Neutral Citation Number: [2010] IEHC 65

THE HIGH COURT

2009 203 JR

John Morgan

Applicant

And

Judge Mary Collins,

The Director of Public Prosecutions,

Ireland

And

Attorney General

Respondents

Judgment of O'Neill J. delivered on the 19th day of March, 2010

1. Reliefs Sought

1.1 Leave was granted to institute judicial review proceedings by this Court (Charleton J.) on the 23rd February, 2009, to seek the following reliefs:-

> 1. An order prohibiting the respondents from proceeding with a prosecution against the applicant pursuant to s. 49(4) and 6(a) of the Road Traffic Act 1961, as inserted by s.10 of the Road Traffic Act 1994, as amended by s.18 of the Road Traffic Act 2006 and outlined on Charge Sheet No. 799176 and in the alternative a stay on the District Court proceedings pending the determination of this application.
>
> 2. An order of mandamus directing the second named respondent to provide the applicant or his appointed agent with the maintenance record to Lion Intoxilyzer 6000 IRL, serial number B0584 covering the 12 month period preceding the date of the test or for such a period of time as this Court shall deem fit.

2. The Facts

2.1 On the 13th September, 2008, the applicant was charged with an offence of drunk driving contrary to s.49(4) and (6)(a) of the Road Traffic Act 1961, as inserted by s.10 of the Road Traffic Act 1994, as amended by s.18 of the Road Traffic Act 2006. The matter came before District Judge Early on the 6th October, 2008. An application was made on behalf of the applicant for the maintenance record of the Lyon Intoxilyzer 6000IRL bearing the serial number B0584 ("the intoxilyzer"). This was refused. The affidavit of Garda Jessica O'Reilly, of Santry Garda Station outlines what occurred at that hearing at para. 7:-

> "7. On 6th October 2008 I appeared in Court 45 to give evidence of arrest, charge and caution. The Applicant's solicitor made an application to have the charge dismissed on the basis that his client had been bailed to attend at 10.30 am but the court did not sit at that time due to the Mass being held to mark the start of term. Judge Early refused the application. The Applicant's solicitor then applied for the maintenance records of the Intoxilyzer machine. Judge Early considered the application and refused it. At this remove in time I cannot recall the content of the debate that occurred or of the reasons given by the Judge but my best recollection is that he held that the Applicant had not established the relevance of the records sought to the particular case. The case was remanded to 16 January 2009 to fix a date for hearing."

2.2 A statement to the effect that on the 6th October, 2008, District Judge Early considered an application for a copy of the maintenance records and dismissed it on the grounds of relevancy is also contained in para. 2 of the second named respondent's statement of opposition. No evidence was put forward by the applicant as to what took place at the hearing of the 6th October, 2008, save for an averment in the affidavit of Mr. James Sweeney, the applicant's solicitor, sworn on the 23rd February, 2009, to the effect that an application for the maintenance record to the intoxilyzer was refused at para.6.

2.3 On the next occasion the matter came before the District Court, on the 16th January, 2009, a renewed application for the maintenance record of the intoxilyzer was made on the applicant's behalf to the first named respondent on the basis that the applicant would be unfairly prejudiced in the conduct of his defence if denied access to it. The application was opposed by the second named respondent who submitted that the defence had previously made the same application to District Judge Early who had refused it and that the principle of *res judicata* should be followed. The defence then applied to have the matter adjourned for a relevancy hearing concerning the maintenance record of the intoxilyzer.

2.4 Ms. Lisa O'Reilly, solicitor in the office of the second named respondent, in para. 5 of her affidavit, sworn on the 3rd June, 2009, averred that the first named respondent had regard to the note made by District Judge Early on the charge sheet to the effect that the prosecution only had to disclose the statements in the case and the custody record. In para. 6 she averred as follows:-

> "6. Judge Collins indicated that she would remand the case to 27 February 2009 for hearing and she stated that if there were any issues as regards disclosure then those issues could be raised with the trial judge."

The outcome of the hearing of the 16th January, 2009, was summarised by Mr. Sweeney in his affidavit at para. 11 as follows and is largely in accordance with the above:-

> "11. I say that an application was made on behalf of the accused to fix a date for a relevancy hearing into the matter. I say that this application was refused and the matter was fixed for hearing on the 27th day of February 2009 without liberty to the applicant to mention the matter prior to that date."

2.5 The applicant's solicitor wrote to the Superintendent of Santry Garda Station and to the second named respondent by letter dated the 28th January, 2009, requesting the maintenance record of the intoxilyzer, to which no response was received.

2.6 Leave was granted in these proceedings on the 23rd February, 2009, to challenge the ruling of the first named respondent, refusing to grant the application for the maintenance records of the intoxilyzer to be made available to the applicant and/or refusing to fix a date for a relevancy hearing into that issue.

3. The issues

3.1 The first or preliminary issue to be determined in these proceedings is whether these proceedings are premature, in that, the question of whether the applicant will be entitled to disclosure of the maintenance record may be raised at his trial and if relevance to his defence is demonstrated he may be successful in obtaining disclosure of that record or in having the prosecution halted. The substantive issue raised is whether the applicant is entitled to be furnished with the maintenance record of the intoxilyzer to ensure constitutional fairness and to vindicate his right to a fair trial.

4. Counsels' Submissions

4.1 Mr. Smyth S.C., for the applicant, submits that he is entitled, for the proper conduct of his defence, to challenge the presumption that the intoxilyzer machine was working properly and he cannot do this without sight of the records. He submitted that the first named respondent erred in law in refusing to grant access to the applicant to the maintenance records of the intoxilyzer machine and in refusing to fix a date for a relevancy hearing, contrary to the principles as set out in *McGonnell & Ors v. Attorney General & Anor.* [2007] 1 I.R. 400. He contended that there was a rebuttable presumption contained in s.13(4) of the Act of 1994 that the machine used for the evidential breath test at the date of the test is in proper working order and that sight of the maintenance records was necessary to challenge this presumption.

4.2 Mr. McDermott B.L., for the second named respondent, contended that these proceedings were premature. He pointed out that if, at hearing, the matter raised by the applicant becomes relevant it is open to him to make an application to the District Court to halt the prosecution.

4.3 He submitted that no evidence had been put forward by the applicant suggesting that the intoxilyzer machine was not in working order on the relevant date. In this regard he submitted that the relevance of the maintenance records to a particular defence must be demonstrated. He cited the case of *Director of Public Prosecutions v. Browne* [2008] I.E.H.C. 391 (Unreported, High Court, McMahon J., 9th December, 2008). He also referred to *Whelan v. Kirby* [2005] 2 I.R. 30, emphasising a passage from the judgment of Geoghegan J. to the effect that a basis for a request for disclosure must be made unless the reason for the request is self-evident.

4.4 He further argued that if an error was made by the District Judge, it was made within jurisdiction and/or was not of sufficient seriousness to justify an intervention by this Court on judicial review.

5. Decision

5.1 The evidence put forward by the second named respondent, specifically in the affidavit of Garda O'Reilly, as quoted from at para. 2.1 above is that District Judge Early, on the 6th October, 2008, considered the application for the copy of the maintenance records of the intoxilyzer machine and dismissed it on the grounds of relevance. In the applicant's written legal submissions it is stated that the applicant accepts the factual background as set out in the affidavit of Garda O'Reilly and in the affidavit of Ms. O'Reilly, Solicitor, with the exception of two matters, neither of which relate to the account of what took place in the District Court on the 6th October, 2008, before District Judge Early. The decision made on that date was not challenged by the applicant. Instead proceedings were brought in respect of the rulings of the second named respondent on a later date. I am satisfied that the issue of the relevance of the maintenance records of the intoxilyzer machine was *res judicata* at the time the case came before the second named respondent and she properly refused the application made by the applicant for disclosure on that basis. As to the application to fix a date for a relevancy hearing she also refused this and directed that any issue as regards disclosure could be raised with the trial judge. Implicit in the ruling made by the first named respondent is that the applicant can at his trial again apply for disclosure of the maintenance record if he can show that it is relevant to his defence and if an order cannot be made against the second respondent an application to halt the proceedings would have to be considered by the Court. Therefore, in my judgement, this application for judicial review is premature and the reliefs sought should be refused for that reason alone.

5.2 Lest I am wrong in the foregoing conclusion and for the sake of completeness I express the following opinion on the substantive issue of whether the applicant is entitled to disclosure of the record in question on the basis on which he claims that entitlement.

5.3 It is clear from the judgment of the Supreme Court in *Director of Public Prosecutions v. Doyle* [1994] 2 I.R. 286 that there is no absolute right to disclosure in summary cases. A number of authorities deal with the extent of disclosure required to vindicate the constitutional right to a fair trial. In *Whelan v. Kirby* [2005] 2 I.R. 30 the Supreme Court quashed the conviction of the applicant (and six other related applicants) on the basis that constitutional fairness required that

the respondent District Court Judge ought to have entertained an application on the part of the applicant to have an intoximeter machine inspected by an independent expert in circumstances where the printout from the intoximeter machine gives rise to a rebuttable statement of facts under s.17(2) of the Act of 1994.

5.4 The evidential value of such a statement is prescribed in s. 21(1) of that Act:-

> "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 statement."

5.5 Geoghegan J. held as follows at p.43:-

> "21 … It can be argued with some validity that apart from cases with very unusual facts the presumptions arising from the certificates in the intoximeter cases are for all practical purposes irrebuttable, notwithstanding the statutory provision to the contrary, if there are no circumstances where an accused can be permitted through an independent expert of his own to investigate the reliability of the apparatus or at the very least if it is not generally known in what circumstances (if any) such apparatus can be unreliable.
>
> 22 In a case such as these where in practice there was no objection to such an inspection on agreed terms provided that the court authorised it the argument is that much stronger. The court at the very least should have entertained and considered the application in the interests of ensuring that the defendants were not unfairly handicapped in their defence. …"

Geoghegan J. then went on to hold at pp.44-45, that a defendant would have to establish a basis for seeking certain documentation or an inspection of a machine:-

> "23 The other line of authority which has been relied on in this case is the line of cases relating to preservation of evidence such as *Braddish v. Director of Public Prosecutions* [2001] 3 I.R. 127 and *Bowes v. Director of Public Prosecutions* [2003] 2 I.R. 25. Also cited was *McKeown v. Judges of the Dublin Circuit Court* (Unreported, Supreme Court, 9th April, 2003). These cases are essentially dealing with the preservation of evidence available or which obviously should be available. There was no preservation of evidence problem in the cases the subject of these appeals. But as in the case of *Director of Public Prosecutions v. Gary Doyle* [1994] 2 I.R. 286, these authorities are based on the constitutional requirement of a fair trial.
>
> 24 The preservation of evidence cases are also relevant to one of the main arguments relied on by counsel for the second respondent in resisting the applications for judicial review. It is clear from those cases that a court will only be concerned with the preservation of evidence if such evidence could possibly assist a defendant in his or her defence. Normally, therefore, a basis would have to be laid before a relevant complaint of non-preservation or refusal of permission to inspect was made. Counsel for the second respondent argues that all the preliminary correspondence and discussions, whether with the gardaí, the second respondent or the Medical Bureau are irrelevant because the first respondent would have been precluded at any rate from making any order of the kind sought as there was not going to be any evidence put forward as to what might have been determined by an inspection which would be helpful to the defence. In the second last page of his written submissions the applicant has answered this suggestion as follows:-
>
> > 'The trial judge seems to suggest that there is an onus on the applicants to inform the court what the results of an inspection or examination of the intoximeter might have been. With respect, it would be impossible for an applicant, or a suitably qualified expert, to predict what an examination of a machine might reveal in any given case. The fact that the inspection of a machine is not a contemporaneous one would not, presumably, affect its result if, for example, a design fault were noted. There may be many other instances where a liability [reliability] of the machine might be called into question, notwithstanding that the examination thereof is not contemporaneous.'
>
> I find myself in agreement with that statement. It would seem to me that from the defence point of view the request for the examination might be regarded as reasonable (which does not necessarily mean that it would have to be acceded to) and the reasons for the request would be self evident."

He then noted the importance of hearing an application for disclosure and pointed out the context of the applications made to the District Court in that case, i.e. at the time the intoximeter was a novelty:-

> "26 Unless there are exceptional circumstances indicating abuse of the process of the court, constitutional fairness of procedure requires that a pre-hearing application to a judge of the District Court for an order requiring the production of documents and/or a request for inspection of equipment permitted to be used by statute for the purpose of producing a statement of facts deemed to be true unless rebutted and essential to the prosecution case ought to be entertained. It will then be within the discretion of the judge as to whether he or she accedes to the request or not. Nothing that I have said should be taken as suggesting that in any or every circumstance an inspection of an intoximeter should be permitted. But the first respondent in this case was wrong not to have entertained the application and properly considered it. It is important to emphasise that these applications to the court to enable one independent inspection of the intoximeter were made in the context that the intoximeter was at the material time a novelty and was a machine which effectively could by its own printout convict an accused without there being in reality any opportunity to rebut, notwithstanding that under the Act the presumption is rebuttable."

5.6 The subsequent case of *McGonnell & Ors v. Attorney General & Anor.* [2007] 1 I.R. 400 involved a constitutional challenge to certain provisions of the Road Traffic Act 1994 providing for evidential breath testing (ss. 13(1), 17 and 21(1), as amended). The three plaintiffs had been charged with offences of drunk driving on foot of print-outs of statements of breath alcohol from various apparatuses designed to measure the concentration of alcohol in the breath. They argued that they had been denied the possibility of an effective defence in circumstances where they could not provide an independent breath sample which could be independently tested and the test results independently verified. Murray C.J., referring to *Whelan v. Kirby* [2005] 2 I.R. 30, upheld the constitutionality of the evidential breath test procedure on the basis *inter alia*, that the accused had a right of inspection at p.417:-

> "29 However as McKechnie J. pointed out in his judgment, it remains open to the plaintiffs, as with any person accused of an offence contrary to s. 49(4) of the Act of 1961, *inter alia* to adduce evidence of the amount of alcohol they had consumed, in seeking to show that the relevant apparatus should be considered as having been defective. Geoghegan J. in *Whelan v. Kirby* [2004] IESC 17, [2005] 2 I.R. 30 specifically pointed out that the presumption under the Act of 1994 is rebuttable and expressly acknowledged the entitlement of an accused person to apply to conduct an inspection of the apparatus so as to investigate its reliability. An accused person is further entitled to adduce evidence regarding the manner of operation of the apparatus at the relevant time of the provision of the breath specimen. As McKechnie J. stated at para. 111:-
>
> > 'In addition to the above there is one further safeguard which I consider of particular relevance. It is the entitlement of an accused person to seek inspection rights of any machine used to provide a section 17(2) certificate in respect of him. Given not only the legal force but also the practical consequences of the presumption contained in section 21(1) of Act of 1994, it is in my view an important assurance for an accused person to know of his right to have access to a judicial authority for the purpose of seeking inspection facilities in respect of any given machine. When so deciding, the court in question must of course comply with constitutional justice and fair procedures on any such application so made, as it must on the hearing of the section 49 charge itself. In both instances it may vindicate such rights of the defendant in the most appropriate manner available. The observations equally apply to any application in respect of documentation.'"

5.7 In *Director of Public Prosecutions v. Browne* [2008] I.E.H.C. 391 (Unreported. High Court, McMahon J., 9th December, 2008) the notice party, who was charged with speeding sought twenty nine categories of disclosure from the prosecution. He argued that the items sought were of relevance as the gardaí had introduced a new system for the processing of fixed charge offences, within the meaning of the Road Traffic Act 2006. McMahon J. reviewed the jurisprudence relating to the duty to disclose in summary cases and concluded as follows:-

> "It is important to emphasise, therefore, that the right to disclosure is not an unlimited one. It should be available if it is necessary to ensure a fair trial and fair procedures and where justice demands it. It also only extends to relevant evidence which is in the prosecution's possession. In determining what is relevant, it is helpful to bear in mind the indicators specified by Denham J. in *Director of Public Prosecutions v. Gary Doyle* [1994] 2 I.R. 286. Finally, in determining what is just in cases such as this, one must appreciate that justice is not only about the rights of the accused. There is also the public interest in the successful prosecution of offences to be taken into account and, in the context of summary proceedings where it is intended that justice should be dispensed in a simple and speedy manner, inordinate expense must be avoided. Commonsense and proportionality are also factors which have to be considered in the weighing exercise which the District Court judge must undertake in exercising his discretion.
>
> In addition to the above considerations it is clear that a basis for any such application must be properly established.
>
> > 'Normally, therefore, a basis would have to be laid before a relevant complaint of non-preservation or refusal of permission to inspect was made." (Per Geoghegan J., in *Whelan v. Kirby* [2005] 2 I.R. 30 (at p. 44).'"

McMahon J. then also had regard to the following dictum of the Court of Criminal Appeal in *Director of Public Prosecutions v. McCarthy* (Unreported, 25th July, 2007):-

> "'The court is satisfied, however, that the obligations of disclosure are not limitless nor are they to be assessed in a vacuum or upon a purely theoretical or notional basis. Nor is a conviction to be regarded as unsafe per se simply because there has been a partial failure by the prosecution to meet the obligations of disclosure. It is a question of degree in every case, having regard to the nature and importance of the material in question.' (At p. 29)
>
> Later, the court continues:-
>
> > 'In the latter case, [*McFarlane v. Director of Public Prosecutions* [2006] IESC 11] in stressing the need for an applicant to establish a risk of an unfair trial, Hardiman J. stressed:-
> >
> > 'In order to demonstrate that risk there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent. Failure to do this was the basis of the failure of the applicant in *Scully [v. Director of Public Prosecutions]* [2005] 1 I.R. 242.'"

McMahon J. concluded as follows:-

> "These cases stress that commonsense parameters must govern the scope of the duty to seek out and preserve

evidence and the consequences of any supposed failure to do so in a particular case. As Hardiman J. noted in *Dunne v. Director of Public Prosecutions* [[2002] 2 I.R. 305], 'no remote, theoretical or fanciful' possibility should lead to a prosecution being prohibited. Repeating this in *Scully v. Director of Public Prosecutions* [2005] 2 ILRM at 216 he added:-

> 'one is concerned, first and last, with whether there is a real risk of an unfair trial. Obviously this will depend on the individual circumstances of each case'.(At p. 31)

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

5.8 Applying the above principles to the case before him McMahon J. held *inter alia* that the notice party had not established the factual basis for the application he made and that he had failed to demonstrate in any specific way that failure to make disclosure would increase the risk of an unfair trial.

5.9 What is sought by the applicant in this case is not an inspection of the intoxilyzer but rather a copy of its maintenance records. That there is a rebuttable presumption contained in the statement of fact in the certificate issued under s.17(2) of the Act of 1994 is clear. Because of this rebuttable presumption, the entitlement of an accused person in an appropriate case, to inspect an apparatus designed to measure the alcohol concentration in the breath has been established. The above two Supreme Court authorities indicate, however, that there usually has to be a basis established as to why particular disclosure or inspection is sought, unless the basis for the request is self evident. This was expressly referred to by Geoghegan J. at p.44 of the reported judgment, as set out above in para 5.5, and also implicitly by Murray C. J. in referring to the judgment of McKechnie J. which stated that the appellants could adduce evidence of the amount of alcohol they had consumed themselves to illustrate that the relevant apparatus was defective. This would seem to indicate that the relevance of what is sought to the applicant's defence must be established unless the relevance is self-evident. This approach was also adopted by McMahon J. in *Director of Public Prosecutions v. Browne* [2008] I.E.H.C. 391 (Unreported. High Court, McMahon J., 9th December, 2008).

5.10 It is to be observed that Murray C.J. pointed out that it is open to an accused person to "adduce evidence regarding the manner of operation of the apparatus at the relevant time of the provision of the breath specimen". In this case the applicant did not indicate that he was of the view that the intoxilyzer was defective or indeed any basis upon which he was seeking the maintenance records of the intoxilyzer, other than to say that he could not begin to rebut the presumption without first seeing the maintenance records. The demand made is simply that and no more. Nothing is advanced either by way of evidence or submission which would tend to demonstrate that a particular defence would be aided by the material sought. In essence, the applicant is merely exploring to see whether something turns up in the maintenance record which would arm him with evidence to rebut the presumption.

5.11 Unless it could be said that such an approach merited the disclosure sought as being a "self evident" basis for it, it clearly would fall short of the requirement, stated in all the above cases, that an accused person must show the relevance of the material sought to a defence to be advanced in the trial. A self evident reason would, in my judgement, be one which of itself demonstrated to the Court the nature of the defence sought to be advanced. Necessarily this excludes a request which is a fishing or exploration exercise to discover if a defence exists. Thus, in my opinion, an accused would have to point to some circumstance which, if established in evidence at the trial, would undermine the accuracy of the printout from the intoxilyzer machine. If it were necessary for the prosecution to furnish the maintenance record solely on the basis of a defence demand unrelated to any particular defence, that would amount to placing an obligation on the prosecution to support the evidential status of the printout with additional evidence and would, in my opinion, undermine the statutory presumption in s. 21(1) of the Act of 1994. Whilst the presumption is a rebuttable one it is rebuttable by an accused by way of his defence to the charge and does not enlarge the burden of proof on the prosecution in order to obtain a conviction. This approach in no way limits the capacity or opportunity of an accused to rebut the presumption, if the accused has a case to make which casts doubt on the accuracy of the printout. If he or she is not aware of any circumstance which calls in question the accuracy of the printout, e.g. that the alcohol level revealed by the printout does not or could not be an accurate reflection of any alcohol, or none, consumed by the accused, then it cannot, in my judgement, be said by an accused that the denial of the maintenance record of the intoxilyzer machine deprives her or him of a fair trial.

6. Conclusion

6.1 For these reasons I must refuse the reliefs sought in these proceedings.