Neutral Citation Number: [2009] IEHC 212

THE HIGH COURT

2008 237 JR

BETWEEN

MICHAEL SWEENEY

APPLICANT

AND

DISTRICT JUSTICE MARY FAHY

RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT delivered by Mr. Justice O'Keeffe on the 27th day of April, 2009

1. The Applicant seeks an order of *certiorari* by way of judicial review quashing the decision of the Respondent made at Tuam District Court on 7th December, 2007, whereby the Respondent convicted the Applicant of an offence contrary to section 49 of the Road Traffic Act 1961, imposed a custodial sentence and disqualification on the Applicant from driving for two years.

2. The Applicant was charged that on 13th October, 2006, he drove a mechanically propelled vehicle in a public place when he was under the influence of an intoxicant, to such an extent as to be incapable of having proper control of a mechanically propelled vehicle contrary to section 49(1), (6) and (8) 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.

3. It was contended by the Applicant that the prosecution solely relied on the certificate issued by the Medical Bureau of Road Safety ("the Bureau") under section 19 of the Road Traffic Act 1994, certifying the presence of a drug or drugs which stated*, inter alia*:-

> "The Medical Bureau of Road Safety certifies that on analysis by the Bureau, the specimen to which the above particulars relate contain the presence of the following . . . Cocaine Class."

4. It was claimed that the said certificate was invalid and null and void and not in accordance with section 19 of the Road Traffic Act 1994, and was not evidence of the presence of an intoxicant in the Applicant's blood on the date of the alleged offence because:-

(a) It did not have affixed thereto the seal of the Bureau.

(b) It was not furnished as soon as was reasonably practicable by the Bureau, but rather, was furnished over some 13 to 14 weeks from the date that the Applicant provided the blood sample in question on 30th October, 2006.

(c) The purported finding of a drug "Cocaine Class" in the Applicant's blood sample was not a finding of an intoxicant within the meaning of section 19(1) of the Road Traffic Act 1994, or a "drug" or a substance within the meaning of that section in Irish law.

(d) It related to a reanalysis some 13 to 14 weeks after the first analysis of a blood sample which raised a serious risk that same was contaminated during this period such that it was unreliable and should not be accepted as evidence.

(e) The certificate was served in circumstances of unfairness in that the Applicant had already been served with the certificate recording the absence of alcohol in his system and the Applicant believed the matter was completed and, accordingly, discarded the sample which he had until then retained.

(f) The Respondent erred in law and exceeded her jurisdiction by accepting the certificate of the Bureau as a certificate within the meaning of section 19 of the Road Traffic Act 1994, or as evidence of the existence of alcohol in the Applicant's blood when it clearly did not bear the seal of the Medical Bureau.

(g) The Respondent erred in law in accepting a document from the Bureau dated 7th February 2007, as a valid certificate, in circumstances where the examination of the Applicant's blood in respect of cocaine did not take place until some fourteen weeks from the date on which the Applicant herein provided the said blood sample, and at a time when the seal of the said sample had been broken by the Bureau when the Applicant's blood sample was examined for alcohol on 13th November, 2006.

(h) The Notice Party, in failing to analyse the Applicant's blood sample for blood and other intoxicants on the same date, namely, 13th November, 2006 (when the Applicant's blood was analysed for alcohol), failed to examine same as soon as was practicable or to forward the sample (*sic)* as soon as was practicable to Garda Duane, as required by section 19 of the Road Traffic Act 1991, in particular, subsection 1 thereof. Further, the seal of the container containing the blood sample was broken on 13th November, 2006, such that the said sample could have been contaminated before it was analysed on 6th February, 2007.

(i) Further, a completed certificate, as required by section 19(3) of the Road Traffic Act 1994, was not furnished to the Garda Station concerned and, in particular, to Garda Duane as soon as practicable and therefore was not in compliance with section 19(1) of the Road Traffic Act 1994.

(j) The Respondent erred in law and in principle in convicting the Applicant, on foot of the purported certificate and in deeming the said certificate to be a valid certificate within the meaning of section 19 of the Road Traffic Act 1994, and/or evidence that an intoxicant existed in the Applicant's blood, namely, "Cocaine Class", when same was not an intoxicant nor a drug known to law and the Applicant's conviction on foot of the said summons is null and void and should be quashed by order of *certiorari*.

(k) The Applicant, by reason of the foregoing, was not dealt with in accordance with constitutional fair procedures to which he was entitled.

5. The circumstances of the case are that at 1.25pm on 30th October 2006, Garda Duane of Tuam Garda Station arrested the Applicant pursuant to the Road Traffic Act. The Applicant opted to provide a blood specimen to the designated doctor. The samples were placed in two sealed containers; the Applicant was offered a choice of either container and took one. On 31st October, 2006, Garda Duane posted the other container containing the Applicant's blood to the Bureau. A receipt was received from the Bureau a few days later. On 16th November, 2006, Garda Duane received a certificate from the Bureau which recorded that it had analysed the Applicant's blood sample and found the concentration of blood alcohol in the Applicant's blood was "nil". A copy of this certificate was sent to the Applicant. The Applicant decided that as there was no alcohol in his blood, there was no need for him to retain the sample which had been given to him by Garda Duane, and he disposed of same, believing that no prosecution would be brought against him.

6. On 10th February, 2007, some 13 to 14 weeks later, a certificate from the Bureau was forwarded to Garda Duane certifying that on analysis, the specimen of the Applicant contained the presence of the following drug "Cocaine Class" certificate. The certificate, it is stated, was adduced in evidence by the prosecution and accepted by the Respondent. It is also claimed the seal of the Bureau was not affixed to the certificate.

7. Garda Duane gave evidence of the arrest of the accused and details of the procedures undertaken at Tuam Garda Station. Part of his evidence was his observations that when he stopped the Applicant whilst driving and whilst speaking with him, he observed that his eyes were bloodshot, glazed and dilated, and that he was disorientated in his speech and manner, that, in other words, he was "high", in the experience of Garda Duane. He said that his evidence was supportive of the other evidence in the case, namely, the certificate from the Bureau which certified the presence of drugs in the Applicant's system. He further stated that in relation to the second certificate (dated 6th February, 2007), that the Bureau's seal was located on the bottom right-hand side but that it did not appear in both copies.

8. He said that at the completion of the evidence, Ms. Angela Dempsey, solicitor on behalf of the Applicant, made submissions to the Respondent in relation to the delay in examining the blood sample for drugs, after it had been examined for alcohol, and she asked that the charge be struck out on that basis and on the grounds that because the only reason the Applicant was driving on the date in question was because he had been requested by gardaí to drive to Tuam. (She claimed that he had been set up by members of An Garda Síochána.) Ms. Dempsey, he said, made no point to the presiding judge regarding the presence or absence of the Bureau's seal on the second certificate, the possibility of contamination of the sample, or that the Bureau's finding that a drug "Cocaine Class" was not a finding of the presence of a drug or an intoxicant known to law. Moreover, he said, no evidence was given in this regard.

9. At Tuam District Court on 7th December, 2007, the Respondent accepted the certificate as evidence that the Applicant had an intoxicant in his blood contrary to section 19 of the Road Traffic Act, and convicted him. Whilst the Applicant filed an appeal to the Circuit Court against this conviction, I have been informed that such appeal has been withdrawn.

10. In an affidavit grounding this application, the Applicant, at paragraph 11 stated that the certificate of the Bureau of 7th February, 2007, was not a valid certificate for the purpose of section 19 of the Road Traffic Act 1994, in that:-

(a) The seal of the Medical Bureau was not affixed thereto.

(b) The Medical Bureau did not analyse the specimen for an intoxicant other than alcohol as soon as practicable after it received the specimen forwarded to it by Garda Duane.

(c) It was clear that a period of 13 to 14 weeks had elapsed between the date the blood sample was furnished to the Bureau and the date that same was reanalysed for an intoxicant.

(d) The Bureau did not forward a certificate in the form prescribed for the purpose of section 19(3) to Garda Duane as soon as practicable, as required by section 19(1) of the Road Traffic Act 1994.

Mr. Giblin, S.C. made submissions in respect of these matters.

11. He contended it was inherently unfair and unjust that he was notified that an analysis of his blood revealed a nil concentration, thereby leading him to believe that no prosecution would be laid against him in respect of the presence of an intoxicant in his blood, which led him to believe there was no need to have the container of blood he had retained analysed by an expert. He said that he disposed of the sample when he received the first certificate from the Bureau, thinking that the matter was then concluded, and that no prosecution would be brought against him in respect of his driving or in respect of any intoxicant in his blood on the date of the alleged offence. He claimed that in the removal of the seal from the container in which his blood was contained and analysed for alcohol prior to 6th February, 2007, that such a process could have or probably did result in a contamination of his blood thereafter by some other substance, and, in particular, "Cocaine Class", prior to the date of the second certificate dated 6th February, 2007.

12. At paragraph 14, he stated (and it was contended on his behalf at the hearing), he believed and was advised that the Respondent erred in law and in fact in holding that there was sufficient evidence to convict him of the offence. He

claimed that the certificate did not amount to evidence of an intoxicant in his blood and was null and void. He claimed that the summons should have been dismissed as the case had not been made out beyond all reasonable doubt by the prosecution.

13. Garda Inspector Francis Nicholson prosecuted the case on behalf of the Notice Party. In an affidavit, he stated that Garda Duane gave evidence that the Applicant was arrested at a routine checkpoint. He said that at the conclusion of the Applicant's evidence, his solicitor, Ms. Dempsey, made submissions to the Respondent on the delay in having the sample analysed, and also the fact that the Applicant would not have driven but for the fact that she claimed that the gardaí had requested him to go to Tuam. No witnesses were called nor further evidence proffered, he said, in respect of the Applicant's allegations. He said there were no defence submissions in relation to possible contamination in relation to the presence or absence of the Bureau's seal on the second certificate that issued, or that the Bureau's finding that a drug, "Cocaine Class", was not a finding of the presence of a drug or an intoxicant known to law.

14. Ms. Dempsey, solicitor on behalf of the Applicant, in an affidavit stated that Inspector Nicholson's account of her submissions (as set out above) did not accurately reflect the submissions made by her at the hearing of the action. She said her submissions were to assert that there was a lack of evidence in regard to showing the presence of any drugs in the Applicant's system and which would render him incapable of maintaining proper and adequate control of his vehicle. She made submissions regarding what had happened to the blood sample in the intervening period between the two tests, and the fact that same tests were carried out by two different people. She made submissions regarding the lack of any evidence of continuity in relation to the seals between the two samples taken. She submitted that there was no evidence that the alleged finding of drug called "Cocaine Class" had been found to such a sufficient degree so as to render the Applicant "incapable of having proper control of the said vehicle". She said Garda Duane never stated that the Applicant was "high", as he deposed in his affidavit. She said that the Respondent erred in law and in fact in holding that there was sufficient evidence to convict the Applicant of the offence. She also stated that it was never part of the defence submissions that the Applicant had been "set up".

15. Counsel on behalf of the Applicant, Mr. Giblin, S.C., referred to the absence of the Bureau's seal on the second certificate. However, there was evidence from Garda Duane that the copy he received had the seal thereon, but it did not appear in the photocopies.

16. Mr. Niall Nolan, on behalf of the Notice Party, submitted the application for judicial review concerned the quality, quantity and essentially the sufficiency of evidence that was available at trial. Reference was made to paragraph 14 of the affidavit of the Applicant to which I have already referred. In support of his argument, counsel for the Notice Party relied on the comments of Ms. Justice Laffoy in *Stokes v. Director of Public Prosecutions and Others* [1999] 3 I.R. 218 (at p. 223):-

> "As to the function of this Court in determining whether the remedy of judicial review is available to an Applicant and, in particular, whether an order of certiorari should be granted, the Respondents relied on three recent authorities.
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> In *Lennon v. District Judge Clifford* [1992] 1 I.R. 382, O'Hanlon J., having referred to a passage from Halsbury's 'Laws of England' (3rd Ed.), vol. 11 at para. 119, and having quoted a passage from the speech of Lord Brightman in Chief Constable v. Evans [1982] 1 W.L.R. 1155, went on to say as follows at p. 386:-
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> 'The general tenor of the decisions is that the High Court is not available as a court of appeal from decisions of other tribunals except where it is given such a function by statute, and that the scope for challenging the validity of orders made by lower courts by way of judicial review proceedings is confined to those cases where reliance can be placed on want of jurisdiction, or excess of jurisdiction; some clear departure from fair and constitutional procedures; bias by interest; fraud and perjury; or decisions containing an error of law apparent on the face of the record.'... It seems to me that it is virtually impossible to make such a case on an appeal by way of *certiorari*. In different appellate procedures, insufficiency of evidence may be a ground for reversing a decision of a court or first instance, but insufficiency of evidence – save in the most extreme case – does not deprive the District Judge of jurisdiction to reach a decision on the matter before him. In this O'Hanlon J. in *Lennon v. District Judge Clifford* regard, I would respectfully adopt and apply the principles so clearly stated by [1992] 1 I.R. 382."

17. He also relied on the decision of O'Hanlon J. in *Truloc Limited v. District Justice McMenamin* [1994] 1 I.L.R.M. 151, where the court found it was not part of the function of the High Court, on an application for judicial review, to examine in detail the evidence tendered in support of a prosecution in the District Court for the purpose of assessing whether, in the opinion of the High Court Judge, that evidence was sufficient to support the conviction which had been entered into against a defendant.

18. The Notice Party contended that the Applicant's case, as presented in this Court, was not advanced at first instance and referred to the divergent accounts between what was stated by Inspector Nicholson in paragraph 7 of his affidavit, and by Garda Duane, and what was stated by Ms. Dempsey in her affidavit of 3rd October, 2008.

19. The Notice Party further referred to section 21(3) of the Road Traffic Act 1994, which provided that 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 – 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 such Part or Part V of the Act of 1968.

20. He submitted that Garda Duane's affidavit confirmed that the Bureau's seal was affixed to the certificate and in any event, this point was not taken at the District Court. No evidence he submitted was advanced to rebut the presumptions which arose that the point in relation to the possibility of contamination of the sample was speculation and cannot rebut the evidential value of the certificate. He submitted that if the Applicant discarded his own sample, having received the first certificate from the Bureau, that was a decision he took upon himself and was not caused or induced by the prosecution. He submitted that the second certificate was forwarded well within the statutory time limit prescribed for commencing criminal proceedings, namely, six months.

21. In relation to the interpretation of "as soon as is practicable", he relied on the decision of Finlay P. in *Director of Public Prosecutions v. Corrigan* (Unreported, High Court, 21st July, 1980) where he stated:-

> "Having regard to the presumption contained in section 23, it seems to me clear that is not possible from a mere lapse of time without any other evidence, and it certainly would not be possible from a lapse of time of approximately a month without any other evidence, for a court properly to reach the conclusion that a specimen was either not analysed or a certificate was not sent as soon as practicable. In order for the court to reach a decision to that effect, it would be necessary for it to have before it material indicating the practical difficulties and surrounding circumstances under which either or both of these activities was carried out by the Bureau, on the one hand, and the effect and consequence of any delay that occurred, on the other. The onus of establishing the facts from which a court could draw conclusions on these two topics is clearly, having regard to the terms of the sections, upon the defendant. In the instant case, therefore, where no evidence was apparently adduced by the defendant with regard to the practicable difficulties or factors surrounding any delay that occurred within the administration of the Bureau, and where, apparently, the defendant did not even adduce evidence of the date upon which he received a copy of the certificate and certainly adduced no evidence to indicate that that date left him in any way prejudiced or that the purpose of his receiving it as soon as practicable was defeated by delay, it does not seem to me that the learned District Justice was entitled to reach a conclusion, as he apparently did, that either the specimen had not been analysed as soon as practicable, or that the certificate had not been sent as soon as practicable. For him to have reached such a conclusion as according to the case stated before me, he, apparently, did upon the basis of the mere dates or the lapse of time indicated on the evidence adduced by the prosecution was, in my view, to ignore the presumption contained in section 23."

22. He also referred to the decision in *Director of Public Prosecutions v. Spaight* (Unreported, High Court, 27th November, 1981) where Finlay P. affirmed his decision in Corrigan.

Decision

23. In my opinion, it is regrettable in an application such as this for judicial review of the Respondent's decision, that there is such divergence of recollection in relation to the submissions made at the District Court hearing (to which I have referred earlier) by and on behalf of the Notice Party and Applicant. However, I agree with the submission of the Notice Party that the substance of the complaints of the Applicant are in relation to the insufficiency of the evidence before the Respondent. I accept the decision of Ms. Justice Laffoy in *Stokes v. O'Donnell* to which I have referred, to exclude insufficiency of evidence as a basis for obtaining judicial review.

24. In his submissions, Mr. Giblin submitted that the charge was not proved beyond a reasonable doubt. He referred to the fact that the Applicant was asked by the gardaí (not the prosecuting garda) to drive to Tuam Garda Station. He said that the Applicant was not cross-examined as to his condition. In my opinion, this is an issue in relation to the sufficiency of evidence before the District Judge and it is not the ground for judicial review. In particular, I rely on the decision of Ms. Justice Laffoy in *Stokes v. Director of Public Prosecutions* above referred to by me. There was evidence before the Court, not alone from the certificate, but also the evidence of Garda Duane.

25. He further submitted that in relation to the description "Cocaine Class" in the Bureau Certificate, there was no reference to such words in the legislation. It was argued by the Notice Party that this submission was not made in the District Court, and in any event, the word "Class" was surplus and of no consequence. I refer to Ms. Dempsey's affidavit at para. 5(g) where she states:-

> "I submitted that there was no evidence that the alleged finding of drug called 'Cocaine Class' had been found to such a sufficient degree so as to render the Applicant 'incapable of having proper control of the said vehicle'."

This is different to the submission made in this application by Mr. Giblin. Ms. Dempsey is again referring to the sufficiency of evidence before the District Court. This is not a matter for judicial review. Furthermore, I am of the belief that the Applicant cannot now raise an issue in a manner which was not addressed at the District Court hearing. If I am incorrect in this, I am not convinced the insertion of the word "Class" with "Cocaine" is fatal to the prosecution.

26. Counsel for the Applicant further claimed that the Applicant was not served as soon as practicable within the meaning of section 19 of the Road Traffic Act 1994, with the copy of the second certificate from the Bureau. In response, the Notice Party relies on section 19(4) where it is presumed that until the contrary is shown, that subsections (1) to (3) have been complied with. In my opinion, the Notice Party is entitled to rely on this presumption and also section 21(3). I rely on the judgment of Finlay P. as above referred to *in Director of Public Prosecutions v. Corrigan*. The Applicant failed to adduce any evidence to rebut these presumptions.

27. Mr. Giblin submitted that there was unfair procedures in the manner in which the prosecution was brought against his client in circumstances in which, having received the results of the first analysis, the Applicant reasonably concluded that he was not going to be charged. It was not for some 13 to 14 weeks thereafter that he was aware that the second certificate had issued from the Bureau. Counsel for the Notice Party submitted that the second analysis was done within the six-month period within which the prosecution could be commenced, and there was nothing in the legislation to prevent the second analysis from taking place. In my opinion, the Bureau was within its rights in having a second analysis undertaken and the communication of the results some weeks after the original incident did not, in itself, constitute unfair procedures. The fact that the State had the opportunity to reanalyse the specimen does not amount to the denial of fair procedures to the Applicant. There was no representation made by the gardaí that a second analysis would not take place. At all times, the Applicant could have tendered evidence to rebut the statutory presumptions, but he did not so elect.

28. In relation to the issue of the seal on the certificate, it is unclear whether this issue was raised at the District Court hearing. In any event, the evidence of Garda Duane clarifies the matter. In my opinion, it is not now a valid ground for this Court to consider in the application for judicial review.

29. In conclusion, I reject the grounds advanced by the Applicant and dismiss the application.