

APPROVED

NO REDACTION NEEDED



THE COURT OF APPEAL

Neutral Citation: [2024] IECA 268

Record Number: 2023/143

Edwards J.

Kennedy J.

Burns 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:

PHILIP CASSERLY

APPELLANT

-AND-

**THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF
GARDA ALLAN DOHERTY)**

RESPONDENT

**JUDGMENT of Ms. Justice Tara Burns delivered on the 10th day of
October, 2024**

1. This is an appeal from the judgment of the High Court (Heslin J.) [2023] IEHC 168, wherein he determined that the Case Stated by the District Court Judge raising the single question for determination, namely whether she

was correct in law to convict the appellant of the offence at issue, should be answered in the affirmative.

Background

2. The appellant was convicted before the District Court of an offence contrary to s. 12(3)(a) of the Road Traffic Act 2010, as amended, ('the 2010 Act'), namely:-

"On the 12/09/2020 at Longford Garda Station [...] being a person arrested under Section 4(8) of the Road Traffic Act, 1961, having being required by Garda Allan Doherty [...] pursuant to Section 12(1)(b) of the Road Traffic Act 2010 as amended, to permit a designated doctor to take from you a specimen of your blood, or at your option, to provide for the designated doctor a specimen of your urine, did refuse to comply with the said requirement."

3. The facts as found by the District Court are set out in the Case Stated as follows:-

"a. The appellant was arrested by Garda Doherty on September 12, 2020 at 2:22 AM pursuant to section 4(8) of the Road Traffic Act 2010, as amended, for the alleged commission of offence contrary to s.4(1) or 4(2) or 4(3) or 4(4) of the Road Traffic Act 2010, as amended;

b. The appellant was conveyed to Longford Garda Station and processed under the treatment of persons in custody regulations;

c. During his detention, Garda Doherty was informed by the member in charge (Garda David Buckley) that the Evidenzer IRL apparatus at Longford Garda Station was out of order;

- d. Consequently, a designated doctor was requested to attend the Garda station for the purposes of a requirement under section 12(1)(b) of the Road Traffic Act 2010;*
- e. In due course, the designated doctor arrived, following which Garda Doherty made a requirement of the appellant pursuant to s.12(1)(b) at 3:15 AM;*
- f. He informed the appellant he was obligated to permit the taking of a specimen of blood or, at his option, to provide a specimen of urine;*
- g. Garda Doherty also outlined the penalties and consequences of refusal or failure to comply with this requirement;*
- h. The appellant elected to provide a specimen of urine due to a dislike of needles;*
- i. However, the appellant also stated he wished to provide a breath specimen. Garda Doherty reiterated that the Evidenzer IRL apparatus was out of order and that no such requirement could be made;*
- j. Thereafter, the appellant was afforded an opportunity to provide a specimen of urine until approx. 3:33 AM;*
- k. During that time, the Garda advised the appellant on several occasions of the consequences of not complying with the requirement;*
- l. The appellant asked if Garda Doherty could leave the room so that he could provide the specimen of urine, however, Garda Doherty explained the reason as to why he had to be present to supervise the provision of the specimen;*
- m. After an opportunity had been provided, Garda Doherty was of the belief that the appellant was not making any effort to provide a*

specimen of urine and again outlined the penalties and consequences of refusal or failure to comply with his requirement;

n. At 3:33 AM the appellant was placed in a cell having failed to provide a specimen of urine;

o. At 3:46 AM and prior to the doctor leaving the Garda station, the appellant was taken from the cell and Garda Doherty made a requirement for him to provide a specimen of urine and the penalties for not doing so were outlined to the appellant. The appellant failed to provide a specimen of urine;

[...]

q. The appellant was then released from Garda custody at 3.49 AM, without charge”

Jurisdiction of this Court

4. As this is a Case Stated, the role of the High Court, and this Court on appeal, relates solely to questions of law, except in exceptional circumstances which do not arise in this case. Accordingly, this Court is bound by the determinations of fact made by the District Court.

Submissions of the Parties

5. The appellant’s core argument was that after the appellant failed to provide a urine sample, an obligation arose upon the guard operating the statutory regime (Garda Doherty) to re-introduce the requirement made of the appellant to permit a blood sample be taken from him. It was submitted that the failure to take such a step was in breach of fair procedures and resulted in the offence at issue not being proven, as a refusal by the appellant to permit a blood sample be taken did not arise.
6. The respondent submitted that a reiteration of the requirement made of the appellant to permit a blood sample be taken from him, after he failed

to provide a urine sample, was not required, as the entire process was part of a continuum which had already been fully and properly explained to the appellant. It was submitted that the information and warnings which had been given to the appellant at 3.15am, and which were repeated up to 3.33am, were sufficient in law. It was argued that the refusal by the appellant to permit a blood sample be taken from him could be inferred by his actions.

The Legislative Provision

7. The relevant provisions of s. 12 of the 2010 Act provide, *inter alia*:-

"(1) Where a person is arrested under section 4(8) [...] of this Act [...], a member of the Garda Síochána may, at a Garda Síochána station [...], do either or both of the following—

(a) require the person to provide, by exhaling into an apparatus for determining the concentration of alcohol in the breath, 2 specimens of his or her breath and may indicate the manner in which he or she is to comply with the requirement,

(b) require the person either—

(i) to permit a designated doctor [...] to take from the person a specimen of his or her blood, or

(ii) at the option of the person, to provide for the designated doctor [...] a specimen of his or her urine,

[...]

(3) Subject to section 22, a person who, following a requirement under subsection (1)(b)—

(a) refuses or fails to comply with the requirement, [...] commits an offence

(4) A person who commits an offence under this section is liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 6 months or to both."

8. Section 22 of the 2010 Act is not relevant to the facts of this case.

Relevant Case Law

9. A significant corpus of case law has developed regarding this statutory offence, which had earlier, similar versions in s. 13 of the Road Traffic (Amendment) Act 1978 ('the 1978 Act') and s. 13 of the Road Traffic Act 1994 ('the 1994 Act'). The High Court judgment extensively reviews this case law. It seems to me that the most relevant of the cases referred to in the High Court judgment, with respect to the offence at issue, are *The People (at the suit of the Director of Public Prosecutions) v. Swan* [1994] 1 ILRM 314 ('*Swan*') and *The People (at the suit of the Director of Public Prosecutions) v. Mangan* [2001] 2 IR 373 ('*Mangan*').
10. *Swan* considered an offence of failing to comply with a requirement of a medical practitioner in relation to the taking of a specimen of blood contrary to s. 13(3)(b) of the 1978 Act. The High Court emphasised the distinction between the offence at issue in *Swan* and the offence being considered in the instant matter. While that distinction was of particular significance with respect to the issue in *Swan* and the question of whether the accused, in that case, should be acquitted of the offence charged, I am of the opinion that the distinction does not detract from the Supreme Court's analysis of the constituent elements of s. 13 of the 1978 Act (a mirror offence to the offence at issue in the instant matter) and the manner in which the Supreme Court determined the section must be operated, as a matter of statutory interpretation. Egan J., delivering the majority judgment of the Court, stated at p. 315:-

"The obligation under the section is to permit the taking of a specimen of blood but subject, at the option of the person, to provide a specimen of his urine. The word used is 'option'. If the person declares that he wishes to avail of the option but then finds that he is unable to do so, the obligation to permit the taking of a specimen of blood revives and, in such circumstances, a refusal by him to permit the taking of blood is the offence with which he should be charged."

11. *Mangan* related to another similar version of this statutory offence, namely, s. 13(3) of the 1994 Act. In that case, the accused opted to provide a urine sample after a requirement to provide a blood sample was made of him at 1.05 am. Having failed to provide a urine sample, a further requirement to provide a blood sample was made of the accused at 1.48 am, which he refused to provide. Keane C.J., delivering the judgment of the Court, stated at p. 382:-

"At that point in time [1.05am] ...the accused was obliged either to permit the designated doctor to take a specimen of his blood or, at his option, to provide for the doctor a specimen of his urine. The obligation of the accused to permit the doctor to take a blood specimen was therefore in abeyance during the period when, as is accepted, the appellant made a bona fide attempt to exercise the option available to him of providing a specimen of his urine. I have no hesitation in rejecting a submission advanced by counsel for the accused that he remained under an obligation to permit the doctor to take a specimen of his blood during the very time that he was endeavouring to provide a specimen of urine. There cannot be the slightest doubt as to what the intention of the Oireachtas was: it must have been envisaged that, in every case where a person chose to avail of the option to give urine, an interval of time, however short, would elapse before the specimen was provided. It must

equally have been envisaged that, in some cases, a person might be simply unable to provide a specimen and again it cannot have been the intention of the Oireachtas that in those circumstances the accused would at that point in time have committed an offence in having refused to permit the doctor to take a specimen of his blood or to provide a specimen of his urine, nor indeed (not surprisingly) is any such submission advanced on behalf of the accused in the present case.

It follows inevitably that, provided the garda had given a reasonable time to the accused to provide the specimen, and it is not suggested that she had not, the duty on the accused to permit the doctor to take a blood specimen revived at the end of the period in question.

[...]

It follows that, when Garda Dowling at 1.48 a.m. made what she described as the "further requirement" of the accused to provide a sample of his blood for the doctor and explained the penalties to him again, she was doing no more than drawing his attention the fact that the obligation to provide a specimen of his blood had now revived, as was indeed the case. The accused, who at that stage must be presumed, because of the terms of the requirement made by Garda Dowling at 1.05 a.m., to have been aware of the statutory obligation to provide a specimen of blood, or, at his option, of urine, and of the consequences of a refusal or failure so to do, nonetheless refused to permit a specimen of his blood to be taken."

High Court Decision

12. After a long and considered analysis of the statutory offence and the corpus of relevant case law, the High Court determined, in summary, that there was no requirement for Garda Doherty to give the appellant any further

warnings, or take any further step, after the appellant failed to provide a sample of urine; that the appellant had been fully informed of the requirement made of him under s. 12(1)(b) of the 2010 Act; that there was no onus on Garda Doherty to remind him of what he had already been told; and that an onus arose upon the appellant to change his mind and permit a sample of blood to be taken.

Discussion and Determination

13. Having regard to the reasoning in *Swan* and *Mangan*, the appellant argued that as the obligation on the appellant to permit a blood sample be taken from him was in abeyance during the time he opted to provide a urine sample, an onus arose on Garda Doherty to revive the requirement made of the appellant to permit a blood sample be taken from him, after he failed to provide a urine sample. In short, a process was necessary to reintroduce the requirement being made of the appellant to permit a sample of blood be taken from him. It was submitted that the trial judge was in error in placing an onus on the appellant to take active steps to permit his blood sample be taken. Having regard to the facts as determined by the District Judge and the case law set out above, the question was posed by Counsel for the appellant - when did the refusal to permit a sample of blood be taken occur, if the obligation to permit it be taken only revived after the failure to provide a urine sample?

14. It seems to me that the issue in this case is not one of reminding the appellant of the consequences of failing to permit the blood sample be taken, but rather putting in place a fair and certain process once the appellant failed to provide a urine sample. I am in agreement with the High Court that the appellant was adequately informed of the requirement being made of him and the consequences of failing to comply. However, I am not in agreement that an obligation did not arise for the guard operating the statutory regime to take a further step once there was a failure by the appellant to provide a urine sample and that the onus lay entirely with the

appellant to take steps toward permitting a blood sample be taken from him.

15. In the context of the commission of a criminal offence, remembering that this offence is an exception to the general principle that an accused is not obliged to incriminate himself (as was commented upon by the Supreme Court in *Director of Public Prosecutions (Keoghan) v. Cagney* [2013] 1 IR 493 when considering a defence provided for in the mirror offence of s. 13 of the 1994 Act), placing an onus on a person in the appellant's position, after a failure to provide a urine sample, to indicate that he is now prepared to permit a blood sample be taken, is imbued with uncertainty as to the process and is open to significant mishap. Instead, placing an obligation on the guard operating the statutory regime to revive the requirement made of a person in the appellant's position to permit a sample of blood be taken is not an onerous requirement and has legal certainty. I am of the opinion that, in the context of fair procedures, such an obligation arises if s. 12(1)(b) of the 2010 Act is to be lawfully operated.
16. I am therefore of the opinion that the High Court erred in finding that there was no obligation on Garda Doherty to revive the requirement made of the appellant to permit a blood sample be taken from him after the appellant failed to provide a urine sample.
17. In addition, having regard to the specific facts of the instant matter, the question posed by Counsel for the appellant as to when the alleged offence occurred, is instructive. As the obligation to permit a blood sample be taken was in abeyance until after the failure to provide a urine sample, the offence of refusing to permit a blood sample be taken could not occur until after the obligation to permit a blood sample be taken was revived. At no stage, after the appellant failed to provide a urine sample, and was placed back in a cell, was he asked to permit a blood sample be taken from him. Accordingly, a refusal to permit a blood sample be taken had to be inferred

from the appellant's actions and proved to the requisite standard, rather than there being direct evidence of such a refusal.

18. Counsel for the respondent suggested that the refusal to permit a blood sample be taken occurred after the appellant was placed in the cell at 3.33 am. Difficulties arise with that proposition as a demand for a urine sample was made of the appellant at 3.46am, with an indication of what the penalties were if the appellant failed to provide a sample of urine. That request cannot marry with a refusal to permit a blood sample be taken occurring at 3.33 am. Furthermore, this was an unlawful demand made of the appellant, as it is not an offence to fail to provide a sample of urine (*The People at the suit of the Director of Public Prosecutions v. Corcoran* [1995] 2 IR 259). It also introduced uncertainty into the process with incorrect information now being given to the appellant to the effect that he was under an obligation to provide a sample of urine or otherwise face penal consequences.
19. In the alternative, the High Court was of the view that the refusal to permit a blood sample be taken occurred as the appellant exited the police station at 3.49 am. This was after the incorrect information regarding penalties for failing to provide a urine sample was provided to the appellant and an unlawful demand for a urine sample was made. These issues cause difficulty for that proposition also.
20. The commission of a criminal offence with significant penalties, as is the case with respect to the instant offence, should be certain. The uncertainty surrounding the commission of the alleged offence at issue in this matter would not exist had the obligation placed on the appellant been revived by Garda Doherty, after the failure to provide the urine sample. While the section does not require this, it seems to me that for the section to be lawfully operated a further demand to permit a sample of blood be taken

should have been made of the appellant after his failure to provide a sample of urine.

21. Accordingly, for the reasons already outlined, my answer to the Case Stated is that the District Court Judge was not correct in law to convict the appellant of the offence at issue.