APPROVED JUDGMENT

NO REDACTION NEEDED

THE COURT OF APPEAL

Neutral Citation: [2024] IECA 318

Record No: 154/2020

Edwards J.

McCarthy J.

Kennedy J.

Between/

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

JAMES BATES

Appellant

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 16th of December, 2024.

Introduction

1. On the 31st of January 2020, Mr. James Bates (i.e., "the appellant") was convicted by a jury in the Circuit Criminal Court, Wexford of the sole count of navigating or operating a vessel dangerously contrary to s. 24 of the Maritime Safety Act 2005 (i.e., "the Act of 2005"). Following his conviction, the appellant was subsequently sentenced on the 16th of June 2020 to a term of five months imprisonment, fully suspended, for a period of two years, on condition of the appellant entering a bond of good behaviour and to keep the peace, such good behaviour to include the manner of navigation of any vessel, together with a fine of €2,000.

2. The indictment proffered against the appellant had initially contained two counts. One was a count of endangerment contrary to s. 13 of the Non-Fatal Offences Against the Person Act 1997. The second was a count of navigating or operating a vessel dangerously, contrary to s. 24 of the Act of 2005. On the Friday prior to the commencement of the trial, the endangerment charge was struck from the indictment by the trial judge upon the application of the defence. Accordingly, when the trial formally commenced on the following Monday it proceeded solely in respect of the offence of navigating or operating a vessel dangerously contrary to s. 24 of the Act of 2005.

3. By Notice of Appeal dated the 13th of July 2020, Mr. Bates appealed against his conviction. In support of his appeal, he advanced two generic and five substantive grounds of appeal. However, he ultimately proceeded only with the generic grounds (i.e., grounds 1 and 2, respectively) and two of his substantive grounds (i.e., grounds 3., and 4, respectively). These were in terms that:

> *"1. Having regard to all the circumstances, the trial was unsatisfactory, and the verdict is unsafe.*
>
> *2. The trial Judge erred in fact and/or in law in refusing the various applications made by counsel for the appellant in the course of the trial; and arising from said refusals, the trial was unsatisfactory, and the verdict is unsafe.*
>
> *3. Further and in addition and without prejudice to the generality of the foregoing the trial judge erred in fact and/or in law in failing to withdraw the case from the jury, when application had been made to him to do so on the grounds, inter alia, of*
>
> > *i. The trial judge erred in fact and in law in failing to dismiss the sole charge against the appellant, that charge being a summary charge only, where there was no evidence called before the trial court that the appellant had been charged before and/or*

summonsed to appear before the District Court in respect of that offence, and where accordingly the Circuit Court lacked jurisdiction.

ii. Further or in the alternative the trial judge erred in fact and in law in allowing the trial to proceed against the appellant, where the sole charge was a summary offence, in circumstances where the court had heard no evidence that the appellant was either summonsed or charged with this offence before the District Court, in this regard the absence of such evidence meant the court had no jurisdiction to proceed with the trial of the action.

4. The trial judge erred in fact and in law in allowing the jury, following its request, to be furnished, and to take with them to the jury room, the relevant legislation pertaining to the charges; in this regard the trial judge, allowed the jury to intervene in the role of the trial judge, namely determining and interpreting matters of law;

Having so erred in allowing the jury to be furnished with some portions of the relevant legislation, the learned trial judge further erred in fact and in law in refusing to allow the jury to be furnished, despite the request of defence counsel, with all the sections of the relevant legislation, in particular those sections which set out the defences available of an alternative verdict."

4. Accordingly, the appeal hearing focussed primarily on the appellant's remaining two substantive complaints, namely:

(i) Ground 3 – that the trial Court lacked jurisdiction due to hear and determine the summary only count contrary to s. 24 of the Act of 2005, due to the failure of the respondent to advance any evidence of the appellant having been charged or summonsed before the District Court in respect of his summary only offence.

(ii) Ground 4 – that the trial judge erred in giving documentary copies of certain provisions of a relevant statute to the jury to be used by them in the jury room during their deliberations, and that having given the jury such documentary material that he further erred in failing to furnish to the jury documentary copies of other relevant provisions of the same statute.

Background to the Appeal

5. The appellant was convicted by the unanimous verdict of a jury, after a contested trial before Wexford Circuit Criminal Court that lasted 4 days (excluding the pre-trial application), of navigating or operating a vessel dangerously contrary to s. 24 of the Maritime Safety Act 2005.

6. During the trial, evidence was given by a Detective Garda Coone of the Garda Mapping section who provided maps of the scene and an aerial photograph.

7. A Mr. Declan Bates (i.e., "the victim") also gave evidence during the trial. He stated that the appellant was his cousin, and the relations were not good between them, and they did not get on. On the 24th of June 2016 he was operating his boat called "An Crosan". Declan Bates is licensed to carry 12 passengers to the Saltee Islands from Kilmore Quay. He explained that he normally did two round trip runs a day, with maybe two outward bound trips in the morning ferrying people to the islands who then stayed on the Saltee Islands for the day, following which he would collect them later on and do two inbound runs to bring them home. "An Crossan" was a fibreglass passenger vessel.

8. On the day in question, Declan Bates had dropped some passengers to the Saltee Islands, one group at 10 am and another at 11 am and then at 3:45 pm he was returning to

Kilmore Quay with some passengers and his plan was to drop those at the pontoons in the harbour and then go back to the Saltee Islands to collect a second group of passengers.

9. Right of way in Kilmore Quay Harbour was an area of controversy in the case. Declan Bates gave evidence that he came in through the mouth of the harbour and he was clear that he had right of way over anything on his red side, the port side. There were 12 passengers on board in total, some were in the wheelhouse of the boat, some were outside. He explained that there is a "*sort of*" decking area on his vessel outside the wheelhouse, and some were positioned there, and some were inside. Declan Bates proceeded through the harbour, his plan was to go to the pontoon which is essentially the top left-hand side of the harbour towards the berth where he would normally discharge his passengers, and on his way there he noticed to his left that the appellant's boat, called "The Torbay Endeavour", was stopped in the harbour. He said it was poised to go across his track. The appellant's boat is a 35-foot steel hull trawler. The evidence by Declan Bates was that when he became visible to the helmsman or operator of "The Torbay Endeavour", i.e., the appellant, that the appellant then started moving the vessel straight towards him. Declan Bates gave evidence that he made eye contact with the appellant, and he was clear that it was him.

10. Declan Bates blew the horn of his boat continuously, making it clear that he was there and had right of way in the case there was any ambiguity about that. He was displaying a red light which would have been visible to the helmsman of the "The Torbay Endeavour". Navigation rules require a vessel operator to give way to another vessel displaying a visible red light. He stated that "The Torbay Endeavour" continued moving towards him despite the horn sounding. He then took evasive action and that was seen from the CCTV footage, which showed that the two vessels came very close together. Once "An Crosan" moved into shot "The Torbay Endeavour" could then be seen to start moving towards it and Declan Bates,

who was operating "An Crosan", then put his vessel into full astern and managed to avoid a collision, but only by an estimated six inches.

11. A prosecution expert witness, a Mr McConnell gave evidence in chief to the effect that the CCTV footage showed that "The Torbay Endeavour" was stationary upon "An Crosan" entering the harbour and then, and only then, started moving towards "An Crosan" which then took evasive action to avoid injury to anybody. His evidence was that if "The Torbay Endeavour", a 30-tonne steel hull trawler had collided with a fibreglass passenger boat it would have caused significant damage.

12. It was contended by the defence, in cross-examining Mr McConnell that a black plume of smoke which could be seen coming from "The Torbay Endeavour" on the CCTV footage, and possible propeller wash also visible on the footage, was evidence that the appellant had tried to reverse his vessel to avoid a collision. Mr McConnell accepted that *"it could absolutely be"* indicative of a reversal attempt, although he was more inclined to regard the claimed propeller wash as being rudder cavitation. A defence expert witness, a Captain Cowman, would later advance the opinion, having viewed the footage, that there had been an attempt by the appellant to put his vessel in reverse. That account, which was put to Declan Bates in cross-examination, was not accepted by him. He contended that if a black plume of smoke was visible it was because *"[h]e gave her a shot ahead to make sure he blocked me."*

13. The expert evidence was not determinative of the issue as to whether the appellant had attempted to reverse his vessel in an effort to avoid a collision, because unless one had been in the wheelhouse of "The Torbay Endeavour" one could not say for certain whether there had been an attempt to put the vessel astern. The CCTV footage was equivocal on the issue, and the experts were not *ad idem* as to the significance of what was to be seen on the recording. In any event, the evidence was that "The Torbay Endeavour" continued moving towards "An Crosan".

14. The two vessels did not in fact collide, and following their narrow avoidance of collision Declan Bates continued moving towards the pontoon in order to allow his passengers to alight from the boat. He was then obliged to return to the Saltee Islands to collect other passengers. He described the passengers who had been on the boat at the time as seeming to be upset about the near collision.

15. The harbour master, a Mr. Eoin O'Doherty gave evidence at the trial. He stated that he was present in the harbour at the time on the date in question in Kilmore Quay Harbour. He stated that earlier in the day he spoke with the appellant and asked him to move his vessel, "The Torbay Endeavour", to the area of the harbour where vessels of that size are ordinarily berthed. "The Torbay Endeavour" is a steel hull beam trawler and it had been converted for fishing for scallops. The appellant did move his trawler, and this was visible on the CCTV footage – one could see he was going forward and back and was manoeuvring his boat. The appellant's boat was stationary then when "An Crosan" entered the harbour. Mr. O'Doherty stated that he was engaged in conversation and had his back to the window when he heard the horn of a vessel and he turned around and saw the appellants' vessel, "The Torbay Endeavour" and "An Crosan" in very close quarters. He stated that he was shocked by this and that there are rules and regulations governing the harbour in order to prevent this. Shortly afterwards he had a telephone conversation with a Mr. Eamon Hayes, the operator of a vessel called "Autumn Dream", who had witnessed the incident, and he looked at the CCTV footage. At 5:46 pm on the day in question, he contacted An Garda Síochána.

16. The appellant was then served with a notice to quit the harbour for contravening harbour rules and regulations. The appellant gave an undertaking to do so by 12 pm and then Mr. O'Doherty downloaded the CCTV footage and made that available to gardaí.

17. Mr. Eamon Hayes gave evidence at trial. He was present at the harbour on the date in question, the 24th of June 2016. He was occupied with washing his boat at the time of the

incident and is visible on the CCTV footage. Mr. Hayes gave evidence to the effect that he thought that the appellant's boat was going to "*ram*" Declan Bates' passenger boat. He grabbed his phone and rang Mr. O'Doherty. Having witnessed the incident he characterised it as being extremely dangerous.

18. Garda Daly attempted to contact the appellant about the incident, and he refused to engage. After some time, he voluntarily attended Wexford Garda Station and was interviewed. He was shown the CCTV footage, the allegations were put to him about it, and his response was "*it is what it is*".

19. At trial the defence did called a number of witnesses, including the aforementioned Captain Cowman, a Mr Keating who was the owner of a vessel called "The Bridget Carmel", and a Mr James Scallan, a fisherman and employee of Mr Keating on "The Bridget Carmel".

20. Captain Philip Cowman gave evidence at length in relation to collision regulations and manoeuvres which are available to operate vessels and the speed limits in the harbour. This was to the effect that Declan Bates was in excess of the speed limit (which was accepted) and that he was the cause of the near collision.

21. Mr. James Scallan gave evidence that he was working on the "The Bridget Carmel" in the harbour at Kilmore Quay when he witnessed the incident. He gave evidence that the manoeuvre was not of a dangerous nature. He had submitted an affidavit to the effect that Declan Bates was the cause of the near collision not the other way around. It transpired during the trial that "The Bridget Carmel", which Mr. Scallan said he was working on, was not in fact in Kilmore Quay at the time of the incident but was in fact at sea off the coast of Ireland or close to the coast of Wales at the time. This was established by sea fisheries protection officers who were able to determine the movements of "The Bridget Carmel" as recorded using a satellite navigation tracking system. Mr. Scallan was later recalled, and he indicated that he may have made a mistake in relation to his evidence. He

stated on this occasion that while the vessel had been at sea on the date in question, he was not onboard. Rather he had been ashore at Kilmore Quay and did witness the incident. He claimed he had been mistaken in recalling "The Bridget Carmel", as having been within the harbour.

22. The jury ultimately rejected the defence case and, being satisfied beyond a reasonable doubt as to the guilt of the appellant, duly convicted him.

The Appellants' Complaints in this Appeal

Issue 1 - Ground 3.

23. The appellant contends that it is clear from s. 24 of the Act of 2005 that the offence is only triable on indictment where the offence causes death or serious injury. It is submitted that no such charge or allegation was before the Circuit Criminal Court in the instant matter. Rather the trial Court was dealing with the summary only charge under s. 24(2), this is not a hybrid offence, it was a summary charge added to the indictment.

24. Following the conclusion of the [prosecution's] evidence and the appellants' expert evidence in the trial, the appellants' senior counsel made an application to the trial Court to strike out the case on the basis that no evidence had been given before the Circuit Criminal Court that the appellant had been 'charged' before the District Court with the summary only offence which remained the sole count on the indictment. The trial judge gave his decision on the application to strike out at pages 44 and 45 of the Transcript of the 31st of January 2020 in the following terms:

"*JUDGE: And this matter was then put into Friday, and I was asked not to swear in the jury on Friday, but we had legal argument and the matter proceeded, I gave a judgment on Friday and the matter then was in the list for Tuesday. There was a new*

jury panel, we swore in the jury. At that stage I was told two to three days, the jury were told that. We're now into Friday and this puts the Court in a difficult situation, because I know from sitting in Wexford that if a matter spills over for a period of time and then the jury are being asked to come back on Tuesday or even Monday, very frequently somebody on the jury, a member or members have a genuine difficulty in attending when they haven't been warned about that. So, there is a risk we would lose a juror if the matter goes back.

In any event, I should say, Mr Justice Charleton in a recent judgment indicated that in current criminal proceedings, the defence have to engage to a certain extent during the trial, they can't just sit on their hands and at the close of the prosecution case, say that some evidential matter which they were required proof of wasn't -- wasn't proved by the prosecution if they haven't mentioned it during the trial. In relation to this case, the argument last Friday when the defence was that endangerment was not the appropriate count, where another count in accordance with the Cagney decision was available, which was appropriate. And in that case, the defence referred to section 24 which was also on the indictment. That argument took a substantial part of the day.

There was no submission made by the defence at that stage and never at any stage indicated that if the Court ruled in a certain way, that they would then be saying and there was no application at that stage that the section 24 count was not properly before the Court. Now, I would query whether the defence in this case can make the argument that the section 24 count is the appropriate count to be on the indictment. And then argue at the close of the prosecution case that in fact there's no jurisdiction to do that,

because there's been no proof they alleged that the matter is before the Court.

In relation to the judgment in the DPP v. Marcel O'Brien, 1958 judgment, I'm satisfied the facts of that are not similar and not relevant to the facts of this case. In relation to section 6 of the Criminal Justice Act 1951, which provides that a -- where a person is sent forward for trial for an indictable offence, the indictment may contain a count, a summary count with which the person has been charged which arises out of the same set of facts.

Now, in relation to the phrase, "With which a person has been charged", I'm satisfied for the purpose of section 6 that charge in that situation includes to be summonsed. A summons, a charge sheet is a document setting out the charge, a summons is a document setting out the charge. It informs the person what they're charged with and the summons is a court document. A person can be summonsed for murder, it doesn't matter, people don't always have to be charged, they can also be summonsed. The procedure for many years at present is that a person is brought before the District Court. The charges are set out or a summons is set out. The indictable matters are sent forward and it's now the practice for many years that for the most part, the summary matters are also added to the indictment.

Now, for the purposes of this application, I'm satisfied that the section that I have -- that I can take notice or that I've sufficient evidence that the section 24 charge was before the District Court, was before the District Court judge. And that it was added to the indictment. So I'm satisfied that the matter can proceed.".

25. The appellant submits that the trial judge was wrong to fail to strike out the summary only count and that the trial should not have been allowed to proceed.

26. The respondent contends that this offence is a summary charge which was added to the indictment after the return for trial. Counsel for the respondent refers in her written submissions to s. 6 of the Criminal Procedure Act 1951 (but must mean the Criminal Justice Act 1951) and submits that this application by the appellant is ill-conceived. The respondent contends that there was evidence before the trial Court that the appellant had been charged with the summary matter in the context of the application to have the endangerment charge withdrawn/struck from the indictment.

27. This is elaborated upon in supplemental written submissions filed by the respondent on the 1st of July 2024. In those written submissions the respondent's counsel quotes at length from the transcript of legal argument before the trial judge on the 24th of January 2020, wherein counsel for the appellant repeatedly asserted, and relied expressly upon, the fact that his client had been charged before the District Court with a summary offence contrary to contrary to s. 24 of the Act of 2005. This was in support of an argument that the endangerment count should be withdrawn/struck from the indictment, relying on *People (DPP) v. Cagney and McGrath* [2008] 2 I.R. 111 as authority for the proposition that a s. 13(1) Non-Fatal Offences Against the Person Act 1997 endangerment charge should not be preferred where the actions of the defendant as alleged by the prosecution would clearly constitute another established and recognised criminal offence. Counsel for the defendant expressly pointed to the fact that his client had been charged before the District Court with a summary offence contrary to contrary to s. 24 of the Act of 2005 as evidencing a belief on the DPP's part that the actions of the defendant as alleged by the prosecution would clearly constitute the summary offence of navigating or operating a vessel dangerously contrary to contrary to s. 24 of the Act of 2005.

28. The respondent submitted before this Court that the appellant could not have it both ways. It was submitted that he could not, on the one hand, rely on the fact that his client was charged before the District Court with an offence contrary to s. 24 of the Act of 2005, for the purpose of seeking to have the endangerment count struck out, and then later in the trial, and on the other hand, seek to argue that there had been no proof of the very fact that he had earlier asserted as being the case, and had indeed expressly relied upon.

29. The respondent submits that in any event, no such evidence was necessary or contemplated by s. 6 of the Act of 1951 in the circumstances of this case. It was submitted that while is it clear that the trial judge was required to be satisfied that the accused had been charged with a summary offence prior to it being added to the indictment, he did not need to receive express evidence of that in the circumstances of this case. This was because the defence had in effect conceded the existence of that fact in the context of earlier legal argument before the trial judge on the endangerment count issue, and indeed had expressly relied upon it. That being so, the respondent maintains they could not then be heard to assert the contrary or deny that which they had conceded and relied upon.

30. Moreover, and for the avoidance of doubt, the respondent further submitted it was clear that being "charged" included being summonsed to appear before the District Court to answer a complaint, and observed that indeed the appellant had not sought to argue otherwise. In the instant case, it was uncontroversial that the appellant had been summoned to appear before the District Court to answer a complaint of navigating or operating a vessel dangerously contrary to s. 24 of the Act of 2005, and had duly appeared there in response to that summons, prior to the appellant being returned for trial on the endangerment count. Following upon his said return for trial, the summary charge of navigating or operating a vessel dangerously contrary to s. 24 of the Act of 2005,

which up to that point had been before the District Court, was then added to the indictment.

31. The respondent further submitted that the case of *DPP v. Marcel O'Brien* [1963] IR 92 referred to by the appellant has limited relevance to this appeal and that it is distinguishable in circumstances where in that case, unlike in the present case, there had been no concession by the defence as to what had happened in the District Court, or reliance by the defence upon it..

Issue 2 – Ground 4.

32. At the conclusion of the charge and following the beginning of their deliberations the jury made a request of the trial judge for copies of certain provisions of the relevant legislation to be provided to them. The request was communicated by means of a note from the jury foreman to the trial judge. The request was not read into the record in terms, but the trial judge's understanding of the note was conveyed to the parties when he remarked:

> *"JUDGE: Now, I understand the jury have passed a note, they're looking for a copy of the Marine Safety Act, number one, dangerous and number two, careless. So, they are obviously looking for section 24(1), (3) and section 23(1), is there any difficulty with simply providing them with that?"*

33. The provisions identified by the trial judge set out the statutory ingredients of firstly the offence of navigating or operating a vessel dangerously contrary to s. 24(1) of the Act of 2005, and secondly of the less serious alternative offence that it might be open to a tribunal of fact to record, namely the offence of navigating or operating a vessel without due care and attention, contrary to contrary to s. 23(1) of the Act of 2005. The trial judge had charged the jury orally with respect to the ingredients of both offences in his original charge. He had also, in his said original charge, expressly drawn the jury's attention to the

terms of s. 26 of the Act of 2005, which sets out statutory defences to offences committed under s. 23 or s. 24 of that Act and had read it out to them.

34. In response to the trial judge's remarks concerning the jury's note, defence counsel initially indicated contentment that the provisions identified by the trial judge might be re-read to the jury, accepting that they had already been *"gone through"* by the trial judge for the benefit of the jury in his original charge. However, he added, *"[b]ut I don't think that they should be given a copy of the Act."* The trial judge was not inclined to agree, observing that, *"... the section itself makes a lot more sense when somebody can look at it and read it themselves."*

35. At this point, defence counsel expressed concern that *"if they're handed a copy of the Act, then it opens up all the other provisions to them"*, which prompted the trial judge to offer reassurance to him that he was only contemplating providing the jury with a copy of s. 23(1) and s. 24(1) of the Act of 2005, as that appeared to be all that the jury had asked for. Defence counsel again reiterated that in his view those provisions should simply be re-read to the jury, but that they should not receive any physical document or documents.

36. Prosecuting counsel indicated that she had no difficulty with what the court was proposing.

37. The trial judge then ruled:

> *"JUDGE: No, I'm satisfied that it would be appropriate for them to have it, because it's not spelled out in the indictment and they are two separate offences and they are quite technical offences and they should have them in front of them in writing, otherwise even if I read it out, they're going to be trying to take a note of it, they probably won't be able to take a note of it. They may not understand it properly.*

DEFENCE COUNSEL: Well, Judge, insofar as the charge, you originally read the sections out to them twice and I've no difficulty in you reading the section out to them and if they want to take notes then so be it. But --

JUDGE: No, I've said I'm going to provide them with a copy, so are we -- insofar as what we'll supply them with, section 23(1) and section 24(1), dangerous navigation and careless navigation or operation and nothing else."

38. While arrangements were being put in place to carry out the trial judge's ruling there was a short adjournment. When the court reconvened defence counsel sought to revisit the issue in the continued absence of the jury and to persuade the trial judge to alter his ruling in one respect. He drew to the trial judge's attention that s. 26 of the Act of 2005 sets out potential defences to offences under s. 23(1) and s. 24(1) of the Act of 2005. He contended that if the jury were to receive a copy of s. 23(1) and s. 24(1) of the Act of 2005, then *"perhaps what's sauce for the goose is sauce for the gander"* and that on that basis it was appropriate that they should also receive a copy of s. 26 of that Act.

39. The trial judge did not accede to this request and was not disposed to provide the jury with a copy of s. 26 of the Act of 2005 in circumstances where they had not asked for it. He observed that they were of very assiduous jury, that they were very attentive and that *"I think if they want the defence section, they'll come back and ask for that."*

40. The trial judge subsequently added:

"-- I'm not going to send them in something that they haven't asked for, because they might be wondering why that was sent in. There has been two experts in the case, they both set out what should and shouldn't be done and the defence has been very clearly set out. So I'm not going to do that. But they might very well come back and ask for that, they're obviously -- they've only just started, so they've obviously started it at the beginning to look at what the alleged offence is."

41. The appellant has submitted on this appeal that in allowing the jury to have any legislation in the jury room that the trial judge erred in law in that it invited the jury to trespass into the judicial function and interpret the relevant legislation in an impermissible manner. Further, it was submitted that having decided to allow the jury to have the legislation the trial court created a "*fundamental unfairness*" to the appellant in failing to allow the jury to have the section of the legislation that set out potential defences open to the appellant (i.e., s. 26 of the Act of 2005). In doing so, the appellant submits that the trial court allowed a real and substantial unfairness to arise at a critical juncture and giving rise to a real risk of an unfair trial.

42. In reply, the respondent submitted that the trial judge had already charged the jury in relation to the law and there was no question of simply handing them the legislation and "*inviting them to interpret*" it without the trial court's guidance. In addition, the respondent submitted that the jury were comprehensively charged in relation to the law.

Analysis and Decision

Issue 1 - Ground 3.

43. Section 6 of the Act of 1951 is in the following terms:

> "Where a person sent forward for trial for an indictable offence, the indictment may contain a count for having committed any offence triable summarily (in this section referred to as a summary offence) with which he has been charged and which arises out of the same set of facts and, if found guilty on that count, he may be sentenced to suffer any punishment which could be inflicted on a person summarily convicted of the summary offence."

44. It is clear from a close reading of this provision that it is a condition precedent to the exercise of jurisdiction by the trial court that an offence added to the indictment under

this section must first have been charged in the District Court. Whether the court of trial has jurisdiction to hear a charge added pursuant to s. 6 of the Act of 1951 is solely a question of law for the trial judge. It is not a question for the jury. It is the trial judge that must be satisfied that he or she has the necessary jurisdiction to place the accused in charge of a jury for trial in respect of a summary offence which has been added to the indictment in reliance on s. 6 of the Ac of 1951.

45. If it is truly in controversy that the aforementioned condition precedent has been satisfied, then it may be necessary for the prosecution to adduce express evidence before the trial judge of the fact that a summary offence purportedly added to the indictment pursuant to s. 6 of the Act of 1951 had in fact been charged in the District Court. Such a controversy existed in *DPP v. Marcel O'Brien* [1963] IR 92. Hence Kingsmill Moore J stated [at p. 97 of the report]:

> "*The requirement that the accused shall have been charged with the offence is a necessary preliminary to the inclusion in an indictment of account for an offence triable summarily. If such a charge has not taken place the count is invalid and the accused cannot be given in charge to the jury on such a count since a necessary requisite to its preferment has not been satisfied. An objection can be taken to the jurisdiction before arraignment or at any time during the course of the trial and it then rests with the prosecutor to satisfy the Court that the facts exist which enable the court to take cognizance of and try as an indictable offence what would otherwise be only a summary offence. If the prosecutor cannot prove the facts which give the Court its jurisdiction the count or counts preferred under the powers given by s. 6 must be struck out*."

46. We think that the situation in the present case is entirely different, however. The point is made by the respondent and, we think, well made that there was in reality no controversy

in the present case about the added count having been originally charged in the District Court. We have read the transcript extracts from the 24th of January 2020 upon which the respondent places reliance, and we think that they establish beyond any doubt that defence counsel had expressly acknowledged in the course of the argument before the trial judge, concerning whether or not the endangerment count should be withdrawn/ struck from the indictment, that his client had been charged in the District Court with navigating or operating a vessel dangerously contrary to s. 24 of the Act of 2005. This acknowledgement was made before any application was made by defence counsel at the close of the prosecution case to have the count in similar terms which had been added to the indictment struck out for want of jurisdiction. The acknowledgement in question was, in our view, a concession made on the record which was sufficient in its own stead to allow the trial judge to be satisfied that the necessary precondition to jurisdiction existed. In the circumstances there was no need for further evidence to have been adduced.

47. We think it is proper to set out the specific exchanges of the 24th of January 2020 which we regard as being of significance:

"JUDGE: Sorry, at all times he was charged with the Maritime Safety Act section 24?

PROSECUTING COUNSEL: Yes.

JUDGE: And the endangerment.

PROSECUTING COUNSEL: Yes, Judge.

JUDGE: When you say the Maritime Safety Act was added, I think what you mean it was added to the indictment.

PROSECUTING COUNSEL: That's correct, Judge. Yes, Judge. It had been travelling in the District Court and adjourned from time to time and then was added to the indictment. In that regard, with regard to the Maritime Safety Act charge, Mr

Bates was investigated by the marine investigator, Captain Black, Judge, who will be giving evidence in this particular case, and also he was interviewed by him also, Judge, that refers to the disclosure that I had a concern with earlier on. I want to confirm the defence have all of that.

[transcript 24/01/20 p.25 ls 17-29]

…

DEFENCE COUNSEL: Just to clarify two or three matters, Judge. This matter first appeared in the District Court on the 21st of March 2017 in relation to offences contrary to the Maritime Safety Act 2005, I believe section 24, of the dangerous navigation. The matter was then adjourned from time to time until the 12th of December 2017, some nine months later when he was directed to be charged with an offence contrary to section 13 of endangerment. And the matters thereafter obviously being sent forward in due course on the endangerment count, with the other matters remaining in the District Court. And it is only, I believe, until very recently that the dangerous navigation was, I suppose, plucked from the District Court and added to the indictment. And in my respectful submission, it is somewhat curious that that should occur so near in advance of the trial date, but that as it may, and as I say, this matter was before this Court on numerous occasions, and it was the understanding on the defence side of the house that the count that we were facing was an endangerment provision contrary to section 13.

[transcript 24/01/20 p.28 ls 13-26]

…

DEFENCE COUNSEL: It appears now that the accused man, Mr James Bates, faces a distinctly summary count -- sorry, a purely summary count of dangerous operation of a vessel contrary to section 24(1). And it has been added to the indictment, it is

now before this Court as a standalone count on a -- but it is and remains a summary matter. It was the first matter, one of two matters, that I think initiated in the District Court in relation to Mr Bates, I think there was originally an offence of section 24 and an offence contrary to section 10(1) of the Act, which I think is effectively driving without due care and consideration, in the road traffic sense, or according to the road traffic sense.

JUDGE: Yes.

DEFENCE COUNSEL: Now, we are left in a situation, had that matter proceeded in the District Court, Mr Bates would obviously have potentially, depending on how the case ran, would have enjoyed the benefits of the Probation Act as it applies to District Court convictions. He would have also had the benefit of an appeal de novo in circumstances -- to this Court.

JUDGE: Are you not one step away, he still retains his presumption of innocence?

DEFENCE COUNSEL: Oh undoubtedly yes, but I'm talking about, I suppose, real prejudice in this regard, potential prejudice. And in circumstances where -- it's a matter, in my respectful submission, that if it was joined to the indictment, it should have proceeded to the exclusion of the endangerment count, whether it be in the District Court or the Circuit Court. The unfairness here is that Director directed in December 2017, whilst those summary matters were proceeding through the District Court, that this matter warranted a prosecution on indictment for endangerment and on foot of that, and additionally on foot of the decision and direction to add the summary count to the indictment, Mr Bates has been now left in a position where he faces a trial where he does enjoy the presumption of innocence, but where the potentials, should it go wrong for him, are not there, the safeguards that he enjoyed previously were not there and are not there. The only appeal coming from this Court

is on a point of law, and that is an unfairness, in my respectful submission, that arises.

It's predicated on the assumption, Judge, that Mr Bates is convicted by a jury but that, I accept, is a significant assumption, but it's a risk, in my respectful submission, that should not occur in the circumstances, particularly where this count is a summary matter and it should have always proceeded in the District Court, and as it stands, stands adjourned in the District Court. Now, the fact that it has been, I suppose, dragged up here prevents it going back down again. I looked into that, but it appears that that is susceptible to judicial review itself. So I am -- there does appear to be a systemic unfairness in the situation that Mr Bates now finds himself in, in circumstances where Cagney and McGrath is considered an axiom of the law at this stage. And I'm somewhat surprised that the Director would take the course of action that she has so done in this case, but the chips fall where they are, and Mr Bates is now suffering the consequences of what I say was an incorrect decision to proceed to add the dangerous operation to the indictment, thereby equalising the offences before this Court, forcing it, as it's the more particular one in the Court's view, for that to proceed as is the proper course to so do. But it is now on indictment before a jury where Mr Bates doesn't have two chances, has one chance in relation to the factual dispute to be decided by the jury. And obviously the ancillary point in that regard is the ultimate unfairness of if he is so convicted, then the appropriate provision of section 1 of the probation act is not available to him as the matter is now in effect --." [transcript 24/01/20 p.41, l.15 – p.42., l. 31.]

…

PROSECUTING COUNSEL: Well that's why it's so -- is he applying for a dismiss in relation to the other charges here in this court, or simply flagging that he is going to go into the high court on Monday. I'm a bit confused about the submissions, I must say. He is flagging to the Court that, in his view, as far as he is concerned, that the accused is now prejudiced because we're proposing to proceed with the section 24 matter before the jury. I understand that in relation to the process, that that particular charge predated the endangerment charge and it was adjourned from time to time in the District Court and that particular charge, the section 24 charge, was taken by the Minister for Transport, I believe, Judge, and then it was obviously added that the indictment. I understand that the defence were aware obviously of the DPP charges and were told that the charge would be added to the indictment. And indeed the director was aware of the Minister's charges as well. Obviously, the Minister's charges, being District Court judge -- is subject to extremely strict time limits and is obliged to obviously charge anybody concerned within a particular strict time limit and did so, I believe. I believe that the accused was represented in the District Court and was at all times aware of the section 24 charge and indeed was aware that it would be added to the indictment. They are my instructions, Judge. It was flagged certainly by myself as soon as I could, and in my submission, there's no reason why that can't be considered now by the jury. My friend has said, look, he's now boxed in in relation to this, he can't appeal when in fact he can appeal to the Court of Appeal and that option is open to him in the case of conviction.

So, in my submission, the District Court proceedings were in being for quite some time prior to the matter being added to the indictment, and it can now be considered by the jury. And the prejudice which my friend is relying on, namely that his appeal is

stymied because of the venue he now finds himself in, well, there's a limit to what this Court can do about that. And, in any event, Judge, the Court is well aware of the prosecution's powers to add charges to the indictment whether they're preferred in the District Court or not."

[transcript 24/01/20 p.43, l.24 – p.44., l.18.]

48. The relevant ruling of the trial judge has been set forth earlier in this judgment at paragraph 24. It alludes with specificity to the argument that had been made by defence counsel some days previously in seeking to have the endangerment count drawn from the jury and struck from the indictment. He references the fact that the defence had specifically referred to the s. 24 charge which was also on the indictment, and states:

"Now, I would query whether the defence in this case can make the argument that the section 24 count is the appropriate count to be on the indictment. And then argue at the close of the prosecution case that in fact there's no jurisdiction to do that, because there's been no proof they alleged that the matter is before the Court."

49. We think those observations of the trial judge were entirely apposite. Defence counsel had clearly acknowledged, in the course of his earlier argument in regard to the endangerment count, the existence of the s. 24 charge before the District Court. His argument in regard to the endangerment count was in part premised on the existence of that charge before the District Court. Having lost that argument, it was not therefore open to him to contend, just a short few days later, that there was no evidence that his client had faced a s. 24 charge before the District Court. Having previously acknowledged the existence of such a charge, and having indeed relied expressly upon it, he was properly to be treated as having conceded the existence of the necessary precondition to the establishment of jurisdiction for the purposes of s. 6 of the Act of 1951.

50. We find no error in the ruling of the trial judge on this issue, and we reject this ground of appeal.

Issue 2 – Ground 4.

51. We have carefully considered the appellant's complaints concerning the trial judge's decision to furnish documentary copies of s. 23(1) and s. 24(1) of the Act of 2005 to the jury. We are satisfied that the decision to do so was a legitimate exercise of discretion by the trial judge. He carefully weighed the pros and cons of doing so, and considered on balance that the provision of the material would be an aide to the jury in better understanding the oral charge he had already given to them concerning the ingredients of the offences with which they were concerned. We are satisfied that there is no basis for believing that that discretion was unlawfully or improperly exercised. The trial judge was best placed to determine what would best assist the jury. There is no reason to believe that the jury were being invited to interpret the legislation for themselves. It had been carefully explained by the trial judge in his oral charge, but he was entitled to conclude that the jury would find it easier to recall and apply his explanation if they had the exact wording of the relevant provisions in front of them as an aide memoir.

52. As to the secondary complaint under this heading, namely the failure to also provide the jury with a copy of s. 26 of the Act of 2005, we think that the trial judge was correct in his approach. The jury had made a very specific request in the question. They had not asked for anything beyond the provisions containing the ingredients of the offence. We think that, as a general rule, a judge responding to a question from the jury should be very slow to furnish any information to the jury beyond that which was being requested. The trial judge in this case made clear that if the jury came back again and made a further request for a copy of the statutory provisions relating to defences, which the trial judge had already read out to them in the course of his charge, he would consider possibly

doing so at that point. We think that was an entirely sensible and reasonable approach, and one for which he is not to be criticised for adopting. We find no error on the part of the trial judge in that respect.

53. In the circumstances, all facets of the appellant's ground of appeal no. 4 are also rejected.

Conclusion:

54. In circumstances where we have not been disposed to uphold any of the appellant's grounds of appeal, his appeal against his conviction is dismissed.