

THE SUPREME COURT

[Appeal No: 92 of 2008]

**Denham J.
Macken J.
O'Donnell J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

GERARD O'NEILL

RESPONDENT

Judgment delivered on the 16th day of February, 2011 by Denham J.

1. This is an appeal by the Director of Public Prosecutions, the prosecutor/appellant, "the D.P.P.", from a decision of the High Court (Edwards J.) delivered on the 15th February, 2008, [2008] I.E.H.C. 457.
2. The facts are set out in the case stated, signed by Judge Gerard J. Haughton on the 10th October, 2007. Gerard O'Neill, the accused/respondent, "the respondent", was arrested by a member of An Garda Síochána under s.50(10) of the Road Traffic Act, 1961. Garda Marion Galvin gave evidence as follows. On Friday the 30th September, 2005, at 11.41 p.m., she was on duty as observer of the official Arklow patrol car, accompanied by Garda Liam Rochford. While driving along the Main Street of Arklow she observed a motor car, registered number 04 WX 402, stopped with the engine running in the middle of the road facing towards the bridge. The car indicated to turn left and then indicated to turn right and was about to move off when Garda Galvin approached the driver. The car was causing an obstruction to traffic heading towards the bridge. On speaking to the driver, Garda Galvin got a strong smell of alcohol from his breath and noticed that his speech was slurred. The keys were in the ignition of the car and the engine was running. The driver gave his name as Gerard O'Neill, who is the respondent. Garda Galvin formed the opinion that the respondent was under the influence of an intoxicant to such an extent as to be incapable of having proper control of a mechanically propelled vehicle while under the influence of an intoxicant at Wexford Road, a public place. At 11.42 p.m. Garda Galvin arrested the respondent under s.50(10) of the Road Traffic Act, 1961, as amended, for an offence under s.50(1), s.50(2), s.50(3) or s.50(4) of said Act. Garda Galvin explained to the respondent in ordinary language, as stated in the Case Stated, that she was arresting him for "drink driving". Garda Galvin gave further evidence which is not relevant to the issue before the Court. On cross-examination, Garda Galvin again stated that she observed the respondent's vehicle indicate to turn right and then to turn left by the operation of the indicators. She stated further that in concluding that the vehicle was about to move off she had observed that the brake lights of the vehicle,

which had been on, went off. Garda Galvin stated that she was familiar with the provisions of s.50 of the Road Traffic Act, 1961, as amended. She agreed that she did not see the respondent actually driving the vehicle, that the vehicle was stationary and that the respondent was attempting to drive. She also agreed that she told the respondent that she was arresting him for "drunk driving".

3. Judge Haughton held that he was satisfied of the following facts: -

(a) That the respondent attempted to drive the vehicle;

(b) That the opinion formed by the garda was bona fide though mistaken.

4. Judge Haughton stated that it was his view that the alternate verdicts available in prosecutions under s.49 and s.50 of the Road Traffic Act, 1961, as amended, were relevant to the matter and that having regard to the evidence in the case, he was of the opinion that the arrest was lawful.

5. Judge Haughton stated a case for the opinion of the High Court and consequently reserved his decision on the said complaint pending determination of the case stated.

6. The opinion of the High Court was sought on the following question:

"On the facts as found by me and on the evidence given by Garda Marion Galvin as to her observations of the vehicle prior to the arrest of [the respondent] as a matter of law can it be held that the arrest of [the respondent] was lawful?"

7. On the 15th February, 2008, the High Court answered the question in the negative.

8. The learned High Court judge held, inter alia: -

"I am satisfied that in enacting ss.49 and 50 the Oireachtas clearly intended to comprehensively address all manifestations of the mischief in question and to that end intended that the sections should complement each other. It is clear that this is so from the presence of the alternative verdict provisions contained in s. 49(6)(b) and s. 50(6)(b) respectively. I think that any other construction would be absurd and untenable.

However, my conclusion in that regard does not dispose of the issue that has been raised in this case. It does not dispose of it because, notwithstanding that the Oireachtas intended that ss.49 and 50 should complement each other, both of these sections contain separate and distinct powers of arrest. These are contained in s. 49(8) and s. 50(10) respectively. The power of arrest created by each of these subsections respectively relates only to "a person who in the member's opinion is committing or has committed an offence under this section" (my emphasis).

What is the significance of this? It is this. The applicant contends that for the power of arrest under either subsection to be validly exercised the member must hold the

required opinion, and that opinion must be bona fide held and not irrational. The bona fides of Garda Galvin is not in issue. However, the rationality of her opinion that an offence under s. 50 had been, or was being, committed is in issue. If the applicant is right then the arrest was bad. If the arrest was bad then the accused was detained in breach of his constitutional right to liberty. Notwithstanding that this might have occurred without mala fides on the part of Garda Galvin, and due to a genuine mistake of fact, the arrest was undoubtedly a deliberate and conscious action in the sense referred to in People (DPP) v. Kenny [1990] I.L.R.M. 569. That being the case, and in the absence of extraordinary excusing circumstances (of which there do not appear to be any), all evidence obtained in consequence of this deliberate and conscious violation of the accused's constitutional right to liberty would be tainted and inadmissible at trial. Such evidence would include, in the circumstances of this case, the sample of blood taken from the accused in Arklow Garda Station, and its analysis. Accordingly, although it would theoretically be open to the District Judge to convict the accused of an s. 49 offence following his trial on a charge preferred under s. 50, he could only do so if there was evidence that an offence under s. 49 had been committed. In circumstances where evidence relating to the blood sample and its analysis could not be admitted, and in the absence of other admissible evidence of intoxication, the District Judge would have no option but to acquit the accused.

While it might be argued, as the respondent has sought to do in this case, that the legislature never envisaged that an intended target of ss. 49 and 50 should "fall between two stools", and that accordingly any construction leading to that result ought to be rejected as absurd, I must respectfully disagree. The language used in both s. 49(8) and s. 50(10) is quite clear. They cannot be read as one, or as being interchangeable, without doing violence to the plain wording of the statute. Moreover, while acknowledging that in the particular circumstances of the present case this may, on one view of it, lead to an absurd result, I cannot ignore the rules of construction of statutes. Sections 49 and 50 of the Road Traffic Act, 1961 are penal provisions and accordingly must be construed strictly. I have had regard to s. 5(1) of the Interpretation Act 2005. This subsection permits the construction of certain statutory provisions, which if interpreted literally would give rise to an absurdity, in a manner consistent with the plain intention of the legislature, where that intention can be ascertained from the Act as a whole. However, provisions relating to the imposition of a penal or other sanction are expressly excluded from the ambit of s. 5(1) of the 2005 Act.

It comes down to this. I consider that the applicant is right in his contention that for the power of arrest under s. 50(10) to have been validly exercised Garda Galvin's opinion must not have been irrational. Therefore the fundamental question that I have to answer is "was the opinion formed by Garda Galvin a rational one in the circumstances?"

On the evidence before me I am driven to the conclusion that the circumstances facing Garda Galvin were clear and unambiguous. When Garda Galvin first observed the accused's car it was stopped in the middle of the road with the engine running and the brake lights on, she observed the activation of the left hand indicators, followed by the right hand indicators, and then observed the brake lights go out. She believed, entirely reasonably, that it was about to move off. She approached the vehicle and observed the accused seated in the driver's seat thereof. This accused was conscious and awake, unlike the accused in the case of DPP v. Edward Byrne. The keys were in the ignition. The engine was still running. During all this time the vehicle did not actually move.

Section 2 of the Road Traffic Act, 1961 defines the words "driving" and "driver" as used in the Act in the following way:

"Driving' includes managing and controlling ... and 'driver' and other cognate words shall be construed accordingly."

Having regard to this definition of driving I consider that the only rational interpretation of the circumstances facing Garda Galvin was that the accused was attempting to drive. There was clear evidence of manipulation of the controls by the accused and, in circumstances where the engine was running, it was clearly to be inferred that the accused was attempting to drive.

In all the circumstances I must hold that the opinion formed by Garda Galvin that an offence had been, or was being, committed under s. 50, as opposed to under s. 49, was irrational. That being the case, I find that the accused's arrest and subsequent detention was unlawful and in deliberate and conscious violation of his constitutional right to liberty. In consequence of that, the sample of the accused's blood taken in Arklow Garda Station was "a fruit of the poisoned tree" and inadmissible as such."

The learned trial judge distinguished the judgment of Finnegan P. in *Director of Public Prosecutions v. Moloney* (Unreported, High Court, Finnegan P., 20th December, 2001). The High Court held that in the *Moloney* case it was immaterial as to whether an accused was arrested under s.49(8) or s.50(10) because the presenting facts were ambiguous in relation to whether a s.49 offence or a s.50 offence had been committed and the garda could bona fide have been of opinion that either offence had been committed. Edwards J. stated that that was not the situation in this case and answered the question in the negative.

Grounds of Appeal

9. On behalf of the D.P.P. six specific grounds of appeal were filed, as follows:-

- (i) The learned judge erred in law in answering in the negative the question posed by the District Judge to wit:- "On the facts as found by me and on the evidence given by Garda Marion Galvin as to her observations of the vehicle prior to the arrest of

the accused, as a matter of law, can it be held that the arrest of the accused was lawful? The correct answer to the case stated is "yes" and the learned Judge should have so found and answered.

- (ii) The learned Judge erred in law and in fact in the correlating Garda Galvin's opinion with the statutory definition of "driving" and so erred in concluding or inferring that because that which the Garda observed came within the definition of "driving" as contained in the Road Traffic Act 1961, as amended, the respondent should have been arrested for "drink driving" under section 49 rather than "drunk in charge" as provided for in section 50 of the Act and any contrary view formed by Garda Galvin was irrational.
- (iii) The learned Judge erred in law in his determination that Garda Galvin's bona fide held opinion was irrational such that the arrest of the respondent was unlawful.
- (iv) The learned Judge erred in law in failing to properly consider and apply the legislative scheme provided in the Road Traffic Acts 1961, as amended, and although he noted that the legislative scheme was directed at a single mischief of which there are many manifestations, he erred in the conclusion that on the basis of objective evidence of "driving" the arrest which was stated by Garda Galvin to have been effected pursuant to section 50 of the Act was unlawful notwithstanding her genuine subjective belief.
- (v) The learned Judge erred in law in failing to have regard to the fact that a person may be arrested under section 50 of the Road Traffic Act, 1961, as amended, where in the opinion of a member of An Garda Síochána he is committing or has committed an offence under the section.
- (vi) The learned Judge erred in law or in fact or partly in law and partly in fact in failing to have regard to the evidence that Garda Galvin informed the respondent that he was being arrested for "drink driving".

Statute

10. Subsections 1,2,3,4,6 and 8 of s.49 of the Road Traffic Act, 1961, as substituted by s.10 of the Road Traffic Act, 1994 state: -

- "(1) (a) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while he is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle.
- (b) In this subsection "intoxicant" includes alcohol and drugs and any combination of drugs or of drugs and alcohol.
- (2) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration

- of alcohol in his blood will exceed a concentration of 80 milligrammes of alcohol per 100 millilitres of blood.
- (3) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his urine will exceed a concentration of 107 milligrammes of alcohol per 100 millilitres of urine.
 - (4) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his breath will exceed a concentration of 35 microgrammes of alcohol per 100 millilitres of breath.
 - (6) (a) A person who contravenes subsections (1), (2), (3) or (4) of this section shall be guilty of an offence....
(b) A person charged with an offence under this section may, in lieu of being found guilty of that offence be found guilty of an offence under section 50 of this Act.
 - (8) A member of An Garda Síochána may arrest without warrant a person who in the member's opinion is committing or has committed an offence under this section."

Subsections 1, 2, 3, 4, 6(b), 8 and 10 respectively of s. 50 of the Road Traffic Act, 1961 as substituted by s. 11 of the Road Traffic Act, 1994, state: -

- "(1) (a) A person shall be guilty of an offence if, when in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle (but not driving or attempting to drive it), he is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle.
(b) In this subsection "intoxicant" includes alcohol and drugs and any combination of drugs or of drugs and alcohol.
- (2) A person shall be guilty of an offence if, when in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle (but not driving or attempting to drive it), there is present in his body a quantity of alcohol such that, within 3 hours after so being in charge, the concentration of alcohol in his blood will exceed a concentration of 80 milligrammes of alcohol per 100 millilitres of blood."
- (3) A person shall be guilty of an offence if, when in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle (but not driving or attempting to drive it), there is present in his body a quantity of alcohol such that, within 3 hours after so being in charge, the concentration of alcohol in his urine will exceed a concentration of 107 milligrammes of alcohol per 100 millilitres of urine.
- (4) A person shall be guilty of an offence if, when in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the

vehicle (but not driving or attempting to drive it), there is present in his body a quantity of alcohol such that, within 3 hours after so being in charge, the concentration of alcohol in his breath will exceed a concentration of 35 microgrammes of alcohol per 100 millilitres of breath.

- (6) (b) A person charged with an offence under this section may, in lieu of being found guilty of that offence, be found guilty of an offence under section 49 of this Act.
- (8) In a prosecution for an offence under this section it shall be presumed that the defendant's intent to drive or attempt to drive the vehicle concerned until he shows the contrary.
- (10) 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."

Submissions

11. On behalf of the D.P.P. it was submitted that where there is sufficient information to ground a genuinely held, if inaccurate, opinion, that opinion should not be deemed irrational, but rather mistaken. The learned High Court Judge attributed "irrationality" to Garda Galvin's opinion on the basis of statutory interpretation and the legal definition of "driving" contained therein. Far from there being a complete absence of circumstances to justify her opinion, it was submitted that the High Court took into account the presence of additional circumstances which, with the benefit of hindsight, including a detailed consideration of the relevant statutory provisions, ought to have led Garda Galvin to conclude that a different but related statutory offence was being committed. Counsel on behalf of the D.P.P. submitted that the opinion of the arresting Garda did not fall to be categorised as "unreasonable" or "irrational", but was properly described by the District Judge as "bona fide but mistaken".

It was submitted further that in his judgment the learned High Court Judge made some concession for circumstances where members of An Garda Síochána enforce sections 49 and 50 of the Road Traffic Act, 1961 where "the presenting facts were ambiguous". The learned High Court judge did not, however, consider that such a situation arose on the facts presented in the case stated. By recognising the validity of opinions held, and arrests made, in such circumstances, it was submitted that the learned High Court Judge accepted the premise contended for on the D.P.P.'s behalf. It was submitted that the concession that a member of An Garda Síochána may make a valid arrest on foot of an opinion mistakenly arrived at recognised that such a category of cases exists. It was submitted that as the District Court held that the factual circumstances of this case came within that category, and since that finding is supported by evidence, the High Court ought not to have disturbed the finding of the District Judge.

For these and other reasons advanced, it was submitted on behalf of the D.P.P. that the Court should answer the case stated in the affirmative.

12. On behalf of the respondent it was submitted, inter alia, that s.49 and s.50 of the Road Traffic Act, 1961, as amended, contain separate and distinct powers of arrest. These

powers are in s.49(8) and s.50(10). The power of arrest created by each of these subsections relates only to "a person who in the member's opinion is committing or has committed an offence under this section". It was submitted that although the statute allows for alternative verdicts it does not exonerate unlawful arrests; that a lawful arrest is an essential element in a drunk driving prosecution. Where the arrest is unlawful, it was submitted, it taints the steps thereafter.

In oral submissions counsel for the respondent referred to *Hobbs v. Hurley* (Unreported, High Court, Costello J., 10th June, 1980) and argued that Costello J. had stated that the opinion of the arresting garda must be reasonable, and that the law requires that the opinion be reasonable. Reference was made also to the *Director of Public Prosecutions v. Breheny*, (Unreported, Supreme Court, 3rd March, 1993), as indicating a requirement that the opinion be reasonable. Counsel referred also to *Director of Public Prosecutions v. Gray*, (Unreported, High Court, 8th May, 1987), where, he submitted, O'Hanlon J. required that the opinion be reasonable. Counsel for the respondent argued that in this case it was unreasonable on the facts to have an opinion that the driver was committing or had committed an offence under section 50. The offence described in s.50(1) being when a person "when in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle (but not driving or attempting to drive it) ... is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle." Counsel submitted that it was unreasonable for Garda Galvin to conclude that the driver was in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle (but not driving or attempting to drive it). Counsel argued that the opinion of Garda Galvin was unreasonable on the evidence and that the answer to the question in the case stated should be in the negative.

DECISION

Rationality

13. The learned High Court judge introduced the concept of rationality into his analysis of an arrest under the Road Traffic Acts. In that analysis the learned High Court judge fell into error. The public law rationality jurisprudence is not relevant to the analysis of an opinion formed in relation to an arrest under the Road Traffic Acts. Although, of course, irrationality in the ordinary sense may be relevant to the issue as to whether or not an opinion was bona fide.
14. Counsel for the respondent did not, in fact, advance his submissions to this Court on the basis of the rationality jurisprudence. Rather, counsel submitted that the question of reasonableness was a relevant part of the analysis.

Statutory Arrest

15. At issue in this case is the arrest of the respondent. The arrest was a statutory arrest, pursuant to the Road Traffic Act, 1961, as amended. The words of s.50(10) are clear and provide that a member of An Garda Síochána may arrest a person "... who in the member's opinion is committing or has committed an offence under this section."

16. The opinion of the member must be bona fide. This was agreed by both counsel and I would affirm such a position.

Reasonable

17. The term "reasonable" does not appear in either s.49 or s.50 of the Road Traffic Act, 1961, as amended. Those sections are unlike s.112 and s.113 where the subsection providing for arrest includes the word "reasonable". Thus s.112(6) provides that where a member of An Garda Síochána "has reasonable grounds for believing" that a person is committing an offence under the section he may arrest the person without warrant.

18. The Court was referred to several cases on the issue of reasonableness. In *Director of Public Prosecutions v. Breheny* (Unreported, Supreme Court, 2nd March, 1993), Egan J. stated, in reference to s.13(3) of the Road Traffic (Amendment) Act 1978, as amended by s.5 of the Road Traffic (Amendment) Act, 1984:-

"If the opinion is genuinely and reasonably held at the time of the making of the request, it seems to me that the literal terms of the subsection have been complied with and it makes no difference that the member's opinion is not proved to be factually accurate.

I cannot see any compelling reason why the subsection should not be construed strictly in accordance with its wording which only demands an opinion. An arrest under the section could still be good if the member's opinion regarding the consumption of alcohol was totally wrong and the test at the station proved that not a single drop had been consumed."

19. In *Hobbs v. Hurley*, (Unreported, High Court, Costello J., 10th June, 1980), High Court, 10th June, 1980, Costello J. held that:-

"A lawful arrest can be made when a member of the Garda Síochána is of the opinion that "an offence under the section" has been committed. There are three distinct offences created by section 49 and it is quite clear that at the time of arrest it would not be possible for the Garda then to know under which sub-section a suspect would subsequently be charged. The Oireachtas has therefore permitted an arrest to be made when an opinion is arrived at that an offence under the section has been committed – an opinion which does not depend on a conscious determination based on scientific evidence that the statutory limit of alcohol in the blood or urine of the arrested person has been exceeded. The opinion arrived at must, of course, be a reasonable one, and must be one which results from an honest belief come to after facts have been ascertained and considered."

20. In *Director of Public Prosecutions v. Finnegan* [2009] 1 I.R. 48, Clark J. recently reviewed the case law. She stated:-

"As the arrest played a large part in the applicant's arguments, I believe that I should make some observations on the matter. As a general proposition, it is undesirable that an arrest based on reasonable cause should be invalidated by facts

found at a trial. This is not to say that the trial judge is precluded from impugning an irrational decision or one based on mala fides or an abuse of power. The protection for investigator and citizen alike is that the suspicion must be reasonably held at the time of the arrest when the facts are still being investigated.

Over the years, the courts have considered the characteristics of a legitimate opinion or suspicion which grounds an arrest. In Gallagher v. O'Hanlon (Unreported, High Court, Finlay P., 10th July 1975) Finlay P. referred to the necessity of the "reasonableness of the opinion". Costello J. in Hobbs v. Hurley (Unreported, High Court, Costello J., 10th June, 1980) stated that:-

"the opinion arrived at must, of course, be a reasonable one, and must be one which results from an honest belief"

Egan J. in DPP v. Breheny (Unreported, Supreme Court, 2nd March, 1993) stated that:-

"If the opinion is genuinely and reasonably held at the time of the making of the request, it seems to me that the literal terms of the subsection [s. 12(1) of the Road Traffic Amendment Act] have been complied with and it makes no difference that the member's opinion is not proved to be factually accurate."

In the modern text, Criminal Law (Charleton, McDermott, and Bolger, Dublin 1999), a reasonable suspicion is defined at p.141 as one "founded on some ground which, if subsequently challenged, will show that the person arresting...acted reasonably."

The prosecutor's arguments, that the validity of an opinion that a crime has been committed does not rely on a subsequent analysis, is well founded. It is well settled and indeed common sense that an opinion or suspicion, arrived at in good faith is not invalidated by subsequent court findings. This view was recently restated in DPP v. Penny [2006] 3 I.R. 553, with Dunne J. holding at p. 564 that:

"... in the present circumstances there is a finding of fact that the garda had formed the necessary opinion. In those circumstances, that being so, I cannot see how a fact so found can be vitiated by subsequent events".

In the current case, the arrest of [Jonathan Finnegan] for driving while intoxicated on the night of 23rd July, 2006 could not be rendered invalid by the trial judge's finding that he had a doubt that Jonathan Finnegan was driving that night."

21. Section 50(10) of the Road Traffic Act, 1961, as amended, provides that

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

Thus the statutory requirement is that the member form an opinion. There are no qualifying words relating to that opinion in the statute. It is well established that the arrest should be bona fide. This case proceeded on the basis that reasonableness was a requirement of a valid arrest. For present purposes it is not necessary to decide if this assumption is well founded.

22. In this case, the member of An Garda Síochána formed an opinion, bona fide, on the facts and reached a conclusion of law and invoked section 50(10). The opinion of Garda Galvin was reasonable. The arrest of the respondent was lawful. The fact that at a later date her opinion as to which of the two closely related and technical sections, s.49 and s.50 of the Road Traffic Act, as amended, was the applicable one in law, was found to be mistaken, does not render the lawful arrest unlawful. The intersection between s.49 and s.50 is a difficult one in law.
23. Legal technicalities may arise on an analysis of the terms of s.49 and s.50 of the Road Traffic Act, 1961, as amended. However, the mischief addressed by the legislature relates to persons unfit to drive due to the consumption of alcohol who are in charge of a motor vehicle and have an intention to drive. See Murray J. *Director of Public Prosecutions v. Byrne* [2002] 2 I.R. 397, at p.408. The act enables a prosecution proceed even if an arrest were made under a different section. Thus, for example, a person charged under one section, say s.50, may be prosecuted under s.49. Also, a person prosecuted under, say s.49, may be convicted under s.50, and vice versa. Of course an arrest made mala fides would taint proceedings. However, it was not intended by the legislature that s.49 and s.50 become so separately and technically interpreted and applied as to defeat the policy of the legislature.
24. Finnegan P. addressed the scheme of the Road Traffic Acts in *The Director of Public Prosecutions v. Moloney*, (Unreported, High Court, 20th December, 2001). He stated: -

"... the scheme of the Road Traffic Acts, 1961/95 is relevant. Section 49(6)(b) provides that a person charged with an offence under that section in lieu of being found guilty of that offence may be found guilty of an offence under Section 50 of the Acts. Section 50(6)(b) provides that a person charged with an offence under that section in lieu of being found guilty of that offence may be found guilty of an offence under Section 49 of the Acts. In each case, the person to be charged is the driver, as defined in the Acts. The distinction between the offences is that in Section 49 there is a requirement that the driver drive or attempt to drive and in Section 50 that he be in charge of the vehicle with intent to drive or attempt to drive the vehicle but not driving or attempting to driver it. The distinction in any particular set of circumstances between the word drive, attempt to drive and in charge is not without difficulty: see footnotes to the Road Traffic Act, 1994 Sections 10 and 11 in Irish Current Law Statutes for discussion. I am satisfied that the object of the provisions in Section 49((6)(b) and Section 50(6)(b) are designed to alleviate this difficulty. Had the Respondent in fact been charged under Section 50 of the Acts, he could have been convicted under section 49 and vice versa."

I agree with the analysis of Finnegan P..

25. In this case, the member of An Garda Síochána formed an opinion, bona fide, on the facts, and arrived at a conclusion of law and applied s.50(10). The opinion of Garda Galvin was reasonable. The arrest of the respondent was lawful. The fact that at a later date the opinion may be found to be mistaken does not alter the validity of the arrest. Nor is the validity of the arrest altered if at a later stage it is decided to prosecute the respondent under s.49, rather than section 50. In his analysis the learned trial judge fell into error. Thus I would allow the appeal, and answer the question posed in the affirmative.

Conclusion

26. The question posed in the case stated was:

"On the facts as found by me and on the evidence given by Garda Marion Galvin as to her observations of the vehicle prior to the arrest of [the respondent] as a matter of law, can it be held that the arrest of [the respondent] was lawful?"

For the reasons given I would answer the question in the affirmative.