



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 55

**Birmingham J.
Sheehan J.
Edwards J.**

The Director of Public Prosecutions (at the suit of Garda Andrea McGovern)

Record No: 2015/39

Respondent

V

Gerry Higgins

Appellant

JUDGMENT of the Court delivered on 2nd March 2017 by Mr. Justice Edwards.

1. The matter comes before the court on foot of a consultative case stated. The background to this is that Mr. Gerry Higgins ("the accused") was convicted in the District Court of the following offence:-

"On the 13th February, 2011, at Balldyrehid, Sligo, Co. Sligo, in said District Court area of Sligo, was in charge of a mechanically propelled vehicle register number 95 D 65910 in a public place with intent to drive the said vehicle (but not driving or attempting to drive it) when in your body there was present a quantity of alcohol, such that, within three hours of being so in charge of the vehicle, the concentration of alcohol on your breath exceeded a concentration of 35mgms of alcohol per 100ml of breath, contrary to s. 50(4) and (6)(a) of the Road Traffic Act 1961 as inserted by s. 11 of the Road Traffic Act 1994, and as amended by s. 18 of the Road Traffic Act 2006."

2. He appealed and the matter came on for hearing in the Circuit Court before His Honour Judge Tony Hunt, as he then was. The evidence on the appeal hearing which is now of relevance in the context of the case stated was that of Garda Andrea McGovern. Her evidence as recited in the case stated was as follows. On the 13th February, 2011, she had been acting as observer in the official patrol car driven by Garda Paul Connolly. At approximately 4.10 hours, she was patrolling the Balldyrehid area. She observed a car pulled in on the side of the road. The lights were on and there was a person sitting in the driver's seat. Both gardaí got out of the patrol car and approached the vehicle. The keys were in the ignition. The gardaí knocked on the window. There was a male asleep in the driver's seat and initially he did not wake up. When the person in the driver's seat did eventually awake, Garda McGovern asked him why he was parked on the side of the road. The male responded by saying that he had been drinking all day and he had become tired and therefore pulled in for a rest. The male in the vehicle was identified as the accused, Gerry Higgins.

3. The accused was then cautioned and he was asked again why he was parked on the side of the road and he again informed Garda McGovern that he had been drinking all day. He said that he had been at a christening in Dromore West and was heading home to Letterkenny when he had become tired and so had pulled over for a rest. Garda McGovern gave evidence of having formed the opinion that the accused had consumed an intoxicant to such an extent as to render him incapable of having proper control of a mechanically propelled vehicle. The accused was informed of this and was advised that Garda McGovern was arresting him under s. 50(10) of the Road Traffic Act 1961 – 2006 for an offence under s. 50(1), (2) (3) or (4) of the said Act. The accused was cautioned again and was then advised in plain language that he was being arrested for being drunk in charge of a mechanically propelled vehicle. Thereafter the accused was conveyed to Sligo garda station where he was introduced to the member in charge and processed in the ordinary way.

4. At the close of the prosecution case, counsel on behalf of the accused applied for "a direction". He submitted that the arrest was unlawful in circumstances where Garda McGovern had only formed an opinion that the accused was drunk and in charge of a mechanically propelled vehicle at the relevant time. He submitted that there were three elements to an offence under s. 50 of the Road Traffic Act, as amended. He argued that before an arrest without warrant could be made, a member of An Garda Síochána must satisfy themselves of the following:-

(i) That the person is then in charge of a mechanically propelled vehicle in a public place.

(ii) That such person is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle and

(iii) That such person is then in charge of the vehicle with the intent to drive or with the intent to attempt to drive the vehicle, but not driving or attempting to drive it.

5. Counsel submitted that for there to be a valid arrest the garda must have formed an opinion that a person is committing or has committed an offence under this section. He submitted that there was no evidence in relation to intent to drive, or intent to attempt to drive. On the contrary, he said, the conversation between Garda McGovern and the accused related to why the accused was on the hard shoulder of the road. No inquiry was made of the accused as to his future intentions. No attempt was made to ascertain from the accused what he intended to do. The vehicle was positioned on the hard shoulder of the road, the accused was asleep and the engine of the vehicle was off. Garda McGovern, counsel submitted, had given no evidence that she had satisfied herself that the accused intended to drive or intended to attempt to drive. On that basis, it was submitted, that the arresting garda had not satisfied herself that the offence had been or was being committed and in such circumstances she was not entitled to arrest the accused under s. 50(10) of the Act.

6. Counsel went on to submit that there was no offence known to Irish law of being "drunk in charge" of a vehicle. That was layman's parlance. Counsel submitted there was no basis upon which the garda could have formed the opinion, as to whether or not the accused intended to drive or to attempt to drive and more relevantly there was no evidence whatever, it was said, that the garda had in fact formed any such opinion. Based on these submissions, counsel sought "a direction" contending that as the arrest was unlawful, everything that flowed from it including the obtaining of the alcohol/breath reading was unlawful.

7. In response, the State solicitor submitted that the opinion formed by Garda McGovern was a valid opinion and that she was entitled to rely upon the presumption in the Act. The State solicitor submitted that the accused was drunk and in charge of a vehicle in the public place and that the arresting garda had satisfied herself of this. Reliance was placed on s. 50(8) of the Road Traffic Act which provides:-

"In a prosecution for an offence under this section it shall be presumed that the defendant intended to drive or attempt to drive the vehicle concerned until he shows the contrary."

8. The Circuit Court judge rose and took time for consideration. The case stated recites that the judge gave consideration to the powers of arrest under s. 50(10), noting that there were four possible offences contained within section 50. He noted that it was necessary to consider whether the opinion of the arresting garda was honestly and reasonably held and that the particular circumstances of the case had to be considered referring to the fact that here that the garda had observed the vehicle, the lights of which were on. The accused was asleep. The judge went on to say that he considered the words spoken prior to the arrest and that he took the view that the word "rest" implied driving in the future at some stage. He was of the view that the words spoken carried with him the implication that the accused would intend to drive at some point in the future.

9. At that point counsel for the accused submitted that this was an important point that arose time and time again, and asked that the judge would consider stating a case. The Circuit Court judge indicated that he was prepared to do so, though confirming that he would give the State solicitor an opportunity to consult with the DPP. The judge did state a case and reserved his decision pending the determination of the case stated.

10. The case stated signed and dated the 12th January, 2015, recited that the opinion of this Court was sought on the following question:-

"Whether a member of An Garda Síochána is entitled to arrest a person pursuant to the provisions of s. 50(10) of the Road Traffic Act 1961, as amended, where that member has satisfied himself/herself that a person has consumed an intoxicant to such an extent as to render that person incapable of having proper control of a mechanically propelled vehicle and was then and there in charge of the said vehicle, the said member not having satisfied himself/herself that the person in the vehicle at the material time had the intent to drive or the intent to attempt to drive the said vehicle."

11. It subsequently emerged that the case stated had been drafted by the defence and that the DPP had no involvement in preparing it and that it was signed before the DPP had sight of the draft. The Director was concerned that the question originally formulated did not reflect the findings of fact set out in the body of the case stated.

12. When the case was mentioned to Kelly J., as he then was, at a directions listing, he gave the DPP liberty to bring the matter back before Judge Hunt when he was next sitting in the Circuit Court. A letter was then sent to Judge Hunt by the Office of the DPP and the matter was then brought before the judge in the presence of both parties on the 3rd June, 2015. The judge agreed to amend the case stated as originally drafted. The amended question, which is the question now before the court was:-

"On the facts as set out above whether the arresting garda was entitled to effect a valid arrest under s. 50 of the Road Traffic Act, as amended."

13. The arguments before this Court have largely mirrored those that were addressed to the Circuit Court. On behalf of the accused it is submitted that the arrest was unlawful in circumstances where the arresting member had formed the opinion that the accused was drunk and in charge of a mechanically propelled vehicle, but it is said that Garda McGovern did not form any opinion in relation to the intention on the part of the accused to drive or to attempt to drive. It is said that Garda McGovern did not satisfy herself that the accused had the requisite intention. That there was no opinion formed that the required third element of the offence was present. The accused takes issue with the DPP's conclusions that Judge Hunt had been of the view that there was ample evidence that the prosecuting garda had formed the requisite opinion that there was an intention to drive. The accused says that it was Judge Hunt and not Garda McGovern who took the view that the words spoken, and in particular the reference to "rest" carried with them the implication that the accused intended to drive at some point in the future.

14. The accused also takes issue with an observation in the course of the written submissions from the DPP that by reason of s. 50(8)

"If a judge can presume in a prosecution that the intent is present, it would seem 'a fortiori' that the arresting garda is also entitled to make such a presumption for the formation of the opinion."

15. In the court's view there is substance in the point made here by the accused. Section 50(8) deals with a presumption that arises at the prosecution stage, the trial stage of the alleged offence. It is not applicable to the formation of an opinion, by a member of An Garda Síochána during the detection/investigation stage. That is not to say that forming a view that (i) a person is in charge of mechanically propelled vehicle and (ii) that the person is under the influence of an intoxicant to such an extent as to be incapable of having proper control will not bring the garda some distance towards being in a position to form a view on the third element of the opinion, that the person intended to drive or intended to attempt to drive. How far along the road it will bring the garda, may depend on the facts of the individual case. If the car is on the hard shoulder, with the ignition running and the lights on, it may be that the garda will readily form the requisite opinion, if on the other hand the car is parked on the driveway of the accused's home, the situation may be more open ended.

16. That accused says that the fact that the garda referred to being of opinion that the accused consumed an intoxicant to such an extent as to be incapable of having proper control of a mechanically propelled vehicle is consistent with the formation of an opinion that would support a s. 49 arrest, but is out of place in the context of section 50. The court does not see any great substance in this point. The issue of being under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle is common to s. 49 and s. 50 and is a feature of what is colloquially referred to as drunk driving offences.

17. The DPP submits that Garda McGovern had explicitly stated she was arresting the accused under s. 50(10) of the Road Traffic Act, for an offence under s. 50(1), (2), (3), (4) and also that she had advised him that he was being arrested for being drunk in charge and says that this indicates that the garda had formed the opinion, she had satisfied herself, of all the elements necessary for the formation of that opinion, including the fact that there was an intention to drive or to attempt to drive.

18. The DPP says that the position for which she contends is fully supported by the authorities, including Supreme Court authorities. She refers to the case of *Director of Public Prosecutions v Byrne* [2002] 2 I.R. 397, and says that the facts of that case are very

similar to the facts of the present case. There the accused was convicted in the District Court of the offence of being in charge of a mechanically propelled vehicle with intent to drive while he had in his body a quantity of alcohol in excess of that permitted by law, contrary to s. 50(3) of the Road Traffic Act 1961, as inserted by s. 11 of the Road Traffic Act 1994.

19. On appeal to the Circuit Court, the judge found as a fact that a garda could see the accused asleep in the driver's seat of his car, while the keys were in the ignition, turned "two clicks" to ready. Having awoken the accused, the garda formed the opinion that he had consumed intoxicating liquor and arrested him under s. 50(10) of the Road Traffic Act, as amended, for being drunk in charge of a car. The Circuit Court stated a case to the Supreme Court as to (i) whether he was entitled to hold that the accused was in charge of a mechanically propelled vehicle in a public place with intent to drive on the facts as set out above and (ii) whether he could consider the intention of the accused before he went to sleep.

20. The Supreme Court held in answering the case in the affirmative, (i) that where the car was parked on the hard shoulder with the lights turned on and the accused was asleep in the driver's seat with the keys in the ignition turned to ready, the Circuit Court judge was entitled to hold that the accused was in charge of the motor car when the garda arrived at the scene; (ii) that if the court was satisfied that the accused was in charge of the motor vehicle, the presumption of intention to drive pursuant to s. 50(8) of the Road Traffic Act 1961, as amended, arose and it was for the accused to rebut the presumption; in deciding the issue, it was open to the Circuit Court judge to consider the intention of the accused before falling asleep and (iii) that there may be certain inferences which can be drawn as to the accused's intention before he fell asleep and the Circuit Court judge was free to consider them.

21. The DPP has also drawn attention to the cases of *Director of Public Prosecutions v. O'Suilleabhain* [1995] 2 ILRM 617 and to *Director of Public Prosecutions v. O'Connor* [1985] ILRM 333. In *O'Suilleabhain*, the accused had been involved in a road traffic accident and a member of the gardaí arrived on the scene shortly afterwards. The defendant admitted that he was driving the vehicle involved. The garda gave evidence that he had got a strong smell of drink from the defendant and formed the opinion that he had consumed intoxicating liquor. The garda gave evidence that he informed the defendant that he had committed an offence under s. 49 of the 1961 Act. However, in the District Court the judge was of the view that the garda should have given specific evidence to the effect that he had formed the opinion that the defendant had, by reason of the consumption of intoxicating liquor, become unable to exercise proper control of the vehicle, while he was driving and so he dismissed the case. The matter was appealed by way of case stated to the High Court and ultimately came before the Supreme Court. There Finlay C.J. commented (at 619/620):-

"I am quite satisfied that common sense must always be applied to evidence. There is no injustice to applying common sense to evidence, in fact it is a thing that must be done in the interests of justice and that applying common sense to the evidence in this case where the District Court judge had evidence before her of the happening of an accident not between two vehicles, but between a vehicle and an immovable object, had evidence of the opinion of a guard that a man had consumed intoxicating liquor, the factual statement that there was a strong smell of drink from him, and the statement made at the scene by the guard and repeated in his evidence before the court that he told the man that he was accusing him of having committed an offence under the subsection, it is quite clear that the guard was giving evidence that he formed an opinion that the man had committed that offence. There is no suggestion under any grounds that that was a groundless opinion and in my view the surrounding facts and circumstances lent weight to it."

22. We were also referred to *Director of Public Prosecutions v. O'Connor* [1985] ILRM 333, which is also a decision of the Supreme Court, and again the judgment was delivered by Finlay C.J. In that case the driver of a bus had mounted a footpath, and knocked down a girl but did not stop. The arresting guard saw the defendant drive the bus in an erratic manner. When speaking to the defendant, the garda noticed that his breath smelled of alcohol and that his speech was slurred. The defendant then failed a roadside breath test. The garda told the defendant that he was arresting him under s. 49(6) of the 1961 Act. No evidence was given as to the formation of any particular opinion. Henchy J. delivering the judgment of the court stated that it was clear that the garda had in fact formed the required opinion.

23. In the present case, there was specific evidence from Garda McGovern that she found Mr. Higgins in charge of a vehicle, she formed the opinion that he had consumed an intoxicant to such an extent as to render him incapable of having proper control of a mechanically propelled vehicle. Given that she was told by the driver that he had been drinking all day, that is hardly surprising and indeed no point is taken on that. The accused was informed of the garda's opinion and was advised by Garda McGovern that she was arresting him under s. 50(10) of the Road Traffic Act. All of the offences under that Act have three elements, one of which involves an intention to drive or an intention to attempt to drive. In addition the driver was told by Garda McGovern that she was arresting him for being "drunk in charge". Drunk in charge is the label that is habitually applied to offences under section 50. In a situation where the Garda was told by the person in charge that he had pulled in for a rest, which implied that when the rest had been availed of the previous activity of driving would be resumed, there was ample evidence for the court to conclude that the arresting garda was entitled to affect a valid arrest under s. 50 of the Road Traffic Act 1961, as amended. In these circumstances the case stated, as amended, must be answered in the affirmative.