

THE HIGH COURT

[2019 No. 554 SS]

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

BETWEEN

**DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF GARDA DAVID COSTIGAN)**

PROSECUTOR

**AND
JOHN MAHER**

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 3rd day of March, 2020

1. This is a case stated by a judge of the District Court pursuant to s. 52(1) of the Courts (Supplemental Provisions) Act, 1961 for the opinion of this Court.
2. At a sitting of the Dublin Metropolitan District Court, the defendant appeared to answer a charge that alleged an offence of burglary, contrary to ss. 12(1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act, 2001. The matter was listed on 8 October 2018 and on a number of dates up to, and including, 15 November 2018.
3. The following facts have been proved or admitted or otherwise established by the District Court: -
 - (i) At some time on 12 November 2010, a burglary occurred at Keeper Road, Drimnagh, Dublin 12 at approximately 21:00 hours on that date. The crime scene was visited by Garda David Costigan, who in turn requested the assistance of a garda "*scenes of crime examiner*" to conduct a technical examination of the locus;
 - (ii) No measures were employed by members of An Garda Síochána to preserve the crime scene between 12 November 2010 and 13 November 2010, and no evidence was adduced in relation to the persons who had access to the house at Keeper Road, Drimnagh, Dublin 12 between those two dates;
 - (iii) On 13 November 2010, during the course of his scenes of crime examination, Garda Declan Whelan took a swab from blood that he detected in a bedroom of the said house for the purpose of further forensic analysis (hereinafter referred to as the "*relevant sample*");
 - (iv) The relevant sample was taken by Garda Walsh and stored in Crumlin Garda Station between 13 November 2010 and 29 April 2013;
 - (v) On 29 April 2013, pursuant to the direction of Sergeant John Schley, the relevant sample was taken to Forensic Science Ireland ("*FSI*") for the purposes of generating a DNA profile. Sergeant Schley is a member of the Garda Síochána divisional crime scene investigation unit with responsibility for the monitoring and storage of DNA samples from crime scenes;

- (vi) The relevant sample was transmitted to FSI, as aforesaid, arising from a verbal agreement between Sergeant Schley and Dr. Maureen Smith, of FSI, wherein FSI agreed to generate a DNA profile. The agreement between Sergeant Schley and Dr. Smith was a departure from the previous policy of FSI whereby DNA profiles would not be generated from crime scene samples unless a suspected offender had been nominated by An Garda Síochána. Since the agreement was not reduced to writing there is no written record available, but the District Court was informed that the agreement was made in anticipation of the introduction of the Criminal Justice (Forensic Evidence and DNA Database System) Act, 2014 (the Act of 2014). Garda Schley testified that samples were submitted to FSI to avoid flooding the system with large quantities of samples after the Act of 2014 came into force;
 - (vii) The relevant sample, the subject matter of the charge sheet, was one of hundreds of such samples that were transferred from Crumlin Garda Station to FSI during the course of 2013. The prosecution described the retention and databasing of this cohort of DNA profiles as "*an intermediate database*" created by FSI to prepare for the introduction of the Act of 2014;
 - (viii) On or about 16 May 2013, FSI generated a DNA profile from the relevant sample and entered that profile onto the "*intermediate database*";
 - (ix) On an unestablished date, a bodily sample taken from the defendant herein was entered onto the "*reference index*" of the DNA database. The prosecution had been unable to establish the surrounding circumstances for the taking of that sample, or whether it was taken after the commencement of the Act of 2014. On or about 22 June 2016, Garda Costigan received a report from FSI indicating that the relevant sample, taken from the scene at Keeper Road, Drimnagh, Dublin 12 on 13 November 2010, matched that bodily sample taken from the defendant;
 - (x) On 12 September 2016, the defendant was arrested and detained pursuant to s. 4 of the Criminal Justice Act, 1984 for the proper investigation of the said burglary offence which he was then suspected of. During the course of his detention, an evidential sample of DNA was taken from him. The defence have not challenged the manner in which this latter evidential sample of DNA was taken; and
 - (xi) Based on the evidence of June Kenna of FSI, the District Judge was satisfied that the defendant's DNA, as taken from him during his detention on 12 September 2016, matches the relevant sample of DNA recovered at the crime scene at Keeper Road, Drimnagh, Dublin 12 on 13 November 2010.
4. At the close of the prosecution case, counsel for the defendant applied for a dismissal of the charge contending, *inter alia*, that the DNA evidence relied upon by the prosecution was inadmissible. Counsel submitted that there was no legal authority for the maintenance of an "*intermediate database*" prior to the introduction of the Act of 2014 and that the applicable statutory powers for the generation and databasing of DNA

samples only came into force on 15 November 2015 upon the commencement of the relevant part of the Act of 2014.

5. Having heard submissions from the prosecutor and the defendant, the District Judge referred the following questions to this Court for determination: -
 - (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 sample after that enactment admissible?; and
 - (iv) In light of the foregoing, is the District Judge entitled to admit the DNA evidence being relied upon by the prosecution?

Provisions of the Act of 2014

6. To answer these questions, the Court must examine the provisions of the Act of 2014. To my mind, the following are the relevant provisions.

7. The long title to the Act of 2014 includes the following: -

"... to provide for the establishment and operation by Forensic Science Ireland of the Department of Justice and Equality of DNA Database System; to provide for the taking of certain bodily samples from persons suspected or convicted of certain criminal offences for the purpose of generating DNA profiles in respect of those persons to be entered in the investigation division of the DNA Database System; ..."

8. Section 7, entitled "*Transitional provisions*", provides: -

"7(1) ...

(2)

(3) *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 may, subject to subsection (4), 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. ..."*

9. Section 59 provides: -

- "(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 2 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 indexes of DNA profiles and information that may be used to identify the person from whose biological material each DNA profile was generated:*
- (a) *the crime scene index;*
- (b) *...*
- (c) *..."*

10. Section 61 provides: -

- "(1) *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 profiles 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 ..."*

Consideration of issues

11. One of the purposes of the Act of 2014 was to provide for the establishment and operation of a DNA Database System. The District Judge found that the relevant sample was transferred from Crumlin Garda Station to FSI during 2013. The prosecutor described the retention and databasing of this cohort of DNA profiles as "*an intermediate database*" created by FSI to prepare for the introduction of the Act of 2014. This arrangement appears to have superseded what was the previous practice of FSI whereby DNA profiles would not be generated from crime scene samples unless a suspected offender had been nominated by An Garda Síochána. It seems to me that there is no legal authority for establishing "*an intermediate database*". If there was such an authority, then the provision in the Act of 2014 establishing a DNA Database System would have been unnecessary.
12. I am confirmed in my view, set out in the previous paragraph, by the provisions of the Act of 2014 which I have referred to. The "*Transitional provisions*" set out in s. 7(3) refer to a DNA profile of a person generated from a bodily sample taken from a person under the Act of 1990 before the commencement of the Act of 2014. Such a profile may be entered into the reference index of the DNA Database System irrespective of whether the DNA

profile of the person was generated from that sample before or after such commencement. In this case, the bodily sample was not taken from a person under the Act of 1990 (Criminal Justice (Forensic Evidence) Act, 1990).

13. Section 61 of the Act of 2014 refers to the "*crime scene index*" of the DNA Database. It comprises of DNA profiles of persons: -

"(1) generated from samples of biological material found at, or recovered from, a crime scene whether before or after the commencement of this section ..."

14. The prosecutor submits that the correct interpretation of this provision is that the DNA Database established by the Act of 2014 includes DNA profiles generated before the commencement of the Act. I do not agree with this. In my view, the wording of s. 61 provides that the DNA Database comprises of DNA profiles of persons 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, but such profile 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. It should be noted that it would have been permissible for the prosecutor to generate a DNA profile after the commencement of the Act of 2014 from samples taken from the crime scene in 2010. Had this been done, the issue would not have arisen.

16. By reason of the foregoing, the answer to questions (i) and (ii) is "*no*".

17. In answer to questions (iii) and (iv), I accept the submissions of the defendant that the admissibility of the DNA evidence is a matter that should be determined by the trial judge.

Conclusion

18. The answers to the questions posed by the District Judge are as follows: -

- (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? – answer – "*no*".
- (ii) Was it lawful for the 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? – answer – "*no*".
- (iii) Is evidence of the match between the DNA profile taken from the relevant sample prior to the enactment of Act of 2014 and the profile lawfully taken from sample after that enactment, admissible? – answer – "*this is a matter for the trial judge to determine*".

- (iv) In light of the foregoing, is the District Judge entitled to admit the DNA evidence being relied upon by the prosecution? – answer – *“this is a matter for the trial judge to determine”*.