THE HIGH COURT

[Record No. 2016 834 SS]

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

Prosecutor

AND

NOEL SLATTERY

Accused

JUDGMENT of Mr. Justice Binchy delivered on the 4th day of July, 2017.

1. This case comes before the Court by way of consultative case stated from Judge Mary Devins of the District Court, pursuant to section 52(1) of the Courts (Supplemental Provisions) Act 1961. The net issue is whether a garda must ask the accused whether he has taken "nil by mouth" in the last 20 minutes, prior to administering a road-side breath test.

The Case Stated

2. The accused was charged with the offence colloquially referred to as 'drunk driving' contrary to sections 4(3) (a) and (5) of the Road Traffic Act 2010 (the "act of 2010") .The matter came on for hearing before the District Court on 7th October 2014. The evidence before the District Judge, as described in the case stated, was that on 17th November 2013, Garda Kenny was performing authorised mandatory alcohol testing at a checkpoint at Hazelhill, Ballyhaunis, Co. Mayo. At 1.25 a.m. Garda Kenny observed a Toyota Land Cruiser, driven by the accused, approaching the checkpoint at speed and Garda Kenny signalled the vehicle to stop. The vehicle came to an abrupt stop. Garda Kenny informed the accused that he was conducting mandatory alcohol testing and that he required the accused to provide a sample of his breath.

3. Garda Kenny invoked section 10(4) of the act of 2010, and made a lawful requirement of the accused to provide a breath specimen by exhaling into the Draeger Alcotest unit ("the apparatus"). Garda Kenny also outlined to the accused that a failure or refusal to do so is an offence and outlined the penalties for failing to comply. At 1.30 a.m. the accused provided a breath sample by exhaling into the apparatus. The sample returned a fail reading and Garda Kenny showed the result to the accused. Garda Kenny then formed the opinion that the accused had consumed an intoxicant to such an extent so as to render him incapable of having proper control of a vehicle in a public place and that he was committing an offence contrary to section 4 of the Road Traffic Act, 1961 to 2010, as amended.

4. The accused was arrested, cautioned and conveyed to Ballyhaunis Garda station and no issues arise from his arrest and detention. While in custody, the accused provided a urine sample to a designated doctor. The sample was analysed by the Medical Bureau of Road Safety and the result showed a concentration of 281 milligrammes of alcohol per 100 millilitres of urine and this certificate was presented to the District Court.

5. Upon the completion of the evidence in the District Court, the solicitor acting for the accused submitted that the accused had not been asked whether or not he had taken "nil by mouth" for the 20 minutes prior to the administration of the road-side breath test, in accordance with the instructions for use of the apparatus (the "instructions"). Although I was not expressly informed as to the nature of any application made or of any legal submissions made by the solicitor arising out of his submission on the evidence, it seems likely that he applied to have the charges dismissed on the grounds that the failure of the garda to put this question to the accused was fatal to the prosecution case, on the basis that it is a pre-requisite to the administration of the breath test, and therefore also as to the formation of an opinion by the garda consequent on the result of the breath test that the accused has committed an offence under section 4 of the act of 2010. The instructions were not however, entered into evidence before the district court. The matter was adjourned to 2nd December 2014, when the issue was addressed again. On that date, a Superintendent Doherty appeared for the prosecution and referred the court to the case of D.P.P. v. Marie Quirke [2003] IEHC 141 as authority for the proposition that a garda is under no obligation to inquire of a person stopped at a checkpoint whether or not he has consumed "nil by mouth" for the twenty minutes prior to administering the breath test, and in any case would have no power to compel a person to answer the question. He argued that the *bona fide* opinion of the garda was sufficient for an arrest under section 49(8) of the Road Traffic Act 1961, as inserted by s.10 of the Road Traffic Act 1994, for an offence under s.49(2) or (3) of the Act of 1961 , and that the same standard applied to the opinion required to be formed by a garda under section 4(8) of the Act of 2010. Superintendent Doherty relied on the English case of DPP v Carey, 1970 AC 1072 in support of this proposition, and I refer to this in more detail below.

6. The District Judge stated the following questions to the High Court by way of consultative case stated:-

> (i) "Before administering a roadside breath test under Section 10 of the Road Traffic Act 1961-2010, is a garda required to observe an accused for 20 minutes, to ensure he has consumed nil by mouth;
>
> (ii) Is the garda required to ask the accused if he has had anything to drink in the previous 20 minutes;
>
> (iii) If the answer to both (i) and (ii) is "yes", am I obliged to dismiss the charge under Section 4(3) of the Road Traffic Act 2010 against the accused."

Submissions

Submissions of the accused

The Instructions

7. Counsel for the accused informed the Court that the 20 minute period referred to in the questions stated by the District Judge are derived from the Drager Alcotest 6510 Operating Instructions i.e. the instructions. According to counsel for the accused, the apparatus has been approved for use by the Medical Bureau of Road Safety ("the MBRS) since 21st December 2004, and that the instructions were also approved by the MBRS at that time. Counsel for the accused explained how the apparatus operates: the device contains an electrochemical fuel cell alcohol sensor, which consists of a plastic housing, a membrane with positive and negative

electrodes and platinum leads. As alcohol gas (in the breath sample) passes through the cell, it causes a chemical reaction, which itself results in a voltage change. The voltage change can be converted to a breath alcohol concentration, which in turn is converted to a blood alcohol concentration.

8. Counsel for the accused relies on the instructions, and in particular on the following extracts:-

> *"**Follow the instructions for Use***
>
> *Any use of the instrument requires [full] understanding and [strict] observation of these instructions.*
>
> ***Requirements of the person to be tested***
>
> *At least 20 minutes should elapse between the person's last drink and before using the device.*
>
> *Residual alcohol in the mouth can distort the measurement. Aromatic drinks (e.g. fruit juice), mouth sprays containing alcohol, medicines can interfere with measurements. Rinsing the mouth with water or non-alcoholic drink does not reduce the waiting period."*

9. In respect of the preliminary breath test, it is submitted that s.10 of the Road Traffic Act 2010, confers a power on An Garda Síochána to conduct checkpoints and to carry out mandatory alcohol testing. Counsel for the accused seeks to distinguish the decision of *D.P.P. v. Carey* [1970] A.C. 1072 relied on by the prosecutor in the District Court. In that case the accused underwent preliminary breath testing using an Alcotest (R) 80. The instructions accompanying that device provided for a 20 minute period of time between the person's last drink and the carrying out of the test. The House of Lords held that if a police officer was acting *bona fide* and reasonably, and had no reason to suspect the consumption of alcohol within the 20 minute period, the test is not invalidated by proof at the trial that the accused had a drink within the 20 minute period, nor would the arrest be invalidated. Counsel for the accused submits that this case should be distinguished on the basis that the instructions accompanying the device in that case had not been approved by the Home Secretary when the device was statutorily approved for use, and therefore did not form part of the device, whereas in this case, the MBRS have approved the apparatus and the instructions pursuant to statute i.e. s.26(2)(e)(i) and (ii) of the Act of 2010. On this basis, it is submitted on behalf of the accused that since the apparatus is provided by the MBRS pursuant to statute, the instructions should be strictly observed.

10. The accused relies on another English authority, in *Re Attorney General's Reference (No.2 of 1974*) [1975] 1 W.L.R. 328. In that case, the UK Court of Appeal was asked to consider the effect of a failure to observe manufacturing instructions which stated that a test subject should not smoke prior to using the device used in that case. The UK Court of Appeal held that if there was a departure from the instructions which might have an effect on the accuracy of the test, *bona fide*s could not excuse the police officer from a failure to inform herself of the particular nature of the manufacturer's requirement. It is therefore claimed on behalf of the accused that ignorance by the gardaí of the 20 minute period before administering the test, although *bona fide*, cannot be excused as the failure to follow the instructions may affect the accuracy of the test.

11. Counsel for the accused distinguishes the facts of this case from those of *DPP v. Quirke* [2003] IEHC 141. In that case, Ó'Caoimh J. held that unless a garda knows, or has reason to suppose that the suspect has consumed alcohol within the preceding 20 minutes, then there is no necessity for him or her to await a period of 20 minutes before he can form a *bona fide* opinion based on the alcolyser test. Counsel for the accused submits that *Quirke* can be distinguished on the basis that that decision predates the statute to which the offence before the Court relates, and also on the basis that on the facts in *Quirke*, the garda had formed the opinion that the respondent was intoxicated *before* he administered the breath test.

The Formation of an Opinion

12. Counsel submits that before administering the roadside test under s.10 of the Road Traffic Act 1961 - 2010, a garda is required to observe an accused for 20 minutes to ensure that he has consumed nil by mouth, if the accused has not been asked if he has consumed alcohol in the 20 minutes prior to the test. If the accused has been so asked and indicates that he has consumed alcohol (or aromatic drinks, mouth sprays or medicines) in the 20 minutes prior to the test, then he should be asked to wait 20 minutes before giving a breath sample, or he can waive that period in order to undertake the test and accept the possibility of an inaccurate reading.

13. It is submitted that the validity of an arrest is an essential requirement for the charge of an offence under the Road Traffic Acts to succeed and in that regard counsel on behalf of the accused relies on *D.P.P. v. Ennis* [2011] IESC 46 and *D.P.P. v. (Moyles) Cullen* [2014] 3 I.R. 30. Counsel also relies on *D.P.P. v. Donoghue* [1986] I.R. 188 in support of the submission that what is reasonable (as regards the formation of an opinion by a garda that an offence has been committed) will depend on the particular facts of each case. Counsel for the accused submits that the accused's arrest was invalid. The accused gave a breath sample pursuant to s.10(4)(a)(i) of the Road Traffic Act 2010 and was then arrested pursuant to s. 4(8) of the Act of 2010, as the arresting garda had formed the opinion that the accused had committed an offence under s.4(1)(2)(3) or (4) of the Act of 2010. However, it is submitted that the opinion of the garda, forming the basis of the accused's arrest, was not *bona fide* or reasonable, as the garda failed to follow the instructions; the basis of the garda's opinion was the positive reading given by the apparatus, which had not been used in accordance with the instructions. It is further submitted that there was no evidence before the Court regarding any observations prior to the arrest. Accordingly, because the garda failed to ask the accused if he had consumed alcohol, or wait the 20 minute period, it is submitted that the positive reading is invalid, and that the garda could not therefore have formed a reasonable or *bona fide* opinion that the accused had committed an offence, and his arrest was therefore unlawful. That being the case, it is submitted that the garda failed to obtain the lawful authority to demand a urine sample from the accused (as per *DPP v. (Moyles) Cullen*) and on that basis that charges against the accused should be dismissed.

14. The questions in the case stated, in the submission of the accused, should each be answered in the affirmative.

Submissions on behalf of the DPP

The Formation of an Opinion

15. Counsel on behalf of the DPP submits that the formation of the opinion by the prosecuting garda, upon which the arrest was based, was not challenged by the defence, in cross-examination, or otherwise. Instead, at the close of the prosecution case, the solicitor for the accused submitted that the accused had not been asked whether he had taken nil by mouth for the 20 minutes prior to giving the sample. It is submitted on behalf of the DPP that given the uncontested evidence of the prosecuting garda that he formed the requisite opinion, which was founded on the very fast driving of the accused and the fact that the accused also failed the roadside breath test, it is not open to the defence to raise, at the close of proceedings, issues about the validity of the test or of the opinion formed. Counsel goes on to argue that if a garda states that he formed the requisite opinion and same is not challenged, then

on the basis of *D.P.P. v. Duffy* [2000] 1 I.R. 393, the evidence obtained on foot of the arrest should not be excluded; if the defence wished to question the validity of the opinion formed grounding the arrest, an opportunity must be given to the garda to address the issue in his evidence. It is also submitted that all that is required is that the opinion formed by the garda, before the arrest, is reasonable and *bona fide* and in this case there is nothing to suggest that the opinion is neither reasonable nor *bona fide*. In this regard, counsel for the DPP relies on *D.P.P. v. Quirke* [2003] IEHC 141, which in her submission is on all fours with this case. In that case there was no indication that the garda had any basis for believing that the suspect had a drink in the 20 minutes prior to the test and therefore (counsel submits) O'Caoimh J. held that there was no basis to hold that the opinion formed was anything other than reasonable or *bona fide*.

16. Counsel draws the Court's attention to the wording of s. 4(8) of the Road Traffic Act 2010, and submits that all that is required is an opinion. Counsel for the DPP also relies on *D.P.P. v. Breheny* (Unreported, Supreme Court 2nd March, 1993) and argues that in that case it was held that s.4(8) of the Act of 2010 does not require any more than that the opinion be *"genuinely and reasonably held."* In *D.P.P. v. Gilmore* [1981] ILRM 102, the Supreme Court, on foot of a case stated from the Circuit Court, held that a positive result of a breathalyser test is sufficient to ground a garda opinion that an offence under s. 49 of the Act of 1961 has been committed. It is argued that in *D.P.P. v. Kulimushi* [2011] IEHC 476, Hedigan J. applied *Duffy* and *Gilmore* and rejected the argument that a positive breath alcohol test result was not sufficient to ground the opinion for a valid arrest for drunk driving. In applying *Kulimushi* and *Duffy*, it is submitted that the prosecuting garda gave unchallenged evidence that he had formed the requisite opinion, however, unlike in *Duffy* the basis for his opinion was clear – the failed breathalyzer test and the fast driving and abrupt stop. It is submitted that the reasonable and *bona fide* opinion of the garda was not challenged and could not therefore be questioned later.

17. It is also argued by the DPP that the issue arising in the case has already been dealt with in *D.P.P. v. Quirke* [2003] IEHC 141. In *Quirke* a garda relied on a positive result from a roadside breath test to form the opinion grounding the arrest of the accused for drunk driving. The District Judge acquitted the accused on the basis that there was no evidence that the garda had allowed 20 minutes to elapse before administering the test. The prosecution appealed by way of case stated and the High Court allowed the appeal. O'Caoimh J. in delivering the judgment, relied on *D.P.P. v. Carey* [1970] A.C. 1072 and held that it was clear that the garda had nothing before him to indicate that he had knowledge or reasonable cause to suspect that the accused had consumed alcohol in the 20 minutes prior to the breathalyser test and in those circumstances there was nothing to suggest that the opinion of the garda was anything other than *bona fide*. Counsel on behalf of the DPP submitted that O'Caoimh J. relied on a line of authorities whereby the courts have consistently held that all that is required for a lawful arrest is that the opinion formed by the arresting garda (as to the commission of an offence) must be *bona fide* and honestly held. It is submitted on the behalf of the DPP that the *Quirke/Carey* line of authority regarding the roadside breath test was recently referred to in *O'Mahoney v. District Judge Hughes* [2016] IEHC 606, in which case McDermott J. stated that even if there had been a successful challenge to the taking of the roadside breath sample, it would not have led to the exclusion of a lawfully taken urine sample.

18. The decision of the Supreme Court in the case of *DPP (O'Mahony) v. O'Driscoll* [2010] IESC 42 was also relied on by counsel for the DPP. That case was a case stated in respect of the formation of a reasonable suspicion or opinion sufficient to ground an arrest, albeit in the context of an offence committed under the Control of Horses Act 1996. It is submitted that this case is authority for the proposition that even "scant" information can form the basis of a reasonable suspicion.

19. On that basis, counsel for the accused submits that each of the questions should be answered in the negative.

The Act of 2010 - Relevant provisions.
20. Section 4 of the Road Traffic Act 2010 sets out offences described as *intoxicated driving offences* and section 4(8) of the act confers on members of An Garda Síochána a power of arrest:-

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

Section 10(4) of the Act of 2010 confers on members of An Garda Síochána the power to breathalyse drivers and states:-

> *"A member of the Garda Síochána, who is on duty at a checkpoint, may stop any vehicle at the checkpoint and, without prejudice to any other powers (including the functions under section 9) conferred on him or her by statute or at common law, may require a person in charge of the vehicle –*
>
> *(a) to –*
>
> > *(i) provide (by exhaling into an apparatus for indicating the presence of alcohol in the breath) a specimen of his or her breath, or*
> >
> > *(ii) accompany him or her or another member of the Garda Síochána to a place (including a vehicle) at or in the vicinity of the checkpoint and there to provide, by exhaling into such an apparatus, a specimen of his or her breath …"*

Discussion and Decision
20. By her consultative case stated, the District Judge raises three questions, the first two of which are of general application, and the third of which she appears to consider may be connected to the answer to the first two questions. While this is understandable, for reasons which will become apparent, the third question, on the facts of this case, is in no way dependent upon the answer to the first two questions; the charges brought against the accused pursuant to s. 4(3)(a) and (5) of the Act of 2010 should not be dismissed.

21. Section 4(8) of the Act of 2010 confers authority on a member of An Garda Síochána to arrest a person without warrant who, in the *member's opinion* is committing or has committed an offence under that section. It is well established and indeed I do not think that it was disputed by counsel on behalf of the accused in these proceedings, that the threshold for formation of an opinion for the purposes of making an arrest is a low threshold. There are numerous authorities to this effect and it is not necessary to rehearse all of them here. Perhaps the most apposite is that of *D.P.P. v. Duffy* [2000] 1 I.R. 393, a case which concerned s. 12(1)(a) of the Road Traffic Act, 1994, which provided:-

> *"Whenever a member of An Garda Síochána is of opinion that a person in charge of a mechanically propelled vehicle in a public place has consumed intoxicating liquor, he may require the person to provide, by exhaling into an apparatus for indicating the presence of alcohol in the breath, a specimen of his breath and may indicate the manner in which he is to comply with the requirement …"*

The prosecuting garda in that case gave evidence that, having formed the opinion that the accused had consumed intoxicating liquor, he required the accused to provide a breath specimen. He did not proffer any evidence as to the basis of his opinion. Quirke J. stated:-

> *"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 …"*

He continued:-

> *"…the member of the Garda Síochána requiring the breath test must first form the opinion that the person against whom the requirement is directed has consumed intoxicating liquor and the formation of that opinion prior to the exercise of the power must be proved by "express evidence" [see Director of Public Prosecutions v. Brady [1991] 1 I.R. 337 at p. 339] of the garda concerned in order to comply with the provisions of the statute.*
>
> *"Express evidence" of the formation of an opinion is relative and will depend upon the circumstances of individual cases. Generally speaking it is desirable that a garda adducing evidence of the formation of an opinion sufficient to satisfy the requirements of s. 12(1)(a) of the Act of 1994 should provide some measure of detail as to acts, omissions, or behaviour giving rise to the formation of an opinion that a person has consumed intoxicating liquor but the failure of the garda concerned to provide such detail in evidence will not, by itself, preclude the adequate proof of the formation of the requisite opinion for the purposes of the section. In particular, where, as in the instant case, during the course of a prosecution pursuant to the provisions of s. 49 of the Act of 1961, a member of the Garda Síochána clearly and unequivocally states in evidence that prior to requiring a breath test he formed the opinion that the accused person had consumed intoxicating liquor and where that accused person is represented by a reputable competent professional legal adviser and where the evidence of the formation of the opinion is not challenged and no suggestion is made that the opinion was not genuinely and reasonably held at the time of the making of the request, it would be illogical and inappropriate for a court to disallow such evidence on grounds which were not placed in issue by or on behalf of the accused person."*

22. *Duffy* was of course concerned with the opinion required to be formed by a garda before he or she could require a person to provide a specimen of his or her breath, which opinion was at the time a pre-requisite to requiring a person to provide a breath specimen. That opinion was dispensed with by the introduction of mandatory alcohol testing pursuant to the Act of 2010, and for the purpose of these proceedings the Court is only concerned with the opinion required to be formed by a garda for the purpose of s. 4(8) of that Act of 2010. But the principles around the formation of an opinion remain the same, and it is apparent from a consideration of the facts in *Duffy* and the facts in this case, that the evidence as to formation of the required opinion in this case is, if anything, more robust. In *Duffy*, the garda had given evidence that he had formed the required opinion, but he had not given any evidence as to the basis for his opinion. Notwithstanding that, Quirke J declined to hold that the opinion should be set aside, because the garda had not been challenged as to the basis for his opinion. In this case, Garda Kenny did give evidence as to the basis upon which he formed his opinion, i.e. the result of the breath test, and he was not challenged about the reasonableness or *bona fide*s of that opinion. He was not cross-examined at all about the basis for his opinion, and the matters relied upon by the accused to contest his arrest i.e. the instructions for the use of the apparatus were not the subject of any evidence at all. So, Garda Kenny was not asked what equipment he was using or his training in the use of the same and nor was he asked to identify the operating instructions for that equipment. Nor was he asked whether he had asked the accused if he had taken "nil by mouth" for the previous twenty minutes or if he had observed the accused for twenty minutes before administering the breath test. There was therefore no evidence before the court from which the District Judge could conclude that the opinion of Garda Kenny was either lacking in *bona fide*s or unreasonable.

23. The accused was legally represented and his solicitor chose not to cross-examine Garda Kenny. He may well have made this choice as a matter of strategy in the hope that he could persuade the court that, in order for the prosecution to succeed, it is necessary for a garda to give evidence that there has been full compliance with the operating instructions pertaining to the apparatus, but a garda is under no such obligation. In order to prove the offence, the prosecution must satisfy the court that the ingredients of the offence have been met and the operating instructions for the apparatus clearly do not form any part of the offence itself.

24. All of that being the case, the opinion of Garda Kenny must be accepted by the Court and the answers to the first two questions of the consultative case stated are therefore moot. Those questions were clearly formulated by the court on the basis that the Dräger breath alcohol screening device was used by Garda Kenny and that the instructions were required to be followed for the effective functioning of that device. I might add that I expressly asked counsel for the prosecutor whether or not she was prepared to accept for the purposes of this consultative case stated that the Dräger device had been used and that the instructions applied, but the DPP was unwilling to make that concession. While the third question of the case stated is formulated on the basis that an answer is provided to the first two questions, it is clear that on the facts of the present case, the District Judge should determine the proceedings on the basis that Garda Kenny had formed a lawful opinion that an offence under s. 4 of the Act of 2010 had been committed by the accused prior to placing the accused under arrest, and the case should not be dismissed on any ground relating to the formulation of that opinion.