

THE HIGH COURT

[2021] IEHC 357
[2021 No. 497 SS]

BETWEEN

**THE DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF GARDA MERVYN J. FORDE)**

PROSECUTOR

**- AND -
BRIAN TUOHEY**

DEFENDANT

JUDGMENT of Mr Justice Max Barrett dated 4th May 2021.

SUMMARY

This is a consultative case stated concerning a practice in which An Garda Síochána has hitherto engaged in in ease of persons who receive fixed penalty notices. The practice involves the post-dating of fixed penalty notices to ensure that the recipient enjoys a full 28-day period to pay the amount owing under the notice. The lawfulness of this practice has been challenged before the District Court and this consultative case stated has ensued. In essence, the court indicates to the learned District Judge that it sees no legal difficulty to present with the practice as engaged in.

1. It is alleged that the defendant, on 23rd July 2017, drove a mechanically propelled vehicle while there was present in his body a quantity of alcohol such that, within three hours after so driving, the concentration of alcohol in his breath constituted an offence under the Road Traffic Act 2010. The matter came before the District Court on 10th December last. In that court, Garda Forde gave evidence that at 3a.m. on 23rd July 2017 he observed a mechanically propelled vehicle being driven by Mr Tuohey through the town of Gort without its lights turned on. He caused the vehicle to stop, formed the opinion that Mr Tuohey was intoxicated to such an extent as to be incapable of having proper control of a mechanically propelled vehicle in a public place, arrested Mr Tuohey on suspicion of drunk driving, and conveyed him to Gort Garda Station. There Mr Tuohey was breath-tested.
2. Under cross-examination by Mr Doherty (the solicitor for Mr Tuohey), Garda Forde, in the District Court, agreed that by virtue of the level of the reading of Mr Tuohey's breath following on the breath test, it was a case that fell to be dealt with by fixed penalty notice. Thereafter, Garda Forde proved (i) service of the fixed penalty notice by producing a computer print-out indicating that service was effected on *26th September 2017*, and (ii) the fixed penalty notice by producing a copy of same which contained the following text: "*Date of Notice: 27/09/2017*". Mr Doherty then put it to Garda Forde that a document (the fixed penalty notice) which, on its face, did not exist on 26th September 2017 could not be served on that date. The consultative case stated, as drafted by the learned District Judge, continues:

"Sergeant Kevin McCahey, an Officer of An Garda Síochána attached to An Garda Síochána's Fixed Charge Processing Office gave evidence in relation to the printing, issue and service of FPNs [i.e. fixed penalty notices]. He said that each day at 3.00a.m. a secure file containing FPN Applications approved for issue is

electronically transmitted to the postal service...and that the FPNs will be issued, printed, and served later that day. He said that these FPNs are dated the following day and the reason for this was to allow affected persons more time to deal with the FPNs served on them."

3. Mr Doherty submitted that: a legal document, to have efficacy, must have a date, that this is the starting-point of a purposeful life of a legal document; a fixed penalty notice could not be served until it had a date; it was wrong for a fixed penalty notice to be appropriated a date which was clearly incorrect; and the post-dating arrangement was not a case of clerical error but a systematic error which contaminated the whole process of service of a fixed penalty notice.
4. Ms Casey, the State Solicitor for County Clare, said that the error was neither a factual error nor an error which misled the defendant, that it was an error capable of explanation, and was not at the end of the day a matter which made any difference. She submitted that although the applicable legislation is silent as to any requirement that the date on the notice be prior to the date of postage, it was clear that what was done was to allow the accused the full benefit of the 28 days to pay. And she submitted that in the event that accused persons were denied the full 28-day period to pay (because the notice was dated before it was posted and then took time to arrive in the post) an accused such as Mr Tuohey could contend that his time to pay was being unfairly impacted upon.
5. Having heard the evidence and the parties' respective submissions, the learned District Judge decided to state the within case stated, made pursuant to s.52 of the Courts (Supplemental Provisions) Act 1952, in which he raises the following questions:
 - "(a) *If the fixed penalty notice served on the accused is dated the day after it was posted so as to allow the maximum amount of time for an accused to pay the notice within the meaning of s.29(11) of the Road Traffic Act 2010, are the statutory provisions complied with?*
 - (b) *In the event that the statutory provisions have not been fully complied with, must the District Court look at the actual effect of the date on the notice being after the date of postage and how this impacts on the fair trial rights of the accused and whether any prejudice arises before determining the admissibility of the evidence?*
 - (c) *If the accused received the fixed penalty notice and was afforded the full statutory time period within which to pay the notice, does the fact that the notice is dated a day after it has been posted have any effect on the admissibility of the evidence and/or should it result in the prosecution being dismissed?"*
6. The court turns now to consider each of these questions. In passing, the court notes that a court of law does not treat with hypothetical cases. The court must and does treat with the practice actually engaged in by An Garda Síochána to and at this time.

7. *Question (a)*. When it comes to Question (a), the relevant statutory provisions are ss.29 and 35 of the Act of 2010 and the Road Traffic Act 2010 (Fixed Penalty Notice – Drink Driving Regulations) 2011. (The Regulations prescribe the form of a fixed penalty notice). Four points might be made about all of this legislation. First, there is no provision in any of it that precludes post-dating a notice so that when a recipient receives it in the post s/he will have the full 28 day period for payment. Indeed a process such as the impugned process which allows for the full 28 day period for payment can reasonably be contended to be more in accordance with what statute contemplates in terms of time for payment than one which does not, and hence to buttress the rule of law, not diminish it, as has been contended. Second, there is no requirement in s.29 of the Act of 2010 or elsewhere within either the Act or the Regulations that a notice must be dated with a date on or before the date on which it is posted. Third, the model form in the Regulations of 2011 simply provides for a notice to be dated. Fourth, the Regulations, under the heading “*Payment of a Fixed Charge*”, are clearly focused on payment being made “*during the period of 28 days from the date of this notice*”. It follows from all of the foregoing that post-dating of the type in issue does not breach the relevant statutory provisions. Nor does it present an issue as regards the law more generally. As there is simply no error of law presenting, it is not necessary for the court to consider, for example, s.12 of the Interpretation Act 2005, or case-law such as *DPP v. Avadenei* [2018] 3 I.R. 215 or *DPP (Garda O'Brien) v. O'Sullivan* [2008] IEHC 375, all of which have been furnished by the prosecutor in support of the contention that such error as has been contended to present (it does not present) is of a type that would not be fatal to a prosecution.
8. Is the post-dating in issue allowed if, as is the case, it benefits an accused? The short answer to this question is ‘yes’. Although the post-dating process is not expressly contemplated by law it neither undermines the operation of the statutory regime, involves any level of error, nor contaminates the prosecution process. That the State may proceed in a manner which confers a benefit on a defendant even where such benefit is not contemplated by statute is clear from *DPP v. Curry* [2002] 3 I.R. 131 where a precautionary deduction in the concentration of alcohol in breath that was inbuilt into the breathalysing process so as to maximise the fairness of the procedure, though not contemplated by statute, was deemed permissible, Carney J. focusing, at p.137, on the fact that “*The deduction process only operates in favour of the accused.*” The same is true of the process in issue here. (The court notes that: (i) the defendant has not asserted that (a) any actual prejudice has occurred to him through the post-dating of the notice; (b) he was not afforded the full 28-day period for payment; (ii) no fair trial rights of the defendant have been infringed; (iii) there has been no denial of any due process; (iv) the defendant is trying to avail of the notice being post-dated when the post-dating was done for, and acted to, his benefit; (v) no confusion could have occurred to the defendant when he received the notice because he would not at that time have known of the post-dating of the notice).
9. Having regard to all of the foregoing, the court’s answer to Question (a) is ‘yes’.

10. *Question (b)*. As indicated in response to Question (a), the statutory provisions *have* been fully complied with. Hence Question (b) on its own terms does not require to be answered.
11. *Question (c)*. As to Question (c), the court respectfully refers the learned District Judge to its reasoning in the context of Question (a). Nothing presents in the post-dating practice as operated that would affect the admissibility of the evidence or should result in the prosecution being dismissed. As operated, it is a legally unobjectionable practice. Hence, the court's answer to Question 3 is 'no'.
12. For the various reasons aforesaid, the court's respectful answers to the questions posed by the learned District Judge are as follows: (a) 'yes'; (b) as the statutory provisions have been fully complied with, this question on its own terms does not require to be answered; and (c) 'no'.