Neutral Citation Number: [2010] IEHC 58

THE HIGH COURT

2008 1420 JR

ADAM THOMPKINS

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

DISTRICT JUDGE JOHN O'NEILL

RESPONDENTS

THE HIGH COURT

2008 1423 JR

MARTIN ARONU

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

DISTRICT JUDGE JOHN O'NEILL

RESPONDENTS

JUDGMENT of O'Neill J delivered the 5th day of March 2010

1. Relief sought

1.1 Leave was granted by this Court (Peart J.) in both of these sets of proceedings on the 15th December, 2008, to pursue *inter alia* the following reliefs by way of judicial review:

1. An order of prohibition or in the alternative an injunction prohibiting or restraining the first named respondent from pursuing the prosecution of the applicant in relation to an offence contrary to s. 49(1) 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), as set out in Case Number 2007/186372 currently before Dublin District Court.

2. An order of *certiorari* quashing the order or decision of the second named respondent dated the 30th October, 2008, deciding that the applicant is not entitled to the information sought by way of disclosure and refusing to order or direct the first named respondent to furnish that information to the applicant.

3. A declaration that the applicant is entitled to be furnished with the following information sought by disclosure in relation to the said offence:

(a) The reason for the lapse of time in conducting the analysis.

(b) The nature of all steps taken and the dates upon which each step was taken, in relation to the analysis of the sample during the time in which it remained in the custody of the Medical Bureau of Road Safety.

(c) Information as to whether at all times between the initial receipt of the sample and the analysis, the sample remained in the custody and control of the Medical Bureau of Road Safety.

(d) Information as to whether the sample remained at all such times within this jurisdiction.

(e) If the sample was analysed in another laboratory outside that of the Bureau, the nature of all steps taken, the dates of each step, and the names and addresses of all persons taking such steps.

2. The Facts

2.1 Both of the applicants, in separate incidents, were arrested and charged with offences contrary to s. 49(1) 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), which prohibits a person driving a vehicle whilst under the influence of an intoxicant to such an extent as to render that person incapable of having proper control of that vehicle.

2.2 The applicant in the first set of proceedings, Mr. Thompkins, provided a urine sample to the gardaí pursuant to s. 13(1)(b) of the Road Traffic Act 1994 (hereinafter "the Act of 1994") and the applicant in the second proceedings, Mr. Aronu, provided a blood sample to the gardaí pursuant to the same section for the purpose of testing for intoxicants by the Medical Bureau of Road Safety (hereinafter the "MBRS"). In each case the results confirmed the presence of various

drugs in each of the applicant's systems. The results further indicated that they were below the legal limit for alcohol.

2.3 Section 19 of the Act of 1994 provides that the MBRS is to perform its analysis of a sample and forward a certificate, a statutory form, detailing *inter alia* the presence of alcohol or drug(s) from the sample supplied to it for analysis, "*as soon as practicable*" after it has received a specimen forwarded to it. The relevant portion reads as follows:-

> *"(1) As soon as 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.*
>
> *…*
>
> *(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."*

Section 21(3) of the Act of 1994 outlines the evidential value of a certificate issued under s. 19:-

> *"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."*

2.4 Mr. Thompkins' urine sample was taken on the 4th November, 2006, and was forwarded to the MBRS for analysis. A certificate under s. 19 of the Act of 1994 was issued by the MBRS on the 8th February, 2007, approximately thirteen weeks later. Mr. Aronu's blood sample was taken on the 7th October, 2006 and was duly sent to the MBRS. A certificate pursuant to s. 19 of the Act of 1994 was issued by the MBRS on the 21st December, 2006, approximately eleven weeks after the test had been requested.

2.5 The applicants' respective cases then came before the District Court. Disclosure, including copies of the certificates issued under s. 19 of the Act of 1994, was made in each case. The applicants' respective solicitors also sought further specific disclosure in respect of the timing of the issuance of the s. 19 certificates, in an effort to determine whether they were issued "*as soon as practicable*".

2.6 Mr. Staines, Mr. Thompkins' solicitor, wrote to the Garda Superintendent in the Bridewell Garda Station seeking further specific disclosure of ten items by letter dated the 11th January, 2008, which included *inter alia*:-

> *"5. The reason for the delay in conducting the analysis.*
>
> *6. Details of all steps taken, including dates, in relation to the analysis of the sample during the time in which it remained in the custody of the MBRS?*
>
> *7. Confirmation that at all times between initial receipt of the sample and the analysis, the sample remained in the custody and control of the MBRS.*
>
> *8. Confirmation that the sample remained at all such times within this jurisdiction.*
>
> *9. If the sample was analysed in another laboratory outside that of the Bureau's, can you please confirm this was done so with the consent of the relevant Minister pursuant to Statutory Instrument 241 of 1968.*
>
> *10. If the sample was analysed in another laboratory outside that of the Bureau's please furnish details of all steps taken, including dates, in relation to the analysis of the sample during the time in which it remained outside the custody of the MBRS."*
>
> *"…If you assert that the above matters in part or whole can only be addressed by oral evidence, we would be obliged if you could furnish us, in advance of any hearing, with a précis of the evidence that will be given by a Medical Bureau witness. …"*

2.7 The prosecuting garda responded in a letter dated the 16th January, 2008, indicating that the information sought was unavailable and that the s. 19 certificate, of itself, was sufficient. *He* forwarded a copy of the letter of the 11th January, 2008, received by him from Mr. Staines to the MRBS, which, in turn, responded to the prosecuting garda by letter dated the 7th March, 2008, stating as follows:-

> *"The Medical Bureau of Road Safety has issued the Statutory Certificate indicating the presence of a drug or drugs in this case pursuant to the Road Traffic Acts. The Bureau is not a party to the proceedings and following legal consultation is of the opinion that the questions posed appear to relate to evidential proofs and issues beyond the Statutory Certificate which are as between the parties if necessary before the court in the first instance. Therefore the Bureau respectfully suggests that the matter is a legal question for you rather than one for the Bureau at this stage in the proceedings."*

2.8 The Office of the Director of Public Prosecutions also responded to Mr. Staines' letter of the 11th January, 2008, by letter dated the 25th February, 2008, to the effect that the prosecution did not accept that there was any delay in conducting the analysis and that it was entitled to rely on the presumptions contained in the Road Traffic Acts in respect of the duties of the MBRS. Mr. Staines then wrote to the MBRS directly in a letter dated the 9th May, 2008, seeking information as to *inter alia* the delay in the analysis and the custody of the sample prior to the issue of the s. 19 certificate. Professor Denis Cusack, Director of the MBRS, replied by letter dated the 21st May, 2008, stating as follows:-

> *"… the Bureau has issued the Statutory Certificate in accordance with law. It is not proper for the Bureau to go beyond the Statutory Certificate and to engage in evidence by correspondence. The Bureau trusts that you will understand this as a matter of law. The Bureau also notes that this is a matter of law that no disclosure order can be made as against a non party in criminal proceedings, much less disclosure on foot of correspondence.*
>
> *The Bureau respectfully suggests that you take the matter of evidential proofs up with the other party to the proceedings, the prosecution. In the alternative, if <u>you</u> wish to raise any matter in evidence, it is open to you to call a witness from the Bureau as previously advised. The Bureau stresses that it is always willing, able and anxious to assist the parties before the court on any matter properly arising in accordance with law.*
>
> *It is noted that you have not actually asked for any witness from the Bureau to date. If and when you confirm that you wish a witness from the Bureau to attend as a defence witness, kindly write to the Chief Analyst and she will arrange for the appropriate witness to attend subject to the availability of dates."*

2.9 Similar correspondence ensued regarding the disclosure of information by the MBRS in the second set of proceedings, the principal difference being that in the first set of proceedings the prosecuting garda also wrote to the MBRS seeking that information. This difference is not material. The position adopted by the MBRS in respect to the request for disclosure was the same in both cases. By letter dated the 8th April, 2008, the solicitors for the applicant in the second proceedings, Fahy McGeever, wrote to the prosecuting garda and sought *inter alia* the reason for the delay on the part of the MBRS in conducting the analysis. In a letter of reply dated the 25th April, 2008, the Director of Public Prosecutions rejected the assertion that there had been a delay in conducting the analysis and stated that the prosecution was entitled to rely on the statutory presumption, as set out in s. 21 of the Road Traffic Acts 1961 to 2006 (as amended). The applicant's solicitors then wrote to the MBRS on the 19th May 2008. Professor Cusack replied in similar terms to the letter he wrote to Mr. Thompkins' solicitor, as quoted at para 2.6 above, on the 22nd May 2008.

2.10 Applications were then made to the District Court for orders or directions as to disclosure in both cases. Written legal submissions were filed by both sides in the District Court and a hearing took place on the 30th October, 2008. The applicants made the case that they were entitled to information relating to whether the MBRS had complied with the *"as soon as practicable"* requirement under s. 19 of the Act of 1994. They pointed to delay on the part of the MBRS in conducting the analyses of the samples and the failure of the Director of Public Prosecutions to furnish information as to the custody of the samples prior to the issuance the s. 19 certificate. It was argued that the provision of that information was necessary to rebut the presumption contained in s. 19 of the Act of 1994. For the Director of Public Prosecutions it was submitted that there had not been delay and it was disputed that the information sought was relevant or necessary for the fair conduct of the trial. It was further submitted that the information sought was not in the power, possession or custody of the prosecution and that the presumption could be rebutted by the calling of a witness from the MBRS. The learned District Court Judge ultimately determined that the application should be refused and that the applicants were not entitled to the information sought or to any further disclosure. The affidavit of Mr. Fahy, the applicant's solicitor in the second proceedings, summarises what occurred on the date of the hearing at para. 15 of his affidavit sworn on the 15th December, 2008 as follows:-

> *"I say that on the next mention date after the said submissions had been filed the Applicant appeared before the Second Named Respondent on 30th October 2008 and:*
>
> a) when the case was called the Second Named Respondent indicated that he had decided that the Applicant's application should be refused and that the Applicant was not entitled to the information sought or any further disclosure;
>
> b) the solicitor for the First Named Respondent invited the Second Named Respondent to give the reasons for the said decision and the Second Named Respondent indicated that the reasons were grounded on the submissions of the First Named Applicant."

The wording of the above replicates para. 16 of the affidavit of Mr. Staines, sworn in the first proceedings on the 15th December, 2008. In later affidavits, Mr. Staines and Mr. Fahy clarified that the reference to the "*First Named Applicant*" at the very end of the paragraph was in error and should have read "*First Named Respondent*".

2.11 Both cases were adjourned until the 5th February, 2009. In the meantime the applicants sought leave to bring these judicial review proceedings which was granted on the 15th December, 2008, in each case.

3. The Issues

3.1 The case the applicants make is twofold. They say that to vindicate their right to a fair trial they are entitled to information relating to the issue of whether the tests undertaken by the MBRS were carried out *"as soon as practicable"*, in order to prepare a defence based on a rebuttal of the presumption under the legislation that they were so carried out. Secondly, they say that the ruling of the District Court Judge on the matter was irrational as he adopted the submissions of the Director of Public Prosecutions in total.

4. The Right to a Fair Trial

Counsels' Submissions
4.1 Mr Ó Lideadha S.C., for the applicants, acknowledged the line of jurisprudence which establishes that an order for disclosure cannot be made against a third party to provide evidential material to the defence. However, he submitted that the applicants could not obtain a fair trial because relevant information had not been disclosed to them to enable the applicants to rebut the statutory presumption and that in such circumstances their trials should not proceed. He relied on *Whelan v. Kirby* [2005] 2 I.R. 30 in this regard which, he submitted, supported the view that a District Court Judge has jurisdiction to make an order that is necessary to comply with the constitutional guarantee of a fair trial. He characterised the MBRS as a standing prosecution witness providing the necessary proof for the prosecution in cases of road traffic offences, obviating the need for any witness and against which an order for disclosure could properly be made. He noted the duty on the prosecution to disclose all relevant evidence, as outlined by the Supreme Court in *The People (Director of Public Prosecutions) v. The Special Criminal Court* [1999] 1 I.R. 60.

4.2 He further submitted that there had been a delay in each case between the forwarding of the sample for analysis to the MBRS and the issuance of the s. 19 certificates in circumstances where no explanation was forthcoming of the delay. He cited *Hobbs v. Hurley* (Unreported, High Court, Costello J., 10th June, 1980), and *Director of Public Prosecutions v. Corrigan* (Unreported, High Court, Finlay P., 21st July, 1980,) in support the argument that evidence of the surrounding circumstances had to be given and considered in determining whether the statutory obligation of the MBRS was carried out *"as soon as practicable"*.

4.3 Mr. Dwyer B.L., for the Director of Public Prosecutions, rejected the contention that the applicants are, as of right, entitled to the information requested, by reason of the fact that the information is in the hands of a third party. In his submission it was well settled that the law does not extend to ordering information to be disclosed by third parties. He referred to the cases of *The People (Director of Public Prosecutions) v. Sweeney* [2001] 4 I.R. 102, *D.H. v. His Honour Judge Raymond Groarke & Anor*. [2002] 3 I.R. 522 and *The Health Service Executive v. His Honour Judge Michael White* [2009] IEHC 242 (Unreported, High Court, Edwards J., 22nd May, 2009). He submitted that in both of the instant cases the gardaí did as much as they could and that as the MBRS was not a suspected party, the gardaí could not exercise their power of arrest or conduct any compulsory form of inquiry, in circumstances where they encountered a refusal to provide information by a third party. He submitted that the District Court was being asked to make an order it did not have jurisdiction to make.

4.4 He noted that there is no general duty to disclose imposed on prosecutors in summary trials, although there was a duty to disclose when fair procedures required it as Denham J. held in *The People (Director of Public Prosecutions) v. Gary Doyle* [1994] 2 I.R. 286. He then referred to a recent dictum of McMahon J. in *The People (Director of Public Prosecutions) v. Judge Geoffrey Browne* [2008] IEHC 391 (Unreported, High Court, McMahon J., 9th December, 2008) to the effect that the right to disclosure is not unlimited, extending only to relevant evidence in the prosecutor's possession. The status of the MBRS as a third party was underlined, he submitted, by this Court (Gilligan J.) in *The People (Director of Public Prosecutions) v. O'Malley* [2008] IEHC 117.

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4.5 In *The People (Director of Public Prosecutions) v. Gary Doyle* [1994] 2 I.R. 286 Denham J. held that a District Court Judge could make a disclosure order and had a duty to decide on the facts of the case before him or her whether the interests of justice required that statements or documents be furnished to the defendant. She outlined the extent of the duty on the prosecution to furnish statements of proposed witnesses for the prosecution in the context of the summary prosecution of an indictable offence in that case, in the following terms at p.302:-

> *"I am satisfied that where an indictable charge is being disposed of by way of summary trial in the District Court, there is no general obligation on the prosecution to furnish, on request, the statements of the proposed witnesses for the prosecution. …*
>
> *However, the applicant retains at all times his constitutional rights to fair procedures and if he requires, and it is in the interests of justice, that he be furnished with statements, or indeed other documents held by the prosecution, which will be evidence in his trial, then he is so entitled. It is a matter for the trial judge to determine in each case."*

She identified the following considerations which a court should have regard to in deciding whether or not to grant disclosure, also at p. 302:-

> *"(a) the seriousness of the charge;*
>
> *(b) the importance of the statements or documents;*
>
> *(c) the fact that the accused has already been adequately informed of the nature and substance of the accusation;*
>
> *(d) the likelihood that there is no risk of injustice in failing to furnish the statements or documents in issue to the accused."*

4.6 In the subsequent case of *Whelan v. Kirby* [2005] 2 I.R. 30, Geoghegan J. accepted that the constitutional principle in the above case could apply in the prosecution of summary offences. The duty of the prosecution to make disclosure can only arise in circumstances where it actually has possession of the material sought, as observed by McMahon J. in

Director of Public Prosecutions v. Judge Geoffrey Browne [2008] IEHC 391 (Unreported, High Court, McMahon J., 9th December, 2008) as follows, at p. 12:-

> *"It is important to emphasise, therefore, that the right to disclosure is not an unlimited one. It should be available if it is necessary to ensure a fair trial and fair procedures and where justice demands it. It also only extends to relevant evidence which is in the prosecution's possession. In determining what is relevant, it is helpful to bear in mind the indicators specified by Denham J. in Director of Public Prosecutions v. Gary Doyle [1994] 2 I.R. 286. Finally, in determining what is just in cases such as this, one must appreciate that justice is not only about the rights of the accused. There is also the public interest in the successful prosecution of offences to be taken into account and, in the context of summary proceedings where it is intended that justice should be dispensed in a simple and speedy manner, inordinate expense must be avoided. Commonsense and proportionality are also factors which have to be considered in the weighing exercise which the District Court judge must undertake in exercising his discretion."*

4.7 In addition, it is clear from the cases of *The People (Director of Public Prosecutions) v. Sweeney* [2001] 4 I.R. 102, *D.H. v. His Honour Judge Raymond Groarke & Anor*. [2002] 3 I.R. 522 and *The Health Service Executive v. His Honour Judge Michael White* [2009] IEHC 242 (Unreported, High Court, Edwards J., 22nd May, 2009) that orders for disclosure cannot be made against persons or entities who are not a party to the proceedings.

4.8 In *The People (Director of Public Prosecutions) v. O'Malley* [2008] IEHC 117, a consultative case which emanated from criminal proceedings based on an incident of alleged drunken driving, the first question raised was whether the learned District Court Judge was entitled as a matter of law to make an order for disclosure against a third party in criminal proceedings and whether there was power to make an order against the MBRS in the case. Gilligan J. noted that both sides agreed that the answer to the first question must be no as it was a well established principle that an order for disclosure cannot be made against third parties in criminal proceedings. The learned District Court Judge in that case made a finding, which she set out as follows, at p 6:

> *"(19) I noted that the Medical Bureau of Road Safety is a State entity and it is not a third party in the ordinary sense."*

4.9 Manifestly, the MBRS is not a party to the proceedings in either of the applicants' respective cases before the District Court. As such, an order for disclosure cannot be made against it.

4.10 Of fundamental importance in the instant cases is the nature of the information which is being sought by the applicants. What they wish to obtain is not evidence they know to exist but, rather, for an inquiry to take place to elicit if evidence exists which would assist the applicants in rebutting the relevant statutory presumption. In essence, the District Court was asked, under the guise of disclosure, to direct the carrying out by the prosecution of a further investigation for the potential benefit of the defence relating to the issue of whether the certificate was produced *"as soon as practicable"*. Disclosure must be confined to evidence that already exists. Otherwise, courts would be asked to become involved in the investigation of the particular criminal matter. The judicial function in this jurisdiction excludes that kind of role for the judiciary and reserves all matters pertaining to the investigation of crime to agencies of the executive, namely An Garda Síochána and the Director of Public Prosecutions The judicial function is to hear and determine all justiciable issues relating to the trial of an accused person including whether in light of the manner in which the prosecution has been conducted and specifically where an accused person has been deprived of essential relevant material, whether an accused can have a fair trial. The separation of powers principle in the Constitution requires that the courts refrain from interventions such as the one now demanded by the applicants which would in my judgment, impermissibly transgress into the reserved functions of the executive.

4.11 It is clear that neither the gardaí or the Director of Public Prosecutions possess powers to direct that information be provided to the defence by the MBRS . The gardaí may only go so far as to request information and may not invoke procedures under the Criminal Justice Act 1984. The MBRS are not suspected of having committed any crime and therefore cannot be amenable to any lawful process of arrest or interrogation.

4.12 As to the right of the applicants to rebut the legislative presumption under s. 19 of the Act of 1994, it was accepted that the defence may cross-examine officials from the MBRS in an effort to rebut that presumption. As is clear from the correspondence from the MBRS, the applicants can call witnesses from it to give evidence concerning the matters relating to the issue of whether the certificates were issued as soon as practicable. The letters from the MBRS seem to make it clear that a witness or witnesses will be provided to assist the defence. It seems a very short step to specifically request the MBRS to make available a witness or witnesses who can deal with the matters set out in the applicants' request to the MBRS and to the prosecution. The applicants in this case specifically requested a précis of the evidence that would be given by any MBRS officials. The advantage for the defence of such a précis of evidence in advance of trial is obvious, in that, it would provide guidance as to how to proceed. However given the clear expression of willingness by Professor Cusack to co-operate with the defence, evident from his replies to the applicants' respective solicitors, as set out in para. 2.8 above, it would seem very unlikely that the applicant would not be made aware of the general position of the MBRS in advance of its officials giving evidence. I am satisfied that the applicants have the means to rebut the presumption under s. 19 of the Act of 1994 and I can see no real imperilment of their constitutional right to a fair trial.

5. Irrationality

Counsels' Submissions

5.1 Mr. Ó Lideadha argued that adopting the submissions of the Director of Public Prosecutions as reasons for his decision rendered those reasons irrational, given that those submissions were, in Mr. O Lideadha's submission, contradictory and unreasonable. He pointed to various examples of where he said this was the case, for example, it was stated that the applicant could rebut the statutory presumption as he retained a specimen; that the material sought was argued not to

be relevant but that it was then stated that a witness could be called to give evidence with regard to it. He relied on *Smith v. Judge Ní Chondúin and the Director of Public Prosecutions* [2007] IEHC 270, (Unreported, High Court, McCarthy J., 3rd July, 2007) where too high a level of generality in relation to the manner in which reasons were given in the District Court was found. He also submitted that in *Kenny v. Coughlan and The Director of Public Prosecutions* [2008] IEHC 28 (Unreported, High Court, 8th February, 2008) this Court found that there may be a breach of natural justice in the context of pre-trial disclosure.

5.2 Mr. Dwyer submitted that the District Court Judge adequately fulfilled the duty on him to give reasons by reference to the standard enunciated by the Supreme Court for District Court Judges in criminal trials in *O'Mahony v. Ballagh* [2002] 2 I.R. 410. He submitted that the applicant had not demonstrated that the written submissions tendered by the Director of Public Prosecutions met the threshold of unreasonableness as set out by the Supreme Court in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] 1 I.R. 642.

Decision

5.3 The central tenet of the applicants' argument based on the irrationality ground was that the submissions made by the Director of Public Prosecutions in the District Court were adopted by the District Court Judge in total. The only evidence of what occurred at the hearing of the 30th October, 2008, is given in the affidavits of Mr. Fahy and Mr. Staines. Their averments are to the effect that the District Court Judge indicated that his reasons "*were grounded*" on the submissions of the respondent. This is different to saying that the District Court Judge adopted the submissions of the respondent in total. I am satisfied that indicating that the reasons were grounded on the submissions of the respondent infers that the District Court Judge accepted the arguments of the applicant and rejected those of the respondent. There is no possible basis for suggesting that this approach flew in the face of reason and common sense.

6.1 Conclusion

6.2 For the reasons set out above I must refuse the reliefs sought in these proceedings.