THE COURT OF APPEAL

Birmingham P.
Edwards J.
McCarthy J.

Neutral Citation Number: [2018] IECA 390

2017 614

IN THE MATTER OF SECTION 52(1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR/

RESPONDENT

- AND -

ANDREW MCTIGUE

ACCUSED/

APPELLANT

JUDGMENT of Mr. Justice McCarthy delivered on the 11th day of December, 2018

1. This appeal is against the judgment and order of Faherty J. (respectively dated the 6th October 2017 and the 2nd November following) in proceedings in which the District Court (Judge Devins) had stated a consultative case for the opinion of the High Court , pursuant to s. 52(1) of the Courts (Supplemental Provisions) Act 1961, in the context of a prosecution of the accused/appellant ("the accused") for failing or refusing to comply with a requirement made of him by a Garda under s. 12(1)(b) of the Road Traffic Act 2010 ("the Act of 2010) to permit a designated medical practitioner to take from him a sample of his blood or urine, at the accused's option, contrary to s. 12(3)(a) of the Act of 2010, as amended by s. 9 of the Road Traffic (No 2.) Act, 2011.

2. The question forwarded in the consultative case stated had asked:

> "Am I correct in law to dismiss the charge on the basis of my finding that an incorrect warning was given to the accused of the consequences of failing or refusing to provide a sample of blood or urine?"

3. The High Court answered that question in the negative and the accused now appeals to this Court against the High Court's ruling in that regard.

4. From the facts proved or admitted before her and as set out in the case it seems that the accused was arrested on the 9th November 2014 and thereafter, at Ballinrobe garda station, one Garda Murrin required of him, pursuant to s. 12(1)(b) of the Act of 2010, that he either-

> (i) permit a designated doctor or designated nurse to take from his person a specimen of his blood, or
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> (ii) at the option of the accused to provide for the designated doctor or designated nurse a specimen of his urine.

5. The accused refused or failed so to do and thereby committed an offence under the section. It will be seen that the factual ingredients are: a valid requirement and a refusal or failure to fulfil it. The accused opted to provide a urine sample but was unable to do so and refused to provide a blood sample, citing a fear of needles. He was warned of the fact that his refusal or failure to fulfil the requirement was an offence and as to the penalties on conviction. Garda Murrin then added that this could also result in "a disqualification of up to four years" whereas, in fact, that was the minimum period. Section 64 of the Act of 2010 provides for a disqualification from driving for the offence in question of "not less than four years" in the case of a first offence (which this was). Effectively, it is contended that, by reason of Garda Murrin' s misstatement of the position with respect to the potential length of the consequential disqualification, the requirement that he made of the accused under s 12(1)(b). of the Act of 2010 to provide a sample of his blood or urine was not valid, alternatively it was vitiated by virtue of the incorrect statement of the garda as to the potential period of disqualification.

6. What is or is not a valid requirement or what information ought to be given by the garda making it to an arrested person has been addressed in a number of cases. Before proceeding to review them it is material to say that a disqualification is not of course a penalty but merely a consequence of a conviction, as held in the well-known case of *Conroy v. the Attorney General* [1965] JR 411.

7. I turn now to the authorities on the core issue. In *DPP v. McGarrigle* [1996] 1ILRM 271 the Supreme Court in dealing with an analogous provision to that here in the Road Traffic (Amendment) Act 1978 ("the Act of 1978") held (*per* Finlay CJ.) that the accused had:-

> "a right to be informed of his legal obligation subject to penal sanction to comply with the requirement and this on the facts as found he was afforded."
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> however,
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> "The obligation to give a specimen which may establish the committing of a serious offence is a significant though not unique exception to the general principles of our criminal code which protect accused persons against involuntary self-incrimination. 'The enforcement of it on the terms of s. 13 of the Act of 1978 depends completely on proof that the requirement refused was made under that section. Such a basic requirement in a serious matter must, it seems to me, be affirmatively proved and not left to be inferred. I would accordingly dismiss the appeal."

8. The latter part of the decision concerned whether or not an express reference to the section was necessary in as much as not merely s. 13 but s. 14 also of that Act permitted the imposition of such a requirement. The relevant portion of the decision for the present purpose is the fact that it was held that the accused has a right to be informed of his legal obligation subject to penal sanction.

9. *Brennan v. Director of Public Prosecutions* [1996] 1 ILRM 267 concerned the efficacy of a requirement to provide a specimen of urine, purportedly under the same section as that at issue in the Mc*Garrigle* case. However in making the requirement the garda concerned had not referred in terms to the statutory provision. It was clear from the case stated (for such it was) that the garda who made the requirement had:

> "quoted almost verbatim the wording of s. 13 of the Act, and that in setting out the consequences of a failure or refusal to Mr Brennan [he] had made it clear to the accused that failure to comply carried penal consequences."

The issue for determination on the case stated concerned whether that had been sufficient, or whether the garda should have gone further and referred specifically to s. 13 of the Act of 1978. Relying upon *McGarrigle* it was submitted on behalf of the accused that explicit reference ought to have been made to s. 13 of the Act. The issue had arisen in circumstances where the sample was provided in compliance with the Act. On this basis *Brennan* was distinguished from *McGarrigle* and it was held that there was no encroachment on any constitutional right of the accused above and beyond that authorised by the legislation and that:

> "No policy purpose is served by requiring members of the gardai to invoke the actual section on which the requirement is based in these circumstances. The requirements for a valid arrest are different since the deprivation of the person's liberty is involved and, in general, it will be necessary for a garda to invoke the operative section when he makes an arrest."

Although nothing turns on it, that latter point is perhaps no longer the law in respect of an arrest. However, the point relevant to the present case is that there is an obligation, at least, to inform the arrested person of the fact that a refusal or failure could carry penal consequences or was an offence attracting penalties. It might be noted in this respect that the Act of 2010 imposes no express obligation to inform the accused of these or any other matters when the requirement is made but it is not in doubt that, having regard to the infringement on the right against self-incrimination constituted by such a requirement, constitutional justice requires that the accused be apprised of these matters.

10. In *DPP v. Mangan* [2001] 2 IR 373 the issue as to the statutory provision under which a requirement was made was somewhat different: the garda making it expressly referred to s. 13 of the "Road Traffic Act" but did not give the year of the enactment in question and the Supreme Court was asked by the Circuit Court to say whether or not the learned circuit judge was entitled to draw the inference that the requirement had been made under the Road Traffic Act, 1994 ("the Act of 1994") (in circumstances where there were a number of Road Traffic Acts enacted in different years in virtue of which the requirement could be imposed). On consideration of the authorities as to the extent of specificity required when identifying the relevant legal provision pursuant to which the requirement was made, it was held that the absence of a reference to the year "1994" was immaterial.

11. In *DPP (Deegan) v. Murphy* [2002] IEHC 79, also a case stated, the High Court addressed directly the issue of whether or not a requirement pursuant to the 1994 Act must be accompanied by reference to a disqualification. The garda who made the requirement told the accused that a failure or a refusal to comply with it, or with the requirement of a doctor in relation to the taking of a specimen of blood or the provision of a specimen of urine, was an offence under s. 13 of the Act of 1994, and the garda also told her of the maximum penalties. It was submitted on behalf of the accused that by the omission to refer to disqualification from driving the prosecution "had not proved its case". Ó Caoimh J. said that he was satisfied that there was no requirement to acquaint the accused of any consequential disqualification since it was not part of the penalty and hence she was not "misled as to the penalty attaching to the offence". He said that:

> "What is important is that a due requirement was made of her. The *McGarrigle* decision does not itself suggest that there is an obligation on the part of a garda exercising the power under s. 13 (1) (b) to inform an accused of the penalties attaching to any contravention of the section. Furthermore, there is no requirement to acquaint the person of whom the requirement is made of the fact that consequential disqualification arises in the event of a conviction under s. 13 (3)."

12. Thus, even if there is an obligation to inform the arrested person of the penalty, it does not extend to a reference to the potential for disqualification.

13. The issue of what should or should not be said is also addressed in *DPP v. Canavan* (Unreported, High Court, Birmingham J. (as he then was) 1st August 2007). There, when making the requirement (under s.13 of the Act of 1994) the garda in question said:

> "Failure or refusal to comply is an offence."

Arising from this, the matter in debate was the absence of a reference to penalties:

Birmingham J. pointed out that he was unable to think of any offence that did not involve a penalty, that is to say, that there was none. He stated:

> "It is true that the failure to refer to the fact that there were penalties means that there was not strict compliance with the wording of the obligation as enunciated by Ó Caoimh J., a formula of words which he himself derived from the Supreme Court judgment. However, judgments are not to be parsed and analysed as if they were sections in a Finance Act. Neither Finlay CJ in *McGarrigle* or Ó Caoimh J. in *Murphy* were dealing with a case where the suspect was told that failing or

refusing to comply with the requirements was an offence. Had that been the situation, I believe it likely, they would have found that there was satisfactory compliance with the statutory requirements and that there was no want of fair procedure."

14. From the case law, Birmingham J. had identified the following principles:-

> "(i) The obligation to provide samples and specimens contained in various sections of the Road Traffic Acts which may provide the evidence to establish the commission of an offence is a significant exception to the general principles of the criminal law which protects against involuntary self-incrimination.
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> (ii) That in a prosecution for failure to comply with the requirement it is sufficient for the garda making the requirement to indicate, at a minimum, to the person concerned at the time that he or she would be committing an offence and exposing himself or herself to penalties. in such a case it is not necessary that the details of the penalties be spelt out.
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> (iii) In a situation where a specimen or sample is actually provided, the attention switches from the terms of the demand to the results of the samples or specimen analysis."

15. Reference has been made to *DPP (Garda Keoghan) v. Cagney* [2013] 1 IR 493 where the Supreme Court was called upon to address the issue of what should or should not be said to the accused where he had failed to provide samples of his breath by means of an intoxilyzer, purportedly due to a transient medical condition. The matter at issue was whether or not there was an obligation on the garda who had made the requirement to tell the arrested person that he had a special defence in the event of such failure or refusal under s. 23 of the same Act which provided as follows:

> "In a prosecution of a person for an offence under s. 13 for refusing or failing to comply with a requirement to provide two specimens of his breath, it shall be an defence for the defendant to satisfy the court that there was a special or substantial reason for his refusal or failure and that, as soon as practicable after the failure concerned he complied (or offered but was not called upon to comply) with a requirement under the section concerned in relation to the taking of a specimen of blood or the provision of a specimen of urine."

As to the substantive issue, Clarke J. held (at p. 506) that:

> "[35] I agree with the submission of counsel for the Director that there is, ordinarily, no obligation on an investigating garda to alert a person under suspicion of any possible defences which might lie to the offence under investigation. However, where, as here, legislation for reasons of constitutional necessity, acknowledges that it is appropriate to make provision for persons who may not have the ability or capacity to give a breath sample, it seems to me that it would be an insufficient vindication of the rights of persons with incapacity to rely on such a defence if they could lose the entitlement so to rely out of ignorance.
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> …
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> [37] In those circumstances it seems to me that there is an obligation on a member of An Garda Síochána, either when giving the original warning required by the line of authorities starting with *Director of Public Prosecutions v. McGarrigle* (1987) [1996] 1 ILRM 271 or, if not then given, after a person has failed or refused to give a breath sample, to alert that person to the fact that, in order to rely on a defence of special and substantial reason for their failure or refusal, the person concerned must offer to provide blood or urine… "

On this basis Clarke J. concluded that:

> "[40] . . . For the avoidance of doubt such warning or information can be given as part of a general warning in advance of the requirement to provide a breath sample being made in the first place or can be made subsequent to a failure or refusal to provide the breath sample concerned. For the avoidance of doubt it should be emphasised that the absence of such warning or information does not entitle an accused to an acquittal unless the accused has first satisfied the trial judge of the existence of a special and substantial reason for failure or refusal."

16. Clarke J. had also considered it important to emphasise earlier in the judgment (at p. 504) that:

> "[28] . . . there is nothing in the Road Traffic Acts themselves which require, as a matter of statute, that any such warning be given. However, it is clear from the line of authority to which reference has been made that, at least in the circumstances then under consideration, this Court was prepared to imply in such an obligation. It follows that, at least at the level of principle, it is possible that there may be obligations placed on members of An Garda Síochána who are involved in applying the relevant provisions of the Road Traffic Acts, to inform persons of the consequence of failure to act... (in circumstances) . . . where a party was being required to give a sample or specimen, where failure so to do amounts to an offence and where it was held that such circumstances amounted to a significant departure from the normal position which pertains in respect of accused persons being that they are not obliged to do acts which might incriminate themselves."

17. It seems to me that one might add to the three principles referred to by Birmingham J. in the light of the more recent decision of *Cagney* that there are circumstances where, to put it shortly, if a special defence arises the arrested person must be informed that a failure to offer a blood or urine sample will preclude him from being able to rely on a defence of having a special and substantial reason for refusal, either as part of the initial general warning in advance of the requirement to provide a breath sample or subsequent to a failure or refusal to do so.

18. Thus, on the authorities: (i) there is no obligation on the part of the relevant garda to inform the arrested person of anything pertaining to disqualifications; (ii) that the arrested person must, at least, be informed that any failure or refusal to provide a blood or urine sample is an offence; (iii) in general, but having regard to the decision in *Canavan* not invariably, the arrested person should be informed of the fact that the offence in question attracts such penalties (but without any detail thereof being required); and (iv) an additional obligation may arise, exceptionally, in what I might describe as relevant circumstances, to refer to the special defence. What then is the effect of the error in the present case?

19. It seems to me that in any issue of this kind one must direct one's mind to the substantive reason behind these decisions, which impose what I might term an extra-statutory obligation to afford certain information to a person the object of a requirement to

provide a sample of blood or urine in order to render constitutionally acceptable the statutory disapplication of the right usually inuring to the benefit of an arrested person not to say or to do anything which might incriminate him or her. The purpose of it is literally to inform the person concerned of the consequences of failure or refusal so that the arrested person may make a judgment as to how he or she shall proceed and if necessary exercise his or her right to seek legal advice. Whether or not an error as to the extent of the applicable penalties and/or consequences, is, as a matter of substance, material must depend on the extent of any error made. Certainly one which is *de minimis* could not be relevant, as is true in any area of the law. Whilst this does not constitute a *de minimis* error, and hence cannot be summarily rejected as irrelevant, it did not fail to vindicate the arrested person's substantive rights but, on the contrary it directed his mind to a factor which might be considered relevant to the decision he was going to have to make. The error was such as not to be material in that context.

20. Counsel on behalf of the accused submitted that there was effective deprivation of the accused's entitlement to consult with a solicitor or at least to obtain legal advice by virtue of the fact that he was misinformed as to the potential duration of disqualification and that thereby his constitutional right was breached. In the submissions reliance was placed on *DPP (Lavelle) v, McCrea* [2010] IESC 60. This is nothing more and nothing less than an authority for the proposition that an accused person's custody is unlawful if, when he is entitled to do so, he seeks to exercise his right of access to a solicitor but is deprived of that right by a refusal by the gardaí to facilitate such access. The fact that erroneous information may be provided by a garda may, in a proper case, have consequences, say, for admissibility of evidence but where it does not undermine the substantive right to which we have referred, as here, it can have no bearing on the exercise of the right of access to legal advice nor admissibility issues.

21. Reference has been made to *DPP v. Avadenei* [2017] IESC 77 in which the judgment of the Supreme Court was delivered by O'Malley J. Two issues arose in that case, namely, whether or not a certain document could, in certain circumstances, and in particular if it was in accordance with a form prescribed by law, constitute proof of the blood alcohol level in the breath of a person arrested, and by virtue of the provisions of the Road Traffic Acts and, further, whether or not in the event of a deficiency (if I might thus describe it) in that document it might nonetheless be admissible as evidence of the truth of its contents. Whilst O'Malley J. found it necessary to deal *in extenso* with a number of aspects of the law of offences pertaining to alcohol under the Road Traffic Acts, none of her observations pertain to the issue which must be addressed in the present case.

22. I think therefore that for the reasons that I have already elaborated upon in detail the learned High Court judge was right in her conclusion and I would also answer the question posed by the learned district judge in the negative. For the avoidance of doubt, this conclusion flows from the fact that the District Court had evidence before it satisfying each of requirements (i), (ii) and (iii), respectively, that were identified in paragraph 18 of this judgment as having been necessary in order for the requirement made by the garda pursuant to s.12(1)(b) of the Act of 2010 to have been validly made. (Requirement (iv) does not arise for consideration on the facts as proved.) There was therefore no legal justification for dismissing the charge on the basis of the incorrect information as to the potential length of the consequential disqualification erroneously provided to the accused by Garda Murrin.

23. I would dismiss the appeal.