

## THE HIGH COURT

[2015 No. 1033 S.S.]

## IN THE MATTER OF SECTION 52(1) OF THE COURTS SUPPLEMENTAL PROVISIONS ACT 1961

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND

PIOTR WIEROWSKI

ACCUSED

## CASE STATED

## IN THE MATTER OF DPP (AT THE SUIT OF GARDA ANTHONY JERAMIAH J. O'BRIEN) V. PIOTR WIEROWSKI

## JUDGMENT of Mr. Justice Michael White delivered on the 11th of November, 2016

1. Judge Elizabeth McGrath, Judge of the District Court, pursuant to s. 52 of the Courts Supplemental Provisions Act 1961, has stated a case for consideration by this Court.
2. The accused was before the District Court charged with two offences contrary to the Road Traffic Act 2010, as amended.
3. It was alleged:-
  - (a) that on the 29th June, 2014, at Tipperary Garda Station in the said District Court area of Tipperary being a person arrested under s. 4(8) of the Road Traffic Act 2010, having been required by Garda Tony O'Brien, a member of An Garda Síochána pursuant to s. 12(1)(a) of the Road Traffic Act 2010, as amended, to provide by exhaling into an apparatus for determining the concentration of alcohol in the breath, two specimens of your breath, did fail to comply immediately with the said requirement, contrary to ss. 12(2) and 12(4) of the Road Traffic Act 2010, as amended by s. 9 of the Road Traffic (No. 2) Act 2011.
  - (b) That on the 29th June, 2014, at Tipperary Garda Station in the said District Court area of Tipperary being a person arrested under s. 4(8) of the Road Traffic Act 2010, having been required by Garda Tony O'Brien, a member of An Garda Síochána pursuant to s. 12(1)(b) of the Road Traffic Act 2010, as amended, to permit a designated doctor to take from you a specimen of your blood or at your option to provide for the said designated doctor a specimen of your urine, did fail to comply with the said requirement, contrary to ss. 12(3)(a) and 12(4) of the Road Traffic Act 2010, as amended by s. 9 of the Road Traffic (No. 2) Act 2011.
4. The evidence adduced before the learned judge was that on 29th June, 2014, at 18:26 having already received a report that a motor vehicle, blue Opel Corsa, Reg. 06-LK-1629 had been driven erratically, the gardai stopped the vehicle at a checkpoint. The vehicle came to a halt almost colliding with a motor vehicle already stopped at the checkpoint. Garda O'Brien spoke to the driver and ascertained his identity as the accused. Garda O'Brien gave evidence that the accused's speech was slurred and there was a smell of intoxicating liquor and that on stepping out of the vehicle, he was unable to stand upright unassisted. Having formed an opinion that he had consumed an intoxicant to such an extent as to being capable of having proper control of a mechanically propelled vehicle and having informed him in ordinary language that he was being arrested for drunk driving. He was arrested pursuant to s. 4(8) of the Road Traffic Act 2010, for an offence under 4(1) 4(2) 4(3) and 4(4) of the Road Traffic Act 2010.
5. In cross examination, it was established that Garda O'Brien on arrest had handcuffed the accused. The garda agreed that the accused was not aggressive nor did he attempt to flee but justified the handcuffing because Garda O'Brien did not deem it safe to leave the accused's car at the side of the road. As Garda Samantha Meehan was the only garda present with him, it would mean that one of them would have to drive the accused's car to the Garda Station and the other garda would be left to transport the accused in the garda car on his/her own. Garda O'Brien said he did not know what the accused's normal demeanour would be and as he was of a much larger physique than either garda, for their own safety, he decided to handcuff the accused.
6. The learned judge has requested the opinion of the High Court on the following question:-
 

"On the evidence adduced, does the Supreme Court decision of the *Director of Public Prosecution (at the suit of Sergeant Sean Moyles) v. Peter Cullen* [2014] IESC 7, bind me to dismiss the charges against the accused as posited by the Defence and/or does the more recent decision of the Supreme Court in *The People at the Suit of the Director of Public Prosecutions v. J.C.* [2015] IESC 31, permit judicial discretion as to whether to dismiss the charges or not."
7. The issue before the court is the validity of the accused's arrest and if unreasonable force was used by the application of handcuff restraints rendering the arrest illegal or invalid.
8. On the facts of this particular case, the discretion of the court to admit evidence tainted by some degree of irregularity or illegality is not relevant to the determination of the guilt or innocence of the accused, thus DPP v J.C. is not relevant.
9. The question posed before the Supreme Court in the case of *DPP v. Cullen*, was whether a general and routine practice of placing drivers in handcuffs when arresting them on suspicion of drunk driving regardless of the fact that the suspected driver behaved properly, peacefully and lawfully, invalidated the subsequent statutory procedure for the taking of a breath specimen.
10. In delivering the majority judgment of the court, Fennelly J. stated at para. 38:-

"In my view, it is unlawful to place handcuffs on suspects who are being arrested without giving any consideration to the context and in particular to the behaviour and demeanour of the individual being arrested. It is unlawful because, as a

matter of principle, the police must use only such force as is reasonable in the circumstances: I emphasise, of course, that it is the police officer who must make that judgement."

11. He stated at para. 17:-

"Before turning to the legal consequences flowing from this state of facts, it is well to recall that, as a general proposition, the power of arrest, whether exercised by a police officer or by a citizen may be exercised and may only be exercised with the use of such force as is reasonable in all the circumstances. There are, of course, many circumstances in which members of An Garda Síochána are amply justified in using force in effecting arrest. The law allows a generous measure of judgement to be exercised as to whether force is or is not justified. An error of judgement by an officer in applying force which he genuinely believes to be necessary will not either render the arrest invalid or expose the officer to legal remedy, whether criminal or civil."

12. He went on to state at para. 25:-

"I would entirely accept that any individual member of An Garda Síochána is fully entitled to and may well be obliged to apply handcuffs to an arrested person, where he or she genuinely believes that it is necessary to do so in the particular case. The decision must be left to the individual Garda dependant on his or her own appreciation of the requirements of the individual case. The nature of the offence, the prevailing circumstances, the personality and character of the individual to be arrested must be taken into account. The law is realistic. It is appreciated that decisions on the necessity for an arrest, the appropriate amount of force and the need for the use of handcuffs are often made under pressure of circumstances of urgency, of danger of flight, and of violence and the threat of violence. Ordinarily, courts are slow to review decisions of Garda officers made in the wide range of situations which they confront in the course of their duty."

13. The matter has also been considered in two recent High Court judgments: *Director of Public Prosecution v. Pires, Corrigan and Gannon*, a decision of Barrett J. of 9th July, 2015, and the judgment: *Director of Public Prosecutions (In the Suit of Garda Alan Lynch) v. Brendan O'Neill*, a judgment of Moriarty J. of 1st February, 2016. Both those judgments distinguished the matters in issue from the judgment in *DPP v. Cullen*, and found in those cases that the Gardai concerned were not operating a blanket policy of applying handcuffs to persons arrested for drunken driving.

14. The Supreme Court decision of *DPP v. Cullen*, does not bind the learned judge to dismiss the charges against the accused. If the learned judge, having taken into consideration the matters set out at para. 25 of the Cullen judgment already recited decides that the application of handcuffs was an appropriate use of force, she is entitled to convict.

15. The answer to the question is:

The Supreme Court decision of the *Director of Public Prosecution (at the suit of Sergeant Sean Moyles) v. Cullen* [2004] IESC 7, does not bind the learned judge to dismiss the charges against the accused nor does the recent decision of the Supreme Court in *The People at the Suit of the Director of Public Prosecutions v. J.C.* [2015] IESC 31, arise in this case.