

THE HIGH COURT

[2005 No. 704 SS]

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857 AS EXTENDED BY SECTION 51 OF THE COURTS  
(SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR/APPELLANT

AND

TIM O'CONNOR

ACCUSED/RESPONDENT

**Judgment of the Honourable Mr. Justice Quirke delivered the 14th day of December, 2005.**

1. This is a case stated by Judge James Paul McDonnell, a judge of the District Court, pursuant to s. 2 of the Summary Jurisdiction Act, 1857, as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961.

2. It has been made on the application of the prosecutor/appellant (hereafter the DPP) who is dissatisfied with the determination of the learned District Judge as being erroneous in point of law. The case stated seeks the opinion of the High Court as to whether the District Judge was correct in law in dismissing a charge against the respondent alleging the commission of an offence contrary to the provisions of s. 49 of the Road Traffic Act 1951. The charge was dismissed on the grounds that the respondent was in unlawful detention for a seven minute period during the investigation of the offence alleged.

**Relevant Facts**

3. At sittings of Tallaght District Court on 22nd January, 2004, and 12th February, 2004, the respondent appeared before the learned District Judge charged with the commission of an offence pursuant to s. 49(4) and (6)(a) of the Road Traffic Act, 1961 as inserted by s. 10 of the Road Traffic Act, 1994.

4. The offence alleged was that on the 29th September, 2001, at the Tallaght bypass, Tallaght, Dublin 24, he drove a mechanically propelled vehicle in a public place while there was present in his body a quantity of alcohol such that within three hours after so driving the concentration of alcohol in his breath exceeded a concentration of 35 microgrammes of alcohol per 100 millilitres of breath. The respondent denied committing the offence.

5. Garda Brian Dineen, testifying on behalf of the DPP, in evidence, said that having formed the opinion that the respondent had driven a vehicle at a time when he had consumed an intoxicant he conveyed the respondent to Terenure Garda Station arriving at 12.55 am. On arrival, Garda Dineen introduced the respondent to Garda Dooley who was the member in charge.

6. At 1.07 am Garda Dineen and Garda Dooley took the respondent to the doctor's room where an Intoximeter machine was located.

7. It is acknowledged that the provisions of s. 13(1)(a) of the Road Traffic Act, 1994, were properly and lawfully applied by Garda Dooley and that the respondent provided two specimens of his breath.

8. The intoxilyzer which records the concentration of alcohol present in human breath, printed statements pursuant to s. 17 of the Act of 1994 which indicated that there was a concentration of 127 microgrammes of alcohol per 100 millilitres within the breath sample.

9. The Case Stated by the learned District Judge provides (at para. 3(e)) that:

*"A 20 minutes observation period prior to the giving of the breath specimen's is justified in order to ensure that an arrested person does not consume anything by mouth, as such consumption might make the specimen unreliable."*

10. It is unclear whether evidence to that effect was adduced in the proceedings but presumably the learned District Judge was satisfied by way of evidence that such was the case and certainly that fact has been established in evidence in many other similar cases.

11. The learned District Judge held that the respondent had been detained within Terenure Garda Station for a period of 27 minutes, and, accordingly, had been in unlawful detention for a period of seven minutes more than was warranted for his satisfactory observation. Accordingly he decided that the respondent had been in unlawful detention during the investigation of the offence alleged and he dismissed the charge preferred against the respondent.

12. He has sought the opinion of this court as to whether he was correct in law:

- (1) in determining that the respondent was in unlawful detention for the additional period of seven minutes and
- (2) in dismissing the charge.

**Decision**

13. On the facts as outlined in the case stated I am satisfied that in this case the learned District Judge was not correct in law in determining that the respondent was in unlawful detention in Terenure Garda Station during the investigation of the offence with which he has been charged.

14. The principles which apply to cases of this kind have been identified by the Supreme Court in the cases of *Director of Public Prosecutions v. Michael Finn* [2003] 1 I.R. 372 and *Director of Public Prosecutions v. McNiece* [2003] 2 I.R. 614.

15. In *Finn* the Supreme Court (Hardiman J.) considered facts analogous to the facts in these proceedings. He observed at p. 385

that:-

*"...where the authorities are entitled to perform a particular procedure on arrest, they are entitled to a reasonable period of time in which to do it. For example, if a decision is made to procure the attendance of a doctor for the purpose of requiring the arrested person to provide him with a specimen of blood or urine, a reasonable period for the attendance of the doctor is required. But, at least upon the reasonableness of the length of time actually involved being challenged, it will, in my view be necessary to demonstrate that the actual period of time was no more than was reasonable. The onus of proof on this point is and must be on the prosecution since the reasons why a particular length of time was required will normally be within its exclusive knowledge. For that purpose evidence about the distance the doctor had to travel, any other commitments he had at the time and cognate matters might be called so as to render a period of time which seemed excessive reasonable."*

16. Noting that the facts in Finn did not:-

*"raise such questions as whether every interval elapsing before some statutory purpose of detention is achieved requires positive justification or whether some intervals are so short as not to call for positive justification even when challenged, I would reserve my position on that issue until it arises on individual case."*

17. The detention, in that case was found to be unlawful because the Garda had made a decision *"simply to sit in a room with the defendant doing or saying nothing for 20 minutes..."*

18. The foregoing passage should not be construed as imposing upon the prosecuting authorities an onus in every case of proving by way of positive evidence that every moment of the detention of an accused person was lawful.

19. If an unlawful detention is to be relied upon as a defence then the prosecuting authorities must be given an opportunity to meet such an allegation. Accordingly, when the duration of detention of an accused person is challenged on the grounds of reasonableness then the onus rests upon the prosecuting authorities to prove by way of evidence that the detention was reasonable and accordingly unlawful.

20. In the instant case there was apparently no such challenge.

21 Apparently the respondent was in the "doctor's room" for a period of precisely 12 minutes that is between 12.55 am, when he arrived at Terenure Garda Station and 1.07 am when the procedure for the provision of breath specimens began.

22. No evidence appears to have been adduced indicating how that 12 minute period was occupied although the ruling of the learned District Judge refers to *"...aspects of the custody record..."* which he found to be unsatisfactory.

23. The learned district judge found, as a fact, that the respondent was *"...observed for a period of 27 minutes and..... his detention was prolonged for some 27 minutes..."*.

24. It is not entirely clear how that finding arose. The case stated indicates that the respondent was detained in Terenure Garda Station for a total period of thirty two minutes (from arrival at 12.55am until 1.27am). The learned District Judge appears to have dismissed the charge on the ground that the DPP had failed to prove that the respondent's detention was lawful during the final seven minutes thereof.

25. Since the final seven minutes of the respondent's detention was spent by the respondent providing breath specimens the learned district judge clearly had misgivings about some aspect of the preceding twenty five minutes. The learned District Judge appears to have accepted that a period of some twenty minutes was required in order to properly observe the respondent during his detention. It follows then, that the learned district judge was concerned with the twelve minute period which commenced at 12.55am.

26. The case stated indicates that some of that twelve minute period was taken up with the "introduction" of the respondent to Garda Dooley, (this apparently involved aspects of the custody record). Thereafter the respondent was brought to the "doctor's room". Whatever remained of the twelve minute period was found by the learned District Judge to comprise unlawful detention of the respondent. The charge was dismissed on that ground.

27. The legality of the detention of an accused person must, in every case, be decided on its own particular facts. On the facts of this case dismissal of the charge against the respondent on that ground would only have been justified if either,

(a) the legality of his detention had been challenged on behalf of the respondent or,

(b) evidence adduced caused sufficient concern for the learned district Judge to commence a focussed enquiry into the legality of the respondent's detention and directed towards reasonableness.

28. The case stated does not indicate that a challenge was made on behalf of the respondent. Neither does it disclose an enquiry by the learned District Judge during which the DPP was given the opportunity to discharge the onus of proving that the duration of the respondent's detention was reasonable in the circumstances.

29. Insofar as the attention of this court has been directed to the ex tempore decision of the High Court (Abbott J.) in *DPP v. Fox* (delivered on 25th July, 2005), I would simply indicate that the conclusions which I have reached in these proceedings have been reached after the application of the principles outlined above to the facts of this case.

30. I am satisfied that the decisions of the Supreme Court in *Director of Public Prosecutions v. Finn* [2003] 1 I.R. 372 and *Director of Public Prosecutions v. McNiece* [2003] 2 I.R. 614 may not be construed as prescribing that any precise period of time is capable of rendering the detention of an accused person either lawful or unlawful.

31. It follows from what I have found that the questions posed by the learned District Judge should be answered as follows:

1. No.

2. No.

