Neutral Citation Number: [2010] IEHC 379

THE HIGH COURT

2010 757 SS

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

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF

GARDA ADRIAN LANIGAN AND GARDA MARK SHORTT)

PROSECUTOR

AND

PAUL FREEMAN

DEFENDANT

JUDGMENT of Mr. Justice Charleton delivered on the 2nd day of November 2010

1. The essence of this case stated is whether it is necessary to imply into a road traffic power vested in the gardaí to inspect insurance on a vehicle a requirement to tell the person against whom it is exercised that the power has a lawful origin and that the consequence of failing to cooperate may be the commission of an offence.

Facts

2. Paul Freeman was summoned to appear before Judge James Paul McDonnell in the District Court on two charges contrary to the Road Traffic Act 1961 ("the Act of 1961") as amended. It was alleged in the first charge that on the 10th November, 2007, he drove a mechanically propelled vehicle, a car, without insurance, or exemption from insurance, in the event of injury to a third party contrary to s. 56(1) and (3) of the Road Traffic Act 1961, as amended. The second charge alleged that on the 13th November, 2007, while the driver of a car, and having been asked by a member of An Garda Síochána to produce a certificate of insurance, he failed to do so and, further, did fail to produce that certificate within ten days of such demand.

3. Judge McDonnell found as a fact that on the date of each alleged offence Paul Freeman was stopped by a garda while on the public road and driving a car; that the garda demanded that he produce his certificate of insurance or exemption, and that while he did not have on him, the demand was then made by the garda that this be produced in a garda station at the nomination of Mr. Freeman within ten days; but that in making the demands the garda did not refer to any section of the Road Traffic Act 1961 and nor did he tell Mr. Freeman that the demand was being made pursuant to a statutory power of compulsion and nor did the garda inform Mr. Freeman of the consequences of failing to comply with the requirement; and, finally, that Mr. Freeman told the garda that he would produce his insurance at Tallaght garda station. There was evidence before the District Court that the certificate of insurance was never produced.

Questions

4. Three questions were asked by the learned district judge:

> (1) In a prosecution for an offence contrary to s. 69 of the Road Traffic Act 1961 (as amended) is the prosecution obliged to prove by way of evidence:
>
> > (i) that the demand for the production of the certificate of insurance or exemption was made pursuant to, and in accordance with s. 69 of the Road Traffic Act 1961 as amended;
> >
> > (ii) that the defendant was informed that he was being subjected to a statutory requirement;
> >
> > (iii) that the defendant was informed that the consequences of failing to comply with the statutory requirement.
>
> (2) In a prosecution for an offence contrary to s. 56 of the Road Traffic Act 1961 (as amended) where the prosecution seek to rely on the presumption that the defendant was driving without insurance (pursuant to s. 56(4) of the Road Traffic Act 1961 as amended), is the prosecution obliged to prove by way of evidence;
>
> > (i) that the demand for the production of a certificate of insurance or exemption was made pursuant to, and in accordance with, s. 69 of the Road Traffic Act 1961 as amended;
> >
> > (ii) that the defendant was informed that he was being subjected to a statutory requirement;
> >
> > (iii) that the defendant was informed of the consequences of failing to comply with the statutory requirement.
>
> (3) In the light of the Court's answers to the above questions, should I accede to the defendant's application for the dismissal of the complaints referred to above?

Interaction of the Sections

5. Section 69(1)(a) of the Road Traffic Act 1961, as amended, allows a garda who has reasonable grounds for believing that a mechanically propelled vehicle has been used in a public place, to demand of the use user of the vehicle, within one month, that he or she produce their certificate of insurance or certificate of exemption. If the person refuses or fails to produce this certificate then and there, an offence is committed unless the person goes to a garda station nominated by them and produces same within ten days.

It is presumed in favour of the prosecution, until the defendant shows the contrary, that no certificate was produced.

6. Section 56 of the Road Traffic Act 1961 as amended, imposes a general obligation on persons who use mechanically propelled vehicles in public to be insured in the case of injury to a third party. It is an offence not to have such insurance, or a certificate of exemption (this generally only applies to State vehicles). If a person is prosecuted, then if there is proof that a demand was made under s. 69 of the Act and the defendant refused or failed to produce a certificate of insurance or exemption then and there or stopped a garda from reading one on apparently producing it, it is to be presumed that there was no insurance for the vehicle and that it was not exempt.

7. Elsewhere in the Road Traffic Act 1961, there is a power granted for gardaí to stop a vehicle in a public place. As a matter of statute, this was not necessary, as the State is entitled to control the public highways. It was argued on behalf of Mr. Freeman that people are entitled to know when they are being subjected to police powers, the relevant legal authority, the consequences of refusal and any presumptions in law that arise by virtue of a failure to cooperate.

8. The result of the requirements argued to be imposed on gardaí in these circumstances is set out in the submissions for the Director of Public Prosecutions in written submissions. If, the Director of Public Prosecutions submits, the interpretation of the law on behalf of Mr. Freeman is correct, then this is what a garda must say on stopping a vehicle in public and making a demand for a certificate of insurance:

> "I am demanding from you your certificate of insurance or certificate of exemption at a garda station of your nomination within ten days. This demand is made under section 69 of the Road Traffic Act 1961 (as amended). If you fail to comply with my demand you may be prosecuted for a criminal offence of failure to produce your insurance as demanded. Furthermore if you were to be subsequently prosecuted for the offence of driving without insurance arising from this incident and you have not complied with my demand for production, the fact you have not complied with my demand for production might result in the shifting of the burden of proof from the prosecution to the defence in the criminal trial for that offence. This would arise under section 56(4) of the Road Traffic Act 1961 (as amended)."

Analysis

9. The principles of statutory interpretation have grown up in a piecemeal manner over centuries. This is particularly true in the field of social regulation through the application of the criminal law, where it is often said that statutes infringing on the liberty of the citizen, or which may result in the citizen being found guilty of a criminal offence, are to be strictly construed. Statutes must be construed as a whole and in the context of their subject matter and object. In the field of drunken driving, the application of legal formalism has meant that every section relevant to the taking of blood and urine samples seem to require a mechanistic approach with appropriate explanations of the legal foundation of a power being given along the way.

10. Whatever the origin of that approach, I cannot see that it is necessarily the correct approach in law in every circumstance.

11. In *Director of Public Prosecutions (Garda Ryan) v. Mulligan* [2009] 1 I.R. 794, this Court decided that where a person was charged with an offence of failing to provide his name and address to a garda upon request, contrary to s. 24 of the Criminal Justice (Public Order) Act 1994, it was an element of proof in the offence that the garda making the request specify that he or she had power by statute to demand those particulars and that if they were not given an offence was committed. In a general way, where there is a power of compulsion that is enforceable by statute then a garda should inform the person to who it is directed that the demand is made pursuant to law and that it is an offence to fail to comply. It is not necessary to specify with particularity a specific section and subsection of an Act, or nominate an exact name or year of an Act. The notification to a citizen that the demand is made pursuant to a power lawfully conferred on a garda exacts compliance in the context of the warning that a failure to comply will be an offence. All that would need to be said, in those circumstances, by a garda would be that he or she was demanding a name and address under the Criminal Justice Act, or Public Order Act, and that failing to give that information would be an offence. There would be no necessity to warn about the consequences or presumptions that might arise in law, to inform the subject of the level of penalty they might face, or of the precise wording of the section, or the particular numbering of the section from which the power was derived.

12. The gardaí have both an entitlement and a power to approach citizens and to seek information from them. They are entitled to give advice to a citizen or direct an appropriate admonition at a citizen without specifying anything. The gardaí are also fully entitled to act under cover and to pursue their enquiries anonymously.

13. Earlier decisions establish that a person arrested is entitled to know, in general terms, the reason for their arrest, when arrested, and to be shown a search warrant, where it is proposed to search their premises, or in the absence of a search warrant otherwise informed of, again in general terms, the power that was being exercised. These decisions proceeded from the balance that is inherent within a Christian and democratic society. It is a mark of totalitarian rule that people can be arrested for no reason, or held without communication, not knowing anything as to the focus of the inquiries that the police may, or may not, be pursuing. The dwelling of a citizen is, for the similar reasons, entitled to be free from lawless invasions by agents of the State. There is also a possible danger that citizens on the public highway could be subjected to bullying or arbitrary actions on the part of the police. The argument made for basic information to be given to a subject of a police power that there is a power in law and that the consequence of failing to disobey may be the commission of criminal offence derives from the same origin.

14. It is not necessary to imply it, however, into every circumstance. The Court notes that the Oireachtas may enact statutory requirements which carry a high level of particularity in the information to be given to citizens in the event that police or administrative powers are to be exercised. For instance, s. 19A of the Criminal Justice (Public Order) Act 1994, as inserted by s. 24 of the Housing (Miscellaneous Provisions) Act 2002, requires a detailed level of information to be given to a person who is subjected to a demand that they move from land. Unless the Oireachtas so specify, then basic information is all that can be argued to be implied into the exercise of statutory police powers. Further, in circumstances where the origin of a legal power cannot readily be stated, it is clearly the will of the Oireachtas that this is not necessary. Gardaí may stop vehicles on the road without brandishing a sign indicating a common law or statutory power in that regard. In circumstances of a riot or affray, the gardaí are entitled to act appropriately with reasonable and proportionate force to quell a disturbance pursuant to their duty to keep the public peace without issuing words of legal notice in all directions. In the context of the regulation of traffic, it has always been part of the power of the State both to regulate traffic and to check compliance with the basic statutory requirements for driving and for public safety through stopping and examining vehicles. Searching vehicles would be another matter and, absent a valid power of arrest, such an action would be founded on a police power provided by statute.

15. The fact that powers are specified to be exercised in particular ways in a statute may add to aspects of the interpretation of the

proper exercise of that power. The context is important. It would not be necessary, to take another example, for every traffic sign to indicate that it was erected pursuant to law, or the consequences of failing to comply with it, or the statute or regulation on which it was founded. Failing to comply with a direction by road sign is still an offence: no one is entitled to say about a one way street sign that as it does not make clear an origin in law that it is to be disobeyed. Finally, there may be matters that are so notorious that proof is not required. It does not seem to me that the Criminal Justice (Public Order) Act 1994 could have come within that category since members of An Garda Síochána were acting pursuant to complex powers that were not part of notorious legal tradition and which, further, infringed the entitlement of the citizen to walk the public highway lawfully.

16. When it comes to the basic regulation of road traffic in the manner provided for in the Act of 1961, now in force for a time span of nearly 50 years, the consideration must proceed on a sensible basis. We are dealing in this context with the driving of vehicles, an activity which must be licensed. Every road user is required by law to have adequate knowledge of the rules of the road and to pass a detailed examination in order to proceed to take a practical driving test. The learned district judge might bear this in mind. Further, was there really nothing in the approach of the garda to the driver that indicated or necessarily implied to a reasonable person that a power was being validly exercised pursuant to law? Do people not, by now, know that drivers have to have insurance; that gardaí may demand to see it or have it produced; and that failure to produce it is an offence? One wonders why Paul Freeman said he was going to produce his certificate of insurance in Tallaght Garda station. Is it not part of the law of every civilized country that vehicles on the road be insured against injury to other road users and, concomitant with that, that there is a power for police authorities to carry out checks? The answer to this particular case may depend on all the circumstances, such as whether the defendant is new to Ireland from another continent or some other scenario that might arise to reasonably suggest ignorance. The Court notes a series of authorities on disparate statutory police powers that indicate that it is both desirable and legally necessary for a garda to indicate in a basic way in exercising police powers that a demand is made pursuant to law and that there may be consequences in terms of a criminal offence in failing to comply. That is not the end of the matter on the authorities, even in those cases, and nor should it be as the courts are obliged to exercise ordinary good sense. In *Bates v Brady* [2003] 4 I.R. 111 the issue that arose was, again, under the Criminal Justice (Public Order) Act 1994; in that instance a police power under s. 8 to require a person to stop abusive behaviour. Ó Caoimh J. held that the gardaí should, in a general way, warn as a matter of law that failure to comply could be an offence. It is, I might also observe, clearly implied in an officer of the law stating that if something is not done that a criminal conviction may result that a demand in that regard is made pursuant to law. At p. 120 the Court said:-

> It is clear from the authority of *Director of Public Prosecutions (Sheehan) v. Galligan* (Unreported, High Court, Laffoy J., 2nd November, 1995) that it is necessary that the evidence in question be given. It is clear that unless it can be shown that the accused was given the warning or knew that the failure to comply with the requirement would result in him committing a criminal offence, that the offence itself is not committed.

17. Counsel, in defending a criminal case, seeks instructions as to the nature of a case that is to be put to prosecution witnesses. It is not of concern to any advocate whether the instructions are likely or not, or true or not. An advocate is the instrument of the client subject to the basic ethic of counsel. Fictional scenarios cannot, of course, be put to witnesses. Since a case is predicated upon the instructions as to the facts, it is a function of the court to sift out and decide through evidence in a criminal case whether the case of the prosecution has been proved to the requisite standard. Each side is entitled to put a case. The defendant may remain silent. A question put by an advocate on behalf of a client is not evidence. The answer of the witness to the question is. Silence in the face of an accusation before a court does not necessarily remove the possibility that a common sense inference may not be made against an accused in circumstances that render that inference appropriate. It has always been the law that, for instance, a failure to specify a ground of arrest in circumstances where the arrested person must have known full well what led to the arrest, would not lead to the detention being declared unlawful. In prosecutions that depend on the proof of regulations made under statute, achieved by handing the court an official copy, the failure to prove regulations that are notorious is not fatal to the case. What a judge is analysing is proof of the case: the nature of any defence offered, or the absence of any particular line of defence, can influence the ultimate decision. In the same way, if Paul Freeman wishes to give evidence that he did not realise that a demand for insurance was made pursuant to law by gardaí and that he did not know that the consequences of failure to comply might have been the commission of a criminal offence, this must be heard. There is no requirement that he give evidence and there is no inference to be drawn against a failure to give evidence. The ordinary operation of law, and how notorious parts of it may sometimes generally be common currency, may or may not, depending on the assessment of the learned District Judge, lead to an inference that he already had sufficient knowledge as to the legal origin of a demand and that a failure may result in the commission of a criminal offence. That is a matter for the trial court.

Result

18. In consequence I would answer the questions of the learned District Judge as I have indicated above.