

APPROVED

THE HIGH COURT

[2022] IEHC 601

[2021 1036 SS]

**IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 52 OF THE
COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961**

BETWEEN

**DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA JOHN
HAYES)**

PROSECUTOR

AND

SOPHIE SMITH

DEFENDANT

JUDGMENT of Mr. Justice Charles Meenan delivered on the 2nd day of November, 2022

Background

1. This is a case stated by a judge of the District Court pursuant to s. 52 (1) of the Courts (Supplemental Provisions) Act, 1961.

2. At a hearing in the Dublin Metropolitan District Court held in Dún Laoghaire Courthouse on 11 November 2020 the defendant was facing a charge that:

“On the 30/5/2020 at Kill Lane, Foxrock, Dublin, a public place in the said District Court area of Dublin Metropolitan District, did drive a mechanically propelled vehicle registration number while there was present in your body a quantity of alcohol

such that, within three hours after so driving, the concentration of alcohol in your breath did exceed a concentration of 22 micrograms of alcohol per 100 millilitres of breath, to wit 59 micrograms of alcohol per 100 ml of breath contrary to s. 4 (4) (a) and (5) of the Road Traffic Act, 2020”.

The hearing in the District Court

3. Garda John Hayes, the first prosecution witness, gave evidence that on 30 May 2020 at 2.30 am he observed a motor vehicle registration weave from side to side and drive on the wrong side of the road on Foxrock Avenue. Garda Hayes stopped this vehicle on Kill Lane and ascertained that it was being driven by the defendant. Garda Hayes gave evidence that he noticed a strong smell of alcohol from the defendant’s breath and that her eyes were glazed.
4. Garda Hayes exercised his statutory entitlement to conduct a roadside breath test under s. 9 of the Road Traffic Act, 2010, the result of which was a failure. Garda Hayes gave evidence that he formed the opinion that the defendant 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.
5. Garda Hayes gave further evidence that the defendant was subsequently conveyed to Dún Laoghaire garda station where the Criminal Justice (Treatment of Persons in Custody) Regulations 1987 were complied with. Garda Hayes stated that the defendant was taken to the interview room at 3.09 am for the purposes of conducting a twenty-minute observation period pending an evidential breath test, during which Garda Hayes confirmed that the defendant took nil by mouth. Having completed an evidential breath test the defendant was charged as above.
6. On cross examination Garda Hayes stated that he could not recall the defendant’s time of arrival at Dún Laoghaire garda station, but it should take approximately ten minutes to drive from the locus of the defendant’s arrest to said garda station. Garda Hayes further stated that subsequent to her arrest the defendant was kept at the roadside as an arrested person whilst

awaiting the arrival of the garda custody van. This was in the context of infection control issues arising from the Covid-19 pandemic whereby arrested persons were not being conveyed to their place of detention in standard garda patrol vehicles. The defendant was not restrained or handcuffed and was cooperative at all times.

7. Evidence was given by Garda Catherine Larkin, observer in the patrol car being driven by Garda Hayes. She stated the defendant's time of arrival at the garda station was 2.55 am. Garda Larkin was cross examined as to the length of time it would take to drive from the locus of the defendant's arrest to the said garda station.

8. Having heard the evidence the District Judge found as a matter of fact that the defendant had been lawfully arrested at 2.26 am on 30 May 2020 and the reason for the arrest had been clearly explained to her. She was detained at the side of the road for the purpose of awaiting arrival of the custody van. The evidence was that this was necessary as a Covid-19 safety measure, which had been put in place to ensure that arrested persons were not transported in ordinary garda cars during the pandemic. The District Judge found that the defendant was detained after arrest for a period of approximately nine minutes before the van arrived. The District Judge further found that there was no evidence that the reason for this nine-minute delay was explained to the defendant.

9. The District Judge asked for submissions to the effect of the failure to explain the reason for the delay to the defendant. Having heard these submissions the District Judge held that:

- (i) That the defendant had been lawfully arrested and the reason for the arrest had been properly explained to her.
- (ii) That the defendant was entitled to be brought to the garda station within a reasonable time.
- (iii) That the defendant was required to wait after arrest for a discreet purpose, namely the arrival of a van to transport her safely.

- (iv) That not every delay needs to be objectively justified but that a delay for such a discreet purpose must be objectively justified.
- (v) That the delay here was not unreasonable and had been objectively justified by the need for minimising risk of exposure to Covid-19 in the transporting of arrested persons.
- (vi) That whilst an arrest might be rendered unlawful if a person was kept at the side of the road for a long unexplained period or was left obviously and unnecessarily confused by the process not every part of the process of arrest and detention needs to be set out in detail. It is a matter of degree in all the circumstances. For example, it was not necessary to explain in every detail that the defendant will have to get into the van to be transported to the station.
- (vii) That in all the circumstances of the case, including the fact that the delay was only about nine minutes, that the defendant knew she had been arrested for a drunk driving offence, that there was no evidence of any confusion on her part whilst she waited for the van or that the garda refused to answer any queries raised by her and that the purpose of the delay was for her own safety.

Case stated

10. Having made the aforesaid findings the district judge was of the opinion that questions of law arose and referred the following questions for determination by the High Court:

1. In the circumstances of this case was there an obligation on the Gardaí to inform the defendant of the reason for the delay at the roadside after arrest?
2. If the answer to the above is yes, did this failure render the detention unlawful?

Submissions

11. The defendant submitted that the defendant was kept at a roadside for a period of time with no evidence of any explanation forthcoming to her as to her status whether or not she

remained at liberty and where – if anywhere, she was being taken. It was submitted that there was a requirement and obligation on the part of the Gardaí present to inform her that (a) she remained under arrest, (b) that she was not free to leave and (c) she was awaiting the arrival of a garda custody van to convey her to Dun Laoghaire garda station and the expected arrival of such van and (d) in general terms what would occur on her arrival.

12. The defendant sought to distinguish the facts of the instant case from those in *DPP v. Garrett Foley* [2006] 3 I.R. 334. In that case O’Neill J. found there was no need for any further or additional caution or warning at the commencement of the twenty-minute observation period pending an evidential breath test. O’Neill J. found that this twenty-minute observation period was an integral part of the detention.

13. The prosecutor submitted that the decision in *DPP v. Foley* was applicable to the circumstances of the instant case in that awaiting the arrival of appropriate and safe transportation to the garda station for the defendant was clearly an integral part of the overall detention period.

Consideration of submissions

14. The prosecutor relied on the decision of the Supreme Court in *DPP v. Finn* [2003] 1 I.R. 372. This case also concerned the twenty-minute observation period prior to the taking of a sample of breath. Having referred to *Dunne v. Clinton* [1930] I.R. 366 Murray J. (as he then was) stated at p. 378:

“In criminal proceedings the onus is on the prosecution to establish beyond reasonable doubt that a defendant, while held in custody, has at all times been so held in accordance with law. But not every delay is unreasonable and if it is not unreasonable it does not require to be objectively justified. Once it has been established by the prosecution that a defendant has been lawfully arrested and detained, the question as to whether that lawful detention has been rendered unlawful by unreasonable delay in dealing with a

defendant is, in the first instance, a matter for the trial judge to determine having regard to the circumstances of the case...."

15. The court was also referred to *O'Neill v. McCarton* [2007] IEHC 83 which involved a complaint of delay based on the arrival of a doctor for the purposes of taking a sample. Charleton J. stated:

“In my view there was sufficient evidence before the learned Circuit Court Judge to enable him to decide that there had been no culpable delay on the part of the Gardáí in ensuring the attendance of a doctor for the purposes of the procedure under the Road Traffic Act 1961, as amended, in taking samples for analysis by the Medical Bureau of Road Safety. The evidence was to the effect that once the procedures for checking the accused into Garda custody, making him aware of his rights and opening up a custody record had been concluded, a doctor's service was immediately telephoned. The arrival of a doctor within an hour of that time must be regarded, in the real world, as being a good service; if not a very good one. Rather than there being evidence of the Gardáí acting with contempt towards the accused's constitutional right to liberty, I would hold that, in accordance with the imperative set out in *People (DPP) v. Madden* [1977] I.R. 336, that they did everything possible to ensure that the relevant procedure was completed within a reasonable time. I would add that it is wrong to apply time limits or comparisons between particular cases. Getting doctors to stations is a practical issue to be decided in a practical way. There was no evidence of anyone doing anything less than their best.”

16. In my view the District Judge correctly applied the law. The District Judge held that the defendant had been lawfully arrested and detained. There was a delay of some nine minutes to take the defendant to the garda station. This delay, and the reasons for it, were fully considered by the District Judge. In May 2020, when these events occurred, the country was in the grip of

the Covid-19 pandemic. Virtually every aspect of life was affected by measures taken to halt or prevent spread of the virus which caused considerable loss of life. The duties and work of the gardaí necessarily involves close contact between gardaí and members of the public. It was reasonable for steps to be taken so as to ensure that when a person, such as the defendant, was being transferred to a garda station that measures would be taken to ensure social distancing. The use of a van for transport rather than a garda patrol car was one such measure. In this particular case the delay was nine minutes which is not in the circumstances an inordinate amount of time.

17. I am satisfied the delay was an intrinsic part of the Defendants detention. Even if there had been no Covid-19 changes to procedures, some delay in the Defendant getting into a patrol car for conveyance to the Garda Station would have happened probably less than nine minutes. It would not have been instantaneous.

Conclusion

18. By reason of the foregoing, I answer the following questions as follows:

1. In the circumstances of this case was there an obligation on the gardaí to inform the defendant of the reasons for the delay at the roadside after arrest – Answer “No”.
2. If the answer to the above is yes, did this failure render the detention unlawful?
The answer to the above question is “no”, so the detention question was not unlawful.

19. I will put the matter in for mention on 17th November 2022. My provisional view, subject to submissions, is that the prosecution is entitled to costs.