

## THE HIGH COURT

[2005 No. 1137 SS]

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

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA SHANE CURRAN)

PROSECUTOR/APPLICANT

AND  
GARRETT FOLEY

DEFENDANT/RESPONDENT

**Judgment of O'Neill J. delivered the 31st day of January, 2006.**

1. These proceedings are an appeal by way of case stated pursuant to s. 2 of the Summary Jurisdiction Act 1857 as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961 from Judge Gerard Houghton a judge of the District Court. The case stated arises out of proceedings in the District Court on 30th July, 2003 in which the defendant/respondent Garrett Foley appeared before the learned District Judge on foot of Bridewell Charge Sheet 29/2001 which is alleged that Garrett Foley did:

*"On 6th January, 2001 at Benburb Street, Dublin 7 in the Dublin Metropolitan District drove a mechanically propelled vehicle registration number 96 D 20651 in a public place while there was present in your body a quantity of alcohol such that within three hours after so driving, the concentration of alcohol in your breath exceeded a concentration of 35 microgrammes of alcohol per 100 millilitres of breath, contrary to s. 49(4) and (6)(a) of the Road Traffic Act 1961 as inserted by s. 10 of the Road Traffic Act 1994."*

2. The defendant/respondent (hereinafter referred to as the "accused" had pleaded not guilty to this charge).

3. The case stated recites that Garda Curran the applicant, gave evidence to the effect that on 6th January, 2001 he was on beat patrol in Benburb Street when he observed a dark coloured BMW being driven slowly along Benburb Street. He signalled the driver of this car to stop, which he did. The driver gave his name as Garrett Foley together with his address. Garda Curran noticed a strong smell of alcohol and that the accused's speech was slurred. At 4.39 am Garda Curran formed the opinion that the accused was under the influence of an intoxicant and he informed the accused that he was of opinion that he was under the influence of an intoxicant to such an extent as to render him incapable of having proper control of a mechanically propelled vehicle in a public place and that he had committed an offence under s. 49(1), (2), (3) or (4) of the Road Traffic Acts 1961-1994. Garda Curran then arrested the accused under s. 49(8) of the Road Traffic Acts 1961-1994 at 4.40 am and he explained to the accused in ordinary language that he was being arrested for drunk driving and he cautioned him.

4. Garda Curran then conveyed the accused to Store Street Garda station where they arrived at 5.00 am. On arrival the accused was introduced to the member in charge, Garda Oliver Henry, and Garda Curran informed Garda Henry that the accused had been arrested under s. 49(8) as aforesaid and Garda Henry completed the custody record in respect of the accused and gave him information in accordance with Regulation 8(1) of the Treatment of Persons in Custody in Garda Stations Regulations 1987 and handed the accused Form C72 which he duly signed for in the custody record.

5. Garda Curran then gave evidence that he observed the accused between 5.05 am and 5.25 am during which time the accused took nil by mouth. At 5.25 am the accused was conveyed to the medical room by Garda Curran and Garda Cathy O'Neill. In the presence of both these Gardaí, Garda O'Neill explained the intoxilyzer to the accused and made the lawful requirement of him and obtained samples from the accused. The lawful requirement pursuant to s. 13(1)(a) of the Road Traffic Act 1994 was made by Garda O'Neill to the accused at 5.27 am. The accused indicated that he understood and Garda O'Neill gave evidence that two successful specimens were provided and the result demonstrated that there were 73 microgrammes per 100 millilitres of breath.

6. The learned District Judge states that having heard various submissions after the close of the prosecution case on behalf of the accused, he rejected all the submissions raised and decided that he could take judicial notice of the working of the intoxilyzer and of the need for a twenty minute period.

7. Following upon that in discharge of his duty to vindicate and protect the constitutional rights of the accused and notwithstanding that the point was not raised by the accused the learned District Judge stated that it was his view that where a citizen was detained by a member of An Garda Síochána for any purpose there was an obligation on the member to inform the person being detained of that fact and the reasons therefore. He stated that he was of the view that as a matter of law the same requirements applied to detentions in Garda stations for the purpose of observation of persons arrested under s. 49(8) of the Road Traffic Act 1994, and he pointed out that if an accused is not told the reasons for his detention and the fact that he is not to consume anything or to drink or smoke during the period of detention he may unwittingly and innocently do so thereby causing his period of detention to be extended.

8. After having rejected prosecution submissions which contested the view indicated by the learned District Judge, the learned District Judge concluded and held as follows:

(a) that there was an obligation on the prosecution to establish on evidence that the accused was told of the fact of and the reasons for his detention;

(b) that in the absence of such evidence the detention was unlawful and in breach of the accused's constitutional rights; and

(c) that in consequence the evidence subsequently obtained should not be admitted.

9. For these reasons the learned District Judge dismissed the charge.

10. The question posed by the learned District Judge in the case stated is as follows:

Was I correct in law in dismissing the charges for the reasons set out above?

11. The central issue which arises on this case is to whether or not the twenty minute period of observation with the consequent period of detention during that same time is to be regarded as an integral part of the lawful detention resulting from the arrest of the

accused and his detention for the purpose of the taking of samples pursuant to s. 13 of the Road Traffic Act 1994 or is the period of twenty minutes to be regarded as a discrete period of detention which has an existence apart from and independent of the process set in train by the arrest, which process is solely for the purpose of the taking of samples pursuant to s. 13.

12. In the recent past the Supreme Court in two cases had to consider the question of whether detention during the twenty minute observation period was lawful or not. In the case of *DPP v. Michael Finn* [2003] 1 I.R. 372 it was held that the detention of a defendant for twenty minutes for observation involved the introduction of a discrete and defined non-statutory minimum period of detention, for a forensic purpose, to be observed as a matter of practice in every case in which a person was arrested under s. 13(1) (a) of the Road Traffic Act 1994 with a view to requiring him or her to provide specimens of breath and this detention was a prescribed and conscious prolongation of an arrested persons' detention in all such cases; that there was an onus on the prosecution to justify in law recourse to a procedure involving such a prescribed minimum period of detention and observation for a forensic purpose which must be justified by objective reasons; and that while the procedural steps could be given specific authorisation by statute or statutory regulation, such procedural steps, if objectively justified, were not required to be statutorily authorised in order to be lawful, provided that they were shown on the evidence to be reasonably necessary in order to give effect to the purpose for which the arrest was authorised by law in the first place.

13. In that case it was further held that because the defendant was obliged by statute to submit to the test in question even though it might inculpate in the commission of an offence and because the period of detention leading up to the taking of that test was not on the facts justified in law, the evidence subsequently obtained was inadmissible.

14. In the case of the *D.P.P. v. McNiece* [2003] 2 I.R. 615 it was held that in that case there was sufficient evidence of the lawful detention of the accused, where evidence was given by a qualified operator of the intoxilyser that the detention and observation for a period of approximately twenty minutes was necessary to ensure that the results of the test was not affected by the presence of alcohol in the mouth of the person concerned. It was held, that there was nothing unlawful or oppressive in the operator waiting twenty minutes before requiring a test in order to ensure a valid and effective result as a sample required within twenty minutes could yield an invalid result and as there might be a concern over the lawfulness of a second requirement. It was held also that where the accused had been in the company of the arresting Garda for a period of twenty minutes until his arrival at the Garda station, it was lawful to detain the accused for a further period of twenty minutes in the Garda station before requiring a breath sample, as the necessary observation for the purposes of the test could be better and more reliably carried on in such a controlled situation.

15. In the latter case, also a case stated, the period of detention of twenty minutes for observation was held to be lawful for the reasons set out above.

16. It would seem to me that if the period of twenty minutes for the purposes of observation is justified by way of evidence as indicated in the judgment of Murray C.J. in the *Finn* case as being necessary for the purposes of obtaining a suitable sample of breath for the purposes of validly carrying out the breath test, it necessarily follows that the twenty minute period is an integral part of the detention for the purpose for which the arrest was made namely, to detain a person so that samples can be required under s. 13 of the Road Traffic Act 1994 and tested pursuant to its provisions. Thus in the *McNiece* case where there was evidence which explained and justified the twenty minute period, it was held that the detention remained at all times lawful.

17. Where the detention for this period of twenty minutes observation can be said to be lawful as being necessary for the purpose of validly carrying out the test, in my opinion the period of detention in question is to be properly regarded as an integral part of the overall detention initiated by the arrest for the purpose of enabling samples to be taken pursuant to s. 13 of the Road Traffic Act, 1994.

18. In that situation in my view no additional caution or warning is required at the commencement of that twenty minute period so as to render it lawful. The information given and cautions given at the time of arrest and subsequently by the member in charge when the alleged offender is brought to the Garda station, if sufficient to render lawful the overall detention will also be sufficient to render lawful the detention during the period of twenty minutes observation.

19. In this case the learned District Judge took judicial notice of the necessity for the twenty minute period of observation for the purposes of carrying out a valid test.

20. This was a development which was anticipated by Murray C.J. in the *D.P.P. v. Finn* where he says at p. 380:

*"...Indeed the need to follow procedural steps in such a process may, as a result of a series of cases, become so notorious as to become the subject of judicial knowledge."*

21. The learned District Judge having taken judicial notice of the need for the twenty minute observation period and being in my view lawfully entitled to so do, it necessarily follows in my opinion, that in this case the detention was justified, and therefore in my view, has to be regarded as part of the detention initiated by the arrest. Where the period is justified it would in my opinion, be wholly artificial to treat this period of detention, as apart from and independent of the overall detention initiated by the arrest pursuant to s. 49(8).

22. In my opinion, in this circumstance there was no need for any further or additional caution or warning at the commencement of the 20 minute period, to render that period of detention lawful.

23. In my view there was no breach of the accused constitutional rights by reason of an absence of such a warning and that being so the learned District Judge was incorrect in so holding and in refusing to admit evidence of the intoxilyser test and its result and in dismissing the charge.

24. Accordingly I would answer the question posed in the case stated in the negative.