Neutral Citation Number: [2006] IEHC 84

THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 495 J.R.]

BETWEEN

JOHN DAVITT

APPLICANT

AND
JUDGE DEERY AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice Roderick Murphy dated the 20th day of March, 2006.

1. Application
The Applicant applied to the court for an order of *certiorari* quashing an order of the first named respondent of 15th February, 2005, convicting the applicant of an offence under s. 13(2) of the Road Traffic Act, 1994 as amended by s. 23 of the Road Traffic Act, 2002 (the Act).

Leave had been given by O'Leary J. on 27th June, 2005.

2. Grounding Affidavit
The applicant's affidavit, sworn 12th May, 2005, stated that, having been required by a member of the Garda to provide two specimens of his breath, the intoxilyser failed to produce a reading.

Evidence was given that having been required to provide specimens he failed to do so and was convicted of the offence charged and fined €200 by order of the District Court dated 8th September, 2004.

He appealed the decision to the Circuit Court on 26th October, 2004. Judge Deery adjourned his decision until 27th October, 2004, and again to 15th February, 2005, when expert evidence was given on the appellant's behalf and on the State's behalf.

The applicant said that evidence was given by the arresting Garda that he had fully complied with the Garda's instructions and tried with his best efforts to provide a sample but was unable to push the meter beyond a little over half its normal level at three different attempts.

He said that the failure to register a reading, despite his best efforts to do so, was not a failure to provide a specimen as envisaged by s. 13(1) of the Act of 1994 and did not amount to an offence. He was not aware of any medical condition as to why he was incapable of blowing with enough force to register a reading other than he was a smoker of an average of forty cigarettes a day.

The first named respondent rejected his submissions and held that he had failed to provide a breath sample and that he must be convicted. The order of the District Court was reaffirmed. He said that he relied on his capacity to drive to a large extent in the course of his work and that the inability to do so would have serious repercussions on his livelihood and ability to provide for his family.

3. Summary of Grounds on which relief was sought
The first named respondent erred in law and acted in excess of jurisdiction in construing a failure to provide a reading resultant on an exhalation into the intoxilyzer. The legislation made no provision for such an offence of strict liability with regard to a person's physical incapacity to produce a sufficiently strong exhalation resulting in a reading. The option of providing a blood or urine sample as an alternative to the option of a breath sample was never put to or formally requested of the applicant. The conviction was wrong in law and in breach of the principles of natural and constitutional justice in that it was posited on the liberal interpretation of a penal statutory provision which ought to have been interpreted strictly in the circumstances.

The fair grounds are more particularly referred to in the decision of the Court at 7.4 below.

4. Statement of opposition
The respondents stated that the finding of facts as found by the first respondent on the evidence, upon which he convicted the applicant, were not disclosed in the application for judicial review.

The first respondent had at all material times acted within his jurisdiction and, if he had erred, the error was made within his jurisdiction.

The requirement to provide a breath specimen was a requirement to provide breath specimens that could enable the determination, by the instrument into which the specimens were exhaled, of the concentration of alcohol in the breath and the failure to comply was an offence of strict liability, subject to the defence provided for in s. 23(1) of the Act of 1994. Even is this were not so, the defence which the applicant advanced was not a valid defence. He was not charged with or convicted of failing to comply with the instructions of a member of the Gardaí.

The first respondent neither erred in his construction of the Act nor failed to have regard to the principles of natural and constitutional justice.

The Act of 1994 does not allow for an option of providing blood or urine samples alternative to a breath specimen otherwise than is set out in section 23(1). There is no requirement or obligation to give an arrested person an option of providing a specimen of blood or urine.

5. Submissions of the applicant
The applicant had used his best efforts to provide a sample but was unable to push the meter, which procedure was repeated on two further occasions.

The net legal question arising is whether s. 13(2), subject to one special statutory defence, had created an absolute offence.

Counsel submitted that *DPP v. Moorehouse* (Unreported, Supreme Court, 28th July, 2005) did not decide that, subject to s.23, s.

13(2) created an absolute offence in all circumstances. It was submitted that s. 23 was not the only exception to what would otherwise be an absolute offence. The applicant was not informed of his statutory right to provide a blood or urine sample.

Counsel for the applicant referred to *Director of Public Prosecutions v. Moorehouse,* Unreported, Supreme Court, 28th July, 2005 and to *C.C. v. Ireland* (Unreported, Supreme Court, 12th July, 2005).

The applicant also referred to *C.C. v. Ireland*, (Unreported, Supreme Court, 12th July, 2005), regarding the defence of *bona fide* mistake as to age, where it was held that there was no absolute offence created. He referred to the judgment of Geoghegan J. setting out the general principles:

> "*[M]ens rea* must be presumed to be a necessary ingredient of all serious offences whether they be common law or statutory unless there is a statutory provision from which it is clear that *mens rea* is excluded either expressly or by necessary implication."

Unless the view was taken that s. 23 was intended as the only possible defence available, it cannot be regarded as having created an otherwise absolute offence.

6. Submissions on behalf of the respondents
The respondents submit that the statement of grounds and verifying affidavits did not disclose what findings of fact were made by the first respondent. The specific basis of that conviction was not known. The Court is being asked implicitly to speculate as to the factual basis upon which the first respondent convicted the applicant, which was inappropriate. The respondents argue that the applicant could have asked the first respondent to state a case for the opinion of the Supreme Court which would have incorporated the findings of fact reached by the first respondent. No complaint was made regarding the procedures adopted or the fairness thereof. The first respondent did not act in excess of jurisdiction.

The reliance on what the Garda asserted with regard to the applicant making all reasonable efforts is misplaced as it is not an offence to fail to comply with the instruction of the Garda as to the manner in which an arrested person is to provide breath specimens or to fail to do one's best in that regard. It is an offence to refuse or fail to comply with a requirement to provide these specimens.

The applicant did not contend that the apparatus was defective.

The applicant did not testify that he was unable to provide the specimens required.

Counsel referred to *Moorehouse* and to *Director of Public Prosecutions v. Doyle* [1996] 3 I.R. 579 where the issue of non compliance was considered.

The applicant did not rely on the defence provided by s. 23(1) of the Act of 1994. The Act does not allow for an option to be exercised by an arrested person for the provision of a blood or urine specimen as an alternative to a breath specimen. The wording of the relevant section does not give the option as an alternative to the provision of breath specimens by the arrested person. The Garda is not under any obligation to put an option to the applicant.

It was finally submitted that the respondent did not posit his conviction of the applicant on a liberal interpretation of the Act given the judgments both of McCracken and Kearns JJ. in *Moorehouse*. Kearns J. emphasised that a penal statute could be interpreted in a purposeful manner and that a court should not readily adopt a construction which led to an artificial or absurd result.

7. Decision
7.1 Section 13 of the Road Traffic Act, 1994 provides as follows:

> "13.- (1) Where a person is arrested under section 49(8) … of the Principal Act … and a member of the Garda Síochána is of opinion that the person has consumed an intoxicant, a member of the Garda Síochána may, at a Garda Síochána station, at his discretion, do … the following –
>
> > (a) require the person to provide, by exhaling into an apparatus for determining the concentration of alcohol in the breath, 2 specimens of his breath and may indicate the manner in which he is to comply with the requirement,
> >
> > …
>
> (2) …a person who refuses or fails to comply forthwith with a requirement under *subsection* (1)(a) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or to both."

As detailed above, four grounds were advanced on which judicial review was being sought. The respondents submitted three grounds of opposition. It is appropriate that the Court considers the first ground of opposition before embarking on an analysis and determination of the applicant's grounds.

7.2 It seems to this Court that it would have been more appropriate to have stated a case for the opinion of the Supreme Court which would have incorporated the findings of fact reached by the first respondent. The respondent had indicated that he would consider stating a case. There is, accordingly, available an alternative remedy which tenders judicial review appropriate.

7.3 In relation to the application for judicial review, the Court is being asked to speculate as to the factual basis, findings of fact and procedures adopted by the first named respondent.

The grounding affidavit of the applicant refers to the submissions made and, at paragraph 5, to the decision of the first named respondent in the following terms:

> "I say that the first named respondent rejected the above submnissions and held that I, this Deponent, had failed to provide a breath sample on the date in question and in the circumstances that I must be convicted."

No indication was given as to the reasons (if any) nor of the procedure followed by the first named respondent.

The relief sought is that of *certiorari* quashing the order made. The order is not either verified nor exhibited in the affidavit but leave is sought to refer to it when produced. There are, in fact, no exhibits to the affidavit.

The Court, accordingly, has difficulty in considering the decision making process.

In this case there is no complaint regarding the procedures adopted nor is any detail given of a want of fairness in relation to the hearing.

Accordingly, for the above reasons it follows that it is inappropriate to proceed by way of judicial review.

Without prejudice to that contention, the Court proposes to examine the applicant's grounds.

7.4 The applicant is seeking *certiorari* of the order of the first respondent on a number of grounds. In summary they are:

> 1. That the first respondent convicted the applicant of the offence on the basis that the applicant's inability to make the apparatus produce a reading constituted a failure to comply with a request by a member of An Garda Síochána to provide a breath sample.
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> 2. That the first respondent erred in law and acted in excess of his jurisdiction in that he construed a failure to provide "a reading resultant of an exhalation into an intoxilyser as a failure to provide a breath sample". It is contended that this was wrong in law as "the legislation makes no provision for such an offence of strict liability with regard to a person's physical incapacity to produce a sufficiently strong exhalation resulting in a reading, or other circumstances amounting to a force majeure". Accordingly, so it is contended, the first respondent erred in law in failing to construe the Act of 1994 "narrowly as befits a penal provision and failed to have regard to the principles of natural and constitutional justice in so doing".
>
> 3. That the first respondent erred in law in construing the applicant's failure to provide a sufficient reading as a failure to comply with a Garda request to provide a breath sample within the meaning of the relevant legislation, notwithstanding that the Act of 1994 allows for the option of providing a blood or urine specimen as an alternative and such an option was not put to or formally requested of the applicant by the Gardaí.
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> 4. That the conviction of the applicant is wrong in law and in breach of the principles of natural and constitutional justice in that it was based on a liberal interpretation of a penal statutory provision in circumstances where it ought to have been interpreted strictly.

7.5 In *Director of Public Prosecutions v. Moorehouse*, the applicant was charged that she did fail to comply with a requirement under s. 13(1) of the Act of 1994 in the manner indicated by the relevant Garda. The Circuit Court judge sought the opinion of the Supreme Court inter alia as to whether s. 13(2) of the Act of 1994 made it an offence to refuse or fail to comply with the requirement in the manner outlined by the relevant Garda. The defendant in that case had been unable to provide complete breath specimens. She was unable to seal her lips around the mouthpiece and the breath she exhaled was not going into the breath tube.

The Supreme Court held that it is not an offence to refuse or fail to comply with a requirement under s. 13(1) in the manner indicated by the relevant Garda. Rather, while the Gardaí may and should indicate how a breath test is to be performed, compliance with the indications given as to the manner in which to provide the breath specimens is not required by the section – only the provisions of the relevant specimens is required.

The Supreme Court further held that the specimen of breath provided must be such as to enable the concentration of alcohol in the breath to be measured. That is the purpose for which the specimen is provided. Mr. Justice Kearns stated at p. 25:

> "… I agree with the submission of counsel for the complainant that the specimen of breath provided must be such as to enable the concentration of alcohol in the breath to be measured. That is the purpose for which the specimen is provided. If it does not so enable or permit, there is non-compliance with the requirement under the section, so that the arrested person thereafter will in the ordinary way only have such defence to a charge of refusing or failing to comply forthwith with the requirement as may arise under section 23 of the Act [of 1994]. I am obviously leaving to one side other defences which might of course still be raised, such as an alleged defect in the equipment or the like …. [M]erely exhaling into the apparatus is not sufficient compliance with the requirement under the section unless it enables the concentration of alcohol in the breath to be determined."

Mr. Justice McCracken stated at p.3:

> "… the purpose of the requirement is to enable the Gardaí to determine the concentration of alcohol in a person's breath. This is the purpose for which the two specimens of breath are required. If a person exhales into the apparatus in a manner which does not allow the concentration of alcohol to be determined, presumably because not a sufficient quantity of the person's breath enters the apparatus, then I do not think the person can be said to have provided the two specimens of breath."

Mr. Justice McCracken further observed that if a person supplied the required specimens of breath, sufficient to determine the concentration of alcohol in the breath, but did so in some manner other than that indicated by the Garda, it would be difficult to see how that could possibly be construed as an offence. Similarly, if the Garda indicated a manner of compliance with the requirement which was very difficult, the person could surely not be penalised for giving the specimens of breath in some much simpler manner.

Applying the principles stated in *Moorehouse* to the instant application, it is submitted that the following conclusions can be reached:

> (a) The applicant's apparent compliance with the instructions issued by the Gardaí regarding the provision of samples of his breath does not constitute compliance with the requirement to provide two specimens of his breath.
>
> (b) The applicant's exhalation into the apparatus in a manner which did not allow the concentration of alcohol to be determined, presumably because not a sufficient quantity of the applicant's breath entered the apparatus, does not constitute compliance with the requirement.
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> (c) There was a refusal or failure by the applicant to provide two specimens of his breath as required and the first respondent was correct in so finding.

It seems to this Court that *Moorehouse* did decide that, subject to s. 23, s. 13(2) created an absolute offence in all circumstances. The decision in *Moorehouse* related to the charge of "failing to comply" rather than to "refusing or failing".

7.6 In *Director of Public Prosecutions v. Doyle* [1996] 3 I.R. 579, the defendant contended that she could not be convicted of failing to provide a specimen of blood contrary to s. 13(2) of the Road Traffic (Amendment) Act, 1978 where she had in fact refused to do so. Geoghegan J. dismissed the defendant's argument stating at p. 584:

> "It would seem to me that the logic of the defendant's argument is that where there has been an express refusal after the requirement has been made, an offence has immediately been committed irrespective of whether in actual fact subsequent to that refusal the defendant does comply with the requirement. That would be an absurdity and was certainly never intended by the Oireachtas. The offence consists of the non-compliance with the requirement and that, of course, can take the form of an express refusal in which case there is both a refusal and a failure or it can take the form of non-compliance with the requirement notwithstanding that the defendant had agreed to comply with the requirement. In the latter case, it would be more appropriate to use the word 'fail' in the summons rather than 'refuse'."

In the present case the applicant has been convicted of failing to comply with the requirement to provide breath specimens. It would seem clear that fault is not a requirement in order to establish that offence. As it was put by Geoghegan J. in Doyle, non-compliance with the requirement was enough. Once there was a failure to provide the required breath specimens, there was non-compliance with the requirement and the first respondent was bound to convict the applicant in the absence of any other defence.

7.7 Even if the offence is not one of strict liability, the defence advanced on behalf of the applicant is not a valid defence. The applicant is contending that despite his best efforts and the fact that he clearly followed the instructions of the Garda when asked to provide a breath specimen, the machine failed to register a reading, even after a number of attempts. However, as the Supreme Court held in *Moorehouse*, merely exhaling into the apparatus is not sufficient in and of itself. The exhalation of breath must be such that the apparatus is capable of determining the concentration of alcohol in the breath and anything less than that amounts to a failure within the meaning of the Act. In those circumstances, therefore, the defence put forward by the applicant is not a valid one.

7.8 The applicant was not charged with or convicted of failing to comply with the instructions of a member of An Garda Síochána as to the manner in which the applicant was required to provide breath specimens for the purpose of the determination of the concentration of alcohol on his breath.

The applicant emphasises in both his statement of grounds and his verifying affidavit the extent to which the evidence confirmed his apparent compliance with instructions given by the Gardaí and his efforts in this regard. For the reasons already outlined above and in circumstances where the applicant was neither charged with nor convicted of failing to comply with the Garda instructions as to the manner of compliance with the requirement made, it is submitted that the applicant's submissions in this regard are not relevant to first respondent's conviction of the applicant.

7.9 The first respondent did not err in his interpretation or construction of the Act of 1994 which was given its proper meaning and effect. The conviction of the applicant is consistent with the interpretation of section 13 of the Act reached by the Supreme Court in *Moorehouse* and in *Doyle*.

7.10 It appears to the Court that the facts of the case do not disclose a failure on the part of the first respondent to have regard to the principles of natural and constitutional justice and no such failure is specified by the applicant.

7.11 The Act of 1994 does not allow for an option to be exercised by an arrested person for the provision of a blood or urine specimen as an alternative to a breath specimen. The Garda, at his discretion, can require that the arrested person provide either two breath specimens or a blood/urine specimen. If it is appropriate, the Garda can request that both of the above options be pursued. However, the statute does not appear to provide the option of giving a blood or urine sample as an alternative for the arrested person to the provision of breath specimens.

It follows that the arresting Garda is not under an obligation to put to an arrested person an option of providing a specimen of blood or urine in the event that the breath specimen can not be obtained. However, the defence provided by s.23(1) of the Act was not relied upon by the applicant and does not require further consideration here. It is in the context of the defence provided by that section that any question of an offer by an arrested person to provide specimens of blood or urine, instead of specimens of breath, arises.

7.12 It is clear from the aforementioned judgments of both McCracken and Kearns JJ. in *Moorehouse* that their interpretation of s. 13 of the Act of 1994 was reached having appropriate regard to the penal nature of the Act. Kearns J. held, that a penal statute could be interpreted in a purposive manner and that a court should not readily adopt a construction which leads to an artificial or absurd result. This was, he said, particularly so in Road Traffic Act cases.

In *Doyle*, Geoghegan J. adopted what he described as the "plain English meaning" of the section. It is submitted that the applicant in the instant case, in the plain English meaning of s. 13(2) of the Act of 1994, failed to comply with Garda Keane's requirement to provide two specimens of his breath.

In the circumstances not only did the first respondent not adopt a liberal interpretation of the Act of 1994, he convicted the applicant in a manner entirely consistent with the Supreme Court's interpretation of the Act.

7.13 The Court has already concluded that the applicant's case does not disclose a proper factual basis on which to seek judicial review.

The first respondent considered the evidence and submissions made. He had indicated that he would consider stating a case for the opinion of the court.

The applicant's case was based on the applicant's compliance with Garda instructions rather than with his failure to provide a specimen as required by section 13. The applicant did not rely on s. 23 of the Act in relation to special and substantial reasons, nor was there any evidence of a medical incapacity to provide the required specimens. There was no defence that the apparatus was defective. In the circumstances, the Court is of the view that the first named respondent had sufficient evidence before him to ground the conviction imposed and was correct in law in so doing.

Accordingly, the application for judicial review must be refused.