THE HIGH COURT

[2023] IEHC 647

[District Court: No.: 2020/96277]

[Record No.: 2023/869 SS]

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF GARDA LEE KELLY)

PROSECUTOR

AND

MARK FLANAGAN

DEFENDANT

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 17th day of November, 2023

INTRODUCTION

1. This matter comes before the court by way of a consultative case stated pursuant to s. 52 of the Courts (Supplemental Provisions), Act, 1961, by District Judge Ann Watkin (hereinafter "the Judge").

BACKGROUND

2. The Defendant was charged with an offence contrary to ss. 4(4)(a) and 5 of the Road Traffic Act 2010, as amended, (hereinafter "the 2010 Act") that he did drive a mechanically propelled vehicle (bearing registration number: 151D0213) on the 10th of May, 2020, at Springfield Park, Foxrock, Dublin 18, a public place, while there was present in his body a quantity of alcohol such that within 3 hours after so driving, the concentration of alcohol in

his breath exceeded a concentration of 22 micrograms of alcohol per 100 millilitres of breath, to wit, 63 micrograms of alcohol per 100 millilitres of breath. The case came on for hearing in Dun Laoghaire District Court on the 23rd of June, 2021.

3. On that date Garda Lee Kelly gave evidence that at 03:55am on the 10th of May, 2020, he observed the Defendant's vehicle driving erratically as it exited Beech Park Drive onto Kill Lane, Foxrock, Dublin 18. He followed the vehicle in his official patrol car on the N11 Northbound and the vehicle then turned onto Springfield Park, Foxrock, Dublin 18, where he signalled the vehicle to stop. He gave evidence that the vehicle had been driven erratically on the N11. He spoke with the Defendant who produced a full driving licence to him at the roadside. He got a smell of alcohol from the Defendant's breath and noted that his speech was slurred. He then cautioned the Defendant in the usual manner, following which the Defendant admitted consuming a drink earlier in the evening.

4. Garda Kelly then stated in evidence that at this stage he formed the opinion that the Defendant had consumed an intoxicant. He proceeded to require the Defendant to provide a breath specimen pursuant to s.9 of the 2010 Act. The Defendant duly provided a breath specimen, and the reading indicated a "*fail*". Garda Kelly gave evidence that he formed the opinion that the Defendant was incapable of having proper control of a mechanically propelled vehicle in a public case and proceeded to arrest the Defendant pursuant to s. 4(8) of the 2010 Act. He informed the Defendant in ordinary language as to the reasoning for his arrest.

5. The evidence was that the Defendant was then conveyed to Dún Laoghaire Garda Station, arriving at 04:20am hours and subsequently provided two specimens of breath pursuant to a requirement to do so under s. 12(1)(a) of the 2010 Act. The Evidenzer device produced two identical s. 13 certificates indicating a reading of 63 micrograms of alcohol per 100 millilitres of breath.

6. On cross-examination by Counsel for the Defendant, Garda Kelly stated that the sole opinion he formed concerning the Defendant, prior to the application of the s. 9 preliminary breath test, was that he had consumed an intoxicant. He further stated that he had not formed an opinion that the Defendant had committed an offence under s. 4 of the Act prior to the application of the breath test. He accepted that he decided to arrest the Defendant pursuant to s. 4(8) after the Defendant had failed the breath test. Under cross-examination Garda Kelly

stated that he understood that a failed breath test merely indicated the presence of alcohol in the Defendant's breath and did not indicate or determine the actual concentration of alcohol in the Defendant's breath nor indicate or determine that the concentration exceeded what was permitted for a driver, such as the Defendant, holding a full driving licence.

FACTS AS FOUND

7. As recorded in the consultative case stated, the Judge found the following facts on the evidence before her:

1. Prior to administering the preliminary breath test Garda Kelly believed that the Defendant had consumed alcohol but was very clear that at that stage he did not have or believe that he had, the opinion necessary to arrest the Defendant for drunk driving i.e. that due to the consumption of alcohol he was incapable of having proper control of his vehicle.
2. Garda Kelly believed that the failed breath test confirmed the presence of alcohol but was very clearly of the view that the positive test did not indicate anything about the level or concentration of same and did not say anything about whether the Defendant might be over any legal limit for alcohol.
3. Further, Garda Kelly said he formed the opinion to arrest without anything further other than this test.

8. Having set out the facts found as aforesaid, the Judge records in the consultative case that she was of the view that, as Garda Kelly did not gain any further information after the test, he could not logically have moved from not having the necessary opinion to having it, given that nothing had changed. She noted that she was aware from experience in drink driving cases that the breathalyser does in fact show levels indicating whether a person is likely to be over the limit, and in fact it could possibly be said that judicial notice of this fact was taken in *DPP v Gilmore* [1981] ILRM 102. However, in this case the Garda was clear that he did not believe this to be so, that the test merely confirmed an opinion he already had which he said was not that the Defendant was over any limit or had any particular level of alcohol in his system.

9. In the circumstances, the Judge indicated that she could not be satisfied beyond reasonable doubt or at all that the Garda could reasonably have formed the opinion he said he did, and therefore could not be satisfied as to the lawfulness of the arrest. She added that she was quite satisfied that a Garda could form the opinion that a person was incapable of having proper control of a mechanically propelled vehicle based solely on a failed breath test because a failed breath test would indicate he had a level of alcohol in excess of the legal limit. This would be sufficient to justify an opinion that he was incapable of having proper control and *DPP v Gilmore* [1981] ILRM 102 supports this view. However, in this case the Garda simply did not know or believe that the test gave this indication, and in the District Judge's view nothing had occurred to justify changing his initial opinion.

10. In the light of the State reliance on *DPP v McGovern* [2019] IECA 293, which the Judge noted appeared to be on all fours with this case in that the opinion there was formed solely on the basis of a failed breath test which the Garda said provided no information as to the concentration or whether the Defendant was over any limit, and yet the Court of Appeal was satisfied that an opinion was justified, a question arose as to whether she could find, as a matter of fact, that she was not satisfied that the Garda could reasonably have formed the necessary opinion to justify the arrest in this case. Underpinning the decision to refer a consultative case stated is the Judge's conclusion that despite the decision in *DPP v McGovern*, she was unable to find as a matter of fact that the opinion in this case could logically have been formed. The Judge observed that in *DPP v McGovern*, the Court of Appeal rejected the Defendant's contention that whether the opinion was reasonably held was a matter of fact and not law, stating that the Defendant's argument was based on an erroneous contention that a Garda could not form his opinion based solely on the results of a failed breathalyser test. The Judge points out that the judgment does not specifically address the issue (although it was a fact in the case) that the Garda believed that the machine did not test for levels and yet he formed an opinion which relied on it indicating levels and whether this was logical or reasonable.

11. Accordingly, the question which arises on this consultative case stated is whether, notwithstanding the decision in *DPP v. McGovern*, the Judge is entitled to find in this case as a matter of fact that she was not satisfied that the Garda could reasonably have formed the necessary opinion to justify the arrest in this case.

12. In prosecutions under the 2010 Act, it is beyond question but that the Judge is the finder of fact. The High Court on a consultative case stated must be careful not to trespass into a matter which is strictly for the finder of fact. In my view, the real question which flows from the terms of the case-stated is whether the Judge was entitled to find the Garda opinion as confirmed in evidence was not reasonably held in view of the finding in *DPP v. McGovern* which confirmed that a reliance on a failed test alone was sufficient basis for such an opinion even where his understanding (perhaps erroneous) was that a failed test does not itself confirm that a driver was over the limit but merely confirms the presence of alcohol.

STATUTORY PROVISIONS

13. Section 4(1) of the 2010 Act provides that a person should not drive or attempt to drive a motor vehicle in a public place while under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle. Section 4(2), (3) and (4) provide that a person shall not drive or attempt to drive a motor vehicle in a public place while there is, present in their body, a quantity of alcohol such that within three hours after so driving or attempting to drive the concentration of alcohol in their blood, urine or breath exceeds the prescribed limits set out in the respective subsections.

14. Section 4(8) of the Act provides that:

> *"A member of the Garda Siochána may arrest without warrant a person who in the member's opinion is committing or has committed an offence under this section.'*

DISCUSSION

15. The Prosecution submits that *DPP v. McGovern* [2019] IECA 293 is "*on all fours*" with this case and should be followed. The Judge's conclusion on the evidence in this case that the only reasonable opinion that the Garda could be said to have come to was that he had alcohol present in his breath and there was no evidence going beyond that to justify the arrest was squarely rejected by the High Court and the Court of Appeal. The very same concern agitated in *McGovern* troubles the Judge in this case. The point is made that if a "*fail*" based on the mere presence of alcohol is sufficient to ground an opinion, as was found in *McGovern*, then where a "*fail*" in fact relates to an excess concentration of alcohol, then this would only serve

to further strengthen rather than to undermine the reasonableness of the Garda's opinion. It is submitted on behalf of the Prosecutor that even if Garda Kelly misunderstood the scientific basis for the "*fail*", and there is no evidence of that, he nonetheless had a *bona fide* basis for his reasonable belief and suspicion and the Defendant's arrest was therefore neither arbitrary, capricious nor illogical.

16. The Defendant relies on a series of decisions including *D.P.P. v Tim O'Connor* [2005] IEHC 422 and *DPP v. Duffy* [2000] 1 IR 393, from which it is established that where a Garda opinion is challenged as to its reasonableness, as it was in this case, it is for the prosecution to establish that the opinion was reasonably held. In *DPP v Gilmore* [1981] ILRM 102, Kenny J. held that:

> *"[A] Garda is entitled to arrest a person in charge of a mechanically propelled vehicle if he has formed the opinion from observation that the person in charge is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle: he is also entitled to do so on the result of the breathalyser test only. Indeed, an opinion formed on the result of the breathalyser test will probably be more accurate than one based on observation. The section does not require that the Garda should form his opinion on observation: the purpose of the breathalyser test is to enable the Garda to form an opinion."*

17. The issue of when a challenge to a Garda opinion as being unreasonably held may succeed was touched on in the decision of the High Court in *DPP v McGovern* [2018] IEHC 577. In his judgment McDermott J. records the facts in that case. During the trial the formation of the Garda's opinion was challenged. The Garda accepted several matters which are set out as follows:

(i) There was nothing in the manner of the Defendant's driving which attracted the Garda and the Defendant drove up to the checkpoint without any difficulties;
(i) The Defendant was at the time not exhibiting any signs of intoxication;
(i) The apparatus which was used to obtain the preliminary breath specimen was the Dräger Alcotest;

(i) The Dräger Alcotest apparatus indicates the presence of alcohol in the Defendants breath;

(i) The apparatus does not give a reading indicating the concentration of alcohol in the breath or that a person is over a permitted limit;

(i) The apparatus was formerly calibrated to give readings of "*pass*", "*alert*" and "*fail*" but this has since changed and now indicates "*pass*" or "*fail*";

(i) There is no "*in between*" reading, meaning it detects the presence of alcohol or not as the case may be, by indicating either "*pass*" or "*fail*";

(i) The arrest of the Defendant was based solely on the "*fail*" result indicating the mere presence of alcohol in the Defendant's breath.

18. McDermott J. having considered this evidence held the following (at para. 10):

"It is clear that the only evidence upon which this opinion was based was the result obtained from the Dräger Alcotest apparatus which indicated the presence of alcohol in the defendant's breath. It is equally clear that the threshold for the formation of the requisite opinion under the section is low. There was no suggestion of a lack of bona fides on the part of the Garda. The court is satisfied that a garda is entitled to form the requisite opinion based solely upon the finding made on the application of the Dräger Alcotest apparatus. This was clear intention of the legislature. The learned District Judge offered no reason as to why this evidence ought not to be accepted."

19. McDermott J. went on to state (para. 12):

"I am satisfied that the opinion formed by Garda Long was sufficient absent any other relevant facts to comply with the provisions of section 49(8). There is no suggestion that his opinion was not bona fides and the case-law states that his is entitled to form his opinion based solely on the results of the test. It follows given the low threshold applicable to the formation of the opinion that an arrest may not be deemed to be unlawful simply because it is based on that result. L am not satisfied that the submissions made to the learned judge regarding the nature and calibration of the device in this case provide a basis upon which to find that Garda Long could not have formed his opinion under the section. The prosecution must of course, establish that the arrest was lawful beyond a reasonable doubt. However, while the Garda was cross-

examined about the device and the fact that he did not rely upon any other observation when forming his opinion this has repeatedly been held not to be a pre-requisite to the lawfulness of the arrest based on the reading. I am not satisfied that there was any basis upon which the respondents arrest could be regarded as unlawful and the question posed should be answered in the negative ... The Garda was challenged in respect of his opinion but to be any legal consequence the challenge must have some relevance to the formation of the opinion under s. 49(8) applying the relevant legal principles. I am not satisfied that the matters relied upon by the applicant 's solicitor offered any legal basis upon which to conclude that Garda Long's opinion was as a matter of law insufficient to justify the respondent 's arrest."

20. The Defendant seeks to distinguish the decisions in *DPP v McGovern* both in the High Court and the Court of Appeal on the basis that those decisions proceeded on the erroneous assumption that the Dräger device in use simply indicated the presence (as opposed to the concentration) of alcohol in the Accused's breath. It is pointed out that there is nothing in the written judgement of either the High Court or the Court of Appeal that acknowledges the fact that Garda's understanding of the device and in particular the significance of a "*fail"* reading was either erroneous or materially incomplete whereas the Judge in this case has a different understanding of the device albeit not based on evidence in the case but on her experience in hearing these types of cases. It is pointed out that the thrust of the submissions on behalf of the Accused in the *McGovern* case was predicated on the assumption that the Dräger device was indicative of the presence of alcohol and incapable of providing an indication as to the concentration of alcohol such that a "*fail*" signified nothing which would justify an opinion that the Accused may have committed an offence under s. 4 of the 2010 Act. It is submitted on behalf of the Defendant that the trial Court in this case having heard multiple cases involving the use of the device, can in its discretion take judicial notice of the following facts and reach the following conclusion based upon those facts:

i. The device is calibrated to produce a "*fail*" reading only where the quantity of alcohol detected in the Accused's breath exceeds the discrete limits for the two separate categories of licence holders, those being specified and unspecified;
ii. The arresting member, Garda Kelly, did not appreciate or have actual knowledge of the significance of a "*fail*" reading at the time he applied the test to the Accused

and in fact erroneously concluded that the failed test merely indicated the presence of alcohol on the Accused's breath in no particular concentration.

iii. In determining the reasonableness and *bona fide* nature of Garda Kelly opinion the trial Court is entitled to consider and indeed must consider the facts and circumstances as apprehended by Garda Kelly, rather than a notional properly trained and instructed Garda who is familiar with the operation of the Dräger device. In other words, the Court must consider the actual basis of the opinion formed by Garda Kelly rather than a notional or theoretical opinion.

21. It is further submitted that the Judge should not be precluded from considering the legal effects of the misapplication of a breath test or a material misunderstanding as to the significance of its results. Reliance in this regard was placed on *DPP v Mcguigan* [2020] IEHC 58 (Hyland J.) where it was held (para. 34):

> *"In this case, although the defence cross examined Garda O 'Shaughnessy, they did not ask about the level of calibration of the device. If he had been asked and had given evidence, for example, that he knew it was calibrated to the wrong level or did not know how it was calibrated…. it is difficult to see how it could be concluded that a bona fide opinion had been formed. However, no such question was put and there was accordingly no evidence before the trial judge that identified any basis for questioning the applicability of the fail result to the accused."*

22. Counsel for the Defendant also relies on *Attorney General's Reference (No. 2 of 1974)* [1975] R.T.R. 142 in arguing that a mistake as to the use of a device can undermine the *bona fides* of an opinion arrived at in reliance on a reading given on the device.

DECISION

23. Reliance on *DPP v McGuigan* [2020] IEHC 58 is misplaced. That case is authority for the proposition that the reasonableness of a decision may be challenged based on issues as to whether the device was appropriately calibrated and the arresting Garda's state of knowledge as to how the device was set where the test result may have been flawed in some way because of miscalibration. This is not the position here. Similarly, insofar as it is suggested that the decision of the UK Court of Appeal in *Attorney General's Reference (No. 2 of 1974)* [1975]

R.T. R 142 is authority for the proposition that a departure from manufacturer's instructions through failure to become acquainted with them undermines reliance on the *bona fides* of the prosecuting Garda, I do not agree. That decision is authority only for the proposition that where ignorance of manufacturer's instructions interferes with the accuracy of the result, then the officer will not be excused from a failure to inform himself of those instructions. There is no suggestion here that there has been any interference with the accuracy of the results arising from a failure to use the device properly in this case. On the contrary, if the concern identified is legitimate and the reading obtained showed a level of intoxication rather than the mere presence of an intoxicant, it would serve to provide a stronger basis for the opinion arrived at than the prosecuting garda understood to be the case thereby serving to strengthen rather than undermine his position in reliance on the test result.

24. The judgment in the High Court in *DPP v. McGovern* records that in that case the learned District Judge found as a fact based on the evidence of the Garda and having regard to the case law that he had no reasonable basis to conclude that the respondent was intoxicated to such an extent as be incapable of having proper control of a mechanically propelled vehicle. However, the High Court concluded, contrary to the Learned District Judge, that as the Garda had also given evidence that he was of the opinion and so informed the accused that he had consumed an intoxicant and committed an offence under s. 4(2), (3) or (4) of the 2010 Act and was arresting him under s. 4(8) thereof, it was clear that the only evidence upon which this opinion was based was the result obtained from the Dräger Alcotest apparatus which indicated the presence of alcohol in the accused's breath. As set out above, McDermott J. concluded (para. 10) that in view of the low threshold for the formation of the requisite opinion and the fact that there was no suggestion of a lack of bona fides, and in view of the clear intention of the Legislature, that the Garda was entitled to form the requisite opinion based solely upon the finding made on the application of the Dräger Alcotest apparatus.

25. While the ratio of *DPP v. McGovern* is that a "*fail*" result which evidences the presence of alcohol but not that a person is over the prescribed limit, is sufficient on its own to ground a reasonable opinion that a person is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle, this case is somewhat different on the facts as found. In this case reliance on the failed test result to ground the opinion formed was supported by additional evidence, specifically, that the Defendant was driving erratically, had

slurred speech and admitted taking a drink earlier. Accordingly, the facts in this case are like the facts in *McGovern* only to the extent that reliance was placed on the failed breath test in forming the necessary opinion to arrest. The basis for forming the requisite opinion to effect an arrest, however, is somewhat stronger than in *McGovern*.

26. Thus, this is not a case where it can be truly said that the Garda's opinion was based only on the failed test, even though the presence of the other factors had not been enough to lead the arresting Garda to form the opinion that the Defendant was under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle without also carrying out a breath test. Instead, while the failed test was enough on its own to ground a lawful arrest in the absence of any other factors on the authority of *McGovern*, the failed test in this case was the additional factor which caused the Garda to form the necessary opinion to arrest the Defendant. If, as a matter of law, there is no illogicality in the opinion being formed on the basis of a failed breath test alone as in *McGovern*, there can be no illogicality where the failed breath test is added to other factors which in this case included slurred speech, erratic driving and an admission.

27. As clear from the decision in the High Court in *McGovern*, the threshold for the formation of the requisite opinion for arrest is low. In the absence of evidence of a lack of *bona fides* the arresting garda is entitled to form the requisite opinion based solely upon the failed test, even though this evidences the presence of alcohol but not intoxication to such an extent as to be incapable of having proper control of a mechanically propelled vehicle. The Judge in this case has not found any lack of *bona fides* on the part of the arresting Garda and accepts that a Garda is entitled to rely on the results of a breath test alone. Her concern flows from her perhaps superior knowledge, not shared by the arresting Garda and not based on evidence in the case, as to the capacity of the breath test to show a level of intoxication coupled with her view that the Garda's mistaken view as to the meaning of the "*fail*" result meant that he could not logically have formed the requisite opinion.

28. I am satisfied that if the Garda was in error as to the true significance of a "*fail*" reading, this does not undermine the reasonableness of his opinion based on his perhaps mistaken understanding that the "*fail*" reading confirmed the presence of alcohol but not the level of intoxication. This is the only conclusion consistent with the decision of both the High Court and the Court of Appeal in *DPP v. McGovern*.

29. I am not satisfied that there was any basis upon which the Defendant's arrest could be regarded as unlawful and the question posed should be answered in the negative. This conclusion in no way interferes with the jurisdiction of the Judge to make appropriate findings of fact relevant to a legal ruling required during or at the conclusion of a trial. The issue raised in this case, as in *McGovern*, concerns the interpretation of s. 49(8) and the opinion required to ground a lawful arrest. The fact, if it be a fact, that unbeknownst to the arresting Garda the device was capable of establishing the extent to which the Defendant was over the limit does not provide a legal basis upon which to conclude that Garda Kelly's opinion was, as a matter of law, insufficient to justify the Defendant's arrest given the low threshold for the formation of the requisite opinion for arrest and the established position at law that a "*fail*" simpliciter is sufficient to ground that opinion provided that the opinion is *bona fide* held.

CONCLUSION

30. In her findings the Judge does not impugn the *bona fide* nature of the Garda's opinion but rather considers the opinion illogical given what she understands about the functioning of the device and what she considers to be his incorrect understanding. It has, however, been repeatedly held in a series of cases including *DPP v. McGovern* that failing a breath test on the basis that the test establishes the presence of an intoxicant, if not the level of intoxication, is sufficient basis in law for a reasonably held opinion. Therefore the fact that the results properly interrogated and understood might have established a particular level of intoxication beyond the mere presence of alcohol does not render the opinion genuinely formed invalid. Accepting that his opinion was *bona fide* arrived at based on his understanding of the test result, it is not open to the Judge to find that such opinion is not a reasonably held opinion in view of the established position in the case-law. Accordingly, as a matter of law, I do not consider it open to the Judge to conclude on the facts as found that the Garda did not have the requisite opinion to arrest the Defendant under s. 4(8) of the 2010 Act.

31. In view of the decision in *DPP v. McGovern*, the Judge is not entitled to find in this case as a matter of fact that she was not satisfied that the Garda could reasonably have formed the necessary opinion to justify the arrest in this case in reliance on a "*fail*" result as this was a reasonably held opinion and she does not impugn the *bona fide* nature of his opinion.