



**THE COURT OF APPEAL**

**In the Matter of Section 2 of the Summary Jurisdiction Act 1857,  
as extended by Section 51 of the Courts  
(Supplemental Provisions) Act, 1961**

**Neutral Citation Number: [2019] IECA 293**

**[30/2019]**

**Birmingham P.  
McCarthy J.  
Kennedy J.**

**BETWEEN**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**KEENAN MCGOVERN**

**APPELLANT**

**JUDGMENT of Mr. Justice Patrick McCarthy delivered on the 18th day of November 2019**

1. This is an appeal against the judgment and order of McDermott J. of the 9th October, 2018. District Judge Colin Daly had sought the opinion of the High Court as to whether he was entitled to dismiss a certain prosecution pursuant to ss.4(4)(a) and (5) of the Road Traffic Act 2001, by a case stated dated the 13th June, 2017.
  
2. I do not set out the case stated *in extenso*. The following facts, as set out, and the transcript appended to it, are relevant: -
  - (1) Garda Long lawfully stopped the respondent who was driving a mechanically propelled vehicle on the 3rd September 2016 and lawfully required him to provide a specimen of his breath by exhaling into an alcometer, which Mr McGovern did. The type of alcometer in question was calibrated to give readings of "Pass" or "Fail" and the result was a "Fail". Solely on the basis of that result, Garda Long formed the opinion that Mr McGovern had consumed an intoxicant and that he had committed an offence under ss. 4(2), (3) or (4) of the Road Traffic Act, 2010. On the basis of it he arrested him under s.4(a) of the same Act and he informed him of the reason for his arrest. Later, having regard to the result of a breath test at a garda station he was prosecuted and it is not capable of debate but that the finding of alcohol in his breath (54Mcg/100mL) was such as to properly ground a conviction. The alcometer used for the roadside test provides no information as to the concentration of alcohol in the breath nor indicates whether or not a person is over a permitted limit. There was nothing in the manner of Mr McGovern's driving which attracted the attention of the garda, he drove up to the checkpoint without difficulty and did not exhibit any signs of intoxication.

- (2) Mr McGovern's solicitor Mr. Lanigan submitted to the learned District Court judge that: –

*"Based on an analysis of his evidence [that of the garda] it is not an opinion he could come to. It is an opinion, the only opinion that he could come to that is reasonable and it must be a reasonable opinion is that Mr McGovern on the night had a presence of alcohol on his breath but that there was no evidence that goes beyond that to justify the arrest".*

- (3) It is plain from the case that Mr McGovern's solicitor, in his submissions, relied upon the decisions of *DPP v. Gilmore* [1981] I.L.R.M. 102 and *DPP v. Brady* [1981] 1 I.R. 337. He submitted, no doubt, in good faith, that in *Gilmore* the Supreme Court had decided that an opinion formed solely on the basis of a so called "Fail" of an alcometer test was insufficient to ground an arrest. *Brady* is of no relevance.
- (4) In the case as appears from the transcript the learned District Court judge ruled upon the matter as follows: -

*"... I am being asked to give a direction and to follow the decision of the Superior Courts in DPP v. Gilmore where the Supreme Court has determined that the breath test on its own is not sufficient to form the opinion and therefore I have to conclude on the basis of the evidence that is before me that the garda could not properly or reasonably form the opinion that the accused on the night in question was incapable of driving the mechanically propelled vehicle and therefore I am going to have to give a direction on that [sic] regard and dismiss."*

- (5) In the case stated, the learned District Court judge summarised his decision as follows: -

*"20. Having considered the submissions of the parties, I then made my decision in this case. I found as a fact that on the basis of the evidence and having regard to the case law from the Superior Courts, Garda Long had no reasonable basis to conclude that the respondent was intoxicated to such an extent as to be incapable of having proper control of a mechanically propelled vehicle. As a consequence of that ruling, I accepted Mr. Lanigan's [solicitor for Mr. McGovern] argument and deemed the arrest of the accused unlawful.*

*21. As a result of the ruling that I made at the hearing and the fact that a lawful arrest is a pre-condition to a requirement for an evidential specimen under s.12 [of the 2010 Act] the evidence subsequently obtained following the arrest of the respondent was excluded.*

*22. In those circumstances, I dismiss the prosecution as against the respondent..."*

3. It was submitted on Mr McGovern's behalf both here and in the High Court that in truth no question of law arose which could legitimately be the subject of the enquiry made in the case stated, but rather what the director was seeking to do was to impugn a pure

finding of fact. I think that this is an oversimplification. Whilst it was not explicitly stated, the argument must be that after exclusion of the evidence of alcohol in the accused's breath obtained after arrest there was no evidence of the offence. Such a proposition is certainly consistent with the case stated, but not with what actually occurred as appears from the transcript. The thrust and tenor of the submission on behalf of the accused was that there was no case to answer because the opinion was not objectively reasonable having regard to the state of the law as erroneously conceived by Mr Lanigan. Any potential application to exclude the evidence as unlawfully obtained was effectively conflated in practice with an application to acquit due to the absence of the excluded evidence. Obviously, such an application could not arise if the arrest was lawful with consequent admission of the evidence. It is plain that the core of the decision and reason for the dismissal was an error of law as to whether or not the result of the alcometer test was sufficient to ground the opinion, of itself. That conclusion was of course based on the evidence as to why the suspicion was formed and that evidence is not in dispute. Even if the conflation to which I have referred did not occur, an erroneous ruling of law resulting in the exclusion of evidence, giving a rise to an acquittal, raises a question of law going to the issue of whether or not Mr McGovern was rightly acquitted. This is long established.

4. This aspect was dealt with in explicit terms by McDermott J. as follows: -

*"13. Finally, I do not consider that this conclusion [on the issue as to the basis of the arrest] in any way interferes with the jurisdiction of the learned judge to make appropriate findings of fact relevant to a legal ruling required during the course of or at the conclusion of a trial: The issue raised in this case concerns the interpretation of s.49(8) and the opinion required to ground a lawful arrest. The garda was challenged in respect of his opinion but to be of any legal consequence the challenge must have some relevance to the formation of the opinion under s.49(8) applying the relevant legal principles... ."*

5. The issue accordingly is whether the opinion of An Garda Síochána based solely on the result of a roadside breath test is sufficient to found a reasonable opinion that a person is incapable of having proper control of a mechanically propelled vehicle. The learned District Court judge relied upon Mr Lanigan's submission that it was held to be insufficient by the Supreme Court in *Gilmore*. There, the court was concerned with Part III of the Road Traffic (Amendment) Act, 1978, (analogous to the provisions under consideration here). On an appeal from the District Court, the Circuit Court had stated a case to the Supreme Court as to whether an arrest was lawful where the opinion of the garda was formed by relying solely or partly upon the result of a breathalyser test (that is to say a test of the same or an analogous kind on the roadside). In the course of his judgment, Henchy J. stated that: -

*"I read Part III of the 1978 Act as indicating a statutory intent that a positive result of a breathalyser test is sufficient to justify an opinion on the part of the Garda who carried out the test, albeit an opinion that may later turn out on a more scientific analysis to have been wrong, that an offence under subs. (2) or subs. (3) had been*

*committed. And, considering that the Garda had formed the opinion that the defendant's alcoholic condition had deprived him of the capacity to drive properly, the Garda must a fortiori have formed the opinion that the defendant had committed an offence ... ."*

6. The judgment of Kenny J. is equally clear: -

*"... , counsel for the defendant, argued that the statutory right of arrest can be exercised only if the Garda has formed an opinion that an offence under s: 49 has been committed based on observation of the accused and not on the result of the breathalyser. When ss.10 and 12 of the Act of 1978 are read together, this contention is seen to be incorrect. The Garda is entitled to arrest a person in charge of a mechanically propelled vehicle if he has formed the opinion from observation that the person in charge is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle: he is also entitled to do so on the result of the breathalyser test only. Indeed, an opinion formed on the result of the breathalyser test will probably be more accurate than one based on observation. The section does not require that the Garda should form his opinion on observation: the purpose of the breathalyser test is to enable the Garda to form an opinion."*

7. In light of the above I would therefore answer the question in the negative and accordingly dismiss this appeal.