Neutral Citation Number: [2007] IEHC 383

THE HIGH COURT

[2004 No. 1595 S.S.]

IN THE MATER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1857 AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN

COLM FITZPATRICK

APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA FERGAL REYNOLDS)

RESPONDENT

Judgment of O'Neill J. delivered the 20th day of November, 2007

1. This case comes before the court as an appeal by way of case stated pursuant to s. 2 of the Summary Jurisdiction Act 1857 as extended by s. 51 of the Courts (Supplemental Provisions) Act, 1961, and the case having been stated by Michael Connellan, a judge of the District Court. The relevant facts as proved or admitted or agreed and as found by the learned District Judge, in summary, are as follows.

2. In the early hours of the morning on 17th December, 2003 the respondent who was on duty as the driver of a marked patrol car followed a motor vehicle which was been driven by the appellant. The appellant's vehicle was brought to a stop and the lights were switched off. The respondent pulled up partly in front and partly alongside this vehicle and when the respondent approached it, the driver of the vehicle identified himself as the appellant. The respondent formed the opinion that the appellant had consumed intoxicating liquor to such an extent as would render him incapable of exercising proper control on a mechanically propelled vehicle. The respondent arrested the appellant at 2 a.m. under s. 50 of the Road Traffic Act, 1961 on suspicion of having committed an offence under subs. 1, 2, 3 and/or 4 of s. 50. The appellant was conveyed to Mullingar Garda Station and at 2.30 a.m. he was brought to the doctor's room to obtain a sample from him. At 2.32 a.m. the respondent made a requirement of the appellant to provide two samples of his breath pursuant to s. 13(1)(a) of the Road Traffic Act, 1994. The respondent informed the appellant of the penalties for failure of refusal to comply with this request.

3. The respondent who was a trained operator of the Lion Intoxyliser machine entered the details into the machine. At 2.34 a.m. the appellant provided the first breath specimen and at 2.35 a.m. he provided the second breath specimen. Having done this, the machine produced two identical statements. The respondent signed both of them and then offered both statements to the appellant to sign and return one of them. The appellant signed both statements and returned one to the respondent.

4. The case stated recites that the statement gave a reading of 41 micrograms of alcohol per 100 ml of breath. The applicant was charged at 3.50 a.m. on charge sheet No. 235182.

5. In the District Court at the close of the prosecution case an application was made by counsel for the appellant for a dismiss of the charge on the basis that a statement prepared pursuant to s. 17 of the Road Traffic Act, 1994 had not been tendered in evidence. It was submitted that this statement was an essential proof in a prosecution under s. 50(4) and (6)(a) of the Road Traffic Act, 1961 as inserted by s. 11 of the Road Traffic Act, 1994 and as amended by s. 23 of the Road Traffic Act, 2002.

6. The learned District Judge rejected this submission. In support of his conclusion he referred to the case of the Chief Constable of Avon and Somerset v. Creech [1986] R.T.R. 87. The learned District Judge refused the application and held that the appellant had a case to answer.

7. At no stage did the prosecution apply to reopen their case in order to put in evidence a statement prepared pursuant to s. 17 of the Road Traffic Act, 1994.

8. After hearing evidence from the appellant and a Mr. Lawless, the learned District Judge convicted the appellant of the offence and imposed a fine of €1000 (three months to pay, 90 days imprisonment in default) and imposed a disqualification from driving of three months, this disqualification to take effect from the 1st August, 2004.

9. Arising out of the foregoing the learned District Judge in the case stated poses the following question for the opinion of this court:-

> "In order to convict a person accused of an offence contrary to s. 50(4) and 6(a) of the Road Traffic Act, 1961, as inserted by s. 11 of the Road Traffic Act, 1994 as amended by s. 23 of the Road Traffic Act, 2002, must a statement prepared pursuant to s. 17 of the Road Traffic Act, 1994 be adduced into evidence?"

10. The statutory provisions relevant to the issues arising in this case stated are the following:

> Section 49(4) of the Road Traffic Act, 1961 (as substituted by s. 10 of the Road Traffic Act, 1994) which read as follows:
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> > "a person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his breath will exceed a concentration of 35 microgrammes of alcohol per 100 millilitres of breath."

11. Section 13 of the Road Traffic Act, 1994:

> "(1) where a person is arrested under s. 49(8) or 50(10) of the Principal Act or s. 12(3), or where a person is arrested under s. 53(6), 106(3A) or 112(6) of the Principal Act and a member of the Garda Síochána is of opinion that the person has consumed an intoxicant, a member of the Garda Síochána may, at a Garda Station, at his discretion do either or both of the following –
>
> > (a) Require the person to provide by exhaling into an apparatus for determining the concentration of alcohol in the breath, two specimens of his breath and may indicate the manner in which he is comply with the request, ….
>
> (4) in a prosecution for a offence under this part or under s. 49 or 50 of the Principal Act it shall be presumed, until the contrary is shown, that an apparatus provided by a member of the Garda Síochána for the purpose of enabling a person to provide two specimens of breath pursuant to this section is an apparatus for determining the concentration of alcohol

in the breath."

12. Section 17 of the Road Traffic Act, 1994:

> " 17-(1) Where, consequent on a requirement under section 13 (1) (a) of him, a person provides 2 specimens of his breath and the apparatus referred to in that section determines the concentration of alcohol in each specimen –
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> (a) in case the apparatus determines that each specimen has the same concentration of alcohol, either specimen, and
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> (b) in case the apparatus determines that each specimen has a different concentration of alcohol, the specimen with the lower concentration of alcohol,
>
> shall be taken into account for the purposes of sections 49 (4) and 50 (4) of the Principal Act and the other specimen shall in disregarded.
>
> (2) Where the apparatus referred to in section 13 (1) determines that in respect of the specimen of breath to be taken into account as aforesaid the person may have contravened section 49(4) or 50 (4) of the Principal Act, he shall be supplied forthwith by a member of the Garda Síochána with two identical statements, automatically produced by the said apparatus in the prescribed form and duly completed by the member in the prescribed manner, stating the concentration of alcohol in the said specimen determined by the said apparatus.
>
> (3) On receipt of the statements aforesaid the person shall on being requested to do so by the member aforesaid –
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> (a) forthwith acknowledge such a receipt by placing a signature on each statement, and
>
> (b) thereupon return either of the statements to the member.
>
> (4) A person who refuses or fails to comply with subsection (3) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £500 or to imprisonment or term not exceeding 3 months or to both.
>
> (5) Section 21 (1) shall apply to a statement under the section as respects which there has been failure to comply with subsection (3) (a) as it applies to a duly completed statement under this section.ö

13. Section 21 of the Road Traffic Act, 1994:

> "21 - (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 a statement."

14. The first issue which arises for determination is whether or not the foregoing statutory provisions require that the statement produced by the intoxyliser machine be proved in evidence as an essential proof. Under s. 21(1) the tendering in evidence of the statement produced by the intoxyliser machine pursuant to s. 17 (2) achieves two evidential purposes. The first of these is that the statement, without more, is proof of facts stated therein, until the contrary is shown, and secondly proof of the statement also proves compliance by the member of the Garda Síochána with all the other requirements imposed upon him under that part of the Act including the requirements of s. 17(2).

15. If the statement is not put into evidence the prosecution automatically loses the advantage of these statutory presumptions.

16. There is no doubt in my opinion that compliance with the requirements of the relevant part of the Act and in particular with requirements of s. 17(2) can be proved by oral evidence and indeed the facts recited in the case stated as having been either proved or admitted or agreed, as found by the learned district judge, indicate that there must have been oral evidence given to satisfy the learned district judge that there had been compliance with these requirements.

17. The facts as recited in the case stated also indicate that evidence was given of the content of the statement produced by the intoxyliser machine and specifically that this statement gave a reading of 41 microgrammes of alcohol of per 100 ml of breath. It is implicit in the case stated that oral evidence must have been given by a member of An Garda Síochána of the content of this statement.

18. Section 21(1) says that the statement is to be "sufficient evidence…of the facts stated therein". In my opinion this statutory provision given its natural and ordinary meaning could not be construed as meaning that the production in evidence of the statement produced by the intoxyliser machine was the only means of proof of the content of the statement. I am of the view that the content of this statement could be proved by any other lawful means.

19. Thus one must consider the nature of this statement and how under the general rules of evidence it can be proved. There is no basis for asserting that the statutory provisions contained in ss. 17 and 21 of the Road Traffic Act, 1994 in some way or other set aside the ordinary rules of evidence or create some form of exception from them, where these statements are concerned, save to this extent, that a s. 21(1) does create an exception to the general rule in relation to the proof of the content of a document.

20. The statement produced pursuant to s. 17(2) in my view is to be regarded as a document, for the purposes of proof, subject only to the exception created in s. 21(1). Thus in my view where the document is to be relied upon in evidence the best evidence rule applies. This was succinctly stated by O'Flaherty J. in *Primor Plc. v. Stokes* [1996] 2 I.R. 459, 518 where he says:

> "The best evidence rule operates in this sphere to the extent that the party seeking to rely on the contents of a

> document must adduce primary evidence of those contents, i.e. the original document in question. The contents of a document may be proved by secondary evidence if the original has been destroyed or cannot be found after due search. Similarly, such contents may be proved by secondary if production of the original is physically or legally impossible…"

21. Thus where the prosecution in a case such as this wish to prove the content of a statement produced by an intoxyliser machine pursuant to s. 17(2) but do not produce the statement itself, in my view they should not be permitted to give secondary evidence of the content of that statement unless it is established by evidence that the original statement has been lost or destroyed or for some other reason, it is physically or illegally impossible to produce the original.

22. In this case the facts recited in the case stated make no mention whatsoever of any explanation being offered for the absence of the statement produced by the intoxyliser machine or any explanation of the need to rely upon oral evidence as to the content of the statement. In those circumstances, in my view, oral evidence as to the content of the statement was inadmissible.

23. If the prosecution were relying upon a copy of the original they could of course have availed of s. 30 the Criminal Evidence Act, 1992 which provides:

> "(1) where information contained in a document is admissible in evidence in criminal proceedings, the information will be given in evidence, whether or not the document is still in existence, by producing a copy of the document or of the material part of it, authenticated in such a manner as the court may approve…."

24. If this section was relied upon it would not have been necessary to prove that the original had been lost or destroyed or its production was otherwise impossible.

25. The facts recited in the case stated do not suggest that any attempt was made to rely upon a copy of the statement, or that any reliance was placed on s. 30 of the Criminal Evidence Act, 1992.

26. I have come to the conclusion therefore that as the evidence of the content of the s. 17(2) statement was inadmissible this appeal should succeed.

27. I would answer 'no' to the specific question posed by the learned District Justice.