

THE HIGH COURT

[2006 73 S.S]

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA GARRY HALLINAN)

PROSECUTOR

AND
DONAL MILMO PENNY

DEFENDANT

Judgment of Ms. Justice Dunne delivered on the 27th day of July 2006 .

1. This is a consultative case stated pursuant to the provisions of s. 52 of the Courts (Supplemental Provisions) Act, 1961, by District Judge Catherine Murphy arising out of a sitting of the Dublin Metropolitan District Court on 30th June, 2005. On that date the defendant appeared before the learned District Judge to answer a complaint in which he was charged with having driven a mechanically propelled vehicle in a public place on 2nd November, 2003, at Templeogue Road, Dublin 6W, while there was present in his body a quantity of alcohol such as that within three hours after so driving, the concentration of alcohol in his breath exceeded a concentration of 35mgm of alcohol per 100ml of breath 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 and as amended by s. 23 of the Road Traffic Act, 2002.

2. At the hearing, the prosecutor was represented by Garrett Henry of the Chief Prosecutions Solicitors office and the defendant was represented by James B. Dwyer, B.L.

3. Two witnesses gave evidence on behalf of the prosecution namely Garda Garry Hallinan and Garda Pat Lally.

4. The relevant facts proved or admitted were as follows:

On November 2nd 2003, Garda Hallinan was on duty at a checkpoint on the Templeogue Road at approximately 8.30 p.m. A vehicle was stopped at the checkpoint and Garda Hallinan spoke to the driver, the defendant herein. He noted that there was a smell of alcohol from the driver and that his speech was slurred. He asked the defendant had he drunk alcohol and the defendant replied that he had and that he had been at a rugby match earlier and was driving towards Templeogue. Garda Hallinan formed the opinion that the defendant was intoxicated to such an extent as to render him incapable of operating a mechanically propelled vehicle in a public place. He then informed the defendant that he was arresting him under the provisions of the Road Traffic Act, 1961 as amended and explained this to the defendant. The defendant was brought to Terenure Garda Station and subsequently a breath test was obtained from him.

Under cross examination, Garda Hallinan confirmed that he stopped the vehicle driven by the defendant, that he observed the general demeanour of the defendant and particularly the smell of the defendant's breath and the fact that his speech was slurred. He cautioned the defendant and asked the defendant if he had been drinking. The defendant told him that he had a few pints after a rugby match in Donnybrook and was going to a friend's house in Templeogue. Garda Hallinan stated that he then asked the defendant to pull over to the side of the road having formed the opinion that he had committed an offence under s. 49 of the Road Traffic Act, 1961. He stated that the checkpoint was in the middle of the road. He watched the defendant drive off the main road into Rathdown Park. He did not order the defendant to drive into Rathdown Park but merely to pull over. He then effected the arrest of the defendant.

At the conclusion of the prosecution evidence counsel for the defendant sought a direction on a number of grounds which were rejected save for the one which gave rise to this consultative case stated. It was submitted by Mr. Dwyer on behalf of the defendant that the arrest of the defendant was unlawful by reason of the fact that Garda Hallinan having purportedly formed the opinion that the defendant had committed an offence under s. 49 of the Road Traffic Act, 1961, then required him to drive his car in circumstances which deprived him of his liberty and furthermore that requirement was in effect a requirement to commit a criminal offence. He then submitted that the illegality associated with the defendant's arrest tainted the evidence obtained by the prosecution thereafter in particular the s. 17 statement. Mr. Dwyer conceded that he was unaware of any case law that supported his submission.

5. By way of reply Mr. Henry for the prosecution likewise was unable to refer to any case law on the issue. He submitted that in the context of a road traffic checkpoint in the middle of a busy public road, the Garda was entitled to ask the defendant to pull in before completing the arrest as a matter of public safety.

6. The learned District Judge was of the view that she was not going to accept the contentions made on behalf of the defendant she was nonetheless prepared to state a case on a consultative basis having regard to the novelty of the point raised. Accordingly the opinion of the High Court has been sought on the following questions:

(a) Was the arrest of the defendant lawful in circumstances where Garda Hallinan, having stated that he formed the opinion the defendant had committed an offence contrary to s. 49 of the Road Traffic Act, 1961, as amended, then required the defendant to continue driving albeit a short distance?

(b) In the alternative, was the requirement that the defendant continue driving sufficient to vitiate Garda Hallinan's opinion that the defendant had committed an offence under s. 49 of the said Act?

7. Submissions were made on behalf of the prosecutor by Paul Anthony McDermott B.L. In the first instance, he contended that as a matter of common sense a member of the Gardaí manning a checkpoint in the middle of a busy road is entitled to request a driver to pull over before the arrest process is completed. He noted that the driver did so voluntarily. He pointed out that it had not been suggested that any of the ingredients which go to make up a valid arrest had been omitted by the Guard. Accordingly he contended that the ingredients of a valid arrest were present in that the arresting officer formed the necessary opinion and the defendant was informed of the reason for the arrest.

8. The main point made by counsel for the prosecutor was that even if the request made to the driver of the vehicle to pull over to the side of the road amounted to a potential wrong or indeed a potential offence, he stated that it was unclear how that potential illegality could affect the validity of the arrest. He pointed out that there was no causal connection between any illegality and the arrest. In such circumstance the Garda derived no benefit from what is contended to be an illegal act. In support of his contention in

that regard he referred to the case of *The People (DPP) v. Spratt* [1995] 2 I.L.R.M. 117. At paragraph 4 of the head note on page 119 it was noted:

"Evidence must be excluded only if it is obtained as a result of a breach of a person's constitutional rights, which requires a causative link between the breach and the obtaining of evidence. The court should look to see how the accused is prejudiced by any breach and whether information was obtained which might not otherwise have been obtained. *Walsh v. O'Buachalla* [1991] 1 I.R. 56 approved"

9. That particular case concerned an issue as to whether or not it was necessary to adduce evidence that an accused person had been informed of his right to a solicitor in accordance with the requirements of the Custody Regulations. Counsel relies on that case to argue that there is nothing to show that the applicant was prejudiced as a result of the alleged illegality or to suggest that as a result of the alleged illegality the Gardaí were unable to effect an arrest they would otherwise have been unable to effect. It was emphasised that all of the ingredients of a valid arrest were present.

10. Counsel then argued that even if the Gardaí were incorrect in asking the accused to pull over to the side of the road it did not follow that the prosecution itself should be dismissed. He referred to the decision in the case of *Lynch v. Attorney General* [2004] 1 I.L.R.M. 129. In that case the applicant sought to prevent his extradition to England. The claim for relief related to the alleged activities of a Detective Garda who was investigating the involvement of the applicant in a stolen cheque matter. It was claimed that the Detective Garda had said on a number of occasions that if the applicant furnished information to the Gardaí about other people involved in the stolen cheque matter, the English warrants would not be executed. In the High Court it was found that the claims made by the applicant in relation to the conduct of the Detective Garda were made out. It was claimed *inter alia* that his arrest was not shown to be lawful. It was held by the Supreme Court that the behaviour of the Detective Garda did not in itself have the effect of invalidating or rendering inoperative the request for rendition which was otherwise regular. It was further held that while the conduct of the Garda was to be condemned, it had no effect on the extradition proceedings. No statement was made by the applicant and no evidence was obtained. No specific detriment accrued to the applicant in terms of the extradition proceedings or his ability to meet the case against him in England if extradited. The Supreme Court went on to hold that while the courts will not normally permit a party to have the benefit of what flows from an illegality or an unconstitutional act, the courts will not normally interfere with a procedure otherwise proper on the basis of disapproval of some step taken in its general context. Finally the court held that the arrest was *prima facie* valid.

11. In the course of the judgment in that case it was stated by Hardiman J. at page 148 as follows:

"The courts do not exercise a general disciplinary power over the executive or the Gardaí in particular. That power is vested elsewhere. The role of the courts is invoked when, in the course of properly constituted proceedings, a complaint is made that some steps or thing adverse to an individual has been taken, or come into being, on the basis of an illegality or an unconstitutional act on the part of his opponents. If this has occurred the courts will not normally permit the opponent to have the benefit of what flows from an unconstitutional act, in the interest of upholding the constitution itself. But it will not interfere with a procedure, otherwise proper, on the basis of disapproval of some step taken in its general context."

12. On that basis counsel argued that it would be absurd to rule the arrest invalid because the applicant was asked to move his car. He also posed the question as to what right of the applicant had in fact been infringed by being asked to pull over to the side of the road.

13. The final argument raised by counsel related to the second question posed in the consultative case stated. He pointed to paragraph 6b of the case stated which described as one of the facts proved the following:

"Garda Hallinan formed the opinion that the defendant was intoxicated to such an extent as to render him incapable of operating a mechanically propelled vehicle in a public place. He informed the defendant he was arresting him pursuant to s. 49(8) of the Road Traffic Act, 1961 as amended for an offence under subsections 2, 3 or 4 of that section. He explained this to the defendant in simple English."

14. Counsel posed the question as to how subsequent events could vitiate an opinion. He argued that the opinion is a fact found in the case. In practical terms the opinion evidence in this case is uncontroverted and he pointed out that it is difficult to see how an opinion can be "vitiating". The question as to whether someone held a particular opinion or not is a question of fact. That fact cannot be vitiated by subsequent events. He also pointed out that as the case stated is confined to questions of law it is difficult to see how it could be reviewed on a case stated.

16. Marc de Blacam SC appeared on behalf of the defendant. In effect he submitted that the question to be considered by the court on this case stated was whether it was lawful for the Garda to oblige the defendant to move his vehicle in circumstances where the Garda had formed the opinion that the defendant had just committed a drink driving offence. He referred to s. 109(1) of the Road Traffic Act, 1961 as amended which provides that:

"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."

17. He described the first question as being somewhat ambiguous in that it referred to the fact that the Garda had "required" the defendant to continue driving. In the case of *DPP (Stratford) v. Fagan* [1994] 2 I.L.R.M. 349 in which it was held that the Gardaí are under a common law duty to detect and prevent crime. Consequently, if they find it necessary to require motorists to stop in order adequately to detect and prevent crime, they have full power to do so at common law. Counsel accepted this proposition but argued that such power stopped short of offering a justification for requiring a driver, whose vehicle had been stopped, to resume driving in circumstances where by so doing he may be committing an offence.

18. He also referred to the provisions of s. 110 and queried whether there could be a power under the provisions of that section which provide for the disposal of vehicles temporarily where a person has been arrested under the Road Traffic Act, 1961 as amended. He pointed out that for that particular section to come into effect an arrest must have been made. Equally he added that there is nothing in the section which suggests that the arrangements for temporary disposition of a vehicle could include an act which constitutes the commission of an offence.

19. The next point raised by counsel for the defendant related to the principle against self incrimination. He referred to the case of *In*

re. *National Irish Bank* [1999] 3 I.R. 145 in which Shanley J. at page 153 made the following comment about the privilege against self incrimination namely:

"That it has always encapsulated a right in the individual to refuse to answer a question or produce a document when to do so would in the opinion of a court tend to expose such an individual to a real risk of criminal prosecution or penalty."

20. He then referred to a decision in the case of *Johnson v. Phillips* [1976] R.T.R. 170. In that case the police attended an incident in a narrow one way street where there was an ambulance in which two patients were being treated. The defendant drove his car into the same street and stopped some ten feet behind the ambulance. One of the police constables attending the scene twice instructed the defendant to reverse his car some fifteen yards into the street from which he had come because he was obstructing the removal of injured persons and other ambulances were expected. The defendant refused to move saying that he could not do so because it was a one way street. He was arrested and charged with obstructing the constable in the execution of his duty. The justices dealing with the case were of opinion that the constable was acting in the course of his duties, that the reversing manoeuvre was awkward but not dangerous and that the defendant in refusing to reverse so as to drive the wrong way in a one way street was wilfully obstructing the constable and the defendant was convicted. Ultimately a case was stated and the following question arose in that case "has a constable in purported exercise of his power to control traffic in a public road the right under common law to disobey a traffic regulation such as going the wrong way along a one way street". In the course of his judgment Wien J. stated at page 176:

"The law protects the liberty of the subject, but it must recognise that in certain circumstances which have to be carefully considered by the courts a constable may oblige persons to disobey a traffic regulation and not only in those cases that are explicitly dealt with by parliament. In the judgment of this court a constable would be entitled, and indeed under a duty, to give such instruction if it were reasonably necessary for the protection of life or property. It is not necessary in the instant case to decide whether there may not be other circumstances in which such an instruction might be justified."

21. In that case it was emphasised that there was not a general discretion given to a constable even in a case where he himself considered an emergency had arisen to disobey traffic regulations or to direct other persons to disobey them, however the court concluded on the facts of that case viewed objectively that the instruction given was reasonable and lawful and given at a time when he was acting in the course of his duty.

22. Relying on the authority referred to above counsel submitted that there was no evidence in this case that it was necessary to protect life or property to request someone to commit an illegal act. At paragraph 8 of the case stated reference is made to a submission by Mr. Henry on behalf of the prosecution that as a matter of commonsense, in the context of a checkpoint in the middle of a busy public road, the Garda was entitled to ask the defendant to pull in before completing the arrest as a matter of public safety. As counsel points out however, there was no evidence as to the circumstances other than a reference to the fact that the checkpoint was in the middle of the road. Accordingly he submitted that even if there was such an entitlement to require someone to commit an act which might constitute an offence, then such a requirement can only be permissible when it is necessary to protect life or property.

23. The second question in the case stated related to the opinion of Garda Hallinan to the effect that the defendant was intoxicated to such an extent as to render him incapable of operating a mechanically propelled vehicle in a public place. Counsel pointed out that the opinion was formed after Garda Hallinan had stopped the defendant but before he required him to remove his vehicle. It was pointed out by counsel that in the case of *Hobbs v. Hurley* (Unreported, High Court, 10th June, 1980) at page 4, Costello J. commented:

"The opinion arrived at, must of course be a reasonable one and must be one which results from an honest belief come to after facts have been ascertained and considered."

24. Counsel also pointed out that it was stated by Henchy J. in the case of *DPP v. Gilmore* that:

"An opinion of this nature is invariably subjective in character, and if its factual or legal basis cannot be fathomed, it may be difficult to subject it to judicial review if it has been reached in good faith. But where, as in this case, the precise basis of the opinion is known, the opinion will not be accorded legal validity at the suit of the person affected by it if the opinion maker misdirected himself as to the law or the facts, or, to put it in another way, if a person in his particular circumstances could not reasonably have reached the opinion formed."

25. Finally counsel referred to the decision in the case of *DPP v. Lynch* [1991] 1 I.R. 43 at page 46 in which O'Hanlon J. stated that it was not to be supposed that:

"... in every case where a Garda informs a person who is being arrested that he is being arrested under the provisions of s. 49 ... there is a necessary inference to be drawn that he has concurrently formed the opinion that the person who is placed under arrest is committing or has committed an offence under s. 49."

26. In essence Counsel argued that the opinion expressed to have been formed by Garda Hallinan could not have been genuinely held by him because if he genuinely believed that the defendant was incapable of operating his vehicle in a public place he would not have required him to move that vehicle. He reiterated his earlier submission that the Garda had put the defendant in a position where he could be prosecuted for committing a subsequent offence i.e. at the request of the Garda in driving the vehicle whilst he was incapable of doing so.

27. By way of reply, Counsel on behalf of the prosecutor made the point that assuming that the defendant had performed an illegal act in complying with the requirement of Garda Hallinan, the defendant has not been charged with anything arising from that illegal act. No evidence was produced against the defendant as a result of the illegal act. Further the illegal act has not been sought to be relied on in any shape or form against the defendant.

Conclusions

28. One of the matters referred to by counsel for the defendant herein was the principle against self incrimination. That concept arises in the context of privilege and the right of an individual to refuse to answer questions or produce documents when to do so would expose an individual to a real risk of criminal prosecution or penalty. Whilst the argument made by counsel on behalf of the defendant was that what occurred here was a breach of the principle against self incrimination by requiring the defendant to move his car to the side of the road, in circumstances where the Garda had already formed an opinion under s. 49, I am of the view that that has nothing to do with the concept of self incrimination as understood in relation to the privilege against self incrimination.

Nonetheless while I am not of the view that the privilege against self incrimination as invoked by counsel in this case is of much assistance in determining the issues that arise in this case, I think it is fair to say that I accept that the fact that a member of the Gardaí has requested one to do something which may be an illegal act does not of itself amount to an authority to an individual to do that illegal act and an individual is entitled to refuse to comply but if the individual does comply with the requirement to do an illegal act, a criminal prosecution may result. The case of *Johnson v. Phillips* referred to above is an interesting contrast to that proposition. As already noted that was a case in which the defendant had been prosecuted for obstruction for failing to comply with a direction of the constable concerned. The defendant refused to carry out the direction on the basis that to do so would result in the commission of an illegal act. Nonetheless he was found guilty of obstructing the police in circumstances where it was found that there was an emergency. However I do not think that the facts of that case and the conclusions reached in that case are of particular assistance to me in regard to the facts of this case.

29. It does seem to me as a matter of practicality that Garda Hallinan having formed the opinion that the defendant was not capable of operating a mechanically propelled vehicle in a public place should not then have asked him to pull over to the side. It would have been more appropriate for the Garda in operating the checkpoint to ask motorists to pull over to the side of the road before dealing with them or alternatively, if having stopped someone at the checkpoint and he had come to the view that that person was suspected of drunk driving, to arrange for the removal of the vehicle after the arrest of the suspect.

30. Assuming for the sake of argument that the requirement of Garda Hallinan that the defendant move the motor vehicle to the side of the road amounted to an illegal act, did that illegal act taint the steps taken thereafter including the arrest of the defendant. In support of his arguments counsel for the prosecution referred to two authorities namely *The People (DPP) v. Spratt* referred to above and *Lynch v. Attorney General* referred to above. Those cases concern instances of a breach of a person's constitutional rights. In one of the cases the alleged unconstitutional act arose in the context of extradition proceedings and in the case of *Spratt*, the issue that arose was the exclusion of evidence obtained as a result of a breach of a person's constitutional rights. Of the cases it seems to me that the findings in the case of *Spratt* are of most assistance to the court in dealing with the issues that arise herein. In the course of his judgment in that case O'Hanlon J. at page 123 made the following comment:

"If a breach of the constitutional rights of the accused person took place, as alleged, in what manner was he prejudiced thereby? Was any information obtained which might not have been otherwise obtained?"

31. It is clear from the facts of this case that the arrest of the defendant did not occur solely as a result of the request to pull his vehicle over to the side of the road. He could have been arrested without that request having been made. The Garda had already formed the necessary opinion to bring into existence the power of arrest under s. 49. It is not suggested that any prejudice has been suffered by the defendant as a result of that illegal act. Nothing flowed therefrom. All that has been suggested is that the arrest is tainted by what is described as an illegal act and that everything that followed thereafter is affectively tainted. It is not suggested that any information was obtained as a result of being asked to move the car over which might not have been otherwise obtained. In those circumstances it seems to me that there is no causative link between the act complained of herein and the obtaining of evidence.

32. The other point to note is that although it was suggested in argument that the request by Garda Hallinan was a breach of the defendant's constitutional rights in that it deprived him of his liberty, I cannot accept that argument where it appears that the defendant voluntarily complied with the request.

33. I should add that whilst much of the evidence in this case proceeded on the basis of the assumption that the requirement to move the car was a requirement to commit an illegal act, it does not necessarily follow that in every case such a requirement would in fact amount to an illegal act. This was a case in which the defendant was arrested pursuant to s. 49(8) of the Road Traffic Act, 1961 for an offence under subsections 2, 3 or 4 of that section. In order to carry out the arrest, the Garda necessarily had to form the requisite opinion under that section. Having done so, it does not follow that in fact it would have been an offence for the defendant to have driven his vehicle in compliance with the direction. On the removal of the defendant to the Garda Station for the purpose of obtaining the requisite blood, urine or breath sample it could have transpired that the concentration of alcohol in his blood, urine or breath did not exceed the permitted amount. In those circumstances, clearly there would be no subsequent prosecution for an offence under s. 49 and moving the car could not be an illegal act. I merely make this comment to point out that such a request may not amount to a request to commit what would be an illegal act.

34. In the circumstances I am satisfied that as all of the necessary ingredients were present for a valid arrest and it has never been suggested otherwise, then, notwithstanding that the Garda required the defendant to continue driving a short distance, nothing occurred which had the effect of prejudicing the defendant in any way. In this context the words quoted from the judgement of Hardiman J. in the case of *Lynch* appear to me to be particularly apposite:

"But it (the court) will not interfere with a procedure, otherwise proper, on the basis of disapproval of some step taken in its general context."

35. Accordingly, the first question posed for the opinion of the High Court should be answered yes.

36. As to the second question posed in the consultative case stated, it is my view that the argument of counsel for the prosecutor in regard to that question is well founded. One of the facts proved and/or admitted in the case stated was to the effect that Garda Hallinan formed the opinion that the defendant was intoxicated to such an extent as to render him incapable of operating a mechanically propelled vehicle in a public place. The power under s. 52(1) of the Courts (Supplemental Provisions) Act, 1961 is to refer any question of law arising in the proceeding for determination. In the course of his submissions in relation to the second question counsel on behalf of the defendant urged the court to look at the surrounding circumstances in order to examine the validity of the opinion of the Garda. That seems to me to require the court to embark on a review of the evidence. No doubt there may be circumstances in which as a matter of law one could say that the surrounding facts could not support the opinion. However, in the present circumstances there is a finding of fact that the Guard had formed the necessary opinion. In those circumstances, that being so, I cannot see how a fact so found can be vitiated by subsequent events. In the circumstances I have some hesitation in answering that question given that I have some misgivings as to whether it was an appropriate question to raise but so far as it may be appropriate to give an answer, the answer to that question is no.