

THE HIGH COURT

2009 710 SS

IN THE MATTER OF SECTION 52(1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961 (No. 39 of 1961)

BETWEEN

**THE DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF SERGEANT MICHAEL MURPHY)**

PROSECUTOR

AND

GERARD DAVENPORT

ACCUSED

CONSULTATIVE CASE STATED

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

1. The following is the consultative case as stated to the High Court by Judge Kevin Kilraine for its opinion:-

"1. Background

1.1 The Accused herein appeared before Letterkenny District Court on the 19th of January 2009 to answer the following two complaints namely:-

(i) That on the 7th May 2006 at Drumnahoagh Letterkenny Donegal a public place in District Court Area of Letterkenny District No. 1, he did drive a vehicle, registration number 98D 27202 without reasonable consideration for other persons using said place Contrary to Section 51(A) of the Road Traffic Act 1961 (as inserted by Section 49 of the Road Traffic Act 1968), and Section 102 of the Road Traffic Act, 1961 (as amended by Section 23 of the Road Traffic Act 2002).

(ii) That on the 7th May 2006 at Drumahoagh Letterkenny Donegal in District Court Area of Letterkenny District No. 1, he drove a mechanically propelled vehicle registration number 98D 27202 in a public place while there was present in your body a quantity of alcohol such that within three hours after so driving, the concentration of alcohol in his breath exceeded a concentration of 35 microgrammes of alcohol per 100 millilitres of breath Contrary to Section 49(4) of the Road Traffic Act 1961, as inserted by Section 10 of the Road Traffic Act 1991, as amended by Section 23 of the Road Traffic Act 2002. Copies of the two Summonses on foot of which the Accused was brought before the Court are appended to this Case Stated at Appendix A.

1.2 A hearing of the said complaints proceeded before me on the 19th of January 2009. Mr. Ciaran Liddy, State Solicitor for the County of Donegal appeared on behalf of the Director of Public Prosecutions. The Accused was represented by Mr. Kieran Dillon of Quinn Dillon Solicitors, Main Street, Letterkenny, County Donegal.

2. Evidence proved or admitted before me

2.1 A Mr. Edward McKnight of Creggan Raphoe gave evidence pertaining to the time of driving in this matter which he placed at approximately twenty minutes after departure from his house. He stated he left his house in Raphoe County Donegal at 4.10pm on the 7th May 2006 and in evidence further stated that it would take him approximately twenty minutes to reach Letterkenny Town and Mr. McKnight placed the time of the collision, of the road accident which forms part of the subject matter of these proceedings, at approximately 4.30pm.

2.2 The next witness called in the case was Garda Paul Lynch of Letterkenny Garda Station who detailed to the Court that at 5.05pm on the 7th May 2006 a call was received by An Garda Síochána to attend a road traffic accident at the locus of this incident namely Drumahoagh, Letterkenny, County Donegal. Garda Lynch further detailed the fact that he attended at the scene and that he spoke to the man who identified himself as the driver of one of the vehicles involved in the road traffic incident namely one Gerard Davenport of 44 Glencar Park, Letterkenny, County Donegal.

2.3 It should be noted that at this juncture in the proceedings that the Defence indicated that the facts were not in issue pertaining to the charge of driving without reasonable consideration contrary to Section 51(a) of the Road Traffic Act and consequently the details pertaining to the circumstances and mechanics of the collision were not gone into in evidence as it was indicated that a plea of guilty was to be tendered pertaining to that aspect of the case. Garda Paul Lynch also confirmed in evidence the registration number of Mr. Davenport's vehicle as being 98D

2.4 The next witness to give evidence was Sergeant Michael Murphy who gave evidence that at approximately 5.25pm on the 7th May 2006 he and Garda Paul Lynch attended at the scene of the accident. Sergeant Murphy detailed the appearance of the vehicles as a consequence of the accident.

2.5 Sergeant Murphy stated that he formed the opinion that the Accused had consumed an intoxicant to such an extent that would cause him to be incapable of driving a mechanically propelled vehicle in a public place and because he was involved in a road traffic accident he was going to request him to provide a road side breath test. Sergeant Murphy invoked the powers provided for under Section 12 of the Road Traffic Act 2003.

2.6 Sergeant Murphy then gave evidence that he requested Garda John Healy to perform the alcometer procedure to test the Accused pursuant to Section 12 of the Road Traffic Act 2003. Garda Healy advised him that he would carry out the test however as he did not have the required equipment he would have to leave the scene to obtain an alcometer from Letterkenny Garda Station. Sergeant Murphy informed the Accused that he would be detained until the arrival of the alcometer. Sergeant Murphy detained Mr. Davenport at the scene. Garda Healy returned to the scene with the said alcometer at approximately 5.40pm. Sergeant Murphy then stated he required Garda Healy to breathalyse Mr. Davenport because he was one of the drivers involved in the accident and it was Sgt. Murphy's opinion that Mr. Davenport had consumed an intoxicant.

2.7 Garda Healy then approached the Accused and administered the test which proved positive at approximately 5.45pm. As a result of this positive breath test Sergeant Murphy gave evidence that he informed the Accused of his belief that he had consumed an intoxicant to such an extent that he was incapable of having proper control of a mechanically propelled vehicle in a public place. He proceeded in evidence by stating that at 5.45pm on the 7th May 2006 he arrested Mr. Davenport as a result of the breath test under section 49(8) of the Road Traffic Act for an offence under Section 49(1) (2)(3) or (4). He cautioned the Accused in the usual manner. He informed Mr. Davenport he was arresting him for drink driving and he conveyed Mr. Davenport to Letterkenny Garda Station arriving there at 5.57pm and the usual formalities were engaged namely concerning the giving of a Notice of Rights.

2.8 Garda Healy then gave evidence in relation to his involvement in the case namely that he arrived at the scene at 5.25pm and was requested by Sergeant Michael Murphy, who was already at the scene, to provide an alcometer test to the suspected drink driver. Garda Healy indicated that as there was no alcometer in his car he returned to Letterkenny Garda Station to obtain same. He gave evidence that he returned to the scene at approximately 5.40pm. He gave evidence that he spoke to Mr. Davenport and informed him that he was of the opinion that he was the driver of a mechanically propelled vehicle involved in a road traffic accident and that he was requiring him to provide a breath test under Section 12(2) of the Road Traffic Act 2003 by exhaling into the apparatus namely the alcometer. Garda Healy gave evidence that the aforementioned Sergeant Murphy was alongside him during the course of the test, that he observed Garda Healy carry out the procedures and the positive result which ensued. He in turn observed Sergeant Murphy arrest Mr. Davenport under Section 49(8) of the Road Traffic Act for an offence under Section 49(1) (2) (3) or (4) of the Road Traffic Act 1961 (as amended). The arrest was entirely dependent on the above-mentioned positive test result there having been no other evidence of alcohol or incapacity to drive tendered by the prosecution.

2.9 Sergeant Brendan Roach then gave evidence in relation inter alia to the activities at the Garda Station namely the administering of the Lion Intoxiliser tests. For the purposes of the within case stated nothing turns on the evidence of this witness.

3. Application for a direction

3.1 At the close of the prosecution's case the Defence applied for a direction on the grounds that Section 12 of the Road Traffic Act 2003 had not been complied with. More specifically the Defence referred to Section 12(2)(a)(b) and (c) and submitted that upon reading this section the only interpretation is that the same Garda who invokes the detention powers of Section 12 must also perform the roadside breath test and submitted that the section does not permit a different Garda member to invoke the powers and detain the accused than the Garda member who administered the test.

3.2 The prosecution submitted that the interpretation advanced by the Defence was a very restrictive literal interpretation of the legislation which does not allow for the practicalities of invoking the provisions of Section 12 and that a common sense approach should be taken to its interpretation namely that the member referred to in Section 12 can be any member of An Garda Síochána.

3.3 The Court held that Section 12(2) appeared to read that a member of An Garda Síochána referred to throughout Section 12(2)(a)(b)(c) appeared to be the same member of An Garda Síochána and did not provide for any member but provides for "the member" of An Garda Síochána.

3.4 I rejected a separate unrelated ground for a direction.

3.5 Notwithstanding my preliminary finding with respect to the point raised on Section 12 of the Road Traffic Act 1991 (as substituted by Section 2 of the Road Traffic Act 2003), I indicated that I was prepared to state a consultative case to the High Court for an interpretation of the said Section. To that end I adjourned the proceedings to the 16th February 2009 for the views of the Director of Public Prosecutions in the matter. On the 16th February 2009 it was conveyed to me that the Director of Public Prosecutions had no objection to the matter being stated to the High Court for a determination.

3.6 I say that in those circumstances I summarised the facts I considered appropriate to the case in the context of preparing the case stated which was in the following terms:

"Sergeant Murphy called to the scene of a road traffic accident and spoke to the Defendant who admitted to being involved in the road traffic accident. Sergeant Murphy having formed the opinion that

the driver was involved in a road traffic accident requested Garda Healy who was trained in the use of the alcometer procedure to test the Defendant pursuant to Section 12 of the Road Traffic Act 1991 (as substituted by Section 2 of the Road Traffic Act 2003). Garda Healy informed Sergeant Murphy that he would however he did not have the required equipment and he proceeded to Letterkenny Garda Station to secure the said equipment and returned to the scene of the accident. Sergeant Murphy detained Mr. Davenport at the scene pursuant to Section 12 of the road Traffic Act 1991 as amended. Until the arrival of Garda Healy with the alcometer to perform the test on Mr. Davenport.

Garda Healy having been informed by Sergeant Murphy of the road traffic accident and pursuant to Section 12 Sergeant Murphy required Garda Healy to breathalyse the Defendant. Garda Healy then approached the Defendant and informed him of his opinion that he was involved in a road traffic accident and he required him to exhale into the apparatus for determining breath alcohol pursuant to Section 12. The test proved positive and Sergeant Murphy then arrested the accused under Section 49(8) for an offence under Section 49(1)(2)(3) or (4) of the Road Traffic Act 1961 as amended. The arrest was entirely dependent on the positive reading there having been no other evidence of alcohol or incapacity to drive tendered by the prosecution."

4. The Question

4.1 The question posed for the High Court is whether the procedure adopted by Sergeant Murphy and Garda Healy was in accordance with the provisions of Section 12 of the Road Traffic Act 1991 (as amended)?"

The Relevant Legislation

2. The determination of this case stated turns on the interpretation of s. 12 of the Road Traffic Act 1991 (as substituted by s. 2 of the Road Traffic Act 2003) and specifically subs. (2) thereof. Sub-section (12) is in the following terms:

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

(a) has consumed intoxicating liquor,

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

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

(2) A member of the Garda Síochána may require a person to whom this section applies—

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

(b) to accompany him or her to a place (including a vehicle) at or in the vicinity of the public place concerned and there require the person to provide, by exhaling into such an apparatus, a specimen of his or her breath, or

(c) where the member does not have such an apparatus with him or her, to remain at that place in his or her presence or in the presence of another member of the Garda Síochána until such an apparatus becomes available to him or her (but the member shall not require the person to so remain for more than one hour) and the member may then require the person to provide, by exhaling into such an apparatus, a specimen of his or her breath,

and the member may indicate the manner in which the person is to comply with the requirement.

(3) A person who refuses or fails to comply immediately with—

(a) a requirement under this section, or

(b) such a requirement in a manner indicated by a member of the Garda Síochána,

is guilty of an offence and is liable on summary conviction to a fine not exceeding €2,500 or imprisonment for a term not exceeding 6 months or both.

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

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

3. The submissions of the accused herein is that s. 12 requires the member who detains under 12(2)(c) must also conduct the test. This is the same submission as was made to the District Court.

4. The events that occurred were at the scene of an accident. No suggestion is made that the accused was not fully aware that he was detained pending an alcometer test. He was informed of this by Sergeant Murphy.

5. The evidence as contained in the case stated shows Garda Healy and Sergeant Murphy were along side each other

during the test when it was administered (2.8 of the case stated).

Interpretation of the Road Traffic Code

6. In *DPP v. Moorehouse* [2006] 1 I.R. 421 at p. 444, Kearns J. observed:

"That is not to say that a penal statute cannot be construed in a purposive manner, or that the court should readily adopt a construction which leads to an artificial or absurd result. This is particularly so in Road Traffic Act cases and I find myself in complete agreement with the sentiment expressed by O'Flaherty J. in Director of Public Prosecutions (O'Brien) v. Cormack [1991] 1 I.L.R.M. 398 at p. 400 when, in relation to a prosecution under s. 49 of the Road Traffic Act 1961 he stated:

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

7. In *DPP v. Somers* [1999] 1 I.R. 115, O'Flaherty J. found that where a flaw in complying with the statutory provision is insignificant and cannot cause prejudice to the accused, the flaw will not of itself be fatal to the prosecution of the accused. In that case, the designated doctor had not filled out the second paragraph of the form prescribed for the purposes of s. 18(1) of the Road Traffic Act 1994. At page 119 he held as follows:

"I believe this case is all but ruled by the previous decisions of this Court in Director of Public Prosecutions v. Kenny [1980] I.R. 160 and Director of Public Prosecutions v. Collins [1981] I.R.L.M. 447. It seems to me that at most what happened here was that the doctor made a technical slip by not filling out the second paragraph of the prescribed form. There could be no confusion in anyone's mind, on reading the document as completed, but that it was a blood sample that was to be forwarded to the Medical Bureau of Road Safety. It is true that in general the law expects strict compliance with the wording of statutes, especially in a penal context. But this is so that the purposes and objects of the legislation are observed. It is impossible to seek perfection at all stages of life and when there is a tiny flaw in the filling out of a document such as this, which flaw is of no significance and cannot possibly work any injustice to an accused and in not in discord with the purposes and objects of the legislation, then the courts are required to say that such a slip as we have here, cannot be allowed to bring about what would be a manifest injustice as far as the prosecution of the offence is concerned."

8. Extrapolating from the above the principles which are relevant here, the following seems to emerge:

(1) Courts should not readily interpret legislation in a way that would lead to an artificial or absurd result.

(2) A minor flaw of no significance in complying with a statutory provision is not fatal to the prosecution of an accused where it cannot cause prejudice of itself or work an injustice to the accused.

9. Applying these principles to the facts of this case, it would be, in my judgment an absurd and artificial interpretation of the relevant section if it meant that the Sergeant in charge at the scene of an accident could not detain under s. 12(2) (c) and then require another member to conduct the alcometer test. Normal operational management of an accident scene cannot possibly require such a narrow and restrictive interpretation. So long as the accused is aware he is being detained pending an alcometer test and is made aware he is required to give a sample when the apparatus is available, the legislative purpose and intent is met.

Even were this not so, in the circumstances pertaining here, the flaw contended for by the accused was a minor and insignificant one which could not possibly cause any prejudice nor work any injustice to him.

Answer to the question

10. The question posed for the High Court is whether the procedure adopted by Sergeant Murphy and Garda Healy was in accordance with the provisions of s. 12 of the Road Traffic Act 1994 (as amended). The answer to that question is yes.