

THE HIGH COURT

[2014 No. 633SS]

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

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA PATRICK DUNNE)

PROSECUTOR

AND

FRANCES McCONVILLE

DEFENDANT

JUDGMENT of Kearns P. delivered on the 12th day of December, 2014

This is a consultative case stated for the High Court by District Judge Hamill pursuant to Section 52(1) of the Courts (Supplemental Provisions) Act 1961. The case stated is dated 8th April, 2014.

THE CASE STATED

The background facts are set out in detail in the consultative case stated by Judge Hamill which it is necessary to reproduce in full:

1. "The defendant was summoned to answer allegations that she committed various offences contrary to the Road Traffic Acts on May 10th 2012 at the suit of the prosecutor the subject of case number 2012/227110 at Dublin Road, Dundalk, Co. Louth. Among the charges is in allegation of an offence contrary to s. 4(4)(b) and (5) of the Road Traffic Act 2010 as follows:

"On the 10/05/2012 at Dublin Road, Dundalk Co. Louth in the said District Court area of Dundalk, while being a specified person as provided under Part 2 of the Road Traffic Act 2010, did drive a mechanically propelled vehicle while there was present in your body a quantity of alcohol such that, within 3 hours after so driving, the concentration of alcohol in your breath did exceed a concentration of 9 microgrammes of alcohol per 100 millilitres of breath, to wit 39 microgrammes of alcohol per 100 millilitres of breath.

Contrary to section 4(4)(b) & (5) of the Road Traffic Act 2010."

2. The facts proved or admitted for the purposes of the issue were as follows:

(a) Garda Patrick Dunne stopped Ms McConville in the early hours of May 10th 2012 while she driving a mechanically propelled vehicle on the Dublin Road which then had no lights on. She was stopped by gardaí who observed her speech was slurred, her eyes bloodshot and a smell of alcohol emanating from her breath. A road-side breath test was administered which gave a 'fail' result. She was arrested on suspicion of drunken driving and brought to Dundalk Garda Station. There was no garda there qualified to operate the evidential breath test apparatus so she was transferred to Drogheda Garda Station. In Drogheda Garda Station Ms McConville gave breath samples which gave a reading of 39µg per 100 ml of breath.

(b) At the point of arrest, Garda Dunne made a demand under s. 40 of the Road Traffic Act 1961 for production of a driving licence within 10 days at a Garda station to be nominated by the defendant. The defendant nominated Dundalk Garda Station but failed to produce a driving licence there within the ten days.

(c) The defendant was charged that night and released on station bail to appear on Dundalk District Court on May 30th 2012. There was no sitting of Dundalk District Court on May 30th 2012 and so no order was made. The defendant subsequently attended at Dundalk Garda Station and secured the return of her bail money. The defendant was subsequently prosecuted by way of summonses which were applied for on October 26th 2012 and made returnable for March 13th 2013. A fixed charge notice did not issue in relation to the alleged offence.

(d) The case was adjourned from time to time. On November 20th 2013 driving licence and insurance documentation was handed over in court to the prosecuting gardaí. The documentation included a document from the UK Driver and Vehicle Agency which demonstrated that the defendant at the time of the alleged offence held a valid UK driving licence.

3. On November 20th 2013 and December 18th 2013 I presided over the court. Mr. Conor MacGuill of MacGuill & Co. Solicitors appeared on behalf of the defendant. On November 20th 2013, Inspector Brendan Cadden appeared for the prosecutor. On December 18th 2013, Inspector Martin Beggy appeared for the prosecutor. Legal submissions were made on both occasions. The trial of the defendant on the charge has not begun but legal argument was made in relation to the propriety of the continued prosecution of the defendant in the foregoing circumstances.

4. In summary Mr MacGuill argued that, as the defendant held a valid driving licence at the time of the alleged offence, she was not a specified person within the meaning ascribed by section 3(1) of the Road Traffic Act 2010 (as amended). The reading of the evidential breath test apparatus was between 35 µg and 44 µg per 100 ml of breath. Therefore, he argued, under section 29(1) of the Road Traffic Act 2010 (as amended) the prosecution were under a duty to issue a fixed charge notice in respect of the offence and pending that, her prosecution was prohibited by section 35(2) of the Road Traffic Act 2010. Mr. MacGuill argued that this is irrespective of whether she had actually produced her licence. In reply it was argued that the failure to produce meant the prosecution could proceed with the prosecution, as per section (8)(1) and (2), and the matter could be dealt with by way of alternative verdicts provisions under section 8(A) of the Road Traffic Act, 2010.

5. By way of further argument Mr MacGuill argued, without prejudice to his previous argument, that when making the requirement to

produce the driving licence, fair procedures required Garda Dunne to inform the defendant, when making the requirement to produce the driving licence, to inform her of the consequences of failure to produce the driving licence in that it could mean she could be excluded from availing of the fixed charge procedure if she did not produce her driving licence within ten days. In reply it was argued that a valid demand for production was made under section 40 of the Road Traffic Act 1961 (as amended).

6. And whereas, I, the said judge, am of the opinion that questions of law arise in the foregoing case do hereby refer the following questions to the High Court for determination:

- (i) Was the defendant a specified driver under s. 3(1) of the Road Traffic Act 2010 (as amended) on the date of the alleged offence?
- (ii) If the answer to question (i) is 'no', did s. 29 of the Road Traffic Act 2010 (as amended) require the prosecution serve a fixed charge notice on the defendant?
- (iii) If the answer to question (ii) is 'yes', what are the consequences for her prosecution of their failure to do so?
- (iv) If the answer to question (ii) is 'no', were the gardaí under an obligation to inform the defendant of the consequences of her failure to produce her driving licence when demanded under s. 40 of the Road Traffic Act 1961 (as amended)?"

RELEVANT LEGISLATION

The provisions of the Road Traffic Act 2010 provide that when the concentration of alcohol in a drunk driving case is within a certain range, then the driver will be served with a fixed charge notice which, if paid, will obviate the need for a court prosecution. However, the relevant legislation also imposes more stringent requirements in respect of certain "specified persons" who shall not benefit from the fixed charge notice system.

Section 3 of the Road Traffic Act 2010 as amended and inserted by section 9 of the Road Traffic (No.2) Act 2011 provides –

"9.— The Act of 2010 is amended—

(a) in subsection (1) of section 3, by substituting for the definition of "specified person" the following:

" 'specified person' means a person who at the time of an alleged offence under section 4 or 5—

(a) is the holder of a learner permit permitting the holder to drive a vehicle of the category concerned,

(b) is the holder of a first driving licence licensing the holder to drive a vehicle of the category concerned within a period of 2 years from the date of its issue,

(c) is the holder of a driving licence licensing the holder to drive a vehicle in the category C, C1, D, D1, EB, EC, EC1, ED, ED1 or W while driving, attempting to drive or being in charge of such a vehicle,

(d) is the holder of a licence to drive a small public service vehicle granted under section 34 of the Taxi Regulation Act 2003 or section 82 of the Principal Act, or a person purporting to be such a holder, while driving, attempting to drive or being in charge of such a vehicle when the vehicle is being used in the course of business, or

(e) does not hold a driving licence licensing the holder to drive a vehicle of the category concerned."

Section 4 of the 2010 Act sets out the prohibition on driving mechanically propelled vehicle while under influence of intoxicant or if exceeding alcohol limits. Section 5 relates to the prohibition on being in charge of mechanically propelled vehicle while under influence of intoxicant or if exceeding alcohol limits.

The Road Traffic (No. 2) Act 2011 amended s.8 of the 2010 Act as follows:

"Failure or refusal to produce licence.

8.— (1) Where a person is required by a member of the Garda Síochána to provide a specimen under section 9, 10, 12 or 14 and the person fails or refuses, at the demand of the member under section 40 of the Principal Act, to produce and present to the member a driving licence then having effect and licensing the person to drive the vehicle concerned, it shall be presumed, until the contrary is shown, that the person does not hold such a licence.

(2) The presumption referred to in subsection (1) shall cease to apply in relation to a person who within 10 days of the requirement referred to in that subsection produces and presents to the member or another member of the Garda Síochána at a Garda Síochána station nominated by the person at the time of the requirement, a driving licence held by the person at the time of the requirement, then having effect and licensing the holder to drive a vehicle of the category concerned, or evidence that he or she held such a licence.

Alternative verdicts

8A.— (1) A person charged with an offence under section 4 consisting of a contravention of subsection (2)(b), (3)(b) or (4)(b) of that section may, in lieu of being found guilty of that offence, be found guilty of an offence under section 4 consisting of a contravention of subsection (2)(a), (3)(a) or (4)(a), as may be appropriate, of that section.

(2) A person charged with an offence under section 5 consisting of a contravention of subsection (2)(b), (3)(b) or (4)(b) of that section may, in lieu of being found guilty of that offence, be found guilty of an offence under section 5 consisting of a contravention of subsection (2)(a), (3)(a) or (4)(a), as may be appropriate, of that section."

Section 29 of the 2010 Act deals with fixed penalty notices:

29.— (1) Where a person, who is not a specified person, is alleged to have committed an offence under section 4 (2),

(3) or (4) or section 5 (2), (3) or (4) and the concentration of alcohol purported to be present in his or her body as stated in accordance with section 13 or certified in accordance with section 17 —

(a) did not exceed—

(i) 80 milligrammes of alcohol per 100 millilitres of blood,

(ii) 107 milligrammes of alcohol per 100 millilitres of urine,

(iii) 35 microgrammes of alcohol per 100 millilitres of breath,

or

(b) exceeded—

(i) 80 milligrammes but did not exceed 100 milligrammes of alcohol per 100 millilitres of blood,

(ii) 107 milligrammes but did not exceed 135 milligrammes of alcohol per 100 millilitres of urine, or

(iii) 35 microgrammes but did not exceed 44 microgrammes of alcohol per 100 millilitres of breath,

he or she shall, subject to subsections (4) and (5), be served with a notice ("fixed penalty notice") in accordance with subsection (10) stating that where the charge specified in subsection (7) ("fixed charge") is paid in accordance with this section and the penalty points specified in subsection (8)(a)(i) or disqualification specified in subsection (8)(a)(ii) for the person holding a driving licence is in consequence applicable, a prosecution in respect of any such offence shall not be initiated against him or her.

(2) Where a specified person is alleged to have committed an offence under section 4 (2), (3) or (4) or section 5 (2), (3) or (4) and the concentration of alcohol purported to be present in his or her body as stated in accordance with section 13 or certified in accordance with section 17 did not exceed—

(a) 80 milligrammes of alcohol per 100 millilitres of blood,

(b) 107 milligrammes of alcohol per 100 millilitres of urine, or

(c) 35 microgrammes of alcohol per 100 millilitres of breath,

he or she shall, subject to subsections (4) and (5), be served with a notice ("fixed penalty notice") in accordance with subsection (10) stating that where the charge specified in subsection (7) ("fixed charge") is paid in accordance with this section and disqualification specified in subsection (8)(b) for the specified person holding a driving licence is in consequence applicable, a prosecution in respect of any such offence shall not be initiated against him or her.

SUBMISSIONS OF THE DEFENDANT

'Specified Person'

In relation to whether or not the accused is a "specified person" for the purposes of the 2010 Act, counsel for the defendant submits that it is clear from paragraph 2(d) of the case stated as set out above that Judge Hamill made a finding of fact that she did hold a valid licence at the time of the alleged offence. Therefore, she cannot be treated as a specified person. Counsel refers to the decision in *DPP (O'Neill) v John Kelly* [2012] IEHC 540 wherein Charleton J. describes the purpose of the new concept of 'specified person' in the following terms –

"In recasting the legislation, the Oireachtas decided that it was much more serious for a learner driver or a taxi driver, and certain other categories of driver, to have any drink taken before stepping behind the wheel of a car. Hence, an ordinary driver is tolerated a particular limit of alcohol consumption but special categories of drivers are allowed less than 50% of that. For an ordinary driver the limit is 22 microgrammes of alcohol per 100 millilitres of breath and for the exceptional category the limit is 9 microgrammes. People in this category are legislatively individually described as a 'specified person'."

Charleton J. concluded –

"If the prosecution have chosen to prosecute on the other charge of driving while a specified person, proof is needed that the Defendant was such a specified person while driving and if that is proved then the permitted alcohol level drops to 9 mg of alcohol per 100 ml of breath. If proof is absent that the Defendant was a specified person, then a conviction cannot take place on the statutory lesser included offence unless the breath of the Defendant was over the higher limit of 22 mg of alcohol per 100ml of breath."

It is acknowledged that there is an evidential presumption that a person does not hold a valid licence to drive where that person fails to produce the licence on demand under s.40. Where the licence is produced within 10 days, s.8A makes provision for alternative verdicts. However, s.3(1) of the 1961 Act includes a 'foreign driving licence' as defined by the European Communities (Recognition of Driving Licences of Other Member States) Regulations 2008 which includes the United Kingdom. As the accused did hold a UK licence on the night of the alleged offence, it is submitted that she was therefore not a specified person on the date of the alleged offence and is therefore entitled to receive a fixed penalty notice.

Counsel submits that the interpretation of the relevant legislation as suggested by the DPP, and in particular sections 8 and 8A, requires a purposive reading which is contrary to the plain meaning of the section.

Fixed Charge notices

Counsel submits that a person charged with drunk driving whose breath reading is between 35mg and 44mg, as was the reading of the accused, shall be served with a fixed penalty notice which, if paid, is a bar to prosecution. If a person does not hold a driving licence

they are not entitled to be served with a fixed penalty notice. As the accused did hold a valid licence, she should have been served with a fixed charge notice.

It is submitted that regardless of the presumption which operates where a person does not produce a licence on demand, s.29(1) makes clear that there was still a requirement to issue the defendant with a fixed charge notice prior to issuing proceedings against her. It is submitted that Judge Hamill made a finding of fact that she did hold a valid licence and therefore, counsel contends she is entitled to receive a fixed penalty notice rather than the more serious consequences of prosecution.

Fair procedures

Counsel for the accused contends that the gardaí were under a duty to inform the accused of the consequences of failing to produce a licence within 10 days i.e. that she would not then be able to avail of the fixed penalty procedure rather than a prosecution.

Counsel for the defendant submits that the facts and decision in *DPP (Ryan) v Mulligan* [2008] IEHC 334 are closely related to the present case. In *Mulligan*, the defendant was prosecuted for failure to give his name and address to a garda on demand under s.24 of the Criminal Justice (Public Order) Act 1994. Charleton J. held it was necessary to demonstrate that the garda had informed the defendant of the consequences of failing to comply with the requirement –

"Where a power of compulsion, enforceable by statute, was exercised by a garda, the person to whom it was directed should be informed of this power and also of the consequences of a refusal to comply."

It is submitted that the situation facing the accused in the present case is the same – it is the failure to comply with the demand that creates the prosecution and therefore the demand should have been coupled with a warning and was invalid in its absence.

SUBMISSIONS OF THE DPP

Question (i)

In relation to question (i) and whether or not the defendant was a "specified driver" under s.3 (1) of the Road Traffic Act 2010 (as amended), counsel for the DPP submits that the defendant was a specified person under the Act at the time of the alleged offence and was therefore not entitled to receive a fixed penalty notice. It is submitted that s.3 of the 2010 Act must be read in conjunction with s.8 (as inserted by s.6 of the Road Traffic Act (No. 2) 2011) which the prosecution contends specifically addresses the situation that arose in the present case. Section 8 provides as follows –

8.— (1) Where a person is required by a member of the Garda Síochána to provide a specimen under section 9, 10, 12 or 14 and the person fails or refuses, at the demand of the member under section 40 of the Principal Act, to produce and present to the member a driving licence then having effect and licensing the person to drive the vehicle concerned, it shall be presumed, until the contrary is shown, that the person does not hold such a licence.

(2) The presumption referred to in subsection (1) shall cease to apply in relation to a person who within 10 days of the requirement referred to in that subsection produces and presents to the member or another member of the Garda Síochána at a Garda Síochána station nominated by the person at the time of the requirement, a driving licence held by the person at the time of the requirement, then having effect and licensing the holder to drive a vehicle of the category concerned, or evidence that he or she held such a licence.

In *Pierse, Road Traffic Law*, the 1961-2011 Road Traffic Acts Annotated Legislation (2011) the editor's note states in relation to s.8 that –

"[The new section] is interlinked by definition of "specified person" in RTA 2010, s.3, above, putting such persons in a special category with lower intoxicant limit".

Counsel submits that section 8A of the 2010 Act (as inserted by the 2011 Act) as set out above specifically addresses the situation where a person did not produce their drivers licence and was charged as a "specified driver" with lower alcohol limits. Under this section, a person charged with an offence as a "specified person" who subsequently produces a valid licence can instead be convicted of the offence as a person who is not a specified person. In *Pierse* it is stated that, like section 8, section 8A is also "interlinked with the idea of 'specified persons', i.e. putting them in a special category as defined above with lower limits." Therefore, a person such as the accused who has produced a driver's licence at the eleventh hour can be treated for the purposes of the hearing as a non-specified person, therefore availing of less stringent alcohol limits and alternative penalties at the trial of the action. In this regard, counsel refers the Court to the Westlaw Annotated Version of the Road Traffic (No. 2) Act 2011 which sets out as follows –

"Section 6 [of the 2011 Act] is also inserting a new s.8A into s.8 of the 2010 Act. Subsection (1) of s.8A brings clarity to the options available to the courts in relation to offences under s.4(2)(b), (2)(c), or (2)(d) of the Road Traffic Act 2010. If a presumption had been made that a person was a "specified person" in line with the definition under s.3 of the Road Traffic Act 2010 and the contrary is shown, then a person can still be found guilty of the offence of drink driving at the higher limits if appropriate."

Counsel submits that rather than being convicted under section 4 (4) (b) of the 2010 Act the accused can be dealt with under section 4 (4) (a) i.e. she is no longer a specified person but has a level in excess of 22 microgrammes and if the offence is proven at this level, she is still guilty of a drunk driving offence.

It is submitted therefore that the answer to question (i) must be in the affirmative.

Question (ii)

It is submitted that if question (i) is to be answered in the affirmative, then question (ii) does not arise. In any event, counsel states that section 29 of the 2010 Act deals with the power to administer fixed penalty notices in certain cases. The accused would have been entitled to receive a fixed penalty notice if she had not been a "specified person". However, as she failed to produce a valid driving licence (until the date of the hearing) the presumption under section 8 that she was a person without a valid licence was operative and she was not entitled to be served with a fixed penalty notice.

Counsel submits that this must be the correct interpretation of the legislation. Where a person such as the accused nominates a

Garda station for production of a licence within 10 days and is given the opportunity to do so but fails to produce the licence, the gardaí must be entitled to proceed on the basis that she does not have such a licence. It is submitted that if the defence is correct then an accused person could reserve the right to produce a licence for a year and a half, as the accused did, and then produce it on the day of trial and claim to be somehow entitled to a fixed penalty notice.

Counsel contends that this construction ties in neatly with the general prohibition on driving without a driving licence as set out in section 38 of the Road Traffic Act 1961.

Section 38(2)(b) provides that in a prosecution for not having a valid driving licence "*it shall be presumed, until the contrary is shown by the defendant, that he did not, at the time he drove the vehicle, hold a driving licence, then having effect and licencing him to drive the vehicle.*"

Question (iii)

Counsel submits that if the prosecution is correct in relation to questions (i) and (ii) then question (iii) does not arise.

Question (iv)

The DPP does not accept that the gardaí are under an obligation to explain to an accused person the ramifications of failing to produce the driver licence i.e. that failure to do so will mean the prosecution does not have to serve her with a fixed penalty notice. It is submitted that no such obligation is set out in the 2010 Act and that no such obligation should be imposed on the gardaí.

It is submitted that the right to be served with a fixed penalty notice has no basis in common law or in the principles of natural justice. Rather, it was introduced in the 2010 Act in order to allow cases to be dealt with in a cost efficient and expeditious manner and is subject to the requirements as set out in the Act. To impose an obligation on the gardaí as contended for by the defence is to interfere with the role of the legislature in establishing the fixed penalty notice administrative framework.

Counsel also points out that the garda made a lawful demand under section 40 of the Road Traffic Act 1961 for production of a licence within 10 days and that the accused nominated Dundalk Garda Station for this purpose. While she attended the station sometime before October 2012 to secure the return of her bail money, she failed to produce a valid licence. In addition to this, upon her arrival at Dundalk Garda Station on the 10th May 2012 the accused was cautioned and advised of her right to consult a solicitor. She subsequently did obtain the services of a solicitor and it is submitted that the classic maxim that "*ignorance of the law is no defence*" applies in this case.

Counsel draws an analogy with a situation where a person is arrested for an assault. There is no obligation on the gardaí to inform the accused that if he or she cooperates fully at the interview, makes a full admission and pleads guilty at the earliest possible stage, then he will most likely get a lesser sentence compared with someone who does not co-operate, contests the charge and is subsequently convicted.

It is submitted therefore that question (iv) must be answered in the negative.

DISCUSSION

I have carefully considered the submissions of both parties and now propose to deal with each of the learned District Judge's questions in turn:

Question (i)

The Court is satisfied that the accused was a specified driver under s.3(1) of the Road Traffic Act 2010 (as amended) on the date of the alleged offence. When stopped by Garda Dunne on the night in question the accused failed to present a valid licence. The garda then made a demand under s.40 of the Road Traffic Act 1961 for production of a driving licence within 10 days at a Garda station to be nominated by the accused. The accused failed to comply with this demand and the presumption under section 8(1) of the 2010 Act (as amended) that she did not hold such a licence was operative. The gardaí are required to proceed with the prosecution on this basis. That the accused eventually produced a valid licence on the day of the hearing does not entitle her to receive a fixed penalty notice at that stage. Rather, s.8A applies and the accused may be convicted under section 4(4)(a) of the 2010 Act.

Question (ii)

Having found that the accused was a specified person on the date of the alleged offence, question (ii) does not arise. It is clear that having failed to produce a valid driving licence on the date of the offence or within 10 days of the demand under s.40 the accused was not entitled to receive a fixed penalty notice. As set out above, having now produced a licence at this late stage, she may be treated as no longer being a specified person but is subject to the provisions of section 8A.

The Court accepts the submissions of the prosecution that the relevant provisions of the legislation must be read in conjunction with one another. The interpretation contended for by the defendant would allow an accused person to indefinitely reserve the right to produce a valid licence until the matter eventually comes before the Court. Allowing such a person to avail of the fixed penalty system at that stage, having been a 'specified person' until then, is not what is envisaged by a plain reading of the relevant legislative provisions. While Judge Hamill found that the accused did hold a valid licence, he made no finding that she was not a 'specified person' on the date of the alleged offence. The presumption that she was a specified person was operative as the prosecution proceeded and it was the failure of the accused to comply with the statutory provisions and requirements that allowed this presumption to continue, thereby denying herself the opportunity to receive a fixed penalty notice.

Question (iii)

As I have found that the accused is not entitled to receive a fixed penalty notice, this question does not arise.

Question (iv)

The Court is satisfied that there was no obligation on the gardaí to inform the defendant of the consequences of her failure to produce her driving licence when demanded under s.40 of the 1961 Act. The *Mulligan* case as relied upon by the defendant is distinguishable from the present proceedings as the failure to comply with the demand in that case was an offence in itself for which the defendant was prosecuted. In the present case the offence remains one of drunk driving. If convicted, the accused will not be

found guilty of failing to comply with a demand, but of a drunk driving offence. The Court accepts that the arguments advanced by counsel for the DPP that there is no obligation on the Gardaí to inform a suspect of the consequences of failing to comply with an investigation of an assault for example, is more closely analogous to the present case than *Mulligan*.

DECISION

In light of the foregoing, I would answer the questions posed by the District Judge in the following way:

- (i) Yes
- (ii) Does not arise
- (iii) Does not arise
- (iv) No