

THE HIGH COURT

2007 No. 628 S.S.

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

BETWEEN

MARY WEIR

APPELLANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF GARDA FRANCIS J. GOODMAN)**Judgment of Mr. Justice O'Neill delivered on the 29th day of July, 2008**

1. This case came before this Court as 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 1951, the case having been stated by Judge John Brophy, a judge of the District Court.

2. The relevant facts as proved or admitted or agreed and as found by the learned District Judge, in summary, are as follows:-

3. On the night of 9th November, 2006, at Charterschool Lands, Longwood Road, Trim, County Meath, the appellant was stopped by Garda Francis Goodman, at a garda checkpoint set up pursuant to s. 4 of the Road Traffic Act 2006, (the Act of 2006) and a roadside breath test was performed on her. The appellant failed the test. Garda Goodman formed the opinion from the result of the test and from his observation of the appellant that she was under the influence of an intoxicant to such an extent as to render her incapable of operating a mechanically propelled vehicle in a public place and that she had committed an offence under subs. (1), (2), (3) or (4) of s. 49 of the Road Traffic Acts 1961-2006. Garda Goodman informed the appellant of his opinion and that he was arresting her under s. 49(8) of the Road Traffic Acts 1961-2006. The appellant was arrested at 9pm and was brought to Trim Garda Station. A further breath test was carried out there by Garda Eric McGovern using the Lion Intoxilyser 6000 IRL. Garda McGovern furnished the appellant with a signed statement pursuant to s. 17 Road Traffic Act 1994 (the Act of 1994) which contained a reading of 48 microgrammes of alcohol per 100 millilitres of breath.

4. The appellant was charged at 10.15 pm with offences under ss. 49(4) and (6) (a) of the Road Traffic Act 1961, as inserted by s. 10 of the Road Traffic Act 1994, as amended by s. 23 of the Road Traffic Act 2002, as set out on charge sheet number 557818. The appellant was released from custody at 10.53 pm.

5. Pursuant to a "Gary Doyle" order made in the District Court on 24th November, 2006, a letter was sent to the appellant's solicitor enclosing statements of four gardai, a copy of the charge sheet, a copy of the evidential breath certificate and a copy of the custody record. The documents furnished to the appellant's solicitor did not include a written authorisation pursuant to s. 4(3) of the Act of 2006.

6. At the subsequent trial, Garda Goodman gave evidence that on the night of 9th November, 2006, he and a colleague had been directed to operate a mandatory alcohol breath test checkpoint under s. 4 of the Road Traffic Act 2006, and that the checkpoint had been authorised by an inspector.

7. In the District Court, at the close of the prosecution case, Mr. Dwyer B.L., counsel for the appellant, sought a direction of no case to answer on the grounds that a written authorisation to set up the checkpoint was a required proof in a case involving a mandatory roadside breath test, in circumstances where it led to the deprivation of the appellant's liberty. The learned District Court Judge refused this application and held that it was sufficient that Garda Goodman had given oral evidence that the checkpoint had been authorised. At no stage was an application made by the respondent to re-open the case nor was there any application to adjourn the case so that the written authorisation could be produced. After hearing the evidence from Garda Goodman and Garda McGovern, the learned District Court Judge convicted the appellant. He imposed a fine of €500 on her and disqualified her from driving for one year.

8. Arising out of the foregoing, the learned Judge posed the following two questions for the opinion of this court:-

"(a) Is oral evidence that a checkpoint is authorised, adequate evidence of the existence of a statutory written authorisation under s. 4 of the Road Traffic Act 2006, to stop the appellant's vehicle and demand from her a sample of her breath on 9th November, 2006, and therefore sufficient to establish the lawfulness of any such requirement?"

"(b) If the answer to (a) is no, was I entitled to convict the appellant?"

9. A new statutory regime was established under s. 4 of the Act of 2006. It gave the gardaí the power to stop vehicles at checkpoints and to require of the person in charge of the vehicle to give a sample of his or her breath for the purpose of investigating offences under s. 49 of the Road Traffic Act 1961, (the Principal Act). The power under s. 4 of the Act of 2006 is colloquially referred to as "random breath testing". It enables breath testing to be carried out where a garda has no suspicion or opinion that any particular motorist has committed an offence. It provides as follows:-

"4. - (1) In this section-

'authorisation' means an authorisation under subsection (2) to establish a checkpoint;

'checkpoint' means a checkpoint established under an authorisation.

(2) A member of the Garda Síochána, not below the rank of inspector, may, for the purposes of section 49 of the Principal Act, authorise the establishment of a checkpoint or checkpoints in a public place or places at which members of the Garda Síochána may exercise the powers under subsection (4).

(3) An authorisation shall be in writing and shall specify-

(a) the date on which, and the public place in which, the checkpoint is to be established, and

(b) the hours at any time between which it may be operated

(4) A member of the Garda Síochána, who is on duty at a checkpoint, may stop any mechanically propelled vehicle at a checkpoint and, without prejudice to any other powers (including the powers under section 12 (inserted by the Act of 2003) of the Act of 1994) conferred on him or her by statute or at common law, may require a person in charge of the vehicle

(a) to-

(i) provide (by exhaling into an apparatus for indicating the presence of alcohol in the breath) a specimen of his or her breath, or

(ii) accompany him or her or another member of the Garda Síochána to a place (including a vehicle) at or in the vicinity of the checkpoint and there to provide, by exhaling into such an apparatus, a specimen of his or her breath, or

(b) to-

(i) leave the vehicle at the place where it has been stopped, or

(ii) move it to a place in the vicinity of the checkpoint, and keep or leave it there until the person has complied with a requirement made of him or her under paragraph (a).

(5) A member of the Garda Síochána for the purposes of making a requirement of a person under subsection (4) may indicate the manner in which the person must comply with the requirement.

(6) A person who-

(a) refuses or fails to comply immediately with a requirement under subsection (4)(a) or (b)(i) or such a requirement in a manner indicated by a member of the Garda Síochána under subsection (5), or

(b) without reasonable excuse, refuses or fails to comply immediately with a requirement under subsection (4)(b) (ii) or such a requirement in a manner indicated by a member of the Garda Síochána under subsection (5) is guilty of an offence and is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 6 months or both.

(7) A member of the Garda Síochána may arrest without warrant a person who in the member's opinion is committing or has committed an offence under this section.

(8) In a prosecution for an offence under this section, section 49 or 50 of the Principal Act or Part III of the Act of 1994 it shall be presumed, until the contrary is shown, that an apparatus provided by a member of the Garda Síochána for the purpose of enabling a person to provide a specimen of breath pursuant to this section is an apparatus for indicating the presence of alcohol in the breath.

(9) An. authorisation or a copy expressing itself to be such authorisation, shall, until the contrary is shown, be sufficient evidence in any proceedings under the Road Traffic Acts 1961 to 2006, of the facts stated in it, without proof of any signature on it or that the signatory was a person entitled under subsection (2) to sign it.

(10) Section 13(1) of the Act of 1994 is amended by substituting 'section 12(4) or section 4(6) of the Road Traffic Act 2006,' for 'or section 12(4)' (inserted by section 3 of the Act of 2003)."

10. The above provision is to be contrasted with the framework of existing statutory and common law powers of arrest which operated together prior to the entry into force of the Act of 2006 although it should be noted that s. 4 of the Act of 2006 was introduced without prejudice to the common law powers of arrest or the power under s. 12 of the Road Traffic Act 1994, (the Act of 1994), as substituted by s. 2 of the Road Traffic Act 2003, (the Act of 2003).

11. Section 109 of the Principal Act, as amended by the schedule to the Road Traffic Act 1968, gave the gardaí the power to operate checkpoints. It provides as follows:-

"109.- (1) A person driving a vehicle in a public place shall stop the vehicle on being so required by a member of the Garda Síochána and shall keep it stationary for such period as is reasonably necessary in order to enable such member to discharge his duties."

12. A garda could only arrest a person under s. 49 of the Principal Act if he held the requisite opinion that an offence had been committed under that section. Alternatively, he could demand of the driver to give a sample of his breath at the roadside pursuant to s. 12 of the Act of 1994, as substituted by s. 2 of the Act of 2003, if one of the three circumstances outlined in that section applied. Section 2 of the Road Traffic Act 2003, substitutes a new s. 12(1) into the Act of 1994. It provides:-

"12.- This section applies to a person in charge of a mechanically propelled vehicle in a public place who, in the opinion of a member of the Garda Síochána -

(a) has consumed liquor,

(b) is or has, with the vehicle, been involved in a collision, or

(c) is committing or has committed an offence under the Road Traffic Acts 1961-2003."

13. The formation of an opinion in respect of the circumstances outlined in s. 12(1) of the Act of 1994 as substituted by s. 2 of the Act of 2003, is in marked contrast with the random nature of the requirement to undergo a roadside breath test, as provided for in s. 4 of the Act of 2006.

14. With respect to common law powers of arrest, this Court (Carney J.) held in *D.P.P. (Stratford) v. Fagan* [1993] 2 I.R. 95, that a garda could stop a vehicle at a checkpoint without first suspecting that the particular driver had committed an offence under the drink driving laws in certain circumstances. This was confirmed by the Supreme Court in the same case at [1994] 3 I.R. 265. The common law powers to stop a vehicle were identified by Finlay C.J. (Egan J. concurring) at p.268 as being:-

"(1) When from observation he suspects that it [the vehicle] is being used for a criminal purpose or that the driving of it constitutes a criminal offence e.g.

(a) unsteady driving giving ground to a suspicion that the driver was affected by alcohol;

(b) a youth driving a particular type of car which having regard to his appearance and the type of car concerned gives grounds for suspicions that he might have stolen it; or

(c) that it coincided with a make or type of car reported as having been used as a getaway car after the commission of a crime.

(2) that a serious crime having been committed it was probable that amongst traffic on a particular route for a particular time there could be the car carrying the perpetrators of the crime in which instance it would at common law be lawful for a Garda Síochána to stop each car for the purpose of ascertaining whether it carried such people."

15. In *D.P.P. v. Cowman* [1993] 1 I.R. 335, O'Hanlon J. held that the gardaí had the right to approach members of the public for the purpose of speaking to them on an informal basis.

16. From the above it is clear that s. 4 of the Act of 2006 represented a new departure in the law governing arrest for drink driving offences. It authorises a garda to carry out a random breath test at a checkpoint, without the need for that garda to form any opinion about a particular driver or vehicle and to arrest or detain for that purpose. It is against this backdrop that the issues in the instant proceedings must be considered.

17. The first issue which falls to be determined is whether or not s. 4 of the Act of 2006 requires that the authorisation of the checkpoint be proved in criminal proceedings as an essential proof.

18. A useful exercise is to consider the legal consequences if there was in fact no written authorisation as required by s. 4(3) of the Act of 2006. Whilst the stopping of a vehicle could be lawful if reliance could be placed on one or other of the statutory or common law powers set out above, the demand on the appellant to undertake the roadside breath test and the carrying out of that test and the detention of the appellant for that purpose, in the absence of the formation of the requisite suspicion or opinion for other forms of arrest, would undoubtedly be unlawful and as a consequence the State could not be permitted to enjoy the fruits of that intrusion on constitutional rights. That being so, the result of the roadside breath test would have to be excluded as a basis of a legitimate suspicion or opinion that a person had committed an offence under s. 49(8) of the Principal Act. It follows that the necessary ingredient for a lawful arrest under s. 49(8) of the Principal Act would be missing.

19. Assuming for the purpose of the above exercise that there was no authorisation in the present case, it would be unreal in the present case, in the context of the random roadside breath to consider that the "observation" of Garda Goodman, was a sufficient basis for a lawful arrest under s. 49(8) of the Principal Act even if it could be detached from the unlawfully obtained fruits of the invasion of the appellant's constitutional right to liberty. Hence, in my opinion, if there was no written authorisation in the present case, the arrest pursuant to s. 49(8) of the Principal Act in this case would have to be regarded as unlawful.

20. There can be no doubt, but that s. 4(3) of the Act of 2006, requires that there be a written authorisation. The necessity for proof of the existence of this authorisation is not in contest. It is an essential proof because the burden of proving all matters essential to establish the prosecution case rests on the prosecution and without proof of compliance with ss. 4(2) and 4(3) of the Act of 2006, the court could not be satisfied beyond a reasonable doubt that the primary evidence to establish the guilt of the appellant i.e. the statement issued by the intoxilyser machine, was obtained in accordance with law.

21. The written authorisation under s. 4(3) of the Act of 2006 can be considered to be the legal act which makes lawful (where no other power of arrest is invoked) the stopping of drivers at the side of the road which, in turn, makes lawful the demand on someone to blow into the apparatus designed to indicate the presence of alcohol in breath which, in turn, makes lawful that person's detention for the purpose of performing the roadside breath test. The potential breach of a person's constitutional right to liberty under Article 40.4.1 of Bunreacht na hÉireann necessitates that there must be strict compliance with the requirements of s. 4 of the Act of 2006. In order to establish the lawfulness of the entire process proof of the existence of a written authorisation is essential.

22. The question arises as to whether the oral evidence of the garda in this case, to the effect that the checkpoint was authorised by a garda inspector is sufficient, in the absence of contradictory evidence, to prove compliance with s. 4 of the Act of 2006?

23. The nature of the evidence which proves the existence of a written authorisation to establish a checkpoint, under s. 4 of the Act of 2006 is probably self explanatory. The best evidence is the document itself, although s. 4(9) contemplates that a copy of the authorisation will suffice as proof of the written authorisation. This best evidence rule was summarised by O'Flaherty J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 at p.518 as follows:-

"The best evidence rule operates in this sphere to the extent that the party seeking to rely on the contents of a document must adduce primary evidence of those contents i.e. the original document in question. The contents of a document may be proved by secondary evidence if the original has been destroyed or cannot be found after due search. Similarly, such contents may be proved by secondary evidence if production of the original is physically or legally impossible."

24. The rule envisages that secondary evidence of the contents of a document may be given by means of oral testimony, but only in exceptional circumstances. These are set out by McGrath in *Evidence* (Dublin, 2005) at p.681-682:-

"There are a number of well established exceptions to the primary evidence rule where secondary evidence of the contents of a document can be given: (i) where there is a failure by an opposing party to produce the original after service of a notice to produce; (ii) when a third party lawfully refuses to produce the document; (iii) if the original has been lost or destroyed; (iv) if the production of the original is impossible; (v) public documents; and (vi) bankers' books. The common thread running through the various exceptions is that the party adducing the documentary evidence is unable to produce the original through no fault of their own."

25. Although, the case stated recites that following upon the carrying out of the roadside breath test, Garda Goodman formed the opinion that the appellant was under the influence of an intoxicant from the result of the test and from his observation of the appellant, it would appear that in the proceedings before the District Court no reliance was placed by the prosecution on Garda Goodman's "observation", the case proceeding on the basis that Garda Goodman had relied on the powers given to him in s. 4 of the Act of 2006. That being so it would, in my opinion, be a distortion of the reality of the case to now attempt to treat the case as if it was not squarely based on s. 4 of the Act of 2006, but rather other statutory or common law powers as set out above.

26. Section 4(9) of the Act of 2006 dispenses with the need for a garda inspector to attend court to give oral evidence to prove, in the ordinary way, the written authorisation to establish a checkpoint. Oral evidence was given by Garda Goodman at trial that the checkpoint had been authorised by Garda Inspector Martin Smithers. His evidence appears to have been to the effect that the checkpoint was authorised but he does not appear to have said that the authorisation was in writing, which of course is what s. 4(3) requires. No explanation was given by him at trial as to why the original or a copy (if it existed) was not tendered in evidence. No evidence was given to the effect that the original written authorisation or a copy of it had been lost or destroyed or for some reason, it was physically or legally impossible to produce the original or a copy. No explanation whatever was given for the absence of the written authorisation or a copy and the respondent does not contend that there was no need for the garda to prove the checkpoint was authorised at all.

27. I am satisfied that in the absence of exceptional circumstances, which do not exist in this case, the written authorisation to set up the checkpoint under s. 4 of the Act of 2006 was a necessary proof. As discussed above, the arrest and detention of the appellant pursuant to s. 49(8) of the Principal Act and, hence the admissibility of the results of the intoxilyser breath test are premised on the existence of a written authorisation establishing a checkpoint. If evidence is obtained in breach of the constitutional right to liberty, the exclusionary rule applies, meaning that the evidence obtained thereafter is excluded, unless as explained by O'Hanlon J. in *DPP v. Spratt* [1995] 2 I.L.R.M. 117 at p.123:-

"If a breach of the constitutional rights of the accused person took place, as alleged, in what manner was he prejudiced thereby? Was any information obtained which might not have been otherwise obtained?"

28. This begs the question whether the primary evidence establishing the guilt of the appellant, namely the result of the intoxilyser breath test, was obtained as a direct result of a breach of the applicant's constitutional right to liberty. If there was no written authorisation then, as discussed above, the arrest under s. 49(8) of the Principal Act was, in my opinion, unlawful. That unlawful arrest led directly to the appellant being detained, taken to the garda station and being compelled under the force of law to submit to the intoxilyser breath test. Hence, it is absolutely clear that the performance of that test and its result were the direct result of the unlawful arrest of the appellant and, in my view, the exclusionary rule must apply to the evidence thereby obtained.

29. In this context, proving the written authorisation is obviously essential having regard to the onus on the prosecution to prove all facts necessary to establish the guilt of the appellant. It is axiomatic that this burden of proof includes establishing the lawfulness of the steps taken to acquire the necessary evidence.

30. It was submitted by counsel for the respondent that the appellant ought to have challenged the evidence of Garda Goodman by cross-examination and in the absence of such challenge, the learned District Judge was entitled to accept his evidence as sufficient to establish that there had been a valid authorisation for the purpose of s. 4 of the Act of 2006.

31. I cannot agree with that submission. If it were correct, in effect, the burden of proving an essential prosecution proof would have been shifted to the appellant, which of course cannot be right. In any criminal prosecution, an accused person is entitled at the close of the prosecution case to seek a direction of no case to answer on the basis that the prosecution has failed to prove the case against him. There is no onus on an accused person to intervene by way of cross examination to fill gaps in the prosecution case.

32. In this case the prosecution did not put in evidence the original or a copy of a written authorisation and did not explain by evidence why it was legally or physically impossible to produce in evidence either the original or a copy of the authorisation. Hence, the prosecution were not entitled to avail of an exception to the best evidence rule.

33. In any event, the evidence of Garda Goodman, even if admissible, could not have proved an essential feature required by s. 4(3) of the Act of 2006 namely, that the authorisation was a written authorisation.

34. For the reasons set out above, I would answer both questions posed by the learned District Court Judge in the negative.