

Director of Public Prosecutions (Long) v McDonald and Others and O'Mahony and Others v Biggs and Others: Supreme Court 1979 Nos. 19 & 20 (Walsh J, Henchy and Griffin JJ) 22 July 1982 (Nem.Diss.)

Road Traffic – Street traders – Conviction for breach of byelaws made for the control of traffic – Whether vehicle being used in connection with the sale of goods in a lawful market – Presumption of immemorial usage from which a lost grant presumed – Constitution of Ireland 1937, Art.40.3 – Road Traffic Act, 1961, (No.24), ss.89(I), 89(7), 90(I), 92

Facts S.89 of the Road Traffic Act 1961 empowers the making of bye-laws for the regulation and control of traffic and pedestrians, and s.90 empowers the making of bye-laws for the control and regulation of the parking of vehicles on public roads. S.92 of the Act provides for the making of bye-laws to provide free passage of vehicular traffic through public roads on the occasion of fairs or markets. The defendant street traders in the instant two sets of cases sold their wares at fairs and markets using their motor vehicles as mobile shops and were prosecuted and convicted in the District Court for breaches of bye-laws made under ss.89 and 90. They appealed unsuccessfully by way of case stated to the High Court and now appealed to the Supreme Court contending (1) the bye-laws were bad for being unreasonable (2) they were bad for lack of good faith in their making and (3) that bye-laws under ss.89 and 90 were not applicable to the circumstances of these cases. The defendants in the first set of cases had each parked a motor van in connection with the sale of goods at Barrack Street, Carlow where a market carried on theretofore at Tullow St. from 1950 and which had moved to Barrack St. at the request of the Garda Síochána had been carried on since 1956 though under no statute or express grant. The defendants in the second set of cases had contravened bye-laws made under ss.89 and 90 by parking their vans in Grattan Square, Dungarvan for over one hour during a market. Uncontradicted evidence showed that a market had been held during living memory in the square on the third Wednesday of each month.

Held (Henchy J, Griffin, Walsh JJ concurring) Submissions (1) and (2) were not supported by the evidence. On the facts when a market had been held for such a long period as the market at Barrack St. there was a presumption of immemorial usage from which a lost grant might be presumed and the holding of a regular market uninterruptedly there since 1956 and indeed elsewhere since 1950 raised the presumption that it was a lawful market. The evidence established that there had been a lawful market at Grattan Square on the occasion of each of the offences giving rise to the second set of cases. In each set of cases, bye-laws made under s.92 would be required to make the conduct complained of unlawful. Since the only bye-laws relied on by the prosecution in each set of cases were made under ss.89 and 90 which were accordingly not applicable the appeals in each of the two cases stated would be allowed.

No cases referred to in judgement.

Ercus Stewart SC and Margaret Walsh for the appellants

Thomas Connolly SC, John Cooke SC and Susan Denham for the respondents

HENCHY J (Walsh and Griffin JJ concurring) delivered his judgement on 22 July 1982 saying: The defendants in each of these two cases stated are street traders. They make their living by travelling around the country and selling their wares at fairs and markets, using their motor vehicles as mobile shops. Such a mode of trading is apt to cause traffic problems when it takes place in the narrow streets and congested squares of provincial towns. Parked motor vehicles, around which shoppers congregate, are usually incompatible with the need to have parking restrictions so as to have an adequately free flow of vehicular traffic. The Road Traffic Acts have recognized the need to control local traffic and parking problems by giving power to make special bye-laws designed to meet the needs of particular localities. As distinct from the power to make general bye-laws for the control of traffic and pedestrians in public places generally, these bye-laws (which are allowed to be made under s.89, s.90 or s.92 of the Road Traffic Act 1961) are designed to deal with special local problems, and the relevant local authority is given a say in the making of them.

S.89 (I) empowers the Commissioner of the Garda Síochána, with the consent of (now) the Minister for the Environment and after consultation with the local authority concerned, to make in respect of any specified area bye-laws for the regulation and control of traffic and pedestrians and to facilitate the movement of traffic and pedestrian. S.89 (7) makes it an offence to contravene a bye-law thus made. A study of the section as a whole shows that it is primarily designed to control *traffic* on specified public roads.

S.90(I) empowers the Commissioner of the Garda Síochána, with the consent of (now) the Minister of the Environment and after consultation with the local authority concerned, to make in respect of any specified area bye-laws for the control and regulation of the parking of vehicles on public roads. Bye-laws made under s.90 (I) are devoted exclusively to the control and regulation of *parking*. A contravention of such a bye-law is made an offence.

If (as happened in the instant cases) bye-laws are made under s.89 and s.90, they may regulate and control both traffic and parking on the specified public roads.

There is a third way provided in the Act for the resolution by bye-laws of a special kind of local traffic problem on the roads. This is to be found in s.92. Bye-laws made under this section are designed to provide ‘free passage of vehicular traffic through public roads on the occasion of fairs or markets’. Unlike bye-laws made under s.89 or s.90, such bye-laws are made, not by the Commissioner of the Garda Síochána, but by the relevant local authority acting on its own. Furthermore, the scope of their operation is more limited in time and place, for they are permitted to be made only for the purpose of securing the free passage of vehicular traffic through public roads on the occasion of fairs or markets.

This limitation of the scope and application of bye-laws made under s.92 is necessary because a fair or a market is a property right. It is a franchise conferring a right to hold a concourse of buyers and sellers to dispose of commodities. The property rights involved in that franchise are required by Art. 40.3. of the Constitution to be protected as far as practicable by the laws of the State. The Legislature, by s.92 obviously considered that the common good warranted that a fair or market held on a public road could be encroached on by bye-laws made under that section, but only to extent of securing the free passage of vehicular traffic through the public road on the occasion of the fair or market. Such an inroad on the property right was obviously deemed by the Legislature to be constitutional.

Therefore, on a comparison of the power to make bye-laws under s.89 or s.90 with the power to make bye-laws under s.92, I am satisfied that the legislative intent was that when what is to be controlled is vehicular traffic in a fair or market held in a public place (which s.3 (I) defines as ‘any street, road or other place to which the public have access with vehicles whether as of right or by permission and whether subject to or free of charge’), the bye-laws must be made under s.92.

The defendants in each of these sets of cases were prosecuted in the District Court for breaches of bye-laws made under ss.89 and 90. They were all convicted and fined. They appealed, by case stated, unsuccessfully to the High Court. They now appeal further to this court. Their appeal is based on three main submissions: (I) that the bye-laws are bad for being unreasonable; (2) that they are bad for lack of good faith in their making, in that (it is said) they were made under pressure from local traders; and (3) that bye-laws made under ss.89 and 90 are not applicable to the circumstances of these cases. I do not consider submissions (I) and (2) to be supported by the evidence, but submission (3) requires to be dealt with fully in the light of the circumstances of each of the two sets of cases.

I turn, therefore to consider each set of cases separately.

THE CARLOW PROSECUTIONS

Each of the defendants in this set of cases was summonsed, convicted and fined for parking a motor van ‘where parking was permitted by means of a traffic sign, the said vehicle being used in connection with the sale of goods, contrary to bye-laws 6(a) of the Carlow Traffic and Parking Bye-Laws, 1969’. These are bye-laws made under ss.89 and 90 of the Road Traffic Act, 1961 (as amended by s.6 of the Road Traffic Act, 1968). They expressly apply to the area comprising the urban district of Carlow. Bye-law 6(a) of those bye-laws prohibits parking in connection with the sale of goods on a public road within the Carlow urban district where parking is permitted or restricted by means of traffic sign. There is no doubt that each defendant, on the date charged, parked a motor van in connection with the sale of goods at Barrack St, Carlow, a street within the urban district of Carlow where parking was permitted by means of a traffic sign. It is clear, therefore, that each conviction was good in law – that is, unless the vehicle was being used in connection with the sale of goods in a market. In that event, bye-laws made under ss.89 and 90 would have no application.

It appears from the case stated that no evidence was adduced to show that a market existed under either statute or express grant in any street in Carlow. However, there was uncontradicted evidence that from at least 1950 until 1956 a regular market was held in Tullow St, Carlow, apparently without let or hindrance from anybody, and that many of the defendants and their predecessors traded there from their vans on market days. In 1956, at the instigation of the Garda Síochána because of traffic congestion, the traders in the market in Tullow St. were asked to transfer to Barrack St. This they did, and from 1956 until 3 May 1976 (the date of the alleged offences) the market was regularly and continuously held in Barrack St.

The law would appear to be that when a market has been held for such a long period there is a presumption of immemorial usage from which a lost grant may be presumed.

What period of user will raise that presumption will vary case to case, but the authorities show that the unexplained user of an easement or other incorporeal right for a period of twenty years is presumptive evidence of the existence of the right from time immemorial. The cases also show that the rule is not inflexible and that the period of twenty years is fixed only as a convenient guide.

I am inclined to the view that the holding of a regular market uninterruptedly in Barrack St. since 1956 raises a presumption that it is a lawful market. Further, I consider that to that prescriptive period may be added the period from 1950 to 1956, for, as the judicial authorities show, where a market or fair is granted to be held in a district, such as a borough, township, or manor, it may be held throughout that district or in any one or more places within that district, but where it is granted to be held in a place defined by metes and bounds it must be held within those metes and bounds. There is no suggestion that the Carlow market (if such exists) was defined by metes and bounds.

In these Carlow cases it does not lie with the prosecuting authorities to say that the market now held in Barrack St. since 1956 is not a lawful continuation of the market which was held before that year in Tullow St, for it was the Garda Síochána authorities who persuaded the market traders in 1956 to transfer the market from Tullow St. to Barrack St. They cannot suggest – nor do they – that what they persuaded the traders to do in 1956 was an illegality.

My deduction from the evidence is that the conduct alleged to constitute the offences charged arose out of trading in what may be a lawful market. If it is, the control of trading in that market so as to make the conduct complained of unlawful would require the bye-laws to have been made under s.92. Apparently no such bye-laws were made. The only bye-laws relied on by the prosecution are those made under ss.89 and 90, but they may have no application to the conduct complained of in these prosecutions. It would be inappropriate in dealing with these District Court prosecutions (in which the only parties represented were the Garda Síochána and defendants) to express a conclusion which might be taken to be a judgement *in rem* in favour of the existence of a lawful market in Barrack St. on the occasion in question. It has to be said, however, that the evidence was such that an onus was placed on prosecution to

show that a lawful market was *not* being held on that occasion. That onus was not discharged by the prosecution. The summonses, therefor, should have been dismissed.

The District Justice who stated this case having died, I would rule that continuances should be entered in Carlow District Court so that another District Justice may order that, in lieu of the convictions entered, the several summonses should stand dismissed.

THE DUNGARVAN PROSECUTIONS

Each of these thirteen defendants was summonsed, prosecuted, convicted and fined in Dungarvan District Court on a complaint that he or she had parked a mechanically propelled vehicle, to wit, a motor van, at Grattan Square, Dungarvan, a place where the parking of vehicles is prohibited by the Dungarvan Traffic and Parking Bye-Laws 1972.

Like the Carlow bye-laws, these bye-laws are expressed to be made under ss.89 and 90 of the Road Traffic Act 1961, (as amended by s.6 of the Road Traffic Act 1968). Bye-Law No.7 of those Bye-Laws had the effect of prohibiting the parking of a vehicle in Grattan Square (or the Market Square, as it is otherwise called) for more than one hour. All defendants had contravened that prohibition by parking their vans in the Square for over one hour. But the uncontradicted evidence was that the occasion of each alleged offence was the market which is held in the Square on the third Wednesday of each month. The defendants were selling their wares in the course of the market from their parked vans.

These prosecutions differ from the Carlow prosecutions in that apparently a charter for the market in question was said to exist. However, the charter or a copy of it was not produced in the District Court, so it is not permissible to act on hearsay evidence as to its existence or contents. As against that, there was categorical and uncontradicted evidence that, so far as living memory goes, a market has always been held in the Square on the third Wednesday of each month. *Prima facie* at least, therefore, the occasion of each offence charged was a lawful market, for it was agreed by the prosecution that the parking objected to in each prosecution took place on the third Wednesday of each month and was for the purpose of selling goods in the course of the market held in the Square on that day.

For the reasons I have given in dealing with the Carlow prosecutions, I consider that bye-laws made under ss.89 and 90 were not intended by Parliament to deal with the conduct complained of. If the prohibitions in these bye-laws could be said to apply to a fair or a market, they could be used to cripple or put out of existence, without any compensation, the particular fair or market. And that could be unconstitutional. Moreover, if bye-laws made under ss.89 and 90 could be used to prevent obstruction of traffic by fairs and markets, the enactment of s.92 would have been superfluous and pointless. Such an exercise in futility should not be imputed to Parliament. The inescapable conclusion is that, whereas local problems as to the control of traffic and pedestrians and parking may be dealt with by bye-laws made under ss.89 and 90, the control and regulation of vehicular traffic through a public road where a fair or market is being held can be affected only by bye-laws made under s.92 (I), and then only to the extent allowed by that subsection.

Accordingly, because the evidence supports a *prima facie* conclusion that a lawful market was being held in Grattan Square on the occasion of each of the offences charged, I would rule that the convictions made in each of the offences charged, I would rule that the convictions made in each of the Dungarvan prosecutions should be set aside and all the summonses dismissed, on the ground that the bye-laws alleged to have been contravened were not shown to apply to the facts of these cases.

In my judgement, the appeal in each of the two cases stated should be allowed.

Solicitors for the first and second named appellants: *Brian Whelan & Co.*

Solicitors for the respondents: *Chief State Solicitor*

John Trainor
Barrister