

THE HIGH COURT

2008 No. 942 SS

**IN THE MATTER OF AN APPEAL BY WAY OF CASE STATED
PURSUANT TO SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857, AS EXTENDED BY THE PROVISIONS OF THE
COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961**

BETWEEN

**THE DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF GARDA FRANCIS W. MCMAHON)**

PROSECUTOR

**AND
JOHN RAFFERTY**

DEFENDANT

Judgment of Mr. Justice Charleton delivered the 29th day of October, 2008

1. This is an appeal, on a driving charge, by way of Case Stated by District Judge Angela Ní Chondúin pursuant to s. 2 of the Summary Jurisdiction Act 1857 (as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961) on the application of the prosecutor who was dissatisfied with the determination of the learned District Judge as being erroneous in point of law.

2. The opinion of the High Court is sought on the following question:

Was the learned District Judge correct as a matter of law in dismissing the prosecution in circumstances where the charge sheet identified the location of the offence as being the street where the Garda asked the accused to pull over his car rather than the street where the Garda first stopped the accused?

Facts

3. At a sitting of the District Court held at Richmond District Court on the 26th November, 2007, the defendant appeared before District Judge Ní Chondúin to answer a charge that he had committed an offence 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. 23 of the Road Traffic Act 2002. This offence is called drunken driving in ordinary speech. The charge sheet detailed the offence as having been committed on Lower Ormond Quay, Dublin 1.

4. The circumstances of the incident are central to this appeal. At approximately 10.20 a.m. on the 13th May 2007, Garda Francis McMahon was on bicycle patrol with Sergeant Curran on Capel Street, Dublin 7, when he observed two vehicles driving across Capel Street Bridge in the wrong direction. Garda McMahon stopped the first vehicle which was being driven by the defendant and directed him to pull onto Lower Ormond Quay in order to minimize traffic obstruction.

5. Garda McMahon spoke with the defendant who claimed to have become confused and taken a wrong turn. During this conversation, Garda McMahon noticed a smell of intoxicating liquor from the defendant and also that his speech was slurred, while his eyes were glazed over. All of these are signs of drunkenness. A request was made for the defendant's name and address, which was complied with.

6. Garda McMahon then arrested the defendant, pursuant to s. 49(8) of the Road Traffic Act 1961 (as amended), having formed the opinion that the defendant was committing or had committed an offence under s. 49(1), (2), (3) or (4) of that Act. The nature of the arrest was explained to the defendant in ordinary language and the usual caution was administered. The defendant was conveyed to Store Street Garda Station where he provided two breath specimens into the machine for analyzing alcohol consumption, called the Lion Intoxiliser, for analysis. The result of the test was 49 microgrammes of alcohol per 100 millilitres of breath. The defendant was charged with drunken driving and then released from custody.

7. At no time during the course of the hearing was any suggestion made by the defendant or his representatives of any non-compliance with the myriad of statutory requirements surrounding the prosecution of the offence in question. During the course of the trial, however, the defendant's solicitor questioned Garda McMahon in relation to his having ordered the defendant to move his vehicle onto Lower Ormond Quay. Garda McMahon asserted that to leave the vehicle on the bridge would have caused an obstruction and that the road layout dictated that the only safe option was to move the vehicle onto Lower Ormond Quay.

8. At the conclusion of the prosecution evidence, the defendant's solicitor made an application to the Court to have the case dismissed on the basis that Garda McMahon had instructed the defendant to pull onto Lower Ormond Quay and that, as a result, the defendant had been driving the car involuntarily. The defendant's case was, therefore, that he was incapable of committing an offence as he was driving the car at the behest of a member of An Garda Síochána. His solicitor further submitted that it would have been open to the prosecution to seek to amend the charge sheet so as to insert the correct location of the offence but this had not been done. It was contended that had this been done, the defendant would have been unlikely to have had any defence to the charge.

9. The prosecution solicitor argued that the case was no different to a situation in which a member of An Garda Síochána asks someone to pull in to a lay-by on the side of the road. He further submitted that no prejudice had arisen as against the defendant and that the prosecution had made its case to the requisite standard of proof.

10. Having heard all the evidence, the learned District Judge dismissed the case on the stated basis that the charge sheet had provided the incorrect location for the offence. The prosecution, being dissatisfied with that decision, now appeals the matter to this Court.

Locating the Offence

11. Section 49 of the Road Traffic Act 1961 (as amended) ('the Principal Act') provides *inter alia* as follows:

“(1)(a) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while he is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle.

(b) In this subsection “intoxicant” includes alcohol and drugs and any combination of drugs or of drugs and alcohol...

(4) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his breath will exceed a concentration of 35 microgrammes of alcohol per 100 millilitres of breath...

(8) 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 this section."

12. Section 109 of the Principal Act provides that:

"(1) A person driving a vehicle in a public place shall stop the vehicle on being so required by a member of the Garda Síochána and shall keep it stationary for such period as is reasonably necessary in order to enable such member to discharge his duties.

(2) A person who contravenes *subsection (1)* of this section shall be guilty of an offence."

13. Section 110 of the Principal Act provides that:

"Where a member of the Garda Síochána arrests under this Act without warrant a person in charge of a mechanically propelled vehicle, the member may, if the circumstances so require, take or cause to be taken such steps as he may consider proper for the temporary disposition of the vehicle."

14. The Criminal Justice (Administration) Act 1924 is relevant to the framing of indictments. As these are usually based on the accused being first charged, the rules set out are relevant. Section 14 provides:

"(1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

(2) Notwithstanding any rule of law or practice, an indictment shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the rules under this Act."

15. In *DPP v. Sheeran* [1986] I.L.R.M. 579 at 587, Gannon J. affirmed that a summons is a notification that a complaint has been made to an authorised person, and is itself merely a process by which an accused person is compelled to attend court.

16. Order 38, rules 1(1) and (2) of the District Court Rules 1997 provide as follows:

"1. (1) Subject to the provisions of *paragraph (3)* hereof, in cases of summary jurisdiction no variance between the complaint and the evidence adduced in support thereof, as to the time at which the offence or cause of complaint is stated to have been committed or to have arisen, shall be deemed material, provided that such information or complaint was in fact made within the time limited by law for making the same; nor shall any variance between the complaint and the evidence adduced in support thereof, as to the place in which the offence or cause of complaint is stated to have been committed or to have arisen, be deemed material, provided that the said offence or cause of complaint was committed or arose within the jurisdiction of the Judge by whom the case is being heard, or that, the accused resides or in the case of an offence was arrested within such jurisdiction. In any such case the Court may amend the summons, warrant or other document by which the proceedings were originated and proceed to hear and determine the matter.

(2) Subject to the provisions of *paragraph (3)* hereof, no objection shall be taken or allowed on the ground of a defect in substance or in form or an omission in the summons, warrant or other document by which the proceedings were originated, or of any variance between any such document and the evidence adduced on the part of the prosecutor at the hearing of the case in summary proceedings or at the examination of the witnesses during the preliminary examination of an indictable offence, but the Court may amend any such summons, warrant or other document, or proceed in the matter as though no such defect, omission or variance had existed.

(3) Provided, however, that if in the opinion of the Court the variance, defect or omission is one which has misled or prejudiced the accused or which might affect the merits of the case, it may refuse to make any such amendment and may dismiss the complaint either without prejudice to its being again made, or on the merits, as the Court thinks fit; or if it makes such amendment, it may upon such terms as it thinks fit adjourn the proceedings to any future day at the same or at any other place."

17. Accordingly, discrepancies between the facts alleged on the summons or charge sheet and the facts as presented in evidence with respect to the time and place of the commission of the offence will not normally be fatal. In *DPP v. Winston* (Unreported, High Court, 25th May 1992) O'Hanlon J. considered a summons which had listed the location of a road traffic offence as Tawnaghmore in the County of Galway when the actual location was the townland of Cummer in the same county. The learned Judge considered the equivalent provision in the District Court Rules 1948 and, at p. 4, stated:

"It appears to me that these provisions in the District Court Rules were designed to discourage the taking of purely technical objections based on variations between the written detail of the complaint and the facts established in evidence and to leave scope for the District Judge to resolve such matters of objection by amendment, if necessary on his or her own motion without awaiting a formal application for an amendment on the part of the prosecution. I am also of the opinion that the Rules envisage that this course will be taken by the Judge except where it appears to him or her that the variance, defect or omission is one which has misled or prejudiced the Defendant or which might affect the merits of the case.

Even if he or she does form such opinion, the position of the accused person can be protected either by making the amendment subject to adjourning the proceedings to a later date, or by dismissing without prejudice to the complaint being again made, and it appears to me that a dismissal on the merits based on a purely technical objection to the form of the complaint should be very much the exception rather than the rule."

18. In *Edkins v. Knowles* [1973] 1 Q.B. 748 at 753-754, the Divisional Court considered the authorities on the meaning of 'driving' for the purposes of the offence of driving while intoxicated and noted that:

"If a motorist is stopped by a constable in uniform who immediately forms the suspicion that the motorist has alcohol in his body, the motorist should be regarded as still driving at the moment when the suspicion is formed: but if an appreciable time elapses before the constable's suspicion is aroused it will be a question of fact and degree whether the motorist is still to be considered as driving at that time."

19. Fundamental to a consideration of this case is the concept of fairness both to the accused and to the community. On any reasonable view of the facts in this case, the accused was driving his vehicle while intoxicated both in the place where he was first stopped, and in the place to which he was lawfully directed by the Garda to move his vehicle. Some criminal statutes provide an exemption to the gardaí from the law governing, for instance, road traffic offences or the possession of drugs. So, for instance, the Misuse of Drugs Regulations 1988-1998 provide for various situations in which a Garda may possess a drug, as where he or she seizes it in the course of duty. There is no exemption in law whereby someone pulling their car into a safe location at the direction of a Garda, is immune from liability for drunken driving. It can also be the case that where the definition of an offence requires an act of receiving stolen property, the facts that the goods had been recovered by the police may undermine the charge against any person who takes them after that recovery; *R. v. Smith* [1975] A.C. 476. This is not the situation on this charge, nor could it be.

20. In addition, the accused had the right to be informed in plain terms what criminal offence he was being summoned to court to meet. In *State (Healy) v. Donoghue* [1976] 1 I.R. 325 Gannon J (at p. 335) gave the following account of the rights of an accused person:

"Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. By mentioning these I am not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence. The rights I have mentioned are such as would necessarily have a bearing on the result of a trial. In my view, they are rights which are anterior to and do not merely derive from the Constitution, but the duty to protect them is cast upon the Courts by the Constitution."

Conclusion

21. The rights of the accused were met in the scrupulous conduct of the case by the learned District Judge. His rights were met, also, by being given a fair notice through the wording of the charge of the offence he had to meet. There is no question of any confusion as the accused was at all times aware of where he had been stopped and in what circumstances. It is within the powers of a Garda, under the relevant legislation, not only to stop a vehicle on a public road, but also to direct, by words or gestures that the vehicle should be stopped in a particular place. It would be to assume an absurd intention to the Oireachtas that in providing to An Garda Síochána a power to stop a vehicle, that a Garda could not direct a vehicle into a proximate and safe place but instead were required to bring a vehicle to a halt exactly where it was first seen. The safety implications and the movement of traffic implications of this are what require an interpretation that is not literalist but sensible. Where a person pulls in, or around the corner, on the direction of a Garda, that person is acting voluntarily in criminal law. These observations apply to the accused. He had no exemption from the offence of drunken driving by obeying a lawful Garda direction in moving his car from an unsafe to a safe place so that he might be examined further. The interpretation placed by the learned District Judge on the relevant legislation in response to persuasive argument was understandable. It was, however, incorrect.