Neutral Citation Number: [2007] IEHC 46

THE HIGH COURT

[2006 No. 177 SS]

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1857 (19 AND 20 VICT. C. 43.) AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961 (No. 39 OF 1961)

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR/APPELLANT

AND

ROBERT CANAVAN

ACCUSED/RESPONDENT

Judgment of Mr. Justice Declan Budd delivered on 6th day of February, 2007

Introduction

1. The background and chronology of this case is important for an understanding of how the issues in this case came into existence and evolved. It is an interesting example of how, during the progression of a case through the court process, the focus of attention may move from the initial question of whether there had been adequate observation of the respondent, who was being prosecuted for driving while under the influence of alcohol during the period before he was subjected to an intoxilyser machine test. The Judge of the District Court made up his mind on the evidence about the inadequacy of the nature and length of the periods of observation attested to by the three Gardaí involved and decided, without hearing the submissions of counsel appearing for the accused/respondent or, more importantly, without inviting or hearing any submission on the facts and the law from the solicitor representing the Director of Public Prosecutions. Not surprisingly in the light of the seemingly plausible evidence given by the three Gardaí in respect of their observation of the accused, the Director gave instructions to seek a Case Stated and notice of this intention was duly given. A Case Stated was drafted but there was a lengthy period when the draft went to and fro between the Office of the Chief Prosecution Solicitor and the respondent's solicitor in respect of conflicts as to what should be included in the Case Stated. Eventually a draft Case Stated was submitted to the Judge of the District Court and on 18th January, 2006 it would seem that he amended the draft in his handwriting and then appended his signature to the Case Stated and it was transmitted to the Office of Chief Prosecution Solicitor. However, such a Case Stated is still governed by the wording of s. 2 of the Summary Jurisdiction Act, 1857, as amended by s. 51 of the Courts (Supplemental Provisions) Act, 1961, which I propose to quote so that the arcane nature of the procedure may be appreciated and there may be an understanding of the basic conflict of important principles which lurk behind the issues which arise in this case.

2. It may also serve as a warning of the pitfalls and oubliettes which were created by some 19th century legislation. These anachronistic procedural hurdles may be well known in legal circles but from a survey of the many cases in the Reports since 1857, it becomes quite clear that the stringent time limits set out in this section are a legal heffalump-trap for the unwary. This is particularly so with regard to service on the respondent of notice in writing of such appeal with a copy of the case so stated and signed (by the District Court Judge), having to be notified to the other party to the proceeding in which the determination was given hereinafter called "the respondent". The snag is that the moving party called "the appellant", shall, within three days after receiving such case, transmit the same to the court named in his application, but first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, hereinafter called "the respondent". Over the centuries time after time in these islands appellants have been caught out by this pitfall and disappeared into an oubliette created by this strict time limiting prerequisite. No doubt the reasoning for this stringent time limit is that the accused/respondent has probably left the District Court thinking joyfully that he has been acquitted before the District Court and accordingly the matter of the prosecution against him for driving while allegedly having an amount of alcohol in his body over the prescribed limit has been concluded happily from his point of view. The need for stringent time limits is explained by the fact that the respondent is under the impression that he has been acquitted and so it is imperative that he be notified expeditiously. Hence either party, if dissatisfied with the determination as being erroneous in point of law, may apply in writing within three days (now fourteen days) after the same to the Justice to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of one of the superior courts of law to be named by the party applying. While I have set out the gist of s. 2 and the relevant part of s. 51, I quote them in full for clarity and ease of reference. For it is important to understand how this arcane section still produces a continual stream of cases, many of which derive from the carnage on the roads which is often ascribed to persons driving under the influence of intoxicating substances. No doubt it is because of the balance involved in the deep principles underlying this section that there has been reticence and perhaps justified reluctance in attempting to draft and then to enact a more flexible and less stringent yet fair and expeditious regime.

S. 2 of the Summary Jurisdiction Act, 1857

> After the Hearing and Determination by a Justice or Justices of the Peace of any information or Complaint which he or they have a power to determine in a summary Way, by any Law now in force or hereafter to be made, either Party to the Proceeding before the said Justice or Justices may, if dissatisfied with the said Determination as being erroneous in point of Law, apply in Writing within Three Days after the same to the said Justice of Justices, to state and sign a Case setting forth the Facts and the Grounds of such Determination, for the Opinion thereon of One of the Superior Courts of Law to be named by the Party applying; and such Party, herein-after called "the Appellent," shall, within Three Days after receiving such Case, transmit the same to the Court named in his Application, first giving Notice in Writing of such Appeal, with a Copy of the Proceeding in which the Determination was given herein-after called the Respondent.

S. 51 of the Courts (Supplemental Provisions) Act, 1961

> 51. —(1) Section 2 of the Summary Jurisdiction Act, 1857, is hereby extended so as to enable any party to any proceedings whatsoever heard and determined by a justice of the District Court (other than proceedings relating to an indictable offence which was not dealt with summarily by the court) if dissatisfied with such determination as being erroneous on a point of law, to apply in writing within fourteen days after such determination to the said justice to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the High Court.
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> (2) Upon the making of an application under section 2 of the Summary Jurisdiction Act, 1857, as extended by subsection (1) of this section, for a case stated, the determination in respect of which the application is made shall be suspended—

(a) where the justice of the District Court to whom the application is made grants the application, until the case stated has been heard and determined, and

(b) where he refuses to grant the application, until he so refuses.

(3) The references in sections 6, 8, 9, 10 and, 14 of the Summary Jurisdiction Act, 1857, to that Act shall be construed as references to that Act as extended by subsection (1) of this section.

(4) In section 2 of the Summary Jurisdiction Act, 1857, and in this section, "party" means any person who was, entitled to be heard and was heard in the proceedings in which the determination in respect of which an application for a case stated is made was given.

3. Thus the original issue was the adequacy and length of the period of observation. The respondent's advisers then moved their ground to a further spearhead to their attack by couching this submission on the basis of the delay on the part of the appellant in bringing the Case Stated before the court. Since the matter first came before the High Court there has been a further shift in the respondent's line of retaliatory attack in that there is now an issue before the court which is a challenge to the jurisdiction of this Court as to the hearing of the Case Stated on the basis that the appellant has produced two Cases Stated before the court and that the true Case Stated is that signed by the judge of the District Court on 18th January, 2006 after the District Court Judge had made handwritten amendments and apparently then signed the Case Stated and this was then transmitted to the Office of the Chief Prosecution Solicitor and a copy of this was then sent on 6th February, 2006 to the respondent's solicitor and referred to as "copy Case Stated signed by Judge Dunne … ". There was no suggestion then in that letter that this was a draft only. It is contended by the respondent's counsel that this amended and signed Case Stated is the authentic Case Stated and that the appellant then failed to comply with the strict prerequisite of service on the respondent within the strict three-day period before the necessary transmission to the Central Offices. As against this submission the appellant's contention is that the Case Stated was not in fact completed until February 9th, 2006 when the District Court Judge was requested to sign a typed up copy of the Case Stated, including his handwritten amendments in typed form, and this copy Case Stated was transmitted in compliance with all time requirements. It is submitted on behalf of the appellant that this Court has jurisdiction now to deal with the matter.

4. Thus there are at least three contentious aspects in this case. The first is the question of compliance with the strict prerequisite in s. 2 of giving notice to the respondent of the Case Stated. The second matter of concern is in respect of the delay in the completion of the Case Stated. The third element is the substantive legal point with regard to the adequacy of and appropriate period of time for the observation of the respondent between his arrest and the intoxilyser testing. After preliminary skirmishes and discussions it became clear that the first issue to be addressed is whether this Court has jurisdiction to deal with the Case Stated. In short, the court should tackle as a preliminary issue the question of which of the Cases Stated is the true and actual Case Stated and this should be done against the background that the evidence in the affidavits points to the fact that if the Case Stated signed on 18th January, 2006 is the authentic Case Stated, then there was a failure to comply with the strict time limit for giving notice to the respondent of the Case Stated being transmitted.

The background and chronology of the Case Stated

5. By summons dated 2nd December, 2003 the respondent herein was charged with an offence contrary to s. 49 of the Road Traffic Act, 1961 as amended. The offence was alleged to have occurred on 1st October, 2003. The summons was served on the respondent and was returnable before Court 52, Dublin Metropolitan District Court, on 19th February, 2004. The complaint was subsequently listed for hearing before District Court Judge Cormac Dunne on 18th October, 2004 approximately one year after the date of the alleged offence.

6. At the conclusion of the prosecution case, counsel on behalf of the respondent indicated that he wished to make an application for a direction of no case to answer according to the respondent's affidavit sworn on 5th May, 2006. Before his counsel had an opportunity to make any further submission, the learned District Court Judge indicated that:-

> "there was no need for counsel to continue and the learned District Judge proceeded to dismiss the charge against me because he was not satisfied that the correct procedures had been followed; the learned District Judge referred to the fact that observation had occurred at the road side during the fluidity of an arrest, in the back of a patrol car, during the transition from the patrol car to the station and when my details were being taken by the gaoler in the station."

7. It appears that a notice of application to state a case dated 29th October, 2004 was filed in the Dublin District Court Chief Clerk's Office by the appellant on the same date. A copy of this notice was sent to the solicitor, who had acted for the respondent in the District Court under cover of letter dated 3rd November, 2004.

8. A draft appeal by way of Case Stated was sent by the Chief Prosecution Solicitor, acting for the appellant, to the solicitor for the respondent under cover of letter dated 1st December, 2004 and then correspondence ensued between the solicitors representing the D.P.P. and the respondent about the need for the draft content of the Case Stated to reflect the evidence that had in fact been given in the case on behalf of the prosecution. By fax and letter dated 17th January, 2005 these suggested amendments were furnished to the appellant's solicitor and were acknowledged by letter dated 18th January, 2005 in which it was indicated that once settled by counsel, the draft appeal would be forwarded to Judge Dunne for his comments. The respondent's solicitor received a letter from the appellant's solicitor which was dated 11th April, 2005 enclosing the draft appeal by way of Case Stated as amended. However, the appellant's solicitor had failed to incorporate into the draft appeal many of the amendments previously suggested on behalf of the respondent and accordingly the respondent's solicitor wrote by letter dated 29th April, 2005 suggesting that the proposed amendments be made and suggesting that, in the absence of agreement, then the matter should be listed before the District Court Judge to resolve the differences as to the facts to be recited in the draft Case Stated. There was further correspondence between the solicitors and then by letter dated 15th June, 2005 the appellant's solicitor wrote to Judge Dunne enclosing the draft appeal by way of Case Stated. By letter dated 21st June, 2005 the respondent's solicitor wrote to the appellant's solicitor suggesting that a copy of the letter from the respondent's solicitor to the respondent dated 29th April, 2005 which suggested amendments to the draft case should be furnished to Judge Dunne along with the draft appeal by way of Case Stated. It was also suggested that the matter should be listed before Judge Dunne for the purpose of legal argument as no submissions were heard from counsel for the respondent during the hearing of the case. It was also brought to the attention of the appellant that it was a source of considerable concern and anxiety to the respondent that this matter remained outstanding in circumstances where the charges had been dismissed approximately eight months previously. By letter dated 29th June, 2005 the respondent's solicitor wrote to the District Court Judge enclosing a copy of the letter dated 29th April, 2005 which set out the respondent's concerns in relation to the draft appeal by way of Case Stated. Neither the respondent nor his solicitor heard anything further in respect of the proposed Case Stated until February, 2006, about seven months later. Then under cover of a letter dated 6th February, 2006 the respondent's solicitor received from the Principal Prosecution Solicitor for the District Court Section in the Office of the Director of Public

Prosecutions a letter referring to re: DPP v. Robert Canavan, and enclosing therewith

> "Copy Case Stated signed by Judge Dunne for your information. I am now passing the file to our judicial review section. Should you have any further queries please contact Michael Brady, head of the judicial review section."

9. I note in passing that this is an important letter. There is no reference to "draft" in the sentence and, from the fact that the file was being sent on to the judicial review section, this would appear to be an acknowledgement that the matter was passing from the District Court Section on to be processed in the High Court on foot of the Case Stated. I should make it clear that exhibit RC 11 in the first affidavit sworn by Robert Canavan on 5th May, 2006 included the letter dated 6th February, 2006 to Shalom Binchy, the respondent's solicitor, together with the copy Case Stated which is amended in handwriting by the learned District Court Judge by the inclusion at para. 7 of two insertions. For clarity I propose to set out para. 7 with each of the two insertions underlined to indicate what these two amendments were and where they were inserted.

> "7. I found as a matter of fact that the observation of the respondent at the roadside during the arrest and in the dark and in the fluidity of the arrest in the back of the patrol car and during the transition from the patrol car to the Station and while the respondents details were being taken was inadequate and not sufficiently precise and controlled for this purpose. I therefore dismissed the charge."

10. After para. 8, which sought the opinion of the High Court as to whether the learned District Court Judge was correct in law in dismissing the charge against the respondent for the reasons stated, there appears the signature of Cormac Dunne, Judge of the District Court dated this 18th January, 2006.

11. This Case Stated, with or without a corresponding notice of appeal, was never served on the respondent in any fashion. Indeed, it was submitted on behalf of the respondent that this Case Stated may never have been transmitted to the Central Office of the High Court.

12. A further document purporting to be an appeal by way of Case Stated was signed subsequently by the learned District Court Judge in similar terms with his previous amendments all typed up and this was apparently signed on 9th February, 2006. This document purporting to be an appeal by way of Case Stated signed and dated 9th February, 2006 was sent to the solicitors for the respondent and a copy was handed to the respondent on 16th February, 2006.

13. A replying affidavit was sworn on 22nd June, 2006 by Tricia Harkin of the Chief Prosecution Solicitor's Office about the efforts made to bring the drafting of the Case Stated to a conclusion and at para. 8 she said that on 12th January, 2006 a message was received from the Courts Service stating that they intended to meet with Judge Dunne on 18th January, 2006 to raise the matter of the draft Case Stated with him. At para. 9 she avers that

> "On 18th January, 2006 a draft of the Case Stated with amendments was received from Judge Dunne indicating that once the amendments had been made, he would be in a position to sign the final draft."

14. During submissions I enquired about this paragraph and a fax copy letter dated 18th January, 2006 was handed up although it was never produced on affidavit. The letter is dated 18th January, 2006 from the Chief Clerk of the Dublin Metropolitan District Court and is addressed to the prosecution solicitor in the Office of the Director of Public Prosecutions dealing with the District Court and states:-

> "I enclose draft Case Stated in the above matter amended by Judge Dunne. He has indicated that once the amendments have been made he will be in a position to sign and date the final draft."

15. There is no sworn explanation for the fact that the learned District Court Judge had signed the Case Stated presumably after making his amendments on 18th January 2006 nor is there any sworn averment to the effect that he regarded his signature as being put on the document as it were in escrow. Moreover the addressee of this letter, the Prosecution Solicitor in her letter dated 6th February, 2006 to Shalom Binchy made no reference to the copy Case Stated signed by Judge Dunne being merely a draft or that the learned District Court Judge had indicated that he was not signing the Case Stated as being his amended and adopted Case Stated as one would have expected if, despite having signed his signature, he did not intend this to authenticate the Case Stated.

16. The experienced and learned District Court Judge is presumably well aware that his signature is what authenticates the Case Stated as being his Case Stated and it would certainly be a cause of uncertainty and anxiety in the future if there could be any sort of reservation about the signing of a Case Stated as the manner of authentication and adoption of the Case Stated by a District Court Judge.

17. A party who has carriage of a Case Stated has a duty to bring on the proceedings as expeditiously as possible (see *Brown v. Donegal County Council* [1980] I.R. 132 at 145 per Henchy J.). An appellant by way of Case Stated has a specific obligation to prosecute his appeal diligently, not least because the respondent left Court after his acquittal and the prosecution is seeking to redress this decision.

The Signing of the Case Stated

18. I have explained above why the completion of the draft Case Stated by the amendments thereto and the signing thereof by the District Court Judge seemed to me to be the completion of the authentication of the Case Stated. There is considerable authority for the proposition that s. 2 must be strictly construed. For example in *D.P.P. v. Galvin* [1999] 4 I.R. 18 the D.P.P. appealed an acquittal in the District Court by way of Case Stated. The judge who heard the case in the District Court was made a Circuit Court Judge before he signed the Case Stated. Accordingly he signed the Case Stated as "Judge of the Circuit Court" and not, as required by s. 2 of the 1857 Act (as amended), as "Judge of the District Court." Geoghegan J., in the High Court, ruled that it was imperative that at the time of signing the Case Stated the judge continued to be a judge of the District Court. Not only was this implicit in the words of the statutory provision, but it was also even necessary for the case to be sent back to the same judge for determination consequent upon the High Court's ruling. If the judge is no longer a judge of the District Court, he would not have jurisdiction to make a final determination in the case.

19. In *Fitzgerald v. Director of Public Prosecutions* [2003] 3 I.R. 247 Hardiman J. stated that in his view the jurisdiction to entertain a Case Stated to the High Court by way of appeal against acquittal required to be strictly construed. He added that the issue of whether a request is frivolous will only arise if the statutory preconditions of a valid application for a Case Stated are met, namely that it is within the time limits laid down and that it relates to dissatisfaction with the decision "in point of law". In the passing I should mention that it was submitted on behalf of the respondent, Robert Canavan that the District Court Judge dismissed the case

on the merits having made a finding of fact and on that basis no appeal could lie to the High Court. I would not accept that proposition as prevailing in the present case as there is a Supreme Court decision *Rahill v. Brady* [1971] I.R. 69 to the effect that where there is a mixed question of law and fact which involves the construction of a statute then the court does have jurisdiction. The *Rahill* case was as to whether a particular occasion constituted "a special event" within the meaning of s. 11 of the Intoxicating Liquor Act 1961 and it was held that it was open to review in an appeal by way of Case Stated as this was not a question of fact only but a decision on a mixed question of law and fact involving the construction of a statute. In the present Case Stated the issue is also a mixed question of law and fact as the court has to extract from the relevant statutes, statutory instruments and such other texts as give guidance, as well as the case law in such cases as *D.P.P. v. Damien McNiece* [2003] 2 I.R. 614 in which Murray C.J. deals with the issues of adequacy of observation. In the recent case of *D.P.P. v. Walsh* [2005] IEHC 77 Macken J. sitting in the High Court gave a helpful review of cases with regard to how much continuous period of observation is required immediately prior to a suspect being breath tested by means of an intoxilyser apparatus in the case of a prosecution brought pursuant to s. 49(4) of the Road Traffic Act, 1961 as amended by the Road Traffic Act 1994. Macken J. held that the respondent in that case would only have been entitled to succeed on the grounds he invoked in his application for a direction and which he now also had invoked and contended for, which involved his establishing in evidence the practice which the respondent contends is determinative of the correct procedures, whether by cross-examination of the Gardaí, witnesses or independently. Since there was no such evidence adduced by the respondent and no cross-examination of the Garda, she concluded that the presumption established by s. 21 of the Act of 1994 concerning the facts appearing in the s. 17(2) statement was not rebutted. In the foregoing circumstance she found that the District Justice was not justified in dismissing the charge against the respondent on the basis that the prosecution had failed to establish, in accordance with the purported content of the Garda Training Manual, that the respondent had been observed for a continuous period of 20 minutes immediately prior to providing the required breath specimens. In consequence, the answer to the question posed by the District Judge was in the negative, as held by Macken J. I have mentioned that case because in the present case on the facts set out in the Case Stated as to the observation of the respondent by each of the several Gardaí of him, a view might have been formed from the passages in the Case Stated that there had been quite adequate observation of him prior to the request to undergo the intoxilyser test. Particularly as the observation period is to ensure that the suspect takes nothing by mouth which will detract from the accuracy of the test.

20. As for the crucial matter of the signing of the Case Stated by the District Court Judge on the 18th January, 2006 I think that some assistance can be drawn from the case of *Whelan v. Judge Kirby and the Director of Public Prosecutions* at [2005] 2 IR 30 at pp. –47-50. *Whelan's* case concerned s. 14 of the Courts Act, 1971 which provides as follows:-

> "In any legal proceedings regard shall not be had to any record (other than an order which, when an order is required, shall be drawn up by the district court clerk and signed by a justice or a copy thereof certified in accordance with rules of court) relating to a decision of a justice of the District Court in any case of summary jurisdiction."

21. That case concerned an application by the appellant's solicitor for inspection by an expert of the intoximeter apparatus which had been used to obtain a sample of the appellant's breath in the proceeding brought against him. The first named respondent District Court Judge was invited by the appellant's solicitor to read correspondence dealing with the requests for inspection but refused to do so and fixed a hearing date for the 5th November, 2001, which meant he was refusing the application for inspection. On the appeal on the substantive issue in the case the Supreme Court held that the respondent District Court Judge was wrong to refuse to entertain the appellant's application regarding inspection of the intoximeter, particularly in view of the fact that the Medical Bureau did not object to the inspection, provided that the court ordered this by way of an order for inspection. The Supreme Court held that there is jurisdiction in the District Court to make any order necessary for the fulfilment of the constitutional right to a fair trial and fair procedures. The sixth finding by the Supreme Court has relevance to the present situation. Section 14 of the Courts Act 1971 requires the District Court to have regard to the record. By bespeaking and exhibiting in court a certified copy of the order of November the 5th, 2001, which recorded no conviction against him, the appellant satisfied the *prima facie* burden of showing that there was an error on the face of the record. By producing a second certified copy of the order without providing any explanation for the difference between it and the original order, the second named respondent had failed to produce any evidence to displace the record. At p. 49 Fennelly J. said:-

> "Here there are two candidates for the office of record. The second respondent has simply produced a second certified copy order without any attempt to explain the discrepancy.
>
> I am satisfied that, in the circumstances of this case, the applicant had discharged, to the required extent, the burden of proving the record of the court. The burden of proof had shifted to the second respondent. It might well have been possible to discharge that burden by proof that there had been some error in transcription of the original order, but that the corrected copy truly replicates the original. Both are, after all, in principle, copies of an original, which exists in electronic form. The insertion of the crucial corrective statement by a manuscript interpolation clearly calls for some explanation. It would clearly be reprehensible to insert such an interpolation for the purpose of correcting an error in an order already made. No evidence has been produced that the new copy was established by virtue of the slip rule in the District Court Rules.."

22. He went on to conclude that the applicants in the case had satisfied the *prima facie* burden of showing that there was an error on the face of the record, by producing a record of the District Court order to which s. 14 of the 1971 Act applies. The second named respondent had failed to produce any evidence to displace that record. In the present Case Stated the accused respondent has produced the Case Stated which was sent to his solicitor and which was sent to her as the Case Stated signed by the District Court Judge on the 18th January, 2006. Why would the District Court Judge have amended and then signed the Case Stated if not to authenticate it as the Case Stated? If the State appellants wished to challenge the authenticity of this newly signed Case Stated then it behoved them to produce sworn testimony to support their contention.

Myriad of Cases supporting the strict construction of the statutory prerequisite

23. There are many cases supporting the strict construction of the prerequisite of giving notice to the respondent before transmitting the Case Stated to the Central Office of the High Court. In *D.P.P. v. O'Connor* (Unreported, High Court, 9 May 1983) Finlay P. held that a letter which enclosed a copy of the Case Stated and sought an endorsement of acceptance of service did not constitute sufficient compliance with the provisions of s. 2 of the Act of 1857. He concluded that he did not have any discretion in relation to compliance by the applicant with the terms of the section and he said that it would do violence to the meaning of the phrase "notice in writing of such appeal" to hold that the statutory requirement had been complied with in the circumstances. Yet again in *D.P.P. (Murphy) v. Regan* [1993] ILRM 335, where the appellant had failed to give notice in writing of the appeal with the copy of the Case Stated signed by the District Court Judge to the other party to the proceedings within three days of receiving the case, O'Hanlon J. held that there was no power to extend the time limit for this purpose by virtue of the rules of court. He referred to the fact that no effort had been made to effect personal service on the respondent and he said that it would "extend the scope of previous decisions considerably were he to hold that the service effected in the case before him was sufficient," where a copy of the Case Stated and

the notice of appeal had been served on the solicitors who had represented the respondent at the initial prosecution in the District Court. Accordingly, O'Hanlon J. dismissed the appeal by way of Case Stated. By contrast and to underline the strictness of the construction of the statutory prerequisite of first giving notice in writing of such appeal, with a copy of the Case so Stated and signed, to the other party in the proceeding, O'Hanlon J. concluded that he would have no hesitation in enlarging the time for transmission of the Case Stated for transmitting it to the Central Office in order to remedy what he termed the "slight oversight" which had occurred. This was because that time limit specified in s. 2 of the 1857 Act was now also dealt with by O. 62, r. 1 and comes within the ambit of O. 122, r. 7 which gives the court jurisdiction to enlarge the time for doing any act or taking any proceedings where it is appropriate to do so. This distinction had previously been underlined by two cases inform the 1970 I.R. as being *Thompson v. Curry* [1970] IR 61 and *Attorney General v. Shivnan* at p. 66. Both cases concern s. 2 of the Summary Jurisdiction Act, 1857. On 4th February, 1963 District Justice Kenneth Reddin, on the application of the complainant in *Thompson v. Curry*, stated and signed a case for the opinion of the High Court pursuant to s. 2 of the Summary Jurisdiction Act 1857 (as amended) and the complainant received the case on the same day. On 7th February, the complainant transmitted the case to the Central Office of the High Court and on 9th February, he gave the defendant notice of the appeal by Case Stated. Section 2 of the Act of 1857 provides that, where a case is so stated, the appellant

> "Shall, within three days after receiving such case, transmit the same to the court named in its application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceedings…"

24. Davitt P. held that the jurisdiction to hear the Case Stated is a statutory one only. The complainant has not complied with the procedure laid down by the statute. He said at 63:- "I accept the submission, made on behalf of the defendant, that in these circumstances I have no jurisdiction to hear the Case Stated and, therefore, the question posed in it will be answered accordingly." On appeal to the Supreme Court (Lavery, Haugh and Walsh J.J.) the Supreme Court per Walsh J. held that the observance of the sequence of events required by s. 2 of the Act of 1857 was a condition precedent to the exercise by the High Court of its jurisdiction and that the terms of O. 62, r. 5, were *ultra vires* the Superior Court Rules Committee insofar as those terms purported to alter the sequence of events required by s. 2 of the Act of 1857.

25. The case of *Attorney General v. Shivnan* is helpfully noted immediately after *Thompson v. Curry* at page 66. The sequence of events required by s. 2 was observed fully but the ultimate lodgement was late in that while he had sent a copy of the Case Stated and notice of the appeal by Case Stated to the Attorney General, the respondent who received the documents on 7th May, was unfortunate in that when he sent the Case Stated to his town agent for the purpose of having it transmitted to the Central Office of the High Court, the case was received by the town agent on Friday 8th May, and he lodged it in the Central Office on Monday 11th May, 1964. At the hearing of the case in the High Court on 12th February 1965 *Shivnan's* appeal by way of Case Stated was dismissed, but on his appeal to the Supreme Court, the court held that the necessary extension of time (pursuant to O. 108, r. 7 of the Rules of the Superior Courts 1962) for transmitting the Case Stated to the High Court in place of the three days after receipt of the case as allowed by O. 62, r. 1, of the Rules of 1962 and the order of the Supreme Court directed that the Case Stated should be remitted to the High Court for hearing. This underlines the distinction in that there is no power to enlarge the time for fulfilling the prerequisite of giving the appropriate notice to the respondent but there is more flexibility as the Superior Courts Rules can be applied to enlarge the time for transmission to the Central Office.

26. By coincidence Brian Dempsey S.C. was in court and was clearly impressed by the forceful and eloquent arguments of Feichin McDonagh S.C. who relied strongly on these two cases which had been reported for the Irish Reports by Mr. Dempsey. Counsel for the respondent certainly made firm and trenchant arguments in response to mild suggestions from the bench that perhaps such arcane points and such strict construction of the statute may thwart public demand for safer roads and stringent prevention of drunken driving and stern retribution for the driving of a lethal missile while intoxicated. It is important to set out and acknowledge the reasons why there is the strict interpretation of the provisions of s. 2, as to the notification to the respondent personally as a prerequisite to the jurisdiction of the High Court. This wording has been construed time and again since 1857 and the intention of the legislature is clear. The interpretation has been stringent and consistent by the courts over the years to the effect that notification to the respondent must be previous to transmission and is a draconian prerequisite, *a sine qua non* without which this court lacks jurisdiction, however appalling any particular drunken driving offence is alleged to have been. Any change in the law on this is a matter for the Executive and the Legislature, bearing in mind the deep issues underlying the superficial conflict of interests.

27. Counsel for the respondent used a colourful argument about the recognition of a duck as a duck by its walk, its appearance and its quack, by comparing this to the amended Case Stated as having been altered and adopted by the District Court Judge, and signed by him on 18th January. He used the simile to make his point that the Case Stated was what it appeared to be. He then submitted that the letter dated 6th February, 2006 from the Chief Prosecution Solicitor's Office enclosing the Case Stated made it even more clear that this was being treated as the Case Stated, having been amended and signed by the District Court Judge.

28. Finally there has been an evolution of the issues in conflict in this case, I trust that the time allowed, when this case came into court first before me on 23rd October, 2006 and written submissions on that day made the first mention of any application on foot of alleged non-compliance with the prerequisite of giving notice to the respondent, has prevented any party being taken by surprise. It emerged that the practical course was to have the court decide as a preliminary issue as to whether there had been adequate compliance with the mandatory prerequisites set out in s. 2. Since I have come to the conclusion that the case stated was completed and signed on 18th January 2006, there was a failure to comply with the statutory prerequisite stipulated by s. 2, of giving notice in writing of the appeal with a copy of the Case Stated signed by the District Court Judge to the other party to the proceedings within three days of receiving the case, this court has no jurisdiction to hear the Case Stated.