Neutral Citation Number [2007] IEHC 83

THE HIGH COURT

JUDICIAL REVIEW

[2006 No. 611 JR]

BETWEEN

DAVID O'NEILL

APPLICANT

AND

JUDGE PATRICK MCCARTAN AND DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice Charleton delivered on the 15th day of March 2007

Facts

1. The applicant David O'Neill was charged and convicted of the following offence:

> "That you did on 26/06/2005 at Curragh, Kildare, a public place, in the said District Court Area in Kildare, drove a mechanically propelled vehicle registered number 05 MH 4235 in a public place while there was present in your body a quantity of alcohol such that within three hours after so driving, the concentration of alcohol in your urine exceeded a concentration of 107mgs of alcohol per 100mls of urine. Contrary to s. 49(3) and (6)(a) of the Road Traffic Act, 1961, as inserted by s. 10 of the Road Traffic Act 1994 and as amended by s. 23 of the Road Traffic Act 2002."

2. On this offence, the accused was convicted in the District Court and having appealed to the Circuit Court; which appeal was heard by way of the full rehearing provided for in law, by the first named respondent on 17th May 2006. The applicant was again convicted and the penalty of disqualification was increased from two to four years. From that conviction, the applicant had sought judicial review of the decision of the learned respondent based on an alleged delay in the arrival of a doctor to Newbridge Garda Station following upon his arrest on 26th June 2005.

3. Briefly, the affidavits indicate that the applicant was arrested at 22.31 hours and was conveyed to Newbridge Garda Station, arriving there at 22.50 hours. The custody record indicates that the notice of rights was read to the applicant and signed off by Garda Darley at 22.55 hours. In court, Garda Brendan McNamara gave evidence that shortly after this a doctor was called to take a sample from the applicant. His evidence, as recounted in affidavit before this court, was recalled by him as being the following:-

> "In cross examination, in respect of the doctor being called I gave evidence that Garda Darley had done this after giving the applicant his notice of rights. I gave evidence that the applicant was given his notice of rights at [22.56 hours] and these had been acknowledged by the applicant by signing the custody record. During the course of my cross examination, the custody record was handed into court and in this regard I beg to refer to a copy of same, which is exhibited above. I stated that it appeared that the doctor had been called at or about [22.56 hours]. I indicated that I was unable to assist the court in respect of the activity of the doctor between being called to the Gardaí and arriving at the station. I gave evidence that the doctor had been requested to come to the station by contacting "K-Doc". I gave evidence that this is an out-of-hours service for doctors. I gave evidence that the doctor was based in the Health Centre in Newbridge on the evening in question but may have been out on call when our request for his services were rung in. I gave evidence that the K-Doc system operates by way of an operator [who] contacts the doctor on duty in the relevant area who is then driven to calls by a driver. I gave evidence that the custody record would suggest that the doctor was called at [22.56 hours] approximately and arrived at [23.40 hours] some forty four minutes later. I said that counsel for the applicant applied for a direction in respect of the time it took for the doctor to arrive. I indicated that I was not in a position to put the matter any further and stated that I had said whatever I could about the doctor. No further evidence was called by the prosecution. The application for a direction was rejected by the first named respondent… In particular he held that he was satisfied that the doctor had been called shortly after [22.55 hours] and that the period that it took to arrive could not be deemed to be unreasonable."

The Law

4. Section 49 of the Road Traffic Act, 1961, as inserted and amended, allows a Garda to arrest without warrant any person who, in the opinion of the Garda, is committing, or has committed, the offence of driving, or attempting to drive, a car in a public place when there is excess alcohol in their body. The section specifies that the offence has to be, in effect, detected within three hours. I derive this from the precise wording of the offence at s. 61(4) which provides:-

> "A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his body a quantity of alcohol such that, within three hours after so driving or attempting to drive, the concentration of alcohol in his breath will exceed a concentration of 35mgs of alcohol per 100mls of breath."

5. Section 61(3) and s. 61(2) provide for similar provisions, but with different concentrations, in relation to urine and blood.

6. The deprivation of liberty of a citizen is a serious matter, even if it occurs only for a matter of minutes.

7. In the *People (D.P.P.) v. Madden* [1977] I.R. 336, a statement by an accused person was held inadmissible by the Court of Criminal Appeal because the time within which he could lawfully be held under s. 30 of the Offences Against the State Act 1939, as amended, had elapsed during the taking of same. An argument was advanced to the court that unless the deprivation of liberty had been wilful, no deliberate and conscious breach of the accused's constitutional rights could have been involved. This argument was rejected. It is clear from the passage which follows, from the judgment of O'Higgins C.J. at p. 347, that there is a positive duty on the Gardái to seek to defend and vindicate the constitutional rights of all citizens, including those whom they suspect of a crime:-

> "In the view of this Court to adopt that approach is to misunderstand the decision in *O'Brien's* case [1965] I.R. 142 and, accordingly, to err in law. What was done or permitted by Inspector Butler and his colleagues may have been done or permitted for the best of motives and in the interests of the due investigation of the crime. However, it was done or permitted without regard to the right to liberty guaranteed to this defendant by Article 40 of the Constitution and to the State's obligation under that Article to defend and vindicate that right. This lack or regard for, and failure to vindicate,

the defendant's constitutional right to liberty may not have induced or brought about the making of this statement, but it was the dominating circumstance surrounding its making. In the view of this Court this fact cannot be ignored."

8. Here, the argument is that there was a failure to comply with the terms of the statute and a failure to set about vindicating the accused's constitutional rights by ensuring the timely attendance of a doctor for the purpose of taking the relevant sample. The onus is on the prosecution to establish that the accused has been held in lawful custody for the purposes of either taking a statement, a DNA sample or a blood, urine or breath sample under the Road Traffic Act 1961, as amended*; Director of Public Prosecutions v. Finn* [2003] 1 I.R. 372. In the latter case the Supreme Court held that a universal administrative policy of observing a person who for twenty minutes while in custody prior to administering a breath test could not be justified. There was no evidence, in effect, to say why the policy was initiated apart from evidence from a member of An Garda Síochána that this was the procedure he was required to follow by his superiors. At p. 378 Murray J. held as follows:-

> "In criminal proceedings the onus is on the prosecution to establish beyond reasonable doubt that a defendant, while held in custody, has at all times been so held in accordance with law. Not every delay is unreasonable and if it is not unreasonable it does not require to be objectively justified. Once it has been established by the prosecution that a defendant has been lawfully arrested and detained, the question as to whether that lawful detention has been rendered unlawful by unreasonable delay in dealing with the defendant is, in the first instance, a matter for the trial judge to determine having regard to the circumstances of the case. Generally speaking, I would be very much disinclined to consider that a delay of 20 minutes*simpliciter* in dealing with an arrested person is the kind of delay which could be treated as rendering an otherwise lawful custody, unlawful, at least in the absence of some other special circumstances."

9. In the slightly later case *Director of Public Prosecutions v. Damien McNiece* [2003] 2 I.R. 614 the same factual situation re-occurred. In that case, however, medical evidence had been given to the Circuit Court, on appeal from the District Court, by the Chief Analyst with the Medical Bureau of Road Safety, that a 20 minute period of observation, upon arrest, conformed with the best scientific practice and was necessary in order to eliminate the possibility that the presence of alcohol in the mouth of the suspect would affect the result of the test. At p. 624 Murray J. held:-

> "In my view, the adoption by the State of a practice designed to ensure an effective and valid breath test when the requirement is first made rather than adopting a trial and error approach does not render unlawful the custody of the person concerned during that initial twenty minute period of observation. It is not in question that the garda member was entitled to require the arrested person to provide breath samples. I cannot see that there is anything unlawful or oppressive in adopting procedures to ensure that when that test is taken, or, if one wishes, taken for the first time, it is effective and reliable. Indeed the State could be more readily criticised in my view if it did not follow accepted procedures necessary to ensure an effective and valid result in each case when the intoxilyser is used. In this regard it was also submitted on behalf of the prosecutor that there were at least doubts as to whether, under the relevant legislation, a second requirement could be made of an arrested person to provide a breath test if he or she had properly done so in response to the first requirement. That particular question of interpretation does not arise in this case stated but it is a matter in my view of legitimate concern for the State and is also a rational basis for following procedures which would ensure that the intoxilyser would give a valid and effective result when initially used."

10. In *Director of Public Prosecutions v. Tim O'Connor* [2005] IEHC 442, Quirke J. considered a case stated from the District Court as to whether it had been correct in dismissing a charge of drunken driving on the grounds that the accused had been in unlawful detention for a seven minute period during the investigation of that offence. The twenty minute period of observation, approved by the Supreme Court where there is evidence to justify it, in *Director of Public Prosecutions v. McNeice* [2003] 2 I.R. 614 was apparently exceeded in *Director of Public Prosecutions v. Tim O'Connor* by seven minutes. The gravamen of the District Judge's decision was that as the accused had been held in custody for twenty seven minutes that this seven minutes was in excess of the twenty minute period of observation to ensure that the breath testing machine worked correctly, and vitiated the test. Quirke J. held that the learned District Judge was not correct in law in determining that the accused was in unlawful detention. At p. 6 of his judgment, Quirke J. made the following observations, which I would follow:-

> "The legality of the detention of an accused person must, in every case, be decided on its own particular facts. On the facts of this case dismissal of the charge against the respondent on that ground would only have been justified if either,
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> (a) The legality of his detention had been challenged on behalf of the respondent or,
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> (b) Evidence adduced caused sufficient concern for the learned district Judge to commence a focussed enquiry into the legality of the respondent's detention and directed towards reasonableness.
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> The case stated does not indicate that a challenge was made on behalf of the respondent. Neither does it disclose an enquiry by the learned District Judge during which the DPP was given the opportunity to discharge the onus of proving that the duration of the respondent's detention was reasonable in the circumstances.
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> Insofar as the attention of this court has been directed to the ex tempore decision of the High Court (Abbott J.) in *DPP v. Fox* (delivered on 25th July, 2005), I would simply indicate that the conclusions which I have reached in these proceedings have been reached after the application of the principles outlined above to the facts of this case.
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> I am satisfied that the decisions of the Supreme Court in *Director of Public Prosecutions v. Finn* [2003] 1 I.R. 372 and *Director of Public Prosecutions v. McNiece* [2003] 2 I.R. 614 may not be construed as prescribing that any precise period of time is capable of rendering the detention of an accused person either lawful or unlawful."

11. The function of the High Court in exercising its jurisdiction to ensure the proper application of constitutional and legal principles by lower tribunals is strictly limited. For this purpose, I adopt the statement by O'Hanlon J. in *The State (Daly) v. Ruane* [1988] I.L.R.M. 117 at 124 where he stated:-

> "Relief by way of *certiorari* is only appropriate in a limited category of cases. Generally speaking it involves the applicant in showing that the inferior court or tribunal acted without jurisdiction, or in excess of jurisdiction, or in this regard a fair procedures, so that the applicant's rights to natural or constitutional justice were violated. Entitlement to the remedy may also arise where there is an error on the face of the record, or where an order has been obtained by collusion or fraud. What must be stressed is that the *certiorari* procedure cannot be utilised to convert the High Court into a court of appeal from all decisions of the District Court, with the court being required to embark upon a re-examination of the

evidence given before the lower court and a re-assessment of all submissions made during the course of the hearings in the lower court."

12. Counsel for the applicant submitted that there was no evidence upon which the learned Circuit Court Judge, the first respondent in this case, could have decided that the detention of the accused remained lawful given the delay in the arrival of a doctor at the Station. Counsel for the respondents submitted that such an argument was an example of "law world", a state of unreality which, as I understand it, entices judges to make decisions which are divorced from the practicalities of life. He urged that the court should look to the real world in deciding this case whereas counsel for the applicant urged that there was no evidence, or no sufficient evidence, before the court to justify the delay in question.

Conclusion

13. In my view there was sufficient evidence before the learned Circuit Court Judge to enable him to decide that there had been no culpable delay on the part of the Gardái in ensuring the attendance of a doctor for the purposes of the procedure under the Road Traffic Act 1961, as amended, in taking samples for analysis by the Medical Bureau of Road Safety. The evidence was to the effect that once the procedures for checking the accused into Garda custody, making him aware of his rights and opening up a custody record had been concluded, a doctor's service was immediately telephoned. The arrival of a doctor within an hour of that time must be regarded, in the real world, as being a good service; if not a very good one. Rather than there being evidence of the Gardái acting with contempt towards the accused's constitutional right to liberty, I would hold that, in accordance with the imperative set out in *People (DPP) v. Madden* [1977] I.R. 336, that they did everything possible to ensure that the relevant procedure was completed within a reasonable time. I would add that it is wrong to apply time limits or comparisons between particular cases. Getting doctors to stations is a practical issue to be decided in a practical way. There was no evidence of anyone doing anything less than their best.