Neutral Citation: [2014] IEHC 652

THE HIGH COURT

2014 414 SS

IN THE MATTER OF SECTION 52 OF THE COURTS SUPPLEMENTAL PROVISIONS ACT 1961

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA MARY GALLAGHER)

PROSECUTOR

AND

MARTIN PARKER

DEFENDANT

JUDGMENT of Ms. Justice Donnelly delivered on the 17th day of December 2014

1. This is a consultative case stated by Judge Mary Devins concerning an issue that arose during the prosecution of Martin Parker ("the accused") for an offence of driving a mechanically propelled vehicle while there was present in his body a quantity of alcohol such that within three hours after so driving, the concentration of alcohol in his blood exceeded a concentration of 80 micrograms of alcohol per 100 millilitres of blood contrary to s.50 (2) and s.50 (6)(a) of the Road Traffic Act 1961 as inserted by s.11 the Road Traffic Act 1994 as amended by the Road Traffic Act 2002.

2. The opinion of the High Court is sought in relation to the following questions of law:

> I. Does the fact that the nominated solicitor of the accused was not contacted by the Gardaí prior to the making of the request under s.13 (1)(b) of the Road Traffic Act 1994 as amended and/or before the accused elected to permit the doctor to take a specimen of his blood render the subsequent evidence inadmissible and/or otherwise justify the dismissal of the prosecution against the accused?
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> II. Does the fact that the Gardaí took the photograph of the accused while he was detained, other than with the authority of a member of, or above, the rank of sergeant as required by s.12 of the Criminal Justice Act 2006 make the detention of the accused unlawful and/or unconstitutional such as to render the evidence required thereafter inadmissible in subsequent proceedings and warrant the dismissal of the prosecution against the accused?

3. The case stated records the following findings of fact relevant to the legal issues:-

> (i) At 15.17 hours on the 22nd February, 2011, Garda Mary Gallagher, having formed the requisite suspicion, arrested the accused under the provisions of s.50(10) of the Road Traffic Act 1961 to 2006 as amended and conveyed him to Ballinrobe Garda Station where they arrived at 15.20 hours.
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> (ii) At 15.23 hours Garda Aidan Connaughton, the member in charge of Ballinrobe Garda Station, read over and gave to the accused a copy of his notice of rights (form C72 (s)).
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> (iii) At 15.23 hours Sergeant Helena Hastings contacted the designated medical practitioner, Dr. Michael Finnerty of Westdoc, and requested him to come to the Garda station to take or obtain a blood or urine specimen from the accused.
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> (iv) At 15.30 hours the accused requested that his own solicitor and his own GP be contacted on his behalf. The solicitor he requested is recorded in the custody record as "John Dillon" although the accused in evidence stated that he requested John Dillon Leetch, it was put to the Garda witness in cross examination and submitted to me that the accused had actually requested the attendance of "John Dillon Leetch" solicitor. The GP requested by the accused is recorded as Dr. Michael Regan. Dr. Regan could not be contacted.
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> (v) At 15.45 hours Garda Colin Murrin made a telephone call to "John Dillon's" office and he informed the court that John Dillon was not available. Garda Murrin could not recall how he had acquired the contact number for "John Dillon". In any event, he did not speak to the nominated solicitor and the accused was invited to nominate another solicitor. Garda evidence was that he again nominated "John Dillon" but the accused stated in evidence that he again requested "John Dillon Leetch". There is no solicitor practising under the style of "John Dillon" in the area, no further effort was made to contact a solicitor.
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> (vi) At 16.10 hours Garda Aidan Connaughton took the accused's photograph, having first obtained his written consent. The taking of the photograph was stated to be for identification purposes although Garda Murrin who had made the telephone calls referred to herein, testified that he knew the identity of the accused. Garda Connaughton did not seek the authorisation of a member of An Garda Síochána not below the rank of sergeant before the taking of the photograph of the accused.
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> (vii) At 17.03 hours Dr. Finnerty arrived at the Garda Station and after the accused had so elected, at 17.13 hours took from him a specimen of blood. That specimen was subsequently forwarded for analysis to the Medical Bureau of Road Safety whence a certificate of analysis was returned showing a concentration of 252 mg. of alcohol per 100 ml. of blood. The certificate was tendered in evidence.

4. It is immediately apparent that no express finding of fact was made by the learned District Judge as to what solicitor the defendant had in fact requested. Neither is there an express finding of fact as to whether the Garda had in fact contacted John Dillon's office. On the other hand, there is a finding that there is no solicitor practising under the style of John Dillon in the area. This finding in itself leads to the inference that the Garda could not have contacted such an office, although it is possible that such office existed outside the area. Although it is clear from the question in the case stated that the nominated solicitor for the accused was not contacted by the Garda prior to the request made of him under the relevant provisions of s.13 of the Road Traffic Act 1994, there appears not to be a finding as to whether this in itself was a breach of *reasonable* access.

The law.

Obligation to provide a specimen.
5. The relevant portions of section 13 of the Road Traffic Act 1994 as amended provide that where a person is arrested under s.50(10) of the Act, a member of the Garda Síochána may at any Garda Síochána station:

> (1) (b) require the person either -
>
> > i. to permit a designated doctor or designated nurse to take from the person a specimen of his or her blood, or
> >
> > ii. at the option of the person, to provide for the designated doctor or designated nurse a specimen of his or her urine.
>
> (3) Subject to section 23, a person who, following a requirement under subsection 1(b) –
>
> > (a.) refuses or fails to comply with the requirement, or
> >
> > (b.) refuses or fails to comply with the requirement of a designated doctor or designated nurse in relation to the taking under that subsection of a specimen of blood or the provision under that subsection of a specimen of urine, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €2,500 or to imprisonment for a term not exceeding 6 months or to both.

6. As those provisions clarify, section 13 of the 1994 Act as amended provides for a mandatory obligation to provide a specimen of blood or urine. It is the contention of the Director of Public Prosecutions ("the DPP") that a person arrested under the drink driving code, that the statutory obligation to comply remains regardless of whether the arrested person has obtained legal advice.

Access to a solicitor.
7. The Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Stations) Regulations, 1987 provides at s.8 (1):-

> The member in charge shall without delay inform an arrested person or cause him to be informed –
>
> > (a.) in ordinary language of the offence or other matter in respect of which he is being arrested
> >
> > (b.) that he is entitled to consult a solicitor.

This information is to be given orally. The member in charge must also explain or cause to be explained to the arrested person that, if he does not wish to exercise [the right in relation to consulting a solicitor] immediately, he will not be precluded thereby from doing so later.

8. The Supreme Court in a series of cases had held that there was a right of reasonable access to a solicitor (e.g. *People (DPP) v. Madden* [1977] 1 I.R. 336). This right of reasonable access has since been elevated to a constitutional right of reasonable access (e.g. *People (DPP) v Healy* [1990] 2 I.R. 73, *People (DPP) v Buck* [2002] 2 I.R. 268).

9. In the leading case of *People (DPP) v. Gormley & White* [2014] IESC 17, the Supreme Court developed the jurisprudence in this area. The Supreme Court held that where evidence was led at a trial which had been obtained during questioning which occurred after a detained suspect had requested legal advice and before that legal advice had been obtained, there was a violation of the constitutional right to a trial in due course of law.

10. The Supreme Court judgment was a joint one concerning two separate accused with two different factual circumstances. Mr. Gormley's case concerned questioning prior to obtaining legal advice. Mr. White's case differed in that the impugned evidence concerned samples taken from him for the purposes of forensic examination. Those samples were taken at a time when he had requested legal advice but the taking of the samples went ahead nonetheless.

11. The Supreme Court (per Clarke J.) distinguished between the two sets of circumstances. Clarke J. dealt with the issue of legal advice prior to forensic sampling at Part 10 of his judgment. In essence, he distinguished forensic testing and interrogation of a subject. Results of forensic testing are objective. Those results do not depend on the will of a suspect. Neither do they depend on comments made by the suspect in circumstances where the right to self incrimination could have been invoked or where interrogation in the absence of advice led to the suspect being unfairly prejudiced. The court held that at a level of principle, the mere fact that otherwise lawful forensic sampling taken prior to the attendance of a legal adviser did not render a subsequent trial, at which reliance is placed on the results of tests arising out of those samples, unfair.

12. The Supreme Court went on to say at para 10.3:-

> *"[i]t remains, of course, the case that the suspect is entitled to reasonable access to a lawyer. The authorities in whose custody the suspect is held are required to take reasonable steps to facilitate such access. What consequences may flow, in respect of the admissibility of forensic evidence taken from a suspect where such reasonable steps are not taken, is a matter to be decided in a case where those circumstances arise. However, I am not satisfied that there is any fair trial constitutional prohibition on the taking, without prior legal advice, of a sample in a minimally intrusive way which is justified in law."*

Thus, the question of the inadmissibility of forensic evidence taken in violation of reasonable access to a lawyer is a matter to be decided upon in each case where those circumstances arise.

Prosecutions relating to drunk driving arrests.
13. The DPP relies upon a number of cases concerning drink driving prosecutions where the court held that access to a solicitor, in circumstances where an accused person was obliged by law to provide a sample, could not avert that statutory obligation. In *Walsh v. O'Buachalla* [1991] 1 I.R. 56 Blaney J. held that:-

> *"[n]o advice could have prevented the specimen being obtained and, accordingly, the applicants not having had access*

to a solicitor in no way affected its being obtained".

14. In the case of *DPP v. Spratt* [1995] 1 I.R. 585 O'Hanlon J. followed the approach of Mr. Justice Blaney. More recently in *DPP v. Gillespie* [2011] I.E.H.C 236, Hedigan J. followed the decision in *Spratt* and focussed on the issue of prejudice. He held that the issue of the absence of prejudice to an accused, a breach of the 1987 regulations would not provide a basis for the exclusion of the evidence in the s.17 intoxilyzer certificate.

15. The case of *DPP v. McCrea* [2010] I.E.S.C. 60 concerned a prosecution for a failure to provide two specimens of breath contrary to the relevant legislation. The accused in that case was denied the right to a solicitor because the sergeant had a mistaken belief that she would not be legally entitled to make another request of the accused if she broke the intoxilyzer machine's cycle in order to allow such a consultation. She found that he had been told he was entitled to seek a solicitor at any time. Ultimately, the District Judge dismissed that charge against the accused on the basis that he had been denied a right of reasonable access to a solicitor and that the refusal by the accused may have occurred as a consequence of the breach of that right.

16. The Supreme Court in *McCrea* did not decide the case on the basis of the reasonableness of what the accused had been told in that particular case. The court specifically said it was not considering the ambit of the constitutional right of access to a solicitor and not considering whether it applied to a person who had been arrested solely for the purpose of taking a breath test under the Road Traffic Acts. It was specifically stated that the Supreme Court could determine the case stated having regard to its own particular facts on the failure to observe the regulatory procedure. Ultimately, the court held that on the specific facts, as found in that case, the District Judge was entitled to find that the accused was:-

> *"…reasonably entitled to rely literally on what the Gardaí had told him as to when he could take legal advice from a solicitor; entitled to find that a solicitor's advice would have been of benefit to him and entitled to find that he had not had reasonable access to it."*

It seems to me that the finding "entitled to find that a solicitor's advice would have been of benefit to him" distinguishes that case from the High Court decisions of *Walsh, Spratt* and *Gillespie*.

17. It is noted that in the case of *McCrea*, there had been a specific finding that the accused had only behaved aggressively after the refusal of access to a solicitor and possibly as a direct result of that. The District Judge had been clear that if the accused had been allowed access to the solicitor, the solicitor would amongst other advices have advised him to provide a breath sample. Depending on the reading, the accused may not have been charged at all or he may have been the subject of a one, two or three year ban as opposed to the four year ban that he was subject to on conviction for a failure or refusal to provide a sample.

18. Clarke J. in *Gormley* and *White* indicated that the issue of entitlement to prior legal advice may well merit specific regulation to avoid the risk that there be confusion in the mind of suspects of those in whose custody the suspect is held between the process leading to interrogation and that of forensic testing. Where confusion leading to prejudice has been caused, it appears that a judge is entitled to find there had been a breach of reasonable access.

19. Counsel for the defendant has urged upon me that *Gormley and White* should be distinguished from the facts at issue here. He submits that there was a clear and unambiguous breach of the right to reasonable access in this case. Such a finding does not appear to have been made by the District Judge at this stage of the proceedings. He submits that if the right is fundamentally and deliberately breached, it is a matter of discretion that the fruit thereof not be admitted. He submits that it is in the very situation where a person, such as his client, is alleged to be drunk, that he requires the benefit of legal advice.

20. In the case of Mr. White, Clarke J. held that if a suspect has genuine legal choices available in respect of the taking of samples and where it would be reasonably necessary for the suspect concerned to have access to legal advice before making any such choice, the situation might be different. However, he went on to state that such a choice does not encompass the fact that a suspect might be able, by committing a separate criminal offence of refusing to cooperate with the giving of samples, to frustrate that exercise.

21. If the law has given a suspect a choice in relation to the sampling and where legal advice is reasonably necessary for the exercise of an informed choice, there may well be an entitlement to access to a legal adviser before exercising same. In the circumstance where there is no legal right to a choice as to whether to give a sample of blood or at his option urine, there was no breach of fair procedures resulting from the requirement made of the defendant to provide the relevant samples prior to the arrival of the solicitor and his subsequent prosecution on foot of the results of those samples.

22. In so far as an assessment of fair trial may be distinguishable from an assessment of the admissibility of the evidence, it appears to me that those cases must be decided on a case by case basis. However, the earlier cases concerning the results of forensic testing on samples in drink driving cases taken in the absence of access to a solicitor, are authority for the proposition that such samples are admissible. That case law was not overturned by *Gormley and White*. On the facts and findings as set out by the Judge in her case stated, there is nothing to bring this case outside the principles set out by the Supreme Court in *Gormley and White* or the High Court in *Walsh, Spratt* and *Gillespie.* He too had been informed of his right to a solicitor but the sample was obtained prior to that access being made available to him.

23. Other issues might arise in particular instances, such as occurred in *McCrea*, where the circumstances of the information given the accused, the denial of his right of access to a legal adviser and resultant prejudice, might entitle a District Judge to dismiss a particular charge. In *White*, as in the earlier High Court drink-driving cases where there was no legal choice in law with respect to the giving of a sample, there was no prejudice to an accused. Absent an egregious constitutional breach (see reference to *Keating v Governor of Mountjoy* [1991] 1 I.R. 61 below), the evidence is admissible and there is no unfairness in the trial.

24. I conclude that since the decision in *People (DPP) v. Gormley and White*, the mere fact that a forensic sample was taken prior to the attendance of a legal advisor as had been requested by the accused having been told of his rights, does not of itself render a trial which relies on the results of tests of those samples, unfair. While a question of admissibility of evidence always remains for the determination of a trial court, that determination must be made on the basis of the principles of law applicable to the particular circumstances.

25. Therefore, the answer to the first question in the case stated is as follows:

> *The mere fact that the nominated solicitor of the accused was not contacted by the Gardaí prior to the making of the request under s.13(1)(b) of the Road Traffic Act 1994 as amended and/or before the accused elected to permit the*

doctor to take a specimen of his blood did not render the subsequent evidence inadmissible and/or otherwise justify the dismissal of the prosecution against the accused.

The photograph

26. The photograph that was taken, was taken with the written consent of the accused. It seems that the taking of the photograph was stated to be for identification purposes, although another Garda who dealt with the accused testified that he knew the identity of the accused. The Garda who took the photograph did not seek the authorisation of a member of An Garda Síochána not below the rank of sergeant before taking the photograph of the accused. The photograph was taken during the interval between the doctor being contacted at 3.24pm and the arrival of the doctor at the Garda station at 5.03pm to take the blood sample. There was no prolongation of the detention for the purposes of taking of the photograph.

27. A power to take photographs is granted under s.12 of the Criminal Justice Act 2006. A member of An Garda Síochána not below the rank of sergeant may authorise the photograph of an arrested person to be taken as soon as may be after his or her arrest for the purpose of assisting with the identification of him or her in connection with any proceedings that may be instituted against him or her for the offence in respect of which he or she is arrested.

28. The power under section 12 is limited. It is for a specific purpose, i.e. that of identification in connection with any proceedings that may be instituted in respect of the offence for which the person is detained. Subsection 6 of section 12 expressly states that the power conferred by that section was without prejudice to any other power exercisable by a member of An Garda Síochána to photograph a person.

29. The DPP submits that the written consent of the defendant to the taking of his photograph brings this within the terms of s.12(6) of the Criminal Justice Act 2006 and/or otherwise provides a lawful basis for the taking of the photograph. In the course of the hearing, I raised the case of the *People (DPP) v. Boyce* [2009] 2 IR 124. That case concerned the taking of a blood sample from an accused while in custody and the reliance at trial on DNA evidence obtained from same. The Criminal Justice Forensic Evidence Act 1990 provided members of An Garda Síochána with powers to take certain bodily samples for forensic testing from persons detained in custody under specified statutes. In *Boyce*, the Gardaí did not rely on the statutory powers under the Act of 1990 but instead the blood sample was taken on the basis that it had been provided voluntarily and with the consent of the accused. Therefore, the procedures provided for in the Act were not followed.

30. The Supreme Court in *Boyce* held that the Criminal Justice Forensic Evidence Act 1990 did not oust the common law power to take samples for forensic testing on the basis of a free and voluntary consent of a person detained. Under the Act of 1990, there had been a similar express retention of powers to An Garda Síochána as are contained in s.12(6) of the Criminal Justice Act 2006. The law is clear. There was an entitlement to seek his consent to the taking of a photograph and to take the photograph on the basis of his consent.

31. The question referred to the High Court concerns the fact of the Gardaí taking the photograph without authority. The mere fact that the Gardaí took the photograph of the accused while he was detained, other than with an authority as required by s.12, could not of itself render the detention of the accused unlawful and/or unconstitutional such as to render the evidence acquired thereafter inadmissible in subsequent proceedings and warrant the dismissal of the prosecution against the accused. That in one sense is the answer to the question. However, the arguments before me on behalf of the defendant ranged over matters that were not contained in the case stated. This court cannot have regard to facts that were not so found and especially cannot have regard to facts that were not even referred to. The position may be different where it is agreed between all parties that the court should have regard to particular facts not specifically contained in the case stated.

32. In relation to inferences that are sought to be drawn from the fact that the Garda said that it was for identification purposes, whereas another Garda said that he knew his identity, this is not a determining feature in the case. There has been no finding that this was a subterfuge in order to obtain his photograph. The mere fact that a person is identified by a single Garda does not mean and could not mean that a photograph could not assist with the identification of that person in connection with the proceedings.

33. In this case, the photograph issue had no substance. It was not a matter which prolonged his detention. It was not a matter which gave rise to the admission of any other evidence, in particular the evidence relating to the taking of the blood sample and the testing thereof. This is not to say that the District Judge would have no function in the protection of constitutional rights. As McCarthy J. said in *Keating v. The Governor of Mountjoy Prison* [1991] 1 I.R. 61 at p. 65:-

> *"there may be cases in which a District Justice in pursuance of his constitutional duty, having regard to some outrage committed upon a person brought before a District Court, would refuse to proceed as prescribed by the Criminal Procedure Act 1967."*

34. By analogy, if there had been the gratuitous taking of an indecent or obscene photograph, such that in the circumstances of a particular case might constitute such an outrage, a District Judge in pursuance of his or her constitutional duty may be required to stay or dismiss the proceedings.

35. Therefore, the answer to the second question in the case stated is as follows:

> *The mere fact that the Gardaí took the photograph of the accused while he was detained, other than with the authority of a member of or above the rank of sergeant as required by s.12 of the Criminal Justice Act 2006, does not make the detention of the accused unlawful and/or unconstitutional such as to render the evidence acquired thereafter inadmissible in subsequent proceedings and warrant the dismissal of the prosecution against the accused.*