

**THE HIGH COURT**  
**JUDICIAL REVIEW**

**2009 841 JR**

**BETWEEN**

**THOMAS KENNY**

**APPLICANT**

**v.**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**Judgment of Mr. Justice Hedigan delivered the 26th day of May 2011**

1. The applicant resides at 1 Portersgate Heights, Clonsilla, Dublin 15. The respondent is the person charged with the direction, control and supervision of prosecutions in the State and his office is located at Chapter House, 26-30 Upper Abbey Street, Dublin.

2. The applicant seeks the following relief's

- (i) An Order of prohibition prohibiting the respondent its servants or agents from dealing with or proceeding to deal with this matter.
- (ii) Such further and other Orders as this Honourable Court deems fit.
- (iii) An Order for Costs.

3.1 On the 4th of April 2008, the applicant was arrested pursuant to section 4 of the Criminal Law Act, 1997, for assault under section 3 of the Non-Fatal Offences Against the Person Act, 1997. He was later released without charge. On the 12th of May, 2009, the applicant was re-arrested by Detective Garda Dervan pursuant to section 10(2) of the Criminal Justice Act, 1984, outside Blanchardstown Court House at 12:40pm. The applicant claims that Detective Garda Dervan explained that the arrest was "for the purposes of charging him in connection with an alleged offence of Section 3 Assault at Clonee, Co Meath on 22nd of March 2007."

3.2 The applicant was taken by Garda car to Dunshaughlin Garda Station in Co Meath. He arrived twenty minutes later at 1:00pm. The applicant was processed through the custody record in accordance with normal procedures. He was provided with form C72 outlining his rights, he was then searched. The applicant was granted permission to make a phone call in accordance with his rights as provided in form C72. At 1:35 pm the applicant was placed in a garda cell where he remained for 15 minutes. At 1:50pm the applicant was charged with assault. He was also charged with criminal damage and two counts of attempted theft. The applicant was returned to the cell for ten minutes. At 2:00 pm the applicant was taken to Dunshaughlin District Court and then released.

3.3 Detective Garda Dervan indicates that the charge sheets were pre-prepared on the pulse system. When however he returned to the station with the applicant on the 12th of May, 2009, he encountered some delay accessing the system to update the charge sheets and print them off. There was no sergeant present at Dunshaughlin Station. This caused delay accessing the pulse system because Detective Garda Dervan was required to contact a sergeant elsewhere to gain a password permitting him to access the system. Once he accessed the system he proceeded to make the necessary amendments to the charge sheets, printed them off and charged the applicant with the four charges. The Director of Public Prosecutions had earlier written to the State Solicitor advising that three additional charges should be brought against the applicant. In these proceedings the applicant seeks to prohibit the Director of Public Prosecutions from proceeding to deal with this matter.

**4 Applicants Submission's**

4.1 Counsel on behalf of the applicant submits that the applicants arrest was in breach of Section 10(2) of the Criminal Justice Act, 1984 in two respects. Firstly section 10(2) requires that an applicant be charged "forthwith". This, he alleges, did not occur. The applicant was arrested at 12:40am in Blanchardstown, driven for twenty minutes to Dunshaughlin. The applicant was processed in accordance with the facts as set out until 1:35pm, he was then imprisoned in a Garda cell for another 15 minutes and at 1:50pm over an hour after being arrested the applicant was finally charged. It is submitted that in these circumstances the applicant was not charged "forthwith".

4.2 In *O'Brien v The Special Criminal Court & Others* [2008] 4 I.R. 514, the issue of how the term "forthwith" is to be construed was addressed by Fennelly J. at 535:-

"Counsel for the applicant concentrated on the period of detention as being unlawful and submitted that charging before the Special Criminal Court was not "forthwith". That expression must be equated with "immediate" or "at once". There must be no delay...he confirms to my mind that "forthwith" imposes a more stringent requirement that "as soon as practicable"... I agree with Counsel for the applicant on the meaning of the term forthwith."

In the same case the issue of what constitutes "forthwith" was also addressed by Denham J. at 526:-

"The word "forthwith" is not a technical term, nor a term of art. It should be given its common and usual meaning. It is defined in the Concise Oxford Dictionary as: "immediately" and "without delay". Thus the law requires that a person in the position of the applicant be charged immediately, without pause or delay. The term "forthwith" requires immediate action. This is in contrast to the pragmatic requirement in the term "as soon as practicable".

The applicant submits that he was not charged "forthwith" in accordance with Section 10 (2) of the Criminal Justice Act, 1984, but was in fact charged as soon as the Garda was ready, at whatever time that might be.

4.3 The applicant submits that his arrest was also in breach of Section 10(2) of the Criminal Justice Act, 1984 as s. 10(2) requires that a person be charged with the charge indicated to him at the time of his arrest. The applicant claims that at the time of his arrest Detective Garda Dervan indicated that the arrest was "for the purposes of charging him in connection with an alleged offence of Section 3 assault." The applicant was not however charged with just the offence indicated to him. He was charged with this offence plus three additional offences.

4.4 The issue of the obligation on a Garda to charge an accused person he has arrested under Section 10(2) of the Criminal Justice Act 1984 with the offence specified, was addressed in *Massoud v Judge Ann Watkins and the Director of Public Prosecutions* [2005] 3 I.R. 155, Gilligan J held at 161:-

"Section 10 of the Criminal Justice Act 1984 is quite clear in setting out that where a person has already been arrested and detained pursuant to s.4 and is released without any charge having been made against him he shall not be arrested again for the same offence. Against this general proviso s.10 provides for two exceptions the first is not relevant to this case...the second which is particularly relevant is contained in s. 10 (2) which states that:-

"Notwithstanding anything in subsection (1), a person to whom that subsection relates may be arrested for any offence for the purpose of charging him with that offence forthwith."

In the circumstances of this case the crucial words are "for the purpose of charging him with that offence forthwith".

I am satisfied that this specific statutory exception 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 a lawful inroad into the right to personal liberty; its terms have to be construed strictly."

Gilligan J. goes on to record the comments made by McGuinness J. in *Director of Public Prosecutions v. Early* [1998] 3 I.R. 158 at 167. In that case a comparison was drawn between Section 10 of the 1984 Act and Section 4 of the 1996 Act. It is stated at 164:-

"The main safeguard, which is contained both in s.10 of the Act of 1984 and s.4 of the Act of 1996, is a safeguard against repeated detention by the gardaí on the same offence without any new information having come to light. However, this is different from the situation which can arise where a person has been released from detention under s.4 of the Act of 1984 or s.2 of the Act of 1996 and at a later stage a decision is made by the gardaí to charge that person with an actual offence. Section 10(2) of the Act of 1984 and s. 4(5) of the Act of 1996 permit a further arrest for this purpose and for this purpose only. It is essential to distinguish carefully and clearly between arrest for the purposes of detention for investigation and arrest for the purposes of charging the alleged offender, of bringing him before the court under the Criminal Procedure Act, 1967, which will eventually lead to his or her trial."

Mr Justice Gilligan continues that:-

McGuinness J. is strong in her view that the provisions of s.10 are a safeguard in respect of the constitutional right to liberty of the citizen. I am satisfied that any interpretation of s.10 which allows the garda authorities to do anything after a person has been re-arrested pursuant to s. 10(2) that is not directed at charging that person with the offence for which he has been re-arrested should be rejected because it goes beyond the purpose of the exception... I take the view that in the particular circumstances of this case, once the applicant had been re-arrested pursuant to s.10(2) in respect of the offence of obtaining money by false pretences, it was incumbent on the member to charge the applicant with obtaining monies by false pretences and proceed from that point on with the normal logical consequence."

The applicant submits based on *Massoud* he should not have been charged with three additional charges, while he was detained.

4.5 Section 10(2) is designed to prevent abuse of detention procedures by providing that the accused may be arrested for any offence for the purpose of charging him with that offence "forthwith". When Garda Dervan invoked s.10 (2) of the Criminal Justice Act 1984, there was a strict onus on him to comply with Section 10(2) of the Act. The onus is on the respondent to establish beyond a reasonable doubt that the applicant was at all times in lawful custody. The applicant submits that the period of detention after he was arrested was unlawful and breached his constitutional right to liberty because he was not charged "forthwith". Article 40.4.1 of the constitution provides that "no person should be deprived of his liberty except in accordance with law." The applicant further submits that the misuse of s. 10(2) by charging him with further offences amounted to a deliberate and conscious violation of his constitutional rights and that the breach was not a mere technicality that was cured once the applicant appeared in Court. The applicant therefore submits that the respondent should be prohibited from proceeding to deal with this matter.

## 5 Respondent's Submissions

5.1 The applicant complains that he was charged with offences other than the offence in respect of which he had been originally arrested and that this contravenes s.10 of the Criminal Justice Act, 1984. Section 10 provides:-

"(1) Where a person arrested on suspicion of having committed an offence is detained pursuant to section 4 and is released without any charge having been made against him, he shall not:

(a) be arrested again for the same offence

(b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he was arrested suspected him or ought reasonably to have suspected him,

Except on the authority of a justice of the District Court who is satisfied on information supplied on oath by a member of Garda Síochána not below the rank of superintendent that further information has come to the knowledge of the Garda Síochána since the person's release as to his suspected participation in the offence for which his arrest is sought. A person arrested under that authority shall be dealt with pursuant to section 4.

(2) Notwithstanding anything in subsection (1), a person to whom that subsection relates may be arrested for any offence for the purpose of charging him with that offence forthwith..."

The respondent submits that it is clear from the foregoing that there is no impediment to re-arresting a person and charging him with offences other than the offence for which he was originally arrested.

5.2 The second complaint of the applicant is that he was not charged "forthwith" in accordance with s.10 (2) of the Criminal Justice Act, 1984. The respondent submits that the requirement to charge "forthwith" is to ensure that a person is re-arrested for the purpose of charge and not for a period of further questioning. There is no suggestion in this case that there was any further period of questioning or that anything else occurred during the period of re-arrest and detention other than the processing of the applicant for the custody record and charging. The case the applicant seeks to rely upon in this regard is *Massoud v Judge Ann Watkins and the Director of Public Prosecutions* [2005] 3 I.R. 155. However the respondent submits that the facts of the present case can be distinguished from those in *Massoud*. In *Massoud* the applicant was arrested for obtaining money by false pretences. He was detained pursuant to s. 4 of the Criminal Justice Act, 1984. The applicant was rearrested for the same offence and detained pursuant to s. 10(2) of the Criminal Justice Act 1984. He was placed in a cell for approximately two and a half hours. However he was then charged with conspiracy to defraud. Mr Justice Gilligan interpreted s.10(2) of the Criminal Justice Act 1984 as providing a mechanism to the Gardaí to re-arrest a person for the sole purpose of charging him/her with the offence for which he had been arrested. The respondent submits that the particular difficulty which presented itself in *Massoud* does not arise in this case as the applicant was charged with section 3 assault which was the offence indicated to him at the time of his re-arrest.

5.3 The applicant complains that he was not charged "forthwith" as required by s.10(2) of the Criminal Justice Act 1984. The interpretation of the word "forthwith" in the context of sections 30 A(1) and (3) of the Offences against the State Act 1939, arose for consideration in *O'Brien v Special Criminal Court* [2008] 1 I.L.R.M 510. The applicant in that case was arrested on April 6, 2004, on foot of a warrant under section 29 of the Offences against the State Act 1939. When his period of detention expired at 10:30 am on the 8th of April, 2004 the applicant was released and re-arrested under section 4 of the Criminal Law Act 1997 at 8:30 pm. Following his re-arrest the applicant was detained at Balbriggan Garda Station for the purpose of being brought before the Special Criminal Court. On the morning of the 9th of April he was brought before the Special Criminal Court and charged. Denham J. considered whether the applicant had been charged "forthwith" at p.520:-

"He was arrested at 8:35 pm on April 8th 2004 and charged before the Special Criminal Court shortly after 12:00 noon on the 9th of April, 2004. In all the circumstances this was 'as soon as practicable', but that is not the requirement of the law. The law required that he be charged "forthwith" and that was not done. Therefore his detention prior to charging was unlawful."

The respondent submits that the ratio of *O'Brien* is that the arrest had to be "for the purpose" of charging the accused person, on pain of his detention thereunder being unlawful. The applicant in *O'Brien* was arrested and detained for the purpose of being brought before the Special Criminal Court in circumstances where he could have been charged "forthwith" by An Garda Síochána. In the present case the applicant was arrested for the purpose of being charged "forthwith" and thereafter was charged without significant delay.

5.4 In *Whelton v. O'Leary and DPP* [2007] IEHC 460 on the 1st of September 2005, the applicant was arrested on suspicion of theft and detained for three hours pursuant to s.4 of the Criminal Justice Act, 1984. On October 27th, 2006 the applicant was re-arrested at 4:30 pm outside Anglesea Street Garda Station, where he had arranged to meet the gardaí. The applicant was brought the ten minute journey to the Bridewell Garda Station where he was then charged with two offences under the Criminal Justice Theft and Fraud Offences Act 2001 and was released. There had been an unexpected delay at the Bridewell Station as the printer which generates the charge sheets malfunctioned resulting in a delay of 55 minutes during which the applicant was placed in a holding cell. In the High Court Birmingham J. accepted the criticisms made in relation to the detention of the applicant in a cell. He nevertheless concluded that the jurisdiction of the District Court to determine charges was not ousted by such delay, if any, in charging the applicant.

*Whelton* was appealed to the Supreme Court however the appeal was dismissed. In his judgment Fennelly J. held at paragraph 43:-

"It follows that, applying these principles to the present case, even if there had been a defect in the way in which the gardaí arrested, detained and charged the appellant, in particular, if there had been an intention to charge him "forthwith" after his arrest, the jurisdiction of the District Court to try him would not have been affected, in the absence of a deliberate and conscious intention to deprive the appellant of his constitutional rights such as what Keane J. described as the "graphic example" of the *Trimbole* case. Thus, the District Court had jurisdiction to try the appellant."

It is submitted by the respondent that as in *Whelton*, the delay in this case is of limited duration and the arrest was for the sole purpose of charging the applicant forthwith. Accordingly, on the authority of *Whelton*, there was a valid exercise of a power of re-arrest in this. Every step taken by An Garda Síochána after his arrest was directed at charging the applicant with the offences for which he had been re-arrested. Thereafter the charging process was executed as expeditiously as possible in accordance with the requirements of the Criminal Justice Act, 1984. The applicant was charged as soon as the paper work was ready. It is further and alternatively submitted that even if the applicant is correct in his submission that his detention on foot of his arrest under section 10(2) of the Criminal Justice Act, 1984 was unlawful, that would not remove the jurisdiction of the District Court to try him on the charge preferred against him. In *DPP (Ivers) v. Murphy* [1999] 1 I.R. 98 Keane J held at 113:-

"It has been repeatedly pointed out that, as a general rule, the jurisdiction of the District Court to embark on any criminal proceedings is not affected by the fact, if it be fact that the accused person has been brought before the court by an illegal process."

It submitted that on the authority of *Whelton* the Court should reject the application on behalf of the applicant and the within proceedings should be dismissed.

## 6. Decision of the Court

6.1 The applicant claims that when he was re-arrested under s10 (2) of the Criminal Justice Act, 1984, Detective Garda Dervan explained that his re-arrest was "for the purposes of charging him in connection with an alleged offence of Section 3 Assault at Clonee, Co Meath." The applicant complains that because he was re-arrested in connection with a s.3 assault, he should have been charged with that offence alone. However he was also charged with criminal damage, attempted theft at the Bunch of Grapes Public House, Clonee Co Meath, and attempted theft at Eurospar, Dunboyne, Co. Meath.

6.2 Section 10 of the Criminal Justice Act, 1984 provides:-

"(1) Where a person arrested on suspicion of having committed an offence is detained pursuant to section 4 and is released without any charge having been made against him, he shall not

(a) be arrested again for the same offence

(b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he was arrested suspected him or ought reasonably to have suspected him,

Except on the authority of a justice of the District Court...

(2) Notwithstanding anything in subsection (1), a person to whom that subsection relates may be arrested for any offence for the purpose of charging him with that offence forthwith..."

While the applicant argues that he should only have been charged with the charge indicated to him at the time of arrest, it seems to me that there is nothing in s. 10(2) to indicate that a person charged in respect of one offence is immune from charge in respect of other offences. There is no impediment in s.10 (2) to re-arresting a person and then charging him with offences other than the offence for which he was arrested under s.10(2). The further charges to be laid were directed by the DPP who wrote to the Chief State Solicitor outlining the charges to be proffered against the applicant together with the charge related to the section 3 assault incident.

6.3 The applicant has sought to rely on *Massoud v Judge Ann Watkins and the Director of Public Prosecutions* [2005] 3 I.R. 155, in that case the applicant was re-arrested pursuant to s. 10(2) of the Criminal Justice Act 1984 for obtaining money by false pretences. He was placed in a cell for approximately two and a half hours and then charged, not with the offence for which he was re-arrested but with the offence of conspiracy to defraud. The applicant seeks to rely on this finding. It is clear however that *Massoud* can be distinguished from this case because the applicant in *Massoud* was not charged with the offence for which he was arrested. In this case, the applicant was arrested for s.3 assault and was charged with that offence.

6.4 The applicant complains that he was not charged "forthwith" as required by s.10(2) of the Criminal Justice Act 1984. In *O'Brien v The Special Criminal Court & Others* [2008] 4 I.R. 514, the issue of how the term "forthwith" is to be construed was addressed by Fennelly J. at 535:-

"Counsel for the applicant concentrated on the period of detention as being unlawful and submitted that charging before the Special Criminal Court was not "forthwith". That expression must be equated with "immediate" or "at once". There must be no delay...he confirms to my mind that "forthwith" imposes a more stringent requirement than "as soon as practicable"... I agree with Counsel for the applicant on the meaning of the term forthwith."

The applicant in *O'Brien* was re-arrested on the 8th of April and detained at Balbriggan Garda Station overnight for the purpose of being brought before the Special Criminal Court, on the morning of the 9th of April. Denham J. considered that the requirement that the prisoner be charged forthwith meant more than 'as soon as practicable'. This stringent requirement was not complied with and therefore his detention prior to charging was unlawful. The present case can be distinguished from *O'Brien* where the applicant was detained overnight. In this case the applicant was arrested for the purpose of being charged "forthwith" and thereafter was charged within one hour and ten minutes. The delay that occurred was caused by technical problems which were quickly resolved.

6.5 It seems to me that the facts in this case are far more closely aligned with those in the case of *Whelton v. O'Leary and DPP* [2007] IEHC 460. The main difference between the cases is that the applicant herein did not meet the gardai by appointment. In *Whelton* the applicant was re-arrested by appointment outside Anglesea Street Garda Station and brought the ten minute journey to the Bridewell Garda Station where he was then charged with two offences under the Criminal Justice Theft and Fraud Offences Act 2001 and was released. The printer which generates charge sheets malfunctioned resulting in a delay of 55 minutes during which the applicant was placed in a holding cell. In the High Court Birmingham J. accepted the criticisms made in relation to the detention of the applicant in a cell. He nevertheless concluded that the jurisdiction of the District Court to determine charges was not ousted by such delay, if any, in charging the applicant. Birmingham J stated that:-

"It must be stressed that the present case is not one where there was a lengthy delay post arrest, or a delay which was unexplained which might lead to the inference that the arrest was not for the purpose of charging forthwith. Here the delay was of limited duration and an explanation was offered to the applicant at the time."

On appeal the Supreme Court upheld the finding of the High Court.

6.6 The delay in this case was also of limited duration. The appellant was arrested at 12:40 pm and taken by Garda car to Dunshaughlin Garda Station in Co Meath. He arrived at 1:00pm. The applicant was processed for the purposes of the custody record in accordance with the normal procedures. He was provided with a C72 form outlining his rights. At 1:35 pm he was placed in a garda cell where he remained until 1:50pm when he was charged with certain offences and then put back into the cell until 2pm. The arresting garda indicated that the charge sheets had been pre-prepared on the pulse system. Notwithstanding this, there was a delay of a limited duration as the garda encountered some difficulty accessing the system to update them and print them. This was because there was no sergeant present and he had to contact a sergeant elsewhere to gain a password permitting him to enter the system. The delay experienced in this case, due to an inability to access the pulse system and the delay experienced in the *Whelton* case due to a malfunctioning printer are comparable. In both cases the delay was less than an hour. It is also to be noted that the delay in *Whelton* was more culpable because he had come to the station by appointment. It seems to me that unless one interprets "forthwith" as meaning "instantly" there has to be some allowance made for the necessary procedure such as transmission of the prisoner to the Garda Station and the normal processing therein. I do not think there was delay here that could be considered such as to render his charging as being not "forthwith".

6.7 Even if it was considered that the applicant was not charged forthwith that does not oust the jurisdiction of the District Court to try him on the charges proffered against him. It is well established that the jurisdiction of the District Court to embark on any criminal proceedings is not affected by the fact that the accused has been brought before the Court by an illegal process. In *Whelton* the appeal to the Supreme Court was dismissed. In his judgment Fennelly J. held at paragraph 43:-

"It follows that, applying these principles to the present case, even if there had been a defect in the way in which the

gardaí arrested, detained and charged the appellant, in particular, if there had been an intention to charge him "forthwith" after his arrest, the jurisdiction of the District Court to try him would not have been affected, in the absence of a deliberate and conscious intention to deprive the appellant of his constitutional rights such as what Keane J. described as the "graphic example" of the *Trimbole* case. Thus, the District Court had jurisdiction to try the appellant."

In my view the delay that occurred was an accidental one. It did not involve any effort to question further the applicant or to do anything not in accordance with s.10 (2). There was no conscious and deliberate violation of the applicant's constitutional rights in this case. So even if I had found the applicant had not been charged "forthwith", I would still hold that the jurisdiction of the District Court to hear these proceedings has not been affected. I therefore refuse the relief sought.