APPROVED

[2019] IECA 239

THE COURT OF APPEAL

In the Matter of Section 52(1) of the Courts (Supplemental Provisions) Act 1961

Record Number: 2019/37

Birmingham P.
Whelan J.
McCarthy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR/RESPONDENT

- AND -

STEPHEN BURKE

ACCUSED/APPELLANT

JUDGMENT of the Court delivered by Mr. Justice Patrick McCarthy on the 22nd day of July 2019

1. This is an appeal against the judgment and Order of Binchy J. of the 3rd October, 2018 whereby he answered certain questions posed in a consultative case stated by District Judge David Kennedy dated the 7th November, 2017. The facts as they appear from the case are that the accused/appellant ("the accused") was prosecuted on two charges of dangerous driving arising from events on the 13th January, 2016. In the course of investigation of the offence, a Garda Reynolds attended at the accused's home on the 16th of January and made a lawful request for information from him pursuant to s.107(4) ("Section 107") of the Road Traffic Act, 1961 ("the 1961 Act"). Section 107 of the 1961 Act provides *inter alia* as follows: -

"(4) Where a member of the Garda Síochána has reasonable grounds for believing that there has been an offence under this Act involving the use of a mechanically propelled vehicle F213 [or a pedal cycle] —

(a) the owner of the vehicle shall, if required by the member, state whether he or she was or was not actually using the vehicle at the material time and, if he or she fails to do so, commits an offence,

And:-

(5) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding €2,000."

2. It is not in dispute but that when asking the accused whether or not he was the user of the motorcycle on the occasion in question he did so by reference to the Act and informed the accused that he would be committing an offence if he did not answer. However, on a number of occasions, Garda Reynolds was told by the accused that he was not the user of the vehicle on the day in question. Some hours later he telephoned Garda Reynolds and then told him that he was using it. Thereafter he was cautioned in the usual terms, and what he said thereafter is not relevant in the present context. It is not in debate but that the information given to the effect that the accused was "driving" the vehicle on the date in question was so given under compulsion of law and was not a voluntary statement or admission as that is ordinarily understood.

3. Whilst a number of questions were addressed to the High Court by the learned District Court Judge, two are now irrelevant and the third was reformulated by the High Court by consent of the parties and is as follows: -

> *"Whether an answer given by an accused person provided pursuant to a question put to him under Section 107 [of the Road Traffic Act, 1961 as amended] may be admitted in evidence against him in a prosecution for an offence under the Act of 1961?"*

The learned High Court judge answered that question in the affirmative and whether or not he was correct is the sole issue before this Court.

4. Nobody doubts the general position as to the inadmissibility of involuntary admissions as outlined by Walsh J. in *The Attorney General v. Cummins* [1972] I.R. 312 where he said (at pg. 322) –

> *"It should be said at once that a trial judge has no discretion to admit an inculpatory or an exculpatory confession, or statement, made by an accused person which is inadmissible in law because it was not voluntary. It is a matter for the trial judge to decide, when he has heard the evidence on the point, whether or not he will admit a statement, but if he is satisfied that it was not voluntary then his decision can be only to exclude it."*

5. That judgment was thereafter considered in *The Attorney General v. Gilbert* [1973] I.R. 383. There, the accused had been convicted of receiving stolen property (a motor car) contrary to s.33(1) of the Larceny Act, 1916 and in the course of the trial evidence of the fact that the accused admitted that he was using the car at the relevant time was introduced, a request having been made of him pursuant to s.107 of the 1961 Act. The Court of Criminal Appeal (per Pringle J. at pg. 387) dealt with the matter thus: -

> *"As in the present case the statement in question was made after the sergeant had stated that a failure or refusal to answer would constitute an offence involving*

serious penalties, in our opinion it could not be said in any sense to be a voluntary statement and so the trial judge should not have admitted it in evidence on the trial of the offences with which the appellant was charged under the Larceny Act, 1916. We express no opinion on the position which would have existed if the charges had been for offences under the Road Traffic Acts." [My emphasis].

6. In *Re. National Irish Bank Limited (No. 1)* [1999] 3 I.R. 145 the Supreme Court addressed the issue of whether or not when information (including answers to questions) was obtained under compulsion of law (and hence involuntarily) it was admissible in evidence against a party in a criminal trial. Under Part 2 of the Companies (Amendment) Act, 1990, inspectors might be appointed to investigate the affairs of a company *inter alia* where there were circumstances suggesting that it's affairs were being conducted in an unlawful manner or for a fraudulent or unlawful purpose. S.10 imposed extensive obligations on officers of a company and others to cooperate with inspectors, including the provision of books or documents and to subject themselves to examination under oath, and, pursuant to s.10 (5) of that Act, in default of *inter alia* answering any question put by the inspectors to him or her with respect inter alia to the affairs to the company the High Court might ultimately (effectively at the instance of the inspectors) require the individual in question to answer a particular question. By s. 18 of the same Act, any answer to a question put under s.10 might be used in evidence against that person. Ultimately, the Supreme Court (per Barrington J. who gave the judgment of the court) held that the latter provision permitted admission in civil cases but that in the light of the so-called double construction rule elaborated in *East Donegal Co-Operative v. Attorney General* [1970] I.R. 317 (whereby an interpretation or construction conformable to the Constitution should be given to a Statute) it did not mean that any answer (or admission) was admissible against the person who gave or made it, in a criminal trial. He put the matter thus: -

"Accordingly, the better interpretation of s.18 [of the Companies Act, 1990] in light of the Constitution is that it does not authorise the admission of forced or involuntary confessions against an accused person in a criminal trial, and it can be stated, the general principle is that a confession, to be admissible at criminal trial must be voluntary. Whether however a confession is voluntary or not must in every case in which the matter is disputed be a question to be decided, in the first instance, by the trial judge."

7. Earlier in the judgment (at p.183) he had commented upon the judgment of Pringle J. aforesaid *("...we express no opinion on the position which would have existed if the charges had been for offences under the Road Traffic Acts...")* saying:-

"The reference to the Road Traffic Acts in the last sentence is puzzling. Presumably the Court did not wish to cast any doubt on the powers of the police to collect information under the Road Traffic Acts. But, in principle, confessions, once involuntary would appear to be equally objectionable no matter what the nature of the criminal prosecution."

It may be that these observations can be read as indicating the view of Barrington J. that any involuntary answers given under compulsion of law pursuant to the Road Traffic Acts are inadmissible, though I think that this is doubtful; however, since he was not dealing with the Road Traffic Acts there, the observations are obiter and not binding in the present context.

8. *Heaney v. Ireland* [1994] 3 I.R. 593 concerned the obligation upon a person under compulsion of law pursuant to s.52 of the Offence Against the State Act, 1939, in certain circumstances, to give an account of his movements or actions and all information in his possession in relation to the commission or intended commission of specified offences, a

failure to do so giving rise to an offence with a potential penalty of imprisonment. In this jurisdiction it was held that it was legitimate for a legislative measure such as that to infringe a constitutional right (the right to silence, or against self-incrimination) if it passed a test of proportionality.

9. However, the European Court of Human Rights condemned the provision because, as referred to by Binchy J., it "in effect destroyed the very essence of his [Mr. Heaney's] privilege against self-incrimination and his right to remain silent"; that conclusion, of course, involved an analysis of the section in question and not that with which we are concerned or any provision analogous thereto. The decision of the European Court of Human Rights does not in any way undermine, however, the relevance of the proportionality test when one is addressing limitations or abridgement of rights guaranteed under the Convention.

10. The test of proportionality originally elaborated in Heaney by our courts was subsequently approved by Murray C.J. in *McGonnell v. The Attorney General* [2007] 1 I.R. 400 and, significantly, in relation to road traffic offences. There, following a lawful arrest under s.49(8) of the Road Traffic Act, 1961, as amended, on suspicion of driving motor vehicles in public places whilst over the legal alcohol limit each of the three accused was brought to a Garda station and required under s.13(1)(a) of the Road Traffic Act, 1994 to exhale twice into an apparatus designed for measuring alcohol levels in the breath which gave rise to a printed reading. They sought declarations that the procedures employed (and certainly related evidential rules) under the latter Act infringed Articles. 38.1 and 40.3 of the Constitution inasmuch as they could not request that a blood or urine sample be taken in a Garda station in addition to a breath test and that it was not possible to split a breath sample [as would have been possible in the case of blood or urine – one sample being given to the suspect or accused and the other analysed on behalf of the prosecution]. They

submitted that the extent of what they contended was an encroachment on their rights under those constitutional provisions was disproportionate. In his judgment (for the court) Murray C.J. said [at para. 33] that: -

> *"These [we do not think it is necessary to refer to them] various interpretations by the courts over the years of the obligations and rights which may arise under different statutory schemes satisfy the Court that a reasonable balance has been maintained in the Act of 1994 between the requirement to enable the State to prosecute drunk driving cases effectively whilst at the same time preserving the right of an accused to maintain a defense (sic). The Court does not see the scheme as a disproportionate interference with the rights of an accused. The test of proportionality, as described in Heaney v Ireland [1994] 3 I.R.593, may be stated as follows. The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right, and must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must: (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) they must impair the right as little as possible, and (c) must be such that their effect on the right was proportionate to the objective."*

11. He contrasted that case (and the contrast is an apt one here also) with the conclusion in *D.K. v. Crowley* [2002] 2 I.R. 744 in respect of which he said (at para. 34) that: -

> *"... [It concerned] ... the constitutional validity of barring orders which were unlimited in time and made ex parte which had the effect of forcibly removing the applicant from the family home without even being heard in his own defence. No such draconian provisions are present in the scheme under consideration here. Furthermore,* ***there can be no doubt but that the requirement to curtail, limit and***

prosecute cases of drunk driving on our roads in the interest of reducing deaths and injuries must be given a high degree of priority in a free and democratic society *[My emphasis]. The Court is therefore satisfied that the procedures provided for by the Act of 1994 do not offend against the principle of proportionality."*

12. The issue of whether or not answer obtained under compulsion pursuant to provisions of road traffic legislation analogous to s.107 gives rise to a breach of the ECHR has been dealt with in *Brown v. Stott* [2003] 1 A.C. 681, [2001] 2 W.L.R. 817 (by the Privy Council) and in the related cases of *O'Halloran v. The United Kingdom* and *Francis v. The United Kingdom (Applications nos. 15809/02 and 25624/02) 29 June 2007).* These decisions are relevant because the right protected is similar to that which exists under the Constitution.

13. In *Browne v. Stott* the issue was the admissibility of an admission of driving on a given occasion obtained compulsorily under s. 172 of the Road Traffic Act, 1988 (a provision analogous to s. 107 here). The question was whether or not to admit such an answer was a breach of a defendant's right to a fair trial under Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides, so far as relevant, as follows: -

"1. In the determination of ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by a ... tribunal...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.]"

14. Lord Bingham pointed out, as is the fact in this jurisdiction, that the right not to incriminate oneself and the right to silence, although distinct, are closely related. Indeed for the present purpose the alternatives open to a person of whom a demand under s.107 is made is either to submit to prosecution if he does not answer (the penalty for which is a

maximum fine of €2,000) and to answer the question and supply an essential proof on a prosecution for the substantive offence(s) of dangerous driving.

15. In the course of his judgment (at pg. 704) Lord Bingham stated: -

> *"The jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute.* ***Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for.***" [My emphasis].

and further that: -

> *"The Court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention ..."*

16. He went on to deal with the *"general interest of the community"* in the context of road traffic (echoing the observations of Murray C.J. in that context), (referred to above), as follows: -

> *"The high incidence of death and injury on the roads caused by the misuse of motor vehicles is a very serious problem common to almost all developed societies. The need to address it in an effective way, for the benefit of the public, cannot be doubted. Among other ways in which democratic governments have sought to address it is by subjecting the use of motor vehicles to a regime of regulation and making provision for enforcement by identifying, prosecuting and punishing offending drivers. Materials laid before the Board, incomplete though they are, reveal different responses to the problem of enforcement. Under some legal systems (Spain, Belgium and France are examples) the registered owner of a vehicle is*

assumed to be the driver guilty of minor traffic infractions unless he shows that some other person was driving at the relevant time or establishes some other ground of exoneration. There being a clear public interest in enforcement of road traffic legislation the crucial question in the present case [as here for this court] is whether section 172 [section 107 here, as its equivalent] represents a disproportionate response, or one that undermines a defendant's right to a fair trial, if an admission of being the driver is relied on at trial."

17. He expressed the view that the English provision did not: -

"... represent a disproportionate response to this serious social problem, nor do I think that reliance on the respondent's admission, in the present case, would undermine her right to a fair trial ..."

18. I think it is of assistance, notwithstanding its length, to set out here the reasons he gave for his conclusion and which, in my view, justify my conclusion that Binchy J. was right and that an admission under s.107 when properly invoked is admissible as evidence to prove a charge under the Road Traffic Acts. Those are as follows: -

"(1) Section 172 provides for the putting of a single, simple question. The answer cannot of itself incriminate the suspect, since it is not without more an offence to drive a car. An admission of driving may, of course, as here, provide proof of a fact necessary to convict, but the section does not sanction prolonged questioning about the facts alleged to give rise to criminal offences ..... and the penalty for declining to answer under the section is moderate and non-custodial. There is in the present case no suggestion of improper coercion or oppression such as might give rise to unreliable admissions and so contribute to a miscarriage of justice, and if there were evidence of such conduct the trial judge would have ample power to exclude evidence of the admission.

(2)... It is true that the respondent's answer, whether given orally or in writing, would create new evidence which did not exist until she spoke or wrote. In contrast, it may be acknowledged, the percentage of alcohol in her breath was a fact, existing before she blew into the breathalyser machine. But the whole purpose of requiring her to blow into the machine (on pain of a criminal penalty if she refused) was to obtain evidence not available until she did so and the reading so obtained could, in all save exceptional circumstances, be enough to convict a driver of an offence ... it is not easy to see why a requirement to answer a question is objectionable and a requirement to undergo a breath test is not. Yet no criticism is made of the requirement that the respondent undergo a breath test.

(3) All who own or drive motor cars know that by doing so they subject themselves to a regulatory regime which does not apply to members of the public who do neither. Section 172 forms part of that regulatory regime. ***This regime is imposed not because owning or driving cars is a privilege or indulgence granted by the state but because the possession and use of cars (like, for example, shotguns, the possession of which is very closely regulated) are recognised to have the potential to cause grave injury*** [my emphasis]. *It is true that section 172(2)(b) permits a question to be asked of "any other person" who, if not the owner or driver, might not be said to have impliedly accepted the regulatory regime, but someone who was not the owner or the driver would not incriminate himself whatever answer he gave.* ***If, viewing this situation in the round, one asks whether section 172 represents a disproportionate legislative response to the problem of maintaining road safety, whether the balance between the interests of the community at large and the interests of the individual is struck in a manner unduly prejudicial to the individual, whether (in short) the leading of this evidence would infringe a basic***

human right of the respondent, I would feel bound to give negative answers ..."

[again, my emphasis].

19. In the related cases of *O'Halloran v. The United Kingdom* and *Francis v. The United Kingdom* Mr. O'Halloran, under compulsion of the (English) Act of 1988 admitted that he was the driver of a car on an occasion when it was seen to be driven in excess of the speed limit and by virtue of his admission he was convicted of such an offence. He alleged that his rights to remain silent and against self-incrimination were absolute and that to apply any form of direct compulsion requiring an accused person to make incriminatory statements against his will of itself destroyed the very essence of his right. The Court, however, took the view that it did not follow that "***Any*** [my emphasis] *direct compulsion will automatically result in a violation*". In order to determine whether or not the essence of the applicant's right to remain silent and what the court described as his privilege against self-incrimination were infringed it focused on the nature and degree of compulsion, the existence of any relevant safeguards and the use to which any material was put. Effectively it quoted with approval from Lord Bingham's opinion that: -

"All who own or drive motor cars know that by doing so they subject themselves to a regulatory regime. This regime is imposed not because owning or driving cars is a privilege or indulgence granted by the State but because the possession and use of cars (like, for example, shotguns, ...) are recognised to have the potential to cause grave injury."

The Court said that: -

"Those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and the legal framework of the United Kingdom, these responsibilities include the obligation, in the event of suspected commission of road

traffic offences, to inform the authorities of the identity of the driver on the occasion."

20. The Court also emphasised, as had been done in *Brown v. Stott*, that the nature of the enquiry which the police were authorised to make was limited and hence "markedly more restrictive" than in certain earlier cases, including *Heaney*.

21. It seems to me that the distinction made in *O'Halloran and Francis* with *Heaney* is an apt one and is analogous to the distinction rightly made between *Re. National Irish Bank* and an answer obtained under compulsion of law of the kind provided for by s.107 of the 1961 Act. The nature and extent of the obligations contemplated by s.10 of the Companies (Amendment) Act, 1990 in the context of a very wide ranging enquiry are quite different from the limited free standing obligation of an individual under the 1961 Act, and where any answer is inadmissible save on prosecution for offences pursuant to the Road Traffic Acts.

22. I agree with the view taken by Binchy J. when he found that the restriction on the right passed the test of proportionality and in particular that it was *"rationally connected to the objective and not arbitrary, unfair or based on irrational considerations, impairs the right [to silence, or against self-incrimination] as little as possible"* and [that the restriction] *"is such that their (its) effect on the right was (is) proportionate to the objective"*. His approach rightly took into account the factors elaborated in *Brown v. Stott* and *O'Halloran & Francis v. The United Kingdom.*

23. Each of the factors elaborated in *McGonnell, Crowley, Brown v Stott*, and *D.K* are present here, and conversely, none of those which triggered condemnation in *Re N.I.B* and *Heaney*.

24. I therefore summarise the position as being: -

(a) There exists under Article 38.1 of the Constitution a right to silence and against self-incrimination [the rights appear to have been conflated].

(b) That right may be abridged or limited.

(c) Any such limitation or abridgment must pass the test of proportionality.

(d) A similar or analogous right exists under the European Convention of Human Rights Article 6 subject to limitation or abridgement, once the test of proportionality has been passed.

(e) The objective sought to be achieved is ultimately one of safety on the roads, including the enforcement of laws pertaining to road traffic and the imposition of a requirement to make a disclosure which is capable of incriminating one or breaches the rule against self-incrimination is proportionate to that objective.

(f) The evidence obtained under compulsion of law under s.107 as to a user of the vehicle is accordingly admissible in evidence in prosecutions under the Road Traffic Acts.

25. I think that the case stated should be answered, in the light of my conclusions, as follows: -

"An answer given by an accused person pursuant to a question put to him under s.107 [of the 1961 Act] may be admitted in evidence against him in a prosecution for an offence under the Act of 1961."

26. I would accordingly dismiss this appeal.