THE HIGH COURT

[2017 No. 1253 S.S.]

IN THE MATTER OF SECTION 52(1) OF THE COURTS

(SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

(GARDA JAMES REYNOLDS)

PROSECUTOR

AND

STEPHEN BURKE

ACCUSED

JUDGMENT of Mr. Justice Binchy delivered on the 3rd day of October, 2018

1. This matter comes before the Court by way of consultative case stated by District Judge David Kennedy dated 7th November, 2017.

2. On 23rd March, 2017 the accused appeared before Bray District Court, Co. Wicklow, charged with two counts of dangerous driving. The offences were alleged to have occurred on the N11 on 13th January, 2016, at two locations, the Glen of the Downs, Delgany, Co. Wicklow and Kilmurry South, Co. Wicklow. The prosecuting garda, Garda Reynolds, gave evidence that on that date he observed a motorcycle being driven dangerously at the two locations in respect of which summonses were issued. He was unable to obtain a complete registration number for the vehicle but obtained sufficient segment of the registration number to match it to a vehicle fitting the description of the motorcycle that he had observed. This led Garda Reynolds to call to the house of the accused on 16th January, 2016, at 11.38a.m. Garda Reynolds inquired of the accused as to who was driving the motor vehicle on the date and at the time he observed it on the N11. He confirmed that he requested this information pursuant to and having referred specifically to s. 107(4) (hereinafter referred to as "s. 107") of the Road Traffic Act 1961 (the "act of 1961"), which provides as follows:-

> "(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 or a pedal cycle —
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> (a) the owner of the vehicle shall, if required by the member, state whether he or she was or was not actually using the vehicle at the material time and, if he or she fails to do so, commits an offence,
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> (b) if the owner of the vehicle states that he or she was not actually using it at the material time, he or she shall give such information as he or she 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 or she fails to do so, commits an offence unless he or she shows to the satisfaction of the court that he or she did not know and could not with reasonable diligence have ascertained who that person was, or
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> (c) any person other than the owner of the vehicle shall, if required by the member, give any information which it is in his or her 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 or she fails to do so, commits an offence.
>
> (5) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding €2,000.

3. Garda Reynolds confirmed to the court that he informed the accused that he would be committing an offence by not telling Garda Reynolds who was driving the motorcycle on the date in question. However, the accused, on three occasions, informed Garda Reynolds that he did not know who was driving the vehicle on that date. Garda Reynolds said that he reminded the accused on several occasions that he would be committing an offence by not telling Garda Reynolds who was driving the vehicle, but the accused persisted in stating that he did not know who was driving.

Garda Reynolds also informed the court that as he was leaving the house of the accused, the accused's partner asked Garda Reynolds how Garda Reynolds could be contacted. Garda Reynolds gave his contact details.

4. Later that day, Garda Reynolds received a message to say that the accused had been looking for him. He returned the call to the accused at 2:11pm on that day. The evidence of Garda Reynolds as to this conversation, as recorded in the transcript sent forward with the consultative case stated, is as follows:-

> "I talked to Stephen Burke who formally said, "I was driving the bike on N11 that morning.
>
> Judge, I cautioned him immediately. I understood – I asked him did he understand the caution. He says "yes". After cautioning him, he said:
>
> "is that serious? I don't recall any serious incident or accident"."

5. Under cross-examination by the solicitor for the accused, Mr. Maloney, Garda Reynolds drew a distinction between issuing a caution to the accused and demanding information from him pursuant to s. 107. This is apparent from the following exchange recorded in the transcript:-

> Garda Reynolds: "when he admitted on the phone call that he was the driver, I cautioned."
>
> Mr. Maloney: "No. No, No. Let's go to back to house, because you have told us in your evidence, and I am picking this up

> from your evidence, when you went in, you were satisfied as that stage to administer a caution to him; isn't that correct?"
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> Garda Reynolds: "Judge, I didn't say I cautioned him. I actually informed him, being the registered owner, that I made the requirement of him to – under the Road Traffic Act to tell me who was driving the vehicle that morning."
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> Mr. Maloney: "And that's under section 107?"
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> Garda Reynolds: "I think it..."
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> Mr. Maloney: "It's what you say in your statement?"
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> Garda Reynolds: "That would be correct then."

6. The accused did not give any evidence at the hearing before the District Court on 23rd March, 2017. It appears that the only evidence was that given by Garda Reynolds. Garda Reynolds accepted that the accused in ,stating that he was driving the motor vehicle at the date and time in question, did so in response to the requirement made by Garda Reynolds. Garda Reynolds did not have any other evidence sufficient to establish that the accused was driving the vehicle on the occasion in question.

7. At the conclusion of Garda Reynolds' evidence, Mr. Maloney submitted to the court that the evidence that Garda Reynolds had obtained from the accused that he was driving the vehicle constituted an involuntary statement in law because it had been provided in response to a demand made by Garda Reynolds of the accused pursuant to s. 107 of the Act of 1961. Accordingly, it was submitted on behalf of the accused that that admission could not be used in evidence against him.

8. The District Judge adjourned the matter for three weeks to allow the parties to make written submissions on this issue. The consultative case stated records that having heard the submissions of the parties on that date, the District Judge ruled that:

> "because there had been a gap between the making of the demand under the legislation and furnishing of the information, that the information was not furnished under the legislative provision.
>
> Having considered the matter, I was of the view that the statement was a voluntary one as it had not been made at the time of demand under the section."

9. It appears that the court did not determine the proceedings and instead decided to state a case on this issue. It is unclear if that was in response to a request made by either of the parties.

10. The District Judge then went on to certify the following questions of law for determination by this Court:-

> (a) Given that the transcript reflects that the information was provided pursuant to the statutory demand, and both parties accepted this to be so, was I right to find that the information provided by Mr. Burke was not provided by him following a demand made pursuant to legislation?
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> (b) If no, does it follow that the information provided by the accused in this case was, in fact, pursuant to a demand made pursuant to s. 107 of the Road Traffic Act 1961 (as amended)?
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> (c) Is an answer provided pursuant to the section voluntary and admissible as evidence in subsequent criminal proceedings?" At the hearing of this case stated, the parties agreed that this question was unnecessarily broad in its scope , and could be reformulated so as to ask whether an answer given by an accused person pursuant to a question put to him under s.107 may be admitted in evidence against him in a prosecution for an offence under the act of 1961?

Are questions (a) and (b) questions of law?

11. It is submitted on behalf of the prosecutor that the first two questions relate to the finding of fact made by the District Judge i.e., that the admission of the accused, that he was driving the motor bike, was made voluntarily. The first question in effect seeks to review the decision made by the District Judge and the second question then invites this Court to make an alternative finding of fact. It is submitted on behalf of the prosecutor that the most fundamental feature of this case is that the District Judge has made a finding of fact that the admission of the accused was voluntary and that such a finding is one that is within the exclusive remit of the trial judge. In this regard, the prosecutor relies upon the case of In *Re National Irish Bank (No. 1)* [1999] 3 I.R. 145 wherein Barrington J. said at p. 118:-

> "and it can be stated, as a general principle, that a confession, to be admissible at a criminal trial, must be voluntary. Whether however a confession is voluntary or not must in every case in which the matter is disputed be a question to be decided, in the first instance by the trial judge."

12. Moreover, it is submitted that a consultative case stated is specifically limited to questions of law. The court cannot entertain a case stated solely involving the determination of questions of fact, and while the third question posed by the case stated herein is a question of law, that question does not arise because if the admission was voluntary (as found, as a matter of fact, by the District Judge) then no issue as to its admissibility arises. The prosecutor relies upon the authorities of *Director of Public Prosecutions v. Nangle* [1984] ILRM 171 and *Fitzgerald v. Director of Public Prosecutions* [2003] 3 I.R. 247.

13. In *Nangle* the accused/respondent had been acquitted in the District Court on the basis that the respondent's evidence raised a doubt as to whether the offence had been proved and respondent was entitled to the benefit of that doubt. The Director of Public Prosecutions appealed the decision by way of case stated, contending that the respondent's evidence was so incredible that it was a perverse decision in law for the District Justice to allow it to raise a doubt in his mind. It was accepted by both parties that where a District Justice reaches a determination which is unsupported by any evidence before him that that constitutes good grounds for setting aside his decision on an appeal brought by way of case stated. Notwithstanding this however, Finlay P. held at p. 173 that:-

> "[I]t would constitute an unwarranted interference by me in a proceeding which is exclusively confined to correcting errors of law by an inferior court in the determination of proceedings before it, to hold that evidence so summarised could not have raised a doubt in the mind of the District Justice. He had the opportunity of hearing the witnesses in

this case and of listening to their answers to questions both in direct and cross-examination dealing no doubt in significant detail with the incidents which occurred. One could well conceive that the case might have taken a completely different courses had the injured party been made available as a witness but it would be quite improper for a court to convict an accused person on any speculation as to what an absent witness might have said. In these circumstances, I am satisfied that there are no grounds on which I should interfere with the decision of the learned District Justice and that this appeal by way of case stated must be dismissed."

14. *Nangle* makes it clear that proceedings coming before this Court by way of case stated are confined exclusively to correcting errors of law. This follows from s. 2 of the Summary Jurisdiction Act 1857 (hereinafter the "Act of 1857") which sets out the basis upon which a case may be stated to the Superior Courts as follows:-

> "After the hearing and determination by a justice or justices of the peace of any information or complaint, which he or they have power to determine in a summary way by any law now in force or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices, to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the Superior Courts of Law to be named by the party applying …"

15. One of the questions that expressly arose for consideration by the Supreme Court in *Fitzgerald* was at p. 263: "whether a District Court Judge who is asked to state a case pursuant to s. 2 of the Summary Jurisdiction Act 1857 must first satisfy himself whether a point of law within the meaning of the section has arisen?"

16. The court answered this question in the affirmative. In his judgment, Hardiman J. considered the distinction between questions in fact and law. He did so in the context that it was submitted in that case that there is no legitimate distinction between fact and law so that a grave error in the assessment of fact would be regarded "erroneous in point of law". Hardiman J. confirmed that where a decision that is impugned is at variance with reason and common sense, such decision is invalid as a matter of law. He went on to observe:-

> "… the ingredients of an offence are always known as ascertainable and the question of whether there is evidence to support the existence of each of them is a wholly legal question. But if the question raised related not to the existence of evidence, but to its credibility or to inferences of fact which could reliably be drawn from it, that would be a question of fact."

17. It is submitted on behalf of the prosecutor that in the consultative case stated that is before this Court is not in the proper format and does not contain a section headed "findings of fact" or pose proper questions of law arising out of those facts. It is acknowledged that while a mere failure to follow form does not prevent this Court from dealing the issue, the question does arise as to whether the jurisdiction of this Court has been correctly invoked in terms of a proper question of law being asked.

18. From the authority of *Nangle* and *Fitzgerald* it is submitted by the prosecutor:-

> (1) The jurisdiction of the court in a consultative case is stated is exclusively confined to correcting errors of law and
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> (2) While the courts have held that the question of whether there is sufficient evidence in law to support a conviction is a question of law, as opposed to fact, this exception is generally limited to cases where it can be said there was no evidence to support the conviction. In this case, it is submitted that there was evidence to support the finding of fact by the trial judge that the admission on the part of the accused that he was driving the vehicle was voluntary in nature. It was apparent from *Fitzgerald* that if the question raised be not the existence of evidence, but its credibility or inferences of fact which may credibly be drawn from it, that is a question of fact and it does not fall for determination by way of case stated.

19. No arguments were advanced on behalf of the accused in response to these arguments. While the third question raised by the District Judge is beyond any doubt a question of law, it is absolutely clear that that question does not arise for consideration unless the first two questions are considered and answered in a particular way.

20. While the proceedings do not appear to have being fully determined in the District Court (which in itself a requirement of s. 2 of the Act of 1857) the District Judge has undoubtedly arrived at the conclusion that the admission on the part of the accused that he was driving the vehicle was a voluntary admission. This is a conclusion on a matter of fact and it is clear from both *Nangle* and *Fitzgerald* that determinations of fact are not reviewable by this court on a consultative case stated, unless there is no evidence to support the conclusion. If there is any evidence at all, the credibility of that evidence, or inferences of fact which may be drawn from it, are in turn matters of fact.

21. That the courts will adhere firmly to this principle is apparent from *Nangle*, in which case Finlay P. noted that there was "a clear air of implausibility" about the evidence given by the respondent, which gave rise to his acquittal, but the court nonetheless declined to intervene.

22. So the question that I must ask is whether or not the District Judge had any evidence before him that the information provided by the accused to the effect that he was driving the motor cycle was provided on a voluntary basis? It is clear from the consultative case stated that the District Judge arrived at this conclusion on the basis that there was a gap in time between the demand made by Garda Reynolds under s. 107 and the answer provided by the accused later in the same day. Accordingly, the decision of the District Judge that the admission of the accused was of a voluntary kind was based upon an inference drawn from the evidence. It cannot therefore be said that his decision in this regard was made without reason. While there was no express evidence to the effect that the information was provided by the accused voluntarily, the decision of the District Judge to this effect was an inference drawn from facts that are not in dispute and arguably therefore the conclusion of the District Judge is a conclusion of fact with which the court should not interfere, because the judge had a basis for drawing the conclusion.

23. However, in *Fitzgerald*, Hardiman J. referred to inferences of fact being "reliably drawn" from the evidence. In my view this makes it clear that if this Court is of the view that such inferences of fact cannot be reliably drawn from the evidence, and there is no other evidence of those facts, then it may set aside the conclusion of fact arrived at by the District Judge. Can it therefore be said that in this case the conclusion of fact arrived at by the District Judge was reasonably drawn from the evidence before him? I do not believe so. Firstly, Garda Reynolds himself confirmed in his evidence that the admissions were made by the accused pursuant to the demand made under s. 107. Secondly, there was a gap of less than three hours between the demand made by Garda Reynolds pursuant to s.

107 and the subsequent telephone conversation in which the defendant admitted driving the motor cycle. The warning given by Garda Reynolds in the terms of s. 107 would still have been very fresh in the defendant's mind and, having initially denied any knowledge as to who was driving the motor cycle at the relevant time, the defendant chose to contact Garda Reynolds within a matter of hours to confirm that he was the driver of the motor cycle. The only reasonable conclusion to draw from this sequence of events is that the defendant changed his mind and decided to inform Garda Reynolds that he was the driver of the motor cycle to avoid making matters worse for himself, by committing an offence under s. 107. The situation would clearly be different if there was a much longer gap in time between the demand made by Garda Reynolds and the subsequent admission of the accused. To take an extreme example, if the accused telephoned Garda Reynolds twelve months later, and nothing else had happened in the meantime, to inform Garda Reynolds that he was the driver of the motor cycle, then it could hardly be said that he was motivated by the threat of proceedings under s. 107. However, it is clearly not possible for a court to proclaim as a general proposition when such a statement moves from being involuntary to voluntary and the circumstances of individual cases will vary. But, in my view, there can be no doubt at all that in this case the statement made by the accused to Garda Reynolds must be regarded as being involuntary and the conclusion of the District Judge that it was made voluntarily was based upon an inference unreasonably drawn from the evidence presented to him.

24. It was further submitted on behalf of the prosecutor that since the accused gave no evidence in the proceedings, he gave no evidence that his statement was involuntary and that the Court should not set aside the conclusion of the District Judge in such circumstances, I do not think that this argument can be countenanced. The burden of proof rests upon the State to prove its case beyond reasonable doubt and it hardly needs to be said that the accused is entitled to elect not to give evidence. If he makes that choice, then the court must decide upon the voluntary nature of the statement from the evidence before it, drawing whatever inferences are appropriate from that evidence , but not from the silence of the accused . In this case, I have come to the conclusion that the statement made by the accused that he was the driver of the motor cycle must be regarded as being involuntary because:-

> (1) Garda Reynolds himself accepted that it was made following upon the demand made by him of the accused pursuant to s. 107, and
>
> (2) The accused contacted Garda Reynolds for the purpose of informing Garda Reynolds that he was the driver of the motor cycle at the relevant time, within a short number of hours following the demand made by Garda Reynolds.

25. Accordingly, the only reasonable inference that can be drawn from the evidence is that the accused made the statement that he did to Garda Reynolds pursuant to the demand made by Garda Reynolds under s. 107. That being the case, the statement made by the accused cannot be regarded as a voluntary statement. It follows therefore that although the first two questions asked by the District Judge in the consultative case stated related to matters of fact, they may be answered in this case because the conclusion reached by the District Judge as to the admissibility of the statement made by the accused was wholly unsupported by the evidence and must be set aside. Having arrived at that conclusion, it follows that the second question asked by the District Judge should be answered in the affirmative; the statement made by the accused was indeed made pursuant to a demand made by Garda Reynolds under s. 107. It follows from that that I must now move to consider the third question asked by the District Judge, but as reformulated by agreement between the parties (see para.10(c) above) Since I have already determined that the answer provided by the accused was involuntary, the question should simply be whether an answer given by an accused to a question made under s. 107 may be admitted in evidence against him in a prosecution for an offence under the Act of 1961 (as amended)?

Submissions of Accused on third question
26. It is the submission of the accused that, since the statement was made involuntarily, it cannot be used in evidence against him. Counsel for the accused relies in this regard on three authorities in particular: *People (A.G.) v. Cummins* [1972] I.R. 312, *People (A.G.) v. Gilbert* [1973] I.R. 383 and *Re National Irish Bank Ltd (No. 1)* [1999] 3 I.R. 145. Reliance is placed upon the following passage from the judgment of Walsh J. in *Cummins* at p. 322:-

> "It should be said at once that a trial judge has no discretion to admit an inculpatory or an exculpatory confession, or statement, made by an accused person which is inadmissible in law because it was not voluntary. It is a matter for the trial judge to decide, when he has heard the evidence on the point, whether or not he will admit a statement, but if he is satisfied that it was not voluntary then his decision can be only to exclude it."

27. In *Gilbert* the accused was tried in the Circuit Court for receiving a motor vehicle knowing it to have been stolen, contrary to s. 33 (1) of the Larceny Act 1916. A member of An Garda Síochána had invoked s. 107 and had asked the accused to state who had been driving the motor vehicle at a particular time. The member had informed the accused of the penalty for failure to comply with a demand made under s. 107, and the accused then admitted that he had been the driver of the vehicle at the relevant time. At the trial, evidence of the accused's inculpatory statement was admitted. On appeal, however, it was held by the Court of Criminal Appeal that the statement made by the accused in answer to the question pursuant to s. 107 was not a voluntary statement, and therefore that it should not have been admitted in evidence at the trial. The court cited and relied upon the passage of Walsh J. in *Cummins* referred to above. Referring to *Cummins* the court said at p. 389:-

> "As in the present case the statement in question was made after the sergeant had stated that a failure or refusal to answer would constitute an offence involving serious penalties, in our opinion it could not be said in any sense to be a voluntary statement and so the trial judge should not have admitted it in evidence on the trial of the offences with which the appellant was charged under the Larceny Act, 1916. We express no opinion on the position which would have existed if the charges had been for offences under the Road Traffic Acts."

28. This last sentence gave rise to comment by Barrington J. in his decision in *Re National Irish Bank Ltd*, also relied upon by the accused in this case. In this regard, Barrington J. said, at p. 183:-

> "The reference to the Road Traffic Acts in the last sentence is puzzling. Presumably the Court did not wish to cast any doubt on the powers of the police to collect information under the Road Traffic Acts. But, in principle, a confession, once involuntary, would appear to be equally objectionable no matter what the nature of the criminal prosecution."

29. In *Re National Irish Bank Ltd* the court was required to consider the admissibility of statements made or evidence gathered pursuant to s. 18 of the Companies Act 1990. That section provided that, *inter alia*, an answer given by a person to a question put to him in exercise of powers conferred [on an inspector] under s. 10 of the same act could be used in evidence against the person making the statement. Section 10 of that Act imposed an obligation on officers or agents of the company to cooperate with inspectors appointed under the Act and to provide them with documents and answer any questions put to them in connection with the affairs of the company. The section further provided that persons failing to comply with requirements made of them under the section could be held in contempt of court. The case was heard in this court by Shanley J. who, applying the decision of the Supreme Court in *Heaney v. Ireland* [1996] 1 I.R. 580 held that the right to silence was not an absolute right and could be abrogated,

expressly or impliedly, by statute. The Supreme Court affirmed the decision of Shanley J., adding that the right to silence could be required in certain circumstances to give way to the exigencies of the common good, provided that the means used to curtail the right were proportionate to the public object to be achieved. In this case, however, counsel for the accused relies upon the final paragraph of the decision of Barrington J. (with whom the other members of the Supreme Court agreed), in which he stated at p. 189:-

> "In these circumstances I would uphold the decision of the learned trial judge but would add the statement that a confession of a bank official obtained by the inspectors as a result of the exercise by them of their powers under s. 10 of the Companies Act, 1990, would not, in general, be admissible at a subsequent criminal trial of such official unless, in any particular case, the trial judge was satisfied that the confession was voluntary."

30. Earlier in his decision, Barrington J. explained the rationale behind this proposition, at pp. 186 – 187 as follows:-

> "…a trial in due course of law requires that any confession admitted against an accused person in a criminal trial should be a voluntary confession and that any trial at which an alleged confession other than a voluntary confession were admitted in evidence against the accused person would not be a trial in due course of law within the meaning of Article 38 of the Constitution and that it is immaterial whether the compulsion or inducement used to extract the confession came from the executive or from the legislature."

31. Thus, it is submitted on behalf of the accused in this case, that since the statement that he made to Garda Reynolds admitting that he was driving the motor cycle at the relevant time was made pursuant to a statutory demand made by Garda Reynolds under s. 107, and was not made voluntarily, that statement cannot be used in evidence against the accused in connection with charges brought against him for offences under the Act of 1961.

Submissions of the Prosecutor on the third question

32. The prosecutor accepts the general proposition that a statement that has not been made voluntarily should not be admitted in evidence against an accused. However, the prosecutor strongly argues that the rule is not absolute and that the correct legal position is more nuanced and in line with the approach taken in cases decided by the Privy Council and the European Court of Human Rights ("ECtHR"). Before dealing, however, with the cases of those bodies to which I was referred, I will deal with the submissions on behalf of the prosecutor in connection with the decision of the Supreme Court, and in particular that of Barrington J. in *Re National Irish Bank*, and other authorities in this jurisdiction to which the prosecutor referred in her submissions.

33. Firstly, it is submitted that, insofar as Barrington J. expressed puzzlement at p. 183 with the statement of Walsh J. in Cummins that "we express no opinion on the position which would have existed if the charges had been for offences under the Road Traffic Acts", the comments of Barrington J. in this regard were obiter. Moreover, there is a clear difference between prosecutions under the Road Traffic Acts and other prosecutions and that there are particular policy reasons for the use of s. 107 in Road Traffic Act prosecutions that do not arise in other offences. These policy reasons have been set out by both the Privy Council and the ECtHR relied upon by the prosecutor to which I refer below and it is submitted that had these authorities been available to Barrington J., it is unlikely he would have made his obiter expression of puzzlement.

34. It is submitted that *Re National Irish Bank* was concerned with extensive powers conferred upon inspectors appointed under the Companies Acts, in contrast to s. 107 which solely relates to the disclosure of the identity of the user of a vehicle. Moreover, merely identifying the driver of a vehicle does not of itself prove that the driver has committed any offence, but merely assists with one aspect of proof of an offence. Such an admission therefore is not a confession in itself and must be supplemented with other evidence as to the manner of driving and the conditions of driving in a public place, before any prosecution for dangerous driving may be successful.

35. It is submitted that without s. 107 it would be impossible to investigate, detect and prosecute effectively many simple road traffic offences, such as speeding. So, therefore, the section, while infringing a constitutional right, meets the proportionality test postulated by Costello J. and approved by the Supreme Court in *Heaney v. Ireland* [1994] 3 I.R. 593. The test itself was set out by Costello J. at p. 607 as follows:-

> "The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right as little as possible, and
>
> (c) be such that their effects on rights are proportional to the objective…"

36. It is submitted that s. 107 meets this test, being a provision that is narrow in its scope requiring only the disclosure of the identity of a user of a vehicle. It is submitted that in the case of *McGonnell v. Attorney General* [2007] 1 I.R. 400, in which the Supreme Court upheld the constitutionality of the mandatory evidential breath test procedure in drink driving cases, demonstrates that the nature of Road Traffic Act offences involves specific policy issues requiring a measure of incursion into constitutional rights more generally enjoyed by the individual. The court held that the objective of curtailing, limiting and prosecuting cases of drunken driving on the roads, in the interest of reducing deaths and injuries, had to be given a high degree of priority in a free and democratic society. It is submitted that the same considerations arise in cases of speeding and dangerous driving.

37. While this specific issue has not arisen previously in this jurisdiction, it has arisen in the United Kingdom and was the subject of a decision of the Privy Council in the case of *Brown v. Stott* [2003] 1 A.C. 681. In that case, the defendant, Ms. Brown, had been charged with driving a car after consuming excessive alcohol. The police were aware that she had been driving the car, not because she had been stopped while driving the vehicle, but because they had exercised their powers under the equivalent section in the United Kingdom to s. 107, and Ms. Brown had informed that she had been driving her car on the occasion in question. She then challenged that section as being incompatible with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). She failed with her challenge. In his judgment on the issue, Lord Bingham of Cornhill said at pp. 704-705:-

> "The jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves

> absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for…
>
> The high incidence of death and injury on the roads caused by the misuse of motor vehicles is a very serious problem common to almost all developed societies. The need to address it in an effective way, for the benefit of the public, cannot be doubted. Among other ways in which democratic governments have sought to address it is by subjecting the use of motor vehicles to a regime of regulation and making provision for enforcement by identifying, prosecuting and punishing offending drivers… there being a clear public interest in enforcement of road traffic legislation the crucial question in the present case is whether section 172 represents a disproportionate response, or one that undermines a defendant's right to a fair trial, if an admission of being the driver is relied on at trial.
>
> I do not for my part consider that section 172, properly applied, does represent a disproportionate response to this serious social problem, nor do I think that reliance on the respondent's admission, in the present case, would undermine her right to a fair trial. I reach that conclusion for a number of reasons."

38. Lord Bingham then proceeds to set out his reasons, of which there are three. The first is that the section in issue provides for the putting of a simple question – the identity of the driver – the answer to which does of itself incriminate the suspect. Secondly, other provisions of the same legislation required persons suspected of drink-driving to provide samples of their breath, and yet no criticism was made of that requirement. Thirdly, the possession and use of cars are recognised to have the potential to cause grave injury and as such the activity requires regulation to protect members of the public. All those who own or drive motorcars know that by doing so they subject themselves to a regulatory regime that has been created in the public interest. For those reasons, Lord Bingham considered that the section at issue in those proceedings could not be said to represent a disproportionate legislative response to the problem of maintaining road safety, or that the balance between the interests of the community at large and the interests of the individual had been struck in a manner unduly prejudicial to the individual.

39. In the same case, Lord Hope made the following remarks at p. 722:-

> "The purpose which these offences are designed to serve would be at risk of being defeated if no means were available to enable the police to trace the driver of a vehicle who, as so often happens, had departed from the place where the offence was committed before he or she could be identified."

He went on to say, at p. 723 that:

> "It seems to me that, bearing in mind the difficulties that may arise in tracing the driver of a vehicle after the event, this limited incursion into the right of silence and the right of the driver who is alleged to have committed an offence not to incriminate himself is proportionate."

40. The decision of the Privy Council in *Brown v. Stott* was referred to and approved of the European Court of Human Rights in the case of *O'Halloran and Francis v. United Kingdom* [2008] 46 EHRR 21. In its judgment, the ECtHR said, at para. 57:-

> "Those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and in the legal framework of the United Kingdom, these responsibilities include the obligation, in the event of suspected commission of road traffic offences, to inform the authorities of the identity of the driver on that occasion."

41. A similar issue arose in the case of *Tura Tuloms v. Spain* [1995] no. 23816/94, decision of 17 May 1995, 81DR, p. 82. In that case, the applicant's car had been photographed breaking the speed limit and the police sent him a notice requiring him to state who was driving his car at the relevant time and place. The applicant contended that his conviction for failing to comply with the notice breached his privilege against self-incrimination. The Commission of the Court of Human Rights declared the application inadmissible holding that a law of this kind is not necessarily incompatible with Article 6 of the Convention, stating at p.84:

> "[T]he person concerned is not inevitably obliged to admit his or her own guilt or to incriminate a relative. Depending on the circumstances, they may be able to show they had nothing to do with the offence committed by the driver, for instance by establishing that the vehicle was being used by someone whose identity is unknown to them or whom they had not authorised to use it."

42. In summary, therefore, it is submitted on behalf of the prosecutor that the privilege against self-incrimination is not absolute and may be breached in the public interest provided that the impugned measure is proportionate to the aim sought to be achieved. In the case of road traffic offences, it would be impossible to prosecute effectively many simple road traffic offences without the power conferred by section 107. It is further submitted that more recent cases such as *DPP v. Forsey* [2016] IECA 233 and *DPP v. J.C.* [2015] 1 I.R. 417 clearly demonstrate that in the modern era, there are very few, if any, absolutes in criminal law.

Conclusion on Third Question

43. The central issue of controversy between the parties on the third question posed by the District Judge is whether there are any circumstances in which a court may admit an inculpatory confession or statement where the confession or statement has been found to be involuntary. In contending that there are no such circumstances, the accused has placed heavy reliance upon the passages quoted above in the decisions of Walsh J. in *Cummins*, and Barrington J. in *Re National Irish Bank*. These passages do indeed appear to be very uncompromising on the issue.

44. In his judgment in this court in *Re National Irish Bank*, Shanley J. cited the decision of Mustill L.J. in *Reg. v. Director of Serious Fraud Office, Ex P. Smith* [1993] A.C. 1, in which he observed that "[s]tatutory interference with the right (i.e. the privilege against self-incrimination) is almost as old as the right itself".

45. Shanley J. went on to quote from the decision of O'Flaherty J. in *Heaney v. Ireland* [1994] 3 I.R. 593, wherein he said at p. 587:-

> "The Irish legislative experience is somewhat akin to what has been enacted in Britain but with the important qualification, touching the primacy of the Constitution which will be considered hereafter. A selection, but not an exhaustive list, of statutes in diverse areas which require disclosure include the Customs Consolidation Act, 1876, the Road Traffic Act, 1961; the Companies Acts, 1963 to 1990; the Income Tax Acts and the Finance Acts; the Offences Against the State (Amendment) Act, 1972; the Criminal Law Act, 1976; the Criminal Justice Act, 1984; the Bankruptcy Act, 1988; the Criminal Justice (Forensic Evidence) Act, 1990; the Pensions Act, 1990 and the Social Welfare (Consolidation) Act, 1993."

Having observed on the differences in substance and objectives between the various statutes, O'Flaherty J. said at p. 588:-

> "In light of the inconsistencies between each, it would be idle to engage in summarising or parsing the various statutes any further; however, they each serve to illustrate that in certain circumstances a person may be required to disclose information under threat of penal sanction. They evoke a legislative intent to abrogate, to various extents, the right to silence, in a myriad of contrasting circumstances."

46. In *Heaney*, the court accepted that a legislative measure could infringe a constitutional right where it passed a test of proportionality. Although unsuccessful before the Supreme Court, Mr. *Heaney* enjoyed better fortune before the ECtHR . That court, while accepting that the right to remain silent and the right not to incriminate oneself were not absolute rights, considered that the degree of compulsion imposed on the applicant , namely, a conviction and imprisonment for failing to give a full account of his movements and actions during any specified period and all information in his possession in relation to the commission or intended commission of specified offences "in effect destroyed the very essence of his privilege against self-incrimination and his right to remain silent", and the court therefore concluded that the security and public order concerns relied upon by the State in that case could not justify the impugned provision. However, *Heaney* was distinguished by the ECtHR in *O'Halloran*. The ECtHR in *O'Halloran* focused on the nature and degree of compulsion used to obtain evidence in each case. In the case of *O'Halloran*, which involved consideration of s. 172 of the Road Traffic Act in the United Kingdom – the equivalent provision to s. 107 in that jurisdiction – the court stated:-

> "57. The Court accepts that the compulsion was of a direct nature, as was the compulsion in other cases in which fines were threatened or imposed for failure to provide information. In the present case, the compulsion was imposed in the context of s. 172 of the Road Traffic Act, which imposes a specific duty on the registered owner of a vehicle to give information about the driver of the vehicle in certain circumstances. The Court notes that although both the compulsion and the underlying offences were "criminal" in nature, the compulsion flowed from the fact, as Lord Bingham expressed it in the Privy Council in the case of *Brown v. Stott* (see paragraph 31 above), that "All who own or drive motor cars know that by doing so they subject themselves to a regulatory regime. This regime is imposed not because owning or driving cars is a privilege or indulgence granted by the State but because the possession and use of cars (like for example, shotguns …) are recognised to have the potential to cause grave injury". Those who chose to keep and drive motorcars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and in the legal framework of the United Kingdom, these responsibilities include the obligation, in the event of suspected commission of road traffic offences, to inform the authorities of the identity of the driver on that occasion.
>
> 58. A further aspect of the compulsion applied in the present cases is the limited nature of the inquiry which the police were authorised to undertake. Section 172 (2)(a) applies only where the driver of the vehicle is alleged to have committed a relevant offence, and authorises the police to require information only "as to the identity of the driver". The information is thus markedly more restrictive than in previous cases, in which applicants have been subjected to statutory powers requiring production of "papers and documents of any kind relating to operations of interest to [the] department" (*Funke*, referred to above, ¶ 30), or of "documents etc. which might be relevant for the assessment of taxes" (*J. B. v. Switzerland*, cited above, ¶ 39). In the case of *Heaney* and *McGuinness* the applicants were required to give a "full account of [their] movements and actions during a specified period" referred to above, ¶ 24), and in that of *Shannon*, information could be sought (with only a limited legal professional privilege restriction) on any matter which appeared to the investigator to relate to the investigation …"

47. The court noted that notwithstanding that Mr. O'Halloran had made a statement that he was the driver of his car and that that was admissible in evidence, "it remained for the prosecution to prove the offence beyond reasonable doubt in ordinary proceedings, including protection against the use of unreliable evidence and evidence obtained by oppression or other improper means (but not including a challenge to the admissibility of the statement under s. 172), and the defendant could give evidence and call witnesses if he wished. The court noted that, as in the case of *Brown v. Stott*, the identity of the driver is only one element in the offence of speeding, and there is no question of a conviction arising in the underlying proceedings in respect of solely of the information obtained as a result of section 172 (2)(a). The court then concluded, at para. 62 as follows:-

> "Having regard to all the circumstances of the case, including the special nature of the regulatory regime at issue and the limited nature of the information sought by a notice under s. 172 of the Road Traffic Act, 1988, the court considers that the essence of the applicants' right to remain silent and their privilege against self-incrimination has not been destroyed."

Thus, the ECtHR very clearly distinguished between the very wide nature of the inquiry authorised by s. 52 of the Offences Against the State Act 1939 in *Heaney*, and the far more limited nature of the inquiry authorised by s. 172 of the Road Traffic Act 1988 in the United Kingdom, in *O'Halloran*.

48. There can be scarcely any doubt but that the investigation, detection and prosecution of road traffic offences would, in very many cases, be impossible if the gardaí were not entitled:-

> (i) to ask the owner of a vehicle who was driving the vehicle on a particular occasion, and
>
> (ii) to put in evidence any statement from the owner of the vehicle that he was the driver on the occasion in question.

49. Public policy for many years now has dictated that the State should take all measures reasonably at its disposal to enhance the safety of road users and to ensure that those who choose to flout road traffic law are made subject to the penalties prescribed by law. Everybody who drives or owns a motor vehicle is aware that the use of them is highly regulated. I agree fully with the sentiments expressed by Lords Bingham and Hope in *Brown v. Stott*. While that case was, of course, concerned with an alleged violation of Article 6 of the Convention and not with the violation of a right protected by Bunreacht na hÉireann, there is no reason to believe why the same principles should not apply when considering a measure which, *prima facie* has the same effect. i.e. the infringement of a right (in this case the privilege against self-incrimination) that would normally apply in the prosecution of an offence.

50. As to the proportionality test, it can hardly be doubted but that the purpose of s. 107 is rationally connected to a proper purpose, i.e. public safety on the roads. In requiring the owner of the vehicle to state who was driving a vehicle on a particular occasion, and no more, the infringement with the constitutional right to remain silent is impaired as little as possible. The owner is not, for example, required to say when he commenced his journey or from where, to say at what speed he was driving or to comment in any way upon the manner of his driving. The speed and manner of driving are matters upon which the prosecution would have to advance its own evidence, independently of the evidence of the accused, save and except where the accused may make a voluntary statement in this regard. It follows from this that the infringements on the rights of the accused are proportionate to the objective,

and that s.107 meets the proportionality test prescribed in *Heaney*.

51. It is clear that all of this has been recognised not just in the United Kingdom but also in the European Court of Human Rights and in other jurisdictions. Could it really be the case, therefore, that a statement made by an accused person in response to a demand made under s. 107 is inadmissible in any prosecution against him?

52. Insofar as the accused in this case relies upon the dictum of Walsh J. in *Cummins*, I think it is clear that the absolute position taken by the Supreme Court in that case has been departed from by the Supreme Court in *Heaney*. Moreover, the Court of Criminal Appeal in *Gilbert*, just a year after *Cummins* and in which *Cummins* is cited, clearly reserved its view on the very question now arising in this case. Insofar as the accused is relying upon the observation in the last paragraph in the decision of Barrington J. in *Re National Irish Bank*, I think that that case may be distinguished for two reasons. Firstly, the powers at issue in that case were far broader than those at issue in this case and may therefore be distinguished in the same way that the ECtHR distinguished the powers at issue in *Heaney* from those at issue in *O'Halloran*. Secondly, it is clear that Barrington J. was referring specifically to those same powers , when observing that evidence gathered as a result of the exercise of those powers would not, "in general terms", be admissible at a subsequent trial, unless the trial judge was satisfied that the confession was voluntary.

53. Moreover, it is not at all insignificant that that observation was qualified by the words "in general". Earlier in the same judgment, at p.188 Barrington J. used almost the same terminology when he said: "…and it can be stated as a general principle, that a confession , to be admissible at a criminal trial, must be voluntary" In my view, Barrington J. was clearly articulating a general rule and of their very nature general rules permit of exceptions. This is just another way of saying what has been recognised by the Supreme Court in *Heaney*: that the right to silence is not absolute and may be abrogated in certain circumstances.

54. Of course the accused also relies on the passage of Barrington J. referred to at para. 28 above, where he said, with reference to the reservation expressed by the Court of Criminal Appeal in *Gilbert*:-

> "The reference to the Road Traffic Acts in the last sentence is puzzling. Presumably the Court did not wish to cast any doubt on the powers of the police to collect information under the Road Traffic Acts. But, in principle, a confession, once involuntary, would appear to be equally objectionable no matter what the nature of the criminal prosecution."

I agree, however, with the submission of the prosecutor that this passage is *obiter* the decision in *re National Irish Bank* and that had authorities such as *Brown v Stott* and *O'Halloran v United Kingdom* been available to him, it is unlikely he would have made that observation.

55. For all of these reasons, I consider that the answer to the third question posed by the District Judge (as modified in the manner indicated above) is that a statement made by an accused person in response to a demand made by a garda pursuant to s. 107 is admissible in subsequent criminal proceedings.