

THE HIGH COURT

[2017 No. 701 S.S.]

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1851 AS AMENDED BY SECTION 51 OF THE COURTS
(SUPPLEMENTAL PROVISIONS) ACTS 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA EAMONN LONG)

APPELLANT

AND
KEENAN MCGOVERN

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 9th day of October, 2018

1. This is a case stated by Judge Colin Daly from the District Court. The learned judge seeks the opinion of the court as to whether he was entitled to dismiss a prosecution against the respondent who on 3rd September, 2016 was stopped at a mandatory alcohol testing checkpoint set up under s. 10 of the Road Traffic Act 2010 at Quarryland, Ring Road, Kilkenny. Garda Long required the respondent to provide a specimen of his breath by exhaling into a Dräger Alcotest Device which measures the presence of alcohol in the breath. The respondent complied with the requirement. The result shown on the Alcometer was a "fail". Garda Long arrested the respondent and he was conveyed to Kilkenny Garda Station where he was processed. A requirement was made of him pursuant to s. 12(1)(a) of the Road Traffic Act 2010 for a breath specimen to ascertain the concentration of alcohol in his breath. The respondent complied with the requirement and the Evidenzer IRL apparatus which is designed for indicating the concentration of alcohol in the breath was used to obtain same. The result of the test was that there was a concentration of 54mg of alcohol per 100ml of the respondent's breath and a certificate indicating this concentration issued under s. 13 of the Act. The respondent was then charged with an offence that he drove a motor vehicle on 3rd September, 2016 at Quarryland, Kilkenny 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 22 micrograms of alcohol per 100 millilitres of breath contrary to ss. 4(4)(a) and (5) of the Road Traffic Act 2010.

2. The only issue which arises for the court's determination is whether the respondent's arrest by Garda Long following the provision by the respondent of a specimen of his breath was lawful. Garda Long gave evidence that he stopped the respondent at 1:05am. The respondent provided a specimen of his breath by exhaling into the Dräger apparatus. He was informed that failure or refusal to comply with the requirement was a specific offence and the relevant penalties were outlined to him. The respondent complied with the requirement. The result shown on the Alcometer was a "fail". Garda Long gave evidence that he then formed the opinion that the accused had consumed an intoxicant to such an extent as to be incapable of having proper control of a mechanically propelled vehicle in a public place. He said that he informed the accused that he was of the opinion that he had consumed an intoxicant and committed an offence under ss. 4(2), (3) or (4) of the Road Traffic Act 2010 and that he was arresting him under s. 4(8) of the Act. He was cautioned in the usual manner and informed in plain English that he was being arrested for "drink driving". Under cross-examination Garda Long confirmed the following matters as set out in the Case Stated:-

(i) there was nothing in the manner of the respondent's driving which attracted his attention and the respondent drove up to the checkpoint without any difficulties;

(ii) the respondent was not exhibiting any signs of intoxication;

(iii) the apparatus used to obtain the preliminary breath specimen was the Dräger Alcotest;

(iv) the Dräger Alcotest apparatus indicates the presence of alcohol in the breath;

(v) the apparatus does not give a reading indicating the concentration of alcohol in the breath or that a person is over a permitted limit;

(vi) the apparatus was formerly calibrated to give the readings "pass", "alert" and "fail" but has since changed and now indicates "pass" or "fail";

(vii) there is no "in between" reading, meaning it detects whether any alcohol is present or not as the case may be by indicating a "pass" or "fail";

(viii) the arrest of the respondent was based solely as a result of the "fail" reading indicating the mere presence of alcohol in the breath."

3. Mr. Lanigan, solicitor for the respondent, then made submissions to the learned judge at the conclusion of the prosecution case concerning the arrest and the reasonableness of the opinion formed by Garda Long to justify it. It was submitted that the only evidence which led to the respondent's arrest was the preliminary breath test which indicated the mere presence of alcohol in his breath which could not of itself have justified an opinion that the respondent was intoxicated to such an extent as to be incapable of having proper control over a mechanically propelled vehicle, and therefore was insufficient to justify his arrest. Mr. Lanigan submitted that the fact that the preliminary breath specimen now merely indicates the presence of alcohol in the breath and nothing more was a significant factor in the case.

4. Inspector Connolly, in reply, submitted that Garda Long had conducted a test which resulted in a "fail" reading and on that basis, the Garda reasonably and genuinely held a belief that the accused was committing the offence of drink driving.

5. The learned District Judge relying upon the decision of the Supreme Court in *Director of Public Prosecutions v. Gilmore* [1981] ILRM 102 and the High Court decision in *Director of Public Prosecutions v. Brady* [1991] 1 I.R. 337 and having considered the evidence held that the Garda had no reasonable basis to conclude that the respondent was intoxicated to such an extent as to be incapable of having proper control of a mechanically propelled vehicle and as a result accepted the argument that the arrest of the accused was unlawful. His lawful arrest was a precondition to a requirement for an evidential specimen under s. 11. The learned judge determined that the specimen evidence was unlawfully and/or unconstitutionally obtained and therefore inadmissible and dismissed the charge. In those circumstances the learned judge asked whether he was entitled to dismiss the prosecution as against the respondents on the facts so found?

Statutory Provisions

6. Section 4(1) of the Road Traffic Act 2010 provides that a person should not drive or attempt to drive a motor 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. Section 4(2), (3) and (4) provide that a person shall not drive or attempt to drive a motor vehicle in a public place while there is present in their body a quantity of alcohol such that within three hours after so driving or attempting to drive the concentration of alcohol in their blood, urine or breath exceeds the prescribed limits set out in the respective subsections.

7. Section 4(8) of the Act provides 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."

Previous Decisions

8. In the *Director of Public Prosecutions v. Gilmore* [1981] ILRM 102 the defendant was convicted on appeal in the Circuit Court of driving a motor vehicle with an excess concentration of alcohol in his urine contrary to s. 49(3) of the Road Traffic Act 1961. The arresting Garda gave evidence that he arrested the accused pursuant to s. 49(6) of the Act because he had formed the opinion that the defendant, because of consumption of an intoxicant, was incapable of having proper control of a vehicle. The sole foundation for that opinion was the defendant's failure to pass the breathalyser test. A case was stated to the Supreme Court as to whether or not an arrest was lawful when the opinion of the Garda was formed by relying solely or partly upon the result of the breathalyser test. It was held by the Supreme Court that s. 49(6) permitted a Garda to arrest a driver without warrant if he forms an opinion that an offence under the section has been committed. The positive result of a breathalyser test was sufficient to justify an opinion on the part of a Garda that an offence under ss. 49(2) or (3) had been committed. Since the Garda had formed the opinion that the defendant's alcohol condition had deprived him of the capacity to drive properly, the Garda must *a fortiori* have formed the opinion that the defendant had committed an offence under s. 49(2) or (3). Section 4(a) is similar to the provisions of section 49(6). As Kenny J. stated at pp. 107 to 108:-

"... the Garda is entitled to arrest a person in charge of a mechanically propelled vehicle if he has formed the opinion from observation that the person in charge is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle: he is also entitled to do so on the result of the breathalyser test only. Indeed, an opinion formed on the result of the breathalyser test will probably be more accurate than one based on observation. The section does not require that the Garda should form his opinion on observation: the purpose of the breathalyser test is to enable the Garda to form an opinion.

Counsel for the defendant relied on a passage in the judgment of Costello J. in *Hobbs v. Hurley* (1980 No. 165 SS unrep.). That was a Case Stated by a District Justice asking certain questions on s. 49 of the Act of 1961 and on the power of a Garda to arrest a driver. In that case the guard suspected that an offence had been committed under the new s. 49: his belief was based on the observation of the accused (blood shot eyes) and the result of the breathalyser test. Costello J. said in the course of his judgment:

"In reaching a conclusion that an offence under the section had been committed Garda Hobbs was entitled to rely on his own observations alone, or on his own observations aided by the positive finding on the alkalyser test. If this means that before arresting an accused under the new s. 49, the guard must have observed facts that led him to the conclusion that the accused was incapable of exercising proper control of the vehicle, I do not agree with it and I think it incorrect. The guard may, in my opinion, form his opinion on the breathalyser test alone."

9. In *Director of Public Prosecutions v. Kulimushi* [2011] IEHC 476, a case stated to the High Court in respect of the interpretation of s. 49(6), the prosecuting Garda gave evidence that having stopped the accused at a mandatory alcohol testing checkpoint he required the accused to provide a roadside specimen of his breath. The result of this test was "positive". The Garda gave evidence that he formed the requisite opinion for the arrest of the accused under s. 49(8) of the Road Traffic Act 1961 to 1994. The reasonableness of the opinion formed by the prosecuting guard was not challenged by the defence in cross-examination. The District Judge questioned the arrest at the conclusion of the prosecuting evidence. He noted that the word "positive" was more suitable in the context of the "old" breathalyser apparatus which had been in use up until the end of 2005 and which had only two readings "positive" and "fail". He stated that the breathalyser currently in operation had four readings and that a positive reading could include "alert" which was a reading of less than 30 to 35mg of alcohol per 100ml of breath or a "fail" which has a reading greater than 35mg of alcohol per 100ml of breath. He held that he was not satisfied that the arrest was valid based on the opinion of the Garda. The Director of Public Prosecutions appealed against this finding and sought the opinion of the High Court as to whether the Garda had not validly formed the opinion necessary to ground an arrest for drunk driving and whether he was correct in law in dismissing the case. In the course of his judgment Hedigan J. considered the applicable authorities including the *Gilmore* case and stated:-

"8. In applying these principles to the present case, it is clear that a positive result of a breathalyser test is sufficient to justify an opinion on the part of a Garda that an offence under s. 49(2) or (3) had been committed. Nothing in the new breathalyser regime changes this. The Garda gave unchallenged evidence that he had formed the requisite opinion. The basis for his opinion, as he put it, was the "positive" result of breathalyser test. The *bona fide* and reasonably held belief of the Garda was not challenged and could not therefore be questioned later when the prosecution case had closed. It is clear from a perusal of the authorities in this area that the test of reasonable cause for suspicion sets a very low threshold. The critical test is that the opinion formed by the Garda must be *bona fide*. To form an opinion, the Garda does not require the level of proof that would be necessary in court. ...

The prosecuting Garda gave evidence that the result of this preliminary test was "positive". He then gave evidence that he formed the requisite opinion for the arrest of the accused under s. 49(8) ... The reasonableness of the opinion formed by the prosecuting Garda was not challenged by the defence in cross-examination or otherwise. It was the District Judge himself who raised this issue at the conclusion of the prosecution and defence case. The prosecuting Garda was not however recalled to address this point. It seems to me that in the absence of what Quirke J. described as a "focused enquiry" by the District Judge during the currency of the trial it was not open to the District Judge to dismiss the case against the accused on the basis that the prosecuting Garda did not validly form the opinion necessary to ground an arrest for drunk driving. If the District Judge had a doubt as to the nature of the opinion formed, he should have recalled the Garda and questioned him as to those concerns. If the Garda formed his opinion on a *bona fide* basis rather than capriciously or arbitrarily, that is enough. It is very low threshold."

The appeal was allowed.

10. In this case Garda Long was cross-examined by the respondent's solicitor. The learned District Judge found as a fact on the basis of the evidence of Garda Long and having regard to the case law that the Garda had no reasonable basis to conclude that the respondent was intoxicated to such an extent as to be incapable of having proper control of a mechanically propelled vehicle. However, it is clear that he also gave evidence that he was of the opinion and so informed the accused that he had consumed an intoxicant and committed an offence under s. 4(2), (3) or (4) of the Road Traffic Act 2010 and was arresting him under s. 4(8) of the 2010 Act. It is clear that the only evidence upon which this opinion was based was the result obtained from the Dräger Alcotest apparatus which indicated the presence of alcohol in the accused's breath. It is equally clear that the threshold for the formation of the requisite opinion under the section is low. There was no suggestion of a lack of *bona fides* on the part of the Garda. The court is satisfied that a Garda is entitled to form the requisite opinion based solely upon the finding made on the application of the Dräger Alcotest apparatus. This was the clear intention of the legislature. The learned District Judge offered no reason as to why this evidence ought not to be accepted. He did not articulate any basis upon which the reasonableness or the *bona fides* of Garda Long's opinion was insufficient to pass the low threshold required on the authorities.

11. The court's attention was also brought to a case stated determined by Kearns P. in *Director of Public Prosecutions v. Louise McMahon* [2011] 1252 SS. (11th January, 2012) (no written judgment available) in which the District Court on a consultative case stated sought the High Court's opinion on the following question:-

"Where a member of An Garda Síochána has administered a test pursuant to the provisions of s. 4 of the Road Traffic Act 2006 and the driver of a vehicle has failed such test and where, as a result of the failure alone the member has formed an opinion that the driver has committed an offence contrary to s. 49 of the Road Traffic Act 1961, as amended, is the mere failure of the said test, unaccompanied by any other observation(s), sufficient to justify an arrest pursuant to the provisions of s. 49(8) of the Road Traffic Act 1961. The learned President answered the question in the affirmative."

12. I am satisfied that the opinion formed by Garda Long was sufficient absent any other relevant facts to comply with the provisions of section 49(8). There is no suggestion that his opinion was not *bona fide* and the case-law states that he is entitled to form his opinion based solely on the results of the test. It follows given the low threshold applicable to the formation of the opinion that an arrest may not be deemed to be unlawful simply because it is based on that result. I am not satisfied that the submissions made to the learned judge regarding the nature and calibration of the device in this case provide a basis upon which to find that Garda Long could not have formed his opinion or had an insufficient basis upon which to form his opinion under the section. The prosecution must, of course, establish that the arrest was lawful beyond a reasonable doubt. However, while the Garda was cross-examined about the device and the fact that he did not rely upon any other observation when forming his opinion this has repeatedly been held not to be a pre-requisite to the lawfulness of the arrest based on the reading. I am not satisfied that there was any basis upon which the respondent's arrest could be regarded as unlawful and the question posed should be answered in the negative.

13. Finally, I do not consider that this conclusion in any way interferes with the jurisdiction of the learned judge to make appropriate findings of fact relevant to a legal ruling required during the course of or at the conclusion of a trial: the issue raised in this case concerns the interpretation of s.49(8) and the opinion required to ground a lawful arrest. The Garda was challenged in respect of his opinion but to be of any legal consequence the challenge must have some relevance to the formation of the opinion under s.49(8) applying the relevant legal principles. I am not satisfied that the matters relied upon by the applicant's solicitor offered any legal basis upon which to conclude that Garda Long's opinion was as a matter of law insufficient to justify the respondent's arrest.