Neutral Citation Number: [2008] IEHC 457

THE HIGH COURT

2007 1492 SS

IN THE MATTER OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACTS, 1961 – 1991 AND IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND
GERARD O'NEILL

ACCUSED

Judgment of Mr. Justice Edwards delivered on the 15th day of February, 2008

Introduction
On the 10th October, 2007, Gerard J. Haughton, a Judge of the District Court sitting at the District Court at Arklow in the County of Wicklow, stated a case for the determination of the High Court pursuant to the provisions of s. 52 of the Courts (Supplemental Provisions) Act, 1961. The facts of the matter are succinctly stated by the District Judge within his case stated in the following terms:-

Facts
1. At a sitting of the District Court held at Arklow in the County of Wicklow on the 1st day of March 2006, the accused appeared before me, charged that he was, on the 30th September 2005 at Main Street Arklow in the said District Court area of Arklow, in charge of a mechanically propelled vehicle registered number 04-WX-402 in a public place with intent to drive the said vehicle (but not driving or attempting to drive it) when in his body there was present a quantity of alcohol such that within three hours of having been so in charge of the vehicle, the concentration of alcohol in his blood exceeded a concentration of 80 milligrammes of alcohol per 100 millilitres of blood, contrary to s. 50(2) and (6)(a) of the Road Traffic Act, 1961 as inserted by s. 11 of the Road Traffic Act, 1994 as amended by s. 23 of the Road Traffic Act, 2002.

2. At the hearing of the said complaint evidence was given on behalf of the prosecutor by Garda Marion Galvin as follows:-

> "I am a member of An Garda Síochána stationed at Arklow. On Friday, 30th September, 2005 at 11.41 pm I was on duty as observer in the official Arklow patrol car accompanied by Garda Liam Rochford. While driving along Arklow Main Street I observed a motor car
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> 04-WX-402 stopped with the engine running in the middle of the road facing towards the bridge. This car indicated to turn left and then indicated to turn right and was about to move off when I approached the driver. The car was causing an obstruction to traffic heading towards the bridge. On speaking to the driver I got a strong smell of alcohol from his breath and his speech was slurred, the keys were in the ignition of the car and the engine was running. The driver gave his name as Gerard O'Neill of Glenour Adamstown, Co. Wexford. I then formed the opinion that the driver Gerard O'Neill was under the influence of an intoxicant to such an extent as to be incapable of having proper control of a mechanically propelled vehicle whilst under the influence of an intoxicant at Wexford Road a public place and at 11.42 pm I arrested Gerard O'Neill under s. 50(10) of the Road Traffic Act 1961/94 for an offence under s. 50(1), 50(2), 50(3), or 50(4) of the said Act. I explained to him in ordinary language that I was arresting him for drink driving. (Further evidence was given by Garda Galvin touching upon the procedure followed by her in bringing the accused to Arklow Garda Station where a blood sample was taken from him which on analysis was proved to contain a concentration of 169 milligrammes of alcohol per 100 millilitres of blood). On cross examination of Garda Galvin by counsel on behalf of the accused Garda Galvin again stated that she observed the accused's vehicle indicate to turn right and then left by the operation of the indicators and she further stated that in concluding that the vehicle was about to move off she had observed that the brake lights of the vehicle which had been on, went off. Garda Galvin further stated that she was familiar with the provisions of s. 50 of the Road Traffic Act, 1961-1994 under which she arrested the accused and she agreed that this offence applies to a person in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle but not driving or attempting to drive it. She also stated that she did not see the accused actually driving the vehicle, but the vehicle was stationary and the person (the accused) was attempting to drive. She also agreed on cross examination that she told the accused that she was arresting him for 'drunk driving'".

3. It was contended for the accused that on the evidence offered by Garda Galvin she could not have reasonably concluded that the accused was committing or had committed an offence under s. 50 of the Road Traffic Act, 1961-1994 as the evidence clearly established that the accused attempted to drive and that therefore the arrest of the accused under that s. was unlawful in the circumstances of this case. It was further contended for the accused that if this contention is correct then the subsequent events were inadmissible in evidence and the accused ought to be acquitted.

4. It was contended for the Director of Public Prosecutions that the arrest of the accused was lawful.

5. On the evidence I was satisfied of the following facts:-

> a. That the accused attempted to drive the vehicle;
>
> b. That the opinion formed by the Garda was *bona fides* though mistaken.

6. I indicated that it was my view that the alternative verdicts available in prosecutions under s. 49 and s. 50 of the Road Traffic Act, 1961 as amended were relevant to the matter and that having regard to same and to the evidence in the case, I was of the opinion that the arrest was lawful. However I indicated that I was prepared to state this case for the opinion of the High Court and consequently I reserved my decision on the complaint pending its determination.

The Question Posed
The opinion of the High Court is respectfully sought on the following question:-

> "On the facts as found by me and on the evidence given by Garda Marion Galvin as to her observations of the vehicle prior to the arrest of the accused as a matter of law, cannot be held that the arrest of the accused was lawful?"

Relevant Legislation
Before proceeding to consider the submissions of the parties I think it would be appropriate to set out the relevant provisions of ss. 49 and 50 respectively of the Road Traffic Act, 1961 as amended. In that regard I do not propose to set out every subsection of the relevant section but merely those that seem to me to be relevant to the issue that I have to decide. Subsections 1, 2, 3, 4, 6 and 8 of s. 49 of the Road Traffic Act, 1961 as substituted by s. 10 of the Road Traffic Act, 1994 are in the following terms:-

> "(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.
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> (b) In this subsection "intoxicant" includes alcohol and drugs and any combination of drugs or of drugs and alcohol.
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> (2) A person shall not drive of 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 three hours after so driving or attempting to drive, the concentration of alcohol in his blood will exceed a concentration of 80 milligrammes of alcohol per 100 millilitres of blood.
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> (3) 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 three hours after so driving or attempting to drive, the concentration of alcohol in his urine will exceed a concentration of 107 milligrammes of alcohol per 100 millilitres of urine.
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> (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 three 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.
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> (6) (a) A person who contravenes subsections (1), (2), (3) or (4) of this section shall be guilty of an offence….
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> (b) A person charged with an offence under this section may, in lieu of being found guilty of that offence be found guilty of an offence under section 50 of this Act.
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> (8) A member of An Garda Síochána may arrest without warrant a person who in the member's opinion is committing or has committed an offence under this section."

Subsections 1, 2, 3, 4, 6(b), 8 and 10 respectively of s. 50 of the Road Traffic Act, 1961 as substituted by s. 11 of the Road Traffic Act, 1994 are in the following terms:-

> "(1) (a) A person shall be guilty of an offence if, when in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle (but not driving or attempting to drive it), 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.
>
> (2) A person shall be guilty of an offence if, when in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle (but not driving or attempting to drive it), there is present in his body a quantity of alcohol such that, within three hours after so being in charge, the concentration of alcohol in his blood will exceed a concentration of 80 milligrammes of alcohol per 100 millilitres of blood.
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> (3) A person shall be guilty of an offence if, when in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle (but not driving or attempting to drive it), there is present in his body a quantity of alcohol such that, within three hours after so being in charge, the concentration of alcohol in his urine will exceed a concentration of 107 milligrammes of alcohol per 100 millilitres of urine.
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> (4) A person shall be guilty of an offence if, when in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle (but not driving or attempting to drive it), there is present in his body a quantity of alcohol such that, within three hours after so being in charge, the concentration of alcohol in his breath will exceed a concentration of 35 microgrammes of alcohol per 100 millilitres of breath.
>
> (6) (b) A person charged with an offence under this section may, in lieu of being found guilty of that offence, be found guilty of an offence under section 49 of this Act.
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> (8) In a prosecution for an offence under this section it shall be presumed that the defendant's intent to drive or attempt to drive the vehicle concerned until he shows the contrary.
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> (10) 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."

Submissions on behalf of the Accused
Counsel for the accused submitted that the net issue in this case is whether or not on all the facts as deposed to by Garda Marion Galvin she could have reasonably concluded that the accused was committing or had committed an offence under s. 50 of the Road Traffic Act, 1961. He contended that if she could not have reasonably so concluded then the power of arrest conferred upon her by s. 50(10) was not lawfully exercised. If that power of arrest was not lawfully exercised then all evidence gathered in direct consequence of that arrest and in particular the blood sample taken at Arklow Garda Station was inadmissible in evidence.

Counsel for the accused pointed to the following piece of evidence given by Garda Marion Galvin as supporting his contention that Garda Galvin could not reasonably have concluded that the accused was committing or had committed an offence under s. 50. She stated:

> "While driving along Arklow Main Street, I observed a motorcar 04WX 402 stopped with the engine running in the middle of the road facing towards the bridge. This car indicated to turn left and then indicated to turn right and was about to move off when I approached the driver."

He further relies upon the following statement as supporting his position:

> "At 11.42 pm I arrested Gerard O'Neill under s. 50(10) of the Road Traffic Act, 1961-1994 for an offence under s. 50(1), 50(2), 50(3) or 50(4) of the said Act."

In regard to the latter, he points out that on the evidence of Garda Galvin the accused was arrested within one minute of the Garda's initial observation of the vehicle. He submits that it is abundantly clear from her evidence that the opinion that she formed can only be relevant to the alleged commission of an offence under s. 50(1), 50(2), 50(3) or 50(4) of the Road Traffic Act, 1961. He contends that it is an essential ingredient of each of these offences that the accused was not driving or attempting to drive the vehicle. Given that Garda Galvin's opinion was formed within one minute of her observations, and that it is now accepted that it was a mistaken opinion, albeit one bona fide held, it could not be regarded as being a reasonable or rational opinion in the particular circumstances in which it was formed. Counsel for the accused contends that the court cannot take at face value the evidence of Garda Galvin concerning the formation of the requisite opinion. The court must scrutinise the assertion that she formed the requisite opinion to see if that was an opinion that could reasonably have been formed in the circumstances as they existed. The accused relies on the decision of the Supreme Court in *The People (Director of Public Prosecutions) v. Tyndall* [2005] 1 I.R. 593. The *Tyndall* case concerned an accused who had been arrested pursuant to s. 30 of the Offences against the State Act, 1939. Section 30(1) of the 1939 Act empowers a member of An Garda Síochána to arrest a person without warrant "whom he suspects of having committed or being about to commit or being or having been concerned in the commission of an offence". During the trial in the Circuit Court the arresting Garda failed to give evidence that he had a suspicion prior to arresting the accused. However, the trial judge upheld the arrest in the absence of this evidence inferring from other evidence that the arresting Garda had a reasonable suspicion at the relevant time. The Court of Criminal Appeal also upheld the arrest as being valid. However, that Court later certified a number of points for the consideration of the Supreme Court on the basis that issues of exceptional public importance had been raised. The Supreme Court held that the suspicion of the Garda required to be proved as a matter of fact. That proof could be by means of direct evidence. However, the suspicion held by the arresting member might also be inferred from the circumstances, but evidence must exist from which it might be inferred. In the particular circumstances of the case there was no evidence before the court which justified the court in inferring the suspicion. Accordingly the appeal was allowed. The relevance of the *Tyndall* decision to the present case is, according to counsel for the accused, as follows. In the course of her judgment in *Tyndall*, Denham J. (at pp. 600 - 601 of the report) stated that an analogy could be drawn with a situation under s. 49(6) of the Road Traffic Act, 1961 where an "opinion" is required by the arresting member of An Garda Síochána. She referred to the case of *Director of Public Prosecutions v. O'Connor* [1985] I.L.R.M. 333 and quoted from the judgment of Henchy J. in that case. She went on to state:-

> "*Director of Public Prosecutions v. O'Connor* [1985] I.L.R.M. 333 was concerned with the Road Traffic Act, 1961 and so is not on all fours with this case. It is analogous in that while requiring an "opinion" of the arresting member of An Garda Síochána, such opinion may be inferred from the circumstances. However, there were clear circumstances in O'Connor from which the opinion of the arresting member could be inferred."

Denham J. went on to hold that although suspicion is not defined in the Act of 1939 it should be *bona fide* and not irrational. In the present case Counsel for the accused says that the same criteria must apply to an opinion formed by a Garda for the purposes of s. 50(10) of the Road Traffic Act, 1961. Such an opinion must be *bona fide* and rational. It was accepted by the District Judge that the Garda's opinion was *bona fide* but he was also of the view that it was mistaken. Counsel for the accused submits that not only was it mistaken, it was also wholly irrational, and therefore it was incumbent on the District Judge to reject it.

Counsel for the accused further points to the fact that under cross examination Garda Galvin stated that she observed the accused's vehicle indicate to turn right and then left by the operation of the indicators. Further, she stated that her reason for concluding that the vehicle was about to move off was that she had observed that the brake lights of the vehicle which had been on went off. He submits that any person observing these things could only have concluded that the person behind the wheel was attempting to drive the vehicle. In the circumstances Garda Galvin's asserted opinion, namely that an offence was being committed under s. 50, was wholly unreasonable. He emphasises that Garda Galvin agreed that she was familiar with the provisions of s. 50 of the Road Traffic Act, 1961. In all the circumstances he submits that the question posed in the case stated should be answered in the negative.

Submissions on behalf of the Prosecutor

The prosecution referred the court to the case of the *Director of Public Prosecutions v. Edward Byrne,* [2002] 2 I.L.R.M. 268. It was submitted that there was a degree of similarity between the facts of that case and the facts of the present case. In the Byrne case a member of An Garda Síochána had observed a vehicle at night parked on the hard shoulder with the lights on. In that case the accused was asleep in the driver's seat. The keys were in the ignition and "turned two clicks to ready". The Garda then woke the accused and noted that his eyes were bloodshot and bleary, that there was a smell of alcohol and that he was unsteady on his feet. The accused was then cautioned and it was alleged that he later admitted that he had had "a few" drinks. The accused was arrested, a sample of urine was later taken and the accused was charged with an offence contrary to s. 50 of the Road Traffic Act, 1961. He was convicted before the District Court. He later appealed against that conviction in the Circuit Court. At the close of the evidence before him the Circuit Court judge stated a case to the Supreme Court as follows:-

> (i) Whether ... I am entitled to hold that the defendant was in charge of a mechanically propelled vehicle in a public place with intent to drive.
>
> (ii) Can I consider the intentions of the defendant before he went asleep as referred to in the statement of facts as set out.

The Supreme Court answered both questions in the affirmative. They held that the trial judge had to be satisfied that the accused was in charge with intent to drive at some point during the period when the Garda observed the accused in the car and arrested him. They also held that being in charge of a vehicle meant having possession or control or being in a position to exercise possession or control, which depended on the circumstances of the case. Where a person is found alone in a car, occupying the driver's seat, with the keys in the ignition, *prima facie* he may be considered to be in charge of the motor car. Whether the accused had an "intent to drive" depended on the circumstances of the case. The trial judge was entitled to consider the intentions of the accused before he went asleep as part of those circumstances. They held that intention is a sense of purpose as to future action. The fact that a person who is in charge of a car falls asleep, even if voluntarily, does not mean that the purpose for which he is in the car has been abandoned and that an intention has ceased to exist. The court further held that if the trial judge was satisfied that the accused was in charge of the motor vehicle as charged the presumption in s. 50(8) of the Act of 1961 arose. In deciding that issue it was open for

the trial judge to consider the accused's intentions prior to the accused falling asleep. Section 50(8) of the 1961 Act indicated that the legislature intended that the intention to drive need not be an immediate one. The link between being in charge of a vehicle and the intent to drive must mean that, in the circumstances in which the accused is found to be in charge, he has an intention, at some point, while in charge, to drive a motor vehicle which intention does not have to be immediate. Counsel for the prosecutor specifically drew the court's attention to the following quotations from the judgment of Murray J. in the *Edward Byrne* case:-

> "The mischief which the legislature appears to have in mind are persons unfit to drive due to the consumption of alcohol who are in charge of motor vehicle and have an intention to drive. That is to say, that it is an offence for a person to be in charge of motor vehicle while at the same time having an intent to drive when he has in his body a level of alcohol prohibited by statute. Thus it would not be a defence for a defendant to admit that he was in charge of a motor vehicle with intent to drive while unfit due to the consumption of alcohol but did not intend to drive for three and a half hours, six hours or as the case maybe. The statute makes it an offence for such an unfit person to be in charge of motor vehicle with requisite intent." (see pp. 79-80 of the report).
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> "The link between being in charge of a vehicle and the intent to drive must mean that in the circumstances in which the defendant is found to be in charge he has an intention, at some point, while in charge, to drive the motor vehicle. It is that intention which does not have to immediate or an intention to do so within a particular time frame. As in all cases of this nature there is a myriad combination of circumstances which can be conjured up on a hypothetical basis. It is really a question of applying the terms of the relevant subsection to the facts of each case according to their ordinary and everyday meaning." (see p. 80 of the report)

Counsel for the prosecution's reliance on the *Edwards Byrnes* case is two fold. Firstly, he points to the similarities between the facts of that case and the facts of the present case as supporting the proposition that it was reasonable for Garda Galvin to be of the view that an offence under s. 50 was being committed rather than an offence under s. 49. Secondly, he submits that the clear identification by Murray J. of the mischief which the legislature intended to address by the enactment of s. 50 is of assistance and that I should have regard to it.

Counsel for the prosecution sought also to address the point raised by the learned District judge concerning the availability of an alternative verdict under s. 50(6)(b) of the Road Traffic Act, 1961 in the following way. The courts attention was drawn to the decision in the *Director of Public Prosecutions v. Sean Kenny* (Unreported, High Court, Herbert J., 13th October, 2006.). In that case the accused was alleged to have blocked traffic with his vehicle in the middle of a public road. He was requested by a Garda to reverse his vehicle 50 yards out of the way. He did so and was subsequently arrested for drink driving pursuant to s. 49(4) of the Road Traffic Act, 1961 (as amended). At the trial in the District Court it was argued on behalf of the accused that the Gardaí could not rely upon the reversal of the vehicle at the request of the Garda as being evidence of driving while under the influence of an intoxicant. It seems that the prosecution conceded the point, but then sought to rely on s. 49(6)(b) of the Road Traffic Act, 1961 which provides:-

> "A person charged with an offence under this section may, in lieu of being found guilty of that offence, be found guilty of an offence under s. 50 of this Act."

The District Judge refused to record an alternative verdict and dismissed the case against the accused. At the request of the prosecutor he later stated a case for the opinion of the High Court as to whether he was correct in law in refusing to record the alternative verdict. In giving judgment in the High Court, Herbert J. held:-

> "In my judgment, subs. 6(b) of s. 49 of the 1961 Act confers on the court the following discretion:-
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> > (a) If satisfied on the evidence that the accused should not be convicted of an offence under section 49 (4) and if satisfied, by submission made by or on behalf of the accused, or of its own motion, that the accused would be prejudiced by the introduction of the alternative offence and could not be afforded sufficient opportunity of countering it, to decline to consider the alternative offence under section 50 of the 1961 Act and acquit the accused.
> >
> > (b) Alternatively, in the absence of any such prejudice or if it is capable of being eliminated, to proceed with the hearing, to consider the evidence and find the accused either guilty or not guilty of an offence under section 50 of the 1961 Act."

He concluded:

> "I find that the learned District Judge had no jurisdiction under s. 49(6)(b) of the 1961 Act to dismiss the case against this defendant on the grounds that the state had brought the prosecution under s. 49(4) of the Road Traffic Acts, 1961 - 1994 alone. I find that the learned District Judge was not correct in law in holding that he had discretion not to convict the accused on that basis."

Counsel for the prosecutor submits that on the authority of *Director of Public Prosecutions v. Sean Kenny*, it was clearly the intention of the legislature that ss. 49 and 50, respectively, should be regarded as complementary. Counsel for the prosecutor submits that an arrest and prosecution under s. 49 may, in appropriate circumstances, lead to a conviction under s. 50. Conversely, an arrest and prosecution under s. 50 may, in appropriate circumstances, lead to a conviction under s. 49. Sections 49 and 50 are addressed to the same essential mischief, they must be read together and be regarded as complementary provisions rather than mutually exclusive provisions.

Turning then to the lawfulness of Garda Galvin's arrest of the accused pursuant to s. 50 of the Road Traffic Act 1961, Counsel for the prosecution relies upon *Christie v. Leachinsky* [1947] 1 All E.R. 567, *Gelberg v. Miller* [1961] 1 All E.R. 29; *Hobbs v. Hurley* (Unreported, High Court, Costello J., 10th June, 1980); *Director of Public Prosecutions v. Connell* [1998] 3 I.R. 62 *and Director of Public Prosecutions v. Moloney* (Unreported, High Court, Finnegan P., 20th December, 2001). The case of *D.P.P. v. Maloney* is the most recent of the cases cited and in his judgment in that case Finnegan P. reviewed and considered the other cases mentioned. Counsel referred with particularity to the following quotation from Finnegan P.'s judgment:-

> "The only issue is the net one - the Garda having arrested a Respondent pursuant to the power conferred upon by the Road Traffic Acts, 1961/95 Section 49(8) was it open for the Appellant to charge the Respondent with an offence contrary to section 50 of the Acts.

> I propose approaching the question in two ways. Firstly, applying the law as set out above, had the Respondent knowledge of the facts alleged to constitute the crime with which he was charged? The Respondent was in the colloquial sense the driver of the vehicle and likewise in the legal sense, having regard to the definition contained in the Road Traffic Act, 1961, Section 2 –
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> > "Driving' includes managing and controlling... and 'driver' and other cognate words shall be construed accordingly.'
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> No issue as to driving arose in the District Court. The engine was running and the keys were in the ignition. Garda O'Connell informed him that he was of the opinion that he, the Respondent, had consumed intoxicating liquor. He was required to, and did in fact furnish, a specimen of his breath, which specimen was positive. He was told that he was being arrested for drink driving. These facts together were sufficient to constitute the crime with which he was charged, that is, an offence under the Road Traffic Acts, 1961/94 Section 50(2) thereof. It is immaterial that he was in fact arrested pursuant to the statutory power of arrest conferred by Section 49(8) of the Acts and in any event the same facts which were within the knowledge of the respondent were sufficient to empower Garda O'Connell to make an arrest under Section 50(10) of the Acts.
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> Secondly, the scheme of the Road Traffic Acts, 1961/95 is relevant. Section 49(6)(b) provides that a person charged with an offence under that section in lieu of being found guilty of that offence may be found guilty of an offence under Section 50 of the Acts. Section 50(6)(b) provides that a person charged with an offence under that section in lieu of being found guilty of that offence maybe found guilty of an offence under Section 49 of the Acts. In each case, the person to be charged is the driver, as defined in the Acts. The distinction between the offences is that in Section 49 there is a requirement that the driver drive or attempt to drive and in Section 50 that he be in charge of the vehicle with intent to drive or attempt to drive the vehicle but not driving or attempting to drive it. The distinction in any particular set of circumstances between the words drive, attempt to drive and in charge is not without difficulty: see footnotes to the Road Traffic Act, 1994, Sections 10 and 11 in Irish Current Law Statutes for discussion. I am satisfied that the object of the provisions in Section 49(6)(b) and Section 50(6)(b) are designed to alleviate this difficulty. Had the Respondent in fact been charged under Section 50 of the Acts, he could have been convicted under Section 49 of the Act and vice versa. The circumstances accordingly are even more cogent than those *in Christie v. Leachinski* where the relationship between the Act relied upon to affect the arrest and the ultimate charge in each case was not nearly so proximate."

Counsel for the prosecution submits that the decision in *D.P.P. v. Maloney* provides further support for the proposition that ss. 49 and 50 of the Road Traffic Act, 1961 are intended to be complementary and to be read and applied in a unitary way as addressing a particular mischief. In those circumstances the fact that the accused in the present case was arrested for an offence under s. 50 but was ultimately charged with an offence under s. 49 ought not to be regarded as fatal or as giving rise to admissibility problems with respect to evidence gathered consequent on the arrest.

Finally, in response to arguments put forward by the accused in reliance *upon Director of Public Prosecutions v. Michael Tyndall* and *Director of Public Prosecutions v. O'Connor,* Counsel for the prosecution, while accepting that the Garda's opinion must a rational one, contends that in the circumstances of this particular case the Garda's opinion was in fact rational. Further, the Garda had a bona fide belief when she affected the arrest. In his submission the arrest must be regarded as lawful in all the circumstances.

Decision
Having carefully considered both ss. 49 and 50, respectively, of the Road Traffic Act, 1961, 1 accept that they are addressed towards a single mischief, of which there may be different manifestations. In broad terms the mischief in question is that identified by Murray J. in *Director of Public Prosecutions v. Edward Byrne*, in the following terms:

> "The mischief which the legislature appears to have in mind is persons unfit to drive due to the consumption of alcohol who are in charge of a motor vehicle and have an intention to drive."

However, Murray J. was only considering s.50 and was dealing with just one manifestation of the mischief in question. To embrace all possible manifestations, I would slightly recast the terms of Murray J.'s description of the mischief as follows:

> "Persons unfit to drive due to the consumption of alcohol who are in charge of a motor vehicle, and who either intend to attempt to drive or intend to drive, or who in fact attempt to drive or drive."

I am satisfied that in enacting ss. 49 and 50 the Oireachtas clearly intended to comprehensively address all manifestations of the mischief in question and to that end intended that the sections should complement each other. It is clear that this is so from the presence of the alternative verdict provisions contained in s. 49(6)(b) and s. 50(6)(b) respectively. I think that any other construction would be absurd and untenable.

However, my conclusion in that regard does not dispose of the issue that has been raised in this case. It does not dispose of it because, notwithstanding that the Oireachtas intended that ss. 49 and 50 should complement each other, both of these sections contain separate and distinct powers of arrest. These are contained in s. 49(8) and s. 50(10) respectively. The power of arrest created by each of these subsections respectively relates only to "a person who in the member's opinion is committing or has committed an offence *under this section*" (my emphasis).

What is the significance of this? It is this. The applicant contends that for the power of arrest under either subsection to be validly exercised the member must hold the required opinion, and that opinion must be bona fide held and not irrational. The bona fides of Garda Galvin is not in issue. However, the rationality of her opinion that an offence under s. 50 had been, or was being, committed is in issue. If the applicant is right then the arrest was bad. If the arrest was bad then the accused was detained in breach of his constitutional right to liberty. Notwithstanding that this might have occurred without *mala fides* on the part of Garda Galvin, and due to a genuine mistake of fact, the arrest was undoubtedly a deliberate and conscious action in the sense referred to in *People (DPP) v. Kenny* [1990] I.L.R.M. 569. That being the case, and in the absence of extraordinary excusing circumstances (of which there do not appear to be any), all evidence obtained in consequence of this deliberate and conscious violation of the accused's constitutional right to liberty would be tainted and inadmissible at trial. Such evidence would include, in the circumstances of this case, the sample of blood taken from the accused in Arklow Garda Station, and its analysis. Accordingly, although it would theoretically be open to the District Judge to convict the accused of an s. 49 offence following his trial on a charge preferred under s. 50, he could only do so if there was evidence that an offence under s. 49 had been committed. In circumstances where evidence relating to the blood sample and its analysis could not be admitted, and in the absence of other admissible evidence of intoxication, the District Judge would have no option but to acquit the accused.

While it might be argued, as the respondent has sought to do in this case, that the legislature never envisaged that an intended target of ss. 49 and 50 should "fall between two stools", and that accordingly any construction leading to that result ought to be rejected as absurd, I must respectfully disagree. The language used in both s. 49(8) and s. 50(10) is quite clear. They cannot be read as one, or as being interchangeable, without doing violence to the plain wording of the statute. Moreover, while acknowledging that in the particular circumstances of the present case this may, on one view of it, lead to an absurd result, I cannot ignore the rules of construction of statutes. Sections 49 and 50 of the Road Traffic Act, 1961 are penal provisions and accordingly must be construed strictly. I have had regard to s. 5(1) of the Interpretation Act 2005. This subsection permits the construction of certain statutory provisions, which if interpreted literally would give rise to an absurdity, in a manner consistent with the plain intention of the legislature, where that intention can be ascertained from the Act as a whole. However, provisions relating to the imposition of a penal or other sanction are expressly excluded from the ambit of s. 5(1) of the 2005 Act.

It comes down to this. I consider that the applicant is right in his contention that for the power of arrest under s. 50(10) to have been validly exercised Garda Galvin's opinion must not have been irrational. Therefore the fundamental question that I have to answer is "was the opinion formed by Garda Galvin a rational one in the circumstances?"

On the evidence before me I am driven to the conclusion that the circumstances facing Garda Galvin were clear and unambiguous. When Garda Galvin first observed the accused's car it was stopped in the middle of the road with the engine running and the brake lights on, She observed the activation of the left hand indicators, followed by the right hand indicators, and then observed the brake lights go out. She believed, entirely reasonably, that it was about to move off. She approached the vehicle and observed the accused seated in the driver's seat thereof. This accused was conscious and awake, unlike the accused in the case of DPP v. Edward Byrne. The keys were in the ignition. The engine was still running. During all this time the vehicle did not actually move.

Section 2 of the Road Traffic Act, 1961 defines the words “driving” and “driver” as used in the Act in the following way:

> “ ‘Driving’ includes managing and controlling ... and ‘driver’ and other cognate words shall be construed accordingly.”

Having regard to this definition of driving I consider that the only rational interpretation of the circumstances facing Garda Galvin was that the accused was attempting to drive. There was clear evidence of manipulation of the controls by the accused and, in circumstances where the engine was running, it was clearly to be inferred that the accused was attempting to drive.

In all the circumstances I must hold that the opinion formed by Garda Galvin that an offence had been, or was being, committed under s. 50, as opposed to under s. 49, was irrational. That being the case, I find that the accused's arrest and subsequent detention was unlawful and in deliberate and conscious violation of his constitutional right to liberty. In consequence of that, the sample of the accused's blood taken in Arklow Garda Station was “a fruit of the poisoned tree” and inadmissible as such.

I wish to add the following. In arriving at my decision I have considered very carefully the judgment of Finnegan P. in *Director of Public Prosecutions v. Moloney*, and I have found it to be of considerable assistance. However, I believe that it is distinguishable on its facts from the facts in the present case. As has already been rehearsed s. 49 covers cases involving actual driving or an actual attempt to drive. Section 50 covers cases that involve having, while in charge of a mechanically propelled vehicle, an intention to drive or an intention to attempt to drive. I conceive that in a great many cases a Garda may be faced with ambiguous facts and circumstances. The presenting facts and circumstances may be such as to be potentially consistent with both offences. In such circumstances a particular Garda could *bona fide* and rationally be of the opinion that an offence was being committed under one section, while his/her colleague standing next to him could equally *bona fide* and rationally be of the opinion that an offence was being committed under the alternative section. One or other of them would be mistaken in point of fact, but in those circumstances they would both have formed valid opinions and which ever of them effected the arrest would have effected a valid arrest. I believe that the presenting facts and circumstances in the *Moloney* case were indeed ambiguous. That seems clear from the following statement in the judgment of Finnegan P:

> “It is immaterial that he was in fact arrested pursuant to the statutory power of arrest conferred by Section 49(8) of the Acts and in any event the same facts which were within the knowledge of the Respondent were sufficient to empower Garda O'Connell to make an arrest under Section 50(10) of the Acts.”

In the *Moloney* case it was immaterial as to whether the accused was arrested under s. 49(8) or s. 50(10) because the presenting facts were ambiguous in relation to whether a s. 49 offence or a s. 50 offence had been committed and the Garda could *bona fide* and rationally have been of opinion that either offence had been committed. In my judgment that was not the situation in the present case.

Accordingly, the question posed must be answered in the negative.