



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 378

[2017/581]

The President

Edwards J.

McCarthy J.

**IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857, AS EXTENDED BY SECTION 51 OF THE COURTS
(SUPPLEMENTAL PROVISIONS) ACT 1961**

BETWEEN

**THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA CAROL MULLANE, GARDA BRIAN WHITNEY AND GARDA
WILLIAM BROSNAHAN)**

PROSECUTOR/RESPONDENT

AND

JAMES KELLY, AISLING BUTLER AND CAROLINE DOYLE

DEFENDANTS/APPELLANTS

JUDGMENT of the Court delivered on the 4th day of December 2018 by Birmingham P.

1. Before the Court are cross-appeals from a decision of the High Court (Eager J.) of 6th March 2017 answering questions posed in a case stated by Judge Anne Watkin of the District Court.
2. The background to the matter is to be found in the fact that each of the defendants was charged in the District Court in Dun Laoghaire with offences contrary to s. 24(3), s. 9 and s. 8 of the Criminal Justice (Public Order) Act 1994 respectively.
3. All of the charges faced by each of the defendants were dismissed. The dismissal of the s. 24(3) charge, that of failing, following a demand made by a member of An Garda Síochána, to provide a name and address is not in controversy. The hearing before the High Court and now this appeal were therefore concerned with the charges contrary to s. 9 of the Criminal Justice (Public Order) Act 1994, and s. 8 of the Criminal Justice (Public Order) Act 1994.
4. The relevant charges faced by the defendant, James Kelly, were as follows:

"[o]n 18th May 2015, at York Road, Dun Laoghaire, Dublin, a public place, in the said District Court area of the Dublin Metropolitan District, did, without lawful authority of reasonable excuse, wilfully prevent or interrupt the free passage of a vehicle in the said public place contrary to Section 9 of the Criminal Justice (Public Order) Act 1994 (as amended by Section 22 of the Intoxicating Liquor Act 2008).

On 18th May 2015, at York Road, Dun Laoghaire, Dublin, a public place in the said District Court area of the Dublin Metropolitan District, having been found in the said public place by a member of An Garda Síochána, namely, Sergeant David Gilmore, who suspected with reasonable cause that you were or had been acting in a manner contrary to the provisions of Section 9 of the Criminal Justice (Public Order) Act 1994, and having been directed by the said member of An Garda Síochána to leave immediately the vicinity of the place concerned in a peaceable and orderly manner, did, without lawful authority or reasonable excuse, fail to comply with the direction given by the said member of An Garda Síochána contrary to Section 8 of the Criminal Justice (Public Order) Act 1994 (as amended by Section 22 of the Intoxicating Liquor Act 2008)."

5. Section 8 of the Criminal Justice (Public Order) Act 1994 provides:

"8.—(1) Where a member of the Garda Síochána finds a person in a public place and suspects, with reasonable cause, that such person—

(a) is or has been acting in a manner contrary to the provisions of section 4, 5, 6, 7 or 9, or

(b) without lawful authority or reasonable excuse, is acting in a manner which consists of loitering in a public place in circumstances, which may include the company of other persons, that give rise to a reasonable apprehension for the safety of persons or the safety of property or for the maintenance of the public peace,

the member may direct the person so suspected to do either or both of the following, that is to say:

(i) desist from acting in such a manner, and

(ii) leave immediately the vicinity of the place concerned in a peaceable or orderly manner.

(2) It shall be an offence for any person, without lawful authority or reasonable excuse, to fail to comply with a direction given by a member of the Garda Síochána under this section.

(3) A person who is guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding £500 or to imprisonment for a term not exceeding 6 months or to both."

6. Section 9 provides as follows:

(1) "9.—Any person who, without lawful authority or reasonable excuse, wilfully prevents or interrupts the free passage of any person or vehicle in any public place shall be liable on summary conviction to a fine not exceeding £200."

7. At trial, the prosecution was represented by Mr. Michael Durkan, solicitor of the Chief Prosecution Solicitor's Office, and the defendants were each represented by Mr. John Berry, Barrister-at-Law, instructed by Cahir O'Higgins & Company. At trial, the prosecution called two witnesses, Gerard Gilmartin: a contractor for Irish Water, and Sergeant David Gilmore.

8. Mr. Gilmartin gave evidence that on 18th May 2015, he was working for Irish Water installing water meters in Dun Laoghaire. On that day, he was in charge of Health and Safety and Traffic Management at York Road, Dun Laoghaire – a site-specific management plan was in operation with respect to the water meters being installed in the area. At 2.00pm, Mr. Gilmartin was driving down York Road when he saw a vehicle, a truck, which had been stopped by a group of protesters. He was driving in the opposite direction. Mr. Gilmartin did a three-point turn to get away from the protesters. The protesters saw his vehicle and began running after him. He drove his car away and parked it. He then went to see where the truck had been blocked by the protesters. The truck was being driven by a man called Declan McCormack. Mr. McCormack was unable to remove the truck because he was blocked by protesters. Mr. Gilmartin then went to the site of the installation of the water meters, 80 to 100 metres away. He made the site safe and removed a Stop/Go system at the location. He observed that traffic had to drive around the truck onto the opposite side of the road to get past.

9. Mr. Gilmartin recalls Gardaí arriving at about 2.20pm. He told them that he was in charge of the site and told them what had happened. Protesters remained at the road when the Gardaí were there. At approximately 3pm, Mr. Gilmartin spoke to Sergeant David Gilmore and told him what had happened. Afterwards Mr. Gilmartin took photographs of the street. After the protesters were arrested and the road was cleared, he saw the truck drive up the road and leave the area.

10. Sergeant Gilmore gave evidence that on 18th May 2015, he was on duty at Dun Laoghaire Garda Station when he was informed of an ongoing incident at York Road, Dun Laoghaire. He went to the scene with a Garda Michael Quill, arriving at approximately 3.05pm. Gardaí Paul O'Donnell, Lee Graydon, and Joseph Byrne were present at the scene upon his arrival. Sergeant Gilmore observed the truck stopped on the outbound lane of York Road. It was a flatbed truck bearing Reg. No. 08D 45673 with a trailer that had a mini-digger on it. He observed a number of people standing on the road immediately in front of the truck and three females sitting in a circle on the road behind the truck. At the time, the road was fully open and traffic had to cross to the opposite side of the road to get around the truck. He directed Garda Graydon and Quill to direct traffic. He observed that Mr. McCormack was sitting in the driver's seat of the truck and that the engine was running. He then had a conversation with Mr. McCormack as to what had occurred.

11. At 3.40pm, Sergeant Gilmore gave a direction to the people both in front of and behind the truck under s. 8 of the Criminal Justice (Public Order) Act 1994, as he believed that each of them were committing an offence under s. 9 of the Act. He informed each of them of the consequences of failing to comply with the direction. Nonetheless, all of them failed to comply with the direction.

12. At 4.05pm, Sergeant Gilmore left the scene and returned to Dun Laoghaire Garda Station to discuss the situation with Superintendent Martin Fitzgerald, Inspector Tom O'Sullivan, and Inspector Martin Creighton.

13. Sergeant Gilmore returned to York Road at 4.45pm. On his return, he observed that the truck was still in the same position with the engine running and the same people were in the same positions, preventing the vehicle moving forward. These were the same people to whom he had earlier given the direction under s. 8 of the Criminal Justice (Public Order) Act 1994.

14. At 4.45pm, Sergeant Gilmore made a demand under s. 24 of the Criminal Justice (Public Order) Act 1994 for the names and addresses of those people who were blocking the traffic on York Road. The people to whom this demand was made were the same people who had earlier been the subject of the direction under s. 8 of the 1994 Act. All of the people refused to furnish Sergeant Gilmore with their names and addresses. Sergeant Gilmore was in a position to identify eight people to whom the s. 8 direction was given which included the three defendants.

15. At 5.01pm, Sergeant Gilmore made a further direction under s. 8 of the Criminal Justice (Public Order) Act 1994 to the people at the front and rear of the vehicle. The direction was made to eight people which included the three defendants. He did so as he believed each of them was committing an offence contrary to s. 9 of the Criminal Justice (Public Order) Act 1994. They were told of the potential consequences of failure to comply with the direction, including the possibility of being convicted of an offence. Once again, they all failed to comply with the direction.

16. Sergeant Gilmore then requested that further Garda resources be made available to deal with the incident which arrived at 5.15pm. Sergeant Gilmore gave a direction to each of the individuals at the front and back of the truck under s. 8 of the Criminal Justice (Public Order) Act 1994 to desist and move on. The three defendants were each among this group of people. He did so as he believed each of them were committing an offence under s. 9 of the Criminal Justice (Public Order) Act 1994. He explained to them the consequences of a failure to comply with the direction, including being prosecuted for a criminal offence.

17. The first named defendant was then sitting on the road directly in front of the truck and had linked arms with three others. Another man stood in front of them holding a mobile phone. The second and third named defendants, along with another female, were sitting on the ground behind the truck. All of the defendants heard the direction and were told of the consequences of failing to comply with it. All of the people, including the defendants, refused to comply with the direction given by Sergeant Gilmore. Each of the individuals involved, including the defendants, were subsequently arrested under s. 24 of the Criminal Justice (Public Order) Act 1994 on suspicion of having committed an offence under s. 8 of the Criminal Justice (Public Order) Act 1994. Each was cautioned and told of the reason for their arrest. The truck was then driven off and the traffic was thereafter able to move as normal.

18. In cross-examination, Sergeant Gilmore was asked by Counsel for the defence about his understanding of s. 9 of the Criminal Justice (Public Order) Act 1994. He confirmed that it was an offence of wilful obstruction of traffic. He made no mention of the

absence of lawful authority or reasonable excuse ingredient of the offence. Following this, the intention had been to call Gardaí Whitney, Mullane, and Brosnahan, but in a situation where it was confirmed that there was no issue about the validity of the arrests, this was considered unnecessary. Counsel for the defence proceeded to make submissions to the Court about the adequacy of the prosecution's evidence. In relation to the s. 24 charges, the judge felt that the evidence that the defendants had been informed of the potential penal consequences of a failure to comply was inadequate and dismissed the charges. There is no dispute in relation to that.

19. Submissions were then directed to the s. 9 charge. The judge held that the reference in that section to "without lawful authority or reasonable excuse" was not a matter for the defence to prove, but rather, required the prosecution to prove the absence of lawful authority or reasonable excuse.

20. The prosecution submitted that the evidence of the duration and nature of the protest combined with the absence of any discussion in advance with Gardaí was adequate to discharge the burden of proof in that regard. The judge of the District Court dismissed the s. 9 charges, holding that while evidence was given that there had been no permission sought from the Gardaí in relation to the incident, she was not able to discount the possibility that another form of reasonable excuse or lawful authority was available to the defendants. The 1994 Act did not require the prosecution to negative every fanciful possibility. Sergeant Gilmore had not said, however, that there was no lawful authority or reasonable excuse or that he did not see anything that would give rise to such lawful authority or reasonable excuse.

21. Accordingly, in circumstances where there was no direct evidence offered by the prosecution in relation to the absence of lawful authority or reasonable excuse, the judge could not be satisfied that the necessary elements of the offence had been proved. In ruling, as she did in relation to the s. 9 charges, the District Court judge contrasted s. 9 of the Criminal Justice (Public Order) Act 1994 with the offence created by s. 9(1) of the Firearms and Offensive Weapons Act 1990, where a statutory defence is provided, but there is an onus on the defendant to establish same.

22. The Court also heard submissions in relation to the s. 8 charges. The prosecution submitted that the fact that the s. 9 charges had been dismissed was not relevant as there was a well-established wide discretion to arrest or give a direction and that suspicion would not be interfered with where it was a belief which was held bona fide. The judge held that as Sergeant Gilmore had been asked to confirm his understanding of the s. 9 offence and had not made any reference to "lawful authority" or reasonable excuse, she could not be satisfied that Sergeant Gilmore could have had the reasonable suspicion required to issue the direction pursuant to s. 8 of the Criminal Justice (Public Order) Act 1994. She held:

"(a) that in order for a valid direction pursuant to s. 8 to be made, Sergeant Gilmore would have had to have a reasonable suspicion that an offence was being committed contrary to s. 9;

(b) that the reasonable suspicion involved two elements: that wilful obstruction was taking place and that there was no reasonable excuse or lawful authority for this wilful obstruction;

(c) that Sergeant Gilmore gave evidence that his opinion was based solely on wilful obstruction, he made no reference to lawful authority or reasonable excuse. Sergeant Gilmore confirmed in cross-examination that his suspicion extended only to wilful obstruction;

(d) that there were no surrounding circumstances or other evidence which could allow her to infer that the Sergeant had formed any other suspicion, particularly where he had given evidence of his suspicion and

(e) that even if the evidence established that an offence pursuant to s. 9 had been committed at the time, the relevant issue was the suspicion formed at the time the direction issued."

The Judge, therefore, dismissed all charges against each defendant.

23. The judge then sought the opinion of the High Court on the following questions:

"1. Was I correct in law in holding that there was inadequate evidence that each of the defendants was acting without lawful authority or reasonable excuse?

2. If the answer to Question 1 is No, was I correct in dismissing the s. 9 charges against each of the defendants?

3. Was I correct in holding that Sergeant Gilmore was required to believe that the defendants were wilfully obstructing traffic without lawful authority or reasonable excuse contrary to s. 9 of the Criminal Justice (Public Order) Act 1994 in order to give a direction to each of the defendants under s. 8 of the Criminal Justice (Public Order) Act 1994?

4. If the answer to Question 3 is Yes, was I correct in dismissing the s. 8 charges against each of the defendants?

5. If the answer to Question 3 is No, was I correct in dismissing the s. 8 charges against each of the defendants?"

24. In the High Court, the view was taken that the District Judge was correct in dismissing the s. 9 offence as there was "no evidence of any kind to suggest that the defendants were obstructing traffic without lawful authority or reasonable excuse". [Emphasis that of High Court]. Eager J. then added the following observation:

"[a]s an aside, it could be argued that the District Judge could have taken a judicial notice of the fact that at the time water protesters were obstructing traffic. However, the District Judge is not required to infer that the protesters were obstructing traffic without lawful authority or reasonable excuse i.e. there was no onus on the District Judge to take judicial notice of the evidence, and in those circumstances she was correct in dismissing the s. 9 charge."

25. The High Court then turned its attention to the dismissal of the s. 8 charge, saying that it was required to analyse if a dismissal of the s. 8 charges logically followed from a dismissal of the s. 9 charges, posing the question "can a Garda form the reasonable suspicion required by s. 8, where the elements of the s. 9 offence have not been made out at trial?". Having reviewed the evidence and referred to a number of authorities that had been opened, Eager J. came to the following conclusion:

"[i]t appears to this Court that Sergeant Gilmore's opinion of his belief that the accused were committing an offence under s. 9 was a reasonable opinion, particularly when they were requested at least three times to comply with his order

under section 8.”

He then proceeded to answer the questions posed in the case stated as follows:

“1. Was I correct in law in holding that there was inadequate evidence that each of the defendants was acting without lawful authority or reasonable excuse?

A: Yes.

2. If the answer to Question 1 is No, was I correct in dismissing the s. 9 charges against each of the defendants?

A. See answer to 1.

3. Was I correct in holding that Sergeant Gilmore was required to believe that the defendants were wilfully obstructing traffic without lawful authority or reasonable excuse contrary to s. 9 of the Criminal Justice (Public Order) Act 1994 in order to give a direction to each of the defendants under s. 8 of the Criminal Justice (Public Order) Act 1994?

A. No.

4. If the answer to Question 3 is Yes, was I correct in dismissing the s. 8 charges against each of the defendants?

A. See answer to Question 5.

5. If the answer to Question 3 is No, was I correct in dismissing the s. 8 charges against each of the defendants?

A. No.”

The case was remitted to the District Court in order that the charges remaining against each of the defendants under s. 8 of the Criminal Justice (Public Order) Act 1994 be dealt with.

The Arguments before this Court

26. Before this Court, the main thrust of the defendants’ appeal has been to submit that a statutory prerequisite to making a direction pursuant to s. 8 was not complied with. It is said that before a valid direction can be issued pursuant to s. 8, a number of elements must be present. These are identified as being that:

“(i) The Guard must have a suspicion;

(i) the suspicion must be reasonable;

(ii) the behaviour which is the subject of suspicion must be contrary to the provisions of one of a number of sections of the Act of which section 9 is one and

(iii) the behaviour in issue must be in a public place.”

A further requirement arises where the section in issue is s. 9. In that scenario the suspicion must also encompass:

“(i) That free passage in a public place is being prevented or interrupted and

(ii) must also encompass that there is no lawful authority or reasonable excuse for the obstruction.”

It is then submitted that there was no evidence that Sergeant Gilmore had addressed the issue of the absence of lawful authority or reasonable excuse when he formed his opinion. It is said this follows from the fact that Sergeant Gilmore’s understanding of s. 9 of the Criminal Justice (Public Order) Act 1994 addressed the question of unlawful obstruction of traffic, but he had made no mention of the absence of lawful authority or reasonable excuse ingredient. It is argued on behalf of Mr. Kelly and his co-defendants that it cannot be said there was a reasonable suspicion when the said suspicion did not encompass a necessary ingredient of the offence.

27. So far as the s. 9 charge is concerned, on behalf of the defendants, it is argued, and it is not in dispute, that the prosecution bears the burden of proving each element of the offence. The defendants say that the Judge in the District Court was perfectly correct in concluding that where no direct evidence had been given, on the question of an absence of lawful authority or reasonable excuse, that she could not be satisfied that each of the elements of the offence had been proved.

28. It is said that the High Court Judge was correct in approving of how the District Court dealt with the s. 9 charge, but that he then fell into error when he turned to consider the s. 8 charge. It is said that, in particular, he fell into error because of the emphasis he placed on what he described as the well-established principle that an opinion or suspicion arrived at in good faith is not invalidated by subsequent Court findings. It is said that the Judge’s error was in failing to appreciate that the line of authority which he had in mind related to cases where there was a factual error.

29. For her part, the Director says that the stopping of the truck, preventing it moving on, and the disruption and blocking of traffic went beyond lawful and constitutionally protected protest. It is said that the evidence adduced as to what occurred on York Road on the occasion in question provided all that was needed to show that what was occurring was unlawful and was occurring without lawful authority or reasonable excuse. Thus, it is said that Eager J. was wrong to dismiss the s. 9 charge.

30. Turning to the s. 8 charge, the Director says it is well-established that a Garda’s opinion will rarely be interfered with if validly held. It is said that this is a clear case where the belief or opinion of the Garda was both bona fide and valid. It is submitted that even if their submissions in relation to s. 9 did not find favour with the Court, that the approach of the High Court to the s. 8 charge was clearly correct and should be followed.

Discussion

31. Firstly, there can be no doubt about the fact that a critical ingredient of the s. 9 offence, being the obstruction of traffic offence, is that the prevention or interruption of traffic must be without lawful authority or reasonable excuse. There can equally be no doubt that in order for there to be a lawful direction issued, pursuant to s. 8, with the possibility of an offence being committed in

the event of non-compliance, it is essential that the Garda issuing the direction should, where s. 9 is the offence in contemplation, reasonably suspect that the free passage of a vehicle was being interrupted and that this was occurring without lawful authority or reasonable excuse. Again, it is and cannot be in dispute that the onus of proving this is on the prosecution. It is for them to establish in the case of a s. 9 offence that the free passage of a vehicle was being prevented or interrupted and that this was occurring without lawful authority or reasonable excuse. Furthermore, insofar as s. 8 is concerned, the prosecution must show that a member of An Garda Síochána reasonably suspected that the free passage of a vehicle was being prevented or interrupted and that this was occurring without lawful authority or reasonable excuse.

32. The fact that the prevention or interruption of free passage of a vehicle was occurring without lawful authority or reasonable excuse was an issue in respect of which direct evidence could be given, or in respect of which inferences could be drawn. The evidence that was given as to what occurred on 18th May 2015 at York Road, Dun Laoghaire, provided a clear basis for concluding that the free passage of a vehicle was being prevented and interrupted there and that this was occurring without lawful authority or reasonable excuse. In my view, there could be no lawful authority or reasonable excuse for the conduct described by Mr. Gilmartin and Sergeant Gilmore. Their evidence could, and indeed should, have led to a conclusion that free passage was being prevented or interrupted without lawful authority or reasonable excuse. It must be appreciated that this was a deliberate and intentional blocking of the free passage of a particular vehicle, for which there could be no excuse. This was not a situation where the free flow of traffic was impeded as a consequence of a legitimate protest such as might occur where a protest march or public meeting is organised or where a picket is placed. Quite simply, it is my opinion that there can be no doubt about this, what took place on York Road was not a legitimate protest.

33. So far as the opinion formed by Sergeant Gilmore is concerned, I do not believe that the fact that Sergeant Gilmore did not recite the statutory formula or did not refer to the individual ingredients of the offence would have precluded the drawing of an inference that he, in fact, reasonably suspected that the vehicle was being denied free passage without lawful authority or reasonable excuse. Indeed, the events that he witnessed would mean that it was inconceivable that he would form any other opinion. There was no possible lawful authority or reasonable excuse that arose for consideration.

34. In my view, it follows that Judge Watkins was wrong to accede to the application made to her in the District Court. To the extent that the High Court upheld her approach so far as the s. 9 charge was concerned, I would disagree. The view that I have formed in relation to the s. 9 charge means that the s. 8 issue does not really arise. However, if I had been taking a different position in relation to the s. 9 charge, I would have found myself in agreement with the approach of the High Court Judge to the s. 8 charge.

35. Accordingly, the questions posed in the case stated should be answered as follows:

Q1. Was I correct in law in holding that there was inadequate evidence that each of the defendants were acting without lawful authority or reasonable excuse?

A. No.

Q2: If the answer to Q1 is No, was I correct in dismissing the s. 9 charge against each of the defendants?

A. No.

Q3: Was I correct in holding that Sergeant Gilmore was required to believe that the defendants were wilfully obstructing traffic without lawful authority or reasonable excuse contrary to s. 9 of the Criminal Justice (Public Order) Act 1994 in order to give a direction to each of the defendants under s. 8 of the Criminal Justice (Public Order) Act 1994?

A. Yes, but the fact that Sergeant Gilmore did not refer expressly to the question of lawful authority or reasonable excuse should not have led to the conclusion that he did not have the requisite opinion.

Q4. If the answer to Q3 is Yes, was I correct in dismissing the s. 8 charges against each of the defendants?

A. No.

Q5: If the answer to Q3 is No, was I correct in dismissing the s. 8 charge against each of the defendants?

A. Does not arise.