THE COURT OF APPEAL

Edwards J.
McCarthy J.
Kennedy J.

Record No: 132/2018

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

ROBERT KANE

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 8th day of May 2019. by Mr. Justice Edwards

Introduction

1. This is the appellant's appeal against his conviction by a jury on 21 June 2017 of a count of burglary contrary to section 12 (1) (a) and (3) of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and a count of damaging property contrary to section 2 (1) of the Criminal Damage Act 1991.

Evidence before the jury

2. At the appellant's trial the jury heard that Patrick Morrisey and Co., Solicitors, have office premises at 22 Crofton Road in Dun Laoghaire, Co Dublin. A Ms. Hayley Kenny who worked with that firm as secretary to the principal, Mr. Patrick Morrisey, told the jury that on 3 February 2017, both she and a Ms. Olive O'Brien were the last persons to leave that premises at the end of the working day. They left together just after 17:00 and Ms. Kenny locked up as they were leaving. Later that evening Ms. Kenny received a text message from a Mr. Synon O'Mahony, who worked on the floor below the solicitors' office in a dressmaker's business. This was at about 20:00. Mr. O'Mahony reported to Ms. Kenny that he had heard noises upstairs in the solicitors' offices and wondered if there was somebody still there and working late. Mr. O'Mahony, who gave evidence at the trial, told the jury that as he was sitting in the window of the front room of the building on the floor below the solicitors' offices – for the purpose of trying to make a mobile telephone call – he heard the latch to the door of the premises that he was in being rattled, which sounded *"like as if it was a key being put into like the Yale lock."* He further stated that a little later he heard noises from upstairs like floorboards creaking. Ms. Kenny replied to Mr. O'Mahony to say that she had been the last to leave and had locked up. As a result of what she had been told, Ms. Kenny telephoned Mr. Patrick Morrisey. Mr. O'Mahony, in turn, telephoned Dun Laoghaire Garda station and conveyed to Gardai there his suspicion that there was an intruder on the premises.

3. In cross-examination of Mr. O'Mahony it was elicited from him that while he was waiting in the dressmakers shop (known as the Silk Shop) for the gardai to arrive, he saw a person, a figure, passing by the front door to that premises (which like that of the solicitors premises on the floor above was an internal front door within the building that is 22 Crofton Road). He saw this person through glass panels in that front door. This person or figure was wearing a green khaki jacket with a hood. There was a live CCTV feed in the adjacent room covering the area outside the door and the CCTV system was also recording. Mr. O'Mahony said that after seeking the man in khaki he checked the CCTV monitor but there was nothing to be seen on screen. He said that he did not tell the gardaí about the CCTV system because nobody asked him about it. There was a degree of conflict in the evidence about this in as much as Garda Corcoran later testified that he had asked Mr. O'Mahony if there was a CCTV system and that he was told that there was but that it didn't capture anything. Be that as it may, the gardaí never sought to view or download any recording.

4. Garda Tony Corcoran, who was assigned to Dun Laoghaire Garda station and who was on duty and on patrol on the evening in question, received a report at approximately 20:45 that there was a possible intruder at 22 Crofton Road in Dun Laoghaire. He and his colleague, Garda James Wall, proceeded immediately to that location and on arrival there they met with Mr. Synon O'Mahony who admitted them to the building. He told the jury that he and Garda Wall walked up the stairs to the premises of Patrick Morrisey, Solicitors. As they were doing so they could hear noise coming from the solicitors' offices. When they got there they could see there was glass on the carpet outside the front door of the solicitors' offices, and the door was ajar. A pane of glass to the left of the door was broken. They shouted out *"Gardaí"* and proceeded through the open door whereupon they immediately encountered the appellant.

5. The appellant was wearing distinctive orange gloves and was wearing a dark jacket. He was holding a screwdriver and what appeared to be some form of a metal rod. Garda Corcoran immediately directed the appellant to put down the objects in his hands. The appellant complied and placed them on a nearby chair. On looking around the office Garda Corcoran noted that it appeared to have been ransacked. There were drawers pulled out and papers in disarray. The appellant was then arrested on suspicion of burglary at 20:49. He was cautioned in the usual manner and in reply to the caution he stated *"I don't give a fuck. Sure, I knew yous would come. Do you think I give a fuck?"*

6. Garda Corcoran told the jury that the person of the appellant was searched and during that search several items were recovered, including several sets of keys, a small torch and two pairs of rolled up black socks. The orange gloves, screwdriver, metal rod, keys, torch and socks were all made exhibits in the trial and were presented to the jury for their consideration.

7. Garda Corcoran told the jury that the appellant, after having been arrested, and having made his initial reply, then indicated that he wished to show gardaí how he had gained entry to the building. He led the gardaí out of the solicitors' offices, across the hallway and into a vacant room at the back left of the hallway. He showed the gardaí a window which was opened and indicated that it was

through this window that he had gained entry. From this window one could see out into a car park. The window in question led out to an external fire escape. It was put to Garda Corcoran in cross examination that the appellant, when spoken to while still at 22 Crofton Road and before he had been brought to a Garda station, had denied burglary and had contended that he was homeless and had nowhere to sleep. Garda Corcoran stated that *"he didn't deny the burglary to me"*, and further the garda denied that that the appellant had claimed at that stage to be homeless. He acknowledged that later at Dun Laoghaire Garda station the appellant had stated that he was homeless and had been looking for a place to sleep for the night. In his evidence, Garda Wall confirmed that the appellant had stated to him while at 22 Crofton Road that he had not committed burglary. However, Garda Wall denied that at this point the appellant had also claimed to be homeless, or that he was only looking for somewhere to sleep. Garda Wall's evidence was that he didn't give any explanation at all, but had merely showed gardai how he claimed to have entered the building.

8. Having been arrested, the appellant was then brought to Dun Laoghaire Garda station. It was confirmed that the appellant had not resisted arrest, that he had complied with being searched and was cooperative initially. Upon arrival at Dun Laoghaire Garda station he was presented to the member in charge, Sgt. Andy Brady, and to the jailor, Garda Eoin O'Connor, and was detained under section 4 of the Criminal Justice Act 1984 for the proper investigation of the offence for which he had been arrested. Garda O'Connor made notes in the custody record. When the appellant was asked his address he initially specified one, but then stated *"No, no I'm homeless. Put me down no fixed abode"*. He was given a notice as to his rights and was also informed orally about his rights and, as is usual, was invited to sign the custody record to confirm that he had been given this information, and he did so. Following the completion of all of this he was brought to an interview room to be searched again. Garda O'Connor told the jury that the appellant became violent during the search and was removed to a cell.

9. Garda O'Connor told the jury that during his detention the appellant requested access to a solicitor. He nominated Partners at Law as his solicitors and Garda O'Connor made three attempts to contact that firm on his behalf. He was not able to get through to anybody and so he left a voicemail and at 21:37 he made an entry to that effect in the custody record. He went on to say that at 21:54 he was called back by a solicitor whose name was Susan Gray. Garda O'Connor arranged for the appellant to be brought out from his cell so that he could speak to his solicitor on the telephone. This event is duly recorded in the custody record at 21:56. The next entry in the custody record is at 22:01 and it records *"Consultation concludes. Solicitor requests prisoner not to be interviewed prior to doctor's visit"*. Then at 23:20 it is recorded that a Dr. Moloney arrived at the Garda station and was taken to see the appellant. His consultation with the appellant concluded at 23:24 and it was noted that the prisoner had been given certain medication by the doctor and that he was deemed fit for interview.

10. The evidence was that the appellant was then taken to an interview room with a view to being interviewed, particularly in circumstances where he had asserted that he had not committed burglary. As Garda Wall put it: *"Well, it was in his interest to come to the interview room. He had informed at the scene that he didn't commit a burglary and it was his chance to say that on interview as well."*

11. While in the interview room he was asked by Garda Wall if he wished to speak to a solicitor, and he replied that he did. He was further asked if he wished his solicitor to be present during his interview, and again he replied that he did. He was then taken from the interview room to the custody area where he was allowed to speak to his solicitor, Ms. Gray, on the telephone for a second time. The custody record records that this occurred at 23:38. It appears that he was then returned to the interview room and the interview then resumed. The custody record records that he became violent towards the interviewing gardai and in consequence of that was handcuffed to a chair for the remainder of the interview. It is common case that nothing of evidential value emerged during the interview or interviews with the appellant. Whether there was more than one interview depends on whether what occurred is to be regarded as a single process that was interrupted and resumed, or a number of separate interviews – however, it seems to us that nothing turns on that.

12. The custody record also records that at 23:58 *"Sgt Brady offers the prisoner suspension of questioning under section 4.6 (a) of the Criminal Justice Act 1984. Prisoner states, 'You can wipe your arse with it'"*.

13. In his evidence Mr. Patrick Morrissey, who attended at the scene on the following morning, described the damage to the glass panel next to the door to his offices, and also having found a bunch of keys, with one of the keys in the keyhole for the deadlock on the door.

14. The defence did not go into evidence.

The Prosecution Case
15. The Director of Public Prosecution's case as reflected in her counsel's closing speech was simply this, that the appellant had entered 22 Crofton Road as a trespasser, and that once inside that premises he had further entered the offices of Patrick Morrisey & Co as a trespasser and with the intention of committing an arrestable offence as defined in s. 12 of the Act of 2001, most likely theft. In addition, he had committed criminal damage by breaking a pane of glass while seeking to gain access to the said solicitor's offices.

16. The fact of trespass was proven from the fact that he was caught red handed on the premises when he had no permission to be there. Moreover, the fact that the appellant was a trespasser was not in dispute and was accepted by the defence.

17. The intention to commit an arrestable offence, and most likely theft, could be inferred, it was said, from the fact that when found on the premises he was in possession of *"housebreaking implements"*, as they are colloquially referred to, namely: a screwdriver, a metal rod, gloves and socks, a torch and a selection of keys; coupled with the fact that the premises in which he was found had been ransacked with drawers rifled through, items moved, and papers scattered in disarray. Further, there was the evidence that entry to the solicitors' offices had been effected by force. A glass panel adjacent to the main door had been smashed, leaving glass on the carpet, and allowing an intruder to reach in and unlock and unlatch the door from the inside. There was evidence that a key, being one of, and still part of, a bunch of keys, was found in the keyhole of the deadlock on the inside of the door in the aftermath of the burglary. It was suggested that the available circumstantial evidence strongly suggested that that damage had been caused by the appellant in the course of breaking and entering. The jury were urged to use their *"cop on"*.

18. While the appellant had contended in verbal interactions with the gardai that he was not a burglar, and that he was homeless and had been looking for somewhere to sleep, it was urged upon the jury that the circumstantial evidence to the contrary was significant. It was urged upon the jury that the appellant's assertions in that regard were not reasonable, and that in substance they were self serving, lacking in credibility and simply untrue. As prosecuting counsel put it: *"Mr. Kane is somewhat cynically trying to play upon public sympathy for persons in bad circumstances who are homeless, trying to play on that sympathy to extricate himself from criminal liability in this case"*. The jury were invited to find that in all the circumstances of the case the state had proven beyond reasonable doubt that the appellant had committed both of the offences with which he was charged.

The Defence Case
19. The defence did not go into evidence, so there was no witness testimony for the defence. Moreover, nothing of evidential value had emerged from the formal interviewing of the appellant in the Garda station, such as might in the normal course be put before a jury in the form of a statement or memo. There was a very small amount of other evidence emanating from the appellant himself, in the form of the several verbal comments to the effect that he was not a burglar; that he was homeless and that he was looking for somewhere to sleep; that he made in the presence of Gardaí; and concerning which evidence was given in the course of the prosecution case as described earlier in this judgment. However, for the most part the defence adopted a strategy of seeking to stress test the prosecution's witnesses through cross-examination, all with a view to seeking to persuade the jury that the prosecution had not proven the case against the appellant to the standard of beyond reasonable doubt. The focus of the cross-examination was to suggest to the investigating Gardaí that they had been completely disinterested in, and had been dismissive from the outset of, the appellant's protestations of innocence, and that they had failed to carry out a rigorous or thorough investigation. This was vehemently rejected by the Gardaí concerned.

20. Reliance was placed by defence counsel on the fact that the evidence had shown that a significant portion of the building was vacant, and that it was easy to get in. There was no evidence to suggest that the window through which the appellant had claimed to have entered had not been open. Ms. Kenny had left and exited through the front door of the building but, it was established in cross-examination, she did not lock that door at the time because there were others still in the building. The finding of the key in the deadlock by Mr. Morrissey rather than the gardai was commented upon. The fact that there had been no complaint of missing keys was also commented upon, as was the fact that nothing was apparently taken during the alleged burglary.

21. Defence counsel commented on the fact that the supposed burglar had been noisy and it was suggested that burglars were generally at pains to be quiet. The jury were told that the appellant denied holding a screwdriver and metal rod, and that he was wearing gloves, when encountered by the gardai. Normally, in circumstances where the defence had not called evidence, and assuming there was no other evidence of it in the case, it would be improper to so inform the jury as counsel cannot give evidence for his client by proxy. However, it had been put to Garda Corcoran at one point during his cross-examination that the appellant was asserting those denials and he had responded: *"If he denies it, I accept it."* On that basis there was in fact an evidential foundation for what was said to the jury. Criticism was then made of the failure to look for DNA traces on the gloves, or to examine the gloves, screwdriver and metal rod for fingerprint evidence. Reliance was placed on the absence of a thorough investigation with respect to the provenance of the keys that had been found, and there was criticism of the fact that they had only been shown to Ms. Kenny.

22. There was also criticism that there was no photographic evidence of the damage, and of the fact that no enquiries had been made to ascertain if anybody else could have had access to the building. Criticism was made of the fact that there had been no apparent following up of Mr Synon O'Mahony's claim that a person wearing a green khaki jacket with a hood had passed the door of the Silk Shop while he was awaiting the arrival of the Gardaí, and in particular that the gardai had not sought out CCTV footage.

The Judge's Charge
23. It is not necessary for the purposes of this case to review the judge's charge in its entirety. However, there are two aspects of it that are directly relevant to live issues on this appeal, and in so far as it bears on those issues, it is necessary to review certain passages of it.

24. The first issue concerns what the trial judge said to the jury concerning what had occurred in the course of the interviewing process in the Garda station. In normal circumstances it might be argued that, where no substantive interview had taken place, it was not necessary to adduce any evidence at all concerning it before the jury. That was the prosecution's view, but the defence were anxious that the jury should hear something concerning the unusual circumstances in which there had been an attempt to interview the appellant while he was handcuffed to a chair, and concerning the decision to press on with an attempt to interview him in circumstances where he had requested to have his solicitor present but this facility was not granted. The relevance of this, the defence contended, was that it provided evidence of generally unfair treatment of the appellant at all stages during the Garda investigation, and was indicative of a generally hostile Garda attitude towards him. Rightly, or wrongly, the jury were allowed to hear evidence concerning these aspects of the matter at issue, and the question then arose concerning what the trial judge would say to the jury in the course of his charge concerning the interviewing exercise, and in particular as to what ultimately had been the fruits of that exercise. It was agreed in discussions with counsel that he should use the standard *"Finnerty"* formula and tell the jury that nothing of evidential value had resulted from the interviewing of the appellant. However, the trial judge departed from that understanding and complaint is now made that his remarks on this subject were inappropriate.

25. The second issue arising in connection with the charge concerns the trial judge's summation of the defence case. It is suggested that the jury were not reminded of important pieces of evidence that the defence relied upon, and that the charhe failed to fairly present the defence case.

26. Coming back to the first complaint, what the trial judge said on the subject of the interview (or interviews) was as follows:

> *"Now, some other issues I want to draw your attention to very briefly. One of them is this. A lot of evidence was given today and some yesterday I think in relation to the interview, what went on in the garda station, how the accused was treated and you had two competing sets of evidence in that regard in relation to the accused. Now, when an accused person is being interviewed by the gardaí the gardaí regularly interview people when they're arrested and they ask them to explain or they ask them what they did. When an accused person is interviewed the gardaí are entitled to interview the accused person. They're entitled to interview them and ask them questions. The accused person is entitled not to answer the questions. The accused person can say, "I'm not answering any questions." So, that's what happens. Now, in this particular case nothing arose from the interview because the accused didn't say anything in the interview. In some cases a jury have to hear evidence or a jury will hear evidence where a person is in the garda station and they're alleged to have made admissions. They're alleged to have said, "I did it," or, "I assaulted somebody," or "I broke into the house." And the person says, "Well, I didn't make those admissions," or "I was forced into making those admissions because of the way the gardaí behaved." In those cases a jury might sometimes have to hear that evidence and a jury would then have to decide whether the admission was a free admission, whether the person was maltreated by the gardaí. But, the important part and the important point in this case is there is no interview. Nothing happened. Nothing flowed from it. The accused didn't say anything in the garda station so you don't take anything that happened in the garda station into account in deciding whether he committed the offences in the building or not. Put it another way, you don't say, "Well the gardaí behaved badly," or you don't decide the gardaí behaved -- weren't very fair to him and the gardaí were being unfair or the gardaí were being nasty to him or the gardaí were breaching his rights in the garda station or the gardaí didn't allow him a solicitor in the garda station therefore we're going to find him not guilty. You don't say that. Equally you don't say, "Well, the accused was belligerent. The accused was violent, the accused was threatening the gardaí in the garda station therefore we're going to take that into account in deciding whether he*

committed the offences." What happened in the garda station very much is of very little consequence to the case. The fact that he telephone the solicitor, the whole issue about the solicitor, that doesn't go anywhere because he didn't make any admissions. There's no evidence in the garda station that supports him committing the offence. So, if he had made admissions in the garda station or that something of relevance had happened in the garda station then you might decide that they were issues, but unless there's some other fact that you decide is relevant to credibility or otherwise what happens in the garda station is of no consequence in relation to your deliberations."

27. At the end of the judge's charge he was requisitioned by both sides with respect to this aspect of his charge. Prosecuting counsel went first, and submitted:

MR. COLLINS: I was only a very small bit concerned about one issue which was that the Court stated that Mr. Kane didn't say anything in interview and I think in fairness to Mr. Kane the position is slightly more nuanced. I think he asserted that he wanted a solicitor. He didn't say, "No comment," really. He just kind of said, "I want a solicitor." Maybe if Mr. White doesn't share that -- I'm sorry --

JUDGE: But, the point -- but the point being there's no interview, there's nothing they have to concern themselves about in the interview.

MR. COLLINS: Yes.

JUDGE: I don't think bringing them back and telling them that he did say something, he wanted a solicitor takes -- takes it any way --

MR. WHITE: No, but I have another issue I'm going to raise anyway that I hope you do bring them back in relation to it and it's a matter for yourself as to whether you deal with Mr. Collins's point at that time. If the Court does bring them back on the other issue perhaps the Court might do it. I would be anxious that the Court might just simply stress that as Mr. Collins has pointed out that in interview it's not that he didn't say anything in the interview he just simply repeated his request for a solicitor to be present.

JUDGE: You see there was no memo of interview read out.

MR. WHITE: No, but it was put to the guard, Garda Corcoran and he accepted that.

MR. COLLINS: Yes. In fairness if the Court summarised it by saying that --

JUDGE: Well, you see if I tell them then that he said he wanted a solicitor I then really have to tell them that he had access to the solicitor by telephone a number of times and I don't see that it goes anywhere because he doesn't say anything in the garda station. So, they don't have to consider anything in relation to that.

MR. WHITE: Yes, but the charge that was given to the jury reference was made to the fact that he didn't say anything in interview and that's our concern.

JUDGE: Yes, but the reason I said that was very unusually in this case all of that was opened up even though nothing flowed from the interview it was opened up by the defence and then the prosecution ran with it. So, the jury had to hear that and all of that was put before the jury even though there was no relevance to it I can see. If you wish I'll bring them back and I'll tell them that he did say he wanted a solicitor but I'll emphasise to them nothing flows from it.

MR. WHITE: Well, I'm anxious that you would say to them that he did request -- that what he said in interview was that he wanted a solicitor to be present. Now, that's what Mr. Collins is suggesting and that's what I'm suggesting. Now, in response to that I know the Court has said, "Well, in those circumstances I'd have to go and remind them or tell them that he had access to a solicitor over the phone." But, sure they know that. They already have that evidence before the Court. It's just that slight concern that we have. That's the only reason we're asking.

JUDGE: But, the member in charge wasn't called and I had understood that he had had ample access to a solicitor by telephone.

MR. WHITE: Yes.

JUDGE: I didn't understand that he was still looking for a solicitor.

MR. WHITE: The point was that he was looking for a solicitor to be present in the interview and that's what was put to Garda Corcoran. Garda Corcoran accepted that he was entitled to that. Garda Corcoran also accepted that he didn't give him that access but Garda Corcoran's view was -- but in any event it was because he had spoken to his solicitor twice.

JUDGE: Yes, but the member in charge is the person who would have to give that evidence.

MR. WHITE: Well, in the circumstances it came out through Garda Corcoran and that evidence is there.

JUDGE: Very good. Well, I'll bring them back and I'll tell them that the accused wanted to have a solicitor to be present in the interview but I'll tell them there is no interview to consider so they don't have to concern themselves with it.

MR. WHITE: That's fine Judge, yes.

JUDGE: Very good..

28. The jury were subsequently brought back and then recharged in the following terms:

"The first thing is I told you that the accused in interview, he didn't say anything in interview. I'm reminded quite correctly that in fact he did. He said he wanted a solicitor to be present in the interview. But, the important point is there is no interview. There's no admissions, there's nothing for you to decide upon in relation to the interview. There's

no admissions or there's nothing in the interview saying he didn't say that he didn't do anything. There's no interview for you to consider. So, the interview doesn't arise. But, he did say he wished to have a solicitor present in his interview."

29. Moving then to the second matter complained of with respect to the judge's charge, what the trial judge said to the jury concerning the defence case, having summarised the evidence that the jury had heard, was as follows:

> *"Now, in this case the defence have indicated that the accused's case is that he entered the office in question as a trespasser. There's no great issue there. But, that he did not intend to steal. That he was homeless, he was looking for somewhere to sleep and that when the gardaí came in he told the gardaí this and he showed the gardaí how he got in. The defence also pointed to the fact that there was nothing taken from the office. So, those are matters of fact for you resolve in relation to that count or that charge and it's up to you to decide how to deal with the issue. Bear in mind fundamentally when you're dealing with evidence what you have to ask yourself is have the prosecution proved their case beyond reasonable doubt.*
>
> *Now, the second charge then is the criminal damage. The evidence in relation to the criminal damage and again I'm trespassing on your domain, but the evidence appears to be the count on the indictment is that the glass window was broken. So, the evidence appears to be that the glass pane was broken and/or removed. The offices had been locked by Ms. Kenny at about 5 pm that evening. Noises were heard, gardaí were phoned, they entered sometime after 8.45 pm and the accused was there. He admitted he had gained entry but said he had done so because he became homeless.*
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> *The prosecution I suppose in a nutshell is that there was nobody else in the room and there was nobody else in the building and that the accused by inference, you can draw the inference the prosecution will say, that the accused broke the window of the door. Now, there's no suggestion that anybody else had entered the premises or that anybody else had broken the glass pane but the prosecution have to prove its case to you beyond reasonable doubt. Now, I should say this to you it's not a defence to a criminal damage charge to say that, "I was homeless therefore I broke a window of a house or I broke a window in order to get in." It's not a defence to say that. Now, as one of the counsel said it could be a defence if it was minus 20 degrees and you really genuinely felt you were going to die and you had to get inside, it could be a defence. But in these circumstances it's not a defence to say, "I was homeless therefore I'm entitled to cause criminal damage." But, all of these are matters for you to decide and bear this in mind, it's for you to decide what are issues in the case. Both counsel have flagged various issues to you. I have told you various issues but you're entitled yourselves to decide what the issues in the case are. What issues have to be resolved? And it's up to you to decide what are the issues in the case, what are the facts of the case. It's up to you to decide what facts have the prosecution proven beyond reasonable doubt and do those facts constitute the offences."*

30. The trial judge was requisitioned by counsel for the defence with respect to this aspect of the charge. He said in the first instance:

> *MR. WHITE: …just in relation to your summary of the facts. One key issue that I did want to stress was that -- and you referenced this about the credibility of the guards when -- well the closing remarks that was made was about the screwdriver and as to whether he had it in his hands or not and you said, "Look it a lot of that is a credibility issue." There was evidence and I've mentioned it in the closing that Synan O'Mahony was asked or sorry Garda Corcoran stated when I asked him did he look and make any inquiries into CCTV and he said, "Yes I did. I spoke to Synan O'Mahony." We asked Synan O'Mahony that and Synan O'Mahony said, "No one spoke to me about it."*

31. A series of exchanges then ensued between the trial judge and counsel concerning the trial judge's failure to allude to the fact that there was a conflict in the evidence between Mr. O'Mahony and Garda Corcoran concerning whether Mr. O'Mahony had been asked about CCTV. Defence counsel said that that was an issue that went to Garda Corcoran's credibility. However, the judge refused to recharge the jury on this point.

32. No point was raised in requisitions that the trial judge had failed in his summary of the evidence to mention Mr. O'Mahony's claim to have seen a man in a khaki jacket outside the door of the silk shop just before the Gardai arrived. The appellant now attempts to rely on this point, but the prosecution relies on *The People (Director of Public Prosecutions) v Cronin (No 2)* [2006] 4 IR 329 to resist this. Counsel for the appellant contends that his failure to raise a requisition on this point was due to inadvertence, and contends that the interests of justice require that he should be allowed to raise the point on appeal notwithstanding that it was not the subject of a requisition.

The Grounds of Appeal

33. The ground of appeals as pleaded are:

> 1. The trial judge erred in undermining the appellant's defence by way of adverse comments made to the jury during the course the trial.
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> 2. The trial judge failed to adequately explain the defence case or permitted to be properly and fairly put the jury.
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> 3. The trial judge's summary of the evidence was entirely one-sided in favour of the prosecution case.
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> 4. The trial judge misdirected the jury in respect of the essential ingredients of the offences proffered on the indictment, in particular; his explanation of the relevant mens rea required to be proven for the offence of burglary was erroneous and low and sufficient to cause such confusion in the minds of the jury such as to render the verdicts unsafe.
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> 5. The trial judge erred in law in failing to recharge the jury adequately in response to requisitions raised
>
> 6. The cumulative effect of the trial judge's errors rendered the trial and verdict unsafe and unsatisfactory in all the circumstances

34. Counsel for the appellant volunteered at the appeal hearing that the fourth ground was not perhaps his best point, a view with which this court expressed agreement, and the matter was not pressed in the circumstances.

Discussion and Decision

35. Our overall impression of the judge's charge is that the trial judge was endeavouring to be fair and even handed. Regrettably, however, we have some doubt that he was in fact successful in achieving that.

36. We regard it as unfortunate that he did not stick to what he had agreed with counsel concerning what he would say to the jury about the interviewing process. It is essential that a jury appreciates that an accused has an absolute right not to say anything in the course of an interview, and that if he elects not to do so that no adverse inference can be taken from that. Our concern is that the trial judge did not confine himself to saying that nothing of evidential value had resulted from the interview or interviews. It was not correct to say that there had been no interviewing. The accused was interviewed but made plain from the outset his position that he would not answer any questions asked of him without his solicitor being present. Seemingly, the interviewing gardaí had persisted in attempting to question him but he gave no answers. It is true that the jury heard nothing of the questions that were asked but not answered. We have some sympathy for the trial judge because all of this was against a background where it was the defence who sought to have introduced what in fact occurred in the interview room, and specifically his being handcuffed to a chair and the fact that he was not permitted to have his solicitor present. By the same token it was vital that the jury should not be given the impression under any circumstances that the accused had been obliged in some way to co-operate, or that it was to be inferred by virtue of his refusal to answer questions until his solicitor was present that he was an un-cooperative guilty suspect. In that regard the repeated emphasis in the trial judge's remarks on the fact that there were no admissions was unfortunate. We have a concern that the jury may have been left with the impression that in some way the appellant was obliged to, or expected to, make admissions. It is true that in convoluted wording the trial judge also indicated that nothing exculpatory was offered either, but his emphasis was very much on admissions. There was simply no need for this. All that was required was to tell the jury that an interview was convened in circumstances that they had heard about in evidence, that notwithstanding that the accused had requested that his solicitor should be present that the interview had proceeded in her absence, but that in any event nothing of evidential value had resulted.

37. While the issue is a finely balanced one, we have come down ultimately in favour of upholding the complaint based upon that aspect of the charge dealing with the interviewing of the appellant. On balance, we consider that it amounted to a misdirection or, perhaps more correctly, an insufficiently clear direction that had the potential to mislead or confuse the jury.

38. Turning then to the judge's summary of the evidence, and summation of the defence case, it has to be said that the case being run by the defence was always going to be a difficult one to sustain, particularly where the defence was electing not to go into evidence. The defence were nevertheless entitled to have their case properly put and explained. Moreover, there was some evidential basis for advocating in favour of the jury having a doubt. In that regard they did have the appellant's excusatory and exculpatory verbals to rely upon. Additionally, there was an evidential basis for inviting the jury to consider whether the prosecution had excluded to the standard of beyond reasonable doubt the possibility that there might coincidentally have been another intruder who had broken in to the solicitor's offices on the same evening and before the appellant was apprehended therein. In that regard there was the evidence of the man in the khaki jacket seen by Mr Synon O'Mahony just before the gardaí arrived. This was expressly alluded to in counsel for the defence's speech to the jury and it is clear that significant reliance was being placed on it.

39. We are prepared to accept counsel for the defence's explanation that his failure to raise a requisition on this latter point was due to inadvertence, both because, as he points out, there was no possible tactical advantage to him in failing to do so, and also because how the discussion about CCTV unfolded during the requisitions phase of the trial raises in our minds the possibility that he may simply have become distracted with that. The sighting of the man in the khaki jacket was undoubtedly a major plank of the defence case. Significant reliance was being placed on it, and we are satisfied that the trial judge's failure to allude to it was an error that created an unfairness in his summation of the defence case. We therefore are also prepared to uphold the second ground of appeal on that account.

40. We are not, however, persuaded that the trial judge's charge was in any way deliberately unfair or one-sided. As already stated, we are satisfied that the trial judge was endeavouring to be fair, and that the critical omission was simply one of oversight.

41. Nevertheless, we are satisfied for the reasons stated that we must allow the appeal.