

**THE HIGH COURT**

**[2014 No. 577SS]**

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

**BETWEEN**

**THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF INSPECTOR McDONALD)**

**PROSECUTOR**

**AND**

**MICHAEL GILVARRY**

**ACCUSED**

**JUDGMENT of Kearns P. delivered on the 11th day of July, 2014**

This is a case stated by Judge Mary Devins, a Judge of the District Court, pursuant to s.52 of the Courts (Supplemental Provisions) Act 1961 on a point of law for the opinion of the High Court relating to the interpretation of s.81 of the Road Traffic Act 2010. The facts as found by Judge Devins are as follows:

"1) On 22 May 2012 Mr Michael Gilvarry (hereinafter "the accused") appeared before me in the District Court, on foot of a summons, in respect of the following charge:

*On the 30/10/2011 at R314 Cullens Ballina Mayo a public road in the said District Court area of Ballina did drive a mechanically propelled vehicle, registration number 00D45421 at a speed which exceeded the Regional and Local speed limit of 80 kilometres per hour applicable to the said road by virtue of Section 6 of the Road Traffic Act 2004.*

*Contrary to Section 47 of the Road Traffic Act 1961 (as inserted by Section 11 of the Road Traffic Act 2004) and Section 102 of the Road Traffic Act 1961 (as inserted by Section 18 of the Road Traffic Act 2004).*

2) ...

3) The prosecution was represented by Superintendent Patrick McHugh. The Accused was represented by Ms Mary McGregor, Solicitor of Mr Michael Gilvarry.

**Evidence proved or admitted before me.**

4) On 22 May 2012 the matter appeared in court for the first time.

5) On that date the Go Safe Operator, Mr. Derek Walsh was called as a witness by the prosecution.

6) Mr. Walsh produced his identification card which confirmed authorisation by the Minister for Justice, Equality and Law Reform under Section 81 Road Traffic Act to conduct speed detections. He furthermore produced a certificate of competency. ... .

7) Mr. Walsh gave evidence of carrying out speed detections at a point on the Killala road outside Ballina on the 30 October 2011. He gave evidence that the vehicle in the summons had been detected exceeding the speed limit, specifically that it had been detected travelling at 93 kilometres per hour in an 80 kilometre zone.

8) Mr Walsh produced to the Court a photograph of the vehicle which showed the registered number of the vehicle (00-D-45421) and again confirmed the speed detected and the speed limit in that area as above. ...

9) Mr Walsh gave evidence that he was authorised under Section 81 of the Road Traffic Act 2010 to give evidence in the matter but he was not in a position to enlighten the court as to what the section contained.

10) The Prosecuting Superintendent understood the section to refer to the agreement between the employer of the witness and the Minister for Justice.

11) The Superintendent handed into court the certificate of the registered owner signed and dated from an authorised officer from the motor tax office.

12) I adjourned the matter to 10 July 2012.

13) On 10 July 2012 the matter was further adjourned to allow Inspector McDonald to give evidence regarding the procedures involved, the relevant legislation to be opened and for submissions.

14) On 9 October 2012 Inspector John McDonald from the Garda Fixed Charge Processing Office gave evidence.

15) Inspector McDonald gave an overview of how the system for the detection of speeding offences through to their prosecution works dealing inter alia with the capture of information, the issue of notices, the postage of the notices, the payment of the notice, the safety camera project and the role of GO Safe.

16) Inspector McDonald was cross examined by various solicitors who had clients before the court on a similar charge to the Accused on a number of issues. These issues included the services of the notices and the application process for the summons.

17) Three issues were raised in cross-examinations which relate to the Accused's case.

18) Inspector McDonald gave evidence in cross-examination that the image provided by the prosecution was the same as the original image that was initially captured and was not altered. Inspector McDonald was questioned regarding the enhancement of the image but was not au fait with the process.

19) The issue of the contract with the GO Safe Company was raised. It was clarified by Inspector McDonald that Mr. Walsh obtained his authority to act from Section 81 of the Road Traffic Act 2010.

20) Inspector McDonald gave evidence that a contract was entered into by the Minister for Justice, Equality and Law Reform, The Garda Commissioner and the Go Safe Company on 19 November, 2009. This governed the outsourcing of functions as provided for in Section 17 of the Road Traffic Act 2006 and in Section 81 of the road Traffic act 2010 since 1 June 2011. While Inspector McDonald could confirm that he had seen the contract he was not in a position to provide a copy of the contract to the Court.

21) Ms. McGregor for the Accused cross examined Inspector McDonald on the provision of the photographic image of the alleged speeding. It was accepted by Inspector McDonald that a copy of the photographic image should be provided to the accused by virtue of Section 81(3) of the Road Traffic Act 2010 before the commencement of the trial.

22) Inspector McDonald gave evidence that the Fixed Charge processing Office attaches an image of the speeding detection to the summons when they are forwarded to the relevant District officer for service. He said it was the responsibility of the relevant District Officer to effect service of the summons and the photographic image of the speeding offence. Inspector McDonald could confirm that an image was forwarded with each summons in each and every case to the District Officer but could not state whether the photographic image was served with the summons in each case.

23) That concluded the evidence adduced by the prosecution. The Defence then rose and went straight into submissions.

#### **Submissions for the defence**

24) At the end of Inspector McDonald's evidence Ms. McGregor for the Accused made the following submissions.

25) It was submitted that there was no evidence before the court that the permanent visual record referred to in Section 81(2)(ii) of the Road Traffic 2010 was served on the Accused as required by Section 81(3) of the same Act. It was further submitted that there is no presumption within the Act that the relevant image has been served on an accused.

26) Ms. McGregor further submitted that the prosecution had claimed that the operator (Mr. Walsh) derived his capacity to act from section 81(7) of the Road Traffic Act 2010 which relates to an agreement between the service providers and the Minister for Justice. It was submitted that this agreement is the foundation of a number of presumptions relied upon by the prosecution e.g. Sections 81(2)(ii), 81(6)(a) and (b).

27) Ms. McGregor submitted that it was insufficient that Inspector McDonald gave evidence of the existence of the contract. It was submitted that the agreement must be in evidence in order to prove that the person is authorised and to prove the extent of their functions. It was further submitted that as the agreement itself was not in evidence and that the Court was not entitled to presume its existence or apply any presumptions that might flow from its existence

28) Ms. McGregor adopted on behalf of her client's submissions by another solicitor (Mr. Gordon) on behalf of this client to the effect that the permanent visual record produced is enhanced after downloading to the server and as such is tainted by such interference.

#### **Submissions for the prosecution**

29) The prosecution referred the Court to Section 81 and the presumptions in it.

#### **My ruling**

30) I adjourned the matter to 13 November 2012 to consider the matter.

31) On 13 November 2012 I was informed that the Go Safe Operator, Mr Derek Walsh was present in court. Two officials from Go Safe were also in attendance, namely Ms Geraldine O'Keane the area manager and Mr Ivor Browne a Director of Go Safe.

32) I queried with Mr Browne if the contract was in place. He indicated that Go Safe now had a contract in place that started on 16 November 2010 and would run until 16 November 2015 with an optional one year extension period after that.

33) I indicated that I had not been able to find any case law dealing with the precise issues that had been raised by these type of prosecutions.

34) I decided to seek the guidance of the High Court by way of consultative case stated regarding the issues raised.

## The Questions

- (i) Was there evidence before the court that the permanent visual record referred to in Section 81(2)(ii) of the Road Traffic Act 2010 was served on the Accused as required by Section 81(3) of the same Act?
- (ii) Is it a necessary proof for the prosecution in a case such as this to hand in a copy of the contract between Go Safe and the Minister for Justice or is it sufficient to give evidence of the existence of the contract?
- (iii) Is the permanent visual record produced tainted by virtue of the fact that it is enhanced after downloading to the server?"

## RELEVANT LEGISLATION

Section 81 of the Road Traffic Act 2010 provides as follows:-

"81.— (1) The onus of establishing *prima facie* proof of a constituent of an offence (including the speed at which a person, whether the accused or another person, was driving) under section 47, 52, 53, 55, 91, 92, 93 or 94 of the Principal Act, section 35 of the Act of 1994 or section 138 of the Railway Safety Act 2005 may be discharged by tendering evidence from which that constituent can be inferred of measurements or other indications which were given by —

- (a) electronic or other apparatus (including a camera) capable of providing a permanent record (including a permanent visual record) and are contained in such a record produced by it, or
- (b) electronic or other apparatus (including a radar gun) which is not capable of producing a permanent record.

It is not necessary to prove that the electronic or other apparatus was accurate or in good working order.

(2) In proceedings for an offence referred to in subsection (1)—

- (a) a document purporting to be, or to be a copy of, a record referred to in subsection (1)(a)—
  - (i) which is not a permanent visual record and to be signed by a member of the Garda Síochána, or
  - (ii) which is a permanent visual record and to be issued by or on behalf of a member of the Garda Síochána or an administrative office or unit of the Garda Síochána designated in that behalf by the Commissioner, or a person authorised under an agreement under subsection (7),

and

- (b) on which is endorsed a statement to the effect that it is, or is a copy of, that record, shall be *prima facie* evidence in those proceedings of the indications or measurements contained in the record. It shall not be necessary to prove, as the case may be, the signature on the document or that the signatory was a member of the Garda Síochána or that the document was so issued.

(3) A copy of the document referred to in subsection (2) shall be given to the accused person before the commencement of the trial of the offence concerned.

(4) The electronic or other apparatus referred to in subsection (1) shall—

- (a) be of a type that has been approved by—
  - (i) the Commissioner or another member of the Garda Síochána not below the rank of Chief Superintendent authorised in that behalf by the Commissioner, or
  - (ii) the chief executive officer of the National Roads Authority or another officer of that Authority duly authorised in that behalf by the first-mentioned officer,

and

- (b) in the case of an apparatus referred to in subsection (1)(a), be capable of producing a record of the measurements or other indications referred to in subsection (1).

It is not necessary to prove that the apparatus is of a type so approved.

(5) In proceedings for an offence referred to in subsection (1), if proof of the offence involves proof of the speed at which a person (whether the accused or another person) was driving, the uncorroborated evidence of one witness stating his opinion as to that speed shall not be accepted as proof of that speed.

(6) In proceedings for an offence referred to in subsection (1) it shall be presumed, until the contrary is shown, that—

- (a) the electronic or other apparatus used for the tendering of evidence was provided and maintained by a member

of the Garda Síochána, or a person authorised under an agreement under subsection (7), and

(b) that the development, production and viewing of records produced by such apparatus was carried out by a member of the Garda Síochána, or a person authorised under an agreement under subsection (7).

(7) (a) The Minister for Justice and Law Reform may by an agreement in writing entered into with any person, upon such terms and conditions as may be specified in the agreement, which shall include a condition to the effect that the determination of the locations where equipment is to be operated shall be a function of a member of the Garda Síochána not below the rank of Superintendent, provide for the authorisation of that or other persons for the purposes of subsection (2), and the performance by those authorised persons of any function, which shall be specified in the agreement, relating to the establishing of *prima facie* proof of a constituent of an offence including the provision, maintenance and operation of equipment and the development, production and viewing of records produced by that equipment and the production of measurements or other indications from which a constituent of an offence can be inferred.

(b) An agreement referred to in paragraph (a) may apply to the performance of all or any of the functions specified in that agreement.

(c) Section 14(2), (3) and (4) of the Act of 2002 applies to any agreement entered into by the Minister for Justice and Law Reform under this subsection.

(8) A member of the civilian staff of the Garda Síochána may perform the functions relating to the establishing of *prima facie* proof of a constituent of an offence including the development, production and viewing of records produced by that equipment and the production of measurements or other indications from which a constituent of an offence can be inferred.

(9) In this section—

“member of the civilian staff of the Garda Síochána” means a person appointed or designated as being transferred under section 19 of the Garda Síochána Act 2005;

“member of the Garda Síochána” other than in subsection (3) or (7), includes a member of the civilian staff of the Garda Síochána;

“permanent visual record” includes a photograph;

“radar gun” means an apparatus which—

(a) can be used to measure the speed of a moving object (such as a motor vehicle) by directing a signal from the apparatus at the object, and, if the signal is reflected off the object, the apparatus in turn receives the reflected signal, and

(b) is capable of measuring the speed of the object and displaying the speed on the apparatus;

“record” includes a visual record which can be stored permanently on the apparatus concerned.”

## THE FIRST QUESTION

When interpreting section 81, the Court does not feel obliged to outline in any detail the well established requirement that penal statutes be construed strictly. If there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, so that it is doubtful whether the act or omission in question in the case falls within the statutory words, the ambiguity will be resolved in favour of the person charged. Further, where the statute provides for procedures which are clearly mandatory, the rights of an accused person are ensured by a rigid adherence to the terms of the statute. (see *DPP v. Freeman* [2009] IEHC 179, and *McCarron v. Groarke*, (High Court, Kelly J., 4th April, 2000)).

While section 81 is replete with various statutory presumptions which operate in favour of the prosecution, the same can not be said of section 81(3) where the word “shall” is ascribed to the obligation to provide a copy of the document (in this case the permanent visual record or photograph of the vehicle) to the accused person before the commencement of the trial of the offence concerned. In a sense the only evidence that exists for the purposes of a prosecution under the section is the visual record referred to in section 81(2)(ii). There is no other evidence that can bring home the prosecution in a case of this nature. It seems to me that this is the reason why the legislation specifies that a copy of the visual record must be provided to an accused prior to the commencement of the trial.

Turning to the evidence before the learned District Judge, it is clear that the “usual practice” for proceeding in cases of this nature is one whereby an image of the speeding detection is attached to the summons when the same is forwarded to the relevant District Officer for service. It then becomes the responsibility of the relevant District Officer to effect service of the summons and photographic image of the speeding offence. While Inspector McDonald could confirm that an image was forwarded with each summons in each and every case to the District Office, he could not go further to state that the photographic image was actually served on the accused along with the summons in each case.

Thus as matters stood before the learned District Judge at the conclusion of the prosecution case, there was no evidence before her that the notice required by subsection (3) was given to the defendant prior to the hearing. The very best that could be said from the point of view of the prosecution was that it should have been served because it was sent to the District Office. Proof of service of the summons, on the other hand, was confirmed by the statutory declaration of service and was further evidenced by the presence of the accused in court, but this statutory declaration refers merely to the summons; it does not refer to the fact that the document

referred to has been provided (or even will be provided) in advance of the trial.

In my view it is insufficient, when dealing with a mandatory directive such as that contained in section 81(3), for a member of An Garda Síochána to state that it is normal or usually the case that the photographic or documentary record is included with the summons when it is issued. There must be evidence that it has in fact been given to an accused person before the trial commences. The evidential shortfall can be easily remedied if the statutory declaration of service of the summons were to also state that the summons, together with "permanent visual record attached", have been served on the defendant prior to trial.

This is the simple answer to a simple question. In the absence of such evidence, the answer to the first question must be in the negative.

## THE SECOND QUESTION

The second question concerns the existence of a contract between the Minister for Justice and the private operators carrying out detection of road traffic offences. Section 81(7) makes provision for the Minister for Justice to enter into an agreement and identify certain terms and conditions that can be included in such an agreement. It is urged on behalf of the defendant that the existence of such an agreement is not in itself subject to a presumption and that therefore the agreement and all its relevant terms must be proved in full. It was submitted that it is not sufficient to simply give evidence in a general and vague way as to the existence of such a contract.

However, it is clear that in this case Inspector McDonald gave evidence that a contract which is still extant was entered into by the Minister for Justice, the Garda Commissioner and the Go Safe Company on the 19th November, 2009. This governed the outsourcing of functions as provided for in section 17 of the Road Traffic Act 2006 and in section 81 of the Road Traffic Act 2010. Inspector McDonald confirmed he had seen the contract though he was not in a position to provide a copy of same to the court and further stated in evidence that the same was subject to issues of commercial sensitivity and confidentiality. This evidence was given by Inspector McDonald who had actually seen the contract. There was no challenge to any of his evidence in this regard in terms of its accuracy, nor was it ever suggested to him that no such contract exists.

It is not an ingredient of the offence of speeding that the prosecution must prove each and every element, including commercially sensitive elements, of a commercial contract such as exists in the instant case. That would be to elevate the onus of proving a minor case of this nature to the realms of major difficulty, if not total impossibility.

A useful way of evaluating this submission is to consider whether in the context of any application for disclosure of documentation prior to trial, a judge would have directed that the full terms of such a document were required to be disclosed in an offence of this nature. In *DPP v. Judge Browne* [2008] IEHC 391, McMahon J. dealt with the level of disclosure that is required in a speeding case. In particular the defence in that case had sought disclosure of documents relating to the company that provided the hand-held computers that the gardaí used. McMahon J. stated that:

*"It is important to emphasise, therefore, that the right to disclosure is not an unlimited one. It should be available if it is necessary to ensure a fair trial and fair procedures and where justice demands it. It also only extends to relevant evidence which is in the prosecution's possession. In determining what is relevant, it is helpful to bear in mind the indicators specified by Denham J. in Director of Public Prosecutions v. Gary Doyle [1994] 2 I.R. 286. Finally, in determining what is just in cases such as this, one must appreciate that justice is not only about the rights of the accused. There is also the public interest in the successful prosecution of offences to be taken into account and, in the context of summary proceedings where it is intended that justice should be dispensed in a simple and speedy manner, inordinate expense must be avoided. Commonsense and proportionality are also factors which have to be considered in the weighing exercise which the District Judge must undertake in exercising his discretion.*

*In addition to the above considerations it is clear that a basis for any such application must be properly established."*

While the ingenuity of defence lawyers in the context of Road Traffic Act prosecutions in this jurisdiction is legendary, the courts approach to the interpretation of the statutory provisions must be informed by commonsense and practicality. As O'Flaherty J. stated in *D.P.P. v. Cormack* [1999] 1 I.L.R.M. 398 at p.400:-

*"Unfortunately, there is I think a certain mythology abroad that some onus rests on the prosecution to prove cases to an impossible extent so as to exclude every hypothesis that might occur to the most ingenious mind. That is not the law."*

What occurred in this case does in my view meet the requirements of the section, that is to say it is sufficient for the purposes of the section if the prosecution produce a witness who has familiarised himself or herself with those parts of the contract which indicate that a contract envisaged by the section was made, the parties to it and the fact that the contract remains extant. To require anything more would render the statutory scheme inoperable, or involve an absurd level of cost and expense in every prosecution. Such an interpretation might require the court to make an order for the costs of such an exercise against a person convicted of the offence charged. Such a power is expressly reserved to the court under s. 82 of the Act.

That does not preclude any defendant from raising in evidence some fact or information which would throw some relevant aspect of the contract into question, but no such evidence exists in the instant case and I am satisfied that it is not a necessary proof for the prosecution in a case such as this to hand in or formally prove every detail of the contract between Go Safe and the Minister for Justice.

## THE THIRD QUESTION

Implicit in the third question is the contention that the prosecution must show that, at each and every stage of the production process, nothing whatsoever occurred which might alter the quality of the original image taken at the scene of the alleged speeding offence. There is no evidence in this particular case to suggest any such alteration ever occurred.

While it was conceded that in some instances a photograph might be enhanced, s.81(1) of the Act of 2010 specifically provides that:-

*"It is not necessary to prove that the electronic or other apparatus was accurate or in good working order."*

In a case such as this it is open to a defendant to give evidence that the image furnished to him and submitted to the court has in fact been altered. For example, the defendant could say that the car in the image is a family saloon whereas his car is a landover and so the car in the image could not be his car. Equally an accused person could give evidence that the registration number disclosed in the permanent visual record is not the registration number of his or her vehicle. In such circumstances the court would have to consider such evidence along with any rebuttal evidence called on the particular issue by the prosecution.

I would therefore answer the questions posed in the case stated in the following manner:-

- (a) No.
- (b) No – it is sufficient that some evidence of the existence of the contract be given.
- (c) Does not arise.