[2019] IEHC 670

THE HIGH COURT

[Record No. 2018 478 SS]

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

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA JAMES NEWMAN)

PROSECUTOR

AND

SULAIMON BALOGUN

ACCUSED

CONSULTATIVE CASE STATED

JUDGMENT of Ms. Justice Murphy delivered on the 16th day of October, 2019

1. This is a consultative case stated brought by District Court Judge, Ann Ryan, pursuant to the provisions of s. 52(1) of the Courts(Supplemental Provisions) Act 1961, in which she seeks the opinion of the High Court on an issue of law arising in a prosecution for drink driving under the Road Traffic Act 2010. The case stated recites as follows:

> *"This is a case stated by me, Ann Ryan, a Judge of the District Court, pursuant to Section 52(1) of the Courts (Supplemental Provisions) Act 1961 for the opinion of the High Court.*
>
> *The Defendant appeared before the Dublin Metropolitan District Court on foot of a summons bearing case number 2016/12379…at the suit of the Prosecutor to answer the complaint that he committed an offence contrary to section 4(3) of the Road Traffic Act 2010 as follows:*
>
> > *'On the 08/12/2015 at Holywell Link Road Swords Dublin a public place in the said District Court Area of Dublin Metropolitan District, drive a mechanically propelled vehicle registration number 06WH8135 while there was present in your body a quantity of alcohol such that, within 3 hours after so driving, the concentration of alcohol in your urine did exceed a concentration of 67 milligrammes of alcohol per 100 millilitres of urine, to wit 72 milligrammes of alcohol per 100 millilitres of urine*
> >
> > *Contrary to section 4(3)(a) & (5) of the Road Traffic Act 2010.'*
>
> *The case came on for hearing before me on June 8th 2017 in Court number 8, Criminal Courts of Justice, Parkgate Street, Dublin 8. Ronan O'Brien, solicitor, of the Office of the Chief Prosecution Solicitor appeared for the prosecutor. Rory Staines BL instructed by Michael Staines, solicitor appeared for the defendant. The Prosecutor called one witness, Garda James Newman. The facts as found by me are as follows:*
>
> *(a) On December 8th 2015 at 8:00pm on Holywell Link Road Swords in Dublin, a public place, Garda Newman was taking part in a mandatory alcohol breath testing checkpoint. This was the subject of a valid authorisation. At 8:29pm on that date a Honda Fit vehicle bearing registration 06WH8135 came into*

the lane where the testing was being carried out. The vehicle was being driven by the Defendant.

(b) *The Defendant produced a full Irish driving licence to Garda Newman. Garda Newman explained to him under section 10 of the Road Traffic Act 2010, gardaí were conducting a mandatory alcohol breath testing checkpoint and that he was now required to provide a sample of his breath by exhaling into the handheld machine designed for showing if there was alcohol in the breath. Garda Newman explained that it was an offence to fail to do so and outlined the penalties. The Defendant provided a sample and the result of the breath test was 'fail'.*

(c) *Garda Newman formed an opinion that the Defendant had consumed an intoxicant to such an extent to make him incapable of having proper control of a mechanically propelled vehicle in a public place. He arrested the Defendant at 8.29pm under section 4(8) of the Road Traffic Act 2010 and cautioned him that he was not obliged to say anything unless he wished to do so but anything he would say would be taken down in writing and may be used in evidence against him.*

(d) *The Defendant was conveyed to Ballymun Garda Station, arriving at 8.52pm. On arrival in the station gardaí were informed the cells were closed and no prisoners were being taken at Ballymun Garda Station. The Defendant was then brought to Coolock Garda Station arriving at 9:01pm. A custody record was completed by Garda Paul Sweeney and a notice of rights was given to the Defendant. A Dr Ghaffar, a designated doctor was already present in the station.*

(e) *In the interview room of Coolock Garda Station at 9:22pm, Garda Newman introduced the Defendant to Dr Ghaffar. Garda Newman then made a requirement of the Defendant under section 12(1)(b) of the Road Traffic Act 2010 to provide to Dr Ghaffar a sample of his blood, or at his option, a sample of his urine. The Defendant opted to give a sample of urine. Garda Newman outlined to the Defendant that failure or refusal to give a sample was an offence and outlined the penalties for that offence.*

(f) *At 9:24pm the Defendant gave a sample of urine. Dr Ghaffar divided the sample in two and sealed the containers. The Defendant was informed that he was entitled to take one of the parts of the sample. He opted to take it. The other sample was placed in the box. Dr Ghaffar completed the section 15 form. The Defendant was taken back to the custody area of the Garda Station and released from custody at 9:30pm.*

(g) *The sample was conveyed to the Medical Bureau of Road Safety. Later a certificate was received from the Medical Bureau of Road Safety pursuant to section 17 of the Road Traffic Act 2010 in relation to the sample which*

indicated that the Defendant had a level of alcohol in his system which was 72 milligrammes of alcohol per 100 millilitres of urine.

(h) With a reading of that level, the Defendant would normally be entitled to a fixed penalty notice, however a fixed penalty notice was previously issued to him on May 2nd 2014 in relation to similar offence which occurred on March 8th 2014. It was paid and the Defendant received three penalty points as a result. Where a fixed penalty notice has previously issued within a three year period a defendant is not entitled to another one.

(i) Gardaí are instructed to email the Garda National Traffic Bureau for a Driver Eligibility Check. Four pieces of information are set out in the email: (i) the driver number, which is on the driving licence; (ii) the date of the offence; (iii) the garda making the request; and (iv) the PULSE ID number.

(j) Garda Newman received back from the National Traffic Bureau the notice that the Defendant was not entitled to a fixed charge penalty notice as one was previously issued. He therefore gave evidence that the Defendant received a fixed penalty notice within the previous three years based on this email and the PULSE record of the incident the subject of the fixed penalty notice. Objection was raised to the admissibility of this evidence at the time it was given.

At the close of the prosecution case Mr Staines made an application or a direction of no case to answer on a number of grounds. Principally objection was taken to the admissibility of the evidence adduced in relation to the Defendant previously having been the subject of a fixed penalty notice in May 2014. This objection had been indicated at the time the evidence was elicited from Garda Newman.

Mr O'Brien replied seriatim to the issues raised. In relation to the issue of the fixed penalty notice, He argued that evidence that a fixed penalty notice was previously sent did not offend the rule against hearsay. He also referred to David Staunton, Drunken Driving, at paragraphs 2-101 and 2-102.

I ruled in favour of the Prosecutor in relation to the other issues raised in the application for a direction. In relation to the issue of the fixed penalty notice, I adjourned the hearing on the application of the Prosecutor to allow the issue to be considered.

Written submissions were exchanged by both sides in relation to the issue. The Defendant raised the issue of failure to disclose the email and PULSE printout in the written submissions.

On June 8th 2017 I ruled in favour of the Prosecutor. I ruled that there was no prejudice to the Defendant in not receiving disclosure of the email or PULSE record before the trial, particularly in circumstances where the Defendant himself knew

that he had previously received a fixed penalty notice. In relation to the issue of whether it required to be proved I held that the onus fell on the defendant to prove the issue. I had particular regard to the case of McCarthy v Murphy [1981] I.L.R.M. 213.

Mr Staines then indicated that the Defendant was not going into evidence. He further indicated that an issue previously raised by the Defendant in relation to the section 17 certificate was no longer being litigated in light of a letter from the Medical Bureau of Road Safety.

Mr Staines invited me to state a case to this Honourable Court. He referred me to the case of DPP (O'Neill) v Kelly [2012] IEHC 540 as summarised in the textbook, David Staunton, Drunken Driving (Round Hall, 2015) at paragraph 2-95. He argued that the case provided a useful analogy. I indicated that I had intended to convict the Defendant but I was minded to state a case.

And whereas, I, the said judge, am of the opinion that questions of law arise in the foregoing case do hereby refer the following questions to the High Court for determination:

Was the Prosecution required to prove that the Defendant had previously received a fixed penalty notice within a three year period?"

(end of case stated)

2. The answer to the question posed by the District Court, hinges on the proper construction of the relevant legislation and in particular s. 29 of the Road Traffic Act 2010. S. 29 introduced the concept of fixed penalties for drink driving offences, where the concentration of alcohol in an accused's system fell below certain specified levels. A person in the accused's position, whose alleged concentration of alcohol is not significantly in excess of the legal limit, is entitled by law, to avail of the less punitive regime provided for in s. 29 of the Road Traffic Act 2010. A fixed penalty notice must issue to that person to allow them to avail of the less punitive regime. There are two exceptions to that rule contained in s 29(4) and 29(5). This case concerns the exception contained in s.29(5) which provides;

> *A person who has been served with a fixed penalty notice and has paid the fixed charge, is not eligible to be served with another fixed penalty notice within the period of 3 years from the…date of commencement of the disqualification…following payment of the fixed charge in accordance with the notice.*

3. The prosecution alleges that the accused was issued with a fixed penalty notice in May 2014 and paid same . This event was within the prescribed three year period. Accordingly the prosecution contend that the accused is ineligible to receive a fixed penalty notice, in respect of this alleged offence. The question arising in this case is whether the prosecution is required to prove the accused's alleged ineligibility, by proving

the fact of the of the prior fixed penalty notice, and if so required, the nature of the proof required.

4. The District Court Judge, having heard the evidence, and relying on the decision in *McCarthy v Murphy* [1981] I.L.R.M. 213, held that the onus fell on the accused to prove that he had not received a fixed penalty notice within the relevant period. The accused maintains that the prosecution is required to prove his exclusion from the s.29 regime by admissible evidence.

5. The prosecution having initially sought to prove the accused's ineligibility by evidence elicited from the prosecuting Garda, of his interaction with the National Traffic Bureau, then altered its position to assert and maintain before this court that the evidential presumption contained in s. 29(18) renders such proof unnecessary. S.29(18) provides:

> *"In a prosecution of an offence referred to in subsection (1) or (2) it shall be presumed until the contrary is shown that—*
>
> *(a) the relevant fixed penalty notice has been served or caused to be served, and*
>
> *(b) a payment under the relevant fixed penalty notice, accompanied by the notice, duly completed, has not been made.*
>
> *(18A) A document purporting to be a certificate or receipt of posting or delivery issued by [or on behalf of] An Post or another postal service is admissible in evidence as proof of the posting or delivery, as the case may be, of a fixed penalty notice."*

Relevant statutory provisions

6. Section 4(3) of the Road Traffic Act 2010 provides:-

> *"A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his or her body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his or her urine will exceed a concentration of—*
>
> *(a) 67 milligrammes of alcohol per 100 millilitres of urine, or*
>
> *(b) in case the person is a specified person, 27 milligrammes of alcohol per 100 millilitres of urine."*

7. Section 29 of the Road Traffic Act 2010 provides that:-

> *"(1) Where a person, who is not a specified person, (specified persons under s. 3 being learner drivers, taxi drivers, truck drivers), is alleged to have committed an offence under section 4(2), (3) or (4) or section 5(2), (3) or (4) and the concentration of alcohol purported to be present in his or her body as stated in accordance with section 13 or certified in accordance with section 17 —*

(a) did not exceed—

…

(ii) 107 milligrammes of alcohol per 100 millilitres of urine,

…

he or she shall, subject to subsections (4) and (5), be served with a notice ("fixed penalty notice") in accordance with subsection (10) stating that where the charge specified in subsection (7) ("fixed charge") is paid in accordance with this section and the penalty points specified in subsection (8)(a)(i) or disqualification specified in subsection (8)(a)(ii) for the person holding a driving licence is in consequence applicable, a prosecution in respect of any such offence shall not be initiated against him or her.

…

(4) A person is not eligible to be served with a fixed penalty notice if he or she does not hold a driving licence for the time being in force or is disqualified for holding a driving licence, at the time of the commission of the alleged offence.

(5) A person who has been served with a fixed penalty notice and has paid the fixed charge, is not eligible to be served with another fixed penalty notice within the period of 3 years from the…date of commencement of the disqualification…following payment of the fixed charge in accordance with the notice.

…

(7) The fixed charge is—

(a) in the case of a concentration of alcohol referred to in subsection (1)(a) or subsection (2) — €200,

…

(8) Where—

(a) a person who is eligible under subsection (1) to be served with a fixed penalty notice pays the fixed charge in accordance with this section and the concentration of alcohol purported to be present in his or her body, as stated or certified in accordance with this Part –

(i) did not exceed 80 milligrammes of alcohol per 100 millilitres of blood, 107 milligrammes of alcohol per 100 millilitres of urine, or 35 microgrammes of alcohol per 100 millilitres of breath, …

(ii) … the person shall be disqualified for holding a driving licence for a period of 6 months beginning on the date referred to in subsection (14),

...

(9) Where a member of the Garda Síochána alleges that a person has committed an offence referred to in subsection (1) or (2) and the person under this section is eligible to be served with a fixed penalty notice, the member shall serve or cause to be served in the manner referred to in section 35, personally or by post, on that person a fixed penalty notice.

(10) A fixed penalty notice—

(a) shall be in the prescribed form,

(b) shall contain details of the manner of payment of a fixed charge, and

(c) may specify the person to whom and the place where the payment is to be made and whether the payment is to be accompanied by the notice, duly completed.

(11) A fixed penalty notice shall contain a statement to the effect that—

(a) the person on whom it is served is alleged to have committed the offence specified in the notice,

(b) the concentration of alcohol purported to be present in his or her body is as stated or certified in accordance with [Chapter 2],

(c) the person is not eligible to pay the fixed charge if he or she is ineligible under this section to be served with a fixed penalty notice,

(d) the person may, if he or she is eligible under this section to be served with a fixed penalty notice, during a period of 28 days beginning on the day stated on the notice, pay to a member of the Garda Síochána at a specified Garda station or another specified place the fixed charge accompanied by the notice, duly completed,

(e) where a payment of the fixed charge is made within the period specified in paragraph (d), the person (not being a specified person) shall, as the case may be, have 3 penalty points endorsed on the entry relating to the person in the circumstances referred to in subsection (8)(a)(i) or be disqualified for holding a driving licence for the appropriate period in the circumstances referred to in subsection (8)(a)(ii) or (8)(b), and

(f) unless the person is not eligible under this section to pay the fixed charge, a prosecution in respect of the alleged offence will not be initiated during the period specified in paragraph (d) or, if payment of the fixed charge accompanied by the notice, duly completed, is made during that period, at all.

(12) A person who is ineligible under subsection (4) or (5) to pay the fixed charge, and who knows or should in the circumstances have reasonably known that he or she is so ineligible, who pays or attempts to pay the charge commits an offence and is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 1 month or to both.

(13)

(a) Where the fixed charge is paid in accordance with this section, a receipt for it shall be issued by the Garda Síochána to the person who has paid the charge.

(b) . . . .

(c) Where a person who is ineligible under subsection (4) or (5) to pay the fixed charge pays the charge, the Garda Síochána may return the payment to the person.

(14) ...

(15) ...

(16) ...

(17) ...

(18) In a prosecution of an offence referred to in subsection (1) or (2) it shall be presumed until the contrary is shown that—

(a) the relevant fixed penalty notice has been served or caused to be served, and

(b) a payment under the relevant fixed penalty notice, accompanied by the notice, duly completed, has not been made.

(18A) A document purporting to be a certificate or receipt of posting or delivery issued by [or on behalf of] An Post or another postal service is admissible in evidence as proof of the posting or delivery, as the case may be, of a fixed penalty notice."

Submissions of the accused

8. The concentration of alcohol in the urine determines whether a person shall be issued with a fixed penalty notice, pursuant to s. 29(1)(a)(ii). The concentration of 72 milligrammes of alcohol per 100 millilitres of urine, entitled the accused to be served with a fixed penalty notice, pursuant to s. 29(1). Such a notice affords an accused the option to accept his guilt of the offence charged and in return, receive a lesser punishment and, importantly, avoid a prosecution via the criminal courts. In the case of this accused, a fixed penalty notice would have entailed a fine of €200, and three months' disqualification. If, however, the matter proceeds to a court prosecution, the accused

potentially faces a fine of up to €5,000 and/or a six-month term of imprisonment, together with a mandatory minimum disqualification of six months.

9. The right to receive a fixed penalty notice is subject to two exceptions, which are set out at subsections (4) and (5) of s. 29 of the Road Traffic Act 2010. As previously stated, the exception in issue in this case is s. 29(5), which provides that a person is not eligible to be served with a fixed penalty notice, if he or she had previously paid a fixed penalty within the preceding three years. Counsel for the accused submits that if the prosecution alleges that an accused is not entitled to a fixed penalty notice, and if no such notice is issued under s. 29, then at the trial of the offence, proof is required of the ineligibility of the accused for the fixed penalty regime so as to establish that the accused is subject to the more severe penalties prescribed by the Act.

10. Counsel for the accused submitted that the prosecution is required to prove that the defendant was not entitled to be issued with a fixed penalty notice by means of adducing admissible evidence, that he or she had previously paid a fixed penalty within the preceding three years. Counsel for the accused cited *DPP (O'Neill) v. Kelly* [2012] IEHC 540, where at p. 3 of his judgment Charleton J. held:-

> *"Proof is needed in a prosecution for any special category that the defendant fitted into the exceptional definition whereby a conviction for an offence is made subject to a special circumstance or whereby a more severe penalty may result."*

According to counsel for the accused, the accused is in a "*special category*" of persons who is *prima facie* entitled to avail of the fixed penalty regime, by virtue of the provisions of s. 29 of the Road Traffic Act 2010, but who is alleged by the prosecution to be disentitled to avail of that regime because of the service on him within the previous three years of a fixed penalty notice. He is thus according to the prosecution liable to the more severe penalty. The accused submits that the prosecution is required to prove the matters set out in s. 29(5), to show that the accused is excluded from the more lenient process.

DPP (O'Neill) v. Kelly

11. Counsel for the accused placed particular reliance on the above case, in which the District Court stated a case for the opinion of the High Court, as to whether it was essential for the prosecution to prove either that the defendant is a *"specified person*" or not a specified person within the meaning of s. 3(1) of the 2010 Act. In the course of his judgment, Charleton J. commented on what the prosecution is required to prove in prosecutions of this nature.

12. In that case, the defendant had provided a specimen of breath with a concentration of alcohol of 7 microgrammes per 100 millilitres. Charleton J. held that the prosecuting authorities are entitled to charge anyone with an offence under s. 4(4) where the concentration of alcohol is at this level, as no person (specified or non-specified), is entitled to avail of the fixed penalty regime when the level of alcohol is so high. However, Charleton J. noted that when a person is prosecuted at a level of alcohol where the fixed

penalty regime would ordinarily apply, the prosecution must prove that the person is entitled to be treated less favourably, and be subjected to the more severe penalty:-

> *"…if the prosecution are alleging that the driver fitted within the special category, then proof is needed from some credible source of the additional element of proof whereby the offence is made more severe…Proof is needed in a prosecution for any special category that the defendant fitted into the exceptional definition whereby a conviction for an offence is made subject to a special circumstance or whereby a more severe penalty may result."*

Applying that rational to the accused's situation, it is contended that he in fact, is in a special category, because he is a person who is *prima facie* entitled to a fixed penalty notice, but is alleged by the prosecution to be excluded from the fixed penalty regime, by reason of the fact that he had received and paid a fixed penalty notice, within the preceding three years. It is for the prosecution to prove that fact by means of admissible evidence.

There is no statutory presumption in respect of s. 29(5)

Counsel for the accused submitted that if a person is not entitled to be served with a fixed penalty notice due to the fact that he or she had previously paid a fixed penalty within the preceding three years within the meaning of s.29(5), this must be proven in evidence.

Reversing the onus of proof

13. It was submitted on behalf of the accused that in holding that it was for the accused to establish that he had not received a fixed penalty notice within the previous three years, the District Judge impermissibly reversed the onus of proof. The District Judge relied on the decision of *McCarthy v Murphy* [1981] I.L.R.M. 213, in so finding.

14. That case concerned the offence of permitting persons to be on a licenced premises during prohibited hours. If persons were 'found on' the premises during prohibited hours an offence was committed both by the person 'found on' and the licensee. The relevant legislation provided for a number of excepted categories of persons whose presence during prohibited hours did not constitute an offence. These excepted categories included the holder of the licence, residents in the premises, employees of the licensee in the course of their employment, and workmen engaged in work on the premises. The prosecution had proved that one or more persons had been 'found on'. The issue before the High Court was whether in those circumstances the onus of proof shifted to the defendant to establish that such person or persons came within one of the excepted categories. While acknowledging the general rule that the onus of proving all material facts rests on the prosecution, Keane J. held that these particular statutory exceptions "*placed on the defendant in the circumstances of the present case, the burden of establishing that each of the persons on the premises during the prohibited hours came within one or more of the exceptions specified .."* in the Act.

15. In so finding, he relied on two statutory provisions, namely s. 78 of the County Officers and Courts (Ireland) Act 1877 and s. 51(4) of the Licensing Act, 1872. Section 78 of the 1877 Act provides that:

"In all cases of summary jurisdiction any exception, exemption, proviso, qualification, or excuse, whether it does or does not accompany the description of the offence complained of, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required from the complainant unless evidence shall be given by the defendant concerning the same."

Section 51(4) of the Licensing Act, 1872 provides that:-

Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information, and if so specified or negatived, no proof in relation to the matters so specified or negative shall be required on the part of the informant or complainant…."

16. Keane J. was fortified in his view of the proper construction of the statutory exceptions in the intoxicating liquor acts, by case law dating back to 1873. He cites the decision of Blackburn J. in Roberts v Humphries (8Q.B.D. 483) in which Blackburn J had come to precisely the same conclusion in respect of the construction of S. 51(4) of the 1872 Act. Keane J. cited with approval the test set out by Gibson J. in R(Sheahan) v Cork Justices ((1907) 2 I.R. 5) to ascertain where the onus of proof lies in a statutory context:-

"Does the statute make the act described an offence subject to particular exceptions, qualifications, etc. which, where applicable, make the prima facie *offence an innocent act? Or does the statute make the act* prima facie *innocent, an offence when done under certain conditions? In the former case the exception need not be negatived; in the latter, words of exception may constitute the gist of the offence"*

Applying that test to the facts of the case Keane J. held "*I have no doubt that it points to the onus of proving the exception being on the defendant. The legislature clearly treated the act of permitting persons to be on licensed premises during prohibited hours as an offence, subject to particular exceptions, which, where applicable, made the prima facie offence an innocent act."*

17. Interestingly, in the context of this case, Keane J. then contrasted the position of persons 'found on' under the licensing acts with that of drivers under the Road Traffic Act 1961. In his view road traffic offences fell to be dealt with under the second limb of the Gibson test. "*Permitting persons to be on licensed premises during prohibited hours may be contrasted with driving a motor car on a public highway, which is clearly treated under the Road Traffic Act, 1961, as being a prima facie innocent act which becomes an offence when done under certain conditions, e.g. without a valid driving licence*" He refers to the decision of a divisional Court of the High Court in McGowan v Carville (1960) I.R. 350) in which the court held that S. 78 of the County Officers and Courts (Ireland) Act did not apply to the offence of driving without a licence. The divisional court rejected a

submission by the complainant that the onus of proving that he had a valid driving licence rested on the defendant as being a fact peculiarly within his knowledge. The decision of the divisional court was upheld in the Supreme Court and while one senses some reservation in the judgment of Keane J. he acknowledged that he would be bound to follow McGowan v Carville but held that it was distinguishable on the facts.

18. A close reading of the McCarthy v Murphy decision leaves one somewhat perplexed as to how the District Judge could find in it authority for the proposition that a person who is *prima facie* entitled to avail of the more lenient regime under s.29 carries the onus of proving that he is not ineligible to avail of that regime. That in principle, would be akin to holding that Mr. Carville in the case above cited carried the burden of proving that he had a valid driving licence when prosecuted for an offence of driving without a licence, a contention rejected by a divisional court of the High Court and by the Supreme Court.

Prosecution submissions

19. At the trial of the matter in the District Court, the prosecution certainly in the initial stages, accepted that it was for the prosecution to prove that the accused was not entitled to avail of the fixed penalty regime. The prosecution sought to prove that the accused was not entitled to a fixed penalty notice because of the exception contained in s.29(5), by adducing evidence from the prosecuting Garda, of a Garda system for checking driver eligibility. The Gardaí apparently have established an administrative system whereby Gardaí involved in such prosecutions are instructed to email the Garda National Traffic Bureau for a Driver Eligibility Check. Four pieces of information are set out in an email:-

(i) The driver number which is on the driving licence;

(ii) The date of the offence;

(iii) The Garda making the request; and,

(iv) The PULSE ID number.

In response, to his email, Garda Newman received from the National Traffic Bureau an email, which indicated that the accused had received a fixed penalty notice on 2nd May, 2014, and the email referred to the PULSE record of the incident the subject of the fixed penalty notice. He gave evidence of his enquiries and the responses thereto. Objection was taken to the admissibility of this evidence on the grounds that it constituted inadmissible hearsay. In the face of that objection, the prosecution initially argued that the evidence was not hearsay.

20. Having sought and been granted time to consider the issue of proof of the prior fixed penalty notice, both sides produced written submissions to the District Court. In its submissions, the prosecutor changed tack, and now argued that it was not necessary to prove the fact that a fixed penalty notice had issued within the previous three years. The prosecution sought to rely on the presumption contained at s. 29(18), as proof of the matters set out in s. 29(5). That position was maintained before this court.

21. Counsel for the accused argued that the statutory presumption in favour of the prosecution in s.29(18) does not cover the situation of a person allegedly ineligible to receive a fixed penalty notice.by reason of having received and paid one in the previous three years., They contend that the prosecution is required to prove this fact in evidence by admissible means. It is, they contend, an essential element of the offence which renders a *prima facie* lesser offence more severe. In submissions, counsel for the accused contrasted the situation with that arising where a person fails/refuses to produce their driving licence. Section 8(1) of the Road Traffic Act 2010, creates a presumption that until the contrary is shown, a person who fails/refuses to produce a driving licence, that the person does not hold such a licence. Based on that presumption, a person would be ineligible to avail of the fixed penalty notice regime, even if at the time they had a perfectly valid licence. (See *DPP (Dunne) v. McConville* [2014] IEHC 616)

22. There is no such presumption in relation to s. 29(5) of the Road Traffic Act 2010, therefore counsel for the accused contends that it is for the prosecution to establish by admissible evidence, that the accused received a fixed penalty notice within the previous three years.

Decision

23. The Road Traffic Act 2010 is a significant piece of legislation which is replete with statutory presumptions and reversals of the normal burden of proof in criminal matters. All of these statutory presumptions are designed to facilitate the detection, investigation and prosecution of what are colloquially known as drunk driving offences.

24. S.29 is the most creative and innovative section of the Act, introducing as it does the concept of fixed penalty notices instead of criminal prosecution for those whose culpability is deemed to be of a lesser degree. Persons within certain bands of alcohol consumption, set out in s.29(1) are entitled *prima facie* to have their alleged offence dealt with by way of a fixed penalty notice. This in effect, allows them to accept responsibility for the offence and in return to receive a lesser penalty and avoid a criminal prosecution in the District Court. This system has considerable benefits for the administration of justice in providing prompt justice for those willing to acknowledge their offence and in reducing the volume of cases coming before the District Court.

25. The accused, Mr Balogun, because of the concentration of alcohol in his urine, is *prima facie* entitled to avail of the fixed penalty regime. The state allege however that he is excluded from the benefit of the fixed penalty system, because he received a fixed penalty notice in May 2014, approximately 18 months before the events giving rise to this prosecution. S.29(5) provides:

> *A person who has been served with a fixed penalty notice and has paid the fixed charge, is not eligible to be served with another fixed penalty notice within the period of 3 years from the date of commencement of the disqualification following payment of the fixed charge in accordance with the notice.*

26. Thus in order to be rendered ineligible three conditions must be met; (i) a previous fixed penalty notice must have been served; (ii) the fixed penalty notice must have been paid and (iii) the event giving rise to the current prosecution must have occurred within three years of the date of the commencement of disqualification for the previous offence.

27. In the District Court, the prosecution initially accepted that it was for the prosecution to prove these matters and it purported to do so by adducing evidence from the prosecuting garda of his interactions by email with the Garda Traffic Bureau. It appears that the Gardai have set up a non-statutory administrative system for checking whether any particular driver is eligible for a fixed penalty notice. The prosecuting Garda sends a request by email to the Traffic Bureau. Four pieces of information are contained in the email; (i) the driver number on the driving licence; (ii) the date of the current offence; (iii) the identity of the Garda making the request; and (iv) the PULSE ID number of the current event.

28. The prosecuting Garda received a reply by email informing him that the accused was not eligible for a fixed charge penalty notice because he had received one within the previous 3 years. It appears that. the email also included the PULSE ID number of the previous event.

29. When objection was taken to the admissibility of this evidence on the grounds that it was inadmissible hearsay, the prosecution argued that it was not hearsay.

30. It clearly is hearsay and when the prosecution sought and were given an opportunity to make written submissions on the issue, it at least implicitly, accepted that this was so, because it abandoned its original submission and appears to have argued instead that it was not necessary for the prosecution to prove that the accused was ineligible, because the presumption contained in s29(18) governed the matter. The prosecution now claimed that it enjoyed a presumption in respect of the previous fixed penalty notice and therefore did not have to prove the individual elements contained in s.29(5). It was for the accused to rebut that presumption, it claimed. This Court has not seen the written submissions put before the District Court but has deduced this from the detailed case stated prepared by the District Judge.

31. Even a cursory consideration of s.29(18) reveals that the presumption it creates does not relate to proof of ineligibility for service of a fixed penalty notice. The subsection provides:

> *"(18) In a prosecution of an offence referred to in subsection (1) or (2) it shall be presumed until the contrary is shown that—*
>
> *(a) the relevant fixed penalty notice has been served, and*
>
> *(b) a payment under the relevant fixed penalty notice, accompanied by the notice, duly completed has not been made. (emphasis added)*

(18A) A document purporting to be a certificate or receipt of posting or delivery issued by or on behalf of An Post or another postal service is admissible in evidence as proof of the posting or delivery, as the case may be, of a fixed penalty notice."

32. The presumption created by this subsection clearly relates to cases in which a fixed penalty notice has in fact, been served. It relieves the prosecution of the burden of proving service of the notice and of proving non- payment of the fixed penalty. The provisions are conjunctive not disjunctive. Both those matters are presumed until the contrary is shown. The amendment contained in (18A) allows the fact of posting or delivery to be proved by production of a certificate or receipt.

33. In the instant case it is accepted that no fixed penalty notice was served and the prosecution allege that the accused is ineligible to receive one. It would be strange were the prosecution to be allowed to use a statutory presumption of service and non-payment of a fixed penalty notice, to establish that an accused was ineligible to receive such a notice. The statutory presumption provided by s.29(18) cannot be used to prove the three elements contained in s.29(5).

34. S29(5) creates no presumption in favour of the prosecution. What is not presumed as a matter of law, must be proved. In *D.P.P. v Kemmy* [1980] IR 160 (cited by Charleton J. in *D.P.P. (O'Neill) v Kelly),* O'Higgins C.J. noted:

> *"Where a statute provides for a particular form of proof or evidence on compliance with certain provisions, in my view it is essential that the precise statutory provisions be complied with. The Courts cannot accept something other than that which is laid down by statute, or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field. This applies to all statutory requirements; but it applies with greater general understanding to penal statutes which create particular offences and then provide a particular method for their proof."*

35. The accused is on the facts, *prima facie* entitled to benefit from the more lenient regime provided for by s.29. If he is to be deprived of that benefit, by reason of other facts, then those facts must be proved . The prosecution alleges that he is ineligible because he received and paid a fixed penalty notice within three years of this alleged offence and so by virtue of the provisions of s.29(5) he cannot avail of the more lenient regime. It is for the prosecution to prove these matters by admissible evidence.

36. For the foregoing reasons the court answers the question raised by the District Court Judge: Yes.

Proof of ineligibility

37. The Court notes that the Gardaí have set up an administrative process where Gardaí can check on driver eligibility for a fixed penalty notice. This process has no statutory basis nor any statutory recognition. While no doubt this process is a useful administrative tool, the fruits of such enquiry, being a PULSE ID of a previous incident, is inadmissible

hearsay. (See *D.P.P. v Lynch* [2016] IECA 78.) The administrative enquiry puts the prosecuting garda on notice of the need to retrieve evidence of the prior fixed penalty notice.

38. The regime prescribed under s.29 provides at s.29(10) that the fixed penalty notice shall be in the prescribed form. The prescribed form is set out in S.I. 595 of 2011, Road Traffic Act 2010 (Fixed Penalty Notice -Drink Driving) Regulations 2011. The form starts with the date of issue of the Fixed Penalty Notice and is followed by the name and address of the person to whom it is to be issued. The next heading on the form is "Alleged Offence" Under this heading are set out details of the place, time and date of the commission of the alleged offence. The next section headed "Payment of Fixed Charge" first informs the recipient of his entitlement to pay a fixed charge and then sets out the consequences of payment and the consequences of non-payment of the fixed charge. Most significantly, in the context of this case the recipient is informed that a payment of a fixed charge under the notice must be accompanied by all of this notice, fully completed. Thus, if an accused opts to avail of the fixed penalty regime he must return the fully completed notice to the Gardaí. Evidence of the issuance and payment of a fixed penalty notice is therefore in the possession of the Gardaí. The next section of the notice contains a declaration to be completed by the recipient, in the event that he chooses to pay the fixed charge. Finally, the operative part of the notice sets out the manner of payment and where payment is to be made.

39. S.29(11)(d) repeats the requirement stated in the notice that a payment of a fixed charge must be accompanied by the notice, duly completed. In addition, s.29(13) provides;

> *"where a fixed charge is paid in accordance with this section, a receipt for it shall be issued by the Garda Siochana to the person who has paid the charge."*

40. Thus the statutory regime envisages and provides that the Gardaí will have the record and the evidence of the issuing and payment of a fixed penalty charge.

41. In a prosecution such as this where the accused is alleged to be ineligible for the lesser penalty to which he is *prima facie* entitled on the facts, his ineligibility can be proved by producing the earlier fixed penalty notice duly paid which will contain a signed declaration by the accused of his awareness of the contents of the notice as well as the date of his declaration.

42. The court is also of the opinion that not merely is the prosecution required to prove that accused received a fixed penalty notice within the three year period, it must also prove that the fixed charge was paid on foot of that notice. This is because a person who received a fixed penalty notice within the three year period, but who did not elect to pay the charge is not rendered ineligible by s.29(5).

43. The clear intent of s.29(5) is that those who have availed of the more lenient regime should not be allowed to do so again within a three year period. In order to prove that the accused availed of the more lenient regime it is necessary to prove that he paid the

fixed charge. A copy of the receipt issued pursuant to s29(13) or any equivalent record of the payment should be sufficient for this purpose.