

THE HIGH COURT

Record No. 2013/313 SS

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

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA LOUISE MCCONNELL)

Prosecutor

AND

RICHARD MCDONNELL

Accused

Judgment of Ms. Justice Iseult O'Malley delivered the 31st January, 2014

Introduction

1. This is a consultative case stated by District Judge William Hamill.

2. The issues in the case concern, firstly, the lawfulness of a search of the clothing of the accused carried out in hospital while the accused was receiving medical treatment and, secondly, the consequences of any illegality attaching thereto.

3. The accused appeared before the District Court charged with the following offences:-

i. On the 18th July, 2010 at Our Lady of Lourdes Hospital Drogheda in said District Court Area of Drogheda, being a person in respect of whom the provisions of Section 15(1) of the Road Traffic Act, 1994 then applied, having been required by Garda Louise Anne McConnell a Member of An Garda Síochána pursuant to section 15(1) of the Road Traffic Act to permit a designated Doctor to take from him a specimen of Blood or at your option a specimen of Urine did REFUSE to permit the doctor to take from you a specimen of your blood contrary to section 15(2) of the Road Traffic Act 1994 as amended by section 18 of the Road traffic Act 2006.

ii. On the 18th July, 2010 at Cherrybrook Drive Drogheda Co. Louth a public place in the said District Court Area in Drogheda, did drive a vehicle, registration number 01-LH 7395 in a manner (including speed) which having regard to all of the circumstances of the case (including the condition of the vehicle, the nature, condition and use of such place and the amount of traffic which then actually was or might reasonably be expected then to be therein was dangerous to the public. Contrary to section 53(1) of the Road Traffic Act 1961 as amended by section 51 of the Road Traffic Act 1961 as amended by section 51 of the Road Traffic Act 1968 and as amended by section 18 of the Road Traffic Act 2006;

iii. On the 18th July, 2010 at Our Lady of Lourdes Hospital Drogheda in said District Court Area of Drogheda had unlawfully in your possession a controlled drug to wit Cocaine contrary to Section 3 and section 2 7 of the Misuse of Drugs Act 1977 (as amended by section 6 of the Misuse of Drugs Act 1984).

The Case in the District Court

4. The evidence is summarised in the case stated as follows:

"At a sitting of the Drogheda District Court held on the 24th February, 2012 Richard McDonnell (hereinafter referred to as 'the accused') appeared by way of summons charged with offence(s) under section 15(2) of the Road Traffic Act 1994 for an alleged failure to comply with the requirement of Garda Louise McConnell (herein the prosecutor) made pursuant to 15(1)(b)(i) of the aforementioned Act and an offence under section 53 of the Road Traffic Act 1961 as amended namely dangerous driving and a further charge under section 3(1) of the Misuse of Drugs Act 19 77 for possession of a controlled drug namely cocaine ...

The facts proved or admitted or agreed and as found by me were as follows:

(a) On the 18th July, 2010, Garda Louise McConnell (herein the prosecutor) received a report of a single vehicle collision at Marley's Lane Drogheda a public place. On arrival at the scene the prosecutor observed motor vehicle registration O1 LH 7385 crashed on its roof with the accused injured and trapped inside the vehicle.

(b) The prosecutor contacted emergency services and both fire and ambulance personnel subsequently attended at the scene of the accident. The accused was stabilised and treated at the scene before being transported by ambulance to Our Lady of Lourdes Hospital Accident and Emergency Department where he came under the care of Dr. Fawad the A/E registrar on duty. The prosecutor travelled to the hospital with the accused in the ambulance.

(c) The prosecutor confirmed that a registration check had been carried out on the vehicle and the name "Richard McDonnell" with an address was provided. The prosecutor confirmed that subsequent to his arrival at hospital the accused was coherent and responded to the name "Richard McDonnell" from conversations with the medical staff treating him at the hospital.

(d) The prosecutor stated in her direct evidence that in an effort to confirm the identity of the accused she searched the accused's clothing which had been cut off him by the medical staff and placed on a table or locker

beside his bed in the Accident & Emergency Department of the Lourdes Hospital, Drogheda.

(e) The prosecutor stated in evidence that as a result of that search she found two bags of what she described in her statement as suspicious white powder in his jeans and as a direct result of this she formed her opinion that the accused was under the influence of an intoxicant.

(f) Subsequently having spoken to Dr. Fawad, he then permitted the prosecutor to make a demand of the accused under section 15 of the Road Traffic Act 1994 for the accused to provide a specimen of blood or at his option a specimen of urine in accordance with section 15(1)(b) of the Road Traffic Act 1994.

(g) The prosecutor gave evidence that a demand was made of the accused and the penalties were outlined to him under section 15(2) of the Road Traffic Act 1994 and having made that requirement the accused refused to provide a sample. The accused was later charged by way of summonses.

Counsel for the accused Mr Hennessy cross-examined the prosecutor with particular emphasis on the search of the accused's clothing and whether there was any lawful authority for such a search. It was put to the prosecutor that she had no lawful authority to search the accused's clothing in circumstances where the accused had not been detained, arrested or made the subject of a demand under section 23 of the Misuse of Drugs Act.

Under cross-examination the prosecutor confirmed that "in her mind" she was relying on section 107 of the Road Traffic Act 1961 as the lawful basis of her search whilst accepting she did not specifically invoke the section or inform the accused of same.

Counsel for the accused put it to the prosecutor that there was no power of search under section 107 of the Road Traffic Act 1961 and even if there was the prosecutor would be required to formally invoke the provision as it was a penal statute which carried penalties.

Under further cross examination the prosecutor confirmed that she did not seek the permission of the accused nor did he consent to her carrying out the search of his clothing.

The prosecutor confirmed in her evidence that as a result of finding two bags of white powder in the defendant's jeans she formed the opinion that the accused was driving under the influence of an intoxicant and having formed that opinion the prosecutor subsequently made a demand of the accused to provide a specimen of blood or at his option a specimen of his urine pursuant to section 15(1) of the Road Traffic Act 1994. The accused failed to comply with the requirement and was subsequently prosecuted.

Evidence was heard from two civilian witnesses in respect of the dangerous driving charge and it was accepted the accused has a case to answer in respect of section 53 of the Road Traffic Act 1961 as amended. This completed the evidence of the prosecution. "

5. The case was then adjourned for the preparation of written and oral submissions on the issues raised. At the adjourned hearing Counsel for the accused applied for a direction in respect of the charges under s.3(1) of the Misuse of Drugs Act, 1977 and s.15(2) of the Road Traffic Act, 1994 on the basis that the prosecutor had no lawful authority to search the accused's clothing. The accused had not been under arrest or detained for the purpose of a search under the Misuse of Drugs Act, 1977, nor did he consent to the search. It was further submitted that anything flowing from an illegal search would be unlawful, including the seizure of the substance found and the opinion formed in relation thereto. The opinion could thus not be relied upon to underpin the subsequent demand made under s.15(1)(b) for the blood or urine specimen. Counsel relied upon the decisions in *DPP v Rooney* [1992] 2 I.R. 7, *DPP v Gaffney* [1987] I.R. 173 and *DPP v McFadden* [2003] 2 I.R. 105.

6. The prosecution contended that the opinion formed was valid and genuinely held and that it was not necessary to prove the basis for it. In this regard the judgment of Quirke J. in *DPP v Duffy* [2000] 1 I.R. 393 was relied upon. It was further argued that this had been an emergency situation in which the prosecutor was endeavouring to establish the identity of the accused. However, it was conceded that there was no power of search under s.107 of the Road Traffic Act, 1961.

7. It may be noted that the learned District Judge inquired of the Inspector making the submissions whether he agreed that if the search was illegal everything that followed was tainted by illegality and must fall. While maintaining that the search was lawful the Inspector agreed with the proposition.

8. On the 8th February, 2013 a case was stated by the learned District Judge seeking the opinion of the High Court on the following questions:-

(i) In all the circumstances, did the manner in which Garda O'Connell discovered the white powder in the clothes of the accused amount to an unlawful search?

(ii) If the answer to question 22(i) is in the affirmative, may the Garda rely on the fact of such discovery and form a lawful opinion that the person consumed an intoxicant as provided for in s.15(1)(b) of the Road Traffic Act 1994 and in consequence make a lawful demand of that person that he provide a sample of blood or urine pursuant to the provision of Section 15(1) of the Road Traffic Act, 1994?

Statutory Provisions

9. Section 15 of the Road Traffic Act 1994 provides:-

(1) Where, in a public place, an event occurs in relation to a mechanically propelled vehicle in consequence of which a person is injured, or claims or appears to have been injured, and is admitted to, or attends at, a hospital and a member of the Garda Síochána is of opinion that, at the time of the event,-

(a) the person was driving or attempting to drive, or in charge of with intent to drive or attempt to drive (but not driving or attempting to drive), the mechanically propelled vehicle, and

(b) the person had consumed an intoxicant,

then such member may, in the hospital, require the person either-

(i) to permit a designated doctor to take from the person a specimen of his blood, or

(ii) at the option of the person, to provide for the designated doctor a specimen of his urine, and if the doctor states in writing that he is unwilling, on medical grounds, to take from the person or be provided by him with the specimen to which the requirement in either of the foregoing sub-paragraphs related, the member may make a requirement of the person under this subsection in relation to the specimen other than that to which the first requirement related.

(2) Subject to section 23, a person who, following a requirement under subsection (1)-

(a) refuses or fails to comply with the requirement, or

(b) refuses or fails to comply with a requirement of a designated doctor in relation to the taking under that subsection of a specimen of blood or the provision under that subsection of a specimen of urine, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or to both.

(3) Notwithstanding subsection (2), it shall not be an offence for a person to refuse or fail to comply with a requirement under subsection (1) where, following his admission to, or attendance at, a hospital, the person comes under the care of a doctor and the doctor refuses, on medical grounds, to permit the taking or provision of the specimen concerned

(4) Omitted

10. Section 107 of the Road Traffic Act, 1961 provides:-

(1) Where a member of the Garda Síochána alleges to a person using a mechanically propelled vehicle that the member suspects that such person has committed a specified offence under this Act, the member may demand of such person his name and address and may, if such person refuses or fails to give his name and address or gives a name or address which the member has reasonable grounds for believing to be false or misleading, arrest such person without warrant.

(2) Where a member of the Garda Síochána has reasonable grounds for believing that an offence under this Act has been committed and that the vehicle in relation to which the offence was committed does not carry its identification mark under the Roads Act, 1920, or any other enactment, the member may arrest without warrant the person whom he has reasonable grounds for believing was using the vehicle when the offence was so believed to have been committed

(3) Where a person, when his name and address is demanded of him under this section, refuses or fails to give his name and address or gives a name or address which is false or misleading, such person shall be guilty of an offence.

(4) Where a member of the Garda Síochána has reasonable grounds for believing that there has been an offence under this Act involving the use of a mechanically propelled vehicle-

(a) the owner of the vehicle shall, if required by the member state whether he was or was not actually using the vehicle at the material time and, if he fails to do so, shall be guilty of an offence,

(b) if the owner of the vehicle states that he was not actually using it at the material time, he shall give such information as he may be required by the member to give as to the identity of the person who was actually using it at that time and, if he fails to do so, shall be guilty of an offence unless he shows to the satisfaction of the court that he did not know and could not with reasonable diligence have ascertained who that person was,

(c) any person other than the owner of the vehicle shall, if required by the member, give any information which it is in his power to give and which may lead to the identification of the person who was actually using the vehicle at the material time and, if he fails to do so, shall be guilty of an offence.

(5) A person who is guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding fifty pounds or, at the discretion of the court, to imprisonment for any term not exceeding three months or to both such fine and such imprisonment.

Submissions on the case stated

11. On behalf of the accused, Mr. Feichin McDonagh S.C submitted that the prosecutor carried out a search of the Defendant's clothing without his consent and without any other lawful authority. The search was, in the circumstances, in breach of the defendant's right to privacy under the Constitution and under Article 8 of the European Convention on Human Rights. As a consequence, the charge in relation to the possession of cocaine must fall. It was further contended that the charge of refusing to provide a specimen must also fall, since the offence was predicated upon a lawful demand having been made. The demand could not be lawful where the suspicion grounding it was based upon the unlawful search.

12. The argument in relation to the unlawfulness of the search was made by reference to the cases of *DPP v. McFadden* [2003] 2 I.R. 105, *DPP v Gaffney* [1987] 1 I.R. 173 and *DPP v Rooney* [1992] 2 I.R. 7.

13. As regards the demand for a specimen, it was contended that the opinion of the prosecutor was based solely on the illegal and

unconstitutional search, there being no evidence of any other facts relied upon by her. There was, therefore, a nexus between the unlawful act of the Garda and the suspicion formed by her which, it was submitted, is not to be found in cases such as *DPP v Cash* [2010] 1 I.R. 609. That being so, the requirement was not lawful, and a refusal to comply with an unlawful requirement could not amount to an offence.

14. On behalf of the DPP, Paul Anthony McDermott B.L submitted that the search was legal and that, even if it were not, in the particular circumstances of the case, that would be no bar to the fruits of the search being relied upon by the prosecution.

15. It was submitted that no express statutory power was required for the search and that it was in the accused's best interests that his identity was double checked "given the potentially serious position he found himself in having been cut from a car and taken to accident and emergency". It was suggested that the hospital staff could lawfully have done the same thing, or a passerby at the scene of the accident. Not every action of a Garda, it was argued, requires statutory authority.

16. In the alternative, it was argued that if the garda was not lawfully entitled to search for the reasons stated by her in evidence, the search was at worst unlawful. It was not the accused who was searched but his trousers, which had been cut away from him. It was therefore contended that the case law relied upon by the accused in relation to the powers of Gardaí to search a person does not apply. There was no breach of any constitutional right.

17. It was further submitted that even if the search was not lawful, its fruits could nonetheless form the basis for the opinion required to ground a lawful demand under s.15. On the authority of *DPP v Cash* [2010] 1 IR 609 it was argued that it was not necessary for the prosecution to establish a lawful basis for the reasonable suspicion required to ground a lawful arrest. Therefore, by analogy, the prosecution does not have to prove that the basis for the making of a demand under the Road Traffic Acts is lawful in order for the evidence to be admissible.

18. Finally, it was submitted that, if the search was found to have involved a breach of the accused's constitutional rights, the court should either find that there were extraordinary excusing circumstances or should adopt the analysis of Charleton J. in *Cash*, leading to a finding that the rule excluding evidence obtained on foot of such a breach does not accord with modern concepts of a fair trial.

19. In response to this last submission Mr. McDonagh said that the learned District Judge had not sought any opinion on admissibility or on the distinction between unconstitutionally and illegally obtained evidence.

The first question - the legality of the search

20. In *People (DPP) v. McFadden* [2003] 2 I.R. 105, the accused had been arrested on suspicion of drink driving and taken to a Garda station. There, he consented to a search of his person by the member in charge. That officer took the accused's wallet out of his pocket, whereupon the accused objected to a search of its contents. The Garda continued with the search, without informing the accused as to the reason, or any lawful authority, for so doing. The subsequent explanation for this was that the accused had given an address from outside the jurisdiction and the Garda wished to see if there was any material confirming his identification. In the wallet he found a piece of paper which contained personal details and information on the movements of a superintendent in the Royal Ulster Constabulary. On the basis of this evidence, the accused was convicted in the Special Criminal Court of being in possession of information of such a nature that it was likely to be useful in the commission by members of an unlawful organisation of a serious offence.

21. The accused appealed against the conviction on the basis that the search of the wallet was unlawful and that therefore, the evidence obtained was inadmissible. The argument advanced was that, in the absence of consent, a search could only proceed where the Garda had lawful authority to carry it out and informed the person concerned of that authority and the reason for the search. Where these requirements were not met the search in question was a violation of the person's constitutional right to privacy.

22. In allowing the appeal, the Court of Criminal Appeal considered and followed the decisions of O'Hanlon J. in *D.P.P. v. Rooney* and in the Court of Criminal Appeal in *The People(D.P.P.) v. O'Donnell* [1995] 3 I.R. 105.

23. Rooney concerned the lawfulness of a search of the accused's pockets by a garda. Objection having been taken at the trial to the admissibility of the resulting evidence, the prosecution relied upon the power under s. 29 of the Dublin Police Act, 1842 to stop and search "any person who may be reasonably suspected of having or conveying in any manner any thing stolen or unlawfully obtained". Applying the principles of *Christie v. Leachinsky* [1947] A.C. 573 and *The People (Attorney General) v. White* [1947] I.R. 247 (relating to the obligation of a police officer to inform an arrested person as to the reason for his arrest), O'Hanlon J. held that before the power of search could lawfully be exercised, the suspect was entitled to be informed of the nature and description of the statutory power being invoked.

24. In *O'Donnell*, a Garda had commenced searching the accused. The latter did not object until the search reached a certain stage, whereupon he withdrew his co-operation. The officer then informed him of his power of search. Giving the judgment of the Court of Criminal Appeal, O'Hanlon J. held that

"It is only when the co-operation of the citizen is withdrawn, and it is necessary to fall back on powers of compulsion under common law or under statute, that the necessity arises for the Gardaí to invoke such powers and at that stage to inform the person against whom it is sought to exercise them of the legal justification for any interference which is to take place with his or her rights under the Constitution."

25. At p. 109 of the report in *McFadden*, Keane C.J. said:

"The evidence in this case established beyond doubt that the search of the accused was conducted at the outset with his consent. It is also clear, however, that he never consented to any examination of the contents of his wallet or to the retention by the Gardaí of the document found by them in the wallet and indeed that he objected to the search by Garda McHugh of his wallet. A member of An Garda Síochána cannot engage in such a procedure without the consent of the person whose person, property or effects are being searched unless it is authorised by law. "

26. The accused in that case was under lawful arrest at the time, and thus both the common law power of search of an arrested person and the power of search under the regulations made pursuant to the provisions of the Criminal Justice Act, 1984 were available to the garda. However, the failure of the garda to give any explanation to the accused as to why he was searching the wallet was a breach of the "fundamental requirement" that a police officer who is carrying out a search of a person without his consent informs that person of the legal justification for so interfering with his constitutional rights.

27. In its concluding remarks the court said:

"It is true that an examination of the contents of a person's wallet is not as intrusive or demeaning as a so-called strip search. The same, however, could be said of a search of a person's outer garments and it could not be suggested that such a search could lawfully be carried out without a person's consent save for a reason recognised by law of which he or she is informed at the time.

Since it is clear that the evidence so obtained in breach of the applicant's constitutional rights was the only evidence on which the conviction was founded, it follows inevitably that it must be quashed. "

Conclusions on the first question

28. In my view these authorities are dispositive of the first issue in the instant case. It is clear that Garda did not seek and did not have the consent of the accused. She had no other lawful authority for her actions in searching the pockets of the accused's jeans. The argument her actions might be justifiable in an emergency situation does not, in truth, arise - it simply is not borne out by the evidence. The accused had already given his name, which was confirmed by the registration check. If there was any reason to disbelieve the information at that stage she had powers available to her under the Road Traffic Acts, but it was not suggested that that was the situation. On the evidence, it appears that this was a suspicionless search. Gardaí have no general right to behave in such a fashion, any more than any other citizen has a right to search through the property of another in the absence of sufficient lawful reason.

29. I do not think that the argument made on behalf of the prosecutor that no constitutional right was involved can succeed. The fact that the jeans had been cut off the accused in the hospital did not render them any the less his property, nor reduce his legal entitlement to consider them private. The contents of the pockets of clothing removed from a person are, in my view, protected by the privacy rights of the owner to the same extent as a wallet removed from the person, as in *McFadden*.

The second question

30. In *DPP v. Cash*, the issue concerned the validity of the suspicion of an arresting officer. In the trial the defence put the prosecution on proof of the legality of the taking and retention of certain fingerprints, which grounded the suspicion justifying the arrest, but were not intended to be produced in evidence. The Gardaí were not in a position to prove that they had lawfully obtained the prints. The defence contended that the exclusionary rule established by the Supreme Court in *People (DPP) v. Kenny* [1990] 2 I.R. 110 applied unless such proof of lawful provenance was adduced.

31. Rejecting that contention in his judgment on the case stated, Charleton J. said that it had never been held

"that what would found a reasonable suspicion in law, requires to be based on the kind of evidence that would be admissible under the rules of evidence during the hearing of a criminal trial".

32. He took the view that the accused was trying to insert the rules of evidence into police procedures, where they had no place.

33. The judgment of majority of the Supreme Court, given by Fennelly J., referred to the decision of that Court in *Kenny* and cited the following passage from the judgment of Finlay C.J. :

"I am satisfied that the correct principle is that evidence obtained by the invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in its (the court's) discretion."

34. Fennelly J. observed that the appellant was attempting to extend the boundaries of *Kenny* in two ways - to include material providing the basis for the formation of a suspicion of guilt, although it was not offered in evidence; and to apply the principle to material that had not been obtained for the purpose of the particular criminal investigation. He did not consider that to be a correct interpretation and agreed with the analysis of Charleton J. in the passage cited above. It was emphasised that the lawfulness of an arrest and the admissibility of evidence in a trial were different issues, to be considered in different contexts. An arrest, it was said, might be unlawful for a variety of reasons:-

- If it is not justified by power conferred by common law or by statute;
- If it is made without reasonable cause or suspicion, depending on the statutory formulation;
- If it is made for a purpose other than that authorised.

35. However, a lawful arrest may be based on matters that are not themselves admissible but that give rise to a reasonable suspicion - for example, hearsay information, or the state of mind in which a police officer may say "I suspect, but cannot prove".

36. Fennelly J. concluded that

"... the accused has not established that an onus rests on the prosecution to establish the lawful provenance of material relied upon by a member of An Garda Síochána or that such material was obtained without breach of a constitutional right to form reasonable cause justifying an arrest. "

Conclusions on the second question

37. On this issue, I consider that the evidence required to prove a lawful demand is comparable to that required for a lawful arrest. It is correct to say that the demand must be authorised by law and must be lawfully made. The opinion grounding the demand must be genuinely and reasonably held, and obviously the demand must not be made for a purpose other than that authorised. However, there is no requirement that the opinion be based upon matters that would in themselves be admissible. To rule otherwise would be to import the rules of evidence into the process of investigation, and to require the prosecution to establish that no part of the material revealed by the investigation were tainted by illegality. That has been definitively ruled upon in *Cash*.

38. Mr. McDonagh has rightly made the point that the nexus between the unlawful action of the Garda and the opinion formed by her

in this case is rather stronger than in *Cash*, where there was no evidence of illegality to be pointed at. The contention by the defence in that case was that there was an onus on the prosecution to prove positively the lawful provenance of the grounds for suspicion. In the instant case, the opinion of the Garda arose directly as a result of a search which the defence can, on my view of the case, positively prove was unlawful. However, while the *ratio* of *Cash*, strictly speaking, might be limited to the statement that the prosecution does not bear the onus argued for in that case, the logic of the judgment seems to me to lie in the analysis of the difference between investigation and trial. Ultimately, the crucial difference, so far as this case is concerned, is that the rules governing admissibility of evidence cannot simply be transferred to the formation of suspicions and opinions.

Conclusion

39. I therefore propose to answer the two questions posed as follows:-

(i) Yes.

(ii) Yes.