

**An Chúirt Uachtarach  
The Supreme Court**



**DETERMINATION**

**BETWEEN**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**APPLICANT**

**AND**

**DISTRICT JUDGE ELIZABETH MCGRATH**

**RESPONDENT**

**AND**

**JOHN MATTHEWS AND GERARD GEARTY**

**NOTICE PARTIES**

**Neutral Citation:** [2021] IESCDET 17

**Supreme Court record no:** S:AP:IE:2020:000111

**Court of Appeal record no:** A:AP:IE:2014:000349 and A:AP:IE:2014:000359

**High Court record no:** 2009 No. 1327 JR

**Date of Determination:** Tuesday, 9<sup>th</sup> February 2021

**Composition of Court:** O'Donnell J., Charleton J., Woulfe J.

**Status:** Approved

**APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.3° OF THE  
CONSTITUTION APPLIES**

**RESULT:** The Court grants leave to the Applicant to appeal to this Court from the Court of Appeal

**REASONS GIVEN:**

**ORDER SOUGHT TO BE APPEALED**

**COURT:** Court of Appeal

<b>DATE OF JUDGMENT OR RULING:</b> 20 <sup>th</sup> December, 2019
<b>DATE OF ORDER:</b> 20 <sup>th</sup> December, 2019
<b>DATE OF PERFECTION OF ORDER:</b> 16 <sup>th</sup> October, 2020
<b>THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 16<sup>th</sup> October, 2020 AND WAS IN TIME.</b>

### **General consideration**

1. The general principles applied by this court in determining whether to grant or refuse leave to appeal, having regard to the criteria incorporated into the Constitution as a result of the Thirty-third Amendment have now been considered in a large number of determinations and are fully addressed in both a determination issued by a panel consisting of all of the members of this court in *B.S. v. Director of Public Prosecutions* [2017] IESCDET 134, (Unreported, Supreme Court, 6 December 2017) and in a unanimous judgment of a full court in *Quinn Insurance Ltd. v. PricewaterhouseCoopers* [2017] IESC 73, [2017] 3 I.R. 812. The additional criteria required to be met in order that the so-called leapfrog appeal directly from the High Court to this court can be permitted were addressed by the court in *Wansboro v. Director of Public Prosecutions* [2017] IESCDET 115, (Unreported, Supreme Court, 20 November 2017). Accordingly, it is unnecessary to revisit the new constitutional architecture for the purpose of this determination.
2. Furthermore, the application for leave filed and the respondent's notice are published along with this determination (subject only to any redaction required by law) and it is therefore unnecessary to set out the position of the parties in any detail. No aspect of this ruling has precedential value as a matter of law.

### **Decision**

3. This determination concerns a decision of the Court of Appeal as above which dismissed an appeal by the applicant, The DPP. The respondent in this case is District Court Judge McGrath, the Judge, and the Notice Party who is part of this application is Mr Matthews. The DPP sought a judicial review of an order of costs handed down by the District Court. The issue which the applicant seeks to raise is whether the District Court has jurisdiction to make such a costs order against the DPP or a member of An Garda Síochána in criminal proceeding. The context of the issue is that the cost order was handed down by the Judge as a result of prosecutions brought against the two Notice Parties that were then abandoned by

the DPP. In the application, the DPP states these reasons as to why a further appeal should be allowed in the interests of justice (quoted without correction):

1. It is in the interests of justice that there is clarity on the jurisdiction of the District Court to make costs orders as against the Applicant or a member of An Garda Síochána.
  2. It is in the interests of justice that certain categories of prosecutor (i.e. those stated in Order 36 Rule 1 of the District Court Rules) do have immunity from costs orders in the District Court.
  3. The longstanding exemption from costs orders enjoyed by the Applicant and members of An Garda Síochána has been upheld by the Supreme Court in *Dillane v Ireland* [1980] ILRM 167, on the basis of, inter alia, " ... the desirability that members of the Garda Síochána; should be encouraged to discharge their police duties assiduously by being given immunity from liability for costs or witnesses' expenses in the District Court – this discrimination could reasonably be thought a justifiable concomitant of the social functions of the members of the Garda Síochána when carrying out their duties as police officers." The interests of justice lean in favour of this appeal being permitted for those identified reasons.
  4. The interests of justice are related to the public interest in the prosecution of offences. This appeal should be permitted so as to determine whether the Applicant or a member of An Garda Síochána has an immunity from a costs order in the District Court.
4. The applicant seeks leave to appeal to this Court to obtain clarity as to whether the District Court has jurisdiction to hand down a costs order in criminal proceedings, and if the DPP or a member of An Garda Síochána can have costs awarded against them or if they have immunity from an order of costs in the District Court. The proceedings comprise a Judicial Review taken by the OPP to quash an Order for costs handed down by the District Judge. The DPP's challenge was based on the claim that "no power vested in the District Court to award costs against the applicant in summary criminal proceedings". Mr Matthews opposed the challenge on the basis that the power to make the costs order in question was conferred by section 59 of the Dublin Police Act, 1842, and devolved onto the District Court through successive legislation. The DPP acknowledged the existence of the relevant

statutory provisions but argued that the power to award costs as against State prosecutors had been removed by Order 36 rule 1 of the District Court Rules. This is said to be a valid exercise of the powers of the rule-making committee, akin to powers exercised by all such committees under the Courts Acts.

5. It is argued that the District Court does not have the power to award costs against the applicant in summary criminal proceedings as a result of Order 36 Rule 1 of the District Court Rules, 1997 as the general provision in the Courts Acts is said not to suffice for a court to award costs, it being claimed that only primary legislation suffices. Hanna J in the High Court quashed the order of costs. In the Court of Appeal, Edwards J overturned the decision of the High Court:

It cannot be right that a court's jurisdiction- in this case the jurisdiction granted by a statute, i.e., s.59 of the Act of 1842, to the District Court to award costs in a cause to any party- can be altered fundamentally by secondary legislation created and promulgated by a rule-maker other than the Oireachtas, purportedly on foot of a delegated power.

In my view the purported curtailment in Order 36 Rule 1 of the District Court Rules 1997 of the general jurisdiction to award costs created by s.59 of the Act of 1842, by effectively exempting the DPP and members of An Garda Síochána acting in the course of their duty, from having cost orders made against them, was *ultra vires* the delegated power granted to the District Court Rules Committee by s.91 of the Act of 1924 as adapted and amended. This was a measure of such far reaching import as to require that it be given effect to by primary legislation. It was no mere adaptation or modification of the Act of 1842 of the type that is permissible. Its import was profound. It operated to restrict a hitherto unrestricted jurisdiction of the District Court, and to curtail the class of persons from whom a successful defendant in summary criminal proceedings could potentially recover costs. The effect of it was to significantly amend the Act of 1824 so as to reduce the scope of the jurisdiction created by s.59 of that Act. Such profound change required primary legislation in my view.

6. The Court of Appeal also held that the Rules Committee has no power to make a rule as to costs, limiting costs or enabling costs and there is no such power in the Courts Acts devolved onto rules committees. The DPP argues that if this is indeed the case that primary legislation is needed to create jurisdiction as to cost orders

then it may have an impact on such orders handed down in the Circuit Court in relation to criminal proceedings.

7. It is contended in reply that while the issues raised by in this case were of general public importance they were dealt with correctly by the Court of Appeal.
8. If the DPP is successful in their application for leave Mr Matthews puts forward a cross appeal on what they say is the Court of Appeal's incorrect interpretation of the argument of an alternative basis for the disputed costs order under Order 38 Rule 1(4).
9. Pending case management whereby some refinement might be made the court considers the issues in this case to be:
  - (1) Is Order 36 Rule 1 of the District Court Rule 1997 *ultra vires* the District Court Rules Committee?
  - (2) Does Order 36 Rule 1 impermissibly alter the jurisdiction conferred by s59 of the Dublin Police Act 1842?
  - (3) Does the District Court have jurisdiction to award costs in summary criminal proceedings and if so on what criteria?
10. This Court is satisfied that it would be in the public interest to obtain clarity on the jurisdiction of the District Court in respect of Orders of costs in summary criminal proceedings.

The Court grants the application for leave to appeal.

**AND IT IS HEREBY ORDERED ACCORDINGLY**