THE HIGH COURT

[2017 No. 956 S.S.]

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICATION ACT, 1857 AS EXTENDED BY SECTION 21 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR/APPELLANT

AND
STEPHEN LARKIN

ACCUSED/RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 21st day of January, 2019

1. This case raises an interesting question of law which, although previously discussed in a number of cases, does not appear to have been finally decided.

2. On 10th January, 2017 Stephen Larkin ("*the accused*") came before District Court Judge Kathryn Hutton sitting at the Dublin Metropolitan District Court to answer a charge of possessing stolen property, to wit a Kindle and a Samsung mobile phone, contrary to s. 18 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

3. The accused, by counsel, admitted that the property was stolen. The evidence established that the accused had been found in possession of the items. The prosecuting Garda accepted in cross-examination that the accused was suspected of stealing them. At the close of a prosecution case, counsel for the accused, citing *People (Director of Public Prosecutions) v. Peter O'Neill* (Unreported, Court of Criminal Appeal, 24th July, 1995) applied for a dismiss on the ground that the prosecution had not proved beyond reasonable doubt that the accused was in possession of the items "*otherwise than in course of stealing*".

4. The District Court judge dismissed the charge but, on the application of the Director of Public Prosecutions, stated a case for the opinion of the High Court on the following questions:

> (i) In a prosecution for an offence under s. 18 of the Criminal Justice (Theft and Fraud) Offences Act, 2001 is the prosecution always required to prove beyond a reasonable doubt that the accused did not steal the relevant items?
>
> (ii) If yes, was I correct in law in determining that the prosecution had not discharged the burden in this case?
>
> (iii) Was I correct in dismissing the charge?

5. The first question asked by the District Court judge was effectively answered by the Court of Appeal in a judgment given on 15th May, 2018 in a case of the *People (Director of Public Prosecutions) v. Daniel Connors* [2018] IECA 144 which explained that although for a possession offence to have been committed the possession relied upon must have been "*otherwise than in the course of stealing*", it does not preclude a thief from also being convicted of being in possession of stolen goods provided that the theft has been completed at the time of the act of possession relied upon as representing the *actus reus* of the offence of possession of stolen goods.

6. When the case stated came on for hearing on 12th November, 2018 it was agreed that the answer to the first and third questions was "*no*" and that the second question did not arise. By then Her Honour Judge Hutton had been appointed as judge of the Circuit Court and the only issue left to be decided was whether the case could (or if it could, whether it should) be remitted to the District Court to a judge other than the judge who had stated and signed the case stated.

7. Section 2 of the Summary Jurisdiction Act, 1857 provides:

> *"After the hearing and determination by a Justice or Justices of the Peace of any information or complaint which he or they have power to determine in a summary way, by any law now in force or hereafter to be made, either party to the proceeding before the said Justice or Justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing within three days after the same to the said Justice or Justices, to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the Superior Courts of Law to be named by the party applying;…"*

8. Section 6 of the Summary Jurisdiction Act, 1857 provides:

> *"The Court to which a case is transmitted under this Act shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices, with the opinion of the Court thereon, or may make such other order in relation to the matter, and may make such orders as to costs, as to the Court may seem fit; and all such orders shall be final and conclusive on all parties: …"*

9. Section 9 of the Act of 1857 provides that:

> *"After the decision of the Superior Court in relation to any case stated for their opinion under this Act, the justice or justices in relation to whose determination the case has been stated, or any other justice or justices of the peace exercising the same jurisdiction, shall have the same authority to enforce any conviction or order, which may have been affirmed, amended, or made by such Superior Court, as the justice or justices who originally decided the case would have had to enforce his or their determination if the same had not been appealed against; …"*

10. Section 51(1) of the Courts (Supplemental Provisions) Act, 1961 provides:

> *"Section 2 of the Summary Jurisdiction Act, 1857, is hereby extended so as to enable any party to any proceedings whatsoever heard and determined by a justice of the District Court (other than proceedings relating to an indictable offence which was not dealt with summarily by the court) if dissatisfied with such determination as being erroneous on a*

point of law, to apply in writing within fourteen days after such determination to the said justice to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the High Court."

11. In *Director of Public Prosecutions v. Galvin* [1999] 4 I.R. 82 the respondent had been acquitted by direction of the District Court judge of a charge of drunken driving. The Director of Public Prosecutions applied for a case stated but before the case stated was signed the judge had been appointed as a judge of the Circuit Court. Mr. Justice Geoghegan struck out the case stated on the ground that s. 51(1) of the Courts (Supplemental Provisions) Act, 1961 required that the judge who heard the case should still be a judge of the District Court at the time of signing the case stated.

12. The judgment turned on the fact that the District Court judge who had heard the case was not still such a judge of that court when he signed the case stated but Geoghegan J. examined the scheme of the legislation and such limited authority as was available.

13. Mr. Justice Geoghegan looked first at the decision in *Kean v. Robinson* [1910] 2 I.R. 306. That was a case which had been decided by three Justices of the Peace. The request for a case stated appears to have been made to all three but two of them died before it was signed: one before it had been approved, and the other after it had been approved but before it was signed. As Geoghegan J. observed, the majority decision of the Divisional Court was based on a combination of common law principles of impossibility and the fact that the surviving justice had approved and signed it and it was not intended to apply to a case heard by a single justice.

14. *Cork County Council v. The Commissioners of Public Works* (1941) 77 I.L.T.R. 195 was a consultative case stated by the High Court to the Supreme Court which came before the Supreme Court after the High Court judge had died. The unanimous decision of the Supreme Court that the case stated could not be entertained was based on the construction of s. 38(3) of the Courts of Justice Act, 1936 which, the court held, contemplated that the same judge who propounded the case stated would pronounce judgment after the determination of the case stated: which was impossible.

15. Geoghegan J. in *Galvin* observed of *Cork County Council v. The Commissioners of Public Works* that:-

"The Court pointed out that the case stated propounded certain questions, that the answers to those questions would have resolved the doubts in the mind of the judge who propounded them, but that there was no guarantee that another judge would not have other points to raise or that at a rehearing there would still be agreement between the parties on all the facts."

16. In *Galvin* the High Court was informed by counsel that the Supreme Court had more recently refused to entertain a consultative case stated from the Circuit Court by His Honour Judge O'Higgins who, by the time the case stated reached the Supreme Court, had been appointed a judge of the High Court.

17. Later in his judgment in *Galvin* Geoghegan J. said:-

"I can undoubtedly see a possible distinction between a consultative case stated and an appeal by way of case stated. The consultative case stated is superficially at least more personal to the actual judge sending it forward, but when properly analysed I do not think that this is really a valid distinction. A case stated coming by way of appeal relates to a particular view of the law the particular judge has taken".

18. With respect, it seems to me that there is a fundamental distinction between a consultative case stated and an appeal by way of case stated. The purpose of a consultative case stated is to resolve an issue of law so as to allow the judge hearing the case to decide it. By contrast, the purpose of an appeal by way of case stated is to allow the party who is dissatisfied with the decision as being erroneous in point of law to have the error of law corrected. In a case where the judge who has referred a consultative case stated has retired or died, the case will necessarily have to be reheard because there will have been no decision. By contrast, on an appeal by way of case stated the High Court will be able to say whether the decision which was made was correct. On a consultative case stated the issue or issues of law will have been propounded by the judge. But on an appeal by way of case stated the judge will have decided the case and the issue of law will have been propounded, or at least identified, by the dissatisfied party. If, as in this case, it should transpire that something has gone wrong in the District Court, it seems to me that there is no good reason why it should not be put right: at the very least to the extent to which it can be put right. In this case the issue of law which gave rise to the case stated was, in the meantime, decided by the Court of Appeal but if it had not been, it would have been highly desirable for it to have been decided by the High Court. In this case the issue was whether the respondent was correctly acquitted. In another case the issue might have been whether the appellant had been properly convicted. Apart from the public interest in certainty in the law, it seems to me to be wrong in principle to contemplate that an erroneous conviction should be allowed to stand, or that a dissatisfied litigant might be deprived of a statutory right to appeal, by the chance of the death, retirement or promotion of the District Court judge.

19. Mr. Galvin, like Mr. Larkin, was acquitted by direction of the District Court judge at the close of the prosecution case. In that case, as in this, the question arose as to what would happen in the District Court if the case was remitted. Mr. Justice Geoghegan had this to say:-

"In this case, the acquittal was by direction. If therefore the High Court took the view that the judge was wrong in dismissing the summons this Court would have to direct the entry of continuances so that the case could proceed in the ordinary way before the same judge of the District Court. It could not substitute the acquittal with a direction for a conviction when the acquittal had been made in the circumstances of an application for a direction at the end of the prosecution case. The case stated procedure, whether it be an appeal by way of case stated or a consultative case stated, normally contemplates that the case will return to the same District Judge because the case stated itself arises from a particular view which that particular judge took of the law. This case cannot go back to Judge Clifford and therefore if the High Court was to take the view that Judge Clifford's decision had been wrong a complete new hearing would have to take place in the District Court. But that would mean the hearing by the High Court of the case stated would be to some extent a 'moot' because a different District Judge might have made a totally different decision on the point of law and indeed might still do so on a rehearing."

20. It seems to me that the proposition that the hearing of the case stated by the High Court might be moot begs the question as to what the High Court might do with the case if it were to conclude that the decision of the District Court was wrong on a point of law. In this case the answers to the questions posed by Judge Hutton would plainly be relevant in the event of a retrial of the respondent by some other District Court judge: if there is power to order a retrial. Logically, if an acquittal founded on an error of law had to stand because another judge who correctly applied the law might, or would, have convicted, then a conviction founded on an error of

law would have to stand where another judge who correctly applied the law would have acquitted. I do not think that that can be right. Even if there is no power to order a retrial, I do not think that it could be said that the correctness of a conviction and sentence would be moot.

21. At the end of his judgment in *Galvin* Geoghegan J. noted that he had been referred by counsel to s. 6 of the Act of 1857 which, it had been argued, enabled the High Court to ensure that justice was done in whatever way it should be done if the case had to go back to the District Court. He said that this did not solve the problem as the court could only make orders under that section if it had in the first instance jurisdiction to entertain the case stated. Having given as his first reason that the court had no jurisdiction to entertain the case that it could not go back to the judge who had stated it, Geoghegan J. appears to have been prepared to contemplate it might: provided it had been validly stated un the first place.

22. Having carefully considered the judgment of Geoghegan J. in *Galvin* it seems to me that the ratio was that the case stated had not been signed by a judge of the District Court and that what was said about the power to remit or the necessity that the case would go back to the same District Court judge was *obiter*.

23. Counsel for the Director referred me to the commentary on this issue in Dr. O'Malley's work on *The Criminal Process (2009, Round Hall)*. At para. 23.45 it is said:-

> *"Until recently, there was some doubt about the High Court's jurisdiction to entertain an appeal by way of case stated if the judge who stated it was no longer a member of the District Court. In DPP v. Galvin [1999] 4 I.R. 18 it was held that the case must be remitted to the judge who stated the case. In that case, the District Court judge who stated the case had been appointed to the Circuit Court by the time the matter came before the High Court. Geoghegan J. held that the wording of s. 51(1) of the Act of 1961 clearly suggested that that the case had to be remitted to the particular judge who stated it. He therefore struck out the case-stated. The problem with this decision is that it did not appear to consider the implications of s. 9 of the Summary Jurisdiction Act 1857 which provides that a case may be remitted to the justice or justices who stated it or to any other justice or justices exercising the same jurisdiction. Once a case stated is properly before the High Court, that court may hear and determine the application and may also affirm, reverse or amend the District Court decision. Alternatively, it may remit the matter to the District Court with its opinion, or it may make such order as it considers appropriate. In Griffith v. Jenkins [1992] 2 A.C. 76 the House of Lords, dealing with the same statutory provisions, had decided that case could be remitted to a different bench of magistrates following a successful appeal by way of case stated. The Supreme Court has recently held that in Ireland as well, a case may be remitted to the District Court although the judge who stated the case is no longer on that court as a result of retirement, death or appointment to another court."*

24. In support of this last statement the author cites *Fitzpatrick v. Director of Public Prosecutions* (*Ex tempore*, Supreme Court, 14th June, 2007)

25. For the reasons I have given, I believe that the *ratio* of *Galvin* was not that the case had to be remitted to the judge who stated it, but that there was no jurisdiction to deal with a case stated which had not been signed by a person who was not a judge of the District Court at the time he signed it.

26. I do not believe that the the last sentence of the paragraph I have quoted from Dr. O'Malley's book is strictly correct, as I will endeavour to explain.

27. It appears that there is no transcript of the *ex tempore* judgment of the Supreme Court in *Fitzpatrick v. Director of Public Prosecutions* but there is a note of the decision which has been agreed by counsel who were instructed in that case.

28. Mr. Fitzpatrick had been convicted in the District Court of an offence under the Road Traffic Acts. The District Court judge had stated a case to the High Court which, if answered in favour of the appellant would have led to the quashing of his conviction but by the time the case reached the High Court the District Court judge had retired. The High Court, relying on *Director of Public Prosecutions v. Galvin* [1999] 4 I.R. 82, decided that it had no jurisdiction to hear the case stated.

29. The note of the Supreme Court judgment in *Fitzpatrick* shows that it was agreed by counsel (quite correctly) that *Galvin* was distinguishable on the ground that it turned on the fundamental capacity of a person who had ceased to be a District Court judge to state a case. The note records that the Murray C.J. said:-

> *"Section 9 [of the Summary Jurisdiction Act, 1857] is also relevant since it envisages that in certain circumstances a case can be dealt with by a judge or judges other than that which stated the case. …*
>
> *In this case, the fact that the District Court judge has retired is not a bar to returning the case to the District Court. It is a matter for the High Court to determine what order to make as a consequence of its decision in respect of the matters raised in the case stated. It is certainly not excluded from the powers of the High Court to send the matter back to a judge other than the judge who stated the case." [The emphasis is mine.]*

30. Critically, *Fitzpatrick* was an appeal by way of case stated from a conviction and the power to remit which the Chief Justice was dealing with was the power in s. 9, rather than section 6. It seems to me that it follows from the observation that the possibility that the case might be dealt with by a judge other than the judge who stated the case arose "*in certain circumstances*" that the power did not necessarily arise in all cases.

31. As I understand the authorities, then, *Galvin* is clear authority for the proposition that the judge who states a case under s. 2 must be a judge of the District Court at the time he signs the case stated and *Fitzpatrick* is clear authority for the proposition that the High Court has jurisdiction to decide a case stated which has been validly stated and signed, notwithstanding the promotion (or death or retirement) of the District Court judge between the time the case stated is signed and the time it comes before the High Court. *Fitzpatrick* is also clear authority for the proposition that the High Court, following its decision of an appeal by way of case stated from a conviction, can consider the possibility of remitting it to a judge other than the judge who stated the case. Neither decision addressed the issue in this case, which is whether the High Court, having decided an appeal by way of case stated against an acquittal, can remit to a judge other than the judge who heard the case.

32. I was referred also to a passage from the second edition of Collins and O'Reilly *Civil Proceedings and the State (2nd edition)(Round Hall)* para. 1-21 which suggests:-

> *"The High Court has power to hear and determine the questions of law before it and may reverse, affirm or amend the determination of the District Court. It may also remit the matter to the judge of the District Court with its opinion, or may make such other orders as may be appropriate. In that event, the High Court order usually directs the judge of the District Court to enter continuances. The High Court must remit the matter to the judge of the District Court who stated the case, failing which it has no jurisdiction to answer the case stated. This is in contrast to the position in England and Wales, where it appears the High Court may remit a matter brought before it by way of an appeal by way of case stated to be reheard by a differently constituted bench of justices. The exercise of the apparently sweeping jurisdiction of the High Court to 'make such other order in relation to the matter … as to the court may seem fit' thus does not permit the case to be referred for rehearing by another judge of the District Court."*

33. This passage is plainly based on the judgment in Galvin and correctly characterised the jurisdiction of the High Court in s. 6 "*apparently sweeping*".

34. I observed earlier that when this case was opened the court was told that counsel were agreed as to the correct answers to the questions asked and that the only issue was whether the court had power to remit the case, or, if it did have such power, whether it should do so. While the reasoning was not spelled out, I think that it must have been (quite correctly) that the fact that the District Court judge was no longer a judge of the District Court was no bar to the court deciding the issues.

35. There is clear authority in England for the proposition for which the Director contends in this case. It is a unanimous decision of the House of Lords in a case of *Griffith v. Jenkins* [1992] 2 A.C. 76.

36. A bench of three Avon Justices sitting at Keynsham Magistrates' Court acquitted Mr. Jenkins of poaching three trout and later stated a case for the opinion of the High Court. A Divisional Court of Queen's Bench (Bingham L.J. and McCullough J.) held that the justices' decision was bad in law but also held that it was not possible to remit it since two of the three justices had in the meantime retired. The High Court certified a question of law as to whether on a proper construction of s. 6 of the Summary Jurisdiction Act, 1857 the High Court had power to order a re-hearing by different justices.

37. Lord Bridge, having set out the facts and the relevant statutory provisions, looked first at *Taylor v. Wilson* (1911) 22 Cox Crim. Cas. 647. That was an appeal by way of case stated against a conviction. The prosecutor would not stand over the magistrates' decision but asked that the case be remitted. Lord Alverstone C.J., having dealt with the substantive question, said:-

> *"Then the question has been raised by counsel for the respondent as to what we ought to do in the circumstances. I do not desire to express any opinion as to what power we have got beyond saying that I think it would require a very strong argument to convince me that where there has been a conviction on matters which were gone into by the justices on a wrong ruling of law, we ought to order the case to be tried again, unless the justices have done what they not infrequently do – namely, ask for directions and adjourn the proceedings, so that they may act on our decision…"*

38. The second case considered by Lord Bridge was *Rigby v. Woodward* [1957] 1 W.L.R. 250 was directly in point. The appellant was the second of two accused who were jointly charged with an offence of wounding. The first defendant gave evidence that it was the appellant who had attacked the victim. The justices refused to allow the solicitor for the appellant to cross examine the first defendant and proceeded to acquit the first defendant but convict the second. That decision plainly could not stand and the issue was whether there should be a re-trial. Lord Goddard C.J. said:-

> *"[There] is no power to order a retrial in the ordinary sense of that expression. If this court holds that on a submission of no case to answer justices were wrong in stopping it they can be ordered to resume the hearing of the case because they very likely have not heard the defence. If we sent this case back, I do not see how it could be dealt with. The co-defendant who gave evidence and was acquitted and was not cross-examined might possibly not be found. We do not know where he is or whether he can be called. We cannot make the prosecution call him. It seems to me that there has been an unfortunate departure from the ordinary principles of justice. It has resulted in a conviction, and although it may be that the appellant is guilty and that the justices were right in the opinion which they formed, we cannot allow a proceeding of this sort to stand. We must decide the question of law that is raised here in favour of the appellant and, having done so, as it seems to me that it is impossible for us to order a re-trial, which I do not think we have power to do, it follows that the conviction must be quashed. I regret it, but that is the only decision we can give."*

39. *Rigby v. Woodward* was followed in *Maydew v. Flint* (1984) 80 Cr. App. R. 49. The appellant in that case had offered the old "*hip flask*" defence to a charge of driving with excess alcohol in his blood. Between the date of the alleged offence and the date of the trial the law had been changed but the justices erroneously applied the new law. Again, the only issue was whether there was power to order a re-trial. Robert Goff L.J. said:-

> *"That being so, we are faced simply with a decision of this court, presided over by the Lord Chief Justice, in which a clear view was expressed as to the powers of this court under section 6 of the Act of 1857. In those circumstances, it would, in my judgment, be quite wrong for us to depart from that statement of the law, especially as it has been accepted as correct since 1957 and has, I understand, never been challenged or departed from, and indeed has been followed."*

40. The Divisional Court in *Griffith v. Jenkins* followed *Rigby v. Woodward* and *Maydew v. Flint* but McCullough J. said that, in the time available, he had not been able to confirm the *dictum* of Robert Goff L.J. that *Rigby v. Woodward* had since been followed.

41. By the time *Griffith v. Jenkins* came before the House of Lords counsel had undertaken further research. This, apparently, had not unearthed any case before *Maydew v. Flint* in which the court had declined to order a re-hearing, but had identified four before 1984 and one after in which "*… the court, disposing of an appeal by case stated under section 6 of the Act of 1857, assumed without question that it had power to order a re-hearing before a different bench and did so*."

42. In his speech in *Griffith v. Jenkins* Lord Bridge identified and summarised the five cases, identified the judges who dealt with them, and continued at page 83:-

> *"Now it is true that in none of these five cases was Rigby v. Woodward [1957] 1 W.L.R.250 referred to nor was any issue raised as to the power of the court under section 6 of the Act of 1857 to order a rehearing. But this, it seems to me, must have been because it never occurred to any of the judges concerned or to counsel appearing before them to doubt that the court had such a power. It is also true that all those five cases were prosecutors' appeals against acquittals resulting from errors of law made by justices whereas in Taylor v. Wilson 22 Cox C.C. 647, Rigby v. Woodward*

[1957] 1 W.L.R. 250 and Maydew v. Flint 80 Cr. App. R. 49, the question whether a re-hearing could or should be ordered arose in the context of a successful defendant's appeal against conviction. But the question whether the court has power under section 6 of the Act of 1857 to order a rehearing before either the same or a different bench cannot receive different answers according to whether it is the prosecutor or the defendant who is appealing. I cannot resist the conclusion that Lord Goddard C.J. was in error when he asserted that the court has no such power. His judgment in Rigby v. Woodward was extemporary and gave no reasons in support of his opinion to that effect. Even the respect due to Lord Goddard's great learning does not, I think, constrain us to treat this dictum as sacrosanct. I do not for a moment question the correctness of the decision in the case. Quite apart from any question of vires the acquittal of the co-defendant made a re-hearing of the case against the appellant a practical impossibility.

My conclusion is that there is always power in the court on hearing an appeal by case stated under section 6 of the Act of 1857 to order a rehearing before either the same or a different bench when that appears to be the appropriate course and the court, in its discretion, decides to take it. It is axiomatic, of course, that a rehearing will only be ordered in circumstances where a fair trial is still possible. But where errors of law by justices have led to an acquittal which is successfully challenged and where the circumstances of the case are such that a rehearing is the only way in which the matter can be put right, I apprehend that the court will normally, though not necessarily, exercise its discretion in favour of that course. I recognise that very different considerations may apply to the exercise of discretion to order a rehearing following a successful appeal against conviction by the defendant in circumstances where the error in the proceedings which vitiated the conviction has left the issue of the defendant's guilt or innocence unresolved. In some such cases to order a re-hearing may appear inappropriate or oppressive. But this must depend on how the proceedings have been conducted, the nature of the error vitiating the conviction, the gravity of the offence and any other relevant consideration. It would be most unwise to attempt to lay down guidelines for the exercise of such discretion and I have no intention of doing so. But I would not regard the strong opinion expressed by Lord Alverstone C.J. in 1911 against the exercise of discretion to order a retrial following conviction based on a wrong ruling in law as any longer appropriate in the 1990s."

43. I have carefully considered the judgment in *Griffith v. Jenkins*. It is well established that the judgments of the English courts can be persuasive authority but they are persuasive, I think, only insofar as and to the extent to which they persuade. Lord Bridge was rather critical of the fact that Lord Goddard C.J. in *Rigby v. Woodward* did not give reasons in support of his opinion but the only reasons that I can discern in Lord Bridge's speech are that none of the many judges who had ordered re-hearings had doubted their power to do so and, perhaps, that it was desirable that the court would have such a power. I fully agree that in England a long-established assumption as to the state of the law would be a sound basis for not departing from established practice but as far as this court is concerned, it seems to me that the persuasiveness of the decision will depend on the reasoning on which it is based.

44. What I find most instructive from the judgment in *Griffith v. Jenkins* is that while there was a difference of opinion or assumption in England as to the existence of a power to remit cases to justices other than the justices who had stated the case, there was unanimity in the view or assumption that the death or retirement of the justices who had stated the case was no bar to the High Court entertaining it.

45. On this appeal counsel for the Director adopts the argument made by Dr. O'Malley that Geoghegan J. in *Galvin* does not appear to have considered the implications of section 9 of the Act of 1857 which, it is said, provides that the case may be remitted to the justice or justices who stated the case or any other justice or justices exercising the same jurisdiction. With respect to both counsel and Dr. O'Malley, that is not what s. 9 says. Section 9 provides that after the decision of the High Court on a case stated, the justice or justices who stated the case or any other justice or justices exercising the same jurisdiction shall have the same authority to enforce any conviction or order as the justice or justices who stated the case would have had to enforce their determination if the same had not been appealed against. It seems to me that s. 9 is not directed to remittal but to enforcement and has no application to a case, such as this, where the decision appealed against is an acquittal.

46. It seems to me that in this case the jurisdiction to remit is to be found, if it is to be found, in section 6. That jurisdiction is, as Collins and O'Reilly have described it, a sweeping jurisdiction. There is an express power to remit the case to the justice or justices who stated it or to make such other order in relation to the matter as to the court may seem fit. It seems to me that the power to make such other order as may seem fit is necessarily an alternative to the power to remit the case to the judge who stated the case and that that alternative must include the power, where necessary or desirable, to remit the case to some other judge of the District Court.

47. I am not persuaded by the argument made on behalf of the respondent that a finding that there is in the general power to make orders a power to remit to a different District Court judge would be to depart from the specific power to remit to the judge who stated the case, or that the general power is to be read eiusdem generis to the specific power.

48. I accept, of course, the argument that the Act of 1857 is to be read as a whole and that doing so may reveal that a proposition in one part of the Act may shed light on the meaning of provisions elsewhere. It is true that s. 9 includes, whereas, s. 6 does not, reference to a justice or justices other than that or those who stated the case but in my view s. 9 is directed to the power of the District Court to enforce convictions or orders. Because sections 6 and 9 are directed to different stages in the process, the interpretation of s. 9 does not inform the interpretation of section 6.

49. For these reasons I have come to the conclusion that the High Court, having heard and determined an appeal by way of case stated under s. 6 of the Summary Jurisdiction Act, 1857 does have power to remit the case to the District Court to be dealt with by a judge other than the judge who stated and signed the case stated.

50. There remains the issue as to whether the court should exercise its discretion to direct a re-trial before another judge of the District Court.

51. Counsel for the respondent (without demur by counsel for the appellant) refers to the statutory framework in the Criminal Procedure Act, 2010 which, he urges, while it does not expressly apply, should inform the exercise of the discretion in this case. Section 23(11)(a)(ii) of the Act of 2010 provides for a retrial if, having regard to the matters referred to in sub-section (12) it is, in all the circumstances, in the interest of justice to do so. The matters referred to in sub-section (12) are:-

(a) whether or not it is likely that any re-trial could be conducted fairly,

(b) the amount of time that has passed since the act or omission that gave rise to the indictment,

(c) the interest of any victim of the offence concerned, and

(d) any other matter which it considers to be relevant to the appeal.

52. In this case counsel for the respondent points to the passage of time since the date of the alleged offence, upwards of two and a half years, and to the fact that any rehearing would take place about three years after the date of the alleged offence. He points to the fact that the alleged offence is a minor offence, fit to be tried summarily. He points to the fact that the submission made to the District Court judge was made in good faith by reference to the authorities then understood to represent the law and to the fact that following the judgment of the Court of Appeal in *Connors* the respondent did not contest the merits of the appeal.

53. I accept that the legal argument made to the District Court was made in good faith. I note that the respondent did not contest the merits of the appeal. The Court of Appeal in *Connors* having exposed the heresy that the offence of possessing stolen property was the same as the old offence of receiving stolen goods, to have done so would have been to try to defend the indefensible. From the point of view of the layman, it was rather peculiar that the respondent was acquitted by direction of the possession of stolen property on his argument that he might very well have been the thief.

54. It is now accepted that the respondent was acquitted in circumstances in which he ought not have been. While, as I have said, I accept that the legal argument made was made in good faith it is quite clear that the Director was of the view that it was a bad point. However bad the point may have been, it was a view fairly commonly espoused by defence lawyers.

55. Notwithstanding the lapse of time I am nor persuaded that a re-trial could not be conducted fairly. At this remove, I do not believe that the owners of the stolen devices would be particularly exercised by the question of a re-trial.

56. What in my view tilts the balance against remitting the case to the District Court is the fact that a re-trial would single out the respondent from the many others in the same position who were acquitted on the same point of law but whose acquittals were not appealed.

57. I will answer the questions in the case stated as follows:-

(i) In a prosecution for an offence under s. 18 of the Criminal Justice (Theft and Fraud) Offences Act, 2001 is the prosecution always required to prove beyond a reasonable doubt that the accused did not steal the relevant items? No.

(ii) If yes, was I correct in law in determining that the prosecution had not discharged the burden in this case? Does not arise.

(iii) Was I correct in dismissing the charge? No.

58. I will not remit the matter to the District Court.