[2020] IEHC 362

THE HIGH COURT

[2019 No. 1359 SS]

[District Court Record 2018 No. 207003]

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

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA ELIZABETH MCDONAGH)

PROSECUTOR

AND

MICHAEL SHERLOCK

ACCUSED

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 26th day of June, 2020

1. On 28th September, 2018 the accused was stopped by Gardaí at Deerpark Estate, Ennistymon, County Clare. At that time, he was the holder of a learner driver permit, but not a driving licence. He was not accompanied by a qualified driver.

2. On 12th November, 2018 a summons was applied for, alleging that in a public place the accused had used a mechanically propelled vehicle without insurance contrary to s. 56(1) and (3) of the Road Traffic Act 1961, as amended by s. 18 of the Road Traffic Act 2006. That summons was first listed on 12th March, 2019 and came on for hearing on 7th April, 2019 before Judge Patrick Durcan in District Court District No. 12, sitting at the District Court in Ennis, County Clare.

3. The accused was apparently separately charged with unlicensed driving although this is not expressly referred to in the case stated. I am told he was convicted of that offence on a plea of guilty.

4. The case stated recites that the accused produced a policy of insurance which on its face covered driving a mechanically propelled vehicle in a public place on the date in question. The circumstances in which that proof of insurance was produced are not gone into in the case stated although I understand that he produced the certificate of insurance to the prosecuting Garda in court. The case stated says that that the investigating Garda gave evidence of contacting the insurer and was advised that in the event of loss to a third-party arising from the driving of the accused *"the insurer would compensate the third party but would seek to recover the cost of same from the accused".*

5. On 13th November, 2019 the learned judge signed a case stated pursuant to s. 52(1) of the Courts (Supplemental Provisions) Act 1961 setting out that he formed the view that:

   (i). for the relevant policy of insurance to be operative the accused needed to have a driving licence;

   (ii). a learner permit is a conditional driving licence and in this case the conditionality is not satisfied; and

(iii). consequently, as a necessary condition had not been complied with, the accused was not insured to drive on the relevant day and, therefore, the policy of insurance was rendered ineffective.

6. The learned judge said that he was minded to convict the accused of driving without insurance and asked: *"am I correct in my view that the charge against the accused of driving without insurance should be upheld".* On that question I have now received helpful submissions from Mr. David Staunton B.L. for the DPP and from Mr. Patrick Whyms B.L. for the accused.

The legislation

7. First of all, I record my gratitude to the learned judge for the very clear and syllogistic way the issues are framed and set out in the case stated. Analysis of the problem must begin with s. 56(1) of the 1961 Act, which as enacted provided as follows: *"A person (in this subsection referred to as the user) shall not use in a public place a mechanically propelled vehicle unless either a vehicle insurer, a vehicle guarantor or an exempted person would be liable for injury caused by the negligent use of the vehicle by him at that time or there is in force at that time either—(a) an approved policy of insurance whereby the user or some other person who would be liable for injury caused by the negligent use of the vehicle at that time by the user, is insured against all sums without limit (save as is hereinafter otherwise provided) which the user or his personal representative or such other person or his personal representative shall become liable to pay to any person (exclusive of the excepted persons) by way of damages or costs on account of injury to person or property caused by the negligent use of the vehicle at that time by the user, or (b) an approved guarantee … [in similar terms]"*

8. Subsection (2) sets out exceptions and limitations that may lawfully be provided for in the policy of insurance and sub-s. (3) provides that a person who contravenes sub-s. (1) shall be guilty of an offence. The penalty under sub-s. (3) was increased to a fine not exceeding €5,000 by s. 18 of the Road Traffic Act 2006. The entirety of s. 56 was repealed and substituted by s. 34 of the Road Traffic Act 2004, but according to the Irish Statute Book online, that provision has not yet commenced because it requires a commencement order. It does seem an unhappy situation that a statutory provision of such crucial daily importance can remain in a state of suspended animation for a period of 16 years. Ideally if the Department of Transport, Tourism and Sport doesn't intend to commence the amendment, the amending provision should be repealed rather than simply left hanging. Otherwise the clarity of the statute book is impinged upon.

9. The provisions of s. 56(1) were amended by regulations under s. 3 of the European Communities Act 1972, the European Communities (Motor Insurance Regulations) 2008 (S.I. No. 248 of 2008), reg. 2(a) of which deletes the words *"(exclusive of the excepted persons)"* in s. 56(1)(a).

10. The Law Reform Commission in its consolidated version of the Road Traffic Act 1961 says that *"Sub-s. (1)(a) purported to be amended (4.07.2008) by European Communities (Motor Insurance) Regulations 2008 (S.I. No. 248 of 2008), reg. 2(a); words to be*

deleted by amendment are not present in sub-s. (1)(a) but are present in sub-s. (1)(b)." However, that is unfortunately incorrect. The words proposed to be deleted occur in both paragraphs of s. 56(1). The reason for the misunderstanding is that the consolidated version of the 1961 Act as updated to 12th August, 2016 gives an incorrect version of s. 56 in which s. 56(1)(a) is essentially transposed from later provisions of the section and is stated as reading: *"there is in force at that time either—(a) it may, in so far as it relates to injury to property, be limited to the sum of €1,120,000 per claim, whatever the number of victims, …"* (the erroneous version of para. (a) doesn't flow from the lead-in which is what brought this error to light in the present case). Unfortunately, the DPP's legal submissions here have inadvertently reproduced this as if it were the terms of the statute (at p. 4 of the written submissions), but the DPP isn't responsible for the problem and indeed it's ultimately to the good that the error was innocently perpetuated here because that has brought the problem to light; and hopefully the Law Reform Commission's consolidated version can now be corrected.

11. As Fennelly J. (Denham C.J., Hardiman, O'Donnell and McKechnie JJ. concurring) noted in *DPP v. Donnelly* [2012] IESC 44 (Unreported, Supreme Court, 23rd July, 2012) at para. 23, *"A motor insurance policy is a policy of indemnity."* The insurer is liable not to a third-party, but to the insured to indemnify him or her in respect of any liability of that insured.

12. So the question in each case as to what is or is not a condition of the motor insurance policy depends on the particular terms of that policy; or as put by the DPP in written submissions at para. 27, *"the view expressed by the District Court judge depends on the terms of the policy"*.

13. It's true that the 1961 Act contains other provisions making clear that the approved policy of insurance must cover all sums, save where the Act otherwise allows (s. 62); that insurer shall give the insured a certificate of insurance in the prescribed form with the prescribed particulars (s. 66); and provides a procedure for recovery against insurers in the case of an approved policy (s. 76); but all of that does not change the fundamental position which is that whether a breach of any particular requirement means that the insurance does not apply depends on the terms of each individual policy.

Was there in force at the time of the alleged offence an approved policy of insurance?

14. The real question arising from s. 56(1) is whether *"there is in force at that time … an approved policy of insurance whereby the user or some other person who would be liable for injury caused by the negligent use of the vehicle at that time by the user, is insured against all sums without limit (save as is hereinafter otherwise provided) which the user or his personal representative or such other person or his personal representative shall become liable to pay to any person by way of damages or costs on account of injury to person or property caused by the negligent use of the vehicle at that time by the user".*

15. There are two kinds of situations in which this question can arise. Situation type A is where the insured has committed some irregularity, but the policy of insurance is not

conditional on there being no breach of that kind. Type B is where the policy is conditional on there being compliance in that respect.

16. An example of a case of type A is *DPP v. Spendlove* [2014] IEHC 558, [2014] 1 I.R. 807, in which McDermott J. held that there was no offence under s. 56 where an accused drove a vehicle on a learner permit licence contrary to its terms because *"he had a certificate of insurance that covered him on the date that was not made conditional in its terms on the accused complying with the terms of a learner permit licence."* Mr. Staunton valiantly attempted to dilute the significance of that case by saying that s. 62 of the 1961 Act had not been considered, but that is irrelevant. As noted above, that section adds colour and context to the point, but the decision in *Spendlove* would have had exactly the same result even if s. 62 *had been* considered. The reason being that on the facts in that particular case the court was satisfied that the policy of insurance was not conditional on compliance with the terms of their learner permit licence or perhaps if one wanted to be hyper-technical about it, that the prosecution had not proved that the policy of insurance was so conditional.

17. Examples of cases of type B where the policy *is* conditional on compliance with relevant requirements would include *Ighovojah v. Smyth* [2016] IEHC 505 (Unreported, High Court, Noonan J., 7th April, 2016), where the accused drove while disqualified in breach of a condition of his insurance. The policy excluded cover in such circumstances and so it was held that there was no approved policy within s. 56(1)(a). That distinction was reinforced in *DPP v. Opach* [2016] IEHC 583 (Unreported, High Court, 25th October, 2016) *per* Twomey J.; and on appeal in *DPP v. Opach* [2017] IECA 305 (Unreported, Court of Appeal, 27th November, 2017) *per* Edwards J. at para. 46.

18. Ultimately this question boils down to the wording of the policy of insurance. The view of the learned District Court judge that a policy would be conditional on having a valid licence set out at para. 6(i) of the case stated may well be correct at least in general terms as an empirical proposition, but not so as an *a priori* position. That is still a question of fact that would have to be proved in each case.

Evidence before the District Court

19. The question before the District Court was whether the accused drove without insurance in the sense that he was in breach of a condition of his policy of insurance. As noted above, that ultimately comes down to the wording of the policy, breach of a condition of which would have to be proved in each individual case either by the application of the statutory presumption where an accused fails to produce proof of insurance thus thrusting the burden of proving the insurance back on the accused, or positive proof of the terms of the policy of insurance. The evidence given to the District Court of what an insurance employee told the prosecuting Garda is inadmissible hearsay. Mr. Staunton agrees that is hearsay, but says it was not objected to. However, such an objection can be made in submissions, and does not have to be made on the day and at the time when the evidence is given. More fundamentally in *DPP v. Lynch* [2016] IECA 78 (Unreported, Court of Appeal, 3rd March, 2016), Edwards J. (Sheehan and Mahon JJ. concurring), held

that the fact that hearsay was not objected to does not make it admissible if it is otherwise inadmissible.

20. Even if I am wrong and the fact that this conversation is recited in the case stated means I have to proceed on the basis that the contents of that conversation are true, all that was said was that the insurer would seek to recoup the payment from the insured, not that it would not be liable to indemnify the insured. The phrase *"seek to"* is unduly vague in the context of a criminal prosecution. One might *seek to* do something without having an entitlement to do it.

21. The case stated doesn't specifically say that the certificate of insurance was before the District Court and I am told that it was not in fact produced to the court but only to the prosecuting Garda in court on the morning. It isn't clear whether it was produced after the expiry of the period specified for the statutory demand which could in turn give rise to a possible presumption against the accused, but even if it had been produced late, the fact it was ultimately produced at all would probably be enough to rebut the presumption of no insurance. No demand as such is referred to in the case stated. In the absence of evidence of a demand that wasn't complied with, the presumption does not apply anyway and the onus of proof of there being no insurance remains on the prosecution.

22. Mr. Whyms said the certificate does not actually contain any statement that the insurance is conditional on compliance with the requirements of a learner permit, but that does not particularly matter because the certificate is not before the court and was not before the District Court. Mr. Staunton suggested that I consider asking the District Court to append the DAR before finalising the present case stated, but that was not on the basis of anything definite. He accepted that he did not have any instructions as to whether there was any relevant additional evidence in fact adduced in the District Court, so under those circumstances it would not seem there is any compelling basis to seek further clarification from the learned District Court judge. Also, as noted above I should add that even if there had been evidence of a demand that wasn't complied with in a timely manner, the fact that a certificate was eventually produced would probably rebut any adverse presumption that might otherwise arise.

Order

23. Two final points are perhaps worthy of mention before concluding. Firstly, in future prosecutions of this type, assuming that a certificate is produced, it will be necessary for the prosecution to prove the breach of a condition of the policy of insurance by some form of admissible evidence. Secondly, the DPP here suggests that it may be useful to append the DAR to cases stated as a general practice, and indeed such a practice would avoid any argument as to what was or was not in evidence in the event of a dispute arising from the precise terms of any summary of evidence set out in the case stated.

24. The order will be as follows:

    (i). The present case stated has to be answered on the basis that the accused cannot be convicted under s. 56(1) of the 1961 Act on the evidence referred to

in the case stated, so the answer to the question posed in the Case Stated is "*No*".

(ii). I will make an order that the accused benefit from an order under s. 5 of the Criminal Justice (Legal Aid Act) 1962.