

IRELAND / JUDGMENT

D.P.P.-v- A.D. [2008]

IECCA 101 (25 July 2008)

[2008] IECCA 101

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[2008] IECCA 101 [New search] [Help] Judgment Title: D. P. P.-v- A. D. Neutral Citation:

[2008] IECCA 101 Court of Criminal Appeal Record Number : 58/07 Date of Delivery: 25 July 2008
Court: Court of Criminal Appeal Composition of Court: Finnegan J., Gilligan J., Mac
Menamin J. Judgment by: Finnegan J. Status of Judgment: Approved Judgments by Result
Finnegan J. Refuse leave to appeal against conviction Outcome: Refuse leave to appeal
conviction COURT OF CRIMINAL APPEAL 58/07 Finnegan J. Gilligan J. MacMenamin J.
THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)
PROSECUTOR and A. D. APPLICANT Judgment of the Court delivered on the 25th day of
July 2008 by Finnegan J. The applicant was convicted before the Central Criminal Court
(White J.) on the 29th January 2007 of two counts as follows:- Count 1. Rape contrary to
section 2 of the Criminal Law (Rape) Act, 1981 as amended by section 21 of the Criminal
Law (Rape) (Amendment) Act 1990. Count 4 Assault causing harm contrary to section 3 of
the Non-Fatal Offences Against the Person Act, 1997. He was found not guilty of two
offences as follows:- Count 2. Sexual assault contrary to section 2 of the Criminal Law
(Rape) (Amendment) Act,1990 as amended by section 37 of the Sex Offenders Act, 2001.
Count 3. Threatening to kill contrary to section 5 of the Non-Fatal Offences Against the
Person Act, 1997. Count 3 was withdrawn from the jury at the close of the prosecution
case. The offences were alleged to have been committed on the 19th March 2006 against A.
K. a Russian National. In summary the prosecution evidence was as follows. The evidence
of A. K. A. K. is the complainant. She is a graduate and at that time was working as a
waitress and studying at a local Institute of Technology. On the 18th March 2006 she had
been drinking very much to excess in her apartment. She was in a low mood. At 6.15 p.m.
that evening she commenced telephoning a number of friends. She telephoned S. T. a
former boyfriend, D. D. her current boyfriend and A. D. an acquaintance to whom she was
attracted. In response to a telephone call S. T. came to her apartment with wine which
they drank. At 7.56 she received a text message from D. D. that he was coming to see her

and she asked S. T. to leave. There was a knock on the door which S. T. answered as he was leaving: it was the applicant and he entered the apartment. A. K. had never seen him before. He entered the bedroom where A. K. was lying in bed covered with a duvet. They started talking and some little time later she gave the applicant her ATM card and pin number and asked him to withdraw some money and buy wine. After the applicant had left D. D. arrived and he entered the bedroom and sat talking to A. K. until the applicant returned. All three continued in conversation and drinking wine. A. K. blacked out for a time. When she awoke the applicant attempted to get into bed with her which she resisted. She put on her dressing gown and ran to a neighbouring apartment where the applicant caught her by the hair, took her back to her apartment, locked the door, took the key and dragged her to the bedroom and threw her onto the bed. She started to scream and he put his hands on her face and throat in an effort to stop her. She was choking and so gave up fighting and the applicant had sex with her. The applicant then demanded oral sex which she refused and the applicant attempted to force her to do so pulling her hair very badly from behind. He then demanded anal sex and she again refused but the applicant attempted to carry out the act. He put both hands on her throat and started to choke her saying "die, bitch die". He inserted his fingers into her anus. From time to time during these events her boyfriend D. D. was present in the bedroom. After two to three hours the applicant went to the kitchen, had something to eat and then returned to the bedroom saying that he was going to cook some chicken. She asked D. D. to leave and after that had some further conversation with the applicant and then went to sleep. She awoke at about 9.30 a.m. on the morning of the 19th March and rang her friend D. P. who together with a friend came to the apartment and escorted the applicant off the premises. Evidence of D. P. When he arrived at the apartment on the morning of the 19th March A. K. was wearing pyjamas and a coat and was crying. There were black and blue marks on her neck and her hair was pulled out. Evidence of Dr. Brennan Dr. Brennan examined A. K. on the afternoon of the 19th March. She found her to have sustained the following injuries:

- (i) Bruising of her left upper and lower eye lid. (ii) Bruising of the inner aspect of the left ear. (iii) A lot of bruising and considerable swelling at the front of her neck with multiple petechiae or pin point flat red areas caused by bleeding into the skin. (iv) An area of hair loss measuring 2 cm by 4 cm at the back of the head.
- (v) Petechiae or bleeding into the hair follicles. (vi) Bruising on the inner aspect of the right wrist and in front of the right shoulder. (vii) Bruising over the left elbow. (viii) Bruising over the inner part of the left wrist and on the left arm close to the shoulder. (ix) Bruising over the left inner thigh and on the left thigh closer to the knee.
- (x) Small bruising along the outer side of her right breast and a bruise above the left breast and deep bruising with bleeding into the skin along the front of the right shoulder. (xi) Bruising over the bony part of the lower back and over the back of both shoulders. She took photographs of the bruising which were introduced in evidence. In the opinion of Dr.

Brennan the injuries were consistent with A. K.'s account. In particular the bruising to the neck looked like finger marks. The hair loss and bleeding into the hair follicles was suggestive of a pulling force being applied to A. K.'s hair. The bruising to the left inner thigh was consistent with the thighs having been forced or held apart. Evidence of S. T. When he left A. K. on the evening of 18th March she was in good form, laughing and joking. When he saw her the following morning she was completely changed. She was withdrawn, scared, upset and crying. There were bruises to her face, eyes and throat and the hair to back of her head was in clumps. Evidence of D. D. He was drinking wine with A. K. in her apartment on the night of the 18th March when the applicant arrived at about 11.30 p.m. The three of them drank wine and engaged in conversation. He went to the toilet and when he returned the applicant was sitting on top of A. K. and was trying to choke her. She was fighting him and trying to push him away. He said he wanted sex and she refused him. At various times he saw the applicant holding the complainant by the arms or around the neck and the complainant trying to push his arms and hands away. Evidence of Dr. Ramsbottom Dr. Ramsbottom gave DNA evidence in relation to vaginal swabs taken from A. K. on the 19th March. The samples matched the applicant's DNA profile. Evidence of Garda Donal Loughnane He photographed A. K.'s apartment on the 19th March. Included in the photographs were photographs showing clumps of hair at two different locations on the bed. A. D. was abroad and did not attend to give evidence. The applicant's statements The applicant made two statements at interview and at trial objection was made to their admission in evidence. A number of witnesses were called relevant to the applicant's state of health at the time of the interviews. It emerged in evidence that tests carried out on the applicant confirmed the presence of cannabis in his blood at the time of the interviews. On behalf of the applicant it was submitted to the court that the statements ought not to be admitted having regard to the evidence as to his medical condition he having consumed cannabis. Further it was submitted that there had been breaches of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Stations) Regulations 1987. In the course of the first interview the applicant's solicitor attended at the Garda Station but was not allowed immediate access to the applicant. The learned trial judge ruled that everything that occurred at interview after the interrogating officers were informed of the presence of the applicant's solicitor in the Garda Siochána station should not be admitted in evidence and that neither should the signed notes of the interview. The evidence then resumed. Evidence of Garda John Shorthall Garda Shorthall was one of the interviewing officers at the first interview. The interview was taken in the presence of a Russian interpreter. The applicant was duly cautioned. He denied that he was in the flat of A. K. on the morning of the 19th March. He did not know anyone with the name A. K. He was in a flat for about half an hour with a girl called Angela. He agreed to stand in an ID parade. That evening he was with a friend A. D. who told him about a woman he had been in a relationship with and who was always telephoning him. A. D. asked him to go to the woman and ask her to leave him alone. A. D. showed him the door to her apartment and he went in to see the woman. The door was opened by a man who immediately left the apartment. The woman was in the bedroom and was in bed. She had bruises on her neck and a blue eye. There were many bottles on the

floor and she was drunk. They had some wine together and when the wine was finished the woman asked him to go and get some wine and gave him her ATM card and pin number. There was only €8.37 credit on the card and he returned to the apartment and returned the card to her and he left shortly afterwards at about 10 p.m. and went to Carlow. That was at about 10.00 or 10.30 p.m. He stayed in Carlow that night. He did not return until the following Monday evening. He denied having had sex with A. K. When he first went to the apartment he remained there for half an hour and when he returned with the ATM card he stayed for a further ten to twenty minutes. Evidence of Dr. David Casey Dr. David Casey gave evidence of examining a pair of thong style panties found in the apartment on which there were traces of blood. He also found traces of blood on a pink duvet found in the apartment. He received evidence from the medical doctor who had examined A. K. that she had had consensual sex with her partner less than sixteen hours prior to and possibly on the night of the alleged offence. Evidence of A. K. on being recalled She said she did not recall how her thong became torn or how it came to be on the floor. That concluded the prosecution case. Application by the defence At the conclusion of the prosecution case there was an application by the defence that the case should be withdrawn from the jury on the basis that the evidence was unreliable, weak and inconsistent. In the course of his ruling on the application refusing the same the learned trial judge had this to say:- "I have to say that this is the most extraordinary case that I have ever encountered, either on the bench or in practice. The expression GUBU immediately springs to mind and I have to ask myself does one of the 'U' s in GUBU come into play in this case, is the account unbelievable to the extent that a jury would be perverse in acting upon it. I have no doubt that if I was sitting on this jury, the verdict that I would return would be one of not guilty. But I cannot simply determine the issue on the basis of how I would vote as a jury member. I must look and ask myself can or could a jury properly charged convict without acting perversely. It is not what they should do, but what they would do, and with a degree of reluctance I have come to a conclusion that it cannot be said beyond reasonable doubt that a jury would be perverse in convicting. Accordingly, with that degree of reluctance, I propose to let the matter proceed to the jury." The applicant then gave evidence. The Evidence of the Applicant At 7.30 p.m. on the 18th March he met A. D. While they were together talking A. D. received a number of text messages and telephone calls. He explained that they were from his ex-girlfriend whom he did not wish to see. A. D. asked him to speak to her on the telephone and he did for a few moments. She invited him to her apartment and he said he would be there shortly. A. D. showed him the apartment. He knocked on the door and was let in by a man who was leaving. He went to the bedroom where A. K. was in bed. She was drinking wine. They had a conversation. He told her that J. D. did not wish to see her and she became upset. She asked him if he wanted to have sex with her and he agreed and they had sex. She gave him her ATM card and pin number and asked him to buy wine. This was about at 9.10 or 9.15 p.m. There was not sufficient credit on the card even to take €10. He telephoned her to tell her that there was no money on the card but the call was not answered. He got a small bottle of whiskey from a friend he met on the street and took it back to the apartment. A. K. was still in bed. He returned her ATM card to her. He poured her a large glass of the whiskey,

finished his cigarette and then left. This was at about 10 p.m. On this occasion he was in the apartment for only five or six minutes and smoked just one cigarette before he left and went home. At about 12.30 a.m. he returned to the apartment with three bottles of Budweiser. There was a man in the bedroom whom he did not know. He was wearing only his trousers. Also in the bedroom was D. D. A. K. was lying on the bed on her back and D. D. was sitting on her. D. D. struck her on the face and said “wake up, bitch”. The applicant kicked D. D. on the leg and struck him with his hand to the head. A. K. was very drunk. Her T-shirt was lifted up to the neck and her thong was on the floor. D. D. got up and dressed. He had been wearing only boxer shorts. When D. D. had dressed all three men went to the living room. The applicant asked the other two to leave the apartment and they did so. The applicant finished the beer and then went to leave but found the door locked. He decided to stay overnight and did so in another room which contained two single beds, A. K. being in one bed and he in the other. He awoke between 9.10 and 9.30 on the 19th March. He understood that A. K. did not remember anything of the night before. A. K. got up, dressed, took her phone and went to the bathroom. When she returned she accused him of beating her up and raping her. He stoutly denied that he had done so. A. K. then left and went to buy some wine. A. K. returned with D. D. and others but did not enter the bedroom. D. D. entered the bedroom. When he had first seen A. K. she had no bruises and had not been beaten up. She had a pink neck which he thought was a skin disease. When he returned later the curtains were closed and it was half dark and she was covering her neck with her bathrobe. When the applicant got out of bed and went to the living room the following morning he saw that A. K. had a bruise on her eye, a bruise on her chin and her neck was dark red. He asked “what happened to you”. A. K. told him to leave the apartment. In cross-examination he admitted that he had told lies in his statement to the Gardai. It was a lie that he had gone to Carlow. He had been afraid to say that he had had sex with A. K. because he knew that she had complained of his beating her up. The sex had been consensual. The Grounds of Application The grounds relied upon by the applicant are as follows:-

1. The learned trial judge erred in law in failing to withdraw the charges of rape, sexual assault and assault occasioning harm from the jury at the end of the prosecution evidence.
2. The learned trial judge erred in law in admitting into evidence the contents of the interview with the accused by the Gardai.
3. The learned trial judge erred in law in admitting into evidence and permitting to be shown to the jury to the video of the said interview.
4. The learned trial judge erred in law in admitting the said interview and/ or video evidence as corroboration of the complainant’s evidence or as of evidence of an admission.
5. The learned trial judge erred in summing up the defence case in his address to the jury.
6. The decision of the jury to find the accused not guilty of sexual assault but guilty of assault occasioning harm and/or rape was perverse.

7. The decision of the jury was perverse. Submission on the Application At the hearing of the application the applicant focused on the following:-
- (a) The failure of the trial judge to withdraw the case from the jury at the close of the prosecution case.
 - (b) The perversity of the jury's decision and
 - (c) the failure of the trial judge to rule the entirety of the first interview inadmissible and the failure of the trial judge to rule inadmissible the video tape of the said interview. It is proposed to deal with each of these in turn. The failure of the trial judge to withdraw the case from the jury at the close of the prosecution case Where at the conclusion of the prosecution case there is an application for a direction the law is that set out in *R. v Galbraith*

[1981] 1 W. L. R. 1039: "How then should the judge approach a submission of no case?

- (1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The judge will, of course, stop the case.
- (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.
 - (a) Where the judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made to stop the case.
 - (b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury." The passage was quoted with approval by Denham J. in *D. P. P. v M.*, unreported, Court of Criminal Appeal 15th February 2001. It was just this approach which was adopted by the learned trial judge. He asked himself whether a jury properly charged could convict without acting perversely and he came to the conclusion that "it cannot be said beyond reasonable doubt that a jury would be perverse in convicting." The applicant's submission is that the phrase quoted from the learned trial judge's ruling indicates that he applied an improper test and that the question he should have asked of himself was whether the prosecution had proved beyond a reasonable doubt that it would be fair to continue the trial: he had shifted the onus of proof onto the applicant. The judge's function in the circumstances of this case was to determine whether on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty. The trial judge takes the prosecution evidence at its highest in reaching a decision. He will, of course, take into account the onus on the prosecution to prove its case beyond reasonable doubt. There is no

onus on the prosecution or the defence in the sense contended for by the applicant. Bearing in mind the onus that rests on the prosecution in a criminal case he will consider the evidence as a whole, its strength and weaknesses, its inconsistencies and if on a possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant was guilty should leave the matter to the jury. In using the phrase quoted the learned trial judge said no more than that it was possible on the evidence in its then state that a jury could convict the applicant. The phrase "reasonable doubt" was not intended to convey that any onus to the criminal standard lay either on the prosecution or the defence on this issue. Further having considered the transcript as a whole this court is satisfied that notwithstanding any inconsistencies in the evidence there was sufficient evidence to justify the case going to the jury. The learned trial judge did ask himself the correct question – "I have to ask myself does one of the 'U's' in Gubu come into play in this case, namely is the account unbelievable to the extent that a jury would be perverse in acting upon it." The applicant fails on this ground. The Perversity of the Jury's decision The jury found the accused guilty of rape and of assault causing harm but not guilty of sexual assault. On behalf of the applicant it is submitted that either the jury accepted the complainant's account of the events of the night in question of which sexual assault was an integral part or they did not and that this was not a case in which it was possible for the jury to pluck those bits of the evidence adduced which they believed and those which they did not. In the course of his charge the learned trial judge said:- "That, in essence, ladies and gentlemen, is the evidence that was given by the complainant. And if the events that she described occurred, the accused man is guilty of all three remaining counts on the indictment. What you have to decide is, are you satisfied beyond reasonable doubt that the events described by her did in fact occur." From the transcript it is clear that the prosecution and the trial judge regarded the complainant's evidence as a package. In these circumstances it would be perverse for the jury to convict in respect of some but not all of the counts. For the respondent it is pointed out that the learned trial judge in his charge reminded the jury that there were three counts and that they had to consider and look at each separately and distinctly: in reality there are three separate trials at the one time. This, it is clear, is what the jury did. "Counsel for the prosecution in his closing speech in relation to the offence of sexual assault said:- "Again, the particulars that you need to look at this case: are you satisfied that in this particular case the accused placed his fingers in A. K.'s anus, are you satisfied beyond reasonable doubt that he placed his penis in her anus, and are you satisfied beyond reasonable doubt that he used force to restrain her to carry out those other actions?" Counsel for the defence did not in any way demur. In his charge the learned trial judge referred to the same two alleged events. Again in his charge the learned trial judge said:- "...so you have three counts to consider. As I say to you, you consider them separately. Your verdict does not have to be the same in relation to each count though logically it would seem that it should be." No requisition in relation to this aspect of the charge was raised. Turning to the evidence given at the trial A. K. gave evidence of both incidents. Garda Ruth Finn gave evidence of statements made by A. K. in which she mentioned both. Having regard to the manner in which the charge of sexual assault was left to the jury and that being quite correct it was open to the jury to have a

reasonable doubt in relation to that charge. The applicant referred the court to Director of Public Prosecutions v Molloy, unreported, Court of Criminal Appeal, 28th July 1995. The applicant in that case was charged with two counts of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990, the first on the 20th November 1991 and the second on the 3rd March 1992. He was found not guilty on the first count and guilty on the second count. On his behalf it was argued that the verdict was perverse and insufficiently supported by the evidence adduced. The court had regard to the following factors:-

1. The mental status of the complainant who had a childlike mind.
2. The difference between her version and the version given by her mother in relation to one count.
3. The unusual domestic set up in the complainant's house. The court went on to say:- "The court is mindful of the fact that it cannot set aside the verdict of a jury simply because of unease or 'lurking doubt' as to its reliability. But when the foregoing factors are combined with the apparent inconsistency of the jury in its approach and verdict in relation to the two separate counts which were based on allegations of fact which were virtually identical the court is satisfied that the verdict of the jury in the circumstances is perverse and should not be allowed to stand." That was a very different case from the present having regard to all the factors which the court took into account and does not it seems to this court assist the applicant. This court is satisfied that having regard to the allegations made in evidence and pointed out to the jury as constituting the basis for the charge, the evidence led in relation to the same and tested in cross-examination and the judge's charge the verdicts are not inconsistent but rather reflect a diligent and conscientious approach on the part of the jury to their function. The applicant fails on this ground. The failure of the trial judge to rule the entirety of the first interview inadmissible and the failure of the trial judge to rule inadmissible the video tape of the said interview The applicant was interviewed on two occasions. The second interview was ruled inadmissible on grounds not relevant to the objection to the first interview. During the first interview the applicant's solicitor arrived at the Garda Station and the member-in-charge told the applicant of that fact and the applicant advised the member-in-charge that he wished to see the solicitor. Notwithstanding this the interview was not suspended. The applicant was asked one further question and the interview notes were then read over to him, and he was asked whether he had any changes to make. He did not require any changes and signed the memorandum of interview. In the course of a voir dire the learned trial judge heard the evidence of the relevant witnesses to the first interview and also viewed the video recording of that interview. The learned trial judge ruled that everything that happened after the interrogating officers were informed of the presence of the accused's solicitor in the station and were informed of the applicant's desire to see his solicitor should not be admitted in evidence. The signed notes of the interview likewise should not be admitted in evidence. Counsel for the prosecution indicated that he proposed to show the jury the video tape which runs for approximately

fifty minutes in an edited form to exclude those matters which were omitted from the oral account of the interview given in evidence. This was objected to by counsel for the applicant but the learned trial judge ruled the same admissible and the video was shown to the jury on the basis that all the video did was to confirm the note which had been read into evidence. The issue on this ground is whether having regard to the interview continuing by the asking of a further question and the applicant being asked to sign and signing the note of interview the entire interview ought to have been excluded from evidence. There is a subsidiary point in that it is submitted that in allowing the video to be played to the jury the learned trial judge undermined his decision not to let the jury have access to the signed memorandum of interview: as the edited video did not disclose the last question or the signing the court is satisfied that there is no objection to the video being shown on this account. There is a constitutional right to a person in custody to reasonable access to a solicitor: *Director of Public Prosecutions v Healy*

[1990] 2 I. R. 73. At page 81 Finlay C. J. said:- “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 commit 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 a 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.” On the same page, however, he went on to say:- “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 Siochana, is whether there is a causative link between that breach and the obtaining of an admission.” In *Director of Public Prosecutions v Buck*

[2002] 2 IR 268 the defendant was in detention under section 4 of the Criminal Justice Act 1984 and requested a solicitor. It proved difficult to procure the services of a solicitor but one eventually did arrive at the station to talk with the defendant. It was there held that the detention of a person against his will pursuant to a statutory power was permissible only where his constitutional right of access to a solicitor was observed and it followed from this that his detention would become unlawful as soon as that right had been denied. Where a person detained asks to see a solicitor and bona fide attempts to comply with that request are made the admissibility of any incriminating statement made by the accused before the arrival of the solicitor should be decided by the trial judge as a matter within his discretion in the light of the common law principles based on considerations of fairness to the accused and public policy. Even where the continuation of the questioning by Gardai continued after a request for a solicitor had been made but before his arrival

could be regarded as a conscious and deliberate violation of the constitutional rights of the accused some causative link between the breach in question and the making of the incriminating statements would be necessary. Where a reasonable time had not elapsed a statement might nonetheless be admissible having regard to the provisions of section 7(3) of the Criminal Justice Act 1984 and this was a matter for the exercise by the trial judge of his discretion in the circumstances of the particular case. In the course of his judgment at p.279 Keane C. J. said in relation to the dicta of Finlay C. J. in *Director of Public Prosecutions v Healy* :- “It would seem to be implicit in that finding of the Chief Justice that, if the trial judge in that case had been satisfied that the incriminating statement had been made prior to the arrival of the solicitor, it would have been admissible in evidence, since, at that point, there would have been no deliberate or conscious violation of the applicant’s constitutional right of access to a solicitor or so total a failure to observe reasonable standards of fairness as to require the exclusion of the statement. It is also to be noted that there is no express statement in the judgment of the Chief Justice in that case or in the separate judgments delivered by Griffin and McCarthy JJ. that the detention of the defendant must be regarded as having been unlawful as from the time when the solicitor was refused access to him. The crucial issue in the view of Finlay C. J. not dissented from by Griffin and McCarthy JJ. was whether there was a causative link between the breach of the right of access to a solicitor by the Gardai and the obtaining of an admission.” Barrington J. in *Director of Public Prosecutions v Finnegan* , unreported, Court of Criminal Appeal, 15th July 1997, having referred to the same passages from the judgment of Finlay C. J. at page 41 said:- “The implication of this is that any statement made after 4 p.m. (when the solicitor arrived and was denied access) would have been inadmissible presumably because the prisoner was from that hour in unlawful detention because of denial of his constitutional right of access to a solicitor and any statement obtained from him was therefore inadmissible...In the present case there was a breach of Mr Finnegan’s constitutional rights when he was denied private access by telephone to a solicitor. From that point on he was in unlawful detention.” Keane C. J. at page 281 having considered *Director of Public Prosecutions v Healy* said:- “It would seem to follow inexorably that his or her detention becomes unlawful as soon as that right (of access to a solicitor) is denied.” However it is clear from the judgment of Finlay C. J. in *Director of Public Prosecutions v Healy* that admissibility is to be examined from the view point of cause and effect. In this case while there was a denial of right of access to a solicitor it has not been established that such a relationship of cause and effect existed between that denial and that part of the interview admitted in evidence. No attempt was made in evidence to establish such a relationship which would require that part of the interview admitted in evidence to be inadmissible. The law it seems to this court is clear that if detention becomes unlawful by reason of the breach of a constitutional right anything that transpires thereafter may become inadmissible but anything which occurred in the course of the detention prior to the detention becoming unlawful remains admissible. Accordingly the applicant fails on this ground also. For the reasons hereinbefore set out the applicant is refused leave to appeal. BAILII: Copyright Policy | Disclaimers | Privacy

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