

THE HIGH COURT

2017 No. 764 SS

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

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND

AIEMEN KHALAEL

ACCUSED

JUDGMENT of Mr Justice Garrett Simons delivered on 31 January 2020

INTRODUCTION

1. This matter comes before the High Court by way of a consultative case stated from the District Court (Judge John Brennan). The case stated presents a net point of law as to the application of the so-called "Judges' Rules". These are a non-statutory statement of principles which provide guidance as to the taking of statements from suspects.
2. The case stated centres on the ninth of these rules, to the effect that any statement should, whenever possible, be taken down in writing and signed by the person making it, after it has been read to him and he has been invited to make any corrections he may wish.
3. The statement the subject-matter of the case stated is said to have been made at a time when the Accused was not in police custody. More specifically, the statement is said to have been made on the side of the road when the police came upon the Accused in the vicinity of a motor car which had been involved in an incident shortly beforehand. The Accused is said to have admitted to having driven the car. This statement is said to have been written down by the Garda in his notebook, but it was not signed by the Accused. The principal issue for determination in the case stated is whether, in the circumstances, the District Court properly exercised its discretion to admit the statement into evidence.

THE CASE STATED

4. This matter comes before the High Court by way of a consultative case stated from the District Court. The original version of the case stated has been amended to clarify one issue which had been raised by the High Court (Coffey J.) by order dated 25 January 2018.
5. The case stated arises out of an incident alleged to have occurred in the early hours of 3 September 2014. In brief outline, it is alleged that the Accused had been the driver of a motor car which had collided with a number of stationary vehicles. The driver of the motor car did not remain at the scene, and is said to have driven off at speed. This incident was reported almost immediately to An Garda Síochána, and a patrol car which responded to the report came upon the motor car parked on the side of the road, with substantial damage to the front and driver's side of the car. The Accused was standing on the footpath.

6. The District Court heard evidence from two local residents who described having witnessed a green motor car bearing the registration number "97 D 64651" colliding with a number of other vehicles. One of the residents rang An Garda Síochána, and passed on the registration number to them.
7. The case stated then explains that the following evidence was given by Garda Kenneth Nerney.
 - "7. Garda Kenneth Nerney gave evidence that he was detailed as the patrol car driver in the early hours of 03 September 2014. At about 00.10 hours, he received a call to attend to a road traffic collision on Auburn Villas, Rathgar, where a car, a Volkswagen Golf, registration number 97D64651 had collided with a number of cars. He made his way from the Lower Rathmines Road to the Upper Rathmines Road when a taxi driver flagged him down stating that a green Volkswagen polo had travelled down the road to Portobello Bridge. He directed the patrol car towards Portobello Bridge and observed a green Volkswagen Polo, registration number 97D64651 parked in the bus lane on the side of the road, with substantial damage to the front and drivers side of the car. He observed a male standing on the footpath. The Garda said he approached the car. The driver's window was down and the keys were in the ignition. He approached the male, who he now knows to be the Accused. The Accused was unsteady on his feet, the Garda got a strong smell of alcohol from his breath, and his eyes were glazed and bloodshot. The Garda said he formed the opinion that the Accused was under the influence of an intoxicant to such an extent as to be incapable of having proper control of the car in a public place. He asked if the Accused had been driving the car and then cautioned him. 'You're not obliged to say anything unless you wish to do so but anything you do say will be taken down in writing and may be given in evidence.' The Accused replied, 'I was driving, I respect you, I drove from family and good people. I respect that. I am sorry, I'm an Arsehole.' The Garda said his speech was slurred. The Garda recorded this statement in his Garda notebook. The Garda then arrested the Accused for drunk driving and cautioned him again. The Accused was then conveyed to Terenure Garda Station. He later gave a sample of blood and the sample of blood showed a concentration of 213 mg of alcohol per one hundred millimetres of blood, above the legal limit. A certificate from the Medical Bureau of Road Safety was handed into court by the Garda. No issue was taken with this part of the evidence for the purposes of the Case Stated.
8. Under cross-examination, it was put to the Garda that although the Accused's alleged admission to the Garda had been recorded in writing in his notebook, this statement had not been signed by the Accused. The Garda accepted that he had not asked the Accused to sign his notebook. When asked if there was any reason for not inviting the Accused to sign it, the Garda said that there was no particular reason."

8. The case stated continues then to explain that an application was made by counsel on behalf of the Accused (i) to exclude the evidence given regarding the admission made by the Accused, and (ii) for a direction that there was no case to answer. The case stated (as amended) explains that the District Court judge was satisfied to deal with the application for the exclusion of the evidence, notwithstanding that the evidence had already been given, in circumstances where this was a summary trial in the District Court with no jury.
9. The application to exclude the evidence was made by reference to rule 9 of the Judges' Rules. The full text of this rule is set out under the next heading below.
10. The District Court judge records his findings as follows at paragraph 11 of the case stated.

"11. Having had regard to the aforementioned submissions, I delivered my decision on Friday, 22 July 2016. I agreed with [counsel for the Accused] that there had been a breach of the Judges' Rules and that said breach was unexplained. I stated that from the authorities, it is a matter for the trial court to determine whether the evidence should be excluded having regard to the circumstances in which the breach arises. Taking into account all of the evidence, I ruled that I would exercise my discretion to admit the evidence in this case. In so doing I had regard to the matters referred to by [counsel for the Director of Public Prosecutions] at paragraph 7 of her submissions. I also had regard to my finding that Garda Nerney was a credible witness. I further stated that the Accused had a case to answer on the five charges set out above."
11. It is appropriate to pause here, and to set out the text of paragraph 7 of the written legal submissions on behalf of the Director of Public Prosecutions expressly cited by the District Court in the passage above.
 7. However, the prosecution submit that this [a breach of rule 9] does not render it inadmissible. It is submitted that the court has a discretion and must take all circumstances into consideration. In the present case the prosecution are not solely relying on the admission. The court can take the following into consideration.
 - a. The registration number taken by the witness is that of the accused and this witness describes the type of car.
 - b. A witness describes the type and colour of the car and saw the car driving into other cars.
 - c. *A witness gave evidence of the time of the collisions and evidence was given of the direction the car travelled off in. This evidence fits with the location and time that the Garda observed the accused. The registration number is the same.*
 - d. The accused was found beside his car.
 - e. There was damage done to the accused's car.

f. An admission was made by the accused and recorded in the Garda notebook. In this case it is not simply the admission that the prosecution are relying on. There is other evidence as outlined above.

The prosecution submit that the court can exercise its discretion. The nature of this case is different and it is not a custody case nor was the accused under arrest and he did not make a formal statement. The case involves an entry in a Garda notebook. It is submitted that the court can take into consideration all the circumstances of the case.”

12. Returning now to the text of the case stated, the District Court judge explains that counsel for the Accused requested that a consultative case be stated to the High Court. Two questions have been put forward as follows.
 - (a) In the particular circumstances of this case, and despite the unexplained breach in the Judges’ Rules, was I correct in exercising my discretion to admit the statement in question into evidence.
 - (b) If the answer to (a) is no, am I nevertheless correct in holding that in the absence of the admission, there is still a case to answer on the five remaining charges before the Court.

THE JUDGES’ RULES

13. The origins of the Judges’ Rules have been described as follows in *Walsh on Criminal Procedure* (Second Edition, 2016), at §6–09.

“6–09 The Judges’ Rules (the Rules) are a body of nine rules for the guidance of the police when engaged in taking statements from suspects. They are unusual in our common law system in that they constitute a code drawn up by judges as opposed to a legislative or executive authority. Moreover, they were not drawn up in the course of handing down judgment in an individual case. Rather, they were first formulated in 1912 by English High Court judges who sat together in an extra-judicial capacity for the purpose of issuing guidance on the type of interrogation practices that the court would consider acceptable for the purposes of admitting in evidence at the subsequent trial admissions made by the suspect in the course of the interrogation. The version handed down in 1912 in response to this request was finalised and published in 1918. It was subsequently replaced in 1964 in the UK by a new set of Rules. These Rules were accompanied by a preamble setting out five general principles and an appendix of administrative directions issued by the Home Secretary. Ultimately, these Rules and administrative directions were replaced in England and Wales by the codes of practice issued pursuant to the Police and Criminal Evidence Act 1984.”

*Footnotes omitted.

14. The parties in the present case were agreed that the status of the Judges' Rules in the domestic legal order remains as summarised as follows by the Supreme Court in *People (DPP) v. Farrell* [1978] I.R. 13.

"Grounds 6 and 7

These grounds relate to the failure to record what was said by the applicant after the appropriate caution. In these grounds of appeal it is suggested that the verbal statements should not have been admitted since what was said was not reduced to writing at the time. It is well to point out that, when a prisoner after caution makes a statement which is recorded, it is always the statement and not the record of it that may be evidence. The onus is always on the prosecution to establish that such a statement is a voluntary one. The trial court or trial judge has a judicial discretion to decide whether, in the interests of justice, a particular statement should be admitted in evidence in all the circumstances of any particular case.

The Judges' Rules are not rules of law. They are rules for the guidance of persons taking statements. However, they have stood up to the test of time and will be departed from at peril. In very rare cases, such as *R. v. Mills & Lemon* [1947] K.B. 297 a statement taken in breach may be admitted in evidence but in very exceptional circumstances. Where, however, there is a breach of the Judges' Rules, such as a failure to make a written record of the alleged confession or a failure to invite the accused to accept or reject the statements, each of such breaches calls for an adequate explanation. The breaches and the explanations (if any) together with the entire circumstances of the case are matters to be taken into consideration by the trial judge before exercising his judicial discretion as to whether or not he will admit such statement in evidence; *The People (Attorney General) v. Keane* (1975) 110 I.L.T.R. 1. In the view of the Court these grounds of appeal also fail."

*Footnotes omitted.

15. The full text of rule 9 is as follows.

"Any statement made in accordance with the above rules, should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish."

16. The mischief which rule 9 is intended to guard against has been summarised as follows by the (former) Court of Criminal Appeal in *People (DPP) v. Towson* [1978] I.L.R.M. 122 (at 126/7).

"With regard to that, I think it is proper to note that the purpose of Rule 9 is to prevent a particular mischief, and that is to prevent a situation in which invented or planted oral statements are adduced in evidence by the stronger side to the detriment and harm and injury of a weak and oppressed defendant; and it is to make sure that that kind of either intentional — or perhaps unintentional —

difficulty about what words were said and how they were said, to prevent that that the rule is that a statement should be reduced to writing. But it is understood that there may be circumstances which may justify and explain why a statement has not been reduced to writing. This is where discretion comes in. It has been held that a proper exercise of the discretion to allow such statements is that the court is satisfied in the circumstances that there was a reasonable explanation why the statement was not recorded. In this particular case, the statement having been made, immediately afterwards the accused expressed a desire to make a more formal statement that would be a statement in greater detail, a more formal statement which would be taken down in writing, and he named two officers to whom he wished to make such a statement. They were sought for but could not be found and by the time they could not be got it was too late to record the original statement. In the circumstances the court accepted that as an explanation for not taking it down in writing. In the view of this Court that was a reasonable exercise of discretion. In any event in this particular case, the first issue the court had to decide was whether in fact the statement had been made or not and, having decided on the evidence and having heard that the statement had been made, there was no question of any concocted or planted statement being in issue at the time when the question of exercising discretion came into consideration. For these reasons this ground also fails."

17. As appears, the rule serves two related purposes: first, to prevent a situation whereby invented oral statements might be attributed to an accused; and, second, to avoid disputes as to what words were said and how they were said.
18. The interpretation and application of rule 9 has been considered more recently by the Court of Criminal Appeal in *People (DPP) v. Ebbs* [2011] IECCA 5; [2011] 1 I.R. 778. The case concerned a prosecution for possession of what might be described colloquially as an "offensive weapon". One of the ingredients of the offence is that the accused person must have knowledge of the existence of the article in question, i.e. to intend to possess it. The accused had been arrested for a road traffic offence, and was seen to remove an object, a stun gun, from the car. Evidence was admitted at trial to the effect that when asked about this article, the accused had said that "Bray is a dangerous place". The statement was potentially relevant to the issue of *mens rea*, i.e. whether the accused knowingly had possession of the prohibited article.
19. The Court of Criminal Appeal addressed the breach of the Judges' Rules as follows.

"[...] A second ground advanced was that the statement 'Bray is a dangerous place', although made after a caution, was not noted in the garda notebook or otherwise offered to the accused for his signature. This, it was said, was a breach of r. 9 of the Judges' Rules. The trial judge nevertheless admitted the evidence, and this court is satisfied he was correct to do so. Rule 9 of the Judges' Rules principally addresses the making of formal statements, rather than the type of exchange dealt with here.

The court has a discretion to admit evidence obtained in breach of the Judges' Rules. In the words of O'Higgins C.J. in *The People v. Farrell* [1978] I.R. 13 at p. 21: -

'The breaches and the explanations (if any) together with the entire circumstances of the case are matters to be taken into consideration by the trial judge before exercising his judicial discretion as to whether or not he will admit such statement in evidence ...'

Here, the 'entire circumstances of the case' were that a single answer was given in the course of a fairly standard road traffic incident in the early hours of the morning. In the circumstances, the court considers that the trial judge was entitled to exercise his discretion to admit the statement in evidence."

SUBMISSIONS OF THE PARTIES

20. Both parties to the case stated are in agreement that a trial judge has discretion to admit a statement which has not been taken and recorded in accordance with rule 9 of the Judges' Rules. Where they are in disagreement is as to the extent of this discretion. Counsel on behalf of the Accused, Mr Simon Donagh, submits that the passage from *People (DPP) v. Farrell* (cited under the previous heading) supports the proposition that the Judges' Rules should only be departed from "at peril", and that evidence in breach of the rules should only be admitted in "very rare" cases. Counsel further submits that a breach calls for an adequate explanation, and that no explanation has been offered for the failure to afford the Accused an opportunity to sign the statement as recorded in the Garda's notebook. The point is made that the Garda was asked for an explanation in cross-examination and none was given.
21. Counsel on behalf of the Director of Public Prosecutions, Ms Ellis Brennan, SC, emphasises that a trial judge has discretion to admit evidence even if there has been a breach of the Judges' Rules. Emphasis is placed on the judgment in *People (DPP) v. Ebbs* (cited under the heading above) and *People (DPP) v. O'Reilly* [2009] IECCA 18.

(1). DECISION ON JUDGES' RULES

22. The case law confirms that the decision as to whether to admit a statement which has not been taken and recorded in accordance with the Judges' Rules is a matter within the discretion of the trial judge. Whereas the exercise of this discretion is, of course, amenable to review whether by way of an appeal or by way of a consultative case stated, it must be borne in mind that the trial judge will have had the benefit of hearing the oral evidence of the witnesses and will have had an opportunity of assessing their demeanour.
23. The fact that no *explanation* has been offered by the Garda for the failure to afford the Accused an opportunity to read and sign the written note which purports to record the oral statement does not mean that the trial judge has no discretion to admit the statement. Whereas the judgment in *People (DPP) v. Farrell* does state that a breach of rule 9 calls for an adequate explanation, it is clear from the use of the phrase "*the explanations (if any)*" in the very next sentence of the judgment that the absence of an

adequate explanation does not automatically lead to the exclusion of the statement. Rather, the trial judge must look at the "*entire circumstances of the case*".

24. As appears from the judgment of the Court of Criminal Appeal in *People (DPP) v. Ebbs* (cited above), the fact that an oral statement has been made at the side of the road in the context of a road traffic incident—as opposed to in a custodial setting—is something which can properly be taken into account in the exercise of the discretion. The District Court has found as a fact that the Garda had administered a caution to the Accused prior to his making the oral statement. The District Court was also satisfied that the Garda had made a note of the oral statement at the time. The breach of rule 9 was, therefore, limited to the failure to afford the Accused an opportunity to sign the written note of the oral statement. The breach was, thus, of a lesser order than that considered in other cases where, for example, there had been a failure to reduce an oral statement to writing. (This was the nature of the breach in *Ebbs* itself).
25. The judgment in *People (DPP) v. Towson* indicates that rule 9 serves two related purposes: first, to prevent a situation whereby invented oral statements might be attributed to an accused; and, second, to avoid disputes as to what words were said and how they were said. It is clear from the case stated that the District Court judge carefully considered the credibility of the Garda witness. The judge thus directed his mind to the reliability of the evidence given in respect of the making of the oral statement, and this has ensured that the first of the two purposes of rule 9 has been fulfilled. Further, it is telling that it was never put to the Garda witness that the Accused never made the oral statement. This is not a case where the making of the oral statement is denied.
26. Insofar as the second purpose is concerned, there is less likely to be a dispute as to what words were spoken in cases where what is in issue is a short oral statement of one or two sentences uttered on the road side, rather than a lengthy series of utterances following an interview in custody over an extended period.
27. Having regard to the entire circumstances of the case, as summarised above, I am satisfied that the trial judge properly exercised his discretion, and that his conclusion that the evidence should be admitted, notwithstanding the breach of rule 9, was properly reached.

(2). DECISION ON WHETHER CASE TO ANSWER

28. The second part of the case stated can be disposed of more shortly. The parties were agreed that the test for determining whether there is a case to be answered in criminal proceedings is that formulated in *R. v. Galbraith* [1981] 1 W.L.R. 1039. A direction that there is no case to answer should be given where the judge comes to the conclusion that the prosecution evidence, taken at its height, is such that a jury properly directed could not properly convict upon it.
29. The principal objection made to the District Court's ruling that there was a case to answer is to the effect that, on the assumption that the oral statement was inadmissible, there was nothing to indicate that the Accused had been driving the car. It was submitted that

the evidence to the effect (i) that the motor car matched the description and registration number given by the witnesses; (ii) that the car was found not far from the scene of the collision with the parked cars; and (iii) that the car showed signs of significant damage, was merely evidence directed to establishing that the *car* was the car involved in the earlier collision. It is said that none of this evidence has any probative value in establishing that the Accused had been the *driver* of the car.

30. This analysis overlooks a number of significant additional factors, not least the timing of the Garda coming across the Accused. The chronology of events is such that the patrol car came upon the motor car and the Accused within minutes of the collision. The car keys were still in the ignition. Further, the car appears to have been registered in the ownership of the Accused. Had the motor car not been discovered until hours later, then the force of the circumstantial evidence would be much less. A person standing by the car might simply be a passer-by who had the misfortune to be in proximity to a car which had been involved in an incident earlier in the evening. The confluence of events in the present case is such, however, that the District Court judge was entitled to conclude that there was a case to answer. Thereafter, it would have been open to the Accused to go into evidence and provide his version of events.

CONCLUSION

31. For the reasons set out herein, the High Court answers the two questions posed in the case stated as follows.

- (a) In the particular circumstances of this case, and despite the unexplained breach in the Judges' Rules, was I correct in exercising my discretion to admit the statement in question into evidence.

YES.

- (b) If the answer to (a) is no, am I nevertheless correct in holding that in the absence of the admission, there is still a case to answer on the five remaining charges before the Court.

YES.