THE HIGH COURT

[2017 No. 61 S.S.]

IN THE MATTER OF SECTION 52 OF THE COURTS

(SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS (AT THE

SUIT OF GARDA DARYL J. HEARNS)

PROSECUTOR

AND

CHRISTOPHER BAILEY

ACCUSED

DIRECTOR OF PUBLIC PROSECTIONS (AT THE

SUIT OF GARDA PETER BARBER)

PROSECUTOR

AND

JOHN BAILEY

ACCUSED

JUDGMENT of Ms. Justice Faherty delivered on the 3rd day of October, 2017

1. This is a consultative case stated by Judge David McHugh, Judge of the District Court pursuant to the provisions of s. 52 of the Courts (Supplemental Provisions) Act, 1961, as amended.

2. The learned District Judge sets out the facts of the case, as follows:

> "1. I presided at a sitting of Blanchardstown District Court on 4th October 2016 which sitting commenced at 10.30a.m. The Accused, who had been arrested on the 3rd October 2016 after 5p.m. were brought before the Court at sometime in and around 12 midday, when evidence of arrest charge and caution was given to the Court by Garda Daryl J. Hearns in respect of the first named Accused and by Garda Peter Barber in the respect of the second named Accused.

2. At the said hearing, the prosecutor was represented by Garda Daryl J. Hearns and Garda Peter Barber of Ronanstown Garda Station. The first named Accused was represented by Ms. Fiona Brennan, solicitor of Merchants House, 20-30 Merchants Quay, Dublin 8 and the second named Accused by Mr. Simon Fleming solicitor, of Connolly Finan Fleming Solicitors, 55 Montpelier Hill, Arbour Hill, Dublin 7.

3.The facts as proved or admitted or agreed and as found by me were as follows:

> a. The Court sat for criminal business in or around 10.30am on the 4th October 2016.
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> b. The Accused had been arrested in or around 11pm on the 3rd October 2016, the previous day, and at a time after the hour of 5p.m. They were brought to Ronanstown Garda Station were they were detained overnight.
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> c. The Accused were charged the following day in and around 5.36a.m. on the 4th October 2016. The first named Accused was charged on foot of charge sheets 17125996, 17126019,17126002, 17126027 and 17126035. The second named Accused was charged on foot of charge sheets 17126092, 17126084, 17126076, 17126068, 17126051, 17126043 and 17126108. A separate District Court bench warrant was also in existence for the second named Accused.
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> d. At approximately 10am on 4th October 2016, the Accused were collected from Ronanstown Garda Station. They were brought to the Criminal Courts of Justice with other prisoners who were also being transported to various courts. The prison van attended in the first instance at the Criminal Courts of Justice in order to deposit a number of prisoners there. Both accused were due to be brought to Blanchardstown District Court and accordingly they were not brought before any Court in the Criminal Courts of Justice but rather remained in the van which they were being transported while the other prisoners were dispatched to the Criminal Courts of Justice.
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> e. The Accused were thereafter conveyed to Blanchardstown District Court arriving at approximately 11.35a.m. Upon arrival they were detained in a court cell and were not brought to court immediately.
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> f. The Accuseds' case was called at approximately 11.30a.m. but the Accused were not present before the court. Their case was again called after 12pm when evidence of arrest charge and caution was given.
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> g. A preliminary application was then made by the solicitors instructed for the first and second named Accused to the effect that the Court lacked jurisdiction to deal with the case due to non compliance with the provisions of section 15(3) of the Criminal Justice Act 1951 [as substituted by section 18(3) of the Criminal Justice (Miscellaneous Provisions) Act 1997]. It was submitted by the legal representatives of both accused that as the Accused not being brought to court with the expedition required by that section and in particular at the commencement of the sitting of the Court, that the Court lacked the jurisdiction to deal with the case.
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> h. Being of the opinion that it was desirable to refer the questions of law set out hereunder to the High Court for its determination, I seek the determination of the said questions of law by the High Court.

i. The Accused were admitted to bail pending the resolution of the issues that had arisen and in particular whether I had jurisdiction to proceed with the case at all."

3. The learned District Judge submits the following questions for this court.

"a. Whether, in the circumstances outlined … there was a failure to comply with the relevant statutory provisions, namely s. 15(3) of the Criminal Justice Act 1951 (as amended), in the manner in which the Accused were brought before the District Court on the 4th October 2016?

b. Whether, if the answer to (a) is yes, the effect of the failure to comply with the said statutory provision, was to divest the District Court of jurisdiction to deal with the charges against the Accused or to make further orders in the case?

c. Whether, if the answer to (b) is no, the failure to comply with the said statutory provision, is of any effect?"

The Relevant Statutory Provisions

4. Section 15 of the Criminal Justice Act 1951(hereinafter "the 1951 Act") [as inserted by s. 18 of the Criminal Justice (Miscellaneous Provisions] Act 1997 provides as follows:

"15. (1) A person arrested pursuant to a warrant shall on arrest be brought, as soon as practicable, before a judge of the District Court having jurisdiction to deal with the offence concerned.

(2) 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.

(3) 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 on 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.

(4) If the accused is remanded on bail and there and then finds bail, the case shall be remitted to the next sitting of the District Court.

(5) In any other event, the case shall be remitted to a sitting of the District Court at a named place to be held within a period not exceeding 8 days of the arrest.

(6) This section is without prejudice to the provisions of any enactment relating to proceedings after arrest or charge in particular cases."

5. As can be seen therefore, there is a general requirement under subss. 1 and 2 of s. 15 to convey a prisoner to court as soon as practicable. Pursuant to subs. 3, certain persons must be brought before the District Court at "the commencement of the sitting". (Note to self: Rephrase)

Preliminary Issue

6. Two matters arise for preliminary consideration. In the course of their respective submissions, counsel for the accused posited that the Court may require further information in order to answer the questions posed in the case stated. Albeit that it is not provided for in legislation, it was submitted that the Court has an inherent jurisdiction to request such information. The case that is made for such a course of action is that if the Court forms the opinion that there was non-compliance with the provisions of s. 15(3), one matter that the Court could consider in the context of determining the second and third questions is whether the non-compliance was a one-off event or whether it was a common practice. It is not known from the case stated whether the procedures for delivering prisoners to Blanchardstown District Court are utilised in every case, namely by the guards using one transport vehicle which does a circuit of the District Courts in the Dublin District. Counsel submitted that it was open to the Court to find that the reason for the non-compliance was an ongoing disregard by the prosecuting authorities to bring persons whom they have detained to court in a reasonably practicable timeframe, as mandated by s.15 of the 1951 Act, but that further information may be required in order to make such a finding. The applicants contend that there is nothing in the case stated to assist the Court in this regard.

7. Counsel for the DPP submits that there is no provision for the Court to seek further information from the District Judge and that the Court must take the facts as presented in the case stated. In any event, counsel contends that it is not necessary to revert further to the District Judge since all salient matters are contained in the case stated.

8. The second issue which arose in the course of the hearing was whether the second accused had come before the District Court on the basis of a bench warrant having been issued for his arrest. Counsel for the DPP submitted that although reference is made in the case stated to the existence of a bench warrant in respect of the second accused, there was no suggestion in the case stated that he had been arrested on foot of it. The DPP contends that it is clear from the case stated that evidence was given in the District Court of the arrest charge and caution of both accused which, counsel contends, implies arrest without warrant.

9. The applicants' position is that this issue is far from clear and that the basis for the second accused's presence before the District Court is not stated definitively in the case stated. Accordingly, counsel for the second accused submits that it is not known whether the second accused was before the District Court by way of arrest on foot of a bench warrant in addition to the new charges in respect of which he undoubtedly appeared before the District Court. It is submitted that this may of some relevance in the case. It is agreed however that if the Court finds non-compliance with the requirements of s. 15(3) of the 1951 Act, the issue of whether the second accused was arrested on foot of a warrant or without warrant is rendered moot since, irrespective of whether the second defendant falls into the rubric of someone who was arrested and then charged after 5p.m. or under the rubric of someone who was arrested on foot of a warrant after 5p.m., there was an obligation pursuant to s. 15(3) on the Gardaí to bring him before the District Court "at the commencement of the sitting".

10. There is authority for the proposition that in hearing a consultative case stated, the High Court is confined strictly to considering the facts as found by the District Judge [*DPP (Houlihan) v. P.G.* [1996]1 IR 281, 294 refers]. Bearing this in mind and with regard to the matters raised by counsel for the accused, I am satisfied from my analysis of the case stated that the factual matrix set out

therein is sufficient for the Court to address the questions posed by the learned District Judge. More particularly, as regards the contention that the second accused may have been before the District Court on a bench warrant, I am satisfied that the facts as found by the learned District Judge are sufficiently clear for this Court to deduce that both accused were before the District Court by way of arrest without warrant. The case stated contains a careful recital of the factual matrix and it seems to me that had the basis for the second accused's presence before him been on a different or additional basis to that of the first accused, the learned District Judge would have recited that in the case stated.

The first question-was there a failure to comply with the provisions of s.15(3)

11. The issue which arises for consideration is whether 5.36 a.m., being the time when the two accused were charged, is "later than the hour of 5 o'clock on any evening", as provided for in s. 15(3) of the 1951 Act, thus mandating their being brought before Blanchardstown District Court at 10.30 a.m. on 4th October, 2016.

12. Counsel for the DPP contends that s. 15(3), insofar as it refers to a specific timeframe, namely "5 o'clock on any evening", must be taken as a reference to a period of time which is after 5 p.m. and in the evening.

13. The DPP submits that s. 15(3) provides for two scenarios. The first is where someone is arrested pursuant to a warrant later than the hour of 5 o'clock on any evening. Counsel contends that that scenario is not relevant in the present case as there is no evidence that either of the defendants were arrested on foot of a warrant. The second scenario provided for in s. 15(3) is when a person having been arrested without warrant is charged after the hour of 5 o'clock on any evening. Given that both accused were arrested without warrant and charged after 5p.m., the question arises as to whether s. 15(3) is applicable to their case. The DPP contends that in order for the accused to fall within the rubric of s. 15(3) they must have been charged after 5p.m. and that this must have occurred in the "evening", albeit "evening" is not defined in the Act. It is submitted that it is clear that "evening" is used to refer to a specific portion of the twenty four hour day. As is clear from the case stated, the accused were charged at 5.36 a.m. on 4th October, 2016, following their arrest in and around 11p.m. on 3rd October, 2016. While "evening" is not defined in the 1951 Act and while it does not appear to have been judicially considered, counsel for the DPP points to the definition of "evening" in the Shorter Oxford English dictionary. It is defined as "the process or fact of dusk falling; the times about sunset" and "the close of day; especially the time from about 6p.m. or sunset if earlier to bedtime". Counsel submits that 5.36a.m. could not on any reasonable interpretation be described as being in the evening time. It is thus argued that since neither of the accused were charged "later than the hour of 5 o'clock on any evening", s. 15(3) is of no application to them. In such circumstances the DPP submits that the answer to the first question posed by the District Judge should be "no".

14. On behalf of the two accused, it is submitted that, even having regard to the DPP's contention that they were arrested without warrant, s. 15(2) of the 1951 Act undoubtedly applies to their circumstances. It is submitted that s.15 (3) is at the core of this case. The text of 15(3) is the standard against which compliance with s. 15(1) or (2) is tested. What s. 15(3) does (both for the circumstances provided for in s. 15(1) and s. 15(2)) is to set out in specific terms how s. 15(1) or s. 15(2), as the case may be, is to be complied with in circumstances where the arrest (if a person is arrested on foot of a warrant) or charge (where a person is arrested without warrant) occurs after the hour of 5 o'clock in the evening.

15. It is submitted that s. 15(3) of the 1951 Act provides a saver for situations where a person is either arrested on a warrant or arrested and charged without warrant at a time when the District Court is not ordinarily sitting (i.e. after 5p.m.). In those circumstances, s. 15(3) mandates that the person be brought before the District Court having jurisdiction which is sitting no later than noon the following day and that a person be brought before the court "at the commencement of the sitting". The case made on behalf of the accused is that the overarching purpose of s.15(3) is to ensure that a person arrested and charged is not deprived of their liberty for longer than is necessary, given the *prima facie* presumption of innocence which arises.

Blanchardstown District Court sat at about 10:30am on 4th October, 2016. In order for the prosecutor to have complied with the mandatory provisions of s. 15(3), the accused should have been brought before that court in or around 10:30a.m. While "the commencement of the sitting" is not expressly defined in the 1951 Act, it is contended, as a principle of statutory interpretation, that the literal meaning, which is also the plain, ordinary and natural meaning, should be given to the phrase, namely that it can only be referable to the time of in or around 10:30 a.m. Counsel referred to *Whelton v. O'Leary* [2011] 4 I.R. 544, where McKechnie J. stated, with reference to the Criminal Justice Act 1984, that:-

> *"words should be given their plain, ordinary and natural meaning set in the context of the surrounding statutory provision or, indeed, of the statute as a whole."* [at para.71]

16. Counsel for the accused thus contend, respectively, that the intention and purpose of s. 15(3) of the 1951 Act is:-

> (a) to safeguard the constitutional right to liberty by ensuring that arrested persons arrested without warrant are brought to court with reasonable expedition i.e. as soon as practicable after charge;
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> (b) to procure the attendance of the charged person before the District Court with reasonable expedition and, in any event, no later than noon the following day; and
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> (c) to do so where a person is charged later than 5p.m., irrespective of whether this occurs either before or after midnight.

Accordingly, as the accused were arrested after the hour of 5p.m. on 3rd October, 2016 and thereafter charged, s. 15(3) applied. They were required to be brought before a judge of the Dublin Metropolitan District at the commencement of his or her sitting, which, in the instant case, was ca. 10.30 a.m. on 4th October, 2016. It is submitted that it is noteworthy that compliance with the mandatory provision of s. 15(3) would have been achieved if the accused had been brought before any court of the Dublin Metropolitan District Court which was sitting before 12 noon on 4th October, provided this was done at the commencement of the particular sitting.

17. The accused submit that the DPP's reading of s. 15(3) is an absurdity. Moreover, the DPP's interpretation would differentiate between persons who are arrested without warrant after 5p.m. and charged with expediency and those who are arrested after 5p.m. but who, for whatever reason, are not charged until sometime later, more particularly after midnight. It is submitted that the DPP's contention is both unreasonable and, more particularly, not consistent with the principle of equality as guaranteed by the Constitution.

18. I agree with the submissions put forward by counsel on behalf of the accused. I do not find merit in the argument put forward by counsel for the DPP as to what was intended by the Legislature by the reference to "evening" in s.15(3) of the 1951 Act. What is

posited by the DPP is that where a person is arrested without warrant after 5p.m. (in this case at 11p.m.) but is not charged immediately on arrest, and if the Gardaí do not charge the person until after evening has ended or until after midnight (as happened here), that means, according to the DPP, that the person does not fall within the rubric of section 15(3). However, as must be acknowledged by the DPP, if a person is arrested without warrant after 5p.m. and charged immediately thereafter, or in the course of the "evening", as defined by the DPP, they would have to be brought before the District Court in the manner provided for in s. 15(3). Effectively, the upshot of the DPP's contention is that if the Gardaí delay in charging a person who has been arrested without warrant after 5p.m. (or indeed someone arrested on a warrant) until after the close of "evening", as that term is defined by the DPP, they relieve themselves of the obligation to bring the person to the District Court in the manner mandated by s.15(3). To my mind, that is clearly not the intention of the s.15(3).

19. What the subsection does, by virtue of the reference to "later than the hour of 5 o'clock on any evening" is, in effect, to identify the relevant hour for the operation of the subsection. It does not set the boundaries of the limitation of a period, as contended for by the DPP. The reference to "that hour" in s. 15(3) is to identify the triggering hour for the operation of s. 15(3) and to identify the period from whence the requirements of the subsection become operative. Accordingly, given that the accused were charged after 5 p.m., they were required to be brought before a judge of the District Court at 10 a.m. on 4th October, 2016 "at the commencement of the sitting", in circumstances where there was in fact a scheduled sitting of the District Court in the district in which they were arrested not later than noon on that day. As the defendants were not brought before Blanchardstown District Court "at the commencement of the sitting", which was at ca.10.30 a.m. on 4th October, 2016, there was failure on the part of the Gardaí to adhere to the provisions of s. 15(3) of the 1951 Act. Accordingly, the first question posed by the learned District Judge is answered in the affirmative.

The second question-was the effect of the the failure to comply with s.15(3)to divest District Court of jurisdiction to deal with the charges against the accused or to make further orders in the case?
20. As the Court has found that the accused were required to be in court at 10.30a.m. on 4th October, 2016, the question which now arises is what consequences, if any, flow from the failure to follow the explicit provisions of s.15(3) of the 1951 Act.

21. As provided for in s.15(2) of the 1951 Act, a person arrested without warrant shall, on being charged with an offence, be brought before a District Court having jurisdiction to deal with the offence concerned "as soon as practicable".

22. With regard to s. 15(3), as already stated, the subsection is clearly designed to ensure that an accused person either arrested on foot of a warrant or arrested and charged without warrant, as the case may be, after 5p.m. is brought before the District Court expeditiously.

23. Similar provisions to those in the 1951 Act have been judicially considered. In *People (DPP) v. Shaw* [1982] 1 I.R. 1, the relevant provision was that "a person charged with an offence shall on arrest be brought before a justice of the District Court having jurisdiction to deal with it, if a justice is immediately available". In Shaw, the accused was arrested on Sunday evening. There was a court sitting at 10.30 a.m. on the following Monday. At that time there was no provision that allowed the Gardaí to detain people for questioning. The accused made admissions and was brought to court on Tuesday. His admissions were sought to be excluded. While much of the case concerned the operation of the exclusionary rule, McMahon J. commented on the section which required the accused to be brought before a justice of the District Court in the following terms:

> *"The authorities, such as Dunne v. Clinton go no further than to require that a person who is detained be brought before a Peace Commissioner or a District Justice as soon as can reasonably be done. This time was 10.30a.m. on the Monday morning at the earliest."* [at p.19]

24. In People (DPP) v. Walsh [1980] I.R. 294, O'Higgins C.J. opined:

> *"Reasonable expedition is required but more than this cannot be demanded. Regard must be had to the circumstances and to the time of the arrest. If a person is arrested late at night, it scarcely seems unreasonable if he is held overnight and charged before a court the following morning. The important thing is that his detention after arrest must be only for the purpose of bringing him before a District Justice or a peace commissioner with reasonable expedition so that a court can decide whether he is to remain in custody or to be released on bail. In this case the appellant was arrested at 9.30 at night on a Thursday. Courts were sitting normally on the following day."* [at pp. 300-301]

25. The issue has also been addressed in *O'Brien v. Special Criminal Court* [2008] 4 I.R. 514. However, the circumstances in the present case can be distinguished from the particular circumstances in *O'Brien*. In that case, a person was not brought before the Special Criminal Court "forthwith" as required by the legislation. As he had not been charged "forthwith" it was found that he was not lawfully before the Special Criminal Court in circumstances where it is a statutory requirement that a person can only be tried before the Special Criminal Court if lawfully before that Court.

26. However, this principle does not apply to the District Court. The authority for this proposition is *State (A.G.) v. Fawsitt* [1955] I.R. 39. *Fawsitt* was considered by Keane J. in *DPP (Ivers) v. Murphy* [1999] 1 I.R. 98, as was *Killeen v. DPP* [1997] 3 I.R. 218, a previous judgment delivered by Keane J. In Murphy, Keane J opined:

> *"It has been repeatedly pointed out that, as a general rule, the jurisdiction of the District Court to embark on any criminal proceeding is not affected by the fact, if it be the fact, that the accused person has been brought before the court by an illegal process. If I refer to a judgment which I delivered in Killeen v. Director of Public Prosecutions [1997] 3 I.R. 218, it is simply because, so far as I am aware, it is the latest restatement of that well settled principle. I said (at p.228):-*
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> *"It can, in general, be said that the jurisdiction of the District Court to embark on any criminal proceeding, including the holding of a preliminary examination, is unaffected by the fact, if it be the fact, that the accused person has been brought before the court by an illegal process. This was so held by Davitt P. in The State (Attorney General) v. Fawsitt [1955] I.R. 39 at p.43 where he said:-*
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> *'The usual methods of securing the attendance of an accused person before the District Court, so that it may investigate a charge of an indictable offence made against him, is by way of arrest or by way of formal summons, but neither of these methods is essential. He could, of course, attend voluntarily, if he so wished: so far as the exercise of the Court's substantive jurisdiction is concerned it is perfectly immaterial in what way his attendance is secured, so long as he is present before the District Justice in court at the material time. Even if he is brought there by an illegal process, the Court's jurisdiction is nonetheless effective.'*

Some qualifications to that general principle may be noted in passing. First, evidence obtained from the accused person during the course of a detention which proves to be unlawful, whether because of a defective warrant or for some other reason, may subsequently be excluded as inadmissible by the court of trial. Secondly, where the process by which the person is brought before the court involves a deliberate and conscious violation of his constitutional rights, of which the most graphic example is The State (Trimbole) v. The Governor of Mountjoy Prison [1985] I.R. 550, the court may be justified in refusing to embark upon the hearing. There may also be cases in which a question is raised as to the validity of the detention in garda custody of a person brought before the District Court, in which case the appropriate course is to remand the person concerned, enabling him, if he wishes so to do, to apply to the High Court for an order of habeas corpus. (See the observations of McCarthy J. in Keating v. Governor of Mountjoy Prison [1991] 1 I.R. 61). None of these considerations arise in the present case." [ap pp. 113-114]

27. The DPP also cites *DPP (McTiernan) v. Bradley* [2000] 1 I.R. 420 as authority for the proposition that the failure on the part of the prosecuting authorities to adhere to the provisions of s. 15(3) of the 1951 Act did not vitiate the jurisdiction of the District Court to embark on criminal proceedings with respect to the two accused in this case.

28. In *Bradley*, the defendant was arrested on suspicion of simple assault for which there was no power of arrest. He was brought before the District Court and the court's jurisdiction to try him was challenged. The matter came before McGuinness J. by way of consultative case stated. The question posed was as follows:

"Where it is alleged that the constitutional right to liberty of a person accused of an offence…has been violated in the procedures adopted in bringing him before the District Court, in circumstances where proof of a valid arrest is not an essential ingredient in proving the charge, am I, a Judge of the District Court, entitled, for that reason, to dismiss the charge accordingly?" [at pp. 421-422]

29. The answer given to the question posed in the case stated was, in the headnote at p. 420, that

"in cases where proof of a valid arrest was not an essential ingredient to ground a charge, the jurisdiction of the District Court to embark on any criminal proceedings was not affected by the fact that an accused person had been brought before the court by an illegal process, and the court should consider whether there had been a deliberate and conscious violation of the accused's rights, prior to embarking on the hearing."

30. In the course of her judgment the learned Judge reviewed the relevant authorities. She went on to state:

"The learned District Court Judge clearly acted correctly in hearing both evidence and submission and in stating a case for this court. It remains for him to decide whether or not to dismiss the case, but this is a decision which he should make in the light of the general rule, as set out by Keane J., that the jurisdiction of the District Court to embark on any criminal proceeding is not affected by the fact, if it be the fact, that the accused person has been brought before the court by an illegal process. Only if he feels that there has been a deliberate and conscious violation of the accused's rights, as in The State (Trimbole) v. The Governor of Mountjoy Prison [1985] I.R. 550, should he decline to embark on the hearing.

The answer, therefore, to the learned judge's question to this court is a qualified affirmative. Yes, he is strictly speaking entitled to dismiss the case, but only if he considers that, on the evidence before him, it falls within the parameters of the decision of the Supreme Court in Director of Public Prosecutions (Ivers) v. Murphy [1999] 1 I.R. 98." [at p. 428]

31. In *Whelton v. O'Leary*, Fennelly J. approved the rationale set out in, *inter alia*, Murphy and Bradley. At para. 43 of his judgment he stated:

"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 applicant, in particular, if there had not 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 applicant 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 applicant."

32. It is submitted on behalf of the DPP that in the present case there is no suggestion of subterfuge by the Gardaí in the manner in which they conveyed the defendants to Blanchardstown District Court. Counsel contends that, at most, there can be a criticism of the punctuality of the Gardaí, but no more. Specifically, counsel contends that, in the instant case, there is no question of there having been a deliberate and conscious violation of the accuseds' rights, unlike the situation that pertained in the *State (Trimbole) v. The Governor of Mountjoy Prison* [1985] I.R. 550. Accordingly, counsel submits that the answer to the second question posed in the case stated should be in the negative.

33. The submissions on behalf of the accused as to the effect of the failure to adhere to s. 15(3) of the 1951 Act are as follows: s.15 does not define "as soon as reasonably practicable". However, it is submitted that that phrase, insofar as it applies to persons arrested and charged after 5p.m., require the bringing of the prisoners before the District Court at the commencement of the proceedings of the District Court which, in the accuseds' particular circumstances should have been 10.30 a.m. on the morning following their arrest and charge. It is contended that driving the two accused around the city on 4th October, 2016, including to the Criminal Courts of Justice, which, incidentally, contained many courts with the jurisdiction to deal with the two accused, and then not producing them before Blanchardstown District Court until a substantial period of time had elapsed after they had been brought to the building containing that court, cannot be said to be, and was not, "as soon as reasonably practicable". It is submitted that any encroachment on the constitutional right to liberty should last for no longer than is reasonably necessary to achieve a lawful objective and that the justification for any inordinate delay or prolongation of a deprivation of liberty required to be affirmatively proved by the prosecutor rather than presumed. (See Hardiman J. in *DPP v. Finn* [2003] 1 I.R. 372.)

34. It is further submitted that any judge assigned to the Dublin Metropolitan District sitting in that district had jurisdiction to deal with the defendants. In particular, numerous courts in the Criminal Courts of Justice had jurisdiction to hear the accuseds' case, yet they were taken away and transported to Blanchardstown District Court. It is argued that had they been brought before a District Judge sitting in the Criminal Court of Justice, it appears probable, based on the facts as found by Judge McHugh, that they would have been before a District Court Judge at the commencement of the sittings in the Criminal Courts of Justice, which are routinely in or around 10.30a.m.

35. It is also contended that there is no basis in law, whether by statute or statutory instrument, for the division of business between

the various courts in the Dublin Metropolitan District. As the Dublin Metropolitan District is one district area, any Judge of the Dublin District had jurisdiction to deal with the accuseds' case. Counsel for the DPP contends that it was proper for the defendants to be brought to Blanchardstown District Court. In this regard reliance is placed on O. 12, r. 3 of the District Court Rules which provides:

> "Notwithstanding the provisions of these Rules, any practice or procedure now in force in the Dublin Metropolitan District may continue in that Court district either in addition to or in substitution for any practice or procedure prescribed by these Rules."

36. Counsel for the DPP states that on foot of a Practice Direction from the President of the District Court dated 7th April, 2016, there was a revised re-distribution of business in the Criminal Courts of Justice and Blanchardstown District Court such that charge sheets from Ronanstown were to be dealt with in Blanchardstown District Court. Counsel submits that this Practice Direction could not be ignored by the Gardaí.

37. While Counsel for the accused acknowledge the existence of the Practice Direction, and do not object in principle to the Practice Direction, that was subject to the caveat that the compliance with the Practice Direction was in a manner that did not breach the requirements of s. 15(3) of the 1951 Act. It is submitted however that was not achieved in the case of the two accused.

38. I should say that for the purposes of answering the questions posed in the case stated I did not perceive any necessity to embark on a discourse of the Practice Direction upon which the DPP relies. As is clear from the case stated, the salient matters which fall for consideration are the three questions posed by the learned District Judge in respect of a sitting of Blanchardstown District Court which took place on 4th October, 2016.

39. With regard to the accuseds' presence before Blanchardstown District Court, the Court is urged by counsel for the accused to bear in mind the manner in which the accused were brought to that court. Their transportation to that court was entirely under the control of the Gardaí. The Gardaí decided the route – they went firstly to the CCJ and only then to Blanchardstown District Court. Effectively, it is the accuseds' contention that the requirement to bring them to the District Court in the manner mandated by s. 15(3) of the 1951 Act took second place to administrative convenience.

40. The case put on behalf of the accused is that in all the circumstances, the actions of the prosecutor amounted to a conscious and deliberate disregard for the requirements of s. 15 of the 1951 Act and the accuseds' constitutional rights. Counsel for the accused contend, respectively, that the division of court work by extra-statutory means, with the consequent disregard for the rights of the accused and the requirements of the 1951 Act, demonstrate a systemic, deliberate and conscious practice and process set up entirely to facilitate the prosecutor. It is contended that the mandatory requirements of the statute, together with the accuseds' constitutional rights, were disregarded in furtherance of administrative convenience.

41. In aid of their submissions, counsel for the accused referred the Court to the decision of Gannon J. in *Kennemerland v. Attorney General* [1989] I.L.R.M. 821. In that case, there was a failure to bring the applicant's before the District Court "as soon as may be", as required by s. 234 of the Fisheries (Consolidation) Act 1959. It was held by Gannon J. that that invalidated their detention under that Act. Gannon J. opined:

> *"The only explanation given for the detention … was length of time devoted to obtaining statements of evidence from intended witnesses, to receiving instructions by 'phone from the Attorney General's Office in Dublin, and to typing in advance form of order it was intended the District Justice would be asked to make when the masters would be brought before him".*

He went on to state:

> *" The time at which the prosecutors were brought before the court was a time which was found convenient to the State Solicitor, to the Attorney General, to Sergeant McAteer and to Lieutenant Commander Quillinan but had no regard to the right to freedom the masters of the three vessels against whom no specific offence had been charged and in this regard of the legal presumption of innocence".*

42. Gannon J. quashed the District Court Orders finding that

> *"notwithstanding that a convenient court was readily available and sitting, the attendance of the … trawlers skippers before that court was deliberately deferred".*

43. Counsel for the DPP contends that reliance on Kennemerland is misplaced since the circumstances of that case did not relate to a criminal trial.

44. While on its face persuasive, I am satisfied that the accuseds' reliance on *Kennemerland* must yield to the more relevant principles enunciated *in Murphy, Bradley and Whelton v. O'Leary*, as set out above.

45. More particularly, in aid of their submissions, counsel for the accused rely on the dictum of McKechnie J. in *Whelton v. O'Leary* where, with regard to the principles enunciated in, *inter alia*, *Murphy* and *Bradley*, the learned judge stated:

> *"[100] This rule is not absolute and as cases have shown the exception list is not closed. It is however limited where the issue is whether the validity of the proceeding process may impact upon jurisdiction. To this, of course, may be added circumstances where it is alleged that during the process evidence has been obtained by either illegal or unconstitutional means. Such cases are not jurisdictional cases but of evidential admissibility. Habeas corpus applications and civil proceedings for damages are likewise not material.*
>
> *[101] The following are examples of where a preceding process may impact on jurisdiction:-*
>
> *(a) Where there has been a deliberate and conscious violation of one's constitutional rights. Keane J. in Killeen v. Director of Public Prosecutions [1997] 3 I.R. 218, at pp. 228 and 229 said:-*
>
> *"[W]here the process by which the person is brought before the court involves a deliberate and conscious violation of his constitutional rights, of which the most graphic example is The State (Trimbole) v. The Governor of Mountjoy Prison [1985] I.R. 550, the court may be justified in refusing to embark upon the hearing";*

(b) where the relevant conduct is of such a nature as to outrage, insult or defy the legal or constitutional authority or status of the court. McCarthy J. in Keating v. The Governor of Mountjoy Prison [1991] 1 I.R. 61 at p. 66, said:-

> *"If cases arise where the circumstances of arrest are such as to amount to an affront to the constitutional role of the courts, then the District Justice will refuse to proceed with the matter and will discharge the person before him." O'Flaherty J. in Director of Public Prosecutions (Ivers) v. Murphy [1999] 1 I.R. 98, at p. 104 seems to have inferred the same;*

(c) where the validity of a preceding event, for example an arrest, is an essential ingredient to ground a charge upon which an accused person stands before the court, see s. 49 of the Road Traffic Act 1961, as amended, and Director of Public Prosecutions v. Forbes [1994] 2 I.R. 542.

[102] Apart from the above I have not been able to identify any other example where in like circumstances a successful challenge to jurisdiction has been mounted. I remain conscious of Massoud v. Watkins [2004] IEHC 435, [2005] 3 I.R. 154 in this context, in which the court undoubtedly prohibited the further prosecution of the applicant on the basis of a prior unlawful detention under s. 10(2) of the Criminal Justice Act 1984. However, it is not absolutely clear as to whether the jurisdictional point, as a point in its own right, had been raised. Therefore, it may be more prudent to exclude that decision from the above list.

[103] The cases last mentioned could not, however, have intended to close out an argument if conduct of the type above described was established. I, therefore, take the view that there remains the possibility of future cases identifying circumstances where jurisdiction will be refused. These may arise either under the Constitution, within a statutory framework or as Convention cases. If and when arising, each case will have to be considered on its own circumstances.

[104] It is somewhat surprising to me that the court's approach to process in this context seems somewhat indifferent. The rationale set out in Hawkins and Curwood is to the effect that once in court the preceding method of securing one's attendance is at an end; that is, the process is over, so why concern oneself with it? Why insist upon a person's presence legitimately obtained via a non-objectionary process? No matter how illegal, since the object has been secured, let the process continue. R. v. Hughes [1879] 4 Q.B.D. 614 offers no better rationale. I must say that I find this reasoning unattractive. The rule of law has a foundation not simply in substantive proceedings, but in all proceedings. Due process must be protected. However, the applicant does not make such a case:- he claims to come within the exception to The State (Attorney General) v. Judge Fawsitt [1955] I.R. 39, as referred to at para. 101(a)supra . Therefore, further consideration of this point is not presently required.

[105] The high point of the applicant's case is that at some point between 16.30 and 17.45 on the afternoon of the 27th October, 2006, but prior to charging, his detention became unlawful by virtue of non-compliance with s. 10(2) of the Criminal Justice Act 1984. Therefore, his charging was tainted with illegality and, consequently, neither the charge sheet nor the bail bond were a valid means by which his attendance at the District Court was secured. These events, which it is alleged were a deliberate and conscious violation of his constitutional rights, impacted critically on the jurisdiction of the District Court. Hence, the relief of certiorari.

[106] In accordance with the principles outlined above, the applicant simply cannot succeed on this point. The validity of his arrest or his charging prior to his appearance before the District Court are not prerequisites to that court having jurisdiction to try him on the theft charge. It is no defence on his part to assert that his attendance was secured under pain of penal sanction and was, therefore, involuntary. That very point was disposed of in The State (Lynch) v. Ballagh [1986] I.R. 203, at p. 213, where Walsh J., dealing with this very point said:-

> *"Even assuming that his presence there was involuntary because of the bail bond of the recognisance, the complaint was made there and then and that was sufficient to give jurisdiction to the District Justice in this summary offence."*

There cannot be any credible argument that by virtue of the presenting circumstances, there was a deliberate and conscious violation of the applicant's constitutional rights. No such conclusion can be drawn from the established case law. Therefore, the District Court was at all times possessed of jurisdiction to try this offence and, in consequence, the resulting conviction cannot be set aside."

46. While acknowledging that *Trimbole* was a particularly egregious example of breach of constitutional rights, counsel for the accused also make the point that there are less graphic acts which also may involve a deliberate breach of constitutional rights – such as the accuseds' circumstances in the present case, where the depravation of their liberty was prolonged such that it impacts on the jurisdiction of the District Court to hear the case. Their contention is that given that the Gardaí must have been aware of their own actions and in circumstances where they must be taken to be familiar with the provisions of s. 15(3) of the 1951 Act, the conscious failure to comply with the provisions of s. 15(3) amounted to a deliberate breach of the defendants' constitutional rights.

47. Alternatively, it is submitted that the conduct in the present case falls into the type of conduct as to *"outrage, insult or defy the legal or constitutional authority or status of the court"* as articulated by McKechnie J. in Whelton v. O'Leary. Accordingly, the accused submit that the Court should find that the conduct of the Gardaí should not be disregarded as their actions cannot be legitimate. Particular reliance is placed on the reasoning of McKechnie J. at para. 104 of his judgment.

48. It is also contended that the accuseds' case can be distinguished from the factual matrix in *Whelton v. O'Leary* since by the time the matter in that case came before the District Court the defendant had been released, unlike the position of the accused in the present case.

49. The first thing to be observed is that in *Whelton v. O'Leary*, McKechnie J. did not depart from the established jurisprudence, as the Supreme Court held that even where there is a defect in the manner in which An Garda Siochana arrested, detained and charged a person, the jurisdiction of the District Court to try the person is not affected in the absence of a deliberate and conscious intention to deprive the person of their constitutional rights.

50. Furthermore, insofar as the accused claim that they fall within the scenario referred to by McKechnie J. at para. 101(a) and (b) in

Whelton v. O'Leary, I note that in that case, in circumstances not unlike what occurred in the present case, McKechnie J. found there had been no deliberate or conscious violation of the applicant's constitutional rights. He found that the high point of the applicant's case was that at some point between 16.30 and 17.45 on the afternoon of 27th October, 2007, his detention became unlawful by virtue of non compliance with s. 10(2) of the Criminal Justice Act 1984. I also note that the learned Judge did not find it necessary to consider whether the relevant conduct was "*of such a nature as to outrage, insult or defy the legal or constitutional authority or status of the court*." In the present case, the timeframe in issue is from 10.30 am to 12.00p.m on 4th October, 2016, therefore not dissimilar to the factual matrix in Whelton v. OLeary.

51. Moreover, in Bradley, McGuinness J. found it "*notable that the learned Keane J. uses the term 'graphic' to describe the facts of The State (Trimbole) v. The Governor of Mountjoy Prison [1985] I.R. 550"* and found that the circumstances in Bradley were"*very far removed from such a deliberate and conscious violation of constitutional rights*". The learned McGuinness J. went on to state that the term "deliberate and conscious" did not necessarily involve *mala fides*, but on the facts as set out in the case stated she considered it unlikely that the unlawful arrest in the case would require the District Court to refuse to embark on the hearing. However, she went on to state that that was a decision for the judge of the District Court and quoted the dictum of Denham J. in *Coughlan v. Judge Patwell* [1993] 1 I.R. 31, as follows:

> "*If an individual as here alleges that his constitutional rights have been infringed in procedures adopted in bringing him before the court, then the District Court has jurisdiction to and indeed should, hear the submission and take such steps as it considers proper*." [at p. 37]

52. Having regard to the relevant jurisprudence and the circumstances of the present case, it seems to me that the answer to the second question posed by the learned District Judge must be answered in the negative subject to the qualification that the learned District Judge should, in hearing the cases, bear in mind the dictum of Keane J. in Murphy, already cited above but part of which bears repeating:

> *"Some qualifications to that general principle may be noted in passing. First, evidence obtained from the accused person during the course of a detention which proves to be unlawful, whether because of a defective warrant or for some other reason, may subsequently be excluded as inadmissible by the court of trial. Secondly, where the process by which the person is brought before the court involves a deliberate and conscious violation of his constitutional rights, of which the most graphic example is The State (Trimbole) v. The Governor of Mountjoy Prison [1985] I.R. 550, the court may be justified in refusing to embark upon the hearing."* [at pp. 113-114]

The third question-whether, if the answer to the second question is no, the failure to comply with s.15(3) has any effect?
53. In *Trimbole*, the Supreme Court noted that the well recognised jurisdiction of the courts at common law to prevent an abuse of their own process was amplified and reinforced by the position of the courts within the framework of the Constitution and that a direct duty arose to prevent such abuse of their process. Counsel for the two accused submit, respectively, that this observation is of particular relevance to the third question, particularly if the Court finds that the jurisdiction the District Court to embark on a hearing is not ousted unless the District Court considered that the exception articulated in *Murphy* applies. It is submitted that the gravelman of the third question is that even if the District Court's jurisdiction is not ousted, is it the case that the District Court is in effect *functus officio* where there has not been compliance with s. 15(3) of the 1951 Act. Accordingly, the accuseds' contention is that for the District Court to be left in a situation where it could not do anything about the non-compliance offends against the well-recognised jurisdiction of the courts of common law to prevent an abuse of their own process, as articulated in *Trimbole*. It is submitted that given that what the District Court Judge seeks guidance on is whether, in the event that non-compliance with the provisions of s. 15(3) did not divest the District Court of jurisdiction, the District Court Judge should consider if the failure to adhere to the provisions of s. 15(3) had other consequences. This, it is submitted, is particularly pertinent if the circumstances in the present case came about because of a routine practice on the part of the Gardaí to transport persons who are in like circumstances to those which pertained in the accuseds' case to the District Court in the manner set out in the case stated.

54. Counsel for the DPP submits that the submissions canvassed by the accused with regard to the third question do not arise given that the District Court is only concerned with the validity of the complaint before it and not with any wider effect.

55. I agree with the DPP's submission in this regard. What the Court is concerned with is the factual matrix described in the consultative case stated. I am satisfied that the third question posed by the learned District Judge is intended solely to refer to the factual matrix which was before him *vis-à-vis* the two accused. Accordingly, insofar as counsel for the accused seeks to imply some wider context into the question any response by the Court to such overtures would be an impermissible position for the Court to adopt.

56. Insofar as the learned District Judge, in the third question, seeks the guidance of the Court, I am satisfied that the answer to the third question is that the question does not arise by virtue of the answer given by the Court to the second question.

Summary
Having regard to the maters set out above, I would answer the questions posed by the learned District Judge in the consultative case stated as follows:

Question a. Yes

Question b. The answer is a qualified negative. The failure to comply with s.15(3) of the 1951 Act does not divest the District Court of jurisdiction to embark upon a hearing unless it is considered, on the evidence before the District Court, that the accuseds' case falls within the exception set out by the Supreme Court in *DPP (Ivers) v. Murphy* [1999] 1 I.R. 98, namely that the process by which the accused were brought before the court "*involves a deliberate and conscious violation*" of their constitutional rights.

Question c. The question does not arise.