Neutral Citation Number: [2009] IEHC 314

THE HIGH COURT

2009 370 SS

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

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND

SHAY O'ROURKE

ACCUSED

Judgment of Mr. Justice Hedigan delivered the 2nd day of July, 2009

1. This matter comes before the Court by way of a consultative case stated by District Judge John Coughlan, sitting at Wicklow District Court, pursuant to section 52(1) of the Courts Supplemental Provisions Act 1961.

2. The opinion of the High Court is sought in relation to the following questions:-

(a) Can it be said that the arrest of the accused was lawful on the evidence given by Garda Trevor Conroy as set out in the case stated? and

(b) If the answer to the first question is no, should the events which took place subsequent to the arrest be inadmissible in evidence?

I. The Legislative Framework

3. Section 49 of the Road Traffic Act 1961, as amended, covers the criminal offence commonly referred to as drink driving. It states as follows:-

"(1) (a) A person shall not drive or attempt to drive a mechanically propelled

vehicle in a public place while he is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle.

(b) In this subsection "intoxicant" includes alcohol and drugs and any combination of drugs or of drugs and alcohol .

(2) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his blood will exceed a concentration of 80 milligrammes of alcohol per 100 millilitres of blood.

(3) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his urine will exceed a concentration of 107 milligrammes of alcohol per 100 millilitres of urine.

(4) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his breath will exceed a concentration of 35 microgrammes of alcohol per 100 millilitres of breath.

(5) (a) The Minister may, by regulations made by him, vary the concentration of

alcohol for the time being standing specified in subsection (2), (3) or (4) of this section , whether generally or in respect of a particular class of person, and the said subsection shall have effect in accordance with any such regulations for the time being in force.

(b) A draft of every regulation proposed to be made under this subsection shall be laid before each House of the Oireachtas and the regulation shall not be made until a resolution approving of the draft has been passed by each such House and section 5(2) of this Act shall not apply to a regulation made under this subsection .

(6) (a) A person who contravenes subsection (1), (2), (3) or (4) of this section

shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €2,500 or to

imprisonment for a term not exceeding 6 months or to both.

(b) A person charged with an offence under this section may, in lieu of being found guilty of that offence, be found guilty of an offence under section 50 of this Act.

(7) Section 1(1) of the Probation of Offenders Act, 1907, shall not apply to an offence under this section.

(8) 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."

I. Factual and Procedural Background

4. At a sitting of the District Court in Wicklow Town on the 19th of May 2008, the accused appeared to face a charge under sections 49(4) and 49(6)(a) of the Road Traffic Act 1961 ('the 1961 Act'), as inserted by section 10 of the Road Traffic Act 1964 and amended by section 18 of the Road Traffic Act 2006. The charge sheet in question specified that the accused had, at 12.28 a.m. on the 24th of November 2007 driven his vehicle in a public place such that within three hours after so driving, the concentration of alcohol on his breath had exceeded a concentration of 35 microgrammes of alcohol per 100 millilitres of breath.

5. During the course of the hearing, the prosecuting member of An Garda Síochána, Garda Trevor Conroy, gave evidence that the accused had been stopped at a mandatory alcohol testing checkpoint at Bollarney in Wicklow, a public place. The accused was required to provide a specimen of breath under section 4 of the Road Traffic Act 2006 and was informed that a failure to comply constituted an offence. The accused duly complied and returned a result of 'fail' on the Draeger Alcometer. The accused was asked to step out of his vehicle at which point Garda Conroy noticed the smell of an intoxicant and that the accused's eyes were bloodshot. Garda Conroy formed the opinion that the accused had "consumed an intoxicant to such an extent that he had improper control over a mechanically propelled vehicle in a public place." The accused was arrested pursuant to section 49(8) of the 1961 Act for an offence under section 49(1) of that Act. The accused was cautioned in ordinary language in the usual manner and conveyed to Wicklow Garda Station. Thereafter, the standard procedure was followed in the Garda Station and, having provided a breath sample with a concentration of 42 microgrammes of alcohol per 100 millilitres of breath, the accused was charged under sections 49(4) and 49(6)(a) of the 1961 Act.

6. Under cross-examination by counsel for the accused, Garda Conroy explained that he had decided to stop every fifth vehicle that approached the checkpoint. He agreed that there was nothing untoward about the manner in which the accused had been driving his vehicle and that it appeared that the accused was driving normally. When questioned on the operation of the Draeger Alcometer, Garda Conroy stated that the apparatus was designed to detect mouth alcohol and that the presence of a certain amount of mouth alcohol would lead to a 'fail' result. He did not know what level of alcohol would be required to create such a result. He was also unsure as to what effect, if any, such an amount of mouth alcohol might have on an individual's ability to exercise proper control over a mechanically propelled vehicle.

7. At the close of the prosecution case, counsel for the accused applied for a direction on the basis that the arrest of the accused had been unlawful and that all matter which occurred subsequently in the Garda Station were therefore inadmissible in evidence. The primary submissions made on behalf of the accused were as follows:-

(a) Garda Conroy had purported to arrest the accused on the basis that he had formed the opinion that the accused had "consumed an intoxicant to such an extent that he had improper control over a mechanically propelled vehicle in a public place." It was submitted that no such offence was known to the law and that section 49(1) of the 1961 Act instead prohibits an individual from driving or attempting to drive "a mechanically propelled vehicle in a public place while he is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle." Counsel for the accused submitted that there was a clear distinction between these two states of mind and, on this basis, Garda Conroy had not actually formed the opinion that the accused was committing an arrestable offence. It was submitted that the accused had therefore been in unlawful custody when he provided the necessary breath specimens.

(b) Further and in the alternative, it was submitted that Garda Conroy's opinion that an arrestable offence had been committed was required by law to have been formed on a rational and sustainable basis. Garda Conroy had given evidence that he had invoked the power of arrest on the basis of the alleged "improper control" of the vehicle by the accused. However, he had also agreed that there was nothing unusual about the driving of the accused as he approached the checkpoint. Counsel submitted that in the circumstances, the result of 'fail' on the Draegon Alcometer, even when coupled with the observations made by Garda Conroy when the accused alighted from the vehicle, were insufficient to sustain the requisite opinion under section 49(1) of the 1961 Act.

8. Having heard these submissions, the District Judge reserved his decision in the case, pending the determination of this case stated.

II. The Submissions of the Parties

9. The accused repeats and emphasises the submissions which were made by him at the hearing on the 19th of May 2008, which have already been outlined above. On the basis of these, he maintains that his arrest was unlawful and that any evidence obtained subsequent thereto ought to be inadmissible at trial.

(a) The Correctness of the Charge

10. The prosecutor argues that there was no defect in the arrest of the accused in the present case. He maintains that an arresting Garda is not required to determine the precise sub-section of section 49 of the Road Traffic of 1961 Act under which an offence has been committed prior to arresting an individual. In his submission, it would have been open to Garda Conroy to simply inform the accused that he was arresting him for the offence of drink driving under section 49 of the 1961 Act. The prosecutor therefore argues that the mere fact that Garda Conroy chose to go further, and specify that he had formed the view that the accused had committed an offence under section 49(1) of the 1961 Act, does not

invalidate the arrest.

12. In the alternative, the prosecutor contends that even if it could be said that there was some shortcoming in Garda Conroy's evidence as to his state of mind when he decided to arrest the accused, this deficiency is of a purely trivial and semantic nature. In his submission, mere errors made in the recitation of the wording of the statutory provision while giving evidence in court ought not to be fatal to the prosecution for a serious offence.

(b) The Basis for the Suspicion
13. In relation to the accused's second argument, relating to the non-existence of a rational basis for Garda Conroy's opinion that the accused had committed an offence contrary to section 49(1) of the 1961 Act, the prosecutor maintains that the evidence was more than sufficient. In this regard, he emphasises that the observations made by Garda Conroy and the result produced by the Draegon Alcometer must also be considered in the context in which they arose, namely while the accused was driving at around half past midnight on a Friday night. The prosecutor argues that the level of proof required to form a valid suspicion of an arrestable offence is, as a matter of law, much lower than that which would be necessary to prove that offence beyond reasonable doubt at trial.

14. Finally, the respondent asserts that the evidence justifying the suspicion of Garda Conroy is not required to correspond with the precise sub-section of section 49 prescribing the offence for which the accused was arrested. In the present case, he submits that the evidence which Garda Conroy maintains gave rise to a suspicion of an offence under section 49(1) must by necessary implication have given rise to a suspicion of a potential offence under sections 49(2), 49(3) or 49(4).

III. The Decision of the Court

(a) The Correctness of the Charge
15. Section 49 of the 1961 Act creates four discreet drink driving offences which might loosely be termed: the traditional incapacity to control offence under section 49(1); excessive alcohol in blood under section 49(2); excessive alcohol in urine under section 49(3); and excessive alcohol in breath under section 49(4).

16. It is well-established as a matter of law that a Garda effecting an arrest under section 49(8) of the 1961 Act is not required to determine, at that point in proceedings, which of the four drink driving offences will ultimately form the basis of the charge preferred against an accused. In *Hobbs v. Hurley* (High Court, unreported, 10th June 1980), Costello J. stated the following:-

> "There are three distinct offences created by section 49 and it is quite clear that at the time of arrest it would not be possible for the Garda then to know under which sub-section a suspect would subsequently be charged. The Oireachtas has therefore permitted an arrest to be made when an opinion is arrived at that an offence under the section has been committed - an opinion which does not depend on a conscious determination based on scientific evidence that the statutory limit of alcohol in the blood or urine of the arrested person has been exceeded."

17. Furthermore, it is equally clear that a mere error made in the recitation of a particular statutory provision will not be fatal. The decision of *DPP v. O'Connell* [1983] 3 IR 62 arose in circumstances similar to the present case. The prosecuting Garda in that case had given evidence before the District Court of arresting the accused under section 49(8) of the Road Traffic Act 1994, when in fact he had intended to state that he had arrested him under section 49(8) of the 1961 Act. The provision which he had purportedly used did not exist on the statute book. Geoghegan J. stated the following at page 66:-

> "A judge at all times takes judicial notice of the law and in my opinion there is only one inference which a judge could draw from the statutory citation given by the sergeant. It was perfectly obvious beyond any doubt at all that the garda was referring to s. 49(8) of the Road Traffic Act, 1961, as inserted by s. 10 of the Road Traffic Act, 1994, even though he clumsily and indeed incorrectly gave the citation. The District Court Judge therefore would have had to draw the conclusion that the garda was intending to arrest under s. 49(8) of the Road Traffic Act, 1961, as inserted by s. 10 of the Road Traffic Act, 1994. But that is not the end of the matter, because of course the garda's intention is only one constituent element in the validity of an arrest. The arrested person must have knowledge of why he was being arrested. On the facts as set out in the case stated, I am satisfied that the defendant would have known the reason for his arrest, sufficiently to render the arrest valid."

Geoeghegan J. then went on, at page 67, to explain the level of information which a Garda was required to provide to a suspect when arresting him for an offence under section 49 of the 1961 Act. He stated:-

> "Following *Director of Public Prosecutions v. Mooney* [1992] 1 IR 548, I likewise take the view that the evidence that Sergeant Connolly informed the accused in layman's language that he was being arrested for drunk-driving was sufficient communication of the reason for the arrest and indeed I further agree with the suggestion of Blayney J. that having regard to the fact that a breath test was taken and proved positive, it was not even necessary to state a reason. However, a reason which was sufficient was in fact stated."

19. Further instruction in relation to such slips in recitation is gained from the recent decision of Charleton J. in *Mulligan v. DPP* (High Court, unreported, 29th October 2008). In that case, the issue arose as to whether a Garda was required to state the precise sub-section of the Criminal Justice (Public Order) Act under which he was making a lawful demand for a person's name and address. Charleton J. stated:-

> "It cannot […] be expected that the Gardaí should be turned into walking repositories of sections and sub-sections of various Acts of the Oireachtas. That has never been the law. […] In arresting someone for murder, for instance, a Garda does not have to mention section 4 of the Criminal Justice Act 1964. He or she need merely specify the offence of murder and its occasion."

20. Taking these two propositions together, I cannot accept the accused's argument to the effect that he was arrested, or indeed that he honestly believed that he was arrested, for an offence that is not known to the law. Garda Conroy's

decision to specifically delimit the arrest as being one for an offence contrary to section 49(1) of the 1961 Act, before charging him with an offence under section 49(4) of that Act, is of no consequence in light of the decision in *Hobbs*. Likewise, the slightly incorrect description of the terms of that section provided by Garda Conroy while giving his evidence at trial is an error of the utmost triviality. The District Court, in hearing such a case, is required to receive clear evidence of arrest, charge and caution. There could be no doubt in the mind of the District Judge, or indeed the parties to these proceedings, as to which offence was suspected by Garda Conroy in the present case. It is also abundantly clear that Garda Conroy understood the fundamental nature of that offence. In this regard, I agree entirely with the prosecutor's submission that it would have been sufficient for Garda Conroy to simply state in evidence that he had formed the opinion that an offence of 'drink driving contrary to section 49 of the Road Traffic Act 1961, had been committed.

(b) The Basis for the Suspicion

21. There can be no doubt but that a member of An Garda Síochána's suspicion of the commission of an arrestable offence must be reasonable and must be genuinely held. In *Hobbs*, Costello J. stated:-

> "The opinion arrived at must, of course, be a reasonable one, and must be one which results from an honest belief come to after facts have been ascertained and considered. In the present case, Garda Hobbs smelled alcohol in the defendant's breath and he noticed that the defendant's eyes were bloodshot. The alkalyser test confirmed the existence of alcohol in the defendant's breath. 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 postive finding on the alkalyser test."

22. Reasonable suspicion is therefore a fundamental prerequisite of any arrest. However, it is also clear that a Garda is not obliged to be satisfied beyond doubt of the commission of an offence before effecting an arrest. In truth, the burden is a light one and does not even rise to the level of *prima facie* proof of guilt. In *Dumbell v. Roberts* [1944] 1 All ER 326, Scott L.J. outlined the position as follows at page 329:-

> "The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called upon before acting to have anything like a prima facie case for conviction."

23. Furthermore, reasonable suspicion is something which may be inferred from the circumstances of a particular arrest. In *DPP v. Tyndall* [2005] 1 IR 593, Denham J. stated as follows while delivering the unanimous decision of the Supreme Court:-

> "Proof of this fact, of the suspicion, may be by direct evidence. There was no such direct evidence in this case. I agree with the trial judge that the omission of direct evidence of the suspicion does not render the arrest unsatisfactory if the suspicion may be inferred from the circumstances. The suspicion held by the arresting member of An Garda Síochána may be inferred from the circumstances."

24. Applying these principles to the present case, I am satisfied that there was ample evidence, arising from direct testimony and logical inference, based upon which Garda Conroy could have reasonably formed the suspicion of the commission of an offence under section 49(1), or the traditional incapacity to control offence as I have referred to it above. It is readily conceivable that where a Garda encounters an individual driving a vehicle after midnight on a Friday night, and where that individual gives off a smell of an intoxicant, possesses bloodshot eyes and fails an Alcometer test, that the Garda in question might reasonably suspect that the individual is under the influence to such an extent as to be incapable of having proper control of their vehicle.

25. It is clear moreover that a Garda whose suspicion that an offence has been committed under section 49(1) of the 1961 Act is unjustified, may nonetheless hold a valid suspicion by implication that an offence under sections 49(2), 49(3) or 49(4) has been committed. In *DPP v. Gilmore* [1981] ILRM 102, the Garda's purported suspicion of an offence under section 49(1) was predicated solely on the fact that the accused had failed a roadside breathalyser test. This was held by the Supreme Court to be an insufficient basis for suspecting that the accused was incapable of controlling his vehicle. However, this was of little consequence since the Court also held that the failure of such a test gave a sufficient basis for a suspicion of any one of the other three drink driving offences. Furthermore, it was held that this suspicion must necessarily have arisen by implication at the time of the arrest, despite the fact that it was on foot of the invalid suspicion upon which the Garda had effected the arrest. Henchy J., delivering the unanimous judgment of the Court, stated as follows at pages 105-106:-

> "This conclusion, however, does not dispose of the main point raised in the case stated. It might be otherwise if the offence charged were identical with the particular offence which was the basis of the Garda's opinion that he was entitled to make the arrest, namely, an offence contrary to subs. (1) of the new s. 49. However, the offence charged, and held proved in the District Court, was an offence contrary to subs. (3) of that section, namely, having a concentration of alcohol in the urine beyond the permitted level. Since subs. (6) of that section allowed the Garda to arrest the defendant if he properly formed the opinion that the defendant had committed "an offence under this section", the real question is whether it can be inferred that the Garda, before he made the arrest, formed a justifiable opinion that the defendant had committed an offence under subs. (2) or subs. (3).
>
> In my judgment, the answer to that question must be in the affirmative. Once the breathalyser test had proved positive, and once, as a result of that, the Garda formed the opinion (unjustified though it was) that the defendant had committed the offence of driving while he was under the influence of an intoxicant to such an extent that he was incapable of having proper control of the vehicle, it follows that the Garda must also have formed the opinion, and justifiably so on the basis of the breathalyser test, that the defendant had, in breach of subs. (2) or subs. (3), driven when there was an excessive concentration of alcohol in his blood or in his urine. Before making a lawful arrest under subs. (6), the Garda cannot be expected to opt, in forming his opinion, for either an offence under subs. (2) or an offence under subs. (3), because he cannot anticipate whether the driver, or would-be driver, will choose between giving a specimen of blood and providing a specimen of urine. But if (as was the position here), after the breathalyser test proved positive and the Garda formed the opinion that the defendant had consumed so

much alcohol that he was incapable of exercising proper control of the vehicle, that opinion must have encompassed the further opinion that an analysis of a sample of his blood or urine would prove that he had exceeded the blood- alcohol or urine-alcohol levels permitted. In other words, the Garda, after he had carried out the breathalyser test and before he arrested the defendant, must have formed the opinion that the defendant had committed an offence under subs. (2) or subs. (3). I read Part III of the 1978 Act as indicating a statutory intent that a positive result of a breathalyser test is sufficient to justify an opinion on the part of the Garda who carried out the test, albeit an opinion that may later turn out on a more scientific analysis to have been wrong, that an offence under subs. (2) or subs. (3) had been committed. And, considering that the Garda had formed the opinion that the defendant's alcoholic 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 subs. (2) or subs. (3).

If I were in any doubt about imputing this opinion to the Garda, I would favour sending the case stated back to the Circuit Court so that positive evidence could be got from the Garda as to whether the opinion he formed subsumed an opinion that the defendant had also committee an offence under subs. (2) or subs. (3). But having regard to the opinion we know he had formed, I feel it may be safely assumed that the Garda's evidence would be that, once the crystals in the breathalyser had turned the colour suggesting the consumption by the defendant of an unpermitted amount of alcohol, the opinion he formed embraced the further and fully supportable opinion that an offence under subs. (2) or subs. (3) had been committed.

My conclusion, therefore, is that the arrest made by the Garda, was lawful, not for the reason given in evidence but for the appurtenant and necessarily implied reason that an offence under subs. (2) or subs, (3) of the new s. 49 had been committed. This means that all the proofs necessary to support the conviction in the District Court were complied with and that that conviction should be affirmed by the Circuit Court Judge”

IV. Conclusion

26. In light of the foregoing, it seems clear to me that both Garda Conroy and the accused were fully aware at all times of the legal basis upon which the accused had been arrested. Nothing arises by virtue of the fact that he was subsequently charged with a slightly different offence under the same legislative provision. It is also evident that Garda Conroy was fully aware of the nature of the offence for which he arrested the accused and that he had formed a reasonable suspicion of the commission of same. The accused was therefore, at all material times, in lawful custody hence I would answer the first question in the consultative case stated in the affirmative. The second question does not therefore arise.