
IRELAND / JUDGMENT

DPP -v- A.D. [2012] IESC 33 (24 May 2012)

[2012] IESC 33

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Judgment Title:

DPP -v- A. D.

Neutral Citation:

[2012] IESC 33

Supreme Court Record Number:

351/11

Court of Criminal Appeal Record Number

:

58/2007

Date of Delivery:

24/05/2012

Court:

Supreme Court

Composition of Court:

Denham C. J., Hardiman J., Fennelly J., McKechnie J., Clarke J.

Judgment by:

Clarke J.

Status of Judgment:

Approved

Judgments by

Link to Judgment

Result

Concurring

Clarke J.

Link

Appeal Dismissed

Denham C. J., Hardiman J., Fennelly J., McKechnie J.

Outcome:

Dismiss

THE SUPREME COURT

[Appeal No: 2011/351]

Denham C. J.

Hardiman J.

Fennelly J.

McKechnie J.

Clarke J.

In the Matter of the Courts of Justice Act, 1924, Section 29(2)

Between/

The People (at the suit of the Director of Public Prosecutions)

Prosecutor

and

A. D.

Applicant/Appellant

Judgment of Mr. Justice Clarke delivered the 24th May, 2012.

1.

Introduction

1.1 On the 19th March, 2006 a Russian national complained to An Garda Síochána of having been assaulted and raped. As a result of investigations carried out the applicant/appellant ("Mr. D") was charged on a number of counts and tried before the Central Criminal Court presided over by White J. In substance Mr. D was convicted of rape and assault. A count of threatening to kill contrary to s.5 of the Non-Fatal Offences Against the Person Act, 1997 was withdrawn from the jury at the close of the prosecution case. One further count gave rise to a non guilty verdict of the jury but Mr. D was convicted on counts 1 and 4, being a count of rape contrary to s.2 of the Criminal Law (Rape) Act, 1981 as amended by s.21 of the Criminal Law (Rape)(Amendment) Act, 1990 and one of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1997.

1.2 Mr. D sought leave to appeal against his conviction and sentence from the Court of Criminal Appeal. That court refused such leave in respect of conviction for the reasons set out in a judgment delivered on the 25th July, 2008 by Finnegan J. (DPP v. A. D.

[2008] IECCA 101

) The Court of Criminal Appeal did not, on that occasion, deal with the question of severity of sentence. That issue was considered on the 14th October, 2008 when the Court of Criminal Appeal decided, in substance, to reduce the sentence imposed on Mr. D from 12 to 9 years. Thereafter, Mr. D successfully applied for a certificate under s.29 of the Courts of Justice Act, 1924 to the effect that the decision refusing him leave to appeal against conviction involves "a point of law of exceptional public importance and that it is desirable in the public interest that the person should take an appeal to the Supreme Court".

1.3 The point so certified by the Court of Criminal Appeal is as follows:

"Is the entirety of a non-incriminating statement made by an accused person while in the custody of An Garda Síochána inadmissible if during the making of the said statement the accused's constitutional right of reasonable access to a solicitor was deliberately and consciously breached?"

1.4 On the basis of that certificate Mr. D has appealed to this Court. In addition a further application was brought on behalf of Mr. D (by motion dated the 24th January, 2012) which sought an order granting leave for argument to be heard and a determination made in relation to part of the decision of the Court of Criminal Appeal which went outside the scope of the point of law of exceptional public importance certified being the question of:-

"Whether the Court of Criminal Appeal erred in that part of its decision in which it determined that the learned trial judge applied the correct test in deciding whether to allow the prosecution case go to the jury".

1.5 In order to fully understand the precise issues with which this Court is concerned it seems to me to be appropriate to turn to a brief recital of the facts insofar as they are relevant to the limited issues which are for this Court to decide.

2.

The Facts

2.1 When Mr. D was arrested in connection with these offences he was questioned by members of An Garda Síochána on two occasions. Both questioning sessions were video recorded and the interviews were contemporaneously written down in the form of questions and answers. It is of some minor relevance to record that Mr. D is a foreign national and required the assistance of an interpreter during the course of the relevant interviews. In the ordinary way when the interviews were completed the written record was read over to Mr. D (again with the assistance of an interpreter) and he was invited to make any alterations and then sign. Mr. D duly signed both accounts.

2.2 At the trial before White J it is important to record that a number of separate objections were made to the respective admissibility in evidence of statements made by Mr. D. The second interview was deemed inadmissible in its entirety by White J on the basis that the trial judge was satisfied that, by the time the interview in question took place, the situation had progressed to one where, in the words of the trial judge, it seemed to him "that the State were in possession of sufficient evidence to charge the accused man prior to the second interview" and that he was not "happy to permit the facts of the second interview to be adduced before this jury"

2.3 So far as the first interview is concerned the evidence at the trial indicated that Mr. D had requested the presence of a solicitor. The solicitor in question arrived as the first interview was coming towards an end. Indeed the interview records a member of An Garda Síochána indicating that the solicitor had arrived and asking Mr. D if he wished to see the solicitor concerned. Mr. D answered that he did wish to see the solicitor. However, the interview did not stop at that stage.

What followed was the asking of one final question of Mr. D, the reading over, with translation, of the entirety of the first interview, an invitation to Mr. D to consider whether he wished to make any changes, Mr. D making one change, and Mr. D's signature. All of these matters occurred at a time prior to Mr. D being actually afforded access to his solicitor. That process took some time, perhaps contributed to by the need to translate, so it is all the more surprising that A. D. was not given access to the solicitor.

2.4 No explanation appears to have been tendered as to why immediate access to the solicitor in question was not afforded to Mr. D. In those circumstances it is hardly surprising that White J concluded that, from the time the solicitor in question arrived, and having regard to the fact that immediate access to the solicitor was not given despite requests, Mr. D was in unlawful custody as a result of a conscious and deliberate breach of his constitutional right of access to a solicitor. In that regard White J, in the course of a ruling delivered by him on the 23rd January, 2007, said the following:-

"It is clear both from the custody record and from the tape that the solicitor acting on behalf of the accused man had called to the station seeking to see his client and when that information was communicated to the accused man he sought to see a solicitor. The interview was not stopped at that stage as it should have been and it is clear from the tape that the interview was to proceed and that the decision to proceed with the interview was made with Garda Egan present. The Member in Charge of a Garda station has a specific duty towards an accused person. The duty of the Member in Charge is that of an independent individual who is there to protect and vindicate the rights of an accused man. It is long established that an accused person has a constitutional right of access to a solicitor and I cannot see any justification for the interview proceeding. It is apparent that one question was asked after notification of the presence of the solicitor and that then the notes were read back and proffered to the accused man for his acceptance and for his signature."

2.5 Subsequently White J went on to rule as follows:-

"Accordingly, the signed notes will not be an exhibit in this case, but the State will be permitted to adduce evidence as regards the interview with the accused man up to the stage that is indicated in the note, being the events that occurred prior to 20:26."

2.6 Thus it is clear that White J ruled inadmissible any evidence of the events which occurred at the interview in question after the time when Mr. D indicated a desire to see his solicitor but that request was not complied with.

2.7 It is also of some importance to note the relevance of the interviews with Mr. D to the issues which arose at the trial. In fact Mr. D made no admissions of guilt during the course of either of the interviews in question. On the contrary, he maintained that he had not even been in the town in which the offence was alleged to have been committed at the relevant time. Thus the statements which he made during the interviews in question were entirely exculpatory. In many cases, perhaps most, it would be unlikely, in those circumstances, that there would be any controversy about the admission in evidence of a statement by an accused person which did not

admit any facts tending to establish guilt as such. It is in that context that an unusual feature of this case needs to be noted.

2.8 As indicated, Mr. D denied having anything to do with the events alleged by the complainant. The complainant had made an allegation of rape against Mr. D together with an allegation of a serious assault as a result of which she suffered injuries. Medical evidence confirming the relevant injuries was before the court. Mr. D's position while being questioned by An Garda Síochána was that he was not there at the time when any incident might have occurred. It is also important, for reasons to which I will return, that Mr. D maintained that same position during the course of the second interview which latter interview occurred after he had had an opportunity to consult with his solicitor. Thus his consistent position, both before and after having had the opportunity to consult with his solicitor, on the day when he was interviewed by An Garda Síochána, was one of asserting that he had no involvement whatsoever in the events which formed the subject of the complaint.

2.9 However, before the case came to trial, the authorities had produced forensic evidence which seemed to establish that Mr. D had, in fact, had sexual relations with the complainant on the occasion in question. In those circumstances the case made by and on behalf of Mr. D at the trial was very different. Rather than assert, as he had to An Garda Síochána, that he had no involvement in the events at all, he gave evidence of consensual sexual activity and gave an entirely separate explanation as to how he suggested that the complainant might have suffered from the undoubted injuries which had been noted by medical personnel.

2.10 Against that change of tack it is hardly surprising that counsel for the D. P. P., at the trial, sought to attack Mr. D's credibility on the basis of his having given an account to An Garda Síochána which he was forced to concede at the trial was entirely false. It is in that rather unusual way that the admissibility of an exculpatory statement by an accused came to assume a significant relevance at his trial.

2.11 One further aspect of the trial needs to be noted in the context of the additional point sought to be argued on behalf of Mr. D. There was a significant debate at the close of the prosecution case as to whether there was sufficient evidence to permit the case to go to the jury. In ruling on that application White J made a comment to the effect that, if he were sitting on the jury, he would return a verdict of not guilty. However, the trial judge went on to state the following:-

"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 should 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".

2.12 The additional grounds sought to be advanced arise out of those comments of the trial judge. Against the background of those facts it is next necessary to turn to the issues.

3.

The Issues

3.1 Three issues arise for the consideration of the Court. The first is as to the proper principles to be applied in a case where there is an undoubted deliberate and conscious violation of the rights of an accused person while under interrogation but where that violation only arises in the course of the interrogation so that it does not, directly at least, affect the account given by the accused prior to the violation in question arising. That is, in substance, the issue or point of law certified by the Court of Criminal Appeal.

3.2 Second, there is the question, raised on Mr. D's motion, as to whether this Court should entertain the additional ground sought to be relied on arising out of the refusal by White J of the application made on behalf of Mr. D to withdraw the case from the jury.

3.3 Third, and in the event that the Court decides to entertain that later ground, there is the question of whether the trial judge applied an inappropriate test in deciding whether the evidence was such as ought go to the jury.

3.4 It does need to be noted that a wider range of issues were canvassed before the Court of Criminal Appeal. It is unnecessary to rehearse all of those issues at this stage. However, it is next appropriate to turn to the judgment of the Court of Criminal Appeal insofar as it deals with the issues with which this Court is concerned.

4.

The Judgment of the Court of Criminal Appeal

4.1 The section of the judgment of the Court of Criminal Appeal which dealt with the admissibility of the first interview commences on p.17 of that judgment. The judgment sets out the facts which have already been referred to together with the ruling of the trial judge. The judgment also notes that the jury was shown the video tape of the first interview which runs for approximately fifty minutes up to the point where the oral account of Mr. D was excluded. The way in which the issue under consideration was put by the Court of Criminal Appeal was to state that the ground referred to "whether having regard to the interview continuing by the asking 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". In discussing that issue the Court started by referring to the judgment of Finlay C. J. in *Director of Public Prosecutions v. Healy* [1990] 2 I. R. 73, where Finlay C. J. (speaking for the Court) held that a right of access to a lawyer was constitutional in its origin and that, thus, a breach of a right of access to a lawyer must amount to a breach of a constitutional right.

4.2 However, the Court of Criminal Appeal went on to note a further passage from the same judgment (at p.81) in which the following was stated:-

"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."

4.3 The Court then went on to consider *Director of Public Prosecutions v. Buck*

[2002] 2 IR 268

. In discussing *Buck* the Court of Criminal Appeal noted the observations of Keane C. J., at p.279, in relation to the dicta of Finlay C. J. in *Healy* to the following effect:-

"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."

To like effect the Court of Criminal Appeal noted the judgment of Barrington J. in the Court of Criminal Appeal in *Director of Public Prosecutions v. Finnegan* (unreported, Court of Criminal Appeal, Barrington J., 15th July, 1997) where the same passage from the judgment of Finlay C. J. in *Healy* was referred to in the following terms:-

"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."

4.4 *Finnegan J.*, in giving the judgment of the Court of Criminal Appeal, reached the following conclusions, which are set out at pp.21 and 22 of the judgment:-

"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."

On that basis the ground under that heading was rejected.

4.5 So far as the issue concerning the trial judge permitting the case to go to the jury is concerned it does need to be noted that the Court of Criminal Appeal was concerned with a wider challenge than that which arises before this Court. In substance it was argued before the Court of Criminal Appeal that the trial judge was wrong, in any event, to let the case go to the jury. The Court of Criminal Appeal conducted a detailed analysis of the evidence and concluded that the trial judge was correct to allow the case to go to the jury. As Finnegan J. put it "... notwithstanding any inconsistencies in the evidence there was sufficient evidence to justify the case going to the jury".

4.6 So far as the narrower issue sought to be raised before this Court is concerned Finnegan J. said the following at p.13,-

"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."

4.7 Having identified the relevant passages from the judgment of the Court of Criminal Appeal it is next necessary to turn to a discussion on the question of severance of a statement made by an accused.

5.

Severance of an Accused's Statement

5.1 Both in the written submissions filed and in oral argument counsel on behalf of Mr. D made three general points. The first was to question whether the summarisation of the law by Finnegan J. (as already cited) was correct, and whether a strict causative connection, between the portion of the statement sought to be excluded and the violation of constitutional rights established, needed to be shown. The second concerned the question of the proper application of a causative connection test (if such be applicable) with a case involving, as here, false exculpatory statements, and the third concerned the fairness based exception said to derive from the judgment of Keane C. J. in *Buck*. I propose addressing each in turn.

5.2 Before so doing it is important that I record that the case made at trial, before the Court of Criminal Appeal, and in this Court was based on Irish constitutional jurisprudence relating to the exclusion of evidence obtained in conscious and deliberate violation of relevant constitutional rights. No case was made, whether relying on the jurisprudence of the European Court of Human Rights or otherwise, which suggested that an accused person has the right to have a lawyer in attendance while being interviewed. In view of the fact that no such case had been made either at trial or before the Court of Criminal Appeal, counsel for Mr. D quite properly accepted that no such issues were before this Court.

5.3. The Court of Criminal Appeal clearly accepted the line of authority deriving from *Healy*, as explained and interpreted in both *Buck* and *Finnegan*, which suggests that there must be a causative connection between the conscious and deliberate violation of the rights of the accused

in question and the statement made by the accused whose admissibility is challenged. There can be little doubt but that the passages from the judgments in those cases cited by Finnegan J. in the Court of Criminal Appeal and cited earlier in this judgment support the view that such a causal connection needs to be established in order for the statement in question to be excluded.

5.4 However, counsel for Mr. D drew attention to a decision of the Court of Criminal Appeal in *People (D. P. P.) v. Madden* [1977] I. R. 336. In *Madden* the Court concluded that the experienced Inspector of An Garda Síochána who was involved in interviewing the accused must have been aware that "it was wholly improbable that a statement", the taking of which commenced almost at the end of the relevant detention period permitted on the facts of that case, "could terminate within the period of lawful detention". The Court went on to note that there was no evidence providing an explanation as to why the taking of a statement commenced so close to the expiration of the period of lawful detention so that the only reasonable conclusion was that "the taking and completion of the statement" involved circumstances of a deliberate and conscious breach of the defendant's constitutional rights.

5.5 It seems to me that the proper characterisation of the decision in *Madden* is that the taking of the statement, from the beginning, was in deliberate and conscious violation of the rights of the accused in that case. The Court concluded that, from the beginning, the Inspector concerned could not have hoped to have completed the process of taking a statement. It follows that the process was unlawful from the beginning rather than being one which was entirely lawful up to a certain point in time but became unlawful because of an intervening fact such as, in this case, the denial of access to a lawyer in a timely fashion. It does not seem to me, therefore, that *Madden* provides any assistance to the case made on behalf of Mr. D.

5.6 Counsel for Mr. D argued that part of the remit of the Court in cases where a conscious and deliberate violation of an accused's rights has been established is to act, as it were, as a policeman to ensure respect for constitutional rights and, in that regard, that the Court should lean in favour of excluding statements made when a conscious and deliberate violation of the accused's rights had been established. It is true that there are passages in some of the earlier judgments by which the jurisprudence in this area developed which do make the point that it is important, for the purposes of maintaining respect for constitutional rights, that an exclusionary rule be applied.

5.7 For example in *The People v. Shaw* [1982] 1 I. R.1, Walsh J. explained the previous decision in *The People (Attorney General) v. O'Brien* [1965] I. R. 142 in the following terms, at p.32,

"The case and the decision dealt primarily with two matters concerning the admissibility of evidence. The first was the question of the admissibility of evidence which was obtained illegally but where the illegality did not amount to an infringement of a constitutional right of the accused person. The second point was the question of the admissibility of evidence obtained by illegal methods which constituted infringements of the accused's constitutional rights. With regard to the first point, the majority of the Court decided that evidence obtained illegally could be admissible at the discretion of the judge, whereas the minority members of the Court took the

view that such evidence was always admissible provided that it was relevant and probative. With regard to the second point, the basic proposition was that an objection to the admissibility at a criminal trial of evidence obtained or procured by the State, its servants or agents, as a result of a deliberate and conscious violation of the constitutional rights of the accused person must be upheld, subject to certain exceptions. This general proposition was contained in my own judgment and was agreed to by all the members of the Court. I expressed the view that an exception to this general rule would be where "extraordinary excusing circumstances" existed and I gave three examples, namely, the imminent destruction of vital evidence, the need to rescue a victim in peril, and also evidence obtained by a search which was incidental to and contemporaneous with a lawful arrest, though made without a valid search warrant. I said that, in addition to these "extraordinary excusing circumstances", evidence obtained without a deliberate and conscious violation of an accused's constitutional rights was not inadmissible by reason only of the existence of a violation of his constitutional right. In other words, accidental and unintentional infringements of the Constitution would not be sufficient to exclude such evidence."

5.8 It does, however, have to be noted that the cases in question were concerned with the debate, now well settled, as to the consequences of a statement being made at a time when an accused's detention was found to have been in deliberate and conscious violation of that accused's constitutional rights, but where the statement in question was nonetheless voluntary. The question was as to whether the statement should necessarily be excluded or whether the Court retained a discretion. It is now well settled that, save in wholly exceptional cases, the statement must be excluded. To that extent it is true that the courts have taken what might be described as a strong line on cases involving deliberate and conscious violation of constitutional rights. However, almost all of the relevant cases involved a situation where the statement under challenge was made during a period of detention which was found to be unlawful for constitutional reasons. There was, therefore, a clear causative link present in any event in that if the accused concerned had not been in unlawful custody and had, therefore, been released the statement would not have been made in the first place.

5.9 Where, however, a statement is made in circumstances where there was no illegality, let alone unconstitutionality, attaching to the accused's custody, or to the taking of the statement concerned, up to a certain point in time, is there any reason in principle why the statement up to that point in time should not be admissible? There is, at least in the ordinary way, no obvious causal link between a subsequent lapse into constitutionally unlawful custody and previous statements made by an accused during entirely lawful custody. To impose an exclusionary rule, at the level of principle, to statements made by an accused during lawful custody simply because the accused's custody later, albeit while the statement taking process was continuing, became unconstitutional would, in my view, be to impose an unnecessarily excessive exclusionary rule not warranted by the need to discourage improper activity by those investigating crime.

5.10 The causative link test is well established in the jurisprudence to which reference has been made. It seems to me that that test meets the legitimate requirements of discouraging constitutionally impermissible investigation while at the same time permitting lawfully obtained evidence to be placed before the Court as part of the criminal process. I am not, therefore, satisfied that there is any legitimate basis for departing from the causative link test identified by Finlay C. J. in Healy.

5.11 However, a number of other observations are necessary for the purposes of dealing with the issues which arise on the facts of this case. The first is to note that in many cases the causative link will be obvious. Where an accused is in unlawful custody deriving from a conscious and deliberate breach of the accused's constitutional rights, then, for the reasons already analysed, the causative link does not need any further establishment.

5.12 Second, it seems to me that the Court can, at the level of principle, sever those portions of a statement or interview given by an accused which occurred during a period of constitutionally unlawful custody from those which occurred during a period of lawful custody. As a starting point there can be no doubt but that entirely separate statements or interview processes can be the subject of legitimately different conclusions. Thus one statement made during a period of lawful detention may be admitted while another statement made during a period of constitutionally impermissible detention may be excluded. Further it is to be noted that in *The People (Director of Public Prosecutions) v. O'Brien*

[2005] 2 IR 206

, this Court held that the constitutional rights of an accused were restored once he was granted access to a solicitor and that it followed that any inculpatory statement made by the accused after he had consulted a solicitor was admissible unless it was elicited from him by the use of material obtained during questioning while his constitutional right of access to a solicitor was being breached. It is clear from the judgment of McCracken J. (speaking for this Court) that the proper course of action to adopt was to analyse whether the breach of constitutional rights concerned (in that case, as here, a refusal of timely access to a lawyer) actually caused or even contributed to the statement concerned. As the accused had had access to his solicitor (albeit belatedly) before he made the statement under challenge then there was no causal connection between his previous constitutionally unlawful detention and the inculpatory statement unless a further link could be shown connecting the admissions later made with earlier statements made by the accused while in unconstitutionally unlawful custody.

5.13 I can see no good reason why the same analysis can not apply to two portions of the same statement taking or interview process where one portion occurs during lawful custody while the other occurs during constitutionally unlawful custody. Unless there is some sufficient nexus between the two parts of the statement or interview process so as to taint the otherwise lawful portion, then there is no reason to exclude that part of the interview or statement which was made while the accused was in lawful custody.

5.14 It seems to me to follow that the test adopted by the Court of Criminal Appeal in this case was correct. It is necessary that there be a causal link between any constitutionally unlawful custody and the making of a statement in order for the statement to be properly excluded. In principle it follows that any part of the statement made during lawful custody is admissible. However, where there is a link between the two parts of the statement such that there is a causal link which taints the part of the statement taken while the accused was in lawful custody then it may be necessary to exclude the entirety of the statement.

5.15 The facts of this case are clear. All that happened after Mr. D was denied access to his solicitor was that one further question was asked and answered, the statement was read over, Mr. D made one correction to the statement and signed it. None of the matters which occurred after Mr. D's detention became constitutionally unlawful were such as to create an unfairness or nexus between what occurred during his constitutionally unlawful custody and what had gone before while he was in lawful custody. The situation might well be different if it proved impossible, with any degree of confidence, to disentangle those aspects of the accused's account which occurred within and outside periods of lawful custody. It must be recalled that in Healy the entirety of the statement was excluded because the trial judge had been unable to determine whether the incriminating statements in that case had been made prior to or after the breach of constitutional rights complained of. In modern conditions, where the interrogation of suspects is conducted with the aid of video recording and timing, it is much less likely that any such difficulty would arise. Indeed, it is instructive to note that the ruling of White J was able to pinpoint, by reference to a precise minute on the video evidence, the point at which Mr. D's custody became constitutionally unlawful.

5.16 However, there may be other circumstances which may create a difficulty in seeking to disentangle parts of a statement made in respectively lawful and unconstitutionally unlawful custody. The interview may range forward and backward over the events under investigation so that it is impossible, without a real risk of unfairness, to sever the portion of the statement made in constitutionally unlawful custody. There may well be cases where there would be a real risk that the admission of a portion only of a statement would give a misleading account of what was said by the accused if the jury were only to be told of the portions of the accused's account which were given while he was in lawful custody. The significance of any account sought to be removed by severance must, of course, be assessed in the context of the real issues likely to arise at the trial.

5.17 However, I am not satisfied that any such concerns exist on the facts of this case. In the light of the limited events which occurred while Mr. D was in constitutionally unlawful custody on the facts of this case, there was not, in my view, any real risk of unfairness by admitting the portion of the interview which occurred while Mr. D was in lawful custody.

5.18 It is next necessary to say something about the point made on behalf of Mr. D about the exclusion of exculpatory statements. In substance the argument made by counsel on Mr. D's behalf under this heading stemmed from the use made by the prosecution at the trial of Mr. D's statement for the purposes of undermining his credibility. As pointed out earlier Mr. D gave

evidence at the trial and was forced to admit that the original account given to An Garda Síochána was false. It was argued on behalf of Mr. D that there was a realistic prospect that, had he been afforded access to his solicitor when he should, his solicitor might have advised him to, as it were, come clean, thus significantly reducing the extent to which his statements, taken as a whole, might have been used to discredit him at the trial. Thus, even to the extent that the Court was persuaded that a causal link needed to be established, it was said that a causal link did exist between the unconstitutional deprivation of access to a solicitor and the adverse evidential consequences for Mr. D of the admission of the partial statement in this case.

5.19 While there may be some theoretical validity to the point made by counsel, it seems to me that the answer given on behalf of the D. P. P. to this point was, on the facts of this case, coercive. Attention was drawn to the fact, as already noted, that Mr. D had made a second statement or interview after he had had access to his solicitor and received whatever advice might have been forthcoming. Despite that fact Mr. D continued to maintain that he was not there on the occasion in question. Whatever might, therefore, be the possibility in another case that an accused might have mitigated any adverse effects of having given an initial false account to An Garda Síochána by coming clean during the same interview process with the benefit of legal advice, that possibility has no application to the facts of this case for it is clear that, despite legal advice, Mr. D did not change his account.

5.20 Under this heading it should finally be noted that the trial judge had the benefit of a transcript of the second interview and was thus able to assess the account given by Mr. D on that occasion. While it is true that the trial judge excluded the second statement as evidence which could be admitted to prove the guilt of the accused at the trial, it does not seem to me that the trial judge was required to exclude that second statement from his consideration in deciding whether or not to admit either or both statements. In addition, it does need to be said that no argument was addressed to the trial judge concerning the possibility that the accused might have come clean had he had the benefit of legal advice and might, therefore, have reduced the extent to which his false denial of any involvement could have been used to affect his credibility.

5.21 In summary under this heading I am, therefore, satisfied that the causal link test is one which needs to be applied in circumstances where an accused comes to be detained in conscious and deliberate violation of constitutional rights. It follows that a part of a statement made or interview given during a period when the accused is in constitutionally unlawful custody must be excluded but that, *prima facie*, any part of the statement made or interview given during a period of lawful custody can be admitted. However, that latter statement is subject to the caveat that, if it can be shown that there is a real risk of unfairness by admitting only part of a statement, then it may well be that the trial judge will have to exclude the entirety of the statement concerned. It also follows that the overall consideration of fairness, identified by Keane C. J. in *Buck*, is met by the application of that caveat.

5.22 On the facts of this case it seems to me that Finnegan J was correct in concluding that the portion of the statement made prior to the denial of access to a lawyer was correctly admitted by the trial judge for there was no basis on which it could have been concluded that the admission of that portion of the statement gave rise to any real risk of unfairness. Having dealt with the points certified by the Court of Criminal Appeal it is next necessary to turn to the two issues which arise from the motion in which it is sought to raise further argument.

6.

Should the additional point of law be considered?

6.1 No application was made to seek to certify the point of law now sought to be raised as an additional point for the purposes of a certificate under s.29(2) of the Courts of Justice Act, 1924. Indeed it was, in effect, accepted by counsel on behalf of Mr. D that the point would not have warranted certification. In those circumstances the matter is now governed by a s.29(5A) of the Courts of Justice Act, 1924 (as inserted by s.59 of the Criminal Justice Act, 2007) which provides as follows:-

"The Supreme Court, in an appeal under subsection (2) or (3) of this section, may, if it considers it appropriate to do so, hear argument and make a determination in relation to any part (not only the point of law of exceptional public importance which is the subject of the certificate concerned issued under whichever of those subsections is appropriate) of the decision of the Court of Criminal Appeal concerned."

6.2 The previous jurisprudence of this Court made it clear that a rehearing of the entire appeal was possible if a s.29 certificate was granted, even though the s.29 certificate related only to a limited aspect of the issues which arose before the Court of Criminal Appeal. It was suggested by Geoghegan J in *D. P. P. v. McKeivitt*

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at p.529 that the right "to argue different grounds has now been greatly restricted by section 59 of the Criminal Justice Act, 2007".

6.3 In truth s.29(5A) gives very little guidance as to the circumstances in which it is appropriate for this Court to allow grounds beyond those certified to be argued. The test is no more than that this Court "considers it appropriate so to do". It seems clear that there is now a discretion vested in this Court but the precise criteria by reference to which the discretion should be exercised are not clear.

6.4 It was argued on behalf of the D. P. P. that the point sought to be argued is very much one which depends on the facts of this case and is of no general application and that that was a factor which ought lean against the court exercising its discretion to entertain the point. It does not seem to me that this is the case in which it is necessary to set out any exhaustive analysis of the circumstances in which this Court ought to "consider it appropriate" to entertain additional points to those certified. The motion was heard at the same time as the trial and the court

decided *de bene esse* to hear argument on the merits of the point. I am satisfied that there is a point of some importance raised in the issue sought to be argued. It might be said, to borrow a term used in relation to the construction of legally binding documents, that, on a literal construction of what the trial judge said in his ruling on the question of whether the case should go to the jury, an incorrect test was applied. The question raised is as to whether, having regard to the overall context of the argument which the trial judge had heard and on which the trial judge was ruling and the further context of the ruling itself, taken as a whole, it can be said that the trial judge, in truth, applied a wrong test. In those circumstances it seems to me to be appropriate to go on to consider the merits of the point sought to be argued.

7.

What test did the trial judge apply?

7.1 It is agreed by both sides and does not appear to have been in dispute, to any significant degree, at the trial, that the test to be applied when an application is made of "no case to answer" is as set out by the English Court of Appeal in *R. v. Galbraith* [1981] 73 Cr. App. R 124, which is as follows:-

"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."

7.2 These principles have been approved and adopted in this jurisdiction in a number of cases not least *The People (D. P. P.) v. M.* (unreported, Court of Criminal Appeal, Denham J. 15th February, 2001).

7.3 It is sometimes said that the test is as to whether a jury would be perverse in convicting. That is, perhaps, a shorthand for saying that a jury properly directed could not convict. Be that as it may the only issue which arises under this heading is as to whether the trial judge applied the *Galbraith* test or whether the wording of his ruling, which has already been cited, and which uses the phrase "that it cannot be said beyond reasonable doubt that a jury would be perverse in convicting", suggests that the trial judge applied a wrong or different test.

7.4 Taken in total isolation and entirely out of context it might be said that the words just cited could be taken to imply that the trial judge considered that the case should go to the jury unless he was satisfied beyond reasonable doubt that a jury would be perverse in convicting.

7.5 In that context it is important to note that this Court is now concerned with a ruling of the trial judge on an application made in the absence of the jury. This is not language used by the judge in the presence of the jury or, in particular, in the judge's charge to the jury. In such circumstances the Court may well have to consider what effect the use of particular language might have had on the jury itself whose members will not, of course, have legal training. Here, however, the Court is simply concerned with interpreting an *ex tempore* ruling of the trial judge made in the course of the trial after full legal argument on both sides.

7.6 It is important to note that there was no real dispute between the parties as to the test to be applied. In addition, as recorded in the transcript, the trial judge makes specific reference to Galbraith in his ruling. The trial judge noted that counsel on behalf of Mr. D had placed reliance on Galbraith together with other authorities. The trial judge also noted that counsel on behalf of the Director of Public Prosecutions had argued that "having regard to the decision of the Court of Criminal Appeal in *The Director of Public Prosecutions and M.*, a judgment delivered by Mrs Justice Denham, that it should be slow to withdraw this case from the jury, and that this is a matter that is quintessentially a matter for the jury, and that the issues of reliability and credibility are quintessentially matters for the jury."

7.7 That analysis by the trial judge of the argument of counsel on both sides comes immediately before the passage from his ruling already cited from which it is argued that the trial judge applied a wrong test. There is nothing in the ruling of the trial judge to suggest that there was any real dispute between counsel as to the test to be applied or that any argument was put forward on behalf of the Director of Public Prosecutions to the effect that the test was not as found in Galbraith. Rather it is clear that the trial judge took the view that the basic principles to be applied were as agreed by counsel with the difference between the respective positions of counsel being as to the application of those principles to the facts of the case. Against the absence of any disagreement at the level of principle between counsel coupled with the absence of any suggestion in the ruling of the trial judge that he proposed departing from the principles agreed by counsel, it would be surprising in the extreme if White J, without setting out detailed reasons, would have departed from those principles. The passage from his ruling already cited, and on which counsel for Mr. D places reliance for his argument, needs to be seen in that context.

7.8 It also needs to be noted that no intervention came from counsel immediately after the ruling was made to suggest that the trial judge had applied an incorrect test. While it might be said that it would not be appropriate for counsel to question the ruling of the trial judge after it had been made nonetheless, if it had transpired that the parties agreed, in argument, on the appropriate test and the trial judge, off his own bat, had applied an entirely different test, it could hardly be said that it would not be open to counsel to seek to have the issue revisited. The only reasonable conclusion to reach is that counsel did not consider, on the day in question, that the trial judge

had done other than apply the agreed Galbraith test.

7.9 But perhaps of even more importance is the fact that the trial judge himself identified in his ruling the Galbraith test and referred to it in a way that does not imply any disagreement with or any refinement of it.

7.10 It seems to me that Finnegan J was entirely correct when he concluded that the proper construction to place on the ruling of the trial judge was that the trial judge meant no more than "that it was possible on the evidence in its then state that a jury could convict the applicant".

7.11 It follows that the appeal under this heading must also be dismissed.

8.

Conclusions

8.1 In those circumstances I would dismiss the appeal on the grounds certified by the Court of Criminal Appeal, allow Mr. D to raise the additional point sought to be raised in his motion, but dismiss the appeal on that ground as well.

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