UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 264

Record No: 208/2019

Edwards J
McCarthy J.
Donnelly J.

BETWEEN/

GEORGE ROSS

APPELLANT

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT delivered by Ms. Justice Donnelly delivered on the 30th day of September, 2020

Introduction

1. The origin of this case is the tragic death of a fourteen-year-old boy, Michael Murphy, who was killed when he fell out of the passenger door of a tractor which was being driven by an employee of the appellant. The accident and the death occurred on the 23rd August, 2013. The legal issue arises because of a decision to prosecute the appellant under the Safety, Health and Welfare at Work Act, 2005 (hereinafter, "the Act of 2005") for an offence despite the fact that three years earlier, on the 2nd October, 2014, he had been convicted for an offence under the Road Traffic Act, 1961 (as amended) (hereinafter, "the Act of 1961") arising from the same accident.

2. The fact that seven years have elapsed since August 2013 and this judgment does not reflect well on this State. No family should have to wait that long before a final decision on whether a prosecution arising out of the death of their son can occur. Indeed, throughout the

proceedings, the investigating and prosecuting arms of the State appear to have given little thought to the interests of the victim's family, who are themselves victims within the meaning of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and the Criminal Justice (Victims of Crime) Act, 2017. At least no evidence of such consideration appears from the affidavits or submissions filed on behalf of the respondent (hereinafter "the DPP").

Background

3. The appellant was the owner of the tractor from which Michael Murphy fell. The appellant was not the driver of the tractor but was (apparently) the employer of the person who was driving the tractor. In a summary prosecution taken against the appellant under s. 54(2) of the Act of 1961, the prosecution alleged that as owner of the vehicle, he allowed the vehicle to be driven while there was a defect affecting it which was known to him or which could have been discovered by the exercise of ordinary care and which was a danger to the public while the vehicle was in motion. That defect was said to be the defective lock/latch on the left hand side door of the tractor cab. The appellant was convicted of that offence in the District Court in Mallow on the 2nd October 2014.

4. In September 2017, the appellant was notified that he was to be prosecuted for an offence under s. 77 of the Act of 2005. It was alleged he was an employer who failed to manage and conduct his undertaking in such a way as to ensure insofar as it was reasonably practicable that in the course of work being carried on, individuals at the place of work were not exposed to risks to their safety, health and welfare. The details of that charge alleged that he failed to maintain the tractor in a safe condition, in particular "the lock keeper on the left hand door of the tractor cab being fractured and distorted, such that the door could not be latched closed or locked being thus in breach of s. 12 of the Safety, Health and Welfare at Work Act, 2005, and as a consequence a person, to whit (sic), Michael Murphy suffered personal injury and died."

5. In summary, the case concerns a situation where there have been sequential prosecutions arising out of this single event; the falling though the passenger door of the tractor by Michael Murphy. The issue is whether in all the circumstances the second trial ought to be prohibited. In the High Court, Twomey J. held that there was no basis for a prohibition as it was not an abuse of process. It is against that judgment that the appellant appeals.

The Offences

6. Section 54(2) of the Road Traffic Act, 1961 as amended provides:

> "where a mechanically propelled vehicle or combination of vehicles is driven in a place where there is a defect affecting the vehicle or a combination of vehicles which the owner knows of or could have discovered by the exercise of ordinary case and which is such that the vehicle or a combination of vehicles is, when in motion, a danger to the public, such owner commits an offence."

7. Section. 77(9)(a) of the Act of 2005 provides, in part, that:-

> "subject to *paragraph (b)*, if a person suffers any personal injury as a consequence of the contravention of any of the relevant statutory provisions by a person on whom a duty is imposed by *sections 8* to *12* inclusive and to *14* to *17* inclusive, the person on whom the duty is imposed commits an offence."

8. The particular section of the Act of 2005 that the appellant is alleged to have breached is s. 12 thereof. That section provides that:-

> "Every employer shall manage and conduct his or her undertaking in such a way as to ensure, so far as is reasonably practicable, that in the course of the work being carried on, individuals at the place of work (not being his or her employees) are not exposed to risks to their safety, health or welfare."

The High Court Judgment

9. In the course of his judgment, Twomey J. noted that the Supreme Court held in *Harris v. DPP* [2012] IESC 6 that it is only in exceptional circumstances that a criminal trial should

be prohibited. On this basis, Twomey J. noted, by way of preliminary observation that the remedy the appellant was seeking, the prevention of his prosecution of an offence, was an exceptional one.

10. Twomey J., under the heading: *"An accused cannot be tried for the same or substantially the same offence"* discussed the appellant's reliance on *DPP v. Finnamore* [2009] 1 I.R. 153. That case is authority for the principle that a person cannot be tried a second time for "*the same offence or, substantially the same offence"* for which he was already tried.

11. In addition to the reliance on the above, the trial judge noted that the appellant argued in the High Court that the two offences being tried sequentially (over what was a period of four years at the time) amounts to an abuse of process. The appellant relied on *Cosgrave v. DPP* [2012] 3 I.R. 666 to this effect. Although the Supreme Court did not find the sequential trial to be an abuse of process, the appellant nonetheless relied on Denham C.J. in that case wherein she stated that-

> "*Thus, while there is a general rule, as described, that a prosecutor should combine in one indictment all the charges he intends to prosecute, and that there should be no sequential trials for offences on an ascending scale of gravity, the court also retains a discretion to protect the fair trial process against an abuse of process in all the circumstances."*

The appellant in the High Court also relied on O'Donnell J. who was in the minority in *Cosgrave v. DPP,* wherein he stated:-

> *"[…] a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case."*

12. In his analysis, Twomey J. asked the question of whether the workplace offence was the same or substantially the same as the Road Traffic offence. Twomey J. analysed the two sets of offences and found that the proofs were different as were the penalties. He asked himself

the question that Kingsmill Moore J. in *The People v O'Brien* [1963] I.R. 92 did as to whether the necessary elements to prove the workplace offence are also the necessary ingredients to prove the Road Traffic offence. Having concluded that they were not, Twomey J. held that the offences, although arising out of the same set of circumstances were not the same or substantially the same offence.

13. Twomey J. then went on to consider whether the second prosecution was an abuse of process or oppressive. He referred to the matters set out by Denham CJ. in *Cosgrave v. DPP* (see further below) as relevant to the consideration. He held that:-

> *"[t]he State only got possession of the tractor after the District Court prosecution and carried out a dismantling of the tractor and its inspection by, inter alia, a UK based metallurgist, who has prepared a Statement of Evidence for the Circuit Court trial and an engineer employed by the tractor company SAME Deutz Fahr UK who has also prepared a Statement of Evidence for the Circuit Court trial. Thus, the evidence and, as previously noted the proofs, for the Road Traffic offence are different from the workplace offence. In addition, as noted hereunder, this investigation/inspection led to new evidence coming to light."*

14. The trial judge noted there was no duty on the Health and Safety Authority ("HSA") to advise the appellant of the potential prosecution. In any event he held that throughout 2015, the appellant was aware that the HSA was conducting an investigation into the circumstances of the accident and that the HSA had retained the appellant's tractor for that purpose. On the 14th June, 2015, the appellant was advised that additional evidence had come to light. The appellant on foot of legal advice declined to attend interview. Twomey J. held that the appellant must have known that a prosecution, was, if not likely, at least possible.

15. Twomey J. noted that one of the reasons why the appellant claimed that the second prosecution amounted to an abuse of process was that after the conversation he had with Mr. McSweeney of the HSA in March 2016, the appellant believed that the investigation under the

Act of 2005 was at an end. Twomey J. noted however that Inspector McSweeney did not imply or explicitly state that this was the case to the appellant. The appellant averred in his supplemental affidavit dated the 19th July, 2018 that the reason why he did not inspect the tractor was due to the fact that neither he nor his solicitor believed that prosecution was likely at that stage. Twomey J. rejected this argument and held there was no evidence to support this contention.

16. Twomey J. held that the two offences are different in nature and in degree; the Road Traffic offence being summary only and the offence under the Act of 2005 being an indictable offence. The offences are also different in moral turpitude; the Road Traffic offence does not require there to be injury sustained to the person wherein the offence under the Act of 2005 requires injury.

17. Notwithstanding moral culpability being equally relevant to the Act of 2005 as it was for the Road Traffic offence, the appellant, according to Twomey J., knew in mid-2015 that prosecution was possible if not probable and that the death of a young boy would lead to further investigation perhaps leading to a charge in addition to the minor Road Traffic offence of which he was charged.

18. He noted that no case had been brought by the appellant that the delay itself was sufficient to justify delay and while his view was that the delay case itself did not justify prohibition, it nonetheless would have been preferable if the proceedings for the workplace offence had been prosecuted more quickly. He concluded as follows:-

> *"However, while Mr. Ross should not have had the prospect of this trial hanging over him for four years, the interference by the courts in the prosecutorial process by means of prohibition is a power which is only exceptionally used and this Court is of the view that the law on autrefois convict and abuse of process is not such as to justify the prohibition of Mr. Ross' trial for a workplace offence. Undoubtedly however, the precise circumstances of the alleged offence and the degree of Mr. Ross' moral*

culpability for the tragic death will be carefully considered by the Court hearing the trial."

The Issues in this Appeal

19. Many grounds of appeal were put forward by the appellant in his Notice of Appeal. The primary ground relied upon was that the trial judge erred in applying the criterion set out in *Harris v. DPP* [2012] IESC 6 in circumstances where the appellant had relied on the rule in *Connelly v. DPP* [1964] A.C. 1254 as applied and adopted by the Supreme Court in *Cosgrave v. DPP*. The appellant submits that the two offences arise out of the same facts or are facts which form or are part of a series of offences of the same or similar character and that the general rule that these should be prosecuted together applies. The main argument made in the appellant's submissions is that sequential trials for the two offences would be an abuse of process and should thereby be prohibited.

The Parties' Submissions

20. The appellant bases his case upon the decision of the Supreme Court in *Cosgrave v. DPP*, a case which in turn adopted the principles set out in *Connolly v. DPP* in the House of Lords. The appellant urges upon this Court that this case, unlike *Cosgrave v. DPP*, amounted to a sequential prosecution for offences arising out of the same facts or are facts which form or are part of a series of offences of the same or similar character. The appellant then urges the Court to accept that in those circumstances the general rule is that they must be prosecuted at the same time, except in special circumstances. The appellant submits that the DPP has not shown any such special circumstances. In the alternative, the appellant submits that this is a case where there has been an abuse of process because the facts arise out of a single incident and it would only be in exceptional circumstances that prosecuting those sequentially is permitted. Again, the appellant urges the Court to accept that there are no special circumstances present.

21. The DPP on the other hand, submits that these do not come within the definition of same facts and circumstances and that in such a case there is no bar to prosecuting them sequentially. If the Court is to engage with an issue of an abuse of process, the DPP submits that it is only in an exceptional case that the courts would prohibit a trial. Counsel for the DPP submits that this is not such an exceptional case.

The Decision in *Cosgrave v. DPP*

22. The decision in *Cosgrave v. DPP* is a recent authoritative decision of the Supreme Court on abuse of process arising from what are or are alleged to be sequential prosecutions. As a result, it is necessary to examine the *ratio* of what was decided in the case. Denham CJ. who delivered the majority judgment endorsed the test set out in the English case of *Connelly v. DPP*. It was in the application of the test that Hardiman J. and O'Donnell J dissented.

23. *Cosgrave v. DPP* concerned an accused who, on the basis of statements made by a Mr. Dunlop, pleaded guilty in 2005 to a single count under the Electoral Act, 1997 arising from providing a false or misleading declaration of donations exceeding £500. He was sentenced by way of an order to carry out community service. The accused was then prosecuted five years later in 2010 for corruptly receiving sums of money from Mr. Dunlop as inducements or rewards for voting in a particular way on motions before Dublin City Council and Dun Laoighre Rathdown County Council relating to lands at Carrickmines in Dublin, contrary to s. 1(1) of the Public Bodies Corrupt Practices Act, 1889 (as amended) and s. 38 of the Ethics in Public Office Act, 1995.

24. The subsequent charges in 2010 were in part based on the statements made by Mr. Dunlop which formed part of the evidence against the accused in the first set of charges five years earlier. What differentiated the evidential basis for the prosecution of the accused in the second set of charges, is that the DPP also relied on other statements made by Mr. Dunlop in 2004. These statements were not furnished to the accused or his solicitor when he was prosecuted and tried for the 2005 offences. The accused took issue with this, alleging that the

non-disclosure of this statement when he was being prosecuted for the first set of charges amounted to an abuse of process.

25. The prosecution argued that the DPP did not disclose these statements nor did they want to join the second set of charges onto the same indictment as the first set of charges as they were of the view that Mr. Dunlop's evidence would be more reliable if it was produced at a time subsequent to Mr. Dunlop's prosecution and conviction for the corruption offences revealed in those statements. The DPP was of the view that if they joined all charges on the same indictment in 2005, then the prosecution could not have been brought without Mr. Dunlop's evidence. Before Mr. Dunlop's prosecution, the DPP were conscious that he may not have given evidence on the grounds that it would incriminate him and also, when he was being cross-examined as a witness in relation to the second set of charges, he may have given evidence in the hope that the State would perhaps not prosecute him or look favourably upon him.

26. Denham CJ. commenced her judgment by noting that the issue was whether the court should prohibit a criminal trial. Such an application may succeed only in exceptional circumstances and the burden rests upon the person seeking that remedy to show that on the facts of the case there has been an abuse of process so as to give rise to a real risk of an unfair trial. Denham CJ. identified that the fundamental issue before the court was whether the prosecution of the current charges, in all circumstances of the case, including the previous Electoral Act charges amounted to an abuse of process.

27. At paragraph 36, she identified the general rule at common law *"that the court should stay an indictment when it is satisfied the new charges are grounded on the same facts as charges on a previous indictment on which an accused had been tried and convicted or acquitted."* She was satisfied in the circumstances of that case that the sequential charges had not been brought on the same set of facts.

28. She referred to the general principle described by Lord Devlin in *Connelly v. DPP* as follows:-

"As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive to an accused for the prosecution not to use rule 3 where it can properly be used. But a second trial on the same or similar facts is not always and necessarily oppressive, and there may be in particular case be (sic) special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule."

29. Denham CJ. held the first part of the rule did not apply as a second set of charges were not founded on the same facts as the Electoral Act charges. Denham CJ. pointed out that the payments relating to corruption referred to in the subsequent statements of Mr Dunlop had *"nothing to do with election expenses of political contributions."* Therefore, the payments could not fall within the definition that is required to ground the obligation to disclose receipt under the Electoral Act, 1997 and it was those payments that ground the corruption charge against the applicant.

30. In relation to the second aspect of the general rule, Denham CJ. held that this also did not apply to the appeal as the current charges were not the same or of a similar character as the offences charged on the Electoral Act indictment. In particular, Denham CJ. held:-

"the offence of failing to declare on a donation statement that he had received a donation exceeding £500 is neither the same nor of a similar character as a charge that he corruptly received a sum of money as an inducement to or a reward for voting in favour of a specific motion before Dublin City Council or Dun Laoghaire Rathdown County Council. The offences are different in nature, degree and moral turpitude."

She approved the finding of the High Court that the former offence may simply involve an inadvertent failure to disclose a *bona fide* donation whereas the latter involved dishonesty.

31. Denham CJ. indicated that she was approaching the case on a broader and more fundamental aspect. She made an analysis as to whether in all circumstances there was an abuse of process and if so whether there was a real and serious risk of an unfair trial. She referred to the discretion to guard against an abuse of process and quoted approvingly from the decision in *R v. Beedie* [1997] 2 Cr. App. R. 167. She held that:-

> *"while there is a general rule, as described, that a prosecutor should combine in one indictment all the charges he intends to prosecute, and that there should be no sequential trials for offences on an ascending scale gravity, the Court also retains a discretion to protect the fair trial process against an abuse of process in all the circumstances."*

32. Denham CJ. went on to say that while the general rule as to sequential trials as described in the *Connelly v. DPP* did not apply in this case, even the general rule had exceptions and the courts retained a discretion to protect an accused against an abuse of process. She referred to another decision of the Court of Appeal in England and Wales in which the discovery of new evidence may amount to special circumstances for the purposes of the *Connelly* principle. She also noted that the occurrence of a new event after conviction for a lesser offence is no bar to prosecution on the more serious offence.

33. Under the principle in *Connelly v. DPP* the burden lies upon the respondents to prove that the general rule does not apply where the facts surrounding the general rule have been established. In *Cosgrave v. DPP*, the facts surrounding the general rule had not been established but Denham CJ. stated that she approached the case from a wider perspective and considered whether the DPP had established that there was good reason for the sequential trials and whether the current charges were an abuse of process. The same facts and arguments that would have established special circumstances if the general rule in *Connelly v. DPP* was established would

also have a bearing on the court's consideration of whether an abuse of process had been established and in the consequent exercise of discretion. She emphasised that the Court retained a discretion to protect a person against an abuse of process such as to give rise to a real risk of an unfair trial.

34. Even though the general principle in *Connelly v. DPP* did not apply, Denham CJ. held that because the prosecution of the Electoral Act charges and the corruption charges arose out of the same series of statements made by the same potential witness, she considered that there are circumstances which required to be considered to determine whether the current charges were an abuse of process or are oppressive to the applicant so as to give rise to a real risk of an unfair trial.

35. Denham CJ. identified a number of relevant factors. The principal relevant factor was that the State had a valid reason for not prosecuting the applicant for corruption in 2004 because the witness upon which they would be relying on was an accused in the second set of charges. The Supreme Court held that it was only after his trial had been determined that Mr. Dunlop could be a prosecution witness in the current charges. Denham CJ. also referred to the facts being different, and the subsequent offences being different in nature, degree and moral turpitude. She also held that the applicant knew of the corruption allegations although there was no duty to inform him of a potential prosecution. She held that in the special circumstances it was just and appropriate for the first respondent to await the prosecution and conviction of the potential witness. She identified that the issue of delay was subsumed into the question of the issue of abuse of process. She also held that there was a significant public interest in permitting the allegations to proceed to trial although on the particular facts of that case it was not necessary to balance the rights of the appellant to reasonable expedition in the prosecution of the charges.

36. In his dissent, Hardiman J. pointed to the general rule as being well expressed in the civil cases such as *Henderson v. Henderson* (1843) 3 Hare 100. He held that the *dictum* of

Kearns J. in *S.M. v. Ireland* [2007] 3 I.R. 283 that *"the purpose of the rule is to uphold an important principle of public policy which demands, in the interest of justice, that the defendants are not exposed to successive suits where one would do",* applies to criminal as well as civil cases. In relation to each set of charges, he held that there was a 100% overlap between the 2005 statement of the witness and the 2010 charges relating to corruption. He held that if one compares the 2005 charges with the 2010 charges it appears that four out of the five payments alleged in 2010 were within the terms of count 2 on the 2005 indictment, an overlap of 80%. He held that the two prosecutions appeared to arise out of the same or substantially the same set of facts. He considered the legal relevance of that and concluded that the decision not to bring the charges in 2005 was a tactical one. He was of the view that the DPP had not explained why he authorised a prosecution for the Electoral Act offences when Mr. Dunlop would be a witness despite the other matters outstanding. In all the circumstances he held the charges should have been brought at the same time.

37. O'Donnell J., also dissenting, held that a broad approach to the concepts of *"same fact"* and *"offences of a…similar character"* contained in the *dictum* of Lord Devlin in *Connelly v. DPP* should be taken on the facts of that case.

Not a situation of Autrefois Convict

38. The appellant in the High Court and to a lesser degree in this Court on appeal, submitted that this was a situation of *autrefois convict*. The appellant relied upon the case of *Attorney General v. Thornton* [1964] I.R. 458 in which there had been prosecutions for dangerous driving *simpliciter* and then dangerous driving causing serious bodily harm.

39. I am satisfied that this is not a case of *autrefois convict.* Blackstone stated that:-

> *"the plea of autrefois convict, or a former conviction for the same identical crime […] is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime."*

Walsh, *Criminal Procedure* (2nd Edn., Round Hall, 2016) provides that:-

> *"If he has already been convicted and punished for the offence, then clearly he should not normally be tried for that offence again."*

40. The appellant in the present case concedes that the principles of *autrefois* defined by Lord Devlin in *Connelly v. DPP* are very narrow and would not form the basis for an order of prohibition in the present case. Lord Devlin held that where the offences are not the same, and in *Connelly v. DPP*, the first offence on which the accused was acquitted was murder and the second offence which the prosecution sought to prosecute was robbery, this does not lead to a plea of *autrefois acquit.* While the case was premised on the principle of *autrefois acquit*, the reasoning still stands for *autrefois convict.* Lord Devlin used the example of common assault and wounding with intent. He stated that he was not of the view that wounding with intent was the same offence as common assault. He stated that if he was of the view that they were the same offences, then he felt that he had no discretion but to order a prohibition of the trial of the second charge. He did not agree that where the offences are not the same, that a plea in bar on the basis of *autrefois* is required. Lord Devlin recognised that there is a wider discretion on the Court.

41. The Court of Appeal decision in *DPP v. Finnamore* [2009] 1 I.R. 153 was correctly relied upon by the trial judge in rejecting the appellant's case in so far as it relates to *autrefois convict*. That case involved a claim that because a jury had convicted the appellant of a s. 3 Misuse of Drugs Act, 1977 count of simple possession of controlled drugs there could be no subsequent prosecution for charges under s.15 or s.15A of possession of controlled drugs for the purpose of sale or supply. Macken J., having reviewed a significant body of case law from this jurisdiction as well as England and Wales held:

> *"It is easy to see that if a person has been acquitted of an offence whose essential ingredient has not been established, he cannot afterwards be convicted of a more serious offence, where the very same ingredient is also an essential element. If that*

essential element has caused the first acquittal, it cannot be revisited for the purposes of proving the second offence. On the other hand, in the case of autrefois convict, where an essential ingredient in the first has offence been proved, it does not automatically follow either in logic, or in law, that that is sufficient to sustain a plea in bar where the second offence requires additional elements to be established. Where, as here, possession of drugs is a necessary element in the s. 3 offence, had the applicant been acquitted, there could not be a further charge in respect of possession with intent to supply or for possession with intent to supply drugs beyond a particular value, pursuant to s. 15 or s. 15A. The essential element of possession not being established in the first case, the applicant has been acquitted and that element, being essential also for the more serious charges(s) is equally missing. But where, as here, an essential further element, or elements, are required to be established, for the latter two charges under s. 15 and s. 15A, the fact that the applicant has been convicted, as opposed to acquitted, of the s. 3 possession of drugs offence, does not have as it's consequence that the same possession is sufficient to establish the s. 15 or s. 15A charges, or could lead lawfully to a successful plea in bar. In the present case, the Court accepts the respondent's submission that the offences under s. 3 and s. 15A are not, on the jurisprudence cited, the same offence or, substantially the same offence."

42. The position is that where there is a subsequent offence charged arising from the same facts as a previous offence for which an accused is convicted, and the subsequent charge is on an ascending scale of gravity, a plea of *autrefois convict* is not an absolute protection against the prosecution of the subsequent offence.

43. It follows therefore, that since the appellant is being charged with a subsequent but different offence arising from the same set of circumstances as his previous conviction, this does not prevent a judge from hearing the case on the basis of *autrefois convict.* This is due to the fact that the subsequent offence, the offence under the Act of 2005, is one which is a

different and more grave offence than the Road Traffic offence for which the appellant was convicted. As the trial judge set out in his judgment, the Health and Safety offence requires different proofs than the Road Traffic offence.

The Approach the Court Must Take

44. In my view, what the Court is required to do, according to the principles set out in *Cosgrave v. DPP*, is review whether the general rule that offences that are premised on the same or similar facts should be joined on the same indictment, is applicable to this situation. If it is applicable, then the DPP must satisfy the Court that there were special circumstances warranting sequential trials in this instance. If the Court is satisfied with the reasons provided by the DPP, the Court must then determine whether proceeding with the sequential trial amounts to an abuse of process or indeed, is oppressive to the accused. If the general rule does not apply, the Court must also enquire into whether there has been an abuse of the process and many of the same issues that are relevant to the question of special circumstances would also be relevant to the abuse of process.

The General Rule in Relation to Sequential Trials

45. The Court must consider whether the general rule, identified in *Connelly v. DPP* and approved of in *Cosgrave v. DPP*, applies. In other words, are these charges founded on the same facts as the Road Traffic offence or do they form part of a series of offences of the same or a similar character as the offences charged in the previous indictment? If so, the issue would arise as to whether there were special circumstances applicable upon which the DPP could rely so as not to make this second trial oppressive.

46. The trial judge held that it was clear that the road traffic offence and the offence under the Act of 2005 arose out of the *"same set of circumstances"*. The trial judge differentiated the offences, indicating that the offences bore different penalties; the requirement of proof in the District Court offence was of danger to the public as opposed to actual harm; and the capacity in which the appellant was charged was different – in the District Court he was characterised

as the owner of the tractor and in the Circuit Court offence, he is characterised as the employer. The appellant submits that the trial judge's differentiation of the offences is acceptable when analysing the principle of *autrefois convict*, however, it is not acceptable when determining the wider question of whether there was an abuse of process. As alluded to above, the principle of *autrefois* is a more onerous a test to satisfy where the offences for which the accused is charged are different. The appellant submits that the analysis engaged in the offences themselves, as opposed to the facts, was erroneous.

47. The appellant argues that it is the difference in consequences of the accused's actions and the penalty for the offence that are good reasons as to why a plea in *autrefois* should not succeed. He submits however that a broader jurisdiction is enjoyed by the Court. Of crucial importance to the appellant's argument is Lord Devlin's statement at p.1353 of the judgment:-

> *"[i]n my opinion if the Crown were allowed to prosecute as many times as it wanted to do on the same facts, so long as for each prosecution it could find a different offence in law, there would be a grave danger of abuse and injustice to defendants."*

48. The appellant relies on Lord Devlin's *dicta* to show that if the facts in which the offences arose are the same, then the second indictment containing the second set of charges should be stayed. The appellant argues that the Court need not require that the facts be the same *and* the offences are of similar character. The appellant accepts that the trial judge agreed that the offences arose from the same set of circumstances and could therefore, as the appellant submits, be tried on the same indictment. Where the trial judge fell into error, the appellant submits, is in the trial judge's failing to require the respondent, to provide an explanation as to why the charges were not put into the one indictment. The appellant argues that the two charges against the appellant could have been put on the same indictment and the respondent has not provided special circumstances as to why this was not done.

49. The DPP submits that while the trial judge differentiated the offences, he did in fact also differentiate on the facts. Counsel for the DPP submits that by differentiating the offences, the

trial judge identified the difference in facts required to be proved for a conviction in each case. The DPP submits that the trial court had the Book of Evidence and upon review of the proposed evidence in the HSA prosecution, the evidence is considerably different to that in the road traffic offence prosecution. The DPP submits that the two offences do not arise out of the same set of facts. Among the "new evidence" are two expert reports which were based on the forensic examination of the tractor/cab. These facts were not in existence at the time of the prosecution of the road traffic offence.

50. A close analysis of the High Court judgment reveals that the trial judge, in moving beyond the question of *autrefois convict* and onto sequential trials asked the question: *"is the workplace offence the same/substantially the same as [the] road traffic offence?"* Having contrasted the elements of the offence he went on to hold at paragraph 27:

> *"For all these reasons, this Court is forced to conclude that, while undoubtedly the offences arose out of the same circumstances, the offence of allowing one's vehicle be driven with a defect which is a danger to the public is not the same or substantially the same offence as an employer who fails to provide a safe place of work which leads to injury to a member of the public. This is important as the test is not: do the two offences arise out of the same set of circumstances? Rather it is: are the two offences the same or substantially the same? In this Court's view, the answer to the latter question must be answered in the negative and so on this ground, this Court refuses to prohibit the prosecution of the workplace offence under the 2005 Act."*

51. In my view, the trial judge unfortunately went into error in his approach to the issue before him. The general rule as outlined in *Connelly v. DPP* and approved of in *Cosgrave v. DPP*, moves beyond a question of whether the offences are the same and looks at whether they arise on the same facts or are offences of a similar character. If the offences were "the same" the principle of *autrefois convict* would arise and the appellant would be entitled to an order of prohibition as of right. The "*Connelly*" rule is a general rule which can permit sequential trials

of offences arising on the same facts in special circumstances. As the trial judge did not enter into this consideration of the issues before him, it is necessary for this Court to do so.

Same or similar facts

52. What are to be considered as the "same facts" in each of these prosecutions? In order to consider this question, it is important to refer to the affidavits of the appellant and Inspector McSweeney in order to determine the facts that founded the charge against the appellant under the first offence and the facts that ground the subsequent offence.

The facts grounding the first offence – An Garda Síochána investigation

53. In the affidavit of the appellant dated the 25th January, 2018, the appellant avers that on the date of the tragic accident, the fourteen year old boy was caused to leave the cab of the tractor. In relation to the actual cause of this unfortunate accident, the appellant avers that "it is alleged by the prosecution that […] the lock keeper on the left hand side door of the tractor cab was fractured and distorted such that the door could not be latched, closed or locked, unfortunately young [Michael Murphy] fell on to the road and died following the accident."

54. In her written submissions, the DPP confirms that during the hearing for the Road Traffic offence the defect in question was identified as a defective lock/latch on the left hand side of the tractor cab. This submission is unsurprising because in the statement of evidence provided by Garda White, the defects on the vehicle were evident before the conviction against the appellant for the first offence. Garda White notes that upon inspection of the vehicle, the "near side door striker bracket, weld cracked and striker bent back as a result of the near side door lock was unable to operate, cable ties in place offering a 'quick fix'." He stated that upon his examination of the vehicle, he was satisfied that the vehicle was "dangerously defective." This was the basis on which the Road Traffic Act offence was prosecuted.

The facts grounding the second offence – the HSA's investigation

55. The HSA, not the gardaí, were the investigating authority in the second offence. Inspector McSweeney was leading the HSA's investigation into the death of Mr. Murphy. The

difference in evidence is that the HSA have provided two expert reports outlining the defects in the vehicle. The first report is by a consulting engineer and the second is from a metallurgist. Mr. Power, the consulting engineer, was asked by the HSA to carry out an inspection of the operator safety cab, the cab frame and the door hinges, door locks and striker bars of the tractor that was in the accident. The consultant engineer attended Fitzpatrick's secure storage where the tractor was being held. He met with Inspectors McSweeney and Hennigan where Mr. Power completed his inspection of the tractor. On the 2nd September, 2014, Mr. Power prepared a file note for Inspector McSweeney and sent it to him. This took place prior to the hearing in Mallow District Court on the 2nd October, 2014 in relation to the road traffic offence.

56. On the 28th January, 2015, Mr. Power attended the HSA secure storage facility to continue his inspection of the tractor and to assist the metallurgist, Mr. Deering in his inspection. Mr. Power was to facilitate Mr. Deering's work by removing some of the plastic panels in the driver cab and door hinges. Both inspectors were present at this inspection. Mr. Power's report, which was compiled before the District Court prosecution, indicated that the doors of the cab are hinged at the rear and open outward at the front. He reported that the "double latch that holds the door shut is mounted on the door. It engages with the lock keeper that is fixed onto the frame of the cab. I found that the lock keeper was damaged. It was broken, worn and distorted inward about 15-mm from its original position." Mr. Power reported on the left hand side door hinges and the cab frame, noting that the "two threaded holes in the cab frame for attaching the bottom hinge strap had been drilled out and rethreaded to accommodate oversized bolts…[t]he heads of the two oversize (sic) bolts were larger than the original bolts. This prevented the fitting of two plastic protection caps that formed part of the original design. […] Mr. Deering [the metallurgist] measured and recorded the dimensions of the various holes, bolts and spacer plate."

57. It is apparent from the above, that before the prosecution in the District Court for the first offence, the HSA were in possession of a report which provided evidence on the state of

the tractor cab and that the cab frame was distorted inwards and the hinge strap had been rethreaded to accommodate oversized bolts. In Mr. Power's analysis in respect of the left hand side door, he reported that "the attempt at some time in the past to address the damage to the cab frame in way of the bottom hinge strap by the fitting large diameter attachment bolts and a spacer did not, in my opinion achieve the desired results. The damage and distortion to the frame were such that the door could not be aligned exactly as it was designed and the attempted repair was a compromise." This caused the bottom hinge to be misaligned and this had the knock on effect that the lock was not correctly aligned with the striker bar. This meant that "each time the door was closed the lock was impacting with the striker bar causing wear to the components as described earlier."

58. It was submitted by counsel for the appellant that Mr. Deering's report, which was compiled after the District Court prosecution, merely confirmed the findings of Mr. Power. It was argued that this could not amount to "new evidence". Counsel submitted that Mr. Deering's report merely provides a more detailed account of the case against the appellant. Mr. Deering reported that on the left hand side door of the cab, he found "visible and marked misalignment of the door with respect to the frame of the cab". In relation to the left hand side door hinges and cab frame, Mr. Deering also indicated that the "two threaded holes in the cab frame for attaching the bottom hinge strap had been drilled out and rethreaded to accommodate oversize (sic) bolts of 10mm and 12mm diameter in lieu of original bolts exhibiting a nominal diameter of 8mm." In relation to the left hand side door lock and striker bar, he found that "when the left hand side door was closed, the lock did not reach or engage on the striker bar" and that the "door could not be latched-closed either singly or doubly on the double catches within the lock or locked either from outside or inside the cab." In his analysis, he reports that the "attempts to correct this misalignment [of the door with respect to the frame of the cab] via the use of the spurious spacer plate and associated oversized bolts observed in way of the lower hinge strap did not, in my opinion effect a satisfactory solution." Mr. Deering's conclusions on

the cause of the accident were very similar to Mr. Power's: "An attempted repair in way of the left-hand side lower hinge strap did not provide a satisfactory solution with respect to the damage and permitted misalignment of the left hand side cab door. […] The fracture of the striker bar prevented the engagement of the lock and the door could not be latched closed per design intent or in an adequate fashion."

59. It is important to recall that the offence under the Act of 2005 expressly refers to the lock keeper on the left hand side "being fractured and distorted, such that the door could not be latched, closed or locked." I am of the view that in so far as the proximate cause of the offence being alleged relates to the defective lock keeper on the left side of the tractor cab, there is no doubt that the offence is based upon that same factual point. The additional evidence provided by the subsequent inspections may have indicated that earlier repairs had been carried out to the door but ultimately, the same factual defect was being relied upon to ground the central feature of the charge. Therefore, while further evidence of the defect may have been found, the fact of the defect was the same or substantially the same in respect of each prosecution.

60. There are of course differences between what is necessary *proof* in relation to each offence. The Health and Safety offence requires proof that the appellant is an employer, that he failed to manage or conduct his undertaking in such a way as to ensure that persons were not exposed to risks to their safety, in the course of their work, that it was a place of work and that harm was caused. The Road Traffic offence required proof that the appellant was the owner of the tractor, he allowed the tractor to be driven with the existence of a defect that was known or could be discovered through the exercise of ordinary care and that therefore the tractor was a danger to the public.

61. Undoubtedly if the interpretation given by Hardiman J. and O'Donnell J. to the concept of the "same facts" is followed, the single factual circumstance out of which both these offences arose would meet the threshold. This Court is bound however to follow the majority decision in *Cosgrave v. DPP* and to note the different view that was taken there of whether the two sets

of charges had arisen out of the same facts. For that reason, a close examination of the precise finding of the majority in *Cosgrave v. DPP* is necessary.

62. In *Cosgrave v. DPP*, Denham CJ. held that the general rule did not apply because the facts were not the same. She found that the first set of offences were based upon donations which were made for political purposes and therefore came within the requirements to furnish donation statements and resulting in the charge of furnishing a false donation statement. At paragraph 43 of her judgment, Denham CJ. noted that Mr. Dunlop's statement also refers to other payments which had *"nothing to do with election expense or political contributions"* (an apparent quotation from the statement of Mr. Dunlop). She held that *"[o]n that statement, these payments could not fall within the definition that is required to ground the obligation to disclose receipt under the Electoral Act 1997, and it is these payments that ground corruption charges against the appellant".* She held in those circumstances that it was clear the current charges were not founded on the same facts as the Electoral Act charges.

63. In my view, therefore, the *Cosgrave v. DPP* decision was one which turned on the fact that different payments were at issue and thus the charges were based on different facts. In making her determination that the payments were different, Denham CJ. did not accept the conclusions of Hardiman J. that the payments at issue in the counts were the same payments. Thus, while Denham CJ. was clear that the allegations were made in the same statement by the same witness, the fact that different payments were at issue meant that the second prosecution was not being brought on the same factual basis as the first prosecution.

64. In the present case, there is no doubt that there is only one set of circumstances that is at issue. This involves the driving of the tractor with a defective lock-keeper by an individual which resulted in the death of Michael Murphy. Different aspects of those facts amount to different offences. Undoubtedly those offences are not the same in law and an acquittal or conviction on one could not amount to a successful plea of double jeopardy on the other. The two offences are however based upon the same facts. Of central importance is the issue

regarding the defect in the tractor. It is the same defect that has led to the charge under both the Health and Safety legislation and the Road Traffic legislation. If each charge was alleged to have arisen from a different defect, then a similar situation to *Cosgrave v. DPP* would arise. They would be based upon different facts. Here the facts are precisely the same: the same driver, the same tractor, the same defect resulting in the death of the same unfortunate victim. There are aspects of those facts which are emphasised differently under each charge. In one situation the appellant is an owner and in another he is an employer. That is not a factual difference; it is the same driver. The difference is one based upon the nature of the relationship between the appellant, the tractor and the driver. Ultimately, the same facts have grounded each offence; each offence simply highlights different aspects of those same facts.

65. It is also helpful to make reference to the rationale behind the general rule as indicated by Lord Devlin in *Connelly v. DPP*. Lord Devlin indicated that the reasoning behind the general rule was that it was otherwise oppressive to an accused for the prosecution not to use rule 3 of Schedule 3 of the Indictment Act, 2015. O'Donnell J. in *Cosgrave v. DPP* pointed out that the same test applies in Ireland. He was of the view that it was obvious that the charges could have been joined in the same indictment. In his view, any application for separate trials would have been doomed to fail. Naturally, his view was a dissenting one on the facts but as a matter of law his view offers insight into how this could be assessed.

66. In that regard, in it interesting to note that the case of *The People (DPP) v. Nevin* [2003] 3 I.R. 321 was not mentioned in any of the judgments in *Cosgrave v. DPP*, although it is possible that it may have been mentioned in argument before the Supreme Court. As a case which explicitly dealt with the joinder of offences pursuant to rule 3 of the Indictment Rules, it is particularly apposite. In *Nevin*, the Court of Criminal Appeal was asked to deal with the issue of whether the count of murder had been properly joined with a number of separate counts of solicitation to murder. The Court of Criminal Appeal stated as follows:

"*The category of offences referred to in Rule. 3 as being 'founded on the same facts' is not restricted to offences which arise out of a single incident or an uninterrupted course of conduct or to offences which were committed contemporaneously or substantially contemporaneously with each other. They extend to situations where later offences would not have been committed but for the prior commission of an earlier offence — see Reg. v. Barrell and Wilson (1979) 69 Cr. App. R 250 in which the Court of Appeal per Shaw L.J. held at pp 252 and 253 that:-*

> *'The phrase "founded on the same facts" does not mean that for charges to be properly joined in the same indictment, the facts in relation to the respective charges must be identical in substance or virtually contemporaneous. The test is whether the charges have a common factual origin.'"*

67. Using the above formulation, the Health and Safety offence has a common factual origin with the Road Traffic offence.

68. For all the reasons set out above, I am satisfied that the Health and Safety offence is founded on the same facts.

Forming part of a series of offences of the same or similar character

69. Strictly speaking it is unnecessary to make a further determination as to whether this offence formed part of a series of offences of the same or similar character, but it is nonetheless worthwhile to address this aspect of the general rule.

70. Denham CJ. held in *Cosgrave v. DPP* that the corruption offences were not offences of the same or similar character as the offences charged previously under the Electoral Act. She held that the offence of failing to declare on a donation statement that he had received a donation exceeding £500 was not the same or similar to corruptly receiving money. She held that the offences were different in nature, degree and moral turpitude. One offence clearly involves dishonesty and is a much more serious offence as reflected by the different penalties.

71. In relation to the phrase *"..a series of offences of the same or similar character"* the Court of Criminal Appeal stated in Nevin that:

> *"The circumstances in which particular charges 'form or are part of a series of offences of the same or similar character' within the meaning of a second limb of the Rule was considered by the Court of Appeal in England in Reg. v. Kray (Ronald) 1 Q.B. 125. It was held, inter alia, at p. 130 that:-*
>
> > *'offences cannot be regarded as of a similar character for the purposes of joinder unless some sufficient nexus exists between them. Such nexus is certainly established if the offences are so connected that evidence of one would be admissible on the trial of the other but it is clear that the rule is not restricted to such cases.*'
>
> *It was further held at p. 131 that:-*
>
> > *'It is not desirable, in the view of this court, that rule 3 should be given an unduly restricted meaning, since any risk of injustice can be avoided by the exercise of the judge's discretion to sever the indictment. All that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together.'"*

72. In my view, the offences in this case had a *nexus* and did exhibit similar features and certainly under the test as approved in *Nevin*, they could have been joined in the same indictment.

73. The overriding factor identified by Denham CJ. in *Cosgrave v. DPP* was that the second set of offences involved dishonesty while the first set of offences could be carried out by simple inadvertence. This dishonesty was reflected in the more severe penalties applicable. In the present case, the trial judge did not address the issue of whether these could properly be joined in the same indictment but in considering whether there was an abuse of process he concluded,

using the words of Denham CJ., that the offences differed in nature, degree and moral turpitude. With respect to the trial judge, I consider his view that these were different in nature because one was a road traffic accident and the other a Health and Safety offence was not on its own sufficient to distinguish them. In this situation the central fact giving rise to both charges was the same, the defect in the lock keeper of the left side of the tractor. Thus, although one offence was a Road Traffic offence and the other a Health and Safety offence, the nature of the offending behaviour was primarily the same factual defect. The difference in degree was related to the fact that one was a summary offence and the other an indictable offence and that is correct. It cannot be the sole defining feature however, as for example, a case of driving without consideration (a purely summary offence) would be capable of being joined on an indictment with the substantive offence of dangerous driving causing death or serious injury. The issue of moral turpitude does raise the issue that one offence alleges harm caused (the death of Michael Murphy). This is of course a significant factor but again it is not a determinative one. It is of note that the trial judge viewed the level of moral culpability of the appellant for the death as very different from (lesser than) other responsibility for deaths which might occur as he was neither the driver of the vehicle nor was accused of allowing the boy in the tractor.

74. Denham CJ. quoted Lord Devlin's general rule which included the reference to rule 3 of the indictment rules. The question that a court has to consider is whether the test would satisfy rule 3 of the indictment rules. Having set out my reasons above, I am satisfied that on careful consideration of the facts of this case, these offences are offences which could have been joined on the same indictment pursuant to rule 3.

Special Circumstances

75. As Denham CJ. pointed out in *Cosgrave v. DPP*, the general rule that these matters ought to be heard together rather than sequentially is not an absolute one. There may be special circumstances which allow or permit the offences to be heard sequentially. In *Cosgrave v. DPP*, although Denham CJ. held that the general rule did not apply, she also held that if the rule

had applied, the special circumstances that would allow sequential trials were similar to those which had to be considered in assessing in general if an abuse of process was taking place. It is important to examine what those special circumstances are in this case.

76. At para. 30 of his judgment, the trial judge identified what he considered as being the relevant issues in assessing whether the prosecution amounted to an abuse of process. These have been set out above. It is clear that both the trial judge and the DPP relied heavily on the fact that the evidence regarding the lock keeper mechanism was only available to the HSA after the District Court prosecution came to an end. It was at that stage that further examination of the tractor was carried out on behalf of the HSA.

77. This Court must be conscious that there is a discretion in a trial judge as regards the assessment of the special circumstances (or the assessment of the alleged abuse of process). Macken J. in *DPP v. Finnamore* stated with regard to the decision of the Court of Appeal in England and Wales in *R v. Beedie* as follows:-

> *"The actual findings of the court can be mentioned in three short sentences, as is clear from the headnote. They are, (a) that the doctrine of autrefois convict or acquit is to be defined narrowly and applied only where the same offence is alleged in the second indictment as in the first; (b) that although as a general rule charges founded on the same facts should be joined in the same indictment, a second trial on a more serious charge might be justified in special circumstances; and; (c) it was for the judge to decide, in the exercise of his discretion, whether special circumstances existed. In a judgment which extends to eleven pages, the actual decision of the court is found on one page, which is understandable, given that very early on in the appeal it became clear that the only issue for the court to decide was whether the trial judge had, in that case, exercised his discretion correctly, and the appeal court concluded that he had."*

78. The case of *R v. Beedie* concerned the discretion of the trial judge in the criminal trial itself. We are concerned here with the exercise of discretion by the judge adjudicating on a

judicial review in which an order of prohibition or an order in the nature of a stay on the criminal trial was sought. In my view therefore, this Court ought to give due weight to the exercise of that discretion.

79. In his judgment, the trial judge makes a clear error in holding that "the State" only received possession of the tractor after the District Court hearing. The DPP accepts that "An Garda Síochána and the HSA are both emanations of the State" and submits that it was clear from the context that what the trial judge was dealing with was the HSA getting possession of the tractor/cab. Thereafter, the DPP relies upon the fact that there is credible evidence to support the finding that additional evidence only came to light after the HSA got possession of the tractor/cab and dismantled same.

80. In my view, the DPP's submission highlights a major defect in the DPP's response to the prosecution, to the judicial review and to this appeal. The DPP was entirely responsible for both prosecutions. Both the summary proceedings and the indictable proceedings were taken in her name. Although the DPP is not the investigating agency, the DPP, as prosecutor, bears the ultimate responsibility in so far as the actions of the investigators have an impact on the prosecution. In that particular sense, the DPP embodies the State's responsibility to the accused (and to the victim) in a criminal prosecution. That is not to say that the Court must ignore difficulties when two or more State agencies have a duty to investigate certain matters, but it is for the DPP to put those difficulties in their appropriate and proper context.

81. In the present case, it can be noted that no representative of the DPP's office has sworn an affidavit. We have not been given any information whatsoever about when and where the DPP became involved in this matter or what consideration, if any, was given to the issue of joint or sequential prosecutions. Moreover, there is no affidavit from any member of An Garda Síochána, giving any explanation as to why it was not possible to permit the HSA carry out the type of examination it required prior to the District Court case.

82. The DPP's statement of opposition reveals that the DPP's main focus was in showing that the case was not *autrefois convict* and that it did not come within the general rule set out in *Connelly/Cosgrave*. In so far as the DPP denied the prosecution was oppressive or an abuse of process, the DPP focused on the failure of the application to demonstrate that it was so oppressive or an abuse of process to justify prohibition. The DPP submitted that the applicant had not demonstrated the existence of wholly exceptional circumstances and that in particular, the delay was not oppressive or an abuse of process. The DPP relied upon the public interest in allowing this serious offence which had led to the death of an individual to proceed to trial. In other words, the DPP did not address the issue of why, even if the general rule did apply, there were special circumstances which required the trial to proceed. While this may have been based upon the DPP's confidence in her legal case based upon her understanding of the *Cosgrave v. DPP* decision, it did fail to take into account that the judgment of Denham CJ. had focused on the same issues as regards adjudicating on whether there had been an abuse of process. The end result of this is that the DPP has not put before this Court any evidence as to why there was a sequential investigation which inevitably meant a sequential prosecution.

83. At the hearing of this appeal, I enquired of counsel for the DPP whether there was a memorandum of understanding between An Garda Síochána and the HSA as to the conduct of investigations where both agencies have an interest in investigating whether a breach of the criminal law has occurred. Having taken instructions, counsel indicated that at the time there was such a memorandum of understanding but it has since been overtaken by a fresh one. Neither this Court, nor the High Court, was privy to what this contains or even if it planned for an event such as this. The only explanation that we have before us as to why the HSA delayed its investigation is contained in the supplemental affidavit of Inspector McSweeney that "the HSA was not given access to carry out a full forensic examination of the tractor until 21 October 2014, after completion of the District Court case." This affidavit was only sworn after the appellant's replying affidavit in which it was pointed out that the HSA had access to the tractor

prior to the finalisation of the District Court case. Despite the issues of access being raised by the appellant, the DPP did not put before the Court any evidence that explained *why* such access was not granted.

84. Unlike the situation in *Cosgrave v. DPP*, where no evidence was put forward by the DPP, this evidential deficit has not been filled by reference to an obvious conclusion that could be drawn from the facts before the court. In *Cosgrave v. DPP*, the facts concerning the difficulty of relying on a witness who was also a co-accused in the second set of offences led to the inescapable conclusion that this was why the DPP could not prosecute both at the same time. In the present case, in the absence of any evidence (or indeed submission) as to why there could be no access, it is difficult to construct a coherent legal argument as to why a more detailed forensic examination could not also take place by the HSA while the tractor was in the possession of An Garda Síochána. Indeed, in the present case, it can be observed that the identity of the owner/employer was known at the time and even if there was any doubt about the propriety of carrying out the proposed forensic examination, the appellant could have been notified of this intention and asked for his observations. If any objection on his part had led to a delay in carrying out the investigation this may be relevant in considering the special circumstances.

85. A second aspect of the case which was not addressed by the trial judge or the DPP was why the more detailed forensic examination which according to the DPP required the "dismantling" of the tractor cab had not taken place while the matter was in the possession of the Gardaí or why it could not have taken place until after they had parted with it. Moreover, there is no explanation or evidence that such a dismantling of the tractor cab would have rendered the original examination by the Gardaí somehow suspect or contaminated.

86. The evidence in the case demonstrates that the HSA were involved in the investigating of this incident within 3 days of it having occurred. The evidence also demonstrates that despite the HSA involvement, the Garda investigation was to take precedence and that the HSA

investigation was only to commence in full form after the conclusion of the District Court case. Therefore, from virtually the outset, the second investigating authority had decided that if charges were warranted these would only occur in a sequential fashion. Thus, regardless of whether the charges might arise on the same facts or be substantially the same or of a similar character that might have permitted them to be joined on the same indictment, the investigating authority's actions and intention were that the general rule would never be applicable. There could be no joint prosecution because the investigation would only occur in earnest after the original prosecution was over.

87. Even if this Court was not dealing with the general rule as set out in *Connelly/Cosgrave*, this is a very disquieting policy. It is even more disquieting that the DPP has not engaged in an evidential manner with whether this is acceptable prosecutorial policy. In fairness to the DPP, the situation might arise, as here, where the initial offence was a summary only offence, where strict time limits on prosecutions require decisions to be taken early in the name of the DPP but without reference to her office. It is unclear however that even if the Garda investigation had revealed an offence that required prosecution on indictment, the DPP is saying that no matter how long it took to prosecute, the subsequent investigation could only make substantial progress when the first case came to a halt. I have no doubt that if such a general policy (as distinct from the entirely exceptional circumstances in *Cosgrave v. DPP*) was to occur, it would have grave implications for the right to a trial in due course of law as set out in Article 38 of the Constitution and the administration of justice generally. There are many situations which give rise to potential criminal offences under a variety of headings; what may be termed ordinary criminal law or specific legislation dealing with what may be termed as regulatory offences. Recent history has shown that these regulatory offences may result in trials of enormous length and complexity. If they were to be followed by a restart of an *investigation* potentially leading to a further trial at some distance removed from the event, this could be said to be unfair in a general

sense and reverse the desirable practice of bringing proceedings against an accused in as short a time frame as possible.

88. The trial judge also relied on other matters in holding there was no abuse of process. These were relevant in general. There was no obligation under the decision in *Cosgrave v. DPP* for the HSA to inform him of the intention to prosecute. I also agree that the accused must have known from the conversation with Inspector McSweeney (and indeed the presence of the HSA at the District Court case) that such a prosecution was possible. I have commented on the importance of differentiating between the offences and the facts upon which they are based above. Similarly, I have addressed his conclusions on the offences being different in nature, degree and moral turpitude. While I agree that these were matters to be addressed although disagreeing with his conclusions on certain aspects of it, I am of the view that the most relevant factor in assessing special circumstances was the reason why the investigation was delayed. That was a deliberate policy decision for which a clear, cogent and compelling reason has not been given. That is in stark contrast to the decision in *Cosgrave v. DPP*.

89. The final matter that the DPP submits that ought to be taken into account is that this involves the death of an individual and that there is a public interest in prosecuting that matter. In *Cosgrave v. DPP*, Denham CJ. identified the public interest as a matter to be considered but held that it was not necessary to consider in that case as she was holding there was no abuse of process there. There is of course a considerable public interest in ensuring that cases involving the deaths of an individual (especially a child) are investigated fully and prosecuted where sufficient evidence exists to justify a prosecution. In this case, there seems to have been no consideration by either the HSA or the DPP of that aspect of the public interest when making the decision to stall the investigation into what may have been more serious offences or to ensure that the prosecution was brought at the most appropriate earliest consideration. Although there is a public interest in ensuring that cases involving fatalities are prosecuted, there is also a public interest in ensuring that the trial process is fair and that the administration

of justice is not compromised by a policy that guarantees delayed trials. Finally, in the present case, although the appellant has not been convicted of an offence which directly references the death of Michael Murphy, he has been convicted of an offence that is directly related to the mechanism by which that fatality occurred and which said offence including a finding that this defect, which was known to him or could have been discovered by ordinary care, was a danger to the public. In terms of moral culpability, this appellant has rightly been convicted of an offence which incorporates a high level of such culpability. Moreover, the offence for which his prosecution is sought is not an offence of manslaughter or even dangerous driving causing death but is an offence of lesser seriousness. It is an offence for which the maximum term of imprisonment is 2 years notwithstanding that there has been a death. That is not to downplay its seriousness, but to outline its *relative* seriousness with the panoply of criminal offences which may arise when the death of an individual occurs. In the context of the previous conviction for an offence which involved the knowing of, or the failure to take care about, the danger to the public, the moral stigma associated with such a conviction has to a certain, albeit lesser extent, been recognised by that prosecution and conviction.

90. It is also necessary to point out that even after the conviction was recorded in the District Court on the 2nd October 2014, it was 3 more years before the prosecution against the appellant began. The excuse for that delay is said by Inspector McSweeney to be "a significant lack of resources in the Legal Unit of the HSA" and that is why a completed file was only sent to the DPP in April 2017. It is the responsibility of the State to provide sufficient resources for the investigation and prosecution of offences. While the delay itself may not be sufficient to ground a finding of an abuse of process, it is a factor in the overall consideration of the exercise of discretion. This was a delay in the prosecution which existed independently of the decision to hold a sequential investigation (and possible prosecution) and thus was unlike the situation in *Cosgrave v. DPP* where there was no separate reason for the delayed prosecution (the delay between the end of the prosecution against Mr. Dunlop and the referral of charges against the

accused was about one year). It is noteworthy, that this delay factor, is not discussed as a relevant factor in the trial judge's consideration of whether the current prosecution amounted to an abuse of process. I consider that the trial judge erred in not doing so.

91. I am satisfied for the foregoing reasons that in the present case the special circumstances pointed to by the DPP are not sufficient to justify the sequential prosecutions in this case of the Health and Safety offence after the Road Traffic offence. The trial judge had not addressed this issue from the point of view that the DPP bore a burden under the general rule as set out in *Connelly/Cosgrave*. To that extent, we are not dealing with the exercise of his discretion. I am satisfied however, that the reasons he gave in relation to his consideration of whether there was an abuse of process, in the same manner as Denham CJ. approached abuse of process in *Cosgrave v. DPP*, were insufficient for the purpose of considering whether there were special circumstances justifying the sequential trial or whether there was an abuse of process in permitting it, especially in light of the absence of an explanation for the apparent policy adopted by the investigating authorities of having sequential investigations based upon a failure to give access to evidence to the other investigating authority. It has not been shown to be just or appropriate to have opted to have serial investigations resulting in serial prosecutions.

Abuse of Process

92. In *Cosgrave v. DPP*, Denham CJ. at paragraph 50 indicated she was approaching the case from a wider perspective and had considered whether the DPP had established good reason for the sequential trial and whether the prosecution on the current charges was an abuse of process. She indicated that the same facts and arguments that would have established special circumstances also have a bearing on the question of abuse of process. From my reading of the approach Denham CJ. took, she was not changing the burden to the DPP in all cases where an appellant claimed an abuse of process, she was simply making the point that many of the same factors would apply to a consideration of both.

93. In his High Court judgment in this case, the trial judge identified the factors he saw as relevant to this case. I have outlined above why I consider he erred in his assessment of these factors or the extent of their relevance. In *Cosgrave v. DPP*, at para. 57, Denham CJ. referred to the special circumstances as demonstrating that it was "just and appropriate" for the DPP to await the prosecution and conviction of Mr. Dunlop before prosecuting that appellant on the corruption charges. I am satisfied that in the present case, no such special circumstances arose which would justify the deliberate decision to embark on a process which would have the result of sequential prosecutions. No explanation has been given as to why that approach was deemed *necessary*, unlike the situation in *Cosgrave v. DPP* where the reasoning was clear and in the words of Denham CJ "just and appropriate". The mere fact that one investigating agency does not give access to potential evidence to another investigating agency until after the conclusion of proceedings does not on its own lead to a conclusion that this was "just and appropriate." On the contrary, such a general policy, in the absence of explanation, would seem flawed, unjust and inappropriate when weighed against the right to a trial in due course of law under Article 38 and the general principles of the administration of justice.

94. I am satisfied that the trial judge erred in the exercise of his discretion in failing to grant the appellant the relief sought.

95. I would therefore allow this appeal.

96. As this judgment is being delivered electronically, it is appropriate to record the agreement of the other members of the Court.

Edwards J.: I agree with this judgment and the proposed orders.

McCarthy J: I agree with this judgment and the proposed orders.