

IRELAND / JUDGMENT

# DPP -v- McCrea [2010] IESC 60 (09 December 2010)

**[2010] IESC 60**

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[2010] IESC 60 Supreme Court Record Number: 82/09 High Court Record Number : 2008 1031 SS Date of Delivery: 09/12/2010 Court: Supreme Court Composition of Court: Murray C. J., Hardiman J., Fennelly J., Macken J., Finnegan J. Judgment by: Hardiman J. Status of Judgment: Approved Judgments by Link to Judgment Result Concurring Hardiman J. Link Appeal dismissed - affirm High Court Order Murray C. J., Fennelly J., Macken J., Finnegan J. Outcome: Dismiss THE SUPREME COURT Murray C. J. 82/09 Hardiman J. Fennelly J. Macken J. Finnegan J. IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1857, AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961 Between: THE DIRECTOR OF PUBLIC PROSECUTIONS AT THE SUIT OF GARDA BRIAN LAVELLE Prosecutor/Appellant and PAUL McCREA Defendant/ Respondent JUDGMENT of Mr. Justice Hardiman delivered the 9th day of December, 2010. This is an appeal by the prosecutor, the Director of Public Prosecutions, from the judgment and order of the High Court (Edwards J.) delivered on the 28 th January, 2009, on a Case Stated by way of appeal from the judgment of the District Court (District Judge Watkin) whereby she dismissed the charge brought against the defendant, Mr. McCrea.

## Background.

The charge against Mr. McCrea which was dismissed on the 23 rd January, 2008, was as follows: “On the 09/06/2007 at Blanchardstown Garda Station in the said District, Court area of Dublin Metropolitan District, being a person arrested under s.49(8) of the Road Traffic Act 1961, having been required by Garda Gillian Synnott, a member of An Garda Síochána, at Blanchardstown Garda Station, pursuant to s.13(1)(A) of the Road Traffic Act, 1994 to provide two specimens of your breath, did REFUSE to comply forthwith with the said requirement. Contrary to s.13(2) of the Road Traffic Act, 1994 as amended by s.23 of the Road Traffic Act, 2002.” At the trial at the District Court both parties were professionally represented. The nub of the case. As appears from

the charge set out above, the substance of the charge against the defendant was that he refused forthwith to provide breath specimens in the garda station. These specimens, which are inputted into a special analysis machine, are known as evidential breath specimens and may be accepted by a court as evidence of driving with excess alcohol. It was essential to the making of a valid demand to produce these specimens that the defendant, the person on whom the demand was made, should, at the time the demand was made, have been a person who had been arrested pursuant to the relevant power and brought to a garda station. There are other requirements as well but, except as set out below, they are not relevant here. In the case as it developed before District Judge Watkin, there was evidence of an arrest and evidence that the defendant was brought, in custody, to the garda station. This happened at 2.18am on the 9 th June, 2007. According to the Case Stated by the learned District Judge what happened next was as follows: “At 2.21am the accused was given his Notice of Rights and Form C72 was read over and explained to him by Garda William Murray, attached to Blanchardstown Garda Station. The accused refused to sign for his Notice of Rights. Garda Lavelle testified that the accused had not requested to speak to a solicitor at this stage despite the fact that it was put to the garda that the evidence of the accused would be that he had made such a request at that stage.” It appears that there was then some delay because there was no garda in the station trained to operate the intoxilyser machine. Eventually a Garda Synnott, who had been so trained arrived and was introduced to the accused at 2.50am. According to the Case Stated: “She noted the temperature and humidity levels in the intoxilyser room were within required perimeters. Garda Synnott entered her details into the intoxilyser machine and made a requirement of the accused under s.13(1)(A) of the Road Traffic Act, 1994 at 2.54am. Garda Synnott explained to the accused the penalties for refusing to give a sample of his breath as required under s.13(1)(A). Garda Synnott stated that the accused replied that he wanted to speak to a solicitor. Garda Synnott stated that she informed the accused that he could speak to a solicitor as soon as he had complied with her requirement . Garda Synnott testified that she reminded the accused that he was obliged by law to provide a sample of his breath and that he would be able to talk to his solicitor afterwards. Garda Synnott testified that she explained to the accused in ordinary language that he was required to provide a breath sample under the law and that his solicitor would tell him the same thing... Under cross-examination and in response to questions from me, Garda Synnott explained that the reason she did not accede to the request of the accused for access to a solicitor was that she believed she could only make one request pursuant to s.13(1)(A) of the Road Traffic Act, 1994, and that if she aborted the process midway through in order to provide the accused with an opportunity to speak to his solicitor, she would be precluded from making any further request under s.13(1)(A).” The Case Stated then recorded that the defendant’s lawyer “sought a direction on the basis that the accused had been denied a right of reasonable access to a solicitor and that this had, in consequences, produced the evidence relied on by the State in prosecuting the case”. At para. 17 of the Case Stated the learned District Judge recorded a concession by the representative of the State that Garda Synnott had been in error in the view she had acted on and that there was nothing to suggest that a garda could only make a request of a suspect on one occasion. Both in the District Court, and on the hearing of this appeal, it was the position of the State, and of the respondent, that Garda Synnott had indeed been in error in this regard and that it would have

been open to her to make a further requirement for a specimen of breath after the interval required to permit the defendant to consult (presumably telephonically) with his solicitor. District Court decision. The learned trial judge recorded her decision at paras. 20 - 24 of the Case Stated as follows: “20. I found that a request to provide a breath sample had been made of the accused and that he had made an immediate request to consult a solicitor. I found that Sgt. Synnott declined this request due to a mistaken belief that she would not be legally entitled to make another request of the accused if she broke the intoxilyser machine’s cycle in order to allow him to consult with a solicitor.

21. I distinguished the Walsh v. Ó Buachalla decision on the basis that it concerned a charge brought under S.49 of the Road Traffic Act 1964, as amended, rather than a charge brought under S.13 of the Road Traffic Act 1994, as amended.
22. I noted that the Custody Regulations and the associated Notice of Rights state that a person is entitled to consult with a solicitor at any time while in custody. I said it was understandable that someone would ask to see a solicitor upon being asked to carry out a particular procedure in a garda station. I said that the aggressive behaviour on the part of the accused occurred after the refusal of access to a solicitor and possibly as a direct result of same refusal. I said there was no reason at law why Sgt. Synnott could not at least have made a phone call to solicitor’s office after the accused made the request to speak to a solicitor.
23. I pointed out that if the accused had been allowed access to a solicitor, the solicitor would, amongst other advices, have advised him to provide a breath sample. The accused would have been advised that, depending on the reading obtained by the intoxilyser machine, he may not be charged at all, or be the subject of a one, two or three year ban as opposed to a four year ban should he fail or refuse to provide a sample. I noted that this was a level of information that Sgt. Synnott was under no obligation to provide, and did not provide, in the instant case.
24. I dismissed the charge against the accused on the basis that he had been denied a right of reasonable access to a solicitor and that the refusal by the accused may have occurred as a consequence of the breach of that right.” What the Gardaí told the defendant. As found by the learned District Judge, a garda read to the defendant, who was a person in custody the contents of Form C72. This is entitled “Information for Persons in Custody”. Under the heading “Legal Advice” it is stated: “ At any time while in custody, you may, if you wish, consult and communicate privately with a solicitor. Any such consultation or communication must take place in the Garda Station, in writing, or by telephone”. (Emphasis added) The defendant was also told that if he did not request the services of a solicitor at the time this right was first notified to him, that fact would not preclude him from doing so later. Source of the right to consult a solicitor. There are a number of sources for the right of a person who is detained by the Garda Síochána to consult with a solicitor. From the point of view of the average lay person in custody the most obvious source is simply what he is told by the gardaí. The gardaí are required to give him information on this

topic by reason of the statutory “Regulations for the treatment of Persons in Custody” (SI 119 of 1987). Insofar as these were relied upon by either side on the hearing of this appeal they provide, omitting irrelevant material: “8(1) The Member in Charge shall without delay inform an arrested person or cause him to be informed -

- (a) In ordinary language of the offence or other matter in respect of which he has been arrested,
- (b) That he is entitled to consult a solicitor... This information shall be given orally. The Member-in-Charge shall also explain or cause to be explained to the arrested person that, if he does not wish to exercise [the right in relation to consulting a solicitor] immediately, he will not be precluded thereby from doing so later. 11(1) An arrested person shall have reasonable access to a solicitor of his choice and be enabled to communicate with him privately.” But the source of the right of a person in custody to consult a solicitor does not depend simply on the statutory instrument cited. It is a right of a constitutional nature as has been quite explicit in Irish Law, and in the law of the European Convention on Human Rights, for a considerable time. A person who is deprived of his liberty and thus reduced to a state of captivity by the State or its agents is so treated following an arrest - a lawful deprivation of liberty usually but not invariably at the hands of the police. Classically, an arrest was solely for the purpose of bringing a person before a court. However, apart from the specific provisions of the Offences Against the State Acts, a series of statutes notably since the 1970s have mandated the arrest of a person for purposes other than bringing him before a court e.g. to search him, to apply forensic or other tests to him, to question him or, as in this case, to produce evidential material by requiring him to exhale into an intoxilyser. It is to be noted that, although this was the specific purpose of the present arrest, it was accompanied by such common features of arrest as (according to the custody record), searching the defendant and later locking him in a cell for a period of hours. It thus cannot be regarded as a merely technical or transient form of detention just for the purpose of getting the defendant very speedily to provide a breath specimen and then sending him on his way. In circumstances where a person is detained in consequence of an arrest, it has been long established that he is entitled to consult with a lawyer. In *D. P. P. v. Buck*

[2002] 2 IR 268 where Keane C. J. said, at p.281: “It would seem in any event to be a logical corollary of the statement of law by this Court in *The Emergency Powers Bill 1976*

[1977] IR 159, i.e. that the detention of a person against his or her will pursuant to a statutory power is permissible only when its constitutional right of reasonable access to a solicitor is observed. It would seem to follow inexorably that his or her detention becomes unlawful as soon as that right is denied.” (Emphasis added) Similarly, in *D. P. P. v. Madden*

[1977] IR 336 O’Higgins C. J. said: “The Court is satisfied that a person held in detention by the Garda Síochána, whether under the provisions of the Act of 1939 or otherwise, has got a right of reasonable access to his legal advisors and that refusal of a request to give such reasonable access would render his detention illegal. Of course, in this context the word

reasonable must be construed having regard to all the circumstances of each individual case and, in particular, as to the time at which access is requested and the availability of the legal adviser or advisers sought.” Factual aspects. In the present case, as may be seen from the Case Stated, the learned trial judge held:

- (a) That the sole reason for refusing the request for a solicitor when it was made, immediately after a statutory requirement had been made of the defendant, was the garda’s mistaken belief that the whole process would be aborted if the procedure were delayed to allow consultation with a solicitor because “she would not be legally entitled to make another request of the accused if she broke the intoxilyser’s machine’s cycle in order to allow him to consult with a solicitor”. This is admitted to be an error but it is, undoubtedly, the source of all the difficulty which has arisen in this case. It must also be recorded that it was admitted to be an honest error, and not one invoked for the purpose of maliciously depriving the defendant of the right of access to a solicitor. In other words, it was no more but also no less than an error made by a member of An Garda Síochána who had been specially trained in the use of this machine and the procedures relevant to it. It will be noted that the commencement of the intoxilyser procedures in Blanchardstown Garda Station had themselves been delayed so as to permit this specially trained garda to arrive from some other location. The statutory provisions are clearly not beyond misinterpretation even after specific training.
- (b) The learned District Judge also held that “there was no reason at law why Sergeant Synnott could not at least have made a phone call to his solicitor’s office after the accused had made the request to speak to a solicitor” and that “it was understandable that someone would ask to see a solicitor upon being asked to carry out a particular procedure in a garda station”. The learned District Judge also held “that the custody regulations and the associated Notice of Rights state that a person is entitled to consult with a solicitor at any time while in custody”. (Emphasis added) The issues. That factual matrix set out above might, conceivably, give rise to a considerable number of legal issues. The scope of such issues was, however, restricted by reason of the fact that the prosecution confirmed that it was not seeking in this case to overturn the exclusionary rule consequent upon a deliberate and conscious denial of constitutional rights, as found in the judgments of this Court in *D. P. P. v. Kenny*

[1990] 2 IR 110, or the position in relation to the legality of a person’s detention when he is deprived of the right of reasonable access to a solicitor as found in *D. P. P. v. Buck*

[2002] 2 IR 268 , which judgment is quoted from above. Instead, the prosecution emphasised the question of whether or not the refusal of a solicitor by Sergeant Synnott was “reasonable, even if mistaken”. This was the prosecution’s first position. In the course of argument, however, Ms. Sunniva McDonagh S. C. for the prosecution submitted that, though Sergeant Synnott was in fact mistaken, it would have been reasonable for her to refuse Mr. McCrea’s request for a solicitor at the time when it was made , even if she knew she would not be debarred from making a second request after an attempt had been made to contact his solicitor and, if the attempt was successful, advice had been taken. It will be observed

that this second position goes much further than the first. These submissions might, perhaps, raise a considerable field for legal argument if they were to be approached in the abstract. There is no doubt that the right of access to a solicitor by a detained person cannot in all circumstances be a right to access “instantly” as Ms. McDonagh put it. Indeed, a solicitor will not generally be instantly available. Neither the solicitor nominated by a person in custody, nor any solicitor, may be available at times such as 2am in the morning. Plainly this cannot indefinitely hold up procedures in the garda station, as was made perfectly clear by O’Higgins C. J. in *D. P. P. v. Madden*

[1977] IR 336. It will be recalled that in his judgment in that case the former Chief Justice emphasised the need to construe the word “reasonable” having regard to all the circumstances of each individual case “and, in particular, to the time at which access is requested and the availability of the legal adviser or advisers sought”. In the present case, however, it appears to me that a salient feature which must be considered in addressing the “reasonableness” of Mr. McCrea’s demand and of its refusal on the sole ground offered, is what the gardaí themselves told Mr. McCrea. Although the right to consult a solicitor in certain circumstances is deprived from principles contained in the Constitution, as the Case Law of this Court over the years has made clear, in this case the defendant was informed by the gardaí not only of his right to consult a solicitor when he arrived in the Garda Station, but of his right to do so at any time while he was in custody there, on the basis of a statutory regulation. It is not contested by the State that there was a breach of the requirements of the statutory regulation but it was contended that the reason for non-compliance given by the garda member concerned was a reasonable one, even if erroneous, as explained in the Case Stated. In these circumstances it is not necessary to consider the ambit of the constitutional right of access to a solicitor and in particular whether it applies to a person who has been arrested solely for the purpose of taking a breath test under the Road Traffic Act. This case can be determined having regard to its own particular facts and the failure to observe the regulatory procedure. In the absence of access to a solicitor, the gardaí themselves were the only source of legal advice available to the Notice Party. They were obliged to advise him about access to a lawyer and this advice was given in unambiguous terms. It was that he was entitled to consult his solicitor at any time during his detention in the garda station and that if he did not avail of the opportunity for access to a solicitor when it was first offered, that fact would not preclude him from exercising it later. This statement of his entitlements was not qualified in any way. The learned District Judge thought it not unreasonable that a person confronted with a demand expressed in statutory, that is in technical legal, terms should then seek a solicitor. There is no need, in my opinion, for this Court to scrutinise that finding, or any other finding of the learned District Judge other than to enquire whether these findings were such as were open to her on the evidence. That is, the question of whether her findings were findings which this Court would itself make on the same evidence simply does not arise. Equally, it must be borne in mind that this is a Case Stated by way of Appeal and not a consultative Case Stated. In the latter species of Case Stated the learned District Judge is entitled to

pose a particular question for the High Court to answer. Under the Appellate procedure, the statutory origins of which are set out on the title page of this judgment, a party, in this case the prosecution, is entitled to apply to the District Judge “to state and sign a case setting forth the facts and grounds of such determination, for the opinion thereon of [the High Court]”. The nature of this jurisdiction is not affected by the terms of s.51 of the Act of 1961. Accordingly it seems to me sufficient to say that, having considered the grounds of the learned District Judge’s decision, which are set out earlier in this judgment, the Court need only say that it was open to the learned District Judge, on the specific facts she found in this case, to dismiss the charge. She was entitled to find that Mr. McCrea was reasonably entitled to rely literally on what the gardaí told him as to when he could take legal advice from a solicitor; entitled to find that a solicitor’s advice would have been of benefit to him and entitled to find that he had not had reasonable access to it. In conformity with the long standing practice of the Superior Courts, it is unnecessary, and would be wrong, to speculate what the result might have been had the facts been slightly different in one way or another and we do not do so. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/ie/cases/IESC/2010/S60.html>

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