THE HIGH COURT

[2022] IEHC 708
[Record No. 2022/109SS]

IN THE MATTER OF

A STATEMENT PURSUANT TO SECTION 52 OF THE COURTS

(SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF GARDA DAVID O'DONOGHUE)

PROSECUTOR

AND

PATRICK WHITE

DEFENDANT

JUDGMENT of Ms Justice Miriam O'Regan delivered on 19 December 2022.

Issues

1. In purported reliance upon an authorisation pursuant to s.10 of the Road Traffic Act 2010 as substituted by s.11 of the Road Traffic Act 2016 dated 13 October 2019 made by Inspector Denis Ellard, authorising the establishment of a checkpoint or

checkpoints as set out thereunder including at number 2 thereof on 13 October 2019 at Bóthar Katherine Tynan, Tallaght, Dublin 24 (a public place) between the hours of 01:00 and 02:00, Garda David O'Donoghue stopped the defendant who was then driving a motor vehicle, registration number 08-D-50307.

The defendant subsequently appeared before Judge Patricia McNamara in the District Court on 25 February 2021 to answer three complaints by way of summons, asserting that the defendant:-

(1) did not have insurance;

(2) was driving without a licence; and

(3) had a concentration of alcohol in his breath that exceeded a concentration of 9mg of alcohol per 100ml of breath.

2. It was accepted at the trial before the District Court that Garda O'Donoghue was conducting a mandatory intoxicant testing checkpoint at the location identified above at 01:40 hours on 13 October 2019 and took a roadside breath sample from the defendant which indicated a fail result. Included in the evidence adduced on behalf of the prosecutor the authorisation aforesaid was submitted in evidence. At the close of the prosecution case the defence made an application to dismiss on the merits all of the charges on the basis that the authorisation was invalid. Submissions were made by the prosecutor and the defendant, following which, the matter was adjourned until 3 June 2021 when the District Court Judge was satisfied that the authorisation document was valid. The defendant did not go into evidence and on 22 July 2021 the defendant was convicted of the three charges. The defendant applied asking the District Court to state a case for the opinion of the High Court which was acceded to in respect of the following questions:-

(1) Was I correct in law in holding that the written authorisation was valid in respect of the checkpoint on 13th October, 2019 at Bóthar Katherine Tynan Tallaght, Dublin 24, at which the defendant was stopped?

(2) If the answer to question (1) is no, was I correct in convicting the defendant on each of the three charges?

Authorisation

3. The authorisation of 13 October 2019 established two checkpoints, the first being on 12 October 2019 on the N81 at Glenview Roundabout, Tallaght, Dublin 24 between the hours of 22:45 and 23:45. It is not disputed that this first checkpoint established was on a date in advance of the signed authorisation by Inspector Ellard.

4. Under s.10(3) of the 2010 Act as amended, the authorisation is to be in writing and shall specify the date on which and the public place in which the checkpoint is to be established and the hours at any time between which it may be operated.

Section 10(4) provides that pursuant to such an authorisation a member of An Garda Síochána on duty at the checkpoint may stop any vehicle at the checkpoint and request the party in charge of the vehicle to do one or more of the following:-

(1) to provide a specimen of his or her breath;

(2) to provide a specimen of his or her oral fluid;

(3) to accompany him or her or another member of An Garda Síochána to a place.

Under s.10(6) if a party fails to comply with a Garda exercising those powers at a checkpoint a penalty arises.

Under s.10(11) an authorisation expressing itself to be such authorisation shall, until the contrary is shown, be sufficient evidence of the facts stated in it without proof of any signature on it or that the signatory was a person entitled under s.2 to sign it.

Submissions

5. The defendant argues, based on the following case law, that the written authorisation for the checkpoint is an essential proof in the prosecution of an individual and such written authorisation must speak for itself in terms of what it constitutes with no scope for supposition or subsequent explanation. It is argued that the authorisation does not meet that standard with the error on its face making it misleading unclear and unintelligible to any ordinary person receiving it. It is said that the obligation of strict statutory compliance and clarity applies with greater force when the authorisation is issued by a non-judicial person and is made on foot of a penal statutory provision.

6. On the other hand, the prosecutor argues that there is no error or ambiguity and the only checkpoint of relevance is the one at which the defendant was stopped. The defendant did not give evidence of and/or has not otherwise highlighted any basis for any confusion on his part and accordingly it is argued that the District Judge correctly determined the case and properly convicted the defendant on the aforementioned three charges.

7. In *Weir v DPP* [2008] IEHC 268 the defendant was prosecuted for drunk driving following the detection of the alleged offence at a checkpoint set up under s.4

of the Road Traffic Act 2006 (similar to the provisions of s.10 of the 2010 Act). In *Weir* the prosecution failed to produce the written authorisation and at the close of the prosecution case the defendant sought a direction of acquittal which the District Court rejected. On an appeal by way of case stated O'Neill J in the High Court was satisfied that the written authorisation could be considered to be the legal act which makes lawful (where no other power of arrest is invoked) the stopping of drivers at the side of the road and subsequent demand to blow into an apparatus. At para.21 the Court held: -

> "In order to establish the lawfulness of the entire process proof of the existence of a written authorisation is essential."

8. In *Maher v DPP and Judge Kenned*y [2011] IEHC 207, Hogan J in the High Court was satisfied that it was not legitimate for prosecuting authorities to seek to call evidence from the inspector who signed the authorisation to show what subjectively he had in mind when issuing the authorisation. It was held at para.9 that: -

> "... the authorisation is a public document affecting legal rights which must speak for itself and any evidence which seeks to explain, supplement or qualify it is not admissible in law."

9. Both parties make reference to Staunton D. *Drunken Driving* (Round Hall, 2nd Edition 2021) Chapter 3, Section 2 where the author discusses the provisions of s.10 of the 2010 Act aforesaid, in particular at 3-76 *et seq*. At para. 3-77 the author states that an error or ambiguity that is minor in nature will generally be overlooked so long as the authorisation is not misleading, unclear or unintelligible. The authorisation must be read in context with the evidence. The author

suggests that case law relative to the validity of a search warrant is a helpful analogy. Such warrant must contain:-

(1) the statutory power under which it is issued;

(2) the statutory preconditions for issue; and

(3) what it is that the warrant authorises.

A minor misdescription of the address will not automatically render it void however a defect that fundamentally goes to the jurisdiction of the warrant will have the effect of having it being declared invalid.

10. In *Dunne v DPP* [1994] 2 IR 537 a peace commissioner issued a search warrant pursuant to the Misuse of Drugs Act 1977 with the wording "a controlled drug is on the premises" crossed out. Carney J in the High Court was satisfied that the constitutional protection given in Article 40.5 of the Constitution gives clear and unqualified protection to citizens and if this is to be set aside by a printed form issued by a non-judicial personage, it is essential such form should be clear, complete, accurate and unambiguous in its terms. It was held unacceptable for the prosecuting authority to place reliance on words crossed out by asserting that that was an inadvertence or a slip.

In referring to *Dunne* aforesaid Staunton D suggests that as s.10(6) of the 2010 Act creates a penal offence it arguably must be interpreted more strictly than the terms of a search warrant.

11. In *DPP* v *Mallon* [2011] 2 IR 544 O'Donnell J ruled at para.45:-

> "It is now quite clear that although a warrant should be prepared with care, not every error will lead to invalidation of the warrant. In particular, where the

substance of the warrant as opposed to the form is not open to objection, invalidity will not necessarily ensue. In such cases, the nature of the error or omission must be scrutinised to see if it is of a fundamental nature. Among the factors which may be taken into account are whether the error is a mere mis-description and whether it is likely to mislead."

12. In *People (DPP) v Jagutis* [2013] 2 IR 250 the Court of Appeal held at para.37:-

"… a principal and significant focus of any inquiry into the validity of a warrant must be to avoid judging the warrant on the basis of absolute accuracy but rather requires consideration of whether any inaccuracy that can be pointed to is truly material in the sense that it might fail to provide a person who is required, under penalty, to comply with its terms, sufficient information to assess its validity and what precisely it authorises. The purpose of a warrant is to require someone, as a matter of law, to do something that they would not otherwise be obliged to do. Persons presented with such a warrant are entitled to be able to satisfy themselves that the warrant is apparently valid on its face and to know what the warrant obliges them to do. If a warrant is materially in error in a way that would truly place a person receiving the warrant in difficulty in assessing their obligations, then the warrant must be found to be invalid for it has failed to do its job in clearly and properly communicating to the person concerned what their obligations are."

13. The prosecution relies on the judgment of Barrett J in *DPP v James Gregory* [2015] IEHC 706 where the court was satisfied that it was permissible for a

written authorisation under s.10 of the 2010 Act to authorise multiple checkpoints at multiple locations over a seven-day period. At para.9 of the Court's judgement it was stated that:-

> "The court is conscious that the end-result of the establishment of a checkpoint may be criminal sanction for one or more individuals. However, the rule that penal statutes be construed strictly does not require that the courts depart from their senses, ascribe statute the most restricted meaning possible no matter how absurd that meaning may be, and justify any such absurdity by reference to a canon of construction which, if applied with unmerited abandon, could, in the context of road traffic legislation, see the personal rights of drunk drivers elevated above the personal rights of their potential victims, a state of affairs that the court is entirely confident the Oireachtas did not intend to achieve via s.10 of Road Traffic Act 2010 as amended."

14. O'Malley J in the Supreme Court decision of *DPP (McMahon) v Avadenei* [2018] 3 IR 215 at para.91 analysed the principles emerging from the authorities as to a flaw in the implementation of a statutory procedure and the possibility of invalidating evidence based upon such a flaw. Four situations were identified where a flaw would invalidate the evidence namely:-

> (1) [A] precondition for the exercise of the power to require a specimen has not been met, as where there has not been a lawful arrest; or
>
> (2) [T]he power purportedly exercised was not a power conferred by the statute, as where a demand was made in circumstances where the driver was under no obligation to comply; or

(3) [T]he power is exercised without full compliance with the statutory safeguards for the defendant's fair trial right; or

(4) [T]he power is erroneously exercised, or procedures are erroneously followed, in such a fashion that the evidence proffered as a result does not in fact prove what it was intended to prove.

The defendant in the instant circumstances suggests that the current authorisation comes within situation one and two above.

Discussion

15. It appears to me that the analogy with a search warrant is limited as there are differences between the search warrants status and the compliance with a penal statute namely:-

(1) The s.10 authorisation is not furnished to people stopped at the checkpoint whereas a search warrant is furnished to the property owner;

(2) The issue of prejudice and/or confusion is relevant in respect of the understanding of the search warrant however given that the authorisation would not be furnished as aforesaid prejudice and confusion are not relevant but rather focus would be on compliance with the statutory requirements and specific precedents on s.10;

(3) A search warrant is issued by a judicial authority however an authorisation is not (see para.10 hereof).

The defendant argues that the presumption as to the validity of the authorisation as provided in s.10(11) has been rebutted because of a clear error on the face of the authorisation in respect of the first mentioned checkpoint therein - the

first mentioned checkpoint is on 12 October 2019 however the single date incorporated after the signature of Inspector Ellard is 13 October 2019. On this basis it is argued that the court cannot be satisfied on a criminal standard of proof that the authorisation was executed prior to 1:40am on 13 October 2019, the time and date when the defendant was stopped. In this regard the prosecutor counters that it is clear from the case stated to this Court and in particular paragraphs 6(a) and 6(e), that the District Court had found as a matter of fact that when conducting the mandatory intoxicant testing checkpoint at Bóthar Katherine Tynan at 1:40 on 13 October 2019, *inter alia*, that checkpoint was conducted pursuant to the written authorisation of Inspector Ellard. Furthermore, as is clear from para.6(e) of the case stated the actual authorisation document was also submitted in evidence. Having regard to the content of the case stated and the particulars included in para.6(a) and 6(e) it does appear to me that in the instant circumstances the District Court has found as a matter of fact that the checkpoint was conducted pursuant to the written authorisation and therefore the authorisation was in existence at the time of the checkpoint.

The defendant argues that the error in relation to the first checkpoint appearing on the face of a single document which also incorporates the authorisation for the second checkpoint is such that the document itself is clearly erroneous and the authorisation therefore is a wholly contradictory document and invalid in respect of both checkpoints therein mentioned. Essentially, the defendant argues that the error in relation to 12 October 2019 cannot be severed for the purposes of saving the second checkpoint whereas the prosecutor argues that it can be severed. The prosecutor suggests that the first checkpoint is not engaged or relevant in respect of the instant checkpoint and therefore has no application to the instant circumstances. It is argued that insofar as the statutory requirements in s.10 are concerned

the authorisation *vis-à-vis* the instant checkpoint fulfils all necessary requirements and therefore is valid in respect of that checkpoint. This is all the more so given, it is argued by the prosecutor, that it is not known whether or not the first authorised checkpoint was in fact undertaken.

16. In para.9 of *Gregory* Barrett J did indicate that the Court is conscious that the end result of the establishment of a checkpoint may be criminal sanction for one or more individuals however construing a penal statute strictly does not require that the courts depart from their senses or ascribe the most restricted meaning possible.

17. In *Mallon* O'Donnell J indicated that *vis-a-vis* a search warrant, the nature of the error or omission must be scrutinised to see if it is of a fundamental nature.

18. In *People (DPP) v Jagutis* [2013] 2 IR 250 the Court of Criminal Appeal, again in relation to a search warrant stated at para.37:-

> "… if a warrant is materially in error in a way that would truly place a person receiving the warrant in difficulty in assessing their obligations, then the warrant must be found to be invalid for it has failed to do its job is clearly and probably in communicating to the person concerned what their obligations are."

Conclusion

19. While acknowledging that the analogy between search warrants and authorisations under s.10 is limited, the quote at para.17 hereof is of assistance insofar

as it does appear to me that the job of the authorisation, just with the job of a search warrant, should clearly and properly communicate a concerned person's obligations. It is my view in this regard that given that:-

(1) the authorisation was in existence at the time of the checkpoint;

(2) the authorisation contains a clear and proper communication *vis-à-vis* the within checkpoint;

(3) the authorisation insofar as it refers to this checkpoint is in writing, does specify the date in which and public place in which the checkpoint is to be established and further identifies the hours at any time between which it is to be operated; and

(4) the defendant was stopped within the confines of those particulars.

I am satisfied that the checkpoint at which the Defendant was stopped was validly authorised.

20. Although the finding of fact identified in paragraph 6(a) of the case stated is not an alternate to the production of the authorisation it is clear that this finding of fact was in addition to the production of the authorisation which is subsequently referred to at paragraph 6(e). The finding of fact is however sufficient to establish that the authorisation was executed prior to 1:40am on 13 October 2019.

Answer

21. In the circumstances I would answer the questions posed by the District Court in the following terms: -

(1) Yes.

(2) Does not arise.

22. As this judgment is being delivered electronically, with regards to the issue of costs, as the prosecutor has been entirely successful, it is my provisional view that they should be entitled to their costs, to be adjudicated in default of agreement. As the parties have not had an opportunity to make submissions as to costs, I shall allow the parties the opportunity to make written submissions of not more than 1,000 words within 14 days of this judgment being delivered should they disagree with the order proposed. In default of such submissions being filed, the proposed order will be made.