UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 263

Appeal Record No.: 2019/469

Birmingham P.
Edwards J.
Ní Raifeartaigh J.

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 16 OF THE COURTS OF JUSTICE ACT 1947

ON A CONSULTATIVE CASE STATED

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

- AND–

PATRICK CLYNE

ACCUSED

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 30th day of September, 2020

1. This judgment arises out of a case stated by Judge Keenan Johnson of the Circuit Court in connection with a prosecution for the offence commonly and colloquially known as "drug driving" i.e. driving while there was present in the motorist's blood a level of cocaine above the legally specified limit. The case stated concerns the proper interpretation of s.13B (1) of the Road Traffic Act 2010 as inserted by s.13 of the Road Traffic Act 2016. This section deals with the conditions to be fulfilled before a person arrested on suspicion of

such an offence may lawfully be required to provide a specimen of his or her blood to a designated doctor or designated nurse.

2. The evidence before Judge Johnson, who was hearing an appeal against a District Court conviction, was as follows.

3. On the evening of 29th January 2018, Garda Keane and Garda Lynch were carrying out a checkpoint at Market Street, Granard, County Longford. At approximately 7:38 pm a white Ford Transit van approached the checkpoint. As it did so, the driver appeared to brake suddenly and then approach the checkpoint slowly. Garda Keane approached the driver who identified himself as Patrick Clyne (the accused) and gave his address. He produced his driving licence. He said the van belonged to his employer and that he was using it for work purposes. However, no trade plates were displayed, and he said he did not have any in the van. Garda Keane thought that the accused seemed nervous, and that his pupils were dilated. He appeared to be chewing something although he said that he was not. The accused had no certificate of insurance with him nor insurance disc displayed on the vehicle. Having regard to all of the circumstances, Garda Keane decided to make a requirement of the accused to provide a specimen of oral fluid (in accordance with the terms of s.9(2)(A) of the Road Traffic Act 2010 As amended by s.7 of the Road Traffic Act 2011). He also informed the accused that the specimen would be analysed by a machine which was located in the patrol car (a Drager Drug Test 5000 machine). The accused took the test and complied with the Garda instructions in that regard. The specimen tested positive for the presence of cocaine.

4. Garda Keane then arrested the accused at 7:57pm, cautioned him and conveyed him to Longford Garda Station. His details were entered on the custody record by the member in charge. Arrangements were made for the attendance at the Garda Station of a registered medical practitioner and at 9:03pm a Dr. Azam arrived at the Garda Station.

5. Garda Keane then made a requirement of the accused to permit the doctor to take a specimen of his blood and informed him of the penalty for failure or refusal to comply with the requirement. The accused permitted the doctor to take the blood specimen. At 9:20pm he was released from custody pending further investigation of the offence.

6. The blood specimen was sent to the Medical Bureau of Road Safety with return certificates showing a concentration of 36.9 mg/ml cocaine and 515.2 mg/ml Benzoylecgonine (cocaine) in the blood (but no alcohol).

7. The accused was convicted at Longford District Court on 5th March 2019 of the offence of driving while under the influence of an intoxicant contrary to s.4(1)A of the Road Traffic Act 2010 as inserted by s.8(a) of the Road Traffic Act 2016, and s.4(5) of the Road Traffic Act 2010. He was fined €250 with three months' imprisonment /five days in default of payment. He was also disqualified from driving from one year and his driving licence was endorsed.

8. In the course of an appeal against that conviction on 1st May 2019 at Longford Circuit Court, counsel for the accused submitted that the arresting Garda had failed to apply the law properly before requiring the accused to provide a specimen of his blood at the Garda Station.

9. The relevant section is s.13 B(1) which authorises the Garda to make the requirement in respect of a blood sample if any one of the three preliminary steps listed in paragraphs (a), (b) and (c) of that Section have been taken. The section reads: -

> "Where a person is arrested under section 4(8), 5(10), 9(4), 10(7) or 11(5) of this Act or section 52(3), 53(5), 106(3A) or 112(6) of the Principal Act and a member of the Garda Síochána, having carried out—
>
> (a) A preliminary oral fluid test under s.9(2A) or s.10(4),
>
> (b) Impairment test under s.11, or
>
> (c) An oral fluid test under s.13A,

is of the opinion that the person has committed an offence under section 4 consisting of a contravention of subsection (1A) of that section or an offence under section 5(1A) the member may, at a Garda Síochána station or hospital, require the person to permit a designated doctor or designated nurse to take from the person a specimen of his or her blood."

10. The argument made on behalf of the accused before the Circuit Court was that the absence of the word "or" after the comma at the end of sub-para. (a) implies that the section should be read as if the word "and" appeared after the comma at the end of sub-para. (a). Therefore, it was argued, before the motorist could be lawfully required to provide a blood sample, an impairment test or an oral fluid test under s.13A had to be carried out *in addition* to the preliminary oral fluid test and that it was not sufficient to conduct only one of the tests set out in (a), (b), and (c).

11. Judge Johnson stated the following question for the Court on a consultative case stated:

"In order for a member of the Garda Síochána lawfully to require an arrested person to permit a registered doctor or a registered nurse to take a specimen of the person's blood under section l3B(l) of the Road Traffic Act 2010, as inserted by section 13 of the Road Traffic Act 2016, is it sufficient for the member to have carried out any one of the tests specified in paragraphs (a), (b) and (c) of the said section 13B(1)?"

The submissions of the prosecutor

12. Counsel on behalf of the prosecutor, Mr. Tom O'Malley B.L., submitted that the interpretation suggested on behalf of the motorist is erroneous for a number of reasons. First, in grammatical and syntactical terms, the use of language in the section is a standard example of enumeration such that when a number of items are listed, the presence of a comma after each item, except the penultimate one, means they are being listed disjunctively where the word "or" appears after the penultimate item. In contrast, they may be regarded as having

been listed conjunctively when the word "and" appears after the penultimate item. Counsel cites *Fowlers Modern English Usage 2nd Edition* 1977 in this regard. Counsel went on to provide the example of the following sentence:-

"An applicant for this post must be fluent in French, German, Italian or Spanish."

This clearly requires fluency in one of the four languages described and not in three out of four languages.

13. The prosecutor submits that there are countless examples of such enumeration in statutes and indeed within the Road Traffic legislation itself. In this regard, counsel cites s.9(2A) of the Road Traffic Act 2010 as inserted by s.10 of the Road Traffic Act 2016. It provides for three options in relation to taking a preliminary specimen of oral fluid; the first is to take the specimen there and then when the driver has been stopped, the second is to require the driver to accompany the Garda to some place and then provide the specimen, and the third is where the Garda does not have the apparatus to hand in which case he may require the driver to remain in place for up to an hour until the Garda obtains the apparatus and is then in a position to administer a test. The prosecutor further says that as a matter of common sense, these three options could not be anything other than disjunctive and that that section was introduced in the same statute as the one under consideration in the case stated. Counsel also gives other examples, including s.37 of the Parole Act 2019.

14. The prosecutor also submits that, while a literal reading of the statute as above is the end of the matter, even adopting a purposive approach to interpreting the legislation would lead to the same conclusion. The purpose of the section is to ensure that the Garda has a credible basis for requiring a person to give a blood sample, which of course must not lightly be done. In effect, and although the statute does not use this language, a Garda must have reasonable suspicion that the person was under the influence of drugs while driving. This state of suspicion may be founded on the results of an oral fluid test administered at the

roadside, an impairment test, or an oral fluid test administered at a Garda Station or a hospital. The first and third of these involve the administration of a minimally invasive screening test, involving the swabbing of saliva from the subject person's mouth, that will indicate the presence of certain drugs in the subject person's blood stream, although not the precise level at which such drugs are present. The second is provided for in the Road Traffic (Impairment Testing) Regulations 2014, SI 534/2014, as amended by the Road Traffic (Impairment Testing) (Amendment) Regulations, 2017, SI 370/2017, and, as the name implies, tests, *inter alia*, for impairment of co-ordination of motor functions, from which a member of An Garda Síochána may infer from observing a person's ability to perform impairment tests in his or her presence that the person's ability to drive is impaired. The purpose of each one of these is to enable a member of the Gardaí to form an opinion as to whether the person may have been driving under the influence of a drug and any one of those three tests will suffice for this purpose. Counsel submits that the oral fluid test administered on the roadside is highly reliable and there would be little point in requiring that either of the other tests should be performed in addition. Accepting that there has to be a rational and reasonable basis for the exercise of the relevant power, any one of the three conditions does provide a rational and reasonable basis of that kind.

15. Counsel refers to the Court to *Rahill v. Brady* [1971] IR 69 (Budd J. at p. 86), where it was said that the language of a statute should be construed according to its ordinary meaning "*and in accordance with the rules of grammar*". Another key principle of statutory interpretation is that nothing should be added to or taken from a statute unless there are adequate grounds to justify an inference that the legislator intended something which it omitted to express. In this regard the Court is referred to *H v. H* [1978] IR 138, where Parke J. said that words may not be interpolated into a statute unless it is absolutely necessary to

do so in order to render it intelligible or to prevent it from having an absurd or wholly unreasonable meaning or effect.

16. Counsel referred to the principle of statutory interpretation concerning the strict construction of penal statutes and accepted that any genuine ambiguity should be resolved in favour of the individual. The Court is referred to *Inspector of Taxes v. Kiernan* [1981] IR 117 where Henchy J. said that if a word or expression is used in a statute creating a penal or taxation liability, and there is *"looseness or ambiguity attaching to it*" the word should be construed strictly so as to prevent the fresh imposition of liability from being created unfairly by the use of "*oblique or slack language*". It is well established that this principle applies only where there is a genuine ambiguity or uncertainty as to the meaning of a word or phrase, referring to Maxwell on *The interpretation of Statutes* (12th Edition) and the decision in *Bowers v. Gloucester Corporation* [1963] 1 QB 881, where it was said by Lord Parker that a provision can only be said to be ambiguous in this context where, having applied all the proper canons of interpretation, the matter is still left in doubt. The passage from Maxwell and the comment of Lord Parker in the *Bowers* case were cited with approval and applied by O'Higgins J. in *Mullins v. Harnett* [1998] 4 IR 26. However, counsel submits, there is no ambiguity or uncertainty in s.13B(1) of the Road Traffic Act 2010 that would justify the Court invoking or applying the principle that penal statutes should be strictly construed.

17. In oral submissions, counsel added that the accused is not going so far as to say that the prosecutor's interpretation is either unconstitutional, or incompatible with the European Convention on Human Rights, and therefore what he is in reality asking the Court to do is to interpret the statute on the basis of a particular policy interpretation, which is not permissible in the face of the clear words of the statute itself.

The Submissions on behalf of the accused

18. In their written submissions, counsel on behalf of the accused submit that it is "essentially correct" that what is argued on behalf of the accused demands, "in strict syntactical terms", that the absence of the word "or" after para. (a) of s.13 B (1) implies that the section should be read as if the word "and" appeared after (a). It is accepted that the Court is being asked to depart to from a strict grammatical interpretation in favour of a "more permissible reading of s.13B (1)". It is submitted that this interpretation "arises from conflict between the purpose of s.13B (1) and its literal reading". It is submitted that the disjunctive reading of the subsection advanced by the prosecution would permit a situation where a Garda, having only carried out an impairment test on a person, can be of the opinion that a person has committed an offence under s.4(1A) and can lawfully require that person to submit to a blood test. It is then stated:

> "*This is a situation that does not adequately reflect the purpose for which the legislation was intended by the Oireachtas, nor, for that matter, does it accord with the wording of s.11 of the Road Traffic Act 2010 as substituted by s.12 of the Road Traffic Act 2016, which deals with impairment testing*".

Therefore, it is submitted, a purposive interpretation of the subsection is necessary and further, a purposive interpretation would require the three conditions to be read cumulatively or conjunctively.

19. The submissions suggest that it is helpful to consider the legal historical context of the 2016 Act and the 2010 Act, although this was advanced "with some trepidation" given the status of parliamentary debates in the interpretation of statutes; it is said that this is done with the intention that the debates are relied upon as an "interpretative aid" to inform what is already apparent from the legislative history of two pieces of legislation which are intimately linked. Portions of the Dáil debate are then set out which, it is submitted, support the contended-for interpretation of the subsection. Counsel submit that the prosecutor's

reading of the subsection would produce "an anomaly that can only be at odds with what was intended by the legislature" and that the "only logical reading" of the subsection requires that a Garda carry out a preliminary oral fluid test and impairment test or oral fluid test under s.13A.

20. It is noted that, unlike the situation in cases of suspected drunk driving, there is no provision in the "drug driving" legislation allowing for the option of a person providing a specimen of urine in alternative to a specimen of blood. The requirement to provide a specimen of blood is more invasive of a person's right to bodily integrity than a provisional specimen of urine, and therefore the legislation must be interpreted in the strictest sense.

21. In oral submissions, counsel on behalf of the accused, Mr. Micheál P. O'Higgins, said that there was a dispute between the parties as to whether there was an ambiguity in the section or not. He accepted that if there was no ambiguity, his argument could not 'get out of the box', and that his position was predicated upon there being an ambiguity.

22. He emphasised that the taking of a blood sample was a significant bodily invasion which would, without lawful justification, constitute an assault; and that the requirement to provide physical evidence against one's self amounted to an exception to the fundamental principle that one had a right not to incriminate oneself. Where underlying rights were constitutional in nature, any interference or restriction should be strictly construed. In this regard, the proportionality test as set out in the case of *Heaney* was relevant. However, in answer to questions from the Court, counsel accepted that this was not a constitutional challenge to the Act and that his contention was not so much that the interpretation advocated by the prosecutor was unconstitutional but that it was 'anomalous and unreasonable' and did not reflect the intention of the Oireachtas.

23. Counsel also referred to the rule of strict construction of penal statutes, pointing out that it was an offence to fail to comply with the requirement to provide a blood sample.

24. Much emphasis was placed upon the fact that if the subparagraphs (a), (b) and (c) were read disjunctively, a motorist could be asked to provide a blood sample on the basis of the opinion of a Garda that there were signs of impairment and in the absence of any scientific test whatsoever.

25. In reply, Mr. O'Malley on behalf of the prosecutor again emphasised that this was not a constitutional challenge, and added that even if it were, and the balancing test would have to apply, a key question would be whether there was a compelling social and public objective for entire scheme, and it would be submitted by the State that there was such an objective and that the suggested interpretation of the subsection did comply with the test of proportionality.

The Court's Decision

26. The Court is of the view that the relevant sub-section is not ambiguous. In accordance with ordinary English syntax and the customary practice in legislation, the subparagraphs (a), (b) and (c) are to be read disjunctively in circumstances where they are expressed in the form: "(a), (b) *or* (c)". In other words, fulfilling any one of those conditions is sufficient. Given that there is no ambiguity in the subparagraph, it is not necessary to proceed to consider any of the other rules of statutory construction, including the strict construction of penal statutes or a purposive approach. Nor is it necessary to consider whether there is a "constitutionally-compliant" interpretation of the legislation available when there is no ambiguity on its face; if the accused wishes to contend that the legislation in its plain unambiguous meaning is unconstitutional, that is a matter for another type of proceeding, not a case stated seeking clarification of the meaning of the sub-section. Only in a proceeding challenging the constitutionality of the sub-section would issues such as the proportionality test arise together with questions such as whether the Oireachtas had struck an appropriate balance in view of the underlying constitutional interests, rights and values. Similarly, the

issue of interpreting the legislation under s.2 of the European Court of Human Rights Act, 2003 to ensure compatibility with the European Convention on Human Rights does not arise in circumstances where the meaning of the sub-section is plain and unambiguous. The height of the accused's submission in any event was not that the prosecutor's interpretation of the section was unconstitutional or contrary to the Convention, but rather that it did not reflect what he contended was the intention of the Oireachtas and/or that it was 'unreasonable or anomalous'. However, here the intention of the Oireachtas is manifest from its use of ordinary English syntax and punctuation in this sub-section and one needs to go no further to discern the Oireachtas' intent, whether or not one agrees with the underlying policy choice manifested through those words, punctuation and syntax. For that is what the accused describes as "unreasonable and anomalous": a policy choice made by the Oireachtas with which the accused takes issue as being insufficiently respectful of certain constitutional rights, including the right to bodily integrity. It is not the Court's function to go behind the plain meaning of the statute to give effect to a different policy choice. It might also be noted that even in proceedings challenging the constitutionality of the legislation, a question might arise as to whether the accused had *locus standi* to advance an argument concerning the requirement to undergo a blood test based upon a Garda 'impairment' assessment in circumstances where this was not the factual situation in his case; he had failed a preliminary oral fluid sample test i.e. a scientific test. Therefore, the argument that he made before the Court that the sub-section does or should require a scientific test to be carried out (even one of a preliminary nature) before a requirement is made to furnish blood is based upon a hypothetical situation that is not his own factual situation.

27. As regards the principle of the strict construction of penal statutes, the Court considers the following statement in the *T.N.* case to be most helpful. In *The People (At the Suit of the Director of Public Prosecutions) v T.N.*, [2020] IESC 26, McKechnie J. set out comments

from the authorities (*Motemuino v Minister for Communications and others* [2013] 4 I.R. 120; *DPP v Moorehouse* [2005] IESC 52, [2006] 1 I.R. 421; *Dunnes Stores v Director of Consumer Affairs* [2006] 1 I.R. 355; *DPP v Hegarty* [2011] 4 I.R. 635) concerning the rule of strict construction of penal statutes, but then went on to stress the importance of keeping this principle within its proper sphere of operation: -

> *"117. It is clear, on the basis of the above authorities, that the rule of strict construction of criminal and penal statutes has frequently and repeatedly featured in our jurisprudence. For my part, I would not wish in any way to dilute the value of this approach. The point which I am about to make is completely different in that it endeavours to properly position within the overall interpretive exercise those diverse principles which loosely are said to give rise to this method of construction.*
>
> *118. To that end, it is important to understand that this principle of interpretation operates in addition to, and not in substitution for, the other canons of construction: see, for example, the judgment of O'Higgins C.J. in Mullins v. Harnett [1998] 4 I.R. 426 at pp. 239-240. Thus understood, the principle does not alter the fundamental objective of the Court in construing legislation, which is to ascertain the will or intention of the legislature. As stated by Kelly J., as he then was, in Macks Bakeries Ltd v. O'Connor [2003] 2 I.R. 396 at p. 400: "[t]he object of all statutory interpretation is to discern the intention of the legislature". Accordingly, while undoubtedly playing a role in many cases, and an important one in some, the principle of strict construction of a criminal statute does not automatically supplant or trump all other interpretive approaches. It is one of many canons, maxims, principles, presumptions and rules of interpretation which are utilised by the judiciary when viewing legislation. The primary route by which the intention of the legislature is*

ascertained is by ascribing to the words used in the statute their ordinary and natural meaning.

119. Therefore, while the principle of strict construction of penal statutes must be borne in mind, its role in the overall interpretive exercise, whilst really important in certain given situations, cannot be seen or relied upon to override all other rules of interpretation. The principle does not mean that whenever two potentially plausible readings of a statute are available, the court must automatically adopt the interpretation which favours the accused; it does not mean that where the defendant can point to any conceivable uncertainty or doubt regarding the meaning of the section, he is entitled a construction which benefits him. Rather, it means that where ambiguity should remain following the utilisation of the other approaches and principles of interpretation at the Court's disposal, the accused will then be entitled to the benefit of that ambiguity. The task for the Court, however, remains the ascertainment of the intention of the legislature through, in the first instance, the application of the literal approach to statutory interpretation".

28. Applying the above to the present case, it is not necessary or appropriate to call in aid the principle of strict construction of penal statutes in this case because the intention of the Oireachtas is clearly ascertainable by applying the ordinary English rules of syntax and punctuation routinely used in legislation; this yields the unambiguous interpretation that subparagraphs (a), (b) and (c) are to be read disjunctively on the plain, ordinary or literal view of the statute. This is fatal to the remainder of the accused's submissions and the Court accordingly proposes to answer the Case Stated accordingly.

29. The case stated was: "In order for a member of the Garda Síochána lawfully to require an arrested person to permit a registered doctor or a registered nurse to take a specimen of the person's blood under section l3B(l) of the Road Traffic Act 2010, as inserted by section

13 of the Road Traffic Act 2016, is it sufficient for the member to have carried out any one of the tests specified in paragraphs (a), (b) and (c) of the said section 13B(1)?". The answer is Yes.