APPROVED **[2021] IEHC 135**

THE HIGH COURT

2020 No. 536 SS

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857 (AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961)

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF GARDA NICOLA CATHERINE MURPHY)

RESPONDENT TO APPEAL

AND

JOSEPH CULLEN

APPELLANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 18 March 2021

INTRODUCTION

1. This appeal comes before the High Court by way of a case stated from the District Court. The appellant has been convicted of a drunk driving offence. The case stated presents a short question of statutory interpretation concerning the procedure governing the taking of a specimen of blood from a person who has been admitted to hospital following a road traffic incident. The question of statutory interpretation centres on the meaning of the phrase "*a doctor treating the person*" as used under section 14 of the Road Traffic Act 2010 (as amended).

NO REDACTION REQUIRED

RELEVANT STATUTORY PROVISIONS

2. Section 14 of the Road Traffic Act 2010 (as amended) ("***the RTA 2010***") allows for the taking of a specimen of blood or urine from a person who has been injured in consequence of a road traffic incident and has been admitted to, or is attending at, a hospital. The section only applies in circumstances where the person has not been arrested. (The taking of a specimen in a hospital setting from an arrested person is governed separately under section 12 of the RTA 2010).

3. Section 14 of the RTA 2010 makes contingency both for circumstances where a person is capable of complying with a requirement to provide a specimen, and those where a person is incapacitated, e.g. where the injured person is unconscious. The case stated is concerned with the former contingency.

4. In each instance, there is a statutory requirement imposed upon An Garda Síochána to consult with "*a doctor treating the person*". This is provided for under section 14(4) of the RTA 2010 as follows.

> "(4) Before making a requirement of a person under subsection (1) or a direction under subsection (3A) the member of the Garda Síochána concerned shall consult with a doctor treating the person, and if a doctor treating the person advises the member that such a requirement or direction would be prejudicial to the health of the person the member shall not make such requirement or direction."

5. There is no statutory definition of the phrase "*a doctor treating the person*".

6. Separately, a doctor or nurse may refuse, on medical grounds, to permit the taking or provision of a specimen from a patient under their care. See section 14(3) as follows.

> "(3) Notwithstanding subsection (2), it is not an offence for a person to refuse or fail to comply with a requirement under subsection (1) where, following his or her admission to, or attendance at, a hospital, the person comes under the care of a doctor or nurse and the doctor or nurse refuses, on medical grounds, to permit the taking or provision of the specimen concerned."

7. For completeness, it should be explained that there is no equivalent statutory requirement to consult with a treating doctor prior to the taking of a specimen from a person in a hospital setting in circumstances where that person is under arrest. (See section 12 of the RTA 2010).

THE CASE STATED

8. The appellant ("***the accused***") had been convicted in the District Court of an offence of drunk driving on the basis of the analysis of a specimen of blood taken from him while he had been attending hospital following a road traffic incident. The accused had not been under arrest at the time. The accused complied with a requirement made by a garda pursuant to section 14(1) of the RTA 2010 to permit a specimen to be taken, and opted to permit the designated doctor to take a specimen of blood (as opposed to urine).

9. The District Court judge explains in the case stated that whereas the member of An Garda Síochána had sought and obtained permission from a named doctor for the taking of a specimen, it had not been proved in evidence that "*the doctor had any responsibility whatsoever with the treatment of the appellant*".

10. The District Court judge nevertheless took the following pragmatic approach to the interpretation of the statutory requirement to consult (see paragraph 10 of the case stated).

> "Having considered the submissions of the parties and the relevant case law, I ruled that notwithstanding the wording of Section 14(4) I was satisfied it was sufficient compliance with Section 14(4) that a doctor in charge (albeit it had not [been] established what the doctor was in charge of) had been consulted even though it was not proved that the doctor had any responsibility whatsoever with the treatment of the appellant. I held that it was an unreasonable expectation to expect that a member of An Garda Siochana would have to seek out a doctor treating an arrested person* (in this case the appellant) in a busy emergency department and I queried with Counsel as to whether he was aware of exactly how busy an emergency department in a large hospital could be."

> *It is common case that the accused had not, in fact, been under arrest.

11. This approach seems to have been informed by a submission made on behalf of the presenting Garda Inspector to the effect that it was sufficient that the relevant garda had consulted with a doctor "*in charge of something involving the running of a hospital*", and that it was "*not feasible*" to expect the member to have consulted with "*a treating doctor*". (See paragraph 9 of the case stated).

12. The following two questions of law have been stated for the opinion of the High Court.

    (a). Was I correct to find that Section 14 (4) of the Road Traffic Act, 2010 was complied with, absent evidence that [the doctor consulted] was a treating doctor as required by the legislation?

    (b). Was I correct in law to convict the appellant?

13. The case stated came on for hearing before me on 11 March 2021, and I reserved judgment to today's date. Both parties had prepared excellent written legal submissions in advance of the hearing for which I am very grateful. These were elaborated upon by oral submission.

SUBMISSIONS OF THE PARTIES

The appellant / The accused

14. Counsel on behalf of the accused submits that, in the absence of a statutory definition, the phrase "*a doctor treating the person*" should be given its ordinary and natural meaning. The phrase would include a doctor providing treatment, by, for example, examining, diagnosing or operating upon a patient. It is accepted that a multi-disciplinary team of doctors might be employed in the treatment of any given patient. This team might involve junior doctors and senior consultants, and no issue could be taken in relation to the rank or experience of the doctor consulted under the section. However, it

is submitted that there must be some nexus vis-à-vis treatment between the doctor and the patient.

15. Counsel refutes any suggestion that the phrase should be given a broader meaning based on the supposed purpose of the legislation. Counsel emphasises that section 14 of the RTA 2010 creates a criminal offence, and that its provisions must therefore be interpreted strictly, citing, by analogy, *Director of Public Prosecutions v. Freeman* [2009] IEHC 179, [39]; *Director of Public Prosecutions v. Moorehouse* [2005] IESC 52; [2006] 1 I.R. 421, [44]; and *O'Keeffe v. District Judge Mangan* [2015] IECA 31, [13].

16. The judgment in *People (DPP) v. Greeley* [1985] I.L.R.M. 320 is cited in support of the proposition that failure to comply with a statutory precondition for the taking of a specimen renders the certificate of the analysis of the specimen inadmissible.

Director of Public Prosecutions

17. Counsel on behalf of the Director of Public Prosecutions ("***the Director***") drew attention to the use of the indefinite article in the phrase "*a doctor treating the person*" under section 14(4) of the RTA 2010. It was submitted that the use of the indefinite article indicates that a garda has "*leeway in respect of which doctor to consult with*". It is further submitted that when a person enters an accident and emergency environment, it is likely that a number of doctors will be engaged in treating that person. As there is no statutory definition of "*treating*", it is submitted that a garda can consult with any doctor who is familiar with the medical condition of the patient, and thus able to determine whether the taking of a specimen would be detrimental to their health.

18. It is said that the narrower interpretation put forward on behalf of the accused would have the potential to lead to absurdity. The Director's argument is formulated as follows in the written legal submissions (at paragraph 16 thereof).

> "It is submitted that, applying the interpretation the Appellant urged the District Judge to accept, has the potential to lead to absurdity and

> negate the intention of the Oireachtas. The Gardai have a finite period of time to take a sample from a defendant, namely three hours from the time of driving. It is submitted that there are numerous examples, in an emergency room situation, where a particular doctor might not be available to consult within that timeframe. If the prosecuting member was limited to getting the requisite permission from a specific doctor, as opposed to any doctor who has provided treatment or engaged in an evaluation of a defendant's medical condition, one could see how prosecutions could be frustrated due to the inability of the prosecuting member to get the requisite permission within the defined time limit."

19. Counsel submits that the purpose of the legislation is to ensure that the health of an incapacitated or injured person is not detrimentally affected by the taking of a sample of blood. It is suggested that this purpose "*is not of the same legal order*" as making a requirement to provide a specimen where there is no legal basis to do so. It is also said that an injured person has "*two levels of protection*": first, a doctor "*familiar with his condition*" must give consent to a sample being taken; and, secondly, the designated doctor or nurse taking the sample can still refuse to take the sample if they have a concern that the incapacitated person is medically unfit to provide it.

20. While accepting that, generally, a penal statute or provision requires a strict, or literal, interpretation, counsel submits this should not be applied if the result would be pointless. The judgment of Finnegan J. in *Director of Public Prosecutions v. McDonagh* [2008] IESC 57; [2009] 1 I.R. 767 is cited in support of this proposition.

21. There is some suggestion in the written legal submissions that the legislative history of section 14 of the RTA 2010 indicates that the statutory requirement to consult with a treating doctor is intended primarily to protect the position of an incapacitated patient (rather than an injured person who is able to refuse to comply with a requirement to permit the taking of a specimen). Attention is drawn to the fact that an express power to direct the taking of a specimen from a person, who is incapable of complying with a requirement by a garda, did not appear in the RTA 2010 as originally enacted. This

power is said to have been introduced subsequently, under the Road Traffic Act 2014. It is suggested that the statutory requirement to consult with a treating doctor is merely a consequential amendment, and that the legislative intent was "*to intrinsically link*" sections 14(3A) and 14(4).

22. Counsel, very sensibly, did not pursue this submission at the hearing before me. It is immediately apparent from the opening clause of section 14(4) that the statutory requirement to consult with a treating doctor applies equally to circumstances where a patient is well enough to comply with a requirement to provide a sample (subsection (1)), and to those where the patient is incapacitated (subsection (3A)). Moreover, the legislative history as outlined in the written legal submissions overlooks the fact that the statutory requirement to consult had first been introduced under the Road Traffic (No. 2) Act 2011, a number of years prior to the insertion of section 14(3A) by the Road Traffic Act 2014.

Definition of "treating physician"

23. Finally, counsel on both sides referred me to the definition, in a United States judgment, of a "*treating physician*". With all due respect to their diligence, it does not seem to me that this definition is of any assistance. It clearly refers to an ongoing long-term relationship between a doctor and patient, and is not apt to describe the transient relationship between a doctor and a patient in an accident and emergency department of a hospital.

DISCUSSION AND DECISION

24. The principal issue for determination in this case stated is whether, on the facts as found by the District Court, the requirement for consultation under section 14(4) of the RTA 2010 had been complied with. In the event that this court were to find that there had been non-compliance, a secondary issue would then arise as to the consequences of such non-compliance for the prosecution's case. These issues are addressed in sequence under separate headings below.

"DOCTOR TREATING THE PERSON"

25. Notwithstanding that section 14 of the RTA 2010 is a penal provision, the process of statutory interpretation must commence with a consideration of the ordinary and natural meaning of the statutory language. The approach to be adopted has been summarised by the Supreme Court as follows in *Director of Public Prosecutions v. T.N.* [2020] IESC 26 (at paragraph 119 of the judgment).

> "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."

26. The Supreme Court reaffirmed this statement in its very recent judgment in *Bookfinders Ltd v. Revenue Commissioners* [2020] IESC 60. O'Donnell J., having cited the passage above, then stated as follows (at paragraph 56 of his judgment).

> "I would merely add that the principle of strict construction is, like many other principles of statutory interpretation, a principle derived from the presumed intention of the legislature, which is not to be assumed to seek to impose a penalty other than by clear language. That approach should sit comfortably with other presumptions as to legislative behaviour, such as the presumption that legislation is presumed to have some object in view which it is sought to achieve. A literal approach should not descend into an obdurate resistance to the statutory object, disguised as adherence to grammatical precision."

27. I turn now to apply these principles to the present case. The phrase "*a doctor treating the person*" can only be understood as referring to a doctor who has had some actual involvement in the treatment and care of a patient. This follows from the ordinary and natural meaning of the word "*treating*" when used in a medical context. The word connotes the giving of medical care and attention to a person. When used to qualify the word "*doctor*", it signifies a doctor who is giving medical care and attention to that person. The use of the indefinite article indicates that the legislation contemplates that more than one doctor may be treating the person. Absent actual involvement in the treatment, however, it is not sufficient that a doctor might be familiar with the medical condition of the patient. The word "*treating*" signifies a greater involvement.

28. There might, in a marginal or borderline case, be an argument as to whether a doctor who had not had direct contact with a patient personally might nevertheless be characterised as a treating doctor. One can readily envisage a situation whereby a junior doctor has sought direction from a more senior colleague as to the treatment of a patient. The fact that the more senior doctor had overall direction of the treatment, albeit that he or she may not have physically examined the patient, would appear to be sufficient to bring them within the concept of a treating doctor.

29. No such niceties arise in the present case. This is because, as appears from the case stated, there was no evidence before the District Court that the doctor, whom the garda had consulted, had had any responsibility whatsoever for the treatment of the accused.

30. It is necessary next to consider whether there is any basis for departing from the ordinary and natural meaning of the phrase "*a doctor treating the person*".

31. Counsel on behalf of the Director made an attractive argument along the following lines. It is submitted that the legislative intent underlying the requirement to consult with a doctor is simply to ensure that the taking of a blood specimen from a person in hospital is not prejudicial to the health of that person. It is sufficient to this purpose that a garda consult with any doctor who is familiar with the medical condition of a patient, and able to determine whether the taking of a specimen would be detrimental to their health.

32. The difficulty with this submission is that it necessitates a departure from the ordinary and natural meaning of the word "*treating*", so as to expand the class of doctors to include not only those involved in the giving of medical care and attention to a person, but also those who are merely familiar with the medical condition of the patient. The justification offered for this expansion is that it is said to better reflect the presumed legislative intent.

33. With respect, it is not permissible to adopt a "*purposive*" approach to the interpretation of penal legislation. This limitation on the use of a purposive approach to interpretation is expressly recognised under section 5 of the Interpretation Act 2005. This section otherwise allows a statutory provision to be given a construction that reflects the plain intention of the Oireachtas in circumstances where a literal interpretation would be absurd or would fail to reflect the plain intention of the legislature. However, this approach is expressly excluded in the case of a provision that relates to the imposition of a penal or other sanction.

34. More generally, this limitation on the use of a purposive approach to interpretation is a logical corollary of the rule of statutory interpretation that criminal and penal statutes are to be construed strictly.

35. None of this is to say that a court must disavow any consideration whatsoever of the legislative context in interpreting penal legislation. To borrow the memorable phrase of O'Donnell J. in *Bookfinders Ltd v. Revenue Commissioners* [2020] IESC 60 (at paragraph 52) it is not correct "*to approach a statute as if the words were written on glass, without any context or background*".

36. The judgment of Finnegan J. in *Director of Public Prosecutions v. McDonagh* (cited by counsel for the Director in the present case) indicates that the literal rule should not be applied in construing penal legislation if this would negate the intention of the legislature as derived from the construction of the section within its context. This supports the "*text in context*" approach to interpretation.

37. Here, the ordinary and natural meaning of section 14(4) of the RTA 2010 is clear and unambiguous. The literal interpretation does not produce a meaning which is absurd or fails to reflect the plain intention of the legislature, still less does it negate the plain intention. It is apparent from the structure of section 12 and section 14 of the RTA 2010 that the legislature intended to provide an additional layer of protection where a specimen is to be taken, in a hospital setting, from a person who is not under arrest. The requirement to consult with a treating doctor only applies where the person in hospital has not been arrested. The legislative history indicates that this additional layer of protection supplements that which had already existed under section 14(3), i.e. whereby a doctor or nurse may refuse, on medical grounds, to permit the taking or provision of the specimen. The additional layer of protection was first introduced by the Road Traffic (No. 2) Act 2011, and is maintained under the Road Traffic Act 2014.

38. There are rational reasons for which the legislature may have chosen to limit the category of doctors to be consulted to those treating a patient. This category of doctor is best placed to determine whether the taking of a specimen would be prejudicial to the health

of the person. An assessment of whether the taking of a specimen is prejudicial requires consideration of matters other than simply whether the drawing of blood is contra-indicated by a particular medical condition. It also necessitates consideration of whether the process will disrupt or delay the provision of medical treatment to the patient. The taking of a blood specimen will involve an external medical professional, i.e. the doctor or nurse designated by An Garda Síochána, attending on the patient, and will take some while to complete. A treating doctor might legitimately decide that the taking of a specimen at a particular point in time would interfere with the treatment of the patient. This requires direct knowledge of the patient's course of treatment. Put otherwise, a treating doctor will have a more immediate appreciation of the medical exigencies than one who is not involved in treatment.

39. It might well be that it would have been more convenient for An Garda Síochána and the prosecuting authorities had the category of doctor to be consulted been defined more broadly. Crucially, however, there is nothing in section 14, nor the RTA 2010 more generally, to indicate any such legislative intent. Rather, what emerges from the legislation is that the legislature was solicitous to protect injured persons who are being treated in hospital following a road traffic incident. This is achieved by imposing an express statutory obligation to consult with a doctor treating the injured driver.

40. As explained at paragraphs 21 and 22 above, this protection is not confined to persons who are unconscious or otherwise incapacitated. Nonetheless, given that section 14(4) must bear the same meaning in both contexts, it is legitimate to have regard to the especial importance of the statutory protection in the case of an incapacitated person. It can scarcely be said that a legislative requirement to consult with a treating doctor in the case of a person, who is incapable of withholding consent to the taking of a specimen, is absurd.

41. The flaw in the interpretation advocated for on behalf of the Director is that it necessitates going well beyond the text of the RTA 2010, and involves speculating as to the legislative intent. In particular, it implies that the statutory protections afforded to injured drivers (who in some instances will be incapacitated) must be subordinated to an unarticulated objective of ensuring that a specimen is taken within the three hour window applicable to drunk driving offences. It also involves making an assumption that a requirement to consult with a treating doctor will present insurmountable logistical difficulties. None of this is to be found in the Act itself, nor is it discernible from the statutory language used.

42. Finally, it should be acknowledged that the discussion immediately above may be open to the criticism that it blurs the distinction between (i) the "*text in context*" approach to statutory interpretation, and (ii) the "*purposive*" approach in its proper sense. It should be reiterated that the latter approach is not appropriate in the case of a penal statute which must be strictly construed. The discussion above does confirm, however, that even if a purposive approach were to be applied to section 14(4), the same interpretation holds good. The phrase "*a doctor treating the person*" refers to a doctor who has had some actual involvement in the treatment and care of a patient.

CONSEQUENCES OF NON-COMPLIANCE

43. It is next necessary to consider the legal consequences of the non-compliance with section 14(4) of the RTA 2010.

44. In this regard, counsel for both sides helpfully referred me to the judgment of the Supreme Court in *Director of Public Prosecutions v. Avadenei* [2017] IESC 77; [2018] 3 I.R. 215. There, O'Malley J., writing for the court, identified various categories

of procedural error which might occur in the context of a prosecution for drunk driving. See paragraph 91 of the reported judgment as follows.

> "[…] the analysis of the authorities cited above demonstrates that in principle a flaw in the implementation of the statutory procedures will invalidate the evidence produced under the statutory regime if:-
>
> (i) a precondition for the exercise of the power to require a specimen has not been met, as where there has not been a lawful arrest; or
>
> (ii) the power purportedly exercised was not a power conferred by the statute, as where a demand was made in circumstances where the driver was under no obligation to comply; or
>
> (iii) the power is exercised without full compliance with the statutory safeguards for the defendant's fair trial rights; or
>
> (iv) the power is erroneously exercised, or procedures are erroneously followed, in such a fashion that the evidence proffered as a result does not in fact prove what it was intended to prove."

45. The procedural error in the present case comes within the first of the four categories identified in *Avadenei*. The judgment goes on to state that the powers conferred by the RTA 2010 must be exercised within the statutory context and in accordance with the statutory conditions. Such powers cannot be added to by error on the part of a garda, so as to be exercisable in respect of a person who has not been made amenable to the statutory regime or so as to enable demands to be made that are not authorised by the RTA 2010.

46. The rationale for this approach has been explained as follows by Clarke J. in *Director of Public Prosecutions v. Cullen* [2014] IESC 7; [2014] 3 I.R. 30. (Although Clarke J. dissented on the question of whether the arrest in that case had been unlawful, his approach to the evidential issue is consistent with the majority judgment and has since

been approved of in *Avadenei*). See page 48 of the reported judgment in *Cullen* as follows.

> "An expert from the laboratory could be called to give an expert view as to the relevant concentration. All of this would, of course, be very cumbersome and make the prosecution of drunk driving cases very difficult. It was, for that reason, that, from the earliest times when drunk driving was defined by reference to alcohol concentration, the relevant legislation provided for the use of a certificate to prove such alcohol concentration. However, it is important to emphasise that such a certificate would not, in an ordinary case and in the absence of enabling legislation, be evidence. It is only because the statutory regime permits such a certificate to be given as evidence that it is admissible at all. Thus compliance with the statutory regime is in the nature of a condition precedent to the admissibility of the evidence in the first place, for in the absence of such compliance, the certificate simply would not be evidence in the ordinary way.
>
> Thus the distinction between certificate evidence in a drunk driving case and the vast majority of other forensic evidence which might be tendered at a criminal trial is that alcohol concentration evidence by certificate is not evidence at all unless the statutory requirements have been met. […]"

47. The RTA 2010 identifies two contingencies in which a person can be obliged to provide a specimen of blood or urine. The first is where the person has been arrested. The second is where the relevant person has been admitted to, or is attending at, a hospital for an injury received in a road traffic incident. In each instance, various preconditions are prescribed.

48. The case law to date has been concerned primarily with the first of these two contingencies. Relevantly, the case law indicates that a valid arrest is a condition precedent to the subsequent admissibility of a certificate of analysis in respect of the blood or urine sample. Thus, the analysis of a specimen has been excluded in circumstances where the specimen had been obtained other than pursuant to a lawful arrest, e.g. where a specimen had been provided voluntarily by a person who had not been arrested (*People (DPP) v. Greeley* [1985] I.L.R.M. 320), or where an arrest had been unlawful (*Director of Public Prosecutions v. Cullen* (cited above)).

49. It does not appear that there is any written judgment addressing the second contingency, namely where the obligation to provide a specimen of blood or urine arises under section 14 of the RTA 2010, i.e. where the sample is taken in a hospital setting from a person who is not under arrest. Logically, the same principles which govern the arrest cases must equally apply to such cases. In each instance, the legislature has identified certain procedural requirements or conditions precedent to the obligation to provide a specimen. There is no logical basis for distinguishing between the two, and saying that the procedure prescribed in the case of a hospital sample does not have to be complied with.

50. It was submitted on behalf of the Director of Public Prosecutions that the rights engaged by the taking of the sample from a person who has not been placed under arrest are not of the same legal order as those engaged by arrest. The submission is correct insofar as it goes. The power to request a sample under section 14 only arises, by definition, where the individual involved has not been arrested and thus has not been deprived of his or her liberty. Nevertheless, the obligation to provide a sample under compulsion does engage other rights including the privilege against self-incrimination. It also engages, to a limited extent, the right to bodily integrity. The effect of section 14 is to allow a member of An Garda Síochána to oblige a person to provide a sample which, ultimately, may be used against them in a criminal prosecution. It also allows for the possibility of a sample being taken without consent in the case of a person who is incapacitated. Whereas any interference with personal rights inherent in the taking of a sample under compulsion is justified and is proportionate to the legitimate aim of the detection and prosecution of a possible offence of drunk driving, the taking of a sample does engage those rights. The legislature has carefully prescribed safeguards in order to regulate the conduct of An Garda Síochána, and these safeguards cannot normally be waived by the courts.

51. Perhaps more importantly, the rationale for the necessity to comply with the statutory requirements as a condition precedent to the admissibility as evidence of a certificate of the analysis of a specimen, i.e. a section 17 certificate, applies equally to a specimen purportedly obtained pursuant to section 14 of the RTA 2010. As explained in the extract from the judgment of Clarke J. in *Director of Public Prosecutions v. Cullen* cited at paragraph 46 above, evidence by certificate is not evidence at all unless the statutory requirements have been met.

52. As appears from the case stated, there was no evidence before the District Court that the doctor consulted by the garda was a treating doctor as required by the legislation. The prosecution thus failed to establish that An Garda Síochána had complied with section 14(4) of the RTA 2010.

53. It is a condition precedent to the lawful invocation of the statutory power under section 14(1), i.e. the power to require an injured person to permit the taking of a sample, that a treating doctor have first been consulted and not objected ("*Before making a requirement of a person under subsection (1) … the member of the Garda Síochána concerned shall consult with a doctor treating the person*"). The consequence of the non-compliance with section 14(4) in the present case is that the specimen was not lawfully obtained in accordance with section 14 of the RTA 2010. The subsequent analysis of the specimen, as *per* the section 17 certificate, is inadmissible as evidence against the accused.

CONCLUSION

54. The District Court has sought the opinion of the High Court on the following two questions of law.

(a). Was I correct to find that Section 14(4) of the Road Traffic Act, 2010 was complied with, absent evidence that [the doctor consulted] was a treating doctor as required by the legislation?

(b). Was I correct in law to convict the appellant?

55. The answer to both questions of law is "*no*". The phrase "*a doctor treating the person*" as used under section 14(4) of the Road Traffic Act 2010, on its proper interpretation, refers to a doctor who has had some actual involvement in the treatment and care of a patient. As appears from the case stated, there was no evidence before the District Court that the doctor consulted by the garda had had any responsibility whatsoever for the treatment of the accused. As further appears from the wording of the first question of law, there was an absence of evidence that the doctor consulted was a treating doctor as required by the legislation. Against this background, the requirements of section 14(4) of the RTA 2010 cannot be said to have been complied with.

56. The consequence of this non-compliance is that the specimen was not lawfully obtained in accordance with section 14 of the RTA 2010. The evidence of the analysis of the specimen is inadmissible. The appellant/accused should have been acquitted.

57. This court will, therefore, make an order reversing the conviction.

58. As to costs, it had been indicated at the hearing before me that the appellant/accused had applied for legal aid in respect of the case stated. If this has been granted, then it would seem that no costs order will be required.

59. In circumstances where this judgment is being delivered electronically, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of such judgments, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this

> regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

60. The parties are requested to correspond with each other with a view to agreeing the precise terms of the order, which can then be submitted to the High Court Registrar for my approval. The agreed order should address costs if necessary. In the event of a dispute as to the form of order, short submissions should be filed within four weeks of today's date.

Appearances

Justin McQuade for the appellant instructed by Brendan Maloney Solicitors (Bray)
Oisín Clarke for the respondent instructed by the Chief Prosecution Solicitor