

THE HIGH COURT
JUDICIAL REVIEW

2012/273JR

Between

JAMES POWER

Applicant

-and-

CIRCUIT JUDGE ANTHONY HUNT and THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondents

Judgment of Ms. Justice Iseult O'Malley delivered the 18th April, 2013.

Introduction

1. This case arises out of the conviction of the applicant by the first named respondent for the offence of driving under the influence of an intoxicant to such an extent as to be incapable of having proper control of his vehicle, as provided for in s. 49(1) of the Road Traffic Act, 1961 as amended. "Intoxicant" includes alcohol, drugs and any combination of drugs or drugs and alcohol.
2. The date of the alleged offence was the 15th June, 2008. Having been convicted in the District Court the applicant appealed to the Circuit Court, where the conviction was affirmed by the first named respondent on the 23rd March, 2012.
3. Leave to seek judicial review was granted on the 26th March, 2012. The Statement of Grounds sets out a number of different issues arising out of the trial of the applicant but only one point was pursued at the hearing. This turns on the interpretation of s.19 of the Road Traffic Act, 1994, a provision concerned with the certification by the Medical Bureau of Road Safety ("the Bureau") of its analysis of blood or urine samples for alcohol or drugs.
4. In this case, the Bureau forwarded a certificate in June, 2008 stating that the applicant's sample contained nil alcohol. Some weeks later, in August, 2008, a second certificate was forwarded recording the presence of cocaine in the sample. Both certificates were issued pursuant to the provisions of s. 19. The applicant was charged with the offence under s. 49(1) as amended and the second certificate was adduced in evidence as part of the prosecution case.
5. In brief, the applicant says that only one certificate can be given under the section, that in this case the one relating to alcohol was the first, and therefore the only valid one, and that the learned trial judge erred in law in admitting the contents of the second one into evidence.
6. The legislation has been amended in some respects since 2008 but for the purposes of this case, obviously, all references are to the Act as it stood at the relevant time.

Statutory provisions**Section 49(1) of the Road Traffic Act. 1961 (as inserted by s. 10 of the Road Traffic Act.1994)**

(a) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while he is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle.

(b) In this subsection 'intoxicant' includes alcohol and drugs and any combination of drugs or of drugs and alcohol.

7. The Act makes provision for the arrest without warrant of a person who, in the opinion of a member of An Garda Síochána, is committing or has committed an offence under the section and for the taking of specimens from a person so arrested by a designated doctor. No issue is taken in this case in relation to these procedures and nothing turns on these provisions.
8. Section 18, as it read at the time, provided for the division of the specimen into two parts; the placing of each part into a sealed container, the offer of one to the suspect, the completion of the prescribed forms and the forwarding of specimens to the Bureau. Again, no issue is raised in the case concerning this procedure.
9. On the 27th June, 2008 a certificate was issued by the Bureau under section 19 of the Act certifying that the sample of the applicant's blood contained a concentration of nil milligrammes of alcohol per 100 millilitres of blood. On the 13th August, 2008 a further certificate was issued under section 19 certifying that the sample of blood contained cocaine.
10. At the applicant's trial the prosecution adduced evidence of his driving on the date in question and put in the second certificate. The first certificate appears to have been given to the applicant by way of disclosure. It was not relied upon for any purpose by the prosecution but was put into evidence by the defence in order to make the argument now under consideration.
11. The learned trial judge accepted the second certificate as valid and convicted the applicant. Reading s.19 in the light of s. 9, he held that the Bureau was entitled to analyse for alcohol and drugs, one test being carried out after the other.

Section 19 of the Road Traffic Act. 1994- subsections (1), (3) and (4)

(1) As soon practicable after it has received a specimen forwarded to it under section 18, the Bureau shall analyse the specimen and determine the concentration of alcohol or (as may be appropriate) the presence of a drug or drugs in the specimen.

(2) [Irrelevant]

(3) As soon as practicable after compliance with subsection (1), the Bureau shall forward to the Garda Síochána station from which the specimen analysed was forwarded a completed certificate in the form prescribed for the purpose of this section and shall forward a copy of the completed certificate to the person who is named on the relevant form under section 18 as the person from whom the specimen was taken or who provided it.

(4) In a prosecution for an offence under this Part or under section 49 or 50 of the Principal Act, it shall be presumed until the contrary is shown that subsections (1) to (3) have been complied with.

12. For the purposes of these provisions, "analysis" includes any operation used in determining the concentration of alcohol in a specimen of blood, breath or urine, and any operation used in determining the presence (if any) of a drug or drugs in a specimen of blood or urine, and cognate words shall be construed accordingly" - s. 9(1).

Section 21 (2) and (3). Road Traffic Act. 1994

(2) A duly completed form under section 18 shall, until the contrary is shown, be sufficient evidence in any proceedings under the Road Traffic Acts, 1961 to 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 designated doctor concerned with the requirements imposed on him by or under this Part.

(3) 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 to 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 this Part or Part V of the Act of 1968.

13. The prescribed forms referred to are provided for in S.I. No. 173/2001-the Road Traffic Act, 1994 (Part III) (Amendment) Regulations, 2001. Separate forms are prescribed for the results of alcohol and drugs analysis. Each of the prescribed forms states on its face that it is issued under s.19.

Submissions

14. The core submission made on behalf of the applicant is that only one certificate is contemplated by ss. 19 and 21. In this case, a valid certificate having been issued on the 27th June, 2008, any subsequent purported certificate is inadmissible. Particular reliance is placed on s.21 (3) - if the certificate is evidence of compliance by the Bureau with all of the requirements of Part III (and Part V of the Act of 1968), that must mean that it has completed all of the requirements in relation to the specimen in question, including the requirement to analyse it for alcohol and, where appropriate, drugs. The certificate cannot be forwarded unless it is complete- when it is complete it must be forwarded as soon as practicable. The Bureau may not revisit a completed certificate. There can, therefore, only be one valid certificate and in this instance that is the one that is first in time.

15. If this submission is correct, the effect would be that the presumption of validity attaching to the certificate relied upon by the prosecution would be displaced.

16. Counsel relies on the judgment of Budd J in *DPP v Canavan* [2007] 3 IR 160. In that case a District Judge had been sent a draft case stated by the prosecution, who wished to appeal against an acquittal. The judge made some handwritten amendments, signed it and sent it back. It was not served on the other side within the time limit specified under the Act. A short time later the judge signed a second document, which was identical save for the fact that the amendments had been typed in. Budd J held that under the Act there was provision for only case stated and that therefore the first document was the only valid one.

17. Reliance is also placed on the following passage from the judgment of O'Higgins CJ in *DPP v Kenny* [1980] IR 160, at p. 164:

"Where a statute provides for a particular form of proof or evidence on compliance with certain provisions, in my view it is essential the precise statutory provisions be complied with. The Courts cannot accept something other than that which is laid down by the statute, or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field. This applies to all statutory requirements; but it applies with greater general understanding to penal statutes which create particular offences and then provide a particular method for their proof"

18. Although this passage comes from a dissenting judgment it expresses a well established principle and was more recently endorsed by the Supreme Court in *DPP v Ennis* [2011] IESC 46.

19. The argument is made that the forms prescribed by the Statutory Instrument do not reflect the intention of the legislature, which is that one certificate should be issued setting out all relevant findings.

20. The respondent points out that only one certificate was relied on in court and she argues that the learned trial judge applied the correct approach to the Act. Since the test for alcohol is different to that for drugs, the process of analysis must be done in two stages. She relies on *Sweeney v Fahy* [2009] IEHC 212 where, similarly, there had been a negative test for alcohol followed by a positive test for drugs. O'Keeffe J held that there was nothing unfair about conducting a second analysis, testing for drugs, in circumstances where no representation was made to the accused that the result of the alcohol test meant the end of the case.

21. In relation to the proper interpretation of s. 19 (3), (which, counsel said, was "not drafted beautifully") reference is made to *Ivers v Murphy* [1999] 1 IR 98, a case concerning s. 6(1) of the Criminal Justice (Miscellaneous Provisions) Act, 1997. That section provided that where a person was arrested without warrant, evidence in relation to the arrest could be given by a certificate signed by the arresting member. The defence had contended that the certificate could not be relied on in the absence of evidence that the arrest was without warrant. Ruling against her, Denham J said at p. 111

"The literal rule should not be applied if it obtains an absurd result which is pointless and which negates the intention of the legislature. If the purpose of the legislature is clear and may be read in the section without rewriting the section then that is the appropriate interpretation for the court to take."

22. Denham J pointed out that the whole purpose of the section was to enable the evidence of arrest, charge and caution to be given by certificate if the accused was arrested without warrant. If the arresting officer had to come to court to give that evidence orally it would render the section absurd.

23. Reliance is also placed on s. 18 of the Interpretation Act, 2005, which provides that

'A word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as importing the singular.'

Conclusions

24. In my view the answer to the issue raised in this case lies in the nature and purpose of certificate evidence in criminal cases.

25. It must be remembered that the reason that such evidence is permitted under various criminal statutes is to enable the prosecution to give evidence of the prescribed matters without having to call oral evidence thereof. The sole point is to make admissible what would otherwise be hearsay. In such cases, the certificate covers the admissibility of its own contents.

26. In the context of a drink or drug-driving case that means that the prosecution does not have to call witnesses from the Bureau to prove how the analysis was carried out or what the findings of the analysis were, along with other issues such as, for example, the chain of custody of the sample within the Bureau and thereafter. The certificate is given evidential status, but only for the purpose of the specified proceedings -that is, for the purposes of prosecution under the specified provisions of the Road Traffic Acts. It has no free-standing legal status. It would not enjoy any presumption in a civil claim. If the prosecution do not seek to rely on it for the statutorily-prescribed purpose, it is irrelevant (unless of course the document itself raises some issue which the defence can legitimately make use of- for example, to raise a reasonable doubt about the reliability of some aspect of the prosecution evidence).

27. This is not analogous to the situation in *Canavan*, where a judge of a court of record had signed off on an official record of a case stated. The document was then not served by the prosecution within the proper time and the High Court held that the prosecution could not, under the terms of the Summary Jurisdiction Act, validly ask him to repeat the process in order to circumvent that problem.

28. In this case, the question was whether the prosecution could prove that the applicant was driving under the influence of an intoxicant. Clearly, having regard to the result of the test carried out for alcohol, it could not be proved that he was incapable by reason of alcohol and the prosecution had no interest in relying on that certificate. Properly, they disclosed it to the defence, who cross-examined in relation to it and put it into evidence, but that does not make it a certificate for the purpose set out in the Act. It cannot be set up in opposition to the admissibility of the certificate relating to the presence of cocaine, unless, as suggested earlier, it in some way contradicts that certificate.

29. Furthermore there is in my view there is nothing intrinsically wrong with having two certificates in existence relating to the procedures adopted by the Bureau. If they contradicted each other in any material way that would obviously cause a problem for the prosecution but they do not.

30. The argument has been made that each certificate purports to establish that all required procedures in relation to analysis of the specimen have been complied with and that that is not possible in circumstances where a second test was carried out after the completion of the first certificate. I think that the proper interpretation is this: each certificate establishes compliance with the statutory requirements in so far as is necessary to ground its own admissibility as to the truth of its contents.

31. I therefore refuse the reliefs sought.