[2020] IEHC 58

THE HIGH COURT

[RECORD NO. 2019/117 SS]

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

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA MICHAEL O'SHAUGHNESSY)

PROSECUTOR

AND

KIAN MCGUIGAN

DEFENDANT

JUDGMENT OF MS. JUSTICE HYLAND DELIVERED 6TH FEBRUARY 2020

Introduction

1. On 22 January 2018, Judge Denis McLoughlin referred a consultative case stated pursuant to s. 52(1) of the Courts (Supplemental Provisions) Act 1961 for the opinion of the High Court. The question of law referred for determination was as follows:

   Am I entitled as a trial Judge to determine that I was not satisfied that a reasonable opinion was formed by Garda O'Shaughnessy to justify the arrest of the Accused for an offence under s.4(1),(2),(3) or (4) of the Road Traffic Act 2010, as amended, following a failed preliminary breath test on the Accused where the evidence failed to disclose that the device had been calibrated to produce a pass/fail reading commensurate with the category of driving licence of the Accused where the test was a material and/or determining factor in the formation of the opinion?

2. The facts are as set out in the case stated. In summary the Defendant was charged *inter alia*, with an offence contrary to s. 4(3)(a) & 5 of the Road Traffic Act 2010. It is alleged that on 18 February 2017 at Cathedral Road, Cavan, Co. Cavan, the Defendant drove a mechanically propelled vehicle while there was present in his body a quantity of alcohol such that, within three hours after so driving or attempting to drive, the concentration of alcohol in his urine exceeded a concentration of 67 milligrammes of alcohol per 100 millilitres of urine. A copy of the charge sheet alleging the offences is appended to the Case stated at Appendix A.

3. The accused pleaded not guilty to the charge. During the hearing of the case in Cavan District Court on 8 February 2018, an issue arose as to the reasonableness or otherwise of the opinion formed by Garda O'Shaughnessy prior to arresting the accused for an offence under section 4 of the Road Traffic Act 1961, as amended, and following the application of a road side breath screening test of the accused pursuant to the provisions of section 9 of the Road Traffic Act 2010, as amended. At the end of the hearing Judge McLoughlin requested written submissions and having considered same he determined he wished to state a Consultative Case for the opinion of the High Court.

4. For completeness, it should be noted that the Defendant is charged with two further offences arising out of the same set of facts that are not the subject of the Case Stated.

Operation of Dragër Alcotest

5. The case concerns the application of a breath test using a device known as the Dragër Alcotest 6510. This device can be set at two levels. The first level is for "specified drivers", and it records a failed reading if the concentration of alcohol in the breath is in excess of 9 micrograms. Specified drivers are defined in the definition section of the Road Traffic Act 2010 as amended, which includes learner drivers, holders of a licence licensing the holder to drive a vehicle within a period of two years from the date of issue, taxi drivers and persons not holding a driving licence.

6. The second and alternative setting of the device is for all other drivers (whom I will describe in this Judgment as non-specified drivers) and records a failed reading if the concentration of alcohol on breath is in excess of 22 micrograms.

Determinations of Fact

7. At Section E of the Case Stated, Judge McLoughlin sets out his determinations of fact as follows:

> *"I. I concluded that, notwithstanding numerous opportunities in examination and cross examination of Garda O'Shaughnessy, no evidence had been given that the Dragër Aloctest 6510 device had been calibrated to the appropriate level to determine on a screening basis that the concentration of alcohol in the Accused's breath exceeded a concentration which was not permissible for the holder of a full driving licence, such as the Accused.*
>
> *II. I was not satisfied to simply assume that the device had been set to the appropriate calibration levels in the absence of such evidence.*
>
> *III. I was satisfied that the failed breath test formed a material and significant element leading to the formation of Garda O'Shaughnessy's opinion leading to the arrest of the Accused.*
>
> *IV. I was not satisfied that Garda O'Shaughnessy would necessarily have proceeded to arrest the Accused were it not for the failed breath test."*

Preliminary Issue

8. By way of a preliminary issue, Counsel for the prosecutor, Mr. Clarke BL, asserted that the facts as found by Judge McLoughlin were incorrect. He asked that I treat the material facts as those appearing on the transcript of the hearing, being Appendix D to the Case Stated and that I depart from matters specifically identified as determinations of fact in the Case Stated.

9. Both parties agreed that the law in respect of findings of fact by a trial judge in a case stated is as identified by Mr. Walsh in his book, Walsh on Criminal Procedure, 2nd edition, Round Hall, to the effect that *"The general principle is that the District Court judge's findings of fact underpinning the case stated are conclusive, unless it appears that there is no evidence to support them".*

10. I have set out in full the determinations of facts at issue above.

11. Both Counsel agree there is an inaccuracy in the finding at paragraph 1, though it is said to be a minor one by Counsel for the accused, Mr. Dully BL. In respect of the remaining three paragraphs, Mr. Dully says they are either correct findings of fact or permitted inferences from the facts by the trial judge.

12. Having read the transcript and heard the submissions of both parties on this point, I consider that the meaning of paragraph 1 is somewhat ambiguous, insofar as the trial judge concludes that notwithstanding numerous opportunities in examination and cross examination of Garda O'Shaughnessy, no evidence had been given that the Dragër Alcotest device had been calibrated to the appropriate level.

13. The point is made by Counsel for the prosecutor that no questions on the topic had been put to Garda O'Shaughnessy and therefore no opportunities had in fact been provided. However, the finding of fact could also be read as being that questions could have been but were not put to Garda O'Shaughnessy on this topic and read in this way is not erroneous. In any case, the core conclusion is undoubtedly correct – no evidence had been given in respect of the calibration of the Alcotest device when the test was administered.

14. Following on from that, there is a finding at paragraph 2 to the effect that the trial judge was not satisfied to assume the device had been set to the appropriate calibration in the absence of such evidence. That is not a finding of fact. Rather the correctness of this assumption is essentially the subject matter of the Case Stated.

15. At paragraphs III and IV the trial judge concluded that the that the failed breath test formed a material and significant element leading to the formation of Garda O'Shaughnessy's opinion leading to the arrest of the accused and that Garda O'Shaughnessy would not necessarily have proceeded to arrest the accused were it not for the failed breath test. Another judge hearing evidence of the accused's vehicle crossing over the centre white line at 4.25am in Farnham St. Cavan, of the vehicle continuing to drive in the centre of the road, and of the accused exhibiting slurred speech and smelling of alcohol on being stopped (see page 1 of the transcript at Appendix D to the Case Stated) might have come to a different conclusion. However, in my view, there was some evidence to support these conclusions and I am not entitled to set them aside. As identified above, the test is whether there was "no" evidence and this is not the case here.

16. Accordingly, there is no basis for displacing the determinations of fact found by the trial judge.

17. The determinations of fact discussed above are reflected in the question of law referred in that it (a) identifies that the evidence failed to disclose that the device had been calibrated to produce a reading commensurate with the category of licence of the accused and (b) refers to the fact that the test was a material and/or determining factor in the formation of the opinion.

18. For the reasons set out above, I see no reason to interfere with the findings of fact inherent in the question referred.

Formation of a reasonable opinion

19. That leaves a core question – given those findings of fact, was the trial judge entitled to determine he was not satisfied that a reasonable opinion was formed by Garda O'Shaughnessy to justify the arrest? The answer to that question depends, in turn, on whether, having regard to the dual calibration level of the device, it is necessary for the prosecution to establish that the appropriate level of calibration was used when relying on a failed breath test to justify the formation of an opinion by the arresting guard.

20. Counsel for the prosecution argues he was not so entitled since it is not part of the prosecution proofs to exclude the possibility that the device was calibrated inaccurately having regard to the designation of the driver i.e. specified or non-specified. He says that the relevant case law indicates that a positive breath test is sufficient by itself to justify the opinion of the Garda that an offence has been committed, relying on cases such as *DPP v. Gilmore* [1981] ILRM 102, and *DPP v. Keenan McGovern* [2018] IEHC 577 and this is the case even if later scientific analysis proves the opinion wrong. Equally, he notes that where an opinion is formed during an unlawful search, a Garda can still form a lawful opinion (*DPP v. McDonnell* [2014] IEHC 35).

21. Counsel for the accused puts the matter simply. Because the device has two calibrations, one for specified drivers and one for all other drivers – described as non-specified – and because the calibration for specified drivers is considerably lower, if it is set to a level not appropriate for the driver who is tested, that driver may fail the test despite the fact that, appropriately calibrated, the driver would pass. Accordingly, the argument goes, unless the level at which the device is calibrated is known, then (assuming that the failed breath test is the basis for the formation of the requisite opinion of the Garda) the lawfulness of the arrest has not been established by the prosecution.

22. Here, because no evidence of the calibration of the device was given by the arresting guard, Garda O'Shaughnessy, counsel for the accused says the trial judge is quite correct in concluding that in the absence of same, no reasonable opinion was formed by Garda O'Shaughnessy to justify the arrest of the accused.

23. Counsel for the prosecution submits that this is not a correct approach and that it is sufficient in respect of the formation of the opinion for the Court to hear evidence from Garda O'Shaughnessy that he administered a test using the device which the accused failed. The most relevant evidence of Garda O'Shaughnessy in question as recorded on the transcript is as follows:

"I formed an opinion that he had consumed an intoxicant and then I assembled an alcometer in his presence and I required him, pursuant to section 9 of the Road Traffic Act to provide a specimen of his breath by exhaling into the apparatus. I cautioned him of the consequences of his failure or refusal which was €5,000 and/or six months imprisonment. At 4.32, he provided a breath specimen which showed "fail". At 4.32 it

showed "fail". I formed the opinion he was committing an offence under section 4.1,2, and --- or 4 of the Road Traffic Act and I informed him of my opinion" (page 36, lines 25-32, Appendix D to the Case Stated).

24. Counsel for the prosecution asserts that the evidence demonstrates the formation of a bona fide opinion and that is sufficient. He says it is for the defence to take issue with the formation of the opinion and if they fail to do so, they cannot assert the absence of such evidence to demonstrate the prosecution has failed to prove its case.

Case Law

25. Turning now to the case law, counsel for the prosecution relied heavily on the case of *DPP v. O'Connor* [2005] IEHC 422. In that case, the question was whether the District Judge could assume the accused had been in unlawful detention for 7 minutes where he had been in the Garda station for 27 minutes and the case law provided that a 20 minute observation period prior to giving a specimen was justified. Quirke J. held the District Judge could not so assume and noted that where unlawful detention was relied upon as a defence the prosecuting authorities must be given an opportunity to meet such an allegation so they could prove the detention was reasonable and that no such challenge was given. He further held that dismissal of the charge against the accused would only have been justified if the legality of his detention had been challenged on behalf of the respondent or evidence adduced caused sufficient concern for the District Judge to commence a focussed inquiry. Mr. Clarke for the prosecution relied on this case to suggest that in the absence of any challenge by the defence or focussed inquiry by the District Judge, there was no obligation on the prosecution to adduce evidence in respect of the calibration of the device.

26. In *DPP v. Gilmore* (cited above) the question was whether an arrest was lawful where the opinion of the Garda is formed by relying solely or partly on the result of the breathalyser test. The Court held a positive result of a breathalyser test is sufficient to justify the opinion on the part of the Garda that an offence under Section 49(2) or (3) had been committed. The Court held that where a positive reading came back from the test, the Garda must have formed the opinion justifiably on the basis of the breathalyser test that the defendant had, in breach of the relevant statutory provisions, driven when there was an excessive concentration of alcohol in his blood or urine. Commenting on the formation of the opinion, Henchy J. observed that an opinion will not be afforded legal validity if the opinion maker misdirected himself as to the law or facts or if a person in his particular circumstances could not reasonably have reached the opinion formed (p. 105).

27. The decision in *Gilmore* confirms that the formation of the opinion must be reasonably reached in the particular circumstances. However, it does not answer the question as to whether, in the circumstances of the operation of the device in this case, the prosecution must as part of their case establish that the device was set to the appropriate level.

28. In *DPP v. Kulimushi* [2011] IEHC 476, it was identified that in respect of the formation of an opinion, the test of reasonable cause for suspicion sets a very low threshold and the critical test of the opinion is that it is bona fide. To form an opinion the Garda does not

require the level of proof that would be necessary in court. In that case, Hedigan J. referred to the case of *DPP v. Duffy* [2000] 1 I.R. 393, also referred to by counsel for the DPP in this case, which establishes that if a Garda states he has formed the requisite opinion and where the accused has been represented by a competent legal practitioner and the validity of the opinion has not been challenged, then the evidence of the Garda is sufficient.

29. The most recent case opened to me, and the only one that refers to the Dragër Alcotest, is *DPP v. Keenan McGovern* (cited above). A case was stated from the High Court asking whether a prosecution could be dismissed where the sole basis for the formation of the opinion was that the driver had failed the test set by the device, thus indicating the presence of alcohol in the driver's breath. Having considered the case law referred above, McDermott J. noted that there was no suggestion the opinion was not *bona fide* and that the case law stated a Garda was entitled to form an opinion based on the results of the test. The Court concluded there was no basis upon which the arrest could be regarded as unlawful.

30. That decision was appealed to the Court of Appeal and by decision of 18 November 2019 ([2019] IECA 293) the Court of Appeal upheld the High Court, relying inter alia on *Gilmore*.

Findings of the Court

31. It is agreed by all that the prosecution must establish that Garda O'Shaughnessy formed a bona fide opinion that the accused was committing an offence under s.4(1),(2),(3) or (4) of the Road Traffic Act 2010 as amended.

32. If the basis for the opinion is that the driver has failed the reading following a breath test using the device, the Garda must be sure that the driver has indeed failed. If, for example, a Garda could not see the level at which the device was calibrated because of a fault with a given device, she or he could not be so satisfied because the device can be calibrated to set "fail" at different levels depending on the category of driver at issue.

33. The calibration level is therefore relevant to the formation of the opinion and so the prosecution must be able to adduce evidence of the calibration level if required. However, that conclusion does not answer the question as to who bears the responsibility for introducing that evidence. Is it a necessary part of the prosecution proofs? Or is it a matter to be raised by the defence or the trial judge?

34. In this case, although the defence cross examined Garda O'Shaughnessy, they did not ask about the level of calibration of the device. If he had been asked and had given evidence, for example, that he knew it was calibrated to the wrong level or did not know how it was calibrated, it is difficult to see how it could be concluded that a *bona fide* opinion had been formed. However, no such question was put and there was accordingly no evidence before the trial judge that identified any basis for questioning the applicability of the fail result to the accused.

35. The defence's case is that, because the device could have been incorrectly calibrated, and because that possibility had not been excluded by the prosecution, then the Court must conclude that the opinion was not formed in a bona fide manner as required. But where, as in this case, the Court has evidence of the formation of a reasonably held, *bona fide* opinion, and no evidence undermining the formation of that opinion by reference to the operation of the device, that evidence is sufficient. The prosecution is not required to exclude a possible factual situation which, if proved, would invalidate the opinion.

36. That conclusion does not amount to requiring the trial judge to assume that the device was appropriately calibrated for the driver as contended by the defence. Rather it means the Court is obliged to accept the evidence of Garda O'Shaughnessy that he formed a reasonably held opinion based (as found by the trial judge) "*reasonably and substantially*" on the fail result of the breath test unless the evidence in that regard is undermined by the defence showing, for example, that the device was incorrectly calibrated. The prosecution is not required to exclude every hypothesis that might invalidate the formation of the opinion; rather as identified in the case law cited above, it must demonstrate the formation of a reasonably held, *bona fide* opinion – the "low bar" identified in *Kulimushi*.

37. To answer "yes" to the question referred to this Court would in my view be contrary to the line of case law cited above establishing what is required for the formation of an opinion. That case law, culminating in the Court of Appeal decision in *Keenan McGovern,* makes it clear that if a Garda states he or she has formed the requisite opinion, the accused has been represented by a competent legal practitioner and the validity of the opinion has not been challenged, then the evidence of the Garda is sufficient.

38. To add an additional obligation i.e. to exclude the hypothesis that the device was incorrectly calibrated, would expand the test identified. Mr. Dully says that is required because of the particular characteristics of the device, which have not yet been considered by the courts. But the mere possibility that the opinion may not have been validly formed because of the wrong calibration is not sufficient in my view to justify an alteration by this Court of the evidence required to be put by the prosecution in respect of the formation of the opinion.

39. The defence will always have the option of cross examining the Garda on the question of the calibration and so can always exclude – or not as the case may be – the possibility that the device was incorrectly calibrated and there is accordingly no risk of injustice to the accused in this respect.

40. I therefore conclude that there is no onus on the prosecution to give positive evidence of the calibration of the device when establishing the formation of the opinion.

Conclusion

41. Having regard to my conclusions above, I answer the question posed by the District Judge as follows:

No.