# THE HIGH COURT

**[2021 No. 9 SS]**

**IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961**

**BETWEEN**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**
**(AT THE SUIT OF GARDA SANDIP SHRESTHA)**

**PROSECUTOR**

**– AND –**

**JORDAN GRIMES**

**DEFENDANT**

**JUDGMENT of Mr Justice Max Barrett delivered on 12th July 2021.**

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**SUMMARY**

This is a case stated arising from an unsuccessful prosecution application to amend certain charge sheets. The learned District Judge, on the application of the DPP, has asked the following question of the High Court: 'In the circumstances of the present case, am I correct in deciding to exercise my discretion in refusing to make the amendments'. For the reasons set out in this judgment, the court's respectful answer to that question is 'no'. This summary forms part of the court's judgment.


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**A**

**Case Stated**

**1.** The court is grateful to the learned District Judge for the detailed consultative case stated that she has furnished. The text of that consultative case stated is as follows:

"*A. Introduction:-*

*....2. The Defendant was charged with three offences of having in his possession a controlled drug for the purpose of sale or supply on 18th, 24th and 25th January 2018 in contravention of the Misuse of Drugs Regulations 1988 and 1993, made under section 5 of the Misuse of Drugs Act 1977 as amended,*[1] *contrary to s. 15 of the Misuse of Drugs Act 1977 (hereinafter 'the Act of 1977').*

*3. ...On the 18/07/2019 the Defendant pleaded not guilty to the charges and a date for hearing of the matter was fixed for the 28/11/2019. On or about the 21st October 2019 the prosecution listed the matter for the purpose of making a preliminary application to amend the charge sheets which are the subject of this case stated. This application was heard by the Court on the 21/11/2019 simultaneously with two separate prosecutions of separate defendants in which the same issue arose. Mr. Michael Durkan, State Solicitor, appeared for the prosecution. Ms Niamh Barry BL, instructed by Tony Collier Solicitor, appeared for the Defendant herein. The application was to amend the sheets in the following terms to delete '1998' and '1993' and insert '2017 as amended'. Therefore, the proposed amendment would read 'in contravention of the Misuse of Drugs Regulations 2017 as amended, made under section 5 of the Misuse of Drugs Act 1977'.*

*4. The application to amend the charge sheets was ultimately refused by me. I took the view that notwithstanding the application was being made prior to the hearing date, no proper explanation had been*

*forthcoming as to why the application was being made some 23 months after the date of the alleged offence, of more significance and in addition to this I also took the view that given the significance of the regulations in this type of case ( which I was satisfied based on the case law created the offence), any such application to amend went to merits of the case and were a matter of substance and not just form, in those circumstances I declined to make the amendment. The exercise of my discretion not to make the amendment is the matter at issue in this case stated. For the sake of completeness the accused is also charged with three counts of possession contrary to Section 3 of the Act however these charges do not form any part of this case stated.*

*B. Proceedings:-*

*5. The Accused was charged with the offences and brought before the court on 28th March 2019. Ultimately the DPP directed summary disposal and the accused pleaded not guilty on 28th July 2019. The court accepted jurisdiction. The total combined value was €80. The matter was listed for hearing on 28th November 2019.*

*6. Prior to the matter being heard the prosecution sought to have the matter listed to make the application to amend the charge sheets. On the 21/11/2019 the Court refused the application of the prosecution to amend the charge sheet in respect of charge sheet No. 19795505, which related to the substance 'Alprazolam'. The Court proceeded to dismiss that charge. Mr. Durcan raised a possibility of stating a case on the matter of refusing to make the amendment sought. In respect of the remaining two charges which pertain to the substance 'Diamorphine', the Court indicated that it was minded to make the amendments to those charge sheets but would leave that matter over to the hearing date (28/11/2019) and hear further legal argument prior to making a decision on that issue.*

*7. On the 28/11/2019 the Court heard further legal argument in respect of the application to amend the charge sheets and adjourned the matter for written submissions to the 19/12/2019. On this date Mr. Jonathan Antoniotti, State Solicitor, appeared for the prosecution. Ms. Niamh Barry BL, instructed by Tony Collier Solicitor, appeared for the Defendant herein. The Court requested that the Defendant provide brief written submissions addressing the written submissions of the prosecution in the matter of DPP (Garda David O'Callaghan) v. Jordan Cooper and setting out the arguments of the Defence made orally before it on the 28/11/2019. (This case was one of those heard simultaneously and involved the same issue)….*

*C. Evidence Proved or Admitted Before Me:-*

*8. The Court was advised that the charge sheets before it on which the complaint was based in respect of the alleged offence contrary to s. 15 of the Act of 1977 stated that the Defendant was charged with committing an offence contrary to: -*

> *'On the 17/01/18 at Sheriff Street Dublin 1 in the said District Court Area of Dublin Metropolitan District, had in your possession a controlled drug, to wit, Alprazolam for the purpose of selling or otherwise supplying it to another in contravention of the Misuse of Drugs Regulations, 1988 and 1993, made under Section 5 of the Misuse of Drugs Act 1977'*

> *'On the 24/01/18 at Sherriff Street Dublin 1 in the said District Court Area of Dublin Metropolitan District, had in your possession a controlled drug, to wit, Diamorphine for the purpose of selling or otherwise supplying it to another in contravention of the Misuse of Drugs Regulations, 1988 and 1993, made under Section 5 of the Misuse of Drugs Act 1977'*

*'On the 25/01/18 at Sherriff Street Dublin 1 in the said District Court Area of Dublin Metropolitan District, had in your possession a controlled drug, to wit, Diamorphine for the purpose of selling or otherwise supplying it to another in contravention of the Misuse of Drugs Regulations, 1988 and 1993, made under Section 5 of the Misuse of Drugs Act 1977'*

*9. A copy of section 7 of the Misuse of Drugs (Amendment) Act 2016 was handed into the Court, which section repealed in full the Misuse of Drugs Regulations 1988[4]. The Court was advised that the offence of the possession of controlled drugs for sale or supply is now an offence by virtue of Regulation 5 of the Misuse of Drugs Regulations 2017 which came into operation on the 04/05/2017.*

*10. The Court was advised by Mr Antoiotti for the prosecution on 21 October that the error contained on the charge sheets arose as a result of the failure to update the relevant wording on the Garda PULSE system. The court enquired as to whether after almost two and a half years after the Regulations of 2017 commenced whether the same error on charge sheets being printed by the pulse system was occurring. The Court was told that it was but that 'it was being changed on the advice of Senior Counsel'. On the 28/11/2019 the Court heard evidence from Sergeant Vincent Campbell that the error was brought to the attention of senior members of An Garda Siochana but that the error was not rectified until some time in or around November 2019 some two an a half years after the legislation and regulations were changed. Sergeant Campbell gave evidence that the updating of the PULSE system was an IT matter and he could not speak to why the error was not rectified until November 2019.*

*11. Evidence was given by the prosecution on the 28/11/2019 in relation to submissions by the Defence that there was delay in prosecuting the*

*matter and delay in seeking to rectify the error on the charge sheet. The prosecuting member Garda Sandip Shrestha gave evidence that the Defendant was interviewed in relation to the alleged offences on the 8th day March 2019 and later charged on the 28/03/2019 and the 20/06/2019 with the offences before the Court. Garda Shrestha was not in a position to give evidence of the date on which he received the certificates of analysis from the FSI.*

*12. Sergeant Vincent Campbell gave evidence that the prosecution before the Court arises out of an undercover policing operation that commenced in October 2017 and ceased in June 2018.*

*13. Detective Garda Daire Daly gave evidence in his capacity as exhibits officer that he took possession of the substance alprazolam on the 17/01/2018 and submitted that substance for testing to Forensic Science Ireland (hereinafter "FSI") on the 15/02/2018. Detective Garda Daire Daly gave evidence that he took possession of the substance diamorphine on the 24/01/2018 and the 25/01/2018 and submitted both quantities of diamorphine for testing to FSI on the 26/06/2018. Detective Garda Daly gave evidence that he was not directed by any person as to when to deliver the drugs for testing and that it was his practice to wait until he had a batch. He stated 'I don't go up to FSI every week', 'I bring a batch every now and then'. He stated that he 'would have brought a number of exhibits in February' and 'waited for a larger number to bring up in June'. Garda Daly further stated that he is not aware of how long certain drugs take to analyse.*

*14. There was a failure by the prosecution to provide a satisfactory explanation to the Court for the overall delay in making the application to amend the charge sheets in the period of time between March 2019 and October 2019.*

*D. Legal Argument:-*

***Submissions of the Prosecution on the 21/11/2019***

*15. In written submissions and oral legal argument heard on the 21/11/2019, the prosecution submitted that Regulation 29(1) of the Misuse of Drugs Regulations 2017 (hereinafter the '2017 Regulations') which provides that '[a] reference in any other enactment to the Regulations of 1988 shall be construed as a reference to these Regulations' meant that the error was insignificant as the reference on the charge sheet to the 1988 Regulations could in any event be construed as a reference to the 2017 Regulations.*

*16. The prosecution further relied on s. 12 of the Interpretation Act 2005:-*

> *'Where a form is prescribed in or under an enactment, a deviation from the form which does not materially affect the substance of the form or is not misleading in content or effect does not invalidate the form used.'*

*to state that the error in relation to the charge sheets should not invalidate them because it does not materially affect the substance of the charge sheets or mislead in their content. In addition, the prosecution relied on section 26(2)(f) of the Interpretation Act 2005 to state that a reference to the 1988 Regulations can be read as a reference to the 2017 Regulations.*

*17. The prosecution submitted that the charge sheets contain the relevant particulars of the offence and that the proposed amendment would not affect the substance of the alleged offences.*

*18. The prosecution relied on Order 38 Rule 2 and 3 of the District Court Rules to state that the Court has a wide discretion to amend a charge sheet or summons and that this is a case in which the Court*

*should exercise its discretion because the proposed amendments will not prejudice or mislead the accused.*

*19. The prosecution relied upon the decisions in AG (McDonnell) v. Higgins and in the State (Duggan) v. Evans to support their argument that the Court is entitled to make the amendments sought. In particular the prosecution relied on the following passage in the State (Duggan) v. Evans:-*

> *'If on his own initiative or as a result of submissions made before him, a District Justice concludes that there is a defect in substance or form or an omission in the document by which a prosecution before him has been originated or that there is a variance between it and the evidence adduced for the prosecution, he is bound to proceed as follows:*
>
> *1. He must first ascertain as to whether the variance, defect, or omission has in his opinion misled or prejudiced the defendant or might in his opinion affect the merits of the case.*
>
> *2. If he is of opinion that none of these consequences has occurred he must either amend the document or proceed as if no such defect, variance, or omission had existed. The Rule contains no express guidance in the event of the proviso in sub-rule (3) not arising, as to whether the justice should proceed by amendment or by ignoring the frailty in the document. It appears to me, however, that this choice should be made by reference to the effect of such frailty on an eventual conviction if such were recorded. Where, as would appear to be the position in this case, amendment is necessary to make a conviction on the charge valid, the amendment should be made; where it is not it may be omitted. Furthermore, this jurisdiction and obligation of*

*the Justice in an appropriate case to make an amendment is not in my view dependent on an application by the prosecution but can and should be exercised, as is the power of a Court to amend an Indictment, on his own initiative.*

*3. If on the other hand the justice is of the opinion that the frailty in the document has misled or prejudiced the defendant or if of the opinion that it might affect the merits of the case three alternative courses are open to him:*

*(a) He may dismiss the case without prejudice,*
*(b) He may dismiss the case on the merits,*
*(c) He may amend the document and adjourn the case upon terms."*

*20. The prosecution submitted on the basis of the State (Duggan) v. Evans that the defects in this case do not warrant a dismissal on the merits. 1n support of this the prosecution relied on the decision in DPP v. John Connolly where it is submitted that the defect was not held to be fatal as it was one of form and not substance.*

*21. Further, the prosecution submitted that the late stage at which the application is made to amend the charge sheet is not fatal and relied upon the decision in DPP v. 0'Brien and Royal wherein an amendment to the charge sheet was permitted after the close of the prosecution case in circumstances where there was no potential prejudice to the accused. Submissions of the Defence on the 21/11/2019*

***Submissions of the Defence on 21/11/2019***

*22. The Defence herein relied on the submissions made by Counsel for the Defence in the matter of DPP (Garda David O'Callaghan) v. Jordan Cooper, in particular the submission that Regulation 29(1) of the 2017*

*Regulations does not apply in circumstances where it refers to 'any other enactment' and the term 'enactment' holds a particular definition under s. 2 of the Statutory Interpretation Act 2005 which does not cover a charge sheet.*

*23. It was submitted by the Defence that the amendment sought was one of substance going to the merits of the case and not one of form. In support of this argument the Defence relied on the decisions in DPP v. Cleary and Kelly v. Judge Dempsey. It was submitted by the Defence that according to the aforementioned decisions the offence of possessing a controlled drug for sale or supply is created by the 1988 Regulations and proof of their existence is required in a prosecution.*

*24. The Defence further argued that the Court should take into consideration that there was significant delay from the date of the offence to the date on which the Defendant was charged. Further, that it is significant that an application to amend the charge sheets was only made a short time prior to the hearing date in October 2019 where the alleged offences occurred in January 2018 and the Regulations of 1988 were repealed in full since the 04/05/2017.*

***Decision on legal argument on the 21/11/2019***

*25. In my decision on all three prosecution applications to amend the relevant charge sheets before me on the 21/11/2019 I noted that the relevant legislation involves Acts, Statutory Instruments and Amendments which are extremely complex. I noted that it was not in dispute that the failure to upgrade the garda PULSE system led to the errors in issue. l held that in all three cases there were delays in making the application to amend the charge sheets.*

*26. I noted that the prohibition against possessing a controlled drug for sale or supply is an offence contrary to Regulations and Statute. I further noted that a controlled drug is defined in the Act of 1977.*

*Section 15 of the Act of 1977 provides that: - 'Any person who has in his possession, whether lawfully or not, a controlled drug for the purpose of selling or otherwise supplying it to another in contravention of regulations under section 5 of this Act, shall be guilty of an offence.' The Regulations of 1988 were the applicable regulations until the Misuse of Drugs (Amendment) Act 2016 came into effect, in particular s.7 thereof, which commenced on 4 May 2017.*

*27. In the view of the Court, the question to be asked was whether it was appropriate to amend the charge sheets in these circumstances.*

*28. I noted that a controlled drug was defined under s. 2 of the Act of 1977 and certain drugs were listed in the Schedule to that Act. I noted, based on submissions erroneously made to me on behalf of the Defendant in DPP (Garda David O'Callaghan) v. Jordan Cooper that the substance alprazolam was not listed in the Schedule nor in the Regulations of 1988.*

*29. I held that on the basis of the decisions in DPP v. Cleary and Kelly v. Judge Dempsey, that the absence of proof of the relevant Regulations was fatal to a prosecution. I was satisfied that in respect of the charges before the Court contrary to s. 15 of the Act of 1977, the Regulations create the offence. I noted also the Court was being asked to amend a reference to something on a charge sheet which no longer exists. I noted that different considerations might arise if it was a recent amendment to legislation that the Court was being asked to amend. However, I considered it relevant that a situation could be permitted to develop where charge sheets on the garda PULSE system are not amended or updated.*

*30. Further, I took into consideration the delay from the date of the offences to the date of charge.*

*31. In all of the circumstances, I refused to make the amendment to Charge Sheet No. 19795505 in respect of the Defendant herein, where such charge sheet related to the substance alprazolam based on the submissions made to me. ln the circumstances, I made an Order dismissing the prosecution in respect of charge sheet No. 19795505, in circumstances where I refused to make the amendment. Mr. Durcan raised a possibility of stating a case on the matter of refusing to make the amendment sought.*

*32. However, in circumstances where the substance diamorphine was listed as a controlled drug in the Schedule to the Act of 1977 I indicated that while I was minded to make the amendment sought in respect of charge sheet No.' s 197954 73 and 19795498 I would hear further legal argument in respect of that matter on the hearing date prior to making a decision.*

***Submissions of the Defence on the 28/11/2019***

*33. Further legal argument was put forward by the Defence on the 28/11/2019 and committed to writing in submissions….The Defence argued that no distinction ought to be made between particular controlled drugs in the Court's consideration of whether to accede to the prosecution application to amend the charge sheets.*

*34. It was submitted that the Regulations of 1988, which create the general prohibition on the sale or supply of a controlled drug, is that which has created the offence as set out in s. 15 of the Act of 1977. In other words, without the Regulations of 1988, Regulation 4 specifically, there can be no offence committed contrary to s. 15 of the Act of 1977. In circumstances where the Regulations of 1988 were repealed in accordance with s. 7 of the Misuse of Drugs (Amendment) Act 2016 on the 04/05/2017, an offence of possession of a controlled drug for sale or supply contrary to the Regulations of 1988 was no longer in existence from that date.*

*35. It was submitted that the particular 'controlled substance' involved forms part of the definition of the offence, but the offence itself is that created by Regulation 4 of the Regulations of 1988 in accordance with s. 15 of the Act of 1977. It was further submitted that the controlled substance must be stated on a charge sheet as a particular of the offence and proof must be provided that it is in fact a controlled substance. However, in circumstances where the actual offence is that created by the Regulations of 1988, it is submitted that there is no distinction to be drawn between whether a particular substance is declared a 'controlled substance' by virtue of the Schedule to the Act of 1977 or alternatively by way of an Order of the Government for the purpose of an application to amend the charge sheet to reflect the correct Regulations.*

*36. It was submitted to the Court that while diamorphine was listed as a controlled drug in the Schedule to the Act of 1977, alprazolam had also been declared a controlled drug since 1987 and therefore it was respectfully submitted that there was no basis for any distinction to be drawn between diamorphine and alprazolam for the purpose of the prosecution application before the Court.*

*37. It was submitted that the Court took into account relevant considerations in its decision to refuse the application to amend the charge sheet in respect of the substance alprazolam and such considerations were equally applicable to the charge sheets pertaining to diamorphine.*

*38. It was accepted by the Defence that the principles set out in the State (Duggan) v. Evans are applicable. It was submitted, based on the decisions in DPP v. Cleary and Kelly v. Judge Dempsey, that the failure to recite the correct Regulations on the charge sheet is not a minor error but is one affecting the merits of the case. In such circumstances, in line with the principles in the State (Duggan) v. Evans the Court has*

*a discretion to either (a) dismiss the case without prejudice; (b) dismiss the case on the merits; (c) amend the document and adjourn the case upon terms.*

*39. It was submitted that in the particular circumstances of the within case the Court ought to decline to amend the charge sheets and dismiss the prosecution case in respect of charge sheet No. 's 197954 73 and 19795498. The circumstances relied upon included the delay in submitting the diamorphine for analysis to the FSI, the delay in charging the Defendant, the manner in which the error on the charge sheet occurred (that there was a failure to amend the Garda PULSE system) and the fact that _the Court decided to refuse the application to amend in respect of charge sheet No. 19795505.*

***Submissions of the Prosecution on the 28/11/2019***

*40. The prosecution reiterated the arguments set out on the 21/11/2019, that the Court has a discretion to amend the charge sheets and ought to exercise that discretion as there is no obvious prejudice to the accused.*

*41. It was submitted that there was no culpable delay on the part of the prosecution as evidence was given as to the reason for the delay in sending the substances for testing and for the delay in charging the accused.*

*42. It was further submitted that this was not a case where the application to amend was being made on the date of the hearing but that the application was brought before the Court six weeks in advance of the date fixed for hearing of the matter.*

***Decision of the Court given on the 19/12/2019 on legal argument made on the 28/11/2019.***

*43 . Following consideration of oral legal argument made on the 28/11/2019 and written submissions on behalf of the Defendant provided to the Court thereafter, I decided to refuse the application to amend charge sheet Nos 19795473 and 19795498 pertaining to diamorphine.*

*44. I accepted the argument of the Defence that there should not be a distinction between various controlled substances in considering the application to amend the charge sheet to reflect the correct Regulations. I noted that I was concerned that alprazolam was not in the 1988 Regulations based on certain submissions made to the Court previously. However, that matter was clarified by Counsel for the Defendant herein.*

*45. I noted that it was important that the 1988 Regulations were revoked by the Misuse of Drugs (Amendment) Act 2016. I also noted as interesting the fact that the Misuse of Drugs (Amendment) Act 2015 gave statutory effect to certain Regulations but that the 2016 Act did not give the same statutory effect.*

*46. I accepted the arguments of the Defence that Regulation 29(1) of the 2017 Regulations does not apply to a charge sheet as the term enactment holds a specific statutory definition.*

*47. I took into account the overall delay in making the application to amend the charge sheets and the importance of the Regulations in a prosecution for an offence of possession of a controlled drug for sale or supply.*

*48. Following the decisions in DPP v. Cleary and Kelly v. Judge Dempsey I was satisfied that the offence of possession of a controlled drug for sale or supply does not stand independently and as such the importance of the Regulations cannot be overstated. I noted that if the correct Regulations were not handed into Court in a prosecution for an*

*offence of possession of a controlled drug for sale or supply it would be fatal to such a prosecution. In this instance the charge sheet refers to Regulations which were revoked six months before the alleged offence was committed and 22 months before the accused had been charged.*

*49. I considered the first question for the Court to assess was the significance of the Regulations and I was satisfied having regard to the decision of McMenamin J. in Kelly v Judge Dempsey their importance could not be overstated and that they created the offence. The second question for the Court in my view was what power of amendment the Court has. While I was satisfied that the Court has a wide power of amendment, in line with the principles enunciated in the State (Duggan) v. Evans I was of the view that the question for the Court in considering the application to amend is whether the amendment sought is one of substance or form and whether the error affects the merits of the case. It seemed to me that the amendment sought is one which goes to the nature of the case and therefore is one of substance and not form. I took into account what would occur in this case if the 1988 Regulations were handed in in the course of the prosecution instead of the correct Regulations. On that basis I believe the amendment sought goes to the merits of the case.*

*50. I held that there was a failure by the prosecution to provide any satisfactory explanation or justification for the overall delay in making the application to amend the charge sheets. There was no explanation provided as to why the error on Pulse went unaddressed for such a lengthy period.*

*51. In all of the circumstances within the case, I refused to make the amendments sought.*

*52. I was invited by the prosecution to ask the opinion of the High Court on whether I was correct in my determination.*

*E. Questions of Law:-*

> *53. And whereas, I, the said Judge, am of the opinion that a question of law arises in the foregoing case, I do hereby refer the following question to the High Court for determination:-*
>
> > *In the circumstances of the present case, am I correct in deciding to exercise my discretion in refusing to make the amendments sought?*"

**2.** The court's answer to the question posed by the learned District Judge is a respectful 'no' for the reasons set out hereafter.

**B**

**Some Aspects of What is in Issue**

**3.** All that is now 'before' this court in terms of relevant facts for the case stated is the diamorphine charges: they are the only subject-matter of the case stated. The offences with which the defendant now stands charged in this regard are the 'standard' s.3 and s.15 offences. Section 3 is concerned with possession *simpliciter*. Section 15, which has never been amended, is concerned with the offence of possession with intent to supply. The s.3 offence is concerned with statute only and poses no issue as such. The s.15 offence is ever-so-slightly complicated because it provides that "*Any person who has in his possession, whether lawfully or not, a controlled drug for the purpose of selling or otherwise supplying it to another in contravention of regulations under section 5 of this Act, shall be guilty of an offence*", *i.e.* there is a cross-reference into regulations made under the Act. Diamorphine (heroin) is a controlled drug by virtue of primary statute (the Act of 1977), not regulation. Under reg.5 of the Misuse of Drugs Regulations 2017, "*(1) Subject to the provisions of these Regulations, a person shall not…(b) supply or offer to supply a controlled drug*". (This essentially replicates wording that previously existed in reg.4 of the Misuse of Drugs Regulations 1988).

**C**

## Citing Statute in Charge Sheets

**4.** Order 17(1) of the District Court Rules states that "[P]*articulars of the offence alleged against* [a]*...person shall be set out on a charge sheet.*" This has been the provision in relation to charge sheets for many years. As will be seen, most of the case-law in this area is concerned with summonses but, helpfully, the same law generally applies in this regard to both summonses and charge sheets. What O.17(1) does not address (but what the relevant case-law does address) is the requirement to cite statute in charge-sheets, that being a separate issue to citing the particulars of an offence. An issue arises, and is addressed in case-law, as to what extent, where a person is charged with a statutory offence, the prosecution/charge-sheet/summons/indictment (in indictable matters) should contain an iteration of the statute involved. The key case presenting in this regard is *Attorney General (McDonnell) v. Higgins* [1964] I.R. 374.

**5.** In *Higgins*, the defendant, while driving a motor car on the night of 10th September 1959, was involved in an accident which resulted in the death of a child. He was arrested and charged with four summary offences under the Road Traffic Act, 1933. Save for one of the charges the statute was not mentioned nor were the words, 'against the statute in such case made and provided,' included in the charge sheet. The defendant was brought before the District Court on various dates until at the commencement of the proceedings on 31st October 1960, application was made to amend the charge sheet by including the words, 'contrary to the statute in such case made and provided,' at the end of the charges from which they had been omitted. The defendant objected, *inter alia*, on the grounds that there was no jurisdiction to make the amendments sought and if the amendments were made the defendant would be prejudiced. A case was stated to the High Court where Davitt P. held that the District Judge had a discretion to make the amendments sought so as to ensure that the real issues between the parties might be determined in accordance with law. This decision was upheld on appeal, Ó'Dálaigh C.J., for a unanimous Supreme Court, observing, *inter alia*, as follows, at p.731, in a since oft-quoted passage:

> "*A complaint in its essence is a statement of facts constituting an offence. It is desirable in the case of a statutory offence that it should conclude:—"contrary to the statute in such case made and provided"; or, better still, contrary to a specific statute and section, but I can find nothing in authority or in principle that requires that a complaint in*

*respect of contravention of a statute will be invalid if it fails to conclude with the words, 'contrary to the statute in such case made and provided.' The form of information (Form I) in the District Court Rules does not contain these words. The fact that a complaint may be verbal is a further reason for saying that a formal conclusion to the complaint is not necessary to its validity.*"

**6.** In short, the Supreme Court, to the extent indicated, set its face against 'magical' forms of wording which require to be incanted for a charge to be valid. It follows from the above-quoted text that in this case there is no need for there to be a citation of the Regulations at all, albeit that the prosecution elected here to do so.

**7.** In passing, it is worth noting that many of the cases in this area, and *Higgins* is one of them, revolve around the issue of the lateness of the making of an amendment application, with the amendment application being said to have occurred outside the time limit for the making of the complaint and a proposed amendment being claimed to be so radical as to involve the making of a new (statute-barred) complaint. Here, however, the defendant has been charged with an indictable offence and so no six-month time limit (which limit features in much of the applicable case-law) arises in respect of any of the offences with which the defendant is charged. Hence, to the extent that delay in this matter was emphasised by the learned District Judge (and it is clear from the case stated that she placed no little emphasis on the issue of delay) this has, with respect, no relevance in the consideration that she had to make.

**D**

**Discretion to Amend Charges**

**8.** The court turns next to the test that a District Judge must bring to bear in an application to amend.

**9.** Order 38.1(2)-(4) of the District Court Rules provides as follows:

"*Defects*

*(2) Subject to the provisions of paragraph (3) hereof, no objection shall be taken or allowed on the ground of a defect in substance or in form or an omission in the summons, warrant or other document by which the proceedings were originated, or of any variance between any such document and the evidence adduced on the part of the prosecutor at the hearing of the case in summary proceedings or at the examination of the witnesses during the preliminary examination of an indictable offence, but the Court may amend any such summons, warrant or other document, or proceed in the matter as though no such defect, omission or variance had existed.*

[Court Note: In passing, the court notes the phrase "*no objection shall be taken*". In this context it also recalls the observation of Finlay P. in *State (Duggan) v. Evans* (1978) 112 I.L.T.R. 61, considered in more detail later below, that the second limb of the test posed by Finlay P. therein is that if a District Judge "*is of opinion that none of these consequences has occurred* [prejudice, *etc*.]…[s/he] *must either amend the document or proceed as if no such defect, variance, or omission had existed.*" So the language used is mandatory.]

*Court's discretion*

*(3) Provided, however, that if in the opinion of the Court the variance, defect or omission is one which has misled or prejudiced the accused or which might affect the merits of the case, it may refuse to make any such amendment and may dismiss the complaint either without prejudice to its being again made, or on the merits, as the Court thinks fit; or if it makes such amendment, it may upon such terms as it thinks fit adjourn the proceedings to any future day at the same time or at any other place.*

*No offence disclosed /No appearance*

> *(4) Where the Court is of opinion that the complaint before it discloses no offence at law, or if neither the prosecutor nor accused appears, it may if it thinks fit strike out the complaint with or without awarding costs.*"

**10.** In *DPP v. Corbett* [1992] ILRM 674, Lynch J., when treating, *inter alia*, with an objection to an amendment of the date of alleged offences from '19 September 1989' to '18 September 1989' (which the defendant claimed upset an alibi defence that he had hoped to rely upon) set out, in the following terms, at pp.678-79, the general principles of law relating to amendment, whether in criminal or civil terms:

> "*The day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party. While courts have a discretion as to amendment that discretion must be exercised judicially and where an amendment can be made without prejudice to the other party and thus enable the real issues to be tried the amendment should be made. If there might be prejudice which could be overcome by an adjournment then the amendment should be made and an adjournment also granted to overcome the possible prejudice and if the amendment might put the other party to extra expense that can be regulated by a suitable order as to costs or by the imposition of a condition that the amending party shall indemnify the other party against such expenses.*"

**11.** There is perhaps a learned law journal article yet to be written on why, in the longer scheme of history, our ancestors *were* satisfied, if they were satisfied, to see justice defeated by mere technicalities which did not materially prejudice a defendant. But in terms of current law, the observations of Lynch J. hold good. The result is that the discretion to amend "*should be exercised judicially and in favour of amending a summons where such an amendment is necessary to allow the real issues to be tried and can be made without prejudice to the other party*" (*Walsh on Criminal Procedure*, 2nd ed., 2016, para.14-69),

**E**

## The Question of Prejudice

a. *State (Duggan) v. Evans*
(1978) 112 I.L.T.R. 61

**12.** The leading case on amending a charge sheet or summons is *State (Duggan) v. Evans (*1978) 112 I.L.T.R. 61. In that case, on 7th February 1977, the respondent, Mr Evans, was charged in the Dublin Metropolitan District Court that "*between 2 a.m. and 3 a.m. on the 27th day of February, 1976, having entered as a trespasser a building known as Stanley's newsagents…he did steal therein books to a value of £2, the property of Joseph Stanley contrary to 23A Larceny Act, 1916.*" Section 23A had been inserted into the Larceny Act, 1916, by s.6 of the Criminal Law (Jurisdiction) Act, 1976; however, the charge made no reference to the later Act. At the close of the case, defence counsel objected to the form of the charge, contending that it was bad in that it omitted all reference to the amending Act. (Notably, the amendment proposed here was made several weeks in advance of the defendant's trial so it is impossible to discern any possible prejudice that could arise for the defendant in this regard). In any event, returning to *Evans*, there the District Judge allowed the objection, even though s.23A did not exist until the enactment of the Act of 1976, and dismissed the charge, without making any finding as to whether the defect in the charge had misled or prejudiced the defendant or affected the merits of the case. The prosecution requested the District Justice to state a case for the opinion of the High Court, as to whether the District Judge had been right in law to dismiss the charge. In the High Court, Finlay P., holding that the District Judge had been wrong in law to dismiss the charge, observed, *inter alia*, as follows:

> "*This, on the face of it, appears to me to be an insufficient charge and if a conviction proceeded upon it on those precise terms it would appear to me to be a bad conviction….*
> *Where, as would appear to be the position in this case, amendment is necessary to make a conviction on the charge valid, the amendment should be made…*
> [As to how a District Judge must proceed:]
> *1. He must first ascertain as to whether the variance, defect, or omission has in his opinion misled or prejudiced the defendant or might in his opinion affect the merits of the case.*

*2. If he is of opinion that none of these consequences has occurred he must either amend the document or proceed as if no such defect, variance, or omission had existed….*

*3. If on the other hand the justice is of the opinion that the frailty in the document has misled or prejudiced the defendant or if of the opinion that it might affect the merits of the case three alternative courses are open to him: (a) He may dismiss the case without prejudice, (b) He may dismiss the case on the merits, (c) He may amend the document and adjourn the case upon terms.*"

**13.** Although Finlay P. was dealing with the 1948 version of the District Court Rules, the above points continue to hold good in the context of the current District Court Rules also.

b. *DPP (King) v. Tallon*
[2007] 2 I.R. 230

**14.** Here, the accused was charged that, having been requested to provide two specimens of breath pursuant to s.13(1)(a) of the Road Traffic Act 1994, he had refused to comply, contrary to s.13(2) of that Act. Pursuant to Supreme Court precedent and prior to evidence being heard, the prosecution applied to amend the charge sheet to delete the words "*in the manner indicated by the said member of An Garda Síochána*". The accused objected to the proposed amendment, claiming that the charge against him was a nullity and not known to law, and that therefore the District Court had no jurisdiction to amend the charge sheet. (A similar line of logic is advanced by the defendant in the within proceedings). The prosecutor argued that the charge was known to the law but just worded incorrectly. A case stated ensued.

**15.** In the High Court, MacMenamin J. held, *inter alia*, that the District Court Rules allowed the court to amend a summons or other originating document, provided the document that it was sought to amend was not a nullity, a relevant factor for consideration in this regard being whether the defect/omission to be corrected had prejudiced or misled the accused. In the course of his judgment, McMenamin J., at pp.240-41, considered the judgment of the Supreme Court in *DPP v. Canniffe* [2002] 3 I.R. 554 – a case concerned with a summons that on its face alleged an offence not known to law – and noted, in particular, the pithy observation of Geoghegan J., at p.563 of *Canniffe*, that "*What is of fundamental importance, however, is that the District*

*Court Judge is clear at all stages as to what the offence is which he or she is trying and that that is clear to everybody in court*".

**16.** Commenting on *Tallon*, *Walsh on Criminal Procedure*, 2nd ed., 2016, observes as follows, at para.14-73:

> "*At the core of the High Court's decision in* Tallon *is the interpretation that the amendment did not entail the substitution of a new complaint for the original complaint. So long as the original complaint disclosed an offence known to the law, a defect in the wording such as the addition of unnecessary words) will not be beyond the reach of amendment. It is also worth noting in this context that when the summons or charge sheet relates to a statutory offence, the failure to state that the alleged act or omission was contrary to statute or the relevant statutory provision will not necessarily render the charge a nullity and beyond the reach of amendment. Indeed, the court can be expected to accede to a request for amendment in these circumstances, unless it would mislead, or prejudice the applicant or otherwise lead to unfairness.*"

c. *DPP v. O'Brien and Royal*
(Unreported, High Court, O'Neill J., 16th December, 2013)

**17.** This was a case in which the offence charged was that of assaulting a peace/prison officer (in a most unpleasant manner). The offence was originally contained in s.19 of the Criminal Justice (Public Order) Act 1994, then moved to another subsection of s.19 by amendment. The charge did not recite the amendment. An application was made at the close of the prosecution case to dismiss the charge; this was met by an application by the prosecution to amend. (Again it is notable that the application to amend was made at the close of the prosecution case whereas here it was made weeks in advance of the trial, so it is impossible to see what conceivable prejudice could arise for the defendant). In *O'Brien and Royal*, O'Neill J. held, in an *ex tempore* judgment that there was no need to refuse the amendment in the absence of any prejudice which could have accrued to the defendants, observing, *inter alia*, as follows (the version of the judgment before the court is signed by both counsel who appeared in the proceedings before O'Neill J. and thus enjoys their *imprimatur* as an accurate reflection of what O'Neill J. said):

"*Paragraph 10 of the case stated continues as follows: ·*

> *'However, I held that this was a criminal prosecution which had proceeded to. hearing and where a considerable amount of evidence· had been heard. I held that the Defendants had not been put on notice. of this application, and that every person charged with a criminal offence is entitled to know the specific charge which is being brought and that in these circumstances this was not the case. I dismissed the charges.'*

*I disagree with the District Judge. The charge sheet makes it clear that the offence was one of assaulting a peace officer. There is no absence of clarity or particularity. The District Judge erred in his conclusion. His observation that the defendants had no notice is strange. It was clearly an oversight. As often happens the defence wait until the end of the prosecution case. The District Judge concluded he should dismiss the case. There was no question of a new offence. There was no basis for the suggestion of misleading of the defendants.*

*The jurisdiction to amend is set out in Order 38(2) and (3) of the District Court Rules which provide as follows:*

[Court Note: O'Neill J. then quotes these provisions which this Court has quoted previously above, also moving on to consider the passage in *Corbett* that has been considered above) and a consideration of that passage by Mac Menamin J. in *DPP (King) v. Tallon* [2006] IEHC 232 (also considered above), which is where this Court takes up its quotation from the judgment in *O'Brien and Royal*.]"

This [the passage in *Corbett*] was quoted by MacMenamin J. in *DPP (King) v. Tallon*…who having quoted the foregoing passage continued as follows:

> *'This passage was approved by the Supreme Court on appeal as being most comprehensive and entirely correct in* DPP *v* Corbett*....However the community's right to have criminal offences prosecuted cannot be interpreted or applied so as to constitute an abrogation of the rights of an accused if real prejudice can be shown. The power of amendment invested in the courts by rule must be exercised judicially and fairly. It cannot be seen as a carte blanche to defeat fairness or established legal rights or so as to entirely reconstitute a case in form or substance in a manner fundamentally prejudicial to an accused.*'

*This is all reflected in the District Court Rules. The court should first consider if the amendment is appropriate. In this case it was not even necessary. Given the District Judge concluded an application should be entertained, he was obliged to consider it. There is virtually no material difference nor any basis for surprise or any lack of notice.*

*The court is then obliged to consider prejudice. There is no possibility of prejudice. The mere fact he was deprived of an advantage could not amount to a prejudice. There was no altered case at all. It was purely technical, the rectification of an inconsequential error. The discretion should be exercised in favour of amendment….*

[Court Note: O'Neill J. then turns to the questions posed to him, his answer to the third question having a particular resonance in the context of the within application.]

*(iii) Did I have a discretion to refuse the Prosecution's application to amend the charges having given consideration to the particular circumstances of this case? In general, yes. However, in this case there is no reason why the amendments should have been refused as there is no potential for prejudice to be suffered by the defendants if the amendments were made.*"

d. *Rostas v. DPP*
[2021] IEHC 60

**18.** Unlike the other authorities considered above, *Rostas* was a judicial review case in which there was superfluous language in the charge sheet, it appears because of some sort of system/template error. Ms Rostas claimed that the charge sheet was bad because it charged conduct that did not constitute an offence. The District Judge amended the charge sheet and deleted the superfluous language. In subsequent unsuccessful judicial review proceedings, the court observed, at para.33, that when it came to the question of prejudice "*not just any…prejudice will do. It has to be prejudice rendering the amendment unjust*", and also observed, at para.35, that "*There is no legal principle that the power of amendment can only be exercised within the limited period for the initiation of the offence and indeed the power of amendment would be unworkable unless it could be used outside that period*".

**19.** In the present case it is impossible to discern any prejudice that could be occasioned to the defendant by the proposed amendment.

**F**

**Some Principles Arising**

**20.** Is it possible to reduce the key principles arising in the foregoing case-law into a succinct suite of propositions? It seems to the court that the following propositions can safely be stated:

(1) A complaint in its essence is a statement of facts constituting an offence. It is desirable in the case of a statutory offence that it should conclude 'contrary to the statute in such case made and provided'; or, better still, contrary to a specific statute and section, but there is nothing in authority or in principle that requires that a complaint in respect of contravention of a statute will be invalid if it fails to conclude with the words, 'contrary to

the statute in such case made and provided' (*Attorney General (McDonnell) v. Higgins*).

(2) The day is long past when justice could be defeated by mere technicalities which do not materially prejudice the other party. (*Corbett*).

(3) While courts have a discretion as to amendment that discretion must be exercised judicially and where an amendment can be made without prejudice to the other party and thus enable the real issues to be tried the amendment should be made. (*Corbett*).

(4) If (a) there might be prejudice which could be overcome by an adjournment then the amendment should be made and an adjournment also granted to overcome the possible prejudice, (b) the amendment might put the other party to extra expense that can be regulated by a suitable order as to costs or by the imposition of a condition that the amending party shall indemnify the other party against such expenses. (*Corbett*).

(5) The judicial discretion as to whether to allow an amendment should be exercised judicially and in favour of amending a summons where such an amendment is necessary to allow the real issues to be tried and can be made without prejudice to the other party (*Walsh on Criminal Procedure*, 2nd ed., 2016).

(6) As to how a District Judge must proceed when confronted with an application to amend: (1) s/he must first ascertain as to whether the variance, defect, or omission has in their opinion misled or prejudiced the defendant or might in the District Judge's opinion affect the merits of the case; (2) if

s/he is of opinion that none of these consequences has occurred s/he must either amend the document or proceed as if no such defect, variance, or omission had existed; (3) if on the other hand the justice is of the opinion that the frailty in the document has misled or prejudiced the defendant or if of the opinion that it might affect the merits of the case three alternative courses are open to her/him: (a) s/he may dismiss the case without prejudice, (b) s/he may dismiss the case on the merits, (c) s/he may amend the document and adjourn the case upon terms. (*State (Duggan) v. Evans*).

(7) So long as the original complaint discloses an offence known to law, a defect in the wording (such as the addition of unnecessary words) will not be beyond the reach of amendment (*Tallon*; *Walsh on Criminal Procedure*, 2nd ed., 2016)

(8) When a summons or charge sheet relates to a statutory offence, the failure to state that the alleged act or omission was contrary to statute or the relevant statutory provision will not necessarily render the charge a nullity and beyond the reach of amendment. (A court can be expected to accede to a request for amendment in these circumstances, unless it would mislead, or prejudice the applicant or otherwise lead to unfairness). (*Tallon*; *Walsh on Criminal Procedure*, 2nd ed., 2016).

(9) The community's right to have criminal offences prosecuted cannot be interpreted or applied so as to constitute an abrogation of the rights of an accused if real prejudice can be shown. The power of amendment invested in the courts by rule must be exercised judicially and fairly. It cannot be seen as a carte blanche to defeat fairness or

established legal rights or so as to entirely reconstitute a case in form or substance in a manner fundamentally prejudicial to an accused. (*Tallon*). The foregoing is all reflected in the District Court Rules. (*O'Brien and Royal*).

(10) When it comes to prejudice not just any prejudice will do, it has to be prejudice rendering the amendment unjust (*Rostas*).

(11) There is no legal principle that the power of amendment can only be exercised within the limited period for the initiation of the offence and indeed the power of amendment would be unworkable unless it could be used outside that period (*Rostas*).

**21.** The application of these principles in the case at hand has already been considered as the court went through its account of the relevant case-law.

**G**

**Some Other Case-Law**

(i) *People (DPP) v. Cleary*
[2005] 2 I.R. 189

**22.** Some emphasis has been placed by the learned District Judge on the *Cleary* case. That was a case where Mr Cleary was tried on indictment on the charge of possession of a controlled drug contrary to ss.3 and 15 of the Act of 1977. At the close of the prosecution case, an application was made for a direction on the s.15 charge (because the regulations had not been handed into court – a deficiency which could only affect, if it affected, the s.15 charge because a s.3 offence is not tied into regulations). It is not clear why the prosecution did not simply apply to re-open the case. In any event the Court of Criminal Appeal held that because a s.15 offence ties into regulations, the regulations are a required proof and hence the conviction failed.

(ii) *Kelly v. Dempsey*
[2010] IEHC 336

**23.** Some emphasis has also been placed by the learned District Judge on the *Kelly* case. Again, there was a failure to prove the regulations in a summary s.15 prosecution. This occasioned much debate as to whether and how the regulations needed to be proved.

(ii) Comment

**24.** Neither *Cleary* nor *Kelly*, with respect, have anything to do with the issue of prejudice that confronted the learned District Judge in the application before her. A court, in an application to amend, has to consider whether or not there is some prejudice, not whether or not something is a required proof. So *Cleary* and *Kelly*, being concerned with the issue of necessary proofs, fall by the wayside and are, with respect, irrelevant to the determination of the prejudice point.

**H**

**Delay in Seeking Amendment**

**25.** Is delay *in seeking an amendment to a charge sheet* a relevant factor? The court has treated with the six-month point previously above and explained why it is irrelevant to the within proceedings. But delay in the seeking of an amendment to a charge-sheet is simply not a factor in the case-law. The test is one of prejudice (and whether it can be cured by adjournment). There is nothing in case-law to suggest that an application to amend a charge-sheet must be made within a certain time of a complaint being made. Quite the contrary. In, for example, the *O'Brien and Royal* case, the amendments were sought at the close of the prosecution case (so much later than in the within case, where the amendment was sought several weeks before the trial), yet O'Neill J., having regard to the issue of prejudice, found that the amendments should have been allowed as no conceivable prejudice could present. The above-mentioned observations in *Rostas* are also of note in this regard. Thus, while the learned District Judge in the within case was clearly disappointed at the pace of the updating of the PULSE system, that disappointment (and that slow pace of updating of the PULSE system) was, with every respect, an irrelevant consideration when it came to the application to amend that was before her to

decide. In essence, she was obliged to apply the test in *Evans*. In so doing, there would have to be something that would suggest a real prejudice to the defendant, absent which prejudice the amendment should have been allowed (and here there was no conceivable prejudice, and even if there was it could have been addressed by adjournment, especially in circumstances where the application for amendment was brought several weeks ahead of the trial).

## I

## Some Additional Points Arising

### i. Cognitive Dissonance in the Prosecutor's Stance?

**26.** Why has this case stated come about if the DPP is correct (and she is correct) that there is no need to cite statute as contended for? Is there some sort of cognitive dissonance presenting in the position adopted by the prosecutor whereby she contends, on the one hand, that there is no need to cite statute, and, on the other hand the amendment in issue to the charge sheet has been sought? The answer to this question is that the judge having dismissed one charge as she did, there appears to be a significant likelihood that she will now dismiss the second and third charges (serious criminal charges) for reasons that the DPP (rightly) considers, for the reasons stated herein, to be misguided.

### ii. The Value of the Drugs

**27.** The value of the drugs in issue was raised before the court. However, the court does not have the full facts before it and does not have the details of what was mentioned in submission was an undercover Garda operation done in Sheriff Street, Dublin. So the introduction into the submissions of the value of the drugs in question is, with respect, of no relevance to the narrow issue on which the case stated is focused.

### iii. Chronology/Delay

**28.** A chronology of events was prepared at the instruction of the learned District Judge. However, this was not a case where there was an application to dismiss on grounds of delay. The District Court has a clear jurisdiction to dismiss on grounds of delay. But no application to

dismiss on this ground was before the District Court. The application was to amend two charge sheets and, in that context, the decision of the District Judge to compel evidence of a particular kind does not render that evidence relevant. The court notes that there was also reference by the defendant to the need for swift justice, but that is not the matter that was before the learned District Judge.

iv. Findings of Fact

**29.** As in any case stated, it is the learned District Judge who makes (binding) findings of fact. However, the parties are not bound by any assertion by the District Judge as to their relevance or as to the application of the law to those facts.

v. Motivation of District Court Judge

**30.** It may be, as the defendant indicated, that the learned District Court Judge was to ensure that the PULSE system is kept up-to-date and, to some extent, to 'mark the cards' of An Garda Síochána in this regard. However, these are criminal proceedings and the District Court is not exercising a supervisory jurisdiction over the PULSE system; and criminal proceedings cannot be used as a vehicle through which to seek to assert such a jurisdiction.

vi. Prejudice

**31.** It will be recalled that O.38(3) of the District Court Rules, under the heading "Court's Discretion" provides as follows:

> "*Provided, however, that if in the opinion of the Court the variance, defect or omission is one which has misled **or** prejudiced the accused **or** which might affect the merits of the case, it may refuse to make any such amendment and may dismiss the complaint either without prejudice to its being again made, or on the merits, as the Court thinks fit; or if it makes such amendment, it may upon such terms as it thinks fit adjourn the proceedings to any future day at the same time or at any other place"* [Emphasis added].

**32.** Counsel for the defendant indicated at the hearing of the application that it was *not* sought to rely on the prejudice ground of the above-quoted text but rather on the "*might affect the merits of the case*" limb of same. However, even if such a possibility presents (and the court does not see how it could, but even if it does) how would that possibility not be cured by amendment?

vii. Deference

**33.** It has been suggested that the District Judge's exercise of judicial discretion is a matter with which the court should be very slow to interfere. In this regard the court has been referred to the recent comments of Kennedy J. in the judgment of the Court of Appeal in *DPP v. CB* [2021] IECA 89. The court has been furnished with a copy of that judgment which is marked 'Unapproved' and admits to being slightly at a loss as to the extent to which it is to rely on the wording of an 'Unapproved' judgment which the Court of Appeal, by so marking its judgment, presumably feels free to amend to at least some extent before it becomes 'Approved'. (For the avoidance of doubt, the court makes no criticism of counsel that the court has received the 'Unapproved' judgment; they can only hand in whatever judgments have become available). Assuming no (or at least no relevant substantial) changes are made to the judgment of Kennedy J., she observes, at para.45 of her judgment for the Court of Appeal, that:

> "*It is now well established by the authorities that this Court should be slow to intervene in the exercise of judicial discretion and should do so only when the decision was made on an incorrect legal basis or was clearly wrong in fact*".

**34.** As it is for the Court of Appeal, the defendant here contends, so it is for this Court.

**35.** A number of points fall to be made in this regard:

– first, the above quoted observation cannot be seen and applied without regard to the context in which it is made. *CB*, like many other cases concerned with corroboration warnings, indicates that there is a strong contrast to be drawn between, on the one hand, the usual errors of law that are dealt with in the Court of Appeal in conviction cases and, on the other hand, decisions

whether or not to give a corroboration warning to a jury. In the latter case, there is clear cause for deference because it is well-known that trial judges will consider the decision as to whether to give such a warning having heard the live evidence in the case, as tested in cross-examination; that is why it differs from other situations that might arise in conviction appeals.

– second, it follows from the foregoing that Kennedy J.'s observation does not really apply to the situation of the type here presenting which does not ordinarily require an assessment of evidence (and while there was evidence here, the other authorities that have been opened to the court and considered above indicate that this is unusual in an application to amend).

– third, even if Kennedy J.'s comment was applicable to the within case (and, again, the court does not see that it is), Kennedy J. herself acknowledges that the deference given to the exercise of judicial discretion on the part of a trial judge can be interfered with where that exercise is done on an incorrect legal basis or was clearly wrong on fact – and here the decision was, unfortunately, made on an incorrect legal basis.

– fourth, this is a consultative case stated in which the learned District Judge has posed to the court the question, "[A]*m I correct in deciding to exercise my discretion in refusing to make the amendments sought?*" These are not judicial review proceedings in which the court would distinguish between errors made within/without jurisdiction. There is no distinction of such kind made in cases stated. The question that the learned District Judge has posed is correct, it is similar to the question that was posed in *Evans*, and it is a question that the court may properly answer.

– fifth, further to the last point, the court notes that O'Neill J.'s answer to the fourth question posed in *O'Brien and Royal*, "[D]*id I…have discretion to dismiss the charges as against both Defendants having given consideration* [to] *the particular circumstances of this case*?", O'Neill J. did not hesitate to answer. "*In general, yes. However, in the absence of any potential prejudice being suffered by the defendants…and the fact that the amendments did not affect the merits of the case, the charges should not have been dismissed*". So clearly it is open to this Court in these proceedings, as it was to O'Neill J. in *O'Brien and Royal*, to consider whether the discretion of the learned trial judge was exercised correctly. The learned District Judge has enquired of the court whether she was correct and the court is entitled in law to answer the

enquiry posed. And law aside (and one cannot set the law aside) it would be discourteous not to provide some form of answer.

viii. *Holemasters*

**36.** The court has been referred to *Allen v. Irish Holemasters Ltd* [2007] IESC 33. That was a case where, in May 1997, the plaintiff's husband, in the course of his employment, was driving a van the property of the defendant when it collided with a truck, yielding personal injuries from which the husband died. A personal injuries action ensued. In 2004, following on the receipt of expert evidence, the plaintiff sought leave to amend the statement of claim in the light of same. The defendant opposed the amendment alleging delay, prejudice and that the new claim sought to be made was statute barred. The High Court granted leave to the plaintiff to amend the statement of claim as sought. The defendant appealed unsuccessfully against that order. It was indicated by Finnegan J. in that case, *inter alia*, that if delay is not justifiable or excusable then that is a factor to be taken into consideration as part of the matters to be weighed in deciding whether or not the court will allow amendment.

**37.** *Holemasters* is obviously a very different type of case from the proceedings that have led to the within case stated. Civil cases are not argued with an eye to whether a particular proposition also holds good in the criminal realm; and civil judgments are not written with an eye to whether a particular proposition also holds good in the criminal realm. So when civil cases are not argued that way and civil judgments not written that way, it follows that civil law propositions cannot lightly be imported into the criminal realm. *Holemasters*, fundamentally, is a case relating to the possibility that the proposed amendment of claim was perceived by the defendant as a means whereby proceedings that were statute-barred could be brought. Here, there is no question of the statute of limitations applying (the offence is indictable), there is no fresh claim/complaint being made, and there is no authority in case-law for the proposition that delay in making an amendment application *per se* will operate to defeat an amendment application of the type here brought.

ix. Nullity

**38.** Reliance was sought to be placed on O.38.1(4) of the Rules of the District Court which provides, under the heading "*No offence disclosed/No appearance*" that "*Where the Court is of*

*opinion that the complaint before it discloses no offence at law, or if neither the prosecutor nor accused appears, it may if it or thinks fit strike out the complaint with or without awarding costs.*" This Rule, with respect, has no relevance to the within matter: the learned District Judge made no findings in this regard, no arguments were made in this regard, there is no finding that O.38.1(4) applies, and the case stated does not raise this issue for the court to answer. The case stated concerns an application to amend made under O.38.1(2) and the case stated relates to that application, not with the issue of whether or not the charge that has been laid is a nullity.

**J**

**Conclusion**

**39.** In the within case stated, the learned District Judge poses the following question: "*In the circumstances of the present case, am I correct in deciding to exercise my discretion in refusing to make the amendments sought?*" For the reasons set out above, the court's answer to the question posed by the learned District Judge is a respectful 'no'.