

THE HIGH COURT

[2023] IEHC 734

[Record No. 2023/60SS]

IN THE MATTER OF SECTION 52(1) OF THE COURTS

(SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF GARDA PRENDERVILLE)

PROSECUTOR

AND

PATRICK FOLEY

DEFENDANT

JUDGMENT of Ms Justice Miriam O'Regan delivered on the 20 December 2023.

1. This is a consultative case stated from the District Court pursuant to the above-mentioned provisions dated 12 December 2022 wherein the District Justice poses the following question for the High Court: -

Whether the breath test is invalid thereby rendering the arrest unlawful: -

(a) in circumstances where the garda administering the test acting *bona fide*, but in ignorance of the manufacturer's instructions, failed to delay the giving of the test to the driver, when he had been informed by the defendant he had

drink taken prior to driving albeit with no time of drinking given and no inquiry as to the time of drinking was made by the garda, and

(b) in circumstances where the garda was aware and accepted the defendant was coming from an address five minutes from where he was stopped.

2. For the reasons hereinafter set out I would answer no to both questions above.

Background

3. The following detail has been furnished in the consultative case stated: -
 - a. The proceedings involved a prosecution under s.4(4)(a) and (5) of the Road Traffic Act 2010 alleging that on 02 August 2021 at South Douglas Road Cork the defendant was driving a vehicle registration number 06 TN 2595 in a public place and 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 exceeded a concentration of 22mlgs of alcohol per 100mlg of breath to wit 60mlg of alcohol per 100mlg of breath.
 - b. The matter was heard on 30 May 2022 and the evidence adduced on behalf of both the prosecutor and the defendant without a final adjudication nor decision on a question of law on that date.
 - c. The evidence given was to the effect that on 02 August 2021 the garda observed the defendant driving at speed and required him to stop. When the garda approached the vehicle he noted a strong smell of intoxicating liquor, the defendant's speech was somewhat slurred and his eyes somewhat glassy, as a consequence he perceived the defendant

had committed an offence and demanded a roadside breath specimen under s.9(2) of the 2010 Act. The sample was obtained and the result was “fail” whereupon the garda then formed the opinion that the defendant had consumed an intoxicant to the extent he could not have proper control of the vehicle.

- d. On cross-examination the garda accepted the defendant voluntarily informed him when stopped that he had consumed a few alcoholic drinks before driving but did not state specifically what time he had consumed the alcohol and the garda made no inquiry as to time. The garda accepted the defendant was coming from a property five minutes from where he was stopped and confirmed he had only formed the opinion that the defendant was incapable following the failed result aforesaid. The garda confirmed that he was not aware of the instructions for use of the Dragor equipment used to take and analyse the breath sample to the effect that it required that at least twenty minutes should elapse between the person’s last drink and before using the device.
- e. On behalf of the defendant, it was submitted that based on the cases of *The DPP v Quirke* [2003] IEHC 141 and the UK decision in *Re Attorney General’s Reference No. 2 of 1974* the Garda knew or had reason to suppose the defendant had consumed alcohol in the preceding twenty minutes and should have afforded him a twenty minute observation period before administering the breath test. It was further argued that the lack of knowledge of the machine’s instructions rendered the arrest, following the failed roadside test, unlawful.

- f. The State submitted that the garda had no authority to compel a person to answer a question as to when he last consumed alcohol pursuant to the *Quirke*, above, jurisprudence and the State also relied on and quoted from the case of *DPP v Slattery* [2017] IEHC 442. The State also relied on the case of *DPP v Feghiu* [2020] IEHC 235.
- g. On behalf of the defendant, it was admitted that there is no provision in law to wait the twenty minute period as the period is purely borne out of the instruction manual. On behalf of the defendant it was argued that the twenty minute wait requirement is a necessary proof in s.4(4) jurisprudence because of the Supreme Court decision in *DPP v McNiece* [2023] IESC 41. The defence further argued that the caselaw relied upon by the State merely apply the principles set out in *Quirke* to the effect that it is only when a garda knows or has reason to suppose that a suspect has consumed alcohol in the preceding twenty minutes must they wait the twenty-minute period at the roadside.

Jurisprudence

4. The following jurisprudence has been engaged by the parties: -
- a. *DPP v Carey* [1970] AC 1072, a UK decision. In that matter there was a finding of fact that the accused had taken drink and smoked within twenty minutes which was unknown to the constable. In the lower courts it was found that there was an invalid arrest by failure to comply with the instructions of the device used. In the House of Lords, it was held that if there is no knowledge or reasonable cause to suspect the

accused had within twenty minutes been drinking or smoking a test result is valid evidence and admissible.

- b. Re Attorney General's reference no. 2 of 1974, UK Court of Appeal held that because the accused had smoked two minutes before the test it was invalid to ground an arrest and the *bona fide* of the constable did not excuse the lack of knowledge of instruction on the equipment used.
- c. In the *Quirke* decision (Ó Caoimh J) the District Judge had upheld the defence submission to the effect that failure by the prosecution to establish a twenty-minute lapse between the accused last consuming alcohol and the taking of the breath test was fatal to the prosecution case. The garda had been aware of the manufacturer's recommendations but hadn't inquired of the accused as to when he last consumed alcohol. On this basis the District Court felt the test was potentially unreliable although did state a case to the High Court as to whether or not the dismissal of the charge was wrong. The question posed was as to whether informing the requisite opinion prior to making the arrest the garda may rely in part on a test result that he is aware may be unreliable. The High Court was satisfied that there was no information available to the garda to give him cause to expect that the accused had recently consumed alcohol and/or to suggest that the test might be unreliable. Therefore, the garda belief was *bona fide*. It was held that unless a garda knows or has reason to suppose that the suspect has consumed alcohol within the preceding twenty minutes there is no necessity to await the twenty-minute period. The court also

held that the relevant issue was not whether the result was reliable but rather whether the opinion formed was *bona fide*: -

“If, acting *bona fide* and reasonably on what is known by him, at the time and when he has no reason to suspect the consumption of alcohol within the twenty minutes, the police officer does not delay the carry out of the test, that test is not, in my view, invalidated by proof at the hearing of the information that he had a drink within that time; nor, in my opinion, does such proof convert an arrest under s.2(4) into a wrongful arrest.”

- d. In *McNiece* the Supreme Court was answering a question posed by the Circuit Court under s.16 of the Courts of Justice Act 1947. The issue in that matter concerned the failure of the accused to provide two breath specimens following his arrest on suspicion of driving with excess alcohol, at the garda station. The question posed was as to whether it was lawful in the above circumstances to detain the accused for twenty minutes prior to requiring a specimen. The evidence of the garda established it was reasonably necessary to observe twenty minutes in taking proper and reliable samples on the basis that if there was alcohol in the accused’s mouth when the test was conducted an “invalid” result would be recorded on the machine. The State gave evidence that there were doubts as to the capacity of An Garda Síochána to take a second test if the first test resulted with “invalid”. Although it was indicated that the doubts aforesaid were legitimate that was not a matter that was before the court, however, the court did find that waiting the twenty

minutes at the garda station notwithstanding the passage of time since arrest, in a controlled environment, was reasonably necessary.

- e. In *Slattery* (Binchy J) the issue was as to whether or not a garda is obliged to inquire of the accused as to when he had last taken alcohol. In that matter the garda did not inquire and did not wait the twenty minutes prior to administering the roadside breath test. The State contended there was no obligation to inquire and no power to compel an answer as to when alcohol was last taken. The accused contended that the instruction should be strictly observed and the garda was obliged to observe that twenty-minute period prior to the administration of the test. The court was satisfied that the threshold for formation of an opinion for the purposes of making an arrest is a low threshold and followed the case of *DPP v Duffy* [2000] 1 IR 393 (Quirke J). In *Duffy* the garda gave evidence that he had formed the opinion that the accused had consumed an intoxicant and required a breath specimen without proffering any evidence as to the basis of his opinion. This evidence was not however contested and the court was satisfied that: -

“...There is no reason why, in the absence of any suggestion or contention to the contrary the district judge or this Court should find that the opinion of Sergeant Tracey did not result from his honest belief and was not genuinely and reasonably held.”

In *Slattery* the garda was not challenged about the reasonableness or *bona fide* of his opinion and Binchy J was satisfied that the garda was not under any obligation to prove compliance with the operating

instructions. He indicated that the trial judge should determine the proceedings on the basis that the garda had formed a lawful opinion and an offence had been committed by the accused prior to placing the accused under arrest.

- f. In *DPP v McGovern* [2019] IECA 293, being an appeal from an order of McDermott J in the High Court, the case concerned an arrest solely based on a fail result of the roadside breath test. In the High Court it was held that there was no suggestion that the opinion of the garda was not *bona fide* and was entitled to rely on the failed test to form his opinion. In the Court of Appeal McCarthy J was satisfied as to the correctness of the High Court's decision and indicated that the result was sufficient for an arrest although later might be proved wrong.
- g. In *Feghiu*, aforesaid, the garda detected a strong smell and erratic driving. The garda did ask if the accused had recently consumed alcohol to which the accused had answered "two Guinness earlier". It was argued on behalf of the accused that by virtue of the accused's answer aforesaid the garda was on alert and was obliged to make further inquiries in order to form a *bona fide* reasonable opinion. The garda should have operated the test in accordance with the instructions or made further inquiries of the accused. Meenan J in the High Court did not accept this argument and indicated that the district judge was not correct to dismiss the charge against the accused on the basis that the garda did not observe the twenty-minute wait period.

Submissions

5. The accused has argued that it would be inconceivable that An Garda Síochána must at a garda station observe the twenty minute wait period but not on the roadside.

6. This submission is made in defiance of the jurisprudence aforesaid and does not take into account that the threshold for forming an opinion to arrest an accused at the roadside is a low threshold. Subsequently, following an arrest, the accused might be charged with an offence because of the test conducted in the garda station, and to sustain such a charge the threshold is proof beyond a reasonable doubt. Further, the test conducted in the Garda Station was within a controlled environment unlike at the roadside. In *McNieve* the complaint was that the accused was unnecessarily detained for too long, whereas here, the accused is effectively complaining that he was not detained for long enough.

7. In accordance with the jurisprudence above given that: -
 - a. there was no suggestion following the evidence adduced in the District Court on behalf of both parties that the opinion of garda Prenderville was not *bona fide*;
 - b. having regard to the fact that in *Feghiu* notwithstanding the accused mentioning that he had “two Guinness earlier” nevertheless the Court followed the *Slattery* decision and was effectively satisfied that the admission by the accused was not sufficient to find that the garda should suspect the consumption of alcohol within the twenty minute period prior to stopping the vehicle.

There was no need for garda Prenderville to await the twenty-minute period.

8. The accused, when proffering the information that he had consumed a few alcoholic drinks before driving did not identify the time which he had last consumed alcohol. In accordance with *Quirke* unless garda Prenderville knew or had reason to suppose that the alcohol was consumed within the twenty-minute period prior to the administration of the roadside test there was no necessity to await that period prior to forming a *bona fide* opinion following the failed result of the test.

9. The accused has argued that if there are two possible interpretations of the meaning of the words volunteered by him, the interpretation most favourable to him should apply. This argument seems to me to be an extension of the *contra proferentum* rule: where a contract is drafted, proffered and put forward by the stronger party to the contract it will be interpreted against the interest of the party. The Garda had no input into the accused's voluntary statement. In my view this argument is unsustainable.

10. In so far as the accused had come from a property 5 minutes from where he was stopped, this cannot amount to an identification of, or a contribution to an identification of when the accused last consumed alcohol.

11. In the circumstance I am satisfied that garda Prenderville acted *bona fide* and did not know nor had reason to suppose the accused had consumed alcohol within 20 minutes of being stopped. The accused argued that it was reasonably possible that he had alcohol within the 20 minute period, however, reasonably possible is not the test -

the garda must know have reasons to suppose or suspect the consumption of alcohol within 20 minutes – the garda was merely told the accused had a few alcoholic drinks before driving. That information similar to *Feghiu*, did not give rise to a reason to suppose or expect consumption within the prior 20 minute period.

12. As this judgment is being delivered electronically, with regards to the issue of costs, as the respondent has been entirely successful, it is my provisional view that the DPP should be entitled to her 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.