Neutral Citation Number [2006] IEHC 357

THE HIGH COURT
JUDICIAL REVIEW

Record Number: 2006 No. 373 JR

BETWEEN

BRIAN MCGINLEY

APPLICANT

AND
JUDGE MICHAEL REILLY AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 15th day of November 2006

Factual background
1. The applicant's grounding affidavit sworn on the 24th March 2006 averred that the applicant had been arrested on the 18th July 2005 in connection with an aggravated burglary on the 13th February 2005, that he was detained under s. 4 of the Criminal Justice Act 1984 when a sample of head hair was taken, and a cigarette butt was taken, each for forensic examination and DNA comparison with a blood sample found at the scene of the crime. He goes on to state that he was on that occasion released without charge.

2. He avers that thereafter an application was made to the first named respondent on the 17th January 2006, by the Superintendent in charge of the case, for an order pursuant to s. 4(5) of the Criminal Justice (Forensic Evidence) Act 1990 extending the period permitted for the retention of the sample, since the forensic report in respect of the samples had not yet been completed. He avers also that no information was provided as to the nature of the outstanding matters in the investigation nor to whom the delay was attributable. There are further averments as to the evidence given on that application as to the delay in obtaining a forensic report. It appears that the first named respondent on that occasion made an order extending the period by two months to expire on the 17th March 2006. The forensic report sees to have been completed by the 20th January 2006 and was received by the Gardai on the 23rd January 2006.

3. On the 3rd February 2006 the applicant was re-arrested and detained for a number hours. He states that during that time he was informed by a Detective Sergeant that a forensic report had been obtained and that he "*would be charged shortly as the Superintendent was on the phone to the DPP obtaining directions*". However no such charges were laid and he was released without charge. Sgt. Delaney on affidavit has denied that he said this to the applicant.

4. A further notice of an intended application to extend time for retention was served on his solicitor on the 3rd March 2006, who responded by stating that she required that the forensic scientist should be available in court for cross-examination on that application. The Superintendent replied on the 13th March 2006 to the effect that the forensic scientist would not be present in court and the view was expressed that "*this issue [is] a matter for any trial judge and premature at this juncture*". That application came before the first named respondent on the 14th March 2006 when the Superintendent informed the court that a file had been sent to the DPP on the 7th March 2006 and that directions were imminent. Supt. Glacken has sworn an affidavit in which he has stated that on this occasion he informed the first named respondent that while he expected the directions from the DPP to issue in about two weeks from that date he could not anticipate what those directions might be or whether the DPP would raise further queries in those directions, and that it was for this reason that he requested a two month extension for the retention of the samples. Supt. Glacken was cross-examined about delay and what the applicant may have been told during his detention following the re-arrest already referred to, and other matters. The applicant himself also gave evidence of what he had been told during this detention, and the Superintendent had informed the judge also that he expected to receive directions from the DPP within one week. The District Judge granted only twenty eight days.

5. The directions duly issued in oral form on the 11th April 2006, followed a day later by a written direction to prosecute the applicant for aggravated burglary. The applicant was arrested on that day the 12th April 2006, and charged in the District Court on the 13th April 2006, by which time these judicial review proceedings were already in being since the 24th March 2006.

6. I should state at this juncture that one of the grounds on which relief is sought is the allegation that on this occasion the applicant's solicitor was precluded by the first named respondent from pursuing a line of cross-examination in relation to the delay in charging the applicant when he was detained on the 3rd February 2006. It is averred in this regard by the applicant's solicitor that during cross-examination of Supt. Glacken on the 14th March 2006, he stated that he was not prepared to answer questions regarding the applicant's detention on that occasion, and that when she attempted to pursue the matter she was prevented from so doing. This is submitted to have amounted to a denial of fair procedures.

7. The District Judge made an order authorising the further retention of the samples for a period of twenty eight days from the 17th March 2006.

8. By order dated 27th March 2006 I granted leave to seek an Order of Certiorari to quash the said order of the first named respondent made on the 14th March 2006 whereby the further retention of the samples was authorised for a further twenty eight days from the 17th March 2006, as well as an Order of Mandamus compelling the second named respondent to destroy the samples, and the other reliefs as set out in my said order granting leave. It is unnecessary to set them out in detail.

9. The question at issue in the case is simply whether the first named respondent had on the 14th March 2006 any proper or lawful basis for concluding, as he is required to have, that there was "good reason" to authorise the further retention of the samples for that further period. Mr Colman Fitzgerald SC for the applicant submits that the requirement that there be "good reason" does not mean that the District Judge is at large as to what he considers to be good reason, but that it must be a "good reason" in the context of the purpose and objectives of the Act itself. In particular he submits that simply because the Gardai were still awaiting directions from the second named respondent could not of itself be "good reason for the purpose of the section, since in that case an application on that ground could always be granted no matter how often it was applied for. The question of how wide is the discretion of the District Judge in an application under s. 4(5) of the Criminal Justice (Forensic Evidence) Act, 1990 as to what may constitute "good reason" is at the heart of this application, and a decision as to that will decide the question of whether the applicant is entitled to some or all of the reliefs sought.

The legislative background
10. The relevant sections of the Criminal Justice (Forensic Evidence) Act, 1990, for the purpose of this application are the following:

"2.—(1) Subject to the provisions of subsections (4) to (8) of this section, where a person is in custody under the provisions of section 30 of the Offences against the State Act, 1939, or section 4 of the Criminal Justice Act, 1984, a member of the Garda Síochána may take, or cause to be taken, from that person for the purpose of forensic testing all or any of the following samples, namely—

(a) a sample of—

(i) blood,

(ii) pubic hair,

(iii) urine,.

(iv) saliva,

(v) hair other than pubic hair,

(vi) a nail,

(vii) any material found under a nail,

(b) a swab from any part of the body other than a body orifice or a genital region,

(c) a swab from a body orifice or a genital region,

(d) a dental impression,

(e) a footprint or similar impression of any part of the person's body other than a part of his hand or mouth.

(2) ……

(3) ……

(4) A sample may be taken under this section only if—

(a) a member of the Garda Síochána not below the rank of superintendent authorises it to be taken, and

(b) in the case of a sample mentioned in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of subsection (1) of this section, or in paragraph (c) or (d) of the said subsection (1), the appropriate consent has been given in writing.

(5) An authorisation to take a sample under this section shall not be given unless the member of the Garda Síochána giving it has reasonable grounds—

(a) for suspecting the involvement of the person from whom the sample is to be taken—

(i) in a case where the person is in custody, in the offence in respect of which he is in custody, or

(ii) in a case where the person is in prison, in the commission of an offence under the Offences against the State Act, 1939, or an offence which is for the time being a scheduled offence for the purposes of Part V of that Act or an offence to which section 4 of the Criminal Justice Act, 1984, applies,

and

(b) for believing that the sample will tend to confirm or disprove the involvement of the person from whom the sample is to be taken in the said offence.

4.—(1) Subject to subsection (5) of this section, every record identifying the person from whom a sample has been taken pursuant to section 2 of this Act shall, if not previously destroyed, be destroyed as this section directs and every sample identified by such record shall be destroyed in like manner.

(2) Where proceedings for any offence in respect of which a person could be detained under section 30 of the Offences against the State Act, 1939, or section 4 of the Criminal Justice Act, 1984, are not instituted against the person from whom the sample was taken within six months from the taking of the sample and the failure to institute the proceedings within that period is not due to the fact that he has absconded or cannot be found, the destruction of the record and the sample identified by such record shall be carried out on the expiration of that period unless an order has been made under subsection (5) of this section.

(3) ……

(4) ……

(5) If a court is satisfied, on an application being made to it by or on behalf of the Director of Public Prosecutions or the person from whom the sample was taken, that there is good reason why records and samples to which this section applies should not be destroyed under this section, it may make an order authorising the retention of such records and samples for such purpose or period as it may direct." (my emphasis)

11. Clearly the interpretation of s 4 (5) above is crucial to this application, as to the meaning to be attached to the phrase "good reason". In submitting that the effect of s. 4(5) above is not to invest the judge with an absolute discretion as to what he/she might consider to be a good reason for the purpose of the section, Mr Fitzgerald urges the Court to consider the whole of the entirety of the Act, and to confine the ambit of the judge's discretion to within a purpose of the Act. In this regard, he points to the fact that the taking of samples from a person constitutes a breach of their right to bodily integrity and their right to privacy, but that these are not absolute rights, since the legislature may in the interests of the common good limit those rights in certain circumstances. He submits that this legislative framework can be seen as the way in which the extent of such an invasion of rights is to be limited by a particular purpose and by a limitation on the period for which such samples as are taken may be retained in the interest of that common good.

12. Mr Fitzgerald refers to the fact that under s. 2(1) of the Act, such samples may be taken only "for the purpose of forensic testing and on the authorisation of a member of An Garda Siochana not below the rank of superintendent, which may be given only if that member has reasonable grounds for suspecting the involvement of the person concerned in the offence under investigation, and if he has reasonable grounds for believing that the sample will tend to confirm or disprove the involvement of the person in the said offence. The further balancing provision to the invasion of the applicant's constitutional rights is, he submits, the requirement that such samples as are taken must be destroyed, along with all records identifying the person from whom the samples were taken, if proceedings against that person have not been instituted within six months from the taking of the samples in question.

13. In Mr Fitzgerald's submission, given that the legislature has chosen to regard the matter so seriously as to provide these safeguards so as to make the invasion of rights a proportionate measure in this way, the District Judge to whom application for further retention is being made must ensure that these protections are not diluted or set at nought by allowing an extension of the period for a reason other than a good reason, such as a reason unconnected with the purpose of allowing the samples to be taken in the first place under s. 2 thereof, namely for the purpose of forensic testing where there exist reasonable grounds for suspecting the involvement of the person in the offence for which he is in custody and for believing that the sample will tend to confirm or disprove the involvement of the person in that offence.

14. Important to that submission is the fact that when the first named respondent made his order on the 14th March 2006, it was known by him that the forensic scientist to whom the samples had been sent for analysis had issued the report on the 20th January 2006, being only three days after the first extension of time was granted up to the 17th March 2006. He submits therefore that the extension was not required for the purpose of forensic testing since that had already been carried out by the 20th January 2006.

15. The reason for the first application under s. 4(5) of the Act on the 17th January 2006 was that this report was still awaited at that time. But that reason had disappeared by the 14th March 2006, since the report then existed and the forensic testing had been carried out. On the latter date, the reason given was that the file was still with the DPP, and that the Gardai were awaiting his directions. Mr Fitzgerald submits that no reason or explanation was given to the judge as to why it was taking so long for those directions to be given, and that in the absence of any such explanation, an extension of the period is not for any "good reason" since none was offered to the court, and it amounts to an extension being given "at will" and that as such it is impermissible and ultra vires.

16. Relevant also is the fact that prior to this hearing an order for discovery was made, and nothing was discovered which disclosed any possible reason which may have existed for the delay in the directions from the DPP being given.

17. The applicant submits that the fact that the taking of the sample in the first place constitutes a battery where there is no lawful excuse, the legislature when acting in the interest of the common good may enact legislation which encroaches upon the individual's constitutional rights only in a proportionate way i.e. a way which encroaches no more than is necessary for the perceived objective. He submits also that the Court when interpreting such legislation must do so in a way which is the least restrictive of the rights in question. The Court has been referred to the judgment of Finlay Geoghegan J. in *Enright v. Ireland* [2003] 2 IR. 321 stating the need to construe the constitutionality of a statute by reference to a proportionality test.

18. Mr Fitzgerald has referred to the judgment of Hamilton P. (as he then was) in *Byrne v. Grey* [1988] IR. 31, in which at p.38, the learned judge states:

> *"These powers encroach on the liberty of the citizen and the inviolability of his dwelling as guaranteed by the Constitution and the courts should construe a statute which authorises such encroachment so that it encroaches on such rights no more than the statute allows, expressly or by necessary implication.*
>
> *The statute authorising such encroachment provides at s. 26 thereof that a justice of the District Court or a peace commissioner must be satisfied by information on oath of a member of the Garda Siochana that there is reasonable ground for the suspicion before he is entitled to issue the search warrant mentioned in the Act as amended.*
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> *In construing this section, a court ought, in the words of Lord Diplock in the course of his judgment in Reg. v. I.R.C., Ex p. Rossminster Ltd. [1980] A.C. 952, at p. 1008:-*
>
> > *'... to remind itself, if reminder should be necessary, that entering a man's house or office, searching it and seizing his goods against his will are tortuous acts against which he is entitled to the protection of the court unless the acts can be justified either at common law or under some statutory authority. So if the statutory words relied on as authorising the acts are ambiguous or obscure, a construction should be placed upon them that is least restrictive of individual rights which would otherwise enjoy the protection of the common law. But judges in performing their constitutional function of expounding what words used by Parliament in legislation mean, must not be over-zealous to search for ambiguities or obscurities in words which on the face of them are plain, simply because the members of the court are out of sympathy with the policy to which the Act appears to give effect'.*
> >
> > *In this country the individual rights referred to as enjoying the protection of the common law also enjoy the protection of the Constitution."*

19. *Byrne v. Grey* was a case in which a peace commissioner had issued a warrant to search a house, based on an information sworn by a member of An Garda Siochana in which it was sworn that there were "reasonable grounds" for suspecting the offence involved. Even though the relief sought was refused, the learned President (as he then was) found that the person issuing the warrant, namely the peace commissioner of District Justice must himself be satisfied that there are reasonable grounds for so doing, and cannot simply issue same on the basis that the Garda has formed the view that there are reasonable grounds for suspicion. Mr Fitzgerald submits that the same should apply in the present case where the District Judge must himself apply his mind to the quality of the reason

offered for the granting of the extension of time for retaining the samples, and not simply grant the application because the Garda is awaiting directions from the DPP. He submits also that this should involve an inquiry by the District Judge as to the reason for the delay having occurred, and only after he has considered that reason for the delay can he form a view as to whether the reason is a 'good reason' or merely 'a reason'. That did not happen in this case.

20. Mr Fitzgerald also refers to a passage later in the same judgment of Hamilton P. (as he then was) at p.40 where it is stated:

"It is quite clear that in deciding whether or not to issue the warrant the first respondent was obliged to act judicially".

21. He submits that in interpreting what the words "good reason" mean in s. 4(5) of the Act, an interpretation akin to 'reasonable grounds' should be adopted, which would infer that a particular reason within the context of the Act read as a whole must be identifiable, rather than the District Judge being completely at large as to what he may consider in any case to be a good reason, such as in the present case a delay by the DPP in issuing directions.

22. He submits that by granting an order for the further retention of the samples, the judge is permitting a continuance of what would otherwise be an unlawful situation, and that the reason for so doing must be within the reasons for allowing the samples to be taken in the first place i.e. for the purpose of forensic testing, and that it is clear and uncontested that this testing had already taken place. The reason offered to the judge on the 14th March 2006, namely the awaiting of the DPP's directions, is not therefore within the reasons for which a sample can be taken under s. 2 of the Act, and therefore cannot amount to a "good reason" for the purpose of s. 4(5) thereof. Mr Fitzgerald highlights the fact that if the awaiting of the directions of the DPP is to be found to be a "good reason", there would have to have been evidence adduced as to the cause of the delay, and not the mere fact of delay, since otherwise the application would be granted in every case of delay, whether the cause of the delay was excusable or not.

23. Referring to the fact that in *Byrne v. Grey* the learned President (as he then was) refused the relief sought even though of the view that the search warrant had not been validly issued, on the basis of the exercise of his discretion given what he perceived to be the applicant's objective, namely the exclusion of the fruits of the search conducted on foot of the warrant impugned, much reliance is placed by Mr Fitzgerald on the undoubted fact that in this case, that at the point in time at which this application for Judicial Review was commenced the applicant had not been charged with any offence, and no criminal proceedings were under way.

24. Mr Fitzgerald submits that in those circumstances there is a justiciable issue to be decided in defence of the applicant's constitutional rights and that the Court's decision should not be influenced by any impact which the Court's decision may have on any criminal proceedings which now exist against the applicant, in relation to the alleged offence for which the DPP requires the samples to be retained, since those proceedings were not in existence when the judicial review of the District Judge's order was commenced. He submits that in this case moving by way of judicial review was the only option open to the applicant at the time, since no appeal of the order was possible. In this way, it is submitted, this case is distinguishable from *The State (Abenglen Properties) v. Corporation of Dublin* [1984] IR. 381 in which it was held that even if there was an entitlement to an order quashing the decision of the respondent, it should not be granted where the applicant had an alternative remedy open to them, namely to appeal the decision to An Bord Pleanála where the complaints could have been examined de novo. In that case, O'Higgins CJ. observed at p.395 that "*the object and purpose of Abenglen's application for certiorari was to by-pass the scrutiny of planning proposals provided by the Planning Acts and, thereby, to frustrate their operation in this instance*".

25. Mr Fitzgerald suggests, however, that where as in this case, there is no abuse of process there is no reason why the mere exercise of a judicial discretion should deprive the applicant of his entitlement to the reliefs sought.

26. Shane Murphy SC on behalf of the respondents urges the Court not to confine itself to s. 2 of the Act in order to glean its purpose, as invited to do by Mr Fitzgerald, and submits that s. 4 is very relevant in view of the provisions which touch upon the destruction of the samples. He emphasises that this application does not concern any complaint about the taking of the samples as authorised under s. 2 but is all about the destruction of the samples as provided for in s. 4.

27. I have already set out those provisions in full above, and Mr Murphy highlights the fact that this section, which includes the provision under which the District Judge may for good reason order the further retention of samples, deals exclusively with the destruction of the samples, and that s.4(1) requires the destruction not only of the samples themselves if proceedings are not instituted within six months of the taking of the sample, but also of "every record identifying the person from whom a sample has been taken". It has been pointed out that the effect of this provision in the present case is that if the District Judge's order is quashed, not only the samples themselves but also any other record identifying the applicant as the person from whom it was taken, would be destroyed, and that this would affect the ability of the DPP to adduce the report of the forensic analysis of the samples which issued on the 20th January 2006. Mr Murphy urges the Court to have regard to this when assessing whether the District Judge was justified in extending the retention of the samples for "good reason.

28. Mr Murphy has also referred to the evidence of Supt. Glacken that an extension of two months was sought, whereas the District Judge granted a shorter time namely twenty eight days, and he suggests that this is indicative of the fact that he applied his mind to the question of exercising his discretion and that this is sufficient to uphold the exercise of what is a wide discretion according to the wording of the section. He suggests that it cannot be said that there was no material before the judge on foot of which such a decision could be made and that it cannot be regarded as irrational. He submits that the fact that the file was with the DPP and that directions were awaited from that office is well within the concept of "good reason" in a statute of this nature where samples are authorised to be taken where there is a belief on the part of the member of An Garda Siochana that they will tend to confirm or disprove the involvement of the person in the offence under investigation, and that there was no obligation on the District Judge to inquire into or be informed of the reason why directions had not been available by that date.

29. In relation to the matter canvassed by Mr Fitzgerald as to the Court not exercising its discretion to refuse relief by way of judicial review on the basis that there is no abuse of process in this case, Mr Murphy submits that while Mr Fitzgerald is correct to say that unlike in Abenglen properties case there is no right of appeal which the applicant could have pursued, the applicant would be entitled to ventilate his complaints regarding the retention of the samples at his trial before the trial judge. In that way, there is an alternative remedy open to the applicant and Mr Murphy suggests that the applicant's real motive in this application has nothing to do with the vindication of his right to bodily integrity or privacy as submitted by him, but rather is designed to achieve a pre-emptive strike at an important piece of evidence against him, namely some blood found at the scene of the aggravated burglary. He suggests that the admissibility of evidence is a matter appropriate for decision by the trial judge, and that this is unaffected by the fact that this application was launched before the applicant was charged with the offence on the 13th April 2006. In this regard Mr Murphy suggests that even if he had not been actually charged, he certainly anticipated or feared that he would be, and that these proceedings can be viewed as having a collateral motive, and as such constitutes an abuse of process.

30. In relation to the complaint made against the first named respondent that he unfairly prevented the further cross-examination of Supt. Glacken by the applicant's solicitor about what was said to the applicant while he was in detention, Mr Murphy urges that the judge has a discretion as to whether he regards a question as having been answered or not, and that he may decide whether further questioning should be allowed or not. He submits that no fundamental unfairness has resulted to the point where the entire proceeding is vitiated.

Conclusions

31. While it is an undoubted fact that these proceedings were commenced some two and a half weeks before the applicant was charged with any offence to which the samples might be relevant, I have no doubt about the reality of the applicant's state of mind and objective at that time. It is fanciful to expect the Court to accept that by the 26th March 2006 the applicant was intent upon seeking the destruction of the samples and all records relating thereto, simply to uphold and vindicate in vacuo his right to bodily integrity and privacy. It is perfectly clear that he knew that there was every possibility that he might soon be charged with the offence with which he was eventually charged, and that in anticipation of that, this pre-emptive strike at the blood evidence was launched. In fact, according to his own evidence, albeit that this is contradicted by Sgt. Delaney and Supt. Glacken, he was told as far back as the 3rd February 2006 that he "would be charged shortly". That is the reality and there is no room for gainsaying it on his part, and it is the context in which this Court must view the present application.

32. It is however not of itself determinative of the question raised, namely whether the District Judge was acting within jurisdiction by regarding as a "good reason" for extending the retention period the fact that the file was with the DPP and that his directions were still awaited. That file had been completed by the 7th March 2006 and was sent to the DPP on the same day. When the application came before the District Judge on the 14th March 2006, the file had therefore been with the DPP's office for seven days only. It has to be recalled that the reason given to the District Judge for the need to extend the time was not the unavailability of the forensic report. That was the reason offered on the previous application on the 16th January 2006 when the period was extended for two months.

33. What the District Judge was dealing with on the 14th March 2006 was a request for a further extension of the period on the sole basis that the file was with the DPP and his directions were awaited. Seven days is a short time for the file to have been in the DPP's offices, and certainly not one capable of amounting to culpable delay.

34. It is little wonder in my view that the District Judge saw no purpose in the further cross-examination of Supt. Glacken about what may or may not have been said to the applicant by Sgt. Delaney while he was in detention on the 7th February 2006, being the occasion on which the applicant had been re-arrested following the availability of the forensic report which, it appears from the affidavit of Supt. Glacken, matches the applicant's DNA to the blood found at the scene of the aggravated burglary in question. Such a cross-examination might have had some relevance to the question of the time which had passed awaiting the forensic report and the passage of time from the 20th January 2006 until the 7th March 2006 when the file was completed, but could not speak to the reason offered to the District Judge for the application.

35. I accept completely Mr Fitzgerald's submission that the taking of bodily samples would, if not done in accordance with a law so authorising, constitute tort against the person concerned, and that in legislating in a way which permits an invasion of that right to bodily integrity, the Oireachtas must to so in a proportionate manner. The safeguards built into the statutory scheme, such as the requirement for an application under s. 4(5) of the Act can be seen as a legislative recognition of that principle, and it follows that this proportionality must not be set at nought if an extension of the time for retention is permitted outside what can be encompassed by the phrase "good reason".

36. I accept also Mr Fitzgerald's submission, grounded upon the judgment of Hamilton P. (as he then was) in *Byrne v. Grey* [supra] that the District Judge must himself form a view as to whether the reason given is a good reason, and must not simply grant the application because the applicant Garda member states that there is good reason for the extension of the period. The District Judge, in other words, must act judicially. The words "good reason" confers a wide discretion without specified limitations, but nevertheless it is not an absolute discretion to be exercised as he or she wishes. In this regard Mr Fitzgerald has submitted that in searching for a good reason the District Judge must confine his search to the objective apparent from s. 2 of the Act, namely that the sample is taken only for the purpose of forensic testing, and that since that testing had been concluded by the 14th March 2006 there could be no good reason for retaining the samples further under that section. I cannot agree.

37. In my view, to so confine the search for good reason would be to overlook the wider purpose of the Act. In interpreting the phrase "good reason" the Court is entitled and even obliged to consider the whole Act in order to discern the intention of the Oireachtas. After all that is the task facing the Court. The Court is not looking at two words in the Act and trying to give a literal meaning to the words, divorced from any context. True it is, that the meaning must be firstly garnered from the plain and ordinary meaning of the words chosen by the Oireachtas to express its meaning. In this case that is not a difficult task since the words used are simple and clear. But such a confined and literal meaning would in fact be to confer a discretion so wide that it would be absolute and as such, a discretion which would infringe the principle of proportionality so necessary for constitutionality. In other words the words "good reason" must by interpretation, be confined in some way. To that extent I agree with Mr Fitzgerald.

38. But it another matter entirely to ignore the overall purpose of testing the samples forensically after they are taken in accordance with the provisions of s. 2 of the Act. To accept the applicant's submissions in this regard would be to render impotent in many cases the power to gather evidence for use in a subsequent trial. The title of the Act makes it clear that it is dealing with "forensic evidence", and not merely a sample for testing. The sample, if taken, has a purpose beyond its mere existence for the purpose of being tested, even if s. 2 indicates that it may be taken "for the purpose of forensic testing". Clearly, and this requires no straining of interpretation or meaning, such testing may result in the sample acquiring the status of potential evidence in a trial of the offence for which it was taken. That much is obvious. It must follow therefore that the District Judge is entitled to have regard to the overall picture, even if by the time the application came before him, the applicant had not been charged with any offence.

39. An important consideration, which has been overlooked in this application as far as I can recall, is that an authorisation under s. 2(5) of the Act to take a sample shall not be given unless, *inter alia*, there is reason to believe that it will tend to confirm *or disprove* the involvement of the person from whom it was taken. There will be cases no doubt where the testing will tend to disprove the involvement, and it must therefore be open to the District Judge to extend the period of retention so that in any trial of the person from whom the sample is taken for the offence involved, that evidence may be available to the defence even if not required by the prosecution. It would work a serious injustice upon such a person if by the time he was charged with the offence the evidence which had the potential to exculpate him or her was no longer available on the basis that the purpose of s. 2 of the Act had been fulfilled, namely the testing of the sample.

40. In the present case, of course, the tests carried out appear to have tended to confirm the applicant's involvement since it is

deposed that the applicant himself that he was so told by Sgt. Delaney on the 3rd February 2006. Supt. Glacken has deposed also that this is the case, and that this was the reason for the applicant's re-arrest on the 3rd February 2006, namely so that the applicant could be given a an opportunity to comment upon the result of the test. But that fact should not determine or unreasonably delimit the scope of the reasons which the District Judge might consider to be "good reason". In the present case, the District Judge was informed that the file was with the DPP for the previous seven days and that his directions were awaited. It does not in my view require any specific evidence as to why the directions had not been received by the 14th March 2006 for the District Judge to consider there to be good reason to extend the time. The good reason is quite clearly in order to afford a reasonable opportunity to the DPP to consider the file before giving his directions. A reasonable margin of appreciation must be given as far as time for considering such a file is concerned, and it is manifest from the fact that the District Judge granted only twenty eight days rather than the two months requested, that he applied his mind to the application and that he acted judicially in the exercise of his discretion.

41. The reason given comes clearly within the overall purpose of the Act. One does not have to contort the meaning of any words in order to see the intention of the Oireachtas. The purpose of testing the sample is so that relevant forensic evidence may be available for any trial of the person which might take place in the future. That purpose is unaffected by the fact that on the 14th March 2006 the applicant had not yet been charged with any offence. The DPP has the constitutional obligation to prosecute offences. The people of this State have an entitlement and right to have offences prosecuted. The applicant's rights to bodily integrity and his other undoubted right, including fair procedures, must be balanced fairly with society rights. In the present case there can have been no real prejudice to the applicant by having the time extended for retention of the samples which could outweigh the entitlement of the people to have the offence prosecuted, and therefrom to have available at any trial any relevant and necessary forensic evidence, provided that such evidence has been obtained in accordance with the statutory scheme in place to obtain and preserve it. I have already taken a view, as expressed above, as to the objective of the applicant in bringing this application at all. The decision of the District Justice does no violence to the applicant's constitutional rights and does not set at nought the constitutional protection of proportionality built into s.4(5) of the Act. It is important that available evidence, within the bounds of constitutional fairness, be retained and preserved until the conclusion of any trial in which it is required. Any issue as to its admissibility as evidence can of course be ventilated in the usual way before the trial judge in the absence of the jury.

42. I am also satisfied that the applicant's rights to fair procedures were not infringed in any way by the manner in which the District Judge conducted the hearing of the application before him on the 14th March 2006.

43. I refuse the application for the reliefs sought.