THE HIGH COURT

[2023] IEHC 76

[Record No. 2022/418SS]

IN THE MATTER OF SECTION 52 OF THE COURTS SUPPLEMENTAL PROVISIONS ACT 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF SERGEANT BRENDAN REVILLE)

PROSECUTOR

AND

PHILIP BARRY

DEFENDANT

JUDGMENT of Ms Justice O'Regan delivered on 17 February 2023.

Introduction

1. This matter comes before the Court by way of a consultative case stated by Judge Ann Watkin, Judge of the District Court, dated 22 February 2022, pursuant to the provisions of s.52(1) of the Courts (Supplemental Provisions) Act 1961 for the opinion of the High Court.

The questions posed are as follows: -

(1) Was I correct in finding on the basis of the evidence referred to in para. 15 above that the defendant had pointed to a possibility that the sample

was not analysed for drugs as soon as practicable such that the onus shifted back to the prosecution to adduce evidence to establish beyond a reasonable doubt that the presumption had not been rebutted;

(2) if the answer to question 1 is yes then was I correct in (1) holding that the failure by the State to comply with s.17(4) resulted in the inadmissibility of the evidence contained in the s.17 certificate and (2) that the dicta in *Avadenei* was inapplicable because the non-compliance was not simply procedural but posed a risk of real prejudice to the defendant.

Preliminaries

2. The only *viva voce* evidence tendered to the District Court was that of Sergeant Reville to the effect that on 24 January 2019 at Enniskerry Road, Stepaside, Dublin 18 he was conducting an authorised mandatory intoxicant testing checkpoint. The defendant was stopped driving motor vehicle registration number 95 WW 3876 and was requested to provide an oral fluid specimen for the purposes of testing for the presence of drugs. The analysis conducted provided a positive result for cannabis and the defendant was arrested and taken to Blackrock Garda Station where a blood sample was taken on 24 January 2019. Subsequently on 25 January 2019 the sample was hand delivered to the Medical Bureau of Road Safety (MBRS). On 28 January 2019 Sergeant Reville received a certificate of analysis from the MBRS confirming a nil alcohol reading and received a second certificate from the MBRS on 22 March 2019 confirming a positive test for cannabis.

3. The defendant was prosecuted summarily by summons number 2019/146910, applied for on 11 June 2019, alleging offences under s.4(1A) and s.4(5) of the Road Traffic Act 2010 as amended.

4. The matter ultimately came for hearing before Judge Watkin on 4 November 2020, having previously been listed on a number of occasions, when counsel on behalf of the defendant indicated that the prosecution was on full proof in establishing compliance with s.17 of the 2010 Act relevant to the requirement of an analysis to be conducted "as soon as practicable".

Legislation

5. Under s.17(1) of the 2010 Act it is provided that as soon as practicable after it has received a specimen forwarded to it under s.15 the Bureau shall analyse the specimen.

Section 17(4) of the 2010 Act provides that in a prosecution for an offence under *inter alia* chapter 4 it shall be presumed until the contrary is shown that subs. 1, 2 and 3 have been complied with. Section 17 is within chapter 4.

6. Under s.20(3) of the 2010 Act it is provided that a certificate expressed to have been issued under s.17 shall, until the contrary is shown, be sufficient evidence in any proceedings under the Road Traffic Acts 1961-2010 of the facts stated in it without proof of a 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 Bureau with the requirements imposed on it by or under chapter 4.

Proceedings in the District Court

7. The defendant argued before the District Court that the State had failed to establish that the specimen had been analysed as soon as practicable in accordance with s.17 of the 2010 Act and accordingly the presumption in s.17(4) had been rebutted on the basis that it took just under two months to analyse the specimen. The defence argued that the State witness was unable to explain why any alcohol test was done. The defence argued that it had only to point to a possibility which would rebut the presumption but the defence was not required to prove the same.
The State argued that the presumption could be relied on and the defendant had not adduced any evidence to the contrary and the onus was on the defendant to do so. It was argued that the mere lapse of time would not be sufficient.

8. The State also argued that if the presumption was rebutted there was no prejudice, unfairness or detriment to the defendant.

9. In the case stated Judge Watkin indicated that as the State was on full proofs in every criminal case the fact that the defence had put the State in the Court on notice that they would require full proof in relation to s.17 did not affect the burden or the presumption; rather, if evidence was adduced by the defence at the hearing the State would be expected to call evidence other than adjourn the matter to call evidence at a later stage. The Judge indicated that she was not in a position to take judicial notice of how long the procedure would normally take and further indicated that she believed that the defendant had adduced evidence in establishing that an alcohol test was conducted before the drug test and no explanation could be given for this. The Judge felt that the question was whether or not this was sufficient to shift the onus back to

the State to establish that they did the analysis as soon as practicable. The Court was of the view that it would seem that the unnecessary delay in conducting an analysis for alcohol might be sufficient to point to a possibility that the sample was not analysed for drugs as soon as practicable. She felt that this would probably be sufficient to require the State to at least explain why the alcohol test was necessary. The Court was satisfied that the defence did adduce sufficient evidence to shift the onus back to the State and was further satisfied that the statutory breach was not simply a procedural breach as the failure to conduct the test as soon as practicable would potentially result in an inaccurate test result which would prejudice the defendant.

10. In para. 15 of the case stated the Court indicated that the defence had established the following in evidence: -

> "(1) That the analysis of the sample for drugs took approximately two months;
>
> (2) that the alcohol test was done first when alcohol had nothing to do with matter as the guard's opinion was the defendant had committed the specific offence of drug-driving and he arrested the defendant for drug-driving in order to take a blood sample for analysis for the present of a drug only;
>
> (3) the State offered no evidence to explain this."

Jurisprudence

11. Both parties accept that the evidential burden attaching to a defendant to rebut a presumption created by statute is low. In this regard the defendant relies on the Supreme Court judgment in *The People (Director of Public Prosecutions) v Frederick*

Forsey [2019] 2 IR 417 and in particular the statement of O'Malley J at para. 185 thereof as follows: -

> "In the case of the burden created by a presumption, the accused will not rebut the presumption unless the evidence relied upon by the defence is, in itself, sufficient to create doubt about the correctness of the presumption. That is what is meant by 'proving' that a doubt exists. In a case such as this, therefore, the evidence would have to point to the possibility of an innocent explanation for receipt of the benefit. However, the accused would not have to 'prove' that innocent explanation."

12. In addition to the foregoing the following jurisprudence is engaged: -

a. In *Hoggs v Hurley,* a decision of Mr Justice Costello in the High Court of 10 June 1980, the Court was dealing with s.23 of the Road Traffic Act 1978 which provided that a certificate issued by the Bureau as to the concentration of alcohol in a specimen of urine forwarded to it for analysis is to be sufficient evidence of the facts certified in it until the contrary is shown. Costello J was satisfied that as soon as practicable was not synonymous with as soon as possible. Furthermore, in considering what difficulties can properly be taken into account in deciding whether the Bureau's statutory obligation was carried out as soon as practicable the content and surrounding circumstances should be considered. The nature and purpose of the obligation must be borne in mind and in this regard the Court indicated that the obligations were two-fold namely in the first instance to assist the prosecuting authorities in deciding under which subsection, if any, the arrested person should be prosecuted and

secondly to make the accused aware of the evidence which may be adduced against him and to afford him an adequate opportunity to prepare his defence. It is the case in that matter that the accused called an analyst to rebut the presumption.

b. In *DPP v Leonard Corrigan*, a judgment of Finlay P of 21 July 1980, the Court referred to and adopted the entire of the decision of Costello J in *Hobbs* aforesaid and in particular in relation to the purpose of the obligation on the Bureau. Finlay P was satisfied that having regard to the presumption it is not possible from a mere lapse of time without other evidence to reach a conclusion that a specimen was not analysed or a certificate was not sent as soon as practicable. For a court to reach a decision to that effect it would be necessary to have material before it indicating the practical difficulties and surrounding circumstances under which either or both of these activities were carried out and the effect or consequence of any delay on the accused. The onus of establishing the facts from which the Court could draw conclusions on these two topics is clearly upon the defendant. In that case no evidence was adduced by the defendant as to the practical difficulties and surrounding circumstances nor was there evidence to indicate that the delay left the accused in any way prejudiced or the purpose of his receiving the certificate as soon as practicable was defeated by delay.

c. In *Sweeney v Fahy*, a judgment of Mr Justice Clarke in the Supreme Court of 31 July 2014, the Court at para. 6.6 indicated that compliance with the obligation of the Bureau was a condition precedent to the certificate having the status of evidence and therefore the question before

the District Judge was as to whether or not there was sufficient failure to certify in a timely manner to render the certificate inadmissible. At para. 6.8 the Court indicated that having regard to the onus which rested on the accused in this regard together with his failure to call any evidence concerning the sort of period which might be practicable in the context of an analysis and certification for drugs the Court was not satisfied that there was any merit in the point at all.

In the judgment of McKechnie J in the same matter at para. 36 it was indicated by the Court that the presumption under s.21(3) of the 1994 Act (being similar to the provisions of s.20(3) of the 2010 Act as aforesaid) has two aspects to it, namely it is sufficient evidence of the specific facts stated in the certificate until the contrary is shown and secondly it is sufficient evidence of the Bureau's compliance with its obligations as imposed including but not restricted to s.19 of the 1994 Act. Section 19 had the benefit of both presumptions. It was held that presumptions in law are for the purposes of easing the evidential burden on a party. At para. 51 the Court noted that the analysis and process differ as between alcohol and drugs and therefore there are separate steps and procedures involved depending on which particular substance is being tested for. The Court noted at para. 53 that the appellant called no evidence as part of his rebuttal to this presumption and the entire basis of the challenge rested on the respective dates when the first and second certificates were received. The Court felt that it was not necessarily correct to regard the date of the receipt of the first certificate as being the appropriate reference point from which the time period should be measured. In the absence of some

evidence in this regard the Court is in effect being invited without any basis to conclude that no such reasons exist as to the practical difficulties and surrounding circumstances which might explain the time involved. At para. 56 McKechnie J indicated that one cannot even say what part of the time period passed before the analysis was done or what part expired before the certificate issued. Consequently, the Court could not agree that the presumption had been stood down.

d. In the case of the *DPP v Collins* [1981] ILRM 447, being a judgment of Henchy J, the Court at p.452 *et seq* indicated that the mere suggestion of counsel for the defendant as to the possibility of a false analysis was not sufficient discharge of the evidential burden of proof which lay on the defendant on the issue. The Court stated: -

> "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 on the former…in the instant case, before counsel's suggestion could be given serious consideration as a defence…the defence should have adduced admissible evidence that a white substance of the kind and in the quantity found in the container could have falsified the certified analysis in the way suggested."

e. In *The DPP v Cronin* [2003] 3 IR 377 the Court of Criminal Appeal was satisfied that an accused is entitled to have the inference most favourable to him drawn unless it has been excluded by the prosecution beyond reasonable doubt.

f. In *Power v Hunt* [2013] 3 IR 709 O'Malley J in the High Court at para. 716 indicated that there was nothing intrinsically wrong with two certificates each certificate establishing compliance with the statutory requirement insofar as necessary to ground admissibility.

g. In the *DPP v Avadenei* [2018] 3 IR 215 the Supreme Court at para. 90 of the judgment of O'Malley J confirmed that: -

> "Production of the statement does not in itself create any criminal liability or impose any detriment. It is a piece of evidence that can be used to establish liability, and the issue is simply one of admissibility and adequacy with respect to that purpose."

At para. 91 of the same judgment the Court identified four situations where a flaw in the implementation of the statutory procedures will invalidate the evidence produced under the statutory regime including at number three if the power is exercised without full compliance with the statutory safeguards for the defendant's fair trial rights. At para. 94 the Court went on to indicate that this category may be more complex than the others. The Court expressed the view that there should be an analysis in each case as to the actual effect of the procedural error on the fair trial rights of the defendant. If a breach of statutory procedure is established but has no consequences, in that no unfairness, prejudice or detriment can be pointed to then the normal standards applicable to criminal trials would indicate that the evidence is admissible. The Court indicated that there should be an analysis in each case as to the actual effect of the procedural error, or flaw in a documentary proof, on the fair trial rights of a defendant.

Submissions

13. In support of the proposition that the District Judge was correct in finding that the statutory presumption under s.17(4) of the 2010 Act was rebutted, the evidence relied upon by the defendant is two-fold namely: -

a. That there was a delay in conducting the analysis and the return of the certificate; and

b. there was an analysis of alcohol content which was not required and did not arise.

Based on the foregoing, the defendant suggests that there was more than just a delay. On the other hand, the State suggests that the testing for alcohol could do no more than add to the delay which according to jurisprudence will never be sufficient to rebut the presumption (see *Hobbs* aforesaid).

The defendant argues that when considering what difficulties can properly be taken into account in deciding whether the Bureau's statutory obligation was carried out as soon as practicable the content and surrounding circumstances should be considered. In this regard, it is argued that the unnecessary testing for alcohol of the sample is such a surrounding circumstance. This contention is in my view valid although it should be borne in mind that as it is the only circumstance surrounding the matter available to the District Court, when considering whether or not the defendant has reached the requisite bar required to rebut the presumption arising under s.17(4).

14. Insofar as the extent of the burden placed on the defendant to rebut the statutory presumption the defendant refers to para. 46 of McKechnie J's judgment in *Sweeney v Fahy* where it was stated: -

> "It may be that evidence, of a credible and plausible nature, which creates a reasonable doubt, would be sufficient to negative a presumption."

The comments of McKechnie J aforesaid in the defendant's submission is consistent with the comments of O'Malley J at para. 188 of the judgment in *Forsey* aforesaid where O'Malley J in the course of identifying the nature of the instruction of a trial judge to the jury in the case such as that which was before the Supreme Court (which involved a statutory presumption of corrupt intention on the part of the defendant) that the jury should take the corrupt intent as proved: -

> "Unless there is something in the evidence that makes them doubt that the accused had a corrupt motive."

Decision

15. In my view the comments in para. 188 of O'Malley J aforesaid must be read in context and in particular in the context of the content of para. 185 of the same judgment where it is stated: -

> "In the case of the burden created by a presumption, the accused will not rebut the presumption unless the evidence relied upon by the defence is, in itself, sufficient to create doubt about the correctness of the presumption. … In a case such as this, therefore, the evidence would have to point to the possibility of an innocent explanation for receipt of the benefit."

McKechnie J at para. 46 of *Sweeney v Fahy* aforesaid did indicate that the standard of proof on the defendant required to rebut the presumption should not exceed the civil standard and he was not convinced that contrary proof to such a level was required. Such a view is consistent with para. 185 of O'Malley J's judgment in *Forsey* to the

effect that the extent of the accused's evidence required to rebut the presumption needs to be sufficient to create doubt about the correctness of the presumption with the evidence pointing to the possibility of an innocent explanation.

16. In the instant matter therefore, it appears to me that to rebut the presumption arising in s.17(4) of the 2010 Act evidence making it sufficient to create a doubt about the correctness of the presumption will suffice.

17. Notwithstanding that there was no reference in the case stated by Judge Watkin or indeed the written submissions of the defendant to the meaning and implications of the words "as appropriate" as they appear in s.17(1) of the 2010 Act, counsel for the defendant in oral submissions contended that this was central to the case stated. This Court indicated that that submission could not be entertained having regard to the content of the case stated.

18. Notwithstanding the low evidential bar required for the defendant to rebut the presumption arising under s.17(4) the defendant cannot avoid the application of the jurisprudence herein before set out in or about an assessment as to whether or not that bar has or has not been achieved: -

a. In *Corrigan*, Finlay P in following the judgment of Costello J in *Hobbs* indicated a need for material as to the practical difficulties and surrounding circumstances prior to finding the Bureau had failed in its obligation *inter alia* s.17(1).
b. In *Sweeney v Fahy*, Clarke J indicated that the failure on the part of Mr Sweeney to call any evidence concerning the sort of period which might

be practicable resulted in Clarke J indicating that he was not satisfied that there was any merit in the point at all.

c. In the same case McKechnie J indicated that *inter alia* in the absence of some evidence with regard to the difficulties and surrounding circumstances in which the Bureau carries out its activities the Court was in effect being invited without any basis to conclude that no such reason existed and that was something the Court could not do.

d. In *Collins*, Henchy J in the Supreme Court distinguished between a suggestion as to something that may or not happen and adducing evidence pointing in the direction of a possibility, the law acting on the latter and not the former.

e. In *Avadenei*, although the Court did identify a number of grounds upon which a flaw in the implementation of statutory procedures would invalidate the evidence produced, the Court was satisfied that even if there was a breach of procedure established but no unfairness, prejudice or detriment which could be pointed to then the evidence was admissible. In that matter a bilingual form was to be provided but was not. However, the Court was satisfied that where all of the required information was present, where the content was in no way misleading, confusing or unfair and where no right of the defendant was violated by its admission, there was no reason why the form should not be admitted into evidence.

f. The prospect of prejudice to the defendant on the basis that the carrying out of an alcohol test on the specimen might have delayed the drug testing on the same specimen or sufficiently contaminated the specimen, by delay or otherwise so that the reading might be incorrect amounts to

matters which Henchy J in *Collins* indicated the law would not act upon.

19. The only evidence before the District Court was the fact that the Bureau received the relevant sample on 25 January 2019 and issued a certificate which was received by An Garda Síochána on 28 January 2019 showing a nil result for alcohol with a further certificate received by An Garda Síochána on 22 March 2019 indicating a positive result for cannabis – there is nothing in such evidence that casts doubt on the authenticity of the content of the certificate of 22 March 2019 (para. 188 of *Forsey*) nor does it amount to evidence which in itself is sufficient to create a doubt about the correctness of the presumption (para. 185 of *Forsey*). Neither does the evidence which was adduced aforesaid amount to evidence of unfairness, prejudice or detriment to the defendant.

20. In the light of the foregoing, I am satisfied that in the instant circumstances the evidence which was before the District Court when the matter was heard on 4 November 2020 did not amount to sufficient evidence to rebut the presumption arising in s.17(4) of the 2010 Act notwithstanding the limit on the level of proof required by the defendant to rebut the presumption. Accordingly, I would answer the District Judge as follows: -

(1) No.

(2) This question does not arise in the light of the answer to number 1 above.

21. Having regard to the fact that this is a case stated by the District Court of its own motion and the fact that the defendant is legally aided I propose to make no order

as to the costs of the matter before the High Court unless submissions limited to 1,000 words are filed within the period of 14 days from the delivery of this judgment as to the appropriate order for costs to be made.