

IRELAND / JUDGMENT

DPP -v- Boyce [2008] IESC 62 (18 November 2008)

[2008] IESC 62

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

[Home] [Databases] [World Law] [Multidatabase Search] [Help] [Feedback] [DONATE]
Supreme Court of Ireland Decisions You are here: BAILII >> Databases >> Supreme Court of
Ireland Decisions >> DPP -v- Boyce [2008] IESC 62 (18 November 2008) URL: <https://www.bailii.org/ie/cases/IESC/2008/S62.html> Cite as:

[2009] 2 IR 124,

[2008] IESC 62,

[2009] 1 ILRM 253 [New search] [Help] Judgment Title: DPP -v- Boyce Neutral Citation:

[2008] IESC 62 Supreme Court Record Number: 292/07 Court of Criminal Appeal Record Number : 56/2001 Date of Delivery: 18 November 2008 Court: Supreme Court Composition of Court: Denham J., Geoghegan J., Fennelly J., Macken J., Finnegan J. Judgment by: Finnegan J. Status of Judgment: Approved Judgments by Result Concurring Denham J. Appeal dismissed Macken J. Fennelly J. Geoghegan J. Finnegan J. Outcome: Dismiss THE SUPREME COURT Appeal No. 292/2007 Denham J. Geoghegan J. Fennelly J. Macken J. Finnegan J. Between Director of Public Prosecutions Respondent and Michael Boyce Appellant Judgment of Mr Justice Finnegan delivered on the 18th day of November 2008 I have had the benefit of reading the judgments delivered by Denham J. and Fennelly J. I agree with those judgments in relation to grounds 5 and 6 in the notice of appeal herein. In relation to the certified ground I agree with the judgment of Denham J. for the reasons briefly hereinafter set out. I do not propose reciting facts of the case as the same are fully set out in the said judgments. I propose confining my remarks to the construction of the Criminal Justice (Forensic Evidence) Act 1990 and in particular section 2 thereof. The following matters are not in dispute:-

1. Prior to the passing of the Act of 1990 it was open to a person detained pursuant to the provisions of section 4 of the Criminal Justice Act 1984 to consent to the taking of any or all of the samples referred in s. 2(1) of the Act. The position at common law for such samples is no different from that in relation to fingerprints.

2. The consent must be freely and voluntarily given. The consent must not be obtained by trickery or unfairly or oppressively. While a discretion remains to admit evidence obtained from a detained person where he is misled or tricked such evidence, whether it be an inculpatory statement or the provision of fingerprints or DNA material, is likely to infringe the rule against self incrimination. It was never contended at the trial that the sample in issue here was given other than voluntarily. In *R (on the application of S) v. Chief Constable of South Yorkshire* ; *R (on the application of Marper) v. Same*

(2004) 4 All ER 193 Lord Steyn remarked on the value of forensic evidence at p. 197:- “My Lords, it is of paramount importance that law enforcement agencies should take full advantage of the available techniques of modern technology and forensic science. Such real evidence has the inestimable value of cogency and objectivity. It is in large measure not affected by the subjective defects of other testimony. It enables the guilty to be detected and the innocent to be rapidly eliminated from inquiries”. The Criminal Justice (Forensic Evidence) Act of 1990 provides in its long title as follows:- “An Act to amend and extend the law to authorise the taking of bodily samples for forensic testing from persons suspected of certain criminal offences”. The clear legislative intention is to enable advantage to be taken of modern technology and forensic science. Few would argue with Lord Steyn’s proposition. It seems much more likely that the intention of the legislature in enacting the Act of 1990 was to enhance rather than restrict the availability of such evidence. This intention clearly appears from section 2(11). This being so in construing the Act regard should be had to the existing state of the law and the object and intent of the Act. The Issue The issue is this: is the effect of the 1990 Act to deprive the Garda Siochana of the facility at common law of taking forensic samples on consent. Central to this issue is the meaning to be given to powers in section 2(11) of the Act. The Act The Act in Section 2 provides as follows: “2(1) Subject to the provisions of subsection (4) to (8) of this section, where a person is in custody under the provisions of ... section 4 of the Criminal Justice Act, 1984, a member of the Garda Siochana may take, or cause to be taken, from that person for the purpose of forensic testing all or any of the following samples, namely –

- (a) a sample of –
 - (i) blood (ii) pubic hair (iii) urine (iv) saliva
 - (v) hair other than pubic hair (vi) a nail (vii) any material found under a nail
- (b) a swab from any part of the body other than a body orifice or a genital region.
- (c) a swab from a body orifice or a genital region
- (d) a dental impression
- (e) a footprint or similar impression of any part of the person’s body other than a part of his hand or mouth.

-
- (2) Subject to the provisions of subsections (3) to (8) of this section, where a person is in prison, a member of the Garda Siochana may take, or cause to be taken, than that person for the purpose of forensic testing all or any of the samples specified in subsection (1) of this section.
- (3) The power conferred by subsection (2) of this section shall only be exercisable –
- (a) where the sample to be taken is required in connection with an offence other than the offence in respect of which the person is in prison or an offence of which he could be convicted on an indictment alleging that offence, and
- (b) where the sample to be taken is required in connection with an investigation in respect of the commission of under the offences against the State Act, 1939, or an offence which is for the time being a scheduled offence for the purposes of Part V of that Act or an offence to which section 4 of the Criminal Justice Act, 1984, applies.
- (4) A sample may be taken under this section only if –
- (a) a member of the Garda Siochana not below the rank of Superintendent authorises it to be taken, and
- (b) in the case of a sample mentioned in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of subsection (1) of this section, or in (c) or (d) of the said subsection (1), the appropriate consent has been given in writing.
- (5) An authorisation to take a sample under this section shall not be given unless the member of the Garda Siochana giving it has reasonable grounds –
- (a) for suspecting the involvement of the person from whom the sample is to be taken –
- (1) in a case where the person is in custody, in the offence in respect of which he is in custody and
- (b) for believing that the sample will tend to confirm or disprove the involvement of the person from whom the sample is to be taken in the said offence.
- (6) Before a member of the Garda Siochana takes, or causes to be taken, a sample under subsection (1) of this section or seeks the consent of the person from whom the sample is required to the taking of such a sample, the member shall inform the person –
- (a) of the nature of the offence in which it is suspected that that person has been involved
- (b) that an authorisation has been given under subsection (4)(a) of this section and of the grounds on which it has been given, and
- (c) that the results of any tests on the sample may be given in evidence in any proceedings.
- (7) An authorisation under subs. (4)(a) of this section may be given orally but, if it is given orally, it shall be confirmed in writing as soon as is practicable.
-

- (8) A sample of a kind specified in sub paragraph (i) or (ii) of paragraph (a) of subsection (1) of this section or in paragraph (c) of the said subsection (1) may be taken only by a registered medical practitioner and a dental impression may be taken only by a registered dentist or a registered medical practitioner.
- (9) A person who obstructs or attempts to obstruct any member of the Garda Síochána or any other person acting under the powers conferred by subsection (1) of this section 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 12 months or to both.
- (10) In this Act “appropriate consent” means –
- (a) in the case of a person who has attained the age of 17 years the consent of that person
 - (b) in the case of a person who has not attained the age of 17 years but has attained the age of 14 years, the consent of that person and of a parent or guardian of that person and
 - (c) in the case of a person who has not attained the age of 14 years, the consent of a parent or guardian of that person.
- (11) The powers conferred by this section are without prejudice to any other powers exercisable by a member of the Garda Síochána.” Section 3 of the Act provides that where a consent required under section 2 of the Act is refused without good cause then in any proceedings against a person for an offence the court may draw inferences from that refusal and the refusal, on the basis of such inferences, may be treated or as being capable of amounting to corroboration of any evidence in relation to which the refusal is material: a person shall not be convicted of an offence solely on an inference drawn from such refusal. Section 3 however shall not have effect unless the person has been told in ordinary language by a member of the Garda Síochána when seeking his consent that the sample was required for the purpose of forensic testing, that his consent was necessary and the effect of not consenting. Section 4 of the Act provides for the destruction of records and samples where proceedings are not instituted within 6 months from the taking of the sample or proceedings having been instituted the person is acquitted or discharged or the proceedings discontinued. Construction of Section 2(11) of the Act Section 2 subsection (11) provides as follows:- “The powers conferred by this section are without prejudice to any other powers exercisable by a member of the Garda Síochána”. The marginal note to section 2 reads:- “Power to take bodily samples”. However the Interpretation Act 2005 s. 18 provides that a marginal note shall not be taken to be part of the enactment or be construed or judicially noticed in relation to the construction or interpretation of an enactment. Section 2 subsection (1) provides that a member of the Garda Síochána “may take or cause to be taken” any of the samples listed in the subsection. Can this be said to confer upon the Garda Síochána “a power” to take such samples as may only be taken on consent? Subsection (3) expressly refers to subsection (2) as conferring a power and does not distinguish between the taking of samples with or without consent. Subsection (9) refers to subsection (1) as conferring powers: while the circumstances envisaged in this subsection are more likely to

arise where consent is withheld circumstances can be envisaged in which it would have application where consent is forthcoming. Where samples may be taken without consent this clearly vests a power in the Garda Síochána: where consent is required this is less clearly the case. Neither subsection (3) nor subsection (9) distinguish between these different situations, each, it seems to me, being regarded as a power. It is, in my view, in accordance with ordinary English usage to treat section 2(1) as conferring a power to take samples on consent. A power may be conferred by statute, by common law or by consent. By way of illustration there is no doubt that the Garda Síochána may carry out a search of premises on foot of a consent: thus once consent is obtained it is in accordance with ordinary English usage to say that the Garda Síochána have power to conduct the search notwithstanding the absence of a search warrant. Section 2(11) must be considered in the context of section 2 as a whole and the Act as a whole. “Powers conferred by the Act” in the absence of some indication to the contrary will include the power conferred by the Act to take samples on consent. In the clause “other powers exercisable by a member of the Garda Síochána” powers should be given a consonant meaning. There is no indication that “powers” should be confined to statutory powers and so it includes powers at common law where there existed prior to the Act a power to take samples on consent. I can find nothing in section 2 (11), in section 2 as a whole or the Act as a whole to suggest a construction which would exclude the preservation of common law powers. The benefit to be derived from forensic evidence in the investigation and prosecution of crime, in enabling the guilty to be detected and the innocent to be vindicated and the object of the statute strongly support a contention which preserves existing powers. In short, the effect of section 2 is to define “power” for the purposes of the Act as including the power to take samples on consent. I do not believe that this approach leads to any manifest absurdity or repugnance which would require the meaning of the language used to be modified or varied. The construction which gives to a word the same meaning throughout a section or throughout an Act is to be preferred: powers should have the same meaning ascribed in subsection (3)(9) and (11). Accepting that the Act is penal I am satisfied that section 2(11) does not admit of two reasonable constructions so that the more lenient should be preferred. Rather one would expect if the legislature had intended to restrict the Garda Síochána in obtaining forensic samples they would have done so in clear words. As Lord Reid said in *Black-Clawson International Limited v. Papierwerke Waldhof-Ashaffenburg*

(1975) 1 All ER 810 at p. 814:- “There is a presumption which can be stated in various ways. One is that in the absence of any clear indication to the contrary parliament can be presumed not to have altered the common law farther than was necessary to remedy the ‘mischief’.”

Conclusion

On the certified question and the first three grounds of appeal which relate to the certified question I agree with the judgment delivered by Denham J. The Garda Síochána have power at common law to take samples for forensic testing where this is done on the basis of a free and voluntary consent of the person detained. JUDGMENT of Mr. Justice Fennelly delivered the 18th

day of November 2008 1. The common law conferred no powers of detention for the purpose of the investigation of crime. The admissibility of confessions made to gardaí alleged to have been providing voluntary assistance in the investigation of crime were often disputed. Allegedly voluntary presence in a garda station was suspected of being a cloak disguising actual detention. Objections to confessions made in disputed circumstances were the subject-matter of the “trial within a trial” or voir dire. 2. The power of detention pursuant to the Offences against the State Act, 1939 related to “subversive” crime. It was not until the enactment of the Criminal Justice Act, 1984 that the gardaí had power to detain suspects without charge. Section 6 of that Act empowered the gardaí to exercise a number of powers in relation to the person of a detained person. Such intrusive acts could previously have been committed only by consent. 3. This appeal raises questions about the extent to which common law voluntary powers are affected by the existence of statutory powers. The case concerns the taking of a blood sample from the appellant, which laid the foundation for incriminating DNA evidence which was probably crucial to his conviction. 4. The appeal comes from the Court of Criminal Appeal which granted a certificate pursuant to section 29 of the Courts of Justice Act, 1924. 5. The appellant was convicted by a jury in the Central Criminal Court of six counts of rape, attempted rape, indecent assault or sexual assault. Since the grounds of appeal are limited to the taking of a blood sample from the appellant and its consequent use to provide DNA evidence which was used against the appellant at his trial, a very brief summary of the facts will suffice. 6. The complainant was an unmarried female neighbour of the appellant who was aged between 55 and 66 years over the period covered by the offences, that is from January 1983 to December 1994. She lived alone in a rural area. She did not identify the appellant in her evidence, but swore that all the sexual offences were committed against her by the same man. Part of her evidence was that the perpetrator of the offences referred to earlier incidents, when assaulting her. The relevance of the DNA evidence was described as follows by the Chief Justice, in delivering the judgment of the Court of Criminal Appeal: “The prosecution relied on DNA evidence from which they said the jury could conclude that the applicant committed two of the offences namely those of 22nd December, 1989 and 16th August, 1991. It was also the prosecution case that if they were satisfied that the DNA evidence established that he committed the offences on the two occasions, they were entitled to conclude on other evidence that it was the same person who committed all or any one of the other offences.” 7. Clearly the jury accepted the DNA evidence and the connection between the different offences which was established, in part, by that evidence. The trial judge tried a preliminary issue as to whether to admit the DNA evidence. 8. The circumstances in which the sample of the appellant’s blood was taken are the principal basis of the present appeal. They are as follows. 9. The appellant was arrested on 10th July, 1996. He was informed that he was being arrested on suspicion of having committed the offence of rape against the complainant at her home in December, 1989. The gardaí administered the usual caution concerning anything he might say and that it might be given in evidence. Gardaí took him to a Garda Station, where they completed the statutory formalities which are required when a person has been arrested and is being detained under section 4 of the Criminal Justice Act, 1984. The learned trial judge found that these were completed correctly and properly. 10. The appellant, in the course of questioning, denied any involvement in the alleged offences. 11. A detective garda asked him whether he

would provide a sample of his blood for the purpose of having it tested in connection with the allegation that he had raped the complainant in December 1989, the offence in respect of which he was being detained. The detective cautioned him that he was not obliged to give any sample but explained to him that any tests carried out on the blood sample might be given in evidence. The applicant agreed to give a sample of blood. The sample was taken in the Garda Station by a medical doctor with the consent of the applicant. The appellant was not informed that the evidence might be used in connection with any offence other than that in respect of which he had been arrested. 12. It was not disputed by the appellant, either at trial or in the Court of Criminal Appeal that he had provided a sample of his blood voluntarily. The learned trial judge found as a fact that he fully understood the caution and that he willingly and freely provided the sample. There was some dispute as to the terms of the caution of which the detective gave evidence, but the learned trial judge accepted the evidence of the garda witnesses summarised above. 13. Thus, it follows that the matter should now be approached on the basis that the blood sample was freely and voluntarily given following a clear caution which the appellant understood, though at a time when the appellant was being detained pursuant to the Act of 1984. 14. It is accepted by the prosecution that the gardaí did not follow the procedures laid down by the Criminal Justice (Forensic Evidence) Act, 1990 hereinafter “the Act of 1990”). 15. The appellant advanced a large number of grounds in the Court of Criminal Appeal, which dismissed his application for leave to appeal. That Court, however, granted a certificate pursuant to section 29 of the Courts of Justice Act, 1924 that the following point was a point of law of general public importance and that it was desirable in the public interest that an appeal be taken to this Court: “Is it lawful for a member of An Garda Síochána, when taking a sample of blood from a person in custody who voluntarily agrees to provide that sample for the purpose of forensic analysis, to do so without having invoked the provisions of Section 2 of the Criminal Justice (Evidence) Act, 1990? 16. The notice of appeal filed on behalf of the appellant advances the following grounds of appeal:

1. That the Court of Criminal Appeal erred in law or erred on a question of mixed fact and law in holding that Section 2 of the Criminal Justice (Forensic Evidence) Act, 1990 did not preclude a Garda from taking a voluntary forensic sample from a person in custody without invoking the provisions of the said Act and that the said section of the 1990 Act was designed to enable Gardai to obtain such forensic samples which might otherwise be refused and to provide for admissibility of such evidence arising from the refusal, and that the neglect, failure or refusal by the Gardai to take the said sample under the aegis of the said Act was ultra vires , contrary to Article 15.2.1 and Article 40.3.1 & 2 of the Constitution.
2. That the learned trial judge erred in law and on the facts in ruling that the blood sample from the Accused for the purpose of DNA testing was admissible in evidence, that it was lawfully taken and/or did not require to be taken pursuant to the Criminal Justice (Forensic Evidence) Act 1990, and thereby failed to vindicate the Accused’s Constitutional Rights to his bodily integrity.

3. That the learned trial Judge erred in law in holding that the said blood sample was not required to be taken pursuant to the Criminal Justice (Forensic Evidence) Act, 1990 and accordingly the provisions regarding the use and destruction of the sample and any records thereof did not apply in this case.
4. That the learned trial judge erred in law in firstly permitting and later preventing Counsel for defendant from pursuing the issue whether the consent given by the defendant to the taking of a blood sample was given as a fully informed consent or not, and whether this was an issue of fact which could properly be considered by the jury: and this was confusing to the jury rendering the trial unfair and unsatisfactory.
5. Failed to give a direction (in particular in relation to Counts other than those which relied on DNA evidence) to the Defence on the points raised at the close of the prosecution case (and in particular the lack of evidence to corroborate the DNA evidence in the case) and failed to correctly and adequately charge the Jury regarding corroboration required in cases of this nature.
6. Erred in law regarding the ruling of Section 5 of the Criminal Evidence Act, 1992 (regarding the Section 6 Certificate) grounding McDonnell's evidence about the English Database used for DNA samples in general and erred in law in allowing evidence of databases to be used which were not properly validated.
7. That in all the circumstances of the case of the case the conviction of the Appellant is unsafe and unsatisfactory. 17. The first three grounds all relate to the certified point and raise the question of admissibility of the evidence. The fourth ground relates to the ruling of the learned trial judge that defence counsel were not permitted to question the consent given by the appellant to the taking of the blood sample once he had ruled on it. The fifth ground relates to the judge's charge regarding the value and strength of the DNA evidence. The sixth ground relates to the use of a DNA database in evidence. 18. Thus all of the grounds of appeal relate directly or indirectly to the legal basis upon which the gardaí took a blood sample from the appellant and the admission of DNA based on that sample. 19. There is one central issue in the appeal, namely whether the gardaí continue to be entitled at common law to take blood samples (and presumably other personal physical samples) from a person detained pursuant to section 4 of the Act of 1984 with that person's consent since the passing of the Act of 1990. I will deal later in this judgment with the additional points concerning the use of a DNA database by an expert witness and the charge to the jury. 20. At one point in his written submissions, it is suggested that there was no common law power to take samples. It is stated that no such samples were taken until the advance of scientific technology which assisted in measuring the alcohol level in blood or urine. Reference is made to powers under the Road Traffic Acts. I did not understand this stance to be maintained at the hearing of the appeal. Mr David Goldberg, Senior Counsel for the appellant accepted that there was (and presumably still is) power to take samples by consent and that he used the word "power" in the sense of "power to compel." 21. There was never any reason to object to the taking of samples of any kind with the consent of a suspect freely given. As the Chief Justice put it in

his judgment in the Court of Criminal Appeal: “While the conduct of criminal investigations by the Gardaí must be carried out within the ambit of the law and in accordance with the law, many of the procedures which they adopt may not require the exercise of powers expressly conferred by statute. The interviewing and taking of statements from witnesses to a crime, the entry upon the scene of a crime, its examination and taking away of forensic evidence are just some examples of investigation methods which are carried out on the basis of the consent and cooperation of the citizens concerned. Of course in certain circumstances, but not all, such as the refusal of a person to make a witness statement, the Gardaí may have an option of resorting to statutory or common-law powers. An example would be where a householder permits a Garda member to enter or enter and search premises without the need for a search warrant..... “Cooperating citizens may willingly provide the Gardaí with forensic evidence such as fingerprints, clothing or blood samples to assist them in their inquiries. A rape victim may willingly provide a sample of pubic hair so that the Gardaí may determine whether it matches a pubic hair discovered in the course of their investigations in circumstances which, if matched, may implicate a suspect. Of course the gathering of such evidence and its use at a criminal trial from persons, who at the trial have the status of witnesses rather than that of an accused, is rarely a source of controversy.”

22. Neither the inviolability of the dwelling nor the right to bodily integrity of the human individual, though these are personal rights which enjoy constitutional protection, prevents individuals from agreeing to provide access to the one and samples from the other. Most citizens will perceive it as their duty to assist in the investigation of crime. Many will wish to eliminate themselves from suspicion; many others will wish to assist in finding the perpetrator of a crime. Where evidence is thus freely and voluntarily provided by a person at liberty, no principle of the criminal law prevents material thus gained in the course of police investigation from becoming the subject-matter of evidence at a criminal trial against the provider. This Court has stated in a series of cases that is the duty of the prosecution authorities, in particular An Garda Síochána, to preserve and retain all evidence, which comes into their possession, having a bearing or potential bearing on the issue of guilt or innocence of the accused (see, for example *Braddish v. Director of Public Prosecutions* ;

[2001] 3 IR 127). 23. What needs to be decided, in the present case, is whether, where the appellant was being detained pursuant to statutory power, the gardaí continued to have the right to resort to the common law and take a blood sample with the consent of the appellant rather than to submit to the restrictions imposed where they exercise the statutory power. 24. The Respondent submits that there is nothing in the Act of 1990 to suggest that the Oireachtas intended to abolish existing Garda entitlements to obtain samples voluntarily provided by persons in custody. They support the view of the Court of Criminal Appeal as expressed in the following passage from the judgment delivered by the Chief Justice: “If the Oireachtas had intended that the Act was to have general application to all circumstances in which the taking of a blood sample from persons in custody could arise that it would have been expressed in words of general application. Moreover, if the Oireachtas intended the Act to have general application to the taking of all samples

involved from persons in custody it would hardly have been necessary for the Oireachtas to include the proviso in subsection 11 of s. 2 whereby the powers conferred by s. 2 are without prejudice to any other powers exercisable by a member of An Garda Síochána, even in adopting the narrow interpretation of “powers” advocated by counsel for the applicant..... “It would indeed be extraordinary if the Oireachtas contemplated that any forensic sample freely and voluntarily provided by a person in custody and then forensically examined by the Gardaí which was lawful before the passing of the Act should be considered unlawful after the passing of the Act without any express provision to that effect, even though it was provided without any element of coercion and when the consequences of the refusal were nil from the point of view of an accused.” 25. This passage highlights the undoubted absence of any express statutory provision encroaching on the common law power to take samples from a suspect with his consent. The opposing view is that the gardaí should by resorting to an unregulated common law power not be allowed to undermine the express protections enshrined where the procedures under the Act of 1990 are followed. The appellant has drawn particular attention to a Garda circular of 1995 with a heading referring to the Act of 1990 addressed to all members of the force, a document whose existence was unknown either at the time of trial or of the appeal in the Court of Criminal Appeal. In effect, it advises all members of the force, where there is a wish to obtain a bodily sample, to seek to obtain it, in the first instance by consent. It then states: “Where such a person refuses to provide or permit the taking of a sample, then and only, then, should the Gardaí consider invoking the provisions of the above Act.” (emphasis added) 26. The respondent has not objected to reference to this document. In fact, it is admitted that the circular invited the “Gardaí to initially seek the sample on a voluntary basis and thereafter, if unsuccessful, to invoke the terms of the Act of 1990.” 27. This then is the question: can the gardaí escape the obligation to follow the provisions of the Act of 1990 by exercising a common law power over a person in custody? 28. The appellant was not at liberty. He had been arrested and was being detained pursuant to the power conferred by section 4 of the Criminal Justice Act, 1994 (as amended by section 2 of Criminal Justice (Miscellaneous Provisions) Act, 1997). The premise and the purpose of the exercise of that power was that the gardaí had “reasonable grounds for believing that his detention [was] necessary for the proper investigation of the offence,” i.e., the offence of which he had been informed that he was suspected. It is obvious that one of the principal methods of investigation of crime is the questioning of suspects. It is implicit in section 4, particularly sub-section 5 of that section, that a suspect may lawfully be questioned while in detention. 29. In addition, section 6 of the Act confers powers on a member of the Garda Síochána to do the following in relation to a detained person: “(a) demand of him his name and address; (b) search him or cause him to be searched; (c) photograph him or cause him to be photographed; (d) take, or cause to be taken, his fingerprints and palm prints; (e) [repealed] (f) seize and retain for testing anything that he has in his possession.” 30. The powers mentioned at (c) and (d) are exercisable only on the authority of a member of the Garda Síochána not below the rank of superintendent. 31. The long title to the Act of 1990 says that it is “an Act to amend and extend the law to

authorise the taking of bodily samples for forensic testing from persons suspected of certain criminal offences.” Section 2 provides the primary power to take samples. It is the provision which principally needs consideration. Section 3 provides for the drawing by a court or a jury, as the case may be, of such inferences as may be proper from a refusal of consent to provide samples pursuant to section 2. Section 4 contains provisions for the destruction of samples in certain circumstances, notably on failure to bring a prosecution within six months or on acquittal. 32. Section 2 provides, so far as relevant:

- (1) Subject to the provisions of subsections (4) to (8) of this section, where a person is in custody under the provisions of section 30 of the Offences against the State Act, 1939 , or section 4 of the Criminal Justice Act, 1984 , a member of the Garda Síochána may take, or cause to be taken, from that person for the purpose of forensic testing all or any of the following samples, namely— (a) a sample of—
 - (i) blood, (ii) pubic hair, (iii) urine,. (iv) saliva,
 - (v) hair other than pubic hair, (vi) a nail, (vii) any material found under a nail, (b) a swab from any part of the body other than a body orifice or a genital region, (c) a swab from a body orifice or a genital region, (d) a dental impression, (e) a footprint or similar impression of any part of the person's body other than a part of his hand or mouth. [Subsections 2 and 3 relate to persons in prison]
- (4) A sample may be taken under this section only if— (a) a member of the Garda Síochána not below the rank of superintendent authorises it to be taken, and (b) in the case of a sample mentioned in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of subsection (1) of this section, or in paragraph (c) or (d) of the said subsection (1), the appropriate consent has been given in writing.
- (5) An authorisation to take a sample under this section shall not be given unless the member of the Garda Síochána giving it has reasonable grounds— (a) for suspecting the involvement of the person from whom the sample is to be taken—
 - (i) in a case where the person is in custody, in the offence in respect of which he is in custody, or (ii) in a case where the person is in prison, in the commission of an offence under the Offences against the State Act, 1939 , or an offence which is for the time being a scheduled offence for the purposes of Part V of that Act or an offence to which section 4 of the Criminal Justice Act, 1984 , applies, and (b) for believing that the sample will tend to confirm or disprove the involvement of the person from whom the sample is to be taken in the said offence.
- (6) Before a member of the Garda Síochána takes, or causes to be taken, a sample under subsection (1) of this section, or seeks the consent of the person from whom the sample is required to the taking of such a sample, the member shall inform the person— (a) of the nature of the offence in which it is suspected that that person has been involved, (b) that an authorisation has been given under subsection (4) (a) of this section and of the grounds on

which it has been given, and (c) that the results of any tests on the sample may be given in evidence in any proceedings.

- (7) An authorisation under subsection (4) (a) of this section may be given orally but, if it is given orally, it shall be confirmed in writing as soon as is practicable.
- (8) A sample of a kind specified in subparagraph (i) or (ii) of paragraph (a) of subsection (1) of this section or in paragraph (c) of the said subsection (1) may be taken only by a registered medical practitioner and a dental impression may be taken only by a registered dentist or a registered medical practitioner.
- (9) A person who obstructs or attempts to obstruct any member of the Garda Síochána or any other person acting under the powers conferred by subsection (1) of this section 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 12 months or to both.
- (10) In this Act "appropriate consent" means— (a) in the case of a person who has attained the age of 17 years, the consent of that person, [(b) and (c) are not relevant]
- (11) The powers conferred by this section are without prejudice to any other powers exercisable by a member of the Garda Síochána. 33. Section 2 contains the following requirements which are applicable in relation to the taking of a blood sample of a person in custody pursuant to section 4 of the Act of 1984: · The taking must be authorised by a member of the Garda Síochána not below the rank of superintendent (for brevity's sake I refer to him as the "the superintendent"); · The authorization may be given orally but must be reduced to writing as soon as practicable; · The superintendent must have reasonable grounds for suspecting the person of involvement in the offence in respect of which he is in custody and that the sample will tend to confirm that suspicion; · The person must be told of the nature of the offence of which he is suspected, of the superintendent's authorisation and that the results of any tests on the sample may be given in evidence in any proceedings; · The consent of the person must be given in writing. 34. Section 2 does not, of course, authorise the forcible taking of samples. Subsection (9) makes it an offence to obstruct or attempt to obstruct the exercise by the Garda Síochána in the exercise of their powers under the section. It does not create an offence of declining to provide a sample. The section lays down a procedure for obtaining samples by consent. The potential sanction for declining to consent to give a sample is provided by section 3. Inferences may be drawn at trial in cases of refusal without good cause. Even then subsection (3) provides that the provision regarding inferences: "...shall not have effect in relation to an accused unless he has been told in ordinary language by a member of the Garda Síochána when seeking his consent that the sample was required for the purpose of forensic testing, that his consent was necessary and, if his consent was not given, what the effect of a refusal by him of such consent could be." 35. Section 4 provides additional protection for persons from whom samples have been taken pursuant to section 2 by laying down rules for their destruction, in effect, if no prosecution has been commenced after a specified time or after an acquittal. 36. None of the

statutory protections laid down in the Act have any application to cases where a sample is taken based on the simple consent of the person giving it. As I have said above, the scheme of the Act is to provide for the taking of samples by consent but subject to elaborate protection. 37. The Act deals only with persons held in custody under various statutory provisions, namely section 30 of the Offences against the State Act and section 4 of the Act of 1984. Did the Oireachtas intend to lay down a regime which was to apply, where samples are taken by consent from persons in custody, while the gardaí could simply ignore that regime by seeking consent based on common law? That would be absurd. It would be inherently inconsistent and potentially unfair. 38. The key fact is that the person from whom the sample is taken is in custody. In matters of criminal law and procedure, the courts lean towards interpretations of statutory provisions which favour the rights of the accused person. In the present case, there is the additional factor that the Garda Síochána has laid it down as a matter of policy that consent should be sought outside the scope of the Act and that, only in the event of refusal, should the statutory procedures be applied. 39. In my view, where a person is in custody pursuant to the Act of 1984, the Gardaí are obliged to follow the statutory procedure. Their failure to do so amounted to a contravention of the Act, though not an interference with the constitutional rights of the appellant. The appellant freely agreed to provide a sample of his blood. 40. The respondent did not suggest that section 2(11) is relevant. As is made clear by the judgment of the Court of Criminal Appeal, counsel for the Respondent did not rely on that provision before that court. Presumably that is because it refers to a “power.” That word would not normally be used to describe the taking of samples or indeed evidence generally by consent of the affected individual. 41. Neither the trial court nor the Court of Criminal Appeal had to address the effect of this failure to follow the statutory regime on the admissibility of the expert evidence which based on the analysis of the blood sample. In each court, it was held that the Act did not apply. It is an undoubted fact that the blood sample led to the production of objective material evidence. The DNA evidence linked the appellant with the commission of the offences. No breach of a constitutional right was involved. 42. It remains to address the fifth and sixth grounds of appeal. The appellant’s submissions on these issues were presented at the hearing of the appeal by Mr Donal Keane, Barrister at law. 43. Under ground number 5, the complaint is that the judge, while giving a warning of the need for corroboration, did not provide the jury with any definition of that term. 44. Mr Keane first raised the issue of the corroboration advice which, though not now obliged to do so, the learned trial judge gave to the jury. The ground of appeal advanced in the Court of Criminal Appeal was that “the learned trial judge failed to correctly and adequately charge the jury regarding corroboration required in cases of this nature.” Ground number 5 repeats the point. It does not specifically mention the criticism of the charge which is now advanced. The most important point is, however, that no requisition was made of the learned trial judge in respect of his charge on corroboration. The Court of Criminal Appeal considered the charge in full and expressed itself satisfied that there was no misdirection of the jury nor did it give rise to any unfairness or injustice in the case. The appellant has not pointed to any suggested mistake by that Court. The failure of the defence to raise any requisition on the point now argued cannot be overlooked. It tends

to support the view of the Court that there was no unfairness in the charge. Clearly, it is only upon detailed examination of the transcript, the point now made has emerged. I would uphold the view of the Court of Criminal Appeal. I would reject this ground. 45. On the sixth ground, Mr Keane, in the first instance made criticisms of a certificate at one point put forward by the prosecution pursuant to section 5 of the Criminal Evidence Act, 1992 in order to introduce a DNA database into evidence. However, the prosecution did not ultimately rely on that certificate. It relied on the expert evidence of Dr McDonald. 46. As explained in the judgment of the Court of Criminal Appeal, “the principal DNA evidence relied upon by the State was that of Dr. McDonald who found a DNA match between the blood sample taken from the accused and the semen stains taken from the underwear of the complainant relating to the relevant offences in 1989 and 1991.” The evidence was that “these were rare matches representing one in five million by reference to the first database which he used and one in six million by reference to the second database which he used.” 47. The appellant’s complaint relates to the fact that the expert witness for the prosecution was permitted to refer to a DNA database, which was not formally proved in evidence. The expert gave evidence based on the contents of this database, the contents of which were not proved in court. An application was made to the court of trial to disallow the evidence on the basis that it was hearsay and unproven. It was submitted that there is a grave danger in cases such as the present that DNA evidence will be accorded far greater evidence than it deserves. Counsel described the figures of probability of 5 or 6 million to one as “fantastic.” Thus counsel on behalf of the appellant could not cross-examine so as to test the veracity or accuracy of the database. 48. Counsel referred to a statement in the judgment of the Court of Criminal Appeal, delivered on 18th December 2003 by McCracken J, in the case of *Director of Public Prosecutions v Allen*, to the effect that there was a danger that a jury might jump to the conclusion that DNA evidence was infallible. Evidence based on a DNA sample had been given on behalf of the pros in that case by an expert witness to the effect that the chances that the DNA of the sample “having the same profile was less than one in a thousand million.” It was suggested, on appeal, that there was available evidence to the effect that the figure should have been much lower if the applicant’s siblings were taken into account. Although the court refused to admit that evidence, the prosecution conceded that the correct figure should have been one in ten thousand. The court set aside the conviction and ordered a retrial. The legal basis for that ruling is not entirely clear, except that the court said that it had an obligation to see that justice was done and that the failure to elicit the evidence regarding siblings had the potential to confuse or mislead the jury. The court did not consider the issue which is before this court. However, the expert had given evidence based on an Irish database. No issue was raised as to her right to do so. 49. The Court of Criminal Appeal, in the present case, ruled: “Furthermore, in a long established exception to the hearsay rule, an expert can ground or fortify his or her opinion by referring to works of authority, learned articles, recognised reference norms and other similar material as comprising part of the general body of knowledge falling within the field of expertise of the expert in question.” 50. The court went on to refer to the English databases for white Caucasians upon which Dr McDonald had relied for his evidence and the evidence that “it

was scientifically acceptable to rely on such databases dealing with a DNA match found in Ireland” and to his reliance “on expert scientific studies from America, Germany and the United Kingdom that different white Caucasian databases do not differ significantly between one country and another...” 51. I am satisfied that the Court of Criminal Appeal was correct in its ruling that Dr McDonald “was entitled to explain his reliance on the databases in question by reference to accepted scientific standards, scientific studies in published scientific data and norms accepted by the science in question.” 52. An expert is entitled to support his opinions by reference to material of the kind referred to in that passage. It is not necessary to prove such material by direct evidence. The appellant’s complaint of the overbearing character of DNA evidence can be met by the defence calling its own scientific evidence. DNA constitutes one of the astonishing scientific advances of the age. It has already contributed greatly to the investigation of crime, not least in enabling innocence to be proved, as has happened in some extraordinary cases. It is true that the powerful possibilities of DNA evidence place a particular burden on the prosecution to ensure the integrity of sampling, conservation of evidence and fair and balanced presentation of expert evidence. These obligations are always present but need to take account of the particular scientific characteristics of the evidence. 53. In the present case, I am satisfied that the sixth ground of appeal should be rejected. 54. Accordingly, I would hold that the gardaí were not entitled to take the blood sample from the appellant, without following the procedures laid down by the Act of 1990. It follows that the DNA evidence was taken unlawfully, even if not unconstitutionally. I would, therefore, allow the appeal and set aside the conviction. Judgment delivered the 18th day of November, 2008 by Denham J. 1. Section 29 Appeal This is an appeal brought by Michael Boyce, "the appellant". His primary appeal is pursuant to s.29 of the Courts of Justice Act 1924, as amended, from the refusal by the Court of Criminal Appeal to grant to him leave to appeal against his conviction in the Central Criminal Court on the 17th November, 2000, on counts of rape, attempted rape, indecent assault and sexual assault.

2. The following question for this Court was certified by the Court of Criminal Appeal:- Is it lawful for a member of An Garda Síochána when taking a sample of blood from a person in custody who voluntarily agrees to provide that sample for the purpose of forensic analysis to do so without having invoked the provisions of Section 2 of the Criminal Justice (Forensic Evidence) Act 1990? 3. Issue It was conceded that the statutory scheme under the Criminal Justice (Forensic Evidence) Act 1990, "the Act of 1990", was not engaged. Therefore, the issue is whether a member of An Garda Síochána was entitled to use the common law in the circumstances of this case
4. For the reasons given in this judgment I am of the opinion that the question should be answered in the affirmative. A member of An Garda Síochána was entitled to use the common law in the circumstances of this case. 5.

Facts

The facts were fully set out by the Court of Criminal Appeal in the judgment of the court delivered by Murray C. J. on the 21st December, 2005. For the purpose of this appeal, which raises matters of law, I gratefully adopt those facts, which I summarise, to explain the backdrop to the question of law arising.

6. The appellant was tried in the Central Criminal Court on the following counts:- Count No. 1. Indecent assault contrary to Common Law as provided for in s.10 of the Criminal Law (Rape) Act, 1981, on the 31st January, 1983. Count No. 2. Rape contrary to s.48 of the Offences Against the Person Act, 1861 and s.2 of the Criminal Law (Rape) Act, 1981, on 5th January, 1984. Count No. 3. Indecent assault contrary to Common Law as provided for in s.10 of the Criminal Law (Rape) Act, 1981, on the 5th January, 1984. Count No. 4. Rape contrary to s.48 of the Offences Against the Person Act, 1861 and s.2 of the Criminal Law (Rape) Act, 1981, on the 6th October, 1985. Count No. 5. Indecent assault contrary to Common Law as provided for in s.10 of the Criminal Law (Rape) Act, 1981, on the 6th October, 1985. Count No. 6. Rape contrary to s.48 of the Offences Against the Person Act, 1861 and s.2 of the Criminal Law (Rape) Act, 1981, on the 22nd December, 1989. Count No. 7. Sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act, 1990, on the 16th August, 1991. Count No. 8. Rape contrary to s.48 of the Offences Against the Person Act, 1861 and s.2 of the Criminal Law (Rape) Act, 1981, as amended by s.21 of the Criminal Law (Rape) (Amendment) Act, 1990, on the 10th December, 1994. Count No. 9. Sexual assault contrary to s.2 of the Criminal Law (Rape) (Amendment) Act, 1990, on the 10th December, 1994.
7. The appellant was put on trial on the nine counts set out above. He was found guilty on counts 1, 6 and 7. On counts 2, 4 and 8 he was found guilty of the alternative verdict of attempted rape. On counts 3, 5 and 9 the jury reached no verdict.
8. The relevant events occurred between January, 1983 and December, 1994. All offences related to the same victim and took place in her home.
9. The appellant was convicted and sentenced to terms of imprisonment from 3 years to 8 years.
10. As described in the judgment of the Court of Criminal Appeal, the appellant was found guilty, where he was so found, by a majority verdict. On count no. 1 he was found guilty by a majority verdict of ten to two. On count no. 2 he was found guilty of the offence of attempted rape by a majority verdict of ten to two. No verdict was returned on count no. 3. On count no. 4 the jury returned a verdict of not guilty of rape by direction of the trial judge, and the jury found him guilty of attempted rape by a majority of ten to two. No verdict was returned on count no. 5, as it did not arise in light of the verdict on count no. 4. The appellant was convicted on count no. 6 by a majority of eleven to one. He was convicted on count no. 7 by a majority of eleven to one. He was convicted of the offence of attempted rape in relation to count no. 8 by a majority of ten to two. No verdict was returned on count no. 9, as it did not arise because of the verdict in relation to count no. 8.

11. The offences arise from six occasions between January, 1983 and December 1994 when the complainant was either indecently assaulted, or the subject of a sexual assault involving an attempted rape, or rape.
12. The complainant at the time was an unmarried woman living alone in a small house in a rural area. The house was relatively isolated. The complainant was born in 1928 and was 55 years of age when the first offence was committed in 1983 and 66 years of age when the last offence was committed in 1994. She was 72 years of age at the time of the trial. The complainant did not give evidence identifying the appellant as her assailant. She gave evidence that it was the same man who sexually assaulted her on each occasion.
13. On the first occasion in January, 1983 she was at home in her house when the lights went out. She heard a noise in the hall and found a man there who said he was from the E. S. B.. He made advances to her. She used a stick to try and fend him off. He attempted to rape her. She described him as a person in his thirties, low size, stocky build. She said he smelt of oil. After the event, she ran, in a very distressed state, to her neighbours who called the guards. It was later found that the fuse box had been interfered with. In January, 1984 the complainant was asleep when she heard a noise, a man forced his way in the door, pushed the complainant to the floor, and sexually assaulted her, in the dark. The subsequent events all occurred at her home, when the assailant broke in, and sexually assaulted her, in the dark. On some occasions the assailant used the same phrases, or made reference to a previous occasion, when he assaulted her.
14. At the trial the Director of Public Prosecutions, "the D. P. P.", relied on DNA evidence from which it was submitted the jury could conclude that the appellant committed two of the offences, those of the 22nd December, 1989 and the 16th August, 1991. The prosecution submitted that if the jury were satisfied that the DNA evidence established that the appellant committed the offences on those two occasions, then they were entitled to conclude on other evidence that it was the same person who committed all or any of the other offences.
15. The DNA evidence was obtained from a blood sample taken from the appellant while he was in custody in the garda station. The members of An Garda Síochána took the sample on the basis that the appellant had freely consented to giving the sample.
16. The appellant was arrested in July, 1996 for the offence of rape of the complainant in December, 1989. Having been cautioned he was taken to the garda station and processed in the usual way by a member of An Garda Síochána who explained why he was arrested and notified him of his rights. As is customary, in the course of his detention the appellant was furnished with a note of his rights and informed that arising from information given to An Garda Síochána he was being detained pursuant to s.4 of the Criminal Justice Act, 1984.
17. It is common case that the Gardaí did not rely on the Criminal Justice (Forensic Evidence) Act, 1990, "the Act of 1990", and so did not follow any of the procedures provided for in the Act of 1990 18. Policy It emerged in the course of the hearing of the appeal before the Court of Criminal Appeal that the members of An Garda Síochána had been advised by the D. P. P.,

after the coming into force of the Act of 1990, that they might continue to take blood samples provided voluntarily and with consent by persons in custody. If the person in custody refused to voluntarily provide a blood sample then the gardaí were advised that they may apply the Act of 1990. On the facts of this case, I am satisfied that this is not a case where the matter in issue is the application of a policy of the D. P. P., and whether that policy is appropriate or inappropriate. Rather it is a question of law. 19. The Central Criminal Court In the Central Criminal Court evidence was given that a member of An Garda Síochána cautioned the appellant as follows:- "You are not obliged to give any sample or to submit to any medical examination unless you wish to do so. If you do submit to such an examination the findings of same may be given in evidence." (See Transcripts, Book 1, p.75). This form of caution was not pursuant to the requirements of the Act of 1990.

20. In the Central Criminal the learned trial judge (Quirke J.) held, as to the DNA sample:- "... I am satisfied that it was voluntarily provided and I have indicated already that Mr Boyce does not deny that. I am also satisfied that the caution was administered by Detective Garda Burke in the manner in which he stated and in the form in which he stated and I am also satisfied as to the accuracy of the notes of the interview which was recorded by Garda Burke. ..." (See Transcripts, Book 3, p.9). He held:- "It follows then that the blood samples taken by Dr Dalton on behalf of the Garda Síochána from Michael Boyce were taken after a simple request was made by Detective Garda Burke, together with a caution in precise terms which indicated that Mr Boyce was not required to provide samples unless he voluntarily wished to do so." (See Transcripts Book 3, p.10). Further he held:- "I am satisfied that prior to the enactment of the 1990 Act, it was not unlawful for a member of An Garda Síochána to request a person in custody, including a person who is detained under the provisions of Section 30 of the Offences Against the Person Act or Section 4 of the Criminal Justice Act, 1984 to voluntarily provide bodily samples for forensic testing. He could, I am satisfied, make a simple request of that kind provided that the detained person was fully advised of his or her rights and, in particular, that he or she had a right to refuse to supply such samples and provided that no coercion, no compulsion, no inducement or no other improper or other influences were exercised or exerted upon such person in order to require them to provide a sample of the kind which is sought. I am further satisfied that the results of tests carried out upon samples of blood provided voluntarily in such circumstances were admissible at the trial of the detained person in respect of the charges which gave rise to his or her detention." (See Transcripts Book 3, p.13-14). The learned trial judge also considered the terms of the Act of 1990. He concluded:- "I am satisfied beyond any doubt that the sample of blood provided by the accused in this case on the 10th July, 1996 was provided voluntarily and that the Garda Síochána were empowered to cause to be taken the sample so provided and that the sample was accordingly lawfully provided. It follows that the results of the tests made upon that sample are admissible in evidence in this trial." (See Transcripts Book 3, p.10).

21. The DNA evidence was accordingly admitted in evidence and the appellant was found guilty by the jury, as described earlier in this judgment.
22. The appellant applied for leave to appeal to the Court of Criminal Appeal on 20 specific grounds. The first two grounds of appeal related to the issue as to whether a sample could be taken from the appellant other than in accordance with the Act of 1990. 23. Court of Criminal Appeal The Court of Criminal Appeal considered the Act of 1990. It held:- "It would indeed be extraordinary if the Oireachtas contemplated that any forensic sample freely and voluntarily provided by a person in custody and then forensically examined by the Gardaí which was lawful before the passing of the Act should be considered unlawful after the passing of the Act without any express provision to that effect, even though it was provided without any element of coercion and when the consequences of the refusal were nil from the point of view of an accused. The Act creates a distinct statutory regime fundamentally different in nature and consequences from the gathering of evidence under common-law rules or powers and does not have the effect of abolishing the right or faculty of Gardaí to take or accept forensic samples from persons in custody that are voluntarily provided. It is an extension of the law rather than an abrogation of the existing law. Although the learned trial judge decided that the provisions of the Act of 1990 did not apply to the circumstances of this case from a different legal perspective the end result is the same. Since the Act does not apply and the blood sample was provided voluntarily he was bound to admit the relevant evidence. In conclusion the Court is of the view that the Act does not purport to abolish expressly or by implication the possibility of the Gardaí to receive from persons in custody a forensic sample, such as blood, voluntarily provided." 24. Context The position of the appellant should be considered in its context. The appellant was being detained pursuant to s.4 of the Criminal Justice Act, 1984. It was in that situation that he was asked to give his consent to voluntarily provide a blood sample. This brings us back to the question posed - whether in such circumstances the appellant could give his consent voluntarily, or whether this was prohibited by the Act of 1990. 25. Powers under Criminal Justice Act, 1984 The powers of the Garda Síochána, detailed in s.6 of the Criminal Justice Act, 1984, are as follows:- "6 . —(1) Where a person is detained pursuant to section 4 , a member of the Garda Síochána may— (a) demand of him his name and address; (b) search him or cause him to be searched; (c) photograph him or cause him to be photographed; (d) take, or cause to be taken, his fingerprints and palm prints; (e) make or cause to be made any test designed for the purpose of ascertaining whether he has been in contact with any firearm (within the meaning of the Firearms Acts, 1925 to 1971) or with any explosive substance (within the meaning of the Explosive Substances Act, 1883) and for that purpose take swabs from his skin or samples of his hair; (f) seize and retain for testing anything that he has in his possession." Sections 6(1) - (4) were modified by the Criminal Justice (Drug Trafficking) Act 1996 s.5. The Act of 1996 was commenced by the Criminal Justice (Drug Trafficking) Act 1996 (Commencement) Order 1996. Section 6 of the Criminal Justice (Forensic Evidence) Act 1990 repealed s.6(1)(e) of the Criminal Justice Act, 1984. The Criminal Justice (Forensic Evidence) Act 1990 (Commencement) Order 1992 brought that Act into operation on the 5th June, 1992.

Section 6(2) of the Act of 1984 mandates that the powers in s.1(c) and 1(d) shall not be exercised except with the authority of a member of An Garda Síochána not below the rank of Superintendent. Subsection (4) of s.6 provides that any person who obstructs or attempts to obstruct any member of An Garda Síochána or any other person acting under the powers in conferred by subsection (1) or fails or refuses to give his name and address, or gives a false or misleading name or address, shall be guilty of an offence. Thus the Criminal Justice Act, 1984 expressly provides powers to An Garda Síochána in relation to the taking of information or certain identifying samples from a detained person 26. The Act of 1990 The Act of 1990 is at the core of this case. Thus it requires to be construed carefully. The Act of 1990 is described in the long title as "an Act to amend and extend the law to authorise the taking of bodily samples for forensic testing from persons suspected of certain criminal offences". Thus it is an Act to "amend" the law. The word "amend" indicates a change in the law. In addition, it is an Act to "extend" the law, which suggests a development of the law. 27. Persons The Act of 1990 defines the persons to whom the Act applies. The long title of the Act of 1990 refers to "persons suspected of certain criminal offences". However, the sections of the Act, which state the law, are more specific. Section 2(1) provides that it applies to a person in custody under the provisions of s.30 of the Offences against the State Act, 1939 or s.4 of the Criminal Justice Act, 1984. Also s.2(2) applies the statute to a person in prison. Therefore, the persons to whom the Act of 1990 may apply are limited. (Section 2(1) of the Act of 1990 has been amended by the inclusion of s.2 of the Criminal Justice (Drug Trafficking) Act, 1996).

28. It is clear that the "appellant" could qualify as a "person" under the Act of 1990, as he was in custody under s.4 of the Criminal Justice Act, 1984.
29. However, the procedures under s.2 of the Act of 1990 were not utilised. The common law was applied. The appellant consented to the giving of a sample, having been cautioned in the terms set out earlier in this judgment, which was accepted by the learned trial judge, and admitted in evidence. 30. Prison Where the person is in prison the Act of 1990 further requires that the sample sought be required in connection with an offence other than the offence in respect of which he is in prison or an offence which he could be convicted on indictment. Also, the sample required should be in connection with an investigation of an offence under the Offences Against the State Act, 1939 or an offence which is a scheduled offence under Part V of that Act or an offence to which s.4 of the Criminal Justice Act, 1984 applies. This aspect of the Act is not in issue. Just for completeness I note that s.2(3) of the Act of 1990 was amended by s.3(a) of the Criminal Justice (Drug Trafficking) Act 1996. 31. Consent It is noteworthy that under both the Act of 1990 and the common law, the consent of a person is required. The facts of this case illustrate the giving of consent under common law.
32. The Act of 1990 established a scheme for the giving of certain samples. It established a specific system for the giving of consent. Is the scheme mandatory? I shall address this question later in the judgment. However, for the purpose of this judgment the consent is not

in issue. 33. Power to take or cause to be taken Section 2 of the Act of 1990 gives power to members of An Garda Síochána to take, or cause to be taken, bodily samples. It provides:- "2. —(1) Subject to the provisions of subsections (4) to (8) of this section, where a person is in custody under the provisions of section 30 of the Offences against the State Act, 1939 , or section 4 of the Criminal Justice Act, 1984 , a member of the Garda Síochána may take, or cause to be taken, from that person for the purpose of forensic testing all or any of the following samples, namely— (a) a sample of—

- (i) blood, (ii) pubic hair, (iii) urine, (iv) saliva,
- (v) hair other than pubic hair, (vi) a nail, (vii) any material found under a nail, (b) a swab from any part of the body other than a body orifice or a genital region,
- (c) a swab from a body orifice or a genital region,
- (d) a dental impression,

(e) a footprint or similar impression of any part of the person's body other than a part of his hand or mouth" (This section was amended by s.3 of the Criminal Justice (Drug Trafficking) Act, 1996 by substituting "section 4 of the Criminal Justice Act, 1984 or section 2 of the Criminal Justice (Drug Trafficking) Act, 1996" for "or section 4 of the Criminal Justice Act, 1984"). Subsections (4) to (8) set out requirements to be met by An Garda Síochána before they take, or cause to be taken, a sample. I shall address them later in the judgment. Section 2(1) identifies the persons to whom the Act of 1990 may relate and states that "a member of the Garda Síochána may take, or cause to be taken" from that person, samples. This is an enabling provision. It does not state that any other process is amended or abolished. It does not state that these provisions are in place of any other scheme. The scheme is extended also to a person in prison, but is expressly limited to the offences for which it may be obtained. Section 2(2) provides:- "(2) Subject to the provisions of subsections (3) to (8) of this section, where a person is in prison, a member of the Garda Síochána may take, or cause to be taken, from that person for the purpose of forensic testing all or any of the samples specified in subsection (1) of this section.

- (3) The power conferred by subsection (2) of this section shall only be exercisable— (a) where the sample to be taken is required in connection with an offence other than the offence in respect of which the person is in prison or an offence of which he could be convicted on an indictment alleging that offence, and (b) where the sample to be taken is required in connection with an investigation in respect of the commission of an offence under the Offences against the State Act, 1939 , or an offence which is for the time being a scheduled offence for the purposes of Part V of that Act or an offence to which section 4 of the Criminal Justice Act, 1984 , applies." (This too is amended by s.3 of the Criminal Justice (Drug Trafficking) Act 1999.) 34. Further Parameters The parameters of the scheme are further stated in s.2(4) to s.2(8). The scheme is detailed. Authorisation is required of a member of the Garda Síochána not below the rank of Superintendent, consent in writing, suspicion of reasonable grounds and that the sample will tend to confirm or disprove that person's

involvement. Specific information is required to be given to the person of the nature of the offence suspected, the authorisation, and its grounds. Thus s.2(4) provides:- "(4) A sample may be taken under this section only if— (a) a member of the Garda Síochána not below the rank of superintendent authorises it to be taken, and (b) in the case of a sample mentioned in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of subsection (1) of this section, or in paragraph (c) or (d) of the said subsection (1) , the appropriate consent has been given in writing.

- (5) An authorisation to take a sample under this section shall not be given unless the member of the Garda Síochána giving it has reasonable grounds— (a) for suspecting the involvement of the person from whom the sample is to be taken—
 - (i) in a case where the person is in custody, in the offence in respect of which he is in custody, or (ii) in a case where the person is in prison, in the commission of an offence under the Offences against the State Act, 1939 , or an offence which is for the time being a scheduled offence for the purposes of Part V of that Act or an offence to which section 4 of the Criminal Justice Act, 1984 , applies, and (b) for believing that the sample will tend to confirm or disprove the involvement of the person from whom the sample is to be taken in the said offence.
- (6) Before a member of the Garda Síochána takes, or causes to be taken, a sample under subsection (1) of this section, or seeks the consent of the person from whom the sample is required to the taking of such a sample, the member shall inform the person— (a) of the nature of the offence in which it is suspected that that person has been involved,
 - (b) that an authorisation has been given under subsection (4) (a) of this section and of the grounds on which it has been given, and (c) that the results of any tests on the sample may be given in evidence in any proceedings.
- (7) An authorisation under subsection (4) (a) of this section may be given orally but, if it is given orally, it shall be confirmed in writing as soon as is practicable.
- (8) A sample of a kind specified in subparagraph (i) or (ii) of paragraph (a) of subsection (1) of this section or in paragraph (c) of the said subsection (1) may be taken only by a registered medical practitioner and a dental impression may be taken only by a registered dentist or a registered medical practitioner. 35. Obstruction The Act creates an offence of obstruction. If any one obstructs the process they may be committing an offence. Section 2(9) provides:- "A person who obstructs or attempts to obstruct any member of the Garda Síochána or any other person acting under the powers conferred by subsection (1) of this section 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 12 months or to both." The terms of this section are very similar to s.6(4) of the Criminal Justice Act, 1984. It is clearly a subsection which may be used by the D. P. P. 36. Appropriate Consent under the Act The Act of 1990 deals expressly with the consent appropriate to persons of different ages. Section 2(10) provides:- "In this Act "appropriate consent" means— (a) in the case of a person who has attained the

age of 17 years, the consent of that person,

- (b) in the case of a person who has not attained the age of 17 years but has attained the age of 14 years, the consent of that person and of a parent or guardian of that person, and
 - (c) in the case of a person who has not attained the age of 14 years, the consent of a parent or guardian of that person." (Section 2(10)(a) has been amended by Regulation 4, Appendix A of the Criminal Justice (Forensic Evidence) Act 1990 Regulations 1992, S. I. No. 130 of 1992). 37. Inference Much of the Act of 1990 established a system which envisages significant regulation which may be construed as being to the advantage of a person in custody or prison, for their protection. However, there is also an aspect of this legislation which may be negative to an accused. The Act of 1990 may enable inferences to be drawn from a refusal to give a sample. Such a statutory inference may be detrimental to an accused. In essence, s.3 of the Act of 1990 states that where a consent required under s.2 is refused without good cause the court may draw such inferences, if any, from the refusal. The refusal may, on the basis of such inference, be treated as amounting to corroboration of any evidence in which the refusal is material, but a person may not be convicted of an offence solely on such inference. This is an important amendment and extension of the law. It creates an exception to the rule that a suspect ought not to be obliged to provide evidence which may incriminate him. This statutory amendment and extension of the law may be detrimental to an accused, should he refuse to give consent, as that refusal may be used in court against him. This does not exist in the common law. No such evidence may be given of a refusal to give a sample under common law. Nor may any inference be drawn from such a refusal. Nor may it be used as corroboration. 38. Penal Statute The Act of 1990 may have significant negative consequences for a relevant person. Thus it should be construed strictly.
39. " Powers" under s.2(11) Section 2(11) of the Act of 1990 states:- "The powers conferred by this section are without prejudice to any other powers exercisable by a member of the Garda Síochána." What does this mean? It refers to the "powers" conferred by this section. This section refers to the power to take, or cause to be taken, samples within a statutory scheme. Thus these powers are without prejudice to any other powers exercisable by a member of the Garda Síochána. They may refer to the powers of the Garda Síochána across the whole panoply of our system of investigation. The issue was referred to by the Court of Criminal Appeal, as follows:- "At this point it should be said that the learned trial judge, in his ruling admitting the evidence in issue did so principally on the basis that s. 2(11) of the Act of 1990 in stating that the powers conferred on the Gardaí under the Act were without prejudice to other powers exercised by them, meant that the 'power' of the Gardaí to invite persons to voluntarily provide a blood sample applied in this case and therefore were unaffected by the provisions of the Act. This point is mentioned now because counsel for the D. P. P., at the hearing of this application, stated that he was not relying on the subsection as a section which saved a specific 'power' of the Gardaí to take such a sample. He relied generally on the lawfulness of a request of persons in custody to voluntarily provide a sample and it being permissible to take it when the request is voluntarily acceded to. Counsel submitted that the

Act of 1990 did not affect the power or right of the Gardaí to take a blood sample when voluntarily given." A similar approach was adopted by counsel for the D. P. P. in this Court.

40. This statutory regime makes provision for a power, where a person is in custody under specified statutes, for a member of An Garda Síochána to take, or cause to be taken, from a person, for the purpose of forensic testing, the specified samples. It relates solely to persons in custody or in prison as specified in legislation. It provides that a member of An Garda Síochána "may" take or cause to be taken the samples. 41. Safeguards for the person The Act provides safeguards for the person. These are essentially to be found in subsections (4) to (8) set out previously in this judgment. (i) Thus a sample may be taken under the section only if it is authorised by a member of An Garda Síochána not below the rank of Superintendent, and, in the case of specified samples (which are particularly intrusive) an appropriate consent is required to be given in writing. (ii) Further, an authorisation to take a sample under this section shall not be given unless the member of An Garda Síochána has reasonable grounds for suspecting the involvement of the person from whom the sample is to be taken, where the person is in custody, in respect of the offence on which he is in custody. Or, if the person is in prison, in the commission of an offence under the Offences Against the State Act, 1939, or an offence which is for the time being a scheduled offence for the purpose of Part V of that Act or an offence to which s.4 of the Criminal Justice Act, 1984 applies. (iii) In addition to the suspicion mentioned above, the member of An Garda Síochána is required to believe that the sample will tend to confirm or disprove the involvement of the person from whom the sample is to be taken in the said offence. (iv) Before a member of An Garda Síochána takes the sample or seeks the consent of the person, he is required to inform the person:-
- (a) of the nature of the offence in which it is suspected the person is involved,
 - (b) that an authorisation has been given, and the grounds on which it has been given, and
 - (c) that the results of any tests on the sample may be given in evidence in any proceedings.
- (v) It is required that a medical practitioner or a dentist take certain specified samples. (vi) Reference is made to "appropriate consent", enabling a person of 17 years to give consent, but special provisions are made for younger persons. These are details of the scheme which may provide safeguards for a person. 42. Regulations The Criminal Justice (Forensic Evidence) Act 1990 Regulations 1992, came into operation on the 5th June, 1992. Very specific requirements are set out in the regulations. Once again the matter is dealt with in a detailed fashion. A record of information given under s.2(b) of the Act of 1990 is required, recording the giving of the information, the name and rank of the member of An Garda Síochána who gave it, and the date and time when it was given, and the entry must be signed by the person making it. There is also required to be a record of the consent to the taking of the sample, or of the refusal of consent. The member in charge is required to record the giving or refusal of consent, together with the date and time. Where consent is given the document containing it shall be attached to the custody order or prison record. The member

in charge is required to record the following particulars on the custody record or prison record:-

- (a) the name of the person from whom the sample was taken,
 - (b) the offence in respect of which the sample was taken,
 - (c) the nature of the sample,
 - (d) the name of the person who took the sample,
 - (e) the date and time the sample was taken and the manner in which it was taken, and the entry shall be signed by the person making it. Forms are set out to be used for the purpose of providing a record. Each is required to be attached to the custody or prison record of the person concerned. These forms are detailed. The first relates to a person aged 17 years or over. Forms are provided also for consent by a person aged 14, 15 or 16 years, and for the consent of his parent or guardian, to the taking of a sample from him; and for consent of a parent or guardian of a person aged less than 14 years to the taking of a sample from him.
- 43.

Submissions

Written submissions were filed on behalf of the appellant and of the D. P. P. The Court also had the benefit of oral submissions on the issues of law before the Court, from Mr David Goldberg S. C., on behalf of the appellant and from Mr Michael Durack S. C. on behalf of the D. P. P. 44.

Decision A new era in human knowledge dawned with the discovery of DNA. Generally, this had an effect in many areas. Specifically, from the information gained of DNA, forensic scientists have been able to use DNA in samples to obtain a DNA profile and so to identify a person, or to exclude a person, from a crime scene. This has brought significant new evidence to trials, indeed sometimes such evidence may be the cornerstone of a trial.

- 45. The primary question of law in issue on this appeal, certified by the Court of Criminal Appeal, is set out in paragraph 2 above and relates to the obtaining of a sample so that DNA may be analysed and evidence of the DNA used in trial.
- 46. The taking of a sample is an invasive act upon a person. It raises issues including bodily integrity, human dignity, and the right not to incriminate oneself. These are matters of constitutional importance and require constitutional protection. Where consent is given, as it was here, the matter moves on and the issue is not whether or not there was consent, but what is the applicable law?
- 47. Under our common law it has long been accepted that members of An Garda Síochána may obtain samples from a person if consent is given voluntarily. However, that is not the issue here. At issue here is the effect of the Act of 1990 on the common law. 48. Comparative Law The Court was referred to the law of other states. However, I have not found it to be helpful.

(i) Reference was made to the Canadian case *R v. Borden*

[1994] 3S. C. R 145. The facts there were entirely different. While the blood sample was taken from an accused with consent the police failed to advise him of the predominant purpose for which they wanted the sample - an offence other than the one for which he was in custody. The issue was thus one of the information given to an accused. That is not in issue on this appeal. In *R v. Borden* Iacobucci J. stated:- "In this case, the key evidence necessary to the Crown's case was obtained from the respondent in circumstances where he was completely uninformed about the main purpose of the police in requesting it from him. Therefore, regardless of how the evidence is classified, its admission would render the trial unfair." The facts of that case are entirely different to those of this case, where there was found by the trial court to be an informed consent. (ii) Reference was made also to *R v. Stillman*, [1997] 1 S. C. R. 607, the Supreme Court of Canada considered a case where DNA evidence had been taken. An accused, 17 years old, had been arrested for the murder of a teenage girl. At the police station the accused's lawyers informed the police by letter that the accused was not consenting to provide any bodily samples, including hair and teeth imprints, or to give any statements. Once the lawyers left, police officers took hair samples under threat of force. Plasticine teeth impressions were also obtained. The accused was subsequently released, but arrested again several months later. At that time a dentist took new impressions of the accused's teeth without his consent and more hair was taken from him, as well as a saliva sample and buccal swabs. The trial judge held that the evidence was obtained in violation of s.8 of the Canadian Charter of Rights and Freedoms, but held that it was admissible. The accused was convicted of murder. The majority of a Court of Appeal upheld the trial judge's ruling. The Supreme Court of Canada held that the appeal should be allowed and a new trial ordered at which the hair samples, buccal swabs and dental impressions should be excluded. McLachlin J. dissented on the review of the balancing act to be done by a trial judge when evidence was obtained illegally pursuant to the Charter. The facts are entirely different to the matter here. There was no consent given. The evidence was obtained contrary to the Charter. Reference was made to a recent amendment of the criminal code in Canada to create a warrant procedure in Canada for the seizure of certain bodily substances for the purpose of DNA testing. Speaking of Canadian law Cory J. stated, in reference to the new system:- "If this type of invasive search and seizure came within the common law power of search incident to arrest, it would not have been necessary for the government to have created a parallel procedure for the police to follow. In my view, it would be contrary to authority to say that this is no more than a codification of the common law." Reference was made to a situation where no consent was given. In this case consent was given. Thus it is not a case of determining whether the taking of such samples contrary to consent is legal. Any analysis in this State would start with issues of bodily integrity, human dignity, privacy and issues of self incrimination. I can find no assistance in this judgment for the analysis required in this case. (iii) Reference was made also to *The Queen v. Ireland*

[1970] 126 C. L. R. 321 of the High Court of Australia. However, in that case the evidence was obtained illegally, without the informed consent of the accused, and the Court addressed the balancing act to be applied when considering whether evidence obtained by means of unlawful or unfair acts should be admitted. The issue in this case is different, and the applicable law is different. (iv) While I have considered the cases to which the Court was referred I have found that they are no assistance to this case. This appeal concerns the construction of a statute, the Act of 1990, and the issue revolves around that Act. 50. Conclusion on s.29 application There is no doubt that the common law enables the taking of samples from a person with their consent. The question is whether the common law was ousted by the Act of 1990? Whether the Act of 1990 supersedes the common law? Or, whether the Act of 1990 runs parallel to the common law?

51. This is not a case of an improper policy. The D. P. P. advised the Garda Síochána. It was an interpretation of the Act of 1990. The issue on this appeal is whether that interpretation was correct. This depends on the construction of the Act of 1990. As has been set out previously in this judgment, the Act of 1990 is a detailed piece of legislation.
52. However, it is noteworthy that there is no section in the Act of 1990 which explicitly states that the Act of 1990 only shall apply to the specified persons in custody or in prison.
53. There is no section of the Act of 1990 which states expressly that the common law is ousted by the statute.
54. There is no section of the Act of 1990 which states expressly that the common law is preserved by the statute.
55. There being no express intent of the Oireachtas in the Act on this issue it is a matter of construing the Act of 1990 to determine the intent of the legislature.
56. The intent of the Oireachtas is best expressed in the words of the Act. It is important therefore to construe those words to find the intent.
57. The common law approach to obtaining information by consent is well established. It is a fundamental aspect of the approach to investigating crime. It is a practical approach. Any alteration to such a fundamental aspect of criminal investigation would require a clear expression of an intent to change. No such approach is apparent from the words of the Act.
58. The Act of 1990 in s.2(11) expressly states that the powers conferred by this section are without prejudice to any other powers exercisable by a member of the Garda Síochána. This section confers powers to take, or cause to be taken, samples, within the scheme provided. It is a matter of construing the subsection to determine to what this reference is made. It expressly retains powers of the Garda Síochána. By inference it is referring to the establishment of a scheme which does not alter the powers of the Garda Síochána. This express and implied construction indicates an intent to establish a new legislative scheme, but not to change existing law.

59. Consequently the common law remains unchanged - but to what extent? Clearly it continues to apply in situations not specifically referred to in the Act of 1990.
60. One could envisage the voluntary giving of samples by many persons in an area in reaction to a crime which has been committed locally: a community response. The common law enables a practical and efficient way to obtain samples, with consent, from the local population.
61. The legislative scheme is clear and established in plain words.
62. There are detrimental consequences to a 'person' under the Act of 1990. For example, the 'inference' which may be raised at the trial, and upon which a jury may rely for corroboration. Also there is the possibility of the offence of obstruction under s.2(9). Therefore, to apply such a scheme in the absence of a clear mandatory requirement under the statute would be a step too far. It would be moving from the judicial into the legislative power. The intent of the Oireachtas should be perceived from the words in the statute. If they are not clear then the benefit, in a penal section, should be given to an accused. The possibility of such an inference being raised is clearly not to the benefit of an accused. Nor is the offence of obstruction. It should also be noted that if the common law applies and there is an issue as to the "consent", which is not unusual at trial, then the voluntary basis of the consent is a matter of proof for the D. P. P. This may be a heavier burden for the D. P. P. than the paperwork which is required to be produced under the Act of 1990.
63. I am satisfied that the Oireachtas did not intend to exclude the common law when it passed the Act of 1990. I am satisfied that the common law may also be applied to a person detained or in prison as referred to in s.2 of the Act of 1990. There is no express intent of the Oireachtas to exclude this application of the common law. There is no express mandatory application of the scheme to all persons detained in the manner referred to in the Act of 1990. Consequently to interpret the scheme as compulsory would not flow from the plain words of the Act. Such an interpretation would be a legislative extension of the Act of 1990.
64. The Act of 1990 was a statute to add to the law and to create a new scheme. This scheme exists in tandem with the common law. The Act of 1990 provided an alternative. Consequently it was open to the Garda Síochána to use the common law in the circumstances of this case. Thus I would answer the question posed in the affirmative. 65. Other Grounds On behalf of the appellant other grounds of appeal were also raised, having been permitted on foot of a motion brought previously to the Court. Both written and oral submissions were advanced.
66. Mr Keane, B. L. brought two grounds of appeal specifically to the attention of the Court. The first ground he raised was that the trial court:- "Failed to give a direction (in particular in relation to Counts other than those which relied on DNA evidence) to the Defence on the points raised at the close of the prosecution case (and in particular the lack of evidence to corroborate the DNA evidence in the case) and failed to correctly and adequately charge the jury regarding corroboration required in cases of this nature." Reference was made to The

People (Director of Public Prosecutions) v. M. K.

[2005] 3 IR 423 , and the Court's attention was drawn to the charge of the trial judge and to the submitted absence of a proper definition of corroboration. However, there was no requisition of this point at the trial. This may well have been a tactical decision. But whatever the reason, the absence of a requisition is a critical factor. The Court of Criminal Appeal addressed the issue of the absence of a requisition fully. It was stated:- "Towards the end or latter part of the trial judge's charge, the jury were allowed to go to lunch and between that point and the resumption of the charge a number of submissions were made by counsel for the defence in relation to the charge. Moreover at the conclusion of the charge itself a number of requisitions were made and the jury were recalled and recharged in relation in particular to the evidence of Mr William Boyce and the alibi which the defence contended this gave to the accused in respect of one of the offences. Secondly, the submission is outside the ambit of the grounds set out in the Notice of Appeal and this Court must address those grounds only. Thirdly, this Court has consistently stated over many years that it is the duty of counsel for the defence (and indeed the prosecution) to draw to the attention of the trial judge any deficiencies which they consider to exist in relation to the charge to the jury. If the defence are of the view that deficiencies which they consider to exist in relation to the charge are so grave or extensive as not to be capable of being corrected by redirecting the jury (such as that it was so biased in favour of the State and against the defence that the making of requisition would be a fruitless exercise), the appropriate and proper approach of counsel for the defence is to seek to have the jury discharged on those grounds. Should the trial judge decline to do so, then the appropriate grounds can be set out for an appeal. In this case the defence had every opportunity to make such requisitions regarding the charge as it thought appropriate. It did make certain requisitions and these were dealt with by the learned trial judge as he thought appropriate. No requisition having been raised with the trial judge concerning his direction to the jury on the question of corroboration the Court is doubtful, in the circumstances of the case, whether it is a question which is of such fundamental importance in the circumstances of the case that it should address the matter in any case. Notwithstanding those concerns it may be said that this was a case in which the trial judge was not bound to give a direction to the jury on the issue of corroboration having regard to the provisions of s.7 of the Criminal law (Rape) (Amendment) Act, 1990. There was no witness who purported to contradict the complainant's evidence that she had been sexually assaulted and she did not, in her evidence before the Court, purport to identify the accused as the person who assaulted her but the trial judge was nonetheless very careful to point out to the jury that the onus at all times rested on the prosecution to prove their case beyond reasonable doubt and while they were entitled to rely on her evidence as evidence that she was sexually assaulted they were not bound to do so." The Court of Criminal Appeal quoted the direction of the learned trial judge, and then concluded on this issue:- "In his charge to the jury the learned trial judge pointed out that such matters as the evidence of immediate complaint

to others concerning the assaults which the complainant said had been committed against her was not evidence which corroborated the case against the accused but was evidence which was consistent with the fact that she had been assaulted. At one point in the above passage he used the word corroboration. It is clear from its context and the context of the charge relating to the facts of the case as a whole that he was not conveying that the evidence in question was corroboration of any allegation of guilt on the part of the accused. That was a question which they had to come to later and separately and that he was still referring to matters which were simply consistent. If anything the charge on this matter was in ease of the defence. In any event the Court is satisfied that there was no misdirection of the jury nor did it give rise to any unfairness or injustice in the case." I would confirm the approach of the Court of Criminal Appeal. Nor do I consider there are any other grounds upon which to allow an appeal on this aspect of the appeal, in all the circumstances of the case.

67. Counsel also raised specifically that the trial court:- "Erred in law regarding the ruling on Section 5 of the Criminal Evidence Act, 1992 (regarding the Section 6 Certificate) grounding McDonnell's evidence about the English Database used for DNA samples in general and erred in law in allowing evidence of databases to be used which were not properly validated." It was pointed out that objections had been made at the trial. Mr Birmingham, S. C. explained at the trial that he did not seek to put any of the databases into evidence. He was simply going to ask Mr McDonnell to give an expert opinion as to the significance of particular matters. This issue was considered carefully by the Court of Criminal Appeal and I would adopt the analysis of that court. This aspect of the argument by the appellant could have been further developed by experts of his own in a challenge at the trial. That was not done. I am satisfied that no case has been made out to allow this ground of appeal. 68.

Conclusion

In conclusion, I would answer the question raised on this s.29 appeal in the affirmative. Currently two systems exist for the taking of such samples. The common law is not ousted by the Act of 1990. I would not allow the appeal on this or any of the other grounds raised. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/ie/cases/IESC/2008/S62.html>

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/ie/cases/IESC/2008/>

CASE PAGE <https://chat.esheria.ai/case-law/ireland/dpp-v-boyce-2008-iesc-62-18-november-2008>

Prepared on 25 October 2026 · Esheria