

## THE HIGH COURT

2006 607 SS

## THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND  
SEAN KENNY

ACCUSED

**Judgment delivered by Mr. Justice Herbert on Friday, 13th October 2006**

1. This is an appeal by way of a Case Stated on a point of law pursuant to Section 2 of The Summary Jurisdiction Act, 1857, as extended by Section 51 of The Courts (Supplemental Provisions) Act, 1961. The case is stated at the behest of the Director of Public Prosecutions, the Prosecutor in the matter.

2. The facts are set out by Judge Aeneas McCarthy, a Judge of the District Court, assigned to the Dublin Metropolitan District as follows:

3. The Defendant, Sean Kenny was charged that:

On 22nd July 2005 at Tyrellstown Way, Blanchardstown, Dublin 15, in the said District Court Area of Dublin Metropolitan District, he drove a mechanically propelled vehicle, registered number 02 D 60097, in a public place while there was present in his body a quantity of alcohol such that within hours after so driving, the concentration of alcohol in his breath exceeded a concentration of 35 microgrammes of alcohol per 100 millilitres of breath. Contrary to Section 49(4) and 6(a) of the Road Traffic Act, 1961, as inserted by Section 10 of the Road Traffic Act, 1994, as amended by Section 23 of the Road Traffic Act, 2002.

4. On 26th October, 2005, the defendant appeared before District Judge McCarthy on this charge. The prosecutor was represented by Mr. R. O'Neill, Senior Prosecution solicitor. The Defendant was represented by solicitor and counsel.

5. Garda Eoghan Clerkin of Blanchardstown Garda Station gave evidence that on 22nd July 2005 at 1:20 a.m., he observed a motor car 02 D 60097 at Tyrellstown Way, Blanchardstown, Dublin 15, a public place, stopped in the middle of the road, blocking all routes of traffic, with its headlights on. He signalled to the driver to move his vehicle off the road and turn off his headlights. Garda Clerkin signalled to the Accused to move the car, and the driver reversed the vehicle 50 yards out of the way. The driver gave his name as Sean Kenny of 225, Cappagh Road, Finglas, Dublin 11. Garda Clerkin asked the driver why he was parked in the middle of the road. The Accused's Counsel objected in advance to Garda Clerkin giving this evidence, and I ruled I would not permit the Accused's explanation as to why he was parked in the middle of the road into evidence, since the accused had not been cautioned.

6. On behalf of the prosecution, Mr. O'Neill cited the case of DPP -v- Paul Cormack the (ex-tempore) Judgment delivered on the 22nd day off January 1999 by Judge O'Flaherty. However, having considered the submission made, I ruled that I was excluding the said evidence. Garda Clerkin then stated that he got a small smell of alcohol from the driver and he appeared to be drunk. Garda Clerkin asked the driver to step out of the vehicle. He formed the opinion that the Accused was intoxicated and he was unsteady on his feet and had a very strong smell of alcohol. Garda Clerkin said at 1:25 a.m., that he was of the opinion that the Accused was under the influence of an intoxicant to render him incapable of having proper control of a vehicle in a public place, and as a result he was arresting him under Section 49(8) for an offence under Section 49(2), (3), and (4) of the Road Traffic Acts 1961 - 1994.

7. He told the Accused in simple terms he was arresting him for drink driving. He then cautioned the Accused. The Accused was arrested at 1:25 a.m. and conveyed to Blanchardstown Garda Station, arriving at 1:30 a.m. Garda Clerkin was present when at 1:33 a.m. the Accused was given his notice of rights (Form C72) by Sergeant Carr, and his details were entered into the Custody Record. Garda Clerkin said that Garda Olive Crowe was introduced to the Accused and that she explained to him she would be processing him on the Lion Intoxilyzer 6000IRL. Garda Clerkin said at 1:55 a.m. he accompanied Garda Crowe to the Intoxilyzer Room. He was present when the Accused provided two specimens at 2:01 a.m. and 2:03 a.m., with a reading of 66mg of alcohol per 100ml of breath. Garda Clerkin handed the Section 17 Statement into court. A copy of the Section 17 Statement appears at Appendix 2 of this Case Stated. Garda Clerkin gave evidence that he was also present when the accused was charged by Sergeant Carr at 2:35 a.m.

8. Garda Olive Crowe of Blanchardstown Garda Station was the next witness. Garda Crowe gave evidence that she was on patrol with Garda Eoghan Clerkin on 22nd July 2005 in the Tyrellstown area of the Blanchardstown District. At 1:20 a.m. she observed a vehicle parked in the middle of the road with its headlights on. She explained that Garda Clerkin indicated to the driver to move his car out of the way and that he also asked the driver to turn off his dipped headlights. She said Garda Clerkin got out of the patrol car and approached the driver to ascertain, she presumed, what was going on. Shortly after that Garda Clerkin returned to the Patrol Car and he informed Garda Crowe that he had arrested the driver for drunk driving. She explained to the court her training in the operation of the Lion Intoxilyzer and gave an explanation for the 20-minute period of observation. She also gave evidence in relation to observing the Accused for 20 minutes. She introduced herself to the Accused and formed the opinion that he had consumed an intoxicant.

9. She informed him she would be processing him by way of the Lion Intoxilyzer 6000IRL. She informed him that the Lion Intoxilyzer is an apparatus designed for determining the concentration of alcohol in the breath, and that she was obliged to observe him for a period of 20 minutes to ensure he consumed nil by mouth. She began her observation of the Accused at 1:35 a.m. to 1:55 a.m.. During the period of observation the Accused consumed nil by mouth. At 1:55 a.m. she brought the accused, accompanied by Garda Clerkin, to the room which contains the Lion Intoxilyzer 6000IRL. On entering the room, she noted the ambient temperature and humidity in her notebook. At 1:59 a.m. she made the following legal requirement for the Accused:-

"I am of the opinion that you have consumed an intoxicant, therefore, pursuant to Section 13(1)(a) of the Road Traffic Act, 1994. I am now requiring you to provide two specimens of your breath by exhaling into this apparatus, designed for determining the concentration of alcohol in the breath. Failure or refusal to comply with my requirement or failure or refusal to comply with my requirement outlined by me is a specific offence under Section 13(2) of the Road Traffic Act, 1994.

Penalty on summary conviction is liable to a fine not exceeding €2,500 or to a term of imprisonment not exceeding 6 months, or both."

10. Garda Crowe then explained in laymans terms to the Accused this requirement. She also informed the Accused that on being convicted, he would be disqualified from driving for a period of two years for failure or refusal to comply with her requirement. The Accused complied and provided two samples of breath. The reading was 66mg per 100ml. The Accused signed the Section 17

Statement.

11. At the end of the case, Counsel for the Accused submitted that the Accused was charged under Section 49(4) of the Road Traffic Acts, 1961 - 1994 and that as the Gardai could not rely on the driving of the car 50 yards up the road on the instruction of Garda Clerkin, that there was no time of driving given in Court. In reply, Mr. O'Neill for the Prosecution said the State would not be seeking to rely on the Accused moving his car 50 yards, on the instruction of Garda Clerkin. Mr. O'Neill submitted to the court that Section 49(6)(b) provides: "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." Mr. O'Neill submitted that on that basis the court could convict the Accused of being drunk in charge of a vehicle under Section 50(4) of the Road Traffic Acts, 1961 - 1994. Counsel for the Accused in reply submitted that on the wording of Section 49(6)(b) of the said Act, that the court had discretion in the matter.

12. The Learned District Court Judge states that he dismissed the case saying, that the State had brought a prosecution under Section 49(4) of the Road Traffic Act, and he was not holding with the submission of the Prosecution. At the request of the Prosecutor, the Learned District Court Judge stated the following question for the opinion of this court:-

"In the above circumstances, in the exercise of my discretion in holding that the State have brought the prosecution under Section 49(4) of the Road Traffic Acts, 1961 - 1994, was I correct in law in holding that I had a discretion not to convict the Accused of an offence contrary to Section 50(4) of the Road Traffic Acts, 1961 - 1994?"

13. It was submitted by Mr. P. A. McDermott BL, on behalf of the Prosecutor, that even though every ingredient of the offence of being drunk in charge of a mechanically propelled vehicle had been made out by the Prosecution and, even though no assertion of prejudice relating to Section 50(4) had been raised by or behalf of the Defendant, the Learned District Judge had erred in law in failing to exercise his discretion in the matter and in declining to consider an alternative verdict under Section 50(4), on the ground that the State had brought the case exclusively under Section 49(4) of the Road Traffic Act 1961 (as inserted & amended). He submitted that the Learned District Judge had mis-directed himself in law in considering that because the prosecution was brought under section 49(4) alone, he could not or should not permit a conviction under Section 50(4) of the 1961 Act.

14. Counsel for the Prosecutor submitted that the Learned District Judge misinterpreted the provisions of Section 49(6)(b) of the 1961 Act which, he said, provides for an alternative verdict under Section 50(4) in lieu of a verdict under Section 49(4) on the same charge under Section 49(4) and, does not merely create an alternative charge or confer a mere power of amendment. Counsel submitted that the question posed by the Learned District Judge should be answered in the negative. He submitted that the interpretation of Section 49(6)(b) adopted by the Learned District Judge would defeat the clear purpose and intention of the Legislature in enacting that provision in the public interest. Mr. McDermott referred to the following authorities: *DPP -v- Corbett* [1992] ILRM 674 at 678/9 per Lynch J. (High Court). *"B" -v- DPP* [1997] 3 IR 140 at 195/6 per Denham J. (Supreme Court). *The State (Duggan) -v- Evans* [1978] 112 ILTR 61 at 63 per Finlay P. (as he then was) (High Court). *DPP -v- Collins* [1981] ILRM 447 at 452/3 per Henchy J. (Supreme Court). *DPP -v- Clifford* [2002] 4 I.R. 398 at 400 per O Caoimh J., (as he then was), (High Court). He also referred to *Robert Pierse, Road Traffic Law*, Volume 1, page 789, (2004, First Law).

15. It was submitted by Mr. S. O Tuathail SC, (with him Mr. Thomas Heffernan BL), for the Defendant, that Sections 49 and 50 of the Road Traffic Act, 1961 create two wholly separate and distinct offences and the Defendant was charged solely with an offence under Section 49(4) of that Act. He submitted that the use of the word "may" in Sub-section 6(b) of Section 49 of the 1961 Act, on the ordinary rules of construction of a Statute creating a criminal offence, vested in the Learned District Judge a discretion to convict or not to convict, which he had exercised in a reasonable manner and within his jurisdiction. Mr. O Tuathail submitted that there was nothing in the findings of fact or inferences drawn from the facts, as set out in the Case Stated, which would support a conviction of the Defendant for the separate charge of being in charge of a mechanically propelled vehicle with intent to drive or attempt to drive it, as required by Section 50(4) of the Road Traffic Act, 1961. The Prosecutor, he submitted, was endeavouring in the absence of any express definition in the Statute, or by reference to any necessary or compelling implication arising from a proper construction of its terms, to construe the word "may", which was permissive and discretionary as "must" or "shall" which would be directory and mandatory. He referred to:- *Stafford -v- Roadstone Limited* [1980] ILRM 1 per Barrington J. (then of the High Court). *Bradley -v- Meath County Council* [1991] ILRM 179 at 181 per Costello J. (as he then was), (High Court). *The State (Sheehan) -v- The Government of Ireland* [1987] IR 550 at 561 per Henchy J., (Supreme Court). He also referred to *Drunken Driving and the Law* by M. de Blacam, page 20, paragraph 2.14 (Thomson Round Hall, 2003). He submitted that Sub-section 6(b) of Section 49 of the Road Traffic Act, 1961, vested a clear and unconditional discretion in the Learned District Court Judge and that the question posed in the Case Stated should be answered in the affirmative.

16. Both parties referred to the decision in *"T" -v- "T"* [1989] IR 29 (Supreme Court) and Mr. O Tuathail referred to the decision in *Fitzgerald -v- DPP & The Attorney General* [2003] 3 IR 247 (Supreme Court), with regard to the proper construction of the provisions of Sections 2 - 7 inclusive, of the Summary Jurisdiction Act, 1857, as extended.

17. Sections 49(4) and 49(6)(b) of the Road Traffic Act, 1961, (as inserted as amended), provide as follows:-

49(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, the concentration of alcohol in his breath will exceed a concentration of 35 microgrammes of alcohol per 100 millilitres of breath," and 49(6)(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."

18. Sections 50(4) and 50(6)(b) of the same Act of 1961 provide as follows:-

50(4) "A person shall be guilty of an offence if, when in charge of a mechanically propelled driving or attempting to drive it, there is present in his body a quantity of alcohol such that, within 3 hours after so driving, the concentration of alcohol in his breath will exceed a concentration of 35 microgrammes of alcohol per 100 millilitres of breath", and, 50(6)(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 49 of this Act."

19. In my judgment, Section 49(6)(b) of the Road Traffic Act, 1961 (as inserted & amended), is a specific statutory provision authorising the return of an alternative verdict under Section 50 of that Act on the hearing of a charge laid under Section 49(4) of the Act. Sub-section 6(b) of Section 49 states unequivocally, "a person charged with an offence under this Section", (the emphasis is mine). There is no express requirement in the Sub-section for the allegation in a charge under Section 49(4) of an alternative offence under Section 50 of the 1961 Act. The court does not have to be concerned to find whether a charge under Section 49(4) of the 1961 Act impliedly includes an allegation of an alternative offence under Section 50 of the Act of 1961. The language of Sub-section

6(b) of Section 49 is clear, and there can be no doubt as to its meaning. There is no occasion to or basis for applying the principle of statutory interpretation which gives a strict construction to Penal Statutes in favour of an accused.

20. The Sub-section continues, "may, in lieu of being found guilty of that offence, be found guilty of an offence under Section 50 of this Act". In my judgment, "may" is here used in its ordinary sense of enabling and rendering discretionary a particular course of action. There is nothing in the definition section of the Act of 1961 or in the provisions of the Interpretation Acts, 1937 and 2005, or in the context of the Statute read as a whole and as part of the road traffic legislation generally, which would require the word to be construed in a mandatory or compulsory sense. I am satisfied that there is nothing to indicate that the person upon whom the particular discretion is conferred is under an obligation to exercise it in a particular way, but it must be exercised.

21. In my judgment, Sub-section 6(b) of Section 49 of the 1961 Act confers on the court the following discretion:-

"(a) If satisfied on the evidence that the accused should not be convicted of an offence under Section 49(4) and if satisfied, by submission made by or on behalf of the Accused, or of its own motion, that the Accused would be prejudiced by the introduction of the alternative offence and could not be afforded a sufficient opportunity of countering it, to decline to consider the alternative offence under Section 50 of the 1961 Act and acquit the Accused.

(b) Alternatively, in the absence of any such prejudice or if it is capable of being eliminated, to proceed with the hearing, to consider the evidence and find the Accused either guilty or not guilty of an offence under Section 50 of the 1961 Act".

22. It would not be appropriate for the court to find the Accused guilty both of an offence under Section 49(4) and Section 50 of the 1961 Act. The proper and effective exercise of this discretion is necessary to comply with the constitutional requirement of fair procedures and the provisions of Article 6 of the First Schedule of the European Convention on Human Rights Act, 2003. In the course of its decision in *Petissier & Sassi -v- France* [2000] 30 EHRR 315, and in a number of subsequent cases, the European Court of Human Rights has ruled that there is an obligation on the court itself to ensure that an Accused is not prejudiced by the introduction of an alternative offence in circumstances where the Accused would not have an opportunity of dealing properly with it in advance of a judgment.

23. I find that the Learned District Judge had no jurisdiction under Section 49(6)(b) of the 1961 Act to dismiss the case against this Defendant on the ground that the State had brought the prosecution under Section 49(4) of the Road Traffic Acts 1961 - 1994, alone. I find that the Learned District Judge was not correct in law in holding that he had a discretion not to convict the Accused on that basis. I answered the question posed by the Case Stated in the negative. I will remit this matter to the Learned District Judge with this opinion of this court and direct that he hear any, (if any), further submissions from the parties, exercise the discretion vested in him and, pronounce judgment.