

## THE HIGH COURT

RECORD NO.: 2017/1250SS

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

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF

GARDA BRIAN J. O'CALLAGHAN)

PROSECUTOR

-AND-

FRASER BROWN

DEFENDANT

**JUDGMENT of Ms. Justice Tara Burns delivered on the 30th July, 2018**

1. By a Consultative Case Stated, District Judge Patrick Durcan stated a case, pursuant to s. 52 of the Courts (Supplemental Provisions) Act 1961, on a point of law for the Opinion of the High Court.

2. The underlying facts of the case are that the Defendant appeared before Ennis District Court on 16th June 2017 charged with minor "Fixed Charge Offences" as defined by s. 103 of the Road Traffic Act, 1961 (as inserted by s. 11 of the Road Traffic Act, 2002). Evidence was given by the prosecuting guard, that he had caused a Fixed Charge Penalty Notice to be served on the Defendant. The Defendant gave evidence that up to the time of the commission of the offences he lived at Ballingaddy, Ennistymon, Co. Clare but at this time he moved at Ardnahea, Liscannor, Co. Clare. He stated that he did not receive the Fixed Charge Penalty Notice at the relevant time; that the first he learned of the intended prosecution, was when the summons in respect of the alleged offences were served on him. Having been served with the summonses, he returned to his former address at Ballingaddy and an envelope containing the Fixed Charge Penalty Notices was there.

3. A direction was sought on behalf of the Defendant on the basis that the Accused had not received a Fixed Charge Penalty Notice within the relevant time period. The prosecutor argued against this, submitting that proof of receipt was not required by the legislation.

4. The Question posed by the District Court Judge is in the following terms:-

"In determining this matter I am of the view that service is not merely a matter of postal dispatch (as in this case) but also a matter of factual receipt, despite the fact that the accused had not registered his current postal address with the Motor Registration Authorities. I seek the opinion of the High Court as to whether I am correct in this determination."

*Relevant Legislation*

5. The relevant portions of Section 103 of the Road Traffic Act, 1961 (as inserted by s. 11 of the Road Traffic Act, 2002 and as amended by s. 18 of the Road Traffic Act, 2004 and s. 14 of the Road Traffic Act, 2006) provides as follows:-

"(2) Where a member of An Garda Siochana has reasonable grounds for believing that a fixed charge offence is being or has been committed by a person –

(a) If the member identifies the person, the member shall serve, or cause to be served, personally or by post, on the person a notice under this section,

(b) If the member does not identify the person and the offence involves the use of a mechanically propelled vehicle, the member shall serve, or cause to be served, personally or by post, on the registered owner of the vehicle a notice under this section.

(10) In a prosecution for a fixed charge offence it shall be presumed until the contrary is shown that –

(a) the relevant notice under this section has been served or caused to be served, and

(b) that a payment pursuant to the relevant notice under this section, accompanied by the notice, duly completed... has not been made."

As an aside, s. 103 of the Road Traffic Act 1961, as substituted, has now been replaced by s. 35 of the Road Traffic Act, 2010.

6. Section 25 of the Interpretation Act 2005 provides as follows:-

"Where an enactment authorises or requires a document to be served by post, by using the word "serve", "give", "deliver", "send" or any other word or expression, the service of the document may be effected by properly addressing, prepaying (where required) and posting a letter containing the document, and in that case the service of the document is deemed, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

7. Article 9(4) of the Road Vehicles (Registration and Licensing) (Amendment) Regulations 1992, provides:-

"On a change of address the owner... of a vehicle which was first licensed in the State on or after the 1st day of January 1993 shall enter particulars of the owner's new address in the space provided in the licensing certificate and shall forthwith deliver the licensing certificate with such particulars entered in it to the Minister who shall note the change of

address, issue an amended licensing certificate to the owner and notify the appropriate licensing authority.”

*Prosecution for a Road Traffic Offence*

*subject to a Fixed Charge Penalty Notice*

8. It is important to consider the purpose of the Fixed Charge Penalty Notice and its interaction with the criminal proceedings which may ensue for the alleged road traffic offence.

9. As very helpfully set out by Mr. Justice McDermott in *Kinsella v. DPP* (Unreported, High Court, 20th July 2018) at paragraph 19 of the judgment:-

“17. The purpose of a fixed penalty notice is to provide an erring motorist with a quick and efficient method of acknowledging his wrongdoing and submitting to a lesser penalty than that which might be imposed after conviction. In doing so the motorist also avoids prosecution and the recording of a potential conviction for a criminal offence...If the penalty is paid, he may not be prosecuted at all. If the penalty is unpaid a summons may issue based on an appropriate complaint. Once the summons had been duly served, the matter comes before the court which is vested with full jurisdiction to hear and determine the charges. The court’s jurisdiction is based on the charges set out in the summons which issued on the basis of a complaint duly made.

18. It is incorrect to state that the history of the fixed penalty notice is irrelevant to the trial of the charges set out in the summons. The statute clearly contemplates that the motorist charged with a fixed charge notice offence is entitled to raise the issue of non-service of the notice or the payment of the charge before the court. The evidential burden of establishing that the charge was paid or the notice was not served was dealt with by way of presumption which is a legislative evidential tool to be deployed in the course of the trial. The existence of the provision itself demonstrates that the matters subject to the presumption may be raised in the course of the trial. Section 103(10) entitled the learned judge to presume until the contrary is shown that a relevant notice has been served or caused to be served and that a payment pursuant to the relevant notice accompanied by the notice duly completed, has not been made.

19. *“An accused is entitled to adduce evidence to the effect that he has not been served with the fixed penalty notice and did not therefore have the opportunity to discharge the fixed penalty within the prescribed period and that consequently it would be unfair if he were to be convicted without being afforded the statutory opportunity to pay the fixed penalty. The evidential rule applicable to how that matter may be canvassed is contained in section 103(10). It may be that a trial judge would find that the facts set out in the summons were proven and convict the accused notwithstanding such submissions....The issue may be relevant to the penalty to be imposed if the accused is convicted and might reasonably, in appropriate circumstances provide a basis upon which a trial judge might mitigate the penalty to reflect the fact that the accused did not have the opportunity to pay the lesser sum at an earlier stage. Alternatively, a trial judge might conclude that it would be entirely unfair to record a conviction against an accused who has successfully raised an issue as to service of the fixed penalty notice and dismiss the charge.” (emphasis added)*

*Does “serve” as referred to in s. 103 of Act of 1961 require proof of receipt*

10. In *DPP v. Tully*, (Circuit Court, Judge White, 13th July, 2009)(approved by Mr. Justice McDermott in *Kinsella v. DPP*), his Honour Judge White, as he then was, found that proof of posting of the Notice, as distinct from proof of receipt would be sufficient to discharge the onus placed on a member of An Garda Síochána by section 103(2)(a). As he further stated:-

“It is clear that the provisions of section 103(7)(d) of the Act that the effect of the service of a Fixed Penalty Notice is to postpone a prosecution for a specific period of time to allow the fixed penalty to be paid, and if it is so paid no prosecution will follow. If not, once a District Court Summons has been issued in accordance with the Courts (No.3) Act 1986, and the complaint is made within the relevant statutory period, the non receipt of a Fixed Penalty Notice, is not an automatic bar to the Judge proceeding with the trial. If the essential proofs required for the offence are established the trial Judge can convict. The fact that penalty points increase, when a Court conviction arises, is not of itself a bar to conviction. There always remains vested in the Court, the discretion not to proceed to conviction if basic unfairness arises.”

11. This view, that proof of receipt of the Fixed Notice Penalty Charge, is not what is required to be established pursuant to s. 103(2) (a) of the 1961 Act as amended, but rather proof of posting, is bolstered when one considers s. 25 of the Interpretation Act, 2005 as set out above. Clearly, having regard to s. 25, serving a Fixed Charge Penalty Notice in accordance with s. 103 of the 1961 Act as amended, only requires that the document be properly addressed and posted to the address.

12. Any question that this interpretation is inoperative as the State cannot know with accuracy the address of a person the subject matter of a Fixed Charge Penalty Notice, is of course answered by the notice requirements of Article 9(4) of the Road Vehicles (Registration and Licensing)(Amendment) Regulations 1992, cited above.

13. The evidential presumptions created pursuant to s. 103(10) of the 1961 Act and s. 25 of the 2005 Act do not aid the Respondent in the manner asserted by him. The effect of the presumption in s. 103(10) has been considered, as set out above, by Mr Justice McDermott in *Kinsella v. DPP*. In summary, the effect of s. 103(10)(a) is that the presumption that a Fixed Charge Penalty Notice has been served can be rebutted in the course of the underlying proceedings for the alleged road traffic offence. If the presumption is rebutted, the effect of same can then be considered. The options available to a District Court Judge in such a scenario have been set out by Mr Justice McDermott in *Kinsella* and are referred to with emphasis above. As is clear therefrom, non-receipt of the Fixed Charge Penalty Notice is not fatal to a prosecution for the underlying road traffic offence, but rather is something which must be considered in the manner as set out. The presumption in section 25 of the 2005 Act does not create a presumption of receipt. What is presumed (deemed) to have occurred pursuant to s. 25 is that service of the document was effected *at the time the letter would be delivered* in the ordinary course of post. Accordingly, the presumption relates to the time of delivery rather than creating a presumption of receipt.

14. It seems to me that the legislation is clear and unambiguous: service of a Fixed Charge Penalty Notice can be effected by posting it; proof of receipt is not required. However, this does not mean that evidence to the effect that the Notice was not received is not of importance. It is a matter which the District Court Judge can consider and balance with all of the evidence in the case, to

determine what the import of same is, if any.

15. If receipt of the Fixed Penalty Charge Notice was what was required, the section, as very many provisions relating to service require, would have referred to service by "registered" post. Clearly, this is not required by the terms of s. 103(2)(a).

16. Accordingly, I am of the view that the District Court Judge is not correct in his view that s. 103 of the 1961 Act requires proof of receipt of the Fixed Charge Penalty Notice. However, if non-receipt of the Notice arises in evidence, this is a matter which he can and should have regard to, in the manner set out above in *Kinsella v. DPP*, in light of the circumstances of the case.