

THE HIGH COURT

CONSULTATIVE CASE STATED

[2018 No. 736SS]

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961 (AS AMENDED)

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS

Prosecutor

AND

ANTOIN BREHON

Accused

JUDGMENT of Ms. Justice Murphy delivered on the 8th day of February. 2019

1. This matter comes before the High Court by way of case stated by District Judge Mary Devins pursuant to the provisions of s. 52 of the Courts (Supplemental Provisions) Act 1961. The question upon which the District Judge seeks the opinion of the court relates to the lawfulness of the detention of the accused at the time he provided a urine specimen in Westport Garda Station on 27th September, 2015. Following discussion with counsel the question to be answered was reformulated to reflect the actual issue of concern to the District Judge which was the lawfulness of the detention of the accused in the particular circumstances of this case. The question to be answered is;

In the circumstances of this case, was the accused in lawful detention at the time he was required to produce a specimen of urine?

The facts and the evidence before the District Judge are agreed.

2. The accused is charged before Westport District Court with an offence of drunken driving. It is alleged that on 27th September, 2015 at Mill Street, Westport, Mayo, he did drive a mechanically propelled vehicle 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 urine exceeded the legal limit. The events giving rise to that prosecution are set out below.

3. On Sunday morning, 27th September, 2015 Garda Darren Conlon of Westport Garda Station received information that there was a suspected drunk driver in the area of the Texaco garage at Sheenaune on the Castlebar Road, outside Westport. On arrival at the Texaco garage, Garda Conlon observed the accused's vehicle pulling out of the garage and continuing in the direction of Westport. Garda Conlon followed the vehicle and at 11.25 a.m. having observed his driving he pulled the accused's car over at the Mill Times Hotel. After speaking to and observing the accused, Garda Conlon formed the view that he was under the influence of an intoxicant to such an extent as to be incapable of having proper control of a mechanically propelled vehicle in a public place. At approximately 11.30 a.m. Garda Conlon made a requirement under s. 9 of the Road Traffic Act 2010 for a preliminary breath specimen. The alcometer registered a reading of 'fail' and Garda Conlon at 11.31 a.m. arrested the accused for drunk driving under s. 4(8) of the Road Traffic Act. The accused was brought to Westport Garda Station, arriving there at 11.35 a.m. The accused was introduced to the member in charge who entered his details into the custody record and handed him a copy of his notice of rights. She also explained to the accused that he had been arrested for drunk driving. At 11.38 a.m. Garda Conlon contacted Westdoc and requested the attendance of a doctor to process the prisoner for drunk driving. Seven minutes later at 11.45 a.m. Westdoc contacted the station and notified them that the doctor was tending to an emergency call and would be at the station as soon as possible. At 11.48 a.m. the accused acknowledged receipt of his rights. At 11.50 a.m. the accused was searched with his consent.

4. Once Garda Conlon had concluded processing the accused, the accused remained seated in the public office. At 1.05 p.m., an hour and twenty minutes after Westdoc had been in contact with the station, Garda Conlon contacted Westdoc again and was told that the doctor would be at the station at approximately 1.10 p.m. - 1.15 p.m. The doctor, Dr. Brian Lennon, eventually arrived at Westport Garda Station at 1.30 p.m. Garda Conlon having introduced Dr. Lennon to the accused as the designated doctor, and having complied with the relevant statutory provisions, required the accused to give either a specimen of his blood or a specimen of his urine pursuant to s. 12(1)(b) of the Act. At 1.32 p.m. the accused opted for a urine specimen and the doctor took the sample at 1.35 p.m. At the time the specimen was supplied the accused had been in the garda station for precisely two hours. Immediately thereafter the accused was released without charge pending the results of the analysis of his specimen.

5. Having processed the specimen, on 7th October, 2015 Garda Conlon received a s. 15 certificate from the Medical Bureau of Road Safety which noted a concentration of alcohol in the urine of 155/100ml. This level of concentration is more than twice the legal limit. The accused was subsequently charged with the offence of drunken driving and came before Judge Devins in the District Court on 7th April, 2016.

District Court hearing

6. At the hearing, the accused's solicitor, Ms. McDarby, challenged the lawfulness of the detention of the accused in the garda station. Garda Conlon was invited to justify the reasons for the delay in the arrival of the doctor. Garda Conlon was not in a position to state precisely why the doctor had taken the length of time that he did to arrive, other than to indicate that he had been informed that the doctor was dealing with a medical emergency. Garda Conlon was cross-examined as to why no interim contact was made with Westdoc service between 11.45 a.m. and 1.05 p.m., given that the gardaí were notified that there might be a delay. Garda Conlon responded that he consciously did not contact Westdoc as he did not want to cause any upset or aggravation to the doctor and that he did not want to interfere with the care being provided. Garda Conlon accepted that if he had called Westdoc he would have spoken to a triage nurse and not the doctor himself. The system apparently is that the call for service goes to a central location and it is the person at that location who dispatches the doctor. Garda Conlon was further cross-examined as to whether – given the delay – he had contacted other medical practitioners who might have been able to take evidential specimens as an alternative to Westdoc. Garda Conlon stated that he had not done so but accepted that there were other practitioners available to the gardaí. He agreed that he had not sought to contact any other medical practitioner and accepted that alternatives would have been available in Castlebar, which is approximately fifteen minutes away from Westport. Garda Conlon gave evidence that the instruction and procedure for summoning doctors out of hours, was through Westdoc and that that was the arrangement in place in the station. Garda Conlon suggested that it could have proven difficult to get a doctor outside of Westdoc, but he accepted that no efforts were

made in that regard. Garda Conlon was also cross-examined about the possibility of transporting the accused to Castlebar Garda Station where an evidential breath test was available. Garda Conlon stated that he had not considered that as he was expecting the doctor to arrive in Westport. Garda Conlon stated that he had been told that the doctor would arrive as soon as possible. Questioned by Ms. McDarby as to whether he could offer any explanation as to why there was such a delay for the accused awaiting the arrival of the doctor, Garda Conlon did not respond.

7. At the conclusion of the prosecution case, the accused's solicitor, Ms. McDarby, applied for a direction of no case to answer on behalf of the accused. She contended that the detention of the accused was unlawful by virtue of the delay. She submitted that the prosecution were under a duty to act with reasonable expedition when dealing with an arrested person. She submitted that where the reasonableness of the period is challenged, the prosecution must objectively justify the reasonableness of any delay to the criminal standard of proof. It was submitted that the prosecution had failed to objectively justify the delay on the facts of the case, given the failure to act on the information received from Westdoc, and to avail of alternative options. It was submitted that where the prosecution knew or ought to have known a delay would arise, there was a duty to seek out alternatives. Alternatives were acknowledged to have been available, but were not pursued.

8. On behalf of the prosecution it was submitted that the gardaí had done everything that they could have done to secure the attendance of the doctor and the prosecution relied on the decision of Charleton J. in the matter of *David O'Neill v Judge McCartan and Director of Public Prosecutions* [2007] IEHC 83.

Concerns of the District Judge

9. The District Judge was concerned about the absence of objective justification for the delay involved which resulted in the deprivation of the accused's liberty for a period in excess of two hours. This was especially so, where it was acknowledged that the Garda failed to pursue alternatives which were available. Having adjourned the matter to consider further submissions, the District Judge remained concerned about the length of the delay in this case and whether the delay had been adequately justified. The District Judge was not satisfied that the law on the matter was sufficiently clear and therefore proposed this consultative case stated. The accused's representative supported that approach, while the prosecution submitted that it was unnecessary.

The Law

10. The introduction of evidential breath testing in garda stations pursuant to the Road Traffic Act 1994 permitted trained gardaí to administer breath tests on apparatus supplied by the Medical Bureau of Road Safety, for the purpose of determining the concentration of alcohol in expired breath. The requirement to have a medic attend for the purpose of taking a blood or urine sample was obviated in those stations where the apparatus was available. The first challenge to the new procedure to come before the Supreme Court came in *DPP v Finn* [2003] I.R. 372. The facts in *Finn* and the question raised on the case stated are worth restating. Mr. Finn was arrested on suspicion of drunk driving contrary to s. 49(8) of the Road Traffic Act 1961, as amended by s. 10 of the Road Traffic Act 1994. He was brought to a garda station for the purpose of supplying two specimens of his breath as provided for by s. 13(1)(a) of the 1994 Act. On arrival at the station no immediate request for the provision of breath samples was made of him. He was placed in an interview room where he was observed by a garda for twenty minutes. At the end of that period of observation the relevant garda confirmed that Mr. Finn had consumed nothing orally. The twenty minute observation period arose from guidelines given to gardaí which were not put in evidence before the court. Once the twenty minute observation was completed, the garda required Mr. Finn to provide two specimens of his breath pursuant to s. 13(1)(a) of the Road Traffic Act 1994. Mr. Finn refused to comply and was prosecuted in respect of that refusal.

11. The Circuit Court posed two questions for the consideration of the Supreme Court:-

(i) In the circumstances before me, where the evidence given was that the gardaí waited some twenty seven minutes (twenty minutes being the minimum period of observation stipulated by the Garda Síochána guidelines) following the arrival of the Accused at the garda station before any requirement was made pursuant to Section 13(1)(a) of the Road Traffic Act 1994 and that nothing prevented the gardaí from making the requirement at the time of the Accused's arrival at the station, was the Accused in lawful detention at the time the requirement was made at 12.07 a.m.? [Emphasis added]

(ii) If the answer to the above question is "No" does that render inadmissible the evidence subsequently obtained?

12. In holding that the accused was unlawfully detained, the Supreme Court did not pronounce any new legal principles. The court simply applied the principle laid down in *Dunne v Clinton* [1930] I.R. 366, followed in *The People v Walsh* [1980] I.R. 294, that an arrested person can only be detained for such period as is reasonably necessary to give effect to the purpose for which the person was arrested, be it to charge them with the offence for which they were arrested or to seek compliance with statutory requirements to provide a sample.

13. In his judgment, Hardiman J. commented that "*although this case seemed to be regarded by both sides as being in the nature of a test case, intended to yield an answer of general application, it seems to me to turn very much on its own facts.*" Murray J. made the same observation. Hardiman J. then proceeded to apply the *Dunne v Clinton* principles to the facts of the *Finn* case and as we know concluded that there was no objective justification for the twenty minute delay which had occurred prior to the accused being required to provide a sample of his breath. He held:-

"This is not a case of delay simpliciter. It is a case in which a Guard having custody of the applicant deliberately decided to wait for a particular fixed period before making the statutory requirement which was the purpose of the detention. He did this, he said, on the basis of 'guidelines' given to An Garda Síochána.

The question in this case is whether that is a sufficient justification of the time which elapsed without any step being taken other than observation.

.....

It is clear from the evidence of the Guard as set out in the case stated that he himself made no decision simply to sit in a room with the applicant, doing or saying nothing, for twenty minutes. He did this because he had been told or advised to do so in 'guidelines'. Whether these are internal Garda guidelines for the manufacturers of the breathalysing device or guidelines from some medical or scientific adviser or from the DPP, does not appear. It is, however, clear that they are not contained in any statute or statutory instrument or regulation on the treatment of persons in custody.

There was, accordingly, insufficient evidence in this case to permit the learned Circuit Judge to draw a conclusion as to whether the twenty minute interval specifically fixed by some unknown authority was or was not reasonably necessary

to the achievement of the statutory purpose mentioned in S. 13(1)(a) of the Road Traffic Act."

14. Murray J. in his judgment characterised the twenty minute observation period as a "pre-established practice according to which there is inserted a discrete period of detention between the arrival of the arrested person at the garda station and the taking of the samples. It is a prescribed and conscious prolongation of an arrested persons (sic) period of detention in all such cases."

It was precisely because there was no evidence before the Circuit Court as to the necessity of an observation period for achieving the purpose for which the accused was arrested, namely the provision of a valid breath sample, that the Supreme Court held that the accused was in unlawful detention at the time that the requirement to produce a sample was made.

15. Both Supreme Court judgments in *Finn* anticipated that in due course, the twenty minute observation period might be justified by a competent witness who could give appropriate evidence as to the necessity for the observation period as a prerequisite for a valid breath sample. This came to pass six months later in the case of *Director of Public Prosecutions v Damien McNiece* [2003] 2 I.R. 614 where, in answer to a question raised by case stated from the Circuit Court, as to the lawfulness of the detention of an accused, in circumstances where he had been detained for a twenty minute observation prior to a requirement being made of him to provide a breath sample, the Supreme Court held that there was sufficient evidence of the lawful detention of the accused where evidence was given by a qualified operator of the Intoxilyzer that his detention for a period of approximately twenty minutes was necessary to ensure that the result of the test was not affected by the presence of alcohol in the mouth of the person concerned.

16. While *McNiece* disposed of the issue of the legality of detention for the purpose of observation, a further finding of the Supreme Court in *Finn* has continued to give rise to challenges to the lawfulness of detention in specific cases. In *Finn*, the Supreme Court held that where the authorities are entitled to perform a particular procedure on arrest, they are entitled to a reasonable period of time within which to do it. This finding merely applies the principle established in *Dunne v Clinton*. Hardiman J. in his judgment, having held that the authorities were so entitled, went on to say:-

"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."

Referring specifically to the situation where the attendance of a doctor is required, Hardiman J. stated that if the reasonableness of the length of time taken for the doctor's attendance is challenged, then "...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."

This view of the law accords with the finding of Finlay C.J. in *Director of Public Prosecutions v McGarrigle* (Unreported, Supreme Court, 22nd June, 1987) to the effect that a person arrested for a particular purpose is entitled to have that purpose accomplished as soon as reasonably possible, and then to have his liberty restored.

17. Since the *Finn* decision there have been a number of challenges to the reasonableness of the length of time taken to 'accomplish the purpose' for which an accused was arrested. Most have related to evidential breath testing. The first in time of the cases submitted to the court is *Director of Public Prosecutions v Fox* [2008] 4 I.R. 811. That was an appeal by way of case stated in which the following question was posed:-

"Was I correct in law in dismissing the charge by reason of the fact the accused had been deliberately detained by the Gardai for observation for a period of 27 minutes and as no evidence was given to explain or justify the 27 minute period of observation during the detention the detention was unlawful, the evidence relating to the intoxilyzer inadmissible."

On the hearing of the case stated, it was accepted that the detention for observation for twenty minutes was lawful. What was in issue therefore was the additional seven minutes. There was no evidence given to explain the additional seven minutes. Murray C.J. applied the *Dunne v Clinton* principle that the detention and processing of persons arrested must be done, as a matter of law, with reasonable expedition or without unreasonable delay. At para. 18 of his decision he states:-

"As Hanna J. observed in the Clinton case, at page 375 'Now, what is a reasonable time after arrest?' No hard and fast rule can be laid out to cover every case. The answer to that question must also be approached in a common sense and practical way. It is not that an arrested person has to be dealt with as expeditiously as at all possible but that he or she is dealt with without the kind of unreasonable delay that would render an otherwise lawful custody unlawful. Otherwise it seems to me that the Courts could become involved in a time and motion study of every move in dealing with an arrested person often in a busy Garda Station at night." [Emphasis added]

18. Contrasting the two day pre-charge detention which had occurred in *Clinton* and the in excess of thirty six hours which had occurred in *The People v Walsh* with the seven minute delay in the instant case, Murray C.J. stated:-

"The question is was the period of delay in this case so unreasonable as to warrant an otherwise lawful custody to be deemed unlawful in the absence of any objective explanation for it."

He answered that question as follows:-

"Absent any special circumstances such as evident malicious intent or purpose I cannot consider from any other point of view that the delay of 7 minutes was one which on the face of it was so unreasonable as to render the detention unlawful."

19. In *Director of Public Prosecutions v Dardis* [2015] IECA 284, an appeal from the decision of the High Court on a case stated, the accused having been lawfully arrested, was brought to Terenure Garda Station for the purpose of being required to provide samples of his breath. During the course of the twenty minute observation the evidence was that the garda was momentarily distracted and therefore considered it necessary to recommence his observation. Secondly, during the first observation period the garda became aware that the Evidenzer machine was in use on another prisoner. The breath samples were provided a little over an hour after the accused's arrival at the station. The Court of Appeal trenchantly rejected any suggestion that at the time of the taking of the breath samples that Mr. Dardis was unlawfully detained and therefore properly acquitted by the District Court:-

"Just what is the basis for the acquittal of the accused? On the judge's facts, the accused was properly arrested, was

lawfully in the Garda Station, was presented with the breath test apparatus when it became available and, prior to that happening, he was observed for the requisite time period.

Mr. Dardis was not detained for longer than was necessitated by the availability of the machine. The only point is that he was 'observed' by the Garda for an unnecessary period of 20 minutes. That cannot justify an acquittal. The accused was not in unlawful custody, still less was there anything unconstitutional. In fact there was not any extra detention, but even if there had been, it was not unreasonable or unjustified or unexplained."

20. In *DPP v Gerard Lynch* [2016] IEHC 723, the net issue as described by Ní Raifeartaigh J. was "whether the detention of the accused was rendered unlawful by reason of the lapse of a period of time during which the pre-test observation of the accused was not commenced at Kilrush Garda Station pending the arrival of a Garda from Ennis station." The delay in the case was in the order of thirty minutes which elapsed while a garda trained in the use of the breathalyser apparatus travelled from Ennis to Kilrush to administer the test. Noting that in *O'Neill v McCartan and DPP* [see below], a delay of almost an hour in the attendance of a doctor was held not to be a culpable delay, Ní Raifeartaigh J. considered that it would be somewhat incongruous were a delay of thirty minutes for the arrival of a trained breathalyser garda sufficient to render a detention unlawful. She concluded that the length of the delay was not of such an order that would of itself normally bring a period of detention into the area of illegality.

21. *O'Neill v McCartan and DPP* was the only delay case involving the attendance of a medic brought to the court's attention. This decision of Charleton J. is of significance to the issue which the court has to determine in this case. The applicant sought judicial review of his conviction for drunk driving in the Circuit Court, based on an alleged delay in the arrival of a doctor to Newbridge Garda Station following his arrest on 26th June, 2005. The applicant had been arrested at 10.31 p.m. He was brought to Newbridge Garda Station, arriving at 10.50 p.m. The custody record indicated that he had been processed by 10.55 p.m. and that a doctor had been called at 10.56 p.m. The doctor arrived at the station forty four minutes later. The prosecuting garda was unable to assist the court as to the reason why it took forty four minutes for the doctor to arrive at the station, other than to suggest that he may have been out on call at the time that the request for services was made. In upholding his conviction the learned Circuit Court Judge was satisfied that the doctor had been called promptly and that the period that it took for the doctor to arrive could not be considered unreasonable.

22. Charleton J. was of the same view. The court noted that samples showing the concentration of alcohol, be they breath, urine or blood are a constituent element of an offence pursuant to s. 61 and that the relevant sample must be taken within three hours of driving. Having reviewed the existing authorities, the learned judge endorsed the observation of Quirke J. in *Director of Public Prosecutions v Tim O'Connor* [2005] IEHC 442 that "the legality of the detention of an accused person must, in every case, be decided on its own particular facts." Quirke J. went on to say in that case the following:-

"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."

23. In *O'Neill* Charleton J. summarised the parties' submissions as follows:-

"Counsel for the applicant submitted that there was no evidence upon which the learned Circuit Court Judge...could have decided that the detention of the accused remained lawful given the delay in the arrival of a doctor at the Station. Counsel for the respondents submitted that such an argument was an example of 'law world', a state of unreality which, as I understand it, entices judges to make decisions which are divorced from the practicalities of life. He urged that the court should look to the real world in deciding this case..."

Charleton J. concluded that there was sufficient evidence before Circuit Court to enable the judge to decide that there had been no culpable delay on the part of the gardaí in ensuring the attendance of a doctor. Central to the court's decision was the evidence that once the procedures for checking the accused into garda custody had been concluded, a doctor's service was immediately sought. The court went on to hold:-

"The arrival of a doctor within an hour of that time must be regarded, in the real world, as being a good service; if not a very good one. Rather than there being evidence of the Gardai acting with contempt towards the accused's constitutional right to liberty, I would hold that, in accordance with the imperative set out in People (DPP) v Madden [1977] I.R. 336, that they did everything possible to ensure that the relevant procedure was completed within a reasonable time. I would add that it is wrong to apply time limits or comparisons between particular cases. Getting doctors to stations is a practical issue to be decided in a practical way. There was no evidence of anyone doing anything less than their best."

Submissions on behalf of the accused

24. Counsel for the accused adopted and endorsed the concerns expressed by the District Judge on foot of submissions made at the District Court hearing by the accused's solicitor, Ms. McDarby. Counsel for the accused, purportedly relying on the principles set out in *DPP v Finn*, submitted the following:

- a. The detention of the accused was unlawful by virtue of delay;
- b. The prosecution is under a duty to act with reasonable expedition when dealing with an arrested person;
- c. Where the reasonableness of the detention period is challenged, the prosecution must objectively justify any unreasonable delay to the criminal standard of proof;
- d. On the facts of this case, the prosecution had failed to justify the delay having regard to the following facts:
 - i) The prosecution knew at the outset of the process that there would be a delay in the arrival of the doctor;
 - ii) Knowing there would be a delay, available alternatives were not pursued;
 - iii) No prosecution witness was in a position to state precisely why the doctor had been delayed for almost two hours other than referring to the fact that "the doctor was dealing with a medical emergency";

- iv) There was no evidence as to the nature of that "emergency", the location of same or the distance to be travelled by the doctor, or whether the doctor was the only medic available to attend at the station;
- v) There were no steps taken to mitigate the delay by availing of alternative options;
- vi) The garda appeared more concerned with avoiding aggravation to the doctor than discharging his duty to have a specimen taken from the accused with reasonable expedition;
- vii) The fixed policy of using Westdoc out of hours service, meant that no consideration was given to summoning other medics who might have been available to take the required specimen.

In the circumstances, the court should answer the question posed in the case stated in the negative and hold that the accused was unlawfully detained at the time a specimen of his urine was taken.

Submissions on behalf of the Prosecution

25. The prosecution submits that the delay which occurred has been explained and justified and that the detention of the accused was lawful at all material times. The prosecution contends that the legal argument advanced on behalf of the accused is based on a "highly artificial construct that there is a set period of time within which it is acceptable to wait for a doctor to arrive for the purposes of taking a sample." According to the prosecution that argument is not supported by the legal authorities nor by common sense. While accepting the validity and applicability of the Finn principle that "a person arrested in circumstances which permit some other procedure to be activated in respect of him was entitled to have this procedure initiated as soon as reasonably possible" and that the arresting garda was "under a duty to take appropriate steps to make the statutory requirement of the Defendant to provide specimens of his breath 'with reasonable expedition', within a 'reasonable' time or without 'unreasonable delay'", the prosecution submits that in this case there was no unreasonable period of delay in the detention. If, contrary to that submission, the delay is found to have been unreasonable, then the prosecution submits that it was objectively justifiable in the circumstances of the case.

26. The prosecution contends that in the period since the Finn decision the law has evolved to a point where the higher courts are reluctant to invalidate a detention on the basis of technical challenges arising from a delay in the taking of a sample in a drunk driving prosecution. In support of this proposition, the prosecution cites the decision of the Court of Appeal in *DPP v Dardis* as mentioned above, in which there was a delay in administering a breath test because the garda conducting the required twenty minute pre-test observation, was momentarily distracted and had to recommence the observation period. Secondly, the apparatus was in use and the garda had to wait until it became available. The Court of Appeal took a very practical approach and having noted that the accused had been lawfully arrested and was lawfully in the garda station, stated at para. 35 of its judgment "...The only point is that he was 'observed' by the Garda for an unnecessary period of 20 minutes. That cannot justify an acquittal. The accused was not in unlawful custody, still less was there anything unconstitutional. In fact, there was not any extra detention, but even if there had been, it was not unreasonable or unjustified or unexplained."

27. The prosecution also cites the recent decision of *DPP v Lynch*, as cited above, in which Ni Rafeartaigh J. held that a delay of fifty four minutes in administering a breath test was justified and did not invalidate the detention. She stressed that some latitude had had to be given to the gardaí in the conduct of their operations. She commented that "apart from the decision in Finn, the Superior Courts have been unsympathetic to complaints about relatively short periods of delay before the administration of the breath test where such delays have arisen in the context of the ordinary day-to-day exigencies of Garda activity."

28. While not directly on point, the prosecution sought to rely on the recent Supreme Court decision of *Director of Public Prosecutions v Avadenei* [2017] IESC 77 as indicative of the approach of the Supreme Court in relation to flaws in the implementation of statutory procedures. Such flaws are not automatically fatal. Having set out circumstances in which a breach of statutory procedures would fatally undermine a prosecution, O'Malley J. states that in her view, there should be "an analysis in each case as to the actual effect of the procedural error...on the fair trial rights of a defendant. If a breach of the statutory procedure is established, but it has no consequences in that no unfairness, prejudice or detriment can be pointed to, then the normal standards applicable to criminal trials would indicate that the evidence is admissible."

29. On the basis of the jurisprudence, the prosecution submits that all that is required is that the prosecution give a reasonable explanation for the period of detention. The fact that it might have been possible to obtain a valid sample in a shorter period of time does not render the detention invalid. In the current case the garda sought the attendance of the designated doctor as promptly as possible but the doctor was delayed due to a medical emergency. When the doctor had not arrived at 1.05 p.m., the garda rang again and was told that the doctor would arrive shortly. The doctor arrived within half an hour. In the circumstances the garda and the doctor had acted reasonably.

Decision

30. The court is satisfied that the detention of the accused was lawful at the time the sample was given. The accused was detained in accordance with law for the sole purpose of being required to provide a sample. His detention was in compliance with the principle set out in *Dunne v Clinton*, as restated in *The People v Walsh* and as further endorsed in *DPP v Finn*. The process for the taking of the sample was commenced immediately following his being taken into custody in Westport Garda Station. He was at no point detained for an ulterior, impermissible purpose such as further investigation of the offence (*Dunne v Clinton*), nor was the initiation of the process of obtaining a sample delayed for an unjustified period of twenty minutes (*DPP v Finn*).

31. The delay in the arrival of the doctor must be measured therefore against the standard of 'reasonableness'. The delay has been explained as being due to the fact that the doctor on call was attending an emergency at the time he received the call. A further inquiry was made by the arresting garda at 1.05 p.m. and an assurance received that the doctor would be in attendance between 1.10 p.m. and 1.15 p.m. In fact he did not arrive until 1.30 p.m. Thus on the evidence the delay has been explained and the court considers in all the circumstances of the case that the delay was reasonable. It must be remembered that this arrest took place shortly before lunchtime on a Sunday when doctors' surgeries were unlikely to have been open. It was in such circumstances perfectly reasonable for the arresting garda to contact the out of hours service Westdoc. The policy if such it be, of using an out of hours service at night or weekends is an entirely rational one.

32. It seems to the court that there is a qualitative difference between those arrests where an Intoxilyzer/Evidenzer is used to obtain breath samples and those where the attendance of a medical person is necessary to obtain a blood or urine sample. In the first scenario, the gardaí have full control of the process. They conduct the pre-test observation and administer the test. If there is a

delay in the process, they are answerable for their actions. In the latter scenario the gardaí are dependent on third parties to attend when called. There are factors which are outside of the control of the arresting garda. In such cases the question for the court is whether in all the circumstances of the case, any delay which occurred was reasonable. In the cases opened to the court this distinction is recognised. In *Finn*, Hardiman J. stated:-

"I have no difficulty with the proposition 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."

From this statement it is clear that what is reasonable depends on the circumstances of the particular case. That of course had been established in *Dunne v Clinton*, and subsequent to *Finn*, as we have seen, has been restated in a number of decisions, in particular: *DPP v O'Connor*; *DPP v Dardis*; and *O'Neill v McCartan and DPP* as cited above. In the oft quoted observation of Hanna J. at p. 375 of that judgment, "Now what is a reasonable time after arrest? No hard and fast rule can be laid out to cover every case. In developing that thought in *DPP v Fox Murray C.J.* stated:-

"The answer to that question must also be approached in a common sense and practical way. It is not that an arrested person has to be dealt with as expeditiously as at all possible but that he or she is dealt with without the kind of unreasonable delay that would render an otherwise lawful custody unlawful. Otherwise it seems to me that the courts would become involved in a time and motion study of every move in dealing with an arrested person often in a busy Garda Station at night." [Emphasis added]

33. In this case the accused has sought to impose just such a burden on the arresting guard. At some unspecified time during the admittedly lawful detention, he became obliged according to the accused, to seek alternative arrangements for the taking of a blood or urine sample. No assistance has been offered to the court as to when this 'obligation' crystallised. Knowing that the doctor on call was dealing with an emergency, did the 'obligation' arise say at 12.30 p.m.? That is forty five minutes after the garda had been notified. Had the arresting garda begun to ring around looking for alternative medics, is it likely that he could have obtained the attendance of such before 1.30 p.m. when the doctor who had been requested attended? The arguments advanced by the accused seem to the court to be another example of "law world" as referred to by Charleton J. in *O'Neill v McCartan and DPP* in which it is sought to deflect the court from the practical realities of the situation that presented itself.

34. The accused submits that the test to be applied in circumstances where there is a challenge to delay in the arrival of the medic is that the prosecution must objectively justify any unreasonable delay to the criminal standard of proof. The court rejects that submission and repeats that the test is 'reasonableness'. To contend that the test is objective justification is a misreading of the decision in *DPP v Finn*. In that decision what required objective justification was the twenty minute period during which the arrested person was simply observed and during which no steps were taken to achieve the purpose for which he had been arrested, namely the taking of a breath sample. As Hardiman J. explained in the passage quoted above, where delay *simpliciter* is challenged, it is for the prosecution to adduce evidence to show that a period which at first glance appears unreasonable or excessive was in fact reasonable. The court is satisfied that the evidence of Garda Conlon discharges that burden.

35. The accused's complaints listed at d) in para. 24 of this judgment are precisely the type of 'time and motion' scrutiny deprecated by Murray C.J. in *DPP v Fox*. The fact that the arresting garda did not take all possible steps does not render a detention which is otherwise lawful, unlawful. It would be ludicrous in the court's view were the state required to prove the fact, nature and place of the emergency which arose in this particular case. The court is satisfied that the arresting garda is entitled to proceed on the basis of the information supplied to him by Westdoc services.

36. Finally the court notes as did Charlton J. in *O'Neill*, that in every detention for the purpose of taking a sample, there is to use *le mot du jour*, a 'backstop' of three hours to the detention. An arrested person cannot lawfully be detained for more than three hours for the purpose of being required to provide a sample, be it of breath, urine or blood. That of course is not to say that an unauthorised detention could not occur within the three hour period which could render the overall detention unlawful. For example, in this case, if Garda Conlon having taken the accused into custody, had decided to have an early lunch before calling for the doctor, thereby leaving the accused cooling his heels for a half hour in Westport Garda Station before the sample process was initiated, a court might well find that his detention was unlawful in accordance with the decision in *DPP v Finn*. Similarly, were the evidence that the doctor when called, was on the tenth hole on the local golf course and that he had decided to finish his round of golf before attending the station, that too might well render the detention unlawful. In each of these examples, the detention of the accused would have been deliberately prolonged for a purpose other than the purpose for which he had been arrested. Such an unreasonable delay could not be objectively justified and the detention would be unlawful on the same basis that the detention in *Finn* was held, on the facts of that case, to be unlawful. However, in this case the process for taking the sample of urine was initiated immediately by calling for services from Westdoc. At no time was the accused detained for any other purpose. On the evidence the doctor attended as soon as the emergency with which he was dealing was concluded. His delay in attending having been challenged, has been explained and the explanation in the words of Hardiman J. "... render(s) a period of time which seemed excessive reasonable."

37. At hearing it was agreed that the question to be answered by this court is as follows;

In the circumstances of this case, was the accused in lawful detention at the time he was required to produce a specimen of urine?

For the reasons set out herein, the court answers this question in the affirmative.