

THE HIGH COURT

2010 2365 SS

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

IN THE MATTER OF A CONSULTATIVE CASE STATED BY JUDGE GEOFFREY BROWNE A JUDGE OF THE DISTRICT COURT

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF GARDA GERALDINE TORMLEY)

PROSECUTOR

v.

COLIN GILLESPIE

ACCUSED

Judgment of Mr. Justice Hedigan delivered the 9th day of June 2011

1. This case stated arises from proceedings dated the 17th June, 2010, wherein Judge Geoffrey Browne, a Judge of the District Court assigned to District No.4 sitting at the District Court in Boyle, Co Roscommon, sought the opinion of the High Court on the following the questions;

(a) In circumstances where it has been established that a Prisoner was on a phone call at the time when he was being given information in accordance with Regulation 8(1) of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, is this a breach of the said Regulations?

(b) If the answer to the aforesaid question is yes, can I exercise my discretion to exclude evidence contained in the section 17 certificate?

2.1 This case stated arises from proceedings dated the 17th June, 2010, which took place at the District Court in Boyle, Co Roscommon. The proceedings involved a charge that on the 21st February, 2010, the accused Colin Gillespie drove motor vehicle registration number 07-DL-4954 while intoxicated contrary to section 49(4) and (6) of the Road Traffic Act, 1961. At the hearing of this matter Garda Tormey gave evidence that on the 21st of February, 2010, she observed motor vehicle 07-DL-4954 being driven in an erratic manner at Great Meadow, Boyle, Co Roscommon. On approaching the vehicle she got a strong smell of liquor from the driver and she formed the opinion that he was incapable of maintaining control of the vehicle. She arrested the accused pursuant to s.49 (8) of the Road Traffic Act 1961. The accused was brought to the Garda station and was processed by the member in charge Garda Pauline Doherty, in accordance with the Criminal Justice Act 1984 (Treatment of Persons in Custody Garda Síochána Stations) Regulations 1987 (hereinafter "the 1987 Regulations"). Garda Declan Conway then introduced himself to the accused and administered the intoxilyzer test which gave a reading of 106 microgrammes of alcohol per 100 millilitres of breath. Garda Tormey charged the accused who stated "no problem, I told ya, I knew I was drunk".

2.2 Counsel on behalf of the accused, cross examined Garda Tormey. It was put to Garda Tormey that the accused would be in a position to establish in evidence that he was in continuous use of his mobile phone at the time and that he had made eleven phone calls between the time of his arrest and his release. Garda Tormey stated that she was not in a position to give an explanation in relation to the accused's use of his mobile phone. Counsel then put this matter to Garda Conway who responded that he did not see the accused physically take out a mobile phone during the course of his dealings with the accused. Garda Conway was asked if he would be in a position to contradict the accused's evidence that he made a total of eleven phone calls while in custody, including the time when he was being processed by the member in charge. Garda Conway said that he would not be in a position to contradict this but that he did not see the accused physically handling a mobile phone. The member in charge, Garda Doherty gave evidence that the accused was given information in accordance with Regulation 8(1) of the 1987 regulations at 4.41 p.m. and was handed the notice of rights at 4.42 p.m. Counsel put it to Garda Doherty that the accused was on a mobile call during the time he was read his notice of rights in accordance with the 1987 Regulations. Garda Doherty stated that she was not in a position to comment on this and said her only recollection was that the accused did use his mobile phone to contact his brother while in custody.

2.3 At the close of the prosecution's case, Counsel for the accused applied for a Direction from Judge Browne. Counsel relied on three separate grounds; the final ground forms the basis of this Consultative Case Stated. Counsel stated that there was clear non compliance by Garda Doherty, as member in charge, with the provisions of the 1987 Regulations. Counsel called the accused who gave evidence that he made eleven phone calls between 4.20p.m. and 5.14 p.m. Specifically, the accused gave evidence that he did not receive the oral information purportedly read to him by Garda Doherty as he was in the course of a telephone conversation at the time. Phone records confirmed that at 4.39 p.m. the accused was on his mobile for a period of 2 minutes and 35 seconds. Following this evidence Counsel for the accused submitted that there was now clear and un-contradicted evidence that the accused was on a mobile phone at the time that Garda Doherty purportedly read the accused his notice of rights at 4.41 p.m. Counsel submitted that the 1987 Regulations required that certain information be given orally to a prisoner in a meaningful way, and the 1987 Regulations had not been complied with if the member in charge had simply read over the document whilst the accused was on a mobile phone.

Counsel argued that because the 1987 Regulations had not been complied with, the Judge should exercise his discretion to exclude the evidence contained in the section 17 intoxilyser certificate.

2.4 Judge Browne accepted the evidence that the accused had been on a mobile phone at the time his rights were being read to him by Garda Doherty. The Judge then enquired whether this was fatal to the prosecution. Superintendent Sutton for the prosecution stated that there were no regulations prohibiting the use of a phone while persons in custody were being processed. Counsel for the accused maintained there was no meaningful compliance with the provisions of the 1987 Regulations. Judge Browne reserved his decision on the matter pending the determination of the Consultative Case Stated.

Submissions on behalf of the Accused

3.1 Counsel on behalf of the accused submits that the obligation to inform a person who is arrested of his entitlement to consult a lawyer underpins the protection and vindication of a number of fundamental constitutional and legal rights. This obligation is contained in Article 8(1) of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, which provides as follows:-

"8(1) The member in charge shall without delay inform an arrested person or cause him to be informed;

(a) in the ordinary language of the offence or other matter in respect of which he has been arrested,

(b) that he is entitled to consult a solicitor

(c) ...

The information shall be given orally. The member in charge shall also explain or cause to be explained to the arrested person that, if he does not wish to exercise a right specified in subparagraph (b) or (c) (i) immediately, he will not be precluded thereby from doing so later.

(2) The member in charge shall without delay give the arrested person or cause him to be given a notice containing the information specified in subparagraph (b) or (c) of paragraph (1) ..."

Counsel submits that the District Judge is required to consider whether there has been a meaningful communication to the accused, of his rights under the 1987 Regulations. Mere recital of the words in the physical presence of an arrested person may not amount to meaningful communication in circumstances where that person is engaged in a telephone conversation. The obligation to inform is one of substance and not simply a question of form this is clear from the "to explain or cause to be explained" in the regulations. There is also a requirement to use ordinary language to ensure communication is effective. It is open to the District Judge to consider whether the obligation was substantively complied with and if not to then consider the consequences of that failure.

3.2 The consequences of a breach of the regulations has been the subject of a number of decisions commencing with the decision of Blayney J. in *Walsh v. District Judge O'Buachalla* [1991] 1 I.R. 56, in which an applicant sought to have his conviction for drunk driving quashed in reliance on evidence that just before the relevant specimen was taken in the station, he asked to see a solicitor but compliance with his request was deferred until after the specimen had been taken. He had been given notice of his right to consult a solicitor and make a phone call some forty minutes before the arrival of the Doctor but chose not to avail of his right. Blayney J. held as follows at 60:-

"It was submitted on behalf of the applicant that if he had access to a solicitor he could have been advised by him. But what advice could a solicitor have given him? He would certainly not have advised him to commit an offence by refusing to give one or other of the specimens. All he could have done was to confirm that the applicant was required by law to provide a specimen of blood or urine. No advice could have prevented the specimen being obtained, and, accordingly, the applicant's not having had access to a solicitor in no way affected it's being obtained."

3.3 The effect of a breach of custody regulations in the context of a drunk driving case was again explored in the case of *DPP v Spratt* [1995] 1 I.R. 585. In that case, the accused argued that because there was no evidence of any kind that he had been informed of his rights in accordance with the 1987 Regulations, that the evidence contained in a certificate from the Medical Bureau of Road Safety should be excluded in evidence. It was held that section 7(3) of the Criminal Justice Act 1984 was applicable to persons arrested under section 49(6) of the Road Traffic Act 1961. Section 7(3) provides that:-

"A failure on the part of any member of the Garda Síochána to observe any provision of the (1987) Regulations shall not of itself render that person liable to any criminal or civil proceedings or of itself affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him."

O'Hanlon J. went on to consider whether non-compliance with article 8 of the Regulations rendered the custody of the accused unlawful notwithstanding the provisions of s.7 (3) of the Criminal Justice Act 1984. O'Hanlon J at page 591 said:-

"The phrase 'of itself' is obviously an important one in the construction of the statutory provisions, and I interpret the subsection as meaning that non-observance of the Regulations is not to bring about automatically the exclusion from evidence of all that was done and said while the accused person was in custody. It appears to be left to the court of trial to adjudicate in every case as to the impact the non-compliance with the regulations should have on the case for the prosecution."

Counsel on behalf of the accused submits that it is clear from *Spratt* that it is for the trial judge to decide what impact the non-compliance with the regulations should have on the case for the prosecution.

3.4 In *DPP v. Diver* [2005] 3 I.R. 271, the Supreme Court held the consequences of non compliance is a matter for the discretion of the trial judge to be exercised having regard to the circumstances of the case. Hardiman J. stated at 280:-

"Where there has been a breach of the regulations due to a failure to record "so far as practicable" an interview with an accused, the task of the trial judge is to determine, whether in all the circumstances, the effect of the failure to observe the regulation has prejudiced the fairness of the trial of the accused other than by the fact of a breach of the regulations

themselves.”

The accused submits that in this case the trial judge has discretion to determine the question of whether the fairness of the accused's trial was prejudiced by the failure to adequately comply with the 1987 regulations. In this case the Court is entitled to direct the District Judge to have regard to the decisions in *Spratt* and *Devlin*. It would then be a matter of fact for the judge to decide whether there was meaningful compliance with the 1987 regulations and if not whether evidence gathered during the custody of the accused, including the Section 17 intoxilyser certificate, should be excluded.

Submissions on behalf of the Prosecutor

4.1 The prosecutor agrees with the submission that that an accused persons rights must be communicated to that person in a meaningful way. Article 8, however, provides for both oral and written communication and it is not disputed that the applicant was handed a notice of his rights. It is a matter for the District Judge to decide whether, in the circumstances of the case, there has been a breach of the requirement to communicate the information to the accused in a meaningful way.

4.2 In a case stated the prosecution is bound by the facts as found by the District Court Judge. It is however unclear whether the evidence has concluded in the case. In cross-examination it was put to the member in charge that the accused was on a mobile call at the time he was read his notice of rights. It was not put to her that she did not in fact read him his rights or that the accused was unaware of his rights. When the accused was called he gave evidence that he did not receive the oral information purportedly read to him by Garda Doherty as he was in the course of a telephone conversation at the time and was unaware of what was being said to him. The accused was not cross examined by the prosecution and the District Judge did not indicate that he accepted that the accused was unaware of his rights. It is a matter of common sense that persons on a phone call can hear what is being said to them. It remains unclear how the accused knew that the member in charge was “purportedly” reading him his rights if he was “unaware” of what was being said. It is also unclear how he could instruct his solicitor that he was on the phone when his rights were being read to him if he was in fact unaware of what the garda was doing. The accused also failed to address the evidence that the notice of rights was handed to him at 4.42 p.m.

4.3 The question posed by the District Judge as to whether there has been a breach of article 8(1) of the 1987 regulations in circumstances where it has been established that a prisoner was on a phone call at the time he was being given the information is essentially a factual one. The fact that a person may have been on the phone at the relevant time does not preclude that person from being given the relevant information. If it is considered inappropriate to remit this question to the District Court Judge, then this question should be answered “no”. It is not a principle of law that a member in charge cannot communicate the contents of Article 8(1) to a person on the phone. If this were an inflexible rule it would be open to abuse, persons in custody could frustrate the statutory procedure by making lengthy phone calls. Counsel submits that this further illustrates that whether a breach occurs is a question of fact which must be decided on a cases by case basis.

4.4 The second question posed by Judge Browne is essentially whether a District Court Judge has discretion to exclude evidence obtained following a breach of the 1987 Regulations? There are a number of cases which establish the principle that breach of the 1987 regulations in and of itself does not automatically lead to the exclusion of any evidence obtained while an accused is in custody. In *DPP v Spratt* [1985] 1 I.R. 585, O'Hanlon J. said at 592:-

“I think the correct approach in the present case is to pose the same question which Mr. Justice Blayney asked of himself in *Walsh's* case. If a breach of the constitutional rights of the accused person took place, as alleged, in what manner was he prejudiced thereby? Was any information obtained which might not have been otherwise obtained?

It is easy to conceive a situation where an accused person in custody is not informed of his right of access to a solicitor, and does not seek legal advice in consequence, and proceeds to make an incriminating statement when a legal adviser might have counselled silence. In this set of circumstances it can be envisaged that the decision of the trial judge might be to exclude the evidence so obtained.

In the present case, however as in *Walsh's* case, an accused person was in the Garda Station awaiting the arrival of the registered medical practitioner who was to take a sample of blood or urine, which the accused person was obliged by law to provide for him in accordance with the relevant statutory provisions. Access to a solicitor or advice from a solicitor could not avert this fate, and no further evidence was then required for the purpose of the prosecution save evidence of the circumstances of the arrest, the obtaining of the sample and the formal, technical evidence of what was disclosed by the sample taken.”

It is clear from the decision in *Spratt* that the appropriate question if a breach of the regulations has taken place, is whether the accused was prejudiced by the breach? In the present case the accused was legally obliged to provide a breath sample. Even if this Court found that the accused was not effectively informed of his right to a solicitor, it could not be said that he was prejudiced as a result of this. A solicitor could not have advised the accused to refuse to provide a breath sample. There can be no basis therefore for the exclusion of the evidence in the Section 17 intoxilyser certificate. In conclusion Counsel submits that question one should be answered “no”. In this case, question two does not arise. If the Court answers “yes” to question one then Counsel submits that question two should also be answered “yes”. The judge does have a discretion which should be exercised in accordance with the principles laid down in the *Spratt* case.

Decision of the Court

5.1 This consultative case stated arises from proceedings heard by Judge Geoffrey Browne on the 17th June, 2010, at the District Court in Boyle, Co Roscommon. At issue in those proceedings was a charge that the accused Colin Gillespie drove a motor vehicle while intoxicated. At the hearing Garda Tormey gave evidence that she arrested the accused pursuant to s.49 (8) of the Road Traffic Act 1961. The member in charge, Garda Pauline Doherty gave evidence that she read the accused his rights in accordance with Regulation 8(1) of the 1987 regulations at 4.41 p.m. and she handed the accused his notice of rights at 4.42 p.m. Counsel on behalf of the accused put it to Garda Doherty that the accused was on his mobile phone during the time she read him his notice of rights. Garda Doherty stated that she was not in a position to comment on this and referred to her only recollection being that the accused did use his mobile phone to contact his brother while in custody. Counsel called the accused who gave evidence that he did not receive the oral information purportedly read to him by Garda Doherty as he was in the course of a telephone conversation at the time. Phone records confirmed that at 4.39 p.m. the accused was on his mobile for a period of 2 minutes and 35 seconds. Counsel argued that the 1987 Regulations had not been complied with and therefore Judge Browne should exercise his discretion to exclude

the evidence contained in the section 17 intoxilyser certificate. Judge Browne accepted the evidence that the accused had been on a mobile phone at the time his rights were being read to him, however he reserved his decision as to whether the section 17 certificate should be excluded pending the determination of the Consultative Case Stated.

5.2 The legislation governing the case stated procedure is contained in Section 52(1) of the Courts (Supplemental Provisions) Act, 1961 which provides:-

"A justice of the District Court shall, if requested by any person who has been heard in any proceedings whatsoever before him... unless he considers the request frivolous...refer any question of law arising in such proceedings to the High Court for determination."

The procedure for stating a consultative case was set out in the case of *DPP (Travers) v. Brennan* [1998] 4 I.R. 67. The procedure is as follows:-

- "1. The District Court should hear all the evidence relevant to the point of law arising.
2. The District Court should find the facts relevant to such point of law in the light of the evidence.
3. The District Court should then state a case, posing questions appropriate to elucidate the point of law and
4. On receiving the answers to those questions, The District Court should decide the matter before it on the basis of those answers."

5.3 The questions posed by District Judge Browne in this consultative case stated are as follows:-

(a) In circumstances where it has been established that a Prisoner was on a phone call at the time when he was being given information in accordance with Regulation 8(1) of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, is this a breach of the said Regulations?

(b) If the answer to the aforesaid question is yes, can I exercise my discretion to exclude evidence contained in the section 17 certificate?

5.4 I will address each of these questions in turn. At the outset it seems to me to be almost inconceivable that a garda would permit a prisoner to be engaged in a telephone conversation whilst reading the notice of rights to that prisoner. Notwithstanding this initial observation, it seems to me that whether or not Article 8(1) of the 1987 regulations is breached in circumstances where a prisoner was on a phone call when his notice of rights were being read, would depend on the particular circumstances of the case. It is thus a question of fact that is posed to this Court rather than a question of law. It is not difficult to conceive of circumstances where a prisoner was on his phone but could not sustain a claim that Article 8(1) had been breached. If, for example, it could be shown that a prisoner was on the phone to his solicitor, he could scarcely complain that he was not informed of his right to consult a solicitor. If the prisoner had put his call on hold or simply put his mobile down when his notice of rights were read, he could not complain in these circumstances. It is highly undesirable for a prisoner to be on a phone call when his notice of rights are being read to him but it does not follow that there has been a breach of regulations. Whether a breach occurs is a question of fact which must be decided on a case by case basis. The fact the accused's phone records show he was on the phone at the time his rights were read to him is not *ipso facto* a breach of the regulations.

5.5 Question (b) is clearly dependent on the answer to question (a). Nevertheless I think I should address this question for the assistance of the District Judge. It seems to me that a Judge can exercise his discretion to exclude evidence where the 1987 regulations have been breached, however as stated by O'Hanlon J. in *DPP v Spratt* [1985] 1 I.R. 585 at page 591:-

"...non-observance of the Regulations is not to bring about automatically the exclusion from evidence of all that was done and said while the accused person was in custody. It appears to be left to the court of trial to adjudicate in every case as to the impact the non-compliance with the regulations should have on the case for the prosecution."

The crucial factor is whether or not the accused was prejudiced by the breach. O'Hanlon J. stated at 592:-

"I think the correct approach in the present case is to pose the same question which Mr. Justice Blayney asked of himself in *Walsh's* case. If a breach of the constitutional rights of the accused person took place, as alleged, in what manner was he prejudiced thereby? Was any information obtained which might not have been otherwise obtained?"

The accused provided a breath sample which he was legally obliged to provide. Even were the Court to find that the accused was not informed of his right to consult a solicitor in a meaningful way, it could not be argued that he was prejudiced as a result of this. A solicitor could not have advised the accused to refuse to provide a breath sample. In the absence of prejudice to the accused a breach of the 1987 regulations would not provide a basis for the exclusion of the evidence in the Section 17 intoxilyser certificate.

5.6 In the result it seems to be that because question (a) as currently formulated is a question of fact and not a question of law the appropriate course of action is to remit that question back to the District Judge for his decision as to whether there was in fact a breach of the regulations. He may wish to hear further evidence in this regard and also hear any cross examination of the accused that there may be. The fact alone that he was using a mobile phone is not conclusive as to whether he was or was not informed of his rights. If the District Judge is of the view he was not then he should determine whether he was prejudiced thereby. In this consideration the District Judge should have regard to the decision of Blayney J. in *Walsh v. District Judge O'Buachalla* [1991] 1 I.R. 56 and O'Hanlon J in *DPP v Spratt* [1995] 1 I.R. 585 as set out above.