Neutral Citation Number: [2006] IEHC 146

THE HIGH COURT
JUDICIAL REVIEW

[2005 1193 JR]

BETWEEN

DANIEL RUTTLEDGE

APPLICANT

AND
DISTRICT JUDGE PATRICK CLYNE

RESPONDENT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

Judgment of Ms. Justice Dunne delivered on the 7th day of April, 2006

1. The applicant in this case seeks an order of *certiorari* by way of application for judicial review quashing the respondent's order dated 21st October, 2005, by which the applicant was found guilty of a charge under s. 49(4) and (6)(a) of the Road Traffic Act, 1961 (as amended) and the consequent disqualification imposed in relation to driving for a period of twelve months and the fine of €150 imposed. In addition the applicant sought a declaration by way of application for judicial review that the District Judge erred in law and acted *ultra vires* and was not entitled to amend a statement issued pursuant to s. 17(2) of the Road Traffic Act, 1994. The applicant also sought a declaration by way of application for judicial review that the making of the order to amend the evidence at the hearing of the prosecution of the applicant constituted a denial of the applicant's constitutional right to fair procedures, due process and his right to fair trial in due course of law. Other ancillary relief was sought.

Background Facts

2. The proceedings before the District Court related to a charge under s. 49(4) and (6)(a) of the Road Traffic Act, 1961 (as amended) of driving a mechanically propelled vehicle in a public place whilst over the legal breath/alcohol and alleged to have occurred on 25th day of July, 2005, at Drummartin Link Road with Kilmacud Road in the County of Dublin. The applicant was brought to Dun Laoghaire Garda Station and provided two samples of his breath for analysis into a "Lion intoxilyzer" machine for determining the concentration of alcohol therein. Thereafter the applicant was supplied with two identical statements produced by the said machine in accordance with the provisions of s. 17(2) of the Road Traffic Act, 1994. Ultimately the applicant was served with Dundrum Garda Station charge sheet No. 403140 requiring him to attend Dun Laoghaire District Court on 9th September, 2005. On that occasion the prosecution indicated that there was a problem with the s. 17(2) certificate and that an application would be made to amend same. The applicant's solicitor indicated he would object to such amendment and that the applicant would be pleading not guilty to the charge and 21st October, 2005, was fixed for the hearing of the matter at Court 40, Dolphin House in the City of Dublin.

3. At the hearing on 21st October, 2005, the prosecution applied to amend the s. 17(2) certificate and notwithstanding an objection by the applicant's solicitor, the first named respondent proceeded to make an order amending same and went on to find the applicant guilty of the offence and imposed a fine of €150 and disqualified the applicant from driving for a period of twelve months.

4. Michael Curneen, solicitor, swore an affidavit herein verifying the statement required to ground the application for judicial review herein. Having set out the matters referred to above he outlined what had occurred during the course of the hearing of the case on 21st October, 2005. In the course of the evidence of the prosecuting Garda, Garda Fergal J. Long, Garda Long indicated that he wished to apply to amend the s. 17(2) certificate as the certificate had referred to his name instead of that of the applicant as the person providing the sample of breath. Mr. Curneen objected to the amendment and the respondent made the amendment. Garda Long continued his evidence. At the conclusion of his evidence, Mr. Curneen made submissions to the respondent to the effect that the certificate should not be amended as it was conclusive and if on the face of the certificate it was stated that the sample was given by somebody other than the defendant, it was so serious as not to be a minor matter and was evidence that went to the root of the case. Mr. Curneen then went on:

> "The State had argued that there was a case of, I think, *Director of Public Prosecutions v. Andrew Barnes* and on that basis the Judge has indicated he had no difficulty in amending the certificate. The Judge indicated that if an application had been made at a certain point he might have been able to consider same. I indicated that as soon as the application to amend the certificate was made I objected to the amendment."

5. Mr. Curneen then went on to deal with the evidence of Garda Kelly. He said that her evidence did not deal with the clearance of the machinery or the preparation of the machinery for the taking of the sample or the entry of the details of the sample provider. Accordingly Mr. Curneen stated that the State had brought to the attention of the Court an error in the certificate and the person operating the machinery did not explain how the error had arisen and left open the possibility that the machinery may have had in it samples from previous providers which were printed out as if they were the conclusion of the tests carried out on the defendant. He argued before the District Court that there was no evidence that the samples exclusively related to the defendant and that the whole process was flawed. Following further submissions the respondent indicated that he had a discretion to make such amendment to the evidence.

6. It is accepted by counsel for the applicant and counsel for the notice party herein that the learned District Judge had no jurisdiction to amend the s. 17(2) certificate. Both sides accepted that the decision of O'Neill J. in the case of *Director of Public Prosecutions (O'Reilly) v. Barnes*, (Unreported, 18th July, 2005) set out the principle to be applied. At p. 9 of his judgment O'Neill J. stated as follows:

> "In the light of my foregoing conclusion it would seem to me to be unnecessary to answer the second question, however I feel it appropriate to observe that I cannot conceive of any circumstances in which it would be permissible for any court to alter evidence and in particular evidence such as a statement of the kind in issue in this case produced in purported compliance with the particular statutory provision."

7. This was the judgment referred to at para. 5 in the affidavit of Michael Curneen. It is clear from that affidavit that whilst that decision was opened to the learned District Judge, it appears that he may have been left under a misapprehension as to what was actually decided in that case.

8. It may be helpful to look at the facts of the decision in *Director of Public Prosecutions (O'Reilly) v. Barnes*. That was a case stated by the District Court in which two questions were posed for the opinion of the High Court namely:

(a) Whether the typographical error in the s. 17 certificate is fatal to the successful prosecution of the accused;

(b) Whether the s. 17 certificate can ever be amended by the court for obliteration or mistake.

9. The facts of that case are that the accused appeared before the District Court where it was alleged that he was in charge of a mechanically propelled vehicle in a public place with intent to drive the vehicle when in his body there was present a quantity of alcohol such that within three hours of having been so in charge of the vehicle the concentration of alcohol in his breath exceeded a concentration of 35 micrograms of alcohol per 100ml of breath contrary to s. 50(4)(6)(a) of the Road Traffic Act, 1961 as amended. Having been arrested, the accused in that case was taken to the intoximeter room for the purposes of an evidential breath test. The prosecuting garda proceeded to enter the accused's details into the intoxilyzer machine and in error he typed into the apparatus that the specimen was being taken into account for the purposes of s. 49(4) of the Road Traffic Act, 1961 whereas he should have typed in that the specimen was being taken into account for the purposes of s. 50(4) of the Road Traffic Act, 1961. At the commencement of his evidence Garda Keenan drew the court's attention to the fact that he had in error typed into the intoxilyzer machine the wrong offence. At the conclusion of the evidence the solicitor for the accused applied for a direction on the grounds that the specimen to be taken into account was for the purpose of s. 49(4) when in fact the accused had been charged with an offence contrary to s. 50(4) of the Road Traffic Act, 1961. It was further submitted that the court had no power to amend the certificate which on its face was incorrect. The learned District Judge stated a case for the opinion of the court and posed the two questions referred to above. Having referred to a number of authorities, O'Neill J. stated as follows:

> "I have come to the conclusion that the error which was made in this case does not detract from the due completion of the statement in question. I have come to the conclusion that having regard to all of the surrounding circumstances, namely the setting out of the charge in the charge sheet, the clear identification of the offence involved and the evidence which was given against the accused as recited in the case stated the strict compliance by the prosecutor and Garda Keenan that the statutory procedure set out in s. 13 and s. 17 of the Road Traffic Act, 1994, it does not seem to me to have been possible that the accused was confused let alone misled as to the particular offence for which the specimen was taken. It would appear to me that a suggestion that there was any lack of certainty in the circumstances of this case as to the particular offence in respect of which the two specimen's of breath were taken is simply unreal and not credible. I am quite satisfied that the error in question did not and indeed could not have imposed any prejudice on the accused or exposed him to any risk of injustice."

10. On that basis O'Neill J. answered the first question in the case by stating that the typographical error in the s. 17 certificate is not fatal to the successful prosecution of the accused.

11. Although counsel for the applicant and the notice party herein were in agreement as to the fact that the learned District Judge in amending the s. 17 certificate erred in law, counsel for the applicant and counsel for the notice party diverge in their views as to the effect of that error in law on the proceedings before the court. Thus it is clear that the net issue to be determined by me in these proceedings is whether or not the error of law on the part of the respondent herein is such that it vitiates the proceedings.

12. Mr. Burns SC placed considerable emphasis on two decisions, one of which is the Supreme Court decision in the case of the *State (Vozza) v. O'Floinn* [1957] IR 227. He referred in particular to the judgment of Maguire CJ at p. 243 where it was stated:

> "While I am prepared to agree that in strictness, except where it goes as of course, the granting of an order of *certiorari* is in all cases a matter of discretion, I am of opinion that in cases where there is conviction on record, made without jurisdiction, the court can only exercise that discretion in one way, viz, by quashing the order….the right of a citizen to be tried by due process of law is as old as Magna Carta. It has now been enshrined in the Constitution in Article 38(1) and while conviction of a crime remains on record it constitutes a representation that a person accused has been convicted after a trial in due course of law. Accordingly it cannot be gainsaid that to allow the conviction to remain on record is a serious matter for the prosecutor. It is submitted, however, that his lack of candour in presenting his case makes it proper that he should remain under the stigma which it carries. I find it difficult, however, to imagine conduct on the part of an applicant for *certiorari* which would disentitle him to an order of *certiorari* in regard to a conviction of a crime of any sort, where it is established that it was made without jurisdiction."

13. He also referred to the judgment of Kingsmill Moore J. in that case, at p. 250 where it was stated:

> "The granting of an order of *certiorari* at the instance of a private prosecutor has always been a matter of discretion, but where the prosecutor was a person aggrieved and the order for *certiorari* answered to the same purpose as a writ of error, it was granted *ex debito justitiae*….In The *King (M'Swiggan) v. Londonderry Justices*, Fitzgibbon L.J. after pointing out that in the case then before the court, the order for certiorari was discretionary and not *ex debito justitiae*, goes on to say at p. 320:
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> > "If a right is involved or if a wrong is continuing, or if liberty or character is at issue or if a defective order is operating in any way, it may be otherwise." The constitution by Article 40(3)(2) provides that the State shall in particular by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen. Here we have a wrong continuing, character at issue, and the defective order operating as a blot on character. Injustice has been done and if the words of the constitution are to have any effect, an order for certiorari should issue *ex debito justitiae*."

14. Mr. Burns then referred to the decision in the case of *De Róiste v. Minister for Defence* [2001] 1 IR 190. He referred to the judgment of Denham J. at p. 208 of that judgment. In the course of her judgment at that page she considered the decision in the *State (Vozza) v. O'Floinn* referred to above and the passage from Maguire C.J. referred to above. She emphasised that the general rule is that *certiorari* is a discretionary remedy. She then went on to say at p. 209 of her judgment:

> "The circumstances of each case have to be considered. The general course is to grant *certiorari* if, for example, a criminal conviction has been ordered in excess of jurisdiction. However, the circumstances of the case are considered by the court in exercising its discretion and the court has a discretion to refuse the relief if, for example, the conduct of the applicant disentitles him or her to that relief. The facts and circumstances of each case have to be considered. Whereas the applicant is in a stronger position if he has been particularly aggrieved, the court retains its discretion in all applications. Factors which may also be relevant in a particular case are an alternative remedy and/or a pending appeal."

15. Mr. Burns also referred to the judgment of Fennelly J. in that case and to a passage from his judgment at p. 217 where he stated:

"In the *State (Kelly) v. District Justice for Bandon* [1947] IR 258, the applicant was convicted in the District Court of a fishing offence by an order bad on its face – part of the fine was unlawfully awarded to a Garda Fund. He appealed to the Circuit Court but withdrew his appeal with a result that an order was made in that court affirming the conviction and only then subject to an order of *certiorari* fifteen months after the original District Court conviction. Murnaghan J. delivering the unanimous judgment of three judges said at p. 261:

> "Where the application is made by a person other than the Attorney General, the issue of the order is not a matter of right, but is discretionary. In the exercise of its discretion, however, the court makes a distinction between persons who have a special grievance, and persons who apply merely as members of the public. In the case of persons who have a special grievance, where there are grounds for the issue of the order, the order is granted *ex debito justitiae* unless the applicant has, by his conduct disentitled himself to relief in the case of a conviction where the penalty is awarded in a manner not justified by the law, the convicted person has according to a long line of authorities, a special grievance.
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> The learned Judge pointed out that the applicant was affected by an order bad on its face which might lead to his imprisonment he was "therefore entitled to *order ex debito justitiae* unless he had disentitled himself by his conduct". Having noted that the particular ground relied upon was delay, Murnaghan J. observed that there was no doubt that delay might be a ground for depriving an applicant of *certiorari*. The learned Judge went on to consider the actual delay, attributing much of it to the delay in the appeal coming on in the Circuit Court and concluding that the effective delay should be counted from the Circuit Court order which was only some three months, which was within the six months then permitted under the rules for *certiorari*."

16. At p. 220 Fennelly J. went on to say as follows:

> "Two points stand out in the *State (Vozza) v. O'Floinn* [1957] IR 227. Firstly, the original order was made entirely without jurisdiction. The summary trial of the applicant proceeded without his consent. Secondly the lack of candour with which the applicant was charged did not affect that ground of complaint.
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> It is clear from a reading of the aforementioned case as well as many other cases that an order of *certiorari* is always, as a matter of principle discretionary. But the nature of that discretion must be considered in two different contexts. An applicant who is not directly affected by the legal act which he attacks can do no more than ask the court to exercise its discretion to quash an order. Applications of this sort are rare. When the order is one to which the applicant is entitled *ex debito justitiae*, i.e. one which affects him directly, that discretion can normally be exercised in only one way (i.e. in his favour). That does not mean however that the behaviour of the applicant may not be such as to deprive him of his *prima facie* right to relief. This gives rise to a second context for the exercise for discretion."

17. Mr. Burns pointed out that the applicant in this case has not disentitled himself from relief by reason of the manner in which he has sought to invoke the jurisdiction of the court. Finally he stated that given the application concerned a criminal prosecution, the applicant is entitled as a matter of right to a hearing at first instance conducted in due course of law in which the court acts *intra vires* and does not exceed its jurisdiction. He argued that the possibility of an appeal is not an appropriate consideration and asked the question whether or not the amendment would stand if the matter was appealed. He concluded his submission by stating that as there was no jurisdiction to amend in the context of the particular circumstances there was no jurisdiction to convict.

18. Mr. Michael P. O'Higgins on behalf of the notice party argued that as the respondent was in any event entitled to convict the applicant on the basis of the s. 17 statement (in its un-amended form) that the error in this case was one of no consequence. It was an error which could not prejudice the accused. The applicant at all times knew the offence for which he had been arrested, charged and detained. He knew the offence was one in relation to which he had been asked to provide a breath sample. In making that submission, Mr. O'Higgins relied four square on the decision of O'Neill J. in the *Barnes* case. Thus he argued that an inconsequential error such as the one in this case was not fatal to the case.

19. Mr. O'Higgins referred specifically to the terms of s. 21 of the Road Traffic Act, 1994 which provides at subs. 1 as follows:

> "(1) A duly completed statement purporting to have been supplied under section 17 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 member of the Garda Síochána concerned with the requirements imposed on him by or under this Part prior to and in connection with the supply by him pursuant to section 17 (2) of such statement."

20. Accordingly the statement is admissible to prove its contents. So far as the final point made in the para. 5 of the affidavit of Michael Curneen is concerned as to what the respondent would have done had he not amended the certificate as he did, Mr. O'Higgins points out that it is not open to the applicant in this case to engage in surmise as to what the outcome might have been if the District Judge hadn't allowed the amendment. Mr. O'Higgins referred in this regard to the fact that it is contended at para. 5 of the affidavit that there was no evidence before the court that the samples of breath exclusively related to the defendant and that the whole process was flawed. In dealing with this argument Mr. O'Higgins contended that this court is entitled to operate on the premise that the District Judge acted appropriately in the context of the particular case and would only have convicted if satisfied beyond reasonable doubt as to the applicant's guilt. He pointed out that in the present case there is no claim of prejudice made by the applicant as a result of the error which was made. Mr. O'Higgins posed the question as to what the outcome of the proceedings would have been had the amendment not been made. On this point he urged on the court that the only outcome would have been that the applicant would have been convicted. He contended that the actions of Garda Kelly were irrelevant to this issue.

21. Mr. O'Higgins then went on to deal with the assertion contained in the notice party's statement of opposition that the error made by the respondent was an error made within jurisdiction in that it related to the question of the admissibility of evidence and is therefore not susceptible to relief by way of judicial review. In support of this argument he referred to a decision in a case called *O'Broin v. District Justice Ruane* [1989] IR 214. In that case the trial judge was found to have erred in law in refusing to permit the applicant's solicitor to enquire in a general way as to what procedures had been followed in relation to taking the specimens and the treatment of such specimens notwithstanding that such questions were not grounded on a specific alleged contravention of the requirements of the section. Lynch J., in the High Court, ruled that the respondent had erred in law in refusing to permit the applicant's solicitor to enquire in a general way as to what procedure had been followed in relation to the taking of specimens and the treatment of such specimens notwithstanding that such questions were not grounded on any specific alleged contravention of the requirements of the section. He went on to hold that the ruling of the respondent had been made in the exercise of his jurisdiction to decide was evidence was admissible and what sort of cross-examination might be pursued and his error was not so gross as to oust

jurisdiction. He held that since the error of the respondent had been made within jurisdiction it could not be quashed by *certiorari*. It was added that the applicant's proper remedy was by way of appeal to the Circuit Court. Finally Mr. O'Higgins argued that the error made in this case by the District Judge whilst it was an error of law, was a trivial error in the sense that if the error on the certificate was not trivial, he could never have amended the s. 17(2) certificate. He put forward the proposition that the facts in the O'Broin case referred to above raised what was arguably a more serious point than the point in this particular case, namely, the latitude that must be given and afforded to a trial judge. Accordingly he concluded that the respondent herein did not go outside jurisdiction in making the error.

22. In reply, Mr. Burns argued that the O'Broin decision was not relevant to this issue. That case was a case concerning the extent to which the procedure involved in the taking of specimens could be the subject of cross-examination notwithstanding the provisions of s. 21 subs. 4 of the Road Traffic (Amendment) Act, 1978 which provided that:

> "(4) In a prosecution under this Part it shall be presumed until the contrary is shown that subsections (1) to (3) have been complied with."

23. He disagreed with the assumption made that the respondent would have convicted on the basis of the evidence before him if the certificate had not been amended. He also disagreed with the concept that, the respondent having acted in excess of jurisdiction, it could be regarded as a trivial matter.

24. So far as the court has to consider the question of discretion he pointed out that the error in this case arose as a result of the fault of the prosecution. It was not of the applicant's making. He argued that this was a matter that had to be taken into consideration in considering the exercise of the discretion of the court in this case. Finally he argued that once the certificate was amended by virtue of the provisions of s. 21 the District Judge was entitled to rely on the certificate and therefore he argued that the conviction in those circumstances was not a conviction obtained in due course of law.

Conclusions

25. As has been made clear from the outset, both sides in relation to this matter are agreed that in purporting to amend the s. 17(2) certificate the respondent herein erred in law. Both sides are also agreed that the obiter dictum contained in the judgment of O'Neill J. in the Barnes case answering the second question posed in the case stated is a correct statement of the law. In trying to consider the issue that arises in this case it seems to me to be important to look at the nature of the error that was made in this case. It seems to me that an error of law may be of such a trivial nature that it should not give rise to a conclusion that the entire proceedings become a nullity. In considering this question it is useful to look again at the decision in the *State (Vozza) v. O'Floinn*. In that case the accused appeared before the District Judge whose jurisdiction to entertain the offence depended upon the provisions of the Criminal Justice Act, 1951, s. 2 subs. 2 (a) and according to how that subsection should have been interpreted it was a necessary preliminary to jurisdiction that the accused should have been personally informed of his right to be tried by jury and should personally have consented to be tried summarily. There were some doubts as to whether the necessary information and consent were given to and obtained from *Vozza* in person initially as to his rights, but what was clear was that following an amendment to the original charge, he was not given such information and no consent to summary trial was obtained when the charge was altered. Because of that omission it was conceded that the conviction was made without jurisdiction and that the proceedings were a nullity. That was the nature of the error in that case. In other words the error went to the entire jurisdiction of the court to hear the proceedings. In the course of his judgment in the Supreme Court in that case Lavery J. at p. 245 made the following comment:

> "It is further agreed that the defect in the trial is not a matter of error of form or on the record, but of total want of jurisdiction in the court which in all good faith, purported to try him."

26. It seems to me that the error in law in this case cannot be equated with the type of error that occurred in the *State (Vozza) v. O'Floinn*. This was not an error that went to the jurisdiction of the court to try the matter. It is most unfortunate that the error was made in this case and undoubtedly it would appear to be the case that the error was made as a result of what can only have been a mistaken reference to the decision in the *Barnes* case. Clearly if that case had been opened properly to the respondent, he would have realised that the court could not amend such a certificate. However it also seems to me to be the case that an error of the kind that had been made on the certificate i.e. the substitution of the name of the prosecuting garda for the accused is one which was of such an obvious or trivial or inconsequential nature that it could not have given rise to any confusion or misleading of the accused or indeed imposed any prejudice on him or any injustice. Comparing the error in this case with that in the *Barnes* case, I am of the view that the error in this case is one which would attract the same answer that was given by O'Neill J. in that case namely that the error in the certificate was not fatal to the successful prosecution of the accused. Thus I find it difficult to reconcile the concept that if the error would not have been fatal to the successful prosecution of the accused in circumstances where the certificate had not been amended, that the amendment of the certificate, albeit an error of law, has the effect of rendering the proceedings before the court a nullity. Such a conclusion would in my view not accord with the statement I have referred to above from the judgment of Lavery J. in the *State (Vozza) v. O'Floinn*. That statement appears to me to confirm that not every error will lead to the conclusion that the order of *certiorari* is due *ex debito justitiae* and cannot be refused, as was argued by Mr. Burns. Accordingly I am refusing this application.