

THE HIGH COURT

[2016 No. 762 S.S.]

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

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA CAROLINE CLARKE)

PROSECUTOR

AND

GEOFFREY LAING

ACCUSED

Consultative case stated**JUDGMENT of Mr. Justice Eagar delivered on the 13th day of January, 2017**

1. This is a judgment in respect of a case stated by Judge Mary Devins of the District Court pursuant to s. 52 (1) of the Courts (Supplementary Provisions) Act, 1961 and the Rules of the District Court.

Facts.

2. The following were the facts and evidence proved before Judge Mary Devins.

1. At a sitting of Ballina District Court on the 8th of July 2014 Geoffrey Laing (hereinafter the accused) appeared before Judge Devins to answer inter alia a charge preferred against him alleging an offence contrary to s. 4 (2) (a) and (5) of the Road Traffic Act, 2010 as follows:—

"On the 21st of September 2013 at Tolan Street, Ballina, Mayo a public place in the said district area of Ballina, did drive a mechanically propelled vehicle registration number 00MH4293 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 body did exceed a concentration of 50 mgs of alcohol per 100 mls of blood (to wit 253 mgs of alcohol per 100 mls of blood.)"

2. Inspector Declan Rock of Ballina garda station appeared on behalf of the prosecution and Mr. Denis Molloy solicitor represented the accused.

3. Judge Devins stated that on 8th July, 2014 she heard oral evidence as follows:—

1. Garda Caroline Clarke gave evidence that on the 21st of September 2013 she attended at the scene of a traffic accident at Tolan Street, Ballina, County Mayo arriving there at 3.12 pm. She stated that one Thomas Muldoon informed her that he was driving in heavy traffic and when he was rear ended by the vehicle that was behind him at the time. The accused, Geoffrey Laing, was the driver of the other vehicle. When he spoke with Mr. Laing, she observed that his eyes were bleary, his speech was slurred and there was a strong smell of intoxicating liquor from him and that she formed the opinion that he had consumed intoxicating liquor. She performed a roadside breath test which he failed. She then formed the 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 vehicle in a public place. She arrested him under s. 4 (8) of the Road Traffic Act, 2010 as Amended, for an offence under s. 4 (1), (2), (3), or (4) of the Act. She cautioned him and arrested him and brought him to Ballina garda station arriving at 3.45 pm and introduced him to the member in charge, Garda Sean Haugh for the purpose of his detention. In her presence the member in charge entered the prisoner's details in the custody record and gave him a notice of his rights and informed him of those rights in ordinary language. She then contacted Dr. Brunker at 3.55 pm to attend the prisoner and he arrived at 4.45 pm when he arrived at 4.45 pm, she made a requirement from the accused to permit the doctor to take from him a sample of blood. All the relevant requirements were complied with and the accused provided a sample of blood that was forwarded to the medical bureau of road safety. The accused was released forthwith from custody at 4.59 pm. A certificate of analysis was later received from the Medical Bureau of Road Safety which returned a reading of 253 mg of alcohol per 100 ml of breath, above the legal for drunk driving which certificate was handed in to court.

2. Evidence was heard from other civilian witnesses and in relation to another charge but that evidence is not relevant for the purposes of this case stated.

3. The defence applied for a direction and Devins J. refused to grant a direction and the defence went into evidence. The defence called Garda Sean Haugh who was the member in charge at the Garda Station on the night in question.

4. He gave evidence that the accused was introduced to him as a suspect in relation to a drink driving offence. He said he gave him his statement of rights, which were acknowledged and then placed the prisoner in the cell at 16:10. Copy of the custody record was handed in to court. The Garda confirmed that he had asked the accused to empty out his pockets and that he placed him in the cell at 16:10 and that he remained in the cell until the doctor arrived at 16:45. The Garda could not remember if he had asked the accused to remove his shoes before placing him in the cell but he confirmed that it would be normal practice to do so. He stated he did not know what time the doctor was going to arrive at the station so it was necessary to place the accused in the cell so that he and Garda Clarke could continue in the performance of their duties, while waiting for the doctor. Garda Haugh said it was routine to detain a person in a cell while awaiting the arrival of a doctor to take a sample. He stated that if the prisoner was not placed in a cell that he would have to sit in the custody area with the prisoner until such time as the doctor arrived and that would limit his ability to answer the phone or attend to the hatch.

4. At this stage Devins J. expressed her view that if a person had never been in a cell before it would be a traumatic experience to be placed in a cell. She also referred to the treatment of persons in custody regulations and the requirements that the gardaí should at all times respect the dignity of persons as human beings.

5. Under cross-examination, Garda Haugh confirmed that he was the only member in charge at the Garda Station with responsibility for prisoners. He was asked if another prisoner came in, what would he do with that prisoner and he stated he would process them

and search them and place them in the cell. He stated that the reason for this was so that any enquiries that needed to be carried out could be carried out and so he could proceed with his duties such as attend the hatch or answering the phones. He said there was a health and safety issue particularly if there was one prisoner and one garda present.

6. At this stage Mr. Molloy for the defence applied for a direction relying on the recent Supreme Court case of the *DPP v. Cullen* [2014] IESC 7 and the judgment of Fennelly J. He stated there was an analogy with the *Cullen* in that there was no assessment made of any possible risk from his client because he was put in a cell. He argued that the arrest which was originally lawful became unlawful by virtue of the fact that he was put in the cell, for the convenience of the garda. Inspector Rock submitted that it was standard procedure to detain persons at a Garda Station in a cell for the safety of prisoners and the safety of gardaí present.

7. Devins J. adjourned the matter as she was considering whether she could state a case to the High Court in view of the Supreme Court decision in *Cullen*.

8. On 28th April, 2015 the prosecuting inspector sought to distinguish *Cullen* and submitted that *Cullen* deals with the procedure where a person is arrested in public but does not apply to the situation where a person is lawfully detained in a garda station. He submitted that if a person can be detained in a garda station for as long as is reasonably necessary to take a sample under the drink driving legislation, then it must be accepted that the person is deprived of their liberty and cannot be free to go. He stated that placing a person in a cell does not lead to unreasonable force being applied to that person. It simply relates to the place where an accused is deprived of their liberty. He then went on to state that if the accused was in an uncontained area, then the accused could just walk out of the station. He further submitted that the gardaí have a duty to prevent escape and to prevent self harm.

9. Devins J. said she considered the submissions made and had decided to state a case to the High Court to determine the following issues of law:

1. Was the detention of the accused at the garda station unlawful in the circumstances of the present case?
2. If the answer to one is in the affirmative, is the evidence obtained thereafter inadmissible?

10. The statutory basis of the arrest in this case is provided in chapter two of the Road Traffic Act 2010. Section 4(1) provides:—

"4.— (1) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while he or she is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle.

(2) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his or her body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his or her blood will exceed a concentration of—

- (a) 50 milligrammes of alcohol per 100 millilitres of blood, or
- (b) in case the person is a specified person, 20 milligrammes of alcohol per 100 millilitres of blood.

(3) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his or her body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his or her urine will exceed a concentration of—

- (a) 67 milligrammes of alcohol per 100 millilitres of urine, or
- (b) in case the person is a specified person, 27 milligrammes of alcohol per 100 millilitres of urine.

(4) A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his or her body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his or her breath will exceed a concentration of—

- (a) 22 microgrammes of alcohol per 100 millilitres of breath, or
- (b) in case the person is a specified person, 9 microgrammes of alcohol per 100 millilitres of breath.

(5) A person who contravenes this section commits an offence and is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 6 months or to both.

(6) A person charged with an offence under this section may, in lieu of being found guilty of that offence, be found guilty of an offence under section 5 .

(7) Section 1 (1) of the Probation of Offenders Act 1907 does not apply to an offence under this section.

(8) A member of the Garda Síochána may arrest without warrant a person who in the member's opinion is committing or has committed an offence under this section."

11. Section 12 of the Road Traffic Act 2010 provides:

"12.— (1) Where a person is arrested under section 4 (8), 5 (10), 6 (4), 9 (4), 10 (7) or 11 (5) of this Act or section 52(3), 53(5), 106(3A) or 112(6) of the Principal Act, a member of the Garda Síochána may, at a Garda Síochána station, do either or both of the following—

- (a) require the person to provide, by exhaling into an apparatus for determining the concentration of alcohol in the breath, 2 specimens of his or her breath and may indicate the manner in which he or she is to comply with the

requirement,

(b) require the person either—

(i) to permit a designated doctor or designated nurse to take from the person a specimen of his or her blood, or

(ii) at the option of the person, to provide for the designated doctor or designated nurse a specimen of his or her urine, and if the doctor or nurse states in writing—

(I) that he or she is unwilling, on medical grounds, to take from the person or be provided by him or her with the specimen to which the requirement in either of the foregoing subparagraphs related, or

(II) that the person is unable or unlikely within the period of time referred to in section 4 or 5, as the case may be, to comply with the requirement, the member may make a requirement of the person under this paragraph in relation to the specimen other than that to which the first requirement related.”

12. Section 16(1) of the Road Traffic Act 2010 provides:

“16.— (1) Where a person is at a Garda Síochána station having been arrested under section 4 (8), 5 (10), 6 (4), 9 (4), 10 (7) or 11 (5) of this Act or section 52(3), 53(5), 106(3A) or 112(6) of the Principal Act, he or she may, at the Garda Síochána station, if the member of the Garda Síochána for the time being in charge of the station is of opinion that the person is under the influence of an intoxicant to such an extent as to be a threat to the safety of himself or herself or others, be detained in custody for such period (not exceeding 6 hours from the time of his or her arrest or, as the case may be, from the time he or she was required to accompany a member to the station) as the member of the Garda Síochána so in charge considers necessary.

(2) Where a person is detained under subsection (1), the member of the Garda Síochána for the time being in charge of the Garda Síochána station shall—

(a) in case the person detained is or the said member is of opinion that he or she is 18 years of age or more, as soon as is practicable, if it is reasonably possible to do so, inform a relative of the person or such other person as the person so detained may specify of the detention, unless the person so detained does not wish any person to be so informed, and

(b) in case the person detained is or the said member is of opinion that he or she is under the age of 18 years, as soon as is practicable, if it is reasonably possible to do so, inform a relative of the person or such other person as the person so detained may specify of the detention.”

13. These are the legislative provisions which permit arrest and detention for the purpose of taking a sample and detention under s. 16 for the purposes of the detention of intoxicated drivers where a danger to themselves or others. The statutory provisions are silent to whether or not person can be put in a cell whilst awaiting in this case a designated medical practitioner for the purposes of taking a blood sample.

14. The Court will then turn to the jurisprudence which has developed in the Superior Courts in many cases having regard to the nature of these offences. Counsel on behalf of the Director of Public Prosecutions submitted that it is settled law that a person can be detained at a Garda station for a reasonable time to enable the relevant drunk driving test to be administered in accordance with the legislation. Once it is accepted that a person can be detained, it is clear that the detention involves a deprivation of liberty. In those circumstances it is irrelevant whether the detention takes place in an interview room or in a cell because the result is the same in that an accused person is not free to leave the Garda station.

15. In this case, counsel submitted, the member in charge explained that he was the only person in charge responsible for prisoners and he did not have time to personally sit in an open area with the accused person while awaiting the arrival of a doctor to administer a test. In those circumstances, the accused is placed in a cell pending the arrival of the doctor. It was submitted that there was no breach of rights and that the detention was lawful as the accused was released once the doctor had arrived and performed the relevant. The accused person spent no longer than an hour in the station and it was not contested that this was a reasonable period of time to allow the doctor to arrive to take a sample of blood. (It is noted by the Court that in fact from the time of his arrival at the Garda station which was about 30 minutes after the traffic accident, he could have been detained for a period of 2 ½ hours). Counsel also submitted that the member in charge complied with all the obligations under the custody regulations and a doctor was contacted at 3.55 pm (10 minutes after arrival at the station, to attend to take a sample from the prisoner). The accused was placed in a cell to await the arrival of the doctor and he was in a cell from 16.10 until 16.45 pm when the doctor arrived and took a sample of blood.

16. Counsel submitted that it was settled law that a person arrested for drunk driving can be detained at a Garda station for as long as is reasonably necessary to enable evidential specimens to be taken from him to determine whether the amount of alcohol in his blood was above the legal limit. She stated that this principle had been established through a long line of cases stretching from *DPP v. Finn* [2003] 2 I.R. 372 and *DPP v. McNiece* [2003] 2 I.R. 614 to the more recent Court of Appeal decision in *DPP v. Dardice* [2015] IECA 284. Most of these cases deal with the taking of a breath sample but the taking of a blood sample was dealt with in *O'Neill v. Judge McCartan and the DPP* [2007] IEHC 83 where Charleton J. commented that the arrival of a doctor to a station within one hour in the middle of the night was a very good service. She cited the text book “*Drunken driving*” by David Staunton, B.L., (2015) where the author summarised the position with respect to detention in the context of an arrest for drunk driving. At page 128 it is stated:—

“4—76 ... Through the enactment of various statutory provisions the Gardaí are now permitted to detain a person to allow for the proper investigation of an offence. Such a detention will normally comprise the questioning of suspects and the taking of evidential or forensic specimens, but they also involve preventing the person from using his or her liberty to interfere with the proper investigation of the offence.”

17. She further submitted that in this case no issue was taken with the lawfulness of the arrest or the initial detention. It is accepted that the member in charge complied with the custody regulations in informing the accused of his rights and in dealing with him in

accordance with those custody regulations. The only issue in the case is whether it was proper to place the accused in a cell while awaiting the arrival of the doctor. In his evidence the member in charge explained that he was the only member in charge at the station with a responsibility for prisoners. He also had other duties such as attending the hatch or answering the phones and he explained that he could not attend to these duties, if he was forced to monitor the accused in the open custody area for the entire period while the doctor was awaited. There was also the possibility that another prisoner could arrive in the station and that person would also require to be dealt with in accordance with the custody regulations. This of course would take up the member's attention.

18. She further submitted that it was not contested that in this case that the accused was in lawful detention. What the accused takes issue with is the place within the Garda station where the detention took place. There are no legal authorities on this precise issue as it would appear axiomatic that the power to detain a person involves the power to place that person in a room where there is a deprivation of liberty. It is submitted that once a person has been deprived of his liberty then whether he is in an interview room, or a custody area or a cell is irrelevant. The law does not place any obligation on the Gardaí to provide a specific type of detention facility in a Garda station to accommodate different types of prisoners. It is at all times envisaged that any detention may be in a cell but clearly there is an obligation that cell facilities must be humane and fit for purpose and a person should not be placed in a cell with a violent person or someone of the opposite sex. She quoted the Treatment of Persons in Custody Regulations, 1987 which she submitted recognised that persons in custody will sometimes be placed in a cell and when the regulations prescribe particular rules that should be complied with when a person is placed in a cell. Rule 19 states:—

"(1) A person shall be kept in custody only in a situation which has facilities to enable him to be treated in accordance with these regulations for the period during which he is expected to be in custody in that station.

(2) A person in custody shall be allowed such reasonable time for rest as is necessary.

(3) A person in custody shall be provided with such meals as are necessary and, in any case, at least two light meals and one main meal in any twenty-four hour period. He may have meals supplied at his own expense where it is practicable for the member in charge to arrange this.

(4) Access to toilet facilities shall be provided for a person in custody.

(5) Where it is necessary to place persons in custody in cells, as far as practicable not more than one person shall be kept in each cell. Persons of the opposite sex shall not be placed in a cell together. A violent person shall not be placed in a cell with other persons if this can be avoided.

(6) Where a person is kept in a cell, a member shall visit him at intervals of approximately half an hour. A drunken person or a person under the influence of drugs shall be visited and spoken to and if necessary roused for this purpose at intervals of approximately a quarter of an hour for a period of two hours or longer if his condition warrants it."

19. She submitted that the member in charge had explained that he did not have the resources to sit and monitor an accused person in the custody area and at the same time attend to other duties including possibly processing other prisoners. If an accused person is allowed to remain in an open and uncontained area, then there is nothing to stop the person from simply walking out of the Garda station and preventing the taking of a sample. She submitted that in those circumstances the member in charge is under a duty to ensure that the person remains at the station until the lawful drunken driving test is administered. The sole complaint made by the accused in this case is that he was placed in a cell.

20. Counsel for the Director argued that the accused argues by analogy with the case of the *DPP v. Cullen* [2014] 3 I.R. 30 that before placing an accused in a cell the member in charge has to make an assessment of the possible risk of flight. It is argued that the arrest becomes unlawful by virtue of the fact that the accused was placed in a cell to allow the member in charge to focus on other duties. She submitted that the reliance on *Cullen* was misplaced. An analysis of the majority judgment by Fennelly J. reveals that this case is about the use of handcuffs in an arrest situation where the use of such handcuffs is an unreasonable use of force. Fennelly J. also was concerned that placing a person in manacles in a public place was humiliating and should not be done unless it was necessary. The learned judge held in the circumstances of the case that more force than was reasonable had been used and such unreasonable force rendered the arrest unlawful:—

"It is unlawful because, as a matter of principle, the police must use only such force as is reasonable in the circumstances: I emphasise, of course, that it is the police officer who must make that judgement. In the present case, the evidence suggests that the officer in question abdicated any such responsibility."

[40] *To paraphrase the language of Hardiman J. in The People (Director of Public Prosecutions) v. Davis [2001] 1 I.R. 146 at p. 150 "[t]he public depiction of any person, but particularly an unconvicted prisoner, wearing the double restraints which are now commonly used in the prison service is a depiction of him in a position of humiliation and indignity". The offence with which Mr. Cullen was charged is necessarily committed in a public place. The arrest will normally take place in public.*

[41] *In my opinion, an arrest carried out in what one hopes are the unique circumstances outlined in the case stated is unlawful."*

21. Counsel for the prosecution submitted that the present case deals with arrest and not detention and in the present case there was no use of any force. Further the accused was not publicly humiliated. The only quibble is with the room at the station where the accused was detained. Once it was accepted that the deprivation of liberty was lawful it is irrelevant in what particular location in the Garda station that person can be detained.

22. She quoted from the *DPP (Kelly) v. Fox* [2008] 4 I.R. 811 where Murray C.J. when considering whether a person had been detained for longer than was reasonably necessary for the administration of a breath test emphasised the importance of applying common sense to any such determinations and stressed that it did not require a minute by minute analysis of Garda actions:—

"18 As Hanna J. observed in Dunne v. Clinton [1930] I.R. 366, at p. 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."

She submitted that in the *DPP v. McNiece* [2003] 2 I.R. 614 the Supreme Court held that it was not an unlawful detention if the gardai detained an accused for a 20 minute period in a Garda station to conduct:—

"18 As Hanna J. observed in Dunne v. Clinton [1930] I.R. 366, at p. 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."

She submitted that in the *DPP v. McNiece* [2003] 2 I.R. 614 the Supreme Court held that it was not an unlawful detention if the gardai detained an accused for a 20 minute period in a garda station to conduct the observation period even if the accused had been observed beforehand for 20 minutes in the patrol car on the way to the station. The Supreme Court held that once it was accepted that a person must be detained to ensure the observation period was carried out, then a degree of latitude should be given to the gardai in the manner in which they carry out these duties. Murray J. stated:—

"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 precise test at the time when it was being given."

She also submitted that a commonsense approach was also advocated by Charleton J. in *O'Neill v. McCartan and DPP* [2007] IEHC 83 an unreported judgment of the High Court dated 15th March, 2007. In that case the prosecution evidence was that a doctor was called at 22.56 after the accused had been given notice of his rights. However the doctor did not arrive until some 44 minutes later. The accused argued the detention became invalid because of the time taken for the doctor to arrive. Charleton J. held that the practicalities of carrying out alcohol tests could not be divorced from the realities of life:—

"In my view there was sufficient evidence before the learned Circuit Court Judge to enable him to decide that there had been no culpable delay on the part of the Gardai in ensuring the attendance of a doctor for the purposes of the procedure under the Road Traffic Act 1961, as amended, in taking samples for analysis by the Medical Bureau of Road Safety. The evidence was to the effect that once the procedures for checking the accused into Garda custody, making him aware of his rights and opening up a custody record had been concluded, a doctor's service was immediately telephoned. 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."

23. Counsel on behalf of the Defendant submitted that it was unlawful to lock the defendant in a garda station as a matter of routine or administrative convenience. Garda Haugh, the member in charge, emptied the pockets of the defendant and though he could not remember exactly, confirmed it would be normal practice to remove the shoes of the defendant. The latter actions appear to be a consequence of the decision to place the defendant in the cell. It does appear there was an option to supervise the defendant in the custody area but was not convenient for the member in charge who had other duties to attend to. It was submitted by counsel on behalf of the defendant that on the facts of the case where the drunk driving suspect presented no safety or security risk such amounted to an unjustified interference with the defendant's personal rights:

1. Routine incarceration in a garda station cell unlawful.

It was submitted by counsel for the defendant that an arrested person should not routinely be locked in a cell. Rather each decision to lock a particular arrested person in a cell, empty his pockets and take off his shoes should be considered in its own context with specific consideration of the circumstances of the case and the behaviour and demeanour of the person being arrested and quoted *DPP v. Moyles and Cullen* [2014] IESC 7 where the Supreme Court held that the handcuffing of drunk driving suspects as "a general policy applied by a particular officer of An Garda Síochána, without exception, to every person arrested on suspicion of driving under the influence, even where that person is entirely peaceful, cooperative, unresisting and willing to travel voluntarily to the Garda Station" rendered the arrest unlawful. He cited *Whelton v. O'Leary* [2011] 4 I.R. 554 where the Supreme Court considered an applicant being kept in a cell for a period of 1 hour 15 minutes owing to the breakdown of a printer used to generate a charge sheet. McKechnie J. deprecated the routine under a casual abridgement of the applicant's right to liberty:—

"The charge sheet could easily have been printed prior to his arrest and one wonders why this was not done, convenience I suspect which in my view is unacceptable is the explanation regarding the printer. I note, in any event, that such explanations account for only 25 minutes of the period of detention. The balance, I have no doubt, resulted from routine practice, casually pursued, in a manner quite indifferent to the applicant's liberty. That is not sufficient. Therefore, the applicant was not, as the section demands, charged promptly or with urgency. Such a time frame exceeded the provisions of the statute and, consequently, the detention of the applicant was unlawful."

(This was in a situation where a person was arrested without questioning for the purpose of charge.)

2. Prosecution carry burden of proving incarceration in a cell was necessary.

Counsel submitted that the defendant's arrest and ensuing detention was lawful only so long as it could be characterised as necessary for the statutory purpose of an evidential specimen. The prosecution carried the burden of proving that emptying the defendant's pockets, removing his shoes and then locking him in a cell and to await the arrival of a doctor to take a blood sample were necessary steps to take for that purpose. Hardiman J. said in the *DPP v. Finn* that in criminal proceedings the onus is on the prosecution to establish beyond a reasonable doubt that a defendant while held in custody

has at all times been so held in accordance with law. Counsel cited the case of the People (*DPP*) v. *McFadden* [2003] 2 I.R. In that case the Court of Appeal held that An Garda Síochána could not search and arrest a person without his or her consent, unless the arrested person was informed of the legal justification for conducting the search. The search in that instance related to the contents of the arrested person's wallet following an arrest for drunk driving. The Court held that failure of the arresting garda to inform the accused of the legal justification was not so trivial or inconsequential a breach of custody regulations that it would not effect the lawfulness of the custody of the arrested person or the admissibility of any evidence at pain thereof. In the *DPP v. Finn* [2003] 1 I.R. 372 the Supreme Court considered a delay in the garda station detention of an arrested person accused of drink driving. The Supreme Court held that where a person is being held at a garda station for drink driving to permit a statutory requirement to provide an evidentiary specimen, that person is entitled to have "*that purpose accomplished as soon as reasonably possible and then to have his liberty restored.*" This however does not deal with the issue of a person who is detained in a garda station cell and there is no evidence to suggest that the doctor was unduly delayed and arrived in Ballina Garda Station at 4.45, one hour after the accused was brought to the Garda Station.

3. No objective justification for incarceration in a garda station cell.

Counsel submitted that there must be a rational, objectively justifiable basis for locking a person in a garda cell. Such rational basis might, for instance, include an arrested person being intoxicated to the criminal extent that they were a visible danger to themselves or others, threatening or abusive behaviour from an arrested person or a specific reasonable suspicion, personal to the arrested person's conduct grounding a fear that he might abscond. The Supreme Court, in the context of delays which extend drink driving detentions have consistently held there must be a justification for detention and held that in the absence of any specific statutory provision or presumption or authoritative decision the delayed detentions become unlawful unless they are justified by objective reasons.

4. The humiliating effect of incarceration in a garda station cell.

The concerns expressed by the district justice echo the concerns expressed by Hardiman J. when in the *DPP v. Gormley and White* [2014] IESC 17 he considered the potential effects of placing an arrested person in a garda station cell:—

"...to an innocent person, or a person with little or no prior experience of the criminal law such treatment may be absolutely terrifying, destructive at least for the time being of their dignity and autonomy and such as may wholly undermine their ability to give a proper account of themselves. If, in addition, such a person is, shortly after arrival at a garda station, thrust into a cell and locked in there to await the next development, his position is considerably worsened. Many cells in garda stations are frankly unsanitary and in a condition such that no normal person would wish to spend time there. Foul smells are not uncommon. They may be in a permanent state of semi-darkness, lighting, or the extinguishment of lights, being controlled from outside only. The seating or bedding may be such that no reasonable person would wish to use it. The sense of being in someone else's power may be utterly overwhelming especially to an inexperienced or sensitive person, or to an entirely innocent person. The noisy closing of a cell door, and the turning of a heavy key, leaving one alone in fetid semi-darkness is not an ideal preparation for what may well be the most important confrontation of one's life."

Addressing the second question.

24. Counsel submitted that the second question, "if the answer to one is in the affirmative, is the evidence obtained thereafter in admissible?" is a matter which is properly and exclusively within the discretion of the trial judge. Clarke J. who delivered the dissenting judgment held that the arrest had not been rendered unlawful, explained why unlawfulness of detention in drunk driving cases resulted in the exclusion of evidence of drunkenness by certificate:

"Thus the distinction between certificate evidence in a drink driving case and the vast majority of other forensic evidence which might be tendered at a criminal trial is that alcohol concentration evidence by certificate, is not evidence at all unless the statutory requirements have been met. Other forensic evidence will ordinarily be admissible although it might be excluded under the exclusionary rule, if it were obtained in circumstances which were in breach of the accused's constitutional rights. Such evidence remains evidence but is excluded for constitutional reasons. Evidence by certificate in alcohol concentration cases does not even get to the point of being admissible evidence unless the statutory regime is complied with. Thus certificate evidence which arises in a case where the relevant person is not, at the time of sampling under lawful arrest is not in fact evidence in the first place because it could only be evidence if the relevant sample was taken in accordance with the statute and thus an occasion when the accused was under lawful arrest. Such evidence, if deriving from an unlawful arrest, is not truly evidence of the first place rather than evidence which is excluded. However, I will return to the question of whether the exclusionary rule has any relevance to this case."

The judgment of the Court

25. The Court has already noted that the statutory regime in respect of the arrest and detention of persons suspected of drink driving which has a maximum period from the time of in this case the accident is a period of less than 3 hours.

26. The Court has to be mindful of the reality of the consequences of persons who are driving with excess alcohol (above the legal limit) in their system. At least one third of the deaths on Irish roads result from persons with excess alcohol in their system.

27. Although the Court was not referred to it, the Court notes the judgment of Ní Raifeartaigh J. delivered on 21st November, 2016 in the *Director of Public Prosecutions v. Lynch* [2016] IEHC 723. It related to pre-test observation. In the context of the administration of a breath alcohol test by the Gardaí, who use specialised equipment for that purpose. In particular at para. 14 she quotes from Murray J. in the *McNiece* case as follows:—

"In my view, this argument is not well founded. 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."

28. Ní Raifeartaigh J. states at para. 16:—

"Thirdly, 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 when such delays have arisen in the context of the ordinary day to day exigencies of Garda activity."

And she quotes from the Court of Appeal decision in the *DPP v. Dardis* [2015] IECA 284. The Court said:—

"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."

29. In the case of *the People v. Gormley and White*, Hardiman J. made strong comments about the state of cells and this was in the context of a detention under s. 4 of the Criminal Justice Act, 1984 for the purposes of questioning an arrested person where a maximum time could have been a period of 24 hours and where the accused person could be questioned. It is in that context that Hardiman J. said:—

"The noisy closing of a cell door, and the turning of a heavy key, leaving one alone in fetid semi-darkness is not an ideal preparation for what may well be the most important confrontation of one's life."

Hardiman J.'s comment is clearly a reference to the questioning which was then to take place. It has long been a feature of detentions under s. 4 and s. 30 that a person is left in such a situation prior to questioning and one supposes that this is for the purposes of what might be described as "softening up the person". However this was not the situation in this case.

30. The case of *Whelton v. O'Leary* related to a person being arrested for a theft offence and was brought to Anglesea St. Garda Station in Cork at 4.30 pm by prior arrangement with the Guards. He was arrested and conveyed to the Bridewell Garda Station in Cork, at 16.40 he was detained by the member in charge and at 17.45, over an hour later, he was charged with the relevant offence and then released. It appeared that the printer was out of order with a result that recourse to Anglesea St. Garda Station was required so that the appropriate charge sheet could be printed. This necessitated the appellant being detained for a period of approximately 25 minutes longer than would have been the case but for the malfunction.

31. The Court notes that s. 10(2) of the Criminal Justice Act, 1984 dealing with "re-arrest" states that notwithstanding anything in subs. (1), a person to whom that subsection relates may be arrested for any offence for the period of charging him with that offence forthwith. The use of the word "forthwith" is of course relevant to the decision in *Bolton and O'Leary*. However in relation to persons arrested for the purposes of giving a sample to a doctor there is no requirement that it be forthwith but within a reasonable time with a maximum period of presumably 2 ½ hours in this case. I distinguish the cases of *Whelton v. O'Leary* and the *DPP v. Gormley and White* as relating to matters other than the statutory regime for drunken driving.

32. The case of the *DPP v. Moyles and Cullen* relates to the handcuffing of drink driving suspects and as this did not arise in this case it is not relevant for the purposes of this decision.

33. Although not strongly argued, the facts in the Supreme Court decision in *the People v. J.C.* delivered on 15th April, 2015 by O'Donnell J. relate to a detention in accordance with the Criminal Justice Act, 1984 and is not relevant to the facts of this case. There is no evidence in this case that Mr. Laing objected to being searched. It would be interesting to see whether or not he made any complaint on the custody record in relation to his detention having been released after giving a sample of blood.

34. In this case, the Court must take into account the reasonable situation that exists within Garda Síochána stations, where the member in charge of the Garda Station was responsible for dealing with persons arriving at the hatch, answering phone calls and also (if the submissions of the defendant are to be accepted), that he must also ensure that the accused person does not leave the station while waiting for the registered medical practitioner.

35. It is the view of this Court that it was eminently reasonable to detain the person for the limited period of time for which he could be detained. The Court accepts that cells are not ideal but nevertheless it is hard to see how the member in charge could otherwise have dealt with the accused man in a situation in a busy station such as Ballina Garda Station.

36. This Court is of the view that no detention of the accused person at the Garda Síochána Station was not unlawful in the circumstances of the present case.

37. In those circumstances the Court, in answer to the questions of the district judge is that the detention of the accused person at

the Garda Síochána station was not unlawful in the circumstances of the case and in the circumstances the second question does not arise.