Neutral Citation: [2014] IEHC 200

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2012/441 JR

Between/

GILES KENNEDY

Applicant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS AND HER HONOUR JUDGE MARGARET HENEGHAN

Respondents

Judgment of Ms. Justice Iseult O'Malley delivered the 28th day of March, 2014

1. The applicant was convicted in the District Court on two charges relating to failure to provide a breath sample under the provisions of the Road Traffic Act, 1994. He lodged an appeal against the convictions but now seeks various judicial review reliefs in relation to the continued prosecution of the offences, by reason of the refusal of the first named respondent to disclose to him in its entirety a document concerning the operation of the intoxilyser utilised in his case. He also seeks *certiorari* in respect of the decision of the second named respondent, made in a preliminary hearing, that he was not entitled to the document in its entirety.

Background evidence

2. The applicant was charged that he:

> (i) On the 25th of April, 2007, at East Wall Road, Dublin 1, being a person in charge of mechanically propelled vehicle, registered number 01 D 57713, in a public place, having been required by Garda David Coyne a member of An Garda Síochána, pursuant to s.12(1)(a) of the Road Traffic Act, 1994, to provide a specimen of his breath, did fail to comply forthwith with the said requirement contrary to s.12(2) of the Road Traffic Act, 1994 as amended by s. 18 of the Road Traffic Act, 2006 and that he
>
> (ii) On the 25th April, 2007 at Store Street Garda Station, being a person arrested under s.12(3) of the road Traffic Act, 1994, having been required by Garda James Smith a member of An Garda Síochána to provide two specimens of his breath, did fail to comply with the said requirement contrary to s. 13(2) of the Road Traffic Act, 1994 as amended by s.l8 of the Road Traffic Act, 2006.

3. The prosecution evidence relating to the first charge was given by Garda David Coyne who, having stopped the applicant at a checkpoint, required him to provide a preliminary sample of his breath under s.12 of the Road Traffic Act, 2003. Garda Coyne produced a Draeger alcolyser machine and explained how it was to be used. According to the Garda statement of evidence (which, in the absence of any indication to the contrary, I take to have been the same as that given in oral evidence) -

> *"He began blowing into the machine but was not blowing hard. While blowing, he interrupted his breath by inhaling. The machine indicated insufficient volume and I reset it. I explained to Mr. Kennedy that the breath must be a single breath, similar to blowing a balloon, and that breathing back in would empty the balloon. I also explained to him that failure to provide a specimen would result in him being arrested and charged with that specific offence. He again blew into the machine, and again interrupted his breath specimen, again with a reading of insufficient volume. He said that he was trying his best and asked for another attempt. He tried again twice more while sitting in the car, but again failed to provide a specimen of breath. At this stage I asked him to step out of the car and into the side of the roadway if it would help with his breathing and proving [sic] a complete specimen. I informed him that he was not providing a complete specimen due to interrupting his breath and again outlined that he must provide a complete specimen by making a complete breath into the machine without interruption. I told him that he was to make a seal around the mouthpiece and demonstrated the type of breath that he was to provide. He began blowing into the machine again, but this time I could see that he was not making a seal around the mouthpiece and that the breath was being blown out the side of his mouth. He ran out of breath and the machine beeped and showed insufficient volume. I informed Mr Kennedy that he must provide a specimen, and that blowing out the side of his mouth was not providing the specimen. I told him that he must provide a seal around the mouthpiece and blow into the machine in a continuous breath until a specimen was given. He attempted twice more, yet again blew out the side of his mouth. In total, he failed to give a preliminary specimen of breath having made 7 attempts. "*

4. At this point the applicant was arrested and brought to the Garda Station. After the preliminary matters pertaining to the taking of a specimen had been dealt with, Garda James Smith made a requirement of the applicant under s.13(1)(a) of the Road Traffic Act, 1994, as amended, to provide two specimens of his breath by exhaling into a Lion Intoxilyser machine. Garda Smith's evidence as to what happened was as follows:

> *"I took a spare mouthpiece and demonstrated to Mr. Kennedy how to provide a breath. Mr. Kennedy indicated that he understood this, and indicated to me that he would provide breath specimens. When required to, Giles Kennedy took the breath tube in his left hand and put his mouth around it. He failed to provide a breath specimen. I noted that there was no condensation on the inside of the mouthpiece. I also noted that there was no sound of blowing from Mr. Kennedy. He placed his mouth around the mouthpiece several times, each time providing no breath specimen. I demonstrated again with a breath mouthpiece the manner in which he should provide a breath specimen. He again continued to place his mouth around the breath mouthpiece, but did not blow. I noted that the pressure meter on the Intoxilyser machine showed that there was no pressure from Giles Kennedy's breaths. Giles Kennedy failed to provide any breath specimens, and the Intoxilyser machine printed two Section 17 statements. "*

5. The Intoxilyser procedure appears to have taken about 14 minutes. The applicant was charged with the two offences approximately an hour later, at which point he asked "Is there any chance I could give a sample of blood or urine?"

Disclosure
6. Prior to the District Court trial, certain orders or directions were given by that court in relation to disclosure. Specifically, in relation to the Intoxilyser, the applicant received various documents from the prosecution, including documents entitled "Evidential Breath Alcohol Testing Training Course", "*Evidential Breath Alcohol Testing Supervisors Supplement" and "Evidential Breath Alcohol Testing Training Course Manual*'.

7. The issue in these proceedings arises from p.41 of one of these documents. The version disclosed to the applicant prior to the District Court hearing instructed the operator of the machine as follows, under the heading "Incomplete Breath Specimen":

> *"The subject has three minutes to provide each breath specimen if he/she fails to do this during provision of the first breath specimen. The test will end and the instrument will indicate that an adequate specimen has not been provided. The message "Specimen 1 incomplete" will be printed on the report.*
>
> *If the subject fails to provide an adequate sample during the second breath specimen the following report will be printed out. uspecimen 2 incomplete".*
>
> *If either of the above occurs the subject will be given two more opportunities to complete a cycle regarding provision of two acceptable breath specimens. "*

The District Court hearing
8. The matter came on for hearing on the 13th April, 2011. The applicant's solicitor has not referred in any way to the evidence given by either side in the District Court. However, Mr. Tom Conlon, the prosecuting solicitor, has without contradiction summarised the defence approach to the case as follows:

> *"At this hearing the Applicant's defence was based on systemic delay, incorrect citation in respect of the road side breath requirement made by Garda Coyne pursuant to section 12 of the Road Traffic Act, 1994 (as amended) and his medical conditions which included difficulty hearing. No reports were provided by the defence and it did not have any medical witnesses in court to back up the claim of medical condition. The Applicant simply gave evidence himself that his hearing had been in deterioration/or a number of years."*

9. It appears that there was no issue raised by the defence in relation to the number of opportunities given to provide a specimen in the Garda Station.

10. The applicant was convicted of both charges. He lodged an appeal which in due course was listed for hearing on the 24th February, 2012.

The Circuit Court hearing
11. Before the appeal came on for hearing, the applicant received advice to the effect that some of the documentation he had been given was out of date and that an updated operator's manual had been issued to all trained operators of the machine in or about February, 2007. On the 7th February, 2012 his solicitor wrote to the first named respondent seeking this manual. He also sought further disclosure of specific documentation containing instruction as to the use of the Draeger Alcotest 6510 and the Intoxilyser 6000IRL and the best practice and procedure in the event of failure of the machines to obtain a specimen. This documentation was said to have been circulated to Gardaí in the months preceding the date of the alleged offences.

12. On the 21st February, 2012 the first named respondent informed the applicant's solicitor that there was in existence an internal Garda Circular dated the 15th March, 2007. Attached to the circular was an updated version of p.41 of the "Evidential Breath Testing Training Course" notes. The first named respondent furnished a copy of the latter document but in relation to the circular said:

> *"This document is clearly an internal Garda legal document containing internal legal advice and it is the Prosecution's position this Circular is not relevant to this Criminal Prosecution. However, on Thursday, 23rd February, 2012 we intend to provide Judge Heneghan with a copy of the document to determine its relevancy or otherwise so that the matter may proceed for hearing on the 24th February, 2012."*

13. The applicant's solicitor did not object to this course of action.

14. The updated p. 41, under the heading "Incomplete Breath Specimen", gives the following instructions:

> *"The subject has three minutes to provide each breath specimen. If he/she fails to do this during provision of the first breath specimen, the test will end and the instrument will indicated that an adequate specimen has not been provided The message 'Specimen 1 incomplete" will be printed on the report.*
>
> *If the subject fails to provide an adequate sample during the second breath specimen the following report will be printed out. 'Specimen 2 incomplete. '"*

15. This version has the merit of making more sense than the original. However, the point of relevance is that the instruction to give two further opportunities to the subject has been deleted.

16. The status of the circular to which the update had been attached was argued before the second named respondent on the 23rd February, 2012.

17. According to the affidavit of the applicant's solicitor, Mr. O'Reilly, the second named respondent was asked to rule on whether or not the document attracted legal professional privilege. He says that the submission made by the first named respondent was that it was "*more than likely privileged*" but also that it was probably "*in the domain of the drink driving defence fraternity."* Objection was made on behalf of the applicant to the plea of privilege, having regard to the positions held by the authors and addressees.

18. Mr. Conlon says that, in accordance with the letter quoted above, the judge was being asked to rule on relevancy as well as

privilege. This does not appear to be contested and I note that the applicant's written submissions deal with this aspect on the basis that the application was made on a twofold basis - privilege and relevancy.

19. In any event, the second named respondent read the document. This was done without objection from the applicant's representatives. She ruled that the defence was entitled to a redacted version.

The document as redacted
20. The circular is from the Continuous Professional Development ('CPD') section of An Garda Síochána. It is headed "*Re: Update of Evidential Breath Testing Training Course Notes*" and is addressed to "*all Garda Members trained in the use of the Lion Intoxilyser 6000/RL* ". It refers to the then current version of p. 41, as quoted in paragraph 8 above. There are then three lines which have been blacked out. The circular continues:

> *"The above instructions clearly state that a total of four extra specimens may be taken from the arrested person, albeit the first two being incomplete specimens. However, the provisions of Section 13(1)(a) of the Road Traffic Act 1994 are clear in that the member is only allowed to require TWO specimens of breath from the accused "*

21. Section 13(1) is then set out, followed by six blacked-out lines.

22. Mr. Conlon has deposed that the redacted parts of the document relate to comments by the Legal Section in Garda Headquarters on what had been happening in recent drink driving cases, with specific reference to what the law did and did not permit the Gardaí to do in such cases.

The judicial review proceedings
23. The matter did not proceed on the 24th February and was re-listed for hearing on the 18th October, 2012.

24. On the 23rd May, 2012 the applicant was granted leave to seek judicial review by Peart J. The reliefs sought are: an order of prohibition or injunction prohibiting or restraining the first named respondent from further pursuing the prosecution of the Garda Station charge; *certiorari* of the decision of the second named respondent that the applicant was not entitled to the document in its entirety; a declaration that the document is not one which attracts legal professional privilege and a declaration that the applicant is entitled to be furnished with it.

25. The applicant submits that s.13(1)(a) of the Road Traffic Act, 1994 permits a Garda to require a person arrested under the relevant provisions to provide two specimens of breath. It is contended that, if a person fails or refuses to provide a specimen after any cycle of the machine, the Garda may continue the process up to the point when the person provides two samples. On this basis it is submitted that the refusal to furnish the document in its entirety deprives the applicant of any reasonable possibility of establishing that the statutory discretion of the Garda to permit more than one cycle had, in his case, been wrongly fettered or interfered with by instructions from a third party. This amounts to a breach of the applicant's constitutional rights to trial in accordance with law.

26. In making this argument, Mr. Devally SC says that without the document it will not be possible to cross-examine the Garda witness as to whether he felt that he had any options in relation to the procedure. Even if the prosecution are correct in saying that copies of the document are in the hands of a number of practitioners, a cross-examiner would not be in a position to prove its provenance. If a Garda was asked why he or she did not offer a further opportunity, and did not give the hoped-for answer "because I was told not to", the cross-examiner would be, in effect, stuck with whatever answer was given.

27. It is further submitted that the decision of the second named respondent was wrong in law, insofar as it related to the question of legal professional privilege, and unreasonable in the *Keegan v Stardust Tribunal* [1987] ILRM 202 sense in that no reasonable judge could have refused disclosure of the document. The submission is made that it could not attract legal professional privilege having regard to the fact that it was a circular from the CPD section, which clearly related to the investigative stages of a case rather than the litigation stage.

28. On the issue of privilege, the argument is also made that the applicant did not acquiesce in the procedure adopted by the second named respondent in receiving and reading the document before making her decision. (It is suggested in the written submissions that, in fact, this course of action was objected to but that is not grounded on evidence.)

29. It is also contended strongly by Mr. Devally that any privilege which might have inhered in the document had in effect been waived, through the original acceptance in the District Court that the defence was entitled to the documentation held by the Gardaí at the relevant time (and the subsequent transmission of the wrong version). The submission is made that the second named respondent failed to have regard to that waiver. She should not have permitted the first named respondent to change stance and should not have embarked on the process of adjudicating on the disclosure issue.

30. It is accepted on behalf of the applicant that, in an application of this sort, the burden on him is to show that he has taken all reasonable steps to obtain disclosure but that necessary material has been withheld from him, such that there is a real risk of an unfair trial. It is specifically stated in the written submissions that -

> *"It has always been the Applicant's case that he was unable to provide 2 specimens of breath in Store Street Garda Station and, inter alia, he was not afforded an adequate opportunity to do so. "*

31. On behalf of the respondents Mr. Paul A. McDermott says that the procedure adopted by the second named respondent was the only available method of dealing with a disputed document. No argument appears to have been put before her to the effect that the first named respondent's previous agreement to make disclosure amounted to a waiver. It was not accepted that there was such a waiver - the first named respondent had disclosed what was thought to be the relevant document, and it subsequently transpired that there was a later version which contained legal advice. The respondent was not, in those circumstances, disentitled from reaching a different decision on the different content of the document.

32. The claim that the document is privileged is maintained, on the basis that such advice in Garda Circulars is always given in contemplation of litigation against the person who has been arrested. It was also legal advice, since it was connected to the process of bringing such persons before the court and with getting proofs in order.

33. Mr McDermott submits that the content of that advice is irrelevant, since it is for the court to determine whether or not what the Garda did was lawful.

Discussion and conclusions
34. The parties have, between them, cited over thirty authorities in relation to the arguments summarised above. However, I do not think it either necessary or helpful to go through them since it seems to me that the case is relatively simple.

35. The starting point in adjudicating in a dispute on disclosure must be the relevancy of the documentation in question. If it is not relevant, the issue of privilege is not material.

36. In the first instance, it is obvious that the first named respondent intended, at the District Court stage, to disclose to the defence the documentation possessed by Garda operators of the Intoxilyser machine at the relevant time. As it happens, that was not properly done, but no challenge has been mounted to the outcome of that trial.

37. I do not consider that the agreement to disclose a type of document necessarily amounts to a waiver of any argument against disclosing a document which contains material of a sort not contemplated by the person making disclosure.. In any event, the matter was not debated before the second named respondent in terms of waiver and nor was it pleaded in these proceedings.

38. It then became apparent to the respondent that there had been an update to the material and that update was furnished, albeit late in the day, prior to the Circuit Court hearing. The update amended the instructions to remove the reference to the possibility of further efforts to provide specimens. It was accompanied by the circular, which is clearly intended to explain the necessity to amend the previous instructions. The unredacted portion stipulates that an operator is only lawfully permitted to require a subject to give two specimens.

39. I am not aware whether, within the structure of An Garda Síochána, individual members are obliged to comply with circulars of this nature or are told to follow their own interpretation of the law - that is a question of fact, which may properly be the subject of cross-examination. However, whether the circular is correct or not having regard to the provisions of s.l3(1)(a) is, as Mr McDermott says, a matter for the court of trial. The legal analysis or commentary grounding the change in instructions, if that is what the redacted portions contain, is to my mind completely irrelevant - in any event, a Garda witness could not be cross-examined on the correctness of such analysis.

40. The concern has been expressed that the witness might not admit in cross examination that the procedure adopted was on foot of instructions. This does not seem to me to be well-founded.

41. The updated p.41, combined with the circular (even in redacted form), does seem to clearly amount to an instruction not to offer further attempts. If the witness says that he followed it, the defence may pursue the argument as to the fettering of discretion (if their analysis of the section is correct). If the witness says that, notwithstanding the circular, he formed his own view, the argument as to the correctness of that view and the lawfulness of his actions are still open to argument by the defence. What is not relevant, either way, is why the CPD section came to its view.

42. It is the sworn evidence of Mr. Conlon that the redacted document contains the view of the CPD section on the proper interpretation of the Act. Having regard to the fact that the material has already been seen by the trial judge there is no reason to doubt this.

43. In my view that is sufficient to dispose of the matter. The applicant has failed to demonstrate that the non-disclosure of the full document has created a real risk of an unfair trial, because he has not demonstrated that the redacted parts are relevant to an issue in the trial such that he cannot have a fair trial without sight of them.

44. For the avoidance of doubt, I should say that I am not basing my decision on a finding of legal professional privilege - if I had to rule on this I would be inclined to accept the applicant's submissions and hold that the advice given related only to the investigative actions of the Gardaí and not to litigation. However, on the facts of this case it is not necessary to make any ruling on the question.

45. I therefore refuse the reliefs sought.