[2020] IEHC 224

THE HIGH COURT

[Record No. 2019/616 SS]

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1987, AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN

NATIONAL TRANSPORT AUTHORITY

APPELLANT

AND

ITA GRANAGHAN

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered electronically on 21st April, 2020

Introduction

1. This an appeal by way of case stated pursuant to section 2 of the Summary Jurisdiction Act, 1857, (as extended by section 51 of the Courts (Supplemental Provisions) Act, 1961). The respondent had been charged with the following offence:

> *"That you the said accused did on 4th day of January 2018 at Broadhaven Bay Hotel, Ballina Road, Belmullet in the County of Mayo, a public place in the district and court area aforesaid, drive a mechanically propelled vehicle, motor vehicle registration number 09-G-1518, for the carriage of persons for reward, such vehicle not being a small public service vehicle licensed under licensing regulations, contrary to s.22(2)(a) of the Taxi Regulation Acts 2013 and 2016 and that you did thereby commit an offence under s.22(4) of the Taxi Regulation Acts 2013 and 2016."*

2. At the conclusion of the prosecution evidence, the learned District Court Judge, Judge Alan Mitchell, acceded to an application for a direction which was made by the solicitor acting on behalf of the respondent.

3. In the case stated drawn up by the learned District Court Judge, he set out at paragraph 14 thereof a summary of the ruling that he made in the case in the following terms:

> *"While a number of points were made by Mr. Ward, I only ruled on one of them, the point made as regards whether the prosecution had proven that the carriage in question was 'for reward'. I gave my ruling at p.32 of the transcript and ruled that in the absence of money having changed hands or in the absence of any agreement in advance of the fare as regards the price that there was no evidence that the accused had carried a person for the purposes of reward. I ruled that the authorised person should have asked what the fare was before he commenced the journey and that he should have paid the driver to bring matters to a natural conclusion. I therefore dismissed the prosecution against the respondent."*

4. At paragraph 13 of the case stated, the learned District Court Judge set out the findings of fact which he had made on foot of the evidence which had been tendered by the prosecution up to the time that the application for the direction was made, the majority of

which evidence had been unchallenged. These facts he summarised in the following terms:

- That Mr. McHale had contacted a mobile telephone number supplied to him.
- That a female voice answered the phone and when asked if she was the taxi, replied in the affirmative.
- That the female agreed to take Mr. McHale on the nominated journey and to meet the prosecution witness at the nominated location.
- That the vehicle in question, driven by the defendant, arrived at the agreed pickup point shortly afterwards.
- That the defendant brought the two prosecution witnesses on the requested journey.
- That at the conclusion of the journey Mr. McHale asked how much the fare was and the defendant replied "€20".
- That no money changed hands and that there had been no prior agreement as to what the fare was.

5. At the end of the case stated, Judge Mitchell certified the following questions for the ruling of this Court:

(1) Was I correct in law in ruling that in order for the carriage as alleged in the offence to be "*for reward*" there had to be a prior agreement as to the price in question or payment of the actual fare?

(2) Was I correct in law in dismissing the case on this basis?

The relevant legislation

6. Section 22(2) of the Taxi Regulation Act, 2013 provides as follows:

"(2) A person shall not drive or use a mechanically propelled vehicle to which this section applies in a public place for the carriage of persons for hire or reward unless –

(a) the vehicle is –

(i) a small public service vehicle licensed under licensing regulations and,
(ii) licensed to be operated or driven in that place,

and

(b) the person holds a license to drive a small public service vehicle of the category that he or she is driving or using".

Submissions on behalf of the appellant

7. It was submitted that the learned District Court Judge had applied the wrong test when considering the application made by the solicitor on behalf of the respondent at the close of the prosecution case. It was clear from the transcript that the judge had made his decision "*on the merits*" at that stage. It was submitted that that was not the correct test which had to be applied at that stage of the proceedings, which was in effect only at the halfway stage of the trial. It was submitted that the judge ought to have applied the test set down in *R. v. Galbraith* [1981] 1 WLR 1039, where Lord Lane C.J. had laid down the principles which should be adopted, which principles had been applied in subsequent Irish cases, which had been stated in the following terms:

> *"(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The Judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the Judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on the submission being made, to stop the case. (b) Where however, the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury. […] There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the Judge."*

8. Mr. Staines SC on behalf of the appellant, submitted that having regard to the largely unchallenged evidence which had been given by the compliance officers, Mr. McHale and Mr. Murphy, and applying the test as laid down in *Galbraith*, the learned District Court Judge should have come to the conclusion that there was evidence on which, if the matter was left to a jury, they could properly convict and in such circumstances, he ought to have refused the application on behalf of the respondent.

9. Counsel further submitted that the District Court Judge had been wrong to have come to the decision that as a matter of law, in order to sustain the charge, there had to be a prior agreement as to the fare, or there had to be actual payment of the fare at the conclusion of the journey. Counsel submitted that the phrase used in the relevant section, "*the carriage of persons for hire or reward*" was not defined in the Acts, nor was there any Irish decision on its meaning. He submitted that either proof of a prior agreement in relation to the applicable fare, or actual payment of the fare at the conclusion of the journey, were not the only ways in which it could be established that the accused's driving had been for hire or reward at the relevant time.

10. Counsel referred to a number of English cases in which the words "*for hire or reward*" had been considered: *Albert v. Motor Insurers Bureau* [1971] 3 WLR 291; *DPP v. Sikondar* [1993] RTR 90 and *Rout v. Swallow Hotels Limited* [1993] RTR 80.

11. Counsel referred in particular to the judgment of Viscount Dilhorne in the *Albert* case, where he stated as follows at page 309:

> *"To constitute carriage for hire or reward, it is not, of course, necessary that payment is made before the journey. If there is an arrangement that payment will be made for that it matters not when the payment is in fact made."*

12. Counsel pointed out that in *Rout v. Swallow Hotels*, a hotel courtesy vehicle was held to have been used *"for hire or reward"* even though there was never a direct payment for anything equating to a fare. It was held that payment for the courtesy bus was included in the general price paid by guests to the hotel. Similarly, in *DPP v. Sikondar*, the use of a mini bus to convey children to school, with their parents making "*intermittent payments towards the costs of petrol",* had been found to meet the test of being "*for hire or reward*".

13. Counsel submitted that the only question which had been before the District Court Judge at the conclusion of the prosecution case and when considering the application made on behalf of the respondent, was whether the prosecution had adduced evidence capable of showing, beyond reasonable doubt, that the defendant had driven the vehicle at the Broadhaven Bay Hotel for the carriage of persons for hire or reward. The learned District Court Judge had ruled that there was no evidence that the respondent had carried a person for the purposes of reward. He submitted that that was an error, due to the fact that the judge had applied the wrong test in law as to what was necessary to constitute carriage of persons for hire or reward, as required under the section. He submitted that when one looked at the totality of the evidence before the Court at the close of the prosecution case, there was ample evidence on which the judge could have reached the conclusion that the respondent had been guilty of the offence charged.

Submissions on behalf of the respondent

14. Mr. McDonagh SC on behalf of the respondent submitted firstly, that when exercising its jurisdiction in considering an appeal by way of case stated, the Court was free to determine points of law other than those actually raised by the learned District Court Judge: see *Attorney General v. Bruen* [1937] IR 125. However, when exercising this jurisdiction, it was submitted that the Court should be careful not to substitute its own view of the evidence for that of the District Court Judge. Counsel submitted that the authorities were clear that the High Court had to give deference to the courts from which the case stated emanated, as those courts were presided over by trained lawyers and were exercising a statutory jurisdiction pursuant to the provisions of the Constitution: see *Clune v. DPP* [1981] ILRM 17; *DPP v. Nangle* [1984] ILRM 171, and *DPP v. Noonan (unreported), High Court 16th December, 2002.*

15. In this regard, counsel relied on the following dicta of Costello P. in *Proes v. The Revenue Commissioners* [1998] 4 IR 174 at page 182:

> *"(4) When the High Court is considering a case stated seeking its opinion as to whether a particular option was correct in law, it should apply the following principles.*

(1) *Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*

(2) *Inferences from primary facts are mixed questions of fact and law.*

(3) *If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.*

(4) *If the judge's conclusions are not based on a mistaken view of the law, they should not be set aside, unless the inferences which he drew were ones which no reasonable judge could draw.*

(5) *Whilst some evidence will point to one conclusion and other evidence to the opposite, these are essentially matters of degree and the judge's conclusions should not be disturbed, even if the court does not agree with them, unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law (see Ó Cúlacháin v. McMullen Brothers Limited [1995] 2 IR 217 and Meara (Inspector of Taxes) v. Hummingbird Limited* [1982] ILRM 421)."

16. Counsel further submitted that where the appeal by way of case stated was against an acquittal, the High Court should exercise particular caution when considering whether to overturn that verdict: See *Fitzgerald v. DPP* (unreported Supreme Court 25th July, 2003) and in particular dicta of Hardiman J. at pages 14 – 16.

17. Turning to the substance of the matter, counsel submitted that one had to have regard to the precise charge which was laid against the respondent in the summons before the District Court. That was not a general charge of operating a taxi or other such vehicle, but was a very specific charge that she had driven a particular motor vehicle for the carriage of persons for reward, such vehicle not being a small public service vehicle licensed under the licensing regulations, at Broadhaven Bay Hotel, Ballina Road, Belmullet, Co. Mayo on a particular date. Counsel submitted that where there was no evidence of any agreement between the respondent and the compliance officers in relation to the fare that would be charged for the particular journey and where the only mention of a fare was made after the vehicle had stopped, the necessary ingredients of the charge had not been made out. It was submitted that in such circumstances the learned District Court Judge had been correct in holding that there was no case for the respondent to answer in respect of the particular charge laid against her, at the close of the prosecution evidence.

18. Counsel submitted that the English cases referred to by the appellant, were not of great relevance to the issues in this case for a number of reasons: firstly, the term driving "*for hire or reward*" was given a specific definition in the English statutes which were under consideration in those cases; secondly, the main case, the *Albert* case, did not concern a criminal prosecution, but was in fact related to the question of insurance cover and in particular the liability of the Motor Insurers Bureau; thirdly, in each of those cases, the

Court found that payment of one sort or another had in fact been made in respect of the carriage in question. For those reasons it was submitted that those decisions were not of great assistance to the appellant in this case. In each of the English cases the driving had been carried on for an appreciable period of time, in some cases for a number of years, and was found to have been in the nature of a business activity. The Court in those cases had been looking at the activity over a fairly prolonged period of time. In this case, the respondent had been charged with one very specific offence relating to a particular time and place.

19. It was submitted that having regard to the specific nature of the charge laid against the respondent, the District Court Judge had been correct in holding that as a matter of law, the charge had not been established, due to the fact that there was no prior agreement in relation to payment of a fare, nor any actual payment at the conclusion of the journey.

Conclusions

20. In reaching its conclusions in this case, the Court has had the benefit of a full transcript of the hearing in the District Court. It has also had the benefit of a very clear and succinct case stated drawn up by the learned District Court Judge. It was also assisted by the helpful and able submissions of counsel for both parties.

21. The Court accepts the submission made by Mr. McDonagh SC on behalf of the respondent that on an appeal by way of case stated, the Court is not confined to the questions raised by the District Court Judge in the case stated, but can look at other points of law raised in the case, so as to give a comprehensive ruling in the matter: see *Attorney General v. Bruen* [1937] IR 125.

22. The Court also accepts the submission made by counsel on behalf of the respondent that this Court cannot substitute its opinion on the evidence for that of the District Court Judge: see *Proes v. Revenue Commissioners* [1998] 4 IR 174. The Court is further satisfied that where there has been an acquittal, the Court should be slow to interfere with that verdict and should only do so on a clear point of law: see *Fitzgerald v. DPP* [2003] 3 IR 247.

23. The Taxi Regulation Act, 2013 does not define what is meant by carriage of persons "*for hire or reward*". There are no Irish cases directly on the point. However, some assistance is provided by the decision in *Attorney General v. Brogan* [1953] 87 ILTR 181, which was referred to by counsel in argument. The issue before the Court was whether the defendant had carried a horse "*for reward*" when he did not have a merchandise licence which would entitle him to do so. In the course of his judgment Davitt P. stated as follows:

> *"It is not any part of my function on the hearing of the case stated to decide the question of mixed fact and law whether there was any carriage for reward. What I have to decide is whether on the evidence before him the District Justice could reasonably come to the conclusion that the defendant did not carry the horse for reward. Section 112(1) of the Transport Act, 1944, provides that it is to be*

presumed that the carriage of merchandise is for reward until the contrary is proved. Was the contrary proved? In my opinion there was evidence on which the District Justice could have come to a conclusion either way. I accept the definition that reward consists in money or monies worth. In this case it might have been provided under Brogan's contract with McLlhagga or apart from it".

24. Davitt P. went on to consider the facts of the case and in particular the nature of the retainer and payment between Brogan and his employer and came to the view that the District Justice had evidence upon which he could reasonably hold that the horse in that case was being carried gratuitously and not for reward. However, given the presumption that applied in that case, the decision is of only marginal relevance to the circumstances in this case.

25. It seems to me that the Oireachtas was very wise not to attempt to define what would constitute driving for hire or reward. The circumstances in which this might arise are varied in the extreme, ranging from situations such as where a person might agree to take a friend on a journey, perhaps to a match, with an agreement between them to split the petrol costs, to circumstances where people would undertake such journeys on a regular basis for an agreed price. There is an infinite number of variations in the circumstances in which such journeys can be undertaken.

26. A brief look at the English decisions that were referred to in argument, shows the nuanced difficulties that can arise in individual cases. In the *Albert* case, a dock worker, Mr. Quirke, regularly carried other dockers in his car to two different docks, at which they would be rostered to work. Among his regular passengers were his brother and the plaintiff. On occasion there would be other passengers, depending on who might be rostered to work at a particular dock at the same time as Mr. Quirke. It was a regular and understood arrangement between Mr. Quirke and the dock workers that they would pay him varying sums depending on the destination, which was usually paid weekly on pay day. Occasionally he received payment in kind, such as a pint of beer, or a packet of cigarettes. Occasionally free transport would be given to a fellow worker who found it difficult to pay. The Court found that that arrangement had been going on for approximately eight years prior to the accident in which the plaintiff's husband, Mr. Albert, died.

27. The question before the Court was whether the carriage by Mr. Quirke of the plaintiff on that occasion was "*for hire or reward*"; if it was, there was an obligation to have insurance in place and therefore the Motor Insurers Bureau would be liable to compensate Mr. Albert's widow. The House of Lords held that "*a vehicle in which passengers are carried for hire or reward*" meant a vehicle used for the systematic carrying of passengers for reward, not necessarily on a contractual basis, going beyond the bounds of mere social kindness and amounting to a business activity.

28. In the course of his judgment, Viscount Dilhorne held that payment must be made for the journey. He stated that if a man were to accept a lift without any expectation or understanding that a payment would be made, he was not being carried for reward while

he was in the car and would not become a passenger for reward if he voluntarily gave the driver a present at the end of the journey. The driver would be rewarded for the carriage, but there would be no carriage for reward. He held that to constitute carriage for hire or reward, it was not necessary that payment be made before the journey. If there was an arrangement that payment would be made, it mattered not when the payment was in fact made.

29. In *DPP v. Sikondar*, the defendant was a Muslim. He had young daughters, who attended a nearby school. On religious grounds, he objected to his daughters using public transport and preferred to bring them to school himself. He also brought the daughters of friends and relatives. He did this on a regular basis. The parents of the other children made intermittent payments to him to cover the cost of petrol. This arrangement had gone on for some five months prior to the time of the prosecution. The Court held that under the relevant statute, it was unnecessary for the prosecution to establish a legally enforceable agreement and that on the evidence, there was plainly a systematic carrying of passengers for reward which went beyond the bounds of mere social kindness.

30. In *Rout v. Swallow Hotels Limited*, the hotel operated a courtesy bus to carry guests and friends to and from various locations. The Court found that no one had a right to travel and no payment was made by any person when using the vehicle and the hotel manager had a discretion as to whether the vehicles ran and to which destinations they would go. In allowing the appeal, the Court held that it was not necessary for the prosecution to establish a legally enforceable agreement; the fact that some people travelled free was not relevant to the question of whether hotel guests were incidentally funding the provision of the service afforded by the vehicles, however sporadic and discretionary its operation; that the service was provided in connection with the hotel's business and included in the payment by a guest of the price of a room or meal, there must be taken to be an element in respect of the amenities of the hotel, one of which was the provision of the vehicles and that accordingly, the defendants' vehicles were public service vehicles as defined in the Acts.

31. In the English decisions there was considerable debate as to whether the driving must be done on a relatively frequent basis so as to constitute a business, even if an informal one. There was also considerable discussion as to whether any legally enforceable agreement or contract was necessary, before the person could be said to be driving for hire or reward. The consensus was that there was no requirement for a legally enforceable agreement, however it has to be borne in mind that in each of these cases, the Court was looking at an activity that had been carried on over an appreciable period of time.

32. As can be seen from the English decisions, the circumstances in which one person may bring another person or persons on a journey, can vary enormously. For that reason, I am of the view that the Oireachtas was wise to have refrained from trying to set out a definition of driving "*for hire or reward*", which would encompass all the variations in circumstances that could arise. I think the better approach is that the Court should look

at all the surrounding circumstances as found on the evidence in a particular case, when deciding whether the driving on any particular occasion was for hire or reward.

33. I am of the view that the learned District Court Judge was wrong to hold as a matter of law that in order to find that the accused had driven Mr. McHale and Mr. Murphy at Broadhaven Bay Hotel for hire or reward on the date in question, there had to be evidence of either a prior agreement on the fare that would be payable, or that the fare of €20 demanded by the respondent, should have been actually paid over.

34. While the offence with which the respondent was charged was a specific one, of driving at a particular time and place for hire or reward, that did not mean that the District Court Judge was confined to evidence surrounding that particular moment in time. The key question was whether the respondent had been driving at Broadhaven Bay Hotel for hire or reward.

35. There was clear evidence that she had been driving at that location, because she drove up to the entrance to the hotel; thus, the act of driving at the particular location was clearly established. The only issue was whether that driving had been for hire or reward.

36. In this regard, I accept the submission of Mr. Staines SC on behalf of the appellant, that in determining that question, the District Court Judge was not confined to considering had there been a prior agreement as to the fare that would be paid, or whether actual payment had been made of the fare demanded. The Court was entitled to look at all the circumstances to establish the character of the driving at the relevant time. In this regard it seems to me that the following evidence was relevant:

    (1) Mr. McHale had phoned a particular number and the lady who answered that mobile number had confirmed that she was a taxi. In the memo taken under caution after completion of the journey, the respondent confirmed that she had received the telephone call that night on her mobile phone, wherein she had been asked to take two passengers from the Talk of the Town pub to the Broadhaven Bay Hotel.

    (2) In that phone call an arrangement had been made for Mr. McHale and Mr. Murphy to be picked up at a particular time and place.

    (3) The respondent turned up at the appointed place and time in a particular vehicle.

    (4) The respondent drove the compliance officers on the requested journey to Broadhaven Bay Hotel.

    (5) At the end of the journey Mr. McHale asked how much the fare was; to which the respondent answered that it was €20.

    (6) In a cautioned statement taken after the journey had been completed, she admitted that the particular vehicle had never been licensed as a small public service vehicle. She confirmed receiving the call on her mobile phone and making

the arrangement. She confirmed that she had charged a fare of €20 for bringing Mr. McHale and Mr. Murphy to the Broadhaven Bay Hotel.

(7) There was also her statement made under caution, that as and from that date she was finished doing "*that type of work".* That was a crucial admission.

37. It seems to the Court that the nomination of the amount of the fare, being €20, was only made at the conclusion of the journey when the vehicle had stopped, was not something that was unusual. That is often done when vehicles do not have a meter fixed on them. While it is certainly true that if the respondent had said in response to Mr. McHale's question, "*There is no charge, this was just a kindness to you guys*", or some such words, there would have been no offence, because that would have shown that she had not brought them on the journey for reward. However, the making of the request for €20, clearly showed that she expected a reward for the journey that had been undertaken by arrangement between them.

38. It is instructive to look at the final part of the judgment in the *Brogan* case where Davitt P. held that the District Court Judge had had evidence upon which he could reasonably have held that the horse in that case was being carried gratuitously and not for reward. If one were to ask that same question here, it seems to me that there is no evidence that supports the proposition that the respondent had carried Mr. McHale and Mr. Murphy gratuitously and not for reward. Indeed, her own statement that there was a fare of €20 due for the journey, points clearly in the opposite direction.

39. In addition, the respondent's statements under caution clearly showed that the character of the driving at the time in question was for hire or reward. In the phone call arranging the trip, she had confirmed that she was a taxi. She had confirmed the carrying out of the arrangement and the request by her of €20 for the journey and had gone on in the cautioned statement to state *"As and from this date I am finished doing this type of work".* All of that was clear evidence on which the Court was entitled to rely when coming to its decision.

40. Thus, it seems to me that the learned District Court Judge was wrong in law in holding that in order for the offence charged to be established, there had to be a prior agreement as to the fare that would be payable, or payment of the actual fare demanded. I am satisfied that applying the test in *Galbraith*, there was evidence on which a jury, properly directed, could have reached a decision to convict and accordingly the application on behalf of the respondent should have been refused.

41. Having regard to these findings, I answer the specific questions raised by the learned District Court Judge in the following manner:

(1) No.

(2) No.

42. I will allow the appeal and overturn the acquittal. The logical step would be to remit the matter back to the District Court for a retrial. However, in the course of argument, counsel for the appellant said that it was not their intention to seek a retrial as they only wanted to obtain clarity on what was necessary in the order for the appellant to establish the offence with which the accused has been charged. Accordingly, I will hear the parties on the exact terms of the Order that should be made herein. Submissions may be made electronically within 21 days of publication of this judgment.