



THE COURT OF APPEAL

[2015 No. 122]

The President
Finlay Geoghegan J.
Hogan J.

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

BETWEEN

**THE DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF THOMAS JAMES KILBRIDE)**

APPELLANT

AND

RONALD DARDIS

RESPONDENT

JUDGMENT of the Court delivered by the President on 11th December 2015

1. This is an appeal by the Director of Public Prosecutions against the decision of the High Court on a case stated for the opinion of that court by Judge Bryan Smyth of the District Court as to whether he was correct in law in deciding an issue and dismissing an intoxicated driving charge against Mr Dardis.

2. On 8th March 2014, Garda Shay Kilbride arrested Mr. Dardis under s. 4(8) of the Road Traffic Act 2010, and brought him to Terenure Garda station where, just over an hour later, he provided breath specimens that revealed a concentration of alcohol of 64 µg per 100ml of breath.

3. The issue that arose in the hearing of the charge before Judge Smyth has its origins in a series of cases decided by the Supreme Court concerning the procedure that is adopted in the Garda station in breath specimen cases. It is now accepted, and a judge may take judicial notice, that it is good practice to ensure that a person who is required to give a breath sample has not consumed anything by mouth in a period of 20 minutes before the sample is taken. There is a Garda Siochána circular to that effect which reflects best practice scientifically to ensure the integrity and validity of the sample.

4. In the first of the cases that came before the Supreme Court, *DPP v. Finn* [2003] 1 I.R. 373, the evidence was that it was Garda practice based on a circular to that effect to wait 20 minutes while observing the arrested person and before making the demand for breath samples. There was no evidence in the trial court to explain or justify why it was necessary to detain the person for that period. The court held that in the absence of justifying evidence, a period of arbitrary detention based in policy was not permissible in law and it followed that the arrested person was not in lawful custody. In the circumstances, the prosecution failed.

5. In *DPP v. McNiece* [2003] 2 I.R. 614, evidence was given by a trained Garda Sergeant and by an expert scientist that it was necessary, in accordance with best practice so that a valid sample was obtained, to wait for 20 minutes while observing the arrested person to ensure that he or she consumed nothing by mouth. The Supreme Court distinguished its previous decision by reference to the absence in *DPP v. Finn* of evidence to justify the 20-minute delay. In this case, that was rationally explained and the Court accepted that as satisfactory.

6. The third case is *DPP v. Fox* [2008] 4 I.R. 811, in which the time in issue was 27 minutes, including the 20 minutes required by best scientific practice. The Supreme Court held that the period of seven minutes was insignificant in the circumstances and did not justify the acquittal of the accused. The court said that not every delay was unreasonable and it was only unreasonable delays that needed to be explained and justified. It was unavoidable, and entirely to be expected, that there would be delays from time to time, depending on the exigencies of the time and place. Their judgment reiterated the analysis of the Finn case, emphasising that it was the unexplained and unjustified policy of detention for the period that rendered the detention of the arrested person unlawful in that case.

7. In the case stated herein, Judge Smyth records the evidence of Garda Kilbride that at 00.45 hours, he commenced a 20-minute period of observation to ensure that the accused took "nil by mouth" prior to exhaling into the breath-alcohol analysis machine. However, two things happened that caused the Garda to believe that it was necessary to commence another 20-minute period of observation. First, he briefly looked away at about a minute before the end of the period and he could not be satisfied that the accused had taken "nil by mouth". Secondly, during the course of the first observation period, he became aware that the Evidenzer machine was in use. The Garda commenced a second period of observation at 01.12 at the end of which Mr Dardis provide the requisite two samples of breath.

8. The defence submitted that a 40-minute observation period was unnecessary and unjustified in the circumstances, and momentarily looking away did not justify the recommencement of a full second period of observation. The prosecution submitted that

the time taken was necessary to ensure an accurate test.

9. Judge Smyth set out his findings, his reasoning and the questions on which he sought the opinion of the High Court as follows:

"I was satisfied and I so found that the second observation period was undertaken for a combination of reasons: first, because it was noted that the Evidenzer machine was in use by someone else during the first observation period and also because the Garda had momentarily lost sight of the Accused towards the end of that observation period giving rise to alleged concerns as to whether the garda could prove beyond a reasonable doubt that the accused had taken 'nil' by mouth in the 20 minute period prior to exhaling into the apparatus, a very important factor in ensuring an accurate breath-alcohol reading.

Whereas I was satisfied that an observation or deprivation period of twenty minutes prior to exhaling into the Evidenzer machine is reasonably necessary in order to have an effective and reliable analysis of an arrested person's breath, I was of the opinion that Garda Kilbride should have checked to see if the Evidenzer machine was in use before he commenced the first 20 minute period of observation. Had he done so, he would have seen that the machine was in use and he could then have waited and commenced the observation period later when he knew, the machine was available. There would then have been only one period of observation. Moreover, I was satisfied that the momentary looking-away by Garda Kilbride, while he remained in the room with him, was not sufficient in the particular circumstances to give rise to a reasonable apprehension that the accused could have ingested, imbibed or otherwise taken something by mouth that would render the breath-alcohol reading inaccurate.

In the circumstances I was satisfied that the detention for the second 20 minute period of observation was unjustified and I dismissed the case.

The Prosecutor, being dissatisfied with my decision as being erroneous on a point of law, applied that I state a case for the opinion of the High Court. The opinion of the High Court is hereby sought on the following questions:

(i) Was I correct in law in my determination that the second twenty minute period of observation in this case was not justified?

(ii) Was I correct in law in dismissing the charge?"

Decision of the High Court

10. Hedigan J. observed that the procedure in a case stated is "exclusively confined to correcting errors of law by an inferior court in the determination of proceedings before it". The law in a case such as this was that the Gardaí were entitled to detain the arrested person for as long as was reasonably necessary to obtain the sample required but the powers had to be exercised in a manner that did not involve unreasonable or unnecessary delay. He cited *DPP v. Finn* [2003] 1 I.R. 312. The onus of proving the necessity and reasonableness of the detention lies upon the prosecutor. The 20-minute observation period was reasonably necessary to obtain a reliable sample: *DPP v. McNeice* [2003] 1 I.R. 372.

11. The High Court turned then to the decision under consideration and held as follows:-

"The District Judge, having heard the evidence, concluded that the Garda should have checked to see if the Evidenzer was in use, and also that what he found to be a momentary looking away by the Garda while remaining with the accused in the room was not sufficient in the circumstances to give rise to a reasonable apprehension that the accused could have ingested, imbibed or otherwise taken something by mouth, thus rendering the reading accurate. For the combination of these two reasons, the District Judge was satisfied that the second detention period was unjustified."

12. Hedigan J. held that this was a finding of fact reasonably made by the trial judge, who, having heard the evidence concluded that a second period of detention in the circumstances was unjustified. It was not an error of law, but "an alleged error of factual analysis that is presented by the prosecution to this Court". He held that he could not intervene even if he were to disagree with the judge of the District Court, which was not in fact the case. He agreed with the District Judge that the "momentary loss of attention by the Garda herein whilst remaining in the same room could not give rise to an apprehension that 'nil by mouth' could not be established". The High Court, accordingly, answered the questions posed by the District Court in the affirmative as to each.

The Appeal

13. The Director of Public Prosecutions now appeals the judgment of Hedigan J. on the basis that the both questions in the case stated involve issues of law rather than questions of fact and should be answered in the negative. The Director submitted that the High Court can only entertain a question of law on a case stated, and this is a question of law because the question whether there was sufficient evidence in law to support a conviction is not a question of fact but a question of law.

14. In *Valentine v. DPP* [2009] 4 I.R. 33, Birmingham J. adopted the test used by Hardiman J. in *DPP v. Fitzgerald* [2003] 3 I.R. 247 at 269 where he said:

"A useful method of approaching the question of whether a particular issue, in a criminal case, is a matter of fact of law, is to ask whether, if the case were being tried by judge and jury, the issue would be one for the judge or for the jury."

15. The only jurisdiction to state a case is in respect of a point of law. It follows that the judge thought there was a point of law on which he wished to have the opinion of the High Court. The prosecutor was entitled to seek to have a case stated to the High Court but the judge was under no obligation and indeed would not have been able to do so if the question were one of fact only.

16. This question would be one for the judge. The Director is not challenging the facts found by the District Court as described in the case stated. The conclusion or inference or deduction or view that the Garda should have checked to see if the machine was in use before beginning the observation period is not a finding of fact. Neither is it a finding of fact that momentarily looking away would not affect the evidential process.

17. The accused is incorrect in the Director's submission in ascribing to the judge the conclusion or finding that the period of detention was not adequately explained or that some shorter period might have elapsed before the machine came free. It was submitted that the judge asked himself the wrong question. He should have considered the legal consequences of his findings of fact. Had he done so, he would not have decided that the period of detention was unjustified or that the case should have been dismissed.

18. The period of time between the arrival of the accused at the Garda station and when he gave the samples of breath was not inordinate, unreasonable or unjustified; there was no evident malicious intent or purpose (see DPP v. Fox); the accused would have had to wait, in any event, for the breath testing machine to be available and so there was no prolongation of his detention.

Submissions on behalf of Mr. Dardis

19. The accused submitted that the High Court judge was correct in holding that the second period of 20 minutes was not justified; it was a matter of fact for the trial judge and not a question of law as counsel for the DPP submitted.

20. He argued that the prosecution was under an obligation to explain the delay and compared and contrasted the factual situation with that in the cases decided by the Supreme Court. The District judge was entitled to find that the prosecution had not done explained the delay.

21. It was submitted that if the Director's position is correct, this case would amount to authority for the proposition that in any and every case in which there was a momentary looking away during a period of observation, a further period of 20 minutes observation would not only be automatically lawful, but also legally necessary.

Discussion

22. The first question is whether the issue, as posed by the District Court judge, is one of fact or of law. If the judge himself thought that it was not a matter of law, he would not have sent forward a case stated because it is only on an issue of law that the procedure is available. We may take it, therefore, that the judge himself was of the view that there was a question of law involved. The two questions are expressed as issues of law in the case stated. The judge decided (a) that the Garda should have checked the availability of the breath test equipment before he initiated the 20-minute observation period that had to precede the test and (b) that the momentary looking away by the Garda was not a satisfactory explanation for aborting the first 20-minute period. He was therefore "satisfied that the second 20-minute period was unjustified and I dismissed the case." The case stated asks whether his conclusion and decision were correct. The High Court held that the judge was correct because the matter was an issue of fact for the trial judge. The issues cannot, however, be disposed of by describing them as matters of fact that the judge decided. The judge did make findings of fact, but the questions arise from his conclusion and inference of law.

23. In *The State (Turley) v. ÓFlóinn* [1968] I.R. 245, the Supreme Court held (*per* O'Dálaigh C.J.) that "the question whether there is sufficient evidence in law to support a conviction is not a question of fact but a question of law".

24. It may be helpful in considering the answers to the questions posed by Judge Smyth to look in a little more detail at the relevant Supreme Court judgments. Shortly after the decision in Finn, the Supreme Court delivered judgment in DPP v. McNiece [2003] 2 I.R. 614, which also was a consultative case stated on questions of law as to the lawfulness of the detention of the accused for twenty minutes prior to requiring him to provide breath specimens. The Court held that in criminal proceedings the onus was on the prosecution to establish beyond reasonable doubt that the accused, while in custody, was detained in accordance with law. Murray J. (as he then was) referencing the earlier decision in Finn stated:-

"It was the absence of any evidence capable of proving an objective justification for the observation period of twenty minutes which led to my conclusion, on the facts of that case, that the prosecution had not discharged the onus on it of justifying the detention in law and that therefore it must be considered to have been unlawful."

25. It was rational and logical for the State to have procedures for administering the test. There was objective justification for the 20-minute observation period. Unless there was some kind of controlled observation, there would always be the risk that the accused could claim to have surreptitiously taken something while the Garda was distracted:-

"What is involved here is the lawful administration of a precise test by the use of an intoxilyser to determine the level of alcohol in an arrested person's breath. The test has potentially important consequences for the arrested person and for the public interest which is concerned with the obtaining of reliable evidence of the commission of an offence in appropriate cases. Once the necessity of an observation period of twenty minutes is objectively justified then the State must have a reasonable discretion as to the manner and circumstances in which that can be effectively carried out. It seems to me entirely rational and logical that the State would have administrative arrangements which placed on a designated person, in this case the trained operator of the machine, the responsibility for ensuring that the appropriate conditions existed and that the proper procedures were followed for the effective administration of such a precision test at the time when it was being given."

26. The court rejected the argument that the Gardaí had sufficient opportunity to observe the arrested person from the time of arrest in the course of travelling to the Garda station and upheld the need for a formal period of observation. Otherwise, "there would always be the risk that an accused could claim to have surreptitiously taken something while the Garda member was momentarily distracted".

27. Murray J. made clear that the earlier decision was located on the specific ground of an unexplained policy of detention and not on the period itself. The judge cited observations that he had made in DPP v. Finn:

"Generally speaking, I would be very much disinclined to consider that a delay of 20 minutes simpliciter in dealing with an arrested person is the kind of delay which could be treated as rendering an otherwise lawful custody, unlawful, at least in the absence of other special circumstances".

28. Where time spans are reasonable from a commonsense point of view, they do not give rise to a question as to the lawfulness of the detention. The detention and processing of persons arrested must be done, as a matter of law, with reasonable expedition or without unreasonable delay. Referring to the famous case *Dunne v. Clinton* [1930] I.R. 366, in which Hanna J. asked the question "Now, what is a reasonable time after arrest"? Murray J answered:

"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."

29. The judge said that these principles are well-established in the leading authorities *Dunne v. Clinton* [1930] I.R. 366 and *The People v. Walsh* [1980] I.R. 294, and as he observed neither of them involved a delay of a short period.

30. In *DPP v. Fox* [2008] 4 I.R. 811, the High Court had held that the District Court judge was correct in law in dismissing the charge because the defendant had been deliberately detained by the Gardaí for observation for a period of 27 minutes in circumstances where no evidence was given to explain or justify the extra 7 minutes. As a result, the detention was unlawful and the evidence relating to the intoxilyzer inadmissible. The Supreme Court allowed the appeal, holding that a delay of 7 minutes was not so unreasonable as to render the otherwise lawful detention of the defendant unlawful. Murray C.J. stated:-

"In my view what was involved here is simply a question of delay. Instead of moving on to the next stage of the process the Garda member delayed doing so for 7 minutes. The respondent was in the Garda Station for a period of 2 hours and 5 minutes up to the point of being charged. Part of the process took 27 minutes instead of 20 minutes. It might have taken 28 minutes or 22 minutes. There are no statutory provisions laying down strict time limits which apply in this case. If there had been I would imagine that they would have been rather broad time limits as they usually are which would provide for things to be done within a timeframe that allowed for the ordinary everyday incidents of human delay of a routine or modest nature in the ordinary course of administration."

31. A person arrested on suspicion of drink driving may be required by the Gardaí to supply a breath alcohol sample. Other options include a demand for a blood or urine sample which is taken by a doctor who comes to the station when sent for by the Gardaí. The breath test equipment does not operate properly if the person has alcohol in his mouth, so the recommended practice and the Garda procedure is to observe the arrested person for 20 minutes to ensure he has not consumed anything before taking the two breath samples.

32. It took slightly over an hour from the time Mr. Dardis arrived in the Garda station to when he gave the breath samples. The judge was satisfied that a second observation period was undertaken for two reasons; because the Evidenzer machine was being used by someone else and because the Garda momentarily lost sight of Mr. Dardis while the machine was being operated.

33. Garda Kilbride gave evidence that he began a 20-minute observation period at 00.45, but his attention was diverted away briefly so he had to do it again to be satisfied that the arrested person had not consumed anything. He also said that he became aware that the test apparatus was in use and so he had to wait for it.

34. 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.

35. 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.

36. It must be remembered that the accused could have been required to furnish a blood or urine sample, which would mean he had to wait around for the doctor to arrive; if more than one arrested person was in line for samples that would entail delay far beyond the 20 minutes in question here. The real point is that the short delay in this case is explained, as the judge found, by the wait for the machine, which is a rational ground. Taking either explanation, as found by the judge, and considering them separately or together, namely, the unavailability of the machine and the fact that the Garda was distracted momentarily, the delay was explained. Hence, the judge was incorrect in law in finding the additional 20 minutes detention unjustified such as to render the continued detention unlawful.

37. In summary, therefore, the delay at issue here – some additional 20 minutes or so – must be regarded as another example of a "human delay of a routine or modest nature" to adopt the words of Murray C.J. in *Fox* and was in the circumstances essentially *de minimis*.

Conclusion

38. Applying the above reasoning leads to the conclusion that the appeal from the determination of the High Court must be allowed and the two questions posed should be answered as follows: (i) No and (ii) No.