THE HIGH COURT

[2023] IEHC 168

Record No: 2022/432 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

PHILIP CASSERLY

APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA ALAN DOHERTY)

RESPONDENT

JUDGMENT of Mr. Justice Mark Heslin delivered on the 31st day of March 2023

Introduction

1. This matter comprises an appeal by way of a case stated (pursuant to s.2 of the Summary Jurisdiction Act, 1857, as extended by the Courts Supplemental Provisions Act 1961) on a point of law for the opinion of this court.

2. The accused/appellant (the "appellant") appeared before Judge Marie Keane in proceedings which were heard in Longford District Court on 21 September 2021 and in Mullingar District Court on 22 October 2021, when the appellant was convicted of an offence contrary to section 12 (3)(a) and (4) of the Road Traffic Accident 2010 as amended by section 9 of the Road Traffic (No.2) Act 2011 (the "2010 Act"). The single question of law in this case stated appeal is whether the district judge was correct in law to convict the appellant of the offence.

The 2010 Act

3. Chapter 2 of the Road Traffic Act 2010 (the "2010 Act") deals with *"Intoxicated driving offences"*. Section 4 sets out a *"Prohibition on driving mechanically propelled vehicle while under influence of intoxicant or if exceeding alcohol limits*", with s.4(1) beginning: *"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". Section 4(8), which is referred to in the relevant summons, states: "*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 this section.*"

Section 12

4. Chapter 4 of the Road Traffic Act 2010 begins as follows:

"Procedure in relation to providing specimen at Garda Síochána station, etc.

12. Obligation to provide breath, blood or urine specimens following arrest under Part 2.

(1) Where a person is arrested under section 4 (8), 5 (10), 6 (4), 9 (4), 10 (7) or 11 (5) of this Act or section 52(3), 53(5), 106(3A) or 112(6) of the Principal Act, a member of the Garda Síochána may, at a Garda Síochána station or hospital, do either or both of the following—

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

(b) require the person either—

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

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

and if the doctor or nurse states in writing—

(I) that he or she is unwilling, on medical grounds, to take from the person or be provided by him or her with the specimen to which the requirement in either of the foregoing subparagraphs related, or

(II) that the person is unable or unlikely within the period of time referred to in section 4 or 5 , as the case may be, to comply with the requirement,

the member may make a requirement of the person under this paragraph in relation to the specimen other than that to which the first requirement related.

(2) Subject to section 22, a person who refuses or fails to comply immediately with a requirement under subsection (1)(a) commits an offence.

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

(a) refuses or fails to comply with the requirement, or

(b) refuses or fails to comply with a requirement of a designated doctor or designated nurse in relation to the taking under that subsection of a specimen of blood or the provision under that subsection of a specimen of urine,

commits an offence.

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

Section 22

5. The reference in s.12 to s.22 is to the following defence:

> "*22. Defence to refusal to permit taking of specimen of blood or to provide 2 specimens of breath.*
>
> *(1) In a prosecution of a person for an offence under section 12 for refusing or failing to comply with a requirement to provide 2 specimens of his or her breath, it shall be a defence for the defendant to satisfy the court that there was a special and substantial reason for his or her refusal or failure and that, as soon as practicable after the refusal or failure concerned, he or she complied (or offered, but was not called upon, to comply) with a requirement under the section concerned in relation to the taking of a specimen of blood or the provision of a specimen of urine."*

One offence – "refuse or fail"

6. Commenting on s.13 of the Road Traffic (Amendment) Act, 1978 (which is mirrored in s.12 of the 2010 Act) Geoghegan J made clear in *DPP v. Doyle* [1996] 3 IR 579 that:

> *"…s.13 creates <u>one offence only</u> and that in essence it is the offence of non-compliance with the requirement. It is to avoid possible loopholes and strained interpretations of s.13 of the Act that the words 'refuse or fail' are used".* (emphasis added)

Charge

7. The charge in question as it appeared on the relevant summons was in the following terms:

> "*On the 12/09/2020 at Longford Garda station in the said District Court Area of Longford, being a person arrested under section 4(8) of the Road Traffic Act 2020, having been required by Garda Allan Doherty a member of An Garda Síochána pursuant to section 12 (1)(b) of the Road Traffic Act 2010 as amended, to permit a designated doctor to take from you a specimen of your blood, or at your option, to provide for the said designated doctor a specimen of your urine, did refuse to comply with the said requirement*."

The court's role

8. The role of the court, in a case stated of this type, was described by Meredith J. in *A.G (Fahy) v. Bruen (No.2)* [1937] IR 236 (at p.166), in the following terms:

> *"An appeal by way of Case Stated under this statute is left entirely at large so far as concerns questions of law, and not alone may questions be raised on appeal to which the statement of the Case was not directed, but also questions which were not raised at all before the District Justice, provided that they are questions of law. Dowse B. commented on the inconvenience of this practice in Guardians of Enniskillen Union v. Hilliard(1): "These cases come before us not upon the points argued below, but upon points that are completely different from those that were raised before the Justices. The course adopted is very inconvenient, but it is clear that the appellant is not confined to his objections below, and full advantage has been taken of the law in this respect" (p. 220). There is, therefore, no doubt that Mr. Justice Hanna was entitled to turn aside from the one question upon which*

the argument before the District Justice turned, and devote his consideration entirely to what he calls the "wider issues" raised by the facts stated."

9. In order to answer the single question which has been put, it is necessary for this court to engage with the evidence, but in so doing, I want to make clear that the exercise is not a *de novo* appeal on the merits and nothing said in this judgment should be interpreted otherwise.

Evidence proved or admitted

10. Section C of the case stated sets out the evidence proved or admitted before the learned judge, as follows:

"*At the hearing, the prosecution called evidence from Garda Allan Doherty and Garda David Buckley. The evidence at the hearing can be summarised as follows:*

a. *The appellant was arrested by Garda Doherty on September 12, 2020 at 2:22 AM pursuant to section 4(8) of the Road Traffic Act 2010, as amended, for the alleged commission of offence contrary to s.4(1) or 4(2) or 4(3) or 4(4) of the Road Traffic Act 2010, as amended;*
b. *The appellant was conveyed to Longford Garda Station and processed under the treatment of persons in custody regulations;*
c. *During his detention, Garda Doherty was informed by the member in charge (Garda David Buckley) that the Evidenzer IRL apparatus at Longford Garda Station was out of order;*
d. *Consequently, a designated doctor was requested to attend the Garda station for the purposes of a requirement under section 12 (1)(b) of the Road Traffic Act 2010;*
e. *In due course, the designated doctor arrived, following which Garda Doherty made a requirement of the appellant pursuant to s.12 (1) (b) at 3:15 AM;*
f. *He informed the appellant he was obligated to permit the taking of a specimen of blood or, at his option, to provide a specimen of urine;*
g. *Garda Doherty also outlined the penalties and consequences of refusal or failure to comply with his requirement;*
h. *The appellant elected to provide a specimen of urine due to a dislike of needles;*
i. *However, the appellant also stated he wished to provide a breath specimen. Garda Doherty reiterated that the Evidenzer IRL apparatus was out of order and that no such requirement could be made;*
j. *Thereafter, the appellant was afforded an opportunity to provide a specimen of urine until approx. 3:33 AM;*
k. *During that time, the Garda advised the appellant on several occasions of the consequences of not complying with the requirement;*
l. *The appellant asked if Garda Doherty could leave the room so that he could provide the specimen of urine, however Garda Doherty explained the reason as to why he had to be present to supervise the provision of the specimen;*
m. *After an opportunity had been provided, Garda Doherty was of the belief that the appellant was not making any effort to provide a specimen of urine and again*

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

n. *At 3:33 AM the appellant was placed in a cell having failed to provide a specimen of urine;*
o. *At 3:46 AM and prior to the doctor leaving the Garda station, the appellant was taken from the cell and Garda Doherty made a requirement for him to provide a specimen of urine and the penalties for not doing so were outlined to the appellant. The appellant failed to provide a specimen of urine;*
p. *Subsequently, a demand was made of the appellant to produce his driving licence and certificate of insurance or exemption at a Garda station of his choice within 10 days;*
q. *The appellant was then released from Garda custody at 3:49 AM, without charge;*
r. *The appellant was such that he summoned for the offence."*

11. Before proceeding further it is appropriate to note that the findings of fact made by the learned judge are *not* in issue in this case stated.

Direction sought

12. At the conclusion of the prosecution case, the appellant's counsel sought a direction of no case to answer.

Submissions on behalf of the accused

13. Although certain of them overlap, the following seem to be the submissions made on behalf of the appellant in seeking a direction:

- Where a person elects to provide a specimen of urine, the requirement to permit a doctor to take a blood specimen is *in abeyance,* pending the provision of a urine sample.
- In the circumstances of this case, when the appellant failed to provide a specimen of urine, it was incumbent on the gardai to then require or alert him of the legal obligation to permit the doctor to take from him a specimen of blood.
- Once he had failed or refused to provide a specimen of urine, the requirement to permit the doctor to take a specimen of blood had revived and the gardai were obliged to require him to permit the doctor to take a specimen of blood.
- It was also submitted that the use in the 2010 Act of the word *"permit"* in respect of the requirement for blood was important, and involved the Garda requesting permission from an accused, at the point no urine was provided.
- It was argued that this involved a *proactive* step on the part of the Gardai, alerting the accused to the fact that the requirement for a blood specimen had revived.
- It was further submitted that there was no onus on the appellant to offer to permit the doctor to take from him a specimen of blood and that, if it were otherwise, silence on the part of an accused having been deemed to have failed or refused to provide a urine

specimen, would result in the commission of offence, where otherwise no such offence would be committed.

- Any offence of refusing to comply with the requirement under s. 12 (1) (b) had not in fact *crystallised*, according to the appellant.
- The appellant was, in effect, prosecuted for failing or refusing to provide a urine specimen, which is not an offence known to the law, it was submitted.

The prosecution's submissions

14. In opposing the application for a direction, the prosecution made the following submissions:

- the appellant had been given approximately 33 minutes to provide a specimen of urine, but had refused to do so;
- at the end of that period, there was no obligation on the Garda to make any request, or alert the accused that the requirement to permit the doctor to take a specimen of blood had revived.

The judge's decision

15. Having heard oral submissions from both sides, the learned judge directed the preparation of written legal submissions and adjourned the case to 22 October 2021, at which point the learned judge gave the following decision (and I quote from the case stated):

- *"I held that appellant had not complied with the requirement made of him by Garda Doherty and that in the circumstances he had committed the offence;*
- *I held that Garda Doherty had been reasonable in allowing and affording the appellant time to provide the specimen of urine once it had been elected for by the appellant;*
- *When process initially concluded at 3:33 AM and the appellant was placed in a cell having failed to provide a specimen of urine, I was not satisfied that when he was brought back from the cell at 3:46 AM, that it was a new process but instead a continuation of the one event following on from the original requirement made by Garda Doherty at 3:15 AM;*
- *As the appellant did not go into evidence, I proceeded to convict him of the section 12 (3) offence.*
- *On October 22, 2021, having heard a plea in mitigation on behalf of the appellant, I imposed a fine of €400. I further impose a period of disqualification from driving for 4 years;*
- *There are also other offences before the court relating to documentary offences under the Road Traffic Act 1961, however they do not concern this case stated;*
- *Being dissatisfied with my decision, the appellant requested that I stated case to the High Court on the following question of law:*
    a. *Was I correct in law to convict the appellant of the offence?"*

Submissions to this Court

16. Before proceeding further, I want to express my very sincere thanks to Mr McDonagh SC for the appellant and to Mr Kelly BL for the respondent. Both made oral submissions with great skill and clarity during the hearing. Both sides also provided detailed written submissions and I have

carefully considered all the foregoing. Key submissions made on behalf of the appellant include the following: (i) at no point prior to leaving the Garda Station did the appellant refuse to permit blood to be taken; (iii) there was no attempt to bring to the mind of someone, whose failure to provide a urine sample did not constitute an offence, that something was now changing; (iii) there was an obligation on the Garda to alert the appellant to the fact that he was about to commit an offence; (iv) the Garda member had a duty to remind the appellant of his obligation to give blood; (v) the revival of the obligation to permit a blood specimen to be taken gave rise to such a duty on the Gardai, otherwise the law is "*a snare*".

17. The respondent argues the contrary and submits that the answer to the question posed in the case stated is in the affirmative.

Discussion and decision

18. As I have already observed, no issue was taken with any of the facts as found by the learned trial judge. Rather, the applicant's case was based on principles derived from authorities to which learned counsel very helpfully drew this court's attention. That being so, it seems appropriate to look at certain of the authorities which I consider to be of most assistance in determining the question.

DPP v McGarrigle

19. In *DPP v McGarrigle* [1996] 1 ILRM 271 the respondent had been arrested under s. 49(6) of the Road Traffic Act 1961 (the "1961 Act") and taken to a Garda station. He was required to give a sample of blood or urine. He was informed that it was an offence if he refused or failed but, in making the said requirement, the relevant member of an Garda Siochana did not invoke any specific section of Road Traffic Acts. The gentleman refused to provide a specimen and a prosecution ensured.

20. At the conclusion of the prosecution's evidence, the District Judge granted an application to dismiss the case, on the grounds that there was no evidence that the requirement was made pursuant to s. 13 of the Road Traffic (Amendment) Act 1978 (the "1978 Act"), being an essential ingredient in the charge, in circumstances where the requirement could equally have been made under either ss. 13 or 14.

21. The question raised in the case stated was whether the District Judge was correct in dismissing the charge. The High Court (considering the case stated) held that the District Court Judge was correct.

22. In an appeal to the Supreme Court, by the DPP, the latter argued that, because the only legal power enjoyed by An Garda Síochána to require the provision of a specimen by a person arrested under s.49(6) of the 1961 Act was contained in s.13 of the 1978 Act, the District Court should have inferred that the requirement had been made under s.13 of the 1978 Act. By contrast, the respondent contended that, because s.13 created a criminal offence arising from a refusal to

comply with the requirement which may incriminate a suspect, it must be construed strictly. The Supreme Court dismissed the DPP's appeal, and Finlay C.J. stated inter alia:

> *"The obligation to give a specimen which may establish the committing of a serious offence is a significant though not unique exception to the general principles of our criminal code which protect an accused person against involuntary self-incrimination. The enforcement of it on the terms* of *s.13 of the Act of 1978 depends completely on proof that the requirement refused was made under that section. Such a basic requirement in a serious matter must, it seems to me, be affirmatively proved and not left to be inferred."*

23. Later, Finlay CJ stated that the respondent had *"…a right to be informed of his legal obligation subject to penal sanction to comply with the requirement and this on the facts as found he was afforded*." (emphasis added)

DPP v. Mangan

24. In the Supreme Court's decision in *DPP v. Mangan* [2001] 2 I.R. 493, Keane J. stated the following, with particular reference to *McGarrigle* and the principle derived from same, which seems to me to be of central importance in this case stated:

> *"The rationale of the decision is clear. Generally speaking, the defendant or putative defendant to criminal proceedings cannot be required to assist the prosecution in the ultimate conduct of their case by incriminating himself or herself. While there are statutory exceptions to this principle - of which s.13 is one - a prosecutor who seeks to rely on them must satisfy the court by the adduction of affirmative evidence that, at the minimum, the person concerned was informed at the time that he was obliged by statute to provide the appropriate information or material - in this case a specimen of blood or urine - and that he would be committing an offence and exposing himself to penalties if he failed to comply with that requirement. Were it otherwise, in a case under s.13 a person might find himself convicted of an offence where a demand had been made of him without any indication as to the legal basis for the demand. That, it was held in Director of Public Prosecutions v. McGarrigle, was not the law." [at pp.380-381]* (emphasis added)

Compliance with *McGarrigle*

25. Armed with the principle derived from *McGarrigle* and emphasised in *Mangan* (i.e. that an arrested person has a right to be informed of his legal obligations, subject to penal sanction, to comply with the requirement to permit a specimen of his blood to be taken or, at his election, to provide a specimen of his urine) I return to the facts in the present case, as found by the learned District Judge, which touch on this aspect. It will be recalled that these include the following:

> *"In due course the designated doctor arrived, following which Garda Doherty made a requirement of the appellant pursuant to s.12 (1) (b) at 3:15 a.m."* (emphasis added) (see para 5 (e) of section C of the case stated)

26. At the risk of stating the obvious, to have made *"a requirement of the appellant pursuant to s.12(1) (b)"* means that Garda Doherty, at 3:15 a.m., told the appellant that he was *required* either to permit the doctor to take a specimen of his blood, *or* at his election, to provide a urine specimen to the doctor. This was, without doubt, to have informed the appellant that he was under a legal obligation to do one *or* the other.

27. It was never suggested for, example, that Garda Doherty told the appellant that if he elected to provide a urine sample but, for whatever reason, did not supply it, that the requirement to give blood 'fell away' or could be ignored. Nor was it ever suggested that the appellant did not understand what was required of him, or that he had impaired capacity when he was told of the requirement, or for that matter, that he subsequently forgot what he had been told.

28. That the appellant was, in fact, required to permit a blood sample to be taken (or a urine sample in the alternative) is also underlined by the next of the facts referred to by the learned judge (the *"He"* in the following being a reference to Garda Doherty):

> *"He informed the appellant he was obligated to permit the taking of a specimen of blood* ***or****, at his option, to provide a specimen of urine;"* (emphasis added) (see para 5 (f) of section C of the case stated)

29. There is simply no question of the appellant having been told that there was a third option available to him i.e. to give *neither* a blood, nor a urine sample. The next of the facts as found by the learned judge were as follows:

> *"Garda Doherty also outlined the penalties and consequences of refusal or failure to comply with his requirement;"* (emphasis added)

30. The foregoing means that Garda Doherty told the appellant that he would be committing an offence and exposing himself to penalties (which penalties Garda Doherty outlined) if he failed or refused *either* to permit the doctor to take a blood specimen *or* to provide the doctor with a urine specimen.

Warnings

31. Thus, in full compliance with the principle in *McGarrigle*, as of 3:15 a.m., a member of the Gardai informed the appellant of (i) what was required of him by law; and (ii) the penal consequences of failure to comply. These I will refer to as the "warnings".

DPP (Coughlan) v. Swan

32. Turning to another of the authorities relied on, the headnote from the reported decision in *DPP (Coughlan) v. Swan* [1994] 1 ILRM 314 summarises the relevant facts as follows:

> "***Facts*** *The defendant was charged with failing to comply with the requirements of a designated registered medical practitioner in relation to the taking of a specimen of urine contrary to s. 13(3) (b) of the Road Traffic Amendment Act 1978 ('the 1978 Act') following a requirement under s. 13(1) (b) of the 1978 Act*.

After the defendant was arrested and brought to the Garda station, the registered medical practitioner ('the doctor') made the requirements specified in s. 13 of the 1978 Act in relation to the taking of a specimen of blood or, at the option of the defendant, the provision of a specimen of urine at 5:38 AM. The defendant opted to give a specimen of urine but failed to do so after two attempts. A Garda Coughlan told the defendant of the consequences of refusal or failure to provide a specimen and he told the defendant that he could change his mind and permit the doctor to take a specimen of blood. the defendant again opted to provide a specimen of his urine at 5:55 AM but failed to so provide and indicated that he was unable to do so, a failure that Garda Coughlan could not say was a deliberate one. The opinion of the Supreme Court was requested as to whether on those facts and in the absence of a requirement made by a designated medical practitioner other than in the terms referred to, the defendant should be acquitted."

33. Before proceeding further, it is important to note that Mr Swan was charged with a *different* offence to the appellant. The former was charged with failing to comply with the requirements of the relevant doctor in relation to the taking of a specimen of urine. That is *not* the position in the present case, where the appellant was charged and convicted of a refusal to comply with the requirement to provide a specimen of blood or, at the appellant's election, a specimen of urine.

34. The foregoing seems to me to be a material distinction which needs to be kept in mind in the context of the Supreme Court's decision which, according to the headnote, was as follows:

*"**Held** by the Supreme Court (Blayney and Egan JJ; Finlay CJ, O'Flaherty and Denham JJ concurring) in finding that the defendant should be acquitted:*

(1) The obligation under s.13 of the 1978 Act is to permit a designated medical practitioner to take from the person a specimen of his blood. The person is given an option of providing a specimen of urine if the option is availed of, it relieves the person from the obligation to permit a specimen of his blood to be taken from him. If the person finds that he cannot provide a specimen of urine, the obligation to permit the taking of a specimen of blood revives and in such circumstances, a refusal by him to permit the taking of blood is the offence with which he should be charged.

(2) As the defendant was charged and convicted of failing to comply with the requirement of a designated medical practitioner in relation to the taking of urine and was not charged with any other offence, he should be acquitted." (emphasis added)

35. In the body of the judgment delivered by Egan J the learned judge analysed, in the following terms, the nature of an arrested person's obligations in the context of the particular facts in the case stated:

"The order of conviction in the District Court recites a failure by the defendant to comply with the requirement of a designated medical practitioner in relation to the taking of a

specimen of urine. The appeal, therefore, is concerned with an alleged failure to comply with a requirement in relation to the taking of a specimen of urine.

The obligation under the section is to permit a designated medical practitioner to take from the person a specimen of his blood. The person, however, is given the option of providing a specimen of his urine. It is quite simply, as the section states, an option. If it is availed of, it relieves the person from the obligation to permit a specimen of his blood to be taken from him.

In the case of Connolly v. Salinger [1982] I.L.R.M. p. 482 on a prosecution under s. 49 the District Justice stated a case to the High Court for the determination of questions of law which included the following question:- If a person is genuinely unable to pass urine is he guilty of the offence of "failing" to comply with such requirement? The answer given by the High Court was "Yes". On a reading of the head-note this answer would appear to have been affirmed on appeal to the Supreme Court but I am satisfied that the head-note is misleading. The judgment of the Court was given by Griffin J. who did not approve of the question but stated as follows:-

> *"The question which does arise for determination on the facts of this case, and which was argued in this Court, is not whether such person is guilty of the offence of failing to comply with the requirement referred to, but whether, in those circumstances, having failed to provide a sample of his urine, it is then permissible, under the provisions of s. 13(1)(b), for the designated medical practitioner, with the consent of such person, to take from him a sample of his blood, and whether such specimen of blood is one taken in compliance with the requirement provided for in s. 13(1)(b)".*

This really involves two questions and both were answered in the affirmative. Griffin J. goes on to say:-

> *"The subsection provides alternatives which the person may choose, and if he chooses to provide a specimen of urine, and is unable to do so, he is not, in my opinion, excluded from subsequently choosing the alternative of permitting a specimen of blood to be taken from him. Unless he does so, he would have "failed" to provide a specimen of his urine, within the meaning of s. 13(3)."*

He later continues:-

> *"In my view, this supports the construction that the choice or option to provide a specimen of urine was not intended by the Legislature to be final or irreversible, or to deprive the person who has failed to provide the specimen of his urine of his liberty to choose the alternative of permitting the doctor to take a specimen of blood."*

In this latter passage the learned Judge was commenting on the fact that s. 19 of the Act provides that, in a prosecution for refusing or failing to permit a registered medical

practitioner to take a specimen of blood, it is a good defence for the defendant to satisfy the Court that there was a special and substantial reason for his refusal or failure whereas, in contrast, there was no provision for a corresponding defence to a prosecution for failing to provide a specimen of urine, however special or substantial the reason for his failure might be.

Connolly v. Salinger, in effect, decided that the declaration of a choice to provide a specimen of urine was not final or irreversible and it is not, in my opinion, a direct authority for the proposition that a person who has declared an election to provide a sample of urine and then finds that he is unable to do so has committed an offence of failing to provide a specimen of urine. In such circumstances there would be a total absence of mens rea. Such would appear to be the situation in the instant case as Garda Coughlan agreed in evidence that he could not say that the defendant's failure was a deliberate one." (emphasis added)

Revival

36. Egan J made clear, however, that taking the option of providing a urine sample did *not* mean that an arrested person could, from the point of such election, simply ignore the primary obligation imposed on them by the statute (and the criminal sanctions for failure/refusal to permit a blood specimen to be taken). He explained the position as follows:

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

The defendant in this case was charged and convicted of failing to comply with the requirement of a designated medical practitioner in relation to the taking of a specimen of urine. He was not charged or convicted of any other offence and, in my opinion, he should be acquitted." (emphasis added)

37. *DPP (Coughlan) v. Swan* is authority for the principle that someone who elected to provide a urine specimen, but is unable to, has not committed an offence of failing to provide a urine sample. As noted earlier, the appeal before this court is *not* concerned with an alleged failure to comply with a requirement in relation to the taking of a specimen of *urine* (again, see the charge *per* the summons, for which the appellant was convicted).

38. Furthermore, nowhere in his analysis did Egan J suggest that, if an arrested person elected to provide a specimen of urine but failed to provide same, (in which case the obligation to permit the taking of blood *revives*) this gave rise to a *new* obligation on the Gardai to *repeat* the very same warnings which had previously been given. Rather, the central point, as Mr Justice Griffin put it in *Connolly v. Salinger,* is that if someone in the appellant's position *"… chooses to provide*

a specimen of urine, and is unable to do so, he is not…excluded from subsequently choosing the alternative of permitting a specimen of blood to be taken from him." (emphasis added)

39. The focus of the foregoing dicta is squarely on the arrested person and their choice(s). The appellant was, in fact, provided with the required warnings and, on foot of this, made a choice. He did not need to receive the same warnings *again* in order to understand either (i) the *alternative* choice available to him (i.e. to permit a blood sample); and/ or (ii) the legal sanction for not doing so. This is because he had already been informed of *both* by means of the warnings given.

40. There is no question of the appellant having been prevented or excluded from making an alternative choice. Put simply *Swan* makes clear the right of an arrested person to change their mind, i.e. to make an *alternative* choice before leaving that Garda station. However, I can see nothing in *Swan* which is inconsistent with holding that, in a 'post-*revival'* scenario, the obligation rests on the arrested person to make the alternative choice, should they so wish, to permit the taking of blood (having previously made a different choice but failed, for whatever reason, to 'follow through' on it) given that the arrested person has already received the warnings (in compliance with *McGarrigle*).

41. The warnings were given to the appellant. It was the appellant who then made the choice to give a urine sample and not to give blood. The failure to provide the urine sample was the appellant's alone and revived the obligation to give blood. That being so, it seems to me that the obligation on the Gardai extends no further than to facilitate an alternative choice by the appellant, should they so wish (and not to prevent the exercise by the appellant of the alternative choice).

42. By that I mean, it would be impermissible for the Gardai to *prevent* an alternative choice being made (e.g. by inaccurately informing an arrested person that, having taken the urine sample option, they could *no longer* opt to permit a blood sample). Nothing of the sort arises here. Moreover, the evidence is that there was a doctor present at all material times. Thus, the evidence speaks to an alternative having been facilitated (i.e. the appellant was *not*, to quote Griffin J, "*excluded from subsequently choosing the alternative of permitting a specimen of blood to be taken from him"*).

DPP v. Corcoran

43. In *DPP v. Corcoran* [1995] 2 IR 259, Lavan J explained that the first of the questions comprising the case stated appeal was: "*Where a requirement under s.13(1)(b) of the Road Traffic Act, 1978 has been made of an arrested person and that person opts to permit a specimen of blood to be taken but through no fault of that person the designated Registered Medical Practitioner is unable to obtain a specimen, is that person legally obligated to furnish a specimen of his urine?"*. The learned judge engaged with this question as follows:

"*Giving effect to the basic meaning of the words in s.13(1)(b) of the 1978 Act, it seems clear that the subsection does not place "blood" and "urine" on an equal footing. There is a legal requirement to permit the taking of a blood sample, which can be discharged if one gives urine instead. In D.P.P. v. Swan [1994] 1 ILRM 314, the Supreme Court held that, in the event of a person opting to give urine, but subsequently finding themselves unable to do so, the obligation to permit the taking of a specimen of blood revives. This is not however to say that the reverse is true; the plain language of subsection (1)(b) does not suggest that the optional provision of a urine sample becomes obligatory if, through no fault of the subject, a blood sample cannot be taken.*

This situation, that a person who cannot provide a blood sample may choose not to give a urine sample, thus removing themselves from the ambit of prosecution under s.49(3) and (4)(a) of the Road Traffic Act, 1961 as amended by subsequent acts, may seem undesirable or even absurd. However, the Court is not entitled to go beyond the plain meaning of the subsection concerned."

44. Following this analysis, Lavan J answered the primary question and clarified the consequences (in circumstances where, despite having elected to provide a blood sample, the relevant accused had been informed of an obligation to provide a urine sample) in the following terms:

"*This Court is therefore of the opinion that, where a requirement under s.13(1)(b) of the Road Traffic Act, 1978 has been made of an arrested person and that person opts to permit a specimen of blood to be taken but through no fault of that person the designated Registered Medical Practitioner is unable to obtain a specimen, that person is under no legal obligation to furnish a specimen of his urine. Consequently, in this case, Garda Nolan was in error in suggesting to the Accused that he did in fact have such a legal obligation, and accordingly the specimen of urine given by the Accused was not given with his free election under s.13 of the 1978 Act and is not admissible in evidence*."

45. It does not seem to me that the decision in *DPP v. Corcoran* avails the appellant. He is not someone who ever provided or ever agreed to provide a blood sample. Quite the contrary. He is someone who refused, for a stated reason (i.e. dislike of needles), to permit a blood specimen to be taken and never altered that stance before he left the Garda Station, despite having been given the warnings as to what was required of him and the penal sanctions for a failure or refusal.

DPP (Keoghan) v. Cagney

46. There was considerable focus, during the hearing before me, on the decision by Clarke J (as he then was) in the Supreme Court's decision in *DPP (Keoghan) v. Cagney* [2013] 1 IR 493 (Denham CJ, Murray and Clarke JJ) ("*Cagney*"). The matter involved a case stated from the Circuit Court following a conviction by the District Court which was subsequently appealed. The defendant had been prosecuted for failing to provide a breath sample to Gardai. The Circuit Court, on appeal, was satisfied that the defendant had been lawfully required to provide two

samples of her breath. However, it was accepted by both the prosecution and defence that this was due to a temporary medical condition which prevented the accused from providing the breath sample, despite a genuine effort on her part.

47. Very significantly, after failing to provide a breath sample the accused had not been offered the opportunity to provide a blood or urine sample. Before proceeding further, this is, in my view, a very significant distinguishing factor. In the present appeal, there was no question of the appellant having a medical condition, temporary or otherwise, which prevented him from providing any specimen. This underlines the very different factual matrix against which the present appeal arises (where the appellant was, without doubt, called upon to give a sample of blood or, at his election, a urine specimen).

48. In *Cagney,* the Supreme Court was asked to determine whether, on the particular facts, it was open to the court to find there was a special and substantial reason for the defendant failing to provide a breath sample in accordance with s.23 of the Road Traffic Act 1994. This section provided a defence for failing to provide a sample of breath, where a "*special and substantial"* excuse was present and where the accused agreed to provide a blood or urine sample instead. I pause again to observe that, wholly unlike the present appeal, the appellant was not required to provide a breath sample and there is no question of any "*special"* or "*substantial"* reason for a refusal or failure to provide same. The s.23 defence aspect was not a feature in the present case.

49. The Supreme Court was also asked to determine whether the defendant was entitled to an acquittal on the basis that Gardai had not asked her to provide a urine or blood sample (if the judge was correct to hold that a special and substantial reason existed for the failure of the defendant to provide a breath sample). Before going further, it seems to me that *Cagney* can be distinguished from the present case, in light of the very the different facts and statutory provisions at play.

50. In delivering the judgment for the Supreme Court, Clarke J held that, in order to avail of the s. 23 defence, there were two hurdles to overcome. First, there had to be a special and substantial reason for refusing to provide a breath-sample. Second, the accused had to comply with the requirement to provide a urine or blood sample. In determining whether the defendant had a special and substantial reason for failing to provide a breath sample, it was held that the trial judge had found as a matter of fact that the defendant had a transient medical condition which prevented her from providing a sample, despite her best efforts. On that basis, it was determined that a special and substantial reason did exist within the meaning of s.23.

51. The Supreme Court held that the DPP was incorrect in contending that the proper interpretation of the section was that the defendant could only avail of the defence if the defendant complied with the requirement to provide a blood or urine sample, or offered to provide but was not called upon to do so. The Court held that where a special and substantial reason for not providing a

breath sample was present, an accused was entitled to an acquittal even when he or she had not provided a blood or urine sample or at least offered to provide same, if he or she was not warned by a member of an Garda Siochana that a failure to provide a urine or blood sample would preclude him or her from using the defence at a later stage. Again this highlights the material differences between the position in *Cagney* and in the present appeal.

52. Looking more closely at *Cagney,* in the Circuit Court, the defendant sought to rely on s.23 of the Road Traffic Act, 1994 (the "1994 Act"). As I understand it, that section is similar to s.22 of the 2001 Act which I quoted earlier in this judgment. Nevertheless, and for the sake of clarity, s.23 of the 1994 Act which was relied on in *Cagney* stated:

> "*In a prosecution of a person under section 13 for refusing or failing to comply with the requirement to provide 2 specimens of his breath, it shall be a defence for the defendant to satisfy the court that there was a special and substantial reason for his refusal or failure and that, as soon as practicable after the refusal or failure concerned, he complied (or offered, but was not called upon, to comply) with the requirement under the section concerned in relation to the taking of a specimen of blood or the provision of a specimen of urine*".

53. The central issue for the Supreme Court was whether, in requiring the breath sample, the investigating garda was obliged to inform the defendant that in order to avail of the defence provided for in s.23 of the 1994 Act, she must offer to provide a specimen of blood or urine. Again, this simply does not arise on the facts in the present appeal where, at all material times from 3:15 a.m. onwards, the appellant knew that he was required to permit a blood sample to be taken or, at his election, to provide a urine sample and that failure or refusal constituted an offence.

54. In *Cagney*, the DPP argued that the natural and ordinary meaning of the words contained in s.23 was that the defendant must actually comply with a requirement to give blood or urine or offer to do so but not be called upon.

55. In his judgment Clarke J. referred, as follows, to principles going back to *McGarrigle* :

> "[27] *It is, however, also necessary to make some reference to the jurisprudence of this Court in respect of the obligation to give a warning to a person who is required to provide a sample under the Road Traffic* Acts to the effect that failure to provide a legitimately requested sample can amount to an offence. The case law stretching from *DPP v. McGarrigle* (reported as an appendix to *Brennan v. DPP [1996] 1 ILRM 267 at p.271*) to *DPP v. Mangan [2001] IESC 40* makes clear that there is such an obligation although the latter cases, most particularly Mangan, were concerned not so much with the obligation itself but as to the form in which the warning needed to be given."

56. The foregoing statement of principle makes clear that the warnings, which were in fact given to the appellant (as of 3:15 a.m.) must be given. With respect to warnings, the learned judge continued:

"[28] *It is important to emphasise that there is nothing in the Road Traffic Acts themselves which require, as a matter of statute, that any such warning be given. However, it is clear from the line of authority to which reference has been made that, at least in the circumstances then under consideration, this Court was prepared to imply in such an obligation. It follows that, at least at the level of principle, it is possible that there may be obligations placed on members of An Garda Síochána who are involved in applying the relevant provisions of the Road Traffic Acts, to inform persons of the consequence of failure to act. Those cases were, of course, concerned with a situation where a party was being required to give a sample or specimen, where failure so to do amounts to an offence and where it was held that such circumstances amounted to a significant departure from the normal position which pertains in respect of accused persons being that they are not obliged to do acts which might incriminate themselves."* (emphasis added)

57. Again, there is no question of the appellant in the present case not having been given the requisite warnings. The appellant was 'full square' on notice, from 3:15 a.m., that if he did not provide a blood sample or a urine sample he would have committed an offence and he had been informed of the penalties for same. Clarke J went on to say:

"[29] *Against the background of that jurisprudence it is necessary to turn to the key issues which arises in this case which is as to the proper interpretation of the relevant provisions of* s.23 *and whether it is necessary, in substance, to read into those provisions an obligation on the part of the garda concerned to alert a person to the need to offer a blood or urine sample in order to be able to avail of the defence under the section."*

58. In the manner explained, the warnings absent in *Cagney* are present in the case stated, whereas the s.23 defence at issue in that case did not feature in the present one. The key issue in *Cagney,* which, as the learned judge noted at para. [34] involved "*some form of defence based on an actual and non-contrived inability of incapacity*" having been "*constitutionally mandated*", was decided in the following manner:

"[35] *…I agree with the submission of counsel for the D.P.P. that there is, ordinarily, no obligation on an investigating garda to alert a person under suspicion of any possible defences which might lie to the offence under investigation. However, where, as here, legislation, for reasons of constitutional necessity, acknowledges that it is appropriate to make provision for persons who may not have the ability or capacity to give a breath sample, it seems to me that it would be an insufficient vindication of the rights of persons with incapacity to rely on such a defence if they could lose the entitlement so to rely out of ignorance."* (emphasis added)

59. It is clear from the foregoing that in *Cagney* the Supreme Court looked at a very particular situation and consider the requirements of constitutional justice in circumstances where there was a non-contrived inability to provide a breath sample, in the context of a statutory defence, to which the attention of the accused person had not been drawn. That is wholly unlike the

present situation where the applicant was ignorant of nothing, having been given the necessary warnings.

60. In *Cagney*, the following was the first of the three questions which arose in the consultative case stated by the Circuit Court Judge: *"(a) Was I correct on the facts found by me in holding that a special and substantial reason existed for the failure of the defendant to provide a sample of breath?"* The answer, as Clarke J confirmed at para [40], was in the affirmative.

61. The second question was: *"(b) If the answer to (a) is "yes", is the defendant entitled to an acquittal in the absence of a requirement pursuant to section 13 (1)(b) of the Road Traffic Act 1994 by a member of An Garda Síochána following a failure to provide the required specimens pursuant to section 3(1)(a)?"* Bearing in mind that s.13 (1)(b) of the 1994 Act is mirrored in s.12(1)(b) of the 2010 Act, it will be recalled that in the present case, Garda Doherty made a requirement of the appellant pursuant to s.12 (1) (b) at 3:15 AM (wholly unlike the position in Cagney). The answer to this second question was given by Clarke J in the following terms:

> *"[40] …The true answer to the second question is that an accused who satisfies the trial judge that he or she has a special and substantial reason for failure or refusal to provide a breath sample is entitled to an acquittal in the event that the accused concerned is not warned or informed by a member of An Garda Síochána that a failure to offer a blood or urine sample will preclude such person from being able to rely on a defence of having a special and substantial reason for failure or refusal. For the avoidance of doubt such warning or information can be given as part of a general warning in advance of the requirement to provide a breath sample being made in the first place or can be made subsequent to a failure or refusal to provide the breath sample concerned. For the avoidance of doubt it should be emphasised that the absence of such warning or information does not entitle an accused to an acquittal unless the accused has first satisfied the trial judge of the existence of a special and substantial reason for failure or refusal."* (emphasis added)

62. Fair procedures undoubtedly required that the appellant be warned of his legal obligations. He was given such warnings. Although it involves repetition, it is appropriate to recall the facts as found by the learned District Court Judge which were set out at paras. e, f, and g of section C of the case stated, namely:-

- *In due course, the designated doctor arrived, following which Garda Doherty made a requirement of the appellant pursuant to s.12 (1) (b) at 3:15 AM;*
- *He informed the appellant he was obligated to permit the taking of a specimen of blood or, at his option, to provide a specimen of urine;*
- *Garda Doherty also outlined the penalties and consequences of refusal or failure to comply with his requirement;* (emphasis added)

63. Applying the principle in *Cagney* to the facts in the present case, these warnings could have been made at 3:15 *or* at 3:46. The warnings were in fact given at 3:15. From that point on, the appellant had *all* the information he needed, both in relation to what was required of him and

the sanctions if he did not comply. There was no information which the Garda omitted to give him.

A duty to remind?

64. Despite the undoubted skill, sophistication and commitment with which submissions were made to this Court on behalf of the appellant, it seems to me that matters 'net down' to the proposition that the appellant should have been given a *reminder* of what he already knew. This does not seem to me to be a requirement derived from *Cagney* or from a first principles analysis of the requirements of fair procedures and constitutional justice. Nor, very obviously, is it a requirement set out in the legislation. Therefore, I am unable to identify any such requirement. Rather, it seems to me that, what the appellant contends for is not the application of any principle identified in *DPP (Keoghan)*, but a very significant extension beyond what is required by that decision. In short, I can identify no duty to remind someone of what they have already been told.

65. Having looked at principles derived from certain authorities, it seems to me that the following can be said having regard to the particular facts as found by the learned District Court Judge.

Dislike of needles

66. The present case is not one in which the appellant was never told of his obligation to permit the taking of a specimen of *blood.* He was told this at 3:15 a.m. He was also told at 3:15 a.m. that as an alternative he could provide a urine sample and that *if* he did so, it would relieve him of the obligation to give blood. However, there was no question of the Gardai informing the appellant at any point that if, for whatever reason, he did *not* to give a urine sample, this failure would relieve him of the primary obligation to give blood.

67. Having been given the warnings, the response by the appellant was as follows: *"The appellant elected to provide a specimen of urine due to a dislike of needles"* (see para 5 (h) of section C of the case stated). To elect to provide a specimen of urine was plainly *not* to elect to provide a specimen of blood. It was to refuse to provide such a specimen, underlined by the fact that the appellant did not merely make an election, but gave a specific reason for *why* he was not prepared to permit a blood specimen to be taken, namely, a "*dislike of needles"*.

68. His election to provide a urine sample did not result in the appellant ceasing to be *aware* of his primary obligation to permit a blood sample, and the consequences of failing to discharge that duty.

69. As a matter of fact, the appellant never changed his election at any stage, despite knowing at all material times from 3:15 a.m. onwards that his legal duty was to provide blood and that duty was relieved if, but only if, he provided a urine sample.

Reasonable opportunity

70. A reasonable opportunity was afforded to the appellant to provide a urine sample and it is not in doubt that, had he provided same, he would have been relieved of the obligation to permit a specimen of his blood to be taken from him, as he was aware.

71. Furthermore, whilst it comprised a reasonable opportunity for the appellant to provide the urine sample which he elected to provide, the time which elapsed before the giving of the obligations/sanctions information to the appellant (3:15 a.m.) and his *second* failure to provide a urine sample (3:46 a.m.) was just in excess of half an hour. My point is that this is not a period of days, or even several hours. Thus, from a first–principles analysis of fair procedures requirements, in the context of the provisions of the legislation and the relevant facts, no issue arises as regards the time which elapsed *post* receipt of the obligations/sanctions information being, for example, so lengthy that the appellant might conceivably have forgotten it. This fortifies me in the view that the garda member was not under a duty to remind.

72. Although nothing turns on it in my view, it also seems from the facts as found by the learned trial judge that the warnings may have been repeated between 3:15 and 3:46 a.m. given that paras. 5 (j) and (k) of section C of the case stated record the following:

> *"thereafter the appellant was afforded an opportunity to provide a specimen of urine until 3:33 AM;*
>
> *during that time the Garda advised the appellant on several occasions of the consequences of not complying with the requirement"* (emphasis added)

73. If a member of the Gardai did give the same warnings for a second time, this plainly did not create any impediment to the appellant discharging the primary obligation (i.e. to permit blood to be taken) which at all material times from 3:15 onwards rested on him.

74. Even if it was the case that the warnings were 'only' given at 3:15 a.m., I have been unable to identify any authority for the proposition that the self-same warnings (i.e. the requirement to give a blood specimen or at the appellant's election a urine sample and the penalties otherwise) which were, in fact, given to the appellant at 3:15 a.m. had to be given to the appellant *again*, be that:

(i) at 3:33 a.m. when the appellant was placed in a cell after failing to provide a urine specimen, despite having been afforded the opportunity to do so from 3:15 a.m.;

(ii) at 3:46 a.m. when, prior to the doctor leaving the station, the appellant was taken from the cell and Garda Doherty made a requirement for him to provide a specimen of urine; outlined to the appellant the penalties for not doing so; and the appellant failed to provide a urine specimen; or

(iii) at 3.49 a.m. when the appellant was released.

75. The facts as found by the learned district court judge indicate that as of 3:46 a.m. it was the requirement to provide a urine sample which the Garda member focussed on. That was hardly

surprising, given that it was and remained the one and only choice made by the appellant, for a stated reason, and the evidence is that he was repeatedly facilitated in respect of that choice. However, the applicant was never misled about his options. The appellant was certainly not told at 3:46 a.m. (or at any other time) that by opting to provide a urine sample, he was relieved of the obligation to permit a blood sample. Still less was he told that a failure to follow through on that choice set the obligation to provide blood (and the attendant penalties for failure/refusal) at naught.

76. In *Mangan,* which was a consultative case stated by a judge of the circuit court, the accused had been charged with refusing to permit a designated doctor to take a specimen of blood, contrary to s.13(3) of the 1994 Act (equivalent to s.12(3) of the 2010 Act, which makes it an offence for a person to refuse or fail to comply with the requirement under subsection (1)(b) of s.12). The relevant Garda had advised the accused of the requirement to provide either a blood or urine sample pursuant to section 13 (1)(b) of the 1994 Act (equivalent to s.12(1)(b) of the 2010 Act). The accused had also been advised that it was an offence not to comply, and had been informed of the penalties. The accused made several attempts to provide a specimen of urine but was unable to. The Garda then made a further requirement for a blood specimen to be provided and the accused refused. The questions comprising the case stated were as follows:

(i) *"In the circumstances before me, where the evidence given was that the requirement made by Garda Dowling at 1:05 a.m. was made pursuant to s.13(1)(b) of the Road Traffic Act, was I entitled to infer that the requirement was made under the Road Traffic Act 1994?*

(ii) *If the answer to the above question is yes, whether I was correct in law in holding that the requirement made at 1:48 a.m. was merely a repetition of the requirement made at 1:05 a.m. or in the alternative otiose?*

(iii) *If the answer to (ii) above is 'no', was the requirement which the accused refused to comply with a lawful requirement?"*

77. With respect to (i), the Supreme Court was satisfied that the learned Circuit Court judge was entitled to reach the conclusion that the requirements laid down in *McGarrigle* had been met, and the first question was answered in the affirmative. In relation to (ii) and (iii) the analysis by Egan J was as follows:

"*The second and third questions in the Case Stated must therefore be approached on the basis that the learned Circuit Court judge was entitled to infer that the requirement made by Garda Dowling at 1.05 a.m. was made pursuant to s. 13(1)(b) of the Road Traffic Act, 1994. It was, accordingly, a lawful requirement under that section, a failure to comply with which rendered the appellant liable to conviction for the offence created by subsection (3). At that point in time, accordingly, the appellant was obliged either to permit the designated doctor to take a specimen of his blood or, at his option, to provide for the doctor a specimen of his urine. The obligation of the appellant to permit the doctor to take a blood specimen was therefore in abeyance during the period when, as is accepted, the appellant made a bona fide attempt to exercise the option available to him of providing a specimen of his*

urine. I have no hesitation in rejecting a submission advanced by Mr. McDonagh that he remained under an obligation to permit the doctor to take a specimen of his blood during the very time that he was endeavouring to provide a specimen of urine. There cannot be the slightest doubt as to what the intention of the Oireachtas was: it must have been envisaged that, in every case where a person chose to avail of the option to give urine, an interval of time, however short, would elapse before the specimen was provided. It must equally have been envisaged that, in some cases, a person might be simply unable to provide a specimen and again it cannot have been the intention of the Oireachtas that in those circumstances the appellant would at that point in time have committed an offence in having refused to permit the doctor to take a specimen of his blood or to provide a specimen of his urine, nor indeed (not surprisingly) is any such submission advanced on behalf of the appellant in the present case.

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

In abeyance

78. Having regard to the foregoing dicta, it seems to me that what is placed in abeyance by the original choice of the arrested person is *their* legal duty to permit a specimen of blood to be taken. The revival of that duty is as a consequence of *their* failure to provide the urine sample they chose to provide. What is revived is *their* duty to provide a blood sample. In the present case stated appeal, there is no doubt about the fact that the appellant was given reasonable time to provide the urine specimen but did not provide same, as a consequence of which his duty to provide a blood specimen revived. This issue of 'revival' is one I will return to presently.

79. The judgment *Mangan* (see p.376) records the following submissions by counsel for the accused in that case: *"… The requirement with which the accused had refused to comply was that made at 1:48 AM when he was simply required to provide a blood sample. Counsel submitted that there was no provision in the Act of 1994 or indeed in any other Road Traffic Act providing for the legality of such a requirement. It was accordingly submitted that, in the circumstances , the requirement with which the accused had refused to comply was neither the requirements set out in the charge nor a requirement provided for by the Act of 1994."*

80. In the present case, whilst a full suite of warnings was given to the appellant at 3:15, the warning at 3:46 focussed only on the provision of a urine sample (being the only option the appellant ever took, for a reason given by him).

81. Keane CJ stated the following with regard to the initial and subsequent warnings in *Mangan*:

"It follows that, when Garda Dowling at 1.48 a.m. made what she described as the 'further requirement' of the appellant to provide a sample of his blood for the doctor and explained

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

I am satisfied that the learned Circuit Court judge in those circumstances was entitled to hold that appellant had refused to comply with a lawful requirement pursuant to s. 13(1)(b) of the 1994 Act. I would answer the second question in the Case Stated 'yes' and the third question in the Case Stated 'yes'."

82. It will be recalled that the second question in *Mangan* was whether the Circuit Court Judge was correct in law in holding that the requirement made at 1:48 a.m. (the obligation to provide a blood specimen/penalties) was merely a repetition of the requirement made at 1:05 a.m. (the obligation to provide blood *or* urine specimen/penalties) or in the alternative otiose. Given the Supreme Court's affirmative answer to that question in *Mangan,* it seems to me in the present case that the warning given at 3.46 (the obligation to provide a urine sample/penalties) took nothing away from the validity of the comprehensive warnings given at 3:15 (the obligation to provide blood *or* urine specimen /penalties).

Condition precedent?

83. I can find nothing in *Mangan* (or in *Cagney*, or in any other of the authorities opened) to support the proposition that the revival of a duty (*on* the arrested person) to permit a blood sample to be taken, involves, as a condition precedent for such revival, the discharge by the Gardai of a fresh duty (*on* the relevant garda member) to give, for a *second* time, comprehensive warnings given earlier. Yet it seems to me that at the heart of this case stated is this 'condition precedent' contention which, for the reasons set out in this judgment, I feel bound to reject.

No added obligation

84. It is in ease of an arrested person that he, or she, has the option of providing a urine specimen, but that person's failure to make good on their choice does not create an *added* obligation on the Gardai to give information which has *already* been given (in this case, just over 30 minutes beforehand) which is nowhere found in s.12 of the 2010 Act and, in my view, is not required by constitutional justice.

Single process

85. On the facts as found, there was a single arrest and a single process, of which the chronology of events represents a continuum. That is also a view which seems to me to accord with the provisions in s.12 of the 2010 Act. There is no question, in my view, of the warnings which were given at 3:15 applying to a *different* process (such that the Gardai were under an obligation to 'start again' as regards warnings). This brings me back to the topic of revival.

Revival

86. What, one might ask, was *revived* in the wake of the appellant's failure to provide a urine sample? The answer seems to me to be very clear, namely, the *appellant's* legal obligation to permit a blood sample to be taken. What had been suspended was not an obligation resting on the *Gardai,* but a legal duty to provide a blood sample which, had the *appellant* provided a urine sample, he would have been relieved of. Thus, once revived, it was an onus on the *appellant* to do what was required of him. I cannot accept that the temporary suspension of and revival of the legal duty on the *appellant* somehow conjured up a duty on the *garda* member, nowhere found in the legislation and, in my view, not required by the principles of natural and constitutional justice. Thus, and although it involves repetition, I take the view that fair procedures certainly required that the appellant was given the warnings which he was, in fact, given at 3:15 a.m. but did not require these to be given more than once.

No 'shifting' onus

87. To look at matters slightly differently, it seems to me that the logic of the appellant's argument is that that there was some sort of 'shifting' onus, i.e. that a pre-cursor to the appellant's revived obligation to provide a blood sample was a legal duty on the part of the Gardai to say what had *already* been said (little more than half an hour earlier, in the present case). Based on my reading of the legislation, a consideration of the authorities and guided by the principles of constitutional justice I find myself unable to agree. Rather, it seems to me that the following was the position post 'revival':

(i) Having already been given the warnings, the obligation rested on the *appellant* to ensure that he gave a blood sample;

(ii) Failure to provide a urine sample did not create an additional obligation on the Gardai (i.e. to repeat the warnings already given, as a pre-condition of the revival of the appellant's primary obligation to give blood);

(iii) It behove the *appellant* to ensure compliance with his legal obligation to provide a blood sample before leaving the station;

(iv) There was no obligation on the gardai to ask the appellant if he wished to change his mind about providing a blood sample (any more than there was an obligation to try and *persuade* him to overcome his expressed dislike of needles or, for that matter, a duty on the Gardai to consider whether, over the course of just over half an hour, the appellant's dislike of needles may have *evaporated* or dissipated such that, had he been told for a second time about his requirement to give blood, his answer might have been at, say, 3:46 a.m., that he disliked needles *less* than he did at 3:15 a.m.);

(v) There was no duty on the Gardai to *remind* the appellant that if he failed to give a blood sample, an offence would be committed, i.e. something he had been told at 3:15 a.m. (any more than there was a duty on the Gardai to consider whether the appellant might have *forgotten* the warnings given just over half an hour earlier).

88. In short, I do not accept that the revival of the obligation which rested on the appellant to permit the taking of a specimen of blood, or at his election a urine specimen, creates a fresh obligation to tell the appellant what he has already been told as to his duty under law, or to remind him of the sanctions information which had already been given to him.

Status quo as he left the station

89. Despite knowing his primary obligation to permit a blood sample, and the fact he had not discharged it, and the fact he had not produced the alternative urine specimen, and the relevant sanctions, the appellant left the Garda Station without permitting blood to be taken. The *status quo*, as he walked out the door, was the appellant's ongoing refusal to allow blood to be taken due to his dislike of needles. There was a doctor present in the station available to take a blood sample had the appellant decided to change his mind, but, despite being possessed of all relevant information, he chose not to, for whatever reason.

Crystallised

90. Thus, I feel bound to reject the submission that no offence ever 'crystallised'. Furthermore, in answer to the rhetorical question posed on the appellant's behalf as to *when* he committed the offence, it seems to me that matters 'crystallised' when the appellant left the station without having permitted a blood sample to be taken. He knew, from 3:15 onwards, that this was required of him, yet his response had been to decline to provide blood due to a dislike of needles. By virtue of the applicant not changing his mind, his initial refusal to give blood *remained* his attitude to same at all material times thereafter. It was open to him, at any point *prior* to exiting the station, to inform the Gardai that he had overcome his dislike of needles and would permit blood to be taken (or that, despite this dislike of needles, he was willing to do what he knew the law required of him). He did not choose this course. Rather, he left without altering his attitude to the taking of a blood sample, namely, his refusal for a stated reason. In short, proactivity was required of the *appellant*, had he wished to change his option, given that the duty to provide blood, once revived, was *his* duty to discharge, as he knew.

Take the initiative

91. It will be recalled (*per* Griffin J in *Connolly v. Salinger*) that someone who chooses to provide a specimen of urine, but is unable to do so, "*…is not excluded from subsequently choosing the alternative of permitting a specimen of blood to be taken…".* In my view, the obligation is on the person who made the original choice to take the initiative and make an alternative one, if they so wish. They already know both alternatives. Indeed, it was by reason of their knowledge of both alternatives that they made their original choice. They do not require to hear, again, what the two choices are. The only 'moving part' seems to me to come down to their own *agency* i.e. their desire, or not, to make a different choice than the one they originally made.

92. The foregoing view seems to me to chime with the *dicta* in *Connolly* (cited with approval in *Coughlan*) which makes clear that a person cannot be excluded from making a different choice

but does not put the focus, in terms of duty, on anyone other than the individual who is entitled to change their mind.

93. Had the appellant, despite his earlier decision *not* to give a blood sample, informed the Gardai that he *was* now willing to permit the doctor to take one, there was no impediment to the taking of same. The appellant did not so inform the Gardai, but left the station knowing (i) what was required of him; (ii) the fact he had not done what the law required; and (iii) the sanctions in that regard.

94. In short, the appellant refused to provide blood (for a stated reason) and was afforded ample opportunity to provide a urine sample but did not do so (for whatever reason). On any analysis, there was (to quote Geoghegan J in *Doyle*) *"non-compliance with the requirement",* being the single offence created by s.12.

'Snare'

95. Fair procedures, as an expression of natural and constitutional justice, are essential in any civilised legal system. However, despite the formidable skill with which submissions were made on the appellant's behalf, I have been unable to find any obligation on the part of an Garda Síochána to tell the appellant what he had *already* been told. It would have, indeed, been to 'snare' the appellant if he had not been given the comprehensive warnings imparted to him at 3:15 a.m. but they were, in fact, given. He no more needed to be given *additional* information at 3:47 a.m. (or at the very point at which he put his first step outside the garda station) than he needed additional information at *any* stage after the warnings were given at 3:14 a.m.

96. In the present case, there can be no question of this court 'second guessing' the finding of fact made by the learned District Court Judge and, for the reasons in this judgment, I am very satisfied that the legal issue was addressed properly. Having weighed the evidence and reached findings of fact the learned trial judge came to the view that the offence had been committed and I am satisfied that she was correct in law in convicting the appellant.

97. For the reasons set out in this judgment, the answer to the single question posed is in the affirmative. To answer the question otherwise, would require this court to extend, impermissibly, the concept of fair procedures requirements in a manner not required by constitutional justice and in a way which would undermine the provisions and legislative objective of the 2010 Act. That would, in reality, be an impermissible exercise in judicial law-making, in my view.

98. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"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."

99. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order, including as to costs, which should be made. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office within 14 days of the start of Easter Term (i.e. by Friday 28 April 2023).