Neutral Citation Number: [2011] IEHC 207

THE HIGH COURT

2010 812 JR

BETWEEN

KEVIN MAHER

APPLICANT

AND

HIS HONOUR JUDGE ANTHONY KENNEDY

RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on 6th May, 2011

1. The applicant in these judicial review proceedings was originally convicted of a drunk driving offence on 2nd March, 2009, by District Judge Haughton. He appealed that decision to the Circuit Court, but the conviction was affirmed by His Honour Judge Anthony Kennedy on 3rd March, 2010. It is this latter decision which has given rise to the present proceedings, where the validity of the decision has been challenged on a variety of different grounds.

2. The circumstances giving rise to the conviction can shortly be stated. The applicant had been charged with the offence of drink driving, contrary to the provisions of s. 49(3) of the Road Traffic Act 1961 (as amended), at Vicarstown, Stradbally, Co. Laois, on 28th July, 2007. The evidence established that the Gardai were conducting a mandatory alcohol testing checkpoint at the time, pursuant to the provisions of s. 4 of the Road Traffic Act 2006 ("the 2006 Act"). Garda Aran Grehan gave evidence that she stopped the applicant's vehicle pursuant to this power and informed him that she was conducting a mandatory alcohol checkpoint. Garda Grehan then required the applicant to exhale into the alcometer apparatus which is designed to determine the presence of alcohol. The applicant failed the test and was promptly arrested. He was then conveyed to Portlaoise Garda Station.

3. On the way to the Garda Station, the applicant complained of being unwell and he informed the Gardai that he was diabetic. A doctor was summoned and the applicant duly produced a urine sample. Following analysis of the sample, the Medical Bureau of Road Safety indicated a concentration of 211 milligrams of alcohol. Evidence to this effect was given in both the District Court and the Circuit Court.

The authorization pursuant to s. 4 of the Road Traffic Act 2006

4. At the hearing the applicant contended that the authorization was defective in that it merely recited under the heading "Location" it merely stated "Vicarstown". It is not in dispute but that there are, in fact, three public places in the State which bear the name Vicarstown in three different counties, namely, Laois, Waterford and Cork. In essence, therefore, the applicant submitted that as this might have referred to the Vicarstown in any one of these three counties, the reference was ambiguous and that this ambiguity infected the authorization with a fundamental defect.

5. Section 4 of the 2006 Act provides in material part as follows:-

> "(2) A member of the Garda Síochána, not below the rank of inspector, may, for the purposes of section 49 of the Principal Act, authorise the establishment of a checkpoint or checkpoints in a public place or places at which members of the Garda Síochána may exercise the powers under subsection (4).
>
> (3) An authorisation shall be in writing and shall specify—
>
> (a) the date on which, and the public place in which, the checkpoint is to be established, and
>
> (b) the hours at any time between which it may be operated.
>
> (4) A member of the Garda Síochána, who is on duty at a checkpoint, may stop any mechanically propelled vehicle at the checkpoint and, without prejudice to any other powers (including the powers under section 12 (inserted by the Act of 2003) of the Act of 1994) conferred on him or her by statute or at common law, may require a person in charge of the vehicle—
>
> (a) to—
>
> (i) provide (by exhaling into an apparatus for indicating the presence of alcohol in the breath) a specimen of his or her breath, or
>
> (ii) accompany him or her or another member of the Garda Síochána to a place (including a vehicle) at or in the vicinity of the checkpoint and there to provide, by exhaling into such an apparatus, a specimen of his or her breath, or
>
> (b) to—
>
> (i) leave the vehicle at the place where it has been stopped, or

(ii) move it to a place in the vicinity of the checkpoint, and

keep or leave it there until the person has complied with a requirement made of him or her under paragraph (a)."

6. It is perfectly clear that in the present case the Gardai acted pursuant to this statutory authorization. Since s. 4 of the 2006 Act authorizes the Gardai to interfere with the personal liberty of motorists in a significant fashion by stopping them at random and by requiring them to exhale into an alcometer apparatus, it must be presumed that the Oireachtas intended that the statutory safeguards specified in s. 4(3) would be strictly complied with: see, e.g., by analogy the comments of Kearns J. in *Fitzwilton v. Mahon* [2007] IESC 27, [2008] 1 I.R. 712 at 730.

7. But even in a case where such strict compliance is deemed to be essential, it does not mean that the slightest deviation from the letter of the statutory requirements will render the underlying decision invalid in every case. As Henchy J. put it in *Monaghan UDC v. Alf-A-Bet Promotions Ltd.* [1980] I.L.R.M. 64, 69:

> "[W]hat the legislature has prescribed…in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial or technical, or otherwise insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore, adequately complied with."

8. In view of the requirements of s. 4(3), it is plain that the Oireachtas clearly intended that the decision to establish the checkpoint would be taken by a senior Garda officer and that the Gardai operating the checkpoint would be empowered to do so at the public place, time and dates so specified in writing. The very fact that the Oireachtas assigned the decision to establish a checkpoint to a Garda Inspector (as distinct, for example, from an ordinary member of the force) and that this decision requires a special authorization by law is the strongest indication possible that compliance with these statutory requirements was intended to be of prime importance: see, e.g., by analogy the judgment of O'Higgins C.J. in *The People v. Farrell* [1978] I.R. 13, 26. It could not be suggested, for example, that the Gardai would be acting lawfully pursuant to s. 4 if, for example, the authorization did not specify the public place at which the checkpoint was to be authorized. As Supreme Court made clear in *Albatros Feeds v. Minister for Agriculture and Food* [2006] IESC 52, [2007] 1 I.R. 221, the normal rule is that authority for an official act should be stated on the face of the relevant instrument.

9. In that regard, I would observe in passing that it was not legitimate for prosecuting authorities to seek to call evidence from Inspector Boyle - the Garda Inspector who signed the authorisation - in order to show what subjectively he had in mind when issuing the authorisation. It follows from the observations of Fennelly J. in *Albatros Feeds* that the authorization is a public document affecting legal rights which must speak for itself and any evidence which seeks to explain, supplement or qualify it is not admissible in law.

10. I mention all of these matters merely to show that the argument advanced by the applicant was an arguable one and turned substantially on whether the authorization was genuinely ambiguous. The authorization would, of course, have to be read in its proper context. Decisions such as that of the Supreme Court in *Croadaun Homes Ltd. v. Kildare County Council* [1983] I.L.R.M. 1 and the more recent judgment of O'Donnell J. for the Court of Criminal Appeal in *The People v. Mallon*, 8th March, 2011, might well have a relevance to this issue. Even if the authorization were held to be invalid, it would not necessarily and automatically follow that the arrest was invalid. However, in the light of the conclusions I am about to reach on the question of objective bias, it would be inappropriate for me to express any further view on these questions.

The reasons given by the respondent and objective bias

11. Quite independently of this contention, the applicant also maintained that the respondent judge failed to give adequate reasons for his decision and, furthermore, that judicial comments gave the appearance of pre-judgment and objective bias. In this regard, it is first necessary to determine what exactly was said and by whom.

12. According to the affidavit evidence sworn on behalf of the applicant, at the conclusion of the relevant evidence his counsel applied for a dismissal on the basis that the authorization was defective. It is accepted that the judge listened to these submissions without interrupting counsel. When these submissions concluded, the State Solicitor rose with a view to replying to these submissions. At the point the judge indicated that he did not require to hear from the prosecution. He then turned to counsel for the applicant and is said to have stated: "the point is rubbish - utter rubbish. There is absolutely no ambiguity whatsoever". He then made a remark to the effect that the applicant had claimed that his solicitor would always get him off. He added that he had "no time for these technical drink driving points". When asked by counsel to state reasons, he indicated that he had just given his reasons. The judge then proceeded to affirm the conviction.

13. It cannot be said that this account has been controverted by any affidavit filed on behalf of the notice party. In these circumstances, I am coerced to find that the account given by the applicant is correct or, at least, substantially correct.

14. It is important to stress that there is absolutely no question of actual bias. Rather, the question is whether these comments amount to objective bias? In this regard, it is important to recall the comments of McMahon J. in *Fogarty v. Judge O'Donnell* [2008] IEHC 198:-

> "[I]t is important also that the judge does not give the appearance that he has prejudged a decision and in this respect he should take great care when expressing himself during the course of the trial that he does not express himself in language which would suggest that he has come to a hasty decision in the matter.
>
> Whether the language used by a judge during the course of a trial is such that it indicates bias in the sense that it shows that the judge has made up his mind before he has heard all the evidence, depends on the facts and circumstances of each case. The use of an infelicitous word or phrase during the trial by the judge should not always compel such a conclusion. To define bias one must look at the overall picture…"

15. In *Fogarty* the District Judge had used the word "irrefutable" to describe a sequence of evidence before the case had concluded. While McMahon J. described the comment as "unfortunate", he was satisfied that having regard to the totality of the evidence that the informed objective observer would not have concluded that the judge had not pre-empted the matter.

16. In reaching this determination, McMahon J. referred to the judgment of Denham J. in *Bula Ltd. v. Tara Mines Ltd.(No. 6)* [2000] 4

I.R. 412 where she said (at 449):-

> "A judge has a duty to sit and hear a case. However, in certain circumstances it is appropriate that he or she disqualify himself or herself from a particular case. The test is not whether that judge believes he or she would be impartial. Nor is it whether the judge or judges on a motion to set aside such a judgment believes the judge was or would be impartial. Nor is it whether the parties consider the judge impartial. The test is objective. This has been analysed by the Constitutional Court of South Africa: *President of the Republic of South Africa v. South African Rugby Football Union 1999 (4)* S.A. 147 at para. 48:-
>
> > '…the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial.'"

17. These are the principles which I am called upon to apply to the present case.

18. To some extent, however, this is a matter of first impression. In the present case, however, I find myself coerced to the conclusion that these remarks were unfortunate and represented an uncharacteristic lapse from the highest standards of fairness, courtesy and civility which the learned Circuit Judge is justly known to uphold. However, if confidence is to be maintained in our legal system, then it is vital that these high standards of courtesy and civility are observed by all who have been privileged by society with the exacting task of administering justice. While this does not mean that judges are entitled to shirk from speaking the unpleasant truth in the name of excessive politeness or from speaking sternly where the situation requires it, as we are nevertheless administering justice in the name of the People of Ireland, it behoves us where at all possible to treat solicitors, counsel, witnesses - and, above all - litigants with such courtesy and decorum as befits the proper administration of justice. If this is, perhaps, a counsel of perfection which in practice cannot always be achieved and in respect of which every single judge will fail from time to time, it is a standard to which the legal system should nonetheless aspire.

19. In the present case, the reasonable, objective and informed observer might justly fear that the judge's ability to preside over a wholly impartial hearing had been inadvertently compromised by these remarks. Such an observer might think as a result that the judge appeared resolute in his determination to find against the applicant, irrespective of the merits of the arguments of counsel. In these circumstances I must reluctantly come to the conclusion that the conviction cannot safely stand.

Conclusion
20. I will, accordingly, quash the applicant's conviction. Counsel for both parties have agreed that in these circumstances the question of whether to remit the case to the Circuit Court must await further argument.

Postscript
21. For completeness, I should record that subsequent to the oral delivery of this judgment, counsel for both parties attended before me on 9th May, 2011, and I was informed that the Director did not seek to have the matter remitted to the Circuit Court. In the light of this, I do not propose to remit the matter to the Circuit Court.