Neutral citation no. [2005] IEHC 77

THE HIGH COURT

2004 No. 1243 SS

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857 AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECTUIONS

PROSECUTOR/ APPELLANT

AND
BRENDAN WALSH

ACCUSED/RESPONDENT

Judgment delivered by Mrs. Justice Macken on the 16th day of March 2005

1. This is a case stated by District Justice William Hamill of the District Court Dublin Metropolitan District, pursuant to s. 2 of the Summary Jurisdiction Act, 1857 as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961, on the application in writing of the Prosecutor/Appellant who was dissatisfied with the determination of the District Justice as being erroneous in point of law. The Case Stated seeks the opinion of the High Court as to whether he was correct in law to dismiss a charge against the respondent on a prosecution arising out of the following sequence of events.

2. At a sitting of the District Court at Dun Laoghaire Co. Dublin on 25th November, 2002, Brendan Walsh, the respondent appeared to answer seven complaints the subject of seven summonses served on him, all involving motoring offences of one type or another. Only one of those summonses is germane to the subject matter of the case stated.

3. According to the case stated, the respondent was charged, *inter alia*, that on 21st April, 2001 at N11, Stillorgan Road, Co. Dublin, a public place in the Dublin Metropolitan District, he drove a mechanically propelled vehicle registered number … while there was present in his body a quantity of alcohol such that, within three hours after so driving, the concentration of alcohol in his breath exceeded a concentration of 35 micrograms of alcohol per 100 millilitres of breath, 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.

4. The relevant facts proved or admitted or agreed and as found by the District Justice, according to the case stated, are the following:

> 1. At 1.24 am (on 21st April, 2001), Garda O'Grady arrested the respondent under s. 49(8) of the Road Traffic Act, 1961-1995 for having committed an offence under s. 49(1) (2) (3) or (4) of that Act, and informed him that he was arresting him for drunk driving.
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> 2. Garda O'Grady then conveyed the respondent to Dun Laoghaire Garda Station in the Garda patrol vehicle, arriving at 1.45 am. On arrival at Dun Laoghaire Garda Station, Garda O'Grady introduced the respondent to the Member-in-Charge, Garda Francis Byrne. In Garda O'Grady's presence, Garda Byrne complied with the provisions of regulation 8(1) of the Treatment of Persons in Custody in Garda Siochana Stations Regulations, 1987 and gave the respondent a copy of his Notice of Rights. The Respondent understood his rights and did not request a Solicitor. At 1.47 a.m. Garda O'Grady accompanied the Respondent to the interview room at Dun Laoghaire Garda Station. Garda O'Grady remained in the interview room, observing the respondent until 2.06 a.m.. During that time, the respondent consumed nothing by mouth.
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> 3. Garda Martha McEnery was present at Dun Laoghaire Garda Station when the Respondent arrived there at 1.45 a.m. on 21st April, 2001, having been arrested by Garda O'Grady for drunk driving. Garda McEnery observed the respondent in the interview room at Dun Laoghaire Garda Station between 1.47 a.m. and 2.06 a.m.. During that time the respondent consumed nothing by mouth. At 2.06 a.m. Garda McEnery took the respondent to the doctor's room at Dun Laoghaire Garda Station for the purposes of carrying out an evidential breath test on the Intoximeter EC/IR. Garda McEnery formed the opinion that the respondent had consumed an intoxicant by reason of her observation that there was a strong smell of intoxicating liquor from his breath and his eyes were bloodshot.
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> 1. Garda McEnery then made a requirement of the respondent to provide two specimens of his breath pursuant to s. 13(1) (a) of the Road Traffic Act, 1994. She informed the respondent that failure or refusal to comply with this requirement in the manner described was an offence contrary to s. 13(2) of the Road Traffic Act, 1994 and outlined the penalties to him. The respondent indicated that he understood the requirement.
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> 2. Garda McEnery observed the relative temperature and humidity of the room from the thermohygrometer and noted those details in her notebook. She proceeded to type the respondent's name and address into the Intoximeter EC/IR. She removed a mouthpiece from a sealed bag, and placed it on the blowing tube. She then outlined to the respondent the manner in which he was to provide two specimens of his breath.
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> 3. At 2.11 a.m. and 2.14 a.m. respectively the respondent provided two specimens of breath in compliance with the requirement administered to him. The Intoximeter EC/IR produced two statements, disclosing the presence of 65 micrograms of alcohol per 100 millilitres of breath. Garda McEnery signed both statements, before making a requirement of the respondent under s. 17(4) of the Road Traffic Act, 1994 to sign the two statements, explaining to him the penalties for failing to do so. The respondent duly signed both, one of which he returned to Garda McEnery.

5. According to the case stated, at the conclusion of the evidence, counsel for the respondent, as accused, submitted that there was no evidence before the court that the respondent had been observed for 20 minutes prior to the requirement made of him to provide two specimens of his breath. The requirement that a person be so observed was contained in the Garda training manual for the use of the Intoximeter EC/IR. It was further submitted that while the s. 17 certificate indicated that the Intoximeter EC/IR had commenced operation at 2.08 a.m. on the relevant date, there was no evidence before the court that any member of An Garda Síochána had observed the respondent between 2.06 a.m. and 2.08 a.m.. It is my understanding that the entire of this paragraph in the case stated reflects the argument made by on behalf of the respondent, and not any findings of fact by the District Justice.

6. Again according to the case stated, it was submitted on behalf of the prosecutor, in response, that in the absence of any evidence regarding the status of the Garda training manual, no conclusions could be drawn as a result of any alleged non-compliance with the procedures laid down therein, that compliance with any such procedures was not a proof required by statute and therefore

the prosecution was not required to give evidence of any such compliance in order to succeed in establishing that the respondent had committed the offence with which he had been charged. If the respondent/accused had wished to challenge the validity of the procedures adopted on the occasion in question, that should have been done by way of cross-examination and/or by adducing evidence for that purpose.

7. Mr. Horgan, for the prosecutor, also invoked the provisions of s. 21(1) of the Road Traffic Act, 1994 concerning the status of a duly completed statement made under s. 17 of the said Act.

8. District Justice Hamill in the Case Stated notes that, having reserved his decision on the charge under s. 49(4) of the road Traffic Act, 1961, as amended, he delivered his ruling on 28th November, 2002. He found that although Garda O'Grady had observed the respondent/accused for a period of 20 minutes, there was no evidence before him that the respondent had been observed for a continuous period of 20 minutes immediately prior to his providing specimens of his breath to the Intoximeter EC/IR. The absence of such evidence, and therefore of compliance with the procedures laid down in the Garda training manual, was fatal to the prosecution case. For that reason the District Justice had dismissed the charge against the respondent.

9. District Justice Hamill requests the opinion of this court as to whether he was correct in law in dismissing the said charge.

Legal Submissions
10. Ms. McDonagh, B.L. on behalf of the appellant argued that this case concerns a very discrete matter which only involves what happened in the Garda Station. She noted that there had been no cross-examination of the garda during the course of the case, and no evidence had been adduced on behalf of the respondent, as accused. The case had proceeded therefore on the basis of a series of statutory presumptions, which, if they were to be challenged, must be done by means of cross-examination and/or by adducing evidence. There was, Ms. McDonagh said, no Garda training manual in court, it had not been produced, and therefore there was no evidence before the District Justice concerning either its status or its content.

11. As to the presumptions operating in the case of charges of drunk driving, she cited s. 17, 20 and 21 of the Act of 1994. In the present case, she submitted that there was no dispute but that a duly completed statement made in accordance with s. 17 was furnished. The only issue was whether the respondent had been observed for a continuous period of twenty minutes prior to submitting to the breath test required under s. 13 of the said Act .

12. It may well be, she contended, that the content of the Garda manual includes a statement of good practice, a type of double protection, but nevertheless such a practice cannot be invoked, and certainly not without that practice having been proved in evidence, to amend or alter the statutory presumption as to the sufficiency of a duly completed s. 17 certificate.

13. She invoked two cases in which a twenty minute practice had been considered. In the first of these, Director of Public Prosecutions v. Finn (2003) 1 I.R. 372 the question arose as to whether a period of twenty seven minutes, which included an observation period of 20 minutes, was inconsistent with the requirement at law that the accused be charged as soon as reasonably possible. That clearly was not relevant to the issue in the present case.

14. In the case of *Director of Public Prosecution v. McNiece* [2003] 2 I.R. 614 there was evidence that an observation period of twenty minutes could be objectively justified. Neither case she said was of real assistance, however, since the basis of the appellant's submission here is that the garda was not cross-examined and there was no evidence adduced as to any requirement for a continuous twenty minute period of observation.

15. Relying on the case of *D.P.P. v. Walsh* [1985] I.L.R.M. 243, she said it was clear in this case that all the necessary ingredients had been proved, and therefore the District Justice was not entitled to dismiss the charge.

16. For the respondent/accused, Mr. Sutton B.L. submitted that, this being a case stated, the District Justice had considered the matter to be of importance, as had the Supreme Court in the case *of D.P.P. v. McNiece,* supra. He submitted that it flows from this latter case that the twenty minute observation period has been given force of law, as being the minimum period now required for a proper evaluation of the breath specimen readings taken pursuant to s. 13 of the Act of 1994.

17. Mr. Sutton submitted that the District Justice had found as a matter of fact that observation for a continuous period of twenty minutes did not occur in the present case, and he submitted that the judge was correct in so doing. He argued that the two cases, *D.P.P. v. Finn* and *D.P.P. v. McNiece* established that the garda manual is the basis for the compulsory twenty minute period in question.

18. As to the presumptions invoked by the prosecutor, counsel submitted that if the prosecutor adduced evidence, as here, that the respondent had been observed for specified periods of time, he cannot then be heard to say that the practice which governs the period of observation cannot be invoked by the accused. The District Justice had in effect found the time of observation to be inadequate, and was entitled to have done so.

Conclusions
19. In this case the only issue for consideration is whether a failure to establish that an accused has been observed by a Garda Síochána for a continuous period of twenty minutes immediately prior to being breath tested by means of an Intoxilyser apparatus is fatal to the success of a prosecution brought pursuant to s. 49(4) of the Road Traffic Act, 1961 as amended by the Road Traffic Act, 1994.

20. Section 13(1) of the Act of 1994 obliges a person who is arrested, inter alia, under s. 49(8) of the Act of 1961, as was the case here, to provide two specimens of his breath in a manner which may also be indicated. The subsection reads as follows, in its relevant parts:

> "13.-(1) Where a person is arrested under s. 49(8) … of the Principal Act … a member of the Garda Síochána may, at a Garda Síochána station, at his discretion, do either or both of the following -
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> (a) require the person to provide, by exhaling into an apparatus for determining the concentration of alcohol in the breath, 2 specimens of his breath and may indicate the manner in which he is to comply with the requirement.
>
> … ."

21. Further, s. 17 of the same provides as follows:

"17.-(1) Where, consequent on a requirement under s. 13 (1)(a) of him, a person provides 2 specimens of his breath and the apparatus referred to in that s. determines the concentration of alcohol in each specimen –

(a) in case the apparatus determines that each specimen has the same concentration of alcohol, either specimen, and

(b) in case the apparatus determines that each specimen has a different concentration of alcohol, the specimen with the lower concentration of alcohol, shall be taken into account for the purposes of s. 49(4) and s. 50(4) of the Principal Act and the other specimen shall be disregarded."

(2) Where the apparatus referred to in s. 13(1) determines that in respect of the specimen of breath to be taken into account as aforesaid the person may have contravened s. 49(4) or s. 50(4) of the Principal Act, he shall be supplied forthwith by a member of the Garda Síochána with 2 identical statements, automatically produced by the said apparatus in the prescribed form and duly completed by the member in the prescribed manner, stating the concentration of alcohol in the said specimen determined by the said apparatus.

(3) On receipt of the statements aforesaid, the person shall on being requested so to do by the member aforesaid –

(a) forthwith acknowledge such receipt by placing his signature on each statement, and

(b) thereupon return either of the statements to the member

… .

(5) Section 21(1) shall apply to a statement under this section as respects which there has been a failure to comply with subs. (3)(a) as it applies to a duly completed statement under this section."

22. Section 20 of the Act of 1994 makes it clear that it is not necessary to show that the defendant had not consumed intoxicating liquor after the time when the offence is alleged to have been committed but before the taking or provision of a specimen under, *inter alia*, s. 13.

23. Section 21 of the Act of 1994 reads as follows:

"21.-(1) A duly completed statement purporting to have been supplied under s. 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 …"

24. It follows from the foregoing that, absent any contrary evidence, a duly completed statement made pursuant to s. 17(2) of the Act of 1994 is sufficient evidence of the facts stated in it. If therefore a District Justice has before him, as he clearly did in the present case, a statement made under s. 17(2) which contains a fact indicative of an alcohol level above the permitted legal level, that fact is sufficiently established in law so as to permit a district justice convict on the charge in question.

25. The real issue is whether, in the present case, the District Justice was entitled to acquit the respondent, having regard to the state of the evidence concerning the events leading up to the making of that statement.

26. I do not consider that the case of *D.P.P. v. Finn* supra is of particular assistance in resolving the issue before me. As is clear from the various judgments it concerned a case, not on the issue of a minimum period of observation of twenty minutes, but rather as to whether a longer period of time which had elapsed, which happened also to include a period of observation, was lawful. The case is, however, helpful in that the court made it clear that evidence had been tendered at least as to the existence and content of the Garda Manual in which the observation procedure invoked was then contained, although not as to the reasons for the same. In the judgment of Murray, J.(as he then was) he stated:

"In my view, the facts found by the learned Circuit Court Judge demonstrate that what is involved here is the introduction of a discrete and defined minimum period of detention, for a forensic purpose, to be observed as a matter of practice in every case in which a person is arrested under s. 13(1)(a) of the Road Traffic Act, 1994 with a view to requiring him or her to provide specimens of breath. This was not so much delay as the observance of a pre-established practice according to which there is inserted a discrete period of detention between the arrival of the arrested person at the garda station and the taking of samples. It is a prescribed and conscious prolongation of an arrested person's period of detention in all such cases".

27. In the same judgment, Murray, J. also stated:

"If it had been objectively established, to the satisfaction of the learned Circuit Court judge that, for example, the procedure of observation for a stipulated period was reasonably necessary for the purpose of taking proper or reliable samples of breath (the purpose of the detention), then in my view, that procedure would not have rendered the defendant's detention unlawful… .

However, that was not the case. All that was established before the learned Circuit Court Judge was that Garda Síochána Guidelines which apply to a person arrested in the circumstances of the defendant required his observation for the purposes and period outlined above. There was no evidence before the Circuit Court which would permit the Circuit Court judge to conclude that the procedure involved was reasonably necessary for the purpose of achieving the objective of the arrest, namely the taking of samples of breath.

In my view, if the procedure according to which an arrested person must be observed for twenty minutes is capable of being justified, it must be justified by a competent witness who can give appropriate evidence. … .

Neither do I think that such procedural steps, if thus objectively justified, require to be authorised by statute or statutory

> regulations in order to be lawful, provided they are shown on the evidence to be reasonably necessary in order to give effect to the purpose for which the arrest was authorised by law in the first place."

28. Finally, I should note that both Murray, J. and Hardiman, J. indicated clearly that that case fell to be decided on its own particular facts.

29. The next case in which the question of a twenty minute period of observation was considered, is the case of *D.P.P. v. McNiece,* supra., again a decision of the Supreme Court, in which the question at issue was whether there was sufficient evidence existing before the Circuit Court judge to establish that it was lawful to detain the accused for observation for a period of approximately twenty minutes prior to the requirement to provide the breath specimens provided for under s. 13 of the Act of 1994. While the particular question was framed thus, the case is however closer to that arising in the present case stated, since the issue of observation for a twenty minute period was under consideration.

30. What is very clear from that case is that there was quite extensive evidence before the trial judge from which the judge could come to the view that the period of observation in issue was justified. There was evidence given by a garda as to his qualification to operate the apparatus in question, as to his training in the same and as to the guidelines provided to him during a training course on the appropriate procedures to be followed. There was additional evidence from the chief analyst of the Medical Bureau of Road Safety on the reasons for the observation period, on the existence of an international practice of observation for a period of fifteen to twenty minutes, on the choice of a period of twenty minutes, and on scientific publications concerning the same subject matter.

31. In his judgment, Murray J., referring to the earlier case of *D.P.P. v. Finn* stated:

> "It was the absence of any evidence capable of proving an objective justification for the observation period of twenty minutes which led to my conclusion, on the facts of that case, that the prosecution had not discharged the onus on it of justifying the detention in law and that therefore it must be considered to have been unlawful."

32. And he further cited an extract from the judgment of Hardiman, J. in the same case and essentially to the same effect, that is to say, that there was a lack of sufficient evidence to permit the Circuit Court Judge in that case to draw a conclusion that a twenty minute interval was reasonably necessary to achieve the statutory purpose of detention.

33. Murray, J. accepted that the evidence in the case of *D.P.P. v. McNiece* was such as to permit the Circuit Court Judge to find that the observation period in question was reasonably necessary in order to take effective or reliable samples of his breath. And he also stated:

> "In my view, the adoption by the State of a practice designed to ensure an effective and valid breath test when the requirement is first made rather than adopting a trial and error approach does not render unlawful the custody of the person concerned during that initial twenty minute period of observation. It is not in question that the garda member was entitled to require the arrested person to provide breath samples. I cannot see that there is anything unlawful or oppressive in adopting procedures to ensure that when that test is taken or, if one wishes, taken for the first time, it is effective and reliable. Indeed the State could be more readily criticised in my view if it did not follow accepted procedures necessary to ensure an effective and valid result in each case when the intoxilyser is used."

34. It seems to me that I can draw considerable assistance from this latter case. First it is clear that a twenty minute observation period was, on the basis of the evidence before the Circuit Court, justifiable and justified, the reasons for this having been established through the evidence of a garda and an expert analyst. It may also be understood from the case that, at least at the time the evidence was given before the Circuit Court, the practice followed was to observe a person for a period of twenty minutes, it being clear from the evidence that at that time it was international best practice to do so for a period of fifteen or twenty minutes, and the latter period had been accepted as the appropriate one, in the jurisdiction, according to the evidence tendered.

35. It is clear from that case also that the practice was followed because it was provided for in a training manual furnished to the garda as part of his training in the use of the apparatus, and he handed that manual into court. There was therefore a clear basis, on the evidence, from which the practice could be justified.

36. It seems to me that the correct conclusion to be drawn from the case of *D.P.P. v. McNiece* is that there was, at time of the events in that case, evidence of an international best practice requiring an observation period of a certain duration. It seems to me also that such an international practice, if adopted at national level, is perfectly justifiable, having regard to the latter judgment. I am satisfied also that if the prosecution relies in the course of its own evidence in the case on the existence of and/or of the reasons for such a practice, it is not necessary that the formal source of that practice, for example, a garda manual, must then be proved in evidence by an accused who wishes to challenge the existence of or non compliance with that very practice invoked.

37. In the present case, according to the case stated, evidence was given that a twenty minute period of observation had occurred, but not a continuous period of twenty minutes immediately prior to the respondent being required to comply with s. 13 of the Act of 1994. What is also clear, and was not contested by the respondent, is Ms. McDonagh's submission that there was no cross-examination of the garda in question, no garda manual was produced in evidence by any party, and there was no independent evidence adduced on behalf of the accused in relation to the observation period.

38. While it is true that the times of arrest, charge, arrival at the garda station and observation periods were recorded, it is nowhere evident from the case stated that the prosecution relied on the existence of any given period of observation for the purpose of establishing any fact, or for the purposes of establishing that any practice had been complied with, or for the purposes of establishing that the facts contained in the s. 17(2) statement, in respect of which the statutory presumption operates, were more reliable than they would otherwise have been, by reason of any invoked period of observation. Nor does the case stated refer to any garda manual being produced in court, nor to evidence having been adduced by the prosecution as to any existing practice, in that part of the case stated which sets out the agreed facts or facts as found.

39. I do not therefore accept the respondent's contention that the practice existing in a garda manual was sufficiently established before the District Court Justice so as to permit the respondent to rely on the existence of that practice, or on the alleged non compliance with that practice, without cross examination of any garda witness or without adducing any evidence himself in support of the same. The submission made on behalf of the respondent appears to have been confined to a claim that a twenty minute period of observation, allegedly found in a garda training manual, had not been observed.

40. It would have been possible, of course, for the respondent to have cross-examined the garda on the existence of such practice in

a garda manual and on the time requirements in relation to the same. It would have been possible for the respondent to have argued that the practice, if it had been established in evidence before the District Court, was one which required a minimum period of continuous observation, and that that requirement had not been met.

41. It would also have been possible, although perhaps more difficult, for the respondent to have adduced independent evidence of the national or international best practice in the field, for the purpose of establishing, if such be the case, that a minimum period of continuous observation is a necessary ingredient in any procedure concerning the taking of a breath specimen, quite apart from the existence or otherwise of any possible practice found in a garda manual.

42. It is not however possible to conclude from the judgment in the *D.P.P. v. McNiece*, however, that there is now in existence in this jurisdiction a legal requirement, or a practice binding on the prosecution, requiring a specified and continuous twenty minute period of observation immediately prior to the requirements under s. 13 of the Act of 1994 being imposed, or that compliance with such a requirement or practice, or with any similar or analogous practice must be established by the prosecution in all cases of drunk driving. That is not to say, of course, that if challenged, the prosecution would not have to prove, following from the logic of the judgment in the case of *D.P.P. v. McNiece*, that such a practice, or the then current practice, is indeed necessary.

43. Both the *D.P.P. v. Finn* case and the *D.P.P. v. McNiece* case are cases which were decided on the respective particular facts and evidence adduced. The international practice in terms of the necessary analysis or observation periods may be different to that which existed previously or to that which may now exist. The recommended period may be longer or even shorter. It will be recalled from the *McNiece* case that the evidence indicated an international standard of fifteen or twenty minutes, although the upper figure appeared at that time to be the one adopted in practice in this jurisdiction, at least according to the course training manual handed into court on that occasion. It would be foolhardy to speculate at this remove what practice might be proposed in a different case heard at a different time or even perhaps with different expert witnesses, absent clear evidence in the case.

44. In the event the existence and content of any such practice is not relied on by the prosecution, as was the position in the trial of the respondent, the respondent would only have been entitled to succeed on the grounds he invoked in his application for a direction, and which he now also contends for, was by establishing, in evidence, the practice which the respondent contends is determinative of the correct procedures, whether by cross-examination of the garda witnesses or independently. Since there was no such evidence adduced by the respondent and no cross examination of the garda, I conclude that the presumption established by s. 21 of the Act of 1994 concerning the facts appearing in the s. 17(2) statement was not rebutted.

45. In the foregoing circumstances, I find that the District Justice was not justified in dismissing the charge against the respondent on the basis that the prosecution had failed to establish, in accordance with the purported content of the garda training manual, that the respondent had been observed for a continuous period of twenty minutes immediately prior to providing the required breath specimens.

46. In consequence, the answer to the question posed by the District Justice is no.