THE SUPREME COURT

Record No: S:AP:IE:2023:000159

High Court Record No.: [2023] IEHC 625

[2024] IESC 54

O'Donnell C.J.

Dunne J.

O'Malley J.

Murray J.

Donnelly J.

Between:

THE DIRECTOR OF PUBLIC PROSECUTIONS (McCLUSKEY)

APPELLANT

AND

JONATHAN O'FLAHERTY

RESPONDENT

Judgment of Ms Justice Iseult O'Malley delivered the 25th day of November 2024

Introduction

1. This appeal arises from a case stated to the High Court by District Judge Gráinne Malone. The context is the exercise by a member of the Garda Síochána, on duty at an authorised checkpoint, of the statutory power to require a driver to provide a specimen of oral fluid for the purpose of a drug test. Failure to comply with such a requirement is an offence and gives rise to a power of arrest.

2. The appellant, the Director of Public Prosecutions, appeals against the finding of the High Court that the Road Traffic Act 2010, as amended, did not at the relevant time confer a power on a member of the Garda Síochána to require a driver who had given a specimen of oral fluid to wait at the checkpoint until the drug-testing apparatus had completed an analysis of the specimen (see *Director of Public Prosecutions (McCluskey) v O'Flaherty* [2023] IEHC 625). As of the date of the events giving rise to the prosecution, and the date of the decision of the High Court, the Act did not make any express provision in this regard. The case made by the appellant is that it must be interpreted as conferring an implied power to require the driver to wait.

3. On the evidence in this case, the respondent was required to provide a specimen and was told by the garda that he would have to wait for up to one hour for the result of the analysis by the apparatus. As it happened, the analysis was complete in a relatively short time. The total time involved from the time of stopping the car to the display of the result was under twenty minutes. The apparatus indicated the presence of cannabis.

4. At that point the respondent was arrested and taken to a garda station. A blood specimen was subsequently taken from him in accordance with other provisions of the Act. He now stands charged with the offence of driving while there was in his blood a concentration of cannabis and a concentration of cocaine greater than the concentrations specified in a Schedule to the Act, contrary to s.4(1A) of the Act.

5. While there is no dispute as to the power to require a driver to provide a specimen of oral fluid, the concern raised by the District Judge is the lawfulness of the requirement to wait pending the result of the analysis. The question asked in the case stated is:

> "*Does s. 10(4) of the Road Traffic Act 2010 provide a power for a member of An Garda Síochána, who is on duty at a checkpoint, to make a legal requirement for a person to remain at that checkpoint after that person has provided an oral fluid specimen for a period of up to one hour, until such time as that an oral fluid specimen has been analysed for the presence of drugs*?"

6. It appears to be implicit in the case stated that if the requirement to remain was not lawful, the consequence would be that the respondent was unlawfully detained during that period. The question whether unlawful detention in those circumstances would affect the validity of the subsequent arrest and the taking of the blood specimen does not seem to have been debated.

7. If the interpretation of the appellant is correct, the power to make such a requirement is in effect a power to detain. Essentially, the case made by the appellant is that there is a power to require a specimen to be given and that, for the Act to be workable, that power must include the power to require the driver to wait for a reasonable time for the result.

Read purposively, the Act must, it is said, be interpreted as conferring an implied power to detain for the purposes of the analysis.

8. The respondent's case, in brief summary, is that the words of the section have the ordinary and natural meaning that the driver's obligation is only to provide the oral fluid, that there is no power to require the driver to wait and that the Court cannot imply into a statute a power to deprive a person of their liberty.

9. It may be necessary to point out, at this stage, that the task of the Court in this appeal is, at least initially, an exercise in statutory interpretation. In that task, the Court is not bound to accept an interpretation put forward by either party to a case.

The legislation

10. The following summary relates to the legislation as applicable to this case, and does not include recent amendments.

11. Section 4(1) of the Act of 2010 provides that a person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while he or she is under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle. The word "intoxicant" includes alcohol and drugs, and any combination thereof.

12. Section 4(1A) of the Act, inserted by s.8 of the Road Traffic Act 2016, provides that it is an offence for a person to drive or attempt to drive while there is present in his or her body a quantity of a specified drug such that, within three hours after so driving or

attempting to drive, the concentration of that drug in their blood is equal to or greater than the concentration specified in the Schedule.

13. There are, therefore, two separate offences. The first relates to the capacity of the driver to have proper control of the vehicle. The second relates to the concentration of a drug in the driver's blood, without regard to the effect of that drug on the capacity of the driver to drive.

14. Under s.4(8), a member of the Garda Síochána may arrest without warrant a person who in the member's opinion is committing or has committed an offence under s.4.

15. Section 10 of the Act of 2010, as substituted in its entirety by virtue of s.11 of the Road Traffic Act 2016, provides for the setting up of authorised traffic checkpoints. The objective of such checkpoints is described as "mandatory" intoxicant testing, the point being that there is no necessity for a garda to form an opinion that a driver has consumed an intoxicant before requiring them to comply with a procedure to test for the presence in their body of an intoxicant.

16. Under s.10(4) a garda on duty at such a checkpoint may stop any vehicle and, without prejudice to any powers conferred by statute or at common law, may require the person in charge of it:

    (a) to provide a specimen of his or her breath (by exhaling into an apparatus for indicating the presence of alcohol in the breath) in the manner indicated by the member;

(b) to provide a specimen of his or her oral fluid (by collecting a specimen of oral fluid from his or her mouth using an apparatus for indicating the presence of drugs in oral fluid) in the manner indicated by the member;

(c) to accompany him or her or another member of the Garda Síochána to a place (including a vehicle) at or in the vicinity and there to provide a specimen of his or her breath, as specified in paragraph (a), a specimen of his or her oral fluid, as specified in paragraph (b), or both, in the manner indicated by him or her or that other member;

(d) to –

(i) leave the vehicle at the place where it has been stopped, or

(ii) move it to a place in the vicinity of the checkpoint,

and keep or leave it there until the person has complied with a requirement made of him or her under any of paragraphs (a), (b) and (c).

17. Section 10(5) provides that for the purposes of s.10(4) a garda may indicate to the person the manner in which the person must comply with the requirement.

18. Under subs.(6) refusal or failure to comply immediately with a requirement under subs. (4) in a manner indicated by the garda is a summary offence (although there is a defence of reasonable excuse for refusing or failing to move the vehicle). Section 10(7) confers a power of arrest without warrant where a garda is of the opinion that an offence under the section is being or has been committed.

19. Section 10(9) provides that in a prosecution for an offence under s.4 it is to be presumed, until the contrary is shown, that an apparatus provided by a garda for the purpose of enabling a person to provide a specimen of breath under the section is an apparatus for indicating the presence of alcohol in the breath. Similarly, s.10(10) provides for a rebuttable presumption that an apparatus provided for the purpose of enabling a person to provide an oral fluid specimen under the section is an apparatus for indicating the presence of drugs in oral fluid.

20. Sections 13A and 13B, both inserted by s.13 of the Act of 2016, deal with the taking of specimens from persons arrested under a range of provisions in the Act of 2010 and also the Road Traffic Act 1961. If a person has been arrested under:

- s.4(8) (suspicion of driving in contravention of s.4(1)),
- s.5(10) (suspicion of being in charge of a vehicle with intent to drive while under the influence of an intoxicant),
- s.9(4) (failure to comply with a requirement to provide a breath specimen),
- 10(7) (failure to comply with a mandatory test requirement) or
- 11(5) (failure to comply with a requirement to perform an impairment test) of the Act of 2010, or
- s.52(3) (careless driving),
- 53(5) (dangerous driving),
- s.106(3A) (offences relating to the duties of a driver after an accident) or
- s.112(6) (unlawful use or taking of a vehicle) of the Road Traffic Act 1961

a garda may, under s.13A, require the provision of an oral fluid specimen for the purpose of a drug test.

21. Section 13B provides for a requirement to provide a blood specimen in circumstances where a person has been arrested under one of the foregoing provisions and the garda has already carried out a preliminary oral fluid test under s.10(4) (i.e. at an authorised checkpoint) *or* an oral fluid test under s.13A. (The section also refers to the carrying out of an "impairment" test – this is not of relevance here, as no regulations have as yet been made providing for such tests.) The specimen is taken by a designated doctor or nurse, and is to be forwarded by the garda to the Bureau for analysis. In the case of a test for drugs, the analyst must determine the concentration of the drug in the specimen.

22. As far as this appeal is concerned, the respondent was arrested under s.4(8) of the Act and the garda had already carried out a preliminary oral fluid test under s.10(4). The blood specimen was taken pursuant to s.13B.

The District Court

23. Having heard the evidence and legal argument, District Judge Malone was inclined to the view that the purported detention pending the result of the oral fluid analysis was unlawful. However, she considered it appropriate to state a case to the High Court for its opinion.

24. The findings of the judge on the evidence in the trial are set out in paragraphs 5 to 13 of the case stated as follows.

C. Evidence Proved or Admitted Before Me:

5. In his evidence in chief, Garda Colin McCluskey gave evidence that on the morning of 8th September 2019, he was on duty at a mandatory intoxicant checkpoint at Constitution Hill, Dublin 7, a public place. The checkpoint was established pursuant to an authorisation granted under s. 10 of the Road Traffic Act 2010.

6. At 10.16 a.m., Garda McCluskey stopped mechanically propelled vehicle 04-D-122347 at the checkpoint. The vehicle was driven by the Defendant. Garda McCluskey spoke to the Defendant and got a strong smell of cannabis from the vehicle.

7. Garda McCluskey informed the Defendant that he intended to carry out an oral fluid test to test for the presence of an intoxicant in the Defendant's system. Garda McCluskey said that he told the Defendant that he was requiring him to remain at the scene until the test was concluded for a period of up to one hour. Garda McCluskey opened an oral fluid kit. He then made a demand under s. 10 of the Road Traffic Act 2010 for the Defendant to provide an oral fluid specimen. Garda McCluskey gave evidence that the demand was explained in ordinary language, that he instructed the Defendant in the use of the oral fluid sampler, and that the Defendant was informed of the penalties for failing to comply with the demand. The Defendant complied with the demand and provided an oral fluid specimen to Garda McCluskey at about 10.16 a.m.

8. Garda McCluskey stated that he invited the Defendant to accompany him to a garda vehicle where the specimen was to be tested on the Drager DrugTest

5000 device. Garda McCluskey placed the oral fluid specimen into the Drager DrugTest 5000 device for the purposes of the specimen being analysed for the presence of drugs. At 10.34 a.m., the Drager returned a positive result for the presence of cannabis in the oral fluid specimen. On viewing this result, Garda McCluskey asked the Defendant if he had a medical certificate of exemption for the use of cannabis. The Defendant answered that he did not have a certificate. Based on the test result, Garda McCluskey formed the opinion that the Defendant was under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle and that he had committed an offence under s. 4(1A) of the Road Traffic Act 2010. At 10.35 a.m., Garda McCluskey arrested the Defendant under s. 4(8) of the 2010 Act for a suspected offence under s. 4(1A).

9. Garda McCluskey conveyed the Defendant to Store Street Garda Station. They arrived at 10.45 a.m. At 11.33 a.m., Garda McCluskey made a demand under s. 13B of the Road Traffic Act 2010 for the Defendant to permit the designated doctor, Dr. Ghaffar, to take a blood specimen from him. The Defendant provided the blood specimen at 11.39 a.m. Section 15 of the 2010 Act was complied with. The form completed by Dr. Ghaffar in compliance with s. 15 of the 2010 Act was tendered in evidence.

10. Evidence was given that the blood specimen was posted to the Medical Bureau of Road Safety. A certificate of analysis was returned indicating the presence of 3.5ng/ml blood of delta9-tetrahydrocannabinol (cannabis) and 20.8ng/ml blood of ll-nor-9-carboxydelta9-tetrahydrocannabinol (Cannabis)

and 79.8 ng/ml blood of Benzoylecgonine (Cocaine). The prosecution tendered the foregoing MBRS certificate under s. 17 of the 2010 Act, indicating that the Defendant had a quantity of cannabis and Cocaine in his blood which was in excess of the statutory limit.

11. Under cross-examination, Garda McCluskey said that when he stopped the Defendant at the checkpoint at 10.16 a.m., he told the Defendant that he intended to carry out an oral fluid test. He accepted that he told the Defendant that he was required to remain at the checkpoint until such time as the test was concluded, for a period of up to one hour.

12. Garda McCluskey gave evidence about the operation of the Draeger DrugTest 5000. He accepted that there are two stages to oral fluid testing using the Draeger DrugTest 5000. Firstly, an oral fluid specimen must be obtained from the test subject. Secondly, the oral fluid specimen must be placed in the Drager DrugTest 5000 and analysed by the machine. The analysis by the machine can take some time. Garda McCluskey said that, in this case, the machine took eight or nine minutes to analyse the Defendant's oral fluid specimen.

13. Garda McCluskey accepted that he had required the Defendant to remain at the checkpoint until both stages of this testing process were completed. The Defendant was not only required to remain at the checkpoint until he gave an oral fluid specimen, but he was also required to remain at the checkpoint until such time as the Drager DrugTest 5000 completed analysis of the oral fluid

specimen. Garda McCluskey agreed that from the time that he told the Defendant that he would be required to remain at the checkpoint, the Defendant was no longer free to leave the checkpoint. He accepted that he clearly communicated to the Defendant he was not free to leave the checkpoint until such time as the analysis by the DrugTest 5000 was completed. Garda McCluskey said that if the Defendant had tried to leave the checkpoint while the analysis of the oral fluid specimen was pending, he would have prevented the Defendant from leaving.

25. The case stated then records that following the conclusion of the prosecution evidence the defence applied for a direction of no case to answer, premised on the proposition that the garda had no power to require the respondent to remain at the checkpoint until the analysis was complete. After hearing legal argument, Judge Malone ruled that the respondent had been detained at the roadside. As noted above, she was inclined to the view that the detention was unlawful but decided to state a case to the High Court.

The High Court

26. Having set out the relevant legislative provisions, Simons J. made a number of observations.

27. Firstly, he took the view that the legislation did not appear to envisage any time lag between the provision of the specimen and the indication of the presence of drugs, and that it certainly did not envisage the two-stage process employed in the present case, where the specimen was transferred to a separate machine for analysis.

28. Secondly, the legislation did not expressly refer to the result of the test. Crucially, in the judge's view, it did not provide that a positive result could be relied upon as giving reasonable grounds for an arrest on suspicion that an offence had been committed.

29. Thirdly, there was no express power in the legislation to detain the person to await "indication" of whether drugs were present or not. The only contingency provided for in which a person could be required to wait was under s.9(2A)(2), dealing with a situation where the garda did not have an apparatus with him or her. In that case, the person could be required to wait for up to one hour until one became available.

30. Fourthly, the power to require a specimen was not conditioned upon any suspicion on the part of the garda that the person might have been driving under the influence of drugs.

31. Finally, no offence was committed by a driver who had been lawfully prescribed cannabis for medical reasons.

32. The judgment records the submission of the appellant that there was an entitlement on the part of the garda to detain the person by the roadside for a reasonable period of time up to an outer limit of three hours, that limit being said to follow from the fact that s.4(1A) describes the offence by reference to the concentration of a prohibited drug in a person's blood within three hours after driving or attempting to drive. (The appellant now says that this submission was intended to convey a view as to the period within which the entire process, including the taking of any evidential sample in the Garda Station upon arrest, must be completed.)

33. Simons J. considered that what the appellant was contending for was an implied power of arrest. The logic of her position, in his view, was that a person could be detained at the place at which their car was stopped under pain of criminal sanction.

34. The judge considered the submission of the appellant that the legislation had to be given a purposive interpretation to ensure that it was not rendered unworkable, and that its purpose was to enable the garda to form an opinion in a scientific and reliable way. He referred to the judgment in *Habte v. Minister for Justice and Equality* [2020] IECA 22, in which it was said that a statutory power could be implied so as to avoid absurdity, advance the effectiveness of the legislation and implement the intention of the Oireachtas. While querying whether that principle applied equally in the criminal law context, he found that in any event the threshold for the implication of a power had not been met for the following reasons.

35. Firstly, the judge did not find it apparent from the scheme of the legislation that the intended purpose of the requirement to provide a specimen of oral fluid was to assist in the formation of an opinion for the purpose of the power of arrest. The only express reference in the Act to reliance upon the analysis was in s.13B, which permitted a garda to require a blood specimen to be given by an arrested person who had earlier failed a roadside oral fluid test. Simons J. considered that the legislation was open to the interpretation that this was the only purpose for which the oral fluid specimen could be required. What the appellant was asking the court to do, in his opinion, was to imply that the purpose of taking the specimen was to assist in the formation of an opinion, and to then further imply a power of detention so as not to undermine the first implication.

This would be to go beyond permissible statutory interpretation and engage in legislating.

36. The second reason for finding that the threshold for the implication of a statutory power was not met was that the legislation did not envisage a time lag between the taking of the specimen and the result of the analysis. It was open to the interpretation that what was envisaged was an instantaneous indication of the presence of drugs or otherwise. The fact that the gardaí were using an apparatus that did involve a time lag could not affect the interpretation of the Act.

37. The third reason was that express provision was made for powers of arrest and detention throughout the structure of the Act. Where the Oireachtas intended such a power to be given it made provision for it. This had been done, for example, to deal with the situation where the garda did not have an apparatus on the spot. That, in the trial judge's view, militated against the implication of an additional, broader power in other situations.

38. Counsel for the appellant had relied upon the decision of this Court in *Director of Public Prosecutions v McNiece* [2003] 2 I.R. 614, where the practice of interposing a twenty-minute observation period before taking a breath sample by way of an intoxilyser (in order to allow for the dissipation of alcohol in the mouth) was upheld as being objectively justifiable. Specific evidence as to the purpose of and necessity for that observation period had been provided to the trial court. Simons J. saw this as a situation where the person had been lawfully arrested, and where the detention might have become unlawful if the specimen had not been taken within a reasonable period of time.

The case was therefore one demonstrating that there was an implied limit on an express statutory power. It did not follow that the prompt taking and analysis of an oral fluid specimen could justify an implied power of detention.

39. Finally, Simons J. declined the request of the appellant to give his views on the validity of events subsequent to the taking of the specimen and in particular on the validity of the arrest and the admissibility of the certificate of blood concentration. The District Court had not reached the point in the trial of having to consider the consequences of an unlawful roadside detention and had not made sufficient findings of fact for the High Court to address such matters.

Submissions in the appeal

40. The appellant submits that the interpretation adopted by the High Court was unduly narrow. She says that the intention of the legislature was clear and that it is trite law that where Gardaí are entitled to perform a particular procedure they are entitled to a reasonable amount of time in which to do it.

41. It is submitted that the process by which the specimen was obtained, including the request to the respondent to remain pending the outcome of the test, was objectively justified and reasonably necessary to give effect to the purpose for which the taking of the specimen was authorised. The clear purpose of the test is to establish the presence of drugs in oral fluid, and that purpose is logically causally related to the power of arrest. The objective is to assist in the formation of the opinion necessary to ground an arrest. The courts have repeatedly found that a positive preliminary breath test, without

more, can provide the necessary grounds for a reasonable suspicion for an arrest for drunk driving.

42. The decision of this Court in *Director of Public Prosecutions v Gilmore* [1981] ILRM 102 is cited here. In that case, a Circuit Court judge asked in a case stated whether an arrest was valid where the sole foundation for the opinion formed by the arresting garda was that the driver had failed a breathalyser test. Judgments were delivered by Henchy and Kenny JJ., both of whom found the arrest to have been valid. If the breathalyser gave a positive result, it was an indication that the driver had more than the prohibited level of alcohol in their urine, and the garda was entitled to rely upon that indication to form an opinion that an offence had been committed. As Kenny J. pointed out, an opinion formed on the result of the breathalyser test would probably be more accurate than one based on observation. He concluded:

> "*The section does not require that the Garda should form his opinion on observation: the purpose of the breathalyser test is to enable the Garda to form an opinion*."

43. The power of arrest is described by the appellant as dependent on the presence of the person who is the subject of the test. Since the garda can require the person to give the specimen, and can indicate the manner in which they are to comply with the requirement, it is said to follow that the power embraces the power to require the person to remain at the scene for the duration of the two-part test. Although it has two parts, it is a single test and it is not logical to suggest that the person can leave before the result

is known. Whether or not this means "an implied power of detention", there must be a power to require them to stay.

44. It is suggested that the interpretation adopted in the High Court leads to "an artificial or absurd" result, in the words of Kearns J. in *Director of Public Prosecutions v Moorehouse* [2006] 1 I.R. 421.

45. In *Moorehouse*, the legislation under consideration enabled a garda to require a person to provide two specimens of breath by exhaling into an apparatus for determining the concentration of alcohol in breath. The provision stated that the garda could indicate the manner in which the person was to comply with the requirement. The driver exhaled into the tube of a breathalyser but failed to seal her lips around the mouthpiece as had been indicated to her by the garda, with the result that insufficient breath for an analysis entered the device. In his judgment, Kearns J. accepted the principle that if there was any ambiguity in the words setting out the elements of an offence declared to be an offence, such that it was doubtful whether the action or omission in the case fell within those words, the ambiguity had to be resolved in favour of the person charged.

> *"A desired statutory objective must be achieved clearly and unambiguously, particularly where statutes of strict liability, such as the Road Traffic Acts, are concerned. Thus, in construing a penal statute, the court should lean against the creation or extension of penal liability by implication."*

46. Kearns J. went on to say, however:

"*That is not the say that a penal statute cannot be construed in a purposive manner, or that the court should readily adopt an artificial or absurd result*."

47. Applying those principles, Kearns J. found that the legislation under consideration did not create a separate offence of failing to provide a breath specimen *in the manner indicated* by a garda. He also held, however, that the specimen actually provided must be such as to enable the concentration of alcohol in the breath to be measured. That was the purpose for which the specimen was provided. If the specimen was insufficient for measurement, there was non-compliance with the requirement to provide a specimen.

48. McCracken J. agreed with Kearns J., stating that if an offence was to be created by statute it must be clearly defined and could not be implied from the wording of the statute.

49. Murray J. dissented on the issue of interpretation, but not because of any acceptance that an offence could be read into a statute by implication. He would have held that the purpose of the section was to make it an offence not to exhale into the apparatus so that a proper test of the breath could be obtained. He considered that it was clear and unambiguous that the requirement to provide a specimen would not be complied with if the person did not exhale as indicated by the garda.

50. The appellant refers to *McNiece* and contrasts it with the facts in *Director of Public Prosecutions v Finn* [2003] 1 I.R. 372. In the latter case there had been no evidence to explain the rationale for the twenty-minute observation period. The judgments of Murray and Hardiman JJ. demonstrate that where the gardaí are entitled to carry out a

procedure they are entitled to a reasonable period of time, but if the reasonableness of the time taken is challenged then it will be necessary to justify it.

51. The appellant points out that gardaí have a wide range of common law and statutory powers, not affected by s.10, that permit them to give directions to motorists in the interests of the detection of crime.

52. The respondent notes that s.10 has recently been amended, and presumes that this was done in response to the High Court judgment in the instant case. Section 13 of the Road Traffic Act 2024 inserts a new subsection 4A into s.10, which provides that where a garda requires a person to provide a specimen of oral fluid "*the member shall require the person to remain at a place (including a vehicle) at or in the vicinity of the checkpoint concerned (for a period that does not exceed 30 minutes after the provision of the specimen)"* until the apparatus indicates the presence or absence of drugs in the specimen. The new provision came into force on the 31st May 2024. The respondent submits that it underlines the fact that the appellant is arguing that the Act of 2010 should be read as if it already contained such a provision.

53. Having referred to a number of authorities on statutory interpretation and the principles derived therefrom, the respondent submits that the interpretation of the provision must commence with the ordinary and natural meaning of the words used. It is noted that the section envisages the collection of the oral fluid specimen by an apparatus that will indicate the presence of drugs. The respondent suggests that it is the choice of apparatus procured by the Garda Síochána that has led to the difficulties faced in this case. He says that under the section the person has complied with the requirement once the

specimen has been collected from their mouth. It cannot, it is submitted, be coherently read as providing an additional power to require the person to remain thereafter for a period of up to an hour.

54. With reference to the appellant's argument that the legislation should be given a purposive interpretation, the respondent says that none of the authorities on statutory interpretation would permit a court to imply into a statute a power to deprive a person of their liberty. What the appellant seeks is the implication of a power to detain for a purpose not even contemplated by the Act – a power to detain a person for up to three hours pending analysis by the machine. This involves rewriting the legislation so as to infer or imply a power to deprive a person of their liberty.

55. The respondent queries whether it is appropriate to apply a purposive interpretation to criminal legislation, but says that in any event such an interpretation would only be permissible if the ordinary and natural meaning of the provision was ambiguous or led to an absurd result. It is submitted that this provision is not ambiguous. The result would not be absurd if the gardaí used a device similar to those used for the collection and analysis of breath specimens, which are said to give an instant reading. It is submitted that the problem that has arisen is the result of the use of a piece of technology that does not align with the powers granted under the Act. As was said in *Director of Public Prosecutions v McDonagh* [2008] IESC 57, [2009] 1 I.R. 767, it would be inappropriate to allow the construction of the legislation to be regulated by the apparatus.

56. The respondent submits that it was open to the High Court judge to find that the purpose of the test was not to ground the necessary suspicion for an arrest. However, he says

that even if the judge was wrong in that, it would not alter the proposition that the apparatus in use does not align with the statutory powers and that the legislature did not intend a process that would require an implied power of detention.

57. The authorities on the strict construction of penal statutes are invoked for the proposition that the Court should not imply a power that would have the effect of creating or extending criminal liability. The principles applied by the Court of Appeal in *Habte* do not apply in this context.

58. *Finn* and *McNiece* are seen as irrelevant. It is accepted that a garda must have a reasonable time within which to *take* the specimen, but that, it is argued, has no implication for the time taken by the apparatus to process it.

Interpretation of criminal statutes

59. *Moorehouse* is an example of the application of the principle that penal statues are to be given a strict interpretation, insofar as the creation of statutory offences is concerned. Criminal liability should not be imposed on individuals other than by clear words, and if there is ambiguity on the question whether or not the actions of the accused person come within the words of the statute that ambiguity should be resolved in favour of the accused.

60. The principle should not, however, be seen as standing in isolation from other applicable rules of statutory interpretation. This is clear from a number of authorities considered in *People (DPP) v T.N.* [2020] IESC 26. The sole judgment given in that case (which concerned the interpretation of certain provisions of the Waste

Management Act 1996) was delivered by McKechnie J. The following statement of principle is in paragraphs 117 – 119 of the judgment.

> "*117. It is clear, on the basis of the above authorities, that the rule of strict construction of criminal and penal statutes has frequently and repeatedly featured in our jurisprudence. For my part, I would not wish in any way to dilute the value of this approach. The point which I am about to make is completely different in that it endeavours to properly position within the overall interpretive exercise those diverse principles which loosely are said to give rise to this method of construction.*
>
> *118. To that end, it is important to understand that this principle of interpretation operates in addition to, and not in substitution for, the other canons of construction: see, for example, the judgment of O'Higgins C.J. in Mullins v. Harnett [1998] 4 I.R. 426 at pp. 239-240. Thus understood, the principle does not alter the fundamental objective of the Court in construing legislation, which is to ascertain the will or intention of the legislature. As stated by Kelly J., as he then was, in Macks Bakeries Ltd v. O'Connor [2003] 2 I.R. 396 at p. 400: "[t]he object of all statutory interpretation is to discern the intention of the legislature". Accordingly, while undoubtedly playing a role in many cases, and an important one in some, the principle of strict construction of a criminal statute does not automatically supplant or trump all other interpretive approaches. It is one of many canons, maxims, principles, presumptions and rules of interpretation which are utilised by the judiciary when viewing legislation. The primary route by which the intention of the*

legislature is ascertained is by ascribing to the words used in the statute their ordinary and natural meaning.

119. Therefore, while the principle of strict construction of penal statutes must be borne in mind, its role in the overall interpretive exercise, whilst really important in certain given situations, cannot be seen or relied upon to override all other rules of interpretation. The principle does not mean that whenever two potentially plausible readings of a statute are available, the court must automatically adopt the interpretation which favours the accused; it does not mean that where the defendant can point to any conceivable uncertainty or doubt regarding the meaning of the section, he is entitled a construction which benefits him. Rather, it means that where ambiguity should remain following the utilisation of the other approaches and principles of interpretation at the Court's disposal, the accused will then be entitled to the benefit of that ambiguity. The task for the Court, however, remains the ascertainment of the intention of the legislature through, in the first instance, the application of the literal approach to statutory interpretation."

61. To that authoritative statement I would add, simply for the sake of clarity, that one applicable principle is that the interpretation of the provision under consideration will usually be assisted by reading it in its statutory context. For an example, see *People (DPP) v Hannaway* [2021] IESC 31, [2023] 2 IR 59, where the entire scheme of the Criminal Justice (Surveillance) Act 2009 was examined with a view to determining the role of a particular section.

Discussion

62. It seems to me that the entire scheme of s.10 must be considered in order to determine the function and purpose of the oral fluid test. The most striking thing about the provision as a whole is that it creates a power to require a specimen to be given whether or not the garda who stops a motorist at the checkpoint has any grounds for suspicion at all. This is unlike previous measures, which generally required the garda to form some opinion, based on observation of the driver, or of the mode of driving, or of other relevant factual circumstances, to the effect that an offence might have been committed.

63. The fact that the section authorises a random, suspicionless requirement to provide a specimen means, I think, that the court must bear two matters in mind in determining the interpretation of the section. One is that this is a power that can be deployed in cases where the driver is not only innocent but has given no grounds for suspicion. The other is that the section does not purport to grant a power of *arrest* in a case where there are no grounds for suspicion.

64. A second feature is the nature of the two separate offences that may be committed by a driver who has consumed drugs. One is the offence of being under the influence of an intoxicant to such an extent as to be incapable of properly controlling the vehicle. That is a matter that does, I think, require factual evidence to be given, probably concerning the condition of the driver or the mode of driving at the relevant time. By contrast, the offence under s.4(1A) is a technical one requiring proof of the concentration of a drug in the driver's blood. If the concentration is over the statutory limit, the offence has been committed whether or not the driver shows any overt sign of being affected.

65. The concentration of a drug in blood cannot be measured by an apparatus that simply detects the presence of a drug in oral fluid. To prove an offence under s.4(1A), therefore,

a blood specimen must be analysed. Clearly, gardaí are not authorised under the statute to take blood specimens at the side of the road – it can only be done by a doctor or nurse, in the garda station, and only if the person has already been arrested.

66. In that context, it seems to me that the trial judge fell into error in attaching significance to the fact that the legislation did not expressly provide that a positive result from an oral fluid test could be relied upon as giving reasonable grounds for an arrest on suspicion that an offence had been committed. (It will have been seen that the respondent has not really contended that he was right.) The error relates, in my view, to both the general law relating to powers of arrest and the scheme of the statute.

67. I am not aware of any statute conferring a power of arrest that sets out the grounds on which the power may be exercised. The procedure invariably followed by the legislature is to confer a power of arrest where the garda has a "suspicion" (or "belief", or "opinion", or "reasonable grounds" to suspect, believe etc) that the relevant offence has been committed by the individual concerned. The facts giving rise to the garda's state of mind do not have to be sufficient to prove guilt and the arrest will not be invalid if it transpires that the arrested person is innocent. The general principle is that what is required for a valid arrest is (a) a genuine suspicion (or "belief", or "opinion") that is (b) based on reasonable grounds. Thus, where the garda forms the requisite suspicion, there must be a factual underpinning capable of rationally supporting that suspicion. This is primarily a question of fact, not law.

68. The oral fluid test is capable of indicating whether or not a drug is present in a person's body, but it is not capable of determining the concentration of a drug in blood and is therefore not capable of being relied upon to prove an offence under s.4(1A). If a

positive result could not be seen as providing grounds for suspicion, and therefore as providing grounds for an arrest, it is difficult to see what purpose it could have. There would have to be independent grounds for arrest arising from, presumably, the garda's observations. The same issue underlies the suggestion that the only purpose of the test at the authorised checkpoint might be to enable the requirement of a blood specimen after arrest, since that view also means that separate grounds are needed for the arrest.

69. Such a conclusion would negate the entire purpose of the scheme of mandatory random testing, which is designed to detect persons who have consumed a prohibited level of intoxicants but may not give overt signs of having done so during a necessarily brief interaction with gardaí at a checkpoint. I would therefore hold that, as in *Gilmore*, and having regard to the scheme of the Act, the validity of an arrest for an offence under s.4(1A) does not require that the garda's opinion be based on observation of the driver. It seems to me to be clear that a positive result of an oral fluid test is capable of grounding a valid arrest on suspicion of an offence under s.4(1A), thereby enabling further investigation of that offence by means of blood analysis. It also seems to me to be clear, furthermore, that that is its purpose.

70. In this case, the evidence was that the garda noticed a strong smell of cannabis in the car when talking to the respondent. That might possibly be sufficient grounds for arrest in some factual circumstances, but could arguably be insufficient in others. The oral fluid test, on the other hand, confirmed that the drug was present in the driver's body. This was sufficient to ground the garda's opinion and hence to ground the arrest.

71. The next question, then, is the overall interpretation of the s.10 process and, in particular the issue of the time lapse, in the light of the finding that a positive result provides

grounds for an arrest and, thereafter, a basis for carrying out the more sophisticated analysis to determine whether the driver has in fact committed the offence under s.4(1A).

72. The appellant has argued that there must be an implied power to require the driver to wait for the result, whether that is to be described as an implied power to detain or not. I find it difficult to accept this submission in the terms in which it has been put, in the context of a provision that is undeniably penal in nature.

73. It may be that in some circumstances a power to interfere temporarily with the right to liberty must be read into a statute as a matter of necessary implication (rather than "reasonable" implication). A power to stop a car necessarily means that the driver is obliged to stop, and their right to proceed on a journey is interfered with. What is important, however, is that it should be possible to discern from the legislation what the lawful parameters of any obligation may be. The principle is, in theory at least, that individuals should know whether or not they are indeed obliged to comply with a particular requirement, and whether or not they will commit a criminal offence if they do not comply.

74. Here, the appellant has argued for an implied power to detain, with a concomitant power to arrest and prosecute for non-compliance. The judgment in *Habte* does not greatly assist the appellant in this regard. The question there was whether or not the Minister for Foreign Affairs had an implied power to amend errors on a certificate of naturalisation. On this issue, Murray J. said (at paragraphs 76 and 77):

76. Ultimately, in determining whether such a power should be discerned from the Act, ***the Court is concerned to determine whether it can be said that the Oireachtas so clearly intended the statutory body to enjoy the power that it was reasonable to conclude it did not feel it necessary to express it****. It is for this reason that it is sometimes said that if the power it is suggested should be implied is of a kind one would, in the ordinary course, expect to see expressed, it is not appropriate to impose that power by implication (see Magee v. Murray and anor. [2008] IEHC 371 at para. 29). However, this should not be overstated: the fact that a power is of a kind that appears expressed in other legislation is not a basis for refusing to imply one if it is otherwise appropriate to do so.*" [Emphasis added]

75. In this case, it will have been seen that the garda believed that he had a power to require a driver to wait up to one hour. That time appears to have been derived, by way of analogy, from the express statutory provision conferring the power to require a driver to wait for an apparatus to become available. Subsequently, the appellant has argued (or so it seemed to the High Court) for a period of three hours, while in this Court she has said that the proposed three-hour limit encompasses the whole procedure including the taking of a blood specimen. It is derived from the fact that the offence is concerned with the concentration of a drug in the body within three hours of having driven or attempted to drive.

76. It might be noted here that even this formulation must, of necessity, contain within it some limitation upon the time taken with the checkpoint test, since there would have to

be sufficient time within the three hours to arrest the person, bring them to the station and arrange for the blood specimen to be taken.

77. The respondent, as set out above, does not accept that there is any power at all to require a driver to wait. This is not a case, therefore, where the argument made is that any specific period of time is excessive and constitutes a disproportionate interference with (and therefore a violation of) the right to liberty.

78. I do not consider that it can be said of either the one-hour or the three-hour theory that ***"the Oireachtas so clearly intended the statutory body to enjoy the power that it was reasonable to conclude it did not feel it necessary to express it***." The very fact that members of the gardaí have (or, at least, this garda has) one view, while the Director of Public Prosecutions has a very different one, might prompt a question as to how a member of the public is to understand that they can be required to wait for any defined period, and to know that they will be criminally liable if they leave before it has expired. To repeat, the Court is dealing here with provisions permitting random testing, without the need for prior suspicion. I find it far from clear that the Oireachtas would not have felt it necessary to expressly provide that an innocent driver would have to wait up to three hours (or even one hour), if such was its intent.

79. Alternatively, the appellant argues for a "reasonable" period of time, without putting an exact limit on it. It is certainly the case that *Finn* and *McNiece*, taken together, permit of a situation where the carrying out of a statutory procedure may take some time. Provided the time actually taken can be explained, if there is a challenge, that is uncontroversial. But neither of those cases dealt with a situation where a person was at risk of committing a criminal offence, based on an *implication* into the statute, if their

view of what was a reasonable time was shorter than that of the garda or of a court. It may be noted that the recent legislative amendment sets a time limit for the test of 30 minutes – half the period of time that the garda in this case thought permissible, and one-sixth that of the period proposed by the Director – so it must be assumed henceforth that 30 minutes is the limit of reasonableness.

80. It seems to me, having regard to the foregoing, that the provisions in question do not, at least in the version in force at the relevant time, lend themselves to being read as encompassing an implied power to detain.

81. In my view, the resolution of the case turns on the statutory process involved in the carrying out of a test. It will be recalled that where a requirement is made, the obligation on the driver is to provide a specimen of his or her oral fluid "by collecting a specimen of oral fluid from his or her mouth using an apparatus for indicating the presence of drugs in oral fluid" in the manner indicated by the member.

82. The specimen must, therefore, be provided by "using" an "apparatus" "for indicating the presence of drugs". The interpretation urged by the respondent is that the requirement was fulfilled when the oral fluid specimen was collected. I do not agree.

83. Here, I think it might be useful to compare the s.10 test procedure with some other common forms of tests of physical specimens. Into one category there might be put procedures such as the one utilised where an arrested person is obliged to provide a saliva or blood specimen for the purposes of DNA analysis. The specimen is then sent to a laboratory for examination to see, for example, if it matches with DNA found at a crime scene. Similarly, when a blood specimen is taken from an arrested person for the purpose of investigating a suspected drug-driving offence, it must be sent for analysis

to determine the concentration of the drug in the blood. The arrested person could not, in either of these circumstances, be described as "using an apparatus for indicating the presence" of any substance, and their obligation goes no further than compliance with the physical taking of the bodily specimen.

84. Other tests are designed to give less sophisticated but much speedier results. Devices for detecting the presence of alcohol in breath (whether called breathalysers, alcolysers, intoxilysers or some other name) have been commonly used for decades. They are relatively simple in terms of operation – one exhales into the apparatus and it automatically displays a result very rapidly, confirming or negativing the presence of alcohol. But the fact that such devices are familiar in the road traffic context does not mean that an apparatus for testing for the presence of drugs must necessarily operate in an identical way or must necessarily yield a result with equal rapidity.

85. A more complex operation is involved in one process to which the population has become accustomed in recent years – the carrying out of an antigen test for Covid 19. The kit for such a test will typically contain several different pieces. The various items must be used in a particular sequence. The nostrils must be swabbed, the contents of the swab added to a chemical solution in a small tube and drops of the resulting mixture must be dropped into the well of the cassette-shaped part of the apparatus that carries out the analysis and displays a result. Typically, the result may take between 15 and 30 minutes to appear.

86. It seems to me to be manifest that the various items in the kit, when used together in the correct manner, make up an "apparatus for indicating the presence of Covid 19". The word "apparatus" is not a term of art, and does not necessarily connote a single device or machine capable of carrying out the operation in question. In this context, it

simply means the item or items of equipment used for that purpose. It further seems to me to be clear that the apparatus continues to be in use until the result is presented. Its use finishes at that point.

87. The process involved in the case under appeal comes, in terms of complexity, somewhere between a breathalyser test and an antigen test. The apparatus utilised by the garda consisted of two pieces of equipment, one of which collected the bodily specimen. It was then inserted into the other piece so that the specimen could be analysed and the result – either positive or negative – displayed. To "use" an apparatus "for indicating the presence of drugs" must mean using it to get a result that will indicate the presence (or absence) of drugs. In my view that, in turn, means that the person required *to provide the specimen by using the apparatus* (the driver) must wait for the result – the *use* of the apparatus does not conclude until that point, any more than the use of an antigen kit concludes before the result is displayed.

88. Further, I consider that this was clearly what was intended by the legislature. Otherwise, the whole procedure would be pointless. No proof of the blood concentration, and hence no proof of the offence, would ever be forthcoming if the person did not have to remain for the result and there were no other grounds for arrest.

89. This interpretation is, in my view, fully encompassed within the words of the section. A requirement to provide a specimen by using the apparatus includes within it the requirement to wait until the use of the apparatus has finished. There is no need to imply any further garda powers, or any additional criminal liability on the part of a person chosen for testing.

Conclusion

90. It seems to me that the issues in this case may have become obscured by the statement of the garda to the respondent that he was required to wait for a period of up to one hour. That period of time had no statutory basis. Thereafter, the parties have argued the matter as turning upon powers of detention rather than on the question of the meaning of a requirement to use an apparatus for detecting the presence of drugs.

91. It is not in accordance with principle to find that a statute has conferred a power to detain by implication, simply in order to make the statute more workable. In any event, I do not see it as necessary for any statutory purpose to imply any additional garda powers into the section. The recent amendment may have clarified the situation but, in my view, a requirement, under the statute as it stood at the time, to provide a specimen by using an apparatus for indicating the presence of drugs clearly included a requirement to wait for a result.

92. The outcome, therefore, is that it was an error of law for the garda in this case to tell the respondent that he was obliged to wait for a period of up to one hour. It is for the District Court to determine whether or not that error had any material effect in circumstances where the respondent was indeed obliged to wait for a result, and the actual time taken was considerably shorter than one hour.