

THE HIGH COURT

[2017 No. 883 SS]

[2018 No. 46 SS]

[2018 No. 47 SS]

[2018 No. 283 SS]

[2018 No. 611 SS]

IN THE MATTER OF S. 2 OF THE SUMMARY JURISDICTION ACT 1857 AS EXTENDED BY S. 51 OF THE COURTS (SUPPLEMENTARY PROVISIONS) 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTION

AND

JOSEPH O'NEILL

ROSS BRADY

CODY FARRELL

EVAN ROTHWELL

STUART COOLING

ACCUSED

JUDGMENT of Ms. Justice O'Regan delivered on Tuesday the 31st day of July , 2018

Issues

1. The issue before the court arises as a consequence of five Cases Stated from the District Court. In each matter the accused was brought before the court charged pursuant to s. 4 of the Road Traffic Act, 2010, with a drink driving offence and in each case the District Judge dismissed the charge against the accused on the basis of an application of the High Court judgment in *DPP v. O'Neill & Bohannon* (ex tempore judgment of Moriarty J., 1st February 2016).

2. The matter came before Moriarty J. in *Bohannon* on the basis of a Consultative Case Stated where two questions were posed following an argument raised by Mr. Bohannon (asserting processing of an arrested person by a member in charge of a Garda Station under the Treatment of Persons in Custody Regulations 1986, is a separate and discrete procedure and should be unaffected by any other procedure; In that instance, the 20-minute observation period of the accused prior to introducing the accused to the Intoxilyzer machine). In the event, Moriarty J. delivered an oral judgment. He answered in the affirmative the question to the effect that the two procedures should be discrete procedures unaffected each by the other. He also agreed with the District Judge that the District Judge was correct on the facts of the case as agreed by dismissing the prosecution.

The prosecutors' arguments

3. In the instant five matters the DPP is seeking a different outcome to that which occurred in *Bohannon*, namely, that the process of arresting a person by a member in charge and that of the 20-minute observation period for the Intoxilyzer test might lawfully overlap.

4. In asking the court not to follow the *Bohannon* judgment the DPP argues: -

- (i) The *ratio decidendi* of the decision remains unclear,
- (ii) The decision conflicts with other High Court authorities,
- (iii) The interchangeability of the roles of An Garda Síochána in a rural garda station did not arise on the facts found by the District Court in its case stated to the High Court,
- (iv) The decision did not give any consideration to relevant case law in the area.

5. The respondents argue: -

- (i) The circumstances and facts involved in the five cases before the court are virtually identical to *Bohannon*, and therefore the District Judge was obliged to follow *Bohannon*,
- (ii) Moriarty J. did not rephrase the questions posed of him which was as a matter of law an option available to him,
- (iii) The *Bohannon* judgment is clear in finding that there should be no overlap between the processing of an accused person and the observation period,
- (iv) The doctrine of *stare decisis* applies,
- (v) The role of interchangeability of An Garda Síochána was not determinative and any comments made by Moriarty J. were *obiter dicta* only in this regard.

6. The respondents accept since the Supreme Court judgment in *The People (DPP) v. J.C.* [2015] IESC 50, that it is possible in the instant type case stated procedure that a prior judgment of a judge of the same court may be overruled. In *J.C.* the Supreme Court

overruled the prior Supreme Court decision of *The People (DPP) v. Kenny* [1990] 2 IR 110. That having been said, the respondents referred to the fact that the decision of the Supreme Court in *J.C.* was on the basis of a 4 – 3 majority. The Supreme Court were subsequently unanimous in determining that the matter should not be remitted to the District Court for rehearing notwithstanding that the options open to the court were to affirm, reject or remit the matter to the District Court.

When is it appropriate not to follow a judgment of the same court?

7. In *Irish Trust Bank Ltd. v. Central Bank of Ireland* [1976-1977] ILRM 50, Parke J. in the High Court said that the principle of *stare decisis* requires that a court should not depart from a decision of another court of equal jurisdiction unless it is established that the decision was based on (a) insufficient authority or (b) incorrect submissions or (c) that the judgment departed in some way from the proper standard to be adopted in judicial determination.

8. In the matter of *re: Worldport Ltd.* [2005] IEHC 189, Clarke J. held that it was a well-established matter of judicial comity that the judge of first instance ought usually to follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. Thereafter he identified a number of circumstances where departing from the earlier decision would be justified namely, (1) that the earlier decision was not based upon a review of significant relevant authority, (2) the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period or (3) there is a clear error in the judgment.

9. In *McKevitt v. Minister for Justice and Equality and Ors* [2014] IEHC 551, a decision of Kelly J. of the 9th December 2014, at para. 87, the court found that two prior judgments (of Barrett and Hogan J.J.) were simply incorrect and failed to take into account a crucially important discretion on the part of the Minister and in those circumstances Kelly J. believed he was justified in not following the prior decisions. The case was appealed and the Court of Appeal decision of the 18th June 2015 held *inter alia*, that Kelly J. had good reason to depart from the construction placed on the rules by his colleagues (see para. 65).

10. In the decision of O'Donnell J. of the 16th May 2018 in *FG v. Refugee Application Commissioner* [2018] IESC 25 it is stated at para. 4 that: -

"The approach (as so described) in *Irish Trust Bank v. Central Bank of Ireland* [1976-77] ILRM 50, and *In Re Worldport*, is that a subsequent High Court Judge should not lightly depart from a previous decision, unless there are strong reasons for so doing. It is an approach (rather than a rule) cast in terms of 'ought not unless' rather than 'must not'."

Can the 20-minute period of observation for the purposes of insuring the integrity of the Intoxilyzer overlap with the processing of an accused by the member in charge?

11. The respondent's submissions extend to the assertion that this matter was fully considered by Moriarty J. in *Bohannon* and therefore should not be departed from at this time by me. They assert that all relevant case law hereinafter referred to was in fact considered by Moriarty J. and indeed the only reason why his judgment was not delivered in writing was because of difficulty with his typist as opposed to the judgment having been delivered on an *ex tempore* basis.

12. In the events it appears in para. 1 of the judgment, that the matter was heard by Moriarty J. on successive Mondays "over the past three-week period."

13. The only reference to case law in dealing with the current issue which arises is limited to the following statement: -

"I would, in general terms, find it difficult in the abstract to enthuse over what might seem inordinately technical or convoluted arguments devised by defence practitioners, preferring, in general terms, the robust common sense analysis apparent in the judgments of Murray J. in *DPP v. McNiece* [2003] 2 IR 614 and O'Neill J. in *DPP (Curran) v. Foley* [2006] IEHC 11 [2006] 3 IR 334".

14. The following submissions have been made on behalf of the DPP: -

(a) A number of the regulations comprised in the Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987 are relevant, namely: -

(i) Regulation 3.2 where it is provided that there shall be no unnecessary delay in dealing with persons in custody;

(ii) Regulation 4.3 which provides as far as is practicable the member in charge shall not be a member who was involved in the arrest;

(iii) Regulation 8(1) provides that the member in charge shall without delay inform an arrested person of certain rights orally and without delay cause that person to be given a notice containing the information;

(iv) Regulation 11(1) provides that an arrested person shall have

reasonable access to a solicitor of his choice and be enabled to communicate with him privately, however, subpara. 3 provides that a consultation with the solicitor may take place in sight but out of hearing of a member;

(v) Regulation 11(5) provides that a member may listen to any telephone

call afforded to an arrested person and may terminate it if he is satisfied that same might hinder or delay the investigation of a crime;

(vi). Regulation 11(6) provides that before an arrested person has a supervised visit or communicates with a person other than a solicitor he shall be informed that anything he says during the visit or in communication may be given in evidence.

(b) In the *DPP v. Foley*, the issue which came before O'Neill J. in the High Court was whether the 20-minute period of observation, and consequential period of detention, is to be regarded as an integral part of the lawful detention resulting from the arrest of the accused and his detention for the purposes of taking samples, or, is the period of 20 minutes to be regarded as a discrete period of detention which has an existence apart from, and independent of, the process set in train by the arrest; the observation process being solely for the purpose of taking of samples pursuant to s. 13 of the Road Traffic Act 1994. At para. 21 of the judgment, O'Neill J. held that in his view the process had to be regarded as part

of the detention initiated by the arrest. Where the period is justified it would be wholly artificial to treat the period of detention as apart from and independent of the overall detention initiated by the arrest and accordingly the court held that there was no breach of the accused's constitutional rights.

(c) In *DPP v. Dardis* [2015] IECA 284, the Court of Appeal delivered a judgment on 11th December 2015, in which it summarised the jurisprudence and background to awaiting the 20-minute observation period before a breath sample is taken from an accused party.

(d) Initially in *Finn*, it was thought to be an arbitrary period of detention and impermissible at law, however subsequently in *DPP v. McNiece*, scientific evidence was given so that the 20-minute period of observation was rationally explained and the court accepted that as satisfactory.

(e) In the *DPP v. Fox*, [2008] 4 IR 811, it was held that only unreasonable delays need to be explained and justified. The court was satisfied that the accused was not detained for longer that was necessitated.

(f) In *DPP v. Avadenei* [2017] IESC 77, the Supreme Court delivered a judgment on the 20th December 2017 which centred upon the breath test results being printed in both Irish and English. O'Malley J. in giving the judgment on behalf of the Supreme Court stated at para. 90: -

"If a breach of the statutory procedure is established, but it has had no consequences in that no unfairness, prejudice or detriment can be pointed to, then the normal standards applicable to criminal trials would indicate that the evidence is admissible."

(g) S. 7(3) of the Criminal Justice Act 1984 also provides that a failure on the part of An Garda Síochána to observe any provision of the regulations shall not of itself render that person liable to criminal or civil proceedings or of itself affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him.

(h) In the *DPP v. Spratt* [1995] 1 IR 585, O'Hanlon J. in the High Court was dealing with the issue as to whether or not the statutory procedure for treatment of persons in custody applies to road traffic offences; whether failure to comply with those provisions was fatal to the prosecution case. At p. 592, O'Hanlon J. indicated that the correct approach was to ask if there was a breach of constitutional rights of the accused person in what manner was he thereby prejudiced. Was any information obtained from him which might not otherwise have been obtained.

(i) The textbook titled "*Evidence in Criminal Trials*" by Heffernan and Ni Raifeartaigh, Ch. 9 quotes from the *DPP v. Spratt*. In the instant matter the DPP points to that fact as supporting the contention that noncompliance with the procedural regulations would be accompanied by some form of prejudice for the purposes of excluding any evidence thereafter obtained.

(j) In *DPP v. O'Kelly* [1998] IEHC 22, the judgment of McCracken J. delivered on the 1st February 1998, the issue concerned the relevant regulation which required the accused to be informed of his rights. Evidence that the accused was so informed was tendered by an observing garda rather than the garda who actually read the rights to the accused. At p. 3 of McCracken J.'s judgment, the court indicated that the regulation merely required the accused to be informed, whether he understood such rights or not was irrelevant and that being so, the only evidence that was required to be given was that the words were spoken and the notice handed over. The court held that the observing guard was entitled to give evidence of these facts, and he did so.

15. In my view on the basis that: -

(a) It is possible for a garda who is not the member in charge and reading the accused his rights; to observe the tendering of such rights to the accused party;

(b) Breach of the procedure regulations must be accompanied by some evidence of prejudice in order to exclude subsequently acquired evidence;

(c) the process of observing the accused in the 20-minute period prior to administering the Intoxilyzer is part and parcel of the procedure whereby the accused is arrested on suspicion of drunk driving.

(d) Even when the accused is consulting with his solicitor under the Regulations nevertheless he can be observed although not heard by An Garda Síochána;

(e) Under the regulations there is to be no unnecessary delay in dealing with persons in custody;

it appears to me clear that there is no unlawfulness in an overlap in the observation period prior to administering the Intoxilyzer test and the processing of the accused person by the member in charge including the reading of his rights and the tendering of a written document in respect thereof. I am satisfied that the jurisprudence herein before referred to and the statutory provisions mentioned support the view aforesaid.

16. Accordingly, I am of the view that Moriarty J. was incorrect in his judgment of the 1st February 2016 in *Bohannon* in indicating that overlap of the foregoing procedures were unlawful. I am further satisfied that the decision arrived at by Moriarty J. was not based upon a review of significant relevant authority in the area. Accordingly, I am satisfied that I am not obliged to follow the decision of Moriarty J. and that the jurisprudence of *Worldport Ltd.*, *Irish Trust Bank* and/or *McKevitt* all herein before referred to apply.

Affirm, reverse or remit

17. The DPP is seeking to have charges in respect of the five accused persons remitted to the District Court for further prosecution. The respondents rely upon the views expressed by the seven-member Supreme Court in *DPP v. J.C.* [2015] IESC 50. There the *Kenny* judgment was overruled. Nevertheless, the judges were satisfied that the accused should not be remitted for further prosecution, citing the effective intervening change in the law, the question of double jeopardy and the fact that Hardiman J. in his strongly worded judgment indicated that he felt there was no jurisdiction to do so as there was no precedent.

18. In seeking a remittal, the DPP submits that the District Court judge in each matter should have been aware that *Bohannon* was not an authority for the proposition that the two processes should not overlap. Counsel further argues that in the judgment of Moriarty J., any suggestion to the contrary is effectively *obiter dicta* and the District Judge should have followed the *ratio decidendi* of the judgment. However, the DPP was unable to point to a clear statement within the judgment of Moriarty J. which would suggest that the *ratio decidendi* of his decision was that generally or otherwise, the overlap of the procedure was lawful. The DPP had in any event earlier argued the ratio was unclear (see para. 4 (i) hereof).

19. Bearing in mind therefore the various issues identified by the seven-member Supreme Court in *J.C.* aforesaid, in my view, it is not appropriate that the accused persons be remitted for further prosecution in respect of the offences for which they appear to have secured a dismissal.

Conclusion

20. Although two questions are posed in each of the five matters before the court, in my view by responding to the queries posed by Lindsay J. in *DPP v. O'Neill*, the answers to the questions posed in the balance of the cases will be evident.

21. Based upon the foregoing judgment, the answers to the questions posed by Lindsay J. on the 28th July 2017 at para. 11 of the consultative case stated will be answered as follows: -

(a) No;

(b) Yes.