

THE HIGH COURT

[2019 No. 836 SS]

**IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1857 AS
EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961**

BETWEEN

**THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA EIMHIN
MATTHEWS)**

PROSECUTOR/APPLICANT

AND

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ACCUSED/RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 28th day of April, 2020

Case stated

1. This is a case stated by a judge of the District Court pursuant to s. 2 of the Summary Jurisdiction Act, 1857 as extended by s. 51 of the Courts (Supplemental Provisions) Act, 1961 made at the request of the prosecutor, being dissatisfied with a determination of the said judge as being erroneous in point of law.
2. At a sitting of Dublin Metropolitan District Court at Swords, County Dublin, on 18 February 2018, the accused/respondent appeared to answer a summons alleging that: -

"On 02/12/2017 at Forester Way, Swords, Dublin, a public place, in the said District Court area of Dublin Metropolitan District did drive a mechanically propelled vehicle registered number – while there was present in your body a concentration of alcohol such that within three hours after so driving, the concentration of alcohol in your blood did exceed a concentration of 50 milligrammes of alcohol per 100 millilitres of blood, to wit 147 milligrammes,

Contrary to section 4(2) and (5)(a) of the Road Traffic Act, 2010, 1961."

3. The facts heard or submitted and as so found by the District Judge are as follows: -
 - (i) At approximately 2:25 a.m. on Saturday, 2 December 2017, whilst Garda Eimhin Matthews, of Swords Garda Station, was on mobile patrol at Forester Way in Swords, County Dublin, he observed a mechanically propelled vehicle having registration number – driving in an erratic manner. The vehicle was being driven at speed, it was weaving in and out between parked cars and it turned sharply before it came to an abrupt stop. Garda Matthews approached the vehicle and he spoke to the driver, the accused/respondent. Garda Matthews detected a strong smell of intoxicating liquor coming from the vehicle and he cautioned the accused/respondent in the usual manner;
 - (ii) Garda Matthews enquired of the accused/respondent if he had recently consumed alcohol. Another Garda, Garda Power, procured a Dräger alcohol test 6510 machine from the patrol car and gave it to Garda Matthews who stated that pursuant to s. 9(1) of the Road Traffic Act, 2010, as substituted by s. 7 of the Road Traffic (No. 2) Act, 2011, he required the accused/respondent to provide him with a sample of his

breath, to indicate the presence of alcohol in his breath and he informed the accused/respondent of the consequences of any failure or refusal. The accused/respondent indicated that he understood the requirement and Garda Matthews proceeded to administer the breath test using the said machine;

- (iii) Having assembled the said machine, Garda Matthews instructed the accused/respondent as to how he should supply a breath specimen. The accused/respondent duly complied with the requirement, and, having provided a sample of his breath, the machine indicated that he had failed the test;
 - (iv) In all of the foregoing circumstances, at 2:29 a.m. on 2 December 2017, Garda Matthews formed the opinion that the accused/respondent had consumed an intoxicant to such an extent as to render him incapable of having proper control of a mechanically propelled vehicle in a public place. Garda Matthews arrested the accused/respondent, having cautioned him;
 - (v) The accused/respondent was conveyed to Swords Garda Station, approximately 100 metres away, and when he arrived at 2:40 a.m., the designated doctor and interpreter were contacted. Subsequently, the accused/respondent elected to permit the doctor to take a blood sample. The Medical Bureau of Road Safety issued a certificate analysis of this sample indicating that the accused/respondent had a concentration of 147 milligrammes of alcohol per 100 millilitres of blood;
 - (vi) In cross-examination, Garda Matthews again confirmed that there were a number of factors that led him to arrest the accused/respondent for drink driving, including the manner of his driving and the strong smell of intoxicating liquor from the vehicle. However, he accepted that the roadside breath test played a part. He indicated that he had received training in the Dräger test machine but that he had no recall of ever seeing the instruction manual for this device. Garda Matthews confirmed that he was unaware of any manufacturer's instructions that suggested a 20-minute observation period before roadside testing, either generally or in relation to recently consumed alcohol. Garda Matthews was aware that there is no statutory requirement for such an observation period and he did not consider a 20-minute observation before he administered the roadside breath test to the accused/respondent; and
 - (vii) Garda Jennifer Quinn, who was on duty at Swords Garda Station when the accused/respondent arrived, noted that he had bloodshot eyes and that there was a smell of alcohol from his breath. When he was asked, he stated that he had had two drinks and that he understood the procedures.
4. Following submissions by the prosecutor and the accused/respondent and having considered the evidence, the District Court Judge concluded that a 20-minute observation period should have been observed in line with instructions for the use of the roadside breath test apparatus and was not satisfied to mark a conviction in the matter. Notwithstanding the other factors that had led Garda Matthews to form his opinion and to

proceed as he did, the District Court Judge was not satisfied to mark a conviction and so the case was dismissed.

5. The prosecutor/applicant, being dissatisfied with this determination as being an erroneous point in law, asked the District Judge to state a case. The opinion of the High Court, therefore, is sought on the following question: -

“(i) Notwithstanding the other factors that grounded the arresting Garda’s opinion, was I correct in law to dismiss the drink driving prosecution against the accused on the basis that the Garda did not conduct a 20-minute observation period before he administered the roadside breath test?”

Consideration of issue

6. In the course of submissions by Mr. Kieran Kelly BL, on behalf of the prosecutor/applicant, referred to the decision of Binchy J. in *Director of Public Prosecutions v. Slattery* [2017] IEHC 442. This case involved a prosecution for drink driving contrary to ss. 4(3)(a) and (5) of the Road Traffic Act, 2010. The evidence given was that the accused in this case had driven his vehicle at speed whilst approaching a Garda checkpoint and came to an abrupt stop. The driver was informed by a Garda that he was conducting a mandatory alcohol testing and that he required the accused to provide a sample of his breath. This sample returned a fail reading and the Garda formed the opinion that the accused had consumed an intoxicant to such an extent so as to render him incapable of having proper control of a vehicle in a public place. The accused was arrested, cautioned and conveyed to a Garda station where the accused provided a urine sample to a designated doctor. This sample, following analysis by the Medical Bureau of Road Safety, showed a concentration of 281 milligrammes of alcohol per 100 millilitres of urine.
7. Upon the completion of evidence in the District Court, the Solicitor acting for the accused submitted that the accused had not been asked whether or not he had taken “*nil by mouth*” within a 20-minute period prior to the administration of the roadside breath test, in accordance with the instructions for the use of the apparatus. The District Judge stated the following questions to the High Court by way of consultative case stated: -
 - “(i) Before administering a roadside breath test under Section 10 of the Road Traffic Act 1961-2010, is a garda required to observe an accused for 20 minutes, to ensure he has consumed nil by mouth;
 - (ii) Is the garda required to ask the accused if he has had anything to drink in the previous 20 minutes...”
8. Clearly, the issue that arose in *DPP v. Slattery* is similar to the issue that arises in this case. In giving judgment, Binchy J. stated: -
 - “21. Section 4(8) of the Act of 2010 confers authority on a member of An Garda Síochána to arrest a person without warrant who, in the *member's opinion* is committing or has committed an offence under that section. It is well established

and indeed I do not think that it was disputed by counsel on behalf of the accused in these proceedings, that the threshold for formation of an opinion for the purposes of making an arrest is a low threshold. There are numerous authorities to this effect and it is not necessary to rehearse all of them here..."

and: -

- "23. The accused was legally represented and his solicitor chose not to cross-examine Garda Kenny. He may well have made this choice as a matter of strategy in the hope that he could persuade the court that, in order for the prosecution to succeed, it is necessary for a garda to give evidence that there has been full compliance with the operating instructions pertaining to the apparatus, but a garda is under no such obligation. In order to prove the offence, the prosecution must satisfy the court that the ingredients of the offence have been met and the operating instructions for the apparatus clearly do not form any part of the offence itself."
9. I fully agree with the conclusions reached by Binchy J. In this case, the Garda formed his opinion, *inter alia*, having seen the result of the breath test from using the Dräger alcohol test machine. As Binchy J. stated: "*the threshold for formation of an opinion for the purposes of making an arrest is a low threshold*" and "*the operating instructions for the apparatus clearly do not form any part of the offence itself*". It follows from this that the Garda was not obliged to carry out a 20-minute observation period before using the apparatus.

Conclusion

10. By reason of the foregoing, in my view, the District Judge was not correct in law to dismiss the drink driving prosecution against the accused/respondent on the basis that the Garda did not conduct a 20-minute observation period before he administered the roadside breath test. Thus, the answer to the question posed is "no". I will hear counsel as to the consequential orders that may now arise.