Neutral Citation Number: [2011] IEHC 153

THE HIGH COURT

2010 276 JR

BETWEEN:

AIDAN BAILEY

APPLICANT

AND

JUDGE GEOFFREY BROWNE

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

Judgment of Mr Justice Michael Peart delivered on the 14th day of March 2011:

On the 3rd December 2009 the applicant was observed by An Garda Siochana driving his vehicle in an erratic manner on a public road, and having been required to stop he did so, whereupon he got out of his vehicle. Garda Nicola Murphy formed the opinion that the applicant had consumed an intoxicant such that he did not have proper control of a mechanically propelled vehicle, and that he had committed an offence contrary to section 49 (1)(2)(3) or (4) of the Road Traffic Acts 1961-2006 "the RTA"). He was cautioned by Garda Ian Coyne, and Garda Murphy informed him that she was arresting him for an offence under those sections, and cautioned him as required. The applicant appears to have admitted that he had been drinking and apologised.

He was conveyed to a Garda Station whereupon he was duly processed, and in due course he provided a sample of breath to Garda Ian Lynott, a trained user of the Lion Intoxilyser, after the warning required to be given under section 13 (1)(a) of the Road Traffic Act, 1994 was given. The text of that warning appears fully set forth in his statement of evidence which has been exhibited by Superintendent Brendan Connolly, who was the senior Garda representative present in the District Court and who prosecuted this case on behalf of the Notice Party on that occasion.

The result of the sample revealed that he was over the limit prescribed by law in that the sample showed that he had 78 microgrammes of alcohol per 100 millilitres of breath. The applicant was charged with the offence, following which he was released.

In due course the applicant, accompanied by his solicitor, Evan O'Dwyer, appeared before the first named respondent on the 13th February 2010, where, having heard the evidence given, the first named respondent convicted the applicant, imposed a fine of €1000 and disqualified him from driving for a period of three years.

An unusual feature of this application is that while the applicant was present and was represented by Mr O'Dwyer at this hearing when it commenced, both the applicant and Mr O'Dwyer left the Court during the course of the prosecution's evidence and were not present when the applicant was convicted. The circumstances in which this occurred are set forth in Mr O'Dwyer's affidavit as well as in an affidavit sworn by another solicitor who happened to be present for the entire of the case, Ms. Bríd Miller. Those affidavits are those filed in support of the applicant's Statement of grounds for seeking to have the conviction, disqualification and fine imposed quashed on the basis that the evidence given by the prosecution did not comply with the statutory requirements, that the District Judge acted without jurisdiction, that the applicant was denied fair procedures, and the decision of the District Judge was irrational and was arrived at by taking into account irrelevant factors and/or failing to take into account relevant factors. Replying affidavits have been filed by the Notice Party, who has appeared on this application, and opposes the application for the reliefs sought.

The applicant himself has not sworn any affidavit.

The evidence:
Mr O'Dwyer has averred that at the hearing of this case, and while Garda Lynott was giving his evidence in relation to having given the applicant the warning required to be given to the applicant under section 13(1)(a) of the RTA prior to the taking of a sample of breath, he noticed that Garda Lynott was reading his evidence from a document other than his notebook. He so informed the District Judge, whereupon Garda Lynott held up what Mr O'Dwyer describes as "a paragraph of script which contained in typed writing the statutory wording of section 13(1)(a)". He states also that the District Judge then stated to Garda Lynott "try not to make it so obvious that you are reading from a precedent", and told the Garda to continue giving his evidence. Mr O'Dwyer then raised an objection on the applicant's behalf in relation to what the judge had said and renewed his objection as to the manner in which the Garda was giving his evidence, but the objection was not acceded to, whereupon, Mr O'Dwyer left the courtroom. He states that he did so only after he took instructions from his client in that regard.

Mr O'Dwyer states that the applicant remained in the courtroom.

It is submitted by Mr O'Dwyer in his affidavit that since evidence was given by Garda Lynott as to the statutory warning only by reading a text of that statutory warning from a typed precedent as opposed to giving that evidence from memory, it cannot be concluded that Garda Lynott was certain as to the precise words he used when administering that warning in the Garda station prior to the breath sample being given, or if indeed any such warning was given at all. As I have said, the applicant has not sworn any affidavit as to what occurred in the Garda station.

Ms. Miller, solicitor who happened to be present in the Court during the entire of this prosecution has deposed also as to what happened, including in relation to matters for which occurred after Mr O'Dwyer had absented himself. She states that when Garda Lynott gave his evidence in relation to the warning "by reading from a piece of paper on the file in from of him". She goes on to say that as this was happening she believed that Mr O'Dwyer was not able to observe this from where he was seated in the courtroom

and that she leant over to him and so informed him. She then states that Mr O'Dwyer stood up and drew the judge's attention to this fact that the Garda was reading from his statement, and that at that point Garda Lynott interjected and informed the Court that he was not reading from his statement but rather from a printout of the section 13 requirement, and that he held this up to show it to the judge, whereupon, she deposes, Mr O'Dwyer stated "this is worse", and informed Garda Lynott that he should try not to make it look so obvious that he was reading from a precedent. She goes on to state that the District Judge refused to accede to Mr O'Dwyer's application, and that Garda Lynott continued to give his evidence and continued to read it from the sheet of paper rather than from his notebook.

Finally, Ms. Miller states that after Mr O'Dwyer left the courtroom she took notes of what happened.

Superintendent Brendan Connolly has sworn an affidavit in which he gives the background to the case, and his recollection of what happened during the prosecution of the charge in question. He states that at the call-over of that day's list when the applicant's case was called, the District Judge enquired of Mr O'Dwyer if the case was "going ahead" to which Mr O'Dwyer confirmed that the case was going ahead, and that at a later stage when the case was called again Mr O'Dwyer stated "we are entering a plea of not guilty but you can proceed to conviction". He states that the judge then enquired what this meant to which Mr O'Dwyer replied that "we are pleading not guilty but we won't be contesting the evidence". He states also that the judge asked Mr O'Dwyer if he wanted Superintendent to go into evidence to which Mr O'Dwyer replied by saying "that is a matter for the Gardai". Superintendent Connolly then informed the Court that he would proffer evidence, following which Garda Nicola gave evidence which was not challenged in any way, following which Garda Lynott was called to give his evidence.

Superintendent Connolly states that as Garda Lynott was giving his evidence as to the warning under section 13 RTA he referred to an extract from the statute, whereupon having been alerted by Ms. Miller, he brought this fact to the attention of the judge who, according to Superintendent Connolly, stated to Mr O'Dwyer "I thought you had no interest in this matter", and that Mr O'Dwyer responded "I am still entitled to defend my client".

He agrees that the District Judge asked the Garda not to read further from the extract of the statute. He states that at this point Mr O'Dwyer appeared to become agitated and stated "that's it, I am withdrawing". He did not see Mr O'Dwyer consulting with the applicant at any stage, and that at all times Mr O'Dwyer was seated to his left but within his line of sight with his head down. He says that Mr O'Dwyer gathered his papers and left the Court, after which Garda Lynott continued to give his evidence but "did not thereafter refer to the legislation", and he rejects any suggestion to the contrary. He believes that all the necessary proofs were given following which the applicant was convicted of the offence.

Superintendent Connolly does not understand the complaints now being made, and that Mr O'Dwyer had informed the District Judge at the commencement of the case that he could proceed to conviction and that he would not be challenging the evidence, and that in any event once the District Judge had asked the Garda not to read from the extract of the Act he did not do so again. He also notes that Mr O'Dwyer did not seek to cross-examine any of the evidence given, that his only interjection was in relation to the reading by Garda Lynott of the extract in question, and that Mr O'Dwyer left the Court half way through Garda Lynott's evidence without making any further submissions.

There are affidavits from Garda Clesham, Garda Murphy and Garda Lynott all of whom were present during the entirety of the prosecution, and since all confirm Superintendent Connolly's recollection of events and add nothing of any importance, there is no need to set out that affidavit evidence in any detail.

Mr O'Dwyer has sworn a second affidavit following the service of these replying affidavits. He takes issue with the averments made in these affidavits to the effect that at the commencement of the case he informed the District Judge that he could proceed to conviction. He states that in act what he said was that the District Judge that the applicant was pleading not guilty and that the District Judge "could proceed to hear the case", and that these Gardai are incorrect and erroneous in what they have stated. He draws attention also to the fact that none of the Gardai who have sworn affidavits have denied that the District Judge stated to Garda Lynott that he should "try not to make it looks obvious that you are reading from a precedent", and that this is the most important aspect of the applicant's case. Mr O'Dwyer makes other averments by way of comment on some of the content of the replying affidavits, but his central argument is that the manner in which Garda Lynott gave his evidence in relation to the warning by reference to a printout from the statute, rather than from his recollection of what precise wording he used at the time the warning was given, constitutes unfair procedures such that the conviction should be quashed.

In his submissions on behalf of the applicant, Paul McGarry SC emphasises that this case is not about Mr O'Dwyer's conduct of the applicant's defence and the fact that he withdrew from the Court when he did, but rather is concerned with the remark's by the District Judge in response to Mr O'Dwyer's intervention and his urging Garda Lynott to try and not look as if he was reading from a precedent. It is submitted that any impartial observer in the Court would reasonably conclude that justice was not being done and that the District Judge lacked impartiality. It is submitted that the evidence of the giving of the warning is an essential proof for a conviction on this charge and the fact that it was given in the manner shown, by reference to a prepared extract, is such a defect in fair procedures that the conviction ought not to be allowed stand, since the district Judge could not have been satisfied on foot of proper evidence as to what warning was given to the applicant prior to his providing a sample of his breath.

Mr McGarry accepts that a Garda when giving his/her evidence is entitled to refresh his/her memory by reference to notes made contemporaneously with events, and has referred to the judgment of Ó Caoimh J. in *DPP v. Clifford* [2002] WJSC-HC 1899, but submits that in the present case there was no question but that Garda Lynott was not simply refreshing his memory from any contemporaneous note when reading a printout of the warning under section 13. He refers also to the judgment of Morris J. (as he then was) in *Dineen v. Delap* [1994] 2 I.R. 228 – a case where the Garda read his evidence from a prepared script - and to the remarks of the respondent judge in that case which were found to offend the fundamental rule that justice should not only be done but be seen to be done, and that it would appear to an impartial reasonable observer that the District Judge was allowing evidence to be given in an impermissible manner against the interests of the applicant.

That case is referred also in relation to a submission that in the event that this court should quash the conviction, no retrial should be ordered as the accused has had to endure the hardship of a trial and as the prosecution should not be acquitted of all blame in relation to how the evidence was given by Garda Lynott.

Mr McGarry has submitted that the facts of the present case are very similar to those in *Dineen v. Delap* and that the conviction should be quashed for the same reasons.

Sinead Ní Chalacháin for the Notice Party has submitted that the District Judge was entitled to convict the applicant, notwithstanding that at first Garda Lynott when giving evidence of what warning he had given to the applicant did so by reference to the text of

section 13 RTA rather than from memory. She emphasises the fact that it was indicated by Mr O'Dwyer when this case was called on that while the applicant was pleading not guilty, the Court could proceed to conviction. In the light of Mr O'Dwyer's averment that in fact what he said was that the District Judge could proceed to "hear the case", it seems clear that whatever form of words were used, the meaning was clear, namely that the prosecution was on proof of its case but that the applicant was not going to challenge the evidence or go into evidence. There is nothing unusual about a case proceeding on that basis and I am satisfied that it was reasonable for the District Judge to presume that the evidence was not being contested. However, the prosecution still had to satisfy the necessary proofs by relevant evidence.

Ms. Ní Chualacháin makes the point that in their grounding affidavits neither Mr O'Dwyer nor Ms. Miller referred to the fact that at the outset of the prosecution Mr O'Dwyer has stated anything to the effect that the prosecution was simply being put on proof and that the evidence in effect was not being challenged, and this fact only became evident in the replying affidavit of Superintendent Connolly. She submits that this was a relevant fact which should more properly have been contained in the grounding affidavits when leave to seek the reliefs was granted.

She relies also on the fact that none of the prosecution evidence was cross-examined, and that the proper way for Mr O'Dwyer to have proceeded rather than to walk out of the Court would have been to have cross-examined Garda Lynott in relation to precisely what wording he had used when giving the warning under section 13 RTA to the applicant at the Garda station, and at the conclusion of the case to have made any submission which he considered appropriate. She submits also that the applicant has not denied that such a warning was in fact given to him, and that his only point now being advanced is in relation to the manner in which Garda Lynott gave his evidence of having given that warning. She refers to the fact that Garda Lynott has averred that after the District Judge said what he said, he did not further refer to the prepared text of the warning given.

She submits that this case is not on all fours with, or near the facts in *Dineen v. Delap*, and that there could be no question of any reasonable observer in the Court considering that justice was not done or seen to be done by reason of anything said by the District Judge.

Conclusion:
I am not satisfied that the manner in which this case proceeded was so flawed and fundamentally unfair to the applicant that it should lead to the quashing of the conviction. As I have said, the applicant has not sworn any affidavit in support of the application in which he might have denied that any proper warning was given to him by Garda Lynott at the Garda station prior to his providing a sample of his breath. Neither did he give that or any other evidence in the District Court. I am of the view that whatever form of words was used by Mr O'Dwyer when indicating that the applicant was pleading not guilty and that the case could proceed either to a hearing or to a conviction, and I accept that there is some dispute as to the precise words used by him, the District Judge was entitled to proceed on the basis that the prosecution was simply being put on proof, as often is the case particularly in cases involving an offence such as that charged against the applicant. Garda Lynott's evidence was that he had given the warning required under section 13 RTA, and then read out from a text of the section what that warning consisted of. But it is essential to appreciate that in his affidavit he states at paragraph 6 thereof:

> "The statutory warning I outlined to the Court was the same wording I used when dealing with the applicant on the night of his arrest on 3rd December 2009".

There is no denial that this warning was given. The only complaint appears to be that the Garda did not state from memory the precise warning. I see no reason why the Garda witness should be required to memorise the precise words of the section and recite that by heart when he gives his evidence. Once he has stated that at the station he gave the warning prescribed in the section, it seems perfectly reasonable that he should then be allowed to read it from the text of the Act. Of course, having done so, the applicant's solicitor could have cross-examined him and in that way perhaps made some headway in any effort to show that the warning given was not in accordance with the Act, but that did not happen. No submissions were made at the conclusion of the prosecution case because both the applicant and his solicitor had by that time left the Court.

When Mr O'Dwyer made his initial objection to the District Judge, the District Judge did not say anything of such a character that would lead any impartial and reasonable observer to think that the judge was being other than impartial. He directed the witness as he did, and it would appear at least from the evidence of Superintendent Connolly and Garda Lynott that thereafter the latter gave his evidence without reference to the extract which he had previously referred to, though Ms. Miller disagrees in that regard. There is no dispute that the warning was as a matter of fact given properly in accordance with section 13 while the applicant was in the Garda station. Garda Lynott stated that when he gave his evidence, and only having so stated did he read from the extract of the Act the precise words which he used. I see no unfairness in giving his evidence in this fashion, especially where it was not disputed by the applicant that he was given such a warning.

I do not consider that the response of the District Judge was inappropriate or improper or demonstrative of partiality.

In my view there are no grounds for quashing this conviction and I refuse the reliefs sought.