



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE:2021:000104

[2022] IESC 29

**MacMenamin J
Charleton J
O'Malley J
Woulfe J
Hogan J**

Between/

**THE PEOPLE (AT THE SUIT OF THE
DIRECTOR OF PUBLIC PROSECUTIONS)**

RESPONDENT

AND

CHRISTOPHER McDONALD

APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered the 30th day of June 2022

1. I have had the opportunity of reading in advance the judgment of Charleton J. I agree that the present appeal should be dismissed, essentially for the reasons which he has given in the judgment which he has just delivered.

2. I take that view because, as Charleton J. indicates in his judgment, the presence or absence of a solicitor to assist the appellant could have made no difference on the facts of this particular case. It is perfectly clear that the DNA sample (which was derived from a swab taken from Mr. McDonald when he was in custody following his arrest) was a critical factor in linking

him to the items used as a false disguise by the person who shot and murdered the deceased, Keith Walker, on 12th June 2015.

3. It is true that the swab was taken from the appellant in circumstances where he was in custody at Blanchardstown Garda Station and at a time when he had not yet had access to a solicitor in person. The appellant had had, however, a brief telephone conversation with his solicitor. The swab was subsequently taken by Gardai pursuant to their common law powers in accordance with a consent form which the appellant executed before his solicitor arrived at the Garda station in question.

4. At the time of the appellant's arrest in June 2015 the relevant provisions of s. 2 of the Criminal Justice (Criminal Evidence) Act 1990 (as amended) allowed the Gardai to take a swab from a detained suspect, irrespective of that person's consent. So what is incontestable is that the Gardai could – and would – have lawfully taken such a swab irrespective of the appellant's consent. In these particular circumstances the issue of whether the appellant either did have or was entitled to have a solicitor present during the course of his detention is of no materiality.

5. In expressing this view, I am deliberately refraining from expressing any view on what might be termed the broader question of whether (and, if so, to what extent) a suspect is entitled to have a solicitor present during the course of such investigation. Ever since this Court pronounced on the right to be legally represented in the course of a criminal trial in *The State (Healy) v. Donoghue* [1976] IR 325, the extent to which there is such a constitutional right to legal representation in other circumstances and in other fora has remained disputed: see, e.g., *The State (O.) v. Daly* [1977] IR 302.

6. In more recent times the extent to which there is such a right to legal representation in the context of pre-trial arrest and detention has been the subject of considerable debate in at least two prominent recent decisions of this Court: *The People (Director of Public Prosecutions) v. Gormley and White* [2014] 2 IR 591 and *The People (Director of Public*

Prosecutions) v. Doyle [2017] IESC 1, [2018] 1 IR 1. These two decisions point to the existence of judicial division on the subject. It is not even clear from whence the right derives. Is it, for example, part of the bundle of rights deriving broadly from Article 38.1 designed to ensure fairness and to safeguard the right against self-incrimination, buttressed perhaps by the dignity provisions of the Preamble? Or is associated with concepts of the proper administration of justice derived from Article 34.1? In any further discussion of this question it would also be important to have regard to the seminal decision of the ECtHR in *Beuze v. Belgium* [2018] EHRR 925; (2019) 69 EHRR 1.

7. In these circumstances it is not necessary for me to consider the broader question of the extent of any entitlement on the part of a detained suspect to legal assistance in the course of pre-trial detention. I would accordingly reserve my position on this issue to a case where this question directly arose and where the resolution of this issue could materially affect the outcome of any appeal. Since, for the reasons I have already given, this is not the present case, I would accordingly agree with the judgment of Charleton J to the effect that the appeal should be dismissed.