Neutral Citation Number: [2008] IEHC 347

THE HIGH COURT

2008 No. 180 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 PROSECUTIONS

PROSECUTOR/RESPONDENT

AND

JONATHAN FINNEGAN

ACCUSED/APPELLANT

Judgment of Judge Maureen H. Clark delivered the 5th day of November, 2008

This is an appeal by way of case stated brought by the accused/appellant.

Background

1. Jonathan Finnegan was convicted on the 11th January 2007 by District Judge John O'Neill that he, on the 23rd July 2006, at Terenure Garda Station in the District Court area of the Dublin Metropolitan District, being a person arrested under s. 49(8) of the Road Traffic Act 1961, having been required by Sergeant Mark McKeon, a member of the Garda Síochána, at Terenure Garda Station, to provide two specimens of his breath pursuant to section 13(1)(a) of the Road Traffic Act 1994, did refuse to comply with the said requirement contrary to section 13 (2) of the Road Traffic Act, 1994 as amended by section 23 of the Road Traffic Act, 2002. Section 49 (8) of the Road Traffic Act 1961, as inserted by section 10 of the Road Traffic Act 1994 states that:

> "A member of the Garda Síochána may arrest without warrant a person who in the member's opinion is committing or has committed an offence under this section."

2. The facts leading to the conviction have been summarised by the learned District Judge. I will try and reduce the background facts to the agreed relevant parts. The accused Jonathan Finnegan had been drinking for several hours in a pub on the evening of 23rd July 2006. He was arrested for drink driving pursuant to section 49(8) of the Road Traffic Act 1961, as inserted by section 10 of the Road Traffic Act 1994, and the reason for his arrest was explained to him before he was brought to Terenure garda station. At the Garda station Sergeant McKeon formed the opinion that he had consumed an intoxicant and required him to provide two specimens of his breath by blowing into an intoxilyser but the accused refused to comply, protesting that he had not driven the car as his girlfriend was the driver. All the appropriate procedures were followed at the station and the appellant was warned of the consequences of failing to provide the specimens. There is no dispute that he refused to comply with the requests.

3. The learned District Judge outlined the evidence called. The arresting guard observed the appellant driving across the path of the garda car and pulling into the side of the road. As he approached the car, he saw Mr. Finnegan jump into the back seat and saw the passenger get into the driver's seat. When he got up to the car he saw the appellant lying across the back seat and a girl in the driver's seat. She was not wearing a seat belt and appeared flustered. The observer in the garda car did not see anything.

4. The appellant gave evidence that he had been drinking in a pub and had called his girlfriend Lucille Collins to collect him. When she arrived she had a passenger with her in the front so he got into the back seat. They dropped the passenger off and he remained in the back. The appellant alleged that Ms. Collins had pulled into the side of the road as she had received a call on her mobile phone. He refused to provide a breath sample because he was not the driver and he believed that he had no obligation to comply with the request and also that his rights had been infringed. He said that he had repeated to the garda on several occasions that he was not driving the car.

5. Ms. Collins gave evidence confirming that she had been called to collect the appellant, that she had spent time with the appellant's niece before going to the pub to collect him and that his niece had travelled with her to the pub to buy cigarettes. She confirmed that she was the driver at all times and that the appellant was at all times in the back of the car. She asserted that she had pulled into the side of the road to take a phone call. The appellant's niece confirmed that she accompanied Ms. Collins to collect Mr. Finnegan, that she sat in the front seat until she was dropped off and that Ms. Collins was driving at the time.

6. As a result of their testimony, the District Judge stated that he had a doubt that the appellant was driving the car that night. He did not find as a fact that the appellant was not driving as asserted by the appellant. He expressed a doubt about the issue but in effect found that driving was not a prerequisite to a conviction for refusing without a good and substantial reason to provide a specimen. The appellant is aggrieved by this determination and requested the District Judge to state a case to this court in the following terms:

> 1. Was I correct in law in holding that the requirement made by Sergeant McKeon pursuant to section 13 (1) (a) of the Road Traffic Act 1994 was made lawfully?
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> 2. Was I correct in holding that the defence provided for in section 23(1) of the Road Traffic Act 1994 would not avail the accused?

The Appellant's Arguments

7. It was not disputed that a lawful arrest is a prerequisite to a requirement to provide a specimen of breath. The appellant argues that he was unlawfully arrested on the night in question as the arresting garda had no rational basis for forming the opinion that he was driving and that the finding by the District Judge that he was not driving (This is not factually correct. The District Judge expressed a doubt as to whether the accused was driving.) is an indication that the opinion held by the arresting guard was irrational. As the arrest was unlawful, the requirement to provide a breath specimen was not lawfully made.

8. The appellant made an alternative and simple case at this hearing; the prosecution for an offence under s. 13 has two ingredients – proof that the accused was driving and proof that he refused to comply with a request. If the prosecution could not prove driving, then the accused is entitled to rely on the defence provided for by section 23 (1) of the Road Traffic Act 1994 which states -

> "In a prosecution of a person for an offence under section 13 for refusing or failing to comply with a requirement to provide 2 specimens of his breath, it shall be a defence for the defendant to satisfy the court that there was a special and substantial reason for his refusal or failure…"

The Respondent's Arguments
9. Both parties in this case agree that the consequences of an irrational or contrived opinion would, in the normal way, lead to the application of the exclusionary rule and the appellant would have to be acquitted of the charge under section 13 (2).

10. The respondent argued that an opinion leading to an arrest was a fact which could not be altered by subsequent court findings. While an arresting officer could be mistaken in his suspicions, the reasonableness or bona fides of those suspicions could not be impugned because of a finding in court that the suspicions, opinion or belief were misplaced. An arrest made on a reasonable opinion that the accused was driving while influenced by alcohol to such an extent that he could not have proper control of a mechanically propelled vehicle in a public place could not be subsequently impugned if it was proved that he had only one drink or even none at all or that he was not driving.

11. Once lawfully arrested, the obligation is to provide a specimen of breath. The defence provided by s. 23 (1) will not avail the applicant as it is a two part defence and cannot be relied upon simply because the accused believes that he has a good excuse. An accused has to a show a special and substantial reason for refusal to provide a breath specimen and that as soon as practical thereafter he complied (or offered, but was not called upon, to comply) with a requirement under the section concerned in relation to the taking of a specimen of blood or the provision of a specimen of urine.

12. The necessary proofs for an offence under s.13 (1) (a) are that the accused is lawfully arrested and brought to a garda station where he is required to provide a specimen of his breath. It is not necessary to prove that he was driving and the respondent relies on DPP v. Bernard Joyce (Unreported, High Court, Quirke J., 15th July, 2004).

Decision
13. Much time was taken up in dealing with the reasonableness of the arresting officer's opinion and whether an opinion held in good faith could be subsequently vitiated by court findings which established that the suspicion was unfounded. I am disturbed by the fact that neither the lawfulness of the arrest nor the reasonableness of Garda Gaskin's opinion grounding his arrest of Mr. Finnegan for drunk driving were argued at the hearing before Judge O'Neill, where the defence centred on the assertion that the appellant was not driving that evening and that this was a special and sufficient reason for refusing to provide a breath specimen. The findings of fact make no reference to any argument relating to the lawfulness of the arrest. It is my view that the applicant cannot ask this court in a case stated to engage in an assessment of the evidence and to determine the reasonableness of Garda Gaskin's opinion. This was a matter of fact which should have been determined by the trial judge when assessing the evidence and is not an appropriate issue for the consideration of this Court. If the issue was not raised at the trial and is not one of the questions posed in the case stated by the trial judge, then it cannot be argued in this venue.

14. The issue of the arrest is not implicit in the first question posed by the learned District Judge, who asks the Court to determine whether he was correct in law in finding that the requirement by Sergeant McKeon pursuant to section 13 (1) (a) was made lawfully. This question must be viewed in the context of the judge's report which unambivalently indicates that the issue before him was whether the accused was driving the car before he was arrested. This Court therefore confines its review of the law to the agreed facts as presented by the District Judge. The judge had a doubt as to whether the accused was driving and it thus follows that the prosecution did not prove that the accused was driving. It is on this basis that he seeks the opinion of the court as to whether in these circumstances, i.e. where driving was not proved, the request to provide a breath sample was lawful and whether the accused could rely on this lack of proof of driving as a defence to the s.13 (2) charge.

15. As the arrest played a large part in the applicant's arguments, I believe that I should make some observations on the matter. As a general proposition, it is undesirable that an arrest based on reasonable cause should be invalidated by facts found at a trial. This is not to say that the trial judge is precluded from impugning an irrational decision or one based on mala fides or an abuse of power. The protection for investigator and citizen alike is that the suspicion must be reasonably held at the time of the arrest when the facts are still being investigated.

16. Over the years, the courts have considered the characteristics of a legitimate opinion or suspicion which grounds an arrest. In *Gallagher v. O'Hanlon* (Unreported, High Court, 10th July 1975) Finlay P. referred to the necessity of the "reasonableness of the opinion". Costello J. in *Hobbs v. Hurley* (Unreported, High Court, Costello J., 10th June 1980) stated that:

> "the opinion arrived at must, of course, be a reasonable one, and must be one which results from an honest belief"

Egan J. in *DPP v. Breheny* (Unreported, Supreme Court, 2nd March 1993) stated that:

> "If the opinion is genuinely and reasonably held at the time of the making of the request, it seems to me that the literal terms of the subsection [s. 12(1) of the Road Traffic Amendment Act] have been complied with and it makes no difference that the member's opinion is not proved to be factually accurate."

In the modern text, Criminal Law (Dublin, 1999) by Charleton, McDermott, and Bolger, a reasonable suspicion is defined at p. 141 as one "founded on some ground which, if subsequently challenged, will show that the person arresting…acted reasonably."

17. The respondent's arguments that the validity of an opinion that a crime has been committed does not rely on a subsequent analysis is well founded. It is well settled and indeed common sense that an opinion or suspicion, arrived at in good faith is not invalidated by subsequent court findings. This view was recently restated in *DPP v. Penny* [2006] 3 I.R. 553, Dunne J. holding at p. 564 of the judgment that:

> "in the present circumstances there is a finding of fact that the garda had formed the necessary opinion. In those circumstances, that being so, I cannot see how a fact so found can be vitiated by subsequent events".

In the current case, the arrest of Jonathan Finnegan for driving while intoxicated on the night of 23rd July 2006 could not be rendered invalid by the trial judge's finding that he had a doubt that Jonathan Finnegan was driving that night. This however is not the question posed. The validity or otherwise of the arrest is not the issue but rather whether the fact of driving a mechanically propelled vehicle in a public place is a prerequisite to the requirement to provide a breath specimen.

18. There is a distinction between the proofs for an offence alleged under section 49 of the Road Traffic Act 1961, as inserted by section 10 of the Road Traffic Act 1994 and the offence created by s. 13(1) of the Road Traffic Act 1994. Section 49 offences involve driving or attempting to drive a mechanically propelled vehicle in a public place while under the influence of an intoxicant to

such an extent as to be incapable of having proper control of the vehicle whereas s.13 creates an offence for refusing to comply with a request to blow into an apparatus for measuring alcohol in breath. The offence is refusing to comply with a request and not "drunk driving."

Mr. Finnegan was not charged with any offence under s. 49 but rather with failing to comply with a request to provide a breath specimen at the garda station where he was taken following arrest. Had he been charged with a section 49 offence, then it is highly probable that he would have been acquitted of the charge as the wording of the statute requires proof that he was driving a mechanically propelled vehicle while intoxicated in a public place.

19. The issue to be resolved is whether the same proofs are required to establish the offence of failing to comply with the requirement to blow into the apparatus for measuring alcohol in breath. The wording of s. 13 (1) establishes that once the person is arrested under section 49 (8) on the basis of the arresting garda's opinion that the person arrested was driving or attempting to drive while under the influence of alcohol and a member of the Garda Síochána at the station is of the opinion that that person has consumed an intoxicant, then the garda may require the arrested person to provide 2 specimens of breath. A person who refuses or fails to comply with such a request – in the absence of a special or substantial reason – will be guilty of an offence. The only opinion required of a member of the Garda Síochána at the station prior to his request is that the arrested person had consumed an intoxicant.

20. The question of whether it is necessary to establish the actual driving and time of driving of the accused in order to convict on the grounds of refusing to provide a specimen of blood or urine contrary to s.30 (3) of the Road traffic Act 1968 was considered by Finlay P. in *Gallagher v O'Hanlon* (Unreported, High Court, 10th July 1975). Gallagher argued that it was a prerequisite to a conviction for refusing to provide a specimen to prove that the blood or urine was capable of being taken from the defendant within three hours from the time of driving and that it was a prerequisite to prove the time when the defendant had last driven. It was held that the section could not be construed as containing additional prerequisites.

21. A closer situation to the one facing this court was determined by the Supreme Court in *DPP v. Breheny* (Unreported, Supreme Court, 2nd March 1993) where the Court, composed of Finlay CJ, Egan and Denham JJ., held that even though it could not be proven that the appellant was in charge of a mechanically propelled vehicle, she still had an obligation to provide a specimen once she was lawfully arrested. The identical issues to those raised in this case came before Quirke J. in *DPP v. Bernard Joyce* (Unreported, High Court, 15th July, 2004). This case was opened by the prosecution in the District Court and was the subject of adverse comment by counsel for the applicant in this case as being a case upon which Judge O'Neill placed undue reliance. Joyce involved an appeal by the DPP from a decision of District Judge Connellan. The facts briefly are that there was a collision between two cars following which the one of the drivers left the scene. The remaining driver followed and found the car abandoned in a yard a short distance from the accident. The Gardaí arrived and the driver of the fleeing car was identified by the other driver but when spoken to by the Gardaí he denied ownership of the car or any knowledge of the accident. There was a strong smell of alcohol from his breath. The Gardaí formed the opinion that he was incapable of exercising control over a motor propelled vehicle and arrested him on suspicion of having committed an offence under s. 49 of the Road Traffic Act 1961. He was brought to the Garda Station and asked to provide two specimens of breath under s. 13(1) (a) of the Road Traffic Act 1994. Although warned of the consequences of failure to comply he refused to provide a specimen and he was charged with refusal. At the hearing, the District Judge could not be satisfied that he was driving at the time of the collision and held that the prosecution must prove that the person asked to provide a breath specimen was driving in a public place prior to arrest. The accused had argued that he was entitled to rely on the statutory defence to such charge, namely that there was a special and substantial reason for his refusal and that his position as someone who knew he was not driving was analogous to that of the special situation of an imaginary person described by Finlay P. in Gallagher who, if asked to provide a specimen the day after he last drove might be entitled to refuse and the Court would be: "almost bound to accept that as a special and substantial reason for declining the request [to provide a specimen]".

22. Quirke J. stated that he could not accept that contention; the terms of section 13 and section 23 are clear and unambiguous. The offence is unconnected with the driving of the vehicle or the concentration of alcohol in the breath and Quirke J. held that the prosecution did not have to prove that the accused was driving in a public place prior to the arrest.

23. The reasoning in these cases strongly suggests that once the person is arrested and the specimen of breath is demanded at the garda station on the basis of the opinion of the requesting guard, then a conviction can lie for refusing to comply. Once the arrest is founded on a reasonably held opinion that the person was driving, then unless the opinion was mala fides or irrational, the arrest is lawful and the request to provide the breath is also lawful.

24. The statutory defence provided by section 23 is very circumscribed and does not end where the appellant argues as referred to in para.8 above but continues in the following terms:

> " and that, as soon as practicable after the refusal or failure concerned, he complied (or offered, but was not called upon, to comply) with a requirement under the section concerned in relation to the taking of a specimen of blood or the provision of a specimen of urine."

The language of the statute could not be plainer. A special and substantial reason for being unable to provide specimens of breath can only be a defence when the arrested person has offered to provide blood or urine. This section imposes an obligation to provide or offer to provide an alternative method of assessing the quantity of alcohol consumed. The intent of the statute and section 13 was to oblige any person lawfully arrested on suspicion of driving while intoxicated by alcohol or drugs to provide a specimen of breath, blood or alcohol when requested. A good and substantial reason for refusing does not include trying to impugn the reasonable suspicion for the arrest. The arguments advanced by the prosecution in this case are in my opinion, well founded.

25. The learned District judge was correct that the request made by Sergeant McKeon was lawfully made and the defence provided by s. 23 (1) was not open to the accused and the answer to both questions is yes.