Neutral Citation Number: [2011] IEHC 476

THE HIGH COURT

2011 1034 SS

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

DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND

NICAISE KULIMUSHI

ACCUSED

APPEAL BY WAY OF CASE STATED

Judgment of Mr. Justice Hedigan delivered the 16th day of December 2011

1. This case stated arises from proceedings dated the 28th September, 2010, wherein Judge Aeneas McCarthy, a Judge of the District Court sitting at Limerick District Court, sought the opinion of the High Court on the following the questions:-

> (a) Whether he was correct in law in holding that the Garda did not validly form the opinion necessary to ground an arrest for drunk driving and
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> (b) Whether he was correct in law in dismissing the case against the accused on that basis.

2. On the 28th September, 2010 District Judge Aeneas McCarthy dismissed a prosecution against the accused under s. 49(4) of the Road Traffic Act 1961, as amended, on the ground that he was not satisfied that the arrest was valid based on the opinion of the Garda. The prosecuting Garda, Mark Mannix, had given evidence that he was administering a Mandatory Alcohol Testing Checkpoint under the Road Traffic Act 2006 and that he required the accused to provide a roadside specimen of his breath. The Garda gave evidence that the result of this preliminary breath test was "positive". He then gave evidence that he formed the requisite opinion for the arrest of the accused under s. 49(8) of the Road Traffic Act, 1961 to 1994. The reasonableness of the opinion formed by the prosecuting Garda was not challenged by the defence in cross-examination. The District Judge questioned this issue at the conclusion of the prosecution and defence case but the prosecuting guard was not recalled to address this point. The District Judge noted that the word "positive" was more suitable in the context of the "old" breathalyzer apparatus, which had been in use up to the end of 2005, and which only had two readings, "positive" and "fail". He noted that the breathalyser currently in operation has four readings and that a positive reading could include "alert", which is a reading of less than 30 to 35 mg of alcohol per hundred millilitres of breath, or a "fail", which is a reading greater than 35 mg of alcohol per hundred millilitres of breath. The Judge held that he was not satisfied that the arrest was valid based on the opinion of the Garda. The DPP seeks to appeal this finding and District Judge Aeneas McCarty has sought the opinion of the High Court on the questions outlined above.

3. The starting point for a consideration of this issue is the case of *DPP v. Duffy* [2000] 1 J.R. 393, which establishes the principle that if a Garda states that he has formed the requisite opinion, and where the accused has been represented by a competent legal practitioner and the validity of such opinion has not been challenged, then the evidence of the Garda as to the formation of the opinion is sufficient. In that case, the Garda had not given any evidence as to the basis for his opinion, but this had not been questioned by the defence, by cross examination or otherwise. Quirke J. stated as follows:-

> "In the instant case, the provisions of s. 12 of the Act of 1994 required that before requiring the accused to provide a specimen of his breath it was necessary for Sergeant Treacy to have formed the opinion that the accused had consumed intoxicating liquor. Sergeant Treacy adduced uncontested evidence on behalf of the prosecution to the extent that he had formed such an opinion and there is no reason why in the absence of any suggestion or contention to the contrary the District Judge or this court should find that the opinion of Sergeant Treacy did not result from an honest belief and was not genuinely and reasonably held. His oral testimony comprised *prima facie* evidence sufficient to satisfy the requirements of s. 12(1)(a) of the Act of 1994 as to the requisite opinion required for the purposes of that section which could, of course, have been displaced either by way of cross-examination or as a result of testimony adduced on behalf of the accused…"

In the present case the Garda gave unchallenged evidence that he had formed the requisite opinion, the basis for his opinion was the result of the "positive" breathalyzer test.

4. In *DPP v. Gilmore* [1981] ILRM 102. The defendant was convicted on appeal in the Circuit Court of driving a motor vehicle while intoxicated contrary to s. 49(3) of the Road Traffic Act, 1961. The arresting Garda gave evidence that he arrested the defendant without a warrant pursuant to s. 49(6) because he had formed the opinion that because of the consumption of an intoxicant the defendant was incapable of having proper control of a vehicle. The sole foundation for that opinion was the defendant's failure to pass the breathalyser test. The Circuit Court Judge stated a case to the Supreme Court as to whether or not an arrest is lawful where the opinion of the Garda is formed by relying solely or partly upon the result of the breathalyser test. The Supreme Court held that a positive result of a breathalyser test is sufficient to justify an opinion on the part of a Garda that an offence under s. 49(2) or (3) had been committed.

5. The Supreme Court has recently set out the law on what is required to form a reasonable suspicion or opinion sufficient to ground an arrest. In the case of *DPP (O'Mahony) v. O'Driscoll* [2010] IESC 42, the question posed in a consultative case stated was whether

it was open to the District Judge on the evidence adduced to find that a member of An Garda Síochána had reasonable cause to suspect that an offence was being, or had been, committed under the Control of Horses Act 1996. In answering this question in the affirmative, Finnegan J. referred to the case of *O'Hara v. Chief Constable of the Royal Ulster Constabulary* [1997] A.C. 286 as authority for the proposition that even "scant" information can form the basis for a reasonable suspicion. Finnegan J. concluded:-

> "It is clear from a perusal of the authorities in this area both in this jurisdiction and in England and Wales that the test of reasonable cause for suspicion sets a very low threshold."

6. The courts have also stressed the need to allow the gardaí an appropriate margin of appreciation in the carrying out of their duties. In the recent case of *DPP (Grant) v. Reddy* [2011] IEHC 40, the President of the High Court, Kearns P. stressed that the gardaí should not be held to an impossible standard:-

> "It seems to me from the cases referred to that the critical test is that the opinion formed by the garda be *bona fide*. It can derive from either his or her own observations or from reports received from third parties. It can be "scanty" in nature, as Finnegan J. pointed out in *DPP v. O'Driscoll* [2010] IESC 42.
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> The section itself does not require that the opinion formed or arrived at be reasonable although the cases to which I have referred indicate that the opinion must be 'reasonably formed' by the arresting officer. I take the view that this means that the opinion in question be not formed capriciously or without proper grounds. In an operational arena of this nature, the courts must allow the arresting officer an appropriate margin of appreciation and not be seen as permanently poised to strike down the prosecution at every turn by holding members of the Garda Síochána to impossible requirements as though they themselves were adjudicating an issue as to reasonableness in a courtroom setting."

7. The Court's must ensure that fair procedures are observed for the prosecution as well as the defence. In the case of *DPP v. Tim O'Connor* [2005] IEHC 422, a case was stated to the High Court in connection with the length of the period of detention of an accused in a drunk driving case. In that case, the accused had been held for an extra period of 7 minutes, this period had not been accounted for, or justified by the prosecution. The District Judge held that the accused was in unlawful detention for a period of 7 minutes. However the period of detention had never been challenged or questioned by the defence. Quirke J. held that the District Judge was not entitled to make the finding of an invalid detention, since the detention had not been put in issue by the defence and the prosecution had never had an opportunity to adequately address the point in evidence. He stated:-

> "On the facts of this case, dismissal of the charge against the respondent on that ground would only have been justified if either,
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> (a) the legality of his detention had been challenged on behalf of the respondent or,
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> (b) evidence adduced caused sufficient concern for the learned District Judge to commence a focussed enquiry into the legality of the respondent's detention and directed towards reasonableness.
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> The case stated does not indicate that a challenge was made on behalf of the respondent. Neither does it disclose an enquiry by the learned District Judge during which the DPP was given the opportunity to discharge the onus of proving that the duration of the respondent's detention was reasonable in the circumstances."

8. In applying these principles to the present case, it is clear that a positive result of a breathalyser test is sufficient to justify an opinion on the part of a Garda that an offence under s.49 (2) or (3) had been committed. Nothing in the new breathalyzer regime changes this. The Garda gave unchallenged evidence that he had formed the requisite opinion. The basis for his opinion, as he put it, was the "positive" result of the breathalyzer test. The *bona fide* and reasonably held belief of the Garda was not challenged and could not therefore be questioned later when the prosecution case had closed. It is clear from a perusal of the authorities in this area that the test of reasonable cause for suspicion sets a very low threshold. The critical test is that the opinion formed by the Garda must be *bona fide*. To form an opinion the Garda does not require the level of proof that would be necessary in court. As was pointed out in *DPP v. Farrell* [2009] IEHC 368:-

> "Members of An Garda Síochána, are required on a daily basis to make on the spot decisions based on available information which they derive from no more than educated impressions. Once the actions of the Gardaí are reasonable and *bona fide* and there is no evidence of abuse of power or arbitrary behaviour, the court should be very slow to put technical procedural obstacles in the way of the day-to-day investigation of crime."

The prosecuting Garda gave evidence that the result of this preliminary breath test was "positive". He then gave evidence that he formed the requisite opinion for the arrest of the accused under s. 49(8) of the Road Traffic Act, 1961 to 1994. The reasonableness of the opinion formed by the prosecuting Garda was not challenged by the defence in cross examination or otherwise. It was the District Judge himself who raised this issue at the conclusion of the prosecution and defence case. The prosecuting Garda was not however recalled to address this point. It seems to me that in the absence of what Quirke J. described as a "focused enquiry" by the District Judge during the currency of the trial it was not open to the District Judge to dismiss the case against the accused on the basis that the prosecuting Garda did not validly form the opinion necessary to ground an arrest for drunk driving. If the District Judge had a doubt as to the nature of the opinion formed, he should have recalled the Garda and questioned him as to those concerns. If the Garda formed his opinion on a *bona fide* basis rather than capriciously or arbitrarily, that is enough. It is a very low threshold.

The answers to the questions posed at (a) and (b) is therefore "No". The appeal is allowed and the case will be remitted to the District Court.