

**THE HIGH COURT**

**[2024] IEHC 317**

**[Record No. 2023/84 JR]**

**BETWEEN**

**CONOR MCGUINNESS**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**JUDGMENT of Ms Justice Marguerite Bolger delivered on the 27<sup>th</sup> day of May 2024**

**1.** This is an application to quash the decision of the Circuit Court on an appeal from the District Court, convicting the applicant of a charge of drug driving. For the reasons set out below, I am granting this application.

**Statutory provisions**

**2.** Section 3 of the Road Traffic Act 2010, as amended, (hereinafter referred to as "the Act") defines "intoxicant" as including "alcohol and drugs and any combination of drugs or of drugs and alcohol".

Sections 4(1), 4(1A) and 4(8) of the Act provide:

*"4.— (1) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while he or she is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle.*

*(1A) Subject to subsection (1B), a person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his or her body a quantity of a drug specified in column (2) of the Schedule such that, within 3 hours after so driving or attempting to drive, the concentration of that drug in his or her blood is equal to or greater than the concentration specified in column (3) at the same reference number.*

...

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

Section 9 of the Act provides:

*"Obligation to provide preliminary breath specimen.*

*9.— (1) This section applies to a person in charge of a mechanically propelled vehicle in a public place who, in the opinion of a member of the Garda Síochána—*

*(a) has consumed [an intoxicant],*

*(b) is committing or has committed an offence under the Road Traffic Acts 1961 to 2011,*

*...*

*...*

*(2A) A member of the Garda Síochána may require a person referred to in subsection (1) —*

*(a) to provide a specimen of oral fluid from his or her mouth, using an apparatus for indicating the presence of drugs in oral fluid, in the manner indicated by the member,*

*(b) to accompany him or her, or another member of the Garda Síochána, to a place (including a vehicle) at or in the vicinity of the public place concerned and there to provide a specimen of oral fluid from his or her mouth, using an apparatus for indicating the presence of drugs in oral fluid, in the manner indicated by him or her or that other member, or*

*(c) where the member does not have such an apparatus with him or her, to remain at that place in his or her presence or in the presence of another member of the Garda Síochána (for a period that does not exceed one hour) until such an apparatus becomes available to him or her and then to provide a specimen of oral fluid from his or her mouth, using an apparatus for indicating the presence of drugs in oral fluid, in the manner indicated by him or her or that other member.*

*(2B) Where a member of the Garda Síochána makes a requirement under subsection (2A), the member may request the person of whom the requirement is*

*made to produce for inspection any medical certificate of exemption referred to in section 4(1B) or 5(1B) which he or she holds.*

*(3) A person who refuses or fails to comply immediately with a requirement of a member of the Garda Síochána under this section commits an offence and is liable on summary conviction to a class A fine or to imprisonment for a term not exceeding 6 months or to both.*

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

Section 13B of the Act provides:

*"Obligation to provide blood specimen where suspected of certain offences involving drugs*

*13B. (1) Where a person is arrested under section 4(8), 5(10), 9(4), 10(7) or [11(6)] 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 section 9(2A) or 10(4),*
- (b) impairment tests under section 11, or*
- (c) an oral fluid test under section 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.*

*(2) Subject to section 22, a person who, following a requirement under subsection (1) —*

- (a) refuses or fails to comply with the requirement, or*
- (b) refuses or fails to comply with a requirement of a designated doctor or designated nurse in relation to the taking of a specimen of blood under that subsection,*

*commits an offence.*

*(3) A person who commits an offence under this section is liable on summary conviction to a class A fine or to imprisonment for a term not exceeding 6 months or to both.*

*(4) Section 1(1) of the Probation of Offenders Act 1907 does not apply to an offence under this section."*

### **The evidence in the Circuit Court**

**3.** The transcript of the Circuit Court hearing contains the prosecuting Garda's evidence, submissions by both solicitors and the decision of the Circuit Judge. The garda was on duty at a road checkpoint on 7 May 2021. He stopped the applicant who was driving a car with no visible tax or insurance disk, noticed a strong smell of cannabis coming from the car, searched the car and found a bag of cannabis. He said that due to the smell of cannabis from the car, the cannabis he had found and the demeanour of the applicant, he formed the view that the applicant was under the influence of an intoxicant and advised the applicant of this. He conducted an oral fluid test pursuant to s. 9(2A) which showed a positive result for cannabis. He informed the applicant that, as a result of the cannabis and his demeanour, he formed the opinion that the applicant was "*under the influence of an intoxicant to such an extent that it rendered him incapable of having control of a mechanically propelled vehicle in a public place*", i.e. the offence that is created by section 4(1). He told the court that he arrested the applicant under s. 4(8) for an offence contrary to s. 4(1), (2), (3) or (4) of the Act and explained to the applicant in ordinary language that he was arresting him on suspicion of drug driving. He brought him to the garda station and told him that he was making a requirement pursuant to s. 13B(1) to permit a doctor to take a blood specimen and a failure or refusal on the part of the applicant to provide the specimen was an offence and could lead to the imposition of a fine, a term of imprisonment or both. The blood specimen was sent for analysis which confirmed the presence of cannabis.

**4.** The garda's evidence was not challenged, but the applicant, via his solicitor, contended that the evidence given did not confirm an opinion that the applicant had committed an offence under s. 4(1A), which was required by section 13B(1). The garda had confirmed that he formed an opinion that the applicant had committed an offence under s. 4(1) for the purpose of the arrest. The applicant argued that the garda was not permitted to make a requirement under s. 13B and sought a direction from the court to

dismiss the case. The applicant's solicitor submitted to the Circuit Judge that the garda should have specified s. 4(1A) in listing the offences under sections 4(1), (2), (3) and (4). The Director asserted that the garda's evidence of arresting the applicant under s. 4(8) for offences under s. 4(1), (2), (3) and (4) included section 4(1A). The Circuit Judge summarised the question to be decided as whether s. 4(1) included s. 4(1A) and concluded "*I can't see that the evidence of the guard which it is suggested, effectively, excludes (a), can be right.*" Whilst the transcript refers to (a), the parties agreed that I should interpret that to mean section 4(1A).

### **Discussion**

**5.** The Director submitted to this court that the Circuit Judge determined that the opinion formed by the garda could not have excluded s. 4(1A) and said there was "*abundant evidence before him to make that finding.*" They said he did not, as claimed by the applicant, make a determination that the garda had formed an opinion that an offence had been committed contrary to s. 4(1) and that this was sufficient to comply with section 13B.

**6.** The Circuit Judge discussed whether subs. (1) could include subs. (1A) and stated that "*a certain reading [of s. 4(1), (2), (3), (4)] could be that it includes all subsections of that*". He described the applicant's case as asking him "*to exclude (a), to exclude anything that might be tagged on to (1), (2), (3) and (4) and [the Director's solicitor] is saying to me, 'no, that includes brackets (a)'*".

**7.** At least part, if not most of, the basis for the decision of the Circuit Judge was that subs. (1A) was somehow part of subsection (1). That is a misunderstanding of subs. (1A) of section 4. Hypothetically there could have been a s. 4(1)(a) (which does not appear in this legislation) i.e. a subsection (a) of subsection (1). Such a provision is an entirely different statutory concept to section 4(1A). It could not be suggested that s. 4(1) includes s. 4(1A) even though it might be possible to argue that a hypothetical s. 4(1)(a) would have been included in s. 4(1).

**8.** Section 4(1A) was introduced by the Road Traffic Act 2016 and created a new offence, reflected in the long title reciting that it was an Act to "*amend and extend*" the Road Traffic Acts 1961-2015. The 2016 Act inserted the new s. 4(1A) after the existing section 4(1). It also created a new s. 13B which set out the basis on which a garda could require an accused to furnish a blood specimen if the garda was of the opinion that an

offence under s. 4(1A) or of s. 5(1A) had been committed. That new offence in the new s. 4(1A) is nothing to do with s. 4(1) other than it is situated after s. 4(1) in the Act, as amended. There is no question that s. 4(1) includes s. 4(1A) or that s. 4(1A) is or might be "tagged on" to section 4(1).

**9.** Section 13B renders it an offence for a person to refuse or fail to furnish the blood specimen required of them and is, therefore, a penal provision that must be strictly construed. The authorities relied on by the Director, where the courts have held that the interests of justice require common sense to be applied to evidence (*DPP v. Ó Súilleabháin* [1995] 2 ILRM 617; *DPP v. Higgins* [2017] IECA 55), cannot be applied to a provision that requires such strict construction. Those authorities relate to the validity of an arrest, whereas what is at issue here is the statutory requirement of a section that renders it an offence, punishable by a fine and/or imprisonment, to fail or refuse to provide a blood specimen required by the garda. The garda is permitted to exercise that significant power only where they are of the opinion that an offence under s. 4(1A) or s. 5(1A) has been committed. That imposes a more onerous standard of proof to establish evidence of the existence of an opinion, than the circumstances in which the law allows for the application of common sense to the evidence that may satisfy the statutory requirements of a lawful arrest. Section 13B cannot be satisfied by what the Director submitted was an opinion that the garda would have been entitled to form on the basis of the roadside test alone (set out at the respondent's submissions at para. 34). Whether or not the garda could have formed the opinion on the evidence is not the issue. What matters is whether the Director has established compliance with s. 13B, i.e. that the garda "is of the opinion" that the person has committed an offence under s. 4(1A) or section 5(1A).

**10.** Section 13B is a mandatory provision which must be followed (similar to the statutory provision in *McCarron v. Groarke* (Unreported, High Court, Kelly J., 4 April 2000)). It cannot be satisfied by evidence that is claimed to have been established by implication, particularly where the evidence may be used to establish the committing of an offence.

**11.** I, therefore, find the Circuit Judge was not permitted, if indeed he did, to find by implication that the garda had given evidence of having been of the opinion that the applicant had committed an offence in relation to s. 4(1A). Insofar as the Circuit Judge

determined that the garda's evidence could not have excluded s. 4(1A), that this was an incorrect application of the legislation to the evidence and, therefore, an error of law.

**12.** Judicial review must lie to correct an error of this type, similar to the error at issue in the decision of the court in *Cork County Council v. Shackleton* [2011] 1 IR 443, where Clarke J. held at paras. 109 and 112 of his decision:

*"[109] It seems to me to follow that, where there has been a significant error in the interpretation of a material statutory provision leading to a decision of the property arbitrator being wrong in law, any such decision should, prima facie, be quashed.*

...

*[112] It should also be noted that the overall approach mandated by s. 96 is, in my view, a fundamental legal question. An error, if an understandable one, in adopting an inaccurate construction of the section is, therefore, in my view a sufficiently fundamental matter which should lead to the quashing of the arbitrator's determination."*

**13.** The consequences of the error made by the Circuit Judge here is that the garda had no power to require a blood sample under s. 13B and, as occurred in *DPP v. Greeley* [1985] ILRM 320, the certification of prohibited levels of cannabis in the applicant's blood "*has no status as evidence in a court of law*" (as per Barrington J. at p. 324) and as applied by Kelly J. in *McCarron v. Groarke* and by MacMenamin J. in *DPP v. Freeman* [2009] IEHC 179.

### **Conclusion**

**14.** The Circuit Judge erred in finding that the evidence of the garda of his opinion that the applicant had committed an offence under s. 4(1) included evidence of his opinion that the applicant had also committed an offence under s. 4(1A) and/or that s. 4(1A) could be tagged on to s. 4(1) and/or that s. 4(1) included section 4(1A). It is an error of sufficient significance in the interpretation of a penal statute that it cannot be allowed to stand and must be corrected.

**15.** I, therefore, grant an order of *certiorari* quashing the decision. I will hear counsel further on the issue of remittal, if any.

**16.** I will put the matter in for 10.30am on 19 June 2024.

**Counsel for the applicant:** Feichín McDonagh SC, David Staunton BL

**Counsel for the respondent:** Oisín Clarke BL