

THE HIGH COURT

2009 443 SS

**IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857, AS EXTENDED BY SECTION 50(1) OF
THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961**

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA MICHAEL MULLANEY)

PROSECUTOR

AND

PAT AND OWEN O'GRADY LIMITED

ACCUSED

Judgment of Mr. Justice Hedigan delivered the 19th day of August, 2009

1. This is an appeal by way of Case Stated by District Judge Mary Devins pursuant to section 2 of the Summary Jurisdiction Act 1857, as extended by section 50(1) of the Courts (Supplemental Provisions) Act 1961, on the application of the prosecutor who was dissatisfied with the determination of the District Judge as being erroneous in point of law.
2. The opinion of the High Court is sought as to whether the District Judge was correct to dismiss all bar one of the charges against the accused.

I. Factual and Procedural Background

3. On the 6th of October 2005, Garda Michael Mullaney stopped a JCB Fast Track vehicle ('the vehicle') towing a three axle trailer ('the trailer') at Fair Green, Westport, County Mayo. The vehicle was being driven by Mr. Pádraig Kilcoyne, a boy of 17 years of age, and was transporting 24 bales of concrete blocks from a quarry in Westport to Louisburgh. He informed Garda Mullaney that he was employed by the accused and that he was transporting the concrete blocks for reward. The trailer had a specially fitted lift arm, designed for the movement and placement of bales of such concrete blocks. Arising out of this incident, a number of summonses were subsequently issued to the accused.

4. On the 5th of October 2006, the accused appeared before the learned District Judge, sitting as Westport District Court charged with the following offences:-

- (a) Employing an unlicensed driver contrary to section 38(3) of the Road Traffic Act 1961, as amended ('the 1961 Act');
- (b) As owner, exceeding the maximum load contrary to section 12(3)(b) of the 1961 Act;
- (c) Possessing a trailer mark which was not punched on the off side of the trailer, contrary to section 10(6) of the 1961 Act;
- (d) Failing to exhibit the trailer mark on the near side of the trailer contrary to section 10(6) of the 1961 Act;
- (e) Operating the vehicle and trailer, without a certificate of road-worthiness in respect of either, contrary to Article 14 of the European Communities (Vehicle Testing Regulations) 1991;
- (f) Carrying merchandise without a merchandise licence contrary to section 9 of the Road Transport Act 1933, as amended ('the 1933 Act');
- (g) Failing to exhibit a road transport plate, contrary to section 34 of the 1933 Act;
- (h) Failing to install a tachograph on the vehicle in contravention of the European Communities (Road Transport) (Recording Equipment) Regulations 1986 ('the 1986 Regulations');
- (i) Failing to use a tachograph in respect of the vehicle in contravention of the 1986 Regulations;
- (j) Aiding and abetting dangerous driving contrary to section 53(1) of the 1961 Act;
- (k) Failing to pay the correct rate of motor tax, contrary to section 2 of the Finance (Excise Duties)(Vehicles) Act 1952; and

(I) Failing to exhibit a rear number plate.

5. At the hearing, Garda Mullaney gave evidence that when he had encountered the vehicle on the 6th of October 2005, he had become concerned that the operation for which it was being used was being carried out in a dangerous and unlawful manner. He made a lawful demand for the subsequent production of a certificate of roadworthiness in respect of both the vehicle and the trailer at Louisburgh Garda station, neither of which was ever produced.

6. Garda Mullaney gave further evidence that there was no tachograph installed in the vehicle. A tachograph is a device which records the speed of the vehicle and the rest periods taken by the driver. There was no identification plate on the near side or on the off side of the trailer and one of the tyres was defective. The driver had been asked to produce a driving licence and had produced a full Category B licence which entitled him to drive vehicles up to 3,500 kilograms in weight. Suspecting the vehicle and the trailer to be overloaded, Garda Mullaney escorted the vehicle to the authorized weighbridge at Moneen, Castlebar, County Mayo. The vehicle and trailer were weighed and their combined weight was recorded at 40,320 kilograms. The weight of the trailer, which had three axles, on its own was 32,660 kilograms. The distance between the axles of the trailer was measured and recorded at 1.2 metres. The distance between the foremost and the rearmost axles of the trailer was, accordingly, 2.4 metres. It should be noted that according to Regulation 10(4) of Road Traffic (Construction and Use of Vehicles) Regulations S.I. No. 5 of 2003 ('the 2003 Regulations'), the total weight laden of the trailer should not have exceeded 13,200 kilograms.

7. Garda Mullaney went on to explain how he had calculated the weight transmitted to the surface of the road by the trailer. The vehicle had weighed 7,560 kilograms on its own. The trailer, while attached to the vehicle, had been placed on the weighbridge and weighed to determine the weight transmitted to the surface of the road by the triaxle. It weighed 28,060 kilograms. As the distance between the adjacent axles was less than 1.3 metres, the maximum permissible weight to be transmitted to the road surface was 21,000 kilograms. The excess weight transmitted to the surface of the road by the trailer was therefore 7,060 kilograms.

8. Evidence was also given by Garda Mullaney of how he had checked the manufacturer's plate on the vehicle. This plate indicates the maximum weight that could, in the opinion of the manufacturer, be safely towed. In the present case, the permissible braked towable mass of the vehicle was 17,235 kilograms while the towed weight, as noted above, was 32,260 kilograms, an excess of some 15,425 kilograms. It was the opinion of Garda Mullaney that to exceed the manufacturer's limit by such an amount was dangerous.

9. Garda Mullaney indicated to the Court that he had been concerned that the vehicle was extremely overweight and that the driver did not have the requisite licence or experience to be in control of same. He considered the overall situation to be highly dangerous. Garda Mullaney told the Court that he had recorded the speed of the vehicle, at one point, as being approximately 69 kilometres per hour. He pointed out that although he was not an engineer, he was concerned that such a heavy load might push the tractor component forward, render the vehicle unstable and affect the steering and braking combinations. He also opined that the load was capable of causing severe damage to roads, ducts and bridges.

10. Garda Mullaney explained to the Court that the licence of the driver had entitled him only to drive vehicles of less than half the weight of the vehicle in which he had been stopped. Furthermore, the vehicle was owned by the accused company which had not been issued a Road Freight Carrier's Licence. As the vehicle had been engaged in commercial haulage, neither the agricultural tractor tax rate of €78 nor the general haulage rate of €253 applied. Instead, in order to obtain a Road Freight Carrier's Licence, the vehicle ought to have been taxed at the goods vehicle rate, based on weight unladen, which in the present case would have been €750. A certificate from the Department of Transport was produced to prove that no such tax had been paid and that no such licence had been obtained.

11. In cross-examination, it was put to Garda Mullaney that the government had failed to provide adequate testing facilities for such a vehicle and that it was therefore impossible to obtain a certificate of roadworthiness. He responded that if the vehicle had been taxed appropriately, it would have been submitted for testing and that in any event, the trailer should have been submitted and tested to obtain a certificate of roadworthiness. Had this been done, a Road Freight Carrier's Licence could have been obtained.

12. It was further put to Garda Mullaney that the vehicle and trailer had a combined total of five axles and could therefore legally carry a weight of 40,000 kilograms. Garda Mullaney explained that an articulated two-axle vehicle carrying a three-axle trailer could indeed legitimately weigh up to 40,000 kilograms. However, he stated that for this to be permissible, at least 20% of the weight of the trailer needed to be superimposed on the vehicle at a point between the foremost and rearmost axle of the vehicle. In the present case, the trailer had been attached to the vehicle by a tow-hook which was not superimposed on the vehicle and which bore only 14% of the weight of the trailer, or 4,600 kilograms. In view of this, Garda Mullaney stated that the particular combination of a vehicle and trailer could not be considered to be an articulated vehicle. Furthermore, he asserted that the 40,000 kilogram limit applying to a combination of a vehicle and a trailer could not be obtained in the present case, owing to the restriction on trailer weight contained within Regulation 10(4) of the 2003 Regulations.

13. Evidence was then given by Mr. Kevin O'Connor, a senior engineer within the Department of Transport. He indicated that he was familiar with the regulations covering haulage vehicles and, in particular, the 2003 Regulations. He referred the Court to Regulations 18(1) and 18(2) and opined that if it were taken that Regulation 18(2) had been fulfilled - that is, that the distance between the rearmost axle and the foremost axle of the vehicle was not less than 3 metres - the weight limit in respect of the vehicle and trailer combination would have been 40,000 kilograms. Mr. O'Connor emphasised, however, that compliance with Regulation 18 on the weight of a combination did not exonerate the owner from compliance with limits on the weights of: wheels; axles; axle groups, such as the triaxle in the present case; or the weight laden of individual vehicles forming part of a combination. In particular, Mr. O'Connor referred to the evidence of Garda Mullaney concerning the distance of 2.4 metres between the foremost and rearmost axles of the trailer and calculated that the application of the 5.5 tonnes per metre rule contained in Regulation 10(4) of the 2003 Regulations gave a maximum permissible value of 13,200 kilograms for the weight laden of the trailer. In light of Garda Mullaney's evidence that the trailer had weighed 32,660 kilograms while laden, this indicated that there had been an overloading of 19,460 kilograms. On this basis, Mr. O'Connor expressed concern that the load was capable of causing severe damage to roads, ducts and bridges.

14. Mr. O'Connor also expressed concern in respect of the ratio of weight distribution between the vehicle and the trailer. He stated that in normal circumstances, a lorry or tractor unit might weigh 12,000 kilograms to pull a trailer of 18,000 kilograms giving a ratio of 1:1.5. In this case, however, the vehicle weighed just 7,560 kilograms and the trailer 32,660 kilograms, giving a ratio of less than 1:4. Mr. O'Connor analogised such a distribution of weight to 'the tail wagging the dog'. He informed the Court that it would render the combination unsafe and that steering and braking would be seriously affected.

15. When the prosecution case had concluded, evidence was given by Mr. Patrick O'Grady, a director of the accused. Under cross-examination, he stated that Mr. Kilcoyne was an employee of the company who had been working in that capacity on the date of the alleged offences. He further admitted that the company owned the vehicle and the trailer but that neither had been submitted for any government testing, nor had the company obtained a Road Freight Carrier's Licence for the vehicle.

16. Evidence was then given for the defence by Mr. Joseph Dooley, a director of Dooley Brothers Limited who had manufactured the trailer. Under cross-examination, he indicated that no tests had ever been carried out to either indicate the effect which a maximum load would have on the trailer and the road surface, or to determine the distance it would take for the vehicle to stop while carrying the maximum load.

17. At the conclusion of the evidence, it was submitted on behalf of the prosecutor that the case had been proven beyond reasonable doubt in relation to each charge. It was submitted on behalf of the accused company that a number of technical defences were available to it in respect of each charge. In the circumstances, the learned District Judge adjourned the matter to allow both sides to lodge written submissions.

18. Written submissions were filed by both sides shortly after the initial hearing. The matter came before the learned District Judge again on the 7th of December 2006. On that date, no further submissions were made on behalf of the accused but a number of oral submissions were made on behalf of the prosecutor. These were as follows:-

(a) In respect of the charge of employing an unlicensed driver, it was argued that a full Category B licence did not entitle Mr. Kilcoyne to drive the vehicle in question. While such a licence did entitle a person to drive a land tractor or works vehicle not capable of exceeding 40 kilometres per hour, the vehicle in the present case was not a works vehicle and had been capable of travelling at 69 kilometres per hour. In the circumstances, what was required pursuant to Regulation 5 of the Road Traffic (Licensing of Drivers) Regulations 1999 ('the 1999 Regulations') was a Category EC driver's licence which Mr. Kilcoyne did not possess.

(b) With regard to the charge of exceeding the maximum load, it was contended that there had been a clear breach of section 12(3)(b) of the 1961 Act which provides *inter alia* that "A person shall not use in a public road a vehicle or combination of vehicles of which the weight as then laden exceeds the maximum weight laden specified by regulation under this section applying in relation to the vehicle or combination." Furthermore, the defence had relied upon the maximum weight for such a vehicle and trailer combination as 40,000 kilograms. However, the proven weight of the combination was 40,350 kilograms therefore even this limit had been exceeded..

(c) In relation to the lack of a certificate of roadworthiness, Regulation 14(1)(a) and 14(1)(b) of the European Communities (Vehicle Testing) Regulations 1991 were quoted. It was argued that these provisions require a vehicle that is more than 12 months old to be tested. It was contended that the trailer fell squarely within the definition of a goods trailer contained within the Regulations. On the basis that the trailer in the present case had been manufactured in 2003 and was stopped in 2005, it was submitted that a certificate ought to have been obtained.

(d) In respect of the charge of carrying merchandise without a merchandising licence, it was asserted that such a licence was required of all vehicles, including trailers, used to carry goods with an unladen weight of more than 2.5 tonnes. It was submitted that a certificate, pursuant to section 9 of the 1933 Act, to the effect that the accused company had not been granted a Road Freight Carrier's Licence, coupled with evidence that the vehicle had been stopped on a public road while carrying goods for reward, was sufficient proof beyond reasonable doubt.

(e) With regard to the charge of failing to have a tachograph installed, it was argued that the vehicle did not fall within any of the exemptions relating to either agriculture or forestry contained within the 1986 Regulations and, therefore, a tachograph was required.

(f) In relation to the charge of aiding and abetting dangerous driving, it was contended that no prudent person could hold a view that such a young, unaccompanied driver holding only a Category B driving licence could safely control a combination in which the trailer weighed more than four times the weight of the vehicle that was towing it. In addition, emphasis was placed on the condition of the trailer, the fact that it was untested and the existence of a large cut on the side wall of one of the tyres.

19. Despite these detailed submissions on behalf of the prosecutor, the learned District Judge concluded that the vehicle in question was not a 'goods vehicle' and therefore could not have been tested for a Road Freight Carrier's Licence. On this basis, she found that the limits on axle weights and laden weight of single vehicles did not apply. The learned District Judge also held that a tachograph could not be fitted to such a vehicle. In light of these findings, she dismissed all of the charges with the exception of the offence of failing to display a number plate at the rear of the trailer.

II. The Decision of the Court

(a) Employing an Unlicensed Driver

20. It is not disputed on the facts of the present case that Mr. Kilcoyne was in possession of a full Category B licence alone. Regulation 5 of the 1999 Regulations that such a licence entitles the holder to drive "[v]ehicles (other than

motorcycles, mopeds, work vehicles or land tractors) having a design gross vehicle weight not exceeding 3,500 kg., and having passenger accommodation for not more than 8 persons." On the evidence, the vehicle in the present case had, on its own, a design gross weight of 7,560 kilograms.

21. It is equally clear that Mr. Kilcoyne was driving the vehicle at the behest of the accused company, in the course of his employment. The inevitable conclusion from such evidence is that the accused company, as owner of the mechanically propelled vehicle, had employed a person to drive a vehicle in a public place, in circumstances where that person's licence did not entitle them to drive the vehicle in question, within the meaning of section 38(3) of the 1961 Act. I therefore conclude that the learned District Judge was incorrect in dismissing the charge.

(b) Exceeding the Maximum Load

22. The learned District Judge predicated her dismissal of this charge on the fact that the vehicle in question was not a 'goods vehicle'. However, it is clear from the 2003 Regulations that the weight restrictions contained therein are not limited to 'goods vehicles' but rather apply in a general manner to all vehicles and trailers. Such a construction of the 2003 Regulations is consistent with the clear intention of the legislature to ensure that overweight vehicles are not used on public roads in such a manner as to jeopardise public safety or the integrity of the national road network.

23. In any event, and as will be noted below, I have reached the opinion that the vehicle in the present case did in fact fall within the definition of a 'goods vehicle' in that it was "adapted primarily for the conveyance of goods or burden of any description" within the meaning of Regulation 2 of the 2003 Regulations. I am thus of the opinion that the learned District Judge was incorrect to dismiss this charge.

(c) Failing to Exhibit a Trailer Mark Punched on the Offside of the Trailer

24. No reason was given for the decision of the learned District Judge to dismiss this charge. On the basis of the clear uncontroverted evidence of Garda Mullaney to the effect that there was no trailer mark on nearside or on the offside of the trailer, I can only conclude that the decision to dismiss this charge without any explanation was incorrect.

(d) Operating the Vehicle without a Certificate of Roadworthiness

25. This charge was also dismissed on the basis that the vehicle was not a 'goods vehicle'. I am of the opinion, however, that this finding was not supported by the evidence in light of the established jurisprudence. As Pierse notes in *Road Traffic Law* (3rd Edition, First Law, 2004) at paragraph 1.11.14:-

"As to goods vehicles, in *A.G. v. O'Sullivan* (1958) 92 ILTR 21, it was held that a tractor adapted to carry sacks by fitting a detachable wooden platform was hauling goods and was taxable as a goods vehicle."

26. In the present case, evidence was given to the effect that the trailer component of the combination had a specially fitted mechanical arm for the lifting of bales of concrete. This, it seems to me, is directly comparable to the situation in *O'Sullivan*, whereby the vehicle was held to be a 'goods vehicle'. In consequence I conclude that the District Judge was incorrect to have dismissed the charge.

(e) Carrying Merchandise without a Merchandising Licence

27. Again this charge is one which was dismissed on the basis that the vehicle was not a 'goods vehicle'. Notwithstanding the conclusions which I have already reached contrary to that view, it appears that such a consideration does not lie at the heart of the offence created by section 9 of the 1933 Act. The position is better explained by Woods in *Road Traffic Offences* (2nd edition, Limerick, 2005):-

"In *Attorney General (O'Gara) v. Farrell* (1958) 94 ILTR 3, the High Court held that a prima facie case is established when the complainant proves that the lorry belonged to the defendant, that it contained merchandise, that it was driven on a public road [...] and that the defendant had no road transport licence. To avoid conviction, the defendant must produce rebuttal evidence."

28. In the present case, Garda Mullaney gave evidence that: the driver was carrying merchandise, in the form of concrete blocks, for reward on a public road; that the vehicle exceeded 2.5 tonnes; and that, according to a certificate produced under section 9 of the 1933 Act, the accused company was not the holder of a merchandise licence. No rebuttal evidence was tendered by the accused. I am therefore of the opinion that the learned District Judge was incorrect to dismiss the charge.

(f) Failure to Exhibit a Road Transport Plate

29. In light of the findings above in relation to the requirement of a merchandising licence, it follows that the vehicle ought to have exhibited a road transport plate pursuant to section 34 of the 1933 Act. The District Judge was therefore incorrect when she dismissed this charge.

(g) Failure to Install and Use a Tachograph in Respect of the Vehicle

30. The learned District Judge dismissed these two charges on the basis that a tachograph could not be fitted to a tractor, such as the vehicle in the present case. However, if such an exception to the requirements of the 1986 Regulations - which is not contained within the terms of the Regulations themselves - were to be allowed, it would be open to any party hiring a driver for commercial purposes to simply obviate the legal requirements by using a tractor or similar vehicle. The 1986 Regulations hold an important role within the State's obligations under European Community law. On this basis, it would be perverse for the Court to allow the plain intention of the Oireachtas to be frustrated in such a manner. I am therefore of the view that the learned District Judge was incorrect in dismissing these charges.

(h) Aiding and Abetting Dangerous Driving

31. No reason was provided by the learned District Judge for her decision to dismiss this charge. I agree with the prosecutor's submissions that much of the evidence tendered gave rise to at least a *prima facie* case against the accused company. Expert opinion was provided to the effect that the weight distribution ratio of the combination was highly dangerous. Furthermore, the driver was an extremely young man who did not possess the required license for the vehicle in question and who cannot have had much experience in controlling such a large and cumbersome vehicle on the public highway. Finally, there is also at least some evidence to suggest that the tyres on the trailer were in poor condition. In light of all of these factors, I can only conclude that the learned District Judge ought not to have dismissed the charge.

(i) Failing to Pay the Correct Rate of Motor Tax

32. With respect to this charge, the learned District Judge gave no explanation for dismissing the charge. In light of Garda Mullaney's evidence to the effect that the rate of tax for a goods vehicle of such a weight unladen would have been €750, coupled with my own conclusions as to the status of the vehicle, it seems to me that the charge was adequately made out. The learned District Judge was therefore incorrect to dismiss the charge.

III. Conclusion

33. In light of the foregoing, I am of the opinion that the learned District Judge fell into error in deciding to dismiss all but one of the charges against the accused. I would answer the question contained within the case stated - that is, whether the learned District Judge was correct to dismiss each of those charges - in the negative.