

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2010 No.1465 S.S.]**

**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**

**(AT THE SUIT OF GARDA MARK GRANT)**

**AND**

**ANTHONY REDDY**

**PROSECUTOR**

**RESPONDENT**

**JUDGMENT of Kearns P. delivered the 4th day of February, 2011**

This is an appeal by way of case stated by District Judge John O'Neill pursuant to s. 2 of the Summary Jurisdiction Act 1857 as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961 and the Rules of the District Court arising out of the prosecution of the accused on a charge of driving under the influence of an intoxicant contrary to s. 49 (4) and (6) (a) of the Road Traffic Act 1961 as inserted by s. 10 of the Road Traffic Act 1994 as amended by s. 18 of the Road Traffic Act 2006.

**FACTUAL BACKGROUND**

On 1st October 2009, the accused appeared before the District Court on foot of charge sheet No. 8972403 alleging that on 13th May, 2009 at the N4 Lucan Bypass in Co. Dublin, he drove a mechanically propelled vehicle, registration number 03MN2628 in a public place while there was present in his body a quantity of alcohol such that within three hours or so after driving, the concentration of alcohol in his breath exceeded a concentration of 35 micrograms of alcohol per 100 millilitres of breath contrary to s. 49(4) and (6) (a) of the Road Traffic Act 1961, as amended by s. 18 of the Road Traffic Act 2006. The District Judge acceded to the application of counsel for the accused that all prosecution witnesses be directed to remain outside the court until called to give evidence.

The factual matrix which led to the prosecution of the respondent are set out by District Judge O'Neill at paragraph 2 of the case stated. The evidence given by Garda Keogh of her observations was set out as follows:-

"(b) Garda Orlaith Keogh of Store Street Garda Station testified that on 13/06/09 at approximately 5.35am whilst driving to work for 6am, she observed an Audi A4 driving in front of her. She stated that the car was driving in an erratic manner and was weaving between lanes. She observed the car approach road works on the N4. At the junction where the slip road for Lucan joins the N4, the car drove straight across two lanes of traffic and hit the traffic cones on the road. The cones flew up into the air and landed across two lanes of traffic causing Garda Keogh and other road users to brake to avoid them. She testified that the car then crashed into the hard shoulder of the N4 across from the Texaco garage on the city bound lane of the N4. Garda Keogh then called 999. She testified that she informed the emergency services that an Audi A4 had been driving erratically, that there was only one person in the car, and that it had crashed into the hard shoulder across from the Texaco garage on the city bound lane. She further testified that she had no opportunity to identify the driver of the said vehicle.

(c) Under cross-examination, Garda Keogh testified that she informed the emergency services of the erratic nature of the driving and the location of that driving. Garda Keogh was specifically asked whether she imparted any other information to the emergency services and she confirmed that she did not. She confirmed that she did not speak with Garda Mark Grant at the time and that she had no further dealings with the vehicle because, having called 999, she left the scene as she did not want to be late for work. She was not present when Garda Grant arrived at the scene."

The evidence given by Garda Mark Grant follows at sub-paragraphs (d), (e), (f), (g) and (h) of paragraph 2:-

"(d) Garda Mark Grant testified that on Saturday 13th June 2009 at approximately 5.45am he was the official observer in the Ronanstown Patrol car QC1 with Garda Richard Lynch detailed as the driver. At approximately 5.45am on Saturday 13th June 2009, they received a call from the Garda Control for a vehicle, an Audi A4, registration number 03MN2628, that had been observed by an off duty member; Garda Orlaith Keogh travelling all over the road on the N4 inbound and the vehicle had crashed into the hard shoulder. Garda Grant testified that it was clear that the car had crashed as there was damage to the side of the vehicle and it had eventually to be towed away.

(e) Under cross-examination, it was put to Garda Grant that his colleague, Garda Keogh, had testified that the only information she imparted to the emergency services was as to the nature of the driving and the location of that driving. It was further put to Garda Grant that Garda Keogh did not give the registration number of the vehicle in question and did not identify herself to the emergency services. When Garda Grant was asked to explain how the emergency services could have communicated such information to him when that information had not been provided to them, Garda Grant could not offer any explanation.

(f) Garda Grant gave further evidence that when he and Garda Lynch got to the N4 city bound, Garda Grant observed a

vehicle 03MN2628, an Audi A4 stopped in the hard shoulder on the N4 inbound, across the road from the Texaco Garage. Garda Grant said there was only one person in the car and he approached the driver, who had rolled down his window. He made lawful demand of the driver to produce his driving licence and also observed the keys in the ignition. Garda Grant noticed that the accused who he now knows is Mr. Anthony Reddy of Tagadroe, Maynooth, Co. Kildare had slurred speech and his eyes were glazed over. Garda Grant got a strong smell of intoxicating liquor from him.

(g) Having spoken to Mr. Reddy, Garda Grant formed the opinion that he was under the influence of an intoxicant to such a degree that he was incapable of having proper control of a mechanically propelled vehicle in a public place. Garda Grant informed him that he was arresting him under Section 49 (8) of the Road Traffic Act 1961/1995, as amended, on suspicion of having committed an offence contrary to Sections 49 (1), 49 (2), 49 (3) or 49 (4) of the Act, or in plain English that he was arresting him for drunk driving. The time of his arrest was 5.50am.

(h) Garda Grant cautioned the Accused, stating that 'you are not obliged to say anything unless you wish to do so but anything you do say will be taken down and may be given in evidence'. After cautioning, Mr. Reddy admitted to Garda Grant that he was driving the vehicle and that he had a few drinks earlier in the night. Mr. Reddy was conveyed to Ballyfermot Garda Station, and arrived at 6.15am. Garda Grant introduced Mr. Reddy to the Gaoler, Garda Ciaran Wynne, and informed him of the reasons for the arrest. He then introduced Mr. Reddy to Garda Emma Corcoran at 6.35am and informed him that she would be performing a breath test with him to determine the concentration of alcohol in his breath."

Following a period of observation, the accused was brought to the intoxilyser room and processed in accordance with s. 13 (1) (a) of the Road Traffic Act 1994. The accused complied with the legal requirement to provide two specimens of his breath; the result of which was 66 micrograms of alcohol per 100 millilitres of breath. The accused was charged with the offences detailed above. Evidence was given by Garda Emma Corcoran in relation to the taking of the two specimens.

At the close of the prosecution case, the defence applied for a direction to dismiss on two grounds: - (i) that the incorrect name was on the s. 17 certificate (the name entered on the certificate was Anthony Brady but the statement was clearly signed by the accused as Anthony Reddy; and (ii) the reasonableness of the opinion grounding the arrest of the accused. Regarding the first ground, the District Judge applied *Ruttledge v. District Judge Clyne and the Director of Public Prosecutions* [2006] I.E.H.C. 146 and *Director of Public Prosecutions v. Cullen* (Unreported, High Court, 2nd July 1984) and held that Anthony Brady and Anthony Reddy were one and the same person and that Anthony Reddy had signed the certificate. The District Judge refused to dismiss the case on this ground.

Regarding the second ground, the defence argued that it was not reasonable for Garda Grant to form the necessary opinion under s. 49(8) of the Road Traffic Act 1961 (as amended), and, in particular, the opinion that the accused was driving the car, as Garda Grant never saw the accused driving the car, had not witnessed any erratic driving, the accused was not identified to him by Garda Keogh and only bare details of the car (not the registration number) were given to him by Garda Control. The defence also noted Garda Grant's inability to explain in evidence how the emergency services had communicated the registration number of the vehicle to him when Garda Keogh gave evidence that she had not provided such information thereto.

It was the prosecution's submission that it was reasonable for Garda Grant to form the opinion that the accused was driving the car in light of the details that had been provided to him: that the car was an Audi A4; that it had been driven erratically along the same stretch of road only a few minutes earlier; that there was one person in the car, and that it had crashed on the hard shoulder in the same location that Garda Grant found the accused in his car.

The District Judge accepted the defence submission that since Garda Grant did not see the accused drive and given that the registration number of the vehicle had not been communicated to him by the emergency services, then he could not have reasonably formed the opinion for an arrest as required by s. 49 (8) of the Road Traffic Act 1961 and that it would have been better if Garda Keogh had remained at the scene.

The prosecution then requested the District Judge to consider an alternative conviction under s. 50 of the Road Traffic Act 1961. Section 49 (6) (b) of the Act of 1961 allows for such a discretion. The defence relied on the decision of *Director of Public Prosecutions v. O'Neill* [2008] I.E.H.C. 457, which approved the test for exercising such discretion set out in the *Director of Public Prosecutions v. Kenny* [2006] I.E.H.C. 330, and argued that in exercising such discretion the District Judge should look at the prejudice the accused would suffer if convicted under section 50. The defence argued: (a) it had been open to the prosecution to charge the accused with an offence pursuant to s. 50 of the Act of 1961, yet this had not been done;; (b) the defence had not taken instructions from the accused regarding such a charge, in particular whether he had the requisite intention to drive the vehicle, (c) the defence had not had the opportunity to call witnesses to rebut the presumption that the accused had the requisite intention to drive, and (d) evidence of an intention to drive had not been put before the court especially having regard to Garda Grant's evidence that the car had been significantly damaged and ultimately had to be towed away.

The District Judge refused to convict the accused under s. 50 on the basis that there were "too many gaps in the prosecution case". The prosecutor then sought an appeal by way of case stated and District Judge O'Neill stated the following question for the opinion of this Court:-

"(a) Was I correct in law in dismissing the case against the accused on the basis that on the evidence as set out above, Garda Grant could not reasonably have formed the opinion required for the arrest of the accused under section 49(8), that the accused had committed or was committing the offence of drunk driving under section 49 of the Road Traffic Act 1961, as inserted by section 11 of the Road Traffic Act 1994, and as amended by section 18 of the Road Traffic Act 2006?

(b) If I was correct on the point set out in (a) above, was I correct in law in holding that there was insufficient evidence to consider a conviction under section 50 of the Road Traffic Act 1961, as inserted by section 11 of the Road Traffic Act 1994, and as amended by section 18 of the Road Traffic Act 2006?"

## THE APPELLANT'S CASE

It was the appellant's case that the District Judge dismissed the prosecution under s. 49(4) of the Road Traffic Act 1961, as amended, on the basis that Garda Grant could not have reasonably formed the opinion required for the arrest of the accused pursuant to s. 49(8), i.e. that the accused had committed or was committing the offence of driving under the influence of an intoxicant.

It was the appellant's argument that this decision was wrong in law and was at direct variance with all case law, and the very recent decision of the Supreme Court in *Director of Public Prosecutions (O'Mahony) v. O'Driscoll* [2010] I.E.S.C. 42, on what was necessary to form an opinion or a suspicion that an offence had been committed. It was the appellant's contention that this District Court decision imposed an impossible burden on the prosecution in the standard it set for the formation of such opinion. In summarising the factual context of this specific case, counsel for the appellant further argued that even if Garda Grant had come upon the scene without having received a call from Garda Control it is difficult to see how he could not have formed an opinion that the driver had committed the offence of drunk driving as there was no explanation offered in this case for how the accused got to the scene other than he drove whilst drunk.

Counsel for the appellant argued case law on the formation of an "opinion". Counsel noted that s. 49(8) requires an opinion only to be formed and relied upon *Director of Public Prosecutions v. Breheny* (Unreported, Supreme Court, 2nd March 1993) in which the Supreme Court held that the section does not require any more than the opinion be "genuinely and reasonably" held. Counsel also noted the decision in *Director of Public Prosecutions v. Gray* (Unreported, High Court, 8th May 1987). Counsel for the appellant relied heavily upon the case of *Director of Public Prosecutions (O'Mahony) v. O'Driscoll* [2010] I.E.S.C. 42 as the basis for their submission that there were substantial grounds for the prosecuting member upon which to form an opinion. The Supreme Court held that there was a low threshold for the formation of a reasonable suspicion. That case arose in the context of establishing what is required to form a reasonable suspicion or opinion sufficient to ground an arrest. It was held that the information acted upon by the member need not be based on his own observations since he is entitled to have a reasonable cause to suspect based on what he is told. Counsel for the appellant also noted that the Supreme Court, in particular Finnegan J., made no distinction between the various formulae used such as "reasonable suspicion" or "reasonable opinion" and in fact the learned judge used them interchangeably as he reviewed the precedent case law on the matter. Counsel for the appellant proceeded to note that Finnegan J. also referred to the case of *O'Hara v. Chief Constable of the Royal Ulster Constabulary* [1997] A.C. as authority for the proposition that even "scant" information can form the basis for a reasonable suspicion.

It was the appellant's contention that there were very substantial grounds to base the formation of the opinion held by Garda Grant.

### THE RESPONDENT'S CASE

It was the submission of the respondent that since the arresting Garda did not see the accused driving then he could not have reasonably formed the opinion that such an offence pursuant to s. 49 (4) and s. 49 (6) (a) of the Road Traffic Act 1961, as amended, had been committed. The respondent submitted arguments to this Court based on the following two interlinked points; (i) the jurisdiction of the High Court, and (ii) the reasonableness of Garda Grant's opinion.

Regarding (i), the jurisdiction of the High Court, counsel for the respondent noted that s. 2 of the Summary Jurisdiction Act 1857 as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961 provides that the case stated procedure may only be used to determine questions of law. To this end, counsel for the respondent relied upon the case of *Proes v. Revenue Commissioners* [1998] 4 I.R. 174 in which Costello P. stated at p. 182 that :-

"When the High Court is considering a case stated seeking its opinion as to whether a particular option was correct in law, it should apply the following principles. (1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them. (2) Inferences from primary facts are mixed questions of fact and law. (3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside. (4) If the judge's conclusions are not based on a mistaken view of the law, they should not be set aside, unless the inferences which he drew were ones which no reasonable judge could draw. (5) Whilst some evidence will point to one conclusion and other evidence to the opposite, these are essentially matters of degree and the judge's conclusions should not be disturbed, even if the court does not agree with them, unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law."

Counsel for the respondent further relied upon the Supreme Court decision in *Director of Public Prosecutions v. McCrea* [2010] I.E.S.C. 60 in which Hardiman J. stated at p. 11 that:-

"There is no need, in my opinion, for this Court to scrutinise that finding, or any other finding of the learned District Judge other than to enquire whether these findings were such as were open to her on the evidence. That is, the question of whether her findings were findings which this Court would itself make on the same evidence simply does not arise."

In arguing the two interlinked points of the jurisdiction of the High Court and the reasonableness of Garda Grant's opinion, counsel for the respondent argued that as Garda Grant had not witnessed the driving of the vehicle and Garda Keogh had not identified the accused as the driver to Garda Grant this resulted in an unreasonable formation of Garda Grant's opinion. Counsel further relied upon the fact that as Garda Grant could not explain how Garda Control could have provided him with the registration number of the vehicle given that Garda Keogh had not communicated such information to the emergency services this further went to satisfy the District Judge that there was insufficient basis upon which Garda Grant could reasonably have formed the requisite opinion.

It was counsel's argument that the District Judge was the sole arbiter of fact and, in carrying out his role, the District Judge elected to accept that the arresting member had unreasonably formed the requisite opinion. Emphasis was placed upon the "reasonableness" of the opinion formed and in this regard counsel relied upon *Hobbs v. Hurley* (Unreported, High Court, 10th June 1980). In arguing that this was a matter of fact, and not one of law, for the District Judge to determine, counsel relied upon the decision of Dunne J. in the *Director of Public Prosecutions v. Penny* [2006] 3 I.R. 553, where it was stated at p. 564 that:-

"One of the facts proved and/or admitted in the case stated was to the effect that Garda Hallinan formed the opinion that the accused was intoxicated to such an extent as to render him incapable of operating a mechanically propelled vehicle in a public place. The power under s. 52(1) of the Courts (Supplemental Provisions) Act 1961 is to refer any question of law arising in the proceeding for determination. In the course of his submissions in relation to the second question, counsel on behalf of the accused urged the court to look at the surrounding circumstances in order to examine the validity of the opinion of the garda. That seems to me to require the court to embark on a review of the evidence. No doubt there may be circumstances in which, as a matter of law, one could say that the surrounding facts could not support the opinion. However, in the present circumstances there is a finding of fact that the garda had formed the necessary opinion. In those circumstances, that being so, I cannot see how a fact so found can be vitiated by subsequent events. In the circumstances, I have some hesitation in answering that question given that I have some misgivings as to whether it was an appropriate question to raise but so far as it may be appropriate to give an answer, the answer to that question is no."

On this basis, counsel for the respondent submitted that this Court lacked the jurisdiction to determine this matter. The respondent

argued that the appellant in this case was seeking to embark on a similar review of evidence in circumstances where it could not be said that the surrounding facts could not support such a conclusion.

In conclusion, counsel for the respondent submitted that the District Judge was entitled to assess the basis for Garda Grant's opinion. In arriving at the decision that, as a fact, Garda Grant could not have formed the requisite opinion, the District Judge did not err in law and had due regard to the evidence. It was further submitted that the decision of the District Judge could not be characterised as one which no reasonable judge would have taken even if a different result could have been yielded from a different judge on the basis of the same evidence.

## DISCUSSION AND DECISION

The District Court's jurisdiction to state a case derives from s. 2 of the Summary Jurisdiction Act 1857. Section 2 of the Summary Jurisdiction Act 1857 was subsequently extended by s. 51 of the Courts (Supplemental Provisions) Act 1961 which states:-

"(1) Section 2 of the Summary Jurisdiction Act, 1857, is hereby extended so as to enable any party to any proceedings whatsoever heard and determined by a Judge of the District Court (other than proceedings relating to an indictable offence which was not dealt with summarily by the court) if dissatisfied with such determination as being erroneous on a point of law, to apply in writing within fourteen days after such determination to the said Judge to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the High Court."

Section 49 (8) of the Road Traffic Act 1961 provides that:-

"A member of the Garda Síochána may arrest without warrant a person who in the member's opinion is committing or has committed an offence under the section."

In the *Director of Public Prosecutions v. Gray* (Unreported, High Court, 8th May 1987) O'Hanlon J. stated at p. 4 that:-

"The fact that a defendant may have a completely convincing explanation for all the matters observed by an arresting Garda does not, in my opinion, deprive the arrest of its validity if it was objectively reasonable for the Garda to form the opinion that the person concerned is committing or has committed an offence under the section."

In the *Director of Public Prosecutions v. O'Driscoll* [2010] I.E.S.C. 42 the Supreme Court held, in the context of establishing what is required to form a reasonable suspicion or opinion sufficient to ground an arrest, the information acted upon by the member need not be based on his own observations since he is entitled to have a reasonable cause to suspect based on what he is told. A reasonable suspicion denotes "a possibility which is more than fanciful, that the relevant facts exist". The Supreme Court further stated that reasonable suspicion does not require evidence which would be admissible in court nor does it require anything in the nature of *prima facie* proof. Finnegan J., in concluding that even scant information can form the basis for a reasonable suspicion, stated at p. 26 that:-

"As in *O'Hara v. Chief Constable of the Royal Ulster Constabulary* the totality of information and circumstances is scanty but I am satisfied that the same is sufficient to enable an inference to be drawn as to what a reasonable man in the position of the independent observer would think of it. 'Suspicion' is a word in ordinary use in the English language. It imports not certainty and not probability. In the phrase 'reasonable cause for suspicion' it requires something more than a bare suspicion."

It was the respondent's argument that as the arresting Garda did not see the accused driving then he could not have reasonably formed the opinion that such an offence pursuant to s. 49 of the Road Traffic Act 1961 (as amended) had been committed. That in my view is a quite untenable proposition as the wording of the section makes it clear that the opinion-forming process relates to circumstances where a defendant "is committing or has committed an offence" (emphasis added). A requirement that the arresting Garda observe the defendant to be actually driving a motor vehicle in such a manner as to give rise to reasonable opinion or suspicion is to add something which the statute simply does not provide. If it was a requirement in every case it would render the statute virtually inoperable in all but a handful of cases where such evidence could be led.

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 *Director of Public Prosecutions v. O'Driscoll* [2010] I.E.S.C. 42.

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.

The facts must be approached by the adjudicator through the correct legal prism. In my view that did not occur in this case. The learned District Judge seems to have felt that on the existing state of the law he could have regard only to an opinion formed exclusively by what Garda Grant had seen and heard himself. That is apparent from his statement that "it would have been better if Garda Keogh had remained at the scene". That was an incorrect approach in law as the cited authorities amply demonstrate.

I would therefore answer the first question posed in the negative which consequently deals with the second question also.