

The High Court

[2012 No. 1515 S.S.]

In the matter of s. 52 of the Courts (Supplemental Provisions) Act, 1961, the Director of Public Prosecutions (at the suit of Garda Janice Catherine O'Neill)

Prosecutor

And

John Kelly

Accused

Judgment of Mr Justice Charleton dated the 10th day of December 2012

[1.] This is a consultative case stated by Judge Ann Watkin of the District Court on an issue in an intoxicated driving prosecution. She seeks the opinion of the High Court on this issue:

Is it an essential proof in a prosecution pursuant to Section 4(4)(a) of the Road Traffic Act 2010 for the prosecution to establish either that the defendant is a 'specified person' within the meaning of s. 3(1) of the said Act, or that he is not a 'specified person' within the meaning of the Act?

[2.] The Road Traffic Act 1961 had been heavily amended as to intoxicated driving legislation. It was, yet again, recast in the form of the Road Traffic Act 2010. In that legislation, what was formerly section 49 of the Act of 1961 dealing with drunken driving is now section 4 of the Act of 2010; what was formerly called the offence of being drunk in charge of a vehicle under section 50 of the Act of 1961 is now section 5 of the Act of 2010.

[3.] In recasting the legislation, the Oireachtas decided that it was much more serious for a learner driver or a taxi driver, and certain other categories of driver, to have any drink taken before stepping behind the wheel of a car. Hence, an ordinary driver is tolerated a particular limit of alcohol consumption but special categories of drivers are allowed less than 50g/o of that. For an ordinary driver the limit is 22 microgrammes of alcohol per 100 millilitres of breath and for the exceptional category the limit is 9 microgrammes. People in this special category are legislatively individually described as a "specified person".

Facts

[4.] This is the charge which the defendant faced:

That the defendant did on or about the 8th of January 2012 at Ballygall Road East, Finglas, Dublin 11 a public place in the said District Court area of the Dublin Metropolitan District, did drive a mechanically propelled vehicle registration number 00 D 68570 while there was in his body a quantity of alcohol such that, within three hours after so driving, the concentration of alcohol in his breath did exceed concentration of 22 micrograms of alcohol per 100 millilitres of breath, to wit 70 micrograms of alcohol per 100 millilitres of breath.

[5.] An issue was raised at trial as to whether the defendant had once been described by the prosecuting Garda in giving evidence as a "specified person". The learned District Judge, however, found as a fact that there was no evidence that the gardai had used any term to that effect.

[6.] This is how the case arose. The prosecuting Garda spoke to the defendant at the scene of a collision at approximately 05.00 on 8th January 2012 and formed the opinion that he was incapable of having proper control of his vehicle in a public place. His speech was slurred, his eyes were glazed and she noticed an overwhelming smell of alcohol. This kind of situation would put any Garda on alert. Her opinion was thus not surprising. The defendant was swiftly taken to Ballyfermot Garda Station and, following observation to ensure that he took nothing by mouth, a breath specimen was taken showing a reading on an Intoxilyser analysis machine as indicated in the charge; more than three times the legal limit for an ordinary driver.

The Legislation

[7.] Section 4 of the Road Traffic Act 2010 creates the following offences:

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

(a) 22 microgrammes of alcohol per 100 millilitres of breath, or

(b) in case the person is a specified person, 9 microgrammes of alcohol per 100 millilitres of breath.

[8.] As can be seen, the 2010 Act provides lower legal limits for persons who are "specified persons". These include learner drivers, truck drivers and taxi drivers. This is set out in s. 3(1) of the Road Traffic Act 2010, as amended by s. 9(a) of the Road Traffic (No. 2) Act 2011 through the use of a definition differentiating a person who drives a vehicle under s. 4(4)(a) from the people who are taxi drivers, etc. by calling any of the latter a "specified person." This new definition of specified person was inserted by the Road Traffic (No. 2) Act 2011 and commenced on the 28th October 2011.

[9.] Section 3(1) of the Act of 2010, as amended, defines a specified person as a person who at the time of an alleged offence under section 4 or 5:

(a) is the holder of a learner permit permitting the holder to drive a vehicle of the category concerned,

(b) holds his or her first driving licence, for a period not exceeding 2 years from its date of issue,

(c) is the holder of a first driving licence licensing the holder to drive a vehicle in the category C, C1, D, D1, EB, EC, EC1, ED, ED1 or W while driving, attempting to drive or being in charge of such a vehicle,

(d) is the holder of a licence to drive a small public service vehicle granted under Section 34 of the Taxi Regulation Act

2003 or Section 82 of the Principal Act, or a person purporting to be such a holder, while driving, attempting to drive or being in charge of such a vehicle when the vehicle is being used in the course of business, or

(e) does not hold a driving licence licensing the holder to drive a vehicle of the category concerned.

[10.] Under s. 8A of the Act of 2010, as amended, a person who is charged with an offence under s. 4(4)(b) may, at trial, be found guilty of the lesser offence under section 4(4)(a). In other words, a specified person facing a charge of having a particular limit of alcohol in their breath may, if it is not proven that they are a specified person, and if they exceed the limit of an ordinary driver, be found guilty of what is described at common law as being the lesser included offence. Nothing turns on this provision. Such legislative measures are common in criminal offences in modern statute law; an example is s. 55 of the Criminal Justice (Theft and Fraud Offences) Act 2001. At common law it was always the case that a person charged with robbery could be found guilty of larceny, or theft as it now is, a person charged with murder could be found guilty of manslaughter and a person charged with rape could be found guilty of indecent assault, or sexual assault as it now is. Nor does the analogous provision under s. 53(4) of the Road Traffic Act 1961, as amended, assist the argument on either side. It provides that a person tried with dangerous driving may be found guilty of careless driving.

[11.] This is a matter of ordinary construction. In *DPP v Kemmy* [1980] I.R. 160 at page 164. O'Higgins C.J. noted:

Where a statute provides for a particular form of proof or evidence on compliance with certain provisions, in my view it is essential that the precise statutory provisions be complied with. The Courts cannot accept something other than that which is laid down by the statute, or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field. This applies to all statutory requirements; but it applies with greater general understanding to penal statutes which create particular offences and then provide a particular method for their proof.

[12.] It is a matter for the learned judge as to whether on the evidence that she heard she will proceed to conviction or not. There is no ambiguity or absence of strict construction whereby she would be obliged to require the prosecution in this, or in any, drunken driving trial to prove that the defendant was either an ordinary driver or a driver who came within the special category whereby a lesser alcohol limit in breath was tolerated.

[13.] It is clear that the general, and lesser, offence is of driving a vehicle as an ordinary driver with the upper limit specified in legislation of 70 µg of alcohol per 100 mL of breath. The prosecuting authorities are entitled to charge anyone with that crime who they find behind the wheel of a car and driving while they have consumed such an amount of alcohol as to put them over that limit. This is the ordinary and common charge under the relevant legislation. That is so whether the driver was in fact not just an ordinary driver but was, as well, a taxi driver or a learner driver or whatever. The special category is included in the general category. On the other hand, if the prosecution are alleging that the driver fitted within the special category, then proof is needed from some credible source of the additional element of proof whereby the offence is made more severe through the limit for consumption of alcohol prior to driving being much less than for the general category. Proof is needed in a prosecution for any special category that the defendant fitted into the exceptional definition whereby a conviction for an offence is made subject to a special circumstance or whereby a more severe penalty may result.

[14.] Such proof can arise from the nature of the vehicle that the defendant was driving, for instance a taxi, or from the nature of the licence produced by the driver, for instance a provisional licence, coupled with a reading of alcohol content in breath that is at least within the special lower category whereby that class of drivers is forbidden from driving. If, on the other hand, the prosecution merely prove that the defendant is in a general category, subject to the ordinary proof for that offence and the ordinary penalty in consequence, conviction in respect of that offence may result where the prosecution have produced that ordinary or general proof.

[15.] The flaw with the defence argument in this case is that it could ever be a defence to the general charge, which this defendant faced, that he was in a special category. Were that to be the subject of proof, for instance if he were to shout at a Garda officer "Leave me alone, I am a taxi driver!" it could never exonerate a defendant who was shown to have more alcohol in his breath than the general charge permitted. This is for the simple and logical reason that the special category is included within the range of forbidden circumstances that the general category embraces. The defence argument, while admirably inventive, should therefore be rejected.

Result

[16.] It is thus the opinion of the High Court that it is not an essential proof in a prosecution pursuant to Section 4(4)(a) of the Road Traffic Act 2010 for the prosecution to establish either that the defendant is a 'specified person' within the meaning of s. 3(1) of the said Act, or that he is not a 'specified person' within the meaning of the Act. To enable the District Court to convict on that charge the prosecution must prove that the defendant was driving within the relevant time limit and that the breath of the driver contained more than the general level of alcohol which is specified in the legislation at 22 µg of alcohol per 100 mL of breath. If the prosecution have chosen to prosecute on the other charge of driving while a specified person, proof is needed that the defendant was such a specified person while driving and if that is proved then the permitted alcohol level drops to 9 µg of alcohol per 100 mL of breath. If proof is absent that the defendant was a specified person, then a conviction cannot take place on the statutory lesser included offence unless the breath of the defendant was over the higher limit of 22 µg of alcohol per 100 mL of breath.

[17.] The case stated is appended to this judgment.

APPENDIX

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA JANICE CATHERINE O'NEILL)

PROSECUTOR

-AND-

JOHN KELLY

ACCUSED

This is a Case Stated pursuant to Section 52(1) of the Courts (Supplemental Provisions) Act, 1961.

The following complaint was preferred in the Dublin Metropolitan District:

"That the defendant did on or about the 8th of January 2012 at Ballygall Road East, Finglas, Dublin 11 a public place in the said District Court area of Dublin Metropolitan District, did drive a mechanically propelled vehicle registration number OOD68570, while there was present in his body a quantity of alcohol such that, within three hours after so driving, the concentration of alcohol in his breath did exceed a concentration of 22 micrograms of alcohol per 100 millilitres of breath, to wit 70 micrograms of alcohol per 100 millilitres of breath contrary to section 4(4)(a) and (5) of the Road Traffic Act 2010."

The case came on for hearing on the 19th of April 2012, and after hearing the evidence adduced by and on behalf of the complainant, the matter was adjourned to the 2nd of May 2012, for the preparation of legal submissions and on that date, the undersigned, being one of the justices of the District Court assigned to the said district and sitting at the Court of Summary Jurisdiction at (insert District Court number and venue), and not having proceeded to a final determination of the said complaint do hereby refer a question of law arising to the High Court for determination.

I adjourned the said complaint to the day of the sitting of the District Court next after the expiration of 14 days from the day upon which the decision of the High Court shall be given.

In pursuance of the statutes in such case made and provided I do hereby state and sign the following case for the opinion of the High Court.

Case

I found the following facts:

At all material times the Defendant was the driver of a vehicle registration OOD68570. At approximately 5.00 a.m. on the 8th of January 2012 this vehicle was in collision with another vehicle.

The prosecutor spoke to the Defendant at the scene of the collision and formed the opinion that his speech was slurred, his eyes were glazed and also noticed an overwhelming smell of alcohol. She formed the opinion that the Defendant had committed an offence under Section 4(1), (2), (3) or (4) of the Road Traffic Act 2010 and that he was under the influence of an intoxicant to such an extent as to be incapable of having proper control of his vehicle in a public place.

Following caution she arrested the Defendant under Section 4(8) of the aforesaid offence and conveyed him to Ballyfermot Garda Station arriving there at 5.30 a.m.

Following observation the Defendant was taken to the doctor's room for the purpose of taking a breath specimen. Garda Irwin made a lawful requirement pursuant to Section 12(1)(a) of the Road Traffic Act 2010 that the Defendant provide two breath specimens. He did so and the Intoxilyser machine printed two identical Section 13 statements which gave a reading of 70 mg of alcohol per 100 ml of breath. These certificates were duly signed and handed in to court as evidence.

Mr. Oisín Clarke Barrister at Law, instructed by Cahir O' Higgins & Co. Solicitors, made the following submissions at the conclusion of the prosecution case:

He submitted that Garda O'Neill had told Garda Irwin that the Defendant was a "specified driver and that he had been treated accordingly."

It was an essential prosecution proof for an offence contrary to Section 4(4)(a) of the Act of 2010 that the prosecution prove in evidence that the Defendant was a "non specified person."

On the basis of above Mr. Clarke submitted that the charge should be dismissed.

I found as a fact that there was no evidence adduced that the accused was a specified person as alleged by Mr. Clarke.

In reply, Ms. Orla Keenan, a solicitor from the office of the Chief Prosecution Solicitor, submitted that the subject of a charge pursuant to Section 4(4)(a) is a "person" and not a non-specified driver /person.

I adjourned the hearing and sought written submissions on the following question of law:

"Is it an essential proof in a prosecution pursuant to Section 4(4)(a) of the Road Traffic Act, 2010 for the prosecution to establish either that the defendant is a 'specified person' within the meaning of s. 3(1) of the said Act, or that he is not a 'specified person' within the meaning of the Act?"

Submissions were duly delivered and are annexed to this Case Stated, I found as a fact that no evidence was adduced to the effect that the accused was a specified or a non-specified person. It seemed to me that having regard to the inclusion of the word "or" in Section 4(4) that the prosecution should prove either that a person was a specified person or in the alternative a non-specified person and I indicated that I was minded to dismiss the charge on that basis.

However, I indicated that I would adjourn the matter to the 16th of May 2012 with a view to either stating a consultative case stated should the prosecution so request or, in the absence of such request, to proceed to determine the matter on the above basis. On the 16th of May 2012 the prosecution indicated that they wished me to state a case for the determination of the High Court. And whereas I, the said justice, am of opinion that a question of law arises in the foregoing case do hereby refer the said question to the High Court for determination.

Question

The question upon which the opinion of the High Court is required upon the above statement of facts is "Is it an essential proof in a prosecution pursuant to Section 4(4)(a) of the Road Traffic Act, 2010 for the prosecution to establish either that the defendant is a 'specified person' within the meaning of s. 3(1) of the said Act, or that he is not a 'specified person' within the meaning of the Act?"