Neutral Citation Number: [2007] IEHC 474

THE HIGH COURT

JUDICIAL REVIEW

[2005 No. 615 J.R.]

BETWEEN

MICHAEL KELLY

APPLICANT

V.

DISTRICT JUDGE DAVID ANDERSON AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice Sheehan delivered on the 19th day of December, 2007

1. On the 20th June, 2005, the applicant was granted leave to apply for judicial review for the reliefs set forth at para. d, subparas.1, 4 and 7 in the statement grounding his application dated the 13th June, 2005.

2. The reliefs sought at 1, 4 and 7 are as follows:-

> (1) An injunction by way of judicial review restraining the respondents from proceeding with the further prosecution of the summons herein which is the subject matter of proceedings entitled: Director of Public Prosecutions at the suit of Garda Rory Isherwood, at present pending before the Dublin Metropolitan District Court, Case No. 2004 /17716.
>
> (4) A declaration that the applicant is entitled in the preparation of his defence of the proceedings against him to inspect the intoximeter machine used to measure the alleged alcohol content of his breath on the 10th January, 2004, prior to the completion of the hearing.
>
> (7) Costs.

3. The Background

3.1 The applicant was arrested on the 10th January, 2004, on suspicion of a drink driving offence.

3.2 An application for a summons charging the applicant with an offence contrary to s. 49 (4) of the Road Traffic Act 1961, as amended, was made on the 15th March, 2004.

3.3 The summons was issued on the 26th March, 2004, and the return date for the summons was the 18th June, 2004.

3.4 On that date the applicant appeared in the District Court and pleaded not guilty to the offence.

3.5 A hearing date was fixed for the 12th November, 2004 and a 'Gary Doyle' order was made on that date.

3.6 The 'Gary Doyle' order was complied with by the prosecution on the 30th July, 2004, when a detailed four paged disclosure letter was sent to the applicant's solicitors by An Garda Síochána. The disclosure letter stated *inter alia*:-

> "I would like to point out that the Director of the Medical Bureau of Road Safety has stated that an expert witness is available from the Bureau to give evidence on behalf of either the prosecution or defence in interpreting the documents relating to the servicing, calibration and testing of the intoximeter. The expert witness can also give evidence in relation to any other matter properly before the Court and in accordance with law, concerning the operation of the intoximeter. The witness will attend if called in the correct manner. The Chief Prosecution solicitor has requested in the interest of fairness that you notify this office of your intention to call such a witness, or indeed any other expert witness."

3.7 This letter gave full details of all false and/or malfunctions of the intoximeter as recorded by the gardaí in the period from the 7th January, 2003, to the 30th July, 2004.

3.8 The letter also gave full details as to all "unusual and/or error messages" indicated by the intoximeter and recorded by the gardaí in that period. These details included the fact that on the 22nd December, 2003, a test showed "ambient fail" and on the 12th January, a test showed "ambient fail". A copy of the log book maintained by members of An Garda Síochána in Dun Laoghaire in relation to the intoximeter was disclosed. This disclosed notes on all faults/malfunctions and unusual and/or error messages. The letter also supplied the certificate of analysis, custody record, copy of the summons and statements from three gardaí that the prosecution proposed to rely on.

3.9 No requests for examination of the intoximeter or for further disclosure were made in response to the disclosure letter.

3.10 The matter then came on for hearing before the first named respondent on the 12th November, 2004, at The Dublin Metropolitan District Court.

3.11 The prosecuting gardaí gave evidence and were cross-examined. No case was put by the applicant's legal representatives to any of the garda witnesses in cross-examination that the results of the intoximeter test carried out on the applicant were vitiated by a faulty intoximeter machine. No case was put to any of the garda witnesses to the effect that an expert would be called by the applicant to give evidence that the machine was not operating effectively.

3.12 At para. 4 (b) of his affidavit, the applicant states that the prosecuting Garda was unable to explain under cross-examination why the tests immediately before and immediately after that of the applicant, both produced a reading which stated "ambient failure". The applicant says the prosecuting Garda suggested this might have been because of something in the atmosphere or because the room had been painted. While this is confirmed by the applicant's solicitor in his affidavit the State Solicitor, Maura Crowley, in the course of her affidavit does not recollect this evidence being given.

3.13 After the prosecution case had closed, counsel on behalf of the applicant applied for a direction on a number of points, including an application for a direction on the basis that the summons was defective in not specifying the registration number of the vehicle on

which the applicant was alleged to have been travelling when apprehended. The first named respondent refused the application for a direction on all points, and in relation to the alleged defect in the summons, said he intended to exercise his discretion by amending the summons, but would adjourn the matter to allow the applicant to make submissions to him as to any prejudice which he might suffer from such amendment.

3.14 The matter was adjourned a number of times. On the 27th April, 2005, it was put in for hearing on the 30th May, 2005.

3.15 On the 5th May, the applicant's solicitor wrote seeking to have the intoximeter examined by an expert. By letter of the 12th May, 2005, the prosecution's solicitor responded refusing the request and objecting to the nature and timing of the request as it had come some sixteen months after the date of the alleged offence, and six months after the prosecution had closed its case.

3.16 When the matter came back before the first named respondent for an order to allow inspection of the intoximeter machine and discovery of related documents, he refused the application saying it was too late in the day for same, and that he was not allowing it.

4. Submissions
4.1 Mr. O'Shea, counsel for the applicant, submitted on behalf of the applicant that the application made on the 30th May, 2005, for an order permitting the inspection of the intoximeter breath testing machine and for discovery of related documentation, was not properly considered or entertained by the first named respondent, and/or that the refusal of such application was *ultra vires*. And in support of his submission he relied on the judgment of Mr. Justice Geoghegan in *Whelan v. Kirby* [2005] 2 I.R. 30

4.2 Mr. O'Shea also submitted that where there are legitimate doubts and suspicions as to the accuracy of the intoximeter machine, constitutional fairness demanded that he be allowed to carry out an independent examination. He argued that had he been allowed to examine the machine at the time he applied for inspection, this would not have not caused any prejudice or delay to the continuing prosecution of the case against the applicant and he submitted that none of the delays that occurred in the prosecution of this case were the applicant's fault. Neither respondent attributes any delay to the applicant. Mr. O'Shea submitted that the second named respondent's refusal to grant the applicant a right to inspect the intoximeter machine because it came too late in the day, was not a sufficient or adequate reason for refusing the application. He submitted that in addition to the suspicions already held by the applicant in relation to the accuracy of the intoximeter machine, these only hardened to the extent that he was willing to incur the expense of an independent examination when he learnt in late April, 2004, that the machine had been withdrawn from service. He also submitted that the refusal of the first named respondent to deal with the application only on the basis that it was too late was in effect a refusal to deal with the merits of the application at that time.

4.3 On behalf of the respondents, Mr. Ferriter submitted that full and adequate disclosure was made in this case, and submitted that in *Director of Public Prosecutions v. Doyle* [1994] 2 I.R..286, the Supreme Court had emphasised that it was for the Judge of the District Court dealing with the case before him to determine whether disclosure should be made, and if so, the extent of the disclosure. Mr. Ferriter submitted that both the D.P.P. and the District Judge were entitled to refuse the application for disclosure and further submitted that it is most inappropriate as a matter of law, to seek to bring judicial review proceedings aimed at injuncting criminal proceedings mid-trial. In support of this last submission he relied *inter alia* on *Ward v. Special Criminal Court* [1999] 1 I.R. 60, which held that in the overwhelming majority of cases any question of judicial review should be left over until after the conclusion of the trial.

5. Decision
5.1 With regard to the judgment in *Whelan v. Kirby*, it is relevant to note this case referred to a pre-trial application for disclosure. I hold that in the circumstances of this case the first named respondent was entitled to refuse to entertain a further application for disclosure. I also hold that in refusing to order an inspection of the intoximeter machine some six months after the prosecution case had closed, the first named respondent was acting within jurisdiction.

5.2 I also hold that the second named respondent was entitled to refuse the application for disclosure, given the particular point in the trial when it was made.

5.3 Accordingly, it would be an inappropriate exercise of judicial discretion in judicial review proceedings, were I to grant the relief sought by the applicant in the particular circumstances of this case. In the first case the applicant, as yet, has suffered no detriment as the case is not concluded. In the event that he receives an adverse finding he will be entitled to appeal and *prima facie* entitled then to have his expert witness examine the intoximeter machine. It is clearly inappropriate to intervene by way of judicial review during the course of a district court trial unless there are compelling reasons to do so. I do not find any compelling reasons in this case. I refuse the reliefs sought by the applicant.