Neutral Citation Number [2007] IEHC 270

THE HIGH COURT

DUBLIN

No. 2006/1240 JR

BETWEEN

THOMAS SMITH

APPLICANT

AND
JUDGE AINGEAL NI CHONDUN

RESPONDENT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

Judgement of Mr. Justice McCarthy on Tuesday, 3rd July, 2007.

Mr. Justice McCarthy: This is the Judgment of this Court in *Thomas Smith -v- Judge Aingeal Ní Chondun*, Respondent, and the Director of Public Prosecutions, Notice Party.

This is an application, effectively, for a certiori of an order of the District Court made on 6th September 2006. On that day, the Applicant was convicted of that offence commonly known as drunk driving, being an offence contrary to section 4 and 6(A) of the Road Traffic Act 1961 as inserted by section 10 of the Road Traffic Act 1964 and as amended by section 23 of the Road Traffic Act 2002.

1. Relief is also sought by way of declaration condemning the order on the footing that in failing to give reasons for her refusal of a directed acquittal, the Applicants right to a fair trial was breached. The gravamen of the case is whether or not the learned Respondent failed to give any or any adequate reasons for that refusal.

2. I will not set out the facts in extenso in the Judgment but rather refer to them as may be relevant.

3. At the close of the prosecution case, counsel on behalf of Applicant submitted that the Applicant had no case to answer on the following grounds to each of which I now turn, namely:

In *The Director of Public Prosecutions v Thomas Keogh* (unreported) Murphy J, 9th February 2004, it had been held that non compliance with the provisions of section 17 of the Road Traffic Act 1994 in respect of a statement issued pursuant to it was fatal to the prosecution case.

The member of An Garda Siochana, Garda Brian Kenny, who operated an intoxilyzer machine to take a sample of the Applicant's breath at Pierse Street Garda Station at approximately 1 o'clock on the morning of 8th April 2006, gave evidence that he had signed the relevant statement or statements prior to the time when the Applicant signed.

The Act provides that two originals generated automatically by such machine should be signed by both the Garda administering the taking of the sample and the suspect, the Applicant contending that the suspect must be afforded an opportunity to sign first in default of which the Garda would be in breach of the obligation to produce statements which were duly completed and one of which, of course, is provided to the Applicant.

This legal proposition was advanced in circumstances where Garda Kenny had given evidence that he had signed the statements before the Applicant.

Garda Mulcahy, on the other hand, gave equally clear evidence that the statements were first signed by the Applicant, thus giving rise to a fundamental difference on this issue on the prosecution case. It should be added, however, that Garda Kenny was trained to operate the machine whereas Garda Mulcahy was not, that Garda Kenny had stated (and I paraphrase here) that he invariably signed such certificates first and that Garda Mulcahy had stated his colleague would be in better position to give evidence on the point.

A second disputed issue of fact pertained to the question of whether, or to what extent, the Applicant was under observation for the period of 20 minutes immediately prior to the taking of the samples. There is no statutory requirement that a suspect be observed during such a period but, as a matter of evidence, it is commonly regarded as necessary to prove that a suspect has not taken anything by mouth or smoked.

Consumption by mouth or smoking during the period in question is conceived to potentially undermine the validity of the result of the test. Garda Kenny agreed in cross-examination that reliance could not be placed on the results where this was so.

As to observation, Garda Mulcahy gave evidence that he was adamant he observed the Applicant for the requisite 20-minute period, though he acknowledged that he later made a phone call. This evidence was later relied upon by the Applicant in his application for an acquittal. In this context I should add that Garda Kenny learned only for the first time in cross-examination that the Applicant had made a phone call.

This evidence gave rise to submissions grounded on authority, the first of which was based on the order in which signatures were appended to the statements to which I have already referred to. Specifically this was on the basis that the Court could not be satisfied that compliance with section 17(2) of the 1994 Act had been proved beyond a reasonable doubt having regard to the conflict of Garda evidence.

Secondly, it was contended that the Court could not be satisfied beyond a reasonable doubt that the 20-minute observation period had taken place, both because of the phone call evidence, if I might describe it as such, and also the fact that the first sample was taken at 1.03 a.m.

Lastly, and this is really a point which flows from the evidence as to observation, it was contended that the presumption in section 21(1) of the Act of 1994 as to the evidential status of the statement as to quantity of alcohol in breath had, in consequence, been rebutted because Garda Kenny, described as the Director's expert witness, stated that the statement could not be relied upon in given circumstances: The proposition depends ultimately on the State facts and each case will be different and Garda Kenny's view

was merely a hypothesis.

The applicant contended that on the basis of *DPP -v- Barnwell* (unreported) Flood J, CCA, 24th January 1977, there were inherent conflicts on vital points.

In the prosecution case between the evidence of Garda Mulcahy and Kenny whereby that, even if the prosecution evidence was taken at its highest, a jury properly charged could not comment upon it. This decision applied, *R -v- Galbraith* (1981) 1WLR, 1039 of the English Court of Appeal. As is well known on that authority, there are three circumstances in which a directed acquittal would fall to be considered, namely where there is no prima facie case where the prosecution evidence is so tenuous or contradictory taken at its highest, that no properly charged jury could properly convict upon it, and where issues of weight, strength and weakness or credibility ordinarily within the provenance of the jury arise. In the first and depending on the facts and circumstances. In the second, a directed acquittal will follow but not in the third. The prosecution cannot pick and choose between mutually contradictory evidence in the second class of case or, as it is put in the well known observation in *R -v- Shipey* (1988) CrLR, "pick out the plums and leave the duff" when analysis of its case is required to decide what its highest point may be.

There is some disputed fact about what the learned District Judge said in her Ruling. The Applicant's solicitor, Mr. Robinson at paragraph 15(E)(7) states that she said:

> "Quite simply I am inclined to convict. I am taking a simple view, a simple perspective on this. I am satisfied that each Guard completed his function. I have no qualms with the section 17 certificate. I am going to convict."

That was is in his affidavit of 20th October 2006.

Mr. Robinson repeats that this is what was, and all that was, said. In his supplemental affidavit of 27th February 2007 at paragraph 8, in reply to that of Mr Conlon of 2nd February of the same year in which the latter deposes at paragraph 13 to the fact that, in his recollection, the learned District Judge stated that the section 17 certificate was not affected adversely in this for the period of observation. He seems here to paraphrase what was his recollection rather than quote directly what was said.

Whilst there was a debate about the meaning of the sentence, I am content to accept that what was said were words to the effect that the learned District Court Judge was of the view that the so-called certificate under section 17, by which all parties mean the statement, should be accepted as valid. In truth, there is no real conflict between this paraphrase and the words "I have no qualms about the section 17 certificate" and Mr Conlon may, handicapped as he was, unlike the Applicant, by having to focus on the twin tasks undertaken for the Applicant by solicitor and counsel, only have inferred that reference was being made to the observation issue.

Mr. Conlon and Mr. Robinson on affidavit have commented on a number of matters. Obviously I cannot have any regard to it. Such comment extends, in Mr Conlon's case, at paragraph 14 to the fact that it is difficult to see how the Ruling on the question affected the Applicant's adviser as to whether or not he should be called in evidence and also that a tactical decision was taken because, in effect, the Respondent had fallen into error, there was no need and perhaps it would have been inappropriate as being, in effect, a complaint expressing dissatisfaction with the Ruling to ask the Applicant to further explain the Ruling. But Counsel for the Applicant had asked whether or not the Respondent was rejecting all of the submissions on behalf of Applicant.

The issues to be addressed by the Respondent were, hence:

> 1. Whether, as a fact, Garda Kenny or Garda Mulcahy signed the statement first having regard to the decision in Keogh and the terms of section 97 of the 1994 Act.
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> 2. Whether or not, as a fact, during the relevant 20-minute period prior to the taking of the sample, there was any lacuna in the observation of the Applicant by Garda Mulcahy and if there was, whether or not an essential proof was missing.
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> 3. Whether the statutory presumption under section 21(1), by virtue of the expert evidence of Garda Kenny, had been rebutted.
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> 4. Whether or not, taking the totality of the evidence, that of the prosecution was so tenuous or contradictory in its body, that no tribunal of fact properly charged or, in the case of a Judge, properly applying the law, could probably convict.

The Judge's attention was brought to the fact that the view favourable to the Defence must be taken. Where two views are possible this is axiomatic and on a free standing basis needed no comment from the Judge whatever else.

In my Judgment in *Foley* and *Judge Murphy and The Director of Public Prosections* delivered today also, I have addressed in some detail the principles to the giving of reasons by judges and I apply the principles I have there elaborated.

Since this was a summary prosecution, however, of minor offence fit to be tried that way, I make special reference to *O'Malley -v- Balla* 2002 IR, 410 and to *Lindon -v- Collins* (unreported) Charleton J, 31st January 2007 which are of most assistance.

In *O'Malley -v- Balla*, to put the matter shortly, on an application for a directed acquittal, the Respondent District Judge made no specific Rulings on a number of the Applicant's submissions. In that case, being a prosecution like the present one for an offence under section 49 of the Road Traffic Act 1961, as amended, the Applicant was acknowledged to have been arrested by a Garda without giving reasons.

As required by *Christie -v- Lechinsky* (1947) AC, 573, approved by the Supreme Court in *The People, DPP -v- Walsh* (1980) IR, 294 and, on later arrival at the scene, a second Garda purported to arrest or rearrest him, it was submitted that the original arrest was bad since no reasons were given and that the second arrest was similarly so in as much so there are circumstances where an "arrest on an arrest" may be bad.

The learned District Judge responded to these submissions on behalf of the Applicant by saying, "He was drunk, wasn't he?" This could have been regarded as a Ruling on the first point since there is no need to inform a person of the ground of his arrest if it is obvious.

Ultimately, however, the Supreme Court (per Murphy J, Hardiman J and Geoghegan J concurring) held that:

> "I would be very far from suggesting that Judges of the District Court should compose extensive judgments to meet some academic standard of excellence. In practice it would be undesirable, and perhaps impossible, to reserve decisions even for a brief period. On the other hand, it does seem, and, in my view, this case illustrates that every trial judge hearing a case at first instance must give a Ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as practicable in the time available, his reasons for so doing and further it does seem in me that in failing to rule on the arguments made in support of the application for a non suit, he fell into unconstitutionality to use the words of Henchy J in *The State Holland and Kennedy* (1977) IR 193, 201"

It is also instructive to see that in Lindon, three submissions were made on a prosecution for a similar offence at the conclusion of the prosecution case and later at the conclusion of the whole case, the accused having gone into evidence: Firstly, that the Road Traffic Acts, applying as they do to public places as defined therein, was required but wanting in as much as Marlboro Street, Dublin where the offence was committed was proved to be such a place. Secondly, that there was insufficient evidence to show observation of the accused for 20 minutes prior to the taking of a breath test, as here, and, lastly, the Applicant was not in charge of the vehicle relevant to the offence.

The Respondent District Judge dealt with the first two explicitly at what I will call the "direction stage" and the last at the conclusion of the case. In the light of the disputed evidence, there was surely no need to say anything beyond the reason, "I am satisfied the State has proved its case" at that stage.

No one could doubt that she did not have to go further then. The significant point is that she dealt explicitly with the first two separately. I do not think it is of any significance whether an accused needs reasons for the purpose of going into evidence and do not agree that this is the only reason why it is necessary.

I do not believe that the Supreme Court intended to be regarded as having restricted the need to give reasons to cases where an accused needed them to decide whether or not to give evidence here in any event since there were disputed issues of fact. He needed them for that reason alone. He would be entitled to them also to decide whether or not he should seek to avail of a case stated or seek judicial review and indeed to assist him in any decision as to whether to appeal or not. This is to say nothing of the fact that there is a free standing basis in fair procedures that an accused person knows why he has been convicted. Reasons of course may be express or implied and they are both here. Their extent will also depend, especially in a court of summary jurisdiction, on the nature of the case.

Contesting prosecutions for what is commonly called drunk driving frequently involves particularly close analysis of evidence and consideration of net questions of law in an area of the law notorious for a myriad of narrow legal issues.

I do not think that the necessity recognised by the Supreme Court for avoiding undue imposition on the District Court in terms of giving reasons, as emphasised by Murphy J, is undermined by the necessity to deal with arguments in a fairly specific way where such evidential or legal issues arise whatever the nature of case.

No real point is taken here about the fact that the Respondent Judge used the words, "I am inclined to convict" even though the matters raised were on a submission of no case to answer. She would have been perfectly entitled to prefer one Garda witness's recollection over another or, having found that a requisite period of observation had taken place, find that the expert evidence was irrelevant since it was based on hypothesis not borne out by evidence on deciding on the verdict.

At the intermediate stage, she had to ask herself whether or not any of the contingencies contemplated in Barnwell or Galbraith arose. I think that the reasons were not adequate in the light of what she said. She did say that she was satisfied that each Garda completed his function. This can only mean that she thought there was sufficient evidence of the fact of the requisite observation from Garda Mulcahy since this was his function. But, at the same time, whilst she said that Garda Kenny had completed his functions, or words to that effect, there was a fundamental dichotomy in their evidence.

As to the statement or certificate, and I think that this ought to have been addressed in clearer terms and having regard to the background principles set out in Barnwell I think that it would have been necessary for her to analyse the evidence and submissions in somewhat greater detail in order that the Applicant could be quite clear as to the basis upon which he was rejecting the several submissions which I have referred to and also the several issues which I have identified.

Now I want to emphasise again the fact that this is a court of summary jurisdiction. No great detail was required. No Reserved Judgment was required. Dare I say it, perhaps a little more would have been sufficient. What was required was that those issues which I have identified were specifically referred to and, again, I think there was too high a level of generality in relation to the manner in which she gave reasons.

The appropriate relief, obviously, is that in *O'Malla -v- Balla* and I therefore quash the decision and I remit it to the Distinct Court for further hearing in accordance with the Rules.