

**THE HIGH COURT  
JUDICIAL REVIEW**

[2005 No.30 JR]

**BETWEEN****BARRY O'BRIEN****APPLICANT****AND****THE SPECIAL CRIMINAL COURT AND THE DIRECTOR OF PUBLIC PROSECUTIONS****RESPONDENTS****Judgment of Mr. Justice John MacMenamin dated the 28th day of July, 2005**

1. The issue at stake in these proceedings is whether on the facts the Special Criminal Court has jurisdiction to try the applicant on the charge of membership of an unlawful organisation contrary to s.21 of the Offences Against the State Act, 1939 - 1998 on a date specified that is the 6th April, 2004.

2. In order to determine this issue it is necessary to examine in some detail the chronology which form the basis of the claim for the relief sought. These grounds are relied on by the applicant for the purposes of these proceedings only and without prejudice to any issue that may be raised relating to matters in the Book of Evidence during the trial of the applicant should it proceed.

**Background: The Facts**

3. On 6th April, 2004, Detective Superintendent Diarmuid O'Sullivan issued a search warrant under s.29 of the Offences Against the State Act, 1939 - 1998 to Detective Sergeant Rory Corcoran to search the home of the applicant at 6 Mountain Court, Dundalk, Co.Louth. At 8.30 pm on the same date Detective Sergeant Corcoran went to the home of the applicant with the search warrant. At 8.45 pm Detective Sergeant Corcoran arrested the applicant at his home under s.30 of the Offences Against the State Act, 1939 - 1998 on suspicion of having committed the offence of membership of an unlawful organisation on 6th April, 2004, contrary to

4. s.21 of the Offences Against the State Act, 1939 - 1998.

5. Following the arrest of the applicant and the search of his house, he was brought to Balbriggan Garda Station arriving there at 10.25 pm on 6th April, 2004. The member in charge, Garda Donal O'Friel dealt with him on arrival. At 10.30 pm the applicant was detained at Balbriggan Garda Station under s.30 of the Offences Against the State Act aforesaid.

6. On the evening of the following day that is 8.20 pm on 7th April, 2004, Chief Superintendent Michael Finnegan authorised the extension of the applicant's detention for a period of 24 hours to commence at the expiry of his first period of detention. The applicant was detained into the following day that is 8th April, 2004. At 5.25 pm on 8th April, 2004, (Holy Thursday) Detective Superintendent O'Sullivan informed Garda Thomas Hargadon, member in charge of Balbriggan Garda Station that he had been notified that the Director of Public Prosecutions had directed that the applicant be charged with membership of an unlawful organisation. He also informed the applicant of this in the presence of Garda Hargadon. The applicant was not charged with the offence at this point nor was he released.

7. At 8.35 pm on the same date the applicant was released from detention under s.30 of the Offences Against the State Act, 1939 - 1998. Immediately thereafter, Detective Sergeant Corcoran re-arrested the applicant at Tankardstown, Balbriggan under s.4 of the Criminal Law Act, 1997 for the offence of membership of an unlawful organisation contrary to s.21 of the Offences Against the State Act, 1939 - 1998. Detective Sergeant Corcoran cautioned the applicant and brought him back to Balbriggan Garda Station where he was dealt with by the member-in-charge and thereafter detained. It was noted on the custody record that the applicant was informed at 8.51 pm on the same date by Detective Sergeant Corcoran that he would be brought before the next sitting of the Special Criminal Court and charged there with the offence in question.

8. The following day was Good Friday. On the morning of that date the applicant was conveyed from Balbriggan Garda Station to the Special Criminal Court where he was charged with membership of an unlawful organisation at 11.50 am.

9. At the charging hearing on 9th April, 2004, the applicant's solicitor Mr. James McGuill, challenged the jurisdiction of the Special Criminal Court on the basis that the applicant had not been lawfully brought before the court. Legal argument on this point was adjourned from that date and heard by the Special Criminal Court on 13th December, 2004. The court gave judgment on 14th of that month holding that the applicant was not unlawfully before the court.

**The Issue**

10. In these proceedings Ms. Deirdre Murphy Senior Counsel for the applicant submits that it is clear that the applicant was detained for 15 hours and 20 minutes from his arrest at 8.35 pm on 8th April, prior to his being charged on Good Friday in the Special Criminal Court. She further submits he was detained for 18 ½ hours from the giving of notification that the Director of Public Prosecutions had directed that he be charged at 5.25 pm on 8th April, 2004, prior to being so charged.

11. By virtue of these facts and for the reasons set out below, it is contended that the applicant is not lawfully before the Special Criminal Court for trial under the Offences Against the State Act, 1939 - 1998 and that, consequently the Special Criminal Court has no jurisdiction to try him for the aforesaid offence. The applicant further submits that the first named respondent, that is the Special Criminal Court misdirected itself in law in holding that the applicant was lawfully before it for trial on the aforesaid offence.

**The Constitutional and Legal Basis of the Special Criminal Court**

12. In order to consider the issue of jurisdiction it is first necessary to examine the constitutional and legal nature of that court.

13. The Special Criminal Court is established pursuant to Article 38.3.1 of the Constitution of Ireland which provides that:-

"Special Courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order".

14. Article 38.3.2 provides

"[t]he constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law".

15. The Special Criminal Court was set up under Part 5 of the Offences Against the State Act, 1939 – 1998. Section 43 of that Act states that the jurisdiction of the court is

“to try and convict or acquit any person lawfully brought that [c]ourt for trial under this Act”.

16. The rules of the Special Criminal Court are to be found in the Offences Against the State Act, 1939 – 1972, Special Criminal Court Rules (Statutory Instrument S.I.No.234 of 1975).

17. Counsel for the applicant submits that by virtue of the statutory scheme outlined above the Special Criminal Court has no inherent jurisdiction. Therefore the scope of its jurisdiction and powers therefore derive entirely from statute. By virtue thereof, the statutory scheme regulating the courts must be strictly construed.

## **The Law**

### **Strict Interpretation**

18. In the course of his judgment *In the matter of Article 26 and the Emergency Powers Bill 1976* [1977] I.R.159 at 173 O’Higgins C.J. at p.173 referring to a criminal statutory provision authorising detention, pointed out

“[a] statutory provision of this nature which makes such inroads upon the liberty of the person must be strictly construed. Any arrest sought to be justified by the section must be in strict conformity with it. No such arrest may be justified by importing into the section incidents or characteristics of an arrest which are not expressly or by necessary implication authorised by the section”.

19. Counsel submits that a penal code in the nature of the Offences Against the State Act under which a person may be convicted of an offence of membership of an unlawful organisation on the basis of evidence of belief, together with inferences, must be construed particularly strictly. She refers to the *D.P.P.v. Tyndall* Unreported, Supreme Court, 3rd May, 2005. Counsel further submits that under s.43(1) of the Offences Against the State Act, the Special Criminal Court, as a creature of statute regulated under Part 5 of the Act has jurisdiction only over those persons “lawfully brought” before it for trial under that Act.

20. Section 43(1) aforesaid provides:

“A Special Criminal Court shall have jurisdiction to try and to convict or acquit any person lawfully brought before that [c]ourt ... under this Act”.

21. In the general aspect of criminal law the Director of Public Prosecutions has no discretion to decide the process whereby a person accused of a crime may be brought before a court, the Offences Against the State Act creates an exception to this principle through the procedures outlined in sections 45 – 48.

### **Section 45 – 48 Offences Against the State Act, 1939 – 1998**

22. Sections 45 – 48 of the Offences Against the State Acts deal with the manner in which the jurisdiction of the court can be invoked and also the manner in which persons can be lawfully brought before the court for trial.

23. Ms. Murphy SC for the applicant submits that where an accused person has been arrested, as in the case of the applicant, for a scheduled offence capable of being disposed of summarily, namely that of membership of an unlawful organisation, and where thereafter a decision has been made by the D.P.P. that he or she be brought before the Special Criminal Court rather than being tried summarily for that offence, there are a number of different statutory routes whereby that person may be “lawfully brought” before the Special Criminal Court.

24. These include:

1. Commencement of procedure in the District Court pursuant to s.45 of the Act. Under this procedure a Garda may bring an accused person before a District Court charged with the aforesaid offence. The D.P.P. requests he shall then be sent forward by the District Court to the Special Criminal Court for trial upon that charge. The District Court has no discretion to refuse to send the accused forward to the Special Criminal Court.

2. The specific empowerment of the Director of Public Prosecutions under the Offences Against the State Act to direct that an accused person be brought directly before the Special Criminal Court without first appearing before the District Court. This is provided for by virtue of s.47(1) of the Offences Against the State Acts, 1939 – 1998. This provision provides that when it is intended to charge a person with a scheduled offence the D.P.P. may direct that a person:

“shall, in lieu of being, charged with such offence before a judge of the District Court be brought before a Special Criminal Court, and there charged with such offence, and upon such direction being so given, such persons shall be brought before a Special Criminal Court and shall be charged before that [c]ourt with such offence and shall be tried by such [c]ourt on such charge”.

25. It is further submitted on behalf of the applicant that where the Director of Public Prosecutions has made a direction under s.47(1) of the Offences Against the State Acts as amended, that an accused person be charged before the Special Criminal Court then this statutory provision provides that he should be so charged “upon such direction being so given”.

26. The applicant further contends that insofar as relates to charging before the Special Criminal Court there are four lawful methods provided for in statutory form governing the jurisdiction and procedures of that Court pursuant to the Offences Against the State Act, 1939 – 1998.

27. These are:

(i) where the accused person has been arrested under s.30 of the Offences Against the State Act, 1939 – 1998 he may be charged before the expiry of the statutory detention period provided for under that section. Section 30(4)(c) of the Offences Against the State Act as amended permits the Gardaí to bring an accused person before the Special Criminal Court during the statutory detention period so that he may be there charged with the aforesaid offence. Alternatively, he may be firstly charged with the aforesaid offence in the Garda station and then also within the said detention period brought before the court under s.30(4)(c): *The State (Walsh) v. Maguire* [1979] I.R.372.

(ii) Following the expiry of the period of lawful detention under s.30, an accused person may be released and a warrant for his arrest sought from the Special Criminal Court by the Director of Public Prosecutions pursuant to s.47(3) of the Offences Against the State Act, 1939 – 1998 so that he may be brought in custody before the Special Criminal Court on the basis of that warrant

(iii) Following the expiry of the period of lawful detention under s.30, aforesaid the accused person may be released and a summons sought from the Special Criminal Court by the Director of Public Prosecutions under Rule 17(1) of the Rules of the Special Criminal Court made pursuant to s.41(1) of the Offences Against the State Act, 1939 – 1998 ordering that the accused person shall attend before the Special Criminal Court.

(iv) Following the expiry of the period of lawful detention under s.30 the accused person may be released and re-arrested for the same offence for the purpose of being charged with that offence, forthwith, under s.30(a)(3) of the Offences Against the State Acts as amended.

28. Ms.Murphy SC submits that this is an exhaustive list of the statutory means whereby an accused person may be lawfully brought before the Special Criminal Court pursuant to a direction of the Director of Public Prosecutions under s.47(1) of the Offences Against the State Act as amended in respect of an offence under s.21 of that Act of his membership of an unlawful organisation.

29. It is accepted that other considerations apply where the Director of Public Prosecutions has a statutory power to transfer an accused person from the ordinary courts for trial before the Special Criminal Court but these, it is submitted, have no relevance to this application.

#### **Power of Arrest under Section 4 of the Criminal Law Act 1997**

30. In the case of the applicant, s.4 of the Criminal Law Act 1997 was used to bring him before the Special Criminal Court. The respondents refer specifically to s.4(3) of the Criminal Law Act 1997 as being a lawful means to bring a person before the Special Criminal Court or indeed any other court.

31. This subsection provides:-

“Where a member of the Garda Síochána, with reasonable cause, suspects that an arrestable offence is being committed, he or she may arrest without warrant anyone whom the member, with reasonable cause, suspects to be guilty of the offence”

32. On behalf of the applicant it is submitted that an arrest under s.4 of the Act of 1997 has no place within what is submitted to be the self contained statutory framework of the Offences Against the State Act, 1939 – 1998. Counsel submits that there is no statutory indication that any of s.4 of the Act of 1997 was intended to change or affect the operation of the Offences Against the State Acts as amended.

33. On behalf of the respondents, Mr.Anthony Collins SC, submits that the provisions of s.4 are no more than a modern statutory formulation of the common law power to arrest for a felony. The section distinguishes between arrestable and non-arrestable offences, not between scheduled and non-scheduled offences. Counsel for the respondents refers to s.2 which defines an arrestable offence as:

“[An] offence for which a person may ... by virtue of any enactment ... be punished by imprisonment for a term of five years or by a more severe penalty”. There is nothing in this definition, he submits, to suggest that it is limited to non-scheduled offences.

34. The kernel of the case is whether (as the applicant contends) the Offences Against the State Act is a self contained code immune from being informed or influenced by other legislation such as the Act of 1997 or whether, per contra, the Offences Against the State Acts as amended are capable of being informed or influenced by other legislation such as the Act of 1997.

35. Prior to considering the decided authorities on this essential point, it may be remarked that there is clear authority that there may be an arrest upon arrest. Indeed as the respondents point out, s.30A(3) of the Act of 1939 expressly envisages an arrest upon an arrest for the purpose of charging a person with that offence forthwith. Thus counsel for the respondents points out that in *Re: Laighleis* [1960] I.R.93 the applicant was served with a warrant of detention whilst already under a s.30 arrest. The validity of this procedure was upheld by Davitt P. who observed at p.108:-

“The fallacy [in the applicant’s argument] ... lies in regarding an arrest as essentially the determination of a pre-existing liberty. This is not, in our view, an essential or necessary feature of arrest. The essence is the restraint from liberty as from the moment of arrest, that is, the subsequent or future restraint. It is irrelevant, therefore, to the true nature of an arrest whether the person arrested was then at liberty or not

36. The respondents also submit that there is no doubt that a person under ordinary detention may be arrested under s.4 of the Act of 1997 for the purpose of bringing that person to the District Court to be charged. Section 47(1) of the Act of 1939 simply provides that the Director of Public Prosecutions may direct that a person be brought before the Special Criminal Court to be charged in lieu of being brought before the District Court.

#### **The First Issue**

37. The issue which then falls to be determined can conveniently be divided into two sub-divisions.

(a) The status of the Offences Against the State Acts with regard to other criminal statutes.

38. The first matter to be determined is whether the Offences Against the State Act is in the words of the respondent “a hermetically sealed code immune from being influenced by other legislation and in particular the Act of 1997”.

39. On behalf of the respondent it is submitted that there are no words in the Offences Against the State Acts as amended which purport to confer exclusivity. No provision of the Acts of 1939 – 1998 stipulates that the only method whereby a person may be brought before the Special Criminal Court is on foot of the Offences Against the State Acts as amended themselves. No stipulation or provision of the Acts indicates exclusivity as to the method or means whereby a person may be brought before the court. In addition the respondents submit that nowhere within the legislation itself are there words to the effect that it is to be interpreted as a self contained code. In fact the respondents contend that the Offences Against the State Acts as amended are to be seen as capable of being informed and influenced and other legislation including the methods or means whereby a person may be brought before the

court.

40. Mr.Collins SC for the respondents, further accepts that the Offences Against the State Act legislation must be construed strictly (this is demonstrated in the case of *McElhinney v.The Special Criminal Court* [1990] 1 I.R.405.However he submits the fact that the legislation has to be interpreted in a strict manner is by no means the same as asserting that it has to be interpreted in a manner which necessarily favours the accused.

41. In order to disprove the applicant's thesis counsel for the respondents point, for example to s.37 of the Offences Against the State Act which refers to attempting, conspiring or inciting to commit or aiding and abetting the commission of a scheduled offence as in itself amounting to a scheduled offence.However, he points out, in order to understand the meaning of each of these terms reference must be made to common law definitions.Thus the Offences Against the State Act is in no way hermetically or self contained as is suggested.

42. Counsel for the respondents further point to s.49 of the Offences Against the State Act 1939 which deals with the selection of the Special Criminal Court by which a person is to be tried and which commences by providing:

"[w]here a person is (in the case of an offence triable summarily) sent or (in the case of an indictable offence) sent forward by a justice of the District Court to a Special Criminal Court for trial or the trial of a person is transferred under this Act to a Special Criminal Court or a *person is to be charged before and tried by a Special Criminal Court* (emphasis added) such of the following, provisions as are applicable shall have effect ... There are no words of limitation, counsel for the respondents submits, suggesting that this provision refers only to a person who is to be charged or tried pursuant to any particular method expressly laid down by the Act.

43. In order to buttress their argument, both applicant's and respondents' counsel rely on the authority of *The People (D.P.P.) v.Pringle and McCann* (1981) 2 Frewen 57.

44. In that case the appellant had been arrested under s.30 of the Offences Against the State Act 1939 as amended and, after his arrest was extended by a further period of 24 hours he was brought to the Special Criminal Court and there charged.Thereafter he was remanded in custody to a further date upon which the Director of Public Prosecutions withdrew the charges he faced and preferred new charges.The appellant had been informed of the new charges prior to the sitting of the court.He submitted that a person could not be charged or tried before the Special Criminal Court unless he was either arrested under s.30 of the Offences Against the State Act as amended or was arrested under a warrant issued by the court under section 47.

45. At p.90 of the judgment O'Higgins C.J.the presiding judge of the Court of Criminal Appeal recited the appellant's submission on this issue.

"The second submission was that, on the facts of what occurred on 25th July, 1980 immediately upon counsel for the Director of Public Prosecutions intimating that he wished to withdraw the existing charges which had previously being preferred in the [c]ourt against the accused, that the [c]ourt no longer had any power or right to hold the accused before it, and that he was entitled immediately to be released, and that consequently when subsequently charged before the [c]ourt on the same date he was not lawfully before the [c]ourt but was in the illegal custody or detention of the [c]ourt".

46. Having considered this submission O'Higgins C.J.concluded:

"Having carefully considered these submissions, this [c]ourt is satisfied that both must fail.Section 43 of the Offences Against the State Act, 1939, gives to the Special Criminal Court jurisdiction to try and to convict or acquit any person lawfully brought before that [c]ourt.There is nothing in the terms of that section or in the other provisions contained in the Act of 1939 which could be interpreted as confining the method of lawfully bringing before the Special Criminal Court a person to be tried by it to an arrest under s.30 or pursuant to a warrant of the [c]ourt as is submitted (emphasis added)" (at pp.90 -91).

47. On behalf of the applicants it is submitted that Pringle establishes that once an accused person is brought lawfully before the Special Criminal Court in the first instance he may then lawfully be charged with additional or substituted charges.The applicant submits that this is not the position here where, it is submitted, the applicant was not lawfully brought the Special Criminal Court in the first place.

48. In *McElhinney v.The Special Criminal Court* [1990] 1 I.R.405 the applicant sought to quash a warrant for his arrest which had been issued by the Special Criminal Court on the basis that there was no evidence that the Director of Public Prosecutions had certified or directed in accordance with the Act of 1939.In the High Court, Gannon J.granted the applicant relief and held that, unlike the jurisdiction of the District Court which was not dependent upon the manner in which the attendance of the accused was procured, s.43 of the Offences Against the State Act made the manner in which a person's attendance is procured before the Special Criminal Court a matter of substance.On appeal to the Supreme Court however Walsh J.upholding the appeal noted at p.419 that:-

"Section 47 requires the accused person to be brought before the court for the purpose of being charged but does is not prescribe that it must be by arrest.

"His view was that by way of illustration, a mere spectator in the court could not be charged with an offence.To that extent he agreed with Gannon J.in the High Court that the Special Criminal Court differs from the District Court.

49. However the respondent points out that this was no more than an application of the plain words of s.47(1) and/or s.47(3) which required that a person be "brought before" the court.Thus the principle established from *McElhinney* is merely that a person must be brought before the court.

50. The respondent contends that in the instant case the applicant was clearly "brought" before the Special Criminal Court and did not therefore attend of his own free will.

51. In *Cully v.Governor of Portlaoise Prison* [1998] 1 I.R.443 the applicant had been remanded by an invalidly constituted Special Criminal Court by reason of the facts that one of the judges had been removed as a serving member of the court at the time of such remand.The applicant was released from Portlaoise Prison, but was thereafter immediately re-arrested outside the gates and taken directly to the court where he was remanded to the next day.He was unsuccessful in his challenge to this procedure.The arrest

effected in that case was pursuant to common law. In the course of his judgment Kelly J. stated at p.447:-

"By the time of the applicant's release the Director of Public Prosecutions had given provisional directions to the effect that if he was released he should be re-arrested at common law ... on suspicion of having committed a felony". Kelly J. upheld the validity of the procedure and held that on the facts a period of legal detention began from the time of the applicant's re-arrest.

52. On behalf of the applicants it is submitted that Pringle is merely authority as to the procedure which may be adopted once an accused person is brought lawfully before the Special Criminal Court in the first instance. Thereafter he may be charged with additional or substituted charges.

53. In the case of *Cully*, the applicant submits that it was not argued in that case that an arrest effected pursuant to common law was invalid. Counsel for the applicant submits that *Cully* is not authority for the proposition that a common law power of arrest may be used.

54. The court does not accept either of these submissions.

55. In the first instance, on its plain words, it appears that there is a clear finding in *Pringle* (as cited above) that the Offences Against the State Act is not self contained. In the words of O'Higgins C.J. there is nothing in the terms of s.43 of the Offences Against the State Act or in the other provisions contained in the Act of 1939 which could be interpreted as confining the method of lawfully bringing before the Special Criminal Court a person to be tried by it to an arrest under s.30 or pursuant to a warrant of the court. No words in the Offences Against the State Act confirm or affirm exclusivity. Nor do any words in the Act of 1997 to which reference has been made above preclude the application of a s.4 arrest as being a legitimate means of bringing an arrested person before the Special Criminal Court.

56. One turns then to counsel's second point that is that it was not argued in *Cully* that an arrest pursuant to common law was unlawful. As is pointed out in the judgment in *Cully* however, that judgment must be seen in conjunction with the judgments of the Divisional Courts in *Hegarty v. Governor of Limerick Prison* [1998] 1 I.R.412 and *Duncan v. Governor of Portlaoise Prison* [at p.433 of the same report]. In each of those three cases it was clearly found that the common law re-arrest was not inherently unlawful provided there was no evidence of abuse of process. The test as to whether abuse of process arose will depend upon the intention and purpose of the arrest (see Geoghegan J. in *Hegarty v. Governor of Limerick Prison* at p.427).

57. Having regard to these authorities therefore I am of the view that in the absence of any evidence of mala fides or abuse or process the release and re-arrest effected in this case was lawful.

## **The Second Issue**

### **(b) Detention under s.4 of the Criminal Law Act 1997**

58. This finding however does not conclude the issues which are before the court.

59. The reason for this is that it is submitted on behalf of the applicant that even if the court were to hold that s.4 of the Criminal Law Act may be used for the purpose of re-arresting a person who has already been arrested under s.30 of the Offences Against the State Act 1939 – 1998, and detained on suspicion of having committed an offence created by that legislation and released from that detention, Section 4 of the Act of 1997 confers no power of detention without charge. It is submitted on behalf of the applicant that it merely confers a power to arrest without warrant simpliciter. The applicant submits that where a person is arrested without warrant for any offence under s.4(1) of the Act of 1997 they must either be charged or released.

60. In this regard Ms. Murphy SC submits that the procedure to be followed upon an arrest under s.4 of the Act of 1997 is prescribed in s.15(2) of the Criminal Justice Act, 1951 (as inserted by s.18 of the Criminal Justice (Miscellaneous Provisions) Act, 1997). This section provides that a person arrested without a 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".

61. The applicant submits that it is required that a person arrested under s.4 must be charged with an offence once arrested (unless released) and that if charged *he shall be brought before the District Court* "as soon as practicable". Thus, it is submitted that s.4 cannot be used to give effect to a direction issued by the D.P.P. under s.47(1) that an accused person be brought before the Special Criminal Court for the purpose of being charged.

62. As an adjunct to this contention the applicant submits that even if the Court were to hold that s.4 of the Act of 1997 may be used for the purpose of re-arresting a person who has already been arrested under s.30 of the Offences Against the State Act, 1939 – 1998, detained on suspicion of having committed an offence created by the Offences Against the State Act, 1939 – 1998 and released from that detention, the statutory obligation to charge that person *forthwith* created by s.30A(1) of the Offences Against the State Act, 1939/1998 remains. Alternatively the applicants submit that the prohibition upon re-arrest under s.30A(3) of the Offences Against the State Act, 1939/1998 must be read subject to permitted exceptions where re-arrest is permitted namely: (1) where a District Judge has issued a warrant on being satisfied that further information has come to the knowledge of the Gardaí as to the persons suspected participation in the offence; and (2) as provided by s.30A(1) of the Offences Against the State Act, 1939/1998, where the Gardaí are permitted to re-arrest the accused person for any offence "for the purpose of charging him with that offence forthwith". Thus it is submitted re-arrest for the same offence is prohibited under s.30(a)(1) of the Offences Against the State Act, 1939/1998 unless for the purpose of charging an accused with that offence".

63. In approaching this argument counsel for the respondent strongly relies on s.47(1) of the Act of 1939 which provides

"whenever it is intended to charge a person with a scheduled offence, the Attorney General may, if he so thinks proper, direct that such persons shall, in lieu of being, charged with such offence before a justice of the District Court, be brought before a Special Criminal Court".

64. Thus it is submitted that the Director of Public Prosecutions as successor in title to the Attorney General may direct that a person may be brought before the Special Criminal Court to be charged in lieu of being brought before the District Court. It is this specific provision, the respondents contend, which confers jurisdiction upon the Special Criminal Court. Thus it is contended the intention of s.47(1) of the Act of 1939 has the effect either of rendering the time scale within which the applicant is to be charged as being "as

soon as practicable" (s.15(2) of the Criminal Justice Act, 1951 (as inserted by s.18 of the Criminal Justice (Miscellaneous) Provisions Act, 1997)) i.e.that applicable under s.4 of the Criminal Law Act, 1997, or if s.30A(3) is applicable in the instant case the timescale applicable should be "forthwith".

65. In either case the respondents contend that the uncontradicted evidence of Detective Superintendent O'Sullivan in this case is that, as soon as a direction was received from the Director of Public Prosecutions at 5.25 pm on Holy Thursday, endeavours were made to convene a sitting of the Special Criminal Court. It proved possible to convene a sitting of that court on Good Friday at 12 midday. The respondents contend it is difficult to see how this could be described as anything other than "forthwith" at any time of the year, let alone a holiday period. The respondents submit that the word "forthwith" cannot be equated with "immediately" since a person arrested at a remote part of the country could not be brought before the Special Criminal Court for a number of hours. Even if the applicant were brought before the District Court the following morning it was by no means inconceivable that a time elapse up to 12 midday would occur before such person was charged.

66. In addition it was submitted that the court must have regard to the purpose of s.30 of the Offences Against the State Act which is to prevent a person from being oppressed by repeated arrest under s.30 for the purposes of interrogation. Its purpose is not to impose restrictions upon the manner of charging a person and bringing them to court.

67. Mr. Collins SC on behalf of the respondents points out that the legislature recognises that the practicalities of court sitting times must be taken into account. For example, the instance of s.15(3) of the Criminal Justice Act, 1951 (as inserted by s.18 of the Criminal Justice (Miscellaneous Provisions) Act, 1997) which provides

"Where a person is arrested pursuant to a warrant later than the hour of 5 o'clock on any evening, or having been arrested without warrant, is charged after that hour and a judge of the District Court is due to sit in the District Court District in which the person was arrested not later than noon of the following day, it shall be sufficient compliance with subsection (1) or (2) of this section, as the case may be, if he is brought before a judge of the District Court sitting in that District Court District at the commencement of the sitting".

68. Section 30A(1) of the Offences Against the State Act, 1939/1998 prohibits a person who has been arrested on suspicion of having committed an offence, detained pursuant to s.30 and released without charge from being re-arrested for the same offence. However s.30A(3) permits the Gardaí to re-arrest the accused for any offence "for the purpose of charging him with that offence forthwith". Thus the issue to be determined is even if s.30A(3) is applicable, was the accused brought before the court "forthwith"?

69. In the official language the term "láithreach" is used in s.30A(3) where "forthwith" is the English version. In Gearrfhoclóir Gaeilge-Béarla the term "láithreach" is translated as meaning in the English language "present or immediate." How then should this term be interpreted in the instant case?

70. In the case of *D.P.P. v. Carolan* [1998] 2 I.L.R.M.212 Shanley J. held that there is no hard and fast rule when deciding what is a reasonable period within which to bring an arrested person before a court or to a Garda station. All the circumstances must be considered and the reasonable period may vary according to the circumstances of each case.

71. Further assistance in such interpretation may be obtained from the decision of Gilligan J. in the case of *Massoud v. Judge Watkins and the D.P.P.* (Unreported, High Court, Gilligan J., 22nd June, 2004), where that judge noted that any interpretation of a statute that allows the Garda authorities to engage in conduct after a re-arrest that is not directed at charging that person with the offence should be rejected as it goes beyond the purpose of the statute.

72. Gilligan J. stated at p.10 of his judgment:-

"I am satisfied that this specific statutory exception [under s.10(2) of the Criminal Justice Act 1984 which permits re-arrest for the purposes of charging a person with that offence forthwith] has to be construed strictly and be allowed to operate only so far as is necessary to serve its statutory purpose against a background where Article 40.4.1 of the Constitution enshrines the right to personal liberty and any provision whereby a person is held without charge in police custody obviously represents an inroad into this right. Accordingly it follows that insofar as s.10 provides for lawful inroad into the right to personal liberty its terms have to be construed strictly".

73. He cited the judgment of O'Higgins C.J. in the matter of Article 26 of the Constitution and in the matter of the Emergency Powers Bill 1976 [1977] I.R.159 and Gannon J. in the case of *O'Flynn v. District Justice Clifford* [1988] I.R.740 at p.745. In addition he relied on the judgment of McGuinness J. in her judgment in *D.P.P. v. Early* [1998] 3 I.R.158 at pp.167-169.

74. Clearly then a pivotal issue which arises here is as to the true purpose of the Gardaí re-arresting the applicant. If this purpose was merely to gain more time to question the applicant then a clear misuse of the power of re-arrest would arise. However, on the basis of the evidence earlier referred to, that is the statement of Detective Superintendent O'Sullivan to the effect that the re-arrest was to bring the applicant immediately before the Special Criminal Court, there appears to be no evidence of such abuse. True, the applicant was detained for a period of 15 hours and 20 minutes from his re-arrest under s.4 until being charged. Yet it can be seen from the evidence of Detective Superintendent O'Sullivan that as soon as a direction was received from the Director of Public Prosecutions at 5.25 pm on 8th April, 2004, endeavours were made to convene a sitting of the Special Criminal Court and the applicant was brought before that Court at noon, the next day Good Friday the 9th April, 2004.

75. Moreover no evidence has been adduced as to any abuse of power or continued enquiry, investigation, or detention of the applicant for the purposes of interview. In the light of the foregoing, and having regard to the specific circumstances of this case, the Court will hold that the direction of the Director of Public Prosecutions was sufficient to invoke the jurisdiction of the Special Criminal Court and to preclude the jurisdiction of the District Court. Again having regard to the time sequence, the totality of circumstances, the absence of any evidence of mala fides or prejudice and the convening of the Special Criminal Court at 12 midday on the following Friday this Court will hold that on the facts the applicant has been brought before the Special Criminal Court within a time frame which may be interpreted as immediately and certainly as soon as was practicable.

76. It follows from these findings that the Court will hold that the Special Criminal Court has jurisdiction, that the applicant is lawfully before it, and that the trial should be permitted to proceed in accordance with law. The Court will therefore decline the application for judicial review.

