

THE HIGH COURT

In the Matter of the Courts (Supplemental Provision) Act 1961, Section 52

[2015 443 SS]

BETWEEN

ROAD SAFETY AUTHORITY

PROSECUTOR

AND

KIERAN KELLY HAULAGE LIMITED

ACCUSED

JUDGMENT of Mr. Justice Noonan delivered on the 7th day of April, 2016

1. This case comes before the court by way of consultative case stated by Judge Patrick Durcan of the District Court sitting at Ennis, Co. Clare.

2. The accused appeared before the learned District Judge on 26th April, 2013 charged with two offences as follows:-

(a) That you did on the 29th day of August, 2012 being the operator and owner of a motor vehicle registration number 07TN1545 and the employer of Alan Hayes, the driver of the said vehicle did cause or purport to authorise the said driver to contravene the provisions of Article 6(1) of Council Regulation (EC) No. 561/06 of the 15th of May, 2006 in that the day driving period was exceeded.

Contrary to regulation 41(2)(b) of the European Communities (Road Transport) (Working Conditions and Road Safety) Regulations 2008 made under section 3 of the European Communities Act, 1972 as amended.

(b) That you did on the 29th day of August, 2012 being the operator and owner of a motor vehicle registration number 07TN1545 and the employer of Alan Hayes, the driver of the said vehicle did cause or purport to authorise the said driver to fail to take an uninterrupted break of at least forty-five minutes after four and half hours driving in contravention of Article 7 of Council Regulation (EC) No. 561/06 of the 15th of May, 2006.

Contrary to regulation 41(2)(b) of the European Communities (Road Transport) (Working Conditions and Road Safety) Regulations 2008 made under section 3 of the European Communities Act, 1972 as amended."

3. Evidence was given on behalf of the prosecutor at the hearing that the vehicle in issue was stopped by Ennis Traffic Corps at 18:55hrs on the 29th August, 2012 during a road side check point. The location of the check point was on the N18 at Moy Hill, Ennis, Co. Clare. On approaching the stationary vehicle the prosecutor examined the tachograph record and interviewed the driver. It was established that the driver was returning back to base in Ennis after having made two deliveries of asphalt from Tulla, Co. Clare to Annascaul, Co. Kerry. The tachograph record indicated that the driver had commenced driving on the morning of the said date at 5:20am. It also recorded that the driver had driven for eleven hours and twenty-three minutes covering a distance of 697km up to the point where he was stopped at the road side check point. The evidence also indicated that the only break taken by the driver over the course of the day was for a period of thirty-one minutes from 7:26hrs to 17:57hrs whilst returning home after delivery of the second load to Annascaul. The evidence established that Kerry County Council had engaged Noel Regan and Sons Plant Hire Ltd. to carry out an improvement scheme to the N86 Annascaul to Gortbreagogue Road. The latter company had sub-contracted the supply lane of black top to Lagan McAdam Ltd. who engaged the accused to haul two loads of material from their quarry in Tulla, Co. Clare to the road maintenance site in Annascaul.

4. The learned District Judge accepted that when the accused's lorry arrived at the locus of the road works, it joined a queue of vehicles which would each in turn be pushed along by a Batelli Paver machine which received asphalt from the accused's vehicle, at a rate controlled by the Batelli Paver. The process of resurfacing was then completed by steam roller following behind after which the accused's vehicle would return to base to pick up a further load. Arising from the foregoing, the learned District Judge posed the following question for the opinion of this court:

"Was the accused's vehicle on the date of the alleged offence being used in connection with road maintenance so as to entitle it to avail of the exemption provided in Article 5(1)(h) of the European Communities (Road Transport) (Working Conditions and Road Safety) Regulations 2008?"

5. Article 6 of the Regulations provides that the daily driving time shall not exceed nine hours. Article 7 provides that after a driving period of four and half hours, a driver shall take an uninterrupted break of not less than forty-five minutes, unless he takes a rest period. The 2008 Regulations which transpose the 2006 Regulations into national law provide at regulation 41(2)(b) that a person commits an offence if the person causes, or purports to authorise, another person who is employed by the person, or is under the person's control, to contravene, *inter alia*, articles 6 and 7. The penalty for so doing as provided by regulation 52 is on summary conviction a fine not exceeding €5,000 or imprisonment for a term not exceeding 6 months or both. Regulation 53 empowers the prosecutor to prosecute offences under the Regulations.

6. Article 5(1)(h) provides, *inter alia*, that certain categories of vehicles are exempted from articles 6 and 7 and these include a vehicle used in connection with road maintenance and control. The issue thus arises as to whether, on the agreed facts, the vehicle in question was being used in connection with road maintenance and control. Regulation 5 constitutes an exemption from the operation of the 2006 Regulations and section 53(3) provides that in proceedings for an offence under the 2008 Regulations, it is to be presumed until the contrary is proved that none of the exemptions contained in Regulation 5 apply. Consequently the onus of

establishing the exemption rests on the accused.

7. A similar issue was considered by the European Court of Justice in *Karuse AS v. Politsei-ja Piirivalveamet* (C-222 12 A 13th March, 2014). This was a reference from the Estonian Courts. The facts were that during a roadside inspection, the relevant authority stopped a lorry owned by Karuse which was carrying a load of gravel to a road maintenance works site. The vehicle was stopped at approximately 42km from the company's head office and approximately 10km from the road maintenance works site. The regulatory breach complained of in that case was not as here, the hours of driving, but rather the failure to have the lorry equipped with a tachograph. Karuse pleaded that it was entitled to the exemption that is claimed to arise in this case. In the course of the judgment, the Court said:-

"35. Firstly, as regards whether the transport at issue in the main proceedings was exclusive, it is apparent from the file that, in the main proceedings, the gravel was intended solely for use in road maintenance works. It follows that that transport was carried out wholly and exclusively in connection with road maintenance, within the meaning of article 13(1)(h) of Regulation No. 561/2006 (see to that effect *British Gas* paragraph 21).

36. Secondly, as regards whether the transport at issue was not ancillary to the road maintenance works, the view must be taken, for that to be the case, that the vehicle concerned must be used directly to spread the gravel on the damaged sections of the roads (see by analogy *Morzek* and *Jager* at paragraph 12). However, the mere transport of gravel intended for use in road maintenance works cannot be regarded as being covered by the derogation laid down in article 13(1)(h) of Regulation No. 561/2006."

8. The ECJ, following its earlier decision in *British Gas*, held that the exemption could only apply to vehicles used wholly and exclusively in connection with road maintenance and control and not to vehicles used wholly or partly for that purpose. The prosecutor submits that in this case, the primary use of the vehicle was for road transport and the actual laying of the tarmac was merely ancillary to that purpose. However, it seems to me that it is impossible to distinguish *Karuse* on this basis as it is virtually on all fours with the present case.

9. The ECJ continued:-

"39. In addition, although Regulation No. 561/2006 does not provide that the vehicles used for road maintenance and monitoring must be used only near to the road maintenance work site in order to benefit from the deregulation laid down in article 13(1)(h) of that Regulation, that is nonetheless a factor which must be taken into consideration for the purposes of assessing the ancillary nature of the transport as regards those works (see by analogy *Morzek* and *Jager* paragraph 12).

40. Vehicles which travel for a short period of time and over a limited distance may be exempted from the obligation to be equipped with a tachograph without that undermining the objectives of Regulation No. 561/2006 as regards the improvement of working conditions and road safety.

41. However, an extension of the deregulation provided for in article 13(1)(h) of that Regulation to vehicles which travel over a long distance would have the effect that the drivers of such vehicles maybe induced to drive long hours without a rest, which would be likely to undermine those objectives (see comment to that effect, *Seeger*, paragraph 36) ...

44. In the present case, it is apparent from the decision for reference that the vehicle in question was stopped approximately 42km from the head office of Karuse and approximately 10km from the site of the works. However, the distance between the site of those works and the loading site has not been given.

45. Consequently, it is for the referring court, taking into account all the factors in the dispute before it and the above mentioned considerations concerning the geographical and climatic conditions prevailing in the region in question, to assess whether the journey of the vehicle at issue meets the requirement of limited distance and short period of time in order that the transport in question does not undermine the objectives pursued by Regulation No. 561/2006."

10. In *Karuse*, as in *British Gas*, the court came to the conclusion that the exemption contended for could be justified in certain circumstances where the relevant vehicle was travelling a limited distance and for a short period of time. The purpose underlying the regulation would otherwise be frustrated.

11. However, the facts here are somewhat different. The "limited distance" requirement can have no bearing in the present case where the regulations themselves impose no limit as to the distance which may be driven. All that is relevant is the period of time which under article 6 may be up to ten hours provided a break is taken after four and half, as per article 7. Neither of these periods could be reasonably described as being of short duration. Consequently, it seems to me that the caveat stipulated in *Karuse* must be approached with some caution as it is difficult to see how it could logically be applied to the facts of this particular case.

12. It seems to me that applying *Karuse* to the facts of the present case, it is clear that the accused's vehicle was being used in connection with road maintenance and control at all material times. Whether the actual transportation formed the greater or lesser part of the time seems to me to be largely irrelevant. For example, the regulation does not provide that the vehicle must be "primarily" or "principally" used in connection with road maintenance and control. It either is or it is not. In this case it clearly was.

13. The prosecutor has argued that the jurisprudence of the ECJ establishes that derogations or exemptions are to be strictly construed so as to not to frustrate the purpose underlying the particular regulation, and in this case if the exemption applies it would clearly have that effect given the length of time spent driving and the distance driven. As I have said however, the distance is immaterial because there could be no complaint about it if it was driven within two consecutive four and half hour periods. What remains therefore is the time duration.

14. One cannot lose sight of the fact that this is a criminal prosecution and if there is ambiguity in the relevant provision relied upon by the prosecutor, any such ambiguity must be construed in favour of the accused. There are many cases in which penal statutes have been found to be unconstitutional on the grounds of vagueness and uncertainty – see for example *Dokie v DPP* [2010] IEHC 110 and the judgment of Hogan J. in *Douglas v DPP* [2013] IEHC 343.

15. As the exemption applies in this case, the question then becomes at what point past four and half hours does the exemption cease to apply? Does it apply at five hours, six hours, seven hours and so forth? And more importantly, how can an accused person know when he is breaking the law? If the legislature wishes to render particular conduct penal, it must do so with sufficient

particularity to enable every citizen to know what he is and is not lawfully permitted to do. It would for example be perfectly open to the legislature to say that where the exemption applies, the time periods specified may be increased to identified limits. They have not done so.

16. In those circumstances I am satisfied that the exemption applies to the accused in this case and I propose answering the question posed by the learned district judge in the affirmative.