THE COURT OF APPEAL

JUDICIAL REVIEW

Neutral Citation Number: [2015] IECA 31

[499/2014]

The President
Finlay Geoghegan J.
Hogan J.
BETWEEN

JAMES O'KEEFFE

APPLICANT

AND

DISTRICT JUDGE MANGAN

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT delivered by the President on 21st May 2015

1. This is an appeal by Mr. O'Keeffe against the dismissal by the High Court of his application for judicial review of a conviction under s. 49, sub-sections (1) and (6)(a) of the Road Traffic Act 1961 (as amended).

2. The case was heard at Ennis District Court by Judge Mangan, the first respondent, on 28th September 2011. Mr. O'Keeffe was charged that on 1st March 2010 in Killaloe, County Clare, he drove a mechanically propelled vehicle while under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle.

3. The issue in the appeal concerns the correctness of the respondent judge's approach to a question that arose in the case before him concerning compliance with s. 18 of the 1994 Road Traffic Act. That provision was subsequently replaced but is the relevant section for the case before the judge of the District Court. The section prescribes the procedure for taking specimens of blood and provision of specimens of urine from and by persons arrested under s. 49. Sub-section (1) provides that the designated doctor who has taken the sample of blood or urine divides the specimen into two parts, places each part in a container which he forthwith seals and then he completes the prescribed form. Sub-section (2) provides that the member of the Garda Síochána then offers the person one of the sealed containers "together with a statement in writing indicating that he may retain either of the containers". Sub-section (3) deals with the submission of the sample to the Bureau by the member of the Garda Síochána. Sub-section (4) provides as follows:

> "In a prosecution for an offence under this Part or under Section 49 or 50 of the Principal Act, it shall be presumed until the contrary is shown that sub-sections (1) to (3) have been complied with."

4. In this case, the prosecuting Garda gave evidence saying that s. 18(1) and (2) of the Act had been complied with. The defending solicitor, Mr. Herbert, whose affidavit grounds the application for judicial review, cross-examined the Garda. He directed questions to events that happened prior to the arrest of Mr. O'Keeffe with which this Court is not concerned on the appeal. He turned then to another topic and asked the Garda to explain exactly how she had complied with s. 18(1) and (2) of the Road Traffic Act 1994. The Garda said that after the doctor had taken the sample of urine, he divided the specimen into two and placed each part into a container and sealed each. She said that she offered the applicant, Mr. O'Keeffe, one of the sealed containers which he accepted. Mr. Herbert says that the Garda went no further in her evidence and he closed his questioning.

5. Mr. Herbert sought a direction from the judge on the basis that she had asked the applicant questions prior to caution, whereupon the judge asked the Garda directly whether she had formed her opinion when she asked Mr. O'Keeffe the particular question and the Garda replied that she had not.

6. Mr. Herbert then sought a direction on another ground, namely, that the procedures followed in taking the sample from Mr. O'Keeffe were not in accordance with the 1994 Act, in that the Garda had failed to provide Mr. O'Keeffe with a statement in writing of his rights. In the case of a urine sample, this was apparently a yellow slip of paper. The solicitor submitted that this was a specific requirement under the section and he referred to the High Court decision of McCarron v. Judge Groarke & DPP, and he went on to say that the presumption of compliance with the Act had been rebutted.

7. The judge rejected the first ground on which the direction was sought, namely, the questioning of Mr. O'Keeffe prior to arrest. Then the judge directly addressed the prosecuting Garda and asked if she had given the slip of paper to Mr. O'Keeffe or not, notwithstanding Mr. Herbert's objection to this question on the basis that the State case had closed and the judge could not question the witness on her proofs thereafter. The judge said that in the case of an inadvertency, he could afford the witness an opportunity to mend her evidence.

8. The Garda replied to the judge that she did give or had given the relevant slip of paper to Mr. O'Keeffe. The judge proceeded to hold against the defence submissions and convicted Mr. O'Keeffe. He imposed a €500 fine with 150 days to pay and ordered that he be disqualified from driving for a period of four years.

9. The issue in the appeal concerns the question asked by the trial judge of the prosecuting Garda following the submission made by Mr. Herbert that the judge should give a direction on the ground that the statutory procedure had not been complied with. 10. Another point that ought perhaps to be mentioned, simply to indicate that it does not arise for consideration on the appeal, concerns sub-section (4) and the presumption, until the contrary is shown, that sub-section (2), inter alia, was complied with. That arises "until the contrary is shown" but it is less than obvious that the failure of the Garda to mention that she had given the form actually constituted proof that she had not done so. She did not say either way. Mr. Herbert naturally did not ask her whether she had given his client the relevant piece of paper because obviously he feared that the answer would be yes. But the point is that it is questionable, at least, is whether the failure to mention that she had given the form to Mr. O'Keeffe is evidence that she did not do so.

The High Court Decision
11. In his judgment, the learned President decided that the respondent judge did not exhibit bias nor did he behave unfairly in the conduct of the case; the applicant was not denied fair procedures; he was not prejudiced by the tendering of the additional evidence; in the circumstances, the evidence was of compliance with a formal requirement in circumstances where the substance of that requirement had been demonstrated to have been properly and duly carried out.

12. The High Court was satisfied that a District Court judge may in certain circumstances, of his own volition, recall a witness to give formal evidence following the closure of the prosecution case in a summary trial. The Court cited the judgment of Kenny J. in the Supreme Court in *Attorney General (Corbett) v. Halford* [1976] 1 I.R. 318 in support. See below for the quotation.

13. Kearns P. cited the judgment of O'Higgins C.J. in *Director of Public Prosecutions v. Kemmy* [1980] I.R. 160, where, at p. 164, he said that it was essential that precise statutory provisions be complied with because otherwise the Court would be trespassing into the legislative field. In his judgment in this case, Kearns P. added the gloss that there was also a consideration of public policy that driving-related offences require to be prosecuted and

> "should not be thrown out willy nilly without good reason. Thus, if the substance of the statutory obligation to comply with certain steps has been complied with, the Court should not automatically dismiss a case merely because some technical or formal attempted proof may not, initially at least, have been addressed in evidence".

14. The Court distinguished the facts of this case from *McCarron v. Groarke* (Unreported, 4th April 2000) in which Kelly J. was concerned with the failure, as he was satisfied was established, to follow the statutory scheme which was fatal to the prosecution. The legitimacy of asking further questions did not arise in that case.

15. The High Court held in this case that there was no detriment, prejudice or compromise of any of the rights of the applicant, nor was there any question of obtaining evidence in breach of his constitutional rights. The Court concluded that the facts of this case meant that it fell into the category of a formal matter which it was within the legitimate discretion of the judge to explore or permit to be explored in all the circumstances.

16. Kearns P. also referred to a number of English cases cited by the respondent in submissions and which supported the approach that he adopted in this case. He said that those cases demonstrated an approach to prosecutions of this kind which accorded with commonsense without in any way interfering with fairness.

17. Finally, the learned president rejected a suggestion of objective bias that it was submitted would or might be entertained by an impartial observer in the circumstances of the case before the respondent judge.

The Law
18. *In Attorney* General (Corbett) v. Halford [1976] I.R. 318 at 324, which was a case stated by the judge of the Circuit Court to the Supreme Court, Kenny J. said at p. 324:

> "The prosecution have closed their case and the question whether that evidence may now be given was not discussed in argument. The decision of this Court in Attorney General v. McTiernan establishes that, in a prosecution in the District Court, the District Justice may allow further evidence of formal matters to be given after the State's case has been closed. He has a discretion in the matter; but he should not allow further evidence to be given if it relates to what Lord Goddard has called 'the merits' (Price v. Humphries) while he should allow it if it relates to procedure only. I think that proof that the veterinary inspector who signed the notice had reasonable grounds for his belief and that he believed the matters I have mentioned was a matter of procedure only and that, if the prosecution wish to give it, the Circuit Court judge should allow this evidence to be given when the matter is re-listed before him: Royal v. Prescott Clarke."

The question then arises as to whether this is evidence that relates to procedure only or whether it goes to the merits. For that to be elucidated, it is necessary to look at the facts of Halford's case to see what the Court considered to be procedural only and not going to the merits.

19. The defendant was charged with breaching a prohibition of movement that had been served on him under a Foot-and-Mouth Disease Order. There was an outbreak of that disease in England in late 1967. The defendant was an apprentice jockey who lived in England and when he arrived in late December 1967, he was served with a notice which prohibited him from entering places in which animals were exhibited for show or sale or buildings or other land on which animals were present. The restriction order served on the defendant was made under a Statutory Instrument, the Foot-and-Mouth Disease Order 1956, under the provisions of the Diseases of Animals Act 1894. Although that Act had been repealed in 1966, the new Act had preserved Orders and Regulations made under the previous legislation.

20. Article 19 of the Statutory Instrument of 1956 read:

> "If a veterinary inspector has reason to believe that the movement of any person . . . to or from any place may be or may have been attended with risk of the spread of foot-and-mouth disease, or that any person . . . has been exposed to the infection of the disease, he may. . . prohibit the movement of any person . . . to or from any place . . . by the service of a notice in writing . . ."

21. The defendant was convicted in the District Court and appealed. The Circuit judge stated a case for the opinion of the Supreme Court as to whether it was sufficient for the prosecution to prove the prohibition only or whether it was also necessary for the Inspector to give evidence that he had reason to believe either of the matters specified in the Article. The Court held that it was necessary for the Inspector to give evidence that he had reason to believe one or other of the statutory conditions. Proof of what

was recited was necessary for the validity of the prohibition and the facts had to be proved in evidence by the Inspector. Henchy J. said that the Inspector had to give evidence, not alone that he believed but that he had reason to believe, as specified in the Regulation. He then declared:

> "As the missing evidence was of a formal nature, which affects the technical proof of the making of a valid prohibition and is not a matter of substance going to the question of the defendant's guilt in breaching the prohibition, the Circuit judge will have jurisdiction to receive it when the case now goes back to him: see Attorney General v. McTiernan; The People (Attorney General) v. Griffin and the cases referred to in Stone's Justices' Manual (103rd Ed. – 1971 – p. 362)."

22. Griffin J. agreed, holding that the prohibition of movement could not have been validly made unless the Veterinary Inspector had reason to believe, and believed, that the defendant's movement, as specified, would be attended with the relevant risk, "therefore, one of the facts on which the prosecution depended was the existence at the relevant time of reason for such belief on the part of the Veterinary Inspector". The judge said that it was a matter for the Circuit Court judge to decide in his discretion whether to receive the evidence of the Veterinary Inspector when the case returned to him, again citing *Attorney General v. McTiernan*.

23. Kenny J. expressed a concurring view and concluded his judgment with the quotation set out above.

24. It may be remarked that these judgments make clear that the missing evidence was essential to the success of the prosecution and arguably went a good deal further than the issue in this case, which is of a much more technical and procedural nature.

25. The *Attorney General v. McTiernan* [1953] 87 ILTR 162 is a decision of the Supreme Court which arose out of a Revenue prosecution in the District Court that was the subject of a case stated to the High Court. That Court decided in favour of the prosecution and the defendant appealed to the Supreme Court. At the time, in a Revenue prosecution, it was necessary that at some stage the Revenue Commissioners be shown to have elected to proceed for a monetary sum. An averment to the fact of such election in the summons would have been sufficient or proof could have been given during the hearing. When he had heard the evidence, the District judge held that the defendant had a prima facie case to answer and that he was inclined to grant an amendment as sought by the prosecution if it could be proved that the Revenue Commissioners had in fact elected to sue for £100 on each charge. Two documents were produced which appear to have been signed by one Revenue Commissioner. The judge was not satisfied that this was appropriate proof but he gave the State Solicitor an adjournment to look into the law. At the adjourned hearing, the State Solicitor produced two documents which he offered in evidence but the judge refused to admit them, holding as follows:

> "As this is a criminal case, I was of opinion that it would be wrong to admit this fresh evidence after the evidence for the prosecution had closed. These documents were not in existence when the case was heard on July 19th, 1950. The case was then adjourned solely to facilitate the State Solicitor in preparing a legal argument on evidence that had concluded. I was satisfied that this was not a case where evidence of the election had been accidentally excluded."

26. The Supreme Court held that the judge was in error, in that he improperly exercised his discretion. Maguire C.J. said:

> "It seems to me it would have been quite wrong to refuse to admit the documents even after the case for the prosecution had closed. It would even have been quite proper to adjourn the proceedings to ascertain whether or not an election had in fact been made. It does not matter that the adjournment was granted for another purpose. The case was still at hearing. It was still open and the fact that it was originally intended that only one point should be argued did not prevent the District Justice from allowing any other point to be raised.

In my opinion, it was the individual duty of the District Justice to receive the documents. The defence had not even been opened. The question raised in the case stated should, therefore, be answered, that the District Justice was not correct in law and the case should be remitted to him to proceed accordingly."

O'Byrne J. said:

> "It is true that the documents were not in existence at the time of the election but the determination of which they were evidence was in existence. I do not think that this was a case in which the District Justice was bound, in the exercise of his discretion, to exclude the documents. He apparently took the view that it would be legally wrong to accept these documents. I think that he was clearly wrong in that view and I agree with the judgment just delivered by the Chief Justice."

Black J. concurred with his colleagues.

27. In *McTiernan's* case, the election of the Revenue Commissioners was an essential matter to be established in the prosecution. The view adopted by the learned District judge echoes the position adopted in this case by the applicant but it was roundly rejected by the Supreme Court. That view was endorsed and followed in the later case above discussed. The question of principle, therefore, is that the evidence can be adduced and ought to be adduced, even after the closing of the prosecution case if it goes to technical or procedural questions, and the nature of that facility has to be understood in the context of the meaning of procedural or technical. It seems clear to me that the question in issue in this case is of a much less central or fundamental nature than the issues that arose in those decided cases. Therefore, the question at issue here is of a much more technical and procedural nature.

28. An analogous question has arisen from time to time in relation to the failure of the prosecution to prove a Statutory Instrument. Whereas judicial notice is taken of primary legislation in the form of Acts of the Oireachtas, that is not the situation with Statutory Instruments. They are normally proved by the production and furnishing to the Court of a copy of the document purporting to be issued by The Stationery Office. The courts have held that a relevant Statutory Instrument may be proved even after an application for a direction has been made on the basis of the failure of proof of the Statutory Instrument. See People (Attorney General) v. Kennedy [1946] I.R. 517, where, at p. 521, Davitt J., giving the judgment of the Court of Criminal Appeal, referred to the convenient modes of proof provided by s. 4 of the Documentary Evidence Act 1925, and commented critically on prosecuting Counsel when saying:

> ". . . it is to be regretted that, with such convenient methods of proof readily and immediately available, counsel for the prosecution did not think fit to adopt one or the other, particularly when the matter had been specifically brought to his attention by the submission of the defendant's solicitor when making his application to the Court for a direction."

29. In *People v. Griffin* [1974] I.R. 416, Henchy J., delivering the judgment of the Supreme Court, noted as follows:

> "For my part I would point out that, when at the trial counsel for the appellant applied for a direction on the ground that the statutory instrument had not been proved, it was open to the trial judge either to direct an acquittal or to allow the necessary evidence to be given notwithstanding that reasons I am of opinion that the appeal should be allowed."

30. These authorities seem to me to support the proposition that it is not alone the entitlement, but may actually be the obligation of a judge, to admit relevant evidence where it may have been overlooked by the prosecution but relates to something that is essentially procedural or technical. The meaning of this expression is to be gathered from the Irish cases and extends to things that are essentially of a formal nature but which may well go to the heart of the prosecution. If the matters are not rectified, the result will be the acquittal of the accused. In locating the nature of the defect in this case, or the lacuna, assuming that the defence did establish enough at least to create an issue in regard to the displacement of the presumption, it would appear to be at a lesser level of importance than in the cases decided by the Supreme Court which are above considered. In other words, on a scale which has substantive factual evidence at one end, and purely formal technical matters at the other end, those cases of Halford, McTiernan, Kennedy and Griffin are substantially further along the scale than the point that arises here.

31. In *Royal v. Prescott-Clarke* [1966] 1 W.L.R. 788, on a case stated by justices, the Court of Appeal held that the justices had a discretion to grant an adjournment to enable the prosecution to produce further evidence to satisfy a formal requirement, namely, to prove an order relating to a motorway. In the absence of such evidence, the defendant was entitled to be acquitted, so it was an essential proof. Counsel for the defendant had applied to the justices for the case to be dismissed and in the middle of his submissions, the prosecution asked for an adjournment to produce the relevant proof but the justices refused. The matter went by way of case stated to the Court of Appeal. The Court held that it was a matter for the discretion of the justices, but in a case such as that, where "there is no question of the prosecution being given a further opportunity to go out and scout about for evidence to strengthen their case", there was only one way in which the direction could properly be exercised.

32. *Price v. Humphreys* [1958] 2 Q.B. 353, is another case stated that came before the Court of Appeal, Devlin J. endorsed the proposition that if the matter that is the subject of the application to reopen the case is one of substance, the prosecution ought not to be allowed to do so, but if it is one of technicality "such as the proof of a statutory rule or order", or something of that sort, then the justices should allow the prosecution case to be reopened. In that case, the Court sent the case back to the justices because the issue was merely one of procedure.

33. Ó Caoimh J. addressed the question of recalling a witness in a public order prosecution in *Bates v. Brady* [2003] 4 I.R. 111. An essential proof of the crime was that the alleged offender be warned by the Garda that if he failed to comply with the requirement, he would be committing a criminal offence and that had not been done. The applicant sought to quash the convictions on the ground that the District Court had erred in recalling the prosecution Garda to give evidence of this essential missing fact. Ó Caoimh J. held that unless it could be shown that the accused was given the warning or otherwise knew that failing to comply would constitute a criminal offence, the offence was not committed. He concluded that the evidence related to the merits, and on that basis granted the order sought.

34. In *Verdon v. Downes* (Unreported, 29th July 1976) the Supreme Court addressed a question of considerable similarity to the instant case. In his judgment for the Court, Griffin J. held that under the statutory regime at the time relating to a drink-driving case, it was necessary for the prosecution to prove that the provisions of the relevant Regulations had been complied with. The judgment went on to make some further relevant observations which although clearly obiter are of assistance:

> "In my opinion, in a prosecution under s. 49 or s. 50 of the 1961 Act, the prosecution must prove that the procedures laid down by Article 13 have been complied with. It is therefore necessary for the 'appropriate person' who carried out the functions specified in Article 13 to give evidence orally, unless and until the Regulations are amended to include these matters in the Certificate to be given by the Director. With this evidence given, the prosecution will have eliminated the possibility that a mistake may have been made. In this case, the necessary proof was not given.

Although of a formal nature, the proof is nevertheless a necessary one. In the normal way, it might reasonably be expected that a District justice would adjourn a case so that the necessary evidence might be given. In this case, however, the solicitor for the prosecution was alive to the difficulty which would arise in the absence of a witness from the Bureau, and at the commencement of the hearing indicated that he might seek an adjournment to produce a witness from the Bureau. In the event, he closed his case without either calling the appropriate person from the Bureau to give evidence, or seeking an adjournment for that purpose, and he did not apply for the adjournment until after the absence of this proof had been argued on the application of Counsel for the defendant to have the complaint dismissed. The District justice had a discretion to allow the adjournment for that purpose (see A.G. (at the Prosecution of Superintendent Corbett) v. Halford, Unreported, Supreme Court 5/4/1976 and the cases therein referred to). However, he exercised that discretion in refusing the adjournment. Having done so, he was correct in law in dismissing the complaint and the question put by the District justice in the case should be answered accordingly."

35. These authorities confirm that in a technical or procedural matter, the judge has a discretion to allow further evidence or to permit the prosecution to reopen the case, whichever expression is appropriate to the situation. Indeed, the authorities state or imply that in such cases, the discretion ought to be exercised in favour of the production of the evidence. Therefore, the concept of a procedural or formal matter, as discussed in these cases, is more than sufficient in breadth to accommodate the question in this instance.

36. The point that was made in argument that there is a special and different rule for cases in which there is proof by way of certificate is not valid. It is a distinction without a difference. The contention does not withstand analysis by reference to the cited authorities and the judgments that may be considered obiter but whose observations remain relevant and helpful. In each case, there was an element of proof that was missing, yet the Court was satisfied that it was in the interest of justice that it should be supplied after the prosecution evidence had been given and the case closed. It is true that the lacunae were considered to be technical or procedural or formal, as opposed to going to the merits of the case, which is the essential criterion for permitting the additional evidence. However, the courts considered material and necessary evidence to be in that permissible category that went far beyond the paper slip in this case. The judgment of the Supreme Court in Verdon v. Downes cited above was concerned with precisely the kind of case that is in consideration here and the missing proofs were much more extensive, substantial and material.

Discussion

37. It is worth remembering what it is in issue here. The Garda gave the appellant the part of the sample and he took it. The slip of paper said that he could retain it. He had already been given the sample, however. It is clear, therefore, that proof of the giving of the piece of paper could scarcely be more formal or procedural or less substantive or going to the merits. That point puts in context the nature of the proof that was given in response to the question by the judge. In this case, we are at a remove in legal principle from even the consideration of the necessity to ensure that the paper chit was given to the suspect.

38. The issue was not whether there was a failure to observe the statutory procedure. There is no dispute in fact that the statutory procedure was complied with in all its formalities. The Garda confirmed that she had given the form, as specified by sub-section (2). That was not disputed and is not disputed by Mr. O'Keeffe. The question is whether the Garda's failure to recall that step when she was being cross-examined is fatal to the prosecution because once she had ceased giving her evidence there was no revisiting the question.

39. It is difficult in the circumstances to understand how the interest of justice might be served by a rule that prohibited the judge from asking an obvious question. Granted that Mr. Herbert had raised the question as to whether the form had in fact been served and it could be considered that that at least raised the question whether the presumption still stood or had been overturned. So, there was a question. Did the Garda give the form to the person she had arrested and who had furnished a urine sample? She had said that she had given the person one of the sealed containers. It was obvious that he was given that for his own use to get it tested or to retain it and keep open the option of having it tested. He might have decided to wait until he got the result of the Medical Bureau analysis and then pursue his own investigation if he saw fit.

40. The judge was entitled to be concerned as to whether the statutory procedure had been followed. If it had not, it would have been legitimate for Mr. Herbert to rely on Kemmy's case and McCarron's case to maintain that the specifics of the sub-section had not been satisfied. But as to the question of whether they had or had not been satisfied, it is not easy to find a justification for a prohibition of the question from the judge.

41. It was clearly in the judge's mind whether this statutory prescribed step had been taken. Suppose the answer had been in the negative – would anybody have been entitled to object in that situation?

42. There was no interference with the accused's constitutional rights or of any legal protection that he enjoyed. He was arrested under statutory power and required to agree to the taking of a blood sample or to provide a urine sample. Mr. O'Keeffe had actually been given the part of the sample in the sealed container. What did the interest of justice require? It cannot be said that it was better that the Court should have been and remained ignorant of a simple piece of information that was readily ascertainable. If the courts were to allow the appeal in this case and to prohibit the question that the judge asked, that would impose a straitjacket on a trial judge. That cannot have any foundation in justice. It is manifestly not in the public interest. It is easy to see how the rule would be extended so as to prevent the judge from intervening to ask a question during the course of the evidence on the ground that it would be conducive to an impression of bias.

43. There will be circumstances where it would not be appropriate for a trial judge to intervene. The judge is not entitled to take up a position for one side or the other in a case and to pursue a line of questioning with witnesses that is designed or may be seen or understood to be designed to achieve a particular outcome. The tomes on judicial review are replete with examples of unhappy and indeed unjust interventions by judges, but the circumstances of this case are very far from any question of injustice, except insofar as the prosecution and the public interest are concerned. The test must be what is in the interest of justice.

44. It is not in dispute in this case that the statutory procedure required under s. 18 of the 1994 Act was fully complied with. The only question is how the information that it was fully complied with came to be before the Court. Or, rather, the only question is as to the legitimacy of the means by which that information came before the Court. It happened because the judge asked the Garda a relevant question in light of the application made by the defence solicitor.

45. It seems to me that this case is invoking high principle to justify a proposed procedural prohibition that is not conducive to the proper administration of justice.

46. In Director of Public Prosecutions v. J.S. 15th April 2015, Clarke J. stated at paragraphs 4.8 and 4.11 as follows:-

> "4.8 In my view, there are two important and, at least to some extent, potentially competing principles involved. On the one hand is the principle that society, and indeed the victims of crime, are entitled to have an assessment carried out at a criminal trial of the culpability of an accused based on the proper consideration by the decider of fact (be it judge or jury) of all evidence, where that evidence is material to the question of guilt or innocence, is potentially probative of guilt, and is not potentially more prejudicial than probative in the sense in which those terms have come to be used in the jurisprudence. That principle is not, of course, an absolute requirement. However, there is, in my view, a high constitutional value to be attached to ensuring that all potentially relevant evidence, which meets the criteria which I have just sought to define, is considered at a criminal trial.
>
> 4.11 However, on the other hand, there is also a significant constitutional value to be attached to the need to ensure that investigative and enforcement agencies (including An Garda Síochána) operate properly within the law. Why do we have elaborate laws concerning arrest, the power to enter premises, questioning and other means of what might be described as non-voluntary evidence gathering? We do so because there is a significant constitutional value in ensuring that there are clear rules which mark the limits of the powers of investigation and enforcement agencies in evidence gathering. Those limits are there to protect us all. There is a high constitutional value in ensuring that those limits are maintained. It follows that there should be consequences, and indeed significant consequences, where those rules are broken."

47. The question was whether the applicant in this case was guilty of the offence of driving a vehicle while under the influence of an intoxicant to the statutorily defined extent. That depended on the content of urine sample, as analysed by the MRBS, subject to disproof by the accused. Compliance with the statutory procedure was a necessary proof.

48. The judge was entitled to ask the question about a technical procedural matter.

Conclusion

49. In my view, the learned President of the High Court was correct in refusing the application for judicial review and I would dismiss the appeal accordingly.