Neutral Citation: [2017] IEHC 628

THE HIGH COURT

[2016 No. 824 S.S.]

IN THE MATTER OF SECTION 52(1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACTS 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND

ANDREW MCTIGUE

ACCUSED

JUDGMENT of Ms. Justice Faherty delivered on the 6th day of October, 2017

1. This matter comes before the court by way of Consultative Case Stated by Judge Mary Devins, Judge of the District Court.

2. The relevant background giving rise to the Consultative Case Stated is as follows:

3. On 9th November, 2014, the accused was arrested on suspicion of drunk driving by Garda Colin Murrin of Ballinrobe Garda Station and was conveyed to the Garda Station. A lawful requirement was made for the accused to provide a sample of urine or blood. The accused opted to provide a urine sample, but was unable to do so. He was then required to supply a blood sample and he refused, citing fear of needles. Garda Murrin warned the accused that failure to comply with the requirement was an offence and warned him of the penalties if he refused to give a sample. Garda Murrin correctly advised the accused of the potential prison term and fine for such refusal. Garda Murrin also stated that the refusal could result in "a disqualification of up to 4 years". The accused was then charged with refusal to provide a specimen pursuant to s. 12(3)(a) and 12(4) of the Road Traffic Act 2010 (hereinafter referred to as "the 2010 Act"), as amended by s. 9 of the Road Traffic Act 2011.

4. The accused appeared before Castlebar District Court on 20th October, 2015, to answer, *inter alia*, the aforesaid charge. At the close of the prosecution case, a submission was made by the defence that the case should be dismissed because the Garda had not stated the proper period of disqualification when he was warning the accused of potential penalties. The Garda had stated that the period was "not exceeding four years" when the potential disqualification period was actually "not less than four years". The defence solicitor submitted to the District Judge that the accused had been incorrectly advised and relied on the judgment of the Supreme Court in *Director of Public Prosecutions v. McCrea* [2010] IESC 60 to say that in the absence of solicitor's advice, then the next best advice was to be from the Gardaí. The submission made to the District Judge was that the advice given by Garda Murrin was incorrect and that if the accused had been correctly advised he would have been fully informed as to the consequences of any intended actions.

5. Judge Devins adjourned the case to 17th November, 2015, in order for submissions to be prepared by the prosecution. On that date, Superintendent Cryan for the prosecution submitted that the accused was not prejudiced by the slight error and that the accused was not relieved of his obligation to give a sample. He also submitted that disqualification is not a punishment and cited *Conroy v. Attorney General* [1965] I.R. 411. He also referred to a passage from the text book "Drunk Driving" by Mark deBlacam when submitting that disqualification was not an additional punishment. Reference was also made to *DPP (Deegan) v. Murphy* [2002] IEHC 79 in aid of the submission that there was no obligation on Garda Murrin to inform the accused of the consequential disqualification order that would be made in the event of a conviction.

6. The solicitor for the accused cited DPP v. McCrea [2010] IESC 60, namely Hardiman J.'s commentary that "in the absence of access to a solicitor, the Gardaí themselves were the only source of legal advice". It was submitted that if the accused had been correctly advised as to the potential consequences of his actions, he would have been clearly and fully informed as to his subsequent actions. The District Judge was asked to consider matters in the accused's case as analogous to strict provisions applicable to (what was then) s. 17 certificates and the defence solicitor referred to *DPP v. Freeman* [2009] IEHC 179 in that regard.

7. The question posed by Judge Devins was in the following terms:

> "Am I correct in law to dismiss the charge on the basis of my finding that an incorrect warning was given to the accused on the consequences of failing or refusing to provide a sample of blood or urine".

The issues before the Court

8. Before the Court, the issue between the parties is whether a prosecution for a refusal to provide a specimen in a drunk-driving case should be dismissed because the prosecuting Garda did not warn the accused with enough precision of the period of disqualification from driving that could ensue from a conviction for that offence. It is accepted by counsel for the Director of Public Prosecutions (DPP) that in making the requirement of the accused for a specimen, Garda Murrin understated the adverse consequences of a failure or refusal by telling the accused that he could be disqualified from holding a driving licence for up to four years when, in fact, the actual potential exposure to adverse disqualification consequences in the event of a refusal was greater than four years.

The DPP's submissions

9. Counsel for the DPP submits that while the requirement made of the accused for a specimen is an exception to the constitutional right not to self incriminate (and a long standing principle of the criminal code), it is not the law that an accused has to be told with exactitude of the specific penalties or periods of disqualification that can ensue from a failure or refusal to provide a specimen. Counsel contends that the case law on the issues sets out the general principle that what is necessary when an accused is requested to provide a specimen of blood or urine is that he or she is made aware that refusal or failure to provide that sample is a criminal offence. In this regard, counsel relies, *inter alia*, on *DPP v. McGarrigle* [1996] 1 ILRM 271, *DPP v. Mangan* [2001] IR 373, *DPP (Deegan) v.Murphy* [2002] IEHC 79 and *DPP v.Canavan* (Unreported, High Court, 1st August, 2007, Birmigham J.) It is submitted that in the instant case the accused was warned in more voluble terms than either of the individuals in *Murphy* or *Canavan*.

10. It is also submitted that while the defence solicitor relied in the District Court on *DPP v. McCrea* [2010] IESC 60, that case is not relevant to the circumstances of the accused in the present case.

11. Counsel contends that for the Court to hold that the accused's rights were infringed upon by the mis-statement concerning the period of disqualification, would be to turn the Gardaí into quasi-legal advisors. While it is accepted that there might be instances where a garda could completely mislead an accused in terms of information provided, the present case was not such an instance.

The accused's submissions
12. Counsel for the accused submits that the accused's position is a novel one. The question is whether a District Judge is entitled to dismiss the charge in circumstances where wrong legal advice was provided to the accused regarding the period of disqualification, as opposed to no reference being made to the issue of disqualification upon conviction. While counsel raises no issue in the latter regard, it is submitted that the provision of wrong information to the accused encroached upon his constitutional rights.

13. Counsel submits that on constitutional rather than statutory grounds, and recognising and balancing the right not to self-incriminate, an accused must be given a certain minimum amount of factual information in order for the operation of the statutory provisions to lawfully encroach upon his constitutional rights. It is contended nothing should be said to an accused in the course of the requirement for a specimen which encroaches on constitutional rights unless it is specifically authorised by statute. Counsel submits that misinforming the accused, without any statutory or constitutional mandate (which can only be to accurately inform), in the course of making a requirement under the 2010 Act, by way of an understatement of the statutory adverse consequences for him if convicted was an unlawful trespass upon the accused's constitutional right and criminal code right not to self-incriminate. It is submitted that the material misinformation as to the adverse consequences of failing to self-incriminate evidently went further than any information or warning authorised by statute or mandated by the Constitution.

14. The offence of which the accused stands charged can only be committed following the making of a statutory requirement for a specimen. Accordingly, if part of that requirement consists of misinformation as to the law (in this case understating the consequences in terms of disqualification for the accused if convicted for a refusal to provide a specimen), it was not a lawful requirement. Counsel submits that if the adverse consequences of a refusal by the accused to expose himself to self-incrimination are characterised as less severe than they are actually are under the statute, this is unlawful for the following reasons: it is not authorised by statute; it weakens the privilege against self-incrimination without statutory authority; it diminishes the protection of the information which is constitutionally required to be given: and it compromises the right of access to a solicitor of an accused person in custody.

15. In aid of his submissions, counsel for the accused cites *DPP v. Cagney* [2013] IESC 13. Counsel also cites the dictum of O'Flaherty J. in *Brennan v. Director of Public Prosecutions* (Unreported, 1st November, 1995, Supreme Court, O'Flaherty J.) in support of the submission that the accused had a right not to have his right not to self-incriminate encroached upon any further than what is mandated by statute.

Considerations
16. In *DPP v. McGarrigle*, the relevant facts were as follows: the respondent was arrested under s. 49(6) of the Road Traffic Act 1961(hereinafter referred to as "the 1961 Act") and brought to a Garda station. He was required by the investigating Garda to give a sample of blood or urine and was informed that if he refused or failed it was an offence attracting penalties. The Garda did not, in making the requirement, invoke any specific or identifiable section or sub-section of the Road Traffic Acts 1961 to 1978. The respondent refused to give a specimen. The District Judge acceded to an application at the conclusion of the evidence for the prosecution to dismiss the case on the grounds that there was no evidence that the requirement was made pursuant to s. 13 of the Road Traffic (Amendment) Act 1978 (hereinafter referred to as "the 1978 Act") which was an essential ingredient in the charge and that the requirement could have made equally under either s. 13 of s. 14 of that Act. The question raised in the case stated was whether the District Judge was correct in dismissing the charge. The High Court held that he was correct to do so. Before the Supreme Court, it was argued on behalf of the DPP that since the only legal power vested in a member of An Garda Síochána to require the giving of a specimen from a person who had been arrested under s. 49(6) of the 1961 Act was contained in s. 13 of the 1978 Act, the District Court should have inferred, having found that the arrest was under s. 49(6) of the 1961 Act, that the requirement was made pursuant to s. 13 of the 1978 Act. As against that, the respondent argued, *inter alia*, that since s. 13 of the 1978 Act created a criminal offence arising from a refusal to comply with the requirement which may incriminate a suspect, it must be construed strictly. The Supreme Court, in dismissing the DPP's appeal, upheld this submission, Finlay C.J. stating:

> *"The obligation to give a specimen which may establish the committing of a serious offence is a significant though not unique exception to the general principles of our criminal code which protect an accused person against involuntary self-incrimination. The enforcement of it on the terms of s. 13 of the Act of 1978 depends completely on proof of the requirement refused was made under that section. Such a basic requirement in a serious matter must, it seems to me, be affirmatively proved and not left to be inferred." [at p.]*

17. In *McGarrigle*, the respondent had also submitted that he had a right to be told that the requirement was being made under s. 13 of the 1978 Act and not under s. 14 since conviction for an offence under s. 13 carried a mandatory disqualification from driving whereas a conviction under s. 14 did not and the Probation Act could be applied to a conviction under s. 14 but not to one under s. 13.

18. However, the respondent's submission in the aforesaid regard was rejected by Finlay C.J. He stated:

> *"I reject this last submission which appears to me to be based on an assertion that the respondent had a legally enforceable right to be volunteered information as to the seriousness of the consequences of refusal so as to permit him to decide whether or not to commit a criminal offence. He did have a right to be informed of his legal obligation subject to penal sanction to comply with the requirement and this on the facts as found he was afforded."*

19. The judgment in *McGarrigle* was considered by the Supreme Court in *DPP v. Mangan*, where Keane J. stated:

> *"The rationale of the decision is clear. Generally speaking, the defendant or putative defendant to criminal proceedings cannot be required to assist the prosecution in the ultimate conduct of their case by incriminating himself or herself. While there are statutory exceptions to this principle - of which s. 13 is one - a prosecutor who seeks to rely on them must satisfy the court by the adduction of affirmative evidence that, at the minimum, the person concerned was informed at the time that he was obliged by statute to provide the appropriate information or material - in this case a specimen of blood or urine - and that he would be committing an offence and exposing himself to penalties if he failed to comply with that requirement. Were it otherwise, in a case under s. 13 a person might find himself convicted of an offence where a demand had been made of him without any indication as to the legal basis for the demand. That, it was held in Director of Public Prosecutions v. McGarrigle, was not the law." [at pp.380-381]*

20. In *DPP (Deegan) v. Murphy*, the accused had been arrested pursuant to s. 49(8) of the 1961 Act, as amended, due to an alleged failure to provide a sample as provided for under s. 13 of the Road Traffic Act, 1994 ("the 1994 Act"). In the District Court, it was accepted that the Garda had informed the accused regarding the fines and the terms of imprisonment applicable but had not informed him of the consequential disqualification from driving for a period of two years if convicted. The District Judge indicated that as the Supreme Court had held in the case of *Conroy v. Attorney General* [1965] I.R. 411 that a disqualification order was not to be regarded as a penalty, he was of the opinion that the provisions of s. 13(1)(b) of the 1994 Act had been adequately and sufficiently explained to the accused and the consequences of a failure or refusal to comply therewith. Upon request, the District Judge submitted a case stated for the opinion of the High Court as to whether the provisions as set out in 1994 Act had been complied with. What the High Court had to consider was the situation where a Garda gave evidence before the District Court that he had informed the suspect that a failure or a refusal to comply with the requirement to provide a specimen was a specific offence under s. 13 of the 1994 Act and also informed the suspect of the maximum custodial and monetary penalties available but failed to mention the mandatory disqualification from driving which follows a conviction for the offence.

21. Ó Caoimh J. stated as follows:

> *"It is clear that no authority exists in support of the case made before the learned District Judge that there was an obligation on the prosecuting member of an Garda Siochana to acquaint the accused of the consequential disqualification order that would be made in the event of a conviction. I am satisfied that no such requirement exists and that it is clear that the accused was appropriately informed of the penalties for a failure or refusal. The consequential disqualification is not part of the penalty (Conroy's case) and accordingly the accused was not misled as to the penalty attaching to the offence. What is important is that a due requirement was made of her. The McGarrigle decision does not itself suggest there is an obligation on the part of a garda exercising the power under s. 13 (1) (b) to inform an accused of the penalties attaching to any contravention of the section. Furthermore, there is no requirement to acquaint the person of whom the requirement is made of the fact that consequential disqualification arises in the event of a conviction under s. 13(3). I am satisfied that the learned judge of the District Court was correct when he indicated to counsel for the accused the effect of the Conroy case and that in his opinion Garda Deegan had adequately explained to the accused the provisions of s. 13(1)(b) and the consequences of a failure or refusal to comply with the requirement made."*

22. In *DPP v. Canavan*, the issue before the District Court, on which the opinion of the High Court was sought, was whether in a prosecution under s. 13 of the 1994 Act it was necessary for the prosecution to prove that the garda who conducted the intoxilyzer test in addition to informing the suspect if he failed or refused to comply that he would be committing an offence was also required to inform him that the offence carried penalties. Birmingham J. held that it was sufficient for the prosecuting guard to tell the accused that failure or refusal was an offence without it being necessary to mention the penalties involved. The learned judge reviewed the relevant authorities (including *McGarrigle, Mangan and Murphy*) and went on to identify the following principles:

> *"1. The obligation to provide samples and specimens contained in various sections of the Road Traffic Acts which may provide the evidence to establish the commission of an offence is a significant exception to the general principles of the criminal code which protects persons against involuntary self-incrimination.*
>
> *2. That in a prosecution for failure to comply with the requirement it is sufficient for the garda making the requirement to indicate, at a minimum, to the person concerned at the time that he or she would be committing an offence and exposing himself or herself to penalties. In such a case it is not necessary that the details of the penalties be spelt out.*
>
> *3. In a situation where a specimen or sample is actually provided the attention switches to the terms of the demand the results of the samples or specimen analysis."*

23. With regard to the specific case before him, Birmingham J. opined:

> *"Here, Mr. Canavan was told he would be committing an offence he was not told that it was an offence carrying penalties. The question is whether, given that there was no obligation to spell out in detail what the penalties were, was the failure to refer to penalties at all fatal.*
>
> *Try, as I do, I have been unable to think of any offence that did not involve penalty.*
>
> *It is true that the failure to refer to the fact that there were penalties means that there was not strict compliance with the wording of the obligation as enunciated by Ó Caoimh J. a formula of words which of course derived from the Supreme Court judgment. However, judgments are not to be passed and analysed as if they were sections in a Finance Act. Neither Finlay C.J. in McGarrigle or Ó Caoimh J. in Murphy were dealing with a case where the suspect was told that failing or refusing to comply the requirement was an offence. Had that been the situation, I believe, it is likely, they would have found that there was satisfactory compliance with the statutory requirements and that there was no want or fair procedure."*

24. He went on to state:

> *"In summary, I am of the view that it was not necessary for the prosecution to prove that the garda told the accused that the offence he would be committing if he failed or refused to comply attracted penalties".*

25. The learned judge went on to answer the question posed in the case stated as follows:

> *"It is not necessary in a prosecution for an offence under s. 13 of the Road Traffic Act, 1994 for the prosecution to adduce evidence that the suspect in addition to being informed that failure or refusal comply with the requirement constituted an offence to be also told it was an offence attracting penalties."*

26. Counsel for the accused contends that the factual matrix in the accused's case is different from the factual backdrop which underlined the rulings in *McGarrigle, Murphy* and *Canavan*. Reliance is placed on *DPP v. Cagney*. Counsel submits that the warnings required by case law to be given by the Gardaí are to give effect to the constitutional right of an accused not to self-incriminate. Thus, it is argued that the case law establishes that if an accused is to be convicted for a refusal or failure to give a specimen, the requirement for that specimen itself must be legitimate, as held by Clarke J. in *Cagney*. Counsel also submits that it is not the accused's case here that there was any obligation on the investigating garda to inform him of the penalties which a refusal might attract or to outline to him that he could be disqualified. However, once the garda embarked on conveying information as to disqualification, there was an obligation not to misinform the accused. This, counsel contends, must follow on from the finding in

Cagney that there is a constitutional right to information in the context where the making of a requirement for a specimen is an exception to the constitutional right not to incriminate oneself. Accordingly, in the circumstances of this case, it is contended that the question posed by the District Judge must be answered in the affirmative as this Court should find that there was an obligation on the garda not to misinform the accused in circumstances where adverse consequences arose on foot of any refusal or failure to provide the requested specimen. It is submitted that there was prejudice to the accused's understanding of how far the law could encroach upon his rights in the event of his refusing to provide a specimen. Counsel argues that insofar as he was given bad legal advice by the Garda Murrin, the accused was prejudiced.

27. In *Cagney*, the factual background was as follows: The defendant was prosecuted for failing to provide a breath sample. The Circuit Court, on appeal, was satisfied that the defendant having been lawfully required to provide two samples of her breath by means of an intoxiliser, was unable to do so due to a transient medical condition. Both the prosecution and defence agreed that the defendant was not offered the alternative of giving a sample of blood or urine. In the Circuit Court the defendant sought to rely on the provisions of s. 23 of the 1994 Act which provides as follows:

> "In a prosecution of a person under section 13 for refusing or failing to comply with the requirement to provide 2 specimens of his breath, it shall be a defence for the defendant to satisfy the court that there was a special and substantial reason for his refusal or failure and that, as soon as practicable after the refusal or failure concerned, he complied (or offered, but was not called upon, to comply) with the requirement under the section concerned in relation to the taking of a specimen of blood or the provision of a specimen of urine".

28. The specific issue which arose for consideration by the Supreme Court in Cagney was whether in requiring the breath sample the investigating garda was obliged to inform the defendant that in order to avail of the defence provided for in s. 23 of the 1994 Act, she must offer to provide a specimen of blood or urine. This issue arose in circumstances where the DPP argued that the natural and ordinary meaning of the words contained in s. 23 was that the defendant must actually comply with a requirement to give blood or urine (as it transpired, not an issue in Cagney as no such requirement had been made) or offer to do so but not be called upon.

29. In the course of giving judgment in Cagney, Clarke J. had occasion to consider the obligation to give a warning to a person who is required to provide a sample under the Road Traffic Acts and relevant jurisprudence in that regard. He stated:

> *"5.4 It is, however, also necessary to make some reference to the jurisprudence of this Court in respect of the obligation to give a warning to a person who is required to provide a sample under the Road Traffic Acts to the effect that failure to provide a legitimately requested sample can amount to an offence. The case law stretching from DPP v. McGarrigle (reported as an appendix to Brennan v. DPP [1996] 1 ILRM 267 at p.271) to DPP v. Mangan [2001] IESC 40 makes clear that there is such an obligation although the latter cases, most particularly Mangan, were concerned not so much with the obligation itself but as to the form in which the warning needed to be given.*
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> *5.5 It is important to emphasise that there is nothing in the Road Traffic Acts themselves which require, as a matter of statute, that any such warning be given. However, it is clear from the line of authority to which reference has been made that, at least in the circumstances then under consideration, this Court was prepared to imply in such an obligation. It follows that, at least at the level of principle, it is possible that there may be obligations placed on members of An Garda Síochána who are involved in applying the relevant provisions of the Road Traffic Acts, to inform persons of the consequence of failure to act. Those cases were, of course, concerned with a situation where a party was being required to give a sample or specimen, where failure so to do amounts to an offence and where it was held that such circumstances amounted to a significant departure from the normal position which pertains in respect of accused persons being that they are not obliged to do acts which might incriminate themselves.*
>
> *5.6 Against the background of that jurisprudence it is necessary to turn to the key issues which arises in this case which is as to the proper interpretation of the relevant provisions of s.23 and whether it is necessary, in substance, to read into those provisions an obligation on the part of the garda concerned to alert a person to the need to offer a blood or urine sample in order to be able to avail of the defence under the section."*

30. The learned judge went on to state:

> *"6.5 It must be recalled that there was an important constitutional backdrop to the decision of this Court to find inherent in the Road Traffic Acts a requirement to warn persons required to give a sample as to the consequences of failure so to do. That constitutional backdrop was the fact that persons, ordinarily, are not ordinarily obliged to take steps which might involve or require such persons to provide evidence or materials which might be relied on in a prosecution brought against them. The requirement, under pain of criminal penalty, to provide a sample which might have the effect of helping to establish an offence of drunk driving, was, therefore, a deviation, albeit a permissible one, from the normal constitutional regime. Against that backdrop this Court considered it necessary to hold that there was an obligation to inform even though nothing in the wording of the relevant legislation expressly provided for such a requirement.*
>
> *6.6 It seems to me that like considerations apply in this case. I agree with the submission of counsel for the D.P.P. that there is, ordinarily, no obligation on an investigating garda to alert a person under suspicion of any possible defences which might lie to the offence under investigation. However, where, as here, legislation, for reasons of constitutional necessity, acknowledges that it is appropriate to make provision for persons who may not have the ability or capacity to give a breath sample, it seems to me that it would be an insufficient vindication of the rights of persons with incapacity to rely on such a defence if they could lose the entitlement so to rely out of ignorance.*
>
> *…*
>
> *6.8 The situation with which this Court is concerned in this case is, however, different. A failure to offer a blood sample deprives the accused of a defence under s.23 as a matter of law. Given that fact and the constitutional backdrop to the defence based on inability or incapacity to which reference has already been made, it seems to me that the defence provided for in s.23 is in a very different category to most of the defences which arise in the general context of the criminal law.*
>
> *6.9 In those unusual circumstances it seems to me that there is an obligation on a member of An Garda Síochána, either when giving the original warning required by the line of authorities starting with McGarrigle or, if not then given, after a person has failed or refused to give a breath sample, to alert that person to the fact that, in order to rely on a defence*

of special and substantial reason for their failure or refusal, the person concerned must offer to provide blood or urine. It seems to me that, in circumstances where such a warning is not given in an appropriate and reasonably understandable way, the prosecuting authorities will be precluded from seeking to argue that the person concerned does not comply with the second leg of the test set out in s.23. It would, of course, even in those circumstances, always be open to the prosecuting authorities to suggest that the person concerned did not have a special and substantial reason for failure or refusal in the first place. The absence of an appropriate warning would not preclude the prosecution from resisting a defence under s.23 on the basis that there was, in truth, no special or substantial reason."

31. It is clear that in *Cagney*, Clarke J. accepted the general proposition that there is no obligation on an investigating garda to alert a person to any possible defences which might arise to the offence under investigation. However, given that s. 23 of the 1994 Act provides a person with a defence as a matter of law, coupled with the constitutional backdrop to the decision in, inter alia, *McGarrigle* to find inherent in the Road Traffic Acts a requirement to warn persons required to give a specimen as to the consequences of a failure or refusal to do so, Clarke J. found an inherent obligation on a member of An Garda Síochána, either when giving the original warning required by *McGarrigle* or, if not then, after a person has failed or refused to provide a breath sample, to alert that person to the fact that, in order to be able to rely on the defence provided for in s. 23 of the 1994 Act, the person must offer a blood or urine sample.

32. In the present case, counsel for the DPP argues that the reliance by the accused on *Cagney* as somehow departing from *McGarrigle* is misconceived since it is clear that, in *Cagney*, Clarke J. endorsed the decision in *McGarrigle* and applied the rationale in *McGarrigle* to the particular circumstances which presented in Cagney. I agree with the DPP's contention in this regard. I do not find that Cagney deviates in any substantive regard from the body of jurisprudence found in *McGarrigle*, *Murphy* and *Canavan* which, taken together, does not place any obligation on an investigating garda to offer any warning as to disqualification if a conviction ensues from a failure or refusal to provide a specimen. The very fact that the garda in this case mentions disqualification and does so by understating the disqualification period consequent on a conviction is not, to my mind, to be taken as a constitutionally impermissible trespass on the accused's constitutional rights in circumstances where a lawful requirement for a specimen was found by the District Court to have been made and in circumstances where the requisite warning as per *McGarrigle*, *Murphy* and *Canavan* was administered, namely that refusal or failure to provide a sample was an offence attracting penalties.

33. I note that in the District Court, the solicitor for the accused relied on *Director of Public Prosecutions v. McCrea.* The facts in that case were as follows: The accused was arrested under s. 49(8) of the 1961 Act. He was processed under the 1987 Regulations and given his rights upon arrival in the garda station and told that he could have access to a solicitor at any time and that his failure to consult a solicitor at the start did not preclude him from having access to a solicitor at any time during his detention. After the accused was brought to a room housing a breath test apparatus, a garda made a requirement of him to provide two specimens of breath pursuant to s. 13(1)(a) of the 1994 Act. At this point, the accused stated he wished to speak to a solicitor and refused to provide a specimen. The garda informed him that he could speak to a solicitor "as soon as he had complied with her requirement", having informed him that it was an offence to refuse or failed to provide his specimen. The accused refused to comply with the requirement and was charged with an offence contrary to s. 13(2) of the 1994 Act. The District Judge held that the garda's belief that she could not postpone the requirement to give a specimen was a denial of reasonable access to legal advice and accordingly he held that the accused was in unlawful custody from the time of such denial. The case was appealed by way of case stated. The High Court upheld the District Judge's decision. The case was then appealed by the DPP to the Supreme Court, which upheld the High Court. In giving judgment for the Supreme Court, Hardiman J. stated:

"In the absence of access to a solicitor, the gardaí themselves were the only source of legal advice available to the Notice Party. They were obliged to advise him about access to a lawyer and this advice was given in unambiguous terms. It was that he was entitled to consult his solicitor at any time during his detention in the garda station and that if he did not avail of the opportunity for access to a solicitor when it was first offered, that fact would not preclude him from exercising it later. This statement of his entitlements was not qualified in any way. The learned District Judge thought it not unreasonable that a person confronted with a demand expressed in statutory, that is in technical legal, terms should then seek a solicitor.

There is no need, in my opinion, for this Court to scrutinise that finding, or any other finding of the learned District Judge other than to enquire whether these findings were such as were open to her on the evidence. That is, the question of whether her findings were findings which this Court would itself make on the same evidence simply does not arise. Equally, it must be borne in mind that this is a Case Stated by way of Appeal and not a consultative Case Stated. In the latter species of Case Stated the learned District Judge is entitled to pose a particular question for the High Court to answer. Under the Appellate procedure, the statutory origins of which are set out on the title page of this judgment, a party, in this case the prosecution, is entitled to apply to the District Judge "o state and sign a case setting forth the facts and grounds of such determination, for the opinion thereon of [the High Court]". The nature of this jurisdiction is not affected by the terms of s.51 of the Act of 1961.

Accordingly it seems to me sufficient to say that, having considered the grounds of the learned District Judge's decision, which are set out earlier in this judgment, the Court need only say that it was open to the learned District Judge, on the specific facts she found in this case, to dismiss the charge. She was entitled to find that Mr. McCrea was reasonably entitled to rely literally on what the gardaí told him as to when he could take legal advice from a solicitor; entitled to find that a solicitor's advice would have been of benefit to him and entitled to find that he had not had reasonable access to it."

34. I agree with counsel for the DPP that *McCrea*, being a case concerning the right of access to a solicitor, has no particular relevance to the present case.

35. In all of the circumstances of the present case, I would answer the question posed by the learned District Judge in the negative, as follows:

The accused was afforded the full panoply of his rights in that he was informed of "*his legal obligation subject to penal sanction to comply with the requirement*" and was warned of the penalties which a refusal or failure attracted in the event of a conviction, all of which was in accordance with *McGarrigle*, *Murphy* and *Canavan* and in circumstances where the established jurisprudence imposes no obligation on an investigating garda to warn the accused of any consequential disqualification, upon conviction. Accordingly, there is no basis in law for a dismissal of the charge notwithstanding the mistaken information as to the period of disqualification which was provided to the accused by Garda Murrin.