

Appendix FF

Order 58, rule 15

No. 1

SUPREME COURT

Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from	
<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court

[Title and record number as per the High Court proceedings]

Director of Public Prosecutions		V James Corrigan	
High Court Record Nr	2015/441 SS	Court of Appeal Record Nr	2015/456
Date of filing		April 2017	
Name(s) of Applicant(s)/Appellant(s)		James Corrigan	
Solicitors for Applicant(s)/Appellant(s)		Sean Costello & Co.	
Name of Respondent(s)		Director of Public Prosecutions	
Respondent's solicitors		Chief Prosecution Solicitor	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?			
<input checked="" type="checkbox"/> Yes		<input type="checkbox"/> No	
If yes, give [Supreme Court] record number(s)			

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Mahon, Sheehan & Edwards JJ.
Date of order/ Judgment	Judgment delivered on 21.12.15 and order perfected on 19.04.17

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	James Corrigan
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Original status

<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input checked="" type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party

Solicitor	Andrew Freeman		
Name of firm	Sean Costello & Co.		
Email	andrew.freeman@costellosolicitors.ie		
Address	Haliday House, 33 Arran Quay, Dublin 7.	Telephone no.	0 1872 53 76
		Document Exchange no.	1094 Four Courts
Postcode	7	Ref.	N/A

How would you prefer us to communicate with you?

<input type="checkbox"/> Document Exchange	<input checked="" type="checkbox"/> E-mail
<input checked="" type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

Counsel			
Name	Mr Feichín McDonagh, SC.		
Email	eftmcd@indigo.ie		
Address	PO Box 5939 145-151 Church Street Dublin 7 Law Library, Four Courts, Dublin 7.	Telephone no.	01-8174523
		Document Exchange no.	816318
Postcode	N/A		

Counsel			
Name	David Staunton BL		
Email	mail@davidstaunton.ie		
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		Document Exchange no.	813232
Postcode	N/A		

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?			
<input type="checkbox"/> Document Exchange	<input type="checkbox"/> E-mail		
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)		

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	Director of Public Prosecutions
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Original status	<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	Is this party being served with this Notice of Application for leave?	
	<input type="checkbox"/> Applicant	<input type="checkbox"/> Respondent		
	<input checked="" type="checkbox"/> Prosecutor	<input type="checkbox"/> Notice Party		
	<input type="checkbox"/> Petitioner			
			Yes	<input checked="" type="checkbox"/> No <input type="checkbox"/>

Solicitor			
Name of firm	Chief Prosecution Solicitor		
Email			
Address	Solicitors Division, Office of the DPP, 90, North King Street, Dublin 7	Telephone no.	01-8588500
		Document	N/A
		Exchange no.	
		Ref.	N/A
Postcode	N/A		

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/> Document Exchange	<input type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

Counsel			
Name	Mr Paul Anthony McDermott, SC		
Email			
Address	No. 2, Arran Square, Arran Quay, Dublin 7	Telephone no.	01-874 6842
		Document	810134
		Exchange no.	
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document	
		Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

	Document Exchange
	Post

	E-mail
	Other (please specify)

4. Information about the decision that it is sought to appeal

Please set out below:

It is sought to appeal against the entire decision of the Court of Appeal.

- a. This application relates to an application for leave to appeal against the decision of the Court of Appeal on appeal from the High Court where the action before the High Court was an appeal by way of Case Stated pursuant to section 2 of the Summary Jurisdiction Act, 1857 as extended by section 51 of the Courts (Supplemental Provisions) Act, 1961.
- b. This case stated relates to a hearing of a summary charge against the Applicant which was heard in the Dublin Metropolitan District Court, sitting at Court No. 8 at the Criminal Courts of Justice, Dublin 8, before Judge Bryan Smyth, on the 28th of May, 2014, on foot of Charge Sheet No. 14497721:

"On the 09/02/2014 at Finglas Road Finglas Dublin 11a public place in the said District Court Area of Dublin Metropolitan District, did drive a mechanically propelled vehicle registration number 131D3384 while there was present in your body a quantity of alcohol such that, within 3 hours after so driving, the concentration of alcohol in your breath did exceed a concentration of 22 microgrammes of alcohol per 100 millilitres of breath, to wit 69 microgrammes.

Contrary to Section 4(4)(a) & (5) of the Road Traffic Act 2010."

- c. The evidence proved or admitted before the District Judge is as follows:
 - i. Garda David Kenny of the Regional Traffic Division, Dublin Castle, gave evidence for the prosecution. He stated that on the date in question he was an observer in a Garda patrol Jeep travelling northbound on the M50 at Lucan at approximately 100kph. The roads were wet and it was raining. He noticed a white Ford Focus van travelling at excessive speed in the outside lane which overtook their Jeep. They followed it and it was travelling at about 130kph. They activated the lights and stopped the vehicle. The reason provided by the Garda for stopping the vehicle was the 'manner of driving'.
 - ii. Evidence was given about performing a road side breath test and the formation of an opinion to ground an arrest under s.4(8) of the Road Traffic Act 2010. Nothing turns on that for the purpose of this case stated.
 - iii. Under cross-examination, Garda Kenny stated that the Accused was handcuffed on arrest. He stated that he makes an assessment every time he arrests someone and that the Accused was handcuffed for his own safety, the safety of Garda Kenny and for the safety of other road users because they were standing on the side of the M50, a very busy motorway with a lot of traffic, and if the Accused decided that he didn't want to get into the back of the car, the Gardai would be struggling with a man on the side of a very busy motorway and there could have been a major incident. Garda Kenny accepted that the accused had been

compliant and agreed that the Accused was showing exemplary behaviour up to that point. Garda Kenny also accepted that the handcuffing was precautionary in nature. Garda Kenny accepted that the handcuffs were placed on the Accused on a 'if he decided' basis rather than any indication of non-compliance.

- iv. Evidence was given about bringing the Accused to Ballyfermot Garda Station and performing a breath test on the Intoxilyser. Nothing turns on that for the purpose of this case stated. A copy of the resulting Section 13 statement is appended to this case stated at Appendix B.
- v. Submissions were made by both sides as regards the applicability and scope of the decision of the Supreme Court in *DPP v Cullen* [2014] 3 IR 30.
- vi. An application was made on behalf of the Accused regarding the manner of the arrest and the use of handcuffs. It was submitted that the accused behaved exemplarily and that there was no difficulty posed by him. It was submitted that when asked for the basis for the use of handcuffs the Garda said the application of same was precautionary in nature '*in case*' or '*if the accused caused trouble after the arrest had been communicated to him*'. It was submitted on behalf of the accused that the present case was on all-fours with the *Cullen* decision as it deals with the arrest and the precautionary use of handcuffs. It was submitted that the lawfulness of the arrest predicates a requirement under Section 12(1)(a) of the Road Traffic Act 1994 and that if the arrest was unlawful, the evidence obtained is inadmissible. Therefore, there was no admissible evidence to prove an allegation for Section 4(4) of the 2010 Act.
- vii. The prosecution disagreed that the case before the court was on all-fours with the *Cullen* decision and submitted that the decision in *Cullen* allowed the Court to take into account the context of the situation and not just the behaviour of the accused. She pointed out that, in this instance, the arrest took place at the side of the M50 where cars were travelling at speed, and that the arresting Garda made an assessment of the situation and decided to handcuff in the circumstances for the safety of all involved. She submitted that the evidence was that the Garda had made an assessment in the circumstances of the case and there was no evidence of any policy of handcuffing. The prosecution submitted that the Garda made an assessment that was reasonable in the circumstances of the case.
- viii. In reply to the prosecution submissions and to the context of being on the side of the M50, it was submitted on behalf of the accused that the Court can take on board any explanation that is offered but the Court has to take on board whether the explanation is based on any substance, given the context, and the previous disposition of the accused. It was submitted that the behaviour of the accused was the important context and in the absence of anything pertaining to the behaviour of the accused, the Court should not have regard to a context which was baseless. It was submitted that the use of handcuffs was precautionary and that is what the evidence in *Cullen* was. The Garda has to assess was this required on the basis of the previous disposition of the accused. It was submitted on behalf of the accused that the accused had behaved in an exemplary fashion and that the handcuffing was precautionary in

circumstances where he had not caused any trouble. It was also submitted on behalf of the accused that the endorsement of Fennelly J of the decision in *DPP v Davis* [2001] I.R.146 where the public depiction of the unconvicted person in double restraints, in a position of humiliation and indignity when there was no requirement to do it, was pertinent to this case in that a person on the roadside in the restraints of handcuffs would have attracted the attention of the members

- d. Having carefully considered the submissions of the parties the District Court judge held that the handcuffing was not justified as a precautionary measure and dismissed the case on the basis of the decision in *DPP v Cullen*.
- e. The Respondent herein applied to appeal the decision of Judge Bryan Smyth by way of case stated to the High Court. Having heard submissions from both parties, Judge Bryan Smyth ultimately stated a case and posed the question: "*Was I correct in law to find the arrest unlawful?*".
- f. The Applicant's case was listed and heard with two other appeals which are set in the judgments of the High Court and Court of Appeal.
- g. The appeal was heard in the High Court (Barrett J.) and judgment was delivered on the 16th of July, 2015 wherein Barrett J. answered the question posed in the negative.
- h. By notice of an ordinary appeal, the Applicant herein appealed the decision of Barrett J and the Court of Appeal heard the appeal from the decision of the High Court on the 15th of November, 2016.
- i. Judgment was delivered (judgment of Mahon J. on behalf of the Court) on the 21st of December, 2016, dismissing the appeals, and the orders of the Court were perfected on the 29th of March, 2017.

The relevant orders and findings made in the High Court and/or in the Court of Appeal:

a. In the High Court:

- i. It was found that the District Court Judge was incorrect in law in finding that the arrest of the Applicant was unlawful;
- ii. The Court found that the District Court Judge contravened principles established in the decision of *DPP (Moyle) v Cullen* [2014] 3 IR 30 in reaching the conclusion that the arrests were unlawful. The learned High Court Judge found that the District Court Judge *afforded "an insufficiently generous measure of judgement"* and *"insufficient latitude"* to the arresting members of the gardaí. The learned High Court Judge further found that the findings of the District Court Judge *"contravened"* the principles in *Cullen* namely that the District Court Judge *"had insufficient regard to the uncommonness of the situations in which handcuffing will in practice be found to be unlawful"* and that the District Court Judge had *"insufficient regard to the slowness with which the courts will tend to review the operational decisions of individual Gardai"*.
- iii. The learned High Court Judge further found that the fact the District Court Judge posed the question "*Was I correct in law to find the arrest unlawful?*" constituted a *"question of law"* for the purposes of the jurisdiction of the Court to hear an appeal by way of Case Stated under s.2 of the Summary

Jurisdiction Act 1857. s.2 of the Summary Jurisdiction Act 1857s.2 of the Summary Jurisdiction Act 1857

- iv. The question posed in the case stated was answered in the negative;
- v. No order for costs were made against the Applicant;
- vi. The learned Judge remitted the case to the Judge of the District Court for the continuance of the hearing of the matter.

b. In the Court of Appeal:

- i. The Court found that the Judge of the District Court failed to have appropriate regard to the decision in *DPP v Cullen* [2014] 3 IR 30;
- ii. The Court found that the legal test for the valid application of handcuffs was where "*it is deemed appropriate and/or necessary*" and that the decision to apply handcuffs is "*essentially a decision to be made by the arresting officer having regard to the circumstances pertaining at the time*".
- iii. The Court found that the test for the use of handcuffs should be "*primarily subjective rather than objective reasonableness*" and that the test was not one of objective reasonableness. The Court found that the test to be considered was whether the arresting member of the gardaí "*made a genuine, albeit subjective, assessment as to what exigencies of the situation required*".
- iv. The Court reviewed the decision of the District Court judge to see whether the fact finding process employed by the District Court Judge in order to ascertain whether the findings of fact were "arrived at properly and in compliance with applicable legal principles" and in order to ascertain "if a point of law exists". The Court considered that there was a misapplication of the law arising from *DPP v Cullen* [2014] 3 IR 30. The Court found that the District Court Judge failed to apply *Cullen* correctly.
- v. The Court agreed with the decision of the learned High Court Judge by answering the question posed by the District Court Judge in the negative, thereby dismissing the appeal;
- vi. The Court remitted the matter to the Judge of the District Court for the continuance of the hearing of the matter and;
- vii. The Court made no order as to costs.

5. Reasons why the Supreme Court should grant leave to appeal

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—

- i. This case raises important questions of public importance regarding the scope and availability of appeals by way of case stated under s.2 of the Summary Jurisdiction Act, 1857 and the basis upon which the Superior Courts can entertain an appeal against an acquittal. Of particular importance is the legitimate scope of any such appeal, for both the DPP and accused persons, and as to what may constitute a 'point of law';
- ii. The appeal involves a matter of general public importance as the legal test for the legitimate use of handcuffs in effecting an arrest has been the subject of apparently conflicting dicta as between judgements in the Supreme Court (referred to below) and, now, the Court of Appeal;
- iii. This appeal concerns an issue of general public importance to the extent that there are significant number of live prosecutions at the suit of the Respondent which are pending or have been adjourned awaiting a final decision in the present case.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

Grounds of Appeal and errors of law.

- i. The Court of Appeal erred in holding that the facts found by the District Court Judge gave rise to a "*point of law*" amenable to an appeal by way of Case Stated against the acquittal of the Applicant.
- ii. The Court of Appeal erred in holding that the District Court Judge was incorrect in law to find the arrest of the Applicant was unlawful.
- iii. The Court of Appeal erred in law in holding that the test as to the justifiable use of handcuffs was primarily subjective rather than objective reasonableness and that learned trial Judge need only be satisfied that the arresting Garda had made a genuine, albeit subjective, assessment as to what the exigencies of the situation required, and had acted on the basis of that assessment and not on foot of some blanket policy to use handcuffs;
- iv. The Court of Appeal erred in holding that the District Court Judge had misapplied and misinterpreted the law as stated in the Supreme Court decision in *DPP v Cullen* [2014] 3 IR 30;
- v. The Court of Appeal erred in failing to have regard to the fact that the District Court Judge relied on the decision of Clarke J. (dissenting in part but on this issue agreeing with the majority) in *DPP v Cullen* [2014] 3 IR 30 at paras.50 and 70 of the report where the trial court was held entitled to apply an objective test regarding the use of handcuffs;

Legal Principles related to each numbered ground.

Grounds i, ii, iii and iv:

- a) The decision in *DPP v Cullen* [2014] 3 IR 30 considered the legality of using of handcuffs at the point of an arrest. That case arose as a consultative case stated from the Circuit Court hearing an appeal from the District Court. In that case, a question posed by the Circuit Court Judge was:

"On the evidence adduced was I entitled to hold that the placing of handcuffs on the accused following arrest was unjustified on the grounds Sergeant Moyles did not believe the particular accused was likely to resist arrest or was likely to attempt to escape from lawful custody unless so restrained?"

- b) The Supreme Court answered the question in the affirmative.
- c) In so answering the case stated in the affirmative, the Supreme Court (judgment of Fennelly J with whom Hardiman J concurred) also set out a standard of "reasonableness" as to whether the use of handcuffs was justified. At paragraph 39 of the judgment, Fennelly J stated:

"In my view, it is unlawful to place handcuffs on suspects who are being arrested without giving any consideration to the context and in particular to the behaviour and demeanour of the individual being arrested. It is unlawful because, as a matter of principle, the police must use only such force as is reasonable in the circumstances: I emphasise, of course, that it is the police officer who must make that judgment."

- d) Clarke J, whilst dissenting on a separate issue, was in agreement with Fennelly J regarding the absence of justification for the use of handcuffs. At para.70 Clarke J held:

" ... I would hold that the trial judge was entitled to form the view that the placing of handcuffs on Mr Cullen was unjustified on the grounds that the relevant sergeant did not believe (and had no basis for believing) that Mr Cullen was likely to resist arrest or escape unless so constrained."

- e) The Judge of the District Court in this case found that the evidence as to the reasons for the handcuffing *"did not show any indication that the application of handcuffs was objectively justified"* and found that the arrest was unlawful.
- f) By holding the that the District Court Judge erred by applying a test of objective reasonableness is inconsistent with the decisions of Fennelly and Clarke JJ in *DPP v Cullen* [2014] 3 IR 30 wherein considering the use of handcuffs on the basis of objective reasonableness was an entirely legitimate matter for the District Court judge to consider.

Ground v:

- a) Section 2 of the Summary Jurisdiction Act, 1857 as extended by section 51 of the Courts (Supplemental Provisions) Act, 1961 provides that an appeal by way of Case Stated to the High Court arises only where the District Court Judge was "*erroneous in point of law*". Indeed, as confirmed by Hardiman J in *Fitzgerald v DPP* [2003] 3 IR 247, an appeal by way of case stated against an acquittal must be strictly limited to a "*question of law*". The "*status of near inviolability classically afforded to an acquittal*" means that scope of an appeal under s.2 of the 1857 Act is severely limited.
- b) In *Proes v Revenue Commissioners* [1998] 4 IR 172, Costello P confirmed the jurisprudence that findings of fact, in cases the subject of appeals by way of cases stated, should not be disturbed or subject to review except where no reasonable judge could have come to that conclusion or that there is a mistaken view of the law.
- c) In this case, the District Court Judge applied a test of objective reasonableness, in accordance with the Supreme Court decision in *DPP v Cullen* [2014] 3 IR 30 and found, as a fact, that the arrest of the Applicant was not justified. The District Court Judge's decision is not one that "*no reasonable judge*" could have come to. Indeed, the District Court Judge was entitled to find the arrest of the Applicant unlawful and unjustified as was the Circuit Court Judge in the decision of *DPP v Cullen* [2014] 3 IR 30.
- d) The Court of Appeal found that the District Court Judge failed to apply the principles enunciated in *DPP v Cullen* [2014] 3 IR 30 however, in doing so, in effect looked behind the fact finding process employed by the District Court judge, which was impermissible.
- e) It is submitted that the effect of the Court of Appeal decision means that an inferior court's findings of fact are subject to review in an appeal by way of case stated. This is contrary to the established jurisprudence whereby a reassessment of the evidence heard by the inferior court is not permissible.

The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely:

- i. Section 2 of the Summary Jurisdiction Act 1857;
- ii. Section 51 of the Courts (Supplemental Provisions) Act 1961;
- iii. Section 4 of the Road Traffic Act 2010;
- iv. Section 12 of the Road Traffic Act 2010.

The issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal

- i. The question as to whether the learned District Court Judge was correct in law, having regard to the judgment in *DPP v Cullen* [2014] 3 IR 30, in finding the arrest of the Applicant unlawful and whether the justification for the use of handcuffs should be based on "*primarily subjective rather than objective*"

reasonableness";

- ii. The scope and availability of appeals by way of case stated under s.2 of the Summary Jurisdiction Act, 1857 and the basis upon which the Superior Courts can entertain an appeal against an acquittal. The question as to whether the Superior Courts can allow an appeal by way of case stated against an acquittal where no "*error of law*" was identified and the challenge was to the findings of fact made by the District Court Judge — findings which he was entitled to make and whether such findings were amenable to review.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

Feichín McDonagh, SC.

David Staunton BL.

7. Other relevant information

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

[2015] IEHC 671 and [2016] IECA 413

References to Law Report in which any relevant judgment is reported

N/A

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

- i. An order allowing the appeal from the decision of the Court of Appeal and answering the question posed by the District Court Judge in the affirmative.

What order are you seeking if successful?

Order being appealed: set aside ☒ vary/substitute ☐

Original order: set aside ☐ restore ☒ vary/substitute ☐

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

N/A

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

N/A

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

☐ Yes

☒ No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

☐ Yes

☒ No

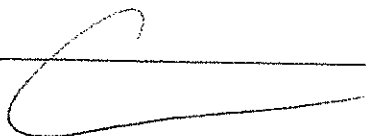
If Yes, please give details below:

Will you request a priority hearing?

☐ Yes

☒ No

If Yes, please give reasons below:

Signed: 

(Solicitor for) the applicant/appellant

Please submit your completed form to:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.