

THE HIGH COURT

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

2007 865 SS

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF GARDA JOHN P. HIGGINS)

PROSECUTOR

AND

BRIAN FARRELL

ACCUSED

JUDGMENT of Ms. Justice Clark delivered on the 16th day of July, 2009.

1. This is an appeal by way of case stated pursuant to s. 2 of the Summary Jurisdiction Act 1857 as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961 from a decision of Judge John Coughlan of the Dublin Metropolitan District convicting Brian Farrell on a charge that: *on the 20th February, 2006 at Neilstown Road, Clondalkin, Dublin, 22, he had with him a knife which had a blade or which was sharply pointed contrary to s. 9(1) of the Firearms and Offensive Weapons Act, 1990.*

2. The accused/appellant was unhappy with this decision and believes that his conviction was wrong in law. The learned District Judge found certain facts as proved, admitted or agreed as follows:

"On the 20th February, 2006, Garda Higgins was on patrol duty in a marked patrol car in and around Neilstown Road, Clondalkin, Dublin, 22. While on patrol he observed the car in which the accused was travelling. Garda Higgins gave evidence that there is a drugs problem in the Neilstown area, and for this reason he decided to stop and search the car under the Misuse of Drugs Act. In cross-examination, counsel for the accused did not question the Guard further in relation to the invocation or exercise of the power of the search.

After signalling for the car to stop, which it did, Garda Higgins spoke to the accused man who was one of the two occupants in the car. He demanded his name and address pursuant to the powers contained in the Road Traffic Act, and the accused gave his name and address as Gorey, Co. Wexford. Garda Higgins asked him what he was doing in Dublin if he had an address in Wexford. There was no evidence given during the hearing of the case concerning Mr. Farrell's response to this question, if indeed one was given. In cross-examination, it was the evidence of the Garda that nothing else was said between the respective parties prior to the search, other than this query in relation to the name and address. There was no evidence to suggest that the accused at any point objected to the searching of the car.

Garda Higgins proceeded to search the car and found therein a knife, which was produced in evidence before the Court. Having administered the legal caution, the accused was asked his reason for possessing the knife, to which he replied that he had brought it back from holidays. He followed this by saying that he used it to cut twine on the Christmas tree. In cross-examination the Garda stated that he did not believe this explanation in relation to the Christmas tree as it had been the 20th February when the accused had been stopped.

At the conclusion of the State's case, in which Garda Higgins was the only witness, counsel for the accused applied for a direction to dismiss the case on two separate grounds: the first being that the reason given by the Garda for searching the car under Misuse of Drugs Act - that there is a drugs problem in Neilstown - was not a suspicion specific to the accused and was not such as would grant a lawful search under the Misuse of Drugs Act, which he offered to open to the Court.

The second ground was that there was no evidence that the accused had ever been informed of the reasons justifying or the powers grounding the search and counsel again offered to open authority in support of this proposition - however, I did not consider it necessary to hear anything further in this regard.

Having considered these arguments I declined to dismiss the case. I found and ruled having been asked to do so, that the drugs problem cited by the Garda was referable to the accused and was sufficient to justify the search. (My emphasis)

The defence did not go into evidence and the accused man was convicted as charged and sentenced to two months imprisonment.

The opinion of the High Court is sought on the question as to whether I was correct in law in so doing, having regard to the suspicion cited by the prosecuting Garda, as well as the fact that the power of search was not recited to the accused on the day in question."

3. The appeal by way of case stated is dated the 17th December, 2007.

The Appellant's Submissions

4. Mr. Paul O'Higgins S.C. appeared on behalf of the appellant. He argued that the issue before the Court involved an extremely net question being, did Garda John P. Higgins have the power of search on the basis of his knowledge that there was a drugs problem in the Neilstown area of Clondalkin and, if such a power arises from this knowledge, was he obliged to invoke his powers under s. 23 of the Misuse of Drugs Act 1977, as amended, before conducting a search of the car?

5. It was argued that the statutory pre-condition that a member of the Garda Síochána must have reasonable cause to suspect that a person is in possession of a controlled drug has to be met before any search can be carried out. Mr O'Higgins submitted that in this case there is no evidence of any kind from which it could be inferred or held as a fact that Garda Higgins had any suspicion or, with more force, any reasonable cause to suspect that Mr. Farrell was in possession of a controlled drug before he searched the car.

6. The appellant accepts that a Garda is entitled to stop drivers of cars of whom he has no suspicion provided that he acts *bona fide* and does not do so in a capricious or arbitrary manner. He accepts that *D.P.P. (Stratford) v. Fagan* [1994] 3 I.R. 265, a decision of the Supreme Court, settles the issue that under the Road Traffic Acts there is an obligation on a driver to stop when requested to do so by a member of the Garda Síochána. The Supreme Court held in that case that while the powers of the Garda are finite and definable, they have a power at common law to stop cars in certain limited circumstances when, for instance:

- (1) From their observations it appears that the car may be used for a criminal purpose, or
- (2) When they are aware that a serious crime has been committed and there is a possibility of cars carrying the suspect away from the crime scene, or
- (3) To minimise the risks of drink driving.

7. None of these circumstances operated on the night that Mr. Farrell was stopped and moreover the findings of facts by the learned District Judge indicate that Garda John Higgins did not inform Mr. Farrell of his reasons for the search or of his statutory powers pursuant to s. 23 of the Misuse of Drugs Act 1977 or that he had a suspicion that the car contained drugs. This action he argued was contrary to the law set out in *DPP v. Rooney* [1992] 2 I.R. 7, following the authorities of *Christie v. Leachinsky* [1947] A.C. 573 and *The People (Attorney General) v. White* [1947] I.R. 247. The final case relied on by the appellant was *Simple Imports Limited v. Revenue Commissioners & Ors* [2000] 2 I.R. 243.

8. The appellant accepted that s. 23 of the Act of 1977 gives Garda Higgins general powers to stop, search and seize but argued that if the general awareness of Garda Higgins of a drug problem in the Neilstown area was a sufficient basis to allow him to search without a warrant, he should at the very least have informed the appellant of the statutory power under which he was acting. His failure to do so invalidated his search and any evidence obtained was tainted.

The Respondent's Arguments

9. Mr. Michael O'Higgins S.C. in reply said that the Court should distinguish between rights of the Gardaí and the powers of the Gardaí. At one end of the spectrum there is a range of Garda powers of arrest and detention and at the other end there is the power to stop a vehicle. The power to search is between the two ends of the spectrum.

10. Mr O'Higgins argued that a common law power to stop implies a power to search and that even if the Court were to find that the search was unlawful, it was still open to the Court to admit the evidence of the finding of the knife and to treat the unlawful search of the car as a breach of a common law right as opposed to a constitutional right. He argued that the facts of this case indicate a bank of evidence on which the District Justice relied to admit the evidence of the finding of the knife. This evidence was that:

- (1) There was a drugs problem in the Neilstown area.
- (2) The car was stopped in Neilstown.
- (3) When the Garda asked the occupants for their names and address, the appellant gave his address as being in Gorey.
- (4) The Garda citing the drugs problem in the area as his reason to stop and search under the Misuse of Drugs Act 1977 did not tell Mr. Farrell which statutory powers he was relying on.

11. At the hearing, when the District Judge was asked to rule whether there was a drugs problem referable to Mr. Farrell, the District Judge found that the problem could be referred to Mr. Farrell and therefore the Garda could, with reasonable cause, have suspected Mr. Farrell of being involved in drugs problem in the area. He found that the reference by the Garda to a drugs problem in the area grounded a reasonable suspicion and therefore gave him sufficient cause to search the car.

12. In *DPP v. Rooney* the decision was that before effecting an arrest, a suspect must be informed of the reason for the arrest. This applies with equal force to the search of a person but Mr O'Higgins argued that the obligation to inform does not extend to the search of a chattel. The *Rooney* decision makes a distinction between breach of a legal right and the breach of a constitutional right. Mr. O'Higgins submitted that it is not a breach of a constitutional right to search a car and that a distinction must be made between searching a dwelling place which has special protection under the Constitution and searching a chattel, such as a car, which does not. He relied on *DPP v. Cash* [2008] 1 I.L.R.M. 443, a recent decision of Charleton J., where he analysed at length the difference between the breach of a legal right and the breach of a constitutional right in relation to the admissibility of evidence.

Decision

13. It is quite remarkable that the questions raised in this case have not been determined previously bearing in mind that the Misuse of Drugs Act 1977 has been in operation for more than 30 years. The issues involve activity which must frequently occur in the fight against drug trafficking. Key to the questions at issue is first whether, when the car driven by Brian Farrell was lawfully halted by Garda Higgins on the night of the 20th February, 2006, Garda Higgins was empowered to conduct a search of Mr. Farrell's car and secondly, if he had such power whether he was obliged to inform Mr. Farrell the source of that power. These questions are set against the background that when Garda Higgins commenced the search, there was no reaction from the accused.

14. Section 23 of the Misuse of Drugs Act 1977, as amended by s. 12 of the Misuse of Drugs Act 1984, states as follows:

"(1) A member of the Garda Síochána who with reasonable cause suspects that a person is in possession in contravention of this Act of a controlled drug, may without a warrant -

(a) search the person and, if he considers it necessary for that purpose, detain the person for such time as is reasonably necessary for making the search,

(b) search any vehicle, vessel or aircraft in which he suspects that such drug may be found (and any substance, article or other thing on or in the vehicle, vessel or aircraft) and for the purpose of carrying out the search may, if he thinks fit, require the person who for the time being is in control of such vehicle, vessel or aircraft to bring it to a stop and when stopped to refrain from moving it, or in case such vehicle, vessel or aircraft is already stationary, to refrain from moving it, or

(c) examine (by opening or otherwise) and seize and detain anything found in the course of a search under this section which with such cause appears to him to be something which might be required as evidence in proceedings for an offence under this Act."

15. Sub-sections 1A to 1F, as inserted by s. 12 of the Act of 1984, are of no relevance to the present case. Of relevance however is sub-section 2 of s. 23, which provides:-

"Nothing in this section shall operate to prejudice any power to search, or to seize or detain property which may be exercised by a member of the Garda Síochána apart from this section."

16. Thus once a Garda has reasonable cause for suspicion that a person is in possession of controlled drugs contrary to the Act of 1977, he is empowered to detain and search that person and to stop, detain and search any vehicle, vessel or aircraft and seize and detain anything relevant to subsequent proceedings for an offence under the Misuse of Drugs Act 1977. This section of the Act of 1977 introduced a range of new police powers to deal with the growing evil associated with drug dealing generally and the recognition that vast quantities of drugs are transported by road, sea and air.

17. There is no dispute in this case regarding the legality of the stopping by Garda Higgins of Mr. Farrell's car that day. He was on patrol duty in a marked patrol car engaged in general observation of activity in the area in the knowledge of a drugs problem. The evidence is that when he saw Mr. Farrell's car he decided to stop it and search it relying on his specific powers provided by the Misuse of Drugs Act 1977. His reason for the stop and proposed search was the general suspicion legitimately held of a drugs problem in that area. The learned District Judge held that was a sufficient suspicion for the Garda to rely on his extensive powers under s. 23 of the Misuse of Drugs Act 1977. The appellant disputes that this non specific suspicion is enough. The question posed for determination by this Court is whether at the time when the Garda moved to search the car he had the power to do so and if so, should he (1) have informed Mr. Farrell of the reason for his search and (2) have informed Mr. Farrell that his power to search the car derived from s. 23 of the Misuse of Drugs Act 1977.

18. To go back to the charge in this case: possession of a prohibited weapon being a sharply pointed knife found in the boot of the appellant's car. There appears to be no dispute that such a knife was found in the car as it was produced in Court. The Prosecution had to establish the legality of the search for drugs during which the knife was discovered. Garda Higgins' evidence was unusually tight and he did not elaborate on the cause of his suspicion or the powers he relied upon to stop and search the car or even how he conducted the search or how he communicated his intentions to Mr. Farrell. No evidence was furnished of any suspicion that Mr. Farrell was in possession of controlled drugs in his car and the paucity of facts disclosed in the recounting of Garda Higgins' reasons for searching the car were not enhanced by any jogging of his memory or mending of fences by cross examination.

19. On the recited evidence there was nothing disclosed which put Mr. Farrell into any category of specific suspicion of the possession of drugs. Prior to receiving information on his identity and address, all that Garda Higgins knew was that the car was driven by a man with a male passenger in an area with a drugs problem. When halted and asked to provide his name and address the appellant answered that he was Brian Farrell from Gorey but according to Garda Higgins' evidence, he had already decided to stop the car and search it pursuant to the powers available him under of the Misuse of Drugs Act 1977. Was that general knowledge that there is a drugs problem in the area enough to constitute reasonable grounds for suspicion that Mr. Farrell was in possession of controlled drugs?

20. What constitutes a reasonable suspicion has been examined by the courts on many occasions. I cannot discern any difference between the phrase "reasonable cause" to suspect as used in s. 23 and "reasonable suspicion" and am of the view that the principles are the same. The authorities on reasonable suspicion all share the common thread that the suspicion must be fair and reasonable and honestly held on the basis of information available to the Garda at the time. This Court reviewed the authorities on what constitutes reasonable suspicion in *DPP v. Jonathan Finnegan* [2008] I.E.H.C. 347 (5th November, 2008) where the issue was whether the reasonableness of an arresting Garda's suspicion can be invalidated by subsequently established facts when all the relevant events have been investigated and the suspicion seems less solidly based. The principle being examined in this particular case is whether the generally held knowledge of a serious drugs problem in an area can be sufficient to establish reasonable cause for suspicion that a driver of a car in that area could be detained and his car searched pursuant to s. 23.

21. As guardians of the peace, with a duty not only to investigate crime but also to prevent its occurrence, members of An Garda Síochána are required on a daily basis to make on the spot decisions based on available information which may derive from no more than educated impressions. Once the actions of the Gardaí are reasonable and *bona fide* and there is

no evidence of abuse of power or arbitrary behaviour, the courts should be very slow to put technical procedural obstacles in the way of the day to day investigation of crime.

22. The Supreme Court in *Fagan* held that the operation of random checkpoints designed to combat the offence of drunk driving fell within the common law power of the Gardaí to detect and prevent crime. Blayney J. who delivered the decision of the Court in *Fagan* examined the pre-existing powers of the Gardaí at common law to investigate and prevent the commission of crime. He referred to the words of Lord Parker C.J. in *Rice v. Connolly* [1966] 2 Q.B. 414 at p. 419:

"It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice. "

23. Having considered the words of Lord Parker, Blayney J. stated at p. 274:

"It is clear from these statements in regard to the duties of the police at common law that part of the duties of the gardaí are to detect and prevent crime. It follows in my opinion that if, in order adequately to detect and prevent crime, they find it necessary to require motorists to stop, the common law gives them full power to do so."

24. In the later judgment of the Supreme Court in *Hayes v. Minister for Finance* [2007] I.E.S.C. 8 (23rd February, 2007) Kearns J. considered other powers of the Gardaí including the power to pursue a motorist. He stated:

"[...] this power exists for practical reasons to allow gardaí to carry out their duties effectively and expeditiously without being concerned with the legality of their actions or that the performance of their functions may carry sanctions which in turn might deter them from their duties. Nonetheless the court stressed in Fagan's case that these powers must be exercised bona fide and not in a capricious or arbitrary manner. I am satisfied that the silence in the legislation as regards the police power to pursue a motorist is confirmatory of a common law power to do so and that those powers must by implication include the power to operate random checks, erect road blocks and stop or pursue offending motorists."

Indeed in recent years the Oireachtas has seen fit to increase the penalties for dangerous driving and speeding. The gardaí have a clear obligation to ensure that these laws are upheld and to detect, prevent or stop any breaches thereof. In complying with these obligations it is obvious that the gardaí may owe different standards of care in a pursuit situation depending on the particular circumstances."

25. This reasoning could with equal force be applied to the detection and prevention of the possession and trafficking of drugs. I see little reason why, if a Garda can randomly stop a driver and speak to him/her in an attempt to detect drunk driving, the same Garda cannot also set up road blocks in areas known for the distribution of drugs to randomly stop and seek to search a vehicle in order to determine whether that vehicle is being used to transport drugs.

26. The powers granted by the s. 23 of the Misuse of Drugs Act 1977 go beyond the common law powers exercised by the police force in the prevention and detection of crime in that there is no requirement for the judicial oversight which occurs if a warrant is required for the search of a vehicle, vessel or aircraft and there is the right to search. It would be illogical therefore to interpret those powers as being less extensive than those at common law. I am reinforced in my view by the last paragraph of s. 23 of the Act of 1977 which states:

"(2) Nothing in this section shall operate to prejudice any power to search, or to seize or detain property which may be exercised by a member of the Garda Síochána apart from this section."

27. The plain and ordinary meaning of those words is that the existing common law powers are not in any way reduced by the provisions of section 23.

28. Following on from the guidance provided by the Supreme Court in *Fagan*, it seems to me that the positioning of the marked Garda car in the vicinity of an area where there is a known drugs problem in order to observe any possible drugs related activity was a proper exercise of good policing. There is no evidence that Garda Higgins was acting *mala fides* or that his behaviour was capricious or an abuse of his powers. He was empowered to stop without any specific suspicion any car in pursuit of the detection and prevention of crime. No objection can be taken to his requiring Mr. Farrell to stop his car and provide his name and address. However, I do not believe that his rights at common law extended to searching the car without permission in these circumstances.

29. Garda Higgins could have relied on his common law powers to stop and request permission to search the car without holding any specific suspicion against the driver and had he indicated in his evidence that he had done this, then I would agree with the finding of the learned District Judge that a general awareness of a drug problem in the area was sufficient to stop and seek consent to a search of the car under common law. The fact that Garda Higgins decided to do so without consent under s. 23 of the Misuse of Drugs Act 1977 meant that he had to have reasonable cause for suspecting that Mr. Farrell was in possession of a controlled drug. The reasonable cause to suspect Mr. Farrell simply did not exist. It may have been otherwise if, having asked to search the car, Mr. Farrell refused his consent. This may have given rise to a suspicion that he was concealing drugs but that was not the case here. It is therefore with some reluctance, in view of my belief that Garda Higgins had a common law power to stop and then ask to search the car, that I feel obliged to hold that the search was, in the circumstances, unlawful.

30. It was open to Mr. Farrell to ask why he was being stopped. The evidence, limited as it was, revealed that when Mr. Farrell was asked his name and address he gave his name and said he was from Gorey and that he was then asked what then he was doing on the Neilstown Road if he was from Gorey. Unfortunately, no assistance is provided to the Court in relation to his response as no evidence was provided on that point. As previously stated there is no evidence that Garda

Higgins said anything more. It is difficult to envisage how in those circumstances he indicated his intention to search the car. There is no information as to how the search was conducted or whether Mr. Farrell and the passenger got out of the car; whether he handed Garda Higgins the keys; whether the boot was opened and searched without the use of keys or whether it was locked and required some cooperation from Mr. Farrell. All these facts remain unsatisfactorily elusive. All we know is that there was no evidence that Mr. Farrell objected but I believe that the evidence is too nebulous to conclude that he consented to the search. Had he consented, the evidence of the finding of the knife would of course have been admissible.

31. This brings me to the next issue. While Mr. Farrell was entitled to ask why his car was being stopped and *a fortiori* why it was being searched, the corollary to this proposition is that he was entitled to be told that the reason for the stop and search was that there was a drugs problem in the area and that all cars travelling in the area were under suspicion. However there is no evidence that even this minimal information was provided.

32. It is well established since *Christy v. Leachinsky* that a subject must be informed of the reason for his arrest and since *Rooney* that the reason for any search of his person should be explained. The reasoning behind for these requirements is that any interference with a subject's right to personal liberty must be justified and the first step in this justification is to inform a person why he/she is being arrested. Similarly, a personal search may infringe on a right to bodily integrity and so the reason for the search should be stated. The obligations are general without being absolute as there will always be occasions where the exigencies are such that they do not permit opportunities to communicate such information or where the reason is obvious or where, as happens at airports and the entrance to many public institutions, persons impliedly consent to body searches.

33. No authority has been opened to the Court relating to the obligation on the part of the investigating Garda to inform a person of his specific power to conduct a search of his vehicle. The cases recited in *Rooney*, *Leachinsky*, *White* and *Simple Imports* are not of assistance on this particular issue. A car does not enjoy any of the constitutional protections afforded to the person or the home and can be searched without warrant when investigating suspected criminal activity. However two judgments which were not opened to the Court do provide some assistance as they are of some relevance to the issue of whether a person should be informed of the reasons for specific Garda activity when there is a compulsion to comply. *DPP (Sheehan) v. Galligan & Daly* (Unreported, High Court, Laffoy J., 2nd November, 1995) considered whether a person being asked to provide his name and address to a member of the Garda Síochána should be informed of the consequences of his failure to do so. Laffoy J. found that:-.

"In a prosecution for an offence contrary to Section 8 (2) of the [Criminal Justice (Public Order) Act 1994] there should be evidence before the court of trial that the accused was informed or was aware of the fact that if he did not comply with the direction being given to him by a member of the Garda Síochána he would be committing a criminal offence; no particular formula of words need be used to convey such a warning."

34. This decision was later followed by Ó Caoimh J. in *Bates v. Brady & D.P.P.* [2003] 4 I.R. 111, who at p. 120 cited the judgment of Laffoy J. as authority for the proposition that:

"It is clear that unless it can be shown that the accused was given the warning or knew that the failure to comply with the requirement would result in him committing a criminal offence, that the offence itself is not committed."

35. I can see no real difference between the requirement to inform a person in ordinary language why he is being stopped and personally searched or why he must provide certain information and the requirement to inform him why his vehicle is being searched. In all three circumstances a person's movements are being impeded and his privacy invaded and he should at least be told why these actions are being taken. I am therefore not inclined to accept the argument submitted by the respondent that there is no obligation to inform the driver present at the time of the reason for the search because the car is a chattel. On the other hand it would be unrealistic to expect the Garda to quote the source of his powers to search the car whether those powers derive from his common law or statutory powers.

36. I do not believe that the failure to recite the statutory basis for his power in itself rendered the finding of the knife inadmissible but there are other omissions of a more serious nature which affect the legality of the search. The main determination of the issue remains: while I believe that Garda Higgins enjoyed a common law right to stop and seek consent to search Mr. Farrell's car on the basis of the prevention and detection of criminal activity associated with the drugs problem in the particular area, the fact that he specifically relied on his powers under the Misuse of Drugs Act 1977 to search the car means that he had to have reasonable cause for suspecting that Mr. Farrell was in possession of controlled drugs. He could not on the evidence before the learned District Judge have had that suspicion.

37. On that basis I answer the first question in the negative. There was no evidence that Garda Higgins was entitled to rely on his powers under s. 23 of the Misuse of Drugs Act 1977 to search his car.

38. I find that there was an obligation to inform the driver generally why his car was being searched but no obligation to inform him specifically as opposed to generally of the Garda's power to search the car.