only omission was the failure to give evidence of the furnishing of a document confirming to the applicant his right to receive what he had, as a matter of fact, been actually given.

In those circumstances I believe that the facts of this case suggest that it falls into the category in respect of which a District Judge could, without any unfairness or without descending into the arena, permit the recall of a witness to complete her evidence on a purely formal aspect. It would be quite a different matter if the record of the District Court proceedings indicated that in doing so the

District Judge exhibited bias or unfairness or a partisan approach to the case before him, and I will return to this point at a later stage.

Counsel for the respondents in his written submissions has referred to a number of cases of an analogous nature to which I can briefly refer. In *Piggott v. Sims* [1973] RTR 15, a drunken driving prosecution, the certificate of analysis of a blood specimen and the certificate from the doctor had not been admitted as part of the prosecution case. They had been served on the defence. The justices allowed the prosecutor reopen the case to admit the evidence after the defence case had closed. This decision was upheld by the High Court where Melford Stephenson J. referred to the missing evidence as "a vital part of the prosecution case" but remarked " ... it cannot be too clearly understood that (the justices) were abundantly justified in permitting the prosecution to put in these certificates at the time they did.". In *R. v. Tate* [1977] RTR 17, the accused was prosecuted for drunken driving. A forensic scientist gave evidence of analysing the blood specimen and that further analysis had also been carried out by a second scientist. The notes of the second scientist were tendered in evidence. At the close of the prosecution case a direction was sought in the absence of the second scientist's evidence. The trial judge allowed the prosecutor to reopen the case to admit that evidence. Lawton L.J. upheld the decision and referred to the absence of any prejudice accruing to the accused.

In *Leeson v. Director of Public Prosecutions* [2000] RTR 385, the accused was charged with drunken driving. Evidence was tendered from an evidential breath testing apparatus to the effect that the accused had alcohol in his breath in excess of the statutory limit. The defence sought a direction of non suit in the absence of evidence of the apparatus having been calibrated. The prosecution case was allowed to reopen to give that evidence, and this was held to be a proper exercise of discretion by a divisional Queen's Bench.

Finally, in *Jolly v. Director of Public Prosecutions* [2000] Crim LR 471, a drunken driving prosecution, a forensic scientist gave evidence of the manner in which a blood sample had been analysed for its alcohol content. The evidence was that the data was inputted into a computer which printed out the results. The defence sought a direction of non suit as there was no evidence that this computer had been working properly. The prosecutor was allowed to reopen his case to admit evidence that it was. This was upheld by a divisional Queen's Bench as a proper exercise of the discretion in the absence of any prejudice to the accused.

These cases demonstrate an approach to prosecutions of this nature which accords with common sense without in any way suggesting that an element of unfair play determined the outcome.

Counsel for the applicant suggested that an impartial observer might have taken away the impression that the trial judge was not approaching the case in a fair or unbiased manner by permitting the recall of Garda Barriscale in the particular circumstances. Quite frankly, the report of the proceedings in the District Court does not suggest to me that the District Judge behaved in any way unfairly. That impression is further strengthened by comparing the facts of this case with those of the case relied upon by counsel for the applicant, namely, *Dineen v. District Justice Delap* [1994] 2 I.R. 228 which at this lengthy remove may safely be described as a classic example of how a judge should not deal with a case. Not only did the District Judge in that case inform all present in court that if a garda witness made a slip in the witness box that he would recall him, but further told the garda who was giving evidence "not to bother responding to counsel and that counsel was only trying to trip him up", stating also that when an objection was taken by counsel to the garda witness reading from what appeared to be a prepared statement, the judge invited the garda to "read from whatever he liked".

This behaviour prompted Morris J. to state as follows (at p. 234):-

> "In my view there are two parts of the respondent's conduct in the course of the hearing of this case for which I am unable to find any justification. Firstly, I can find no justification for the respondent telling Garda Mullaney not to bother responding to counsel and that counsel was only trying to trip him up. In my view the objection taken by counsel to the garda reading from a prepared statement was a valid objection. I make no criticism of the respondent for the fact that his judgment of the objection was wrong. To identify counsel's role as being that of trying to trip up the garda and directing the garda not to bother responding is, in my view, an unwarranted interference with counsel in the performance of his duty and responsibility of making his defence. The suggestion that the garda would be recalled by the respondent in the event of his making a slip is again improper and would cause an impartial observer to recognise that the judge hearing the case was prepared to support the prosecution to the extent of filling gaps which their evidence might leave.
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> Secondly, I am unable to identify any justification for the respondent requiring to hear the evidence of Garda Sheehan when he had already ruled against counsel on his application for a dismiss. The only possible explanation for the respondent calling the additional witness which the prosecution had not called was to lend assistance to the prosecution by copper fastening his previous decision.
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> I am left in no doubt that this conduct would, in the words of Maguire C.J. 'reasonably give rise in the mind of an unprejudiced observer to the suspicion that justice was not being done' and, accordingly, there was a breach of the fundamental rule that not only should justice be done but it should seem to be done."

The reference was of course to the decision of Chief Justice Maguire in *The State (Hegarty) v. Winters* [1956] I.R. 320.

Overall I am satisfied that the conduct of the District Judge in this case did not remotely resemble that exhibited in the *Dineen* case. The judge in this case did not exhibit bias nor did he behave unfairly in his conduct of the case. I am equally satisfied that the applicant was not denied fair procedures and I am more than satisfied that he was not prejudiced by the tendering of this additional evidence which, in the particular circumstances was evidence of compliance with a formal requirement in circumstances where the substance of that requirement had been demonstrated to have been properly and duly carried out.

For those various reasons I would refuse the relief sought in this case.