THE HIGH COURT

[2023] IEHC 43

[Record No. 2021/708JR]

BETWEEN:-

G.B.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on the 8th day of February, 2023.

Introduction

1. In these proceedings the applicant is seeking a number of declarations to the effect that the District Court does not have jurisdiction to try him on a charge of assault contrary to s.2 of the Non-Fatal Offences Against the Person Act 1997 (hereinafter referred to as "the s. 2 assault"), based on a summons issued on 27th July, 2020, in respect of an offence alleged to have occurred on 17th November, 2016.

2. The basis of his challenge to the summons is not on grounds of delay *per se*, but due to the fact that an earlier summons was withdrawn by the prosecution in the mistaken belief that the summary charge therein had been added to an indictment then pending before the Circuit Criminal Court.

3. The background can be summarised in the following way: the applicant was at the material time employed in a child-care facility. Complaints were made that he had assaulted a number of minors in the facility. As part of the garda investigation, CCTV of the interior of the facility was examined by the gardaí. Arising out of what they saw on the CCTV recording, the investigating garda was of the opinion that the applicant had committed a s.2 assault on a child on 17th November, 2016. Arising out of the complaints and the garda investigation, the applicant also faced charges of sexual assault on minors, which were brought on indictment before the Circuit Criminal Court.

4. On 8th May, 2017, the investigating garda made an application for the issuance of a summons in respect of the alleged s. 2 assault. The summons issued on 31st July, 2017. When the matter was returnable before Naas District Court on 21st November, 2017, it was struck out due to non-service on the applicant.

5. On 3rd April, 2018, the investigating garda applied for the issuance of a fresh summons in respect of the same alleged offence, which application was based on her original application made on 8th May, 2017. The fresh summons issued on 3rd April, 2018.

6. The second summons was returnable to Naas District Court on 4th September, 2018. That summons was withdrawn by the prosecution on the mistaken belief that the offence charged in the summons had already been added to the indictment pending before the Circuit Criminal Court.

7. On 4th February, 2020, at the commencement of the trial of the applicant in the Dublin Circuit Criminal Court, it transpired that the s.2 assault matter had not been added to the indictment. It was not possible to add it to the indictment at that stage, as the summary matter was no longer live before the District Court. The trial of the applicant proceeded before the Circuit Criminal Court on the original counts.

8. Following the conclusion of the trial in the Circuit Criminal Court, on 12th June, 2020, the investigating garda applied for a further summons in respect of the s.2 assault offence. That third summons issued on 27th July, 2020. It was returnable to Naas District Court on 11th November, 2020, at which stage, the applicant indicated that he would be challenging the jurisdiction of the District Court to proceed with the matter.

9. On 24th June, 2021, a hearing was held of a preliminary issue in the District Court, on whether the District Court had jurisdiction to deal with the s.2 assault matter on foot of the third summons. Evidence was heard from the investigating garda. The District Court judge ruled that he had jurisdiction to deal with the matter. The matter was then put back for a trial date.

10. On 26th July, 2021, the applicant obtained leave in the High Court to challenge the ruling of the learned District Court judge.

11. In these proceedings, the applicant alleges that once the proceedings were withdrawn in the District Court on 4th September, 2018, that was the end of those proceedings. It is submitted by the applicant that when the investigating garda applied for a third summons on 12th June, 2020, she was out of time to do so; therefore, the District Court lacked jurisdiction to entertain the prosecution. The applicant seeks a number of declarations to that effect.

12. For completeness, and in fairness to the applicant, it should be stated that in relation to the charges preferred against him on indictment, at the first trial in the Circuit Criminal

Court the jury acquitted him of five counts, while disagreeing on the remaining charges on the indictment. On a retrial of the remaining charges, the applicant was acquitted on all counts.

Chronology of relevant dates.

17/11/2016	Date of alleged offence
8/5/2017	Application by D/Gda Nolan for summons alleging s.2 offence.
31/7/2017	First summons issued.
21/11/2017	First summons returnable to Naas District Court. Summons was struck out due to non-service on the applicant.
3/4/2018	Application by D/Gda Nolan for second summons based on original application. Second summons issued on that date.
4/9/2018	Second summons returnable to Naas District Court. A second summons withdrawn by prosecution on the mistaken belief that the offences charged in the summons had already been added to the indictment pending before the Circuit Criminal Court.
4/2/2020	Commencement of trial in the Dublin Circuit Criminal Court. It transpired that the summary matter had not been added to the indictment. The trial on indictment proceeded.
12/6/2020	Following end of the trial in the Circuit Criminal Court, D/Gda Nolan applied for a third summons in respect of the s.2 assault offence.
27/7/2020	Third summons issued.
11/11/2020	Third summons returnable to Naas District Court; at which stage, the applicant indicated that he would be challenging the jurisdiction of the District Court to proceed with the summons.
24/6/2021	Hearing of a preliminary issue in the District Court on jurisdiction. Evidence heard from D/Gda Nolan. Judge ruled that he had jurisdiction to deal with the matter.
26/7/2021	Order granting the applicant leave to proceed by way of judicial review.

The Evidence.

13. The key evidence concerned two matters: the withdrawal of the second summons on 4th September, 2018 and the application for the issue of the third summons on 12th June, 2020.

14. In relation to the withdrawal of the second summons, the respondent has candidly admitted that this was done due to the mistaken belief that the summary charge had already been added to the indictment. In an affidavit sworn on 22nd February, 2022, D/Sgt Lalor stated as follows at paras. 3 and 4: -

> *"3. On 28 August 2018, I contacted the office of the State Solicitor for Kildare North/West to confirm what was going to happen with the summons against the Applicant in respect of the alleged assault on [name redacted] on 17 November 2016. By that stage the Applicant had already been sent forward for trial to the Circuit Court. I was informed that the summons could be withdrawn from the District Court as it had been added to the indictment in the Circuit Court and could proceed there. As a result of this conversation, I informed Garda Shona Nolan that the summons could be withdrawn. I understand that the solicitors for the Applicant were notified of this and that counsel appeared for the Applicant before the District Court on 4 September 2018.*
>
> *4. It was never the position that the withdrawal of the summons on 4 September 2018 meant that the allegation as regards [name redacted] would not be prosecuted. On the contrary, the withdrawal of the summons was only considered to be a procedural step to ensure that the s.2 assault offence would form part of the trial of the Applicant in the Circuit Court."*

15. This account was supported by the affidavit sworn by D/Gda Nolan on 22nd February, 2022, where she stated as follows at para 6: -

> *"6. As set out in the statement of opposition, on 4 September 2018, the matter was before Naas District Court. On that occasion, the prosecution withdrew the summons then before the court in the genuine but mistaken belief that the offence had been added to the indictment in the Circuit Court. On an application made by the Respondent to this honourable Court, the digital audio recording has been released and furnished to the parties. I say that it is apparent from that digital audio recording that it was clear to the parties in court that day that the intention of the prosecution was to proceed with the s.2 assault offence but by way of it being added to the indictment in the Circuit Court. Given the very short length of proceedings before the District Court that day, the proceedings lasted approximately one minute before*

the District Court. …[D/Gda Nolan exhibited a transcript of that hearing and the audio recording itself]."

16. In her evidence to the District Court on the hearing of the preliminary issue in relation to jurisdiction, which was held on 24th June, 2021, D/Gda Nolan confirmed what had been stated in her affidavit in relation to the withdrawal of the second summons: namely, that a decision had been made to withdraw the proceedings in the District Court, in the belief that the summary charge had been added to the indictment. She confirmed that approximately two days prior to the hearing of the matter in the District Court on 4th September, 2018, she had been informed that the summary charge had been added to the indictment and that the matter was to be withdrawn from the District Court level, because it was to proceed along with other matters in the Circuit Criminal Court. She confirmed that that had been communicated to the applicant's legal team in advance of the hearing on 4th September, 2018.

17. The court was provided with a transcript of the DAR recording for the application that was moved before the District Court on 4th September, 2018. The transcript of the hearing is as follows: -

"*SERGEANT: Judge, that matter is a summons which is related to a case that's been sent forward to the Circuit Court, Judge, and this, this matter has been actually added to the indictment –*

JUDGE: It's been done?

SERGEANT: - and can be withdrawn, Judge.

JUDGE: Is it… I'll make no order, that's all.

SERGEANT: No, Judge, it has been added already and –

JUDGE: Yes I'll make –

SERGEANT: - it's set for trial in 2020.

JUDGE: Yes I've no problem withdrawing it at this stage but it's still active?

SERGEANT: Yes.

JUDGE: So no order.

SERGEANT: No order, thank you Judge.

COUNSEL [for the applicant]: May it please the Court."

18. The court was furnished with a copy of the order that was made in the District Court on 4th September, 2018. The order records that on 4th September, 2018, a complaint was

heard and determined that the accused had assaulted the named individual on 17th November, 2016 at the child-care facility contrary to s.2 of the 1997 Act. The order goes on to state: "*It was adjudged that the said offence be withdrawn*".

19. At the hearing in the District Court to deal with the issue of jurisdiction, D/Gda Nolan gave evidence as to what had happened in the Circuit Criminal Court when the trial on indictment commenced in February 2020. She stated that it was discovered that the summary matter had not in fact been added to the indictment. It was not possible to have it added to the indictment at that stage, because the charge had been withdrawn in the District Court. She stated that following the conclusion of the trial in the Circuit Criminal Court, she applied for a fresh summons on 12th June, 2020. She stated that when she applied for that summons, she intended to apply for it based on the original application that she had made for a summons on 8th May, 2017. However, she was not able to reissue the summons based on the original application, because the Garda PULSE system would not allow her to do so. For that reason, she had to make a fresh application on that date for the issuance of a fresh summons, which issued on 27th July, 2020.

The Summonses.

20. The first two summonses are in almost identical terms. They both record that on 8th May, 2017 an application was made to the Naas District Court office by D/Gda Nolan for the issuance of a summons against the applicant in respect of the alleged offence which was stated to have occurred on 17th November, 2016, wherein he was alleged to have assaulted a named minor contrary to s.2 of the 1997 Act. The first summons issued on 31st July, 2017 and the second summons issued on 3rd April, 2018.

21. The third summons recorded that on 12th June, 2020 an application was made by D/Gda Nolan for the issuance of a summons against the applicant in identical terms to the previous summonses. It issued on 27th July, 2020.

Relevant Statutory Provisions.

22. Section 1 of the Courts (No. 3) Act 1986, as amended by s.19 of the Civil Liability and Courts Act 2004; and s.19 of the Civil Law (Miscellaneous Provisions Act) 2008; and s.2 of the Courts Act 2017, provides where relevant: -

> *1.—(1) Proceedings in the District Court in respect of an offence may be commenced by the issuing, as a matter of administrative procedure, of a document (in this section referred to as a 'summons') to the prosecutor by the appropriate office.*

[…]

(6) A summons shall—

(a) specify the name of the person who applied for the issue of the summons,

(b) specify the application date as respects the summons,

(c) state shortly and in ordinary language particulars of the alleged offence, the name of the person alleged to have committed the offence and the address (if known) at which he or she ordinarily resides,

(d) notify that person that he or she will be accused of that offence at a sitting of the District Court specified by reference to its date and location and, insofar as is practicable, its time, and

(e) specify the name of an appropriate District Court clerk.

[…]

(9) In any proceedings it shall be presumed, unless the contrary is shown, that—

(a) a document purporting to be a summons is a summons duly applied for and issued, and

(b) the date specified in the summons as being the application date is the application date.

(9A) In any proceedings it shall be presumed, unless the contrary is shown, that a summons to which subsection (2A) applies was created in an automatic manner on the basis of information transmitted as specified in paragraph (a) of that subsection.

[…]

(12) Any provision made by or under any enactment passed before the passing of this Act relating to the time for making a complaint in relation to an offence shall apply, with any necessary modifications, in relation to an application under subsection (3) of this section.

[…]

(14) In this section—

[…]

'application date' means, in relation to a summons, the date on which the application for the issue of the summons was received by the appropriate office;

[…]

23. Section 10 of the Petty Sessions (Ireland) Act 1851, insofar as relevant, provides as follows: -

> *4. In all cases of summary jurisdiction the complaint shall be made…within six months from the date when the cause of complaint shall have arisen but not otherwise…*

24. Section 6 of the Criminal Justice Act 1951, provides as follows: -

> *6.—Where a person is sent forward for trial for an indictable offence, the indictment may contain a count for having committed any offence triable summarily (in this section referred to as a summary offence) with which he has been charged and which arises out of the same set of facts and, if found guilty on that count, he may be sentenced to suffer any punishment which could be inflicted on a person summarily convicted of the summary offence.*

Submissions on behalf of the Applicant.

25. The applicant submitted that the key issue in this case was the effect of the withdrawal of the summons from the jurisdiction of the District Court on 4th September, 2018. It was submitted that that was a deliberate act by the prosecution which brought the proceedings before the District Court to an end. It was stated that that was the clear intention of the prosecution at that time. That they took these steps based on the mistaken belief that the summary charge had already been added to the indictment, was not relevant to the efficacy of the order that was made in the District Court as a result of their application.

26. It was submitted that it was clear that as a result of the application moved on 4th September, 2018 and the order made thereon, the proceedings in the District Court had been brought to an end. They no longer existed after the order had been made on that day. It was submitted that that was evident from the fact that when the absence of the summary charge from the indictment was noticed at the commencement of the trial before the Circuit Criminal Court in February 2020, the summary charge could not be added to the indictment, because there was no extant charge in the District Court against the applicant at that time. That had been accepted by D/Gda Nolan in her evidence.

27. It was submitted that the fact that there was a mistaken belief on the part of the prosecution when moving the application on 4th September, 2018, could not prevent the order withdrawing the proceedings from the jurisdiction of the District Court, from taking effect. In this regard counsel referred to the decision in *Kennelly v. Cronin* [2002] 4 IR 292, where proceedings had been struck out on the mistaken belief that the Book of Evidence

was not available; McGuinness J. had stated that the fact that the strike out order had been sought as a result of a misunderstanding by the prosecutor was "*neither here nor there; it is quite irrelevant*"; as far as the effect of the strike out order was concerned.

28. It was submitted that while at first sight the decision in *R (McDonnell) v. Justices of County Tyrone* [1912] 2 IR 44, to the effect that a "withdrawal" was no obstacle to subsequent proceedings on foot of the complaint so withdrawn, was contrary to the applicant's acquittal, it was submitted that that finding was subject to important reservations. First, the case concerned proceedings under a somewhat obscure eighteenth century statute; it did not concern the jurisdiction to try charges under the Petty Sessions (Ireland) Act 1851. Secondly, the analysis in that case concerned whether a withdrawal amounted to an acquittal. It was submitted that the question arising in the present proceedings was more subtle than that. Thirdly, the understanding in that case of the effect of the withdrawal of a charge, was contradicted by later Irish authorities: see *Carpenter v. Kirby* [1990] ILRM 764 and *Kennelly v Cronin*. Counsel accepted that the two latter decisions had concerned indictable offences and had been distinguished by Hedigan J. in *DPP (O'Connor) v. District Judge Mangan* [2010] 3 IR 530 on that basis. In the *Mangan* case, the complaint had been made in sufficient time to ground a summons under the 1851 Act, but the summons had actually issued under the 1986 Act. It was submitted that that was a mere deficiency of form, which could not invalidate proceedings on foot of a valid complaint.

29. Counsel submitted that there was a more nuanced point which arose in this case, as to whether it was possible to apply for a new summons under the 1986 Act procedure, which application could be made outside the six-month time limit, but would be based on an earlier application, which had been made within time. However, counsel submitted that the court was not required to decide that issue, if the court held with the applicant that the withdrawal of the summons on 4th September, 2018, had brought the District Court proceedings to an end. If that had happened, it was clear that the third application was for a completely new set of proceedings and were clearly out of time.

30. Counsel accepted that the decision in *DPP v. McKillen* [1991] 2 IR 508 was against him on the more nuanced point. That decision had applied the earlier decision in *DPP v. Nolan* [1990] 2 IR 526 and had held that a person could apply for a second summons on the basis of an application made for the first summons within time, pursuant to the 1986 Act procedure.

31. Counsel submitted that the *McKillen* decision should be held as having been wrongly decided, because the judge in that case had simply proceeded on the basis that there were parallel procedures provided for under the 1851 Act and the 1986 Act and that these were essentially the same. It was submitted that that was incorrect, because under the 1851 Act, a complaint is made to the District Court and then a summons is issued. So the issuance of a second or subsequent summons, at a date or dates outside the six-month period from the date of the alleged offence, was irrelevant, because the complaint had been made to the District Court within time. It was that application to the District Court that was the essential step to ground jurisdiction. The resulting summons was only a notice telling the person of the charge against them and informing them of the date on which they had to attend court to face the charge.

32. It was submitted that under the 1986 Act, the procedure was quite different, because while the application for the summons was the critical step from the point of view of the stopping of time under the six-month period provided for the making of a complaint in respect of a summary matter under the 1851 Act, it was the issuance of the summons itself which grounded jurisdiction in the District Court. However, counsel reiterated that it was not necessary for the court to decide this more nuanced point, if it held with the applicant that the withdrawal of the summons on 4th September, 2018, constituted the end of the proceedings in the District Court. If that was the case, the application for the new summons in June 2020, was clearly out of time.

33. Finally, on the point that the time bar issue was a matter of defence, rather than a matter for jurisdiction, which should be raised at the time of the trial of the action in the District Court; it was submitted that this issue had been tried as a preliminary issue in the District Court; extensive evidence had been given by D/Gda Nolan and relevant documentation had been submitted. It was submitted that in these circumstances it made no sense to require all the relevant witnesses to attend for the trial, only to litigate the jurisdiction issue again at the conclusion of the trial.

Submissions on behalf of the Respondent.

34. Mr. McKenna BL, on behalf of the respondent, submitted that the application that had been made on 12th June, 2020, had been grounded on the original application of 8th May, 2017, which had been made within time; therefore, the proceedings were lawfully

before the District Court on the return date of 11th November, 2020 and on subsequent dates.

35. It was submitted that the withdrawal of the summons before the District Court on 4th September, 2018, was not a bar to further proceedings before the District Court for the same offence. The application made on 12th June, 2020, was based on the earlier application of 8th May, 2017. The fact that the summons bore the application date of 12th June, 2020 was not determinative of the question of whether the time limit had been complied with.

36. It was submitted that in relation to the effect of the withdrawal of a summons, as set out in *R (McDonnell) v. Tyrone Justices*, which had been applied in *The State (McLoughlin) v. Judge Shannon* [1948] IR 439, it was clear that the withdrawal of a summons, was not an adjudication on the merits, such as would prevent a further prosecution for the same matter. It was submitted that the decision in *DPP (O'Connor) v. District Judge Mangan*, had distinguished the earlier decisions in *Carpenter v. Kirby* and *Kennelly v. Cronin* as relating to indictable offences and held that strike out of a summons, did not strike out the complaint on which this summons had been based.

37. It was submitted that it was well established that fresh proceedings could be grounded on an earlier complaint, which had been made within time: see *DPP v. Gill* [1980] IR 263, *DPP v. McKillen* and *DPP (Treacy) v. Thomas* [2007] 2 ILRM 234.

38. Counsel submitted that the evidence of D/Gda Nolan had been very clear that when she had applied for the third summons in June 2020, she was basing that on her previous application made on 8th May, 2017, which was well within time. The fact that she was unable to do so, due to computer difficulties, was not relevant to the validity of that summons: see *The State (McLoughlin) v Judge Shannon*.

39. It was pointed out that while the proceedings had been withdrawn from the District Court on 4th September, 2018 on the application of the prosecution, it was abundantly clear that the respondent was not dropping the summary charge, but had only taken that step in the District Court, because they thought that it had already been added to the indictment pending before the Circuit Criminal Court. The intention of the respondent to prosecute the applicant on the summary charge, was unambiguous and continued beyond the hearing held on 4th September, 2018.

40. It was submitted that in these circumstances, when it transpired that the summary charge had not been added to the indictment and that it was not possible to do so in February

2020, there was nothing to prevent the investigating garda from applying for a fresh summons based on her original complaint. It was submitted that that was clearly permitted under the 1986 Act, as demonstrated in the *McKillen* and *Thomas* decisions.

41. Insofar as there had been a lapse of a considerable period of time between the date of the alleged offence and the third application for a summons, if that had caused prejudice to the applicant in the conduct of his defence, that was a matter that could be raised in his defence at the trial in the District Court.

42. It was submitted that although the date of the application, as stated in the third summons, was 24th June, 2020, this did not prevent D/Gda Nolan giving evidence of her intention that the application would be grounded on her earlier application of 8th May, 2017. It was submitted that she had only made the fresh application, because the PULSE system would not allow the issuance of a fresh summons against the applicant for the offence based on the original application, as had been done in relation to the application for the second summons. It was submitted that it was appropriate for the detective garda to give evidence of her intention to base the application on her first application for a summons: see *Hegarty v. District Judge Fitzpatrick* [1990] 2 IR 377.

43. Finally, it was submitted that the question of whether the time limit was complied with, was a matter of defence, which should be raised at the court of trial and was not a matter going to jurisdiction: see *Murray v. McArdle (No.2*) [1999] 4 IR 383.

Conclusions.

44. In relation to the point taken that the time bar issue is a matter of defence, rather than one of jurisdiction, and should be raised at the conclusion of the trial as part of the defence; I am satisfied that there is no substance in this point. There was a full hearing in the District Court on the preliminary issue concerning jurisdiction. The District Court judge made his decision. While it could be argued that if the applicant was aggrieved by that decision, he should more properly have proceeded by way of appeal; that point was not taken against the applicant in these proceedings.

45. I am satisfied that it would be a waste of time and resources to compel the applicant to raise the grounds of challenge that he has raised in this application as part of his defence, rather as a challenge to jurisdiction. It is in the interests of all concerned that this Court should proceed to determine the issues raised in these judicial review proceedings.

46. The key issue in this case is the effect of the withdrawal of the summons by the prosecution on 4th September, 2018. For that reason, the court has gone into the evidence on that aspect in some detail.

47. The evidence of D/Sgt Lalor, in his affidavit sworn on 22nd February, 2022 and the evidence of D/Gda Nolan, in her evidence to the District Court on 24th June, 2021 and repeated in her affidavit sworn on 22nd February, 2022, shows clearly that because the gardaí believed that the summary charge had already been added to the indictment, they informed the defence in the days leading up to the hearing in the District Court on 4th September, 2018, that they would be withdrawing the summons from the District Court. They followed through on that assertion, when the presenting sergeant made the application before the District Court.

48. The District Court is a court of record. The order made by the District Court on 4th September, 2018 is clear in its terms. It notes that at the sitting of the court on 4th September, 2018 the complaint was "*heard and determined*" and it goes on to record: "*It was adjudged that the said offence be withdrawn*".

49. I am satisfied that once that order was made by the District Court on 4th September, 2018, both the prosecution and the defence understood that those proceedings before the District Court had completely terminated. The proceedings had not gone into some form of limbo, whereby they were likely to be revived at some indeterminate date in the future.

50. That those proceedings had been finally disposed of and were not extant after 4th September, 2018, is shown by the fact that when the absence of the summary charge from the indictment became known to the prosecution in February 2020, it was not possible to add the charge to the indictment at that stage, because there was no charge then pending against the applicant in the District Court. This meant that the conditions in s.6 of the Criminal Justice Act 1951 were not met and the summary charge could not be added to the indictment.

51. In relation to the effect of an order providing for the withdrawal of a summons, the respondent relied heavily on the decision in *R (McDonnell) v. The Justices of County Tyrone*, where the court held that an order permitting a summons for an offence punishable on summary conviction to be withdrawn, did not amount to an acquittal of the defendant, and a fresh summons could subsequently be issued for the same offence.

52. In particular, counsel for the respondent relied on the following dicta from the judgment of Palles CB:

> "*In my opinion, the permission given by the Justices to withdraw the first complaint did not amount to an acquittal. The order involved no more than the consent of the Justices that the question of the guilt or innocence of the defendant in the summons should be withdrawn from their cognizance, that is, that they should not adjudicate upon it. There was therefore, an absence of adjudication; whilst, to amount to an acquittal, it was necessary that there should be an adjudication on the merits. The withdrawal had not, in my opinion, any greater effect than that which a nolle prosequi has in proceedings by indictment, and that undoubtedly, would not be an answer to a subsequent indictment for the same offence*."

53. Reliance was also placed on the following dicta of Gibson J.:

> *"Putting compromise aside, I am of opinion that under the Petty Sessions Act "withdrawn" could not have a more binding effect than "dismissed without prejudice..... "Withdrawn" cannot be an acquittal; it is not an adjudication at all; it only shows why the Court is not required to hear or determine; and it could not absolve the defendant from prosecution by another common informer."*

54. The court is satisfied that for a number of reasons, this authority is not binding upon it in relation to the effect of an order withdrawing a summons. First, the decision in the *McDonnell* case is of considerable antiquity, having been handed down in November 1911. Secondly, the true ratio of the case turns on whether the order withdrawing the summons had the same effect as an acquittal following a full hearing. The court held that the withdrawal of the summonses in the circumstances before it, did not amount to an acquittal of the accused. The court is satisfied that each case must turn on its own facts. It was for that reason that the court looked at the circumstances surrounding the withdrawal of the summons before the District Court on 4th September, 2018 in some detail. The court is satisfied that the intention of the prosecution on that occasion was to withdraw the summons from the jurisdiction of the District Court once and for all, it being of the belief that the summary charge had already been added to the indictment. Thus, one was dealing with an application of a totally different character in this case, than that which was moved in the *McDonnell* case.

55. I am satisfied that the application made on 4th September, 2018 brought the entirety of the District Court proceedings to an end. That meant that not only was the summons gone, but so also was the application on which it was based.

56. I accept the evidence of D/Gda Nolan that there had been an intention on the part of the respondent to prosecute the applicant for the s.2 assault. I accept her evidence that the matter had only been withdrawn from the District Court in September 2018, because it was thought that it had already been added to the indictment in the Circuit Criminal Court. However, the intention of the respondent to continue the prosecution of the summary matter in a different forum, cannot be used to effectively overturn the order made by the District Court on consent of the parties, which was to withdraw the proceedings then pending before the District Court on 4th September, 2018.

57. The respondent made a decision to withdraw the proceedings in the District Court. The respondent made an application to that effect. A decision was made by the District Court judge to accede to her application. The respondent cannot turn around later and plead her own mistake, as a means of setting aside the order that was made by the District Court judge on that occasion.

58. That a mistaken belief on the part of the prosecution cannot affect the validity or efficacy of a court order, was clearly established in *Kennelly v. Cronin*. In that case the original charge sheet had been struck out due to the mistaken belief on the part of the prosecution that the book of evidence was not ready. The charge was struck out and the first respondent was subsequently arrested and recharged with murder. The question arose as to the validity of the striking out order and the earlier entry of recognizances is by the second and third respondents. It was held that they were not bound, because the order striking out the first charge had the effect of discharging them from their recognizances. In the course of her judgment, McGuinness J. made it clear that a mistaken belief on the part of the prosecution, which had led to the making of the court order, was irrelevant:

> *"As far as the immediate effect of the strike-out order is concerned, the fact that the book of evidence was not produced at the proper time due to a "misunderstanding" and that it was in fact available is neither here nor there; it is quite irrelevant."*

59. To enable the respondent to set aside an order simply because they had made a mistake in applying for it, would be to allow an abuse of process of the court. This case is

an analogous to the circumstances that arose in *Cleary v. DPP* [2013] 2 IR 48. In that case the applicant had been charged with assaulting a woman in a nightclub by cutting her face with a broken glass. The charge was one which the prosecution could elect to try summarily (subject to the consent of the District Court judge), or on indictment. In that case, the prosecuting sergeant, acting on foot of a general discretion that had been issued by the DPP to the gardaí, elected to proceed summarily. Jurisdiction was accepted by the District Court judge and the matter was given a trial date. When the prosecution did not turn up for the trial, the matter was struck out.

60. Subsequently, the DPP elected to proceed on indictment. It was held that the DPP could not do so, as that would be an abuse of process of the court. It had been argued that there had been a mistake by the prosecuting sergeant to allow the matter to proceed in a summary fashion. Under the heading "Constables' Blunders", Hardiman J., delivering the majority judgment, stated that a mistake by the prosecuting authorities would not enable them to ground a fresh prosecution. He stated as follows at p.66: -

> *"The phrase then, is an appeal to a more general feeling that a mistake or impropriety by the authorities should not interfere with the prosecution's case. I do not agree with this in principle, for the reasons given by Mr. Justice McCarthy in Trimbole v. The Governor of Mountjoy Prison [1985] IR 550."*

61. I agree with the submission made by Mr. Guerin SC on behalf of the applicant, that it is not necessary for the court to decide the more nuanced issue of whether it is possible for a fresh summons to be issued under the 1986 Act, based on an earlier application, which had been made within time. There is certainly authority for the argument that that is possible: see *DPP v. McKillen*; *DPP (Treacy) v. Thomas*.

62. I am satisfied that it is not necessary to decide that issue and in particular, whether it was possible for D/Gda Nolan to apply for a third summons on 12th June, 2020, based on her first application, made some three years earlier on 8th May, 2017, because I hold that once the proceedings on the s.2 assault charge were withdrawn on 4th September, 2018, it would be an abuse of process for the respondent to be allowed to go behind the position she had adopted at that time and to go behind the order of the District Court made on that occasion and be permitted to revive the proceedings by virtue of the application made by D/Gda Nolan on 12th June, 2020.

63. It was unfortunate that the respondent had proceeded under a mistaken belief, when she made the decision that she did in September 2018 to withdraw the District Court proceedings on the s.2 assault charge. She made a deliberate decision. She acted on that decision in making the application to withdraw the proceedings from the District Court. The court made the order requested. The respondent cannot plead her own mistake, which was not caused by the applicant, as a means of setting aside the court order made on 4th September, 2018.

Decision.

64. For the reasons set out above, the court is satisfied that the applicant is entitled to the reliefs sought at paras. (ii); (iii); and (iv) of his notice of motion dated 29th July, 2021.

65. The applicant is not entitled to the reliefs sought at para. (i) of his notice of motion, because the order of the District Court made on 24th June, 2021, was not produced in court.

66. The court will continue in place the order that it has already made that there should be no publication of any details that would tend to identify the applicant, as that may tend to identify the complainants in respect of the original charges, who are minors.

67. As this judgment has been delivered electronically, the parties will have two weeks within which to furnish brief written submissions in relation to the terms of the final order and on costs and on any other matters that may arise.

68. The matter will be listed for mention at 10.30 hrs. on 7th March, 2023 for the purpose of making final orders in the matter.