Neutral Citation Number: [2009] IEHC 549

THE HIGH COURT

JUDICIAL REVIEW

2009 112 JR

BETWEEN

KEN BROE

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AND

THE JUDGE OF THE NORTHERN CIRCUIT AND

JUDGE KEVIN KILRANE

RESPONDENTS

JUDGMENT of Mr. Justice Ryan delivered on the 4th day of December, 2009

Introduction

1. This is an application for judicial review seeking orders of prohibition and *certiorari* and declarations in respect of criminal proceedings against the applicant, who has been returned for trial to Letterkenny Circuit Criminal Court on charges under the Non-Fatal Offences against the Person Act, 1997, and the Misuse of Drugs Act, 1977. The events giving rise to the charges took place on the 9th October, 2008 at Letterkenny. The accused was charged with the offences on the 12th October, and 15th October, 2008. Leave was applied for and granted on the 2nd February, 2009.

2. Section 10(2) of the Criminal Justice Act 1984, provides that a person who has been released from detention under s. 4 of that Act can only be re-arrested by order of the District Court or for the purpose of charging him forthwith.

3. The applicant in this case was re-arrested following a period of such detention and charged with offences. He was brought to court and is now facing trial by judge and jury. The trial has been stopped awaiting the outcome of this application in which he is challenging the validity of the charges and the subsequent court process.

4. There was a delay of 3 hours and 45 minutes between the time when the applicant was arrested and when he was charged. During this period the Gardaí were trying to arrange a for a special sitting at the District Court to which they could bring the applicant and they needed to know the venue of the court in order to complete the charge sheet. The applicant's case is simply that the hold-up means that the charge did not happen forthwith, as the subsection provided. In consequence, he argues, the charges and all the proceedings that followed including the return for trial were invalid and void.

5. Paragraph 11 of the grounding affidavit sworn by the applicant's solicitor says:-

> "I am advised and believed that the applicant herein was being detained unlawfully at the time when he was charged with the offences, the subject matter of the proceedings herein. I am further advised and believe that accordingly the applicant has been unlawfully before the courts at all times during the prosecution herein. I say and believe that the second named respondent has no jurisdiction to hear the trial of the applicant herein or to in anyway deal further with the prosecution of the applicant herein and I say and believe that the first named respondent has no power to deal further with the prosecution of the applicant herein on the charges currently before the courts."

6. Paragraph E (5) of the Statement of Grounds says:-

> "Following his release from detention pursuant to s. 4 of the 1984 Act, the applicant was re-arrested and thereafter detained. This arrest and/or detention was contrary to law where he was not immediately charged with any criminal offence or otherwise detained on any lawful basis. His subsequent charging with the offence is the subject matter of the proceedings herein and the criminal proceedings arising therefrom are null and void and of no legal effect where his detention prior to being charged was unlawful."

7. There is no challenge to the facts as deposed by the Gardaí. It is accepted or not disputed that there was no *mala fides* on the part of the Gardaí and that there was no actual difference between what happened to the applicant and what would have occurred if the procedure contended for had been followed, except for the timing of the charge. Another matter that is not in dispute is the reason put forward by the Gardaí for not charging the accused earlier than 12.33 pm on Sunday 12th October, 2008. The Gardaí depose in their affidavits that they had instructions from the DPP to charge the applicant and were in the process of doing so. They had to state in the charge sheet the court at which he was to appear; in order to ascertain the court they made inquiries with the Courts Service and acted as soon as they knew the position.

The Facts

8. On Thursday 9th October, 2008 the applicant was arrested and detained at Monaghan Garda Station under s. 4 of the

Criminal Justice Act 1984, in connection with an assault that caused serious injuries to a young man in Letterkenny. Shortly before he was due to be released, the DPP gave instructions that he was to be charged with a number of offences. When the applicant was released by the Gardaí at 8.48 am on Sunday 12th October, 2008, he was immediately re-arrested for the purpose of charging him, but he was not charged until 12.33 pm, some 3¾ hours later.

9. The chronology of Sunday 12th October, 2008 is as follows.

8.11 am – DPP directed that the applicant be charged with certain offences.

8.48 am --applicant released from s. 4 custody and rearrested by Det. Sgt. Michael Carroll "for the purpose of charging him with assaulting Kristian Shortt at Upper Main Street, Letterkenny on the 9th October 2009, contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997. "I also had directions that Mr. Broe was to be charged pursuant to s. 15 and s. 3 of the Misuse of Drugs Act 1977. It was my intention that Sgt Kelly of Monaghan Garda station preferred these charges upon him" – para. 3 of affidavit of Det. Sgt. Michael Carroll.

8.52 am --Det. Sgt. Carroll "spoke with Sgt. Kelly and requested that he make contact with the District Court Clerk so as to find out what court to prepare the charges for. Sergeant Kelly informed me a short time later that he was having difficulty getting through the out of hours number for the court clerks. Sergeant Stephen Kelly deposed that he was informed by Sgt. Carroll that Kenneth Broe had been released from detention pursuant to the provisions of s. 4 of the Criminal Justice Act 1984 and that he had re-arrested him for the purpose of charging at 8.48 am on the direction of the Office of the Director of Public Prosecutions. Sergeant Carroll requested that "I contact the District Court Clerk and arrange a special court because it was a Sunday and no court was scheduled for that day."

10.00 am –"At some time shortly after 10.00 am Sgt. Kelly informed me that he had got in contact with the court clerk and that he was waiting for her to get back to him in relation to a court venue for a special sitting that day. I had the charge sheet almost prepared, I just needed the court detail but I could not complete this task until I had same.

10.14 am --Sergeant Kelly managed to get through to the Courts Services and "I advised the duty Court Clerk that I had a suspect in custody who had been arrested for the purpose of charging in relation to a serious assault and possession of controlled drug. I requested that she arrange a special sitting of the District Court. The details of the court sitting was also information I needed in order to enter charges on the PULSE system.

12.07 pm – I contacted the District Court Clerk again as I had not received a reply and was advised that I should bring the suspect to the sitting at Ballyconnell District Court on the following day at 10.30 am. Kenneth Broe was informed by myself that I was in contact with the District Court attempting to arrange a special sitting."

12.30 pm – Shortly before 12.30 pm that Sunday 12th October, 2008, Sgt. Kelly informed Detective Sergeant Carroll that the Court Clerk had got back to him and the instruction was that they were to charge Mr. Broe to the Ballyconnell District Court sitting the next morning, Monday 13th October, 2008, at 10.30 am at Ballyconnell courthouse. "I inserted these details on the charge sheet that I was preparing for Mr. Broe and I brought the charge sheet to the cell area where he was charged as set out on charge sheet 809835".

12.33 pm – applicant was charged.

10. Detective Garda Colm McDonagh deposed that during the applicant's time in the cell in Monaghan Garda station, Sgt. Kelly was in contact with the District Court Clerk and that on two occasions while he was visiting Mr. Broe, Sgt. Kelly accompanied him in order to inform Mr. Broe that efforts were being made to arrange a special court sitting for that day.

11. Ms. Margaret Connolly is the District Court Clerk and she says that she was the Court Clerk on duty for out of hours calls for Monaghan District Court on Sunday 12th October, 2008. "I do not have a clear recollection of the particular morning of the 12th October, 2008, and therefore cannot say with certainty what interactions took place by phone between myself and other parties. However I believe that the normal protocol, namely that we follow up a request from An Garda Síochána for a special court as soon as practical was adhered to on this occasion." This is not very informative but it does not in any way contradict what the Gardaí are saying.

12. Relevant dates are as follows.

> **Thursday 9th October, 2008, - 11.45 pm**- applicant arrested and brought to Monaghan Garda station,
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> **Friday 10th October, 2008 - 12.15 am** – applicant was detained under s. 4 of the Criminal Justice Act 1984,
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> Sunday 12th October, 2008 -- set out above.
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> **Monday 13th October, 2008** -- applicant was brought before Ballyconnell District Court on foot of these charges and was remanded in custody.
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> **Wednesday 15th October, 2008** -- applicant was charged with a further offence.
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> **15th January, 2009** -- applicant was sent forward for trial to Letterkenny Circuit Court on the 3rd February, 2009.
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> **2nd February, 2009** -- (nearly four months after the events complained of) these proceedings were instituted when leave was granted pursuant to an *ex parte* application.

13. Some reference to procedure is necessary. Charging a person with a criminal offence begins a transition from investigation to prosecution, which ends when the Gardaí hand over the accused person to a court. They can of course continue to pursue inquiries but they do so without the involvement of the accused. When a person has been charged he must be brought before the District Court as soon as practicable.

14. The process of charging a person consists of putting to the suspect the crime he is accused of having committed.

This means reading out to him what is on the charge sheet. That is a document in a standard form prescribed by rules of court. When the suspect has been charged, he must be given a copy of the charge sheet. It follows that the charge sheet has to be prepared before the person can be charged. It would be possible to do otherwise by charging *ore tenus* and then making the document but that is fraught with possibilities of error and confusion and the process would still be held up while the sheet was produced.

15. One of the pieces of information on the charge sheet is the court venue, identified by area and district. When the Gardaí know the court to which the accused will be brought they fill in that part of the form. This normally causes no difficulty because the rules provide for jurisdiction and it often happens that there is a choice of court venues to deal with the case. But the venue is not known in advance when a special court is to be convened to sit out of hours.

16. It is not clear to me that an error or omission of the court venue in a charge sheet is a fatal flaw but I think it could give rise to uncertainty at least and a judge might be concerned about his or her capacity to deal with the matter in the particular court. A Garda Sergeant would obviously be worried that a mistake in this document would have serious consequences.

17. Order 17.1(1) of the District Court Rules 1997, provides, so far as relevant, as follows:-

- "Whenever a person is arrested and brought to a Garda Síochána station, and is being charged with an offence . . . particulars of the offence alleged against that person shall be set out on a charge sheet. (Form 17.1 Schedule B)."

- The form of charge sheet includes the District Court area and the District number.

- Order 17.1(3) provides that the charge sheet shall be lodged as soon as possible with the Clerk for the District Court area in which the case is to be heard.

- Order 17.2(2) provides:-

"A person arrested without warrant shall on arrest be brought before a Judge having jurisdiction to deal with the offence concerned as soon as practicable."

- Order 17.3 provides that if a person is charged after 10.00 pm, it is sufficient compliance with the requirement for "as soon as practicable" if he is brought before a judge at the commencement of the sitting scheduled for the following morning.

18. The relieving provision in Order 17.3 carries the implication that if it is well before 10 pm, as it was in this case, the requirement has to be satisfied in a different manner.

19. Mr. Colman Fitzgerald SC for the applicant argues first for what he says is an absolute rule, i.e., that any departure from immediate charging and for whatever reason invalidates the procedure. Alternatively, he contends that a test which examines the circumstances of the delay leads to the same conclusion. He submits that if the applicant was not charged forthwith, it follows that all subsequent proceedings were void. The case does not have any excusing circumstances that could save the proceedings from this fatal and inevitable flaw.

20. Mr. Niall Nolan, counsel for the Director, opposes the claim for judicial review on the grounds that the delay in bringing the application disentitles the applicant from relief; that there has been acquiescence on the applicant's part that also bars him from relief; that the arrest was not made under s. 10(2) but under other legal authority and therefore the obligation of charging him forthwith did not apply; that notwithstanding the alleged breach of s. 10(2) the District Court had jurisdiction to deal with the charges and the Circuit Court has jurisdiction to try the applicant; that he was brought before the District Court as soon as practicable as required by law. Finally, the replying affidavits and submissions also contend at least by implication that the interval between re-arrest and charge has been explained and is reasonable and is therefore not in breach of s. 10(2).

21. The case is concerned with the following questions:

A. Did s. 10(2) apply in the circumstances?

B. Was the applicant charged forthwith?

C. If he was not charged forthwith, what are the consequences?

D. Is he prevented from challenging the process because of delay or acquiescence?

22. The first point to be considered is whether the arrest in this case was effected under s. 10(2) of the 1984 Act or under s. 4(3) of the 1997 Criminal Law Act. Mr Nolan, Counsel for the respondents submits that the Gardaí have a choice in a case like this whether to arrest under s. 4(3) or under s. 10(2) and whichever they decide has different procedural consequences. This is why he says that what was required in this case was not that the applicant be charged forthwith, but rather that he had to be brought before the District Court as soon as practicable. I do not accept this contention. In my opinion, s. 10(2) does not confer any power of arrest, but simply deals with a situation where the person is in fact arrested under some power of arrest either by statute or at common law. Section 10(2) implicitly acknowledges the power of arrest that exists under different legal provisions. I therefore reject the argument based on a factual point that there are s. 10(2) arrest cases in this context that are different from other arrests. I also think it would be wholly unsatisfactory if separate sets of obligations that arose depending on which procedural course the Gardaí decided upon. There are, of course, different powers of arrest contained in a multitude of statutes and also available at common law, but none of the different powers requires to be analysed in this case.

23. Did the authorities comply with section 10(2) in dealing with Mr Broe? Mr. Colman Fitzgerald SC for the applicant relies on the Supreme Court decision in *O'Brien v The Special Criminal Court & Another* [2008] 4 I.R. 514. That case concerned s. 30A (3) of the Offences Against the State Act, 1939 which was inserted by s. 11 of the amending Act of 1998 and which was at the material time in the same terms as s. 10 (2). Admittedly, there are significant differences between the facts and procedures of that case and the present. First, Mr O'Brien was to be brought to the Special Criminal Court to be charged there, pursuant to a direction under s. 47 of the Act of 1939. The court had to be assembled for the purpose and the Supreme Court held that the delay of some 15 hours between the arrest and the appearance before the court for charging was a breach of the requirement in the sub-section. Secondly, since the jurisdiction of the Special Criminal Court, under section 43 of the 1939 Act, depended on the accused person being lawfully brought before the court, the proceedings were quashed for invalidity. By contrast, Mr Broe was to be charged by the Gardaí in the station and then brought to court and it is not a statutory condition precedent of the jurisdiction of the District or Circuit Courts that the accused be lawfully brought to court. Having noted two of the points that distinguish the facts of the two cases, it is nevertheless clear that the Supreme Court considered the effect and application of the same words in the same context, with particular reference to the word "forthwith."

24. Two important points about *O'Brien's* case should be mentioned. The first is that the Court read the similar sub-section not as expressing a valid purpose for arrest, namely, to charge the arrested person forthwith, but as a statutory obligation to charge forthwith. An arrest could be made with the intention and for the purpose of immediate charge but supervening accidental or fortuitous events might make it impossible to do so. The second feature was that "forthwith" was given its ordinary, dictionary meaning of "at once" or "immediate," instead of a legal interpretation.

25. Section 30A (3) had been considered by the Court of Criminal Appeal in *The People (DPP) v. Birney and Others* [2007] 1 I.R. 338, in which the Court held against a similar argument to that advanced by this applicant. Although the case is cited with approval in *O'Brien's* case on a different point, the part of the judgment dealing with this issue is not mentioned and the applicant submits that it has been superseded. His written submissions at para. 6 deal with the case as follows:-

> "In *the People (Director of Public Prosecutions) v. Birney* [2007] 338 the Court of Criminal Appeal dealt, inter alia, with a submission that a person released from detention under Section 30 of the Offences Against the State Act (as amended) must, under the provisions of Section 30A of the said Act be charged forthwith for his arrest to be valid. The Court of Criminal Appeal (Hardiman J.) dealt with that submission at page 352/353 and held against it. The judgment in the Court of Criminal Appeal in that Case was given on the 12th May, 2006. It is submitted that that part of the Birney judgment has been overtaken by the authority of the Supreme Court in the O'Brien case. This is inconsistent with the judgment of the Court of Criminal Appeal in Birney."

26. Applying the reasoning in *O'Brien v The Special Criminal Court & Anor* to this applicant's circumstances, the applicant argues that he was not charged forthwith when he was brought to the Garda Station on his arrest. The delay was 3 hours 45 minutes. The time was spent while the Gardaí sought a special sitting of the District Court. It cannot be said, therefore, that the charge was preferred immediately or at once. The absence of *mala fides* is irrelevant. It does not matter that the Gardaí were trying to get a court sitting to deal with Mr Broe. Even if it was necessary to the charging process to ascertain the court venue, as the replying affidavits assert without contradiction, that is an explanation but not an excuse for the failure to charge forthwith, as was the need to get the Special Criminal Court to assemble in the *O'Brien* case. The fact that the arrested person was kept informed is no more than evidence of the benign disposition of the authorities.

27. I have to say that I am not at all sure that the applicant is correct in his contention that the Supreme Court meant to lay down an absolute rule that would apply in all conditions and circumstances. Is anything less than immediate charging of an accused on a re-arrest to be condemned whatever the circumstances? I am thinking about a situation where the Gardaí had every intention of charging a person immediately, but some supervening circumstance prevented them from doing so. A car accident might happen on the way to the Garda station, the building might go on fire, the member in charge or the officer to do the charging might have a heart attack or otherwise become ill, some external commotion might occur in the form of a riot or something of that kind – there is in a word a large number of possibilities that could disrupt the best laid plans of mice and men. If immediate charging is to be regarded as an absolute, unrelated to the circumstances, then it runs into all these practical possibilities. Having said that, if the judgments do mean immediate and nothing else, the charging in this case was not immediate.

28. The applicant's second approach is based on an analysis of a number of High Court cases that have been decided on this section and which considered different delays and the reasons for them. Some of the cases were decided before and some after the *O'Brien* decision. In each of them the High Court considered the general circumstances and the reasons for the delays that occurred, which ranged from 55 minutes to 2 hours and 17 minutes. If it is permissible to look at the reasons for any delay, it is clear that the period in this case was significantly longer than those others. Moreover, there was nothing like the breakdown of equipment such as happened in *Whelton v. Judge O'Leary and another* [2007] IEHC 460, in which Birmingham J. distinguished the facts from *O'Brien's* case.

29. It could be said that charging is not always a discrete and simple statement of accusation and that in circumstances such as arose in this case it is more of a process that can take time to complete. Hardiman J. said in *DPP v. Finn* [2003] 1 I.R. 372:

> "I have no difficulty with the proposition that where the authorities are entitled to perform a particular procedure on arrest, they are entitled to a reasonable period of time in which to do it. For example, if a decision is made to procure the attendance of a doctor for the purpose of requiring the arrested person to provide him with a specimen of blood or urine, a reasonable period for the attendance of the doctor is required. But, at least upon the reasonableness of the length of time actually involved being challenged, it will in my view be necessary to demonstrate that the actual period of time was no more than was reasonable. The onus of proof on this point is and must be on the prosecution since the reasons why a particular length of time was required will normally be within its exclusive knowledge. For that purpose evidence about the distance the doctor had to travel, any other commitments he had at the time and cognate matters might be called so as to render a period of time which seemed excessive reasonable."

30. This was not argued, however, and I am reluctant to base any decisive conclusion on it.

31. Ultimately, although I do not believe that the Supreme Court laid down an absolute and general rule for all cases, the reasoning in *O'Brien's* case does in my view apply to this case. The unambiguous judgments of the Court point to the interpretation of the words of the sub-section that is binding on me. In the result, the conclusion must follow that there was, however innocently, a failure to comply with s. 10 (2). It is noteworthy also that the actual time delay in this case is substantially greater than in any of the other cases on the section decided in this court.

32. If the applicant was not charged forthwith, does that invalidate the subsequent court proceedings? The answer is that generally speaking it does not matter that a person is unlawfully brought before a court. The exceptions are first where the court is the Special Criminal Court, because its jurisdiction expressly requires that the accused be lawfully brought before it: s. 43 of the Offences Against the State Act 1939. The second exception is where there has been an egregious violation of the accused person's constitutional rights, as in the *Trimbole* case [1985] I.R. 550.

33. The Director's submissions rely on *DPP v. Bradley* [2000] 1 I.R. 420, in which McGuinness J. cited with approval the judgment of Keane J. (as he then was) in *Director of Public Prosecutions (Ivers) v. Murphy* [1999] 1 I.R. 98 at 113, where Keane J. said:-

> "It has been repeatedly pointed out that, as a general rule, the jurisdiction of the District Court to embark on any criminal proceeding is not affected by the fact, if it be the fact that the accused person has been brought before the court by an illegal process. If I refer to a judgment which I delivered in *Killeen v. Director of Public Prosecutions* [1997] 3 I.R. 218, it is simply because, so far as I am aware, it is the latest restatement of that well settled principle. I said at p. 228:-
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> > 'It can, in general, be said that the jurisdiction of the District Court to embark on any criminal proceeding, including the holding of a preliminary examination, is unaffected by the fact, if it be the fact, that the accused person has been brought before the court by an illegal process. This was so held by Davitt P. in *The State (Attorney General) v. Fawsitt* [1955] I.R. 39 at p. 43 where he said:-
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> > > 'The usual methods of securing the attendance of an accused person before the District Court, so that it may investigate a charge of an indictable offence made against him, is by way of arrest or by way of formal summons, but neither of these methods is essential. He could, of course, attend voluntarily, if he so wished; so far as the exercise of the court's substantive jurisdiction is concerned, it is perfectly immaterial in what way his attendance is secured, so long as he is present before the District Justice in court at the material time. Even if he is brought there by an illegal process, the court's jurisdiction is nonetheless effective.'
> >
> > Some qualifications to that general principle may be noted in passing. First, evidence obtained from the accused person during the course of a detention which proves to be unlawful, whether because of a defective warrant or for some other reason, may subsequently be excluded as inadmissible by the court of trial. Secondly, where the process by which the person is brought before the court involves a deliberate and conscious violation of his constitutional rights, of which the most graphic example is *The State (Trimbole) v. The Governor of Mountjoy Prison* [1985] I.R. 550, the court may be justified in refusing to embark upon the hearing. There may also be cases in which a question is raised as to the validity of the detention in Garda custody of a person brought before the District Court, in which case the appropriate course is to remand the person concerned, enabling him, if he wishes so to do, to apply to the High Court for an order of habeas corpus. (See the observations of McCarthy J. in *Keating v. Governor of Mountjoy Prison* [1991] 1 I.R. 61). None of these considerations arise in the present case.'"

34. McGuinness J. in the *Bradley* case found that none of those exceptional circumstances arose in that case either. *Bradley's* case concerned an arrest by the Gardaí without warrant for an offence to which the general power of arrest without warrant did not apply. The District Judge stated a case as to whether the charges should be dismissed if the person's constitutional right to liberty had been violated in the procedures adopted in bringing him before the District Court. The court held that the question whether there had been a lawful arrest was immaterial to the hearing before the District Court. The learned Judge decided that since none of the exceptional considerations mentioned by Keane J. arose in the case that was "sufficient to dispose of the present case". McGuinness J. went on (pp. 427/8):-

> "It is, as was pointed out by counsel for the prosecutor, notable that the learned Keane J. uses the term 'graphic' to describe the facts of *The State (Trimbole) v. The Governor of Mountjoy Prison* [1985] I.R. 550. The circumstances in the instant case are very far removed from such a deliberate and conscious violation of constitutional rights. I am of course, aware that the term 'deliberate and conscious' does not necessarily involve *mala fides*; however, on the facts as set out in the case stated, it seems unlikely that the unlawful arrest in this case would require the court to refuse to embark on the hearing. Ultimately, however, as was held by Denham J. in *Coughlan v. Judge Patwell* [1993] 1 I.R. 31, this is a decision for the judge of the District Court. Denham J. states at p. 37:-
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> > 'If an individual as here alleges that his constitutional rights have been infringed in procedures adopted in bringing him before the court, then the District Court has jurisdiction to, and indeed should, hear the submission and take such steps as it considers proper. It is not appropriate for a District Court to refuse to allow such a submission to be made to the court. It may be that the judge on hearing the submission would have a very clear picture and could deal with the matter there and then. It may be that the judge would take the view that there should be a full submission after evidence is heard in the trial. It may be that the judge would take evidence and state a case.'
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> The learned District Court Judge clearly acted correctly in hearing both evidence and submission and in stating a case for this court. It remains for him to decide whether or not to dismiss the case, but this is a decision which he should make in the light of the general rule, as set out by Keane J., that the jurisdiction of the District Court to embark on any criminal proceeding is not affected by the fact, if it be the fact, that the accused person has been brought before the court by an illegal process. Only if he feels that there has been a deliberate and conscious violation of the accused's rights, as in *The State (Trimbole) v. The Governor of Mountjoy Prison* [1985] I.R. 550, should he decline to embark on the hearing."

35. The applicant in this case expressly disavows any suggestion of *mala fides* on the part of the Gardaí. Like the other

cases that have been cited above, there is nothing in this case to bring it within the *Trimbole* exception.

36. It is indeed arguable whether there was any breach of the accused's constitutional rights. The applicant was lawfully arrested by the Gardaí, a fact which is not in dispute. He was to be charged and his entitlement was to be brought before the District Court as soon as practicable. That is precisely what happened. The only irregularity that is alleged is in the timing of the presentation of the charges to him. He did not have a right to liberty and his only complaint is about the delay that occurred while the Gardaí tried to arrange for a special sitting of the court in order to bring him before it as soon as they could. The circumstances of this case may be contrasted with those of the *Bradley* case, where the arrest itself was unlawful.

37. The result is that the court proceedings whereby Mr Broe comes to stand his trial are lawful and valid, notwithstanding the delay in charging him.

38. The last issue is whether the application should be rejected because of acquiescence or delay on the part of the applicant. On the 15th January 2009, he was sent forward to Letterkenny Circuit Court for trial on the 3rd February 2009 but on the day before he obtained leave in these proceedings, with an order stopping his trial. Between the 13th October, 2008 when he first appeared in court, and the 2nd February, 2009, when he got leave, he did not raise the matter on which he now relies. The applicant decided to change solicitors which led to an assignment being made on the 15th January, 2009 and his new solicitor thought of the point about the time of charge when he read the Book of Evidence. The rebutting affidavit sworn by the applicant's present solicitor says that he was assigned on the 15th January, 2009 following the decision by the applicant to change solicitors.

> I say that it was only when the book of evidence was read that it transpired that an issue arose on the lawfulness of the re-arrest of the applicant and subsequent proceedings. I say that the applicant was so advised and that he gave instructions to institute the proceedings herein. Thereafter things moved with all due haste and the *ex parte* application for leave herein was made on the 2nd February, 2009.
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> I say and am advised that the primary issue before the courts in these proceedings is whether the applicant when rearrested was charged forthwith, not whether the applicant was brought before a district judge as soon as was practicable.

39. A person seeking judicial review is required to move promptly - Order 84 rule 21(1). It is important that official acts that are challenged are declared valid or void as early as possible. If the review takes place in timely fashion people who are affected suffer less disruption of their affairs. In criminal proceedings, the community has an interest in seeing the matter brought to a conclusion and so does the victim and other witnesses.

40. An applicant's failure to raise objection to a much earlier event until the eve of his trial militates against his application, particularly where a technical breach and not a matter of substantive justice is in issue. Even in the latter case, as Henchy J observed in *The State (Byrne) v. Frawley* [1978] I.R. 326 at 350:-

> "What has been lost in the process of events is not the right guaranteed by the Constitution but the prisoner's competence to lay claim to it in the circumstances of this case."

41. The explanation that the issue was only discovered when the new solicitor came into the case does not, in my opinion, materially affect the situation. The solicitor should normally be considered as a single entity not dependent on an individual person. As a general rule, a change of solicitor should not make a situation better or worse for a party to litigation. The fact that a party's legal advisor did not think at a particular time of a point that later occurred to him is not an excuse for delay in raising it earlier. I consider the change of solicitor from one who did not, for whatever reason, raise the timing of the charge to one who did so to be essentially similar. I do not therefore find that the change overcomes the delay.

42. It is difficult to address the question of delay in isolation from the conclusions I have reached on the other issues and to be confident that the latter have not had an impact. Having said that, it does seem to me that the applicant did in all the circumstances lose the competence to lay claim to the point, in the words of Henchy J.

43. Finally, I refer again to the judgment of the Court of Criminal Appeal in *DPP v. Birney* [2006] I.R. which has relevance for two of the issues in this case. Hardiman J. delivered the Court's judgment, in which he cited the decision of the Court of Criminal Appeal in *The People v. Kehoe* [1985] I.R. 444:

> "There, the applicant had been brought before the Special Criminal Court while in s. 30 detention. He argued that as he had been physically restrained during a shoot-out with the Gardaí prior to his arrest, his subsequent purported arrest under s. 30 and its later extension was invalid. Therefore, he had been in unlawful custody at the time he was brought to the Special Criminal Court.
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> The judgment in the Court of Criminal Appeal was delivered by McCarthy J. who commenced his judgment with the observation:
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> 'This application for leave to appeal has one undeniable characteristic - it is devoid of merit.'
> The learned judge said this because the applicant had been one of a group who, at a private home in County Wicklow, were found carrying loaded firearms and subsequently engaged in a gunfight with the Gardaí."
>
> McCarthy J. then recorded that the Special Criminal Court before whom the applicant had been brought "Was satisfied that his jurisdiction as conferred by s. 43 of the Offences against the State Act, 1939, is lawfully invoked when, in regard to a scheduled offence, the Director of Public Prosecutions directs that the person be brought before that Court". McCarthy J. continued:

> "It is sufficient to say that the jurisdiction of the Special Criminal Court is conferred by s. 43 of the Act of 1939, and that that jurisdiction does not depend upon the technical validity of the manner in which an individual may be physically present before that Court which has (by s.43(1)(c) jurisdiction to order the detention of and to detain in civil or military custody or to admit to bail . . . pending trial by that Court and during and after such trial until conviction or acquittal, any person sent forward, transferred or otherwise brought for trial before that Court."

44. McCarthy J. also made two other relevant observations:

> "This is not to say that there are not circumstances constituting unfair procedures or breach of constitutional rights that would not invalidate a trial; ordinarily, however, as was pointed out during the course of the argument in the Special Criminal Court by counsel for the Director, the time to take such a point is when first brought before that Court – if the point is not then taken, it is spent."

45. As to the latter point, it is sufficient to say that there are no circumstances whatever in the present case capable of constituting unfair procedures of breach of Constitutional rights so as to invalidate the trial. The applicants have instead addressed an argument to the Court which is wholly technical, as they are entitled to do.

46. In my view, the concluding comments by Hardiman J. in *Birney's* case apply with at least equal force in this case.

47. For these reasons I refuse this application.