

**An Chúirt Uachtarach****The Supreme Court**

O'Donnell CJ  
Charleton J  
O'Malley J  
Woulfe J  
Hogan J

Supreme Court appeal number: S:AP:IE:2021:000104  
[2022] IESC 29  
Court of Appeal Record Number: 197/17  
High Court Record Number: CCCDP0114/2015

**Between**

**The People at the Suit of the Director of Public Prosecutions  
Respondent/Prosecutor**

**- and -**

**Christopher McDonald  
Appellant/Defendant**

**Judgment of Mr Justice Peter Charleton delivered on Thursday 30 June 2022**

1. The issues on this appeal are, firstly, whether an arrested person, by virtue of common law principle, may validly give consent to the taking of forensic samples from his person (usually various plucked and cut hair samples and blood or other DNA by swabbing) notwithstanding that the Criminal Justice (Forensic Evidence) Act 1990, Regulations 1992, s 2 provides a procedure for taking such samples and, secondly, whether the presence of a solicitor is necessary for such consent to be given validly.
2. The first issue arises by virtue of the necessity to properly consider the issues in the appeal with a view to a proper assessment and is integral to the decision of this Court granting leave to appeal where, [2021] IESCDET 135, the question for appeal was thus stated:

The Court is of the opinion that this case does involve a matter of general public importance regarding the extent of the entitlement of a person in custody to access legal advice in respect of non-mandatory forensic sampling. The Court notes that these issues may arise in other criminal trials in the future and it would be in the public interest to obtain further clarity.

## Background

3. Christopher McDonald was found guilty by a jury in the Central Criminal Court on 10 July 2017 of the murder of Keith Walker on 12 June 2015 at Blanchardstown Racing Pigeon Club. The circumstances were such that investigation into trace elements might be expected to potentially yield material which might be used to establish a link to the perpetrator. In the area of the club, eyewitnesses encountered an individual, who appeared to be a woman. That individual was described by witnesses as wearing a long black wig and women's sunglasses and a cut was noticed over the person's right eye. In so far as the getup was designed to deceive, it was not successful. Witnesses in the neighbourhood testified to having encountered a man in women's clothing who was carrying a handbag. This person asked them for directions to the club; apparently innocently. That individual, however, had a firearm concealed in the handbag draped over their arm. Shortly afterwards, the victim drove up near to the club and parked his car. As he alighted having secured the vehicle, the person dressed as a woman pulled a submachine gun from the handbag, aimed the weapon and opened fire on the victim, killing him.

4. There is no question raised as to the rationality of the suspicion focusing on Christopher McDonald in consequence of an exhaustive garda enquiry. On 16 June 2015, gardaí went to a public laneway in Sheepmoor Grove and located a handbag, matching the description given by eyewitnesses from the scene of the shooting, a firearm, a wig, a clear disposable glove, and an earplug. The discharged bullets found at the scene of the shooting were of the same type as would be loaded into a machine gun of that type. Prior to recovery of this evidence, on the day after the shooting, on, 13 June 2015, the District Court issued a search warrant for a residence in County Meath. Christopher McDonald appeared to be staying there and he was there arrested. On arrest, gardaí noted him to have what seemed to be makeup on his face and there was a cut over his right eye, similar to a cut described on the individual by the two witnesses from the day of the shooting. He was arrested at 06:10 hours. On arrest, his detention was authorised by the member in charge of Blanchardstown garda station. He indicated on being detained that he was taking methadone 30 ml periodically. He was handed a notice of his rights. He had a two minute telephone call with his solicitor John Quinn; but there was no face-to-face meeting with his legal advisor until later. Shortly afterwards, Christopher McDonald signed a document consenting to the taking of forensic samples. The sampling centred on the discharge of a firearm, which leaves chemical residues on those in the immediate vicinity of firing, resulting from the explosive propellant that drives the bullets. Hence, swabs were taken from him for firearms residue analysis, swabs were also taken for DNA comparisons and a swab of what was suspected to be the makeup on his face.

5. Subsequent testing yielded a DNA profile from the disposable glove at Sheepmoor Grove, which matched the DNA profile of Christopher McDonald, as did one source of the mixture of DNA from more than two sources found on the wig. The finding of two sources means no more than that some other person had handled or worn the wig prior to or after the suspect. Thomas Hannigan, a forensic scientist at the Forensic Science Laboratory, testified at trial that the forensic analysis provided very strong support for the suggestion that the items in question had been worn by the shooter. Hence, the forensic connection established as between the person wielding the machine gun who killed the victim and Christopher McDonald was a key building block of the prosecution case.

## Statutory regime

6. At the time the samples were taken from Christopher McDonald, it was possible to require a suspect in garda custody to give samples in circumstances where an inference might be drawn

from refusal but only where the statutory regime was followed. Statutory authority derived from the Criminal Justice (Forensic Evidence) Act 1990 s 2, as amended by the Criminal Justice (Drug Trafficking) Act 1996, the Criminal Justice Act 2006 and the Criminal Justice Act 2007. This is the wording extant at the time since the substantive sections of the Criminal Justice (Forensic Evidence and DNA Database) Act 2014 were not commenced until 20 November 2015. This was after the relevant samples in this case were obtained. The relevant section is quoted as agreed and as reproduced in O’Sullivan, *Criminal Legislation in Ireland* (2nd edition, Dublin, 2014):

- (1) Subject to the provisions of subsections (4) to (8A) of this section, where a person is in custody under the provisions of section 30 of the Offences against the State Act, 1939, section 4 of the Criminal Justice Act, 1984, section 2 of the Criminal Justice (Drug Trafficking) Act, 1996 or section 50 of the Criminal Justice Act 2007, a member of the Garda Síochána may take, or cause to be taken, from that person for the purpose of forensic testing all or any of the following samples, namely—
  - (a) a sample of—
    - (i) blood,
    - (ii) pubic hair,
    - (iii) urine,
    - (iv) saliva,
    - (v) hair other than pubic hair,
    - (vi) a nail,
    - (vii) any material found under a nail,
  - (b) a swab from any part of the body including the mouth but not from any other body orifice or a genital region,
  - (c) a swab from a body orifice, other than the mouth, or a genital region,
  - (d) a dental impression,
  - (e) a footprint or similar impression of any part of the person’s body other than a part of his hand.
- (1A) A reference in subsection (1) of this section to the mouth shall be read as including a reference to the inside of the mouth. (2) [...]
- (2) [Omitted.]
- (3) [Omitted.]
- (4) A sample may be taken under this section only if –
  - (a) a member of the Garda Síochána not below the rank of superintendent authorises it to be taken, and
  - (b) in the case of a sample mentioned in subparagraph (i), (ii) or (iii) of paragraph (a) of subsection (1) of this section, or in paragraph (c) or (d) of the said subsection (1), the appropriate consent has been given in writing.
- (5) An authorisation to take a sample under this section shall not be given unless the member of the Garda Síochána giving it has reasonable grounds –
  - (a) for suspecting the involvement of the person from whom the sample is to be taken –
    - (i) in a case where the person is in custody, in the offence in respect of which he is in custody, or
    - (ii) [Omitted]

and

  - (b) for believing that the sample will tend to confirm or disprove the involvement of the person from whom the sample is to be taken in the said offence.
- (6) Before a member of the Garda Síochána takes, or causes to be taken, a sample under subsection (1) of this section, or seeks the consent of the person from whom the sample is required to the taking of such a sample, the member shall inform the person –

(a) of the nature of the offence in which it is suspected that that person has been involved,

(b) that an authorisation has been given under subsection (4)(a) of this section and of the grounds on which it has been given, and

(c) that the results of any tests on the sample may be given in evidence in any proceedings.

(7) An authorisation under subsection (4)(a) of this section may be given orally but, if it is given orally, it shall be confirmed in writing as soon as is practicable.

(8) A sample of a kind specified in subparagraph (i) or (ii) of paragraph (a) of subsection (1) of this section or in paragraph (c) of the said subsection (1) may be taken only by a registered medical practitioner and a dental impression may be taken only by a registered dentist or a registered medical practitioner.

(8A) [Omitted]

(9) A person who obstructs or attempts to obstruct any member of the Garda Síochána or any other person acting under the powers conferred by subsection (1) of this section shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 12 months or both.

(10) [omitted]

7. For these purposes, importantly, subsection (11) provides that “The powers conferred by this section are without prejudice to any other powers exercisable by a member of the Garda Síochána.” The relevant samples included in s 4(b) of the 1990 Act included bodily samples of the kind taken from Christopher McDonald while in custody. At trial, Superintendent Mahon testified that he had authorised the taking of the samples pursuant to s 2 of the Act, while Garda Graham Dillon gave evidence that he had tendered a bodily samples consent form to him. This consent form was said to be generally used where samples are taken pursuant to the common law power, not abolished by the legislation, as opposed to the specific one required to properly implement the 1990 Act. The consent form was signed by Christopher McDonald prior to the taking of said samples. Where samples are obtained on foot of the statutory power, no consent of the appellant is required. However, if they are taken on the basis of the common law power, consent is necessary. It is therefore contended on behalf of Christopher McDonald that, if taken pursuant to the 1990 Act, the failure on the part of the Garda Síochána to utilise the specified form constitutes a failure to follow procedures which render the samples unlawfully taken. If the samples were in fact taken on foot of the common law power, however, it is contended on behalf of Christopher McDonald that his lack of access to legal advice, in not meeting with his solicitor John Quinn prior to consenting to the samples being taken, renders the evidence unlawfully obtained.

### **Admission at trial**

8. A *voir dire* was carried out in relation to the use of the sample evidence at trial in the Central Criminal Court during which Garda Graham Dillon outlined the manner in which forensic samples were obtained from Christopher McDonald. In admitting the evidence the trial judge, McCarthy J, noted that the garda approach of consent, founded on the common law power, had been considered in *The People (DPP) v Boyce* [2005] IECCA 143. From this case, it was held that it was “unambiguously clear” that the common law power to take samples with consent was preserved, provided the samples were taken on a voluntary basis. McCarthy J ruled accordingly:

He [Garda Dillon] did not, in fact, proceed in accordance with the statute, but rather in accordance with a process which is perfectly lawful, which was to seek to obtain from the accused permission to take various samples from him and in the course of which he elaborated in detail upon and I’m satisfied as a fact that this occurred, the written consent

which was proffered to the accused. In effect, therefore, at that juncture the Garda had abandoned reliance upon the Act and the order made by the Superintendent and was proceeding in accordance with his powers as a member of An Garda Síochána at common law to take samples from someone who was in garda custody with that person's consent.

9. McCarthy J therefore held that the forensic evidence obtained from Christopher McDonald was admissible on the basis that the common law power to obtain samples had been lawfully utilised, thereby rendering any argument in relation to compliance with the requirements of the 1990 Act no longer applicable in this context. The evidence was presented to the jury.

### **Court of Appeal**

10. Christopher McDonald appealed to the Court of Appeal on 13 grounds, which do not require to be reproduced here, apart from

(vi) That the trial judge erred in law and in fact in admitting evidence in respect of forensic samples taken from the appellant in circumstances where it had not been established in evidence that the samples were lawfully taken;

11. The Court of Appeal rejected each ground of appeal, holding at [56] that “none of the grounds advanced by way of written or oral submission have caused us to doubt the fairness of the trial or the safety of the verdict.” Essentially, the argument put forward on behalf of Christopher McDonald in the Court of Appeal is the point advanced on appeal, with counsel for Christopher McDonald submitting that the samples were taken unlawfully if they were to be deemed taken pursuant to the 1990 Act on the basis that the relevant procedures had not been followed, or, if taken on foot of the common law power, as held by the trial judge, the evidence was unlawfully obtained on the basis that it had been obtained on foot of consent in breach of the appellant's constitutional right of access to a lawyer.

12. Submissions on this appeal focused on the argument in relation to the appellant's right to legal advice prior to the taking of samples for forensic analysis. The Court of Appeal had held that this finding was dependent on the implications of the decision in *The People (DPP) v Gormley and White* [2014] IESC 17, [2014] 2 IR 591. Counsel for Christopher McDonald contended that the *ratio* of this decision was that, as the appellant had a choice as to whether or not to give a sample on foot of the common law power, the taking of the sample prior to his having any opportunity to take advice from his solicitor constituted a breach of his constitutional right of access to a lawyer. The prosecution relied on this same decision and certain *dicta* of Charleton J in *The People (DPP) v Barry Doyle* [2017] IESC 1, [2018] 1 IR 1 in submitting that access to legal advice was not required in this instance, as it did not engage Christopher McDonald's right against self-incrimination due to the objective nature of the forensic evidence.

13. In considering the *Gormley and White* case, at [35], the Court of Appeal judgment stated that “in one sense it might be said that this case falls somewhere between *Gormley* and *White*”, in that the Christopher McDonald was not questioned prior to the arrival of his solicitor, thereby distinguishing the *ratio* of *Gormley* from this case. However, the samples were not taken pursuant to a compulsory process, as in *White*, which arguably might have engaged an issue of fair process; in so far as that might ever be relevant.

14. At [40], the Court of Appeal held that the “basic fairness of process” was not engaged in the same way as it was in the cases of *Salduz v Turkey* (App No 36391/02) (2009) 49 EHRR 19 and in *Gormley* based on the circumstances which arose here, as a statutory power existed which allowed

for compulsory obtaining of the samples. It was held that, in effect, the choice on the part of the appellant was rendered “illusory” by the additional mechanism which could have overridden any decision made by Christopher McDonald in light of legal advice received. It was, however, highlighted in the Court of Appeal judgment that this conclusion was reached solely on the basis that a power to obtain the sample compulsorily existed, and no proposition was made that the entitlement to a lawyer could never arise in relation to choices relevant to the gathering of “static” evidence, a term used by Charleton J in *The People (DPP) v Barry Doyle*.

## Submissions

15. In this court, on behalf of Christopher McDonald it is emphasised that the common law power exercised in this instance derives its legitimacy from the voluntary act of the accused in providing consent. Thus it is contended that the Court of Appeal erred in this context. In effect, it is argued, such a finding would give rise to a situation in which gardaí would be entitled to tell an accused they had a choice in consenting to giving the relevant samples, but where such consent was “effectively a nullity”, as the use of the compulsory power could override any decision, thereby leading to a significant lack of clarity in relation to the potential ramifications of refusing consent.

16. Furthermore, it is contended for Christopher McDonald that this interpretation assumes that such a potential use of the relevant statutory power for compulsory sampling would have been invoked and exercised, thereby bringing the circumstances within the scope of the decision in *White*. This, on the appellant’s submissions, constitutes a significant level of speculation and should therefore not be countenanced.

17. The effect of this alleged breach of constitutional rights, it is argued, gives rise to a failure to meet the requirement for basic fairness, which was held to be inherent in the requirement of a trial in due course of law under Article 38.1 of the Constitution in *Gormley and White*. A breach of this requirement between the time of arrest and the trial, it is submitted, resulted in a failure to give this accused a trial in due course of law. In this context, the submission advanced is that this breach results in Christopher McDonald’s trial not being in due course of law. In consequence, it is argued by the appellant, the resulting conviction must be set aside.

18. The primary submission on the part of the Director of Public Prosecutions is that there is no constitutional obligation on investigating police to allow a detained suspect access to legal advice prior to samples being taken, regardless of whether they are being taken on the basis of a voluntary or a mandatory process. In addition, the prosecution asserts that, even if a finding were somehow to be made in favour of a constitutional right to access to legal advice prior to being required to indicate consent to the taking of samples, this should not result in the setting aside of the murder conviction, as contended by counsel for Christopher McDonald, on the basis that the breach was not knowingly “deliberate and conscious”, and therefore does not come within the scope of the test set out in *DPP v JC* [2015] IESC 31, [2017] 1 IR 417.

19. In relation to the decision in *Gormley and White*, the prosecution emphasises that any finding by Clarke J in that case in relation to a potential infringement of constitutional rights where genuine legal choices are available to a suspect, and where it is reasonably necessary for the suspect to have access to legal advice before making any choice in relation to consent, was strictly *obiter*, and that such a circumstance did not arise on the facts of *White*. Furthermore, it is asserted that such a situation does not arise solely where there is a genuine legal choice available, but also requires the additional element that it be reasonably necessary for the suspect concerned to have access to legal advice. Hence, it is argued that, even if the *obiter dicta* in *Gormley and White* is deemed to be binding

in law, which is not conceded, the situation arising on the facts of this case does not fall within the scope of the ruling of Clarke J.

20. The prosecution argues that there is no constitutional right of access to legal advice prior to sampling, based on the ruling of Charleton J in *The People (DPP) v Barry Doyle*, on the basis that the forensic evidence obtained was wholly objective, thereby not engaging the right against self-incrimination in the same way that a statement or confession evidence may. It is also put forward in the prosecution submissions that the nature of forensic evidence is not dependent on whether the samples were obtained voluntarily with consent or mandatorily under statute. This distinction is claimed to be supported by the ruling of Charleton J in the High Court in *The People (DPP) v Cash* [2007] IEHC 108, in which it was held that the nature of fingerprint evidence, similarly to blood samples, will not be altered by its taking voluntarily or involuntarily at [32]. Consequently, a major distinction is sought to be drawn as between a voluntary or involuntary confession in custody, which is, on the run of all the relevant cases, capable of being coerced through pressure or constructed through suggestion, and forensic samples which are said to be subject to no such infirmity.

21. The prosecution submits that the European Court of Human Rights supports the position of the DPP, noting that the Court of Appeal at [36] of its judgment relied on *Salduz*. Further, the prosecution contends that the ruling in *Gormley* placed considerable reliance on the *Salduz* authority, basing the right to access to legal advice on the protection of the right of an accused to not incriminate themselves: the forensic objective test argument as opposed to the infirm confession danger. The Court of Appeal supported the position of the prosecution, it is claimed, in relation to the distinction between statement evidence and objective forensic evidence at [39] of its judgment in finding that, in the case of statements made during an interrogation, the right to legal advice is significant on the basis that “the course of action the suspect thus adopts may have significant implications for his or her position in the course of any subsequent trial.”

22. Based on the evidence provided to the trial judge during the course of the *voir dire* in relation to the admissibility of the samples, it is contended by the prosecution that there was no basis on which a conclusion could have been reached whereby the appellant was unaware that he was entitled to refuse consent, or that the appellant required legal advice on this issue prior to consenting, noting that the appellant did not give evidence on the *voir dire*. This, it is submitted, fails to meet the test which the prosecution claim was set out in *White and Gormley*: that the suspect show that legal advice was “reasonably necessary to enable the suspect to make an informed choice”. The prosecution submissions emphasise that there is no evidence establishing that Christopher McDonald was unaware of what he was consenting to at the time that the form was completed. The prosecution points to the fact that no complaints were made either directly following the taking of the relevant samples or over the course of subsequent consultations with solicitors in support of this submission.

23. With respect to the proposition advanced by counsel for Christopher McDonald that the inference made by the Court of Appeal that the statutory process for obtaining samples would be correctly followed was inappropriate, the prosecution counters that any such interpretation would render any consent given by an individual to voluntarily provide access to a premises by investigating gardaí inadequate, thereby mandating a reliance on statutory powers on the part of the gardaí. The prosecution point, for example, to a scenario where consenting to investigators coming on a property would be somehow rendered inadmissible where statutory powers for search were available to be pursued. Such an interpretation is therefore claimed illogical. It is submitted that the giving of consent freely and on an informed basis should be sufficient. Applying the position contended on behalf of Christopher McDonald would extend the right outlined in *Gormley*

and *White* beyond the scope intended by the Supreme Court, so it is contended. Such access as Christopher McDonald had to his solicitor is asserted, in any event, to suffice.

### Confession evidence and forensic samples

24. A distinction may validly be drawn as between what emanates from the mind of a person in custody and physical samples from that suspect's clothing or body. That does not mean that forensic sampling is not subject to the requirements of fairness. But, the application of fairness does not mean that a person in custody has more extensive right to privacy than would a person in the public street. While the substantive content of a right does not alter because a person is in custody, the fact of custody will evoke a close scrutiny of how the right is affected.

25. In the judgments of this Court in *The People (DPP) v Barry Doyle* [2017] IESC 1, [2018] 1 IR 1, the history of how abuse of a suspect in custody may lead to an unreliable or false admission to the commission of a crime is set out as the basis for the formulation of the rule, expressed by the maxim *nemo tenetur se ipsum prodere*, which underlies the reasoning for protecting against coercion and trickery. The discretion on which that maxim is based, whereby a judge may exclude evidence of an admission against interest, an exception to the prohibition of hearsay, has for centuries been exercised on the basis of the protection of suspects. But the underlying reasoning is that what is forced from a prisoner in custody, while against his or her interest, may not be an admission at all. Hence, unusually, a trial judge may conduct an examination in the absence of the jury, a *voir dire*, literally "to see to say" or "to see what will be said", in order to interrogate the circumstances in which a confession was taken. What results from a fear of prejudice or hope of favour, whether due to brutality, bullying, coercive promises or undermining by tricks, has always been considered unreliable evidence and subject to exclusion. For all the rules of the common law, where more base motives such as revenge, even on an animal or an inanimate object such as a ship, have faded into the historical distance, there remains an underlying rationale based on experience; Oliver Wendell Holmes, *The Common Law* (Boston, 1881) chapter 1. Where coercion or trickery cause a suspect confined without social or legal support into admitting to the very definite suspicions that led to their arrest in the first place, the admission before a jury of such evidence may draw them into an unfair conclusion; and this danger is not necessarily removed by the entitlement of counsel for the accused to re-examine the circumstances in which that confession emerged by testing witnesses as to its weight in their presence. This is sufficiently analysed in the aforementioned judgments to not require repetition or refinement.

26. Furthermore, reading the judgments of the European Court of Human Rights, analysed for the most part in the judgments in *Doyle*, the emphasis there is in the protection of a suspect in terms of equality of arms and fairness of treatment where arrest and interrogation may, of itself, tend to weaken the will or undermine the mind of an arrested person. *Salduz, v Turkey* (App No 36391/02) (2009) 49 EHRR 19, basing the right to access to independent legal advice on the right to a trial in due course of law, with only limited exceptions permitted. That court based the right to access to a lawyer on "the protection of the accused against abusive coercion on the part of the authorities", as well as "equality of arms" considerations and the "particularly vulnerable position" of the suspect. The court stated, at [54], that pre-questioning legal advice is required to ensure that the right against self-incrimination is not impacted or infringed. Since then, in *Ibrahim v United Kingdom* (2015) 61 EHRR 9, a two-stage test has emerged. Where a restriction is found on non-incrimination, the court must first analyse whether there are compelling reasons for the restriction and then evaluate the impact of the restriction on the overall fairness of the trial. Since confirmed in *Beuze v Belgium* (2019) 69 EHRR 1, this test has so far related to the effect of a lack of legal assistance on the mind of a suspect in terms of disputed admissions.



27. The 1990 Act did not abolish the common law. Nor did it, purposely or otherwise, usher in the application by investigating authorities of unfair practices. There is no rule of law which prevents a person burdened in conscience by a crime from arriving at a garda station and seeking to confess. Nor is a person required by law to not let investigating officers enter the family home. It is also possible for a person to waive the right to legal advice upon arrest and detention by gardaí. But, of course, the courts must scrutinise the reality of any such exercise of apparent free choice. While there is freedom from coercion in admission, and while investigating authorities are neither required to reveal their hand nor to eschew stealth, there remains an entitlement not to be the subject of fundamental unfairness in extracting consent. As Finnegan J notes in *The People (DPP) v Boyce* [2009] 2 IR 124, 162:

The consent must be freely and voluntarily given. The consent must not be obtained by trickery or unfairly or oppressively. While a discretion remains to admit evidence obtained from a detained person where he is misled or tricked such evidence, whether it be an inculpatory statement or the provision of fingerprints or DNA material, is likely to infringe on the rule against self-incrimination.

28. In *Boyce* this Court held that the enactment of the 1990 Act did not constitute the only means whereby a sample for forensic testing might be obtained. Section 2(11) preserves the common law. Hence, Denham J at [60] states that “the common law enables a practical and efficient way to obtain samples with consent, from the local population.” In that case it was consent by the suspect in custody to the taking of a blood sample which subsequently established a forensic connection to the crime of rape. Denham J expressly stated that the common law had been preserved:

57. The common law approach to obtaining information by consent is well established. It is a fundamental aspect of the approach to investigating crime. It is a practical approach. Any alteration to such a fundamental aspect of criminal investigation would require a clear expression of an intent to change. No such approach is apparent from the words of the Act.

58. The Act of 1990 in s.2(11) expressly states that the powers conferred by this section are without prejudice to any other powers exercisable by a member of the Garda Síochána. This section confers powers to take, or cause to be taken, samples, within the scheme provided. It is a matter of construing the subsection to determine to what this reference is made. It expressly retains powers of the Garda Síochána. By inference it is referring to the establishment of a scheme which does not alter the powers of the Garda Síochána. This express and implied construction indicates an intent to establish a new legislative scheme, but not to change existing law.

29. The distinction between statement evidence and forensic evidence in relation to consent from the suspect is correctly stated in Coen, *Garda Powers: Laws and Practices* (1<sup>st</sup> edition, Dublin, 2014) at 233, noting that the compulsory sampling of forensic evidence is permitted “notwithstanding the fact that in giving a forensic sample a person may well incriminate himself – the right not to incriminate oneself is not applicable in the context of forensic sampling.” That distinction is one made in *The People (DPP) v Cash* [2007] IEHC 108, and see *The People (DPP) v Gormley and White* [2014] IESC 17, [2014] 2 IR 591. A fingerprint or a sample of DNA does not change in nature regardless of the nature of the process by which it is obtained. Nonetheless, that process cannot be coercive or unfair.

30. While argument has been addressed to the issue of whether or not legal advice is appropriate prior to a person consenting, as in this case, to giving a sample, there is a reality to the case which is that Christopher McDonald did have a consultation with his solicitor prior to any sample being taken. Furthermore, there is no evidence of any coercion or unfairness by way of a trick whereby any entitlement to hold back from assistance, apart from the statutory scheme not invoked here,

which might call the validity of his actions into question. It should also be remembered that in *Doyle*, this Court did not hold beyond the provision of legal advice and did not insist on the presence of a solicitor while interviews were being conducted. There was, however, both a detailed examination of the circumstances of the confession of that accused and an overall ruling that fairness prevailed in the taking of his admission to murder. Since what was involved in that case was a process as to what a person admitted out of his own mind, as opposed to what his blood or a plucked hair sample might objectively say, the reasoning of Denham CJ becomes stronger in the context of the argument advanced on behalf of Christopher McDonald:

7. The constitutional right is grounded in Article 38.1 of the Constitution, which provides that: “No person shall be tried on any criminal charge save in due course of law.”

8. The protection of a trial in due course of law is not confined to the trial in court but applies also to pre-trial detention and questioning. However, not all rights which are guaranteed for the courtroom apply to pre-trial detention and questioning. For example, the solicitor of an accused is not permitted to have regular updates and running accounts of the progress of an investigation: *Lavery v. Member in Charge, Carrickmacross Garda Station* [1999] 2 I.R. 390.

9. The concept of basic fairness of process applies from the time of arrest. In *DPP v Gormley and DPP v White* [2014] IESC 17, [2014]2 I.R. 591, Clarke J. described this as:“...[T]he requirement that persons only be tried in due course of law therefore requires that the basic fairness of process identified as an essential ingredient of that concept by this Court in *State (Healy) v Donoghue* applies from the time of arrest of a suspect. The precise consequences of such a requirement do, of course, require careful and detailed analysis... it seems to me that the fundamental requirement of basic fairness does apply from the time of arrest such that any breach of that requirement can lead to an absence of a trial in due course of law. In that regard it seems to me that the Irish position is the same as that acknowledged by the ECtHR and by the Supreme Court of the United States.”

10. *DPP v Gormley and DPP v White* confirmed an entitlement to have reasonable access to legal advice prior to the conduct of any interrogation.

11. Further, in *DPP v Gormley and DPP v White*, opinions were given as to possible future development of the law. Thus, Hardiman J. stated (in a judgment concurring with Clarke J.):-

“[12] In my view, the most salient and practically important feature of Mr. Justice Clarke’s judgment is the citation from the judgment of the Supreme Court of the United Kingdom in *Cadder v. Her Majesty’s Advocates* [2010] UKSC 43. There, at para. 48, Lord Hope, having summarised the principal features of the European Convention on Human Rights jurisprudence concluded that: “the contracting States are under a duty to organise their systems in such a way as to ensure that, unless in the particular circumstances of the case there are compelling reasons for restricting the right, a person who is detained has access to a lawyer before he is subjected to police questioning.”[13] I believe that the law in Ireland is identical, as to the need to organise [our system] to take account of detained persons’ rights.

[17] It is, at least prima facie, a matter for the legislature and the State to provide for the time and manner of a person’s arrest and the circumstances of his or her detention. But it is now essential that these matters should be regulated, and if necessary the mode of regulation altered, in order to vindicate the right to legal advice.”

12. In other words, while the right of access to a solicitor before questioning was once again affirmed, Hardiman J. pointed out that there needed to be regulation by the Legislature and the State in the area.

13. In *Gormley* the issue as to whether a detained person is entitled to a general right to have a lawyer present during an interrogation did not arise. Consequently, any statements on such issue are obiter dicta.

14. In this case the appellant had access to his lawyer just before the key interview. Also, at the solicitor's request, the interview was interrupted to enable access by the solicitor to the appellant.

15. Consequently, it is clear that the appellant requested access to a solicitor and obtained access to a solicitor. He had access to legal advice. He had access to the solicitor before the important Interview 15, and he had access, at the solicitor's request, during that interview, when the solicitor phoned in and sought to speak to the appellant as Interview 15 was underway. The interview was interrupted to enable the appellant to speak to his solicitor. There was no request to have the legal adviser present during the interview.

31. In *The People (DPP) v Wilson* [2017] IESC 54, [2019] 1 IR 96 a man arrested for murder refused to cooperate in the giving of a sample. This assumed importance due to the gardaí obtaining a full DNA profile from a glove discarded at the scene of the crime. In consequence, the investigators kept such items as the accused had touched for analysis; particularly cigarette butts as he was a prodigious smoker. Rights to privacy within a garda station could not be higher than had the gardaí, for instance, trailed the accused and picked up such butts as he had discarded on the public street; that was the basis of the ruling in relation to discarded chewing gum in a case called *The People (DPP) v Scanlon* (Unreported, Court of Criminal Appeal, 20 April 2007) where that sample was simply taken up when abandoned in custody. This case is sought, on behalf of Christopher McDonald, to be distinguished on the basis that the appellant in that case had no choice, whereas this detainee exercised a choice. It is hard to see how exercising a choice makes what is otherwise lawful into an unlawful act. Furthermore, the judgment in principle of the Court clearly covers both a chosen course of consent and the *Scanlon* type of situation. Clarke, Dunne and O'Malley JJ considered the privacy and disparity of power argument and ruled:

4.30 We accept that a person in detention is, for a variety of reasons, in a particularly vulnerable position. Apart from other potential issues, the Court of Criminal Appeal was correct in pointing out that he or she will be dependent on the Gardaí for the supply of all necessary things and facilities for the duration of the detention. It is partly for that reason that the courts will give extra scrutiny to events occurring during detention, to ensure that the rights of a vulnerable person are not breached.

4.31 However, the requirement for enhanced scrutiny, and careful examination of the question whether a right has been breached, cannot create a situation where the actual substantive content of the right differs according to whether a person is at liberty or in custody. It cannot be that a person who is in custody for the purpose of investigation has a more extensive privacy protection than a person at liberty. The issue has to be the same in both cases – was the constitutional right to privacy breached by the manner in which the sample of biological material was obtained and analysed? The answer cannot vary simply because one is in custody.

4.32 The first part of the question is easily answered in this case. The Gardaí must be entitled to pick up items discarded by persons in detention in a Garda station in the same

way that they would in a more public place. There is no question of any property right being interfered with. The cigarette butts were therefore lawfully in the hands of the Gardaí. We would accept that, while he had relinquished all interest in the physical cigarette butts, Mr. Wilson continued to retain a privacy interest in the information contained in the DNA deposited on them. However his rights in this regards were, as already noted, subject to the public interest in the proper investigation of the offence. The lawfulness of carrying out an analysis of the DNA material therefore depended on whether it was properly related to that objective. In our view the generation of a DNA profile, for the purpose of discovering whether or not it matched the profile associated with the crime, was a justifiable intrusion into Mr. Wilson's privacy.

4.33 The argument made on behalf of Mr. Wilson (and to a certain extent accepted in the Court of Criminal Appeal) would lead to the conclusion that a person in custody could exercise a veto on the investigation of DNA material, unless the sample was taken by the use of force in exercise of the powers under the 1990 Act. Under the analysis adopted by the Court of Criminal Appeal that veto could arise in any event in the case of "necessary" items handled by the prisoner.

4.34 In our view this analysis is misconceived and fails to take sufficient account of the relevance of the unchallenged legislation conferring on the Gardaí the power to take bodily samples, if necessary by force. The statute, in the terms in which it conferred that power, must be taken as having embodied the policy of the legislature in respect of the parameters of the privacy rights of an individual in DNA material. It restricted the taking of bodily samples to cases where an authorisation was given for stated reasons and the material was taken only for the purposes of the investigation in question. That proportionate invasion of privacy was justified by the need to investigate serious crime, and the legal obligation on the detained person was to refrain from obstructing it.

4.35 Where the detained person indicated an intention to resist the taking of the sample, and the Gardaí had an alternative source lawfully in their hands, it would not accord with principle to elevate the privacy rights of the person in custody – the whole purpose of which is investigatory – beyond those of either a person who complied with the statutory regime or a person at liberty. Since it is accepted that the latter would have no cause for complaint if his cigarette butts were picked up in a public place, or in an authorised search of his premises, it is impossible to hold that the rights of the detained person are breached by the same procedure in respect of things that he discards. Equally, it would clearly be contrary to public policy to hold that the Gardaí were in the circumstances constrained to use force, thereby risking injury to both the suspect and themselves, and that a failure to use force rendered the picking up of the discarded items unlawful.

4.36 In circumstances where the biological material is obtained without recourse to the statutory power to take it by force, the right to privacy would however arguably entail a right that it not be tested or used for purposes outside the investigation of the offence. That question does not however arise in this case, since there is no evidence that the sample was subjected to any process beyond the generation of the DNA profile or that the Gardaí retained it in an unauthorised databank.

32. Nor does DNA evidence, a forensic fact "uninfluenced by the mental state of the arrested person" (Charleton J in *DPP v Doyle* [2017] IESC 1 at [44]) become subject to infirmity by reason of any circumstance of its taking. The ruling in *Doyle* distinguished the significance of access to legal advice for a detained suspect in the past and the modern position in this context, most notably the ruling of Warren CJ in *Miranda v State of Arizona* 384 US 436 (1966), at [48] on the basis that the "most fundamental problem" giving rise to the need for extensive protection, that

interrogations were originally carried out in secrecy, no longer applied in this jurisdiction. Here, there is no question of any trick or coercion. It may be noted that in *Gormley and White* at [9.14], it was held that any departure from the general position that legal advice should be received after arrest and that no interrogation may take place without the opportunity to obtain such advice must involve a “pressing and compelling need to protect other major constitutional rights such as the right to life.” That does not arise in this case.

33. Finally, it might be added that only one form seems to be in use in garda stations where a prisoner chooses to consent to physical sampling from his body. That form references the 1990 Act but is not capable of any argument as to confusion.

### **Result**

34. In the result, there is no basis for any ruling that the consensual taking of a blood sample from a person in custody who has been given a notice of rights and who has availed of a telephone conversation with a solicitor was unlawfully taken.