



THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 225
Appeal No. 2020:218

Record No. 2019/554SS

Birmingham P.

McCarthy J.

Kennedy J.

UNAPPROVED

**IN THE MATTER OF SECTION 52 OF THE COURTS
(SUPPLEMENTAL PROVISIONS) ACT, 1961**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR/APPELLANT

-AND-

JOHN MAHER

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice McCarthy delivered on the 3rd day of August 2021

1. This is an appeal against the judgment of Meenan J. delivered on the 3rd March, 2020 in relation to a case stated by a judge of the District Court made pursuant to s. 52(1) of the Courts (Supplemental Provisions) Act, 1961 for the opinion of the High Court. The appellant stands charged in the District Court with burglary contrary to section 12 of the

Non-Fatal Offences Against the Person Act 1997. I will set out below the questions asked by the District Court.

2. After the burglary with which the defendant/respondent is now charged, at Keeper Road, Drimnagh, Dublin 12 on the 12th November, 2010 the scene of the crime was examined and a blood sample was recovered. This was retained at Crumlin Garda Station until the 29th April, 2013. On that date it was taken to Forensic Science Ireland (then the Forensic Science laboratory of the Department of Justice) (“FSI”); this is a statutory body established by the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (“the 2014 Act”) and it was so taken for the purpose of generating a DNA profile from it. This was apparently done by arrangement between a garda officer, informally made, and an officer of FSI – it appears that a significant number of samples were so delivered with a view to generating DNA profiles in anticipation of, and for inclusion in, a database to be established under the 2014 Act; it was anticipated that this would reduce the great number of samples to the laboratory after the entry into force of the 2014 Act and it was for the avoidance of that eventuality and consequent delays that the step in question was taken. In due course once a DNA sample was extracted from the blood the DNA profile derived from the sample was entered into it or retained upon what was called an “*intermediate database*” and thereafter entered on the “*statutory database*” established pursuant to the 2014 act

3. The defendant/respondent was arrested and detained for another offence on the 12th September, 2016 and a bodily sample was taken from him which was sent to FSI and DNA extracted therefrom. The profile derived from the blood recovered from the 2010 burglary and the sample were compared and matched and this gave rise to the present charge against the defendant/ respondent.

4. At trial in the District Court counsel for the defendant/respondent contended that the DNA evidence relied upon by the prosecutor/appellant was inadmissible on the basis that there was no legal authority for the maintenance of an “intermediate database” prior to the commencement of the relevant provisions of the 2014 Act; there is apparently no argument advanced in relation to the respondent’s personal rights. It was apparently conceived that in some sense there was a chain of unlawfulness leading from illegal extraction and profiling via the intermediate and statutory data bases to detection and then trial at which of course the evidence would be of the fact of the generation of the DNA profiles from both and the fact that they matched; whether or not the crime scene profile was generated before or after the entry into force of the 2014 Act or placed on either database is irrelevant to admissibility – the profile retained on the database established under the 2014 act was that from which the initial comparison was made and it was simply used to nominate the defendant/respondent as a suspect.

5. The establishment of a database is provided for by s. 59 the relevant provisions of which are as follows: -

“(1) The director of FSI shall, as soon as may be after the commencement of this section, establish in accordance with this part a database to be known as the DNA Database System. (in this Act called the “DNA Database System”).

(2) The DNA Database System shall comprise the following two divisions:

(a) the Investigation Division; and

(b) the Identification Division.

(3) *The Investigation Division of the DNA Database System (in this part called “the Investigation Division” shall contain the following indices of DNA profiles and information that may be used to identify a person from whose biological material each DNA profile was generated:*

(a) *the Crime Scene Index;*

...

”

6. On perusal of the long title (a portion of which was quoted by Meenan J.) there appears to be no explicit provision therein in respect of crime scene samples or DNA profiles generated therefrom; “crime scene sample” is defined (in the present context) in S.2(1) of the 2014 Act as “a sample of biological material found at, or recovered from, crime scenes from which a DNA profile in respect of a person may be generated”; here that is the blood sample obtained in 2010. The only references in the 2014 Act to such samples are in the definition section and section 61.

7. In any event the following are the questions asked by the District Court: -

- (i) prior to the enactment of the Criminal Justice (Forensic Evidence and DNA Database System) Act, 2014 was it lawful to generate, retain and/or enter a DNA profile onto a database in the manner described in this case?;
- (ii) was it lawful for a DNA profile from the relevant sample that is in issue here to be included on the DNA database after the enactment of the Act of 2014.
- (iii) Is evidence of the match between the DNA profile taken from the relevant sample prior to the enactment of the Act of 2014 and the profile lawfully taken from [the] sample after that enactment admissible?; and

- (iv) In the light of the foregoing, is the district judge entitled to admit the DNA evidence being relied upon by the prosecution?

8. Meenan J. took the view that there was no legal authority for establishing an intermediate database. His reasoning was, firstly, that if there was such authority then the provisions of the 2014 Act establishing DNA database would have been unnecessary, secondly by analysis of s. 7 (“Transitional Provisions”) and, thirdly, those of s. 61(pertaining to what is described as the “Crime Scene Index”). He did not need to reach any view about whether or not it was lawful before the entry into force of the 2014 Act to generate a profile as that point did not arise.

9. The intermediate database, so called, was obviously non-statutory and whilst it was, as I understand, constituted by information retained on computer it might equally have been so constituted by, say, a card index or some other means of keeping records. Furthermore, it is difficult to see the distinction in legal principle between the retention of records of one profile or a larger number. It was contended also, at least here, that the generation of a profile itself (and presumably also the extraction of DNA) from the blood sample was also unlawful as done without authority ,at least for the purpose of entering it on the intermediate database. It does not seem to be in debate but that the contents of that intermediate database (including as it did the profile relevant to this case) was transferred to and became part of one of the database maintained under the 2014 Act by FSI. The (old) laboratory was not, of course, a statutory body.

10. As to the proposition that if there was authority to establish an intermediate database then the provisions of the 2014 act establishing a DNA Database system would have been unnecessary it does not follow by any means that because the 2014 act mandated the creation of a statutory DNA database system there was no power prior to such statute to establish one: statutory intervention has often taken place even if some pre-existing power existed or to place organisations on a statutory footing. It simply does not assist one way or another in deciding the issue.

11. The laboratory itself even though a non-statutory body jealously guarded its independence before the establishment of FSI. It routinely conducted analysis or undertook forensic tests or investigations though there was no express power to that effect and, in particular (in the present context), to extract DNA and generate profiles generally; as far as I know there could be no question but that its activities were lawful. Effectively the laboratory, in practice, acted as experts for the assistance of *inter alia* An Garda Síochána in the investigation and prosecution of crime. Any suggestion accordingly that in law there was any inhibition from, say, extracting DNA from crime scene samples and generating DNA profiles without statutory authority is in my view untenable; the logic of the respondent would have excluded all of the normal, day-to-day activities of the laboratory for which there was no statutory basis either. Was it lawful to establish or maintain a non-statutory database of profiles in anticipation of the entry into force of the act and for ultimate inclusion in the new database system? If it was lawful, as I hold it was, to generate a profile what was to be done with it? What occurred was that the laboratory established such a database of the fruits of their DNA profiling and I cannot see any inhibition in law on that course – a statute was simply not required merely to permit it to do so; ultimately it was a mere record maintained for a perfectly legitimate purpose.

12. Meenan J. considered also S.7 (3), a “transitional provision”, which is as follows:-

“A DNA profile of a person generated from a bodily sample taken from the person before the commencement of this section under the Act of 1990 [the Criminal Justice (Forensic Evidence) Act, 1990] may, subject to ss. (4) [not relevant] be entered in the reference index of the DNA database system irrespective of whether the DNA profile of the person is generated from that sample before or after such commencement [i.e. commencement of the relevant part of the 2014 Act].”

Since the bodily sample in question here is a crime scene sample as defined rather than one taken from a person under the 1990 Act I do not think that this provision is relevant: it tells us nothing about crime scene samples or their entry into databases. The fact that under the rubric of a transitional provision express provision is made in relation to samples taken by the gardaí from individuals(almost invariably suspects) either pursuant to statute or voluntarily does not mean that in the absence of a transitional provision in respect of profiles ultimately generated (before or after the Act’s entry into force) from crime scene samples (a quite different thing) obtained before the act’s entry into force there is no power to so generate, retain and enter them in an intermediate database or that created under statute.

13. What is, in effect, a further transitional provision is contained in s. 61(1) and this is relevant to the inclusion of the profile from the intermediate database in that established under statute;this is to the following effect: -

“The Crime Scene Index in the Investigation Division of the DNA Database System (in this part called the “Crime Scene Index”) shall comprise the DNA profile of persons generated from samples of biological material found at, or

recovered from, a crime scene whether before or after the commencement of this section, and ...”

One must bear in mind that the defendant/respondent’s proposition in substance amounts to is this: one can take the sample from the crime scene and retain it, extract DNA and generate a profile and enter it into the statutory database if, but only if, the DNA is extracted or profile generated after the commencement of the act but not before. The respondent freely accepts that if DNA could be extracted a second time after the entry into force of the act and any profile thereby obtained could be entered into the statutory database: it is all a question of timing so far as the respondent is concerned. The defendant/respondent is effectively saying that there is a lacuna in the Act giving rise to what I would have thought was quite an absurd position – if the timing was wrong then an uncovenanted bonus would be granted to that class of person whose DNA could not be extracted from a crime scene sample a second time for scientific or technical reasons (say, due to the small quantity of material available).

14. Meenan J.’s decision in this connection was also based on his interpretation of s. 61(1). He took the view that –

“the wording of s. 61 provides that the DNA database comprises of DNA profiles ... generated from samples found or recovered before or after the commencement. This means that the DNA profile must be generated after the commencement of the Act of 2014, ... profiles may be generated from samples of biological material found or recovered before or after the commencement. The words “whether before or after the commencement” refer to samples of biological material, not DNA profiles.

15. I do not agree with his interpretation of this provision. The relevant part of the database (in this instance the “Crime Scene Index”) is described as comprising DNA **profiles** [my emphasis] which are generated from samples of biological material. The reference to such material found at or recovered from a crime scene “whether before or after the commencement of this section ...” is referable to that which is recovered and not the DNA profile ultimately generated from it.

16. Indeed, the Crime Scene Index as ultimately constituted **must** include DNA profiles generated from crime scene samples recovered before the Act’s commencement: there is simply no choice but to include them – at one level that is the end of the matter. One might add that the provision must be read to give effect to the intention of the Act when taken as a whole to create – indeed to mandate the creation of - a database of profiles from *inter alia* crime scene samples recovered including crime scene samples recovered before commencement. I do not think that this aim would be served, nor intended by the legislature, if it was not permissible to include DNA profiles generated prior to commencement but would permit the user of the samples themselves to generate DNA (perhaps for a second time) after the commencement. What happened in the meantime to the profile (i.e. that it was placed in or on an intermediate database) cannot be relevant.

17. The practice of the Forensic Science Laboratory prior to the commencement [of the relevant provisions] of the 2014 Act was not to generate DNA profiles from crime scene samples unless a suspected offender had been nominated by the Gardaí. Counsel for the defendant/respondent suggests that this was, or at least may, have been the case because there was no legal basis which permitted the laboratory extracting DNA and generating profiles from such samples prior to the commencement of the relevant provisions of the

2014 Act. I cannot see any basis for that speculation – for reasons in respect of which there is no evidence this was simply the fact. It is not accordingly of any relevance.

18. Counsel for the defendant/respondent also submitted that (to quote his written submissions) “... *the Attorney General made a reference pursuant to 4 (two) of the Law reform commission act 1975 requesting that the commission consider whether a DNA database should be established. The Law reform commission was asked to assess the constitutional and human rights issues associated with the establishment of DNA database. It seems extraordinary that the Attorney General should make such reference if it were the case that such databases were lawful and absent express statutory provisions*”; I cannot agree that this is so; on many occasions even where statutory provision exists, to a greater or lesser extent, in respect of a given matter the commission has been asked to report and there was certainly nothing to suggest that the reference, nor indeed, as far as I can see, the consultation document (published in 2004) or the report itself opens for debate the issue of lawfulness.

19. The question of admissibility then arises: as indicated above at paragraph XXX the issue is not whether what might be described as the record of the profile on the statutory database is admitted – no one has suggested that; the question is whether or not evidence to the effect that the DNA profile obtained from the crime scene sample is the same as that obtained from the sample taken from the respondent when in custody. I cannot see, again as indicated above, any question as to the admissibility of that evidence could arise as a matter of legal principle by virtue of when the DNA was extracted and the profile generated whether or not it was placed on either or both databases. In any event I am of the view that it was lawful to generate the profile, to place that a profile on the intermediate

database for the purpose of using its contents or transferring its contents to the statutory database when established and thereafter so transferring it.

20. I expressed surprise at the hearing that the Data Protection Acts 1988 to 2003 were considered relevant, and not indeed just because the issue was not raised on behalf of the appellant in the trial court. Objection was taken by the Respondent to the introduction of the matter on this basis but he now relies upon them to a degree. We consider that arguments based upon the can be introduced on their merits by virtue of the rule in *Lough Swilly Shellfish Growers Co-Op and Ors . v. Bradley and Ors.* [2013]1 IR 227 . I feared that perhaps an unnecessary complexity was being injected into the matter by canvassing issues pertaining to them. Those statutes regulated the control or processing of personal data (to put the matter shortly); they imposed no explicit prohibition on the creation of a database such as the intermediate database. The appellant raised them only for the purpose of saying that the information in question on that database was not personal data as defined by them (that is to say that they were not engaged). In his replying submissions the defendant /respondent disputed that. He elaborated on a number of the obligations imposed by them on data controllers or processors. He said that –

“... The respondent has not sought to answer any arguments in respect of his personal rights. Rather, it is contended that the operation of an “intermediate database” was unlawful because it was unregulated, not provided for by law and established on foot of an ad hoc arrangement without any safeguarding measures to ensure that the doubted therein was processed fairly, operated for specified purposes or some other legitimate basis prescribed by law”

21. In truth if the statutes were applicable, as the respondent now contends ,notwithstanding his objection, the intermediate database was subject to regulation

including so-called “safeguarding measures to ensure that the data therein was processed fairly” and it “operated” for specified purposes (the creation of the statutory database).

22. In oral submissions – and this was a new submission triggered one assumes by the introduction of data protection issues into the case – counsel said that the creation of the intermediate database was unlawful by virtue of those statutes; he thus sought to rely upon them to advance his contention of unlawfulness having opposed the appellant’s entitlement to raise them at all ; on any view this proposition cannot be correct even if they apply since they impose obligations and otherwise regulate – they do not prohibit. It appears that it was also conceived by him (as appears from his written submissions) that the appellant might seek to justify the lawfulness of that database “by way of derogation or exception to the general principles contained in the absent 1988 and 2003 where the basis for intermediate DNA database, derogation and/or exception is not provided by law” although nothing was said in the appellant’s submissions to that effect and no such argument was advanced.

23. More to the point what this court has been asked to do here is decide on the application of statutes which were repealed to a database which does not exist in circumstances where no illegality otherwise arises – a moot if ever there was one. Their relevance on any view is well and truly spent if they ever had any.

24. I would accordingly answer the questions asked in the following way: -

Question One – Prior to the enactment of the Criminal Justice (Forensic Evidence and DNA Database System) Act, 2004 was it lawful to generate, retain and/or enter a DNA profile onto a database in the manner outlined in this case?

Yes.

Question 2 – Was it lawful for a DNA profile from the “relevant sample” [the crime scene sample] that is in issue here, to be included in the DNA database after the enactment of the 2014 Act?

Yes

Question 3 – Is evidence of the match between the DNA profile taken from the relevant sample prior to the enactment of the 2014 Act (*sic*) and the profile lawfully taken from (the) sample after that enactment, admissible?

Yes.

Question 4 – In the light of the foregoing, in the instant case, am I entitled to admit the DNA evidence being relied upon by the prosecution?

Yes.

25. I would accordingly allow this appeal. My colleagues Birmingham P. and Kennedy J. have authorised me to say that they concur in this judgment.