Neutral Citation Number: [2008] IEHC 436

THE HIGH COURT

2007 161 JR

BETWEEN

VARIS MEDNIS

APPLICANT

AND
DISTRICT JUDGE GEOFFREY BROWN

RESPONDENT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

Judgment of Mr. Justice Michael Peart delivered on the 18th day of December 2008

1. On this application the applicant seeks an order of *certiorari* quashing a conviction made against him by the respondent on the 10th January 2007 in respect of an offence of drunk driving under s. 49 (4) of the Road Traffic Act, 1961, as amended ("the Act"). That offence was committed by him on the 26th September 2006, on which date he was arrested by Garda Dooner under s. 49 (8) of the Act while driving in the townland of Townparks, Carrick-on-Shannon, and was immediately conveyed to Carrick-on-Shannon Garda Station, arriving there at 12.35am.

2. It appears to be not contradicted that Garda Dooner kept the applicant under observation at the Garda Station until 12.55am, being a period of twenty minutes for the purpose of ensuring that nothing was taken by mouth by the applicant before the test was carried out. However, neither is it contested that the test itself was not carried out until 1.23am in respect of the first sample, and 1.24am in respect of the second sample. In other words, a period of twenty eight minutes passed from the end of the 20 minute observation at 12.55am, until the test was carried out.

3. The point at issue in these proceedings relates to the fact that the evidence for the prosecution led at the trial of the offence, and up to point at which the applicant's solicitor applied to have the charge dismissed, did not include any explanation for that delay of twenty eight minutes and any evidence that the applicant was kept under observation for that additional period to ensure that in that period he had nil by mouth before he took the test.

4. I will return to that after I have set forth relevant evidence as to how the trial was conducted, for it is submitted that in all the circumstances, the respondent did not conduct the trial in a fair and impartial manner, since after the prosecution case closed, and after the applicant's solicitor made a submission that the absence of this evidence should lead to a dismissal of the charge, the respondent recalled Garda Dooner in an effort to try and fill these gaps in the evidence.

The hearing on the 10th January 2007

5. The applicant was represented by his solicitor, John Gerard Cullen. Mr. Cullen has sworn two affidavits for this application. In his first affidavit he has stated that on the 10th January 2007 at the call-over of cases for that day he indicated that the applicant was pleading not guilty and that "*the matter would be fully contested*".

> *He states that "it was clear that all matters were in issue and the prosecution was being put on strict proof in respect of all matters including the lawfulness of arrest, detention, and conduct of tests carried out on the applicant".*

6. He goes on to state that the inspector conducting this prosecution, as well as Garda Dooner, "*clearly understood that to be the case*". He proceeds to give an account of the evidence given by Garda Dooner as to arrest, and as to the times to which I have referred. He states then that he did not ask any questions by way of cross-examination of Garda Dooner, and then enquired of the prosecution if it had closed its case. Upon being informed that it had, he applied to the respondent for a dismiss of the charge, since it was apparent from the evidence of Garda Dooner that there two entirely separate periods of detention, the first being the *period of twenty minutes* during which Garda Dooner had the applicant under observation, and the *second period of twenty eight minutes* before the test was carried out for which no explanation had been given in evidence, and "*during which it was not claimed that the applicant was under observation*".

7. Mr. Cullen avers that following his submissions in this regard, the respondent stated that what had happened during the twenty eight minute period in question had not been raised by Mr. Cullen in any cross-examination of Garda Dooner, and that the respondent then invited Mr. Cullen to recall Garda Dooner so that questions could be put to him in this regard. Mr. Cullen declined this offer and submitted that the prosecution case was already closed and that it was not his role as the applicant's solicitor to assist the prosecution in filling gaps in its evidence. He then states that the prosecuting inspector informed the respondent that the reason for the twenty eight minute delay "*might be due to the fact that the applicant was a non-national and more time might have been necessary to explain what the Garda was doing*".

8. It appears then that the respondent himself proceeded to recall Garda Dooner in spite of Mr. Cullen's objection to that being undertaken, and he asked Garda Dooner to explain this delay in administering the test, to which, according to Mr. Cullen, Garda Dooner stated that he had to input the details into the machine, explain the consequences of a refusal to the comply, unwrap the mouthpiece and insert it into the machine, and further that Garda Dooner justified the delay on the basis that the applicant was a foreign national and that this caused a delay in explaining matters.

9. Mr. Cullen deposes that following this evidence of Garda Dooner, he was invited by the respondent to cross-examine Garda Dooner which he eventually did having voiced his objection to Garda Dooner having been recalled in this way, and given what he says were his instructions from his client to the effect that the cause of the delay was that the test machine had failed several times to work properly, and that it worked properly only after twenty eight minutes.

10. It is stated that during that cross-examination, Garda Dooner confirmed that the test had been carried out during the twenty eight minute period rather at the end of the twenty minute period, and was not clear as to the precise point during the twenty eight minute at which the test was carried out. Mr. Cullen states also that Garda Dooner denied that there had been any problem with the intoxilyser and stated that it was a "trouble free" test. He states also that at this point the respondent interjected to say that the reason for the delay was that the applicant had failed to blow into the intoxilyser; but he states that there had been no evidence to that effect. He states that the respondent proceeded to find that there had been no unreasonable delay, and at that point permitted the prosecuting inspector to ask other questions of Garda Dooner "*such as whether the applicant was informed of the penalties for non-compliance and was kept informed of what was occurring at all times*".

11. Following this, it appears from Mr. Cullen's evidence that he was then invited to make further submissions while Garda Dooner remained in the witness box, and Mr. Cullen believed that the respondent was intent on permitting the prosecuting inspector to adduce evidence from Garda Dooner on a continuing basis in response to any submissions made by him. In such circumstances Mr. Cullen decided to make no further submissions, and believes that, given that there had been no evidence that the applicant had been under observation under the twenty eight minute period and that he had not consumed anything by mouth during that period, if he had made further submissions to that effect the respondent would have given Garda Dooner an opportunity to give that evidence.

12. He states that the respondent indicated that he was relying on a decision in "*DPP v. O'Connor*" as the basis for allowing the recall of Garda Dooner where the legality of detention was in issue. That was a reference to a judgment of Quirke J. in *DPP v. O'Connor* [2005] IEHC 422.

13. Mr. Cullen concludes his affidavit by stating that the applicant's complaint is one of lack of fair procedure in the manner in which this trial was conducted by the respondent, rather than on the factual issue of whether or not the applicant had been kept under observation during the twenty eight minute period referred to.

Statement of Opposition
14. A Statement of Opposition was filed by the respondent, and this is supported by an affidavit sworn by Garda Dooner. That Statement denies a breach of fair procedures, and pleads that "*where an issue was taken as to the lawfulness of detention by reason of the length of detention, but the DPP was not put on notice of that issue being raised before the prosecution has closed its case, the respondent acted properly and within jurisdiction in permitting a prosecution witness to be recalled*".

15. It is pleaded also that fair procedures require that the DPP be on notice that the duration of detention is in issue and be given an opportunity to respond to same; that the applicant cannot rely on the failure to adduce evidence of continuous observation for the further period of twenty eight minutes in circumstances where, firstly, there is no statutory requirement for such observation, and, secondly, the matter of continuous observation was not put in cross-examination and the DPP was not on notice that this was an issue. It is pleaded in addition that it is reasonable to infer in the absence of this issue being put in cross-examination, that the applicant was in fact continuously under observation during this additional period, and further that the applicant is estopped from raising an issue in judicial review proceedings which was not raised at the hearing before the respondent, and in respect of which he did not make submissions before the respondent. Other matters are pleaded including that the respondent had before him an explanation for the duration of the period of detention and was within jurisdiction in accepting this explanation, and finding that the detention was lawful.

The affidavit of Garda Dooner
16. In his affidavit Garda Dooner states that on the 25th September 2006 he was on duty and observed a vehicle being driven by the applicant in an erratic manner, swerving from side to side on the road in front of him, that he stopped the vehicle and spoke to the applicant. He formed the impression that the applicant had consumed an intoxicant to such an extent as to be incapable of having proper control of a mechanically propelled vehicle. He arrested him at 00.30 am, and conveyed him to Carrick-on-Shannon Garda Station, arriving there at 00.35am. He says that he commenced his observation of the applicant at 00.35am in order to ensure that he nil by mouth for twenty minutes, and explained the reason for this observation to him. He goes on to state that at 00.55am he took the applicant to another room where the intoxilyser was situated, and he was satisfied at that time that the applicant had not taken anything by mouth in the previous twenty minutes. He goes on to state that he then explained the machinery to the applicant, showed it to him and explained the procedure to him. In addition he explained the legal requirements to the applicant by reference to the relevant provisions of the Road Traffic Acts, and that two samples were required. He also advised him of the penalties for refusing to comply with these requirements was an offence. He states in his affidavit that the process of explaining all these matters to the applicant took longer than usual as the applicant did not have a good understanding of English and that he was careful to ensure that all matters were carefully explained and that the applicant understood them. He goes on to state that while he was explaining all these matters to the applicant he was at all times present with the applicant and observed him at all times, and that he did not unduly delay in taking the test.

17. Garda Dooner explains that at 01.23 the first breath sample was given, and the second at 1.24am. At 1.30am the applicant was returned to the public office and was later charged with the offence for which he was convicted.

The District Court hearing on 10th January 2007
18. Garda Dooner then proceeds to describe what he recalls happening in the District Court on the 10th January 2007.

19. He states that having given evidence of arrest charge and caution, removal to the Garda Station, and his observation of the applicant over twenty minutes in the public area of the Garda Station, and the conduct of the intoxilyser tests in the Intoxilyser Room.

20. He states that he was not cross-examined by the applicant's solicitor on this evidence, and specifically in relation to the period of time in the intoxilyser room where the procedures were explained to the applicant and the tests carried out. He states that he was not aware that this would be an issue in the case, and did not address his mind to this when giving his evidence.

21. He goes on to state that when the prosecution case had closed, Mr. Cullen made a submission that no justification had been advanced for the delay of twenty eight minutes in the intoxilyser room and that therefore the detention was unlawful. He states that the respondent then invited Mr. Cullen to recall him to be cross-examined in this regard, but that this invitation was refused on the basis that the prosecution had closed its case. He confirms that the respondent referred to the case of *DPP v. O'Connor* pointing out that where the defence is making the case that there was unlawful detention, the prosecution must be given an opportunity to defend the fact at issue and should be put on notice of it, and states that the respondent recalled him to the witness box so that the issue of the length of detention in the intoxilyser room could be put to him. He goes on to state that he explained to the respondent about preparing the machine, and that explaining matters to the applicant necessitated speaking slowly, and repeating matters when necessary, since the applicant was is a foreign national.

22. He refers again to the fact that Mr. Cullen did not ask him any questions about this period of time, and that in fact it was clear from his evidence that he was in the intoxilyser at all times with the applicant. He says that if he had been asked whether during this time he had continuously observed the applicant he would have expressly confirmed this fact, and that he was occupied in preparing the machine for the test and explaining matters to the applicant. He says that it was clear from his evidence that he had not absented himself from the room at any time and that the applicant remained with him and under his observation.

23. Finally he refers to the statement by Mr. Cullen that he had remained in the witness box while Mr. Cullen was invited to make submissions, but states that Mr. Cullen raised no objection to this and that he could equally have waited for him to leave the witness

box before making any submissions if he had so wished, or requested that he leave the witness box on the basis that his evidence was complete. The remainder of his affidavit contains what is more in the nature of legal submissions, including that the applicant should not be permitted to now argue a point that he did not pursue in the District Court, as the District Judge would have been competent to hear, consider and rule on the issue. I should add that in his second affidavit, Mr. Cullen reiterates what he stated in his first affidavit at paragraph 7 thereof, namely that he did in fact argue the issue of the second period of unexplained detention in submissions to the respondent and sought a dismissal on that ground.

24. Before leaving this point, I should refer to the fact that by Notice of Motion the applicant sought and was refused leave to cross-examine Garda Dooner. That leave was refused by O'Neill J. Following that refusal some correspondence passed between the applicant's solicitor and the Chief Prosecution Solicitor which concluded with a letter from the latter which states in relation to the issue of observation, that Garda Dooner has no recollection of any such submission being made in the District Court. I understand that the applicant's solicitor responded to this letter by a letter in which he stated that since that was Garda Dooner's position the applicant would rely upon Mr. Cullen's clear recollection of what happened and as he has stated in his first affidavit.

Applicant's Legal Submissions

25. Giollíosa Ó Lideadha SC for the applicant submits that the evidence adduced on this application demonstrates that as a result of the manner in which the respondent intervened in the trial of the applicant by recalling Garda Dooner after the closure of the prosecution case, and having refused the applicant's solicitor's application for a dismissal of the charge for lack of evidence being led in relation to the twenty eight minute period, has led to the trial becoming an unfair trial, and that justice cannot be seen to have been done.

26. He submits that the evidence shows clearly that the prosecution was put on notice of the fact that the issue in relation to the lawfulness of the applicant's detention during this twenty eight minute period was being put in issue, and that in those circumstances it was wrong for the respondent to permit the prosecution to rectify a frailty in the prosecution case by recalling Garda Dooner to give further evidence, and that this amounts to giving the prosecution having "another bite of the cherry", especially when this occurred after Mr. Cullen had made detailed submissions in relation to the gap in the prosecution evidence.

27. Mr. Ó Lideadha submits also that it is clear that in fact even after Garda Dooner was recalled, he did not in fact explain this twenty eight minute delay in administering the test, or state that he had kept the applicant under observation during this additional period. He submits also that it appeared to Mr. Cullen that since Garda Dooner was permitted to remain in the witness box during his submissions that the respondent would permit further evidence to be give on an ongoing basis as required by Garda Dooner. This is said to amount to an unfairness to the applicant such as to require that the conviction be quashed.

28. It is submitted that the respondent was not entitled to reopen the prosecution's case where the prosecution did not request that this be done. It is submitted that by so doing at his own behest the respondent cannot be seen to have been impartial, and that this unfairness is exacerbated by the fact that the prosecution had been put on notice by the applicant's solicitor that the lawfulness of detention during the twenty eight minute period referred to was in issue in the case, and in circumstances where it occurred following the submissions on this issue which were made by the applicant's solicitor. It is also contended that the respondent ought to have requested Garda Dooner to step down from the witness box before asking the applicant's solicitor if he wished to make further submissions.

29. Mr. Ó Lideadha has submitted also that the DPP has not challenged the averment of Mr. Cullen that he had made it clear to the prosecution that it was being put on strict proof of all matters including the lawfulness of the arrest, detention and conduct of the tests, and that this was understood by both the prosecuting inspector and Garda Dooner. It is submitted in this regard that the period of twenty eight minutes was not an insignificant length of time such as might not require to be explained, and that the prosecution must be taken as being aware that it had to be explained in evidence, particularly having been put on notice of the issue being live.

30. In relation to the pleading in the Statement of opposition filed that the question of observation during the twenty eight minute period was not put by Mr. Cullen in cross-examination, and that the DPP was not on notice that this was an issue, Mr. Ó Lideadha submits that the prosecution had two separate opportunities to address the issue – firstly after Mr. Cullen had made submissions in relation to it at the close of the prosecution case, and secondly, after Garda Dooner was recalled by the respondent for the specific purpose of explaining what had happened during that period. He submits also that where these two opportunities had been available to the prosecution to deal with that period, and that they did not avail of them by explaining what happened during it, it cannot be reasonable for the respondent to have assumed that that observation of the applicant was continued during the period. He submits hat such an assumption would have the effect of reversing the onus proof from the prosecution, and would undermine a fundamental principle underlying the conduct of criminal trials.

31. It is submitted also that where the applicant's solicitor had raised the issue during his submissions ahead of Garda Dooner's recall to the witness box, and where in that recall Garda Dooner had been invited to fill the lacuna in the prosecution case, and the lacuna remained thereafter, it was reasonable that the applicant's solicitor should decide to make no further submissions. It is suggested that the circumstances as they unfolded are such that as referred to in *Dineen v. Delap* [1994] 2 IR. 228 at 234 where the circumstances in that case "*an impartial observer [would] recognise that the judge hearing the case was prepared to support the prosecution case to the extent of filling gaps which their evidence might leave.*"

32. The facts in *Dineen v. Delap* were of course very different to the present case. It would appear that in that case the District Judge had been less than impressed by the applicant's counsel's objection to the prosecuting Garda witness reading from his notes when giving his evidence, and told the Garda to ignore the objections. Later during cross-examination it transpired that some of the evidence of events following that applicant's arrest given by the Garda was hearsay evidence in that it was another Garda who had brought the applicant to the Garda Station following the arrest. On that basis an application was made to dismiss the charges. That application was refused by the judge, who then proceeded to call that other Garda to give evidence after the prosecution case had closed, and the judge in due course convicted the applicant.

33. That conviction was set aside on the basis that it could not stand in circumstances which reasonably gave rise in the mind of an unprejudiced observer to a suspicion that justice was not seen to be done. In so finding, Morris J. (as he then was) stated at p.234:

> *"The suggestion that the garda would be recalled by the respondent in the event of his making a slip is again improper and would cause an impartial observer to recognise that the judge hearing the case was prepared to support the prosecution to the extent of filling gaps which their evidence might leave.*
>
> *Secondly, I am unable to identify any justification for the respondent requiring to hear the evidence of Garda Sheehan*

when he had already ruled against Counsel on his application for a dismiss. The only possible explanation for the respondent calling the additional witness which the prosecution had not called was to lend assistance to the prosecution by copper-fastening his previous decision.

I am left in no doubt that this conduct would, in the words of Maguire C.J. "reasonably give rise in the mind of an unprejudiced observer to the suspicion that justice was not being done", and accordingly, there is a breach of the fundamental rule that not only should justice be done, but it should seem to be done."

34. Mr. Ó Lideadha has referred also to the judgment of O'Higgins J. in *Flynn v. Kirby* [2000] IEHC 291 where a conviction under s. 49 of the Road Traffic Act 1961, as amended, was quashed on the ground that the respondent judge had, after the prosecution had closed its case, recalled a witness to give evidence as to the time of driving by the applicant. That witness was the driver of the other car in the accident to which the Gardai had been called. The relevance of that evidence was that the blood sample taken from the applicant in the Garda Station would have to have been taken not later than three hours from the time of driving. It would appear that the evidence led by the prosecution had stopped short of giving the time of driving, although the driver of the other car had given evidence of the fact that the applicant had collided with his car, and that he had called the Gardai to come to the scene. The Garda who came to the scene gave evidence of the time at which at the scene the applicant had admitted being the driver of the car, and of the time at which the blood sample was taken at the Garda Station, and of the blood alcohol concentration found therein. At the close of the prosecution case, the solicitor for the applicant had made a submission that there was a defect in the evidence for the prosecution in that the time of driving had not been given, and that the judge could not convict in such circumstances.

35. Following this submission, the judge adjourned the case to another date, but before that date, when the prosecution solicitor and the applicant's solicitor happened to be in his court on other matters, the judge indicated to them that on the adjourned date the injured party should be in court. On the adjourned date, the prosecuting Garda was present as was the injured party, but the prosecution solicitor for some reason was absent. The applicant's solicitor indicated that he would not object to an adjournment, but the judge informed them that he did not require the prosecution solicitor to be present and proceeded to call the injured party to the witness box and, when the applicant's solicitor informed the judge that he did not know what question the judge proposed asking the injured part, the judge informed him that he did not intend asking him any questions on the issue of time. The applicant's solicitor made submissions as to the unfairness of what was occurring, but the judge stated that "*where non-essential facts are defective and are given in evidence they cannot cause a Court to give a decision in favour of the defence which would result in an injustice*". He proceeded to ask the injured party under oath "*do you know who telephoned the gardai?*" to which the injured party stated: "*I did, a minute after I got out of the car after the accident*". There had been evidence on the previous date that the Garda who attended the scene had received a radio call in the Garda car at 7.30pm on the date in question.

36. Further submissions were made by the applicant's solicitor following this additional evidence, including that the witness's answer had not advanced the question of the time of driving, but the judge ruled that the case had been proved and convicted the applicant.

37. On the application to quash this conviction, O'Higgins J. referred to the judgment of Morris J. (as he then was) in *Dineen v. Delap* (supra), as well as that of Flood J. in *Magee v. O'Dea* [1994] 1IR. 500, and other cases to which he was referred, and concluded as follows in relation to the unfairness of the proceedings:

"The decision of the learned judge to recall the witness in the absence of the prosecution and in circumstances where the defence were agreeable to an adjournment was highly unusual. Counsel argues that it could hardly be said to be prejudicial to the applicant. This may be so, but the circumstances must be taken into account as they are highly relevant as to questions of perception of fairness. The decision taken by the learned judge in the circumstances might give rise to, at least a suspicion, by an impartial observer that fair procedures were not being adopted. Unfortunately that perception would have been strengthened by the reasons given for recalling the witness which was that

> *'he stated that where non-essential facts are defective and are given in evidence, they cannot cause a Court to give a decision in favour of the defence which would result in an injustice.'*

It would appear from that passage that the decision to recall the witness was based on the learned judge's understanding of the Fennelly decision, and that he considered there was a defect in a non-essential fact. It is difficult to reconcile this reason for calling the witness with the learned judge's expressed view that he was satisfied as a result of Mr. Geraghty's answer in the witness box. This would strongly suggest that the answer was determinative in arriving at the decision. If there was an essential matter left undetermined at the end of the prosecution case the recall of Mr. Geraghty could not be justified on the grounds stated by the judge on his understanding of the Fennelly case. If, however, the matter was non-essential it is hard to see how it would be necessary or useful to recall the witness. The reasons given, and the difficulties posed by them, are not here relevant except and insofar as they impinge on any perception of unfairness of procedure in the decision to recall the witness in unusual circumstances. In my view they would strengthen rather than alleviate any perception of unfairness. In the circumstances the applicant is entitled to the order sought."

38. Mr. Ó Lideadha submits that something similar has occurred in the present case to the extent that the respondent of his own motion after the close of the prosecution's case, decided to recall Garda Dooner in order to try and fill a gap in the prosecution case after the applicant's solicitor had made submissions in relation to that gap in the evidence led.

39. He has referred also to the judgment of Quirke J. in *DPP v. O'Connor* [2005] IEHC 422 which arose by way of a Case Stated from the District Court, at the behest of the DPP, in which the issue for decision was whether the judge had been correct in law in dismissing a charge under s. 49 of the Road Traffic Act, 1961, as amended on the grounds that the respondent was in *unlawful detention for a seven minute period* during the investigation of the offence over and above the twenty minute period required to ensure that nothing was taken orally by the respondent prior to the administration of the intoxilyser test. In concluding that the additional period of seven minutes in the circumstances and on the facts of that case did not render the detention unlawful, Quirke J. referred to the judgment of Hardiman J. in *DPP v. Finn* [2003] 1 IR. 372, in which the latter stated at p.385:

" … 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. 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."

40. Having referred to the above passage, Quirke J. stated

> *"If an unlawful detention is to be relied upon as a defence then the prosecuting authorities must be given an opportunity to meet such an allegation. Accordingly, when the duration of detention of an accused person is challenged on the grounds of reasonableness then the onus rests upon the authorities to prove by way of evidence that the detention was reasonable and accordingly lawful. In the instant case there was apparently no such challenge."*

41. Mr. Ó Lideadha submits that the reasonableness of the length of detention was specifically challenged in the present case by Mr. Cullen, in the sense that he informed the prosecution that all matters were in issue and strict proof would be required, and that therefore, as stated by Hardiman J. above, and by Quirke J. the onus was on the prosecution to prove its reasonableness, and that having failed to do so, it was inappropriate and unfair for the respondent to attempt to do so for them, and that by doing so the respondent was seen as having "entered the arena". He submits that the prosecution would be expected to know that when they are told that they are on strict proof of all matters relating to the lawfulness of detention, they would know form being so told, that the reasonableness of the length of the period of detention is under challenge.

42. In all these circumstances it is submitted that the trial was unfair due to the manner in which the respondent involved himself in the case following the closure of the prosecution case, and proceeding to convict in such circumstances.

Respondent and Notice Party's Legal Submissions
43. Siobhán Phelan BL for the respondent and notice party submits at the outset that the applicant's solicitor has overstated the extent to which the prosecution was put on notice that the issue of the lawfulness of the applicant's detention during the twenty eight minute period in question. In that regard she refers to paragraph 5 of Mr. Cullen's grounding affidavit in which he avers simply that at the call-over of the list on the morning of the trial he "*indicated that the applicant was pleading not guilty and that the matter would be fully contested*". She submits that this was precisely what occurred in the case of *DPP v. O'Connor* [supra] since it is noted by Quirke J. in his judgment on p. 5 thereof that "in the instant case there was apparently no such challenge [to the duration of the detention]", and also in the case of *DPP v. Finn* [supra] in which it is clear from the account of the evidence in that case that the prosecuting garda was specifically challenged under cross-examination to justify the detention of the defendant for the period of twenty minutes in that case, and that the justification given by her was on the basis of certain guidelines which provided that such a period should be allowed for observation prior to the test being done. It is submitted that it is only when the duration of the detention is specifically challenged as being not reasonable that there is an onus on the prosecution to justify or explain it by relevant evidence.

44. Ms. Phelan refers also to paragraph 7 of Mr. Cullen's grounding affidavit and notes that he does not go so far as to state that any failure to observe, if it so happened, cast any doubt on the validity of the test. That paragraph states simply that no explanation was given for that extra period of time and that "it was not claimed that the applicant was under observation". She submits that it is not open to the applicant to now state that the test was in any way invalid, since that case was not made in the District Court. In fairness to the applicant, I should state that in his replying submissions, Mr. Ó Lideadha made it clear that this application was not akin to an appeal on the merits as to whether the applicant was in lawful detention or that the test was done properly. He emphasised that the application was entirely based on a fair procedures point arising from the manner in which the respondent intervened by recalling Garda Dooner as already fully set forth above.

45. Ms. Phelan submits that it is clear from the affidavit evidence that neither the prosecution nor the respondent were aware until Mr. Cullen made his submissions at the close of the prosecution case that he was challenging the reasonableness of the twenty eight minute period of detention, and therefore the lawfulness thereof. There had been no cross-examination of Garda Dooner which would have given some earlier notice of that challenge, but she submits principally that simply because Mr. Cullen stated to the judge at the call-over of the list that there would be a plea of not guilty and that the matter would be fully contested was insufficient to put the prosecution on notice of the fact that they would be required to adduce evidence for the purpose of justifying a period of twenty eight minutes detention. She submits that it is manifestly clear that the respondent was not so aware since after Mr. Cullen's submissions he recalled Garda Dooner so that evidence could be given in that regard. She states that the only reason that Garda Dooner was recalled was that an issue had only then arisen of which no notice had been given to the prosecution.

46. She submits also that in fact by recalling Garda Dooner to the witness box for that evidence the respondent was in fact facilitating the applicant, and not the respondent, since having not challenged the evidence of Garda Dooner in cross-examination and not having put the prosecution on notice of the challenge, the applicant would have had no basis for succeeding on his application for a dismiss. She submits, in relation to the fair procedures aspect of the case, that the action of the respondent was in fact in ease of the applicant so that the point about the reasonableness could be ventilated. She characterises the intervention of the respondent as being an attempt to deal with the case in a manner fair to the applicant since the issue had not been raised at an earlier stage. She submits that it is incorrect for the applicant to characterise the respondent's intervention as being to favour the prosecution and allow them opportunities on an ongoing basis to fill gaps in their case, and thereby "enter the arena". She submits that what the respondent did is entirely consistent with DPP v. O'Connor which the respondent apparently specifically cited as authority for recalling the witness, in circumstances where he was of the view that the issue had not been raised by way of challenge.

47. In relation to whether the fact that Garda Dooner remaining in the witness box while submissions were being made amounts to an unfairness, Ms. Phelan submits that it does not, and furthermore that it was at all times open to Mr. Cullen to request that he step down from the witness box if he felt at the time that it was an unfairness.

Conclusion
48. It is important to state at the outset that this application to quash the conviction of the applicant is not based on any alleged invalidity of the tests performed, or any failure by Garda Dooner to have kept the applicant continually under observation after the initial observation period of twenty minutes, and until the intoxilyser test was actually performed some twenty eight minutes later. The allegation made on the applicant's behalf that Garda Dooner did not at any point of his evidence, even on his recall, explain the twenty eight minute period or confirm that during it he had the applicant under constant observation, is really part of the general background to the applicant's main submission that the manner in which the respondent intervened after the closing of the prosecution's case by inviting that recall, amounts to such an unfairness that an impartial observer would consider that justice was not seen to be done.

49. The first issue for determination is whether it was permissible at law for the respondent to have Garda Dooner recalled after the closure of the prosecution case. If it was permissible, it is hard to see how that could be found to constitute a breach of fair procedures such that the subsequent conviction should be quashed. That issue is, on the basis of the authorities opened to the Court and to which I have referred, dependent on whether, as submitted by the applicant, the prosecution had been put on notice by Mr. Cullen that the lawfulness of the detention of the applicant during the twenty eight minute period was in issue, as only in those circumstances could there have been an onus on the prosecution to lead evidence as to the reasonableness of that period of

detention. If that notice was given, then the onus upon the prosecution to adduce that evidence before closing its case was not discharged, and it would become necessary then to consider whether what the respondent did by way of recalling Garda Dooner constituted unfair procedures and/or create a perception in the eyes of an impartial observer that justice was not seen to be done.

50. The remarks of Hardiman J. in *DPP v. Finn*, and the judgment of Quirke J. in DPP v. O'Connor make it clear beyond doubt that where the lawfulness of detention is challenged by an accused, the fact of that challenge being made must in advance be notified to the prosecution in order to give the prosecution an opportunity of dealing with it. It is also clear that where that notice is not given, then it is permissible for the judge hearing the case to recall a witness to deal with the issue arising. While the onus is at all times on the prosecution to prove its case, it will not always be the case that where a period of in excess of the twenty minute observation period passes prior to testing, the additional period in question is of such a character, including its length, that it will render that detention unlawful. It is not in every case where the twenty minute period is exceeded that it will be necessary to have that period justified. Not only will there be the obvious cases where the delay is so small as to be quite obviously covered by a *de minimis* consideration, but there will be cases also in which the tests are delayed for some period beyond the twenty minute period, but where the prosecution could not reasonably anticipate that it might be regarded as an unreasonably long period of itself requiring justification in the absence of being put on notice of some objection being taken.

51. The period will need to be justified as part of the prosecution case where it is manifestly in need of explanation on account of its duration. But where the period is short or otherwise unexceptional, it will not be apparent to the prosecution that there will be an issue raised in respect of it. In other words there is not, in my view, and this is suggested also by some of the remarks of Hardiman J. in *DPP v. Finn*, an automatic onus on the prosecution to justify every period of detention. In that regard he stated at p. 386 of his judgment:

> *"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. This case, accordingly, does not raise such questions as whether every interval elapsing before some statutory purpose of detention is achieved requires positive justification, or whether some intervals are so short as not to call for positive justification even when challenged. I would reserve my position on that issue until it arises in an individual case."*

52. My view is that the twenty eight minute period was not, of itself, of such magnitude as to have required the prosecution, in the absence of any notified challenge in respect of that period, to have itself led evidence about it for the purpose of discharging the onus on the prosecution to prove its case. Where a challenge to the detention is notified, the matter becomes different.

53. The next question therefore is whether what was stated by Mr. Cullen to the court at the call-over of cases at the commencement of the day for trial was a sufficient notification of the challenge to that period and the lawfulness of that detention to trigger the additional onus to justify that period as part of its proof of the case against the applicant. Mr. Cullen has made no averment that before Garda Dooner gave his evidence as to the time at which the tests were taken, he was aware that a twenty eight minute period had elapsed after the twenty minute observation period. He has not stated that he was aware of this evidence in advance of hearing it. The only evidence given by Mr. Cullen is, firstly, that at the call-over he indicated a plea of not guilty and that all matters were being fully contested, and that having heard Garda Dooner's evidence he decided not to cross-examine in relation to it, and to make the application for a dismiss and submissions in relation to same.

54. I would have thought that this is a matter of such importance to the applicant's case that if he was so aware before the evidence was given, he would have said so in his affidavit, and, that in view of that importance, and as a matter of fair procedure to the prosecution, he would not have made sure that the prosecution was aware in an explicit way, that this period was considered unreasonable in the absence of justification and was under challenge.

55. If Mr. was not aware of what Garda Dooner was going to say, I cannot see how simply informing the court that the applicant was going to plead guilty and that "*the matter would be fully contested*" makes it sufficiently clear that "all matters" includes a challenge to a period of time of which Mr. Cullen was unaware at that moment.

56. It is also not entirely clear at this stage whether, having heard the evidence of Garda Dooner in court, Mr. Cullen's objection at that time was that Garda Dooner had not stated in that evidence that he had kept the applicant under observation at all times during the period, or, regardless of whether he did or not, that the period of twenty eight minutes was not explained or otherwise justified as being a reasonable period of detention in all the circumstances. However, at this point in time, it is of no moment since the basis of the present application to quash the conviction is based solely on fair procedures grounds as outlined.

57. My view is that on the evidence before me, Mr. Cullen was not aware of what Garda Dooner was going to say in his evidence about the timing of the test, until he heard that evidence. It must follow from that finding that even when he indicated to the court at the call-over of cases that the applicant would plead not guilty and that the matter would be fully contested, even he did not know what matters were in issue. The plea of not guilty is sufficient to indicate that the prosecution is required to prove the guilt of the accused. Stating in addition that the matter will be fully contested adds nothing of substance to the plea of not guilty. It certainly in my view cannot mean that the prosecution are thereafter to be taken as having been on notice of a specific point taken later, which neither the applicant nor his solicitor was unaware of.

58. The issue which arose from Garda Dooner's evidence related to the length of the detention, and in particular that which followed the expiry of the initial twenty minute observation period. In my view, the prosecution was not on notice of that objection, and as outlined above, could not have been on notice of that objection, as Garda Dooner had not yet given his evidence. It is true that the prosecution would have known that the test had not been carried out until twenty eight minutes after the first observation period, but that knowledge is not of itself sufficient to have required them to lead evidence in relation thereto prior to the closing of the prosecution case, particularly where the applicant's solicitor did not cross-examine Garda Dooner at all.

59. As a matter of fact, the prosecution was not on notice of the issue being raised as to the lawfulness of the applicant's detention after the expiration of the twenty minute observation period. In my view, Mr. Cullen could not have put them on notice of this issue, since he was not aware of it himself either at the call-over or later until Garda Dooner had completed his evidence. Mr. Cullen chose not to pursue the issue in any cross-examination of Garda Dooner, but rather rely on what he then saw as a lacuna in the prosecution case. The respondent could in my view simply have convicted the respondent on the unchallenged evidence of Garda Dooner, without going as far as recalling Garda Dooner as he did. I favour the submission of Ms. Phelan that in effect what the respondent did can be seen as being in ease of the applicant since Garda Dooner had not been cross-examined in a situation where perhaps he should have been. The recall of Garda Dooner was permissible where the issue of lawfulness of detention had not been notified in advance, and arose only as evidence was given. That was in ease of the applicant and provided an opportunity for Mr. Cullen to ask questions pertinent to the reason for the delay in carrying out the tests. That opportunity was not taken, albeit for the reasons given by Mr.

Cullen, and although the period does not seem to have been explained in the way perhaps the respondent and the prosecution thought it might be. The upshot is that the issue sought to be relied upon by Mr. Cullen for the purpose of the dismiss application had no factual evidential basis other than the fact that the prosecution had led no evidence in relation to the reason for that additional period of twenty eight minutes. Cross-examination might have provided some.

60. It seems to me that the procedure by which the respondent intervened after the close of the prosecution case and recalled Garda Dooner was not unfair. As I have said, it would have been permissible for the respondent to have simply refused to accede to the application for a dismiss, and to have convicted on the evidence adduced by the prosecution, and which had gone unchallenged. However, far from being unfair to the applicant, what the respondent did initially was to recall Garda Dooner, not in order to fill some gap in the prosecution's case, as submitted by the applicant, but to deal with an issue which had had no opportunity of ventilation during the prosecution case since the issue had not been notified by the applicant. It does not seem to me that any impartial observer could or would reasonably view such an intervention as unfair, and as indicative of any intention on the part of the respondent to recall witnesses as necessary in order to assist the prosecution's case.

61. The right to fair procedures is a right to which both parties to the prosecution are entitled. It is not simply the applicant who is entitled to fair procedures. That is in no way to dilute the undoubted onus which is at all times on the prosecution to prove its case, and the right of the accused to be presumed innocent until such time as the prosecution has successfully proven its case, and a finding of guilt is made. But, as I have stated, the mere fact of a not guilty plea is sufficient to require the prosecution to prove all necessary facts for a conviction, and stating at the time of making a not guilty plea that the matter will be fully contested, is insufficient to require more of the prosecution than to prove its case. In the present case the proof of the prosecution's case did not require it, of its own motion so to speak, to explain or otherwise justify the reasonableness of the twenty eight minute period, in the absence of either being notified in advance specifically that the lawfulness of detention would be raised on that basis, or in the absence of any issue arising on cross-examination in relation to this period of time.

62. It is for this reason that the jurisprudence of the courts has developed as already referred to, whereby in the absence of a notification to the prosecution in advance of the case, that a particular issue is being relied upon by way of defence, the prosecution will be entitled to recall a witness to deal with the issue of which no notice had been given. The judge may also recall such a witness. That is to accord fair procedures to the prosecution, a right to which it too is entitled. That much is clear. The present case can be easily and clearly distinguished from the facts of *Flynn v. Kirby*, as well as *Dineen v. Delap*. The respondent cannot be seen as having entered the arena in any way that was unfair or impermissible. He has not displayed a willingness, as submitted by the applicant, that he would assist the prosecution to plug gaps in the prosecution case on an ongoing basis and as required. If anything it should be seen as providing a situation which could have been of benefit to the applicant.

63. Neither am I satisfied that following the recall of Garda Dooner in this way, matters proceeded in a way which an impartial observer might construe or view as justice not being seen to be done. It is true that Garda Dooner remained in the witness box while Mr. Cullen made some further submissions, but on the other hand no particular objection was taken to that at the time. It could have been, and in such an event no doubt Garda Dooner would have stepped down.

64. For all these reasons, the application for orders by way of judicial review are refused, and I dismiss the application.