

THE HIGH COURT

[2014 No. 320 SS]

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

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA JOHN KELLY)

PROSECUTOR

AND

ETHAN SPENDLOVE

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered on the 20th day of November, 2014

1. This is a consultative case stated by Judge Patrick Durcan as follows:-

"1. At the sitting of the District Court held at Kilrush, Co. Clare on 16th April, 2013, Ethan Spendlove (hereinafter referred to as "the defendant") was represented before me to answer the offences set out in the following District Court summons

- (i) District Court summons; Case No. 2013/3816, External No. 47217503 which alleges the following offence;
A. That the defendant...on 19th November, 2012, at the Glen, Kilrush, Co. Clare, a public place in the said district area of Kilrush District No. 12, were (sic) the user of a mechanically propelled vehicle registration No. 89TN58, such vehicle being one for which neither a vehicle insurer nor an exempted person would be liable for injury caused by the negligent use of the said vehicle at that time and for which there was not then in force an approved policy of insurance as required by Part VI of the Road Traffic Act, 1961, as amended by Part VI of the Road Traffic Act, 1968, as amended. Contrary to s. 56(1) and (3) of the Road Traffic Act, 1961, as amended by s. 18 of the Road Traffic Act, 2006.
- (ii) District Court summons Case No. 2013/3816 External No. 47217511, which alleged the following offence:
B. That the defendant...on 19th November, 2012, at the Glen, Kilrush, County Clare, a public place, in the said District Court area of Kilrush District No. 12, was the user of a mechanically propelled vehicle, registration number 89TN58, (and) did fail to produce then and there on demand to a member of An Garda Síochána, either a certificate of insurance or a certificate of exemption in respect of (his) use of that vehicle on that occasion, and did fail within ten days after the date (on) which such production was demanded to produce such certificate in person to a member of An Garda Síochána at a garda station named by (him) at the time when such production was so demanded, contrary to s. 69(1) Road Traffic Acts, 1961 and s. 102 Road Traffic Act, 1961, as amended by s. 18 of the Road Traffic Act, 2006.
- (iii) District Court summons; Case No. 2013/3816 External No. 4721758, which alleges the following offence;
C. That the defendant did on 19th November, 2012, at the Glen, Kilrush, County Clare, a public place in the said District Court area of Kilrush, District No. 12, ...drive a mechanically propelled vehicle registration No. 89TN58 without holding a driving licence for the time being having effect and licensing you to drive such vehicle. Contrary to s. 38 of the Road Traffic Act 1961 (as substituted by s. 12 of the Road Traffic Act 2006) (which) provides the offence. Section 102 of the Road Traffic Act, 1961 (as substituted by s. 12(a) of the Road Traffic Act 2006) provides the penalties...

2. At the said hearing the Director of Public Prosecutions (hereinafter referred to as "the prosecutor") was represented by Superintendent Seamus Nolan. The defendant was represented by Michael Ryan, Solicitor, Vandeleur Street, Kilrush, County Clare.

3. The matter proceeded to hearing. At the said hearing the following facts were admitted or agreed.

(i) On 19th November, 2012, at the Glen, Kilrush, County Clare, a public place Garda John Kelly stopped the defendant who at the time was driving a motor vehicle bearing registration number and mark 86 TN 58. Garda Kelly asked the defendant to produce evidence of his insurance and driving licence.

(ii) The defendant produced an insurance certificate which was on its face a valid certificate of insurance covering the date of driving and a "driving learner permit".

(iii) The certificate of insurance in specifying the "drivers or classes of drivers whose driving is covered", indicated *inter alia*,

'E. the person(s) named in paragraph 6 above covered – Ethan Spendlove, provided that the person holds a licence to drive such a vehicle or, having held such a licence is not disqualified from holding such a licence.'

It is accepted that the defendant Ethan Spendlove never held a driving licence of any kind at any time, and it is further accepted that for the purpose of this Case Stated the only relevant document is the "learner permit". A copy of said learner permit is attached at annexe 2.

(iv) The learner permit in question issued on October, 24th, 2012, and is valid to October 23rd, 2014 and accordingly, subject to law and validity on the date the defendant was stopped by Garda Kelly.

(v) Section 35 of the Road Traffic Act, 1961 (as inserted by s. 11 of the Road Traffic Act, 2006) makes provision for the making of applications for learner permits and the granting of the learner permits. Section 35(4) of the Road Traffic Act 1961 provides that "a learner permit has effect in accordance with its terms and conditions".

Section 42(2)(k) provides for the making of regulations in relation to, "the conditions to attach to a learner permit and failure to comply with which makes the permit void".

The Road Traffic Licensing of Learner Driver Regulations 2007 (S.I. 719 of 2007) specifies, *inter alia*, that:

(a) the holder of a learner permit must at all times be accompanied by a driver who has a full driving licence for at least two years and not be disqualified; and

(b) that certain categories of holder of Learner Permit (Licences) (including the defendant in this case) must have certain type of "L" Plates.

(vi) The evidence in this case, which is accepted, was to the effect that the defendant at the time of detention (sic) was unaccompanied and his vehicle did not display "L" Plates.

(vii) Mr. Michael Ryan, solicitor for the defendant argued that the "learner permit" was a driving licence within the meaning of the Road Traffic Act, 1961 pointing out that on its face, the learner permit document made reference to "categories of vehicle for which (the) licence is valid". It was argued that this was a licence of the nature specified in the heading of the insurance certificate dealing with "drivers, or classes of drivers, whose driving is covered".

(viii) Garda John Kelly the prosecuting garda, argued that s. 42(2)(k) of the Road Traffic Act, 1961 is specific in indicating that if conditions prescribed in regulations are not complied with, the learner permit is void. In this case it was accepted that basic, but fundamental, conditions specified in the regulations had not been complied with.

4. In the light of the issues raised I now seek the opinion of the High Court upon the following question of law;

In determining the matter, I indicated that in my view a driving permit was a form of conditional licence, that the conditions provided by regulations had to be complied with for the permission to be activated and effective, that in this case the conditions had not been complied with, that the permit was not activated and the Defendant had not been licenced to drive on the date and at the place specified in paragraph 1 hereof was guilty of the offences described in paragraph 2 hereof and being more particularly specified in the Summonses attached hereto."

2. The question posed by the learned judge is whether a driver who is the holder of a valid learner permit licence may be convicted of driving without a licence, notwithstanding the fact that the licence is valid on its face and covers the date upon which the charge is alleged to have been committed, because the failure of the driver to observe the conditions of the permit licence in that he was not displaying "L" Plates and was unaccompanied by a qualified driver, renders the licence permit void and ineffective and whether that on the findings of fact made the learned District Judge would be correct to convict the defendant of driving without a valid driving licence "for the time being having effect".

3. The second question that arises concerns whether if by reason of the breach of the condition of the licence permit, it was rendered void or ineffective on the occasion of the driving, the learned judge would be correct to convict the defendant of driving without a valid insurance certificate, because the certificate of insurance specified that the defendant was covered if he held a licence to drive the vehicle or having held such a licence he was not disqualified from holding it. At the commencement of the hearing both parties indicated to the court that in the circumstances of this case the defendant could not be convicted of the insurance offences set out at A and B above, because he had a certificate of insurance which covered him on the day which was not made conditional in its terms on the accused complying with the terms of the learner permit.

Statutory Provisions

4. Learner permits are issued pursuant to s. 35 of the Road Traffic Act 1961 (as inserted by s. 11 of the Road Traffic Act 2006). Section 38(1) provides that a person shall not drive a mechanically propelled vehicle in a public place unless he holds a driving licence "for the time being having effect and licensing him to drive the vehicle". Section 38(2)(b) provides:-

"In a prosecution for an offence under this subsection, it shall be presumed, until the contrary is shown by the defendant, that he did not, at the time he drove the vehicle, hold a driving licence, then having effect and licensing him to drive the vehicle."

5. Section 42(2)(k) states that the Minister may make regulations to provide for all or any of the following:-

"...

(k) the conditions to attach to a learner permit and failure to comply with which makes the permit void;

..."

Section 42(6) provides that a person who contravenes a regulation under this section which is stated to be a penal regulation is guilty of an offence.

6. A learner permit may be issued under s. 35(4) of the Road Traffic Act 1961, as amended by s. 11 of the Road Traffic Act 2006. It is granted to a person who wishes to learn to drive a vehicle of any category in order to pass a test for a certificate of competency. Section 35(4) provides that:-

"A learner permit has effect in accordance with its terms and conditions."

7. The regulations in respect of the licensing of drivers are set out in the Road Traffic (Licensing of Drivers) Regulations 2006 (S.I. No. 537/2006) which regulate the application for and issuing of licence permits to drive provisionally, in particular Regulation 17(6)(b) provides, *inter alia*,:-

"Subject to subpara (c), a provisional licence, on coming into effect, entitles the holder of the licence to drive a vehicle of any category for which the licence is granted on any occasion during the period specified in the licence where the following conditions are complied with, namely that a person provisionally licenced to drive –

...

(iii) vehicles of category B...shall not drive such a vehicle unless there are displayed on the vehicle rectangular plates or signs bearing the letter "L" not less than 15cm high in red on a white ground, in clearly visible vertical positions to the front and rear of the vehicle,

(iv) vehicles of category B...shall not drive such a vehicle unless he or she is accompanied by and is under the supervision of a qualified person..."

A "qualified person" is defined by Regulation 17(6) as a person who holds a driving licence without disqualification for a period of two years in respect of the vehicle category being driven. Regulation 17(d) as substituted by Regulation 2(iii) of the Road Traffic (Licensing of Learner Drivers) Regulations 2007 (S.I. No. 719/2007) provides that:-

"(d) the holder of a provisional licence must comply with the conditions set out in paragraph (b) relating the category of vehicle which he or she is provisionally licenced to drive. This subparagraph is a penal provision."

This renders a breach of the aforementioned conditions subject to criminal prosecution.

The Law

8. The prosecutor submits that Regulation 17(6)(b) of S.I. No. 537 of 2006 entitles a learner permit holder to drive a vehicle "on any occasion" that, *inter alia*, the prescribed conditions are complied with, namely that the holder is accompanied by a fully licenced driver and that the L plates required are displayed. Section 35(5) provides that in a prosecution for an offence under s. 38(2):-

"It is a defence for the defendant to show that, at the time he or she drove the vehicle, he or she held a learner permit then having effect and permitting him or her to drive the vehicle."

Section 35(4) provides that:-

"A learner permit has effect in accordance with its terms and conditions."

Therefore, it is submitted that the learned judge was correct to conclude that he was entitled to convict the applicant of driving without a licence because when he was stopped he was not displaying "L" plates and was not accompanied by a qualified person, thereby rendering the learner permit ineffective because the defendant was not driving the vehicle in accordance with the terms and conditions of the permit. It is claimed that this failure rendered the permit "void" pursuant to s. 42(2)(k). This submission was carefully confined to the proposition that the word "void" meant, in effect, "temporarily of no effect". Thus, it was submitted that the defendant was guilty of the offence of driving without a licence if it was established that on the occasion upon which he was stopped he was driving the vehicle in breach of the statutory conditions the observance of which was essential to the continuing validity of the licence permit. If the permit holder failed to observe the conditions of the permit, it was rendered "void" to be construed as "temporarily of no effect" during the currency of the breach. The prosecutor did not contend that on the occurrence of the breach the licence permit was thereby rendered "void" for all purposes beyond the time span covered by the alleged unlawful driving. Opinion is sought solely in relation to the facts found in this case relating to the defendant's driving on 19th November, 2012.

9. A similar question was considered in the Scottish case of *Stewart v. Paterson* [1959] SLT 66. Under the Road Traffic Acts of 1930 and 1934 then applicable to Scotland, a person disqualified from driving was entitled to obtain and hold a provisional licence. Section 7(4) of the Road Traffic Act 1930, made the driving of a motor vehicle while disqualified an offence. Section 6(4) provided that a disqualified person shall "be entitled to obtain and to hold a provisional licence..., and to drive a motor vehicle in accordance with the conditions subject to which the provisional licence is granted". The Sheriff-Substitute held:-

"Thus, in the case of a person in the accused's position s. 7(4) of the 1930 Act still is effectual to make it an offence and a punishable offence, for him (1) to apply for and obtain a full driving licence, or anything but a provisional licence; or (2) to drive a motor vehicle otherwise than in accordance with the conditions applicable to the provisional licence held by him. The parallelism between subsection (a) of section 6(4) of the 1934 Act and section 7(4) of the 1930 Act is clearly deliberate and not accidental. For a person in the position of the accused, his only protection from the operations of the provisions of section 7(4) of the 1930 Act, when driving with a provisional licence is, accordingly, when he is driving in accordance with the conditions applicable to that licence, *i.e.* when, *inter alia*, he is displaying "L" plates and is accompanied by a duly qualified supervisor. If he omits either of these precautions, both of which are, incidentally detailed on the back of every driving licence, he is clearly to my mind guilty of a contravention of section 7(4) of the 1930 Act. To take any other view would, I am sure, be to disregard entirely the careful provision of section 6(4) of the 1934 Act."

10. A similar approach was adopted by the Queens Bench Division of the High Court of England and Wales in *Hunter v. Coombs* [1962] 1 W.L.R. 573, in which the defendant had been convicted of careless driving and disqualified from holding a driving licence until he passed a driving test in accordance with the relevant legislation. While lawfully holding a provisional licence under s. 109(3) of the Road Traffic Act then applicable, but before he had passed a driving test, he drove a vehicle on the road without displaying "L" plates. The justices before whom he appeared convicted the defendant of driving a motor vehicle while disqualified contrary to s. 110 of the Road Traffic Act 1960. It was submitted that the defendant could not on the facts have been convicted of driving while disqualified under section 110. Atkinson J. (with Lord Parker C.J. and Ashworth J. concurring) noted that the disqualification was not absolute and that the defendant was permitted to drive if he held a provisional licence under s. 109(3) of the Act. It had been submitted that s. 102(3) of the same Act which provided that a person to whom a provisional licence was granted was guilty of an offence if he/she failed to comply with any of the conditions subject to which it was granted was the offence with which the defendant should have been charged. Atkinson J. stated:-

"I recognise the force of that submission, and perhaps like the Sheriff in the Scottish case referred to *Stewart v. Paterson*, at the outset was not at all clear in my own mind that this defendant had in fact involved himself in an offence against s. 110, but in the end I arrived at a conclusion clearly to this effect that the defendant was...a person disqualified from holding or obtaining a licence, that while so disqualified he drove on the road, and that, therefore, he was *prima facie* guilty of an offence against s. 110 unless he came within the exception provided by s. 109(3), first by holding a

provisional licence, and secondly, by driving within the conditions subject to which that provisional licence was granted. In my view, by driving in breach of those conditions, by driving without "L" plates, the defendant did indeed offend against s. 110 of the Act of 1960."

11. The matter was again considered by the Queens Bench Division in *Scott v. Jeff* [1974] RTR 256, in which the court was once again dealing with a disqualified driver who was permitted under the legislation to obtain a provisional licence and drive in accordance with its conditions. The question posed for the court was summarised as follows by Lord Widgery C.J.:-

"Taking the test involves driving on a road and thus involves the obtaining by him of a provisional licence, as was done in this case. If the defendant had been driving on the road with a qualified passenger he would have committed no offence because, although still disqualified within the meaning of section 99, he would have the specific excuse provided for him by section 98(3). He did not have a qualified driver, and the issue in this case is whether the fact that he drove in defiance of the conditions attached to a provisional licence had the effect of removing the protection of section 98(3) altogether so as to make him a driver driving when disqualified, or whether it had the less draconian result of merely rendering him liable to be prosecuted under section 88(6) of the Act for failing to comply with the terms of a provisional licence."

12. Having reviewed the authorities he continued:-

"Thus, as far as the authority is concerned, it is in my judgment all against the defendant, and I come back to look at the section to see what its effect would appear to be in the absence of authority. I find myself left in absolutely no doubt that section 98(3) is carefully worded so as to allow a disqualified driver to use a provisional licence on the road provided he complies with the terms of the provisional licence. I think that is the only meaning which can be derived from the language used if given its ordinary meaning. The terms of section 98(3) provide an exemption for a disqualified driver driving on a road provided that he holds a provisional licence and drives in accordance with the provisions of that licence. I cannot understand why specific reference should have been made to driving in accordance with the conditions of the provisional licence unless it was intended that the exemption provided by the subsection should be restricted to those who drive in accordance with the provisional licence to which it refers." (MacKenna and May J.J. concurred)

13. The Court of Appeal in Northern Ireland in *McGimpsey v. Carlin* [1969] N.I. 116, considered a somewhat different provision. In that case the respondent had been convicted of a road traffic offence and disqualified from holding a driving licence. The disqualification continued until he had passed a driving test for the purpose of which he was permitted to obtain a provisional licence. Before taking the driving test he drove a motor car while unaccompanied by a qualified person contrary to the regulations attaching to provisional licensees, and was prosecuted for the offence of driving while disqualified. It was held by the Court of Appeal that the respondent's provisional licence continued in force, notwithstanding his breach of one of the conditions because in Northern Ireland, unlike Great Britain, the conditions attached to the licence holder rather than to the licence. Lord McDermott L.C.J. noted that the relevant subsection of the legislation which empowered the Minister to prescribe conditions and restrictions "applicable to persons to whom a provisional licence has been granted", meant that the conditions were not attached to the licence itself and breach of the conditions, therefore, had no consequences for the continuation of the licence for the duration of the period for which it was granted "the continuum of the licence was not broken or intended to be broken by the breach of condition".

14. In this case the legislation clearly attaches the conditions to the licence. Failure to comply with the conditions makes the permit "void". This case, therefore, is entirely distinguishable from the *McGimpsey* case, and I am satisfied that the answer to the question posed lies in the interpretation of the Irish provisions and the approach adopted in the Scottish and English cases relied upon in respect of similar provisions.

15. The provisions of the Road Traffic Acts and Regulations concerning the continuing validity of a learner permit licence indicate clearly that a breach of the conditions attaching to the licence render it "void" or at least "temporarily of no effect" (s. 42(2)(k)). Regulation 17(6)(b) entitles the holder to drive on any occasion when the conditions are complied with. Section 35(5) provides that in a prosecution for an offence under s. 38(2) it is the defence to show that at the time of driving, the driver had a learner permit "then having effect and permitting him or her to drive the vehicle". Section 35(4) provides that the learner permit has effect "in accordance with its terms and conditions". Section 38(2)(b) provides that in a prosecution for driving without a licence it should be presumed until the contrary is shown that the driver at the time of driving did not hold a driving licence "then having effect and licensing him to drive the vehicle". The conditions clearly attach to the licence and the failure to observe the conditions at the time of driving has the consequence as the licence does not "then" have effect.

Opinion

16. The following is the court's opinion in respect of the question posed:-

1. The defendant drove a mechanically propelled vehicle on 19th November, 2012, at a time when he possessed a learner permit licence valid to cover his driving on that date subject to his compliance with, *inter alia*, the two conditions that he be accompanied by a qualified driver and that he display "L" plates on the vehicle while he was driving, breach of which rendered the learner permit licence temporarily ineffective as a result of which he was driving a mechanically propelled vehicle in a public place whilst not holding a driving licence for the time being in effect and licensing him to drive the vehicle and on the facts accepted and established is liable to conviction for an offence contrary to section 38 of the Road Traffic Act 1961 (as amended).

2. The defendant should not be convicted of an offence contrary to s. 56(1) and (3) of the Road Traffic Act 1961, as amended by s. 18 of the Road Traffic Act 2006, or failure to produce a certificate of insurance or exemption in respect of the use of his vehicle on 19th November, 2012, contrary to s. 69(1) of the Road Traffic Act 1961, as amended, because he had a certificate of insurance which covered him on the date which was not made conditional in its terms on the accused complying with the terms of a learner permit licence.