THE COURT OF APPEAL

Record No.: 2020/159

Edwards J.

McCarthy J.

Donnelly J.

BETWEEN/

FRANK BRASSIL

PLAINTIFF/APPELLANT

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 23rd day of March, 2021

1. The appellant sought to judicially review the decision of the Eastern Circuit Court to affirm his convictions in respect of road traffic offences in the District Court. The High Court (Gearty J.) refused to grant his application for judicial review and the appellant now appeals against that decision.

2. The appellant was arrested on suspicion of driving under the influence of alcohol at 4:05 a.m. , as recorded on the custody record, on the 2nd September, 2013. He was conveyed to the garda station and arrived at 4:56 a.m. and the arresting Garda sought to test the appellant's breath using an Evidenzer. The Gardaí began the twenty minute period of observation. It transpired however, that there was no key to access the Evidenzer. A doctor was therefore contacted at 5:35 a.m. to take samples from the appellant. The doctor indicated he would be at the station five minutes later, but he did not arrive until 6:30 a.m. The appellant refused to give blood or urine samples and was therefore charged with failing to provide a

sample under s. 12 of the Road Traffic Act, 2010 (as amended). He was also charged with dangerous driving contrary to s. 53 of the Road Traffic Act, 1961 (as amended) based upon the observations by a member of An Garda Síochána of his driving.

The High Court Judgment

3. The appellant claimed that the Circuit Court judge had failed to apply the law as set out in *DPP v. Finn* [2003] 1 I.R. 372 in holding that the appellant was in unlawful custody because of an unexplained delay in having a doctor attend at the station to take the sample.

4. The High Court judgment *Brassil v DPP* [2020] IEHC 328 dealt in a clear and structured manner with the submissions. Gearty J. dealt with preliminary grounds of objection, applied a justice of the case test to considering the implications of failing to satisfy procedural requirements and looked at the substantive claims before her.

5. In her judgment, Gearty J. recites that the respondent had made objection to the granting of the relief on three preliminary grounds. These grounds were delay by the appellant in seeking leave to quash the Circuit Court decision, the appellant's failure to lodge a copy of the court order sought to be quashed before the hearing commenced, as required by the Rules of the Superior Courts and, the failure of the appellant when arguing his case in the Circuit Court to raise the arguments now made in respect of the dangerous driving conviction. As regards this latter point, the focus of counsel's submission in the Circuit Court had solely been in relation to the failure to provide a blood sample for analysis.

6. The trial judge noted that leave had been obtained over five months after the date of conviction, a day after his disqualification period was due to commence. Indeed, the appellant did not serve papers on the respondent within the prescribed time under the order and had to obtain two extensions of time for the same purpose. There was no affidavit to grant an application seeking an extension of time nor was a copy of the impugned order before the court.

7. The trial judge noted that Order 84, r. 21 of the RSC required an explanation for the delay. The applicant had given an explanation but not on affidavit although that is required by the rules. The trial judge noted *"the applicant has referred in written and oral submissions to Christmas, Covid-19, family difficulties of his former solicitor, a death in the family of that solicitor and a final consultation date which was never revealed to the Court, having been left blank in the written submissions."* It should be noted that Covid-19 had no relevance with regard to the failure to seek leave in this case is leave was sought on the 20th May, 2019.

8. The trial judge relied upon *The People (DPP) v. Kelly* [1982] 2 I.R. 90 ("*Kelly")* which is the applicable test for an enlargement of time to in a criminal case. She held that the Court must consider what the justice of the case requires in all the circumstances. While the test for an extension of time in a judicial review is governed by Order 84, r. 21 and the decision in *O'S v. Residential Institutions Redress Board* [2018] IESC 61, the difference, if any, between the two was not a focus of submissions in this case. We will proceed on the basis that the decision in *Kelly* governs this case.

9. Gearty J. held that the reasons offered to explain the delay were weak, combining personal misfortune on behalf of one of the solicitors and the claim that a new solicitor took a different view of the case. The change of advice was pressed as a more pertinent reason supported by references to the former solicitor's letter to explain why the appellant did not immediately seek to review the decision to affirms convictions. The trial judge relied on the decision of Ryan J. in the High Court in *Broe v. DPP & Ors* [2009] IEHC 549 ("*Broe*") which held as follows: -

> *"*73. *The explanation that the issue was only discovered when the new solicitor came into the case does not, in my opinion, materially affect the situation. The solicitor should normally be considered as a single entity not dependent on an individual person. As a general rule, a change of solicitor should not make a*

> *situation better or worse for a party to litigation. The fact that a party's legal advisor did not think at a particular time of a point that later occurred to him is not an excuse for delay in raising it earlier. I consider the change of solicitor from one who did not, for whatever reason, raise the timing of the charge to one who did so to be essentially similar. I do not therefore find that the change overcomes the delay."*

10. The trial judge held that the delay was insufficiently explained. She held that *"in deciding whether or not this is fatal to the application, however, the other arguments in the substance of the case must be considered as the justice of the case, considering all the circumstances, is the overriding factor."*

11. In relation to the absence of the impugned order, the trial judge relied upon Order 84, r. 27 which says that an "applicant may not question the validity of any order, warrant, committal, conviction […] unless before the hearing of the motion or summons he has lodged in the High Court a copy thereof verified by affidavit or accounts for his failure to do so". The trial judge referred to the authority of *Cash v Halpin* [2014] 1 I.R. 328 ("*Cash*") and noted that in applying *Cash* to the present case, it seems that the requirement to lodge a copy of the impugned Order before the Court might not in itself be fatal to an application to review a criminal conviction if the justice of the case requires it. The trial judge stated that *"[i]t will fall to be considered as one more circumstance in the case in which the overriding factor must be the justice of the case as a whole."* She held that in order to consider that, she must consider the substantive argument made, which was that the doctor was so late that the appellant who was originally lawfully detained was, upon the doctor's arrival, in unlawful detention. Therefore, any evidence obtained thereafter was in breach of his constitutional right to liberty and was inadmissible.

12. The trial judge while relying on the test espoused in *The People (DPP) v. J.C.* [2017] 1 I.R. 417, referred to the cases opened by the appellant regarding detention periods in circumstances where there was a delay usually by a doctor, such as *DPP v. Brehon* [2019] IEHC 63 and the Supreme Court decision of *DPP v. Finn.* The appellant submitted that per Hardiman J. in *DPP v. Finn*, specific evidence from a doctor will be necessary where the reasonableness of a delay was challenged and which might *"render a period of time which seemed excessive reasonable."* The appellant argued that this principle should apply to both convictions as while the search for the Evidenzer explained the initial delay, there was no evidence as to what delayed the doctor. The trial judge noted that the latter argument that it applied to both convictions was not made in the Circuit Court.

13. The trial judge then considered the appellant's argument that because of the delay on the part of the Gardaí in securing the Evidenzer and the subsequent delay of the doctor arriving at the station to obtain a sample, the said evidence obtained during the alleged unlawful detention amounts to "fruits of the poisoned tree" and is therefore inadmissible. The trial judge distinguished between the two offences. She held that in respect of the offence of dangerous driving, the convicted was supported by ample evidence, being eyewitness testimony of the prosecuting Garda, that was not obtained during the course of the applicant's detention. The trial judge rejected any suggestion that such evidence was inadmissible. She did so with imagery that is helpful in conveying why this was so:

> "*Nothing about the subsequent detention could alter the nature of the evidence which supported the charge of dangerous driving. The reason to exclude evidence is policy-based in that an apple from a poisoned tree cannot be used, save in circumstances suggested in J.C., 14 in order to discourage State agents from breaching the law they are expected to uphold, i.e. to discourage them from using bad apples. If that is so, this evidence is an orange. It does not come from the same*

tree, so the question as to whether it was poisoned or not, does not arise, and a court can safely convict."

14. Gearty J. went on to cite cases such as *DPP(Ivers) v Murphy* [1999] 1 IR 98, *DPP (McTiernan) v Bradley* [2000] 1 IR 420, [1999] 12 JIC 0901 and *State (Trimbole) v The Governor of Mountjoy* [1985] I.R. 550 (*"Trimbole*"), in holding that, absent a deliberate and conscious violation of an accused's person's rights an illegal process by which the person is brought before a court does not affect the jurisdiction of the court to hear the case. She referred to the facts of *Trimbole* and noted that these facts were a long way removed from "such *colourable devices*, as deliberate breaches of the Constitution on the part of State agents are sometimes called in relevant cases and text". She held that the exclusionary rule was not applicable to the issue of dangerous driving as there was no logical link between the argument that his detention was unlawful and the conclusion that the conviction in respect of dangerous driving was in any way unsafe.

15. Referring to *Devoy v The DPP* [2008] IESC 13, [2008] 4 IR 235, Gearty J. noted that the Supreme Court held that an accused who does not assert his rights does not waive them, but that fact will be taken into account in assessing where the justice of the case lay. The trial judge t observed that the failure to raise this argument at any stage in respect of the dangerous driving was another reason weighing against reviewing that conviction.

16. The trial judge held that the principles in *Lough Swilly Shellfish Growers Co-Operative Society Ltd. & Atlantfish Ltd. v. Bradley & Ivers* [2013] IESC 16 apply to judicial review proceedings and therefore, while an argument that had not been raised in earlier proceedings, might, in the appropriate case, be raised in a judicial review. However, she ultimately held that on the facts of this case, no argument put forward about the doctor's delay in the garda station could taint the evidence that the appellant drove five times around a roundabout to evade the Gardaí and then drove at a speed of 220kp/h before being arrested. She noted that the Circuit

Court Judge imposed the same penalty in respect of the dangerous driving conviction as that imposed for the failure to provide a sample conviction. Even if the issue of illegality of detention had been raised in either the District or Circuit Court, it could not have succeeded in respect of the latter conviction. The sentence would still stand in any event.

17. The trial judge held that due to this conclusion it was unnecessary to consider the delay on the part of the doctor is required. She did however say that it may be helpful to remark that a delay of about an hour has already been characterised in *O'Neill v. McCartan* [2007] IEHC 83 *"as being a good service; if not a very good one"* and she held that this is entirely compatible with Hardiman J's rationale in *DPP v. Finn* to the effect that evidence will be required where a period of time *"seemed excessive".* The trial judge held that at 5:30am, it is difficult to characterise an hour as being excessive and how it could be argued that this delay might constitute a deliberate breach of rights that renders a detention unlawful, even without considering the implications of *DPP v. J.C.* on such a finding.

18. The trial judge rejected the respondent's submission that judicial review was not appropriate as the Circuit Court acted within its jurisdiction in considering the issue of delay in the way it did. The trial judge relied on *Sweeney v. Fahy* [2014] IESC 50 to show that where a case such as the present one, involved a mixed question of law and fact, judicial review can still be an appropriate remedy.

19. The trial judge then restated that the rationale and discussion in the cases of *Broe* and *Cash*, in dealing with the tension between substance and form had led her to these conclusions. She said that the Court had considerable discretion in cases where error or misfortune can excuse what would otherwise be blameworthy delay or other procedural failures. She repeated the overriding consideration that justice must be done in criminal cases. She did however repeat that it was extremely important to abide by procedural rules, including time limits. If

such rules were not enforced strictly, "the resulting chaos would make the justice system utterly unfit for purpose".

20. She carefully considered the exercise of her discretion in the case. She noted that it was only after a full consideration of the facts that the overall justice of the case can be determined. She noted that his liberty was not at stake. She noted that the change of solicitor had been put forward as the main reason for the delay and she also referred to the failure to put the impugned order before the Court. She said that "these reasons alone would not persuade a court to refuse relief if the applicant had an otherwise meritorious claim, his substantive claim is extremely weak in respect of one offence and he has no case in respect of the other. The penalties imposed in respect of both convictions are identical such that, in the unlikely event that he could succeed in relation to the first offence, he is bound to fail in respect of the second. There is no injustice caused by refusing to grant the application for certiorari on the preliminary grounds raised in the circumstances of the case;".

Grounds of Appeal

21. In his notice of appeal, the appellant has set out a number of grounds. However, it was outlined in oral submissions that the main thrust of the argument put forward by the appellant is that:-

(i) the trial judge erred in her refusal to quash the conviction of the appellant in circumstances where no explanation was given as to why there was a delay in securing a doctor to attend the station to obtain a sample. The appellant argues that the conviction should be overturned on the basis that the holding of the trial judge runs contrary to *DPP v. Finn*;

Submissions of the Parties

22. The trial judge ultimately found against the appellant on the basis of the procedural delay on the part of the appellant to bring the application for judicial review within the requisite

time frame and, the fact that the impugned order was not before the Court and relied on *Cash* to that effect. The appellant however did not seek to challenge these findings of the trial judge in its Notice of Appeal but did however allude to them in oral submissions. However, it was raised by the respondent in written submissions and it is on that basis, I shall set out the procedural arguments put forward by both parties and the substantive issues on appeal.

Procedural Issues: Delay and the Absence of the Impugned Order in the High Court

23. The respondent submits that the trial judge was correct in her finding that the reasons offered for the delay in the applicant in bringing judicial review proceedings were weak. The reasons put forward by the appellant was due to the change of solicitor in the case who took a different view of the matter and this therefore explained the later decision to seek relief in the High Court.

24. Further, the respondent submits that the trial judge was correct in her finding that the appellant should have exhibited the impugned order of the Circuit Court that sought to be challenged. The respondent submits that the trial judge was correct in her reliance in *Cash* and that while the absence of the order is in contravention of Order 84 RSC, she still went on to determine the appellant's substantive argument before the court.

25. The appellant did not appeal either of these grounds but however submitted in oral submissions that while the explanation for the delay in making the application was not particularly meritorious, the real issue before this Court is the finding of the trial judge in the substantive issue.

Substantive Issue: The Interpretation of DPP v. Finn

26. The crux of the appellant's submissions is that no explanation is provided by the respondent for the delay by the doctor in arriving at the garda station. The appellant did not focus on the length of the delay in his submissions. Rather, the appellant submits, the *dicta* of Hardiman J. and Murray J. in the Supreme Court in *DPP v. Finn* make it clear that where the

issue of delay is legitimately raised, an *explanation* for the delay and evidence thereof must be provided by the prosecution. According to the appellant, *DPP v. Finn* has established the following principles:-

a. that it is open to the defence in a criminal case to argue that a period of delay which has occurred in the course of detention following arrest is unnecessary and/or unreasonable and as such renders the detention unlawful;
b. where such argument is *bona fide* raised, the prosecution is obliged to adduce positive evidence, which can objectively justify the period of delay in issue;
c. the evidence as adduced must be sufficient to meet the criminal standard of proof beyond reasonable doubt.

27. The appellant submits the principles in *DPP v. Finn* requiring an explanation by the prosecution for the delay were not followed in the Circuit Court and therefore, the Circuit Court Judge acted outside his jurisdiction.

28. The respondent submits that while there is no dispute that *DPP v. Finn* is the governing authority in this case, the respondent disputes the interpretation adopted by the appellant. The respondent submits that while it is indeed the case that there was no explanation for the delay provided by the prosecution, there was, as a matter of law, no requirement to provide one where the Court have made the initial finding that the delay was not unreasonable. Only where the Court makes a finding that the delay is *unreasonable*, should the prosecution be obliged to adduce evidence to objectively justify the delay.

29. The respondent clarified in oral submissions that the appellant in its appeal before the Circuit Court, made an application for a direction on the matter and the Circuit Court judge ultimately made a finding that the delay was not unreasonable and relied on *DPP v. Finn* in that regard. The finding that the delay was not unreasonable meant, as submitted by the respondent, that no requirement to provide an objectively justifiable reason for the delay was

required by the prosecution. The respondent relies on *DPP v. Brehon* to this effect which, the respondent submits, reaffirms *DPP v. Finn.* The respondent submits that a distinction exists between an accused being detained in order to provide a breath sample *via* intoxilyser/Evidenzer and a detention in order to provide a sample of urine or blood. The respondent relies on *DPP v. Brehon* wherein Murphy J. held:-

> *"In the first scenario* [where the accused is arrested in order to obtain a breath sample], *the gardaí have full control of the process. They conduct the pre-test observation and administer the test. If there is a delay in the process, they are answerable for their actions. In the latter scenario* [wherein a doctor is necessary to obtain a blood or urine sample], *the gardaí are dependent on third parties to attend when called. There are factors which are outside the control of the arresting garda. In such cases the question for the Court is whether in all the circumstances of the case, any delay which occurred was reasonable […] what is reasonable depends on the circumstances of the particular case."*

Murphy J. in *DPP v. Brehon* went on to discuss that there are of course circumstances where a detention of this nature could become unlawful. The respondent relies on Murphy J.'s consideration that such circumstances would require the detention of the accused to be *"deliberately prolonged for a purpose other than the purpose for which he had been arrested."*

30. The appellant submits that that *DPP v. Brehon* does not overrule *DPP v. Finn*. The appellant attempts to distinguish *DPP v. Brehon* to the present case however and submits that Murphy J. in that case came to a decision that there was before the Circuit Court judge, evidence on which the trial judge could act in that it tended to explain the period of delay which had been raised as an issue.

Analysis and Determination

Procedural Issues: Delay and the Absence of the Impugned Order in the High Court

31. It was an unusual feature of this appeal that very little of the appellant's submissions was focussed on the actual decision of the High Court judge. She had made a specific decision in light of the procedural deficiencies, having considered the facts of the case, that the interests of justice did not require the decision of the Circuit Court to be reviewed. This was primarily based upon the fact that the decision with regard to the dangerous driving case was a standalone decision that was not challenged in the Circuit Court arising from the doctor's delay, but no challenge could have been successful as that conviction depended on eyewitness testimony and he was validly before the Court. It was also based on the fact that no liberty was at issue and the penalty imposed on both the failure to provide a sample and the dangerous driving offence was the same. In those circumstances there was no injustice.

32. There has been no attempt by the appellant to engage with the findings in respect of the procedural difficulties. Indeed, a curious feature of the appeal was that it was not until the last minute that the appellant obtained the Circuit Court orders at the centre of the judicial review. I consider that there is no basis for interfering with the trial judge's findings that there were procedural deficiencies in failing to explain the delay in complying with the three-month time limit prescribed by Order 84, r. 21(1) RSC for leave to seek judicial review within three months and in failing to follow the procedural rules of obtaining an extension of time. Moreover, although there was some attempt by the appellant in the course of the appeal to explain why the Court Order may have been produced too late for the High Court hearing, this did not excuse the failure to have it before the High Court.

33. The trial judge was very alert to the need to look beyond mere procedural deficiencies, not matter how gross, and was attentive to ensure that the interests of justice, especially important in a criminal context, were at the forefront on any exercise of discretion in proceeding

to hear and determine the substantive issue in the application. Her judgment is a very careful exposition of the context behind the convictions and the challenge by way of judicial review. She carefully distinguished between the two offences, noting that the challenge to the offence of dangerous driving was never made to the Circuit Court. Moreover, she was careful to note that the offence of dangerous driving was not dependent in any way upon the evidence in respect of the failure to provide a sample. It was dependent on Garda eyewitness testimony. She dealt comprehensively with the claim that simply because he was charged with that offence while in apparent unlawful custody that the conviction could not be sustained by engaging with well-established case law that such a situation does not deprive a court of jurisdiction. She pointed to the exception to that where the presence before the court arises as a result of a type of deliberate and conscious violation of rights. She indicated that it was not such a case and no effort has been made before the Court to substantiate that type of claim. On the contrary, the entirely of the appeal was based upon the failure to apply the Supreme Court decision in *DPP v Finn* to this case.

34. It is noteworthy that the written submissions of the appellant do not address the case law such as *DPP (Ivers) v Murphy* and *DPP (McTiernan) v Bradley* relied upon by the trial judge. Still less do they attempt to bring the circumstances of this case into a *Trimbole* type scenario. Of course, that absence is likely to be because it is impossible to create any kind of resonance between the facts of this simple case of a misplaced key and a doctor's delay with the kind of deliberate actions of the particular Gardaí in *Trimbole* designed to create a situation where that applicant would be available for extradition. It was in that context Gearty J. held that regardless of how one assesses the decision in *DPP v Finn*, the appellant simply had no case based upon it because it had not applicability in the situation where he was validly before the court and the evidence of dangerous driving did not derive from any aspect of the doctor's delay.

35. The final piece relevant to the matrix of the interests of justice is that, absent quashing his dangerous driving conviction, he could not gain anything by quashing his conviction for failing to provide a sample. Not only was there no issue of custody involved in his conviction, but the same penalty had been imposed in respect of both convictions. In those circumstances, the interests of justice did not require that the entire procedural deficiencies should be set aside and the appellant permitted to seek judicial review.

36. I do not see any error in the trial judge's assessment of the legal and factual issues and in the exercise of her discretion with regard to refusing the application for relief. On that basis it is sufficient to dismiss this appeal. I do note however that most of the appellant's appeal concerned the trial judge's reference to his substantive case being weak in respect of the offence of failure to provide a sample. The appellant submits that far from being weak, the reliance on *DPP v Finn* provided a clear authority for holding that the doctor's delay was fatal to the case against him. I am not of the view that this aspect of the trial judge's decision was decisive in her decision to refuse belief but for the avoidance of doubt I will now address the substantive claim made by the appellant.

Substantive Issue: The Taking of the Sample and the Interpretation of DPP v. Finn

37. The appellant relied on *DPP v. Finn* to establish that the prosecution is required to objectively justify a delay in the period of a detention following an arrest. The appellant submits that the prosecution in this case, did not provide any explanation for the delay of the doctor and therefore, not only does the delay fall foul of the requirement in *DPP v. Finn* to provide objective reasons to justify the delay, the appellant argues that no explanation has been provided whatsoever. Therefore, the appellant submits, the delay by the doctor to attend the garda station was unlawful.

38. In order to determine the correct interpretation of *DPP v. Finn*, a brief background of the case is required. The accused was arrested and was required to provide two specimens of

his breath in a manner indicated by the Gardaí. The accused was conveyed to the garda station and was brought to an interview room and remained there with a Garda present with him. The Garda observed the accused in the interview room for 20 minutes to verify he did not consume anything orally in alleged compliance with the An Garda Síochána guidelines. The minimum period of observation stipulated in the guidelines is 20 minutes. The Garda then required the accused to provide two samples of breath as required by s. 13(1)(a) of the Road Traffic Act, 1994. The accused refused to comply and was charged with an offence arising from his refusal. In total, since the accused's arrival at the station, the Gardaí waited some 27 minutes before requiring a specimen from him.

39. In a consultative case stated from the Circuit Court, the Supreme Court held that the procedure according to which an arrested person must be observed for 20 minutes is capable of being justified by a competent witness who can give appropriate evidence. Hardiman J. noted that this case was not a case of delay *simpliciter* but was rather, a *"case in which a garda having custody of the defendant deliberately decided to wait for a particular fixed period before making the statutory requirement which as the purpose of the detention. He did this, he said, on the basis of 'guidelines' given to An Garda Síochána."* Hardiman J. gave an example of a doctor attending a Garda station for the purpose of obtaining a sample:-

> *"For example, if a decision is made to procure the attendance of a doctor for the purpose of requiring the arrested person to provide him with a specimen of blood or urine, a reasonable period for the attendance of the doctor is required. But, at least upon the reasonableness of the length of time actually involved being challenged, it will, in my view, be necessary to demonstrate that the actual period of time was no more than was reasonable. The onus of proof on this point is and must be on the prosecution since the reasons why a particular length of time was required will normally be within its exclusive knowledge. For that purpose*

> *evidence about the distance the doctor had to travel, any other commitments he had at the time and cognate matters might be called so as to render a period of time which seemed excessive reasonable."*

40. This was the passage heavily relied on by the appellant to demonstrate the failure of the Gardaí to provide an explanation for the delay and the failure to provide evidence as to why the doctor was delayed. In my view however, the appellant has missed a crucial step in this analysis. Murray J. held that:-

> *"Not every delay is unreasonable and if it is not unreasonable it does not require to be objectively justified. Once it has been established by the prosecution that the defendant has been lawfully arrested and detained, the question as to whether that lawful detention has been rendered unlawful by unreasonable delay in dealing with the defendant is, in the first instance, a matter for the trial judge to determine having regard to the circumstances of the case."*

Therefore, where the delay is found to be *reasonable* by the trial judge, there is no requirement on the prosecution to justify it. The question that must be answered in each case is whether the delay by the doctor of almost one hour was unreasonable? In *DPP v. Finn* the Court were adamant to hold that the question of unreasonableness is heavily dependent on the facts of each case.

41. It must be accepted that the present case, as distinct from the facts in *DPP v. Finn,* does not have a deliberate delay on the part of the Gardaí. The requirement of Gardaí to wait for the doctor who is a third party, is a matter outside their control. *DPP v. Brehon* is a case on point here. In that case, by the time the accused had provided the specimen to the doctor, the accused had been in the garda station for two hours. At the hearing in the District Court, the Garda in his evidence, could not state precisely why the doctor took the length of time he did to arrive at the station other than to indicate that he had been informed that the doctor had to tend to a

medical emergency. The District Court brought a consultative case stated to the High Court on the grounds of the Court's concerns as to whether the delay had been adequately justified. Murphy J. in *DPP v. Brehon* held:-

> *"[T]here is a qualitative difference between those arrests where an Intoxilyzer/Evidenzer is used to obtain breath samples and those where the attendance of a medical person is necessary to obtain a blood or urine sample. In the first scenario, the gardaí have full control of the process. They conduct the pre-test observation and administer the test. If there is a delay in the process, they are answerable for their actions. In the latter scenario the gardaí are dependent on third parties to attend when called. There are factors which are outside of the control of the arresting garda. In such cases the question for the court is whether in all the circumstances of the case, any delay which occurred was reasonable.*

42. Murphy J. referred to the decision in *DPP (Kelly) v Fox*, taken in the aftermath *of DPP v Finn*, which concerned a challenge to a seven minute delay in the minimum observation period. She relied upon the following dicta of Murray C.J. in that case:

> "*As Hanna J. observed in the Clinton case, at page 375* "Now, what is a reasonable time after arrest"? *No hard and fast rule can be laid out to cover every case. The answer to that question must also be approached in a common sense and practical way. It is not that an arrested person has to be dealt with as expeditiously as at all possible but that he or she is dealt with without the kind of unreasonable delay that would render an otherwise lawful custody unlawful. Otherwise it seems to me that the Courts could become involved in a time and motion study of every move in dealing with an arrested person often in a busy Garda Station at night*."

43. Murphy J. also relied on *O'Neill v Judge McCartan and Director of Public Prosecutions* [2007] IEHC 83. In that case, the doctor arrived at the garda station forty four

minutes after he was called. The Garda again, could not assist the Court why there was a delay. In upholding the decision of the Circuit Court that the delay was not unreasonable, Charleton J. endorsed *DPP v. O'Connor* [2005] IEHC 442 wherein Quirke J. held that *"the legality of the detention of an accused person must, in every case, be decided on its own particular facts."* Charleton J. found that once the procedures for checking the accused into Garda custody had been concluded, a doctor's service was immediately sought. Charleton J. held that :-

> *"[t]he arrival of a doctor within an hour of that time must be regarded, in the real world, as being a good service; if not a very good one. Rather than there being evidence of the Gardaí acting with contempt towards the accused's constitutional right to liberty, I would hold that, in accordance with the imperative set out in People (DPP) v Madden [1977] I.R. 336, that they did everything possible to ensure that the relevant procedure was completed within a reasonable time. I would add that is wrong to apply time limits or comparisons between particular cases. Getting doctors to stations is a practical issue to be decided in a practical way. There was no evidence of anyone doing anything less that their best."*

44. In the present case, the Circuit Court judge heard a challenge to the evidence based upon the decision in *DPP v Finn*. He rejected that challenge. To the extent that he made a decision that the period of time before the doctor arrived was reasonable, the court, in a challenge by way of judicial review, has limited authority to interfere with such a finding. Indeed, the appellant's submissions before this Court have been premised on the suggestion that once a challenge is made, the prosecution *must on evidence*, satisfy the trial court that it was not unreasonable. That appears to be a mistaken view of the import of the authorities. It is apparent, even in *DPP v Finn*, based upon the quotes from Murray C.J. and Hardiman J. above, that it is not every delay that is to be seen as excessive or unreasonable. It is only where the delay is seen as unreasonable or excessive does it have to be justified. In the usual case

there will be a challenge to the admissibility of evidence, the prosecution will then have to determine the extent of the evidence needed to justify the effluxion of time between arrest and the failure to give a sample or indeed the giving of a sample. In some cases, the prosecution may simply call the Gardai, in other cases the prosecution may choose to call a doctor to explain the delay. Each case will be fact dependent. If a Garda, as in this case, has given evidence that the delay was caused because of the initial failure to access the machine and notwithstanding the information from the doctor that s/he would arrive soon there was a delay in arriving, it will be up to the trial judge to decide if the elapsed time is reasonable on the basis of that evidence or if it was excessive.

45. It appears in the present case that the question of unreasonable delay was not challenged before the evidence of the Garda was given but that the application was made at the conclusion of the trial. If evidence is not challenged i.e. evidence of a failure to provide a sample, then the other party is entitled to assume it has been admitted into evidence. Occasionally when trials that are held in the absence of a jury, there can be a blurring of the distinction between a *voir dire* on admissibility and the substantive trial. In a case where the prosecution might have chosen to call further evidence if they had known it was a challenge to admissibility, issues of fair procedures may arise if an accused person seeks to close out the prosecution from rebuttal by waiting until the end of the case to make the challenge. It is not suggested that there was any such deliberate manoeuvre in the present case and it seems in any event that the Circuit Judge may have decided this on the basis that the delay was not unreasonable. If that was so and was a conclusion reached on the basis of some evidence, our power of review would be very limited. We have not however had the benefit of a transcript or even a proper note of the proceedings in the District Court. In the usual course, the absence of such a transcript must count against the moving party. There does appear however to have been an application by the

DPP to obtain the transcript and it has not been put before us or the High Court. For that reason, we will assess whether the time was reasonable.

46. In the present case, there is no indication that the appellant was detained for any reason other than to obtain a sample. There was no deliberate act of the Gardaí that caused the delay. There was an initial delay of 39 minutes. This was unfortunate but explicable as a matter that can happen in a garda station where it is important to keep safe custody of such items as an Evidenzer. The doctor was contacted and the subsequent fifty five minute wait in this case for the doctor was dependant on third parties and was outside the control of the Gardaí. While the doctor in the present case indicated he would be available within a couple of minutes, but instead arrived within one hour, this cannot be regarded as other than a *"good service; if not a very good one"*, to use Charleton J.'s analysis. Therefore, we are satisfied that the High Court judge's observation that the appellant's case was "extremely weak" is well borne out. The delay in this case did not require to be justified by any further evidence as the delay was not excessive in the circumstances.

47. It is for these reasons that this ground of appeal must be rejected.

Conclusion

48. The appellant has failed to provide any explanation for the delay in bringing the judicial review proceedings by way of affidavit. Further, the failure on his part to exhibit the impugned order before the High Court, or at least swearing on affidavit the reasons for not so doing, cannot be ameliorated by any factors that would usually afford latitude in this area. There was no challenge made to the dangerous driving conviction in the Circuit Court. Moreover, there was no link between his conviction on that offence and the delay in calling the doctor, as there was eyewitness testimony in relation to the dangerous driving and the District Court had jurisdiction to hear the case irrespective of any earlier delay in custody. The appellant's liberty was not at stake as a result of his conviction and the penalties imposed in relation to each

offence was the same. The trial judge carefully considered the interests of justice and there was no basis to interfere with the exercise of her discretion to refuse the appellant relief by way of judicial review in all the circumstances.

49. Moreover, in relation to the substantive point, the decision in *DPP v Finn* must be understood as meaning that any delay must be examined as to whether it is excessive. It is only where it is excessive that the prosecution will be required to justify that unreasonable delay. In the present case, it appears that the Circuit Court judge made a decision that the delay was not excessive and such a decision, where founded on the evidence before him, was one he was entitled to make. As no transcript of that hearing was made available to the Court and of the precise decision of the Circuit Court judge, I have also considered whether on the evidence as agreed between the parties the delay could be said to be excessive. I conclude that it was not excessive.

50. I would therefore dismiss the appeal.

51. As the respondent has been entirely successful in this appeal, my provisional view is that she is entitled to her costs in this Court. If the appellant wishes to contend for an alternative form of order, he will have liberty to apply to the Court of Appeal Office within 14 days for an alternative order and must do so on written submissions no greater than 2,000 words in length. The respondent will have 14 days to reply by way of written submission, also no more than 2,000 words in length. Thereafter, the appellant has 7 days to reply in no more than 1,000 words. In default of receipt of such application by the appellant made within 14 days, an order in the terms I have proposed will be made.

52. Edwards J. and McCarthy J. hereby indicate their agreement with this judgment and the proposed order.