THE COURT OF APPEAL

Record No. 2023 71

Neutral Citation Number [2024] IECA 190

Edwards J.

McCarthy J.

Burns J.

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/

PATRICK WHITE

Appellant

V

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 16th day of July, 2024.

Introduction

1. Before this Court is an appeal brought by a Mr. Patrick White (i.e., "the appellant") against the judgment of O'Regan J. in the High Court delivered on the 19th of December 2022, and against the consequent order perfected the 1st of March 2023, wherein O'Regan J. had ruled on certain questions the subject of an appeal by case stated by District Court Judge

McNamara of the Dublin Metropolitan District Court sitting in Tallaght, and had further awarded costs to the respondent.

Background

2. The background to the case stated arose in the context of a road traffic operation being conducted by a member of An Garda Síochána, namely a Garda David O'Donoghue (otherwise "Garda O'Donoghue").

The prosecution case

3. On the 13th of October 2019, Garda O'Donoghue was conducting a mandatory intoxicant testing checkpoint (i.e., "MIT checkpoint") on Bóthar Katharine Tynan, Tallaght when he observed and stopped a mechanically propelled vehicle of which the appellant was the driver. Garda O'Donoghue, having spoken with the appellant and having duly informed him of the procedures relevant to the MIT checkpoint, demanded the production of the appellant's driving license. The appellant, who did not have a license in his possession at the time he was stopped by the Garda, was subsequently required to produce his driving license and certificate of insurance within a ten-day period at a Garda Station nominated by Garda O'Donoghue. The appellant later failed to comply with this requirement.

4. Further to the foregoing, a roadside breathalyser test was performed on the appellant, which the appellant failed. He was subsequently arrested by Garda O'Donoghue on suspicion of an offence contrary to s. 4(1), (2), (3) and (4) of the Road Traffic Act 2010 (as amended), and he was thereafter conveyed to Terenure Garda Station where breath specimens he had provided to gardaí were tested utilising the Evidenzer IRL machine. The results the said machine produced indicated a concentration of 15 microgrammes per 100 millilitres of breath, which was over the permitted limit. The appellant was informed by Garda O'Donoghue of the implications of this result, and he was thereafter released from Garda custody. The appellant was later duly summoned on foot of three summonses (bearing the

following respective reference nos. 67256612, 67256661, and 67256589) to appear before the District Court to answer alleged offences contrary to s. 18 of the Road Traffic Act 1961 (i.e., a "no-insurance charge"), s. 4 (4)(b) and (5) of the Road Traffic Act 2010 (i.e., a "drunk driving charge"), and s. 12 of the Road Traffic Act 2006 (i.e., a "driving without a driving licence charge").

5. On the 25th of February 2021, the appellant appeared before District Court Judge McNamara at Tallaght District Court to answer the three aforementioned complaints. The case proceeded to trial, during the course of which certain facts were proved, agreed, admitted or found by the District Court judge. These facts included the following matters which were set out at paras. 6(a) and (e) of the Appeal by Case Stated forwarded to the High Court:

> "*(a) Whilst conducting a mandatory intoxicant testing (MIT) checkpoint at Bóthar Catherine Tynan, Tallaght, Dublin 24, a public place, at 01.40 hours on 13th October 2019 Garda O'Donoghue observed and stopped a mechanically propelled vehicle bearing registration 08D50307 of which the Defendant was the driver. The checkpoint conducted* (sic) *pursuant to the written authorization of Inspector Denis Ellard of Tallaght Garda Station, under section 10(2) of the Road Traffic Act 2010 (as amended)*
>
> [...]
>
> *(e) As part of the prosecution case an authorisation expressing itself to be an authorisation to establish a checkpoint signed by Inspector Denis Ellard of Tallaght Garda Station under section 10(2) of the Road Traffic Act 2010, was submitted in evidence, a copy of which forms part of this case stated, and is attached at Annex II*".

Application for dismissal on the merits of all the charges

6. At the close of the prosecution case, counsel for the defence made an application to the District Court judge for the dismissal on the merits of all the charges. The thrust of this application was that an essential proof of each of the three charges (i.e., that the MIT checkpoint at which the appellant was stopped was validly authorised pursuant to s. 10(2) of the Act of 2010) was absent, and that accordingly the charges should be dismissed.

7. Counsel for the defence highlighted that the written authority adduced in evidence by the prosecution purported to authorise the establishment of two separate checkpoints, one on the N81 on the 12th of October 2019 between the hours of 22:45 and 23:45 (i.e., "the first checkpoint"), and one on Bóthar Katharine Tynan on the 13th of October 2019 between the hours of 01:00 and 02:00 (i.e., "the second checkpoint"); and counsel further highlighted that the written authority was signed by Garda Inspector Denis Ellard (otherwise "G/Insp. Ellard") on the 13th of October 2019, with no indication as to the time of this signature being provided.

8. Counsel for the defence drew the District Court judge's attention to the judgment of Hogan J. in *Maher v. Judge Kennedy & DPP* [2011] IEHC 207, which counsel posited as authority for the proposition that a written authorisation pursuant to s. 10 of the Act of 2010 should be clear, unambiguous, and speak for itself, with no additional or oral evidence permitted to explain, supplement, supplant or qualify it; that not being admissible in law.

9. Counsel was critical of the written authorisation of G/Insp. Ellard, and he submitted that there was a clear anomaly surrounding the dating of the signature, particularly where the authorisation purported to authorise two different checkpoints for different dates and times but which on its face bore a single, dated but untimed, signature purporting to cover both checkpoints, and which document had ostensibly been signed *ex post facto* the specified date on which the first checkpoint was to have taken place. Counsel submitted that the anomaly in

question was not capable of being explained with reference to the document itself. Counsel stressed that the document in question must be read as a whole, with authorisation for one checkpoint not capable of being severed from the other; thus, it was submitted that while the authorisation for the second checkpoint (i.e., that at which the appellant was stopped on the 13th of October 2019) would, if viewed in isolation, appear to be *prima facie* valid, the authorisation for the first checkpoint (on the 12th of October 2019) appeared to have been retrospectively made, and the resulting impermissibility of this rendered to whole written authorisation invalid.

10. The District Court judge then queried with counsel for the defence whether any prejudice resulted to his client by virtue of the ostensibly invalid authorisation of the first checkpoint. The reply to this query was that there is a particularly strict and onerous level of statutory compliance and unambiguity required in terms of the written authority as an essential proof, and that this had not been met in this case and it was not in its prescribed form. Counsel repeated his earlier submission that the first checkpoint appeared to have been retrospectively authorised and was invalid, and further argued that the absence of any indication as to what time the written authorisation was signed raised a reasonable possibility that the second checkpoint, at which the appellant was stopped, was retrospectively authorised also. Counsel submitted that the District Court judge needed not to be satisfied as to the level of this particular possibility, and that the core question to be determined was whether the written authority could speak for itself without additional explanation. It was the defence's position that it could not. Counsel concluded his submission by contending that if the District Court judge was satisfied that the written authorisation could not be admitted, then the three charges must each be dismissed, as their respective detections flowed from the same checkpoint which was invalidly authorised.

11. In reply, counsel for the prosecution made a number of submissions. It was said that for the purposes of the prosecution the prosecutor was relying on the authorisation document as a formal prosecution exhibit; that the relevant checkpoint was that set out at para. 2 of the document (which provided that a checkpoint was authorised "*On (Date) 13th October 2019 at Bóthar Katharine Tynan, Tallaght, Dublin 24 (a public place), between the hours of 01:00 & 02:00*"); that the authorisation did not post-date this particular checkpoint, and; that, if necessary, the document was capable of being severed. Counsel for the prosecution cited in support of his arguments the judgment of Barrett J. in the High Court in *DPP (Garda Hegarty) v. Gregory* [2015] IEHC 706, and he submitted that it was clearly established in caselaw that multiple locations and times were permitted within a written authorisation for mandatory intoxicant testing pursuant to s. 10 of the Act of 2010, and further that it was not necessary to prove the entirety of the document, and that it was only necessary to prove (i) that there was authorisation to establish a particular checkpoint, (ii) that such authorisation was provided for in writing, (iii) that the date, place, times and location are specified in the authorisation given, and (iv) that the written authorisation purports to have been signed by a member of An Garda Síochána not below the rank of inspector.

12. Counsel for the defence replied to the foregoing submissions made on behalf of the prosecution by contending that the prosecutor's argument rested on whether the District Court could overlook or sever the reference to the first checkpoint. It was submitted that this could not properly be done, and he reiterated his earlier argument that the document as signed must speak for itself and have regard to the strict statutory requirements of compliance that he had previously outlined.

Judge's ruling on the dismissal application

13. The District Court judge adjourned his decision on this application to consider the submissions of the parties and, having found the prosecution arguments more persuasive,

found in favour of the prosecution on the 3rd of June 2021. The District Court judge was satisfied that the document validly authorised the establishment of a checkpoint on Bóthar Katharine Tynan for the date, time and location at which the appellant was stopped by Garda O'Donoghue. The defence's application for dismissal of the charges was refused, with the District Court judge ruling that the defence had a case to answer.

Outcome in the District Court

14. The defence did not go into evidence, and the case was finalised in the District Court on the 22nd of July 2021, the result being that the appellant was convicted on each of the three charges. He was subsequently fined €400 and disqualified from driving for a period of six months in respect of the drunken driving charge; fined €450 and disqualified from driving for a period of 4 years in respect of the no insurance charge, and; fined €250 in respect of the driving without a driving licence charge.

Appeal by Case Stated

15. The appellant, being dissatisfied with the District Court judge's decision as being erroneous on a point of law, requested that she state a case for the opinion of the High Court. The District Court judge stated a case pursuant to s. 2 of the Summary Jurisdiction Act 1857, as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961, and sought the High Court's opinion on the following questions:

> "*(i) Was I correct in law in holding that the written authorisation was valid in respect of the checkpoint on the 13th of October 2019 at Bothar* (sic) *Katherine* (sic) *Tynan, Tallaght, Dublin 24, at which the Defendant was stopped?*
>
> *(ii) If the answer to question (i) is no, was I correct in convicting the defendant on each of the three charges?*"

Judgment of the High Court

16. On the 19th of December 2022, O'Regan J. delivered judgment in the High Court on the case stated.

17. The High Court judge noted that the authorisation of the 13th of October 2019 established two checkpoints, and that it was not disputed between the parties that the first checkpoint was established on a date in advance of the signed authorisation by G/Insp. Ellard. The High Court judge then reviewed the provisions of s. 10 of the Act of 2010 as amended by s. 11 of the Road Traffic Act 2016. She noted that as per s. 10(3) of the Act of 2010, an authorisation must be in writing and shall specify the date on which and the public place in which the checkpoint is to be established and the hours at any time between which it may be operated. She observed that s. 10(4) provides for certain powers for gardaí operating a checkpoint established pursuant to a s. 10 authorisation, which powers include the requests for a person in charge of a vehicle to provide a specimen of his or her breath, to provide a specimen of his or her oral fluid, and to accompany him or her or another member of An Garda Síochána to a place. She observed that failure to comply with any such request may constitute an offence under s. 10(6) of the Act of 2010. The High Court judge then noted that under s. 10(11) of the Act of 2010, a written authorisation expressing itself to be such authorisation shall, until the contrary is shown, be sufficient evidence of the facts stated in it without proof of any signature on it or that the signatory was a person entitled under s. 2 of the Act of 2010 to sign it.

18. The High Court judge then succinctly stated the essence of the parties' respective submissions to the High Court:

> "***5.*** *The defendant argues, based on the following case law, that the written authorisation for the checkpoint is an essential proof in the prosecution of an individual and such written authorisation must speak for itself in terms of what it*

constitutes with no scope for supposition or subsequent explanation. It is argued that the authorisation does not meet that standard with the error on its face making it misleading unclear and unintelligible to any ordinary person receiving it. It is said that the obligation of strict statutory compliance and clarity apples with greater force when the authorisation is issued by a non-judicial person and is made on foot of a penal statutory provision.

6. *On the other hand, the prosecutor argues that there is no error or ambiguity and the only checkpoint of relevance is the one at which the defendant was stopped. The defendant did not give evidence of and/or has not otherwise highlighted any basis for any confusion on his part and accordingly it is argued that the District Judge correctly determined the case and properly convicted the defendant on the aforementioned three charges*".

19. The High Court judge then engaged in a review of the following authorities to which she had been referred by the parties: *Weir v. DPP* [2008] IEHC 268, *Maher v. Judge Kennedy and DPP* [2011] IEHC 207, *Dunne v. DPP* [1994] 2 I.R. 537, *DPP v. Mallon* [2011] 2 I.R. 544, *People (DPP) v. Jagutis* [2013] 2 I.R. 250, *DPP v. James Gregory* [2015] IEHC 706, and *DPP (Garda McMahon) v. Avadenei* [2018] 3 I.R. 215. Also considered, was David Staunton BL's work *Drunken Driving* (2nd edn., Round Hall 2021), in particular para. 3-76 thereof *et seq*.

20. To the extent that the parties had relied upon certain authorities which, on their facts, related to the validity of search warrants, the High Court judge found that the analogy made was limited as there are differences between a search warrant's status and the compliance with a penal statute. She identified these differences as follows at para. 15 of her judgment:

"*(1) The s.10 authorisation is not furnished to people stopped at the checkpoint whereas a search warrant is furnished to the property owner;*

(2) The issue of prejudice and/or confusion is relevant in respect of the understanding of the search warrant however given that the authorisation would not be furnished as aforesaid prejudice and confusion are not relevant but rather focus would be on compliance with the statutory requirements and specific precedents on s.10;

(3) A search warrant is issued by a judicial authority however an authorisation is not".

21. The High Court judge noted that the appellant had argued that the presumption as to the validity of the authorisation as provided for in s. 10(11) of the Act of 2010 had been rebutted because of a clear error on the face of the authorisation in respect of the first checkpoint which predated the date incorporated after the signature of G/Insp. Ellard on the document. She observed that the appellant had argued on this basis that the court could not be satisfied on a criminal standard of proof that the authorisation was executed prior to the time of the second checkpoint, at which checkpoint the appellant was stopped. She noted that the prosecution in turn had countered this argument by stating that it was clear from the text of the Appeal by Case Stated by District Court Judge McNamara that she had found, as a matter of fact, that the second checkpoint was conducted pursuant to the written authorisation of G/Insp. Ellard, and that this written authorisation had been submitted in evidence. The High Court judge agreed that these findings were apparent from the text of the Appeal by Case Stated, in particular paras. 6(a) and 6(e) thereof (set out in this judgment at para. 5).

22. On the issue of the document's severability. The High Court judge noted that the position of the appellant was that the written authorisation was incapable of being severed, and that while the authorisation in respect of the second checkpoint might *prima facie* appear valid, the document as a whole was erroneous owing to the flaw in respect of the authorisation for the first checkpoint, and it was therefore invalid in respect of both

checkpoints. The prosecution, conversely, submitted that the document was capable of being severed, that the first checkpoint was not engaged or relevant in respect of the second checkpoint, and that the first checkpoint therefore had no application to the present case. The prosecution submitted that insofar as any statutory requirements under the Act of 2010 are concerned, the authorisation vis-à-vis the first checkpoint fulfilled all necessary requirements and was therefore valid in respect of that checkpoint. They further submitted that the foregoing was all the more so given that it was not known whether or not the first authorised checkpoint was in fact undertaken.

23. The High Court judge observed that Barrett J. in *Gregory* (cited at para. 19 above) indicated at para. 9 of his judgment that the court is conscious that the end result of the establishment of a checkpoint may be the imposition of a criminal sanction for one or more individuals; however, construing a penal statute strictly does not require that the courts depart from their senses or ascribe the most restricted meaning possible. The High Court judge also observed that in *Mallon* (cited at para. 19 above) O'Donnell J. (as he then was) indicated that vis-à-vis a search warrant, the nature of the error or omission must be scrutinised to see if it is of a fundamental nature. Further, she noted that in *Jagutis* (also cited at para. 19 above) Clarke J. (as he then was), giving judgment for the Court of Criminal Appeal, stated at para. 37 of his judgment:

> "[...] *If a warrant is materially in error in a way that would truly place a person receiving the warrant in difficulty in assessing their obligations, then the warrant must be found to be invalid for it has failed to do its job in clearly and properly communicating to the person concerned what their obligations are*".

24. The High Court judge found that while the analogy between search warrants and s. 10 authorisations is limited, the passage just quoted was of assistance insofar as it appeared to her that "*the job of the authorisation*", just as with that of a search warrant, should clearly and

properly communicate a concerned person's obligations. She stated in that regard that she was satisfied that the checkpoint at which the appellant was stopped was validly authorised, given four specific reasons outlined at para. 19 of her judgment:

> "*(1) the authorisation was in existence at the time of the checkpoint;*
>
> *(2) the authorisation contains a clear and proper communication vis-à-vis the within checkpoint;*
>
> *(3) the authorisation insofar as it refers to this checkpoint is in writing, does specify the date in which and public place in which the checkpoint is to be established and further identifies the hours at any time between which it is to be operated; and*
>
> *(4) the defendant was stopped within the confines of those particulars*".

25. The High Court judge further added at para. 20 of her judgment in reference to paras. 6(a) and 6(e) of the Appeal by Case Stated (quoted above at para. 5 of this judgment):

> "***20.*** *Although the finding of fact identified in paragraph 6(a) of the case stated is not an alternate to the production of the authorisation it is clear that this finding of fact was in addition to the production of the authorisation which is subsequently referred to at paragraph 6(e). The finding of fact is however sufficient to establish that the authorisation was executed prior to 1:40am on 13 October 2019*".

26. Accordingly, the High Court judge answered the questions posed in the case stated as follows:

> "***21.*** *In the circumstances I would answer the questions posed by the District Court in the following terms: -*
>
> *(1) Yes.*
>
> *(2) Does not arise*".

27. By order perfected the 1st of March 2023, the High Court further awarded the prosecutor her costs, said costs to be adjudicated in default of agreement.

Notice of Appeal

28. By Notice of Appeal filed on the 28th of March 2023, Mr. White appealed against the judgment and consequent order of the High Court. In support of his appeal, he advanced the following three grounds:

> "*1. The Learned Trial Judge erred in holding that the District Court judge had effectively found that their checkpoint was conducted lawfully pursuant to a written authorisation which was then in existence.*
>
> *2. The Learned Trial Judge erred in not holding that the written authorisation was fatally flawed.*
>
> *3. The Learned Trial Judge erred in answering the case stated as set out in the order*".

Respondent's Notice

29. The Director of Public Prosecutions (i.e., "the respondent") filed a Respondent's Notice on the 3rd of April 2023 and therein set out certain grounds of opposition which stated as follows:

> "*1. In this appeal by way of case stated the High Court determined that the District Judge was correct in law to convict the appellant of "drink-driving" in circumstances where she found as a fact that he had been stopped at a Garda mandatory intoxicant testing ["MIT"] check-point that had been authorised in writing by a Garda Inspector and subsequently found to have an excess breath/alcohol concentration. In answering the case stated the learned trial judge did not err, as contended for by the appellant, but was entirely*

correct in holding that the District Court Judge had found that the checkpoint was conducted lawfully pursuant to an existing written authorisation. The points at paragraphs 6(a) and (e) of the case-stated, reciting the facts as found by the District Judge, fully support the High Court's determination.

2. *There was ample information in the case stated to support the determination that the check-point at which the appellant had been stopped, had been lawfully authorised. The learned trial judge did not err, but, was entirely correct not to deem the written authorisation to be fatally flawed.*

3. *The learned trial judge did not err and was correct to answer the case stated in the manner set out in the Order of the High Court. Having correctly answered the first question in the affirmative, the second question posed in the case-stated, that was conditional on a negative answer to the first question, did not then arise for consideration*".

Submissions to the Court of Appeal

Submissions on behalf of the appellant

30. Counsel for the appellant referred the Court to several authorities, the principles of which he submitted were applicable to the instant case.

31. The first authority referenced was *Weir v. DPP* (previously cited at para. 19 above) which arose in the context of an appeal by way of case stated from a drink driving prosecution in which an issue arose as to whether oral evidence, absent the production of a written authorisation in evidence, was sufficient proof that a Garda checkpoint was authorised under s. 4 of the Road Traffic Act 2006 (which counsel submitted had similar provisions to s. 10 of the Act of 2010) in order to lawfully stop an individual and request a breath sample. In particular, counsel sought to draw the Court's attention to passages from pp. 9-10 of O'Neill J.'s judgment, wherein the learned High Court judge observed that proof

of the existence of a written authorisation was an essential proof in order to establish the lawfulness of the stopping of drivers on the side of the road and subsequent acts done in connection with the operation of a roadside checkpoint.

32. Also referred to was *Maher v. Judge Kennedy and DPP* (cited at para. 19 above) in which the High Court (Hogan J.), on an appeal by way of case stated, ruled at p. 6, in circumstances where an ambiguity had arisen as to the public place to which the Garda Inspector had intended the written authorisation to relate, and where the prosecution had called the Garda Inspector as a witness to clarify his intentions when signing the written authorisation, that the evidence of the Garda Inspector was inadmissible as the written authorisation must speak for itself, with evidence seeking to explain, supplement or qualify it not being admissible in law.

33. Counsel for the appellant also referred the Court to the judgment of Barrett J. in *DPP v. James Gregory* (cited at para. 19 above) wherein the said learned High Court judge, in considering the issue of whether multiple checkpoints could be authorised in one document, held that they could, applying s. 18(a) of the Interpretation Act 2005 to the wording of s. 10 of the Act of 2010.

34. Counsel for the appellant submitted that when applying the foregoing principles to the present case, the dating of the written authorisation on the 13th of October 2019 amounts to a clear anomaly, incapable of explanation by reference to the document itself. It was said that this was so particularly in circumstances where the written authorisation purports to authorise two checkpoints which are both set out on the one page; rather than it purporting to authorise several checkpoints over a number of pages in which circumstances a transgression in dating may be more understandable. Counsel submitted that there are no means of resolving this anomaly by reference to the document itself; with the intent of G/Insp. Ellard when signing the document being unclear, misleading, and unintelligible. It was contended that in such

circumstances, the written authorisation does not speak for itself, is thus inadmissible, and therefore an essential proof is absent from the prosecution case.

35. Counsel further expounded in written submissions on this contended anomaly with reference to the sequencing of events on the 13th of October 2019:

> "*Put another way, the Appellant was stopped at 1.40am on the 13th. In order for the stopping to have been lawful, the authorisation (signed on the 13th) must have been signed between midnight and 1:00am (when the checkpoint started). If it was signed at any other time on the 13th (between 1:00am and midnight on the 14th) then it was unlawful as it would be a retrospective validation. Having regard to the fact that the other checkpoint was purportedly retrospectively validated, the District Court could not be satisfied to the criminal standard that it was authorised during the only hour of 24 which suited the prosecution case*".

36. Counsel for the appellant then made submissions under the heading of "*An analogy with search warrants*". The Court was referred to commentary by David Staunton BL in his work *Drunken Driving* (2nd edn, Round Hall 2021) wherein it is stated at para. 3-77:

> "*An error or ambiguity that is minor in nature will generally be overlooked so long as the authorisation is not misleading, unclear or unintelligible. The authorisation must be read in context with the evidence. In determining whether an authorisation is invalid, it is helpful to draw on the case law in relation to search warrants*".

37. Proceeding on the foregoing basis, counsel referred the Court to a number of cases, *DPP v. Mallon* [2011] 2 I.R. 544, *People (DPP) v. McCarthy* [2011] 1 I.L.R.M. 430, *People (DPP) v. Jagutis* [2013] 2 I.R. 250, all of which related to issues pertaining to the validity of search warrants. From these authorities, counsel distilled a number of principles which he submitted are applicable to the immediate case.

38. First, in *Mallon* the former Court of Criminal Appeal had ruled that the governing principle was a consideration of whether an error at issue was of a fundamental nature, by reference to whether it was a mere misdescription or whether the error in fact had the potential to mislead. Counsel drew the Court's attention specifically to the following passage from the judgment of O'Donnell J. (as he then was) at p. 568 of the report:

> "[...] *It is now quite clear that although a warrant should be prepared with care, not every error will lead to invalidation of the warrant. In particular, where the substance of the warrant as opposed to the form is not open to objection, invalidity will not necessarily ensue. In such cases, the nature of the error or omission must be scrutinised to see if it is of a fundamental nature. Among the factors which may be taken into account are whether the error is a mere misdescription and whether it is likely to mislead*".

39. Second, the Court of Criminal Appeal in *Mallon* had (at para. 45 of its judgment) endorsed and reiterated certain principles previously enumerated by that Court in the slightly earlier *McCarthy* case. See p. 441 of the report of *McCarthy* in the Irish Law Reports Monthly, wherein the relevant principles are stated in these terms:

> "[...]
>
> *(c) Although search warrants should be prepared carefully, not every error in such a warrant will, by virtue of the same, lead automatically to the invalidation of a warrant;*
>
> *(d) In particular where the substance of the warrant, as opposed to its form, is not open to objection, the invalidation of the warrant will not necessarily ensue;*
>
> *(e) The nature of the error, or omission, must be scrutinised by the courts to see whether it is of a fundamental nature, including an error going to jurisdiction. Several factors may be taken into account, including whether the error is a mere mis-*

description, whether it is likely to mislead, whether it undermines the apparent jurisdiction to issue it, according to the warrant on its face, and such matters, before the courts will find, in an appropriate case, that it should be considered invalid;

(f) It is not possible in relation to non-substantive errors, that is to say, errors which do not affect the substance of the legislative requirements found in the body of the warrant itself, to say that they will never lead to the invalidation of a search warrant, due to the wide variety and nature of errors which may occur".

40. Our attention was also drawn to the dicta of Clarke J. (as he then was) in *Jagutis* wherein the former Court of Criminal Appeal had to consider whether a failure to properly define the offence in the warrant rendered it invalid. Counsel noted that the Court remarked *obiter dictum* that the key issue was whether the error was material in the sense of failing to provide the person affected with sufficient information to assess the validity of its compulsion and their obligations under it. Referring to *McCarthy* and *Mallon*, Clarke J. remarked:

"*As both of those judgments emphasise and as this court agrees, a principal and significant focus of any inquiry into the validity of a warrant must be to avoid judging the warrant on the basis of absolute accuracy but rather requires consideration of whether any inaccuracy that can be pointed to is truly material in the sense that it might fail to provide a person who is required, under penalty, to comply with its terms, sufficient information to assess its validity and what precisely it authorises. The purpose of a warrant is to require someone, as a matter of law, to do something that they would not otherwise be obliged to do. Persons presented with such a warrant are entitled to be able to satisfy themselves that the warrant is apparently valid on its face and to know what the warrant obliges them to do. If a warrant is materially in error in a way that would truly place a person receiving the warrant in*

difficulty in assessing their obligations, then the warrant must be found to be invalid for it has failed to do its job in clearly and properly communicating to the person concerned what their obligations are. However, as the authorities to which reference has been made make clear, it is by no means the case that every error will meet that test".

41. We were also referred by counsel for the appellant to *Dunne v. DPP* [1994] 2 I.R. 537, which case concerned the issuing by a peace commissioner of a search warrant pursuant to provisions of the Misuse of Drugs Act 1977 that contained wording to the effect that "*a controlled drug is on the premises*" which was crossed out. The High Court held, on an appeal by way of case stated, that the statute had a clear pre-requisite that a non-judicial person, such as a peace commissioner, must satisfy; and further that this necessitated that the warrant be clear, complete, accurate and unambiguous. Carney J. held, at pp. 540-541 of the report:

"*The constitutional protection given in Article 40, s. 5 of the Constitution in relation to the inviolability of the dwellinghouse is one of the most important, clear and unqualified protections given by the Constitution to the citizen. If it is to be set aside by a printed form issued by a non-judicial personage it would appear to me to be essential that that form should be in clear, complete, accurate and unambiguous terms. It does not seem to me to be acceptable that the prosecuting authority can place reliance on words crossed out by asserting that that was an inadvertence or a slip. Such an approach would facilitate the warrant becoming an empty formula*".

42. Counsel noted that Mr. Staunton in his work *Drunken Driving* commented at para. 3-79 of his work that:

"*While cases such as Dunne provide some guidance, it must be borne in mind that s.10(6) of the 2010 Act creates a penal offence and, arguably, must be interpreted more strictly than the terms of a search warrant*".

43. Counsel submitted that when applying the foregoing principles to the facts of the present case, the error on the written authorisation goes far beyond what could be described as a misdescription; rather, what exactly the written authorisation permits is misleading, unclear, and unintelligible on an ordinary plain reading of the document. It was argued that the error raised "*is of a fundamental nature*", as the written authorisation is an essential proof and there is no explanation which can be proffered as to how the written authorisation, which was dated the 13th of October 2019, purported to authorise a MIT checkpoint on the 12th of October 2019, having regard to the strict requirements of statutory compliance under s. 10 of the Act of 2010 and the close proximity of the signature and dating by G/Insp. Ellard to the reference to the MIT checkpoint on the 12th of October 2019. It was said that a person receiving such an authorisation would have been confused by the error raised as to what their obligations were in fact under it. And it was further noted that the written authorisation was issued by a non-judicial person, and that this fact was observed by the High Court judge at para. 15 of her judgment. It was submitted that this fact makes it essential that the document should be in clear, complete, accurate and unambiguous terms, with it not being acceptable to excuse such ambiguity by reference to possible inadvertence.

44. It was thus submitted that were one to transpose the authorities in respect of invalidating warrants, the written authorisation is inadmissible, and that an essential proof was absent from the prosecution case pursuant to s. 10 of the Act of 2010. It was observed that s. 10 of the Act of 2010 is a penal statutory provision that both creates an offence and confers the power to issue a written authorisation, which is comparable to a warrant. Reiterating earlier submissions regarding the principles in *Weir* and *Maher*, counsel

emphasised that the authorisation must speak for itself, with no allowance for explanation or supposition. While s. 10(11) of the Act of 2010 provides for a rebuttable presumption enuring to the prosecution's favour, it was said that the facts of the present case and the clear anomaly in the written authorisation meant that the burden of proof shifted back to the DPP and was not discharged.

45. Lastly, in relation to the analogy with search warrants, counsel for the appellant noted that the High Court judge remarked at para. 15 of her judgment that a search warrant must be furnished to a person present when a dwelling is searched and that this demonstrates contemporaneously the validity of the search. Counsel, however, submitted that this does not apply to a checkpoint authorisation which will not be seen by the person stopped unless and until they are prosecuted. Counsel noted that such a person is not in position to satisfy himself of the validity of the checkpoint before submitting to it.

46. Counsel also drew the Court's attention to the Supreme Court authority of *DPP (Garda McMahon) v. Avadenei* [2018] 3 I.R. 215, wherein O'Malley J. (*nem. diss.*) reviewed the law in relation to the invalidation of evidence produced under a statutory procedural regime that is flawed in its implementation. Counsel specifically referred the Court to paras. 91-93 thereof, wherein the said learned Supreme Court judge observed:

> "***[91]*** *Secondly, the analysis of the authorities cited above demonstrates that in principle a flaw in the implementation of the statutory procedures will invalidate the evidence produced under the statutory regime if:-*
>
> *(i) a precondition for the exercise of the power to require a specimen has not been met, as where there has not been a lawful arrest; or*
>
> *(ii) the power purportedly exercised was not a power conferred by the statute, as where a demand was made in circumstances where the driver was under no obligation to comply; or*

(iii) the power is exercised without full compliance with the statutory safeguards for the defendant's fair trial rights; or

(iv) the power is erroneously exercised, or procedures are erroneously followed, in such a fashion that the evidence proffered as a result does not in fact prove what it was intended to prove.

[92] *Although the context within which disputes about the admissibility of evidence has undoubtedly been altered by the judgments of this court in The People (Director of Public Prosecutions) v. J.C. [2015] IESC 31, [2017] 1 I.R. 417, the decisions cited about in relation to the first two of these principles are not in question in this case. The powers conferred by the 2010 Act must accordingly be exercised within the statutory context and in accordance with the statutory conditions. Such powers cannot be added to by error on the part of a garda, so as to be exercisable in respect of a person who has not been made amenable to the statutory regime or so as to enable demands to be made that are not authorised by the 2010 Act.*

[93] *It seems likely that disputes about the "due completion" of the statutory forms will fall into either the third or fourth category. The latter presents a simple enough situation – if a form has been filled in so inadequately as to fail to prove the requisite matters, either in whole or in part, it will to the same extent lose the benefit of the evidential status conferred by the 2010 Act*".

47. Counsel submitted that the error in the present case, having regard to the dicta of O'Neill J. in *Weir* (described at para. 31, above), falls under categories (i) and (ii) as set out in O'Malley J.'s judgment in *Avadenei* at para. 91 thereof. Counsel noted that O'Malley J., in analysing these particular categories at para. 42 and 43 of her judgment in *Avadenei*, referred to authorities *People (DPP) v. Greeley* [1985] I.L.R.M. 320 and *DPP v. Cullen* [2014] 3 I.R.

30, and emphasised that these authorities did not involve engagement with the exclusionary rule of evidence but rather whether the defendant was an arrested person which is a condition precedent to the taking of a sample.

48. Counsel for the appellant was critical of the High Court judge's finding at para. 15 of her judgment. The High Court judge stated, *inter alia*:

> "*Having regard to the content of the case stated and the particulars included in para. 6(a) and 6(e) it does appear to me that in the instant circumstances the District Court has found as a matter of fact that the checkpoint was conducted pursuant to the written authorisation and therefore the authorisation was in existence at the time of the checkpoint*".

49. Counsel went on to observe in written submissions that the High Court judge would again find at para. 19 of her judgment that "*the authorisation was in existence at the time of the checkpoint*"; and further that the High Court judge would later observe at para. 20 that:

> "***20.*** *Although the finding of fact identified in paragraph 6(a) of the case stated is not an alternate to the production of the authorisation it is clear that this finding of fact was in addition to the production of the authorisation which is subsequently referred to at paragraph 6(e). The finding of fact is however sufficient to establish that the authorisation was executed prior to 1:40am on 13 October 2019*".

50. Counsel referred the Court to the content of paras. 6(a) and 6(e) of the Appeal by Case Stated (set out in full at para. 5 of this judgment) and noted that following submissions from both parties the District Court judge held for the prosecutor and found, as described at para. 10 of the Appeal by Case Stated:

> "[...] *I gave judgment that I was satisfied that the document authorizes the checkpoint at Bothar Katharine Tynan, Tallaght, Dublin 24 for the date, and time when the Defendant was stopped and the authorization is valid*. [...]".

51. Counsel submitted to this Court that if one were to read paras. 6(a) and 6(e) together, it is clear that the District Court judge found that the authorisation "*expressed itself*" to be an authorisation to establish a checkpoint (to use the language of para. 6(e)). In that context, it was contended that it is clear that in para. 6(a) that the "*checkpoint conducted pursuant to the written authorisation*" was shorthand for "*checkpoint which expressed itself to be conducted pursuant to a written authorisation*". In support of this assertion, counsel for the appellant proffered the following observations/submissions:

> "*(a) There is no explicit finding of fact in para. 6(a) that the checkpoint was conducted pursuant to the authorisation.*
>
> *(b) The use of 'purported' in para. 6(a) of the case stated would be surplusage if the District Court judge had found that the authorisation was in effect at the time of the stop;"*

I pause here to observe that (b) is patently misconceived because contrary to what is suggested the word "*purported*" does not appear anywhere in paragraph 6(a) of the case stated, as the submissions on behalf of the respondent correctly point out. The appellant's observations continue,

> *"(c) There is no explicit finding of fact by the District Court judge that the authorisation came into existence prior to the checkpoint being operated by the gardaí*".

52. Finally, counsel for the appellant made submissions under the heading of "*Right to appeal*". Counsel observed that under s. 14 of the Summary Jurisdiction Act 1857 where an appeal by way of case stated is prosecuted, an appellant can no longer prosecute an appeal *de novo* to the Circuit Court. For clarity, s. 14 of the Summary Jurisdiction Act 1857 provides:

> "***14.*** *Any person who shall appeal under the provisions of this Act against any determination of a justice or justices of the peace, from which he is by law entitled to*

appeal to the quarter sessions, shall be taken to have abandoned such last-mentioned right of appeal, finally and conclusively, and to all intents and purposes".

53. Counsel submitted that the appellant is entitled to prosecute an appeal against his conviction and against the holding that the stopping of the appellant was not unlawful. He was critical of the High Court's approach in the present case, which he described as holding, in effect, that "*the District Court judge found that the authorisation is valid therefore it is*", and which he argued effectively deprived his client of his statutory right of appeal to the High Court under s. 2 of the Summary Jurisdiction Act 1857.

54. Counsel observed that in *Tyrell v. Flanagan* [1901] 2 I.R. 423, Boyd J. (with whom Murphy J. agreed, O'Brien L.C.J. dissenting) held at p. 426 of the Report that:

"*In this case I am of opinion that, as the Justices have not only stated what they actually found as a fact, but the grounds also on which they arrived at their conclusions of fact, this Court is entitled to consider whether those grounds are sufficient in law to support their decision*".

55. It was said that in the instant case, the High Court judge effectively declined to consider the conclusions of the District Court Judge, and that in so doing the appellant was deprived of his right to appeal.

Submissions on behalf of the Director/respondent

56. Counsel for the Director observed in written submissions that the primary issue to be decided in this appeal is whether the judgment of the High Court judge, that upheld the determination of the District Court, should be overruled or upheld. He noted that the essence of the appellant's case is that both the District Court judge and the High Court judge were incorrect to find and to rule that the relevant MIT authorisation was valid and that it did authorise the MIT checkpoint at Bóthar Katharine Tynan on the 13th of October 2019, at which MIT checkpoint the appellant was stopped by Garda O'Donoghue. Counsel further

noted that the appellant had advanced that the written authorisation was invalid by virtue of "*a clear anomaly*" on its face, relating to both the date and time at which it was purportedly signed and in relation to the dates and times of the checkpoints it purported to authorise. He further noted that the appellant had submitted that this "*clear anomaly*" was not explainable by reference to the text of the document itself; that the contended for transgression was less understandable by virtue of the document's confinement of its contents (including G/Insp. Ellard's signature) to a single page, and; that counsel for the appellant had argued that the intention of G/Insp. Ellard when signing the document was unclear, misleading and unintelligible.

57. Counsel for the Director noted that these submissions had been made notwithstanding that there was no suggestion of any person being misled, and that the District Court judge had found that the authorisation was in existence prior to the conduct of the checkpoint at which the appellant was stopped by Garda O'Donoghue. Counsel submitted that the District Court judge properly admitted the evidence in the case, and that the High Court judge correctly answered the case stated. Accordingly, it was said that there is no proper basis for this Court on appeal to intervene or overturn the High Court judge's decision in the case stated. In furtherance of these arguments, he made the following submissions.

58. Counsel for the Director set out the provisions of s. 10 of the Act of 2010 in submissions and therefrom distilled the following statutory requirements for a MIT checkpoint:

> "*(1) It may be authorised by a member of the Garda Síochána not below the rank of inspector;*
>
> *(2) The authorisation must be in writing;*
>
> *(3) The authorisation must specify*
>
> *(i) the date on which the checkpoint is to be established.*

(ii) the public place in which the checkpoint is to be established; and

(iii) the hours at any time between which the checkpoint may be operated".

59. Counsel for the Director submitted that while the appellant purported to rehearse again before this Court the argument advanced in the courts below that the authorisation for the MIT checkpoint at which the appellant was stopped was invalid because it was "*infected*" by the purported retrospective authorisation on the same document of another checkpoint for a different date and time, neither the District Court judge nor the High Court judge were satisfied that there was any such infection and they upheld the validity of the written authorisation. It was stressed that the document, which was in writing, conveyed that G/Insp. Ellard had authorised the second checkpoint at which the appellant was stopped. It had specified the date on which the checkpoint was to be established, the public place at which the checkpoint was to be established, and the hours at any time between which the checkpoint would be operated. Moreover, the appellant did not go into evidence, or offer anything to suggest that he was in any way confused or disadvantaged by what the document conveyed with respect to the second checkpoint. Counsel submitted that the appellant was duly convicted.

60. Counsel acknowledged that in *Weir v. DPP* (cited previously) the High Court noted that a MIT authorisation is the legal act that makes lawful the stopping of drivers at the side of the road (where no other power of arrest is invoked) such that in a drink driving prosecution that flows from a MIT checkpoint, proof of the existence of a written authorisation is essential.

61. He further acknowledged that in *Maher v. DPP and Judge Kennedy* (cited previously) it was held that the calling of oral evidence to clarify an apparent ambiguity in an authorisation is impermissible. Hogan J. held in that case that the normal rule is that authority for an official act should be stated on the face of the relevant instrument: "*the authorization*

(sic) *is a public document affecting legal rights which must speak for itself and any evidence which seeks to explain, supplement or qualify it is not admissible in law*".

62. Counsel for the Director's position was that whilst the appellant sought to rely on these cases, the facts of both of which are readily distinguishable from the facts of the present case, neither case presented the respondent with difficulty. The Director accepts the principles of law which they establish. It was accepted that proof of the existence of a written authorisation is essential. It was further accepted that the calling of oral evidence to clarify an apparent ambiguity in an authorisation is impermissible. However, counsel said that there is no ambiguity within the document at issue insofar as it concerns the authorisation of the second checkpoint, and therefore no clarifying evidence is required.

63. Counsel for the Director asked us to note that in *DPP v James Gregory* (cited previously), the High Court (Barrett J.) confirmed that it is permissible for a written MIT authorisation under s. 10 of the Act of 2010 to authorise multiple checkpoints at multiple locations over a 7-day period. He had no doubt but that when s. 10(3) of the 2010 Act is properly read, it requires any authorisation(s) to be in writing and to specify (a) the date(s) on which, and the public place(s) in which, the checkpoint(s) referred to in the authorisation is or are to be established, and (b) the hours at any time between which it/they may be operated. It was submitted that the MIT authorisation in the appellant's case fully complies with this requirement.

64. Further, counsel for the Director drew the Court's attention to the following passage from para. 9 of Barrett J.'s judgment in *Gregory*:

> "*9. The court is conscious that the end-result of the establishment of a checkpoint may be criminal sanction for one or more individuals. However, the rule that penal statutes be construed strictly does not require that the courts depart from their senses, ascribe statute the most restricted meaning possible no matter how absurd that*

meaning may be, and justify any such absurdity by reference to a canon of construction which, if applied with unmerited abandon, could, in the context of road traffic legislation, see the personal rights of drunk drivers elevated above the personal rights of their potential victims, a state of affairs that the court is entirely confident the Oireachtas did not intend to achieve via s.10 of the Road Traffic Act 2010, as amended".

65. Counsel for the Director observed that the uncontroverted evidence of Garda O'Donoghue was that at 1:40am on the 13th of October 2019 he operated a MIT checkpoint at Bóthar Katharine Tynan pursuant to the written authorisation of G/Insp. Ellard under s. 10(2) of the Act of 2010. Counsel for the Director submitted that it is hence clear that the authorisation in question had already issued at the time Garda O'Donoghue performed the checkpoint. Counsel contended that there is no anomaly on the document or otherwise insofar as that checkpoint is concerned. Counsel stressed that the document speaks for itself, that it is clear, and that it expressly covers the place, the date, and the time at which the appellant was stopped. Counsel refuted any suggestion by the appellant that the document is invalid for want of fulfilling all of the statutory requirements and pre-conditions, stating that all such requirements and pre-conditions were duly fulfilled. It was said that the document was tendered in evidence and was properly admitted.

66. It was argued that the mere fact that the document at issue references another checkpoint at an earlier time and different place is not material to the validity of the authorisation of the checkpoint at which the appellant was stopped; and that any error or ambiguity pertaining to the purported authorisation of another checkpoint on the document is not relevant to the authorisation of the checkpoint at issue, and in respect of which the statutory requirements and pre-conditions were on the face of the document fulfilled. Any

such error or ambiguity was not relevant and was not sufficient to undermine the entire document.

67. Counsel for the Director submitted, without prejudice to his earlier submission that there is no relevant error or ambiguity on the document, that even if there was such an error or ambiguity, Mr. Staunton in his book *Drunken Driving* has noted that an error or ambiguity that is minor in nature will generally be overlooked so long as the authorisation is not misleading, unclear, or unintelligible (para. 3-77 of the aforementioned work, quoted at para. 36 above). Counsel noted that the only ambiguity to which the appellant pointed pertains to a different checkpoint, on a different date, and at a different location, that may or may not ever have been held.

68. Counsel stressed Mr. Staunton's commentary at para. 3-77 of his aforementioned work, in particular his comments to the effect that "*the authorisation must be read in context with the evidence*", and the Court in this regard was referred to the unconverted evidence of Garda O'Donoghue (described at para. 65 above). It was said that the District Court judge had accepted the evidence of Garda O'Donoghue that he had conducted the checkpoint at issue pursuant to a written authorisation of G/Insp Ellard. It followed that any document purporting to grant such authority, whether valid or not, had to have been in existence at the time. Further, as part of the prosecution case a document said to have been that written authorisation was submitted in evidence. The District Court judge, having scrutinised it, was satisfied that although it sought to retrospectively authorise the first checkpoint, an irregularity that would have invalidated the authorisation of the first checkpoint, that irregularity did not impact the validity of the authorisation of the second checkpoint. It was submitted that the District Court judge properly determined the matter.

69. Insofar as counsel for the appellant purported to adopt Mr. Staunton's suggestion that in determining the validity of an MIT authorisation it is helpful to draw on the jurisprudence

in relation to search warrants, it was submitted by counsel for the Director that the High Court judge properly addressed the appellant's submission in this regard. Counsel for the Director observed that the High Court judge found this analogy to be limited owing to differences between the status of search warrants and compliance with a penal statute. It was further observed that, notwithstanding that distinctions can be drawn, "*the general proposition*" in relation to search warrants is that they must contain the statutory power pursuant to which they are issued and the statutory preconditions for their issue must be satisfied. It was said that whilst a defect that goes to jurisdiction will result in a warrant being declared invalid, minor mistakes will not automatically render a warrant void. Counsel referred the Court to the dicta of the former Court of Criminal Appeal in *Jagutis* (previously cited) and noted that that court had observed that where there is an error, the key issue is whether that error is material in the sense of failing to provide the person affected with sufficient information to assess the validity of its compulsion and their obligations under it. It was said that an assessment of this issue requires a consideration of whether any inaccuracy that can be pointed to is truly material in the sense that it might fail to provide a person who is required, under penalty, to comply with its terms, sufficient information to assess its validity, and what precisely it authorises.

70. Turning to the present case, counsel for the Director submitted that the appellant can be in no doubt from the detail on the face of the written authorisation, which was under the signature of a member of the Garda Síochána not below the rank of inspector, that it permitted the MIT checkpoint at Bóthar Katharine Tynan at 1:40am on the 13th of October 2019 at which the appellant was stopped. It was said, therefore, that the written authorisation complied fully with the relevant requirements for its admission under s. 10(11) of the Act of 2010. It was to be treated as evidence, unless the contrary was shown, of the facts stated in it. The contrary was not shown. Further, the document did not contain any mistake or ambiguity

in respect of the relevant MIT checkpoint, such as to invite a consideration of the law in relation to search warrants.

71. It was submitted that in the circumstances neither the *Dunne* and *Avadenei* cases, to which the appellant had referred the Court, are on point here and that they are not relevant precedents.

72. Counsel for the Director stated that in all of the circumstances, the express findings of fact made by the District Court judge were open to her on the evidence and her rulings were properly upheld by the High Court. On this point, counsel for the Director emphasised the difference between an appeal by way of case stated and an appeal *de novo*, referencing the principles as set down by the Supreme Court in *Mara v. Hummingbird Ltd.* [1982] I.L.R.M. 421, wherein Kenny J. stated at p. 426:

> "[...] *The line between questions of law and those of fact can rarely be drawn firmly so as to separate one from the other.*
>
> *A case stated consists in part of findings on questions of primary fact* [...]. *These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them*".

73. Counsel noted that the above test, the so-called "*Hummingbird test*", was adopted by the Supreme Court (Blayney J.) in *Ó Cúlacháin v. McMullen Brothers Ltd.* [1995] 2 I.R. 217 at p. 222-223:

> "[...] *it seems to me that when a court has before it a case stated seeking its opinion as to whether a particular decision was correct in law, the following principles apply* [...]:
>
> [...]
>
> *(5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not*

be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonably judge could not have arrived at them or they are based on a mistaken view of the law".

74. Blayney J. went on, at p. 226 of the judgment in *Ó Cúlacháin*, to state:

"*Having regard to the principles which I set out earlier governing the manner in which a case of this kind must be approached, it seems to me that since Judge Martin's conclusion is not based on a mistaken view of the law, it being common case that he correctly set out in his judgment (which is incorporated in the case stated) the law to be applied, what the Court has to do is to consider whether his conclusion is one which no reasonable judge could not have arrived at. If it is, it must be set aside, but otherwise it cannot be disturbed even if the Court should disagree with it, since we are not retrying the case. The view I take is that Judge Martin's conclusion is not one which a reasonable judge could not have reached and accordingly that Lardner J. was correct in the manner in which he held that the question posed in the case stated should be answered*".

75. Counsel for the Director further observed that a similar rationale is reflected in the judgment of Clarke J. (as he then was) in *Clifford v. DPP (Garda McLoughlin)* [2013] 2 I.R. 396, at para. 14:

"It is important to emphasise that the issue that was before Charleton J. in the High Court and that is before this court on appeal is not as to whether the District Judge was factually correct to make a finding either of intent or recklessness but, rather, whether it was open, on the evidence, to the District Judge to reach such a conclusion. If it were open to the District Judge to find either the necessary intent or recklessness, then the proper means for dealing with any concern which Mr. Clifford might have had as to whether the District Judge's conclusion on that question was in

fact correct on the merits was by an appeal to the Circuit Court rather than by case stated. That procedural distinction is no mere technicality. The purpose of the case stated procedure is to deal with a point of law arising in, in a case such as this, the District Court, so that the point can be definitively determined by the High Court, or, if necessary, on appeal from the High Court, by this court. On the other hand, an appeal on the merits by way of complete rehearing is open to any accused convicted in the District Court. The distinction between an appeal and a case stated is, therefore, one of substance rather than technicality. Those aggrieved by a decision of a District Judge on the merits of the facts have their remedy in an appeal to the Circuit Court where all the witnesses are reheard. Those who feel that the District Judge is wrong in law have the option, in addition to or instead of an appeal, of seeking, as Mr. Clifford has done, a case stated. But the case stated procedure is confined to points of law. Where, therefore, the issue is as to whether a District Judge was correct in reaching a conclusion on the evidence that a particular charge had been made out, the issue of law likely to arise (and which did arise in this case) is solely as to whether, as a matter of law, it was open to the District Judge to reach such a conclusion. Provided it was so open to the District Judge, it is no function of either the High Court or this court to form a view as to whether the District Judge was right on the merits".

76. It was submitted that this jurisprudence was applied again recently in the High Court's decision (per Twomey J.), in *Byrne v. Revenue Commissioners* [2021] IEHC 262 to decline to upset a first instance decision made by the Tax Appeal Commissioner.

77. It was submitted that the fundamental distinction between a case stated and an appeal *de novo* is sufficient to answer the appellant's appeal wherein he purports to challenge the findings made by the District Court judge that were open to her on the evidence. It was said

that notwithstanding that it was entirely reasonable for the District Court judge to have found as she did, and that the High Court agreed with her determination, the appellant has nonetheless pressed this further appeal against the finding that the MIT authorisation was valid and that the stopping of him at the checkpoint by Garda O'Donoghue was unlawful. Counsel for the Director submitted that, having regard to paras. 6(a) and 6(e) of the Appeal by Case Stated (quoted at para. 5 of this judgment), there was no proper basis for the appellant to assert that the District Court judge did not expressly find as a fact that the checkpoint was conducted pursuant to a written authorisation under s. 10 of the Act of 2010. Reading these two paragraphs together, it was said that it was apparent that the document in question was in existence at the time the appellant was stopped. It was observed that the contention in the appellant's written submissions that the use of the word "*purported*" in para. 6(a) would be surplusage if the District Court judge had so found is undermined by the fact that the said word does not appear in the text of para. 6(a).

Analysis & Decision

78. Following a careful consideration of the parties' submissions, and having reviewed the authorities cited on both sides, and the evidence, I am satisfied to uphold the decision of the High Court judge as having been correct.

79. In circumstances where it has been held that a document in writing containing a written authorisation for a checkpoint the purposes of s. 10 of the Act of 2010, may contain more than one such authorisation, I see no reason in principle why, in appropriate circumstances, so much of the text as is expressed to relate to one checkpoint may not be isolated and severed from text relating to another checkpoint (or other checkpoints), with impugned text being discarded and the remainder retained. The issue is whether it was appropriate to do so in the circumstances of this case, bearing in mind the caselaw that has been cited on both sides.

80. To answer that question, it is necessary to consider both the nature and quality of the claimed "*infection*" (to adopt the language used by the appellant) of one by the other. In that context the following questions seem to me to be pertinent:

(a) Does one purported authorisation depend on the other in any way?

(b) Are they inextricably linked in some way?

(c) If not inextricably linked, are they linked by some shared text or text in common, and if so, is that shared or common text in some way erroneous or ambiguous?

(d) If there was to be a severance, would the fact of severance itself create any lack of clarity or confusion as to what was being authorised in so far as the retained portion is concerned?

(e) Most critically of all, if there were to be severance, would the retained text standing on its own satisfy the statutory criteria for validity set out in s.10 of the Act of 2010? These are that:

(1) the authorisation is signed by a member of the Garda Síochána not below the rank of inspector;

(2) the authorisation is in writing;

(3) the authorisation specifies:

(i) the date on which the checkpoint is to be established.

(ii) the public place in which the checkpoint is to be established; and

(iii) the hours at any time between which the checkpoint may be operated.

81. The authorisation document at issue in this case was in these terms:

" *Mandatory Intoxicant Testing*

(Authorisation to establish a Checkpoint or Checkpoints)

Section 10 Road Traffic Act 2010, as substituted by section 11

Road Traffic Act 2016.

I: Denis Ellard: a member of An Garda Siochana not below the rank of Inspector, in accordance with the provisions of section 10 of the Road Traffic Act 2010, as substituted by section 11 of the Road Traffic Act 20161 authorise the establishment of a checkpoint or checkpoints as set out hereunder :

(1) On (Date) 12th October 2019 at N81 (Between M50 J.11 & Glenview Roundabout), Tallaght, Dublin 24 (a public place) between the~ hours of 12:45 & 23:45

(2) On (Date) 13th October 2019 at Bóthar Katherine Tynan, Tallaght, Dublin 24 (a public place), between the hours of 01:00 &: 02:00.

SIGNED: Denis Ellard RANK: Inspector

DATED: 13/10/2019"

82. I am satisfied that, in the circumstances of this case, queries (a), (b), and (d) at para. 80 above can all be answered in the negative. Insofar as (c) is concerned, while the title, first paragraph and attestation of the document represents shared or common text when read in conjunction with either paragraph (1) or paragraph (2), it is not suggested that that shared or common text is itself erroneous or ambiguous. Neither is there any ostensible inhibition to considering the shared or common text with either paragraph (1) or paragraph (2) separately. Paragraphs (1) and (2) are in no way interlinked and do not in any way depend on each other for their meaning. When the shared or common text is read in conjunction with paragraph (1) of the document in isolation, there is an apparent error or ambiguity in that the document so read purports to retrospectively authorise the first checkpoint. Equally, when the shared or common text is read in conjunction with paragraph (2) of the document, again in isolation, there is on this occasion no apparent error or ambiguity. Rather, it is entirely clear as to what

is being authorised insofar as the second checkpoint is concerned. Finally, query (e), and its component subparts, at para. 80 above can all be answered in the affirmative.

83. In those circumstances I see no reason why so much of the authorisation document as was contained in paragraph (1) thereof could not be severed and the remainder which related to paragraph (2) and which expressed itself to be an authorisation by G/Insp Ellard of Tallaght Garda Station under s. 10(2) of the Act of 2010 in respect of a mandatory intoxicant (MIT) checkpoint "o*n (Date)13th October 2019 at Bóthar Katharine Tynan, Tallaght, Dublin 24 (a public place), between the hours of 01:00 & 02:00*", could not have been retained and relied upon. I consider that the District Court judge was correct in having done so, and I uphold the judgment and reasoning of the High Court judge in answering the questions posed in the case stated as she did.

84. Nothing in the case law cited by the appellant suggests that severance may not be effected in an appropriate case, i.e., where the error is not a fundamental one. For the avoidance of any doubt, I expressly find that insofar as the authorisation document contained text that was erroneous or ambiguous, the nature of the error or ambiguity was not of a fundamental nature inasmuch as on any reasonable construction it only potentially affected one of the two purported authorisations, namely that in paragraph (1) of the written authorisation. There was absolutely no evidence to support any suggestion that the document was not in existence at the time that Garda O'Donoghue stopped the appellant at the second checkpoint. On the contrary, it was legitimately open to the District Court judge based on Garda O'Donoghue's evidence, which was uncontroverted, to conclude that it was in existence, as she patently did.

85. I would dismiss the appeal.

McCarthy J.: I agree.

Burns J.: I also agree.