Neutral Citation Number: [2009] IEHC 39

THE HIGH COURT

2008 1031 SS

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

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF GARDA BRIAN LAVELLE)

PROSECUTOR/APPELLANT

AND

PAUL McCREA

RESPONDENT/ACCUSED

JUDGMENT of Mr. Justice John Edwards delivered the 28th day of January, 2009.

Introduction

The proceedings herein take the form of an appeal by way of Case Stated pursuant to s. 2 of the Summary Jurisdiction Act, 1857 as extended by s. 51 of the Courts (Supplemental Provisions) Act, 1961. For ease of reference the prosecutor/appellant and the respondent/accused respectively will hereinafter be referred to simply as "the prosecutor" and "the accused" respectively.

Section 2 of the 1857 Act provides:-

"After the hearing and determination by a Justice or Justices of the Peace of any information or complaint which he or they have power to determine in a summary way, by any law now in force or hereafter to be made, either party to the proceedings before the said Justice or Justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same 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 one of the Superior Courts of Law to be named by the party applying".

Section 51 of the Courts (Supplemental Provisions) Act, 1961, provides:-

> "(1) Section 2 of the Summary Jurisdiction Act, 1857, is hereby extended so as to enable any party to any proceedings whatsoever heard and determined by a Justice of the District Court (other than proceedings relating to an indictable offence which was not dealt with summarily by the court). If dissatisfied with such determination as being erroneous on a point of law, to apply in writing within fourteen days after such determination to the said Justice to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the High Court."

The Case Stated

On the 8th July, 2008 Judge Anne Watkin, a Judge of the District Court, assigned to the Dublin Metropolitan District, pursuant to a request from the prosecutor, stated a case for the opinion of the High Court in the following terms.

"(1) On 23rd January, 2008, the above named case was listed for hearing before me in the District Court, Richmond Courts Complex, North Brunswick Street, Dublin 7. The accused faced the following charge, as contained in Charge Street No. 632056:

"On the 9th June, 2007 at Blanchardstown Garda Station in the said District Court Area of Dublin Metropolitan District, being a person arrested under s. 49(8) of the Road Traffic Act, 1961, having being required by Garda Gillian Synnott, a member of the Garda Síochána, at Blanchardstown Garda Station pursuant to s. 13(1)(a) of the Road Traffic Act, 1994 to provide two specimens of your breath, did refuse to comply forthwith with the said requirement. Contrary to s. 13(2) of the Road Traffic Act, 1994, as amended by s. 23 of the Road Traffic Act, 2002".

A copy of charge sheet No. 632056 is appended to this Case Stated at Appendix A.

(2) The case came before me on 23rd January, 2008 and was prosecuted by Mr. Ronan Cleary, Solicitor of the office of the Chief Prosecution Solicitor. The accused was represented by Mark Byrne, B.L., instructed by Terence Lyons and Company, Solicitors.

Evidence proved or admitted before me

(3) The first prosecution witness to give evidence was Garda Brian Lavelle. He testified that, on the morning of 9th June, 2007, the accused had been pulled over for driving erratically, swerving left to right on the road. Garda Lavelle testified that he spoke to the accused, who had been driving the vehicle, and detected a strong smell of intoxicating liquor from his breath. The accused's speech was slurred and his eyes were glazed.

(4) The accused stated to Garda Lavelle that it had been one hour since his last drink. Garda Lavelle made a

requirement of the accused, pursuant to s. 12 of the Road Traffic Act, 1994 (as amended by s. 10 of the Road Traffic Act, 2002 and s. 2 of Road Traffic Act, 2003) to provide a specimen of his breath, and explained to the accused the penalties for failure to provide same. The accused provided a specimen of his breath and it was a "fail" reading. Garda Lavelle formed the opinion that the accused was intoxicated to such an extent as to be incapable of controlling a mechanically propelled vehicle in a public place and he was arrested at 2.10 a.m. on 9th June, 2007 under s. 49(8) of the Road Traffic Act, 1961.

(5) Garda Lavelle explained the reason for his arrest to the accused, both in terms of the relevant legislation as well as in ordinary language. The accused was given the usual legal caution and replied that he understood the reason for his arrest. He was brought to Blanchardstown Garda Station, arriving at 2.18 a.m. At 2.21 a.m. the accused was given his notice of rights and Form C72 was read over and explained to him by Garda William Murray, attached to Blanchardstown Garda Station. The accused refused to sign for his notice of rights. Garda Lavelle testified that the accused had not requested to speak to a solicitor at this stage; despite the fact that it was put to the said Garda that the evidence of the accused would be that he had made such a request at that stage.

(6) A copy of the custody record which was before the court is appended to this Case Stated at Appendix B.

(7) Garda Lavelle observed the accused for a period of 30 minutes from 2.18 a.m. to 2.48 a.m. to ensure he consumed nil by mouth. The reason for this period of observation was explained to the accused and it was completed successfully. There was no Garda trained to operate the intoxilyser machine present at the station at this time and the arrival of Garda Gillian Synnott was awaited.

(8) Garda Synnott testified that she arrived at the station and was introduced to the accused at 2.50 a.m. She noticed a smell of intoxicating liquour from his breath and that his eyes were red and glazed. She noted the temperature and humidity levels in the intoxilyser room were within required parameters. Garda Synnott entered her details in to the intoxilyser machine and made a requirement of the accused under s. 13(1)(a) of the Road Traffic Act, 1994 at 2.54 a.m. Garda Synnott explained to the accused the penalties for refusing to give a sample of his breath as required under s. 13(1)(a).

(9) Garda Synnott stated that the accused replied that he wanted to speak to a solicitor. Garda Synnott stated that she informed the accused that he could speak to a solicitor as soon as he had complied with her requirement. Garda Synnott testified that she reminded the accused that he was obliged by law to provide a sample of his breath and that he would be able to talk to his solicitor afterwards. Garda Synnott testified that she explained to the accused in ordinary language that he was required to provide a breath sample under the law and that his solicitor would tell him the same thing.

(10) Garda Synnott testified that the accused refused to get up from his chair and refused, in a verbally aggressive manner, to provide a breath sample, specifically stating that he would not give a sample.

(11) A cycle of three minutes was completed on the intoxilyser machine without the accused exhaling in to it and the machine timed out. The accused was deemed to have refused to provide a sample of his breath and was duly charged under s.13 (2) of the Road Traffic Act, 1994 as amended by s. 23 of the Road Traffic Act, 2002.

(12) Gardaí Lavelle and Synnott both testified that at no point did the accused offer any medical reason for his failure to provide a breath specimen when required.

(13) Under cross-examination and in response to questions from me, Garda Synnott explained that the reason she did not accede to the requests of the accused for access to a solicitor was that she believed she could only make one request pursuant to s. 13(1)(a) Road Traffic Act, 1994 and that if she aborted the process midway through, in order to provide the accused with an opportunity to speak to his solicitor, she would be precluded from making any further request under s. 13(1)(a) at a later stage.

Application for a Direction

(14) At this stage counsel for the accused sought a direction on the basis that the accused had been denied a right of reasonable access to a solicitor and that this had, in consequence, produced the evidence relied on by the state in prosecuting the case, namely the evidence that the accused had refused to provide a breath sample.

Submissions

(15) Counsel for the accused submitted to me an extract from the 3rd Edition of Mr. De Blacam's "*Drunken Driving and the Law*", quoting the case of *DPP v. Byrne*, (Meath Chronicle 1st June, 1991).

(16) Counsel for the accused submitted to me that the failure by the Gardaí to accede to the requests of the accused to see his solicitor was fatal to the prosecution.

(17) Counsel for the accused referred me to the wording of s. 13 of the Road Traffic Act, 1964, as amended, and submitted that there was nothing to suggest that a Garda could only make a request of a suspect on one occasion. Mr. Cleary, for the prosecution, agreed with this interpretation of the relevant section.

(18) Mr. Cleary for the prosecution, opened the case of *Walsh v. O'Buachalla*, [1991] I.R. 56 and argued that it showed that the accused was obliged to give a sample of his breath in any event, whether his request to consult with his solicitor was acceded to or not. Mr. Cleary pointed to the late stage in the process at which the accused made his request, despite having been informed of his right to speak with his solicitor at the outset and despite the fact that the accused had had the opportunity to speak to a solicitor at an earlier stage in the proceedings. Mr. Cleary submitted that the accused should not be allowed to profit from behaviour that could be construed as an attempt to frustrate the lawful actions of An Garda Síochána.

(19) Mr. Cleary submitted that any solicitor would have informed the accused that he was obliged to conform to Garda Synnott's request under s. 13(1)(a) of the Road Traffic Act, 1994. Accordingly Mr. Cleary argued that the accused had not been prejudiced in any way, he was obliged to give a sample and access to a solicitor's advice would not have changed this.

My Decision

(20) I found that a request to provide a breath sample had been made of the accused and that he had made an immediate request to consult a solicitor. I found that Sergeant Synnott declined this request due to a mistaken belief that she would not be legally be entitled to make another request of the accused if she broke the intoxilyser machine's cycle in order to allow him to consult with a solicitor.

(21) I distinguished the *Walsh v. O'Buachalla* decision on the basis that it concerned a charge brought under s. 49 of the Road Traffic Act, 1964, as amended, rather than a charge brought under s. 13 of the Road Traffic Act, 1994, as amended.

(22) I noted that the custody regulations and the associated notice of rights state that a person is entitled to consult with a solicitor at any time while in custody. I said it was understandable that somebody would ask to see a solicitor upon being asked to carry out a particular procedure in a garda station. I said that the aggressive behaviour on the part of the accused occurred after the refusal of access to a solicitor and possibly as a direct result of same refusal. I said there was no reason at law why Sergeant Synnott could not at least have made a phone call to a solicitor's office after the accused made the request to speak to a solicitor.

(23) I pointed out that if the accused had been allowed access to a solicitor, the solicitor would, amongst other advices, have advised him to provide a breath sample. The accused would have been advised that, depending on the reading obtained by the intoxilyser machine, he may not be charged at all, or be the subject of a one, two or three year ban as opposed to a four year ban should he fail or refuse to provide a sample. I noted that this was a level of information that Sergeant Synnott was under no obligation to provide, and did not provide, in the instant case.

(24) I dismissed the charge against the accused on the basis that he had been denied a right of reasonable access to a solicitor and that the refusal by the accused may have occurred as a consequence of the breach of that right.

The Question

(25) The prosecution, being dissatisfied with my decision, have asked me to state a case to this court on the following question of law:-

(i) In all the circumstances, should the accused have been provided with access to a solicitor before the breath test procedure under s. 13 of the Road Traffic Act, 1994 as amended, was completed?

(ii) If the answer to question 1 is "yes", was I correct in dismissing the prosecution on that basis? "

The Relevant Legislation

The relevant provisions of the Road Traffic Act 1994 are as follows:-

"Section 13

(1) Where a person is arrested under section 49(8) or 50(10) of the Principal Act or section 12(4), or where a person is arrested under section 53(6), 106(3A) or 112(6) of the Principal Act and a member of the Garda Siochána is of opinion that the person has consumed an intoxicant, a member of the Garda Siochána may, at a Garda Siochána station, at his discretion, 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 breath and may indicate the manner in which he is to comply with the requirement,

(b) (Not relevant).

(2) Subject to section 23, a person who refuses or fails to comply forthwith with the requirement under section (1) (a) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or both.

(3) Subject to section 23, a person who, following a requirement under subsection (1)(b):

(a) refuses or fails to comply with the requirement, or

(b) (not relevant),

shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or to both.

(4) In a prosecution for an offence under this Part or under Section 49 or 50 of the Principal Act it shall be presumed, until the contrary is shown, that an apparatus provided by a member of the Garda Siochána for the purpose of enabling a person to provide 2 specimens of breath pursuant to this section is an apparatus for determining the concentration of alcohol in the breath."

"Section 23

(1) In a prosecution of a person for an offence under section 13 for refusing or failing to comply with a requirement to provide 2 specimens of his breath, it shall be a defence for the defendant to satisfy the court that there was a special and substantial reason for his refusal or failure and that, as soon as practicable after the refusal or failure concerned, he complied (or offered, but was not called upon, to comply) with a requirement under the section concerned in relation to the taking of a specimen of blood or the provision of a specimen of urine."

The Prosecutors Submissions
Counsel on behalf of the prosecutor has submitted (i) that it was an error of law to hold that the accused had been denied a right of reasonable access to a solicitor, and (ii) it was an error of law to hold that the mere speculative possibility that there may have been causation was a legitimate basis on which a prosecution could be dismissed. He further submitted that these errors were caused by a fundamental misunderstanding and/or mis-application of the judgment of Blaney J. in the case of *Walsh v. O'Buachalla* [1991] 1 IR 56. In his submission the denial of access to a solicitor was reasonable in the particular circumstances of the case having regard to the fact that it was done for a bona fide reason (i.e. the Garda was concerned that if she interrupted the procedure she would not be able to lawfully recommence it) and there was in any event no causation. In Counsel's submission the Solicitor would have told the accused the same as the Gardai namely that he was obliged to provide a sample and the penalties for a refusal. Moreover, the prosecutor contends that it is a reasonable interpretation of the facts that the accused was doing everything possible to frustrate the process.

Counsel further submits that, notwithstanding that it was the view of the solicitors on both sides that Garda Synnott was mistaken in her understanding of the law, and the fact that the District Judge shared this view, it is by no means clear that Garda Synnott was in fact mistaken. Counsel argued that there is nothing in s.13 of the Road Traffic Act 1994 to suggest that the Gardai can make more than one lawful requirement. He contended that it is at least arguable in the light of the strict manner in which the Supreme Court has interpreted another aspect of section 13 in the case of *DPP v McDonagh* [2008] IESC 57 that Garda Synnott was correct in her view. In his submission, once you go down the road of permitting detainees a right to suspend the intoxilyser process once it has commenced so that they can seek legal advice all sorts potential difficulties arise, both of a legal and of a logistical nature. Counsel submitted that far from being "mistaken", Garda Synnott acted in a very prudent manner.

Counsel for the prosecution's case can be succinctly summarized as follows. First there was no breach of the applicant's constitutional right to be afforded reasonable access to a solicitor. Secondly, if there was a breach of the said right the exclusionary rule does not arise because nothing was done in any active sense to gather or obtain evidence during the period of the breach. All that happened was that the accused refused to provide a sample lawfully demanded of him. That refusal was merely passively observed. The active step of making the demand had been made before the accused requested a solicitor. Thirdly, if there was a breach of the said right and evidence was obtained, albeit passively, during the period of the breach the evidence in question was not liable to be excluded because there was no causal connection between the violation of the right and the gathering of the evidence. Fourthly, although Counsel did not put it in these exact terms, the Court interpreted him as making the further argument, based upon his contention that Garda Synnott had acted not only reasonably but prudently in all the circumstances, that the exclusionary rule ought not to apply on account of extraordinary excusing circumstances.

Quoting extensively from the judgment of Blaney J in *Walsh v. O'Buachalla*, Counsel for the prosecution sought to adopt the learned judge's reasoning in support of his first and third contentions respectively. In that case the accused had been informed of his right of access to a solicitor when he arrived at the Garda station but did not seek to avail of it. It was only when the medical practitioner arrived some 40 minutes later to take the blood specimen that, for the first time, the accused requested access to a solicitor. This request was refused by the arresting Garda because he believed that the request was not genuine and was made merely for the purpose of delay. The applicant was informed that he could contact a solicitor as soon as the blood specimen had been taken. After the blood specimen was taken the applicant did not seek to contact a solicitor. Counsel for the prosecution pointed out the following similarities between that case and the present case. In *Walsh v. O'Buachalla* it was only after he was required to provide a sample that the accused first requested a solicitor. Similarly, in the present case it was only after the requirement was made that the accused sought access to a solicitor. Both that case and this involved 40 minute periods in which the accused could have sought a solicitor before the specimen process commenced. In *Walsh v. O'Buachalla* Blaney J doubted whether on the facts of the case there had been any breach of the applicant's right of access to a solicitor and stated:

> "I have assumed up to this that Garda Fahy did violate the applicant's constitutional rights. But there must be a doubt as to this. At eleven minutes past midnight, the applicant was given the document informing him of his right to communicate with a solicitor, and Garda Fahy saw him reading this document a few minutes later. From then until six minutes to one, for approximately 35 to 40 minutes, he was in the parade room where there was a telephone. Garda Fahy says that during this time he and other gardaí were in and out of the public office and the parade room, so the applicant had ample time to ask if he could ring for a solicitor. Furthermore, he was told he could have a solicitor immediately after he gave the specimen of blood. So it was only during the interval between the time the doctor began to prepare to take the specimen and the time he had completed taking it that the applicant's request was refused.
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> On these facts, while it might have been the better course for Garda Fahy to have permitted the applicant to make a telephone call to a solicitor, it is in my opinion doubtful if there was any violation of the applicant's constitutional rights……"

The basis on which Blaney J held that the evidence should not be excluded was that there was no causation between the denial of access to a solicitor and the evidence sought to be adduced. He said:

> "In my opinion the evidence here was not obtained as a result of the violation of the applicant's constitutional rights. It is a case of *post hoc sed non propter hoc*— the evidence was obtained after the violation but not as a result of the violation. The applicant was obliged by statute to give a specimen of his blood or urine. No advice from a solicitor could have altered that. So his being refused access to a solicitor did not in any way lead to the specimen of blood being obtained. Either that specimen or a specimen of the applicant's urine would have been obtained anyway because Garda Fahy was entitled to require the applicant to provide them.
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> It was submitted on behalf of the applicant that if he had had access to a solicitor he could have been advised by

him. But what advice could a solicitor have given him? He would certainly not have advised him to commit an offence by refusing to give one or other of the specimens. All he could have done was to confirm that the applicant was required by law to provide a specimen of blood or urine. No advice could have prevented the specimen being obtained and, accordingly, the applicant's not having had access to a solicitor in no way affected its being obtained.

I am satisfied accordingly that even if the applicant's constitutional rights were violated there was no causal connection between such violation and the applicant giving a specimen of his blood and accordingly the first respondent was correct in admitting the certificate in evidence."

Counsel for the prosecutor contends that the reasoning of Blaney J is quite simply that the accused was obliged to supply a specimen and that legal advice would simply confirm that fact. Moreover, he contends that the basis on which the learned District Judge distinguished *Walsh v. O'Buachalla* (viz (i) that in that case an incriminating sample was provided whereas the present case concerns a refusal offence, and (ii) that a solicitor in the present case could have persuaded the accused to comply with the requirement by a hypothetical comparison of the relevant penalties) was flawed. He submitted that the legislative purpose of the refusal offence is not to permit an accused person to engage in a process of weighing up the pros and cons of complying with the law. Everyone is obliged to comply with the law. He submitted that the suggestion that a solicitor might have been able to persuade the accused to comply with the law is entirely speculative. He submitted that the accused bore an evidential burden in respect of that type of assertion which he had not discharged and in support of this he cited passages from the judgment of Henchy J, in the Supreme Court case of *The People(D.P.P.) v. Collins* [1981] ILRM 447 at 452-453:

Counsel also relied upon the judgments of O'Hanlon J. in *The People (D.P.P.) v. Spratt* [1995] 1 IR 585, and Johnson J. in *The People (D.P.P.) v. Clark* [2001] IEHC, both of which applied and followed *Walsh v. O'Buachalla*.

Further, Counsel for the prosecutor argued that to the extent that there may have been a breach of Regulation 8 of The Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations 1987 such a breach should not, by virtue of s.7(3) of the Criminal Justice Act, 1984, lead to the automatic exclusion of evidence.

Finally, Counsel for the prosecutor argued that it would not be in the public interest to apply the exclusionary rule in the circumstances of this case.

The Accused's Submissions
Counsel for the accused has submitted that the accused was being held in breach of his constitutional right of access to a solicitor when the evidence as to his refusal was procured. He relies upon *The People (D.P.P) v Madden* [1977] IR 336 and *The People (D.P.P.) –v- Healy* [1990] 2 IR 73. In *Madden* O'Higgins C.J. said at 355:

"This Court is satisfied that a person held in detention by the Garda Síochána, whether under the provisions of the Act of 1939 or otherwise, has got a right of reasonable access to his legal advisers and that a refusal of a request to give such reasonable access would render his detention illegal. Of course, in this context the word "reasonable" must be construed having regard to all the circumstances of each individual case and, in particular, as to the time at which access is requested and the availability of the legal adviser or advisers sought."

Counsel points out that in *Healy* it was elucidated that that right was a constitutional right. In his judgment in *Healy* Finlay C.J. said at p 81:

"The undoubted right of reasonable access to a solicitor enjoyed by a person who is in detention must be interpreted as being directed towards the vital function of ensuring that such person is aware of his rights and has the independent advice which would be appropriate in order to permit him to reach a truly free decision as to his attitude to interrogation or to the making of any statement, be it exculpatory or inculpatory. The availability of advice from a lawyer must, in my view, be seen as a contribution, at least, towards some measure of equality in the position of the detained person and his interrogators.

Viewed in that light, I am driven to the conclusion that such an important and fundamental standard of fairness in the administration of justice as the right of access to a lawyer must be deemed to be constitutional in its origin, and that to classify it as merely legal would be to undermine its importance and the completeness of the protection of it which the courts are obliged to give."

Counsel then went on to rehearse for the court the effect of a breach of the right of access to a solicitor and outlined how the exclusionary rule in respect of evidence obtained in circumstances involving a breach of a person's constitutional rights has developed, and in doing so cited the following passage from the judgment of Walsh J in *People (D.P.P.) v. O'Brien* [1965] I.R. 142, at p.170

"The vindication and the protection of constitutional rights is a fundamental matter for all Courts established under the Constitution. That duty cannot yield place to any other competing interest. In Article 40 of the Constitution, the State has undertaken to defend and vindicate the inviolability of the dwelling of every citizen. The defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence. The Courts in exercising the judicial powers of government of the State must recognise the paramount position of constitutional rights and must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State or its servants or agents as a result of a deliberate and conscious violation of the constitutional rights of the accused person where no extraordinary excusing circumstances exist, such as the imminent destruction of vital evidence or the need to rescue a victim in peril. A suspect has no constitutional right to destroy or dispose of evidence or to imperil the victim. I would also place in the excusable category evidence obtained by a search incidental to and contemporaneous with a lawful arrest although made without a valid search warrant.

In my view evidence obtained in deliberate conscious breach of the constitutional rights of an accused person

should, save in the excusable circumstances outlined above, be absolutely inadmissible."

The Court was then referred to the decision of the Supreme Court In *The People (D.P.P.) v Kenny* [1990] 2 IR 110, and in particular to the following passage from the judgment of Finlay C.J., at p.134

> "The detection of crime and the conviction of guilty persons, no matter how important they may be in relation to the ordering of society, cannot, however, in my view, outweigh the unambiguously expressed constitutional obligation "as far as practicable to defend and vindicate the personal rights of the citizen."

After very careful consideration I conclude that I must differ from the view of the majority of this Court expressed in the judgment of Griffin J. in *The People v. Shaw* [1982] I.R. 1. I am satisfied that the correct principle is that evidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in its (the court's) discretion."

It was further pointed out that in *The People (D.P.P.) –v- Healy* (to which I have previously referred) Finlay C.J alluded to how the exclusionary rule may operate in the context of a breach of the constitutional right to have access to a solicitor, and stated (at p 73) :

> "The vital issue which arises, therefore, if a breach of the right of access to a solicitor has occurred as a result of a conscious and deliberate act of a member of the Garda Síochána, is whether there is a causative link between that breach and the obtaining of an admission."

However, in *The People (D.P.P.) v. O'Brien* [2005] I.R. 206, Mr Justice McCracken, giving judgment in the Supreme Court, commented in relation to this remark (at p 210) that :

> "This would seem to imply that there may be circumstances in which statements taken at a time when an accused's constitutional rights were being breached could nevertheless be admissible if there was no causative link between the breach and the statement. While it is not what occurred in this case, this seems to me to be a somewhat doubtful proposition. However if the passage refers to an admission obtained after the breach had ceased, then it seems to me to state the legal position correctly."

Counsel for the accused contends that the requirement for a "causative link" between the breach of a right of access and evidence obtained by the State was rendered a moot issue by the decision of the Supreme Court in *The People (D.P.P.) v Buck* [2002] 2 IR 268 where it was held that the effect of a breach of the right of reasonable access to a solicitor is to render the detention of the person detained unlawful. In his judgment in that case Keane C.J. stated at p.281:

> "…it would seem in any event to be a logical corollary of the statement of the law by this court in *The Emergency Powers Bill*, *1976* [1977] I.R. 159, *i.e.* , that the detention of a person against his or her will pursuant to a statutory power is permissible only where his constitutional right of reasonable access to a solicitor is observed. It would seem to follow inexorably that his or her detention becomes unlawful as soon as that right is denied."

I must interrupt this review of Counsel for the accused's legal submissions to comment that while I am satisfied that the passage just quoted succinctly encapsulates the present law as to the implications for the lawfulness of a person's detention of a breach of that person's constitutional right of access to a solicitor, and that it does indeed seem to imply that no causative link is in fact necessary for the exclusion of evidence obtained during the currency of an unlawful detention, I was initially somewhat puzzled by a seemingly inconsistent obiter statement made towards the end of the Chief Justice's judgment, namely the following statement at p 283 of the report:

> "Even if the continuation of the questioning by the Gardai between the time that he asked for a solicitor and the arrival of the solicitor who visited the defendant at 8.33 pm could be regarded as a conscious and deliberate violation of his constitutional rights, there was no causative link between the breach in question and the making of the incriminating statements."

However this dictum has since been explained and I will return to this presently.

> Before doing so, however, I should complete my review of the case law cited in Counsel for the accused's submissions by noting his further submission that the proposition proffered in the first passage that I alluded to from the judgment of Keane C J in *Buck* has been re-iterated and indeed confirmed in the judgment of McCracken J in *The People (D.P.P.) v. O'Brien* [2005] I.R. 206 where he states at 210:
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> "The question was visited in a slightly different context in *The People (Director of Public Prosecutions) v. Finnegan* (Unreported, Court of Criminal Appeal, 15th July, 1997), which judgment was delivered by Barrington J. In that case, the accused had had access to a solicitor, but subsequently, in the course of being questioned, he requested a telephone conversation with the solicitor. This conversation took place in the hearing of one or more members of the gardaí. It was held that evidence of an interview which subsequently took place was inadmissible. At p. 42 of the judgment it was said:-
>
> > "Even though the right to make a telephone call to a solicitor may not be, *per se* , a constitutional right, once the telephone call is allowed, the detainee has a constitutional right to make that call in private.
> >
> > In the present case there was a breach of the accused's constitutional rights when he was denied private access by telephone to his solicitor. From that point on he was in unlawful detention. No evidence was adduced to show that this unlawful detention came to an end at any particular time nor indeed was the point addressed at the trial."

This case confirms that the right of private access to a solicitor is a constitutional right. It does seem to me to be manifest that where a person is held in detention, albeit that the detention itself was initially lawful, a breach of the constitutional rights of the person detained during the period of detention must render the detention unlawful."

I now wish to return to the somewhat puzzling *obiter dictum* in the *Buck* case. This *obiter dictum* has since been explained by McCracken J *The People (D.P.P.) v. O'Brien* [2005]. Immediately after the passage just cited McCracken J added (with reference to the *Finnegan* case):

> "However, this case does not answer the question as to whether, once the breach of the constitutional right has been remedied, the status of the unlawful detention is altered, and it becomes lawful.

The case that comes nearest to the present case is *The People (Director of Public Prosecutions) v. Buck* [2002] 2 I.R. 268. In that case, as in the present case, there was a very considerable delay between the request for a solicitor and the arrival of the solicitor. However, there were two important distinctions between that case and the present case. Firstly, no statement was made by the accused before the arrival of the solicitor and, secondly, the court held that the delay in the arrival of the solicitor, under the circumstances, was not a breach of the accused's constitutional right of access to a solicitor. It follows that there could have been no question of him having been in unlawful custody when he did make the statements. Having made that finding, however, Keane C.J. continued, in a passage that is undoubtedly *obiter* , at p. 283 to say:-

> "Even if the continuation of the questioning by the gardaí between the time that he asked for a solicitor and the arrival of the solicitor who visited the accused at 8.33 p.m. could be regarded as a conscious and deliberate violation of his constitutional rights, there was no causative link between the breach in question and the making of the incriminating statements. The accused had not made any incriminating statements prior to the arrival of the solicitor and, on the trial judge's findings, had been advised by him as to his right not to make any statement. The trial judge also accepted the solicitor's evidence that, at that point, the accused was relaxed and not showing any signs of stress. It follows inevitably that there was, on the evidence, no causative link between any breach of the accused's constitutional rights arising from the questioning before the solicitor arrived and the making of the incriminating statements."

Notwithstanding that this passage was *obiter* , it does purport to deal with the situation which has arisen in the present case. If the inculpatory statement or admission ultimately made by the accused was elicited from him by the use of information disclosed by him while he was in unlawful detention, there would clearly have been a causative link between the breach of his constitutional rights and the making of the statements or admissions. In those circumstances, material which had been wrongfully obtained in breach of the accused's constitutional rights would have been used to obtain an inculpatory statement or admission. However, the corollary to this also appears to me to be valid, namely that if the statements were not made as the result of any material obtained in breach of the accused's rights, then they are not tainted by unconstitutionality and, provided the accused's detention was lawful at the time they were obtained, they are admissible. In my view, the statement quoted above from *The People (Director of Public Prosecutions) v. Buck* [2002] 2 I.R. 268 is a correct exposition of the legal position."

Bearing in mind the principle expressed by Finlay C.J. in *The People (D.P.P.) v Kenny* [1990] 2 IR 110 (to which I have already referred) McCracken J continued:

> "In the present case, of course, the trial judge held that there was a deliberate breach of the constitutional rights, and that any statements made before the arrival of the solicitor must be excluded. However, two questions still remain unanswered. Firstly, whether, once the solicitor arrived and gave his advice, there was any further breach of the accused's constitutional rights and, secondly, even if the breach had ceased, whether his detention remained unlawful. I have no doubt that the answer to the first question must be that the ultimate access to the solicitor put an end to any unconstitutional situation. The unconstitutionality lay in the absence of legal advice, and once that advice had been obtained, his constitutional right had been complied with.
>
> The much more difficult question is whether the accused's detention, having been rendered unlawful by the breach of his constitutional rights, remained unlawful. The initial arrest of the accused was undoubtedly lawful, as was his custody up to the time that he requested a solicitor. Thereafter, it was certainly wrongful of the gardaí to question him pending the arrival of the solicitor but that questioning is not what created the unlawfulness of his detention. The statements made by the accused pending the arrival of his solicitor would have been inadmissible whether there had been an undue delay in the arrival of the solicitor or not. What made the detention unlawful was the deliberate and conscious decision of the gardaí to contact Mr. Gaffney, rather than a more convenient solicitor, when they knew or ought to have known that there would be a very considerable delay in his attendance. That decision was made in breach of the accused's constitutional rights and, therefore, from the moment that decision was made his detention became unlawful. The detention remained unlawful so long as the breach of the constitutional rights continued. Logically, therefore, once the breach of the constitutional right ceased, the detention ceased to be unlawful."

In summary, the accused's case is that he was being held in breach of his constitutional right of access to a solicitor when the evidence as to his refusal was procured. The breach of his constitutional right of access to a solicitor was deliberate and conscious and there were no extraordinary excusing circumstances to excuse it. Accordingly this breach rendered his detention unlawful. Counsel has contended that the evidence as to his refusal was inadmissible as having been obtained during a period of detention rendered unlawful on account of a deliberate and conscious violation of his constitutional right of access to a solicitor and in respect of which there were no extraordinary excusing circumstances. He contends that it is no longer the law that the requirement identified by Blaney J *in Walsh v. O'Buachalla*, viz that there must be a causal connection between the infringement and the obtaining of the evidence, needs to be satisfied before the exclusionary rule can be relied upon. The accused contends that the current legal position is as stated in the decisions of the Supreme Court in *The People (D.P.P.) v Buck* [2002] 2 IR 268 and *The People (D.P.P.) v O'Brien* [2005] 2 IR 206, viz that the detention of a person will be rendered unlawful if he is not afforded reasonable access to a solicitor, and for so long as he remains deprived of a solicitor.

Finally, Counsel for the accused has submitted that there was, in any event, a causal link between the breach of his right of access to a solicitor and his refusal to provide a specimen, namely, that if he had had a solicitor he would have had the benefit of independent legal advice in respect of which he could have had confidence. He agrees that a solicitor would certainly not have advised him to commit an offence by refusing to provide a sample as requested and that a solicitor would have confirmed that he was required by law to provide a specimen of his breath as requested. However, he contends that a solicitor would have been likely to advise him that, aside altogether from his legal obligations, the most advantageous course of action for him would be to provide a sample, as it could possibly result in no charge being preferred if the reading came in below the legal limit or, if over the limit, the court would have regard to the exact alcohol reading, in the event that he were to be found guilty, in deciding on penalty and the minimum consequential disqualification period to be imposed.

He says that he is also likely to have been advised that the law recognises three brackets of alcohol readings for the purpose of determining, upon conviction, the minimum period of consequential disqualification to be imposed. S. 26 of the Road Traffic Act 1961, as amended by s 6 of the Road Traffic Act 2006, provides that a person convicted of driving with a blood alcohol reading in the bracket 36-44 microgrammes of alcohol per 100 millilitres of breath shall be disqualified from driving for a minimum of 1 year (2 yrs for a second or subsequent offence); that a person convicted of driving with a blood alcohol reading in the bracket 45-66 microgrammes of alcohol per 100 millilitres of breath shall be disqualified from driving for a minimum of 2 years (4 yrs for a second or subsequent offence); and that a person convicted of driving with a blood alcohol reading in the bracket 67 + microgrammes of alcohol per 100 millilitres of breath shall be disqualified from driving for a minimum of 3 years (6 yrs for a second or subsequent offence). Further still, the solicitor would likely have advised him that a failure or refusal to provide a sample would likely result in a criminal charge being preferred against him under s.13 of the Road Traffic Act 1994 and that, if found guilty, the law would, for the purposes at least of determining the minimum period of consequential disqualification to be imposed, treat him more harshly than a person convicted on a first offence of having an alcohol level in their system falling into the highest of the three brackets provided for by legislation. S.26 of the Road Traffic Act 1961, as amended by s 6 of the Road Traffic Act 2006, provides that the period of disqualification for a person convicted under s. 13 of the Road Traffic Act 1994 shall not be less than 4 years in the case of a first offence and not less than 6 years in the case of a second or any subsequent offence under the same section.

Decision
This Court has reached the conclusion that Counsel for the accused is correct in his submission that *Walsh v. O'Buachalla* [1991] 1 IR 56 no longer represents the law and that the current legal position is as stated in *The People (D.P.P.) v Buck* [2002] 2 IR 268 and *The People (D.P.P.) v O'Brien* [2005] 2 IR 206. The accused in this case was in lawful detention up until the point where, he having requested access to a Solicitor, Garda Synnott refused to accede to his request and decided to take no steps to contact, or have someone else contact, a solicitor on the accused's behalf, until such time as the intoxyliser cycle that was then underway was completed. I am satisfied that Garda Synnott's decision, although it was a *bona fide* one, and not in any way a *mala fide* attempt to ensure that the accused was without legal advice, was nonetheless a deliberate and conscious decision in the sense spoken of by Finlay C.J. in *People (D.P.P.) v Kenny* [1990] 2 IR 110. Accordingly, she unwittingly committed a deliberate and conscious violation of the accused's constitutional right to have access to a solicitor. This breach had the effect of rendering the accused's detention unlawful from the moment Garda Synnott made the decision to refuse the accused's request.

For so long as the accused remained in unlawful detention the strict exclusionary rule as identified in *Kenny's* case must be applied, unless there were in existence at the material time extraordinary excusing circumstances. I cannot agree that the lack of culpability of Garda Synnott in any moral sense, or that the subjective reasonableness of her actions, or as has been urged, the prudence underlying her actions, constitute extraordinary excusing circumstances. In support of this view I would the following passage from the judgment of Finlay C.J. in *The People (D.P.P.) –v- Healy* [1990] 2 IR 73:

> "I reject completely the submission made on behalf of the Director of Public Prosecutions that the test to be applied to the question of reasonable access is a subjective test in the mind of the jailer of the detained person. The test is whether the superintendent's refusal of access was a conscious and deliberate act, as it clearly was. The fact that he may not have appreciated that his refusal was a breach of the defendant's constitutional right is immaterial."

Moreover, I don't accept the contention that Garda Synnott may not necessarily have been mistaken. While I accept that s. 13 must be construed narrowly, that does not mean that common sense should go out the window.

Accordingly, and though some would regard it as harsh, unless or until the Supreme Court decides to ameliorate the strict exclusionary rule as identified by them in *The People (D.P.P.) v Kenny* [1990] 2 IR 110, I consider that the maxim *ignorantia juris haud excusat* must apply. The rationale for the application of a strict exclusionary rule is clearly set out in the judgment of Finlay C.J. in *Kenny* at page 133/134:

> "As between two alternative rules or principles governing the exclusion of evidence obtained as a result of the invasion of the personal rights of a citizen, the Court has, it seems to me, an obligation to choose the principle which is likely to provide a stronger and more effective defence and vindication of the right concerned.
>
> To exclude only evidence obtained by a person who knows or ought reasonably to know that he is invading a constitutional right is to impose a negative deterrent. It is clearly effective to dissuade a policeman from acting in a manner which he knows is unconstitutional or from acting in a manner reckless as to whether his conduct is or is not unconstitutional.
>
> To apply, on the other hand, the absolute protection rule of exclusion whilst providing also that negative deterrent, incorporates as well a positive encouragement to those in authority over the crime prevention and detection services of the State to consider in detail the personal rights of the citizens as set out in the Constitution, and the effect of their powers of arrest, detention, search and questioning in relation to such rights.
>
> It seems to me to be an inescapable conclusion that a principle of exclusion which contains both negative and positive force is likely to protect constitutional rights in more instances than is a principle with negative consequences only.

> The exclusion of evidence on the basis that it results from unconstitutional conduct, like every other exclusionary rule, suffers from the marked disadvantage that it constitutes a potential limitation of the capacity of the courts to arrive at the truth and so most effectively to administer justice.
>
> I appreciate the anomalies which may occur by reason of the application of the absolute protection rule to criminal cases.
>
> The detection of crime and the conviction of guilty persons, no matter how important they may be in relation to the ordering of society, cannot, however, in my view, outweigh the unambiguously expressed constitutional obligation "as far as practicable to defend and vindicate the personal rights of the citizen."

I should mention in passing that this Court is aware of the very thought provoking judgment of Mr Justice Charleton in the case of *The Director of Public Prosecutions v Cash* [2007] IEHC 108, in which the learned judge, while acknowledging that *Kenny's case* represents the current law, and that he must apply it, has conducted a most thorough and comprehensive review of the historical development of the strict exclusionary rule and has urged a re-examination of it. He contends that "a rule which remorselessly excludes evidence obtained through an illegality occurring by a mistake does not commend itself to the proper ordering of society which is the purpose of the criminal law." He goes on to suggest that any system of the exclusion of improperly obtained evidence ought to be implemented on the basis of a balancing of interests, the relevant interests being primarily those of society and of the accused, with the rights of the victim also being weighed in the balance.

I would agree with Mr Justice Charleton that the automatic exclusion of evidence due to a mistake made in good faith arguably represents an unjustifiable anomaly in the law and something which is inimical to the public's interest in the prosecution of crime. I would therefore support the learned judge's call for a re-examination of the need for the strict exclusionary rule some eighteen years post *Kenny*, particularly in the light of the changed circumstances in which the Criminal Courts now find themselves, where the previously ubiquitous trial within trial seeking the exclusion of evidence on the grounds of alleged Garda misconduct has become … not quite a thing of the past, that would be to overstate it, but …very much the exception rather than the rule.

I understand that the *Cash* case is under appeal to the Supreme Court and I will await the outcome with considerable interest.

I must, however, decide this case on the basis of the law as it is now.

The prosecutor in this case has argued that, notwithstanding that there may have been a breach of the accused's constitutional rights, the application of exclusionary rule does not arise because there is no evidence to exclude. He contends that nothing was done in any active sense to gather or obtain evidence during the period of the breach. All that happened was that the accused refused to provide a sample lawfully demanded of him. That refusal was merely passively observed. The active step of making the demand had been made before the accused requested a solicitor, and was therefore made at a time when he was in lawful detention. The only thing that happened after his detention became unlawful was that he was passively observed not to provide the sample that had been lawfully demanded of him within a reasonable time.

At first glance, this is an attractive argument. Developing it slightly, the Court would pose the following rhetorical question. Could it seriously be contended that if, instead of refusing to supply a sample of his breath, the accused had instead lashed out and kicked over the intoxilyser machine within the clear view of Garda Synnott thereby causing damage to it, that he couldn't be charged and prosecuted with the offence of causing criminal damage, or that if he was so charged, that Garda Synnott could not give evidence as to what she had passively observed, simply because he happened to be in unlawful custody at the time that he elected to commit the offence. If so, it would be indeed be anomalous.

However, after some reflection, I have arrived at the conclusion that the situations are not fully analogous. They certainly have a number of features in common. In both situations the evidence is acquired passively. Moreover, there is no direct causative link in either case. In regard to that I hold the view that to suggest that the evidence against the accused would not have been obtained "but for" the breach of the accused's right of access to a solicitor would, in either case, be an untenable proposition. It would amount to a suggestion that in each instance the accused was induced to commit the offence by reason of the breach of his right to have access to a solicitor. However, the accused puts forward a more nuanced point, namely, that he might have made a different choice or adopted a different course of action if he had had the benefit of legal advice. Moreover, in the accused's case there was a statutory process underway and the entitlement of the Gardai to require the accused's participation in that process was contingent on him being in their lawful custody. At the point at which his detention became unlawful the entire process became tainted with illegality. The suggestion is that on account of this the evidence acquired by Garda Synnott in passively observing the accused's failure to provide the sample that had been lawfully demanded of him within a reasonable time, must also be regarded as tainted . I think there is substance in that point. Once his detention became unlawful he was entitled to be released and to leave the Garda station forthwith. He was not obliged to remain to fulfil the demand that had been made of him. Garda Synnott's entitlement to insist on compliance with the demand that she had made moments before evaporated at the moment that she refused to comply with the accused's request to be afforded access to a solicitor, notwithstanding that the demand was lawful at the time that it was made. It is not necessary that a causative link should exist between the breach of rights and the evidence acquired. It matters not whether the evidence was acquired by means of some positive action taken by the Gardai, or whether it was gathered incidentally, serendipitously or by mere passive observation.

The absolute exclusion of evidence, obtained in breach of an accused's constitutional rights, as being fruits of the poisoned tree, represents a judicially created remedy in fulfilment of the State's obligation to defend and vindicate the constitutional rights of the citizen. This principle of absolute vindication of constitutional rights was most clearly articulated in the *State (Quinn) v. Ryan* [1965] IR 70 and in *Trimbole v. Governor of Mountjoy Prison* [1985] IR 550, before being applied in the *Kenny* case in stated preference to the principle of deterrence adopted by the United States Supreme Court in *United States v. Leon* (1983) 468 U.S. 897.

Finally, although the existence of a causal link between the breach of rights and the procurement of evidence does not now need to be established, and I do not regard it as having been established, I wish to say nevertheless that I disagree

fundamentally with the submissions of the prosecutor to the effect that it was an error of law on the part of the District Justice to hold that that the refusal by the accused may have occurred as a consequence of Garda Synnott's refusal to afford him access to a solicitor. It will be recalled that he characterised this as a "mere speculative possibility". I would adopt the view expressed by Messrs Butler and Ong in their article "Breach of the Constitutional Right of Access to a Lawyer and the Exclusion of Evidence – The Causative Link" (1995) 5 Irish Criminal Law Journal 156 – 172, namely, that the appropriate question was not whether a lawyer *would* have made a difference but rather whether a lawyer *could* have made a difference. In my view the learned District Judge adopted the right approach on that question, although by reason of the decisions in *Buck* and *O'Brien* [2005] it is now academic.

In conclusion I would answer both of the questions posed in the case stated in the affirmative.