Neutral Citation Number: [2010] IEHC 183

THE HIGH COURT

JUDICIAL REVIEW

2009 943 JR

BETWEEN

MARY KENNEALY

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Hedigan delivered on the 18th day of May, 2010

1. The applicant is charged with a refusal to permit a designated medical practitioner take a blood sample contrary to s. 13(3) of the Road Traffic Act 1994, and also with criminal damage contrary to s. 2 of the Criminal Damage Act 1990, on 24/05/08

2. The relevant events occurred in the garda station. Suffice it to note, the applicant had been arrested in circumstances where she clearly was in a state of high distress. At the scene, and in the garda station, she was unruly and non-cooperative from the outset. A registered medical practitioner was called to the garda station. She was required to provide a sample of blood. When the doctor attempted to take a sample, she refused to allow him tie a tourniquet around her arm. She claims she was not uncooperative and that she had difficulty understanding the doctor's English. She says she held her arm still. She said it became excruciatingly painful. She says Dr. Lone, the registered medical practitioner, withdrew the needle when the syringe was half-full of blood. She says, as far as she can recall, nobody suggested she had failed to provide a sample.

3. Garda Fionnuala Whelan swears, in her affidavit, that the applicant never, at any stage, complained of being unable to understand Dr. Lone's English. She avers his English is of a very high standard. She says the applicant demanded to have an Irish doctor. Garda Whelan states the applicant remained uncooperative at all times and that the account she gives in her affidavit is untrue. She swears that the applicant was utterly uncooperative and determined to ensure that a proper sample could not be taken. She swears she refused to hold her arm still and Dr. Lone was unable to take a proper sample as her arm kept moving. The doctor told her that she had failed to provide a sample. She did not complain of any bruise on her arm. The custody record exhibited records that the applicant was violently knocking on the cell door and banging it violently, both before and after the attempt to take a sample.

There has been no notice of cross-examination herein.

4. I have read the affidavits and the witness statement exhibited therein. I accept the evidence of Garda Whelan. I note that the applicant claims she was never told she had failed to provide a sample. Prior to leaving the station, however, she was charged with failure to provide a sample. She was, at this point, at the latest, aware it was alleged she had failed to provide a sample.

5. In his s. 21 statement, Dr. Lone states:

> *"The patient refused to allow to apply the tourniquet. When started to take sample, after extraction of about half of sample, Ms. Kennally shouted and refused to give rest of sample and started arguing and shouting."*

Dr. Lone and the applicant are therefore in agreement that the syringe was half-full of blood, *i.e.* 5mls.

6. The case was listed first in the District Court on 16/06/08. A Gary Doyle order was made. On 18th June, 2008, the gardaí received a letter dated 05/06/08, seeking basic disclosure. There is no reference to the blood sample in it. On 09/09/08, the prosecution provided the disclosure order, save that the statement of Dr. Lone was not included. It was to follow. The hearing date of 03/12/08 was vacated owing to an injury to a witness. A new date of 02/02/09 was fixed. No mention was made prior to the December date of the blood sample issue. The February date was vacated owing to an injury to a witness. On 19/01/09, the applicant was sent the statement of Dr. Lone. In the accompanying letter, her solicitors were told, "*if you have any queries, please do not hesitate to contact me*". A hearing date of 05/05/09 was fixed peremptorily against the State. Immediately before this trial, for the first time, the applicant, by letter dated 29/04/09, raised a question as to whether the blood sample had been retained. This letter was sent over the bank holiday before the trial the following Tuesday. Witnesses could not be called off but could not proceed owing to the absence of a witness and the respondent's objection to amend the charge of criminal damage to take account of that absence. On 13/05/09, an application was made to the District Court for an order in respect of retaining blood. It was refused. On 28/05/09, the prosecution wrote to the applicant's solicitors informing them that the sample had not been retained. On 17/07/2009, expressing concern at the delay in this case, the District Judge fixed a date of 17/09/2009 for the hearing. During this time, the solicitors for the applicant were seeking sight of the guidelines issued by the Medical Bureau of Road Safety (MBRS). These are readily available to the public and were sent on 20/08/09 by return of post when the MBRS were finally asked for them. On 15/09/2009, two days before the date for the hearing, the applicant applied for and got leave to seek judicial review.

7. The applicant seeks to prohibit the refusal charge on the basis that the blood sample taken was not retained. She argues that the "*missing*" blood sample evidence creates the risk of an unfair trial. She wishes to argue that the amount of blood actually taken was enough for analysis by the MBRS and that, therefore, there was no refusal. The absence of the sample taken precludes her obtaining a scientific determination of the exact quantity of blood taken. The MBRS guidelines, which are headed '*Notes for the Guidance of Doctors'*, suggest that 2mls could be adequate for analysis. This means that in order to have two specimens (one for the subject in question for possible independent analysis and one for the MBRS), it would be necessary to extract at least 4mls of blood. The syringe provided has a capacity of 10mls. The applicant and Dr. Lone are agreed, in the evidence before this Court that he had extracted

about half the full amount of the syringe when he stopped. On the evidence, as it stands, therefore, he had extracted somewhere in the vicinity of 5mls. The doctor considered this an inadequate sample. The applicant would hope to argue it was adequate because the guidelines say if it is not possible to take the full 10mls, 4mls will do. Therefore, since she did provide a quantity of blood in excess of 4mls, there was not refusal.

Delay

8. The obligation to move promptly for prohibition is of particular importance in criminal matters. Any delay in determining criminal charges is to be deprecated. Order 84, r. 21 of the Rules of the Superior Courts requires an application, such as this, to be made within three months from the date when grounds for the application first arose and, in any event, promptly. The applicant had knowledge of the fact the sample had not been retained at the very latest on 28/05/2009. This application was made on 15/09/2009, some three and half months after that date. It might be possible to argue that they ought to have known the sample would not be retained from the very beginning. However, taking the date of their knowledge as 28/05/2009, this application is out of time. In any event, the delay between 28/05/2009 and two days prior to the trial could not be described as prompt action. In a case such as this, action should have been taken immediately. Any delay of any kind needs the clearest explanation. No explanation is provided for the delay in question. This application, therefore, fails, on either the three month requirement or the requirement to act promptly.

9. However, it should be noted that the very heart of this application is misconceived. The so-called "*missing evidence*" is well capable of being replaced by the evidence of Dr. Lone which agrees with the evidence of the applicant, *i.e.* a quantity of blood was taken from her that, according to the MBRS recommendations, was sufficient if it was not possible to fill the syringe. Whether this recommendation can trump the doctor's own view as to what is or is not an adequate sample, whether in evidence in chief or cross-examination the doctor clarifies his sworn declaration that he took about half the sample before he stopped, all these are matters, obviously, for argument in the District Court with appropriate applications to the District Judge for directions and his ruling thereon. Any conviction raises the possibility of an appeal to the Circuit Court and a hearing *de novo*.

10. Mr. McDermott has argued the applicant's case with some force. However, he has little to work with in this application. In truth, it is the latest in a long line of hopeless applications brought on the basis of missing evidence. There appears to have developed a practice of searching to find some "*missing evidence*" and then trying to erect this evidence, no matter how inconsequential or replaceable, by other evidence into something so crucial it raises the clear and unavoidable risk of an unfair trial. It is a form of legal alchemy, attempting to transmute base metals into gold.

As has been repeatedly stated by the Supreme Court and the High Court, prohibition is an exceptional remedy rarely granted: see *DCC v. Director of Public Prosecutions* [2005] 4 I.R. 281 at 283, where Denham J. stated as follows:

> *"Such an application [for the prohibition of a trial] may only succeed in exceptional circumstances. The Constitution and the State, through legislation, have given to the Director of Public Prosecutions an independent role in determining whether or not a prosecution should be brought on behalf of the people of Ireland. The Director, having taken such a decision, the courts are slow to intervene. Under the Constitution, it is for a jury of twelve peers of the applicant to determine whether he is guilty or innocent. However, bearing in mind the duty of the court to protect the constitutional rights of all persons, in exceptional circumstances, the court will intervene and prohibit a trial. In general, such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly, under the presiding Judge. However, in circumstances where there is a real or serious risk of an unfair trial, the court will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should a trial commence, it will be stopped by the direction of the trial Judge because of the real or serious risk of an unfair trial.*
>
> *It is this exceptional jurisdiction which the applicant wishes to invoke. Such a jurisdiction to intervene does not apply where the applicant has minutely parsed and analysed the proposed evidence and sought to identify an area merely of difficulty or complexity. The test for this court is whether there is a real risk that by reason of the particular circumstances that the applicant could not obtain a fair trial."*

As is clear from the above, the courts will always be alert to the danger of an interference with the constitutional rights of citizens and will move to protect them where necessary. However, this jurisdiction in relation to criminal trials is one which will only be exercised in exceptional cases. The long line of cases which have come before the High Court on judicial review in these types of cases rarely raise any points that might move the court to intervene, as sought. Practitioners should give the most careful consideration, at the earliest possible time, as to whether there is any reality to an application to prohibit the holding of criminal trial - a very rare action by the High Court. If there is, they should move with great speed. In this type of case, delay will almost always result in failure. The delay involved in the criminal process, as noted above, is to be deplored. The heavy expense incurred by the continuous line of unsuccessful applicants, when, as in almost every case, they are fixed with the costs of the judicial review, is a very heavy burden to bear at the best of times, and particularly in these difficult times. The delay in concluding the criminal process is contrary to everyone's interest. The place for criminal trials is in the criminal courts.