

THE HIGH COURT

[2014 No. 75SS]

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

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA DARREN PAUL LYNCH)

PROSECUTOR

AND

COLMAN MORAN

DEFENDANT

JUDGMENT of Kearns P. delivered on the 4th day of July, 2014

This is a consultative case stated by District Judge Patrick Durcan pursuant to the provisions of section 52 of the Courts (Supplemental Provisions) Act, 1961. The case stated is dated 13th November, 2013.

BACKGROUND

The defendant in these proceedings is charged with the following offence –

"(i) That the defendant did on the 6th day of January, 2013 at Clonmahaha, Gort, Co. Galway, a public place, in the said District Court Area of Gort, did drive a mechanically propelled vehicle registration number 05G8596 while there was present in his body a quantity of alcohol such that within 3 hours of so driving the concentration of alcohol in his breath, to wit 95 microgrammes of alcohol per 100 millilitres of breath did exceed the consideration of 22 microgrammes of alcohol per 100 millilitres of breath contrary to Section 4(4)(a) and (5) of the Road Traffic Act, 2010."

The case stated sets out the facts which were admitted or agreed at the District Court hearing, which can be summarised as follows. On Sunday 6th January, 2013 at 15.30pm Garda Lynch observed the motor vehicle bearing the registration number 05G8596 driving towards the Garda patrol car at a slow speed. The vehicle was not holding a steady course on the road and was being driven on the grass verge. The Garda found this driving to be erratic and activated the blue lights on the patrol car in order to signal the driver to stop. The Garda spoke to the driver who gave his name as Colman Murray of 23, Crowe Street, Gort, Co. Galway. Garda Lynch detected a strong smell of alcohol from the driver's breath and noticed that his speech was slurred. The Garda formed an opinion that the defendant had consumed intoxicating liquor and was under the influence of an intoxicant to such an extent as to be incapable of having proper control of a mechanically propelled vehicle in a public place, therefore committing an offence under Section 4 of the Road Traffic Acts 1961-2010.

At 15.32pm the defendant was arrested under s.4(8) of the Road Traffic Act 2010 and conveyed to Gort Garda Station, arriving at 15.38 from when the defendant was handed over to the Member in Charge. The relevant procedures in relation to persons in custody were fully complied with. At 16.00 Garda Phil Donoghue, a qualified and trained operator of the Evidenzer IRL breath testing equipment, arrived at the station and spoke with the defendant. A period of observation commenced at 16.02. At 16.22pm the breath test was administered and the defendant provided two samples of his breath with an overall reading of 95/100. At 16.55 Garda Lynch charged the defendant and handed him a copy of the charge sheet.

At the District Court hearing the solicitor for the defendant informed Judge Durcan that the evidence of Garda Claire Heneghan, the member in charge, and the evidence of Garda Phil Donoghue was accepted. Submissions were made by both parties and an application to dismiss was made by the solicitor for the defendant. As set out in the case stated, Judge Durcan seeks the opinion of this Court upon the following questions of law –

- "1. In view of the mandatory provisions of Section 9(2) of the Road Traffic Act, 2010 is it always necessary in those particular circumstances for a Garda to administer the roadside breath test and if the answer is in the affirmative can a prosecution pursuant to the provisions of Section 4 of the Road Traffic Act, 2010 be sustained where such a test was not administered?
2. Is an Opinion formed under one Section for one purpose under the Road Traffic Code sufficient to satisfy the mandatory nature of forming an Opinion under another Section of the Road Traffic Code?
3. If the interpretation of the legislation as put forward on behalf of the Prosecution is correct would I be correct in convicting the defendant as set out in paragraph 1?"

RELEVANT LEGISLATION

Section 4 of the Road Traffic Act 2010 relates to the prohibition on driving a mechanically propelled vehicle while under the influence of an intoxicant or if exceeding alcohol limits, and is the section under which the defendant is charged. Subsection (8) provides –

"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."

Section 9 of the Road Traffic Act 2010, as amended, provides –

"(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 committing or has committed an offence under the Road Traffic Acts 1961 to 2011,

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

(d) is or has been, with the vehicle, involved in an event in which death occurs or injury appears or is claimed to have been caused to a person of such nature as to require medical assistance for the person at the scene of the event or that the person be brought to a hospital for medical assistance.

(2) A member of the Garda Síochána shall, unless he or she is of opinion that the person should be arrested and subject to subsections (6) and (7), require a person to whom paragraph (a) or (d) of subsection (1) applies, and may require a person to whom paragraph (b) or (c) of that subsection 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 in the manner indicated by the member,

(b) to accompany him or her to a place (including a vehicle) at or in the vicinity of the public place concerned and there to provide, by exhaling into such an apparatus, a specimen of his or her breath in the manner indicated by the member, 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 (for a period that does not exceed one hour) until such an apparatus becomes available to him or her and then to provide, by exhaling into such an apparatus, a specimen of his or her breath in the manner indicated by the member.

(3) A person who refuses or fails to comply immediately with a requirement of a member of the Garda Síochána under this section commits an offence and is liable on summary conviction to a class A fine or to imprisonment for a term not exceeding 6 months or to 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 section 4, 5 or 6 of this 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 under this section is an apparatus for indicating the presence of alcohol in the breath.

(6) A member of the Garda Síochána shall not make a requirement under subsection (2) of a person to whom paragraph (a) of subsection (1) applies if, in the opinion of the member, such requirement would be prejudicial to the health of the person.

(7) A member of the Garda Síochána shall not make a requirement under subsection (2) of a person to whom paragraph (d) of subsection (1) applies if, in the opinion of the member or on the advice of a doctor or other medical personnel attending the scene of the event, such requirement would be prejudicial to the health of the person.

(8) Section 1 (1) of the Probation of Offenders Act 1907 does not apply to an offence under this section.

(9) Nothing in this section affects any power of arrest conferred by law apart from this section.

(10) It is not a defence in any proceedings, other than proceedings under subsection (3), to show that a member of the Garda Síochána did not make a requirement under this section."

SUBMISSIONS OF THE DPP

At the District Court hearing the prosecuting Garda Inspector submitted that there was no necessity for a preliminary roadside breath test in the circumstances that pertained as the Garda had already formed the opinion, based on his observations of the defendant, that the driver should be arrested. It is submitted that Garda Lynch independently formed a reasonable suspicion in relation to drink driving and decided to arrest the defendant without regard to a preliminary breath-test.

It is accepted by the prosecution that the mandatory provision contained in s.9 of the 2010 Act is designed to ensure that save in exceptional circumstances all persons who are involved in road traffic incidents as set out in subsection (1) are subjected to a preliminary breath test, even where there are no external signs of intoxication. Counsel for the prosecution contends that in the present case there was ample evidence to justify the arrest without the need for a preliminary breath test.

Counsel for the prosecution submits that it is evident from the facts of this case that the statutory exception specified in s.9(2) of the 2010 Act applies whereby a preliminary breath test 'shall' be administered "unless the Garda is of the opinion the person should be arrested". Counsel submits that the logic behind this exception is that in certain cases where a person's intoxication is so apparent, there is no need to conduct a preliminary breath test to confirm this. In the present case Garda Lynch observed the defendant driving in an erratic manner at a slow speed, failing to maintain a steady course on the road and driving in the grass verge at the road side. When Garda Lynch approached the driver he detected a strong smell of intoxicating liquor and noticed that the driver's speech was slurred. The prosecution submits that in such circumstances, where the defendant's level of inebriation was readily apparent to Garda Lynch, a preliminary breath test is not a mandatory requirement. It is further submitted that in any event s.9(10) of the 2010 Act makes clear that a failure to seek a preliminary breath test in circumstances where it is mandatory, does not afford a defence to any proceedings under the section other than subsection 9(3).

Based on these submissions, counsel for the prosecution contends that the questions posed by Judge Durcan should be answered in

the following terms –

- “1. No; the mandatory provisions of section 9(2) are not without exception and a preliminary breath test is not always necessary. It is submitted that the second prong of this test does not arise but that even if a preliminary breath-test was mandatory but not fulfilled, the prosecution could still be sustained and s.9(10) expressly denies a defendant the right to rely by way of defence on non-compliance.
2. Does not arise; regard may be given to s.9(9) which expressly provides that nothing in this section affects any power of arrest conferred by law apart from this section. Therefore, the question could be answered in the affirmative.
3. Yes.”

SUBMISSIONS OF THE DEFENDANT

At the close of the prosecution case in the District Court an application to direct the acquittal of the defendant was made by his solicitor on the grounds that the prosecution had failed to adduce evidence to establish that section 9 of the Road Traffic Act 2010 had been complied with. It was submitted that the 2010 Act must be interpreted strictly and that section 9(2) of the Act is mandatory in nature save and in so far as provided by the exceptions contained in section 9(2), (6) and (7), which it was submitted do not arise in the present case.

Counsel for the defendant submits that the circumstances of this case bring the matter within the scope of one of the classes of events provided for by section 9(1), thus rendering that section operable. It is submitted that the exceptions at subsections 6 and 7 do not arise. Prior to the enactment of the 2010 Act, the taking of a preliminary breath specimen was a discretionary matter under section 12(2) of the Road Traffic Act, 1994. Counsel for the defendant submits that the substantive difference between this provision and section 9 of the 2010 Act is that the latter provision makes the requirement mandatory. In the absence of evidence having been adduced that the Garda had a power of arrest under section 4(8) without the need for a preliminary breath test, the defendant submits that the arrest was unlawful and the evidence harvested on foot thereof must fall.

Counsel refers the Court to the Supreme Court decision in DPP v. Kemmy [1980] IR 160 where O’Higgins C.J. held that –

“Where a statute provides for a particular form of proof or evidence on compliance with certain provisions, in my view it is essential that the precise statutory provisions be complied with. The Courts cannot accept something other than that which is laid down by the statute, or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field.”

Further, in DPP v. Moorehouse [2006] IR 421 the Supreme Court held that *“It is a well established presumption in law that penal statutes be construed strictly”*.

Based on these submissions, it is submitted that the answers to the questions posed in the case stated should be as follows –

1. Yes; save for the exceptions contained therein at s. 9(2), (6) and (7).
2. No, other than as provided for by s.9(2),(6) and (7).
3. No, but does not fall to be considered.
4. No, but does not fall to be considered.

DISCUSSION

I have carefully considered the submissions of both parties as well as the relevant statutory provisions and case law.

The Court finds that the wording of section 9(2) of the 2010 Act is clear and unambiguous and that an exception to the mandatory duty to administer a preliminary breath test exists where a Garda is of the opinion that a person should be arrested for a suspected offence. In the present case Garda Lynch observed the defendant driving in an erratic and dangerous manner whereby the defendant’s vehicle was failing to maintain a steady course on the road and had veered onto the grass verge at the roadside. Upon stopping the vehicle Garda Lynch detected a strong smell of alcohol and noticed that the driver’s speech was slurred. Based on these factors, Garda Lynch formed the entirely reasonable independent opinion that the defendant might be intoxicated and therefore arrested him for the purpose of administering an evidential breath test at Gort Garda Station. The evidence of Garda Heneghan and Garda Donoghoe in this regard is not in dispute. The defendant’s level of intoxication was immediately apparent to Garda Lynch so that a preliminary road-side breath test was not necessary in this case in order to justify an arrest. Section 9(2) makes clear that where a Garda is of the opinion that a person should be arrested on suspicion of an offence the mandatory duty to administer a preliminary breath test does not arise. This interpretation does not fall foul of the principles of strict construction of penal statutes and nor does it do any violence to the intention of the legislature. The Court has had regard to the principles as set out by the Supreme Court in Kemmy and Moorehouse and believes its interpretation of the statutory provisions conforms with those principles.

The Court further accepts that having made this finding the second question in the case stated does not arise. For the sake of completeness however it is worth noting that had it been necessary to answer this question the Court would be inclined to agree with the submission of the prosecution that according to s.9(9) of the 2010 Act nothing in section 9 affects any power of arrest conferred by law apart from that section. Therefore, the second question could be answered in the affirmative.

It follows therefore that the arrest of the defendant was lawful and that the evidence obtained from the evidential breath test administered at Gort Garda Station is admissible. Consequently, the third question posed by Judge Durcan in the case stated can be answered in the affirmative.

DECISION

For the reasons outlined above, I would answer the questions posed by the District Judge in the following way –

Q. 1 No.

Q. 2 Does not arise.

Q. 3 Yes.