UNAPPROVED JUDGMENT
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THE COURT OF APPEAL

Record No: 321/2021
Neutral Citation: [2023] IECA 194

Edwards J.
McCarthy J.
Ní Raifeartaigh J.

IN THE MATTER OF SECTION 16 OF THE

COURTS OF JUSTICE ACT 1947

Between/

THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF SERGEANT CIAN P.M. O'BRIEN)

Prosecutor

V

SIMON GORDON

Defendant

JUDGMENT of the Court delivered by Mr. Justice Edwards on 28th of July 2023.

Introduction

1. This judgment relates to a consultative case stated to the Court of Appeal by His Honour Judge Francis Comerford, a Circuit Court judge sitting on the Northern Circuit and in

County of Cavan, pursuant to s. 16 of the Courts of Justice Act 1947, upon a question of law arising in proceedings pending before him, upon the application of the prosecutor in the said proceedings.

Background

2. At a sitting of the said Circuit Court on the 22nd of January 2020, at which District Court Criminal Appeals were listed for hearing, the defendant appeared before the said Circuit Court judge to prosecute his appeal against his earlier conviction by the District Court for the District Court Area of Cavan, and District No. 5, of an offence of being drunk in charge of a vehicle contrary to section 5(4)(a) & (5) of the Road Traffic Act 2010 ("the Act of 2010").

3. The particulars of the offence of which he had been convicted, and in respect of which he was appealing, were set out on Cavan Charge Sheet No 17051345, as follows:

> "[…] *that you the said accused/defendant,*
>
> *On the 09/09/2016 at Beaghy, Stradone, Co. Cavan a public place in the said District Court Area of Cavan and District aforesaid, were in charge of a mechanically propelled vehicle registration number 10D25163 with the intent to drive and attempt to drive the said vehicle (but not driving or attempting to drive) while there was present in your body a quantity of alcohol such that, within 3 hours after so being in charge, the concentration of alcohol in your breath did exceed a concentration of 22 microgrammes of alcohol per I 00 millilitres of breath, to wit 87 microgrammes of alcohol per 100 millitres of breath. Contrary to section 5(4)(a) & (5) of the Road Traffic Act 2010.*"

Facts as found by the Circuit Court Judge

4. At the hearing of the District Court appeal before Cavan Circuit Court the prosecutor called two witnesses, namely a Mr. Keith Brady, a civilian witness, and a Sergeant Cian O'Brien (otherwise "Sgt. O'Brien"), a member of An Garda Siochana . The Circuit Court judge found the following facts to be proved or admitted.

5. On the 9th of September 2016, members of An Garda Síochána attended a single vehicle incident at Beaghy, Stradone, County Cavan. Upon their arrival at the scene, Sgt O'Brien observed a silver Skoda positioned partially in a ditch. Inside, and seated in the driver's seat, was an extremely inebriated individual who had a bottle of vodka in his possession. A member of the public, the aforementioned Mr. Keith Brady, had previously observed the driver revving the engine of the vehicle and attempting to drive it out of the ditch. He had taken possession of the keys to the vehicle, and furnished gardaí with them. Sgt. O'Brien tried to rouse the driver who was extremely drunk and had difficulty forming words. Eventually, Sgt. O'Brien managed to obtain his name and address. The driver was identified as the defendant.

6. Sgt. O'Brien's evidence in relation to the positioning of the vehicle was as follows: the front right wheel was on the road, the two left wheels and rear right wheel were in a drain, and; there was evidence of tyre marks and tracks indicating that the vehicle's wheels had been spun in an unsuccessful attempt to drive out of the drain. Sgt. O'Brien further testified that he formed a suspicion and an intention to arrest, which he executed. That suspicion, of which he informed the defendant at the time of his arrest, was that the defendant was drunk while in charge of a vehicle.

7. Sgt. O'Brien further gave evidence in relation to the defendant's detention and the operation of the Evidenser apparatus at the Garda station to which the defendant was taken, by which apparatus the alcohol in the defendant's breath was measured.

8. The test was properly conducted, and it produced a s. 13 certificate which established an alcohol reading in excess of the permitted level (which, in the defendant's circumstances, was 22 microgrammes of alcohol per 100 millilitres of breath), namely, a reading of 87 microgrammes of alcohol per 100 millilitres of breath. Although the s. 13 certificate incorrectly described the offence of which the defendant was suspected, a discrepancy which

was explained in evidence by Sgt O'Brien, leading to its admissibility being contested, the prosecutor was ultimately permitted to rely upon it (in both courts), and nothing turns on that in the context of this consultative case stated.

The Controversy Giving Rise to the Case Stated

9. It may be helpful at the outset to set out the terms of ss. 4(4), and 5(4), respectively, of the Act of 2010.

10. Section 4(4) provides:

> "*A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his or her body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his or her breath will exceed a concentration of—*
>
> *(a) 22 microgrammes of alcohol per 100 millilitres of breath, or*
>
> *(b) in case the person is a specified person, 9 microgrammes of alcohol per 100 millilitres of breath.*"

11. Section 5(4) in turn provides:

> "*A person commits an offence if, when in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle (but not driving or attempting to drive it), there is present in his or her body a quantity of alcohol such that, within 3 hours after so being in charge, the concentration of alcohol in his or her breath will exceed a concentration of—*
>
> *(a) 22 microgrammes of alcohol per 100 millilitres of breath, or*
>
> *(b) in case the person is a specified person, 9 microgrammes of alcohol per 100 millilitres of breath.*"

12. The defendant in the present case was not a specified person for the purposes of either provision.

13. At the conclusion of the prosecution's evidence at the hearing of the District Court Appeal before the Circuit Court judge, a direction was applied for on behalf of the defendant. Although various points were argued not all of which are material at this stage, it is of significance that the Circuit Court judge was confronted with the contention that the offences contrary to s. 4(4) of the Act of 2010 (sometimes colloquially referred to as "*drunk driving*") on the one hand; and contrary to s. 5(4) of the Act of 2010 (sometimes colloquially referred to as "*being drunk in charge*") are mutually exclusive. The argument was that if you are guilty of one, you cannot be guilty of the other. The case made on behalf of the defendant was the evidence before the Circuit Court at the hearing of his District Court appeal did not establish the ingredients of an offence contrary to s. 5(4) of the Act of 2010. The Circuit Court judge agreed. He found that the evidence that had been adduced before him was insufficient to allow him to convict the defendant of an offence contrary to s. 5(4) of the Act of 2010 which would have required proof that while the defendant had been in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle (but not driving or attempting to drive it), there had been present within his body a quantity of alcohol such that, within 3 hours after being so in charge, the concentration of alcohol in his breath exceeded the permitted limit. The Circuit Court judge was of the clear view that there was evidence, which he accepted to a standard of beyond all reasonable doubt, that there had been an attempt to drive while the defendant was in charge of the vehicle.

14. That having been said, the Circuit Court judge was also of the view that there was evidence before him which suggested that the defendant was guilty instead of an offence contrary to s. 4(4) of the Act of 2010, which required proof that the defendant drove or attempted to drive a mechanically propelled vehicle in a public place while there was present in his body a quantity of alcohol such that, within 3 hours after so driving or attempting to

drive, the concentration of alcohol in his breath exceeded the permitted limit. However, the defendant has not been convicted of a s. 4(4) offence in the District Court.

15. That being the case, the Circuit Court judge then considered whether by virtue of s. 5(6) of the Act of 2010 it would be open to him, in the exercise of his appellate jurisdiction, assuming no change in the evidential position (the prosecution case was closed; procedurally he was concerned with an application for a direction; and it remained to be seen if the defence would go into evidence), to convict the defendant of an offence contrary to s. 4(4) of the Act of 2010. In that context he considered s. 5(6) of the Act of 2010, which provides:

> "*A person charged with an offence under this section may, in lieu of being found guilty of that offence, be found guilty of an offence under* ***section 4***."

16. For completeness, it should be stated that this provision is mirrored in s. 4(6) of the Act of 2010, which provides:

> "*A person charged with an offence under this section may, in lieu of being found guilty of that offence, be found guilty of an offence under* ***section 5***."

17. The Circuit Court judge was satisfied that the terms and wording of s. 5(6) did not preclude him in the context of considering an application for a direction from considering whether an alternative verdict might be open if a direction was not granted, and the case was to be allowed to proceed. However, notwithstanding being of that view, the Circuit Court judge had serious reservations as to whether the power granted by s. 5(6) (or, as might arise in another case, by s. 4(6)) was one exercisable at all by a court exercising appellate jurisdiction as opposed to one hearing a case at first instance. Those reservations are set out in the Case Stated, in these terms:

> "*(h)* […] *My concern was whether I could apply this subsection so as to impose a conviction on appeal which was inconsistent with the conviction imposed at first instance, so that it would be a new conviction from which there was no appeal.*

(i) The particular difficulty arose from the fact that the statutory framework of ss. 4 and 5 made the two offences mutually exclusive. The facts on which the convictions in the District Court and Circuit Court were based would be the same but if I convicted for [a] *s. 4 offence rather than affirming the conviction for a s. 5 offence, I would be imposing a conviction for an offence which would be incompatible with and therefore distinct from the finding in the District Court.*

(j) This circumstance of the offences being mutually exclusive gave rise to the concern that the defendant would be convicted for the first time of an offence contrary to s. 4 at the appeal hearing and would have no right of appeal from this finding. Such a conviction would be in contrast to the normal conduct of District Court Appeals, where if the Circuit Court convicts, it either affirms the District Court conviction, or in some instances, convicts for a lesser offence which is, as a matter of fact, subsumed within the conviction imposed by the that so that it did form part of the District Court finding. On the basis that the right of an appeal is a fundamental requirement of due process, the absence of an appeal from a conviction in the Circuit Court which was distinct from the conviction in the District Court gave rise to concern. I was satisfied there would be no right of appeal against the s. 4 conviction if I were to impose this.

(k) In the course of the submissions, it was established that the defendant did not intend to go into evidence. My view was that the evidence had established the commission of an offence contrary to s. 4. I further concluded that it would not be appropriate to impose a s. 4 conviction on appeal when the District Court had convicted for an offence which was by the terms of statute incompatible with that s. 4 conviction. This was on the basis that the defendant would have no right of appeal against this new conviction.

(l) I am therefore minded to allow the appeal on the basis that an offence contrary to s. 5 has not been proved and that it would be a breach of due process to exercise s. 5(6) to impose a s. 4 conviction. Having given this indication, I further indicated that I was willing to state a case if this was sought by the prosecutor. I did this prior to making a final determination. The prosecutor has asked me to state a case.

(m) As a result, application is now made on behalf of the prosecutor to state a case on the following questions of law for determination by the Court of Appeal:-

1. *In the circumstances of this case, am I correct in law to hold that it would be a breach of due process to exercise the power conferred by s.5(6) so as to impose a conviction contrary to section 4, which would be incompatible with the conviction of the District Court and from which there would be no right of appeal.*
2. *If so, is the breach of such significance to warrant allowing the appeal in circumstances where I have determined that there is sufficient evidence to convict the defendant of the alternative section 4 offence?*"

Submissions of the Prosecutor

18. In the first place, counsel on behalf of the prosecutor submitted that the appellate jurisdiction of the Circuit Court is exercised within the same limits as circumscribe the jurisdiction of the District Court and that accordingly a Circuit Court judge in the context of an appeal *de novo* from the District Court has jurisdiction to confirm, reverse or substitute the order of the court below. In this regard, we were referred to: *The State (McLoughlin) v. Judge Shannon* [1948] I.R. 439 (Davitt J.), at p. 449; *Attorney General v. Mallen* [1957] I.R. 344

(Lavery J.), at p. 352, and; *The State (White) v. Martin* (Unreported, Supreme Court (Henchy J.) 21st of October 1976).

19. The right of appeal from the District Court to the Circuit Court is provided for in s. 18 of the Courts of Justice Act 1928 (i.e. "the Act of 1928"). Counsel for the prosecutor submitted that once an appeal from the District Court commences, the legal situation "*from a practical standpoint*" is the same as obtained in the District Court, inasmuch as the appeal is a full rehearing, and all the options open to the District Court judge at first instance are available to the Circuit Court judge exercising his appellate jurisdiction. It was submitted on behalf of the prosecutor that there is a well-established statutory framework permitting substitution of an alternative offence, allowing for a drink-driving charge to be substituted for a charge of being drunk in charge of a vehicle, and vice versa. It was submitted that s. 5(6) of the Act of 2010 clearly provides for the returning of such an alternative verdict, that the decision on whether or not it is appropriate to do so in the circumstances of the case is within the jurisdiction of the Circuit Court judge, and that it is not impacted by the finality of a Circuit Court decision under s. 18(3) of the Act of 1928.

20. In support of the suggestion that there is a well-established statutory framework permitting substitution of an alternative offence in this context, we were referred to a number of authorities; including: *DPP v. Gerard O'Neill* [2011] IESC 7 (Denham J., as she then was) at para. 23; *DPP v. Thomas Moloney* [2001] IEHC 178 (Finnegan P.) at p. 10; and *O'Leary v. Cunningham* [1980] I.R. 367 (Kenny J.) at p. 377. Reference was also made to commentary in David Staunton B.L., *Drunken Driving* (2nd edn, Round Hall 2021).

21. We should reference here that the following passages from the judgment of Kenny J. in *O'Leary v. Cunningham* (at p. 377 of the report) were very strongly relied upon by the prosecutor:

"*It is now necessary to consider the nature of an appeal from the District Court in a criminal case, and the powers of a Circuit Court judge at the hearing of the appeal. This matter is regulated now by the provisions of s 18 of the Courts of Justice Act, 1928, and s 50 of the Courts (Supplemental Provisions) Act, 1961. The latter provisions relate to sentence only and are not relevant to this case. The effect of s 18 of the Act of 1928 was happily summarised by Davitt J in The State (McLoughlin) v Shannon* ([1948] I.R. 176) *at p 449 of the report:– "It seems to me that when a defendant, aggrieved by the decision of a District Justice in a criminal case, takes an appeal therefrom to the Circuit Court he seeks, and obtains, a hearing of the case de novo. He, in effect, asks the Circuit Judge to hear the whole matter again and to substitute for the order made by the District Justice (of which he disapproves) the order of the Circuit Court (of which he hopes he can approve). He impliedly admits the jurisdiction of the Circuit Court to substitute its own order for that of the District Court. It would, I think, be a grave matter for appellants if it was held that the Circuit Court had no power to substitute its own order for that appealed from." This statement was approved*[†] *by Mr Justice Henchy, when sitting as a Supreme Court judge, in The Attorney General (Lambe) v Fitzgerald* ([1973] I.R.195).

It is now established that on the hearing of an appeal from the District Court, the Circuit Court has power to vary the order made by the District Justice: The State (McLoughlin) v Shannon. He also has power to substitute a conviction of a different offence to that on which the defendant was convicted in the District Court when such substitution is authorised by statute or by the common law. Examples of this are found in s 44 of the Larceny Act, 1916, under which an accused charged with robbery may be convicted of an assault with intent to rob, and in s 53, sub-s 4, of the Road Traffic

Act, 1961, under which an accused charged with dangerous driving may be convicted of driving without due care and attention."

(Reporting references in parenthesis inserted by the Court of Appeal)

22. Accordingly, counsel for the prosecutor says, the potential for a discretionary conviction for an alternative offence is "*live*" in a scenario where it is open to a Circuit Court judge to conclude that there is insufficient evidence to support a conviction for the original offence charged but there is sufficient evidence to support a conviction for an alternative offence, where a statute allows for it. It was submitted that the fact that the defendant may have been convicted of a different offence at first instance in the District Court is in that situation immaterial.

23. Insofar as there is a discretion to be exercised, the test is, counsel submitted, one of prejudice. In support of this argument we were referred to *DPP v. Sean Kenny* [2006] IEHC 330 (a case concerning earlier iterations of ss. 4 and 5 of the Act of 2010 originally arising under the Road Traffic Act 1961 ("the Act of 1961"), namely ss. 49 and 50, respectively, of the Act of 1961), where Herbert J. stated at p. 14 of his judgment:

"*In my judgment, Sub-section 6(b) of Section 49 of the 1961 Act confers on the court the following discretion:-*

> *"(a) If satisfied on the evidence that the accused should not be convicted of an offence under Section 49(4) and if satisfied, by submission made by or on behalf of the Accused, or of its own motion, that the Accused would be prejudiced by the introduction of the alternative offence and could not be afforded a sufficient opportunity of countering it, to decline to consider the alternative offence under Section 50 of the 1961 Act and acquit the Accused.*
>
> *(b) Alternatively, in the absence of any such prejudice or if it is capable of being eliminated, to proceed with the hearing, to consider the evidence and*

> *find the Accused either guilty or not guilty of an offence under Section 50 of the 1961 Act.*"

24. Counsel for the prosecutor submitted that in the present case, the Circuit Court judge did not identify any prejudice such as was contemplated by Herbert J. As such, it was argued that in the absence of such prejudice, and in the light of the evidence before him, the Circuit Court judge should have proceeded to convict the defendant of an offence under s. 4(4) of the Act of 2010.

25. In conclusion, it was submitted by the prosecution that the answers to the questions posed by the Circuit Court judge should be firmly answered in the negative.

Submissions of the Defendant

26. The starting point of the defendant's submissions is that the jurisdiction conferred by s. 5(6) of the Act of 2010 (or for that matter under s. 4(6) of the Act of 2010) is only available to be exercised by a court hearing a case at first instance, and not by a court which is exercising appellate jurisdiction in circumstances where there had been no consideration of the possibility of an alternative verdict at first instance.

27. The case made in that regard is based on a literal interpretation of the wording of s. 5(6) of the Act of 2010 (and the point equally would apply to s. 4(6) of the Act of 2010). Both provisions refer to "*a person **charged** with an offence under this section*" (emphasis added). The defendant says that an appellant is no longer a person charged, but rather a convicted person, and therefore these subsections cannot be availed of on appeal.

28. In support of this argument, the defendant relies on the following observations by Lavery J. (*nem. diss.*) for the Supreme Court in *Attorney General v. Mallen* [1957] I.R. 344, at p. 352, concerning the nature of District Court Appeals:

> "*The appeal is a true appeal though by way of re-hearing and is not a re-trial except in form. The defendant appealing comes before the Circuit Court as a convicted*

person. He does not rid himself of the conviction by serving notice of appeal. He is not called on to plead and his task is to show, if he can, that the conviction was wrong in whole or in part. This situation is not altered by the circumstance that there is a re-hearing."

29. Insofar as the prosecutor had sought to rely on *O'Leary v. Cunningham*, the defendant's position is that such reliance is misconceived. In that case Kenny J. had observed, at p. 377 of the report, that the Circuit Court when hearing an appeal "*has power to substitute a conviction of a different offence to that on which the defendant was convicted in the District Court when such substitution is authorised by statute or by the common law*." However, counsel for the defendant says, no such authorisation is to be found within s. 5 (or for that matter s. 4), or elsewhere within the Act of 2010, or indeed in any other enactment, or arising at common law. We were asked to contrast with the position under the Act of 1928, the position with respect to appeals to the Court of Appeal against convictions on indictment where the Oireachtas has made provision for such substitutions by an appellate court. We were referred in this context to s. 3(1)(d) of the Criminal Procedure Act 1993.

30. Section 3(1)(d) of the Criminal Procedure Act 1993, provides:

"*3.—(1) On the hearing of an appeal against conviction of an offence the Court may—*

(a) […], *or*

(b) […], *or*

(c) […], *or*

(d) quash the conviction and, if it appears to the Court that the appellant could have been found guilty of some other offence and that the jury must have been satisfied of facts which proved him guilty of the other offence—

(i) substitute for the verdict a verdict of guilty of the other offence, and

(ii) impose such sentence in substitution for the sentence imposed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity."

31. Counsel for the defendant submitted that there is no corresponding provision in the Act of 1928 which would allow for a similar substitution by the Circuit Court when exercising its appellate jurisdiction from the District Court.

32. In further support of the argument that the jurisdiction conferred by s. 5(6) of the Act of 2010 (or for that matter under s. 4(6) of the Act of 2010) is only available to be exercised by a court hearing a case at first instance, and not by a court which is exercising appellate jurisdiction in circumstances where there had been no consideration of the possibility of an alternative verdict at first instance, the defendant points to s. 18(3) of the Act of 1928 which provides that the decision of the Circuit Court on appeal "*shall be final and unappealable.*" It is said that if it were possible for the Circuit Court on appeal to impose an alternative verdict, there would be a *prima facie* unfairness to it inasmuch as it would effectively "*shut out*" a defendant from any possibility of appealing. Relying on *McCabe v. Ireland* [2015] 3 I.R. 95, the defendant says that the only way in which s. 5(6) (and s. 4(6)) of the Act of 2010 (which enjoy a presumption of constitutionality) can in fact be operated constitutionally, in the light of s. 18(3) of the Act of 1928 and in the absence of a right of appeal from the Circuit Court to the Court of Appeal in respect of any such substitution, is if they are interpreted on the basis that the jurisdiction they confer extends only to the District Court when hearing a case at first instance.

33. While the defendant's main contention was that it was not open to the Circuit Court to avail of s. 5 (6) of the Act of 2010 to record a conviction against him under s. 4 of that Act, he had sought to advance, without prejudice to that contention, several fall-back arguments.

34. He complains firstly in that regard that he was never charged, nor was he tried, either at District Court or Circuit Court level, with an offence contrary to s. 4 of the Act of 2010. It was submitted that s. 4 and s. 5 offences are distinctly different offences and require distinctly different proofs. It was further said that the question of an alternative verdict arising was not engaged, at any time, by the prosecution in either jurisdiction, and that consequently, as a matter of practical importance, the defendant could not have been aware that reliance would be placed on, nor did he have any opportunity to contest or challenge, evidence now being pointed to as providing the necessary proofs in respect of such an alternative verdict; nor did he have any advance notice that such an eventuality might occur.

35. Counsel on behalf of the defendant submitted that absent being summonsed for, or charged with, s. 4 and s. 5 of the Act of 2010 as alternative charges before the District Court, or (by virtue of the invocation at first instance of s. 5(6) of the Act of 2010, the engagement of s. 4 of the Act of 2010 in the District Court), it was not open to the Circuit Court as a matter of fundamental fairness to seek to convict the defendant of a s. 4 offence in the context of a District Court Appeal against his conviction by the District Court for a s. 5 offence.

36. It was further contended by the defence that the Circuit Court judge erred in law in and about his consideration of this issue at the "*direction stage*". It is said that this was inappropriate timing, as at that stage the issue could not arise. It was said that if, as a consequence of submissions made at that point in the trial, the Circuit Court considered that the evidence required to support a conviction under s. 5 had not been adduced, the only possibility open to the judge was to find that there was no case to answer and to grant a direction. The question of a conviction for an alternative offence could not arise at that point in the trial process. Counsel submitted that the only correct course in the circumstances would be to acquit the defendant.

37. As regard the differences between ss. 4 and 5 of the Act of 2010, counsel argues that the distinction between the two provisions principally relates to the issue of whether the accused was actually driving or attempting to drive a mechanically propelled vehicle, or whether they merely had intent to do so. If the defendant was actually driving or attempting to drive the vehicle, then s. 4 would be the appropriate section under which to have charged him. Conversely, merely being in charge of a vehicle with intent to drive or attempt to drive while under the influence of an intoxicant would not be captured by that provision, s. 5 being the more appropriate section. As such, it was submitted, the two provisions are mutually exclusive. Whilst it was permissible for the prosecution to proceed on a summons charging s. 5 in the District Court and then at some future stage to rely upon the alternative verdict provision to request the court to convict instead of a s. 4 offence, the defendant says, "*it is self-evident that at some point in the process the accused person must be made aware of that prospect.*" That did not happen in his case. Counsel observed that the prosecution made representations in the Circuit Court to the effect that what was being pursued was a prosecution under s. 5 of the Act of 2010 and not one under s. 4. It is said that by making these representations the prosecution necessarily "*out-ruled*" the availability of any alternative verdict.

38. Without prejudice to his argument that the jurisdiction conferred by s. 5(6) was only exercisable by a District Court when hearing a case at first instance, counsel agreed that where an alternative verdict can legitimately be recorded as a matter of discretion, the possibility of prejudice is a relevant consideration for a court that has to decide how to exercise its discretion. In that regard, the defendant also relies on the same passage from Herbert J.'s judgment in *DPP v. Kenny*, at p. 15, to which we were referred by the prosecutor and which we quoted earlier.

39. The defendant therefore submitted that the questions posed by the District Court judge should be answered in the affirmative.

Court's Analysis & Decision

40. We consider that none of the authorities to which we were referred are directly in point. We do not propose to review all of them, although we have considered all of them. It will suffice for the purposes of this judgment if we confine our review to those on which substantial reliance was placed.

41. We were referred by both sides to *The State (McLoughlin) v. Judge Shannon* (citation provided earlier). That case had been concerned with judicial review proceedings brought by an applicant who had been charged before the District Court with offences in relation to a single incident concerned with the driving of a motor bus, being a charge of dangerous driving contrary to s. 51 of the Road Traffic Act 1933 (i.e. "the Act of 1933") and a charge of driving without reasonable consideration contrary to s. 50 of the Act of 1933. The District Justice hearing the case convicted the defendant, and the record showed that he was convicted of an offence contrary to s. 51, and that a fine was imposed of IR£5. 0s. 0d. The defendant appealed to the Circuit Court which affirmed the conviction but held that the s. 51 offence constituted two offences and therefore the order of the District Court was varied, two convictions were recorded (being convictions for offences under both s. 50 and s. 51) and two separate fines of IR£2. 10s. 0d. were imposed. The defendant then unsuccessfully sought an order of *certiorari* in the High Court to quash the orders of the District Court and Circuit Court. The High Court held that s. 51 of the Act of 1933 did involve two offences, and that the Circuit Court judge had been correct to record two convictions and to impose separate fines for them. It was in that context that Davitt J. offered the observations on which such reliance has been placed in the present case. At p. 449 of the Report, he said:

> *"It was next contended that, the order of the District Justice being bad, the learned President of the Circuit Court had no power to amend it and make it good, or to make a good order in lieu thereof. It seems to me that when a defendant, aggrieved by the decision of a District Justice in a criminal case, takes an appeal therefrom to the Circuit Court he seeks, and obtains, a hearing of the case de novo. He, in effect, asks the Circuit Judge to hear the whole matter again and to substitute for the order made by the District Justice (of which he disapproves) the order of the Circuit Court (of which he hopes he can approve). He impliedly admits the jurisdiction of the Circuit Court to substitute its own order for that of the District Court. It would, I think, be a grave matter for appellants if it were held that the Circuit Court had no power to substitute its own order for that appealed from."*

42. We regard it as being importance that, unlike in the present case, the defendant in *The State (McLoughlin) v. Shannon* had been charged from the outset with both s. 51 and s. 50 offences. While the Circuit Court substituted its own order for that appealed from, the substituted order was one in respect of which the defendant had been in jeopardy from the outset. The substitution involved in *The State (McLoughlin) v. Shannon* did not therefore concern substituting an alternative offence for the one charged and convicting of that. Rather the position seems to have been adopted that, in a situation where arising from the same facts, the accused was charged from the outset with two offences, one of which was a more serious offence than the other, that the greater included the lesser and that a conviction for the greater was in reality also a conviction for the lesser. That was not the situation in the present case, and accordingly the observations of Davitt J. are only helpful up to a point.

43. The much later case of *Attorney General v. Mallen* (also cited already) involved a defendant who had also been charged on summons in the District Court with two traffic offences, in relation to a single incident concerned with the driving of a motor car, being a

charge of dangerous driving contrary to s. 51 of the Act of 1933 and a charge of driving without reasonable consideration contrary to s. 50 of the Act of 1933. The applicant had pleaded not guilty to both charges. The District Justice ordered that the s. 50 charge be dismissed and proceeded to convict the applicant of the s. 51 charge. The applicant appealed his conviction to the Circuit Court and before that court sought to raise a plea in bar, contending that as he had been acquitted of an offence of driving the same motor car at the same place and on the same occasion without exercising reasonable consideration, he could not then be guilty of the s. 51 charge. The Circuit Court judge stated the case for the opinion of the Supreme Court asking whether the acquittal of the defendant in the District Court of the offence charged under s. 50 could support a plea in bar, i.e. of *autrefois acquit*, to a charge under s. 51 of the same act. He further asked whether it was competent for the defendant on the hearing of a District Court appeal to plead in bar to the charge of which he had been convicted in the District Court.

44. The Supreme Court answered both questions in the negative, and it will be appreciated that the facts of that case are clearly distinguishable from the present case. In particular, that case (as was also the case in *The State (McLoughlin) v. Shannon*) was again not concerned with substituting an alternative offence for the one charged and convicting of that. The defendant in that case had from the outset been charged with both s. 51 and s. 50 offences, and the s.50 charge had been dismissed in the court below. It was an entirely different factual scenario from that in the present case. That having been said, the remarks of Lavery J. relied upon by the defendant concerning the nature of a District Court appeal are, it seems to me, of general application.

45. The case of *O'Leary v. Cunningham* (cited earlier) was not a road traffic case. It concerned a defendant who was charged with robbery from a service station in which a sum of money was taken, contrary to s. 23 of the Larceny Act 1916 (i.e. "the Act of 1916"); and

also with having received the said sum of money on the same occasion knowing it to have been stolen, contrary to s. 33 of the Act of 1916. At his trial before the District Court he was convicted of the receiving charge and the District Justice make no order on the robbery charge. The defendant appealed his conviction on the receiving charge to the Circuit Court. The evidence received by the Circuit Court suggested that he had in fact been guilty of robbery rather than receiving and that his conviction on the receiving charge was erroneous. The Circuit Court judge stated the case for the opinion of the Supreme Court as to whether, having found that the defendant was a principal in the robbery, the judge could convict him on the receiving charge and, if not, whether he could convict him on the robbery charge.

46. The Supreme Court answered both questions in the negative. As the evidence indicated that he was guilty of the robbery in which the money was stolen he could not be convicted of receiving that money on the same occasion. Further, the failure of the District Justice to make an order in respect of the robbery charge was deemed to be the equivalent of an acquittal of the defendant on that charge, in circumstances where he had been in peril of being convicted of robbery. In the circumstances the Circuit Court was held to have no power to set aside that acquittal.

47. The observations of Kenny J., at page 377 of the Report, have, therefore, to be seen in context. In stating that the Circuit Court judge has power to substitute a conviction of a different offence to that on which the defendant was convicted in the District Court, the learned Supreme Court judge added the qualification "*when such substitution is authorised by statute or by the common law*". In the case of the defendant in *O'Leary v. Cunningham,* Kenny J. held there was no power under statute or common law to substitute a verdict of guilty of robbery when an accused had been charged with receiving stolen goods. More fundamentally, however, the defendant had been in jeopardy of being convicted of robbery in the District Court and the failure of the District Justice to record a verdict was deemed to be

an effective acquittal on the robbery charge. Accordingly, he was entitled to plead *autrefois acquit* insofar as the charge of robbery was concerned on the hearing of the appeal.

48. Again, it may be said that *O'Leary v. Cunningham*, although helpful to an extent, is distinguishable on its facts and not directly in point. It is helpful to the extent of establishing that a Circuit Court judge hearing a District Court appeal has power to substitute a conviction for a different offence to that on which the defendant was convicted in the District Court when such substitution is authorised by statute or by the common law and providing the appellant was not acquitted of the alternative offence in the court below.

49. We accept that the offences under s.4(4) and s.5(4) of the Act of 2010 are mutually exclusive. (For the avoidance of doubt, in saying that, we are not suggesting that one cannot be charged and convicted of both the s.4(4) and the s.5(4) offences in respect of offending behaviour on different occasions on the same date, but not in respect of offending behaviour isolated as occurring at a single definite point in time on that date).

50. It is quite clear in the present case that the defendant was not charged with an offence contrary to s. 4(4) of the Act of 2010 in the court below. He was only charged there with a s. 5(4) offence, and the issue of a possible alternative verdict was never canvassed or raised at any stage before that court. It was only raised as possibility, by the Circuit Court judge of his own motion, at the end of the prosecution's evidence at the appeal hearing, and in the context of that judge having to consider submissions made to him concerning, and to deliberate upon, a direction application.

51. We think that the critical issue that arises is whether the substitution then being considered as a possibility was one (to quote Kenny J. in *O'Leary v. Cunningham*) that was "*authorised by statute or by the common law*". We can say immediately that nobody has suggested to us that the proposed substitution was authorised by the common law. The question may therefore be recast to ask: was it authorised by s. 5(6) of the Act of 2010?

52. We think that the issue raised comes down to a question of statutory interpretation, namely, how to correctly interpret s. 5(6) (and its analogue s. 4(6)) of the Act of 2010. Does the statute only envisage the substitution of an alternative verdict at first instance? Is the expression "***a person charged with an offence***" to be given a strict literal interpretation, such that it is to be read as referring only to a person who is presently charged (and who has not yet been convicted of the offence before any court); or, might a purposive interpretation be applied to it so as to allow it to be read as though the words "***who has been***" were interpolated into it, so that it could then be applied, both at first instance and at appellate level, as though it read "***a person who has been charged with an offence.***" The prosecutor contends for the latter, as having being the true intention of the legislature, whereas the defendant says that such a purposive interpretation would be a step too far, that it would involve judicial re-writing of the legislation, which is not permitted, and that it would amount to a *contra legem* interpretation.

The Statutory Interpretation Issue

53. At the outset, reference should be made to s. 5(1) of the Interpretation Act 2005, which provides:

> "*5.—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—*
>
> > *(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or*
> >
> > *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

54. We are satisfied that although s. 5(6) (and its analogue s. 4(6)) of the Act of 2010 may be invoked in the context of the prosecution of an offence, and allows for a defendant to be convicted of an alternative specific offence instead of that with which they have been charged, it does not of itself impose a penal sanction. Rather, it is essentially a procedural measure designed to ensure that an accused does not secure a technical acquittal on the basis that the wrong charge has been opted for, in circumstances where they have been charged with an offence under s. 5 of the Act of 2010, and the evidence adduced at trial suggests that they are instead guilty of an offence under s. 4 of the same Act, and vice versa.

55. While there is a vast corpus of caselaw concerning the correct approach to statutory interpretation, and it remains an evolving subject, the most recent and authoritative statement of the law in that area is to be found in *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, a unanimous decision of the Supreme Court, in which Murray J delivered a judgment with which the other members of that Court (O'Donnell C.J., O'Malley, Woulfe, and Hogan J.J.) respectively agreed.

56. The decision in *Heather Hill* was recently reviewed and applied by Ní Raifeartaigh J. in this Court in *The People (DPP) v. Czelusniak, (and the Attorney General as amicus curiae)* [2023] IECA 159, and in her judgment (from paras. 53 to 60 inclusive) she summarises the approach commended by the Supreme Court. We are happy to adopt her summary:

"*53. At para 105 of his judgment, Murray J. described the more modern authorities on statutory construction as moving away from an approach which he described as "a narrow and literal construction that eschewed, in the case of seemingly precise*

and unambiguous language, any broader consideration of legislative context". Having referred to Board of Management of St. Molaga's School v. Minister for Education [2010] IESC 57, [2011] 1 IR 362 as an example of this "narrow and literal" approach, he went to refer to more recent decisions which, he said, emphasised that that "background" and "context" should play a proper role in the analysis: People (DPP v. Brown [2019] 2 IR 1]; Minister for Justice v. Vilkas [2018] IESC 69, [2020] 1 IR 676; Dunnes Stores v. The Revenue Commissioners [2019] IESC 50, [2020] 3 IR 480; Bookfinders Ltd. v. The Revenue Commissioners [2020] IESC 60; and The People (DPP) v. AC [2021] IESC 74, [2021] 2 ILRM 305.

54. He said that the judgment of McKechnie J. in Brown provided a good summary of this approach, and summarised the essential points made in Brown as follows:

(i) The first and most important port of call is the wording of the statute itself, with those words being given their ordinary and natural meaning.

(ii) However, those words must be viewed in context; what this means will depend on the statute and the circumstances, but may include 'the immediate context of the sentence within which the words are used; the other subsections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including Law Reform Commission or other reports; and perhaps the mischief which the Act sought to remedy'.

(iii) In construing those words in that context, the court will be guided by the various canons, maxims, principles and rules of interpretation all of which will assist in elucidating the meaning to be attributed to the language.

(iv) If that exercise in interpreting the words (and this includes interpreting them in the light of that context) yields ambiguity, then the court will seek to discern the intended object of the Act and the reasons the statute was enacted.

55. As Murray J. pointed out, ambiguity can arise not merely "because on its face the text is clearly susceptible to more than one meaning" but also from the context: " it may also be contextual, so that seemingly clear words can, when placed in situation, bear a construction not always evident from the language alone".

56. Murray J. said that McKechnie J. had envisaged a two-stage inquiry i.e. one which consider, first, the "words in context" , and only secondly, purpose, "if there remained ambiguity". However, Murray J said, the better approach was to regard both context and purpose" as part of a single continuum rather than as separated fields to be filled in". In that regard, he considered to be correct the Attorney General's submissions in the Heather Hill case that "the literal and purposive approaches to statutory interpretation are not hermetically sealed".

57. Murray J. said that the modern authorities showed that "in no case can the process of ascertaining the 'legislative intent' or the 'will of the Oireachtas' be reduced to the reflexive rehearsal of the literal meaning of words, or the

determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted".

58. While thus emphasising the need for a contextual approach, he did, however, caution against it being used a licence for judges simply interpreting legislation to align with what appeared to them as a sensible outcome. In this regard, he referred to"an obvious danger in broadening the approach to the interpretation of legislation in the way suggested by the more recent cases - that the line between the permissible admission of 'context' and identification of 'purpose', and the impermissible imposition on legislation of an outcome that appears reasonable or sensible to an individual judge or which aligns with his or her instinct as to what the legislators would have said had they considered the problem at hand, becomes blurred".

59. He then made four points as follows (paras 113-116):

First, 'legislative intent' as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer into minds of parliamentarians when they enacted legislation and as the decision of this court in Crilly v. Farrington [2001] 3 IR 251 emphatically declares, their subjective intent is not relevant to construction. Even if that subjective intent could be ascertained and admitted, the purpose of individual parliamentarians can never be reliably attributed to a collective assembly whose members may act with differing intentions and objects.

Second, and instead, what the court is concerned to do when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and latterly statute) has developed for that purpose (see DPP v. Flanagan [1979] IR 265, at p. 282 per Henchy J.). This is why the proper application of the rules of statutory interpretation may produce a result which, in hindsight, some parliamentarians might plausibly say they never intended to bring about. That is the price of an approach which prefers the application of transparent, coherent and objectively ascertainable principles to the interpretation of legislation, to a situation in which judges construe an Act of the Oireachtas by reference to their individual assessments of what they think parliament ought sensibly to have wished to achieve by the legislation (see the comments of Finlay C.J. in McGrath v. McDermott [1988] IR 258, at p. 276).

Third, and to that end, the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it.

Fourth, and at the same time, the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown. However …the 'context' that is deployed to that end and 'purpose' so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language."

60. Murray J then went on to discuss the interaction of these principles with s.5 of the 2005 Act. After a detailed review, which it is not necessary for present purposes to set out, he concluded that s.5(1) in essence sets out the same interpretative approach as had been separately arrived by the courts in the recent authorities he had discussed. Thus, there is alignment between the statutory and the non-statutory principles of interpretation. It may be noted that he made clear, in the course of that discussion, that the decisions in Dunnes Stores, Bookfinders and Brown "strongly suggest" that contextual material can be consulted in construing 'penal' statutes (see para 126 of his judgment)."

57. Applying the commended approach we have considered the wording of s. 5(6) (and its analogue s. 4(6)) of the Act of 2010. Applying a narrow literal construction to them, the power to substitute an alternative verdict would appear to apply only to a person presently

charged with an offence, and not to a person who was charged but who has since been convicted of the offence and is now appealing their conviction. However, bearing in mind McKechnie J.'s caveat in *Brown* that the literal words must be viewed in context, we have considered the immediate context of both subsections in terms of what is provided for in ss. 4 and 5, respectively, of the Act of 2010. We have also considered their place within Chapter 2 of Part 2 of the Act of 2010, and, more widely within the overall scheme of the Act of 2010. We note that they substantially mirror analogous provisions that previously were in force as s.49(6)(b) and s.50(6)(b) of the Road Traffic Act 1961. We are clear that the mischief that they were intended to address was, as we have said at para. 53 above, to ensure that an accused does not secure a technical acquittal on the basis that the wrong charge has been opted for, in circumstances where they have been charged with an offence under (say) s. 4 of the Act of 2010, and the evidence adduced at trial suggests that they are instead guilty of an offence under s. 5 of the same Act, and vice versa.

58. The question we must ask ourselves is whether it was clearly the intention of the legislature that such a mischief should only be capable of being addressed during the trial at first instance, or if instead their intention was that it should be capable of being addressed both at first instance and on appeal. In interrogating this issue we must bear in mind the admonition of Murray J. in *Heather Hill* to guard against any blurring of the line between the permissible admission of 'context' and identification of 'purpose', and the impermissible imposition on legislation of an outcome that appears reasonable or sensible to us, or which aligns with our instinct as to what the legislators would have said had they considered the problem at hand.

59. The clear wording of the provision at issue is a strong indicator that it reflects what the legislators themselves understood when they approved it. It is neither ambiguous nor is it absurd. While of course, a case could be made that it would have been sensible to allow the

mischief to be addressed both at first instance and on appeal, there are cogent counter-arguments as is apparent from the positions taken by the parties in this case, and indeed from some of the concerns raised by the referring Circuit Court judge.

60. There is statutory provision for the substitution of alternative verdicts in many areas of the criminal law (as instanced by Kenny J. in *O'Leary v. Cunningham,* and we can think of other examples such as under s. 55 of the Criminal Justice (Theft and Fraud Offences) Act 2001). The question is: are these powers ostensibly confined to a trial at first instance?

61. One reason why the Oireachtas might not have been disposed to see the power provided for under s. 5(6) (and its analogue s. 4(6)) of the Act of 2010 extend to the substitution of an alternative verdict by an appellate court is that there would be no right of appeal from that decision to substitute. However, a relevant consideration in that context is the fact that in the sphere of appeals against conviction following a prosecution on indictment, s. 3 of the Criminal Procedure Act 1993 expressly provides that the Court of Appeal may quash a conviction and, if it appears to the Court that the appellant could have been found guilty of some other offence and that the jury must have been satisfied of facts which proved him guilty of the other offence substitute for the verdict a verdict of guilty of the other offence, and impose such sentence in substitution for the sentence imposed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity. Accordingly, the substitution of an alternative verdict on appeal is not a concept unknown to the law, or manifestly something that cannot be contemplated, even in the absence of further right of appeal. The defendant will not have been denied an appeal, merely a further right of appeal.

62. An issue of perhaps greater concern than any limitation on the right to appeal, is the fact that while in principle it is possible to legislate for the substitution of alternative verdicts at appellate stage, the Oireachtas had found it necessary to expressly confer such a power on

the Court of Appeal (and its predecessor the Court of Criminal Appeal). No similar power has been expressly conferred on the Circuit Court in the context of the exercise of its jurisdiction to hear appeals in criminal matters from the District Court, and the defendant says that it is a bridge too far to suggest that by virtue of the enactment of s. 5(6) (and its analogue s. 4(6)) of the Act of 2010, in the context in which it was enacted, that the Oireachtas may be inferred to have intended that the Circuit Court should have such power when hearing District Court appeals; alternatively to suggest that such a power in some way arises implicitly.

63. A significant concern, and of potential relevance, is the effect of a conviction at first instance in circumstances where there was statutory provision granting the court a discretionary power to record an alternative verdict in appropriate circumstances. It may be contended (and the defendant in the present case does so) that an accused may, by virtue of a particular statutory provision providing for alternative verdicts (knowledge of which will be imputed to him), be deemed to have been in jeopardy of being convicted of the stated alternative during the trial at first instance, and that in such a case his conviction at first instance of one of the alternatives amounts to his acquittal on the other. Further, that that will be the case regardless of whether the possibility of substituting an alternative verdict was even canvassed, much less considered, in those proceedings.

64. Without seeking to generalise, we think it is difficult, given the terms of s. 5(6) (and its analogue s. 4(6)) of the Act of 2010, to argue convincingly that a person who has undergone trial before the District Court on a s. 5 charge (of being drunk in charge of a motor vehicle), and has ultimately been convicted of that charge, was not by the recording of that conviction simultaneously acquitted of the available possible alternative offence, i.e., the s. 4 offence of driving while drunk.

65. On the issue of a defendant being imputed with knowledge the possibility that an alternative verdict might be substituted, the legislation is clear in its terms. Herbert J.,

speaking, in *Director of Public Prosecutions v. Kenny* (cited previously), of the equivalent provisions to those at issue in the present case under the Act of 1961, said at p. 13 of his judgment:

> "*There is no express requirement in this subsection for the allegation in a charge under s. 49(4) of an alternative offence under section 50 of the 1961 Act. The court does not have to be concerned to find whether a charge under section 49 (4) of the 1961 Act impliedly includes an allegation of an alternative offence under section 50 of the Act of 1961. The language of subsection 6 (b) is clear and there can be no doubt as to its meaning.*"

66. A further relevant consideration to be taken into the mix in considering the intention of the Oireachtas, is that the power created by s. 5(6) (and its analogue s. 4(6)) of the Act of 2010 is a discretionary one that need not be, and indeed ought not to be, exercised if to do so would give rise to an unfairness or result in a denial of due process. This was the effect of the decision of Herbert J. in the *Director of Public Prosecutions v. Kenny* (which admittedly was concerned the exercise at first instance, and not in the context of an appeal, of the equivalent powers under s. 49(6)(b) and s. 50(6)(b) of the Road Traffic Act 1961). Emphasising that the provisions at issue used the word "*may*", and that for the proper and effective exercise of the discretion thereby conferred, a court considering invoking the power must, in order to ensure compliance with the constitutional requirement of fair procedures and with the provisions of Article 6 of the European Convention on Human Rights, ensure that the accused is not prejudiced by the introduction of an alternative offence to the extent of being denied an opportunity of dealing properly with it, in advance of a judgment Herbert J. put it thus at pp. 14 - 15:

> "*In my judgment, subsection 6(b) of section 49 of the 1961 Act confers on the court the following discretion:-*

(a) if satisfied on the evidence that the accused should not be convicted of an offence under section 49 (4) and if satisfied, by submission made by or on behalf of the accused, or of its own motion, that the accused would be prejudiced by the introduction of the alternative offence and could not be afforded a sufficient opportunity of countering it, to decline to consider the alternative offence under section 50 of the 1961 Act and acquit the accused.

(b) Alternatively, in the absence of any such prejudice or if it is capable of being eliminated, to proceed with the hearing, to consider the evidence and find the accused either guilty or not guilty of an offence under section 50 of the 1961 Act."

67. The possibility of the discretion not being exercised, or more correctly being exercised against substitution, if to do so would give rise to an irremediable unfairness, e.g. where the accused would be subjected to double jeopardy, is, in our judgment, an important safeguard, that must also be taken into account in considering whether the legislation can be legitimately afforded the purposive interpretation that the prosecutor contends for.

68. Having considered all of these issues, the prosecutor has not persuaded us that it was the intention of the Oireachtas that the discretionary power under s. 5(6) (and its analogue s. 4(6)) of the Act of 2010 to substitute a verdict of conviction for an alternative specified offence in lieu of a conviction for the offence charged, should be available to a Circuit Court judge hearing a District Court appeal. We are not therefore disposed to afford those provisions the purposive interpretation contended for by the prosecutor. In reaching that decision we have been particularly influenced by (i) the clear literal meaning of the provisions at issue; (ii) concern that conviction of one alternative in the District Court represents *de facto* an acquittal of the possible alternative; (iii) the fact that in the sphere of indictable appeals the Oireachtas has expressly conferred on the Court of Appeal the power to

substitute an alternative verdict in appropriate circumstances, and has not enacted a comparable provision with respect to the appellate jurisdiction of the Circuit Court.

Conclusion:

69. The first question stated by the Circuit Judge is answered in the affirmative. In elaboration on this, there is a premise in the question which we consider to be false, namely that it could have been open to the Circuit Court in any circumstances to exercise the power conferred by s. 5(6) of the Act of 2010 in the context of its appellate jurisdiction. We are not satisfied that the s. 5(6) power was one capable of being exercised by a Circuit Court judge in the context of hearing a District Court appeal.

70. It follows that the second question must also be answered in the affirmative.