



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 161

[2018 No. 409]

**The President
Edwards J.
McCarthy J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

PADRAIG CANAVAN

APPELLANT

JUDGMENT of the Court delivered on the 28th day of May 2019 by Birmingham P.

1. This matter comes before the Court by way of a consultative case stated by His Honour Judge Gerald Keys, Judge of the Circuit Court. The case stated has its origins in issues that arose in the course of an appeal from the District Court heard before Clifden Circuit Court on 24th October 2017. On that occasion, Mr. Canavan ("the accused") was appealing his conviction on a charge of drunk driving contrary to s. 4 of the Road Traffic Act 2010.

2. The prosecution followed an incident that occurred in the early hours of the morning of 31st January 2016. On that occasion, Sergeant Edward Cronin, along with a number of other members of An Garda Síochána, were on duty in an unmarked Garda car. They were driving along the Cill Chiaráin to Carna Road and they went through a junction with another road leading to their right. Sergeant Cronin stated that he saw a van parked close to the mouth of the junction. There was a person behind the wheel and that person appeared to be slumped forward. Sergeant Cronin continued on for some seventy-five to one-hundred yards and pulled into a right-hand side car park. He stated that his intention was, in the event that the vehicle started to move, to stop the vehicle because he was concerned about the driver's ability to safely operate same given that he had been slumped over the steering wheel. Sergeant Cronin says that he put on his high visibility jacket and walked into the middle of the road and, as the vehicle approached, put his hand out to stop the van. However, the driver ignored him and continued on. The vehicle then turned into the driveway of a house and Sergeant Cronin proceeded to run after the vehicle. According to the case stated, in entering onto the premises, the Sergeant was exercising his powers under s. 7 of the Road Traffic Act 2010. Upon being confronted, the driver indicated that he had been at the removal of a friend who had died and that he had consumed a few cans of beer. The Sergeant made a demand, pursuant to s. 9(1) of the Road Traffic Act 2010, that the accused provide a roadside breath sample. The accused complied with the demand and provided a sample which was recorded as failing. The Sergeant then formed the opinion that the driver was under the influence of an intoxicant to an extent that he was incapable of having proper control of a mechanically-propelled vehicle and proceeded to arrest him. He was then brought to a Garda station where he provided a specimen of blood which was over the legal limit.

3. In the Circuit Court, counsel on behalf of the accused appellant made submissions in relation to s. 7 of the Road Traffic Act 2010. Section 7 provides:

"[a] member of the Garda Síochána for the purpose of—

(a) making a requirement of a person under [section 9(2), 9(2A) or 10(4)], or

(b) arresting a person under section 4(8), 5(10) or 6(4),

may enter without warrant (if need be by use of reasonable force) any place (including the curtilage of a dwelling but not the dwelling) where the person is or where the member, with reasonable cause, suspects him or her to be."

In essence, counsel on behalf of the accused/appellant submitted in the Circuit Court that the powers in s.7 of the Road Traffic Act 2010 are mutually exclusive with the Sergeant having the option of exercising the first or the second power, but not both. It was further submitted that once the Garda had exercised his power to request a roadside breath sample then he was not entitled to thereafter exercise a power of arrest. The net question that arises for consideration is whether a Garda, having effected an entry on the curtilage of a dwelling under s. 7 of the Road Traffic Act 2010, can lawfully arrest a person for drunk driving after he has administered a preliminary breath test which has resulted in a "fail" reading.

4. On behalf of the DPP, it is submitted that s. 7 is an extension of the powers of the Gardaí to enter onto the curtilage of a dwelling. Previously, s. 39(2) of the Road Traffic Act 1994 had permitted a Garda to enter on the curtilage of a dwelling in order to effect an arrest for drunk driving. It is pointed out that that section in turn had to be seen against the backdrop of relevant pre-existing case law, including *DPP v. McCreesh* [1992] 2 IR 239.

5. On behalf of the accused/appellant, it is submitted that words spoken by the accused to the effect that the prosecuting Sergeant was "on private property now" constituted a clear withdrawal by the accused of his implied consent to the Sergeant to enter the property. It is said that as a matter of statutory interpretation, the wording of s. 7 is clear and unequivocal, empowering a Garda to enter for one or other of the purposes referred to in the section, but not for both. The accused points out that the use of the word 'or' in s. 7 is to be contrasted with s. 12 of the Act relating to the taking of samples in the Garda station where it is provided that a Garda may do "either or both" of requiring the arrested person to give a sample of breath or a sample of blood. It is said that the plain

meaning of the Act permits only one interpretation which is that the Sergeant, having required the accused to provide a breath test, had exhausted his powers and did not have a right to arrest the accused.

6. On behalf of the DPP, it is said that one has to have regard to the legislative history, and if one does, that the meaning of the section is clear. The DPP says that section 7 is an extension of the powers of the Gardaí to enter the curtilage of the dwelling. Previously, s. 39(2) of the Road Traffic Act 1994 permitted a Garda to enter upon the curtilage of a dwelling to effect an arrest for drunk driving. Section 39(2) has to be seen in the context of earlier cases such as *DPP v. McCreesh*. The said case was one in which an accused told a Garda who had approached him in the driveway of his property that he was a trespasser and asked him to leave. On the basis of findings of fact in the Circuit Court that the accused had not given the Gardaí leave or licence to enter onto the driveway, the Supreme Court concluded that the Gardaí were trespassers in the circumstances, and that as a consequence, the arrest was invalid.

7. In the view of this Court, on the facts of this case, the Gardaí had clear statutory authority to enter the curtilage for the purpose of requiring the accused to give a preliminary sample. The entry onto the premises was lawful, and in those circumstances, Gardaí were lawfully entitled to effect the arrest for drunk driving. The Court does not agree with the submissions on behalf of the accused that in a situation where there was a requirement to provide a breath sample, that the powers available to the Gardaí had been exhausted. The legislative developments post-*DPP v. McCreesh* were aimed at filling the lacunae that had been identified in that case by giving Gardaí powers of entry to effect arrests for drunk driving and this was one such case.

8. In the circumstances, the Court will answer the question posed, which was:

“[w]hen a Garda has entered the curtilage of the dwelling house of the accused, pursuant to section 7 of the Road Traffic Act 2010, and having made a requirement of him under section 9 of the 2010 Act, is he therefore also entitled to effect an arrest of the applicant pursuant to section 4(8) of the 2010 Act while still on the property?”

The answer is, yes.