Neutral Citation:[2015] IEHC 671

THE HIGH COURT

[2015 No.28 SS]
[2015 No. 441 SS]
[2015 No. 442 SS]

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

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR/APPELLANT

–AND –
CICERO PIRES

ACCUSED/RESPONDENT

–AND –
JAMES CORRIGAN

ACCUSED/RESPONDENT

–AND –
PAUL GANNON

ACCUSED/RESPONDENT

JUDGMENT of Mr Justice Max Barrett of 9th July, 2015.

PART I

SCOPE OF JUDGMENT

1. The within appeals concern arrests made in the context of drink-driving offences. The law as argued at the appeals, and this judgment in its scope, are concerned with that context only.

PART II

FOURTEEN PRINCIPLES IDENTIFIED

2. In *DPP (Moyles) v. Cullen* [2014] IESC 7, the defendant had been arrested on suspicion of drunk driving and immediately handcuffed in circumstances where the arresting sergeant had a policy of handcuffing all such suspects irrespective of the circumstances but had also formed the necessary opinion to justify an arrest under the provisions of the Road Traffic Act. Following his arrest, Mr Cullen was subjected to a breath test under s.13(1)(a) of the Road Traffic Act, 1994, as amended. That breath test resulted in a reading in excess of the permitted amount.

3. The issue which arose at Mr Cullen's trial and which was subsequently the subject of a consultative case stated by the Circuit Court to the Supreme Court,pursuant to s.16 of the Courts of Justice Act 1947, concerned the lawfulness of the actions of the arresting sergeant in immediately handcuffing Mr Cullen and the consequences, if any, for the charges brought against Mr Cullen for drunk driving.The majority judgment of Fennelly J. in *Cullen* is authority for the principles set out hereafter:

A. Use of Reasonable Force when making Arrest

(1). The power of arrest may only be exercised with the use of such force as is reasonable in all the circumstances. (Fennelly J., paras.17, 38).

B. Judgment of Gardaí as to Reasonable Force

(2). An arresting Garda makes a judgment as to what force is reasonable in the circumstances. The law allows a generous measure of judgment in this regard. (Fennelly J., paras. 17, 38).

(3). An error of judgment by a Garda in applying force s/he genuinely believes necessary will neither (i) render the arrest invalid, nor (ii) expose the officer to civil or criminal liability. (Fennelly J., para. 17).

C. Application of Handcuffs

(4). Every Garda is entitled, and may be obliged, to apply handcuffs to an arrested person where s/he genuinely believes that necessary in the particular case. (Fennelly J., para. 25).

(5). The decision as whether or not to apply handcuffs must be left to the individual Garda dependent on his or her own appreciation of the requirements of the individual case. (Fennelly J., para. 25).

(6). When a Garda is considering whether to apply handcuffs, the following factors must be taken into account: (i) the nature of the offence; (ii) the prevailing circumstances; and (iii) the 'BCDP' (behaviour, character, demeanour, personality) of the individual to be cuffed. (Fennelly J., paras. 25, 38).

(7). A realistic latitude is shown by the law to the Gardaí in this regard. (Fennelly J., para. 25).

(8). Despite the generous measure of judgment allowed, and the realistic latitude shown, to an arresting Garda, circumstances may present in which a court later determines that particular handcuffing was unlawful. Because of the generous measure of judgment allowed, and the realistic latitude shown, to the arresting Garda, such circumstances should be uncommon. The 'blanket policy' of cuffing applied in *Cullen* is an example of the uncommon. (Fennelly J., paras. 25, 38, 40).

D. Courts slow to review

(9). Ordinarily, the courts are slow to review operational decisions of individual Garda officers made in the wide range of situations which they confront in the course of their duty. (Fennelly J., para. 25).

(10). In the extraordinary event of a review, the effect of Principles (2) and (7) is that even though the test of reasonableness is objective, it allows a generous measure of judgment and a realistic latitude to the arresting Garda.

E. General observations on lawful arrest and detention

(11). A lawful arrest is a pre-requisite to the authority under road traffic legislation to make lawful demand that a suspect provide samples of blood, urine or breath. (Fennelly J., paras. 33, 35).

(12). An arrest may be invalid if, in the absence of lawful authority or consent of the owner, it is carried out on private property. (In the road traffic context, lawful authority presents under s.7 of the Road Traffic Act 2010). (Fennelly J., para. 35).

(13). A detention originally lawful can become unlawful where a suspect is held in detention without justification. (Fennelly J., para. 35).

(14). Public depiction of any person, but particularly an unconvicted prisoner, in handcuffs, is a depiction of that person in a position of humiliation and indignity. (Fennelly J., para. 39). However, if this Court might add a gloss that seems implicit in *Cullen*, the public handcuffing of an individual, in and of itself and without other circumstances presenting, will not render an arrest unlawful.

PART III

THREE APPEALS BROUGHT

4. The within proceedings involve appeals by the Director of Public Prosecutions by way of case stated pursuant to s.2 of the Summary Jurisdiction Act, 1857, as extended by the Courts (Supplemental Provisions) Act, 1961. The Director asserts that the learned District Judge Bryan Smyth erred in law in dismissing in each case a charge laid against each respondent/accused alleging a breach of s.4(4)(a) and (5) of the Road Traffic Act, 2010. The court proceeds now to consider the pertinent facts of each appeal.

i. MrPires' case.

5. The relevant facts are as follows: (i) Mr Pires was swerving from side to side as he drove on Fortunestown Way and on Tallaght By-Pass; after being signalled to stop it took approximately 0.5km to come to a complete stop on Tallaght By-Pass; (ii) Garda Brady handcuffed Mr Pires after evaluating the situation; (iii) Mr Pires was intoxicated; (iv) Garda Brady did not know the background of Mr Pires, Mr Pires was of a bigger stature than Garda Brady, and the two men were on their own; (v) Garda Brady had to transport Mr Pires in a Garda traffic jeep, which has no protective equipment for prisoners; (vi) Garda Brady stated that he was of the opinion that, if not handcuffed, Mr Pires could exit the vehicle at any time or could attack Garda Brady while he was driving. Garda Brady further stated that if Mr Pires had become difficult while being transported, this would have become a high-risk situation.

6. In the District Court, the DPP submitted to the court that the evidence established that not handcuffing Mr Pires would have entailed Garda Brady taking an unjustifiable risk for his safety, for the safety of Mr Pires, and for the safety of the public at large, in circumstances where Mr Pires may have become difficult, caused a disturbance or attempted to flee as Garda Brady drove him to the Garda Station.

7. Having considered the evidence in the case, the submissions made and the judgment in *Cullen,* the learned District Judge found as a fact that (a) the behaviour of Mr Pires in his interaction with Garda Brady and the reasons for handcuffing as given in evidence by Garda Brady did not show any indication that the application of handcuffs was objectively justified, (b) the arrest of Mr Pires was unlawful because the use of handcuffs was not objectively justified, and (c) this had the effect that there was no admissible evidence on which to convict Mr Pires.

ii. Mr. Corrigan's case.

8. The relevant facts are as follows: (i) Mr Corrigan drove onto a roundabout without yielding and nearly collided with another vehicle coming off the roundabout, forcing it to stop suddenly. He continued driving towards the M50 motorway at speed and erratically, and after being signalled to stop, failed to stop for at least 300 metres; (ii) Garda Murphy accepted that Mr Corrigan had co-operated, though at one point when Garda Murphy had placed his hand on Mr Corrigan to usher him into the back of the Garda patrol-car, Mr Corrigan hesitated. Garda Murphy stated that this did not appear to him to be aggressive; however, he felt that Mr Corrigan could become overwhelmed with the situation and panic; (iii) Garda Murphy stated that he believed that this fact, combined with the fact that Mr Corrigan was intoxicated, could result in Mr Corrigan doing something irrational; (iv) Garda Murphy stated that he and Mr Corrigan were on a dual-carriageway at the time, which was an unsafe environment, and that he had a duty of care towards Mr Corrigan; (v) Garda Murphy stated that Mr Corrigan's car was also on the dual-carriageway and that there was a front passenger in that car. He stated that he believed that it would be unsafe to leave the passenger in Mr Corrigan's care. He stated that he and Garda Walsh, who was accompanying him on patrol, decided that Garda Walsh should drive Mr Corrigan's car to Finglas Village for courtesy and safety reasons; (vi) Garda Murphy stated that he was accordingly alone in the Garda car with Mr Corrigan, whom he believed to be intoxicated, albeit co-operative. He stated that, although Mr Corrigan was being co-operative, he was still being detained and transported against his will. He stated that he had prior experience of prisoners who had originally been co-operative but suddenly turned aggressive; (vii) Garda Murphy stated that he was the lone driver of the patrol-car with Mr Corrigan in the back. He stated that the patrol-car is an ordinary saloon car with no barrier between the passenger seats and the driver's seat; (viii) Garda Murphy stated that he took all these factors into account before deciding to hand-cuff Mr Corrigan. He stated that he took the decision firstly for his own safety as he was travelling alone with a prisoner and could have been assaulted. He stated that, secondly, he made the decision for the safety of Mr Corrigan, and that as the latter was in custody he did not want him to suddenly realise the gravity of the situation, panic, and do something irrational. The decision was made, thirdly, to protect Garda Murphy, the accused, and the public, as a potentially uncontrolled, aggressive prisoner in the back of a Garda patrol-car could lead to the patrol-car being involved in a traffic collision.

9. In the District Court, the DPP drew the court's attention to the safety issues involved in leaving Mr Corrigan's car abandoned on a dual-carriageway and stated that the car was removed for safety and courtesy reasons. She asserted that in the hierarchy of rights, the public should come first. She stated that as a citizen she would not want to drive on roads where cars are abandoned by Gardaí because of the need for extra manpower to transport prisoners without hand-cuffs. She also stated that she would not like to drive on roads on which patrol-cars containing unrestrained prisoners are travelling.

10. Having carefully considered the evidence in the case, the submissions made and the judgment in *Cullen*, the learned District Judge found that (a) although Garda Murphy made a *bona fide* decision and not as part of a policy to handcuff Mr Corrigan, nonetheless his decision was not objectively justified by the reasons given in the evidence for the handcuffing, and (b) the arrest of Mr Corrigan was unlawful because the use of handcuffs was not objectively justified. The arrest being unlawful, the District Judge considered that certain breath evidence was inadmissible and that there was therefore insufficient evidence for him to convict Mr Corrigan of the offence with which he was charged under s.4 of the Road Traffic Act, 2010.

iii. Mr Gannon's case.

11. This is the third of the drink-driving cases before the court. The relevant facts are as follows: (i) Mr Gannon was travelling at excessive speed of about 130 miles per hour in the outside lane of the M50 motorway and overtook the Gardaí before being stopped; (ii) Garda Kenny stated that Mr Gannon was hand-cuffed on arrest. He stated that Mr Gannon had co-operated at the scene and caused no difficulties but that the reason he handcuffed him was that they were on the side of the M50 motorway and cars were travelling past them at high speed. He stated that he had decided that it was safer in the circumstances to do so because if there had been a struggle, there could have been very serious consequences.

12. The DPP submitted that in this instance, the arrest took place at the side of the M50 motorway where cars were travelling at speed, and that the arresting Garda made an assessment of the situation and decided to handcuff in the circumstances for the safety of all involved. She submitted that the evidence was that the Garda had made an assessment in all the circumstances of the case and that there was no policy of handcuffing.

13. Having carefully considered the evidence in the case and the submissions of the parties, the learned District Judge held that the handcuffing of Mr Gannon was not justified as a precautionary measure and dismissed the case on the basis of the Supreme Court's decision in *Cullen.*

iv. A point of note.

14. It appears that none of the three respondents – Mr Pires, Mr Corrigan or Mr Gannon – sought to establish any specific evidential platform on which to object to the excluded evidence. For example, there is no finding of fact recorded in the cases stated as to the period of time within which they were held in handcuffs or whether or not any members of the public were present and saw them being so handcuffed. Thus the only fact that each of Mr Pires, Mr Corrigan and Mr Gannon adduced in each case was a handcuffing of them; this consequently is the only platform on which each man can seek to have the evidence against him excluded.

PART IV

APPEALS BY WAY OF CASE STATED

15. There is a limited form of appeal available to the DPP against the dismissal of a charge in the District Court. The Director has no right of appeal to the Circuit Court, which would entail a re-hearing of the charge. Rather, the DPP is confined to the form of an appeal provided for in s.2 of the Summary Jurisdiction Act 1857, as extended by the provisions of s.51 of the Courts (Supplemental Provisions) Act, 1961. The procedure is available in respect of an erroneous finding in respect of a point of law only. Thus s.2 of the Act of 1857, as amended, and insofar as is relevant, provides that:

> *"After the hearing and determination by a justice or justices…of any information or complaint which he or they have power to determine in a summary way…either party to the proceeding…may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing…to the said justice or justices to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of [the High Court]…".*

16. Section 6 of the Act of 1857 provides that:

> *"[The High Court] shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices with the opinion of the court thereon, or may make such other order in relation to the matter, and may make such orders as to costs as to the court may seem fit…".*

17. The jurisdiction of the High Court on an appeal by way of case stated has been the subject of consideration by the superior courts on a number of recent occasions. It is a jurisdiction which, to the extent that it allows an appeal against an acquittal is quite exceptional. It must also be viewed against the general framework of our court system, as described by Gannon J. in *Clune v. DPP and Ors*. [1981] I.L.R.M. 17, in a passage frequently cited since:

> *"The concept of guiding, directing, controlling, supervising or correcting lay Magistrates which might have been inferred from proceedings of certiorari and prohibition and mandamus prior to the establishment of the State is not appropriate to Courts established under our Constitution. The Courts of limited jurisdiction established by legislation pursuant to constitutional authority in that behalf are not in any sense subject to direction, control or supervision by the superior courts established by the Constitution. The statutory Courts are 'inferior courts' in the sense only that the range of their jurisdiction is limited and defined by legislation. The superior courts are 'superior' in the sense only that their authority derives directly from the Constitution and not from the Legislature. They are constituted as one court and of unlimited jurisdiction and one of final appeal. The High Court has not only invested but inherent authority to ensure the administration of the law in accordance with principles of justice and the requirements of the Constitution. It has the capacity and authority to hear appeals from the courts of limited jurisdiction by any of such 'inferior courts'. Many of the procedures which were appropriate to the circumstances when the inferior courts were administered by lay magistrates have been adapted and adopted in relation to our District Courts now administered by fully competent and qualified lawyers, whose independence as Judges, not only from the Executive but even from their judicial colleagues, must be respected. The Justice sitting in the District Court has the sole and exclusive authority to control and supervise the conduct of proceedings in his own Court within the limits of the jurisdiction conferred upon him. His independence and authority is secured in his*

freedom not only from pressures of political or executive nature but also from purported intervention, direction, or control by any superior Court."

18. In *Fitzgerald v. DPP* [2003] 3 I.R. 247, the Supreme Court held that the circumstances under which a challenge to an acquittal should be permitted must be strictly construed. In delivering the judgment of the court, Hardiman J. noted:

> *"I…have difficulty in agreeing with the Director's submission that acceding to an application for a case stated, which will continue the suspension of the judgment of acquittal, and which can have the result of reversing it…is not to be regarded as judicial act, but as 'an administrative or a ministerial one only'. But that is not the issue at present. The status or near inviolability classically afforded to an acquittal emphasises the need to construe the permitted scope of an attack on such acquittal strictly. I have no hesitation in finding that the scope of such challenge is strictly limited to a question of law."*

19. In Fitzgerald, the Supreme Court considered the earlier decision in *DPP v. Nangle* [1984] I.L.R.M. 171. In that case, the respondent/accused was tried and acquitted by the District Court on a charge of assault occasioning actual bodily harm. The District Judge acquitted on the basis that the respondent's evidence raised a doubt as to whether the offence had been proved and the respondent was entitled to the benefit of that doubt. The Director appealed against the acquittal, contending that the decision of the District Judge was perverse and could not have raised a doubt in his mind. In dismissing the appeal, Finlay P., while remarking that there was a "*clear air of implausibility"* about the evidence, held as follows, at p.173 of his judgment:

> *"I am satisfied, however, that it would constitute an unwarranted interference by me in a proceeding which is exclusively confined to correcting errors of law by an inferior court in the determination of proceedings before it, to hold that evidence so summarised could not have raised a doubt in the mind of the District Justice. He had the opportunity of hearing the witnesses in this case and of listening to their answers to questions both in direct and cross-examination dealing no doubt in significant detail with the incidents which occurred."*

20. In *DPP v. Noonan* (Unreported, High Court, Ó'Caoimh J., 16th December, 2002), Ó'Caoimh J. again highlighted the limited nature of an appeal by way of case stated when dealing with the appeal of an appellant/accused aggrieved with the decision of a District Judge. In doing so, he adopted the principles established in *Proes v. Revenue Commissioners* [1998] 4 I.R. 174 at p.182, where Costello P. stated:

> *"When the High Court is considering a case stated seeking its opinion as to whether a particular opinion was correct in law, it should apply the following principles. (1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them. (2) Inferences from primary facts are mixed questions of fact and law. (3) If the judge's conclusions show that he has adopted a wrong view of the law they should be set aside. (4) If the judge's conclusions are not based on a mistaken view of the law, they should not be set aside, unless the inferences which he drew were ones which no reasonable judge could draw. (5) Whilst some evidence will point to one conclusion and other evidence to the opposite, these are essentially matters of degree and the judge's conclusions should not be disturbed, even if the court does not agree with them, unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law…"*

21. More recently, in *DPP (Lavelle) v. McCrea* [2010] IESC 60, a decision of a five-person Supreme Court, Hardiman J., delivering the unanimous decision of the Supreme Court, pointed out that in the case before the court, the judge of the District Court had thought it not unreasonable that a person confronted with a demand to provide a specimen expressed in technical terms should then seek a solicitor, and this in circumstances where he had previously been told that he could have access to a solicitor at any time. In coming to the conclusion that the judge of the District Court was entitled to have dismissed the charge, Hardiman J. stated, at pp.14–16 of his judgment:

> *"There is no need, in my opinion, for this Court to scrutinise that finding, or any other finding of the learned District Judge other than to inquire whether these findings were such as were open to her on the evidence. That is, the question of whether her findings were findings which this Court would itself make on the same evidence simply does not arise, Equally, it must be borne in mind that this is a Case Stated by way of Appeal and not a consultative Case Stated. In the latter species of Case Stated the learned District Judge is entitled to pose a particular question for the High Court to answer. Under the Appellate procedure, the statutory origins of which are set out on the title page of this judgment, a party, in this case the prosecution, is entitled to apply to the District Judge 'to state and sign a case setting forth the facts and grounds of such determination, for the opinion thereon [of the High Court]', the nature of this jurisdiction is not affected by the terms of Section 51 of the Act of 1861.*
>
> *Accordingly it seems to me sufficient to say that, having considered the grounds of the learned District Judge's decision, which are set out earlier in this judgment, the Court need only say that it was open to the learned District Judge, on the specific facts she found in this case, to dismiss the charge. She was entitled to find that Mr McCrea was reasonably entitled to rely on what the gardaí told him as to when he could take legal advice from a solicitor; entitled to find that his solicitor's advice would have been of benefit to him and entitled to find that he had not had reasonable access to it.*
>
> *In conformity with the long-standing practice of the Superior Courts, it is unnecessary, and would be wrong, to speculate what the result might have been had the facts been slightly different in one way or another and we do not do so."*

22. Similarly, Hedigan J. recently dismissed an appeal by the DPP in *DPP v. Dardis* [2015] IEHC 53, where he applied the decisions in *Fitzgerald* and *Nangle*. In *Dardis*, the DPP appealed the acquittal of the accused on a charge of drunken driving contrary to s.4(4) of the Road Traffic Act, 2010. The trial judge had held that the reason advanced by the prosecution for the detention of the accused prior to the provision of two specimens of breath was not justified and dismissed the charge. The DPP appealed the matter by way of case stated under s.2 of the Act of 1857. In dismissing the DPP's appeal, Hedigan J., at p.7 of his judgment, emphasised the limited nature of appeals brought under that section:

> *"This is a procedure exclusively confined to correcting errors of law by an inferior court in the determination of proceedings before it. See The Director of Public Prosecutions v. Nangle [1984] I.L.R.M. 171. It is confined to a party who is 'dissatisfied with the said determination as being erroneous in point of law'. It is not available therefore to a party dissatisfied with the decision of the District Court on the grounds that the District Judge has taken one view rather than another of the evidence or has accorded credence to one witness and withheld it from*

another. See Fitzgerald v. The Director of Public Prosecutions [2003] 3 I.R. 247."

23. In dealing with the finding of fact made by the District Judge that the detention was unjustified, Hedigan J. noted, at p.8 of his judgment, that the court could not intervene even if it were to disagree:

> *"It seems to me that this was a finding of fact reasonably made by a trial judge who had heard all the evidence and concluded [that the detention] in the circumstances herein was unjustified. It is not an error of law but an alleged error of factual analysis that is presented by the prosecution to this court. Thus on the principles enunciated above, I cannot intervene even if I were to disagree with the District Judge. The court has a limited jurisdiction only to correct errors of law."*

24. In summary, the task of the High Court in an appeal such as that now before the court is a very limited one. This is implicitly recognised in the very succinct question put by the learned District Judge in the case stated in respect of each of the three acquittals now before the court, namely *"Was I correct in law to find the arrest of the accused unlawful?"*

PART V

QUESTIONS OF FACT VERSUS QUESTIONS OF LAW

25. It can, of course, be difficult to differentiate between questions of fact and questions of law in the context of appeals such those now before the court. Consequently, the courts have always permitted what might be described as mixed questions of fact and law to be the subject of cases stated. The judgment of Finlay P. in *Nangle* (considered above) is instructive in this regard. There, Finlay P. stated, *inter alia,* at p.172 of his judgment *"[W]here a district justice reaches a determination which is unsupported by any evidence before him that…constitutes good grounds for setting aside his decision on an appeal brought by way of case stated"*, albeit that he concluded as indicated previously above.

26. The question whether there is sufficient evidence in law to support a conviction is a question of law, as opposed to fact. Thus in *State (Turley) v. Ó'Floinn* [1968] I.R. 245 at p.251, Ó'Dálaigh C.J. stated:

> *"The ground of the District Justice's refusal to state a case was that there was no question of law involved, but the question whether there is sufficient evidence in law to support a conviction is not a question of fact but a question of law."*

27. The rationale for this rule was explained by Hardiman J. in *Fitzgerald v. DPP* [2003] 3 I.R. 247 when, after quoting the above-mentioned passage from *Ó'Floinn*,he stated, at p.269 of his judgment:

> *"This is so because the ingredients of an offence are always known as ascertainable and the question of whether there is evidence to support the existence of each of them is a wholly legal question. But if the question related not to the existence of evidence, but to its credibility or to inferences of fact which could credibly be drawn from it, that would be a question of fact."*

28. For obvious reasons, the courts take a stricter view in relation to an acquittal. Thus in *Fitzgerald*, Hardiman J. stated, at p.265 of his judgment,that *"In my view, the jurisdiction to entertain a case stated by way of appeal against acquittal requires to be strictly construed."* Continuing, at p.266, Hardiman J. stated:

> *"The status of near inviolability classically afforded to an acquittal, emphasises the need to construe the permitted scope of an attack on such acquittal strictly. I have no hesitation in finding that the scope of such challenge is strictly limited to a question of law."*

29. Hardiman J. concluded, at p.269 of his judgment, by drawing a distinction between an appeal by way of case stated following an acquittal and one following a conviction:

> *"Many cases establish the proposition that a decision which is come to wholly without evidence to support it, may be quashed by certiorari. A classic Irish decision in this area is State (Creedon) v. Criminal Injuries Compensation Tribunal [1988] I.R. 51. As appears from that case, the test is whether the decision impugned was at variance with reason and commonsense. That such a decision is invalid is undoubtedly a legal proposition, and a true one. But the question of whether in any particular case a decision to acquit is of that nature, is a factual one which does not give rise to any 'question of law'. In this respect it is to be distinguished from a decision to convict…".*

30. In this case the court is presented with a clear question of law by the learned District Judge in respect of each of the *Pires, Corrigan and Gannon* cases, namely *"Was I correct in law to find the arrest of the accused unlawful?"* The answer to that question lies in whether the learned judge conformed with the principles identifiable in *Cullen* when he did so. For the reasons stated hereafter, the court respectfully concludes that in each of the three presentingthe learned District Judge did not so conform. However, before moving on to state its reasons for this conclusion, the court pauses to consider some practical questions that were raised or touched upon during the hearing of these appeals and which fall to be answered by reference to the principles identified in Part II above.

PART VI

EIGHT QUESTIONS ANSWERED

31. Q1. ***Can a member of the Gardaí apply a pre-determined blanket policy whereby s/he places an arrested driver regardless of the circumstances?***

A1. No. This, at the least, would involve a breach of Principles (4), (5) and (6), and would be directly contrary to what the Supreme Court specifically decided in Cullen.

32. Q2. ***Who is to make the judgment-call as to whether handcuffs should be applied?***

A2. The arresting Garda in the first instance. Under Principle (9), ordinarily the courts will be slow to review what the decision of the individual Garda. In the event of a review, the effect of Principles (2) and (7) is that, even though the test of reasonableness is objective, it allows a generous measure of judgment and a realistic latitude to the arresting Garda.

33. Q3. Does a person arrested for drink-driving actually have to flee across a busy road or actually engage in or threaten

an act of violence before the Gardaí may apply handcuffs?

A3. No. Consistent with Principle (6), when a Garda is considering whether to apply handcuffs, s/he may have regard to anticipated problems that have not yet occurred. In this regard, a Garda can and may have regard to his or her experience of previous such situations, albeit that whether to apply cuffs in any one instance rests ultimately on the particular circumstances presenting.

34. Q4. What test ought to be applied by the arresting Garda in determining whether handcuffing is appropriate?

A4. A test of 'genuine belief of necessity'. Under Principle (4) every Garda is entitled, and may be obliged, to apply handcuffs to an arrested person where s/he genuinely believes that necessary in the particular case.

35. Q5. Should the courts apply the Cullen judgment as a matter of routine in order to second-guess decisions made by the Gardaí to use handcuffs in particular circumstances?

A5. No. This, at the least, would involve a breach of Principle (9) whereby, ordinarily, the courts are slow to review operational decisions of individual Garda officers made in the wide range of situations which they confront in the course of their duty.

36. Q6. Is the safety of the prisoner a valid factor when a Garda is determining whether or not to apply handcuffs to an arrested person?

A6. Yes. Such a factor is part of the person's 'BCDP' to which an arresting Garda must have regard under Principle (6).

37. Q7. If the presence of other Gardaí at an arrest would have meant that there were no handcuffs necessary, does this render the application of handcuffs unlawful?

A7. No. Consistent with Principle (6), an arresting Garda must have regard to the circumstances in which the arrest in fact falls to be made, not those in which it might have fallen to be made. (For the avoidance of doubt, this does not affect the fact that when a Garda is considering whether or not to apply handcuffs. s/he may have regard to anticipated problems, including but not limited to the fact that an arrestee might seek to run across a busy road).

38. Q8. Are the factors to which an arresting Garda may have regard in deciding whether to apply handcuffs limited to the behaviour of the accused prior to the arrest?

A8. No. Consistent with Principle (6), in having regard to the 'BCDP' of an arrestee, the arresting Garda may have regard to the pre- and/or post-arrest 'BCDP' of the arrestee.

PART VII

SOME CONCLUSIONS

39. Was the learned District Judge correct in law to find the arrest of the accused unlawful in each of the *Pires, Corrigan* and *Gannon* cases? The court considers, with respect, that the learned District Judge was not correct so to find. It appears to the court that the reasoning employed by the learned District Judge in reaching his conclusion, in each of those three cases, that the arrest of the relevant accused was unlawful, contravened one or more of the principles identifiable in the judgment of Fennelly J. in *Cullen* and recited in Part II of this judgment. The particular principles and the contraventions that the court considers to arise are listed hereafter.

40. **Principle No. (2). An arresting Garda makes a judgment as to what force is reasonable in the circumstances. The law allows a generous measure of judgment in this regard**.

It appears to the court that in breach of the applicable law, as identified in Cullen,an insufficiently generous measure of judgment was afforded by the learned District Judge to the arresting Gardaí in each of the appeals now presenting.

41. Principle No. (6). When a Garda is considering whether to apply handcuffs, the following factors must be taken into account: (i) the nature of the offence; (ii) the prevailing circumstances; and (iii) the 'BCDP' (behaviour, character, demeanour, personality) of the individual to be cuffed.

Principle No. (7). A realistic latitude is shown by the law to the Gardaí in this regard.

It appears to the court that, in breach of applicable law, as identified in *Cullen*,insufficient latitude was afforded by the learned District Judge to the arresting Gardaí in each of the appeals now presenting.

42. Principle No. (8). Despite the generous measure of judgment allowed, and the realistic latitude shown, to an arresting Garda, circumstances may present in which a court later determines that particular handcuffing was unlawful. Because of the generous measure of judgment allowed, and the realistic latitude shown, to the arresting Garda, such circumstances should be uncommon. The 'blanket policy' of cuffing applied in Cullen is an example of the uncommon.

The regularity with which the learned District Judge found handcuffing to be unlawful (on 3rd March, 20th March, and 28th May, 2014, in the three appeals presenting) suggests to the court that in breach of applicable law, as identified in *Cullen*, the learned District Judge had insufficient regard to the uncommonness of the situations in which handcuffing will in practice be found to be unlawful.

43. Principle No. (9). Ordinarily, the courts are slow to review operational decisions of individual Garda officers made in the wide range of situations which they confront in the course of their duty.

The regularity with which the learned District Judge found handcuffing to be unlawful (on 3rd March, 20th March, and 28th May, 2014, in the three appeals arising) suggests to the court that in breach of applicable law he had insufficient regard to the slowness with which the courts will tend to review operational decisions of individual Gardaí.

PART VIII

REPLY TO QUESTIONS RAISED

44. The learned District Judge has in each of the *Pires, Corrigan* and *Gannon* cases posed the following question to the court: "*Was I correct in law to find the arrest of the accused unlawful?"* For the reasons stated above, the respectful answer of the court in each case is 'No'.