Neutral Citation: [2014] IEHc 102

THE HIGH COURT

[2013 No. 2042 SS]

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857, AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND

PREZEMYSLAW CZYZAK

RESPONDENT

JUDGMENT of Kearns P. delivered on the 7th day of March, 2014

This matter comes before the Court by way of case stated by Judge Ann Watkin of the District Court pursuant to s. 2 of the Summary Jurisdiction Act 1857, as extended by s. 51 of the Courts (Supplemental Provisions) Act, 1961, and the Rules of the District Court.

It concerns the validity of an arrest under s. 5 of the Road Traffic Act, 2010. The facts may be summarised as follows:-

The accused appeared before the learned District Judge at the Criminal Courts of Justice, Dublin 8 on the 18th June, 2013, on foot of a charge sheet alleging that on the 4th April, 2013, at Ballymun in the City of Dublin, while being a specified person under Part 2 of the Road Traffic Act 2010, he was in charge of a mechanically propelled vehicle with the intent to attempt to drive the said vehicle (but not driving or attempting to drive) while there was present in his body a quantity of alcohol such that, within three hours after being so in charge, the concentration of alcohol in his breath exceeded a concentration of 9 micrograms of alcohol per 100 millilitres of breath, to wit, 82 micrograms per 100 millilitres of breath, contrary to s. 5(4)(b) and (5) of the Road Traffic Act 2010. The accused was also charged on a separate charge sheet with a separate offence under s. 13 of the Road Traffic Act, 2010, which is not the subject matter of the present case stated.

The facts stated to have been "proved or admitted or agreed and as found by the District Judge" are as follows:-

> "Garda Brendan Eddery gave evidence that on the 4th April, 2013, he was on patrol with a colleague when shortly before midnight they responded to a call of a suspected drink-driver at Harristown in Ballymun. On proceeding to that location and on approaching the motor vehicle which had been identified to him, Garda Eddery observed a male whom he now knew to be the accused, who appeared to be asleep in the driver's seat. The engine of the car was running, the car keys were in the ignition and the lights of the car were on. Garda Eddery knocked on the car window but failed to initially rouse the driver. He then opened the car door to find the accused with a smell of alcohol coming from his person. The garda said that when he roused Mr. Czyzak his eyes were glazed and his speech was slurred. Garda Eddery gave evidence that he asked the accused where he was going and he replied: 'I'm heading home to Finglas.' Garda Eddery said he formed his opinion that Mr. Czyzak was under the influence of an intoxicant to such an extent as to render him incapable of having proper control of a mechanically propelled vehicle in a public place. He further stated he had formed the opinion that the accused was in charge of the car and had 'intent' to drive. He then arrested the accused under s. 5 of the Act of 2010 and cautioned him in plain English that he was being arrested for being 'drunk in charge' of a vehicle. The accused replied by saying 'you're joking, that's ridiculous'. Garda Eddery then told the accused he was being arrested for being drunk behind the wheel of the car while the vehicle was running. He was thereafter conveyed to Ballymun Garda Station where, following the usual formalities, he was required to furnish two specimens of his breath. Following receipt of the two statements produced by the apparatus, the same were supplied to the accused with a request that he sign same. The accused declined to do so."

Following the examination of this witness by the prosecution solicitor, the learned District Judge states as follows:-

> "I indicated that my view is that the offences created by s. 5 of the Road Traffic Act, 2010, often referred to as 'drunk in charge' are not offences with which the public would be familiar when compared with the more well known and commonly prosecuted offences created by s. 4 of the Act of 2010, often referred to as drink-driving. Therefore, I indicated that I was of the view that when he was arresting the accused, Garda Eddery should have told the accused that he was being arrested for being drunk in charge 'with intent to drive' as being drunk in charge does not constitute an offence as such. I said that I was of the view that Garda Eddery had not given a sufficient communication of the reason for the arrest to allow the accused to understand why he was being arrested. Not only do the public frequently misunderstand the nature of the 'drunk in charge' offence, but many lawyers, gardaí and even judges can make the same mistake, in not appreciating that it is the intention to drive that is key to the formulation of the offence. Being drunk whilst in charge of a vehicle is not an offence unless one has an intention to drive it. The language used by the Garda misinformed the accused as to the reason for his arrest, because Garda Eddery specifically told the accused that he was being arrested for being drunk behind the wheel of the car whilst the engine of the car was running. I found as a fact that just because the accused told the Garda that he was 'heading home' did not indicate that he understood the reason for his arrest. I took the view and found as a fact that the accused, on the evidence before me, did not understand the reason for his arrest. This finding was reinforced by the evidence that when the accused was told by Garda Eddery that he was being arrested for being 'drunk in charge' of a vehicle, he responded by saying 'you're joking, that's ridiculous'. However, I was satisfied that the accused understood that he was being arrested for something to do with drinking and driving.
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> Ms. Staunton, for the prosecution, submitted that Garda Eddery had given evidence of his opinion that the accused had intent to drive and had given evidence that the accused had told him he was intending to drive home. She also submitted that the Garda had told the accused he was arresting him for being 'drunk in charge' and that, further, it must have been obvious to the accused what he was being arrested for, given the surrounding circumstances, keys in the ignition, engine running and lights on. I disagreed with these submissions for the reasons set out in detail above and found that the circumstances were not such as to make it obvious to the accused why he was being arrested. Having so found, I

therefore held the arrest to be unlawful. I therefore dismissed both charges. I held that the arrest was not a valid arrest because I was of the view that the Garda had not given a sufficient communication of the reason for the arrest. I then dismissed both charges."

Following her determination, the learned District Judge, at the request of the prosecution, furnished a case stated to this Court seeking its opinion on the following questions:-

> "(a) In circumstances where the accused did not understand the reason for his arrest, was it within my discretion to hold that the arrest was invalid for the reason set out above?
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> (b) If the answer to bracket (a) above is 'yes', did I then have discretion to dismiss both charges against the accused in the particular circumstances of this case?"

SUBMISSIONS

On behalf of the respondent, it was submitted that, in reality, the prosecution were seeking to appeal and displace findings of fact arrived at by the District Court Judge which were supported by evidence. Findings of primary fact by the trial judge should not be disturbed unless there is no evidence to support them. The rights available to the prosecutor were confined to those cases where it was alleged that the determination arrived at by the District Judge was erroneous in point of law.

In the instant case the finding made by the District Court that the accused did not understand the reason for his arrest was solely a question of fact. The finding that the accused understood his arrest to have what is nebulously phrased as "something to do with drink and driving" is not proof that he understood in substance the reason for his arrest. No issue of law arises for consideration. The District Judge had accurately analysed that "intention to drive" is the essential element of the offence. She had further correctly identified that the intention to drive is that which elevates being intoxicated whilst in charge of a vehicle to a criminal offence. There is no offence in Ireland of being in charge of a vehicle while intoxicated. This crucial distinction was appreciated and understood by the District Judge and it cannot reasonably be stated that this analysis went so far as to constitute a ruling that the *mens rea* of any suspected crime must be relayed to a person whom a garda proposes to arrest. The District Judge had merely indicated a view that the most essential and defining element of the offence should be communicated to a suspect.

On behalf of the prosecution it was submitted that it must have been obvious to the accused when told he was being arrested for being "drunk in charge" what he was being arrested for, given the surrounding circumstances, namely keys in the ignition, engine running and lights on. There is no requirement for a garda to set out all the elements of the offence, including the *mens rea*. The only reasonable possible inference from the facts was that it was obvious to the accused given the circumstances and his stated intention of "heading home", why he was being arrested and there was no need to particularise or subdivide the reasons for arrest any further.

The issue of whether the arrest was valid in this case was a clear question of law. There was no conflict about what was communicated to the accused at the time of the arrest. The accused had not given evidence because the learned District Judge essentially gave a direction on the invalidity of the arrest. In those circumstances there was absolutely no evidence before the judge that the accused did not understand the reason for the arrest or indeed as to what the accused might have thought were the reasons for his arrest. However, the judge had clearly accepted that he knew his arrest had to do with drinking and driving. That was sufficient, and it was incorrect in law for the learned District Judge to make the finding that an order for an arrest to be valid certain fixed words must be used in all cases.

Insofar as the respondent based his arguments on findings of fact made by the learned District Judge, the same were wholly unsupported by evidence and on this ground also an error in point of law had arisen. For the District Judge to hold that the arrest was invalid, there must have been clear evidence before the court that the accused did not understand the reason for his arrest because the explanation offered by the garda fell short of what was required. This could not be a subjective test of the appellant's belief, as it would leave the validity of every arrest in doubt if such an approach were to be adopted.

DISCUSSION

The law on what must be communicated to an accused at the time of arrest has been comprehensively set out in the case of *D.P.P. v. Mooney* [1992] 1 I.R. 548. In that case, it was argued that it was not sufficient for the arresting garda to say that he was arresting the accused for "drunk driving" (an offence which was then set out in s.49(1) of the 1961 road Traffic Act, as amended), when in fact the garda had formed the opinion that an offence under s. 49(2) or s. 49(3) had been committed. Blayney J. noted that the proofs were different for each offence, one offence related to not having proper control of the vehicle, one related to the concentration of alcohol in the blood and one related to the concentration of urine. However, Blayney J. held that it was sufficient for a garda to tell an accused that he was being arrested for "drunk driving" without giving the necessary specifics of the offence and the specific section under which he was being arrested. He stated the law as follows at pp. 552-554:-

> "In *The People v. Walsh* [1980] I.R. 294 O'Higgins C.J. at pp. 306-307 cited with approval the following passage from the speech in the House of Lords of Viscount Simon in *Christie v. Leachinsky* [1947] A.C. 573 at p. 587:-
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> > 'The above citations, and others which are referred to by my noble and learned friend, Lord du Parcq, seem to me to establish the following propositions.
> >
> > (l) If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words a citizen is entitled to know on what charge or on suspicion of what crime he is seized.
> >
> > (2) If the citizen is not so informed but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.
> >
> > (3) The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.

> (4) The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restrains on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.'
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> It is clear from the fourth of these propositions that a garda in making an arrest does not have to use technical or precise language. Provided the arrested person knows in substance why he is being arrested the arrest is valid. So telling the respondent that he was being arrested for an offence of drunk driving was a sufficient communication of the reason for his arrest since in my opinion that could mean any of the three offences under the section. It told the respondent in substance why he was being arrested. Furthermore, in view of proposition 3, which dispenses with the necessity of giving any reason where the circumstances are such that the person arrested must know the general nature of the offence for which he is being detained, it must be doubtful if Garda Cloughley was required to give any reason at all. As the respondent had been required to blow into the breathalyser, and the results had been positive, the respondent must have been well aware of why he was being arrested. However, as the respondent was in fact informed of why he was being arrested, this question does not arise."

The courts take a practical approach to the issue of whether the reason for arrest has been properly communicated. In the subsequent case of *D.P.P. v. Francis Connell* [1998] 3 I.R. 62, Geoghegan J. refused to hold an arrest invalid because the Garda had cited the incorrect statutory provision, that is, he had cited the Road Traffic Act 1994 when in fact the correct Act was the Act of 1961 as amended. Geoghegan J. held the arrest was valid and that the defendant would have known the reason for his arrest. He then went further in stating that in certain circumstances, it will be very obvious to an accused why he is being arrested at p. 67:-

> "Following *Director of Public Prosecutions v. Mooney* [1992] 1 I.R. 548, I likewise take the view that the evidence that Sergeant Connolly informed the accused in layman's language that he was being arrested for drunk-driving was sufficient communication of the reason for the arrest and indeed I further agree with the suggestion of Blayney J. that having regard to the fact that a breath test was taken and proved positive, it was not even necessary to state a reason. However, a reason which was sufficient was in fact stated."

In *D.P.P. v. McCormack* [1999] 4 I.R 158 McGuinness J. applied *Mooney* and *Connell*, and held that, even though a Garda did not cite the relevant statutory provision governing the arrest nor the reason for the arrest in ordinary language, nevertheless the circumstances were such that the accused must have known the reason for the arrest (the driver was stopped by gardai, his speech was slurred and he had a strong smell of alcohol on his breath; when asked to breathe into a breathalyser, the test was positive).

Indeed, the facts of the case of *DPP v. Thomas Moloney* [2001] IEHC 178 (Unreported, High Court, Finnegan P., 20th December, 2001) are similar to the facts of the present case. In *Moloney*, the prosecuting guard observed the accused's vehicle pulled up on a grass verge with the engine running and the keys in the ignition. He got a smell of alcohol from the accused and his speech was slurred. He gave a breathalyser sample which was positive, whereupon the Garda arrested him under the then s. 49 of the Road traffic Act 1961 and said he was arresting him for "drunk driving". Notwithstanding that the arrest was under s. 49, the accused was later charged under the then s. 50 of being "drunk in charge of the vehicle". By way of case stated, the High Court was asked to decide whether a person arrested under s. 49 for drunk driving could later be charged with being drunk in charge under s. 50.

Finnegan P. held that he could. However, he firstly examined the requirement that an accused know the reason for his arrest. He stressed that no technical precision is necessary and all that is required is that the accused is made aware of "the facts alleged to constitute crime on his part". He stated as follows:

> "In *Christie -v- Leachinski* [1947] 1 All ER 567 at 575, Lord Simmons in speaking of an arrest said that if a man is to be deprived of his freedom he is entitled to know the reason why. That rule he accepted is subject to qualification and the qualification relevant here is that an arrest does not become wrongful merely because a man is arrested for one felony, say murder, and he is subsequently charged with another felony, say, manslaughter. He goes on to say:-
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> 'These and similar considerations lead me to the view that is not an essential condition for lawful arrest that the constable should at the time of arrest formulate any charge at all, much less the charge which may ultimately be found in the indictment, but this, and this only, is the qualification which I would impose on the general proposition. It leaves untouched the principle, which lies at the heart of the matter that the arrested man is entitled to be told what is the act for which he is arrested. The "charge" ultimately made will depend on the view taken by the law of his act. In 99 cases out of 100 the same words may be used to define the charge or describe the act, nor is any technical precision necessary - for instance, if the act constituting the crime is the killing of another man, it will be immaterial that the arrest is for murder and at a later hour the charge of manslaughter is substituted. The arrested man is left in no doubt that the arrest is for that killing. This is, I think, the fundamental principle, that a man is entitled to know what in the apt words of Lawrence L.J. are "the facts alleged to constitute crime on his part'."

Finnegan P. then quoted from the case of *Gelberg v. Miller* [1961] 1 All E.R. 291, to stress once more that while an accused was entitled to know the act for which he was arrested, he did not need to be told of the precise indicia of the actual charge brought against him:-

> "Again in *Gelberg v. Miller* the appellant was arrested and at the time the constable told him that he was arrested for obstructing him in the execution of his duty by refusing to move his motor car. The appellant was charged with and convicted of wilfully obstructing a police officer in the execution of his duty contrary to s. 2 of the Prevention of Crimes Amendment Act, 1885 an offence which did not empower a constable to arrest without warrant. It was held that a power to arrest without warrant existing under s. 54 of the Metropolitan Police Act, 1839 and that accordingly having regard to what the appellant knew at the time of his arrest and what the respondent (the arresting constable) said to him before making the arrest was sufficient to satisfy the legal requirement for an arrest without a warrant, namely that the arrested person was entitled to know what was the act for which he was arrested and that it was immaterial that the charge ultimately brought against him was not a charge under the Metropolitan Police Act, 1839 section 54.
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> That the foregoing propositions represent the law in this jurisdiction is clear from the decision of Blayney J. in *D.P.P. v. Mooney* [1992] 1 I.R. 548 and of Geoghegan J. in *D.P.P. v. Connell* [1998] 3 1.R. 62."

Finnegan P. then went on to apply these principles in the *Moloney* case and concluded that the arrest was lawful as the accused would have been aware that the reasons for the arrest had to do with drunk driving.

> "… 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 Act, 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) [drunk driving] 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) [the section dealing with being drunk in charge] of the Acts."

I am satisfied that the foregoing judgments amply and coherently describe the nature of the obligation upon a garda who is effecting an arrest in these circumstances. He is not required to provide a detailed explanation or exposition of the nature of the offence such as might be outlined by defence counsel when seeking a direction for want of a detailed proof at the conclusion of the prosecution case in a criminal trial. It is sufficient that the person, prior to his arrest, be given sufficient information to know the nature of the offence, which in the instant case was one derived from his presence at the wheel of a motor car with its lights on and engine running where he stated to the garda it was his intention to go home (without indicating it was by means other than driving the vehicle in question) and where the garda had grounds for suspecting he had consumed an excessive quantity of alcohol. Indeed it might be said that the circumstances themselves adequately conveyed the reason for the arrest as per the third limb of the test outlined by the House of Lords in *Christies's* case. In any event the omission of the garda to expressly refer to the fact that the particularised nature of the offence was to be drunk in charge of the vehicle *with intent to drive* does not in my view amount to a failure to comply with the requirements of law once the application of an objective test to the factual evidence is sufficient to establish that any reasonable person must have known why he was being arrested.

In this regard, I cannot see how it could possibly be suggested that the test in question is a subjective one, given that the application of any such approach would mean that every arrest was liable to be impugned on the subsequent say-so of an accused person who would have every interest in advancing the contention that he did not properly understand why he was being arrested.

In so far as the facts of this case were concerned, the learned District Judge had no evidence from the respondent to place in the balance with that offered by the prosecuting garda which would suggest that the respondent failed to understand the reason for his arrest as described by the garda member.

The first question therefore in the case stated is one which does not admit of a straightforward answer. This is because the Court is entitled to consider whether incorrect inferences were drawn from the evidence adduced before the learned District Judge. In this regard, I am putting to one side entirely any suggestion advanced by the prosecution that the learned District Judge holds to a view that some sort of "fixed formula of words" must be deployed when making an arrest under s. 5 of the Act. The learned District Judge did not tie herself into any such rigidity in the case stated. However, I am of the view that there was in reality no evidence to support her conclusion that the respondent misunderstood or could have not understood why he was being arrested.

Even in the context of a case stated, the Court must take such considerations into account, as was made clear by O'Hanlon J. in *D.P.P. v. Gray* (Unreported, High Court, O'Hanlon J., 8th May, 1987) at p.3-5:-

> "It appears to me on reading the case stated that it discloses an error of law in the manner in which the learned District Justice evaluated the evidence. What he was required to determine was whether the Garda had arrived at an opinion which was reasonable in all the circumstances. As stated by Mr. Justice Costello in *Hobbs v. Hurley* (Unreported, 10th June, 1980):
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> > '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.'
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> The learned District Justice appears to me to have rejected the evidence of the Garda as unreasonable because it appeared to him (the District Justice) that there were other possible explanations for all the features of the defendant's conduct which were described by the Garda in evidence, not necessarily involving over-consumption of alcohol. This, however, could be put forward in every case, no matter what factual evidence led up to an arrest …
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> I am of opinion that the learned District Justice erred in law in concluding – as he appears to have done – that the possibility of innocent explanations for the matter which gave rise to the Garda's opinion was sufficient to invalidate that opinion. I would also hold that the findings of fact made by the learned District Justice on which he based his decision were wholly unsupported by evidence insofar as I can glean from the recital in the case stated, and on this ground also an error in point of law arose.
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> On the evidence given, even having regard to the criticisms made regarding same by the District Justice, I am satisfied that the Garda had ample grounds for forming the opinion which he says he formed, that the defendant was incapable by reason of consumption of intoxicant of having proper control of the vehicle, and that he did form such opinion, and was reasonable in doing so."

Similar views were expressed by Costello P. in *Proes v. Revenue Commissioners* [1998] 4 I.R. 174 at p. 182:-

> "(4) When the High Court is considering a case stated seeking its opinion as to whether a particular option was correct in law, it should apply the following principles. (1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them. (2) Inferences from primary facts are mixed questions of fact and law. (3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside. (4) If the judge's conclusions are not based on a mistaken view of the law, they should not be set aside, unless the inferences which he drew were ones which no reasonable judge could draw. (5) Whilst some evidence will point to one conclusion and other evidence to the opposite, these are essentially matters of degree and the judge's conclusions should not be disturbed, even if the court does not agree with them, unless they are such that a reasonable judge could not have arrived at them or they are

based on a mistaken view of the law (see *Ó Cúlacháin v. McMullan Brothers Ltd*. [1995] 2 I.R. 217 and *Mara (Insp. of Taxes) v. Hummingbird Ltd*. [1982] I.L.R.M. 421)."

In the circumstances, I would therefore hold that the answer to the first question must be that if an accused does not know the reason for his arrest, it is within the discretion of the judge to hold that the arrest was invalid. However, there was no evidence before the court that the respondent did not understand the reason for his arrest. It follows that the answer to the second question must be "No".