Neutral Citation Number: [2006] IEHC 232

THE HIGH COURT

[2006 No. 289 SS]

IN THE MATTER OF A CONSULTATIVE CASE STATED PURSUANT TO SECTION 52(1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA JAMES KING)

PROSECUTOR

AND

CHRISTOPHER TALLON

ACCUSED

Judgment of Mr. Justice John MacMenamin dated the 28th day of July, 2006.

1. On 10th November, 2004 the accused was charged that

> "On 10th/11th 2004 at Store Street Garda Station in the said District Court Area of Dublin Metropolitan District, being a person arrested under s. 12(3) of the Road Traffic Act, 1994 having been required at Store Street Garda Station by Garda Enda Brogan Member of the Garda Síochána pursuant to s. 13(1)(a) of the Road Traffic Act, 1994 to provide two specimens of your breath, did refuse to comply forthwith with the said requirement in the manner indicated by the said member of the Garda Síochána.
>
> Contrary to Section 13(2) of the Road Traffic Act 1994 as amended by s. 23 of the Road Traffic Act 2002."

2. On 16th November, 2005 the accused appeared before the learned District Court Judge on the said charge. The prosecution, prior to evidence being heard applied to amend the charge sheet to delete the words "in the manner indicated by the said member of An Garda Síochána". The solicitor acting for the accused objected to the proposed amendment on the basis inter alia that the charge against the accused was a nullity, and that therefore the District Court had no jurisdiction to amend the charge sheet. Thus the question of law posed for the opinion of this court is whether the learned District Court Judge has jurisdiction to amend the charge sheet in the circumstances of the case that is where the purported offence on the charge sheet allegedly does not exist.

3. This submission is said to emanate from the decision of the Supreme Court (Kearns J. and McCracken J.; Murray C.J. dissenting in the *D.P.P. v. Moorehouse* [2006] 1 ILRM 103). Counsel for the accused submits that this is authority for the proposition hat no such offence as set out in the charge sheet exists – namely to *comply forthwith* with the said requirement in the manner indicated by the said member of the Garda Síochána. In *Moorehouse* the Circuit Court Judge posed for consideration whether s. 13(2) of the Road Traffic 1994 made it an offence to *refuse or fail to comply* with the requirement in the manner outlined by the member of An Garda Síochána. The Supreme Court held that the answer to this question was no. Kearns J. speaking for the majority stated:

> "However I would be of the view that the charge in this particular case, and the conviction recorded in respect thereof is one which is not provided for by the section and thus by virtue of the requirements to construe such statute strictly, the answer to the first question in the case stated must be no."

Thus, in the instant case, the court must consider the effect and meaning of the decision in Moorehouse as regards a charge brought and preferred against the accused. In order to do this it is necessary consider first the nature of the charge sheet procedure.

The Charge Sheet Procedure

4. By virtue of s. 15(2) of the Criminal Justice Act 1951, as substituted by s. 18 of the Criminal Justice (Miscellaneous Provisions) Act 1997 it is provided that:

> "A person arrested without warrant shall, on being charged with an offence, be brought, as soon as practicable before a judge of the District Court having jurisdiction to deal with the offence concerned."

5. Order 17 of the District Court rules 1997 deals with charge sheet procedure and provides as follows:

> "Order 17
>
> **Procedures on Arrest**
>
> Particulars to be set out on a Charge Sheet
>
> 1(1) Whenever a person is arrested and brought to a Garda Síochána station and is being charged with an offence, or where an offence is alleged against a person who is already on remand to the Court and a summons in respect of the offence is not issued, particulars of the offence alleged against that person shall be set out in a charge sheet (Form 17.1 Schedule B).
>
> (2) When particulars of any offence were set out on a charge sheet in accordance with this rule, a copy of the particulars shall be furnished as soon as maybe to the person against whom the offence is alleged.
>
> (3) A charge sheet to which this rule applies shall be lodged as soon as possible with the Clerk for the court area in which the case is to be heard.
>
> **Person arrested should be brought before a judge as soon as practicable**
>
> 2(1) A person arrested pursuant to a warrant shall on arrest be brought before a judge having jurisdiction to deal with the offence concerned as soon as practicable.
>
> (2) A person arrested without warrant shall, on being charged with an offence be brought before a judge having jurisdiction to deal with the offence as soon as practicable.

6. The entry of a charge on a charge sheet does not amount to the making of a complaint for the purpose of conferring jurisdiction on the District Court per se. The charge sheet is merely an internal police document. The court is therefore not actually seised with jurisdiction in the case until the complaint is made to the court itself (see Criminal Procedure, Dermot Walsh, p. 659).

7. In *Attorney General (McDonnell) v. Higgins* [1964] I.R. 374 390) it was stated by Kingsmill Moore J. "That an information or complaint to an authorised person is a very foundation of the jurisdiction hardly needs authority but I may refer to Paley on Convictions (First ed. 1814) at p. 14 "It is requisite in all summary proceedings that there should be an information or complaint, which is the basis for all subsequent proceedings and without which it seems that the justice is not authorised in inter meddling." Hutton on Convictions (First ed. 1835) has as the first words in his treatise – "In exercising the power of convicting summarily any person charged with having infringed the provisions of the statute, the initiative proceeding is that the party complaining must present a statement of the events complained off to a Justice authorised to take such an information. To the same effect are Nun and Walsh Justice of the Peace (2nd ed. 1844) at p. 472; Molloy Justice of the Peace (1890 at p. 169); O'Connor Justice of the Peace (2nd ed. 1915) Vol 1. at p. 227.

> Neither summons nor warrant to arrest, consequent on the information, confer jurisdiction. They are merely processes to complete the attendance of the person accused of the offence …"

At p. 393 of the same judgment that judge added:

> "This charge cannot be a complaint or information for it is not made before a District Justice, a Peace Commissioner or a Clerk. The charge sheet on which it is entered initiates as a purely police document and the entry of the offences charged is necessary for the protection of the Garda to show that such offences justify arrest and detention in the barracks without warrant. Subsequently when the charge sheet is put before the District Justice and the final two columns are utilised by him to record his decisions, it becomes a document of the court, but before a District Justice enters on the case it seems to me that there must be a complaint to him by some person, preferably but not necessarily the Superintendent alleging the commission of the offences by the defendant with such particularity and details as are required by the authorities for legal complaint. Only when this has been done is jurisdiction conferred to enter on the hearing of the case".

Counsel for the accused herein Mr. Mark Dunne BL submits that the accused was charged with an offence which does not exist, namely refusing to give the two specimens of breath in a manner indicated by the member of An Garda Síochána. On this premise, he asserts that the entire proceedings before the District Judge were a nullity in that the learned District Court Judge did not have jurisdiction to embark upon the case nor to use the District Court Rules to amend the charge sheet. Counsel submits that by virtue of s. 15(2) of the Criminal Justice Act of 1951, it is made clear that for the District Court to have jurisdiction to deal with a complaint a person must be charged with an offence. The accused herein was not charged with a valid offence (emphasis added). Applying the dicta of Kingsmill Moore J. in *McDonnell* he submits that it is a pre-requisite to valid summary proceedings that the accused be charged with a valid offence without which the District Court Judge is not authorised in making any order. O'Dalaigh C.J. in McDonnell at p. 3 observed:

> "A complaint in its essence is a statement of facts constituting an offence."

If the case law is invalid or defective then it is submitted that the District Judge cannot act within jurisdiction, even for the purposes of amending the charge.

8. In *Moorehouse* the Supreme Court by a majority held that it was not correct to frame a charge contrary to s. 13(2) of the Road Traffic Act 1994 by alleging that a person had failed to comply with a requirement *in the manner indicated by the member of the Garda Síochána*; whilst neighbouring sections of the legislation created two offences (i.e. failing to comply in the manner indicated and failure to comply simpliciter), s. 13(2) simply created a single offence of failure to comply and that was therefore the manner in which the charge should properly be framed in any prosecution.

An offence not known to the law
In the course of submissions considerable emphasis has been laid on the phrase "an offence not known to the law". Mr. Dunne B.L. submits that it is the primary duty of the District Court Judge to consider the substance of the charge as a discrete issue in order to establish whether there is jurisdiction to deal with the charge. Only after such separate consideration may be the court then proceed to deal with any question of an application to amend the charge. If the complaint is "invalid" the court has no jurisdiction to embark on such consideration.

Moorehouse considered
9. In considering the decision in *Moorehouse* it is essential to advert to precisely what was, and was not determined therein. In essence as is pointed out in the judgments of Kearns J. and McCracken J. the court concluded that two offences were not created under s. 13(2) of the Act of 1994. Kearns J. stated:

> "Ultimately, therefore, the kernel of this case is to inquire whether the words "and may indicate the manner in which he is to comply with a requirement" are merely enabling provisions for the Garda making the requirement under s. 13(1)(a), or do they form part of the requirement itself. An immediate consequence of finding that they form part of the requirement would be that no distinction or difference could be drawn between an outright refusal to provide a breath specimen on the one hand and a failure to comply with the requirement of a Garda as to how it should be done on the other. However these are clearly two quite different factual circumstances which cannot logically be conflated into one. The fact that they are different is expressly recognised in s. 12."

He added:

> "I am therefore driven to conclude that the words do not form part of the requirements, but are merely enabling words whereby a Garda may and should indicate how a breath test is to be performed. For the words to have the meaning contended for by counsel on behalf of the complainant would in reality require the insertion of the following words in s. 13(2):
>
> > "Subject to s. 23, a person who refuses or fails to comply forthwith with the requirement under subs. (1)(a), or to do so in a manner indicated by a member of the Garda Sicohana, shall be guilty of an offence and shall be liable …"
>
> Quite clearly, to give s. 13 this extended meaning would have necessity involved judicial rewriting of the statutory

provision, which is clearly impermissible …".

It was on this finding that the court concluded that the conviction in *Moorehouse* was one not provided for by the section, construed strictly as a penal provision. Counsel on behalf of the complainant herein, Mr. Paul Anthony McDermott B.L. states that in the instant case the court is not considering a charge that is unknown to law. Rather it has to consider a charge that is known to the law i.e. an offence contrary to s. 13(2) of the Act of 1994, but one which has been incorrectly worded. In *Moorehouse* the issue before the Supreme Court was what was and what was not an acceptable wording for charging an offence under s. 13(2). But in the instant case there is no doubt what is in issue. It is a charge under s. 13(2) of the Act of 1994 albeit an incorrectly phrased one.

The Power to Amend: The District Court Rules

10. The District Court Rules contain specific provision relating to the power to amend a charge. The relevant parts of Order 38 Rule 2 of the rules provide that no objection shall be taken or allowed to:

> "A defect in substance or in form or an omission" in the charge sheet "but the court may amend … or proceed in the matter as though no such defect, omission or variance had existed".

On its plain meaning it is submitted the rule permits a defect in substance in the charge sheet to be the subject of an amendment. Counsel for the prosecutor submits that the clear purpose of this rule was to provide a prima facie unlimited power of amendment even as to matters of substance. He adds that the only limitation to such power is provided for by the subsequent Order 38, Rule 3 which states:

> "Provided however that if in the opinion of the court the variance defect or omission is one which had 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 date or at any other place."

On behalf of the prosecuting authorities it is submitted that no factual basis has been established in the present case for any suggestion that the accused has been misled or prejudiced by the proposed amendment. The prosecution case has yet even to open. Here, the accused has not disclosed his defence and then found that the prosecution is seeking to amend the charge. It is open to the accused to apply for an adjournment if any particular prejudice might arise.

11. Order 38 Rule 4 provides:

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

Counsel for the complainant submits that this section is not intended to trammel the wide power of amendment granted by Order 38 Rule 2. If a Judge of the District Court chooses not to permit the amendment then he may strike out the charge. That this is the case is apparent from the fact that Rule 4 is framed in discretionary terms. Were it mandatory to strike out a charge on the basis that it is "not known to the law" the rule could not be phrased as it is, permitting a discretion. Thus it contemplates a judge not striking out a complaint that discloses "no offence known to law". The logical basis for this must be if the District Judge intended to amend the charge instead.

Power to Amend: Case Law

12. In *The State (Duggan) v. Evans* (1978) 112 ILTR the fact that a charge referred to "s. 23(a) of the Larceny Act 1916" but failed to recite that section had been "inserted by s. 6 of the Criminal Law (Jurisdiction) Act 1976", was held to be capable of amendment. This was so, even though s. 23(a) did not exist until it was inserted in the section by the Act of 1976. Finlay P. noted that:

> "This on the face of it appears to me to be an *insufficient charge* and if a conviction proceeded upon it in those precise terms it would appear to me to be a bad conviction" (emphasis added) (p. 62). However, that judge added:
>
> > "Whereas 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".

He observed the duty of the judge was:

> "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.
>
> 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" (at p. 63 of the judgment).

13. The phraseology adapted by Finlay P. in the first quotation above is both interesting and helpful. The charge as originally phrased was, he considered, "*insufficient*". If a conviction had proceeded upon it then it would have been a "bad conviction". But such a finding would not render the charge or any conviction made "not known to the law". Such charge or conviction could be considered as being defective or insufficient, but not a nullity. Because there was no question of the accused having been misled or prejudiced, the duty of the judge was to amend the document and to proceed as if no such defect variance or omission had existed. The accused in Evans was charged with an offence defectively phrased. If the court allowed the amendment and permitted the reference to the Act of 1976 the offence, in that sense, became an offence "known to law". That such an amendment was lawful is far from transforming a complaint which in form and substance is not known to the law in the sense of a nullity, or a matter not legally cognisable.

14. In *The State (Roche) v. Delap* [1980] I.R. 1970 it was held that a Circuit Court judge was not precluded from exercising his jurisdiction to hear and determine a matter notwithstanding the fact that the District Court Order was bad on its face to show jurisdiction. The District Court Order however defective, acted as the platform on which the Circuit Court could proceed to hear the appeal. Thus it illustrated the point that even an originating document which *insufficiently* establishes jurisdiction does not deprive the court of an ability to rectify such a defect. A distinction must be drawn between an existent offence insufficiently described on the one hand, and an allegation which is a nullity or not legally cognisable on the other.

15. In *D.P.P. v. Caniffe* [2002] 3 I.R. 554 (a case concerning amendment in the Circuit Court on appeal from the District Court), Geoghegan J., (Denham and Hardiman JJ. concurring) stated:

> "There is no doubt that the section confers wide power of amendment somewhat analogous to the District Court Rules. But in my view it can only come into play in a case where the defendant was tried in the District Court for the offence which he appeared to have been convicted by reference to the order. If the defendant was tried for an non existent offence he cannot have a conviction entered against him in respect of an existing offence. If that happens this will be a matter of legitimate defence on the District Court appeal and it cannot be cured by amendment.
>
> *If, on the other hand, notwithstanding what may have been contained in documentation such as the application for the summons or the summons itself the defendant was in fact tried in the District Court for an existing offence then, if the defendant goes the route of appeal rather than judicial review the Circuit Court judge can cure any defects in the documentation by virtue of s. 76 unless an injustice would ensue" (emphasis added).*

16. *Caniffe* concerned a summons that on its face alleged an offence "not known to law". The words emphasised in the above passage clearly suggest that so long as the accused is actually tried and convicted in the District Court for an existent offence, then a defect in the originating documentation can be cured, even if the defect means that the face of the document shows an offence not known to law. Thus, the key issue in that case would appear to hinge on what the accused was actually tried on in the District Court. The problem that emerged in *Caniffe* was that there was no evidence before the Supreme Court as to what exactly had occurred in the District Court. In particular no evidence existed that the District Judge had adverted to the error or had taken any step to cure it, such as amending the summons, or simply proceeding to try the correct charge without any making any formal amendment. Geoghegan J. stated that:

> "If it were to emerge that the insertion of the correct offence in the conviction was merely done by the District Court Clerk and that for all practical purposes the District Court Judge had conducted a trial in respect of the repealed offence then in my view the defendant was not convicted of any offence known to the law and that cannot be cured on appeal by an amendment under the Act of 1877. On the other hand, *if it was made clear in the District Court that the defendant was being tried for the offence under the Act of 1994 but the District Court Judge failed to make a formal amendment of any of the documentation this might not necessarily be fatal to the conviction and it may be open to the District Court Judge on an appeal to exercise his power of amendment.*"

17. The resolution of the issue is perhaps best, and most pithily phrased by the following observation of Geoghegan J.

> "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" (at p. 563).

18. He added:

> "The powers of amendment under the District Court Rules are extremely wide and it may well be, that, at least if the defendant had been present and given an opportunity to resist, the court would have had a discretion to amend and proceed accordingly … it is sufficient to state that I do not necessarily accept that a complaint purporting to be based on a repealed statutory provision is in all circumstances invalid ab initio if the substantial allegation would itself be an offence under an updated statutory provision."

19. In the instant case the substantial allegation was that the accused had refused to provide a breath sample contrary to s. 13(2) of the Act of 1994. The charge incorrectly identified the failure as being to provide such sample in a particular way rather than failure simplicter. However that error does not make the entire complaint void ab initio. The additional words in the charge may form the evidence in the case as they explain how the refusal occurred. But insofar as relates to the charge they are surplusage.

20. In *D.P.P. v. MacAvin* The High Court Unreported 14th February, 2003 O'Caoimh J. it is held that an amendment should not be made the effect of which was to prefer an entirely different charge against an accused outside a six month time limit. That judge held that a District Judge had erred when he made an amendment purporting to *substitute* a charge of refusing to comply with the Garda requirement under s. 13 of the Road Traffic Act 1994, for a charge of failing to comply with the requirement of a designated doctor in relation to the taking of a specimen:

> "I am satisfied that the section provides for distinct offences in regard to the failure to comply with the requirement of a member of An Garda Síochána on the one hand, which relates to the requirement to provide a specimen of blood (or urine) as the case may be, and the failure to comply with requirement of a designated doctor "in relation to the taking of a specimen" on the other hand. While these offences are created by the same section, I am satisfied that they are distinct offences. In this regard, I am satisfied that the power of amendment was exercised in the instant case to convert an accusation of the commission of one offence to an accusation of the commission of a separate offence. Had this taken place within the period of six months from the date of the alleged offence, I am satisfied that it could have been done in the preferring of a separate charge against the accused ore tenus." (Emphasis added)

He concluded:

> "I am satisfied that the learned judge erred in law in these circumstances in permitting the amendment of the summons or complaint to prefer a wholly different charge against the appellant in circumstances where the time provided for in s. 10 of the Petty Sessions Act 1851 and applied by the Courts (No. 3) Act 1986 had expired. While this is not a matter of jurisdiction but one of defence, I am satisfied that it was correct of the appellants solicitor to submit to the District Court that by the proposed amendment the respondents sought to substitute one offence for another" (pp. 17 – 18).

21. In considering the decision in MacAvin it is important to focus on the degree of prejudice which arose in that case by reason of the District Judge in so deciding. First, as pointed out by O'Caoimh J. the power of amendment was exercised to convert an accusation of the commission of one offence to that of the commission of a separate offence – it was effectively a substitution of one charge for another. Second, such amendment took place outside the period of six months from the date of the alleged offence. Third, the procedure adopted was the purported amendment of the original offence rather than the preferring of a separate charge against the accused ore tenus. Fourth, the application to amend the summons was made on the third occasion on which the accused was before the court. On each of the previous occasions the case had been adjourned owing to the fact that the respondent was unable to proceed. Finally the proposed amendment of the location of the offence (it was submitted) took place in a completely different place to that set out in the summons.

An amendment cannot be permitted therefore where there is such a degree of prejudice, and where it amounts to the substitution of a quite different charge and, where it is out of time. But this is not the situation on the facts of this consultative case stated.

22. The case advanced by the accused suffers from a greater frailty. Much reliance was placed on *McDonnell's* case. There, the decision of the President of the High Court, Davitt P. was upheld by the Supreme Court. In the course of his judgment that judge stated:

> "The District Justice has of course jurisdiction to amend the charges. The rule is clear and says so. There is this distinction to be remembered between procedure in the District Court and in a trial on indictment: in the latter case, the jury, if they convict, convict on the indictment. The judgment of the Court merely records the verdict and the sentence. If the indictment is defective … a conviction based thereon would be bad. The defect could be cured by amending the indictment; but if that were not done it could not be cured by a verdict or a judgment. *In a case of summary jurisdiction in the District Court such a defect, it seems to me, need not necessarily be cured by amendment; it can be cured by the conviction as entered on the charge sheet by the District Justice*.

He added

> "I do not think that the District Judge could reasonably come to the conclusion that the omission of a reference to the statute has misled the defendant or that it affects the merits of the case. Nor do I think that if he amends by supplying the omission he will be depriving the defendant of any defence that he might otherwise have. The complaint in this case was made well within the period of limitation prescribed by s. 10 para. 4 of the Petty Sessions Act 1851. It was made in fact on the day following the alleged offences. *If the District Justice amends he will not be substituting a new complaint for the original complaint; he will be merely amending the original complaint in a particular way which in no way alters the substance or affects the merits of the case*". (Emphasis added)

On the appeal, O'Dalaigh C.J. (with whom Walsh J. concurred) stated:

> "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 include:-
>
> > "Contrary to the statute made 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 a 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."."

He added

> "The form of information (Form 1) 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 as to its validity. *Cunningham's* case [1960] I.R. 198 does not assist the defendant. Cunningham's case is based upon the principle that convictions of inferior tribunals must show jurisdiction upon their face. *A correct conviction can cure defects in a summons*." (Emphasis added)

Kingsmill Moore J. stated that he could find no authority to the effect that the absence of the words "contrary to the statute in such case made and provided" rendered the complaint defective by the omission of such words. While the distinctions between the judgments of O'Dalaigh C.J. and Kingsmill Moore J. may be seen as ones of nuance in that each judge was concurring, it is important to note that Walsh J. concurred with the judgment of the Chief Justice on the assumption, made by all three judges that a complaint had properly been made within time. The nuance in question is undoubtedly of relevance in considering the principle of law actually established in McDonnell. The decision is by no means authority for the proposition that a defective charge or complaint cannot be subsequently amended in District Court proceedings. To the extent that *McDonnell* is the premise upon which this case is built therefore it is a false one.

It will be recollected that in the *Director of Public Prosecutions v. John Sheeran* [1986] ILRM at p. 579, Gannon J. stated, in the context of proceedings brought by way of summons that neither defect nor form of a summons nor failure to serve or proceed on foot of it will invalidate the proceeding, having previously held that a complaint is the initiative proceeding; but it must be made to a person having authority to receive it. That judgment also distinguishes between a situation where the making of a complaint (for example to a person unauthorised to receive it) *is a nullity*, as contrasted to a situation where the making of such complaint for the purposes of a summons is merely procedurally defective. The former is fatal, the latter is not. It need hardly be added that a complaint or a charge must recite the fundamental necessary ingredients in order to form the basis of the charge.

The situation here is not or all analogous to that which arose in *Key v. Bastin* [1925] 1 KB 650 where the summons and information were not laid in the name of the Attorney General or Solicitor General as only permitted by statute. Because that pre-condition, essential to jurisdiction was not fulfilled, the proceedings were null and void, and therefore the court had no jurisdiction to amend the defect. This illustrates the fundamental distinction to be drawn therefore between an information or complaint which is a nullity as distinct from one which may be merely defective.

Each of these cases demonstrates the fallacy of seeking to isolate the charge, or a complaint from the rules of the District Court which permit amendment save in the case of a nullity or where the ingredients of the offence are not made out at all. The power of amendment applies to a charge or complaint cognisable to the law albeit defectively framed, but not to a nullity, or in circumstances of prejudice arose in *Mac Avin*.

23. In *D.P.P. v. Corbett* [1992] ILRM 674 Lynch J. stated

> "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." (at p. 678/679).

This passage was approved by the Supreme Court on appeal as being "most comprehensive and entirely correct". (*D.P.P. v. Corbett* Unreported Supreme Court, 16 October 1992 p. 4 of the judgment). 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.

24. The question posed in the consultative case stated is whether the District Court has jurisdiction to make the amendment? I would answer "yes". Whether or not the amendment will actually be made is a matter for the discretion of the District Judge which discretion should be exercised in accordance with the approach set out by Finlay P. in *The State (Duggan) v. Evans*, and Lynch J. in D*.P.P. v. Corbett*.