Neutral Citation Number: [2010] IEHC 381

THE HIGH COURT

JUDICIAL REVIEW

2009 614 JR

BETWEEN

MICHAEL OATES

APPLICANT

AND

DISTRICT JUDGE GEOFFREY BROWNE AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Charleton delivered the 11th day of November 2010

1. On the 27th May, 2009, the applicant was convicted in the District Court of drunken driving on a Roscommon road in July, 2008. He argues his conviction is invalid because the judge hearing his case should have allowed a forensic scientist appointed by him to examine the Lion Intoxilyser machine which, in the garda station following on his arrest, produced a reading on his breath sample revealing a concentration of 88 microgammes of alcohol per 100mls of his breath. This is more than twice the legal limit. The applicant did not give evidence at his criminal trial. Nor was any question put to any prosecution witness indicating any reason to doubt the proper functioning of the mechanical device in question. The garda who arrested the applicant on the roadway, Garda Pádraig O'Gara, gave evidence of a random breath test on stopping the applicant, which indicated on a preliminary basis that the applicant was over the limit. He also told the court of trial of a strong smell of intoxicating liquor coming from the applicant. This evidence was not challenged. Nor was there any evidence suggesting that the Lion Intoxilyser machine installed in Roscommon Garda station was not correctly calibrated or that appropriate procedures for using it were not followed.

2. On a preliminary application on the 4th December, 2008, relating to disclosure to the defence of garda statements, the learned district judge granted that application, but refused facilities to inspect the Lion Intoxilyser machine and declined to order inspection of documents relevant to its servicing and its calibration.

3. That decision by the learned trial judge was correct. My reasons now follow.

Engagement with the Evidence

4. The applicant has not sworn an affidavit indicating any reason why any court should doubt the result of the scientific test that was carried out mechanically on his breath sample. He has not sworn that on the occasion of his driving and subsequent arrest that he had been teetotal for a relevant period of time. There is nothing in the evidence to indicate that at the time of his arrest that there was any reason to doubt the observation at the roadside of Garda O'Gara or that, on being processed in the garda station, the applicant made any statement in his own interest indicating a line of defence, or even surprise at the high level of the alcohol consumption reading. There has thus been no engagement with the evidence either in this Court, or before the learned district judge, which would reasonably raise any prospect that the prosecution case was incorrect either through its own inherent weakness or through the proffering of contradictory evidence on behalf of the defence. The applicant bears the burden of showing that his conviction for drunken driving should be quashed by an order of *certiorari.* He claims a failure by the court of trial to follow the constitutionally mandated procedures which would allow him to fairly explore the prosecution case. There has been no breach of fair procedures in this case. There was no engagement by the applicant with the evidence and nor did he exercise his right to present any contradictory evidence.

5. The right to disclosure and the inspection of machinery is not an unlimited or automatic right. Ordinary disclosures should be made by the prosecution in respect of material which is relevant to their case or to any potential defence that might reasonably arise in the course of the evidence. In *DPP v. Browne* [2008] I.E.H.C. 391, (Unreported, High Court, McMahon J., 9th December, 2008), an elaborate series of applications were made to the District Court to challenge proposed mechanical evidence that a man who was accused of speeding had been driving in excess of 100km per hour. In the course of his judgment, McMahon J. made it clear that it is for the District Court judge in any criminal prosecution to determine whether it is necessary in the interests of justice and fair procedures for the accused to be furnished prior to the trial with particular information. The same observation applies to any inspection facilities that may be sought in relation to a machine for testing alcohol consumption through breath sampling. There has to be a reason for disclosure beyond material gathered in the ordinary way in the investigation of a crime. Why an extension into testing mechanical devices should be entertained has to be stated, and it has to be in some way related to the evidence to be given at the trial either for the prosecution or the defence. In the course of his judgment McMahon J. summarised the law in relation to disclosure and fair procedures in the following way:-

> "McCarthy J. (as he then was) in the *People (Director of Public Prosecutions) v. Tuite* [1983] 2 Frewen 175 states the general principal with exceptional clarity:-
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> > 'The constitutional right to fair procedures demands that the prosecution be conducted fairly; it is the duty of the prosecution, whether adducing such evidence or not, where possible, to make available all relevant evidence, parol or otherwise, in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so.' (At. 180 – 181)

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.

In addition to the above considerations it is clear that a basis for any such application must be properly established.

> 'Normally, therefore, a basis would have to be laid before a relevant complaint of non-preservation or refusal of permission to inspect was made.' (*Per* Geoghegan J., in *Whelan v. Kirby* [2005] 2 I.R. 30 (at p. 44))

In relation to disclosure, the Court of Criminal Appeal in the *Director of Public Prosecutions v. McCarthy* (Unreported, 25th July, 2007) made the following statement:-

> 'The court is satisfied, however, that the obligations of disclosure are not limitless nor are they to be assessed in a vacuum or upon a purely theoretical or notional basis. Nor is a conviction to be regarded as unsafe per se simply because there has been a partial failure by the prosecution to meet the obligations of disclosure. It is a question of degree in every case, having regard to the nature and importance of the material in question.' (At p. 29)

Later, the court continues:-

> 'In the latter case, [*McFarlane v. Director of Public Prosecutions* [2006] IESC 11] in stressing the need for an applicant to establish a risk of an unfair trial, Hardiman J. stressed:-
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> > 'In order to demonstrate that risk there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent. Failure to do this was the basis of the failure of the applicant in *Scully* [*v. Director of Public Prosecutions*] [2005] 1 I.R. 242.'
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> These cases stress that commonsense parameters must govern the scope of the duty to seek out and preserve evidence and the consequences of any supposed failure to do so in a particular case. As Hardiman J. noted in *Dunne v. Director of Public Prosecutions* [[2002] 2 I.R. 305], 'no remote, theoretical or fanciful' possibility should lead to a prosecution being prohibited. Repeating this in *Scully v. Director of Public Prosecutions* [2005] 2 ILRM at 216 he added:-
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> > 'one is concerned, first and last, with whether there is a real risk of an unfair trial. Obviously this will depend on the individual circumstances of each case'.' (At p. 31)

Although the above remarks were applied in the context of the prosecutor's obligation to seek out and preserve evidence, it is my view that they are equally apposite in the present circumstances."

Criminal Trial

6. The attractive submissions made to this Court are underpinned by an assumption that a criminal trial is, contrary to the analysis of McMahon J. just quoted, in some way a theoretical, or even fictitious, exercise. It is not. The prosecution present its case on the basis of evidence which it considers would be sufficient to establish the burden of proving their case beyond reasonable doubt. They bear that burden of proof. It is often said that the defence have no burden of proof, save for those rare cases provided for by law; as would be the case, for instance, in relation to the special defence of insanity, which must be proved as a probability. The defence are, on the current state of the law, entitled to remain mute throughout a criminal trial. The failure of the defence to raise a relevant issue, however, carries ordinary and common sense consequences. Any failure to give evidence on a relevant issue means that there may be no evidence to contradict the prosecution case on that issue. Questions may be asked in cross-examination of prosecution witnesses, but these questions, often containing assertions of fact on the basis of the instructions of the accused, are not evidence. If the assertions put to prosecution witnesses are not backed up by evidence, than that evidence is absent. A question is not evidence. It may be that cross-examination by the defence can be argued to have weakened the prosecutions case to a degree, but the failure to contradict it by evidence may lead, in the ordinary way, to a fact being challenged but being uncontradicted. This does not mean that an inference is to be drawn against an accused person for failing to give evidence. It means that a failure to contradict evidence leaves that evidence undisturbed, subject to any doubt that may be raised in cross examination and always subject to the principle that the evidence of a witness is to be analysed on the basis of what they assert and not on any basis that would elevate questions put to a witness to the level of testimony.

7. Furthermore, it cannot be suggested that the defence are entitled to raise every fanciful or theoretical possibility, as McMahon J. puts it, that might occur on analysis of the prosecution case. Cross-examination is a responsible procedure and is based on the nature of the defence presented to an advocate by his or her client. The court of trial is entitled to know that the defence are pursuing a particular reply to the prosecution case. Hence, in jury trials, the duty of the trial judge to put the defence case to the jury as well as the prosecution case. Before a defence can be said to be live at a criminal trial there is a duty of adducing evidence as to that defence. The Court of Criminal Appeal in *The People (DPP) v. Smyth and Smyth* [2010] I.E.C.C.A. 34, (Unreported, Court of Criminal Appeal, 18th May, 2010), at paragraphs 15 and 16, put the matter in this way:-

> "At a criminal trial, the burden of proof is borne by the prosecution in respect of every issue; except on those issues on which the burden of proof is cast on the accused by statute. This burden is not to be confused with the burden of adducing evidence. Criminal trials would be chaotic were the accused entitled to run any potential defence which might be hypothetically open on the facts of the prosecution case. The accused must engage with the evidence. Where the defence of the accused to a murder charge is that he was defending himself, or that he was provoked, or that he was acting in an automatous state, he carries the burden of adducing evidence on those issues in order to allow that defence to be argued by defence counsel in a closing submission to the jury. As it was put by Devlin J. in *Hill v. Baxter*, [1958] 1 Q.B. 277 at 284:-

> 'It would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had not proved affirmatively and beyond a reasonable doubt that the accused was at the time of the crime sober, or not sleep walking or not in a trance or black out.'

> 16. Consequently, there must be some evidence to which the accused can point whereby a particular defence to crime becomes open. This is not a legal burden of proof; it is merely the burden of adducing sufficient evidence to allow a defence to be argued in closing and then included as part of the relevant legal directions in the charge of the trial judge."

8. What characterises this case is the absence of any reason whereby it could be said that the machine for breath testing alcohol consumption was malfunctioning. In the procedure used in this, as in other cases, two breath samples are taken and two readings are consequently produced. These, it is asserted, are different to each other. That is not surprising. The lowest reading is the appropriate one for the criminal prosecution. As to how the difference between the readings might be approached so as to show that the machine was malfunctioning was not explained in the affidavits in this judicial review, notwithstanding expert evidence on affidavit. Instead, a general assertion is made that doubts have been cast in the United States of America on the accuracy of readings from this kind of breath testing machine. That lower reading is, it might be noted, discounted on the basis of 17%, to ensure its accuracy for criminal trial purposes.

The Intoxilyser Machine

9. By virtue of s. 21(1) of the Road Traffic Act 1994 ("the Act"), as amended by the Road Traffic Act 2006, there is a presumption that a reading produced on analysis of a breath sample by the Lion Intoxilyser machine is correct. A certificate showing the reading is admissible by virtue of s. 17(2) of the Act. If the presumption were not rebuttable this statutory scheme would be unconstitutional. Consequently, there is an entitlement, as part of the trial process, for a person accused of drunken driving in this way to apply to inspect the machine to ensure that it was working correctly. This entitlement is well established by the case of *McGonnell v. DPP* [2007] 1 I.R. 400. There the issue was the compatibility of the statutory scheme with the Constitution. The Supreme Court affirmed the judgment of McKechnie J. in the High Court that a person facing an accusation that they had driven a car while drunk were entitled to seek inspection rights of any machine used to supply the relevant certificate. In so deciding an application to inspect a machine, McKechnie J. held that the court must apply fair procedures. In the course of the Supreme Court judgment, at p. 411, Murray C.J., giving the sole judgment of the Supreme Court said:-

> "In addition . . . there is one further safeguard which I consider of particular relevance. It is the entitlement of an accused person to seek inspection rights of any machine used to provide the s. 17(2) certificate in respect of him. Given not only the legal force but also the practical consequences of the presumption contained in s. 21(1) of the Act of 1994, it is in my view, an important assurance for an accused person to know of his right to have access to a judicial authority for the purposes of checking inspection facilities in respect of any given machine. When so deciding, the court in question must of course comply with constitutional justice and fair procedures on any such application so made, as it must on the hearing of the s. 49 charge itself. In those instances it may vindicate such rights of the defendant in the most appropriate manner available. These observations equally apply to any application in respect of documentation."

10. In *Morgan v. Collins* [2010] I.E.H.C. 65 (Unreported, High Court, Ó Neill J., 19th March, 2010) an application was made to prohibit the hearing of a charge of drunken driving, because the prosecution had refusing to provide the applicant with the maintenance records for the Lion Intoxilyser machine for the twelve month period preceding the date of the test. That application for prohibition was refused by Ó Néill J. In principle, as I see it, there is no difference between an application seeking to overturn a conviction on the basis that the sought-for records were not provided, or inspection was not granted, and an application prohibiting a case from proceeding on the same argument. I quote from paras. 5.9 to 5.11 of his judgment:-

> "5.9 What is sought by the applicant in this case is not an inspection of the intoxilyser but rather a copy of its maintenance records. That there is a rebuttable presumption contained in the statement of fact in the certificate issued under s.17(2) of the Act of 1994 is clear. Because of this rebuttable presumption, the entitlement of an accused person in an appropriate case, to inspect an apparatus designed to measure the alcohol concentration in the breath has been established. The above two Supreme Court authorities indicate, however, that there usually has to be a basis established as to why particular disclosure or inspection is sought, unless the basis for the request is self evident. This was expressly referred to by Geoghegan J. at p.44 of the reported judgment, as set out above in para 5.5, and also implicitly by Murray C. J. in referring to the judgment of McKechnie J. which stated that the appellants could adduce evidence of the amount of alcohol they had consumed themselves to illustrate that the relevant apparatus was defective. This would seem to indicate that the relevance of what is sought to the applicant's defence must be established unless the relevance is self-evident. This approach was also adopted by McMahon J. in *Director of Public Prosecutions v. Browne* [2008] I.E.H.C. 391 (Unreported, High Court, McMahon J., 9th December, 2008).
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> 5.10 It is to be observed that Murray C.J. pointed out that it is open to an accused person to "*adduce evidence regarding the manner of operation of the apparatus at the relevant time of the provision of the breath specimen*". In this case the applicant did not indicate that he was of the view that the intoxilyser was defective or indeed any basis upon which he was seeking the maintenance records of the intoxilyser, other than to say that he could not begin to rebut the presumption without first seeing the maintenance records. The demand made is simply that and no more. Nothing is advanced either by way of evidence or submission which would tend to demonstrate that a particular defence would be aided by the material sought. In essence, the applicant is merely exploring to see whether something turns up in the maintenance record which would arm him with evidence to rebut the presumption.
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> 5.11 Unless it could be said that such an approach merited the disclosure sought as being a "self evident" basis for it, it clearly would fall short of the requirement, stated in all the above cases, that an accused person must show the relevance of the material sought to a defence to be advanced in the trial. A self evident reason would, in my judgement, be one which of itself demonstrated to the Court the nature of the defence sought to be advanced. Necessarily this excludes a request which is a fishing or exploration exercise to discover if a defence exists. Thus, in my opinion, an accused would have to point to some circumstance which, if established in evidence at the trial, would undermine the accuracy of the printout from the intoxilyser machine. If it were necessary for the prosecution to furnish the maintenance record solely on the basis of a defence demand unrelated to any particular defence, that would amount to placing an obligation on the prosecution to support the evidential status of the printout with additional evidence and would, in my opinion, undermine the statutory presumption in s. 21(1) of the Act of 1994. Whilst the presumption is a rebuttable one it is rebuttable by an accused by way of his defence to the charge and does not enlarge the burden of proof on the prosecution in order to obtain a conviction. This approach in no way limits the capacity or opportunity of an accused to

> rebut the presumption, if the accused has a case to make which casts doubt on the accuracy of the printout. If he or she is not aware of any circumstance which calls in question the accuracy of the printout, e.g. that the alcohol level revealed by the printout does not or could not be an accurate reflection of any alcohol, or none, consumed by the accused, then it cannot, in my judgement, be said by an accused that the denial of the maintenance record of the intoxilyser machine deprives her or him of a fair trial."

11. With these observations I completely agree. I need only add that if the defence, on instructions, have a need to apply for inspection of a machine or to have a view of documents related to it, that this application should be notified to the prosecution and grounds given. In the alternative, an application on evidence can be made directly to court in advance of the trial. The learned district judge, in this case dealt with the matter correctly.

Result

12. In the result there is no reason to disturb the conviction of the applicant for drunken driving.