

THE HIGH COURT

[2017 No. 1173 S.S.]

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

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (GARDA BARRY DOHERTY)

PROSECUTOR

AND

MARIAN O'DONOGHUE

ACCUSED

JUDGMENT of Mr. Justice McDermott delivered on the 15th day of June, 2018

1. This is a consultative case stated by Judge Patrick Durcan, pursuant to s. 52 of the Courts (Supplemental Provisions) Act 1961 on a point of law for the opinion of the High Court.

2. The accused Ms. Marian O'Donoghue was summonsed to appear before the District Court in respect of a charge that she: -

"On the 27/06/2006 at Bóthar na Luachra, Shannon, Co Clare, a public place in the said District Court area of Ennis, District Court Area No 12, did drive a mechanically propelled vehicle registration number 03WD 2918 while there was present in your body a quantity of alcohol such that, within 3 hours after so driving, the concentration of alcohol per 100 millilitres of urine, to wit 200 millilitres of alcohol per 100 millilitres of urine, contrary to s. 4(3)(a) & 5 of the Road Traffic Act, 2010."

3. The learned judge heard the evidence in the case on 9th February, 2017. Following legal argument a Case Stated was drafted and the matter was adjourned to await the judgment of this court. It is clear from the Case Stated that a great deal of the evidence is not in issue. Garda Doherty gave evidence on behalf of the prosecution as to the driving of the accused on the morning in question, the formation of his opinion that the accused was intoxicated to such an extent as to be incapable having proper control of her vehicle in a public place and her subsequent arrest and conveyance to Shannon Garda station. He also gave evidence of the designation and arrival of the doctor under the Act, the introduction of the accused to the doctor and vice versa. Garda Doherty invoked s. 12(1)(b) of the Road Traffic Act, 2010 requiring the accused either to permit the designated doctor to take from her a specimen of her blood or at her option to provide for the designated doctor a specimen of her urine.

4. The Case Stated continues:

"Evidence was then given by Garda Doherty that he handed a sealed Urine Kit to the designated Doctor, that the designated Doctor opened the kit, removed the jug and gave the jug to the accused. Garda Doherty then said that the accused provided the sample supervised by Garda Hanley, the member in charge, and a female member of An Garda Síochána. Garda Hanley was also called to give evidence. She gave evidence in relation to the discharge of her duties as Member in Charge and nothing is in dispute in that regard. She also gave evidence that Garda Doherty asked her to supervise the provision by the accused woman of the provision by her of the urine sample. Garda Hanley stated that she informed the accused that she would supervise her, that the accused went into "the cubicle" (toilet) with the jug and that she stood at the door. Garda Hanley added that she observed the accused providing the sample. She added that the accused then came out of the cubicle with the jug and handed it to the designated doctor. Garda Hanley added that she left the Doctor's Room at that stage.

's. 12(1)(b)(ii) of the Road Traffic Act, 2010 requires that a detained person at their option provide for the designated doctor a specimen of their urine. The designation of the doctor and the exercise by the detained person of the option to provide a urine specimen creates a particular professional relationship between the designated doctor and the detained person. By virtue of the statutory basis of this professional relationship, and the statutory obligations placed on the designated doctor, it is not open to the designated doctor to abrogate those statutory duties and delegate them to a third party.'

The Prosecutor (Inspector TA Kennedy) contended that the reason(s) why a Garda is required to supervise the taking of the sample is to ensure that there is no contamination of the sample and that this is a policing function not a medical one."

5. The learned judge then set out his ruling in respect of the role of the designated doctor as follows:

"6. Section 12 (1) and S. 15 of the Road Traffic Act, 2010 specify in related to blood/alcohol testing particular functions of the investigating Garda and the designated doctor. In this case I query the manner of the "provision" of the sample. Is it in order, as I see (it), for the designated doctor to abrogate his statutory responsibility in relation to the direct and immediate provision by an accused person of a urine sample, and allow that sample be provided by the accused person in the immediate presence of a supervising Garda, but not in the sight of the designated doctor? I expressed the view that the correct interpretation of s. 12(1)(b) and s. 15, in relation to the statutory function of the designated doctor, in relation to the provision by an accused person of a urine sample, is that the sample be provided directly to the designated doctor."

Arising from that ruling the learned judge seeks the guidance of this court as to:

"...whether I am correct in law as to my interpretation of the aforementioned statutory provisions? If I am, am I correct in dismissing the prosecution case?

Relevant statutory provisions

6. The relevant statutory provisions are s. 12 and 15 of the Road Traffic Act, 2010.

Section 12 provides:

"12. -(1) Where a person is arrested under section 4 (8), 5 (10), 6 (4), 9 (4), 10 (7)

or 11 (5) of this Act ... a member of the Garda Síochána may, at a Garda Síochána station, do either or both of the following—

(a) require the person to provide, by exhaling into an apparatus for determining the concentration of alcohol in the breath, 2 specimens of his or her breath and may indicate the manner in which he or she is to comply with the requirement,

(b) require the person either—

(i) to permit a designated doctor or designated nurse to take from the person a specimen of his or her blood, or

(ii) at the option of the person, to provide for the designated doctor or designated nurse a specimen of his or her urine...

(2) Subject to section 22, a person who refuses or fails to comply immediately with a requirement under subsection (1)(a) commits an offence.

(3) Subject to section 22, a person who, following a requirement under subsection (1)(b)—

(a) refuses or fails to comply with the requirement, or

(b) refuses or fails to comply with a requirement of a designated doctor or designated nurse in relation to the taking under that subsection of a specimen of blood or the provision under that subsection of a specimen of urine, commits an offence.

..."

In passing, the court notes that the offence provided for in sub-s 1(b) does not encompass the requirement to comply "immediately" with the requirement as is the case in respect of an offence under sub-s.1(a) . Thus the reference to the requirement of immediacy in the Case Stated in respect of the offence charged in this case is an error.

7. Section 15 insofar as may be relevant provides:

"15. — (1) Where under this Chapter a designated doctor ... has been provided by the person with a specimen of his or her urine, the doctor ... shall divide the specimen into 2 parts, place each part in a container which he or she shall immediately seal and complete the form prescribed for the purposes of this section.

(2) Where a specimen of ... urine of a person has been divided into 2 parts under *subsection (1)*, a member of the Garda Síochána shall offer to the person one of the sealed containers and inform the person that he or she may retain either of the containers.

(3) As soon as practicable after *subsection (2)* has been complied with, a member of the Garda Síochána shall cause to be forwarded to the Bureau the completed form referred to in *subsection (1)*, together with the relevant sealed container or, where the person has declined to retain one of the sealed containers, both relevant sealed containers.

(4) In a prosecution for an offence under this Chapter ... it shall be presumed until the contrary is shown that *subsections (1) to (3)* have been complied with."

It is clear that no issue arises in this case about compliance with the provisions of s. 15. However, the learned judge was concerned that the provision of the urine sample by the accused person in the physical presence of a supervising Garda but not in the sight of the designated doctor might constitute an abrogation of the doctor's statutory responsibility in relation "to the direct and immediate provision by an accused person of a urine sample" and that the sample must be provided directly to the designated doctor.

8. In this case it is clear that the accused, a female, was the subject of the requirement under s. 12 and elected to give a sample of urine. She was provided with the jug from the Urine Kit. She went to a nearby toilet where under the supervision of Garda Hanley, a female Garda, she went into the cubicle with the jug. Garda Hanley stood at the door and observed the accused providing the sample into the jug. The accused then came out of the cubicle with the jug and personally handed it to the designated doctor. The learned judge was satisfied that once the detained person has exercised the option to provide a urine specimen, "a particular professional relationship between the designated doctor and the detained person" was created. This relationship was a statutory relationship which imposed duties on the designated doctor and it was not open to him to "abrogate" those duties and delegate them to a third party. In effect the learned judge held that it was part of the designated doctor's duty to accompany the accused to the cubicle and observe the passing of the sample into the jug.

Submissions

9. Counsel on behalf of the accused submitted that once the accused elects to provide a urine sample the designated doctor has a statutory duty to fulfil. It was implicit in the learned judge's finding that this involved more than receiving the receptacle which

contains the urine sample which is proven to have been given by the detainee. The learned judge was not satisfied that proof of the simple physical act of urination into a receptacle as verified by Garda Hanley and the handing over of that sample by the detainee to the doctor immediately thereafter was sufficient evidence of the discharge of the doctor's duty under the section. It was submitted that this interpretation of the doctor's duty was supported by the statutory procedure that must be followed by the doctor in respect of the "sealed urine kit" in the Garda station. In that regard the court was referred to the dissenting judgment of Blaney J. in *DPP (Coughlan) v. Swan* [1994] 1 I.L.R.M 314 in which the accused appealed a District Court conviction for failing to comply with a requirement contrary to s. 13(3) of the Road Traffic (Amendment) Act, 1978. In discussing the requirements that might be made by a designated doctor under the section Blaney J. stated:

"I think there is a clear distinction between the two offences which are the subject matter of s.13(3) of the 1978 Act. Under sub-paragraph (a) the offence is refusing or failing to comply with the requirement of a member of the Garda Síochána to permit a doctor to take a specimen of blood or, at the option of the person to provide a specimen of his urine. The second offence under sub-paragraph (b) which is the offence of which the defendant is charged, is failing 'to comply with a requirement of a designated registered medical practitioner in relation to the taking under this section of a specimen of blood or the provision under this section of a specimen of urine.'

In my opinion the requirement in this sub-paragraph is of a different nature to that of the first. It is concerned with ensuring that the defendant will comply with any instructions which the doctor may give him in relation to taking a specimen of his blood or getting him to provide a specimen of his urine. For example, in relation to taking a specimen of his blood, the doctor might need to require a defendant to take off his coat and roll up the sleeve of his shirt so that he could take blood from a vein in his arm. And in relation to providing a specimen of urine, the doctor might require the defendant to provide a particular quantity of urine or to provide it in a particular receptacle or provide the specimen to the doctor in his presence or make some other necessary requirement. There is no evidence in the Case Stated that Dr. Williams gave any particular requirement to the defendant in relation to his provision of a specimen of urine."

10. It is clearly the case that the designated doctor may make certain necessary requirements to ensure that the accused provides a specimen of urine. There is no statutory requirement however, that the doctor personally witnesses the delivery of the sample into the jug. On the other hand, the mechanics of the taking of blood sample require this to be done by the designated doctor and could not be carried out by somebody under his supervision in his presence or who took the sample in another room in his absence.

11. Counsel for the prosecutor relied upon an unreported decision of McMahon J. in a Case Stated entitled "*The Director of Public Prosecutions Complainant and David Byrne Defendant*" dated 15th July, 1980 by District Justice Dermot Dunleavy. In that case the defendant was charged that on the 10th August, 1979 at a public place he drove a motor vehicle with a concentration of alcohol in his urine which exceeded 135 mgs of alcohol per 100 mls of urine contrary to s. 49 (3) and (4a) of the Road Traffic Act, 1961 as amended. At the trial it was established that the accused had been lawfully arrested and requested by a Garda to provide a sample of blood or urine: he elected to provide a urine sample. He was then provided with a jug for that purpose by the doctor. The accused then asked to go to the toilet and the Garda accompanied him. The toilet was located on a landing on the first floor of the station and there were ten steps of a stairway between it and the examination room. The accused urinated in the toilet and provided a urine sample in the jug which had been given to him by the doctor. The Garda remained standing at the door of the toilet. The doctor remained in the examination room. When the accused emerged from the toilet he handed the jug with the urine sample to the Garda who accepted it from him and accompanied him to the examination room where the urine specimen was then handed to the doctor. This was done in the presence of the accused. The doctor then divided the specimen in two and sealed it in the prescribed manner. It emerged in cross examination that the doctor did not accompany the Garda and the accused to the toilet and did not see the sample being provided. It was submitted to the learned justice that a failure of the doctor to accompany the respondent to the toilet and to be present when the sample was provided was in conflict with the requirements of the Act and rebutted the presumption then applicable under s. 23(1) of compliance by the doctor with the provisions of the Act. The prosecuting inspector submitted that s. 13(1)(b) of the 1978 Act only required a sample to be provided and did not state that the doctor had to be physically present when the sample was physically provided. The learned district justice was satisfied that the procedure laid down in the section had not been complied with in that the section provided that the doctor must take the sample of blood from the defendant or the defendant shall provide a specimen of urine for the designated medical practitioner. He concluded that this meant that the sample must be given in the doctor's presence and therefore dismissed the charge. In addition, in that case the Garda admitted that he did not see the defendant urinating from his position standing at the door of the toilet but that he handed the Garda the jug when he came out. The learned district justice concluded that if the doctor was not physically present when the sample was taken he could not certify of his own knowledge that the defendant provided him with it so therefore the presumption under the Act was displaced and he dismissed the charge. The opinion of the High Court was sought as to whether upon that finding of fact this determination was correct in point of law.

12. Counsel's note of McMahon J.'s judgment on 20th October, 1980 is as follows:

"I am satisfied that the district justice has erred in point of law in holding that there was no evidence before him to hold that the specimen was provided by the Defendant.

When a person opts to provide a specimen of urine the obligation on him is to provide such. There is no obligation on the doctor to take it from him by either being present or by supervising the urination.

It is a question of evidence whether or not the sample was provided. In this case the Defendant was present when the sample was handed over to the doctor and that is *prima facie* evidence that the sample was his."

While the court notes that this was an *ex tempore* judgment and that the note was not approved by the learned trial judge, I consider the noted reasons to be persuasive.

13. The prosecution also relied upon *obiter dicta* of Murphy J. in *Director of Public Prosecutions (Traynor) v. Lennon* [1999] 2 I.R. 402. In that case the respondent was arrested on suspicion of driving while under the influence of intoxicating liquor and was required to provide a sample of urine or blood. Having elected to provide a urine sample she was directed to a cubicle in the corner of the room in which a male doctor and a male Garda were present. She found this situation lacked privacy and elected thereafter to provide a blood sample. At the conclusion of the prosecution case the learned district judge dismissed the charges on the basis that the respondent's privacy had not been respected and that she had therefore been unlawfully deprived of the choice to which she was entitled under s. 13 of the Road Traffic Act, 1994. On appeal by way of Case Stated the district judge asked whether he was correct in law in dismissing the case. The High Court answered the question in the affirmative. On appeal to the Supreme Court it was held in allowing the appeal and answering the question in the negative that a detainee would be deprived of the option to which she was entitled under s. 13 if the circumstances in which the urine sample was to be provided involved an excessive or unnecessary intrusion

on the dignity of her person when measured against reasonable standards of modesty. It was held that the facilities provided were not so deficient as to represent such an excessive or unwarranted intrusion on her right to privacy to the extent that she had been deprived of any real choice.

14. In *Traynor* the toilet was in a cubicle in the left rear portion of a room. The door on the front of the cubicle had a division on the bottom and also on the top of the door. There was also a division between the top of the cubicle and the ceiling. The Garda confirmed that he and the doctor remained in the room but that no pressure was exerted on the accused to provide a urine sample. Female Gardai were attached to the station but not present in the station at the time. In delivering judgment Murphy J. stated at p. 407: -

"We do not have measurements of the room in which the garda and the doctor were to remain or the toilet cubicle in which the respondent was to provide the urine sample. Persons required to give a urine sample must be provided with an appropriate receptacle, and even if they then withdraw to a secluded toilet in a different area they must return with the sample. Most people would regard this as rather embarrassing and some intensely so. It seems to me that this basic problem is inescapable. The issue is whether the layout of the toilet area and the adjoining room and the other circumstances was such as to render the circumstances unacceptable. The fact that the partition walls of the cubicle did not reach fully down to the floor or up to the ceiling so as to exclude the possibility of a determined observer seeing the respondent's feet is hardly decisive. I would have thought there was adequate visual privacy. Nor does the absence of a female garda - or her presence if she had been present - significantly alter the situation. Whether male or female, the function of the garda concerned was to witness the handing over of the urine sample to the doctor. The learned judge of the District Court concluded, following his inspection, that the facilities at the garda station were so inadequate as to deprive the respondent of her right of privacy but he did not suggest in the case stated that what he observed differed in any way from the specific findings he made by reference to the evidence given by Garda Traynor..."

15. Barron J. made reference to the matter at p. 409: -

"In *Director of Public Prosecutions v. Swan* [1994] I.L.R.M. 314, Blayney J. suggested that a male person might be required to provide his sample of urine in the presence of the doctor. It appeared in argument that this is usual. In my view, a female person should have no complaint about being asked to provide a sample in a cubicle where she cannot be seen.

As Murphy J. has said the circumstances are embarrassing in any event. Such embarrassment cannot be avoided. It is not significantly aggravated by the instant circumstances. It has been suggested that the presence of a female guard might have made a difference. While I readily accept that it might make a difference in individual cases and perhaps also in the instant case, I would not accept it as a legal proposition."

I note that the accused in that case retired out of sight of the Garda and the doctor to a cubicle to which she was taken. There was no issue taken or criticism made by the Supreme Court of the fact that the accused was allowed to provide the sample out of sight of the Garda and the doctor: Barron J. stated that the accused could have no complaint about being provided with privacy in a cubicle where she could not be seen. In *Byrne* the Garda remained at the door of the toilet while the accused urinated and was provided with the jug which he handed to the doctor.

Conclusion

16. I am satisfied to accept the submissions made on behalf of the prosecution. There is no statutory requirement imposed on the designated practitioner to take the sample of urine from the accused directly: this only arises in respect of the taking of the blood sample under section 12. There is no requirement that the doctor be present at the moment of urination or the filling of the receptacle or that he/she should observe it. Furthermore, there is no statutory requirement that the sample once delivered into the receptacle be personally handed by the accused to the doctor. The obligation of the accused "is to provide for" the designated doctor a specimen of urine. This distinction is continued under s. 15 which provides for steps to be taken once the designated doctor "has taken the specimen of blood from a person or has been provided by the person with a specimen of his or her urine". While the doctor may be present and indeed observe the person providing the sample and thereafter receive it directly from that person, I do not consider that there is a statutory requirement that the doctor should observe the urination into the receptacle. Of course the doctor may require the arrested person to take some step in relation to the provision of the specimen of urine with which the person must comply under s. 12(3) or else commit an offence. In this instance a female Garda accompanied the accused to a toilet and stood at the door observing the provision of the sample. The accused then took the sample directly to the doctor and gave it to him. I am not satisfied that this involved any abrogation by the doctor of his responsibilities under the statute. I am satisfied that the procedure and process described in the facts outlined in the Case Stated comply with the procedure envisaged by the section. There is no suggestion in the case that the sample obtained came from any other source than the accused.

17. I am therefore satisfied that the learned district judge was not correct in law in his interpretation of s. 12(1) and s. 15 of the Road Traffic Act, 2010. The court therefore answers the question "whether I am correct in law as to my interpretation of the aforementioned statutory provisions?" in the negative. Consequently, the second question as to whether the learned district judge was correct in dismissing the prosecution case which was posed on the presumption that the first question was answered in the affirmative does not arise for consideration.

18. It is clear that no possible prejudice has or could have arisen for the accused on the basis of the facts outlined in the Case Stated. Thus even if this court found that the learned judge was correct in law it does not appear to me that it was appropriate to dismiss the prosecution even if there had been a failure to follow the correct statutory procedure. This would not have justified the dismissal of the prosecution in the circumstances of this case: *DPP v. Avedenei* [2017] IESC 77.