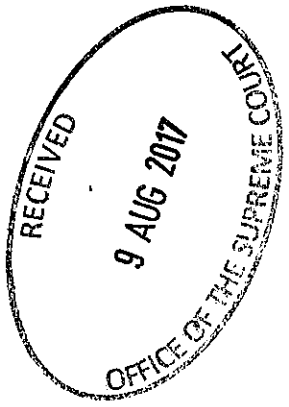
No. 2

O. 58, r. 18(1)

THE SUPREME COURT
Respondent's Notice

Supreme Court Record No. S:AP:IE:2017:000108



THE COURT OF APPEAL
JUDICIAL REVIEW
2016 No. 124

CHRISTOPHER CONNORS

Applicant/Appellant

-and-

DISTRICT JUDGE JAMES FAUGHNAN

First Respondent

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Second Respondent

Date of filing	9th August 2017.
Name of respondent:	The Director of Public Prosecutions. ☐
Respondent's solicitors:	The Chief Prosecution Solicitor.
Name of appellant:	Christopher Connors.
Appellant's solicitors:	Cahir O'Higgins & Co., Solicitors.

1. Respondent Details

Respondent's full name: The Director of Public Prosecutions.

The respondent was served with the application for leave to appeal on 28th July 2017

The respondent intends to oppose the application for leave to appeal.

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal. Details of respondent's representation are correct and complete on notice of appeal:

Respondent's Representation:

Solicitor:	Tom Conlon.
Name of firm:	Chief Prosecution Solicitor.
Email:	*tom.conlon@dppireland.ie*
Address:	Office of the Director of Public Prosecutions Infirmary Road, Dublin 7.
Telephone no:	01 8588532
Document Exchange no:	38
Postcode:	Dublin 7.
Ref:	

How would you prefer us to communicate with you? ☐E-mail

Counsel:	Kieran Kelly BL.
Email:	*kierankelly@lawlibrary.ie*
Address:	The Law Library, Four Courts, Dublin 7.
Telephone no:	087 2359307
Document Exchange no:	811134
Postcode:	Dublin 7.

2. Respondent's reasons for opposing extension of time.

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused.

N/A

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

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

On 16th December 2013, whilst conducting a search under warrant of an apartment bedroom shared by the applicant and his partner, Gardaí located a blue canvas hold-all bag that had been stolen in a burglary in County Monaghan more than three weeks previously. The full and zipped-up stolen bag was found conspiciously located at the foot of the bed in the small bedroom. It was one of number of items seized in the course of the search on suspicion that they constituted stolen property taken in the course of various crimes. Although a Sergeant seized the bag because he suspected that the applicant had stolen it, nothing probative arose from three subsequent Garda interviews with the applicant to further substantiate that suspicion. Accordingly, in circumstances where an injured party had identified the bag as her property that had been stolen from her in the burglary on 23rd November 2013, and where it had been found in the applicant's possession as aforesaid, he was charged with "handling" stolen property contrary to section 17 of the Criminal Justice (Theft and Fraud Offences) Act 1997. That case came on for hearing on 23rd September 2014.

Whereas at para (c) of section 4 in his Application for Leave the applicant indicates that he made "a concession" at the commencement of the District Court hearing that the ownership of the bag was not in issue and that it was found in his room, that is not disputed, but, it merits noting that his "concession" was more extensive than that; he also expressly accepted that the bag was stolen.

The applicant's case, as put in his cross examination of the Gardaí, was that it was his partner, and not himself, who had brought the bag into their shared bedroom, and, at the close of the prosecution case, through his counsel, he made two very brief legal submissions in support of his application for a direction viz; (i) that it had not been proved that the stolen bag had been found in his possession "otherwise than in the course of stealing" and, (ii) because his partner had already pleaded guilty to handling the the stolen bag, he could not also be found guilty of handling it.

The applicant's contention at 4 (i) and (k) of his Application for Leave that the District Judge did not engage with his submission at all, is disputed. As is recorded in para. 19 of its judgement, the Court of Appeal correctly found that the District Judge did so engage.

On 23rd September 2014 the District Court convicted him of handling the stolen property and imposed a fully suspended two-month sentence. On 15th February 2016 the High Court (O'Regan J.) refused to grant him relief by way of judicial review and on 30th June 2017 the Court of Appeal dismissed his appeal against that determination. In the rejection of his application and his appeal both the High Court and the Court of Appeal properly applied the jurisprudence of this Honourable Court as outlined *inter alia* in *Kenny –v- Judge Coughlan* [2014] IESC 15.

4. Respondent's reasons for opposing leave to appeal

If leave to be appeal is being contested, set out concisely here the respondent's reasons why:

The applicable law has been comprehensively analysed by this Honourable Court in a number of cases, including *Kenny –v- Judge Coughlan* [2014] IESC 15, and both the High Court and the Court of Appeal considered and properly applied that jurisprudence. There are no new legal considerations at play here. Rather, the applicant contends that issues of fact peculiar to his case should have been determined and/or weighed differently and/or despite the nature of the submissions in his particular case, he was entitled to more comprehensive reasons. However, it is patently obvious (and he does not contend otherwise) that the applicant knew the case that he had to meet and he was aware that the District Judge had rejected his two very brief legal submissions, categorised by the Court of Appeal as "weak or unstateable". The High Court and the Court of Appeal correctly distilled the core of the applicant's case and both Courts properly applied the relevant case-law and precedent and were correct in their rulings and in their reasoning.

This application is wholly predicated on the specific facts of the applicant's case. His judicial review in the High Court and his appeal to the Court of Appeal were determined by the simple application of well-established legal principles to those facts. It does not involve a matter of general public importance, and/or, it is not otherwise in the interests of justice that there should now be a further appeal to this Court. The applicant has already had a hearing before the District Court, a review in the High Court review and an appeal to the Court of Appeal. The law is clear and he does not meet the constitutional criteria for a further appeal to this Court.

5. Respondent's reasons for opposing appeal if leave to appeal is granted.

Please list (as 1, 2, 3 etc. in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

I.

1. The Court of Appeal did not err in holding that the District Judge's decision to dismiss the [applicant's] submissions without giving reasons (which is denied) was permissible in the circumstances of the case. The Court of Appeal gave a full and proper consideration to all elements of his appeal and properly applied the law (as had the High Court) in the particular circumstances of his case and the "weak or unstateable" submissions made. The Court of Appeal upheld the High Court determination and the applicant has already had the benefit of two hearings.

2. The Court of Appeal did not err in holding, notwithstanding indicating that it was permissible for the District Judge not to give reasons, that the learned Judge had in fact engaged with the arguments made and gave reasons. Whereas the Court of Appeal categorised the applicant's two submissions as "weak or unstateable", the Court nonetheless properly traced the evolution of the District Court hearing and noted the Judge's engagement by reference to the transcript. The High Court had also cross-referenced its decision with the transcript of the District Court hearing.

3. The Court of Appeal did not err in holding that the District Judge' had engaged in the arguments made by defence counsel. The District Judge did so engage and the Court in rejecting the applicant's contention that there was no engagement at all expressly referenced that engagement in the transcript.

4. The Court of Appeal did not err, as the applicant contends, in holding that the District Judge's recitation of two lines of section 17 of the 2001 Act was an appropriate discharge of his requirement to give reasons. The Court referenced the Judge's recitation of the critical elements of

section 17 of the Act in the particular context of the District Judge's engagement with the applicant's submission, and, by way of a direct response to the applicant's submission that there had been no such engagement.

5. Neither the High Court nor the Court of Appeal (at para. 19) erred in holding that the District Judge had recited section 17 of the 2001 Act. Both courts clearly contextualised that reference. The content of section 17 as divined from the charge sheet and cited by the District Judge reflected the relevant *mens rea* of the offence and it represented an appropriate engagement and observation by the Judge in the context of the submissions that had been made to him.

6. The Court of Appeal did not err in holding that *Kenny –v- Judge Coughlan* [2014] IESC 15 was a very good comparator. Whilst it concerned a different underlying offence, the jurisprudence of that case as outlined and enshrined by this Court was directly on point and it was the most apt comparator. The relevant legal principles arising from the case-law were outlined by the Court of Appeal at paragraph 14 and thereafter applied.

7. The Court of Appeal did not err in holding that the submissions made on behalf of the applicant were of such weak character that the District Judge did not have to give reasons. As the Court of Appeal observed: "*In this case the submissions made were very weak. The first was that as the Garda had suspected the appellant of stealing the bag, he could not be charged with handling it. It might well be that the appellant was suspected of theft but he was charged only with handling. There can be no bar on charging for the handling where the Garda did not have the evidence to prefer a case of stealing. Joined with this submission was another linked one that the handling had to be otherwise than in the course of stealing.*

In this case the handling could not be in the course of stealing since there was a three-week gap between one action and the other. The second submission was to the effect that since the appellant's girlfriend had pleaded guilty to handling the bag, the appellant could not be convicted because two people cannot be convicted of the same offence. This is patently not so. Any number of people may be convicted of handling the same property".

8. The Court of Appeal did not err in holding that the District Judge's contention, that defence counsel should have cross examined the Garda further in respect of an issue in the case, was an engagement with the arguments raised by counsel. That was a direct and relevant engagement by the District Judge in light of the applicant's contention that he could not be convicted of "handling" if the Garda suspected that he had stolen the bag in the course of a burglary.

9. The Court of Appeal did not err in holding that, while the exchange between the District Judge and defence counsel was "inconclusive", it was removed from failing to engage at all. The applicant has confused the issues of engagement and reasons.

10. The Court of Appeal did not err in holding (which is denied) that the District Judge's statement that he did not have to give reasons did not bring him into unconstitutionality. The Court fully considered all of the facts of the case and properly assessed them in their particular context.

11. The Court of Appeal did not err in failing to consider the Supreme Court authority of *Oates –v- Judge Browne* [2016] IESC 7 nor the recent High Court authority of *Ayadi –v- D.P.P.* (unrep. High Court 20th January 2017). The respondent herein relied upon both case to distinguish them from the facts of the case herein, whereas *Kenny –v- Coughlan* represents the best comparator and it was correctly applied.

12. The Court of Appeal did not err in applying *dicta* from *Lydon – Judge Collins* [2007] IEHC 487. Rather, the Court merely observed how in that case Charleton J. had applied this Court's dicta in *O'Mahony –v- Ballagh* [2002] 2 IR 410.

II **1.** The applicant has failed to properly trace the evolution of the District Court proceedings as recorded in the transcript, he has failed to have any or proper regard to the High Court determination and furthermore he has failed to properly rationalise the decision of the Court of Appeal.

2. The District Judge engaged with the submissions made by counsel and there was no injustice. All aspects of the case were considered and the relevant law and precedent was properly applied in the Court of Appeal. Although the applicant was convicted in the District Court he did not exercise his entitlement to appeal *de nova* to the Circuit Court. Instead, he unsuccessfully pursued a judicial review in the High Court and he has since also had the benefit of an appeal to the Court of Appeal, which was also dismissed. Article 38 of the Constitution has not been breached.

3. The Supreme Court authority of *Oates –v- Brown* and the High Court case of *Ayadi –v- DPP* are entirely distinguishable on their facts. *Kenny* –v- Coughlan is a very clear precedent. It represents the best comparator and it was correctly applied in this case.

4. The Court of Appeal (and the High Court before it) correctly applied the law and precedent as clarified by this Honourable Court in *Kenny.* The Court of Appeal highlighted the weakness of the applicant's submissions and it referenced the District Judge's engagement with them. Contrary to the applicant's contention, there was and there is no inconsistency. There is no uncertainty in the law, rather, this Honourable Court has clearly pronounced upon the law and it was properly applied in the two Courts below.

Kieran Kelly BL

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

The applicant has not properly engaged with the facts of the allegation made against him, rather he has sought to pursue an absent "silver bullet".

Are you asking the Supreme Court to depart from (or distinguish) one of its own decisions?

☐ **No.**

make a reference to the Court of Justice of the European Union? ☐ **No.**

Will you request a priority hearing? ☐ **No.**

Helena Kiely,
Chief Prosecution
Solicitor

Please submit your completed form to:

The Office of the Registrar of the Supreme Court,
The Four Courts,
Inns Quay,
Dublin 7.

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.