

THE HIGH COURT

[2021] IEHC 570
2020/1667/SS

**IN THE MATTER OF SECTION 2 OF
THE SUMMARY JURISDICTION ACT, 1857,
AS EXTENDED BY SECTION 51 OF THE COURTS
(SUPPLEMENTAL PROVISIONS) ACT, 1961**

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND

COURTNEY WALSH AND KIRSTY WALSH

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Heslin delivered on the 31st day of August, 2021

Introduction

1. The respondents appeared in the District Court on foot of summonses alleging the commission of offences contrary to the Prohibition of Incitement to Hatred Act, 1989 ("the 1989 Act") and the Criminal Justice (Public Order) Act, 1994 ("the 1994 Act"), relating to an incident on 6th November, 2017. Both of the defendants/respondents pleaded guilty to offences contrary to s. 6 of the 1994 Act. The District Court Judge dismissed the charges which had been brought pursuant to s. 2 of the 1989 Act. This was based on the acceptance by the learned judge of submissions made on their behalf as to the construction of s. 8 of the 1989 Act, which provides that "*where a person is charged with an offence under section 2, 3 or 4, no further proceedings in the matter (other than any remand in custody or on bail) shall be taken except by or with the consent of the Director of Public Prosecutions*". The District judge accepted the submission made on behalf of the respondents to the effect that this section required that, when called upon by the defence to so prove, the prosecution was obliged to prove that the DPP specifically consented to further proceedings being taken beyond the initiation of the prosecution. The DPP had directed the prosecution and was represented at the summary trial. The District Court held that the evidence of the DPP's decision to prosecute for the relevant offences was not sufficient to comply with s. 8. The DPP contends that the determination of the District Court was erroneous in point of law and involved a misinterpretation of the relevant Statute. The prosecutor initiated an appeal by way case stated, the question being: Was the District Court Judge correct in dismissing the case against the defendants? The matter comes before this court in circumstances where defendants/respondents seek an order striking out the appeal by way of case stated ("the Appeal") on the basis that the prosecutor's failure to comply with the procedure set down in s. 2 of the Summary Jurisdiction Act, 1857. The prosecutor admits that there was a failure to comply with the necessary procedure and, in response to the relevant motion which seeks an order striking out the proceedings, the DPP seeks an extension of time with which to comply with the procedure mandated by s. 2 of the 1857 Act.

Relevant legislation

2. An appeal by way of case stated is provided for pursuant to s. 2 of the Summary Jurisdiction Act, 1857 as extended by s. 51 of the Courts (Supplemental Provisions) Act,

1961 as amended by s. 45 of the Criminal Justice (Miscellaneous Provisions) Act, 2009. This provides as follows:

"After the hearing and determination by a Justice of any proceedings howsoever heard and determined (other than proceedings relating to an indictable offence which was not dealt with summarily by the court), 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 fourteen 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 the High Court; and such party, hereinafter called the Appellant, shall within three days after receiving such case or such longer period as may be provided for by rules of court, transmit the same to the Court first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceedings hereinafter called the respondent."

3. Section 51 of the Courts (Supplemental Provisions) Act, 1961 provides as follows:

"51. - (1) 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."

4. Section 45 of the Criminal Justice (Miscellaneous Provisions) Act, 2009 ("the 2009 Act") provides as follows:

"Section 2 (as extended by section 51 of the Courts (Supplemental Provisions) Act, 1961) of the Summary Jurisdiction Act, 1857 is hereby amended by the insertion after 'such Case' of 'or such longer period as may be provided for by rules of Court' ."

5. In light of the foregoing, s. 2 of the 1857 Act (as amended) lays down the following procedure to be followed by an appellant after the case stated is signed by the District Court Judge:-

*". . . the appellant, shall, within three days after receiving such case, or such longer period as may be provided for by Rules of Court, transmit the same to the court named in his application **first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, hereinafter called the respondent**". (Emphasis added)*

6. It is uncontroversial to say that s. 45 of the 2009 Act constitutes an intervention by the Oireachtas to permit an extension of time and at the heart of the case before this Court is the respondents' contention that the relieving provision in the form of s. 45 does not allow this Court to extend time other than in respect of the transmission of the case stated to the court - something which was, in fact, done well within time. In particular, the respondents argue that this Court has no jurisdiction to extend time regarding the procedural service requirements set out in s. 2, namely, the obligation to give the respondents notice in writing of the appeal and a copy of the case stated and signed and to do so *before* transmitting same to the court. Relying on the decision in *DPP v. Kudriacevas* [2014] IEHC 53, the DPP argues that s. 45 of the 2009 Act entitles this Court to extend time in respect of all procedural requirements in s. 2 of the 1857 Act and it is argued on behalf of the respondents that it is appropriate in the present case for time to be enlarged.
7. It is clear from the foregoing that s. 2 of the 1857 Act requires that notice in writing of an appeal and a copy of the case stated and signed be given to the other party in the proceedings. Prior to the coming into force of the 2009 Act, s. 2 was not specific in relation to the question of service. S. 46 of the 2009 Act addressed this issue, providing:
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"The Act of 1857 is hereby amended by the insertion after section 2 of the following new section:

"2A.— (1) Notice in writing of an appeal and a copy of the case stated and signed, required by section 2 (as extended by section 51 of the Courts (Supplemental Provisions) Act 1961 and amended by section 45 of the Criminal Justice (Miscellaneous Provisions) Act 2009) of this Act to be given to any other party to the proceedings may, subject to subsection (2), be so given—

- (a) by delivering it to him or her or to his or her solicitor,*
- (b) by addressing it to him or her and leaving it at his or her usual or last known residence or place of business or by addressing it to his or her solicitor and leaving it at the solicitor's office,*
- (c) by sending it by registered post to him or her at his or her usual or last known residence or place of business or to his or her solicitor at the solicitor's office, or*
- (d) in the case of a body corporate, by delivering it, or sending it by registered post, to the secretary or any other officer of the body at its registered or principal office.*

(2) Notice in writing of an appeal and a copy of the case stated and signed, required by section 2 (as so extended and amended) of this Act to be given to any other party

to the proceeding shall, if that party is not represented by a solicitor be given personally to him or her.

- (3) *For the purposes of subsections (1) and (2) the solicitor retained to appear on behalf of any party at the hearing and determination of the information or complaint shall be deemed to continue to be retained on his or her behalf unless the Court has otherwise been advised”.*

Relevant Rules of the Superior Courts

8. The Rules of the Superior Courts also address certain requirements in respect of a case stated and this can be seen from the contents of O. 62 and O. 122. O. 62, r. 1, inserted by S.I. 293/2014 and which came into force on 21 July 2014, provides as follows: -

“Every case stated by a Judge of the District Court under the Summary Jurisdiction Act 1857 (20 and 21 Vic. c. 43) shall be transmitted to the Central Office by the party requesting the case within fourteen days after receiving such case”.

9. O. 62, r. 4 and 5 provide as follows: -

“4. Any case may be transmitted to the Central Office by delivering the same to the proper officer, and upon receipt thereof the proper officer shall forthwith file the same and set it down for hearing; but it shall not appear in the list for hearing until the expiration of ten days after it shall have been so received.

5. Immediately before transmitting the case to the Central Office, the person transmitting the same shall give notice thereof to every other party to the proceedings in or in relation to which the case is stated”.

10. O. 122, r. 7 (1) provides as follows: -

“(1) Subject to sub-rule (2) and to any relevant provision of statute, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed or allowed”.

11. It is uncontroversial to say that s. 2 of the 1857 Act mandates that two specific things must be done and also mandates the order in which they must be done. In other words, the appellant must (1) give notice in writing of the appeal and a copy of the signed case stated to the other party and (2) lodge the case stated with the High Court. S. 2 of the 1857 Act is also clear that the foregoing must be done in that order, i.e. (1) must be done before (2). In the present case, the DPP did all the foregoing, but in the *wrong* order. I now turn to the facts which emerge from an examination of the affidavits before this Court.

An examination of the evidence

12. This Court was provided with a book of pleadings comprising the notice of motion, issued on 19 April 2021 by the solicitors for the first named respondent, grounded on an affidavit sworn by Mr. Brian Coveney, solicitor, sworn on 19 April 2021. In response, Ms. Edel Golden, solicitor, swore an affidavit on 21 May 2021 in her capacity as senior prosecutor in the office of the DPP. The said motion seeks: -

- "1. *An order striking out the proceedings against the first named respondent;*
2. *Such further or other order as this honourable Court may deem fit*".

It is not in dispute that the hearing, which commenced on the evening of 10 June and completed on 11 June, constituted a similar application brought on similar terms by both respondents. I have carefully considered the contents of the affidavit sworn by Mr. Coveney and, in reply, by Ms. Golden. It is fair to say that there is no material disagreement in relation to salient facts which I now set out in chronological order for the sake of clarity: -

- The incident giving rise to the prosecutions occurred on 6 November 2017.
- The proceedings were first before the District Court on 16 May 2018 and were adjourned on a number of occasions.
- The offences alleged against the respondents pursuant to the 1989 Act were indictable matters, but jurisdiction was accepted by the District Court on 4 October 2019.
- The cases were listed for hearing on 11 February 2020 and a summary trial before Judge Murphy proceeded in the District Court over a number of dates i.e. 11 February 2020, 21 April 2020 and 16 June 2020 (the cases being adjourned as of 21 April 2020 due to COVID - 19 restrictions).
- On 16 June 2020, the District Court dismissed the summonses against each respondent alleging offences contrary to s. 2 of the 1989 Act.
- Both defendants subsequently pleaded guilty to offences contrary to s. 6 of the 1994 Act.
- Immediately after Judge Murphy made her decision on 16 June 2020, Ms. Golden, solicitor, asked the court to let the matter stand for a few moments and she contacted the relevant directing officer in the office of the DPP, which officer confirmed to Ms. Golden that it would be likely that the DPP would be appealing by way of a case stated. The directing officer indicated, however, that it was necessary for him to consider the matter and to discuss this with his unit head.
- In light of the foregoing, Ms. Golden indicated to the court on 16 June 2020 that she would need take instructions from the DPP in relation to her decision. The legal representatives of the respondents were present in the District Court when Ms.

Golden indicated this. Thus, it is a matter of fact that, as early as 16 June 2020, both of the defendants/respondents, via their legal representatives, were squarely on notice that the DPP was going to give serious consideration to pursuing a challenge to the decision of the District Court to dismiss;

- Later, on 16 June 2020, Ms. Golden formally sought directions as to pursuing an appeal by way of case stated, which request was considered by the directing officer who also consulted with his Unit Head, being a senior officer in the Office of the DPP;
- On 24 June 2020, Ms. Golden received directions from the DPP to lodge a notice of application to state a case and the relevant "*notice of application to state a case*" was filed and served within two days of that;
- On 26 June 2020, the Notice of Application to state a case was lodged with the District Court office, following which, as per the appropriate procedure, it was then served on the respondents;
- Exhibit "EG - 1" to Ms. Golden's affidavit comprises a copy of the relevant Notice of Application to state a case and the said notice names both of the respondents as well as their solicitors and it is acknowledged that the said notice was properly served on both respondents.
- It is not in doubt that service of the notice of application to state a case had the effect of suspending the District Court's decision to dismiss the relevant charges.
- On 30 June 2020, the case came before Judge Murphy in the District Court, at which point a solicitor for the DPP stated that the prosecutor wished to appeal by way of a case stated. The judge in question indicated she had no difficulty with this and would sign the case stated once it had been prepared.
- There is no doubt about the fact that since late June 2020, the defendants/respondents have been aware of the DPP's intention to appeal by way of case stated.
- The case was listed for mention before the District Court Judge on 31 July 2020, 25 September 2020, 9 October 2020 and 15 October 2020 and was adjourned from time to time to allow for the drafting of the case stated.
- On all these occasions the respondents were legally represented before the court and the court was aware that the parties were engaging with each other as to the draft case stated.
- As regards such engagement between the parties, Ms. Golden furnished a draft case stated to the respondent's solicitors on 24 July 2020, having received approval for the draft from the DPP on 22 July 2020.

- On 30 July 2020, the solicitors for the first named respondent replied with an amended draft, giving rise to an adjournment which was to 25 September 2020 for the consideration of the draft.
- On 22 September 2020, following the DPP's consideration of the suggested amendments, a further draft case stated was sent to the respondents on 22 September 2020.
- As of 15 October 2020, when the matter was again before Judge Murphy, there were only a small number of areas of disagreement between the parties as to the draft case stated and Judge Murphy made rulings as to the draft and the case was adjourned to 30 October 2020.
- Subsequent to 15 October 2020, the draft case stated was amended to take account of the rulings made by the judge in order to arrive at the final version which was to be signed by the judge.
- On Friday 20 October 2020, in CCJ Court 2, Judge Murphy signed the case stated. Neither of the respondents were present as they were not required to be in court but both of the respondent were legally represented on the day and the Judge signed the case stated in the presence of all the legal representatives of the parties.
- It is a matter of fact that the draft case stated was prepared in a timely fashion.
- It is a matter of fact that there was full engagement and detailed consideration given to the drafting of the case stated by all relevant parties, including the legal representatives of both the defendants/respondents.
- After the Judge signed the case stated, Ms. Golden received it from the District Court Clerk. Ms. Golden also received a Form 102.5 from the Court Clerk, being a Notice that the case stated has been prepared and signed.
- On 30 October 2020, Judge Murphy granted legal aid for the purposes of defending the appeal by way of case stated, to provide for solicitor, junior counsel and senior counsel for each respondent.
- On 30 October 2020, Ms. Golden went straight from the District Court to the Central Office of the High Court. On arrival, she learned that, having regard to COVID - 19 restrictions, it was necessary to make an appointment with the office in order to lodge the papers. She received an appointment for later that afternoon and the papers were then lodged.
- Upon returning to her office Ms. Golden drafted letters dated 30 October 2020, in relation to service of the papers.

- The only reason the correspondence dated Friday, 30 October, was not sent that day was because Ms. Golden missed the post, having been in the Central Office on the afternoon of Friday, 30 October 2020.
- Ms. Golden contacted the DPP's service officer and was advised that service officers would make sure to get the correspondence sent on the following Monday;
- All correspondence was handed to the service officer on Friday, 30 October 2020, namely, the letters dated 30 October 2020;
- Emails attaching all relevant papers were sent to the solicitors representing both defendants on 02 November 2020 at 9:55am and 9:58am, respectively.
- At 9:55 a.m. on Monday 02 November 2020, Mr. Coveney, solicitor for the first named defendant/respondent, received an email from Ms. Golden which stated *"Please see attached papers for the case stated which was lodged in the High Court on Friday. A hard copy of all the relevant papers have been sent in the post to your office and to your client. The record number of the proceedings is 2020/1667 SS and the case will be in the High Court non - jury list on the 7th December 2020 for mention"*.
- There were three attachments to Ms. Golden's 02 November 2020 email, namely: (1) a copy of the case stated as signed by Judge Murphy, which bore a central office stamp indicating that it had been filed on 30 October 2020; (2) a notice of appeal by way of case stated dated 30 October 2020; and (3) a notice that the case stated had been prepared and signed, dated 30 October 2020 (being the form 102.5).
- On Tuesday 03 November 2020, Mr. Coveney's office received a letter by post from the DPP, dated 30 October 2020 which stated: *"[T]he papers served on you and your client yesterday have been lodged with the High Court. The record number of the proceedings is 2020/1667 SS and the case will be in the High Court non - jury list on 7th December 2020 for mention"*. Enclosed with the said letter were the same three items which comprised attachments to the 02 November email, namely (1) a copy of the case stated bearing a stamp indicating that it had been filed in the Central Office on 30 October 2020, (2) a copy of the notice of appeal dated 30 October 2020 and (3) a notice that the case stated had been prepared and signed, dated 30 October 2020.
- On Tuesday 03 November 2020, the first named respondent received a letter by registered post to her address, which letter was dated 30 October 2020. This letter from the DPP referred to and enclosed *"by way of service"* the same three documents, namely (1) a copy of the case stated, (2) a copy of the notice of appeal and (3) a copy of the form 102.5. There is no suggestion that the second named respondent and their solicitors did not receive similar communication and documentation.

- In light of the foregoing it is a matter of fact that, as of the morning of Monday 02 November 2020, the legal representatives of the defendants/respondents received by email a copy of the case stated, as signed by the Judge, as well as a copy of the notice of appeal by way of case stated, hard copies of which they received the following day, as did the defendants/respondents.
 - It is also a matter of fact that the case stated, as signed by the Judge on 30 October 2020 was transmitted to the High Court Central Office that same day, being before the DPP served a copy of the signed case stated and written notice of the appeal, whereas s. 2 of the 1857 Act mandates the opposite in terms of sequencing.
 - Although the sequencing was not in accordance with the provisions of s. 2 of the 1857 Act, the case stated was, in fact, lodged in the Central Office and was, along with notice of the appeal, served on the respondents and their legal representatives within a few days of 30 October 2020 and well within the period of fourteen days;
 - When the matter came before this Court on 07 December 2020, the DPP applied for a hearing date to be fixed and this was done. The date given was 10 June 2021. The issue raised in the respondent's motion was not raised on 07 December 2020 or at any stage prior to service of the respondent's 19 April 2021 motion.
 - As of 07 December 2020, when a hearing date for the appeal was granted, it was envisaged that the appeal by way of case stated would be heard by this Court on 10 June 2021. In light of the motion subsequently issued by the respondents, what commenced on 10 June 2021 was a hearing of the said motion rather than a hearing of the appeal.
13. In light of the uncontested facts which I have summarised in the foregoing manner, it seems entirely fair to say that, had Ms. Golden served the respondents and their solicitors with precisely the same papers in exactly the same manner as she did on the 2nd and 3rd of November 2020, but held off lodging the papers in the High Court Central Office until the following week, the position of the defendants/respondents would be precisely the same, but the present motion would be devoid of any basis. In other words, in that hypothetical scenario where Ms. Golden was less efficient with regard to transmitting papers to the Central Office, but just as efficient insofar as serving the defendants/respondents and their solicitors, there would be no change whatsoever in terms of the notification and documentation which the defendants/respondents and their solicitors in fact received, but there would be no grounds for the present applications, the sole issue underpinning them being the timing of the lodgement of papers in the Central Office.
14. Obviously, no defendant/respondent is involved in lodging papers in respect of an appeal. Leaving aside for present purposes the mandatory obligations as to sequencing found in s. 2 of the 1857 Act, the fact that papers were lodged in the Central Office on 30 October as opposed to, say, 4 November 2020, had no practical effect on the

defendants/respondents in terms of what they, in fact, received and when they received it. That is not for a moment to take away from the legal obligations as to sequencing which are mandated by s. 2 of the 1857 Act and I will look closely at that issue which is at the heart of the present claim. My point is simply to highlight that the facts which emerge from an analysis of the evidence in this case indicates that (1) at all material times the defendants/respondents and their legal representatives were fully aware of the DPP's intention to appeal by way of a case stated and (b) there was full engagement by all relevant parties with the drafting of same and (c) the defendants/respondents and their legal representatives were, in fact, served with notice of the appeal and a copy of the case stated, as signed, and (d) such service was effected on the first working day after the case stated had been signed by the Judge in question.

The case stated

15. A copy of the case stated, as signed by the judge on 30 October 2020 was before the court. On any analysis, it is a detailed document running to ten pages excluding the annex which comprises copies of the relevant summonses concerning offences alleged contrary to s. 2 of the 1989 Act. The said case stated contains a detailed setting out of the hearing which took place, including the testimony given by a number of witnesses, in addition to reference being made to CCTV footage evidence. There is also a detailed setting out of the submissions made by the prosecution and the submissions on behalf of the defendants, as well as a detailed account of the judgment given by the District Court. As regards the decision made by the District Court, para. 15 of the case stated confirms that the District Judge in question held that the evidence touching on the issue of the consent of the DPP was not sufficiently clear in order to establish to the judge's satisfaction that the specific type of necessary consent had been provided by the DPP.
16. The case stated makes clear that, while the prosecution had adduced evidence of a direction by the DPP to bring charges, the District Court Judge was not satisfied that the evidence clearly established that the direction authorised the taking of further proceedings past the initiation of the criminal prosecution as she had held was specifically required under s. 8 of the 1989 Act and the District Judge did not think it was appropriate to draw an inference that the direction given by the DPP conveyed the authorisation.
17. It is clear from the terms of the case stated that the appeal does not hinge on the evidence which was before the District Court such as the statements attributed to the defendants/respondents. Rather, the question arising in the appeal relates to whether or not the District Judge was correct in dismissing the relevant case against the defendants by reason of the District Judge taking the view that the prosecution had failed to discharge the burden of establishing compliance with s. 8 of the 1989 Act.
18. Although it is not for this Court to engage in the merits of the aforesaid appeal, it could hardly be said that the issue raised is other than significant and substantial. It seems entirely uncontroversial to say that there is an obvious public interest in such an issue being determined.

The DPP's explanation for failure to comply with the sequencing requirements of s. 2 of the 1857 Act

19. Earlier in this judgment, I set out a number of facts, which are not in dispute between the parties, insofar as the chronology of relevant events if concerned. It is appropriate, at this juncture, to refer to uncontested averments by Ms. Golden, solicitor, by way of an explanation for the undoubted and acknowledged failure on the part of the DPP to comply with the sequencing requirements as mandated by s. 2 of the 1857 Act. Ms. Golden fully accepts that there was non-compliance with the procedure set out in s. 2 of the 1857 Act *"...insofar as instead of serving the respondents with a copy of the signed case stated and notice of appeal prior to filing same in the Central Office of the High Court, I first filed the case stated in the Central Office and then served the respondent, and their solicitors, with the documents"* (para. 4 of Ms. Golden's affidavit). From para.14, Ms. Golden makes the following uncontested averments:-

"14. I was anxious to ensure that the case stated was filed and served within the time limit. I was aware that the time was fourteen days, but out of an abundance of caution, I wanted to ensure that the papers were lodged close to, or on the same day as, the signing of the case stated, particularly given that I knew the case stated would be signed on a Friday. I was aware that the procedural requirements for an appeal by way of case stated are strict and therefore I wanted to deal with those requirements as soon as possible after the case stated was signed. I inadvertently neglected to comply with the requirement to serve the signed case stated and notice of appeal before lodging the case stated with the Central Office. I say this was inadvertent because I did not deliberately seek to dispense with the requirement to serve the papers prior to transmitting the case stated to the Central Office. I simply got the sequencing wrong. For the notice of application to state a case, which was done on 26 June 2020, that notice was lodged with the District Court Office and then served on the respondents. I complied with that aspect of the procedure and this later impacted on my thinking as to how I would go about filing and serving papers after the Judge signed the case stated.

15. I fully accept the error in the procedure and I do not seek to resile from that. In my desire to ensure that matters were attended to expeditiously within the period, and having previously filed the notice of application to state a case prior to service of same, I did not properly advert to the later sequencing requirement. In saying that, I wish to stress that I do not seek to downplay the importance of complying with the procedure laid down by s. 2 of the Summary Jurisdiction Act, 1857."

20. There is no suggestion whatsoever that Ms. Golden is other than a diligent and conscientious solicitor. It is clear that there was never any deliberate intention to do things in the wrong sequence. It is equally clear that there was never any deliberate intention on the part of the DPP to dispense with the requirement in respect of service of papers on the respondent. On the contrary, it is a matter of fact that, whatever about the legal status of same, service of all relevant papers was effected very promptly on all relevant parties. In other words, what the defendants/respondents and their legal representatives received is precisely what they were entitled to receive and was no less

than what they were entitled to and expected to receive. Unfortunately, however, a simple mistake was made as to sequencing and there is a clear and cogent explanation as to why that mistake was made, namely, because the sequence required, pursuant to s. 2 of the 1857 Act in respect of the signed case stated and notice of such appeal is precisely the reverse of the sequencing which applied in respect of the notice of application to state a case. There is a positive and uncontested averment that the foregoing impacted on Ms. Golden's thinking as to how she would go about filing and serving the papers after the Judge had signed the case stated and one can readily understand how such a simple mistake might have arisen, particularly in circumstances where, as is very well known, it is normally the case that an application by way of, for example, a notice of motion, first involves attending the Central Office to lodge papers before papers are served.

21. Fairly considered, the mistake which was made was a simple one, an understandable one, and one which has been explained. Under no circumstances could the mistake be considered to be an egregious one. Furthermore, it is not a mistake which, in fact, caused any prejudice whatsoever to the defendants/respondents. There is no evidence before this Court of any actual prejudice sustained by the defendants/respondents or either of them, nor is prejudice asserted. I am entirely satisfied that there are no facts before this Court from which prejudice could be inferred. I say this, having regard to the factual position which is not in dispute and which includes: (1) the fact that, at all material times, the defendants/respondents, through their legal representatives, were aware of the DPP's intention to appeal by way of a case stated as well as; (2) the fact of active engagement by the legal representatives of the defendants/respondents insofar as the drafting of the case stated is concerned, and; (3) the receipt by the defendants/respondents and by their legal representatives of a copy of the signed case stated and written notice of the appeal, as of 02 and 03 November.
22. In short, the mistake which is acknowledged on the part of the DPP, is not one which had any tangible effect, as a matter of fact, on the defendants, insofar as, for example, their ability to oppose the appeal. Unfortunately for Ms. Golden, she was the victim of a very understandable and laudable desire to be as efficient as possible.
23. There is no evidence before this Court that either the prosecutor or the defendants/respondents were aware of the mistake which had been made as regard sequencing, at the time the mistake was made or in the months that followed. On the contrary, the fact that when the case came before this Court on 07 December 2020 and a date was fixed (i.e. 10 June 2021) for the hearing of the appeal by way of case stated, suggests that neither party were aware of the mistake as regards sequencing, at that point in time. It is also a matter of fact that the motion before this Court was not issued until 19 April 2021 entitling me to infer that the mistake was discovered by the defendants/respondents in or about April 2021, at which point the defendants/respondents decided that, rather than fight the appeal which had been set down for a hearing due to take place on 10 June 2021, they would bring the present motion seeking an order striking out the entire proceedings on jurisdictional grounds. I am entitled to take the view that, until served with the respondents' 19 April 2021

motion, the prosecutor was unaware of the jurisdictional challenge and the basis for same. To put it another way, there is no evidence before this Court which will allow me to hold that, from 30 October 2020 onwards, the prosecutor was aware that a mistake had been made yet, despite that knowledge, chose not to alert the defendants/respondent and chose not to take any steps to rectify matters. Among the submissions made with skill by counsel representing the second named respondent was to characterise the prosecutor as being guilty of delay from 30 October 2020 onwards and the submission was to the effect that the prosecutor did nothing from 30 October 2020 onwards to rectify matters by, for example, making an application to enlarge time, the submission being that there was very significant delay running to seven months on the part of the prosecutor, terminating with the swearing by Ms. Golden of her affidavit on 21 May 2021, in which she seeks an order refusing to strike out the appeal by way of case stated and, instead, to enlarge time to permit the procedure to be attended to correctly. It would be entirely unfair for this Court to hold that there has been seven months' delay on the part of the prosecutor. There is simply no evidence which will allow for such a finding. Rather, upon being served with the respondents' 19 April 2021 motion, grounded on Mr. Coveney's affidavit of the same date, wherein, for the first time, the sequencing issue was raised, the DPP promptly swore a replying affidavit in which Ms. Golden acknowledged and explained the unfortunate but simple and understandable mistake which had been made. Having looked at the evidence, it is appropriate to refer to the submissions made on behalf of the parties.

Legal submissions

24. I am grateful to counsel and to their instructing solicitors for the detailed written submissions which were provided on behalf of the respondents and on behalf of the prosecutor. The aforesaid submissions, all of which I have very carefully considered prior to reaching the judgment detailed herein, were supplemented by skilled oral submissions made during the hearing by Mr. Perry BL (representing the first named respondent) on 10 June, by Mr. McKenna BL (representing the prosecutor) on 11 June and by Ms. Lawlor SC (representing the second named respondent) on 11 June. In addition to making oral submissions, Ms. Lawlor confirmed that the second named respondent adopted the oral submissions made by Mr. Perry.
25. Among the submissions made on behalf of the defendants/respondents is that the authorities establish that strict compliance with the procedure set down in s. 2 of the 1857 Act is a condition precedent to the exercise by this Court of its statutory jurisdiction to hear an appeal pursuant to the 1857 Act and that failure to comply with the aforesaid procedure deprives this Court of jurisdiction. There was no dispute between the parties as regards the foregoing issue in that it is accepted on behalf of the DPP that observance of the sequencing required by the statute is a condition precedent to the exercise of this Court's statutory jurisdiction pursuant to s. 2 of the 1857 Act.
26. The attention of this Court was drawn to the decision in *Thompson v. Curry [1970] IR 61* wherein the appellant transmitted a case stated to the High Court, and after doing so, served the notice of appeal on the respondent. Davitt P., noting that the relevant

jurisdiction was a statutory one, held that the appellant had not complied with the procedure laid down by the 1857 Act and, accordingly, took the view that this Court had no jurisdiction. On appeal to the Supreme Court, Walsh J. upheld the decision of the then High Court President, noting that this Court's jurisdiction to hear a case stated under s. 2 of the 1857 Act was created by that section, and that giving notice of the appeal in writing to the respondent prior to transmitting the case to the High Court was a "statutory condition precedent" to the exercise of this Court's jurisdiction. Later in this judgment, I will look closely at the much more recent decision of O'Neill J. in *DPP v. Kudriacevas* [2014] IEHC 53, which decision, it is fair to say, is of fundamental significance to the prosecutor's application for the relevant extension of time. For present purposes it is sufficient to note that in *DPP v. Kudriacevas*, O'Neill J. emphasised that:- "*All of the cases, and in particular, Thomson v. Curry, stress the necessity for the sequence of events set out in s. 2 to be correctly followed in order to invoke the jurisdiction of the High Court to hear a Case Stated*".

27. Reliance was also placed by the respondents on the 1983 decision in *DPP v. O'Connor* (Unrep. High Court, Finlay P. 9th May 1983) in which, similar to the situation in *Thompson v. Curry*, the relevant appellant failed to serve a "notice in writing" of the appeal by way of case stated prior to the transmission of the case. The then President rejected the proposition that a letter enclosed with copies of the case stated constituted sufficient notice of the appeal, even though the learned judge was satisfied that the respondent's solicitor could have been under no real misapprehension as to the purpose of the service of documents upon him. Finlay P. went on to state (at p. 9) that: -

"If I were satisfied that the statute conferred on me any discretion with regard to the compliance by the Appellant with the terms of the section, I would unhesitatingly exercise that discretion in favour of the appellant and against the respondents. Being a statutory condition and provision, however, I am satisfied that I have not got any such general discretion. It seems to me to do violence to the meaning of the phrase 'notice in writing of such appeal' to interpret a letter merely enclosing a copy of the case stated and seeking an endorsement of acceptance of service on it as such notice".

28. Elsewhere in his judgment, Finlay P. made specific reference to the Supreme Court's decision in *Thompson v. Curry* and held as follows (from p. 3) in relation to the High Court's power having regard to the provisions of the relevant statute: -

"It was decided by the Supreme Court in the case of Thompson v. Curry [1970] IR p. 61 that the observance of the sequence of events required by s. 2 of the Act of 1857 was a condition precedent to the exercise by the High Court of its jurisdiction to hear a case stated pursuant to that section. It follows in my view from this decision that the High Court has not got power to dispense an appellant from compliance with the sequence of events provided by the section, no such statutory power being contained in the Act of 1857 nor in any amending Act, and there being no such general inherent power in the court".

29. In view of the foregoing, the court was forced to hold that the appellant had not complied with the provisions of s. 2 of the 1857 Act and that, accordingly, the High Court had no jurisdiction to entertain the relevant appeal by way of case stated. There can be no dispute that the decisions in *Thompson v. Curry* and in *DPP v. O'Connor* represented the state of the law at the relevant time and the position appears to have been very well settled at that stage. No issue is taken by the prosecutor in respect of the principle emerging from *Thompson v. Curry* and from *DPP v. O'Connor* to the effect that strict compliance is required with the sequencing obligations imposed by s. 2 of the 1857 Act. Where the parties diverge, however, is that the DPP argues that there exists a discretion for this Court to extend time for compliance with the requirements of s. 2 of the 1857 Act.
30. The respondents also drew this Court's attention to the 04 December 1992 decision by O'Hanlon J. in *DPP v. Regan* [1993] ILRM 335, wherein service of the case stated was effected on the respondent's solicitors, rather than on the respondent, personally. O'Hanlon J. held that service on a person who could be regarded as an agent of the respondent would suffice only where diligent efforts had been made to effect personal service on the respondent, but had proved unsuccessful. No efforts had, in fact, been made to effect personal service on the respondent and a question arose as to whether the solicitors who had been served were appropriate persons to accept service on behalf of the respondent. It is clear from the decision of O'Hanlon J. that the court held that service of the case stated was not effected on the respondent and that transmission of the case stated to the High Court did not take place within three days after it had been received from the relevant District Court Judge (three days being, at that point, the period laid down in s. 2 of the 1857 Act). It was "*with reluctance*" that O'Hanlon J. dismissed the appeal by way of case stated, commenting as follows in the final sentence of his judgment: -
- "I think it would be desirable that rigid time limits prescribed by statute for procedural matters should be relaxed by giving more discretion to the Courts to extend them where there are reasonable grounds for doing so".*
31. It is fair to say that judicial disquiet was expressed in relation to the fact that strict compliance was required in respect of the provisions of s. 2 of the 1857 Act, with no possibility of the court exercising any discretion in that regard and the court explicitly referenced the absence of any amending legislation. In this judgment, reference is made to amending legislation in the form of s. 45 of the Criminal Justice (Miscellaneous Provisions) Act 2009 and to its significance to the present case.
32. In *DPP v. Canavan* [2007] IEHC 46, the respondent was charged before the District Court with an offence contrary s. 49 of the Road Traffic Act 1961, as amended, but was acquitted. A draft case stated was submitted to the District Court Judge who made handwritten amendments to same and signed the case stated on 18 January 2006. The appellant argued that the case stated had not in fact been completed until 09 February 2006 when the District Court Judge was requested to sign a typed - up his handwritten amendments in typed form and it was the latter copy which was transmitted in

compliance with the relevant requirements pursuant to s. 2 of the 1857 Act. In essence, the respondent argued that the first case stated was the "real" case stated and that there had been a failure to comply with the time limits mandated by s. 2 of the 1857 Act in relation to same. Budd J. held that the first case stated, namely that signed on 18 January 2006, was the relevant one and that, because there had been a failure to comply with the statutory prerequisite stipulated by s. 2, of giving notice in writing of the appeal, with a copy of the case stated signed by the District Court Judge, to the other party to the proceedings within three days of receiving the case (being the relevant time limit at that point), the court had no jurisdiction to hear the case stated. The learned judge observed at para. 23 that: -

"It is important to set out and acknowledge the reasons why there is the strict interpretation of the provisions of s. 2, as to the notification to the respondent personally as a prerequisite to the jurisdiction of the High Court. This wording has been construed time and again since 1857 and the intention of the legislature is clear. The interpretation has been stringent and consistent by the courts over the years to the effect that notification to the respondent must be previous to transmission and is a draconian prerequisite, a sine qua non without which this court lacks jurisdiction, however appalling any particular drunken driving offence is alleged to have been. Any change in the law on this is a matter for the Executive and the Legislature, bearing in mind the deep issues underlying the superficial conflict of interests".

33. As regards the foregoing decisions, there has, in fact, been action on the part of the legislature since *DPP v. Regan* and *DPP v. Canavan* were decided, namely, the relieving provisions introduced by virtue of s. 45 and s. 46 of the Criminal Justice (Miscellaneous Provisions) Act 2009. The former introduced into s. 2 of the 1857 Act the words "*or such longer period as may be provided for by Rules of Court*", whereas the latter section clarified the service requirements, making clear that personal service on a respondent is no longer a prerequisite to the jurisdiction of this Court, in circumstances where service may be effected in a range of ways specified in s. 46.
34. This Court's attention was also drawn to the decision of Kearns P. in *Coonan v. Coughlan* [2011] 1 I.R. 537. In that case, the applicant was convicted of certain road traffic offences, whereupon counsel for the applicant requested the respondent judge to fix a recognisance for the purpose of an appeal by way of case stated to the High Court pursuant to the 1857 Act. The judge in question refused to do so but, instead, fixed a recognisance for the purpose of an appeal to the Circuit Court. The applicant sought *inter alia* an order of mandamus directing the first respondent to fix a recognisance for the purpose of an appeal by way of case stated. In finding for the appellant Kearns P. cited (at para. 9) s. 2 of the 1857 Act as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961, going on to refer (at para. 10) to O. 102 of the 1997 District Court Rules, r. 8 of which deals with an application to state and sign a case and notice thereof, whereas r. 9 dealt with recognisances. Kearns P. went on to state the following (from para. 12): -

"It is abundantly clear from the foregoing provisions that a "step by step" process providing for the order of events exists to ensure that the case stated procedure proceeds in the following manner:

- (i) Lodgement of notice requiring a case stated;*
- (ii) Entry into recognisance;*
- (iii) Preparation of the case stated;*
- (iv) Service of a notice on the respondent;*
- (v) Transmission of case stated to the High Court;*
- (vi) Hearing in the High Court.*

[13] That this sequence is not discretionary is abundantly clear from the decision of the Supreme Court in Thompson v. Curry [1970] IR 61 in which it was held that the observance of the sequence of events required by s. 2 of the Act of 1857 was a condition precedent to the exercise by the High Court of its jurisdiction. In the People (DPP) v. O'Connor (Unrep. High Court, Finlay P., 9th May 1983) Finlay P. stated at p. 4 that: -

" . . . the High Court has not got power to dispense an appellant from compliance with the sequence of events provided by the section, no such statutory power being contained in the Act of 1857 nor in any amending pact, and there being no such general inherent power in the court".

35. No issue is taken by the DPP with the correctness of the foregoing, in that it is fully accepted that s. 2 of the 1857 Act clearly sets out that steps be taken and taken in a particular sequence (with service on the respondent coming *before* transmission of the case stated to the High Court) and it is acknowledged that, in the case before this Court, things were done in the reverse order, contrary to the requirements of s. 2 of the 1857 Act.
36. In *DPP v. Vaitkevicius* [2010] IEHC 64, the respondent was charged with the offence of "drink driving". The District Court Judge examined the written authorisation required for the setting up of the Garda checkpoint at which the respondent had been stopped and concluded that the authorisation was fatally flawed because the time specified was unclear. The respondent was acquitted and the prosecution requested that an appeal by way of case stated. The case stated was served on the respondent's solicitors but it was not served personally on the respondent and, in his judgment, O'Neill J. remarked that it was quite clear that no attempt was made to effect personal service on the respondent, no doubt because of the active involvement of his solicitor in the process of preparing the case stated. He went on to note that, nevertheless, s. 2 of the 1857 Act required personal service on the respondent, unless that could not be effected despite diligent effort within the time limit. It was on that basis, and with obvious reluctance, that O'Neill J. felt obliged

to conclude that service of the case stated did not satisfy the requirements of s. 2 of the 1857 Act and, accordingly, the court did not have jurisdiction to embark on a hearing of the case stated.

37. It is clear that O'Neill J. expressed the same disquiet as to the rigidity of procedures applicable in an appeal by way of case stated as had been expressed by O'Hanlon J. almost two decades earlier in *DPP v. Regan*. The final sentence of O'Neill J. in *DPP v. Vaitkevicius* stated:-

"I too would echo the sentiment expressed by O'Hanlon J. in the last sentence of his judgment to the effect that the Oireachtas should consider that rigid statutory time limits for procedural matters should be framed so as to give the courts some discretion to extend them in an appropriate case".

38. At this juncture, it is appropriate to observe that all of the authorities relied upon by the defendants and examined in this judgment thus far, pre - date the coming into force of amendments to the 1857 Act introduced by ss. 45 and 46 of the Criminal Justice (Miscellaneous Provisions) Act, 2009 which, it seems uncontroversial to say, represented a response on the part of the Oireachtas to the concerns expressed regarding the rigid compliance required in respect of procedural matters having regard to the provisions of s. 2 of the 1857 Act in its previous form.

Enlargement of time

39. The traditional view taken in the case law was that it was only the time for the *transmission of documents to the High Court* that could be extended beyond the time limit set down in s.2 of the 1857 Act. In this regard the court's attention was drawn to the decision in *Attorney General v. Shivnan* [1970] I.R. 66. In that case, the transmission of papers to the High Court was outside the then prevailing three-day time limit. As Lavery J. made clear (at p.67): "*The single point is whether Shivnan cannot be heard by the court because he did not transmit the case to the Central Office of the High Court within three days after he had received it from the District Court, as he was required to do by the provisions of O.62, r.1, of the Rules of the Superior Courts, 1962*". It will be recalled that earlier in this judgment I quoted O.62, r.1, which currently specifies a fourteen-day time limit but previously referred to a three-day period. Later, Lavery J observed that "*the order or sequence of events required by s.2 of the Summary Jurisdiction, Act, 1857 was observed fully, but the ultimate lodgement was late.*"
40. It is also appropriate to quote, in full, the relevant section of Mr. Lavery J's judgment wherein he explains why the Supreme Court took a different view to that adopted in the High Court:-

"The President of the High Court took the view that he must apply the three-day period specified in O.62, r.1, and that he had no power under O.108, r.7, to enlarge that period owing to the decision of this Court in Thompson v. Curry; but the President overlooked that the distinctive feature of that case was that the sequence of events was the issue on that appeal. Mr. Walsh cited Minister for Social Welfare

v. Land (Supreme Court - 13th March, 1962) which was cited by counsel for the appellant in Thomson v. Curry. In this case the President adverted to the fact that the three-day period allowed by O.62, r.1, was subject to the powers of enlargement in O.108, r.7, whereas the Act of 1857 prescribed a period of three days. The Rules of the Superior Courts have adopted the three-day period of the statute, but subject to the powers under O.108, r.7 to enlarge that period. Therefore, the President had power to enlarge the three-day period and I feel sure that he would agree with me that this is a proper case in which to do so."

Earlier in this judgment I quoted from O.122, r.7 of the Superior Court Rules, which is the successor to O.108, r.7. Before moving on from the decision in *Attorney General v. Shivnan*, it is appropriate to observe that the correct sequencing required pursuant to s.2 of the 1857 Act was, in fact, observed in that case.

41. The respondents also emphasise that in *DPP v. Regan*, a case previously examined, this Court enlarged time, pursuant to O.122, r.7, for transmission of the case stated. It is appropriate to say, however, that in the manner previously examined, *DPP v. Regan* is a case in which the focus concerned personal service on a respondent and the court (O'Hanlon J) took the view that "...it was unwise on the part of the appellant to consider that service of the documentation on the solicitors in question would satisfy the requirements of the statute, with no apparent effort being made to serve the respondent personally." No such issue arises in the present case. Furthermore, *DPP v. Regan* was decided almost two decades prior to the relieving provisions introduced by ss. 45 and 46 of the 2009 Act, the latter dealing comprehensively with service requirements. In the present case, there is no doubt about the fact that service was effected on both defendants and on their legal representatives. The issue in the present case is, of course, the mistake in respect of sequencing.
42. On behalf of the respondents it is submitted that, with the exception of the decision in *DPP v. Kudriacevas* (which authority this Court is encouraged not to follow), previous authorities make clear that time could be enlarged in respect of the doing of an act contemplated by the Rules of the Superior Courts and in respect of which the rules lay down a time-limit. The respondents submit that, with the exception of the decision in *DPP v. Kudriacevas*, all relevant authorities make it clear that time cannot be enlarged in respect of the requirement to give the relevant notice to the respondent as per s.2 of the 1857 Act. The respondents rely *inter alia*, on the dicta of Budd J in *DPP v. Canavan* [2007] 3 I.R. 160, wherein he stated (at para. 22):-

"The case of Attorney General v. Shivnan [1970] I.R. 66 is helpfully noted immediately after Thompson v. Curry [1970] I.R. 61. The sequence of events required by s.2 was observed fully but the ultimate lodgement was late in that while he had sent a copy of the case stated and notice of the appeal by case stated to the Attorney General, the respondent who received the documents on 7th May, was unfortunate in that when he sent the case stated to his town agent for the purpose of having it transmitted to the Central Office of the High Court, the case

was received by the town agent on Friday, the 8th May, and he lodged it in the Central Office on Monday, the 11th May, 1964. At the hearing of the case in the High Court on the 12th February, 1965 Shivnan's appeal by way of case stated was dismissed, but on his appeal to the Supreme Court, the court held that the necessary extension of time (pursuant to O.108, r.7 of the Rules of the Superior Courts 1962) for transmitting the Case Stated to the High Court in place of the three days after receipt of the case as allowed by O.62, r.1, of the Rules of 1962 and the order of the Supreme Court directed that the case stated should be remitted to the High Court for hearing. This underlines the distinction in that there is no power to enlarge the time for fulfilling the prerequisite of giving the appropriate notice to the respondent but there is more flexibility as the Rules of the Superior Courts can be applied to enlarge the time for transmission to the Central Office."

43. As regards the foregoing, it is appropriate to note that in the case before this Court notice was in fact given to both of the respondents and to their legal representatives and this was, in fact, done within three working days, at most, from the signing of the case stated. Transmission of the papers also took place, indeed took place on the very day the case stated was signed. Unfortunately however, due to an honest and understandable mistake the "cart" (of compliance with notification requirements) was put before the "horse" (of compliance with transmission requirements) even though, as a matter of fact, there was both transmission of the relevant papers to the Central Office and service of the notice of appeal and signed case stated on the respondents and their solicitors (and all the foregoing occurred as a matter of fact, no later than 03 November 2020 in respect of a case stated which was signed by the judge on 30 October 2020).
44. It will be recalled that, earlier in this judgment, I quoted s.2 of the 1857 Act as well as from Orders 62 and 122 of the Superior Court Rules. Among the submissions made with skill on behalf of the respondents is the submission that O.122, r.7 comprises very specific in its language in that it only permits an extension of time for the taking of a step provided for in the Rules themselves. Thus, it is argued, it would certainly allow for the extension of time for the transmission of documents to the High Court under O.62, r.1. Accordingly, the defendants/respondents submit that, in circumstances where O.62, r.1 lays down a specific time limit in respect of the transmission, to the Central Office, by the requesting party, of every case stated, the time limit for the taking of that particular step comes within the ambit of O.122, r.7.
45. It is also argued on behalf of the respondents that, by contrast, the mandatory procedural requirements as to service which are laid down in s.2 of the 1857 Act are not explicitly set out in the Rules of the Superior Courts. Thus, it is argued that the procedural requirements at issue in the present case do *not* come within the ambit of O.122, r.7. It was submitted on behalf of the respondents that, on a plain reading of O.122, r.7, it does not entitle this Court to extend time for the taking of steps mandated in s.2 of the 1857 Act, in circumstances where the Superior Court Rules do not lay down any time-limit for the taking of those steps.

46. It is argued that, because O.122, r.7 only provides for an extension of time for the taking of steps provided for in the Superior Court Rules. O.122, r.7 does not apply to the taking of steps required by s.2 of the 1857 Act. It is also submitted on behalf of the respondents that the insertion, into s.2 of the 1857 Act, of the words "*or such longer period as may be provided for by the rules of court*" envisages that Rules might be brought into force which would provide for specific time - limits in respect of compliance with the procedural requirements as regards service of the signed case stated and notice of appeal. It is further submitted that no such Rules have been introduced (in that no Superior Court Rule lays down, for example, a specific time limit in relation to the requirement to serve the signed case stated and notice of appeal on a defendant/respondent). Thus, it is argued that the wording that is used in the amended s.2 of the 1857 Act is not broad enough to mean that the general power to enlarge time, as found in O.122, r.7, could permit enlargement of time in respect of the requirements laid down in s.2 of the 1857 Act.

The prosecutor's reliance on DPP v. Kudriacevas [2014] IEHC 53.

47. I now turn to the 07 February 2014 decision by O'Neill J. in *DPP v. Kudriacevas*. As to the facts, the appellant was convicted in Navan District Court for a "drink driving" offence. A motion was issued seeking to strike out the appeal by way of case stated on the grounds that the High Court had no jurisdiction to hear and determine the appeal because service of the signed case stated, together with the notice in writing of the appeal, was not served on the respondent in the manner required by s.2 of the 1857 Act, as amended. The appeal by way of case stated was brought by the appellant against his conviction and the motion to strike out the appeal was brought by the DPP. At para.18 of his judgment, O'Neill J stated that it was well settled that there must be strict compliance with the requirements of s.2 of the 1857 Act and he proceeded to cite authorities including *DPP v. O'Connor* and *Thompson v. Curry* as well as *DPP v. Canavan*. It is appropriate to quote at some length from Mr. Justice O'Neill's decision, given its obvious significance to the situation with which this Court is presented. It is fair to say that *Kudriacevas* is the principal authority upon which the DPP/prosecutor relies in the present applications. From para. 24, O'Neill J stated as follows:-

"24. *In 2009, the Oireachtas intervened with a relieving provision in the form of s.45 of the Criminal Justice (Miscellaneous Provisions) Act 2009, which states as follows:*

'45.- Section 2 (as extended by section 51 of the Courts (Supplemental Provisions) Act 1961) of the Summary Jurisdiction Act 1857 is hereby amended by the insertion after 'such Case' of 'or such longer period as may be provided for by Rules of Court'.

25. *Thus, the full amended provision now reads as follows:*

'...within three days after receiving such case, or such longer period as may be provided for by Rules of Court, transmit the same to the court named in his application, first giving notice in writing of such appeal with a copy of the case so

stated and signed to the other party in the proceedings in which the determination was given hereinafter called 'the respondent' ... [Emphasis added]

26. *The question which arises on this application is whether or not this amendment to s.2 entitles the appellant in this case to relief, where it is clear, that but for this new statutory provision his case had fallen foul of the procedural requirements in s.2 and this court would have to decline jurisdiction to hear the Case Stated.*
27. *Section 45 of the Act of 2009, clearly provides for the extension of time for the doing of all the procedural requirements in s.2 of the Act of 1857, but the jurisdiction to grant such extensions of time appears to be contingent upon the making of Rules of Court in that regard. It is common case that no such rule or rules have been introduced by the Rules Making Committee of the Superior Courts. It was submitted by Mr. Harte that as s.45 had unambiguously given to the High Court a jurisdiction to enlarge time, and notwithstanding the absence of Rules of Court, that jurisdiction was there. Specifically, it was submitted that the Oireachtas, having legislated for extensions of time under s.2 to be provided for in Rules of Court, this engaged the undoubted jurisdiction contained in O.122, r.7 of the Rules of the Superior Courts which gives this Court jurisdiction to enlarge or abridge the times set out in the Rules or fixed by any Order enlarging time, for doing any act or taking any proceeding upon such terms as the court may direct.*
28. *In the absence of an express provision in the Rules of Court relating specifically to s.2 of the Act of 1857, in my opinion, s.45 of the Act of 2009 is expressed in sufficiently general terms as to include provision already made by Rules of Court for the enlargement of time. I have no hesitation in construing the phrase 'or such longer period as may be provided by Rules of Court' on a literal construction as encompassing existing Rules, when, to do otherwise would postpone the jurisdiction given under s.45 indefinitely until express Rules would be made, which would have the consequence of defeating the legislative provision for an indefinite period of time."*
48. I gratefully adopt the foregoing analysis. It will be recalled that, in submissions made on behalf of the respondents, it is argued that the effect of the coming into force of s.45 of the 2009 Act does *not* provide for the extension of time in respect of all of the procedural requirements laid by s.2 of the 1857 Act. The decision of O'Neill in *DPP. v. Kudriacevas* is in my view, clear authority to the contrary. The submission was made to this Court on the respondents' behalf that O.122, r.7 must be interpreted by this Court as permitting an extension of time *only* for the taking of steps where existing Rules lay down specific time limits. The decision in *DPP. v. Kudriacevas* comprehensively undermines what is urged on this Court on behalf of the defendants. In truth, the argument advanced before this Court is the self-same argument which was made, and rejected, in *Kudriacevas*.
49. Having held, in para. 29, that the time period provided in s.2 of the 1857 Act could be enlarged under O.122, r.7 of the Superior Court Rules by virtue of s.45 of the 2009 Act, O'Neill J turned to the question of whether such an enlargement of time could, in the case

before him, provide any relief to the appellant and he continued, at para. 31, to state the following:

"Ms. Brennan B.L. for the respondent submits that the amendment effected in s.45 has no impact on the situation in this case, that this legislation makes no change with regard to the sequence of events mandated in s.2 of the Act of 1857, and particularly the requirement for a notice in writing of the appeal to be served with a copy of the case so stated and signed prior to the transmission to the High Court. The Case Stated in this case was promptly transmitted on 9th May 2013 i.e. on the same day as it was signed by the District judge and received by the appellant and well within the three days provided for under s. 2 of the Act of 1857.

32. *It is to be noted that O.62, r.1 of the Rules of the Superior Court make a provision in relation to the transmission of the Case Stated to the Central Office of the High Court in terms similar to those in s.2 of the Act of 1857, as follows:*

'1. Every case stated by a Justice of the District Court under the Summary Jurisdiction Act, 1857 (20 and 21 Vic. c. 43) shall be transmitted to the Central Office by the party requesting the case within three days after receiving such case.'

33. *Notwithstanding the absence of any statutory provision prior to s.45 of the Act of 2009 permitting an extension of the three-day period provided for in s.2 of the Act of 1857, nonetheless, the Supreme Court in the case of Attorney General v. Shinivan [1970] 1 I.R. at p. 66, held that the provision in O.62, r.1 of the Rules of the Superior Courts 1962 which correspond exactly with O.62, r.1 in the current Rules, had the effect of enabling recourse to O.108, r.7 of the 1962 Rules which corresponds to O.122, r.7 in the current Rules, so that the three-day period for the transmission of the case to the High Court could be extended.*

34. *Section 45 permits time to be extended for all of the procedural requirements set out in s.2 and not just the transmission of the case to the High Court in respect of which, as discussed above, there already was provision for the enlargement of the three-day time limit under Rules of Court.* (emphasis added).

50. It is clear from the foregoing that this Court in *Kudriacevas* very specifically addressed the question of whether enlargement could be ordered to deal with a sequencing problem as occurred in the present case, as opposed to enlargement of time being limited to the question of the transmission of the case to the High Court. In my view the court's decision in *Kudriacevas* addresses the very issue which arises in the present case and undoubtedly constitutes authority to the effect that this Court has jurisdiction, by virtue of s.45 of the 2009 Act, to extend time in respect of all of the procedural requirements found in s.2 of the 1857 Act.

51. It is also clear that Mr. Justice O'Neill was conscious of the fact that, even prior to the coming into force of s.45 of the 2009 Act, the court had jurisdiction to extend time with

regard to the transmission of the case to the High Court. Indeed, this has been the position since the Supreme Court's decision in *Attorney General v. Shivnan* (a decision reported in 1970, concerning events which arose in 1964). That being so, if s.45 of the 2009 Act only permits enlargement of time in relation to transmission to the High Court, its coming into force is meaningless in circumstances where this Court has enjoyed such a power for over half a century. In truth, the interpretation contended for on behalf of the respondents is not only one which runs entirely contrary to this Court's decision in *Kudriacevas*, the inescapable logic of the respondents' submission is that s.45 was, and is, meaningless. For very obvious reasons I am bound to reject a submission to the effect that this Court can or should interpret a statutory provision enacted by the Oireachtas in a manner which sets it at naught and robs it of meaning.

52. On behalf of the respondents, counsel submitted that there are significant differences between the case before this court and *Kudriacevas* and this court was encouraged not to follow the decision of O'Neill J. Whatever about the factual differences between the respective cases, the core issue in both cases is precisely the same. On behalf of the respondents, the following argument is made: (1) O. 122 r. 7 only permits the enlargement of 'the time appointed by these rules' for doing an act and, thus, would thus allow the extension of time for transmission of documents to the High Court under O. 62 r.1; (2) however, a crucial distinction was drawn in cases such as *Vaitkevicius* and *Canavan* and O. 62 r. 1 does not deal with the time limit for compliance with the procedural service requirements of s. 2; (3) this distinction means that an extension of time cannot be granted under O. 122, r.7 for the purposes of complying with the requirements to serve documents on a respondent, as the time for the carrying out of that requirement is not 'appointed by these rules'; (4) for these reasons, it is respectfully submitted by the respondents that O'Neill J. was incorrect in holding that the introduction of the phrase '*or such longer period as may be provided for by rules of court*' into s. 2 made the time limit in that section subject to O. 122, r. 7; and (5) this would involve a "strained" interpretation of O. 122, r. 7, which only permits extension of '*time appointed by these Rules*'.

53. The gravamen of the submission made on behalf of the respondents is to suggest that this Court's decision in *Kudriacevas* was incorrect and should not be followed. For the reasons explained, I am bound to reject that submission, which in my view, clearly runs contrary to the ratio of this court's decision in *Kudriacevas*. It also seems to me to be, at its heart, a submission which urges the court to interpret secondary legislation (in the form of Rules of Court introduced pursuant to statutory instrument) in a manner which would undermine the effect of the words used in primary legislation (specifically the words in s.2 of the 1857 Act, as introduced by s. 45 of the 2009 Act). I am fortified in this view by the careful analysis given by O'Neill J. in *Kudriacevas* and, in that regard, it is appropriate to look at his judgment from para. 35 onwards:

"35. *There is already a time limit of fourteen days for the making of the application to the District judge to state a case, this time limit having been introduced by s. 51 of the Courts (Supplemental Provisions) Act, 1961. As the time limit for the*

transmission of the case to the High Court is already subject to enlargement by virtue of O. 62, r. 1 in conjunction with O. 122, r.7 as per the decision of the Supreme Court in the Shinivan case, the only other requirement of s. 2, which prior to the Act of 2009 was subject to the rigid three-day time limit, was the giving of notice in writing of the appeal with a copy of the case so stated and signed.

36. *If the appellant is given an extension of time for giving the notice in writing, there is still the problem of the correct sequencing of the requirements in section 2.*
37. *As discussed earlier, s. 2 requires that after the receipt by the appellant of the Case Stated, he must serve the notice in writing with a copy of the case so stated and signed, but before transmission of the case to the High Court. With commendable promptness, the appellant, without having served a notice in writing, transmitted the case to the High Court on the same day that it was received by him, namely, 9th May 2013. For an extension of time for the giving of notice to have any effect, it would be necessary to undo or treat as a nullity the transmission of the case to the High Court on 9th May 2013, and to provide an extension of time for a fresh or a new transmission of the case to the High Court. All of the cases, and in particular, Thomson v. Curry, stress the necessity for the sequence of events set out in s. 2 to be correctly followed in order to invoke the jurisdiction of the High Court to hear a Case Stated. The final question for decision in this case is whether, under the jurisdiction given in the Act of 2009 to enlarge time, can this court afford to an appellant time to do what is required by s. 2 in the correct sequence, notwithstanding that there was a partial compliance with s. 2 insofar as the case stated was transmitted within three days, but overall a failure to comply with s. 2 within the time prescribed under section 2. The partial compliance in question, namely the transmission of the Case Stated to the High Court because it was done without notice first being given to the respondent, was in terms of s. 2 an invalid compliance and can, therefore, rightly be regarded as a nullity so that for the purpose of availing of the relieving provision introduced by s. 45 of the Act of 2009, the appellant's situation can be dealt with as if no step post the receipt by the appellant of the signed Case Stated, had been taken apart from the giving of a copy of the Case Stated to the respondent. Although a copy of the signed Case Stated was given, it was not given with a notice of the appeal. To ensure strict compliance with s. 2, the enlargement of time envisaged by me would include the service of the notice of appeal, with a copy of the Case Stated, as signed.*
38. *In this case, the appellant suffered the wholly undesirable fate, in common with many appellants before, of falling into the trap created by the extraordinarily short statutory time limit provided in s. 2 of the Act of 1857. In her anxiety to ensure that the case was transmitted within the three days, the solicitor for the appellant understandably overlooked the other and prior requirement of notice in writing, believing that that had already been accomplished. The interests of justice are not well served if an obviously carefully crafted Case Stated, raising issues of substance as agreed between both parties, is because of draconian and anachronistic*

procedural requirements, excluded from the jurisdiction of this court so that the appellant is to be repelled in limine, his cause unheard. Section 45 of the Act of 2009 was enacted to address this wholly undesirable situation by providing relief in the form of a jurisdiction to enlarge time under the Rules of Court, for the doing of what was required under section 2.

39. *Accordingly, I would extend the time for the service on the respondent of the notice of appeal with a copy of the Case Stated as required by s. 2 and I would further extend time for transmission immediately thereafter of the case to the High Court.*

40. *For the reasons set out above, I refuse the relief claimed in the notice of motion."*

54. There are obvious parallels between what occurred in *Kudriacevas* and what transpired in the present case. It is entirely fair to say that it was with "*commendable promptness*" that Ms. Golden transmitted papers to the High Court Central Office on the very day the case stated was signed. That same commendable promptness was deployed insofar as ensuring that a copy of the signed cases stated and a copy of the notice in writing were served on the legal representatives of the respondents and on the respondents themselves. Unfortunately, however, this was done in the wrong order insofar as s. 2 is concerned.
55. It is perfectly clear from O'Neill J.'s decision in *Kudriacevas* that he answered, in the affirmative, the question as to whether under the jurisdiction given in the 2009 Act to enlarge time, this court can afford to an appellant the time to do what is required by s. 2 of the 1857 Act in the correct sequence notwithstanding that there was partial compliance only, with the requirements of s. 2. Thus, I cannot accept the respondents' submission to the contrary.
56. It also seems appropriate to say that, if this court was to approach the matter entirely afresh, the following can be said. Firstly, there is no dispute between the parties that O. 122, r.7 permits this court to extend time for the transmission of documents to the High Court. Secondly, there can be no dispute between the parties that s. 2 of the 1857 Act mandates that transmission of documents occur *after* documents have been served on a respondent. It seems to me, therefore, that this court's undoubted power to extend time for the transmission of documents could be rendered meaningless, having regard to the sequencing requirements set out in s. 2, if the power to enlarge time did not also include a power to afford time to an appellant to comply with the undoubted sequencing requirements.
57. Where the latter power arises has been very clearly identified by O'Neill J. in *Kudriacevas*, namely, it arises by virtue of the wording introduced into s. 2 of the 1857 Act as a result of s. 45 of the 2009 Act. I am entirely satisfied that it is a power available to this court. Far from being, as the respondents would have it, an amendment which did nothing more than give this court the power to enlarge time for the transmission of documents to the High Court (a power the court has already had for more than half a century, as *Shinivan* makes clear), s. 45 of the 2009 Act comprised a legislative response entitling this court,

in the interests of justice, to ameliorate the harshness of strict procedural requirements in statute, and the Oireachtas did not confine this Court's powers as regards the alleviation of injustice the context of s.2 to the sole issue of the transmission of documents.

58. A further question for this court to determine is whether to invoke that jurisdiction and to extend time in the manner requested by the prosecutor. The respondents have argued that the court has no power to extend and make a secondary argument that, if the court finds that it does have such a power, extending time in the present case would be *contrary* to the interests of justice and it submitted that no extension of time should be granted.

Submissions as to why time cannot/should not be extended

59. As to why the respondents contend that this court should not extend time, a variety of submissions are made. These include the submission that there are very significant factual differences between the situation in *Kudriacevas* and the position in the present case. It is submitted that *Kudriacevas* concerned an appeal against a conviction, whereas the case before this court involves an appeal by way of a case stated against a decision to acquit. Emphasis was laid on the constitutionally protected right of a person convicted of an offence to appeal against their conviction and it was stressed that this constitutional right was at play in *Kudriacevas*. It was submitted that, had the extension of time not been granted in the *Kudriacevas* case, the individual in question would have lost their opportunity to vindicate a constitutional protected right to challenge their conviction for "drink driving" and that, by contrast, the appeal in the present case is not brought by a person who has been convicted. Rather, it is brought by the DPP in circumstances where the prosecutor is dissatisfied with the determination made by the relevant District Court Judge who acquitted the respondents. The foregoing is said to be a crucial distinction mitigating against this court exercising the jurisdiction to extend time in circumstances where it is submitted that there is no question of any constitutional right enjoyed by the DPP being at play.
60. It is also submitted that, in the context of an appeal against a decision not to convict for a criminal offence, this court should be very slow to rectify an error made by the prosecutor which will result in an extension of time to facilitate the challenge to an acquittal. It is submitted that a "general thread" runs through the entire of the criminal law, to the effect that a prosecutor is expected to do things correctly and to the highest standard, including the standard required by statute. It is submitted that this is reflected in the standard of proof and in the burden of proof insofar as criminal proceedings are concerned and it is submitted that a wealth of case law emphasises the obligation on a prosecutor to comply strictly with strict procedural requirements wherever they are set down. The thrust of the submission is that no latitude or concession should be shown to the applicant.
61. Emphasis is also laid on the special status afforded to an acquittal. In that regard, counsel for the defendant/respondents refer to the decision of Hardiman J. in *Fitzgerald v. DPP* [2003] 3 I.R. 247, wherein the learned judge stated *inter alia* that: "...the jurisdiction to entertain a case stated by way of appeal against acquittal requires to be strictly construed." Hardiman J. went on to refer to the decision in *DPP v. O'Shea* [1982] I.R.

384, as well as the judgment in *Regina v. Justices of Antrim* [1895] 2 I.R. 603, quoting from the foregoing decision, a passage cited by Finlay P. in *DPP v. O'Shea*, which passage concludes with the following words: "*The status of mere inviolability classically afforded to an acquittal, emphasises the need to construe the permitted scope of an attack on such acquittal strictly.*" It is acknowledged, on behalf of the respondents, that the facts and the issues in *Fitzgerald* are not "*on all fours with*" those in the present case. Nevertheless, it is submitted that the foregoing is an important statement of principle which is relevant to this court's determination as to whether or not an extension of time should be granted, given that the extension of time is sought in order to remedy a failure to comply with a statutory requirement in the context of a challenge to a decision to acquit.

62. The respondents also rely on the decision in *DPP v. Barry* [2017] IECA 337. In that case, the DPP sought an extension of time to bring a challenge in respect of a sentence which the DPP argued was unduly lenient. Due to inadvertence, the challenge had not been brought on time. The DPP argued that it was in the interests of justice to extend time. On behalf of the respondents it is submitted that the Court of Appeal took the view that significant value had to be given to the importance of finality in respect of decisions against convicted persons and that this should not be interfered with lightly. It was also submitted that the Court of Appeal held that 'inadvertence' as a reason to extend time was not sufficient justification. For the respondents, it was emphasised that the approach taken by the Court of Appeal in *DPP v. Barry* is highly relevant to the position with which this court is presented. It is submitted that, just as in *DPP v. Barry*, the application for enlargement of time in the present case is based on inadvertence and it is submitted that the appropriate approach for this court to take would be to decline the request for an extension. In opposing the extension of time, it is also submitted that the DPP enjoys what was characterised as a 'procedural advantage' over the defendants/respondents, by virtue of the right to appeal by way of a case stated. It is submitted that, ordinarily, before someone can appeal by way of a case stated, a District Court Judge must first be satisfied that it should be brought and emphasis was laid on the entitlement of a District Court Judge to decline to sign a case stated on the basis of a view that an appeal by way of case stated would be without merit or frivolous or vexatious.
63. On behalf of the respondents, emphasis was also laid on the fact that a State body such as the DPP has what was described as "the significant procedural advantage" of being able to appeal by way of a case stated whenever the DPP so decides, with no right on the part of the District Court Judge to decline to sign the case stated. It was submitted that this is a very important procedural advantage not enjoyed by the defendants/respondents and the submission is made that, in light of the foregoing, the interests of justice require that an extension of time be refused. It is submitted that it would not be *just* to grant an extension of time where the DPP has failed to comply with mandatory statutory requirements, particularly given the significant procedural advantages said to be enjoyed by the DPP.
64. In support of the submission that inadvertence should not be regarded by this court as an acceptable excuse in respect of the failure to comply with the statutory requirements laid

down in s. 2 of the 1857 Act, reliance is placed on the '*Éire Continental*' principles (see *Éire Continental Trading Co. Ltd. v. Clonmel Foods Ltd.* [1955] I.R. 170). The respondents submit that an extension of time will generally only be granted where an appellant has a *bona fide* intention to appeal within time as well as an arguable ground of appeal and where the appellant can show "*the existence of something like mistake*", but that "*mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient*". In light of the foregoing, it is submitted that a mistake by a solicitor in the prosecutor's office is not sufficient and the respondents submit that what occurred in the present case is that the relevant solicitor made a mistake which this court should not accept as an excuse.

65. It is also submitted that the procedural failures in the present case go further than those in *Kudriacevas*. It is submitted that there has been a greater failure to comply, in the present case, with the mandatory statutory requirements in s. 2 than there was in *Kudriacevas*. It is submitted that, in *Kudriacevas*, the case stated was, in fact, served on the respondent and the only issue was that a separate notice of appeal had not been served whereas, in the present case, there was both a failure to serve the signed case stated and a failure to serve the notices of appeal in the order required by s. 2 of the 1857 Act, namely *prior* to transmission of papers to the High Court central office. As I referred to earlier in this decision, the submission is also made that the prosecutor has been guilty of doing nothing for a period of seven months i.e. from 30th October 2020 until the date Ms. Golden swore her affidavit on 21st May 2021 in response to the defendants' motion.
66. I have carefully considered all submissions, both written and oral, made on behalf of the defendants/respondents who argue that it would be contrary to the interests of justice to extend time in the present case.

Discussion and decision

67. If the submissions made on behalf of the defendants/respondents are correct, the following is the position in relation to a variety of scenarios:
- (1) In a case where the DPP promptly served the defendant with the signed case stated and notice of appeal but entirely failed to transmit papers to the central office, this court could extend time for transmission;
 - (2) In a case where the DPP promptly transmitted papers to the central office and, immediately thereafter, served the defendant with a copy of the signed case stated and notice of the appeal, this court could not extend time;
 - (3) In a scenario where the DPP promptly transmitted papers to the central office and then immediately served the defendant with a signed case stated but omitted to enclose a notice of appeal, this court could not extend time;

- (4) In a scenario where the DPP promptly transmitted papers to the central office and immediately thereafter served the defendant with notice of the appeal but omitted to serve the case stated, this court could not extend time;
- (5) In a scenario where the DPP did nothing whatsoever and neither served papers on the respondent nor transmitted papers to the High Court central office, this court could extend time.
68. The foregoing are the consequences of the submission made by the defendants/respondents in the present case to the effect that *Kudriacevas* was wrongly decided and/or should not be followed. If one works through a variety of scenarios which result from the submissions made on behalf of the defendants/respondents, the consequence is a patent injustice best illustrated by the fact that a prosecutor who gives a defendant absolutely nothing and neither transmits papers to the High Court central office, nor serves any papers on the defendant/respondent, can seek an extension of time for the taking of all steps, whereas a prosecutor who both transmits papers to the central office and serves a copy of the signed case stated and notice of appeal on the defendant/respondent promptly cannot be afforded an extension of time. In the former scenario, the prosecutor has done nothing and the defendant/respondent has received nothing, yet an extension of time can be granted. In the latter scenario the prosecutor has done everything, and the defendant/respondent has received everything but, according to the respondents, no extension of time can be granted because the right things were done in the wrong order.
69. The foregoing seems to me to offend both common sense and natural justice. Let me stress, however, that, in circumstances where a statutory power conferred on this court is necessarily limited by the relevant statutory provisions, I am not for a moment suggesting that merely because common sense or fairness would contend for other than what a particular statutory provision provides, that this court can ignore it. Far from it. I am very mindful of the limits on the relevant statutory power as made clear in the authorities. I am equally clear, however, that, far from O'Neill J.'s decision in *Kudriacevas* being an "outlier" or inconsistent with earlier authorities and distinguishable or incorrect, it represents a development of the jurisprudence and constitutes the up - to - date setting - out of the relevant legal principles, in particular, an analysis of this court's power to extend time for the taking of all procedural steps required by s. 2 of the 1857 Act, including this court's jurisdiction to enlarge time so that procedural requirements can be attended to in the correct sequence mandated by section 2 in light of the up to date statutory position.
70. In short, the principles enunciated in *Kudriacevas* are of fundamental relevance to the situation before this court and this court should not, in my view, depart from those principles which, I am satisfied, must guide this court in the present case.
71. I have also carefully considered the submissions made on behalf of the DPP on the question of whether an extension of time should be granted. Among other things, Mr. McKenna submitted that the difficulty arose because Ms. Golden was, in reality, too

prompt in that the case stated was filed in the High Court on the same day it had been signed by the Judge in question, immediately after which Ms. Golden served the relevant papers. The evidence undoubtedly confirms that this is the factual position.

72. It is also submitted on behalf of the DPP that a novel and an important point arises in the appeal which is brought by way of case stated. The foregoing is clearly so, having regard to the contents of the case stated.
73. It is submitted on behalf of the DPP that the present case boils down to one mistake, which is acknowledged, namely, the error in terms of sequencing. The foregoing submission is borne out by the evidence and, earlier in this judgment I looked at the uncontested averments made by Ms. Golden in which she offers a cogent and entirely understandable explanation as to why she made this innocent mistake in respect of sequencing.
74. With regard to the respondents' submission that constitutional rights were at play in *Kudriacevas* which distinguish that decision from the present situation, the submission is made on behalf of the DPP that a statutory provision permits the taking of an appeal, by way of case stated, against an acquittal. Counsel for the DPP goes on to submit that there are competing rights, including competing constitutional rights, at play throughout the criminal justice system and the proper and effective administration of justice includes the hearing of appeals by superior courts in respect of errors of law said to have been made by lower courts. The foregoing is a submission of great force in circumstances where, plainly, the case before this court is not one which is concerned with the rights of one party alone. There are competing rights and interests at play, including the public interest in the prosecution of offences and the public interest in the proper and effective administration of justice which, self-evidently, includes the hearing of appeals wherein it is claimed that an error of law was made. The foregoing competing interests, when assessed, weigh in favour of extending time, in my view.
75. On behalf of the DPP it is also emphasised that the mistake which has given rise to the present application was not a grievous mistake. The evidence undoubtedly supports that submission. Insofar as the defendants/respondents place reliance on the Court of Appeal's decision in *DPP v. Barry*, it is appropriate to point out that *Barry* concerned s. 2 of the Criminal Justice Act, 1993 which, as amended, provides, *inter alia*, that if it appears to the DPP that a sentence imposed by a court, on conviction on indictment, was unduly lenient, the DPP may apply to the Court of Appeal to review the sentence and such an application "*shall be made, on notice given to the convicted person, within 28 days, or such longer period or such longer period ... , within 28 days or such longer period not exceeding 56 days as the court may, on application to it in that behalf, determine, from the day on which the sentence was imposed*". The respondent in *Barry* was convicted on 14 March 2017 and the DPP did not apply for a review of sentence within 28 days. On 04 May 2017, an application was made by the DPP to extend time on the basis that inadvertence had led to the delay in applying for a review of the sentences and that the

interests of justice would be served by permitting the application to proceed. It is appropriate to quote the head note from the case as follows:

"Held by the Court of Appeal (Birmingham, Edwards and Hedigan JJ.), in refusing the application, 1, that adherence to the time limits set out in s. 2(2) of the 1993 Act was important. The facility afforded by the provisions of the 1993 Act to the State, through its prosecuting authority, to challenge a sentence as being "unduly lenient" constituted a significant encroachment upon the finality of a judicial decision in favour of a convicted person which, at least in the case of sentences imposed on persons convicted on indictment, was without precedent. Where there was provision for review of sentence, it was desirable that that provision be availed of promptly by the prosecuting authority. Applications under s. 2(2) were required to be brought on with all possible expedition and to be prioritised by all those charged with dealing with them."

76. As can be seen from the foregoing, the decision in *Barry* concerned a very specific provision in the 1993 Criminal Justice Act, and the Court of Appeal was not at all concerned with s. 2 of the 1857 Act. It is uncontroversial to say that, where a person is convicted on indictment and where no application is made under s. 2 of the Criminal Justice Act 1993 within 28 days, the convicted person and/or their legal advisors will be aware that the relevant time limit within which the DPP has an entitlement to challenge the leniency of the relevant sentence, has passed. In other words, after the 28 day period, but before 56 days from the date upon which the sentence was imposed, the DPP can make an application to extend time to review the sentence in question, but the DPP has lost the statutory *right* to review the sentence on the grounds of undue leniency.
77. The position before this court is entirely different. There is no question whatsoever of the defendants/respondents not receiving notice at any stage or believing that the time for a case to be stated has passed or that no appeal by way of a case stated would be brought. It will be recalled that, on the very day the District Court Judge made her decision, on 16 June 2020, the solicitor for the DPP indicated to the court, in the presence of the legal representatives of the respondents, that the DPP was going to seriously consider pursuing a challenge to the decision of the District Court. Thereafter, all parties engaged with regard to the draft case stated. Moreover, this was in the context of a formal Notice of Application to state a case, having been served on all relevant parties on 26 June 2020. This had the effect of suspending the acquittal of the defendants/respondents and all the foregoing was known by all parties at all material times.
78. The foregoing is wholly unlike the position in *DPP v Barry*. Furthermore, and again in contrast to the position in *Barry*, the respondents in the present case, and their legal representatives were, in fact, served with the signed case stated and a copy of the notice of appeal and this occurred within the relevant time limit. In other words, at no stage (in particular from the point at which a Notice of Application to state a case was served) did the respondents believe that the District Judge's decision was final and could not, or would not, be challenged. On the contrary, at all material times, the

defendants/respondents were very well aware that there was a challenge by way of case stated. In addition, the defendants/ respondents have never been at any practical disadvantage arising out of the innocent and entirely understandable mistake which was, unfortunately, made with regard to sequencing. In other words, the passage of time has not affected, much less adversely affected, the respondents in any way.

79. Among the submissions made on behalf of the DPP is that there is no principle in Irish criminal law which requires mutuality as between the State and a citizen insofar as identical procedures are concerned. To illustrate the point, it was submitted that if an accused is convicted in the District Court, they have a right to a full re-hearing *de novo*, by way of appeal, whereas the DPP has no such right. It is also submitted that, where an accused applies to have a case stated, they have such an entitlement, in that the district judge cannot refuse this unless satisfied that the matter is frivolous or vexatious. In this manner, counsel for the DPP submits that, what the defendants/respondents characterise as a "procedural advantage" enjoyed by the DPP is not, in reality, a factor which argues against an extension of time being granted. That seems to me to be a submission with considerable force and it seems to me that the proposition advanced on behalf of the respondents that the DPP enjoys a procedural advantage adds no additional weight in favour of the result they contend for, insofar as a weighing up by this court of all relevant matters in the context of deciding whether to extend time is concerned.
80. With regard to the submission, made in opposition to an extension of time, to the effect that the instant case involved more deficiencies than arose in the *Kudriacevas* case, the DPP disputes this, submitting that the case before this court "boils down" to a sequencing issue. In my view, the case before this court could not fairly be characterised as one involving more deficiencies, or greater deficiencies, than in *Kudriacevas*. In the present case there was service of the signed case stated; there was service of the notice of appeal; and there was transmission of the relevant papers to the High Court Central Office. Unfortunately, the latter took place before the former, breaching the sequencing requirements in s. 2 of the 1857 Act whereas, in *Kudriacevas*, there was no service of the notice in writing. Unlike in *Kudriacevas*, there was no failure to serve the notice of appeal in this case. In the present case, the DPP was not late, either, in transmitting documents to the High Court, or in serving the relevant notice and signed case stated. The DPP simply got the sequencing wrong.
81. On behalf of the DPP it is also submitted that, in the case of *People v Kelly* [1982] IR 90, the Supreme Court rejected the proposition the '*Éire Continental*' principles applied in criminal appeals, stating:

"... it was the view of the court that an extension or enlargement of time should be granted only where an intention to appeal existed at the time or immediately after the conviction, and where there were grounds of appeal which could be described as arguable or substantial. It seems to me, therefore, that these are the criteria upon which the Court of Criminal Appeal acted and which, when applied, guided the court in its decision to reduce the application made by the appellant. If that be so,

the court applied the tests laid down by the Supreme Court for such applications, in relation to appeals in civil cases, in Éire Continental Trading Co. Limited v Clonmel Foods Limited 5 [1955] I.R. 170. In my view, such tests or criteria are inappropriate to a consideration whether an enlargement of time should be allowed for an appeal, or an application for leave to appeal, in a criminal case."

O'Higgins CJ held further that: "... the court's approach must be flexible and its discretion guided not by any general test or criterion but by what appears to be just and equitable on the particular facts of the case in question." At this juncture, I want to emphasise that the foregoing is the approach taken by this court, namely, to decide whether, on the particular facts of this case, it is just and equitable to grant, or not, an extension of time to enable the DPP to comply with the procedural requirements set out in s. 2 of the 1857 Act and to do so in the correct sequence, in circumstances where the evidence discloses that all requirements were complied with, but in the wrong order. The essential question for this court to consider is whether it is in the interests of justice, or not, to grant the extension of time. This entails a consideration of all relevant facts and circumstances, to give all matters appropriate weight and to come to a decision which reflects the interests of justice. I am satisfied that this is the proper approach and that, in arriving at a decision which reflects the interests of justice, this court is not confined to simply applying a test urged on it by counsel for the defendants/respondents with reference to the *Éire Continental* principles. Counsel for the DPP also directs this court's attention to the recent Court of Appeal decision in *DPP v Dewey* [2019] IECA 29 in which Mr. Justice Edwards stated as follows:

"It is clear since the decision of the Supreme Court in The People v Eamonn O'Kelly [1980] 2 I.R. 90 that the Éire Continental Trading Company Limited v Clonmel Foods Ltd jurisprudence, which applies on the civil side, does not apply to applications for an enlargement of time on the criminal side. The test is somewhat more flexible on the criminal side, the court should not make its decision based on pre-determined criteria but by a consideration of what the justice of the case, in light of all the circumstances requires."

82. The foregoing fortifies me in the view that the appropriate approach for this court to take in the present case is to respond to the particular facts and circumstances in this specific case, by means of a decision which accords with the interests of justice, rather than to apply any rigid or pre-determined test or criteria. Without prejudice to the submission that the *Éire Continental* principles are not applicable, counsel for the DPP goes on to submit that very recent Supreme Court authority emphasises that *Éire Continental* did not set down rigid criteria for extension. In that regard, Counsel for the DPP refers to the decision of O'Malley J. in *Seniors Money Mortgages (Ireland) DAC v Gately* [2020] IESC 3 where (at para. 7) it was stated that:

"There is no doubt but that over the years there has been a tendency to take the passage quoted above, which simply summarised counsel's submission, as encapsulating the ruling of the Court. However, while the three factors have been

endorsed in innumerable judgments, from time to time there has been a reminder that the Court did not, in fact, lay down the "rigid rules" that the respondent in Éire Continental advocated."

Similarly, O'Malley J., at para. 122 in *Pepper Finance Corporation v Cannon* [2020] IESC 2, stated: -

*"In my view the High Court judge in the instant case erred in so far as he saw Éire Continental as setting a 'test' with three 'requirements' that had to be met, in holding that a mistake as to law could not be sufficient to satisfy the 'mistake' criterion and in determining that, since the appellants failed to meet the other two requirements, the existence of arguable grounds could not be sufficient to justify an extension. Extension of time in which to appeal is a matter for the discretion of the court, the exercise of which will in most cases be guided by the three factors identified in Éire Continental but which is not the subject of rigid rules. As Geoghegan J. said in *Brewer v Commissioners of Public Works* [2003] 3 IR 539, it is not to be assumed either that an extension will be granted if all three are satisfied or that it will be refused even if an applicant fails in respect of all three."*

83. On behalf of the DPP, it is submitted that, even if *Éire Continental* principles were applicable, an enlargement of time should be granted in circumstances where the DPP has arguable grounds of appeal; has clearly formed an intention to appeal within time; and the mistake made was inadvertence as to the correct procedure, being a situation where the correct things were done the wrong way around in terms of sequencing. In my view, this court is not bound by the *Éire Continental* principles, nor are same a rigid test or rigid rules, but even if this court were to apply *Éire Continental* principles, I am satisfied on the evidence before this court that the DPP has satisfied the three factors identified in *Éire Continental*.

Decision summarised

84. At the heart of the application before this court is the making of a simple error which is acknowledged on the part of the DPP and which has been clearly and cogently explained in uncontroverted averments made by a conscientious solicitor who, out of an obvious desire to ensure efficiency, unfortunately made a mistake in terms of the sequencing insofar as procedural requirements under s. 2 of the 1857 Act is concerned.
85. She served the signed case stated. She served the notice of appeal. She transmitted the papers to the High Court. Unfortunately, she did not do this in the order required by s. 2 of the 1857 Act.
86. This caused no prejudice whatsoever to the defendants/respondents who received everything they were entitled to receive and who received it promptly.
87. It is, of course, vital that statutory procedural requirements be complied with. Nothing in this court's judgment takes away from that fundamental proposition.

88. However, turning to the question as to whether the interests of justice lie in favour, or against, granting an extension of time to facilitate compliance with the procedural requirements of s. 2 of the 1857 Act (i.e. doing the self-same things as have already been done but in a different, ie the correct order) it seems to me appropriate to pose the following question. *Can it truly be said that there is any material difference, on the facts in the present case, in so far as the ability on the part of the ability of the respondents to oppose the appeal brought by way of a case stated between (a) the situation in the present case (where the respondents were served with the signed case stated and notice of the appeal after papers were transmitted to the High Court) and (b) a hypothetical scenario where the respondents were served with precisely the same signed case stated and notice of appeal but, in that hypothetical scenario, papers were transmitted to the High Court after such service upon the respondents?* There is no material difference whatsoever.
89. Had Ms. Golden “held off” attending the High Court Central Office until, say, the 4th or 5th of November, the respondents would have received precisely the same documents, at precisely the same time, the only difference being that the sequencing insofar as transmitting papers to the High Court would have been in compliance with s. 2 of the 1857 Act whereas, as matters transpired, the sequencing was incorrect.
90. To say the foregoing is not for a moment to downplay the importance of compliance with statutory requirements but it seems to me to be a consideration which is relevant to the exercise of this court’s undoubted jurisdiction to extend time to facilitate compliance, in the correct sequence, with the procedural requirements laid down by s. 2 of the 1857 Act.
91. To borrow from Mr. Justice O’Neill’s decision in *Kudriacevas*, the appeal by way of case stated which was signed by the learned district judge 30 October 2020 has obviously been “*carefully crafted*” and plainly raises “*issues of substance as agreed between the parties*”.
92. Weighing up all relevant facts, circumstances and issues and taking due account of all submissions made on the question of whether an extension of time should be granted, I am satisfied that the interests of justice require that this court enlarges time under the Rules of the Superior Courts further doing of what is required pursuant to s. 2 of the 1857 Act, in the correct order.
93. In my view, the result of this analysis is not one involving fine margins. Rather, having regard to the facts and circumstances in this particular case, the outcome of an assessment of where the interests of justice lie is that it decidedly favours the granting of the extension of time and it would, in my view, be to create a patent injustice if this court is deprived of the opportunity to determine an issue of substance by reason of an innocent and understandable mistake which has been cogently explained and which has caused no prejudice whatsoever to the defendants/respondents.
94. For the reasons explained in this judgment, this court refuses the relief sought in the defendant’s motion which issued on 19 April 2021 and it is appropriate, instead, to make

an order enlarging time for compliance by the prosecutor with the procedural requirements laid down in s. 2 of the 1857 Act, in the sequence required by that section.

95. Doing so reflects the approach taken in *Kudriacevas* and recognises that, in the manner explained in *Kudriacevas*, the steps taken by the DPP can be regarded as a nullity in circumstances where all the right things were done but in the wrong order as per the sequencing requirements set out in s. 2 of the 1857 Act.
96. Thus, relying on the relieving provision introduced by s. 45 of the 2009 Act, this court is entitled to deal with the situation before it as if no step had been taken.
97. In order to ensure that the strict compliance with sequencing laid down in s. 2 of the 1857 Act can be addressed, this court is enlarging time so that, in reality, no more and no less than has already been done (between 30 October and 03 November 2020) can be done again, but in a different order.
98. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*
99. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs which should be made. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office within 14 days.