Neutral Citation Number: [2011] IEHC 418

THE HIGH COURT

2011 924 SS

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

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF GARDA ALAN O' DONNELL)

PROSECUTOR

AND

MICHAEL NASH

RESPONDENT

JUDGMENT of Kearns P. delivered the 16th day of November, 2011

This appeal comes before the Court by way of case stated from the District Court on a point of law, following a request from the prosecution. A copy of the charge sheet and the Section 17 Certificate were included as appendices to the case stated.

The respondent was charged with driving a mechanically propelled vehicle in a public place 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 breath exceeded a concentration of 35 microgrammes of alcohol per 100 millilitres of breath, contrary to ss. 49(4) and 6(a) of the Road Traffic Act, 1961 (hereafter referred to as 'the 1961 Act'), as inserted by s. 10 of the Road Traffic Act, 1994 (hereafter referred to as 'the 1994 Act'), as amended by s. 18 of the Road Traffic Act, 2006 (hereafter referred to as 'the 2006 Act').

The case was prosecuted by Superintendent Joseph Roe on behalf of the Director of Public Prosecutions.

BACKGROUND

Garda Alan O'Donnell gave evidence in the District Court of the following sequence of events:

On 17th February, 2010, Garda O'Donnell, while on mobile patrol, observed a motorcar being driven towards him on Lower Main Street, Rathkeale, Co. Limerick. He observed the car to turn suddenly and without indicating into St. Mary's Park, a public place. He followed the car into St. Mary's Park and activated his flashing beacon to indicate to the driver to stop, which it did.

Garda O'Donnell approached the vehicle and spoke to the driver. The driver gave his name and address as Mike Nash of Gortroe, Newcastle West, Co. Limerick, the respondent herein. Garda O'Donnell noticed a smell of intoxicating liquor from the driver and his speech was extremely slurred. Upon being asked to step out of the car, the respondent stumbled and was unsteady on his feet. Garda O'Donnell informed the accused that he was of the opinion that he had consumed an intoxicant to such an extent as to render him incapable of having proper control of a mechanically propelled vehicle in a public place.

At 1.45 am Garda O'Donnell arrested the respondent under s. 49(8) of the 1961 Act (as inserted by s. 10 of the 1994 Act) for an offence contrary to ss. 49(1), 49(2), 49(3) or 49(4) of the 1961 Act. He explained to the respondent in ordinary language that he was arresting him for drink driving. Garda O'Donnell then cautioned him in the usual terms. The respondent told Garda O'Donnell that he understood the terms.

Garda O'Donnell conveyed the respondent to Newcastle West Garda Station and introduced him to Garda Michael Galwey, the member-in-charge. Garda Galwey handed over Form C72 to the accused and explained to him the reason for the arrest and his rights while in custody. At 2.28 am Garda O'Donnell brought the respondent to the medical room of the station with Garda O'Sullivan. Garda O'Sullivan made the legal requirement of the respondent to provide two specimens of breath pursuant to s. 13(1) of the 1961 Act, as inserted by the 2006 Act. At 2.55 am Garda O'Donnell charged the respondent with an offence contrary to s. 49(4) of the 1961 Act as inserted by the 2006 Act.

The next witness at the trial was Garda Michael Galwey, who gave evidence that he was the member-in-charge on the date in question and that he was present when the respondent was brought to the Garda Station. Garda Galwey stated that he entered the respondent's details into the custody record, that he complied with Regulation 8 requirements and that he provided the respondent with a copy of a C72 form. Garda Galwey stated that the respondent refused to sign the custody record in acknowledgment of his rights.

The respondent's solicitor did not cross-examine either Garda O'Donnell or Garda Galwey on their evidence.

The next witness on behalf of the prosecution was Garda Jerry O'Sullivan, who gave the following evidence. The respondent was introduced to Garda O'Sullivan as someone who had been arrested under s. 49(8) of the 1961 Act. Garda O'Sullivan formed the opinion that the respondent had consumed an intoxicant as there was a strong smell of intoxicating liquor from his breath, his eyes were fixed and glazed, he was unsteady on his feet and his speech was slurred. Garda O'Sullivan informed the respondent that he was a trained Lion Intoxilyser 6000Irl Evidential Breath Test Machine Operator and that he was of the opinion that the respondent had consumed an intoxicant and he was requiring the respondent to provide two specimens of breath but that first he would be observing him for a

period of twenty minutes to ensure that the respondent had nil by mouth and did not smoke in the last five minutes of that period to ensure non-interference with the Breath Test Machine.

The period of observation began at 2.08 am and at 2.28 am Garda O'Sullivan, being satisfied that he had nil by mouth, brought the respondent to the medical room of the Garda Station. Garda O'Sullivan noted that the Lion Intoxilyser was on standby mode. He checked that there was sufficient gas in the machine for a simulator check to be carried out. He also checked that there was sufficient paper in the machine and that it scrolled freely. He checked the inlet tube and found it in order and warm to the touch. Garda O'Sullivan noted that the temperature in the room was 22.5 degrees Celsius and that the humidity was 26%.

Garda O'Sullivan explained to the respondent that he was checking the machine to ensure that it was in working order and that he would shortly be making a requirement from him to provide two specimens of his breath by exhaling into the machine. Garda O'Sullivan entered both his and the respondent's details into the machine.

At 2.32 am Garda O'Sullivan required the respondent to provide two specimens of breath by exhaling into the machine. He explained the possible consequences to the respondent of a failure or refusal to comply with this requirement in the manner outlined and the respondent indicated that he understood.

Two specimens were provided at 2.35 am and 2.38 am respectively. The Intoxilyser provided two identical original statements which showed a concentration of 58 micrograms per 100 millilitres of breath. Garda O'Sullivan signed both statements in the presence of the respondent and supplied them to him. Garda O'Sullivan cautioned the respondent in the usual way and the respondent signed both statements, and retained one. The Intoxilyser printed off a Section 17 Certificate, a copy of which was handed into Court.

On cross-examination Garda O'Sullivan was asked by the solicitor for the respondent whether he was a trained operator of the Intoxilyser machine. Garda O'Sullivan replied that he was. The respondent's solicitor put it to Garda O'Sullivan that the humidity in the room should have been over 30%, and quoted from De Blacam, *Drunken Driving and the Law* (3rd Edition, 2003), which states:

> *"The ambient temperature may be between 15 and 35 degrees centigrade and the ambient relative humidity may be between 30 and 90 per cent."*

He asked Garda O'Sullivan to repeat the humidity reading in the room and Garda O'Sullivan stated that it was 26%.

At the conclusion of the evidence of Garda O'Sullivan, the respondent's solicitor submitted that the trial judge should dismiss the case on the basis that the humidity was 26%. Superintendent Roe submitted in reply that the humidity figures were merely guidelines and that if the temperature and humidity of the room were such as to affect the accuracy of the reading, then the Intoxilyser would not have printed off the Section 17 Certificate as it did. Superintendent Roe further submitted that, if the trial judge had any concern about whether the humidity level in the room could have affected the accuracy of the result, the case should be adjourned to permit this matter to be followed up. The solicitor for the respondent was anxious that a decision be reached in the case and opposed this application for an adjournment.

The trial judge declined to adjourn the matter and proceeded to dismiss the charge on the ground that the humidity in the room was 26% and that it should have been 30% or over.

The prosecution requested that the trial judge state a case to this Honourable Court on the following questions of law:

> (i) In the light of the evidence that has been adduced before the trial judge, was the trial judge correct as a matter of law in dismissing the case on the ground that the humidity level was 26%?
>
> (ii) Did the trial judge's decision to dismiss the case amount to a correct application in law of the statutory presumption as to the contents of the section 17 Certificate that is contained in section 21(1) of the Road traffic Act 1994?
>
> (iii) In circumstances where the defence had raised a challenge to the humidity level was the trial judge correct as a matter of law in refusing the prosecution an opportunity to adduce rebuttal evidence as to whether the humidity level of 26% could have affected the reliability of the test result in this case?

SUBMISSIONS OF THE DPP

Counsel on behalf of the DPP submitted that there is a rebuttable presumption under the 1994 Act that a printed Section 17 Certificate will be sufficient evidence that a member of the Garda Síochána has complied with the requirements in relation to the use of the Intoxilyser machine. It was further submitted that the Section 17 Certificate in the case at hand was duly completed and that the presumption therefore arises. It was argued that no evidence was adduced by the accused to question the reliability of the machine or the accuracy of the reading, and that there was no evidence before the trial judge to rebut the presumption that the Section 17 Certificate was accurate.

Counsel for the DPP also claimed that the respondent had been given the benefit of a 17% deduction at his trial as a further safeguard against error, and that this was not a borderline case.

Counsel for the DPP submitted in the alternative that, even if the presumption in relation to the Section 17 Certificate had been rebutted, the trial judge should have granted the prosecution an adjournment to call rebuttal evidence. Counsel stated that the prosecution have a general right to call rebuttal evidence where a technical issue arises in drink driving cases.

Counsel argued that the public interest is in favour of the High Court intervening where a drink driving prosecution is dismissed for no good legal reason.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

Counsel for the respondent submitted that there was a sufficient evidential basis to ground a dismissal of the charge against the respondent at his trial and that the decision by the trial judge not to adjourn the case to allow the DPP to adduce rebuttal evidence was made within jurisdiction and in accordance with decided case law.

Counsel argued that, in an appeal by way of case stated, findings of fact are conclusive, unless there was no evidence to support them, and the Court's jurisdiction is confined to determining questions of law. Counsel noted that no explicit findings of fact were set

out in the case stated and that, absent such explicit findings, it was open to the trial judge to dismiss the charges.

Counsel accepted that questions put to a witness are not capable of constituting evidence, but stated that this is not the case in relation to answers to questions put to witnesses. Counsel pointed out that Garda O'Sullivan gave no answer as to what the humidity should be and did not say that 26% humidity was within the acceptable range and in accordance with the guidelines. Counsel further stressed that Garda O'Sullivan did not seek to explain to the trial court the potential impact of the humidity level and that he did not say that the humidity did not have any impact on the reliability of the Section 17 Certificate.

Counsel for the respondent submitted that it was at the discretion of the trial judge whether rebuttal evidence is to be allowed and that the trial judge exercised that discretion in a fair way. Counsel claimed that, as the case was in for hearing, the prosecution should have had all relevant witnesses in court, and that it was reasonably foreseeable that technical evidence would be required as this category of case is generally contested on the basis of technicalities. It was also argued that the prosecution were aware of the humidity level in the room and, presumably were aware that the level was outside the guideline level and, that being the case, that evidence should have been available in the first instance.

It was submitted that the presumption that the Section 17 Certificate is sufficient evidence to ground a conviction is rebuttable and that it was submitted that it is not necessary to call evidence in order to rebut this presumption. Counsel claimed that it was apparent to the trial judge that the Intoxilyser machine was operating outside the guidelines for the machine and it was open to the trial judge to consider the presumption rebutted in the circumstances.

THE PRESUMPTION IN THE 1994 ACT

Section 17 of the 1994 Act sets out the procedure which must be followed after the provision of a breath specimen pursuant to section 13 of the Act:-

> *"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 2 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."*

The statements produced by the Intoxilyser are generally known as a Section 17 certificate.

Section 21(1) of the 1994 Act provides as follows:-

> *"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."*

Regulation 4 of the Road Traffic Act 1994 (Section 17) Regulations 1999 (S.I. No. 326/1999) provides for the form of the Section 17 certificate. Regulation 5 states that the garda who requires the provision of the samples must comply with the following requirements: input the name and address of the accused; input the section of the Road Traffic Acts it is alleged that they have contravened; input his/her name and number and; sign the certificate.

RELEVANT CASE-LAW

The case of *DPP v. Collins* [1981] I.L.R.M. 447 concerned an appeal of a drink driving conviction where there was evidence that there was an unspecified white substance in the containers in which a blood sample had been put. Henchy J., delivering the judgment of the Supreme Court, stated:-

> *"The mere suggestion of counsel for the defendant that the unspecified white substance could possibly have produced a false analysis to the extent of showing the offence charged to have been committed is not sufficient to discharge the evidential burden of proof which lay on the defendant as to this issue. To suggest that something may have happened, or may have produced a particular result, is one thing; to adduce evidence pointing in the direction of that possibility is another matter. The law acts on the latter, but not the former. Where, as in this case, the prosecution have adduced evidence showing the existence of all the elements necessary for the commission of the offence, and the defence wish to controvert or cast necessary doubt on the prosecution case by suggesting the existence of a factor which could justify an acquittal, the evidential burden as to that factor passes to the defence." (pp. 452-453)*

Henchy J. continued:-

> *"In the instant case, before counsel's suggestion could be given serious consideration as a defence (or, be deemed fit to be submitted to the jury as a defence, if the charge was being tried with a jury), the defence should have adduced admissible evidence that a white substance of that kind and in the quantity found in the container could have falsified the certified analysis in the way suggested. And even if such evidence had been adduced, the prosecution would have been entitled to give rebutting evidence. But since no evidence on the matter was brought forward by the defence, I would rule that the analysis, and therefore conviction, were not invalidated by the presence of the unspecified white substance." (p. 453)*

In *DPP v. Corcoran* (Unreported, High Court, 22nd June, 1999), the accused succeeded in getting a direction at the close of the prosecution case after his solicitor referred to evidence given in a previous case to the effect that samples of urine should be tested within 10 days. The certificate in that case was dated 11 days after the taking of the sample. The DPP successfully appealed by way of case stated. McCracken J stated:-

> *"The clear scheme of the Act is that once a certificate is produced at all it is presumed to be genuine and accurate, although this is a presumption which may be rebutted by the accused. However, it is clear that the onus of proof shifts*

from the prosecution to the accused once a certificate has issued. That onus can only be satisfied by evidence given before the court in the instant case. It cannot be satisfied by an interpretation of evidence given in an earlier case, as such evidence would not be admissible in this case. The learned District Judge appears to have accepted as evidence matters in the earlier case which he had noted, no doubt accurately, but which the prosecution had no opportunity of testing by cross-examination. There was no admissible evidence before the Court upon which the learned District Judge could decide that the sample ought to have been tested within ten days of its provision no[r] by which he could have determined that it was not in fact analysed within ten days of its provision." (p. 3)

The principle established in *Collins* and *Corcoran* was followed by the High Court in *DPP v. Bourke* [2005] IEHC 327. In that case, the trial judge had dismissed a prosecution on the basis that both readings on the Section 17 certificate had been given at 2.14 am. The judge granted an adjournment so that the DPP could call expert evidence. The DPP called a Ms. Levy from the MBRS who gave evidence that the Intoxilyser was capable of providing two samples within a 60 second period. However, the District Judge still held that there had been sufficient rebuttal of the presumption that the Section 17 Certificate was accurate. Quirke J. held that it was not open to dismiss the charge as "*[t]he only information contained on the face of the certificate was information comprising evidence consistent with and supportive of the appellant's case against the respondent*." (p.7).

He stated:-

"Mr. Crowley on behalf of the respondent submitted that it was not possible to analyse two specimens of breath within a 60 second period. That was no more than a suggestion. As such it was insufficient to displace the presumption created by s. 21(1) of the Act of 1994. The suggestion was not accepted by Ms. Leavy when she testified. The evidence of Ms. Leavy cannot accordingly be deemed to have displaced the presumption and indeed in the case submitted the learned district judge did not say that it did. She concluded that she should dismiss the charge by virtue of the provisions on the face of the statement. I do not believe that such a conclusion was warranted.

It is important to add that displacement of the presumption created by s. 21(1) of the Act of 1994 will not automatically result in an acquittal. In cases where the presumption has been displaced the court must then go on to consider all of the evidence adduced by the parties and may convict if satisfied of the accused's guilt on the evidence and beyond a reasonable doubt.

It follows from the foregoing that it is the opinion of this court that the learned district judge was not correct in dismissing the charge."

In *DPP v. Walsh* [2005] IEHC 77, the trial judge dismissed a drink driving case on the basis that the gardaí had not adduced evidence that the accused had been observed for a 20 minute continuous period even though such a requirement appeared in the Garda training manual. The DPP successfully appealed the dismissal by way of case stated. Macken J. noted the statutory presumption in Section 21 of the 1994 Act and stated:-

"It follows from the foregoing that, absent any contrary evidence, a duly completed statement made pursuant to s. 17(2) of the Act of 1994 is sufficient evidence of the facts stated in it. If therefore a District Judge has before him, as he clearly did in the present case, a statement made under s. 17(2) which contains a fact indicative of an alcohol level above the permitted legal level, that fact is sufficiently established in law so as to permit a district justice convict."

PERMITTING THE PROSECUTION TO CALL REBUTTAL EVIDENCE

It is trite law that an evidential burden can pass from one side to the other during the course of a trial.

The right of the prosecution to call rebuttal evidence where a technical issue arises in a drink driving case has been recognised by the courts. As noted above, Henchy J. stated in *DPP v. Collins* that the defence should have adduced admissible evidence as to the facts that they were asserting could have falsified the certificate produced, and that "*even if such evidence had been adduced*, the prosecution would have been entitled to give rebutting evidence."

In *DPP v. Walsh*, Macken J stated:-

"It is not however possible to conclude from the judgment in the D.P.P. v. McNiece, however, that there is now in existence in this jurisdiction a legal requirement, or a practice binding on the prosecution, requiring a specified and continuous twenty minute period of observation immediately prior to the requirements under s. 13 of the Act of 1994 being imposed, or that compliance with such a requirement or practice, or with any similar or analogous practice must be established by the prosecution in all cases of drunk driving. That is not to say, of course, that if challenged, the prosecution would not have to prove, following from the logic of the judgment in the case of D.P.P. v. McNiece, that such a practice, or the then current practice, is indeed necessary." (p. 17)

In *DPP v. O'Connor* [2005] IEHC 422, the trial judge had dismissed a s. 49 charge on the basis of a finding that the accused was in unlawful detention for a seven minute period. Quirke J. held that the trial judge had been incorrect in law and stated:-

"The legality of the detention of an accused person must, in every case, be decided on its own particular facts. On the facts of the charge against the respondent on that ground would only have been justified if either,

(a) the legality of his detention had been challenged on behalf of the respondent or,

(b) evidence adduced caused sufficient concern for the learned District Judge to commence a focused inquiry into the legality of the respondent's detention and directed towards reasonableness.

The case stated does not indicate that a challenge was made on behalf of the respondent. Neither does it disclose an enquiry by the learned District Judge during which the DPP was given the opportunity to discharge the onus of proving that the duration of the respondent's detention was reasonable in the circumstances."

In *Markey v. The Minister for Justice* [2011] IEHC 39, this Court considered the concept of trial by ambush and I stated:-

"Quite different obligations devolve on the two sides to a criminal trial. To the prosecution falls the obligation to make

disclosure of all materials gathered in the course of the investigation which might be of assistance to the defence and the further obligation to furnish to the defence in a timely manner all statements of the proposed evidence upon which it intends to rely at trial, including the statements of experts. Hitherto - with the statutory exceptions referred to later in this judgment - no such obligations fall on the defence. The defendant need not say anything, need not reveal his defence or assist or contribute to the process in any way. The prosecution must prove its case beyond reasonable doubt whereas a person accused of a criminal offence need only raise a reasonable doubt to secure his acquittal. With a few statutory exceptions there is nothing to prevent the defence from lying in wait to ambush the prosecution, perhaps on some point of technical proof, as recently occurred in Director of Public Prosecutions v. Mackin *(Unreported, Court of Criminal Appeal, Hardiman J., 19th July, 2010). To characterise the obligations imposed on the different sides to a criminal trial as an evenly balanced see-saw which becomes totally unbalanced by the imposition of a requirement to notify the prosecution and seek leave in respect of expert evidence upon which the defence proposes to rely strikes me as astonishing and unreal. As the report of the expert group makes clear, it was the disadvantage and inequality being suffered by the prosecution (and, by extension, the public interest in the successful prosecution of crime) which required to be addressed in new legislation. The recognition that trial by ambush is inherently unfair and damaging to the justice system has been recognised in most jurisdictions outside our own. In* Williams v. Florida *399 U.S. 78 (1970) the U.S. Supreme Court upheld an alibi notice requirement and White J. stated at p. 83 that the adversarial system of trial 'is not yet a poker game in which the players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by ensuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence'."*

DECISION

In relation to the first and second questions, the evidence adduced at trial should be considered. The Section 17 Certificate adduced shows a reading of 58 microgrammes of alcohol over 100 millilitres of breath. Garda O'Sullivan stated in examination-in-chief that the humidity was 26%. He also stated that he checked the machine was in working order and that the Intoxilyser provided two identical original statements which showed a concentration of 58 micrograms over 100 millilitres of breath. On cross-examination Garda O'Sullivan was asked about the humidity in the room and it was put to him that the humidity should have been over 30%. Mr. O'Connor, solicitor for the accused, opened a quote from De Blacam *Drunken Driving and the Law* to the effect that the Intoxilyser should optimally be used with a humidity level of between 30 % and 90 %. In re-examination Garda O'Sullivan stated that the Intoxilyser was working properly on the night in question.

I am satisfied that the Section 17 certificate was duly completed and that the presumption contained in s. 21 of the 1994 Act therefore arose. There is nothing on the face of the Section 17 certificate to suggest that the Intoxilyser was not working on the date in question. There is no requirement in either the legislation or in the regulations that the temperature and humidity be noted, much less that they be requirements for a conviction on the basis of the Section 17 certificate. No evidence was adduced by the accused to question the reliability of the Intoxilyser or the accuracy of the reading of 58 and there was no evidence before the trial court to rebut the presumption that the certificate was accurate.

In relation to the third question, even if the presumption had been rebutted, the trial judge should have permitted the prosecution an adjournment to call rebuttal evidence. There must be an entitlement available to the prosecution to call rebuttal evidence where a technical issue arises in a drink driving case. As mentioned above, in *DPP v. Collins*, Henchy J. stated "*the defence should have adduced admissible evidence that a white substance of that kind and in the quantity found in the container could have falsified the certified analysis in the way suggested. And even if such evidence had been adduced, the prosecution would have been entitled to give rebutting evidence*."

In the instant case, if the District Judge had any concerns about the humidity reading or the accuracy of the certificate, he should have permitted the prosecution to call expert evidence as to whether or not the humidity could have an impact on the accuracy of the Section 17 certificate and, if so, the extent of the impact. To fail to allow the prosecution this opportunity would be to require the prosecution to anticipate every conceivable issue that may be raised by an accused and to have an expert on hand in case a technical issue is raised.

For the above reasons, I am satisfied that the three questions should be answered in the following fashion:-

(i) In light of the evidence that has been adduced before me was I correct as a matter of law in dismissing the case on the ground that the humidity level was 26%? – NO.

(ii) Did my decision to dismiss the case amount to a correct application in law of the statutory presumption as to the contents of the s. 17 certificate that is contained in s. 21(1) of the Road Traffic Act 1994? – NO.

(iii) In circumstances where the Defence had raised a challenge to the humidity level was I correct as a matter of law in refusing the prosecution an opportunity to adduce rebuttal evidence as to whether the humidity level of 26% could have affected the reliability of the test result in this case? – NO.