



**THE COURT OF APPEAL**

**Court of Appeal Record No. 293/2018**

**Edwards J.  
McCarthy J.  
Kennedy J.**

**BETWEEN/**

**THE PEOPLE  
(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)**

**RESPONDENT**

**-AND-**

**AIDAN CONROY**

**APPELLANT**

**JUDGMENT of the Court delivered on the 30th day of November 2020 by Mr Justice McCarthy**

1. This is an appeal against the appellant's conviction of five offences pertaining to the controlled drug cocaine at Dublin Circuit Criminal Court on the 20th October, 2018. To put the matter shortly there were two counts of possession of the controlled drug in question for the purpose of sale or supply, two for possession of that drug for the purpose of sale or supply in circumstances where the market value thereof exceeded €13,000 and a count of unlawful importation of the drug in question. Nothing turns in the present appeal on the number of counts because the evidence in support of each one arises from the same series of events and the two appeal points which have been raised are potentially applicable to all of them.

**Background**

2. On the 20th August, 2015 just after midnight, the appellant drove his refrigerated articulated truck off the ferry from England (he is a self-employed haulier) and was stopped by customs officers. Enquiries were made of him as to his journey (which was with a cargo of fruit imported from the continent) and when asked he said he had bought cigarettes abroad. He was described as appearing nervous during the conversation. He was then told to move his vehicle from what we might describe as the thoroughfare leading from the ship to an area nearby used by customs authorities for searching vehicles. He drove the vehicle there in the company of one of the customs officers and on arrival he was asked to accompany an Officer Rafferty to a waiting room adjacent to where the lorry was to be searched. Whilst recollection of times vary, nothing turns on the fact that for a period of between half an hour and an hour after arrival at the waiting

area the appellant was in the company of Officer Rafferty (who stood at the open door of that area) and little conversation took place. At a given stage, however, an Officer Griffin found a fire extinguisher in a storage box on the passenger side of the cab of the vehicle. It was properly suspected (and ultimately shown) to contain cocaine. Officer Griffin then approached the appellant and his colleague and asked the appellant to accompany him to the lorry's cab (which involved going around the back of the vehicle) informing him that he had something to show him (or words to that effect). The appellant was walking in single file with Officer Griffin and Officer Rafferty from the waiting room, the appellant being in the middle, Officer Griffin first, Officer Rafferty bringing up the rear. Officer Rafferty stated in her evidence that in the course of this short walk she heard the appellant say "so you found the drugs then".

3. Subsequent to the admission (for such it was), about an hour afterwards, Officer Rafferty enquired of Officer Griffin whether or not he had heard the words in question. Officer Griffin's evidence, in the course of a *voir dire* concerning whether evidence of this admission should be admitted before the jury, was that:

*"Later on in the day, subsequent to the events involving the search of the cab, I was talking to my colleague, Officer Rafferty, and Officer Rafferty said to me, did you hear the comment that Mr Conroy made en route from the room ..., and I had said no, I didn't hear any comment. She said "I heard him say 'so you the found drugs so'." I put it to Audrey to Officer Rafferty, "I simply didn't hear that comment".*

4. Undoubtedly, there is a slight difference between the form of words that Officer Rafferty claimed to have heard spoken by the appellant, compared with the form of words that Officer Griffin recalls that Officer Rafferty had suggested to her were spoken by the appellant. Nothing turns on that in the context of the issues raised in this appeal.
5. The appellant denied in the course of the aforementioned *voir dire* that he had spoken the relevant words at all, and, there was some controversy about whether or not, if such words were indeed spoken, it would have been possible for Officer Griffin to have heard them because of noise from a nearby refrigeration unit. Again, nothing turns on any of that in the context of the issues raised on this appeal.
6. Officer Rafferty wrote down what was said, on what was described as a piece of paper. It was not produced. However, during the third of five interviews of the appellant by members of an Garda Síochána on the evening of the same day, Officer Rafferty was afforded an opportunity of reading over what was said, as noted by her, to the appellant and his response was to deny having spoken the alleged words. Officer Rafferty gave the note to the Gardaí and this was apparently annexed to the memorandum of the third interview. Further information about it was not sought at the trial. It is of significance in the context of issues canvassed on the appellant's behalf that this is not a case where it was admitted that some words were spoken with a dispute as to what exactly was said; here, there was a blank denial that any words were spoken by the appellant on the occasion in question, i.e., during the walk from the customs' waiting room to the vehicle.

7. The appellant was arrested by Detective Garda Brian McDermott and was cautioned in accordance with the Judges Rules in the normal manner on arrest. No caution had been administered prior to that time. The arrest took place a very short time after the words were uttered – the arresting Garda was at the scene at that stage. The appellant was then removed to Store Street Garda Station.
8. In his submissions at the trial, counsel for the appellant effectively said that the judge should exercise her discretion to exclude the alleged verbal admission from the evidence to go before jury on the ground that it was made, if made, in circumstances of unfairness and he also said that there was a breach of the Judges Rules. No particular rule was quoted but we believe he was referring to the fact that the appellant had not been cautioned before he was asked to accompany the customs officers from the waiting area, nor was what he had said been taken down in writing and put to him at the time. Counsel for the Director did not directly address those issues at trial but confined himself to submitting that what was said was an admission against interest admissible as such in the ordinary way and he also addressed the possible argument that the prejudicial effect outweighed the probative value. No one could doubt the probative value was such that all else being equal it would be wrong to exclude it but such admission in evidence was subject to the discretionary capacity of the judge to exclude it on the grounds that to permit its receipt would be unfair having regard to the circumstances in which it was allegedly made, or to refuse to exercise her discretion in favour of its receipt in the event that it was not taken in accordance with the Judges Rules. In any event, the judge admitted it and in doing so briefly said that it was admissible as an exception to the rule against hearsay as it was an admission against interest. She did not say anything about the exercise of a discretion to exclude it because it was made in circumstances of unfairness or touch upon the Judges Rules. It was of course a matter for the jury thereafter to decide what weight, if any, to attribute to it. →→The decision to admit the evidence of the verbal admission is now the subject of the first ground of appeal, to be discussed later in this judgment.

**The Motion seeking Leave to Amend the Notice of Appeal**

9. The Notice of Appeal, as filed, had contained a second ground of appeal, which has since been abandoned. However, the appellant now seeks to substitute a new second ground and, if permitted to do so, to ventilate before us a fresh issue pertaining to the judge's charge and in particular whether or not, pursuant to s. 10 of the Criminal Procedure Act, 1993, she ought to have given a corroboration warning to the jury on the basis that that provision imposed an obligation on the judge to have "due regard" to the supposed absence of corroboration. There is a motion before us for leave to amend the Notice of Appeal accordingly. The issue which it is now sought to argue is not one that was relied upon in the court below. An issue immediately arises where that proposition, critical of the charge, was not relied upon in the court below; namely, whether or not the appellant should be permitted to rely on it before this court.
10. There is no suggestion that the issue was deliberately not raised for tactical or strategic reasons, rather it appears to have been the case that it did not occur to anybody at the

time to seek to raise the point that the appellant now seeks to rely. We deal first, accordingly, with whether or not the ground contemplated may be raised at all. It is well established by virtue of *The People (Director of Public Prosecutions) v. Cronin (No. 2)* [2006] 4 IR 329 (and having regard to the fact that the decision is so well-established we think will suffice to quote from the head note) that: -

*"...only in circumstances where the court was of the view, that, due to some error or oversight of substance, a fundamental injustice had occurred should the court allow a point not raised at trial be argued on appeal. In addition, an explanation must be furnished as to why it was not raised at trial."*

11. The question of whether or not a "fundamental injustice" has occurred will itself involve some consideration of the merits of the point. We are prepared, on balance, to allow the appellant to advance it, because if, in principle, the point was to be well founded, an injustice would occur. Furthermore, whilst counsel for the Director in this court opposed the grant of permission to pursue this aspect of the matter he readily conceded that it pertained to the receipt of evidence of the admission and for practical purposes was closely related to it to the first or original ground. We will accordingly permit the amendment to the grounds of appeal sought.

#### **Grounds of Appeal**

12. Having decided to permit the additional ground the grounds now before us are as follows:-

- (1) The learned trial judge erred in ruling that the proposed evidence of a customs officer that the accused had said "So you found the drugs then" at a time when he was being detained by customs officers and before Gardaí arrived was admissible.
- (2) Having admitted into evidence an alleged admission made by the applicant to a customs officer, the learned trial judge erred in law and in fact in failing to give a corroboration warning to the jury pursuant to s. 10 of the Criminal Procedure Act, 1993.

We proceed to deal with each separately.

#### **Ground 1**

***The learned trial judge erred in ruling that the proposed evidence of a customs officer that the accused had said "So you found the drugs then" at a time when he was being detained by customs officers and before Gardaí arrived was admissible.***

13. The appellant's contentions in relation to this matter are that there was a breach of the Judge's Rules so it should have been excluded on that ground alone and further or in the alternative, that the judge should have excluded it in her discretion on the grounds that it was taken in circumstances which were unfair. Mr Gageby accepted that these overlapped to some degree.

14. It was contended in the first instance that the appellant was in custody in as much as he could not have left the waiting area or customs building had he sought to do so. The contention of the appellant that this was so, that is to say, he was under an obligation to remain pending the search, has not been questioned. It is said when Officer Griffin approached the appellant and told him he had something to show him in the vehicle such a statement or request was, in reality, a question. Thus, it is contended that a caution should have been administered. This is because of the provisions of rule 3 of the Judges Rules, which is as follows:-

*"Persons in custody should not be questioned without the usual caution being first administered."*

15. It seems to us that there is no breach of that rule. Even if one were to proceed on the basis that the appellant was in custody (which does not appear to be contested notwithstanding the singular position of persons asked to await the conclusion of a search for the purpose of clearing customs) he was not questioned. Mr Gageby has sought to characterise the words spoken by Officer Griffin to him, the tenor of which was to invite him to look at the fire extinguisher containing the cocaine, as constituting a question. We do not think that it bears this complexion. Were he, of course, to be questioned about it a caution would have been requisite if in custody. It simply does not arise on the facts.
16. It is also submitted that a breach occurred of Rule 9, which is as follows –

*"Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish"*

17. The purpose of this rule was identified by O'Higgins CJ. in *the People (DPP) v Pringle* (1981) 2 Frewen 57, as follows:-

*"It seems clear that this Rule, which, of course is not a rule of law but rather an admonition for the carrying out of fair procedures of interrogation, was designed to achieve a situation which (a) there would be accuracy in the recording of any statement made to be achieved by the early writing down of it so as to obviate errors of recollection and (B) in which an accused person would, at a time when he should have sufficient memory of what he had said, beginning opportunity of challenging the accuracy of the record made."*

18. Officer Rafferty was clear as to what had been said, although Officer Griffin (who had not heard it) recollected the use by Officer Rafferty of a slightly different form of words when Officer Rafferty had recounted to him what he claimed to have heard. We think it would have been preferable if Officer Rafferty had written down what was said forthwith. We do not think that there was any reality in the idea that, having done so, she should, then and there, immediately prior to the appellant's arrest, have read over to him what it was alleged he had said. We think therefore that there was compliance with this Rule when what was allegedly said was put to him later on the same day when he was being

interviewed in custody. In truth, however, and in any event, this issue does not hinge on the precise form of words used but rather on whether or not anything inculpatory was said at all, and it is clear that the appellant was not prejudiced by the timing of when the words spoken were recorded in writing and read over to him. He gave evidence on the *voir dire* and what was in debate was not the correctness of Officer Rafferty's recollection as to the precise wording but rather whether he had said anything at all.

19. Officer Rafferty did not proffer her physical note to the appellant to sign (i.e. to sign a note agreeing with its accuracy when he denied it) (this would have been a violation of common sense) after its contents had been put to him to him on the occasion of his third interview (Thursday 20th of August 2015) in the Garda station. The interviewing Garda (D.Gda. Griffin ) did make a note of what was said by Officer Rafferty and the appellant's responses and referred to the circumstances so that there was compliance with the rule. Officer Rafferty was present at the time. The note of the relevant interview, containing in its body the full detail of the alleged admission and what was said at interview about that topic was agreed by the appellant to be correct and signed (in fact, to put the matter shortly, a denial that the words alleged to have been spoken were so spoken). We therefore think that there was no breach of rule nine.
20. We should say that addressing the question of breaches of the rules has occasioned us a degree of difficulty because the issue was raised with a very high degree of generality by counsel for the defence at the trial, and not addressed at all by prosecuting counsel or by the trial judge in her ruling. The latter is perhaps understandable due to that level of generality and prosecuting counsel's silence. What we have sought to do is to address the substance of the point, however, based on the evidence. With respect to the second limb of the argument presented in support of this ground of appeal, the proposition upon which Mr Gageby seeks to build is encompassed by what was said in *The People (DPP) v. Sean Breen* (Unreported, Court of Criminal Appeal, March 1995) where Egan J., for the court, said that: -

*"The crucial test is whether it (the statement) was obtained in compliance with basic or fundamental fairness... The test of basic fairness... superimposed on the need for voluntariness, has the merit of ensuring, if the judicial discretion is correctly exercised, that an accused is not wrongfully or unfairly to be convicted out of his own mouth."*

21. It was submitted under this head that in certain situations, as it is put in the appellant's submissions, it may be necessary to caution earlier than the time referred to in the rules: it is said that this proposition is relevant because the appellant's truck was "a particular target" (due to the fact that it was, apparently, suspected to contain controlled drugs, based on intelligence from an undisclosed source or obtained on an undisclosed basis) and it was in consequence of that that the vehicle was stopped and searched. In *Breen* the court held that a caution should have been given when the Garda Officer knew or ought to have appreciated that the suspect was likely to be on the threshold of admitting some involvement in the crime. There is nothing here to suggest that prior to the time

when he made the incriminatory utterance anyone might have supposed that he was anywhere near that threshold. It would, perhaps, have been appropriate to caution him as soon as he was shown the item because it would then be rational to expect that he might comment one way or another and of course the position would be even clearer should any question have been asked of him. In any event, notwithstanding that it is plain that the authorities had a "tipoff" and searched the vehicle accordingly, the mere fact that there was suspicion concerning the vehicle does not imply that it would be unfair, in a subsequent prosecution, for the State to rely on a verbal admission volunteered by the appellant and unprompted by any questioning, just because he had not been cautioned at the stage that it was made.

22. Mr Gageby sought to amplify his argument by reference to a number of passages from Mr. McGrath's work on "Evidence" with respect to what ought to occur if there was a breach of the rules. However, we are satisfied that there was no such breach here, nor was there a basis for any contention that there was a wider element of unfairness, so it is not necessary to repeat the well-established legal principles that were opened to us.
23. Accordingly, we are not disposed to uphold the first ground of appeal.
24. We turn now to the second ground which is as follows:-

**Having admitted into evidence an alleged admission made by the applicant to a customs officer, the learned trial judge erred in law and in fact in failing to give a corroboration warning to the jury pursuant to s. 10 of the Criminal Procedure Act, 1993.**

The Supreme Court in *The People (DPP) v. Power* [2020] IESC 13 addresses directly the issue of whether or not, and when, a corroboration warning is mandated by the statutory provision in question, which is as follows:-

"10 (1) Where at a trial of a person on indictment evidence is given of a confession made by that person and that evidence is not corroborated, the judge shall advise the jury to have due regard to the absence of corroboration."

25. The issues which arise under this head are in our view as follows:-
  - (a) Whether or not the confession (for such it is) of the appellant to Customs Officer Rafferty ("You found the drugs then") attracts the provisions of section 10 of the 1993 Act.
  - (b) If it does attract those provisions are they to be interpreted as referring to corroboration of the fact that the confession was made or, rather, corroboration of the guilt of the accused.
26. A number of authorities exist which have dealt with these matters, but these have now been superseded by *Power* and it is to that that we now turn. The *Power* case involved a murder in which the deceased had been shot by the appellant outside the former's home.

The appellant had then made his getaway in a car which was subsequently found in a burnt out state and evidence existed to show that he had been driving a similar car on the day immediately preceding the offence (which occurred in the small hours of the morning) and, further, on that day, what was described as a sham transaction had been entered into by him so that he would be able to show that the vehicle had been sold to, as it happened, a non-existent third party. CCTV footage was available to show the appellant (or so the prosecution contended) putting fuel into the car. He attended a Garda Station on the day after the offence on a voluntary basis and submitted to interview asserting that he had been at home at all times material to the offence. However, there was evidence that he had called to a neighbour who had a domestic security camera seeking to obtain from her what was described as a chip from the system [which, in our understanding, would have stored what was recorded by the camera] for his own "peace of mind". When he attended the station, he was a person of interest to the investigating Gardaí.

27. He was subsequently arrested and during his detention on the fourth day thereof, he admitted that he had shot the deceased, stating that he had feared that the deceased intended to kill him and affording some considerable detail as to the circumstances in which that had occurred. It was this confession that, in the appellant's contention, attracted the requirements of section 10. It was contended that he had been in unlawful custody at the time of the confession and that, accordingly, it should be excluded from evidence (although that is not of direct significance here). It was contended that the trial judge was wrong when she refused, to put the matter shortly, to give a corroboration warning of the kind contemplated by that provision.
28. In her judgment (for the court) O'Malley J. referred to the earlier authorities relevant to the issue with special reference to *The People (DPP) v. Connolly* [2003] 2 IR 1. There, the application of the section arose in what we might term its purest form in that the only evidence against the appellant was his signed confession (made in garda custody) and hence differs from the present case. The judgment of the Court of Criminal Appeal in that case had been given by Hardiman J. and O'Malley J. referred to it with approval as follows:-

*"The judgment, delivered by Hardiman J., goes into some detail in relation to the context in which section 10 came to be enacted. The analysis in the 1993 Annual Review of Irish Law describing the measure as "The legislative reaction to the fallout from the well-publicised cases of miscarriages of justice, including the Guildford Four, the Birmingham Six and, in Ireland the Nicky Kelly case was quoted by him and endorsed.*

...

*The judgment suggests that it was perhaps to be inferred from the enactment of s. 10 that the legislature was of the view that juries might not be sufficiently aware of the need to have regard to the lack of corroboration in cases where the only evidence was an "unsupported" confession."*

29. She also pointed out that the court in *Connolly* "saw no difficulty" in deciding what would constitute corroboration inasmuch as Hardiman J. had said that:-

*"I would have thought that the most obvious form of corroboration is some relevant, objective confirmation of the factual material in the confession."*

She referred to the fact that the appellant's contention in *Power* was that the judge failed:-

*'... to distinguish between corroboration of the reliability of the confession and corroboration of the commission of the offence. It was argued that she should have instructed the jury that there was no corroboration of the latter.'*

This is in accordance with the fact that:-

*"The interpretation of s.10 was debated before the trial judge, who described the dispute between the parties as being whether the need for a warning under the section was triggered by a lack of corroboration of guilt, or alternatively by a lack of corroboration of evidence of the making of the confession."*

That of course is the issue which arises here.

30. Here, the trial court approved as correctly stating the law a passage from *McGrath On Evidence* (2nd Edn.) (para. 8-282, p. 572) as follows: -

*"The first question that arises in relation to section 10 is whether the warning mandated is triggered by and relates to a lack of corroboration of the accused's guilt of the offence or a lack of corroboration of the making of the confession. An argument can be made that the mischief that the section is directed at is the fabrication of confessions and, thus, the warning is directed towards circumstances where there is no corroboration of the making of the confession. This interpretation is supported by the wording used in subsection (1) which requires a warning when "evidence is given of a confession made... and that evidence is not corroborated", i.e. the evidence that has to be corroborated is the evidence of the making of the confession... however, the word, corroboration, is undoubtedly a term of art with a particular technical meaning i.e. independent evidence that tends to implicate the accused in the commission of the offence. Thus, the use of that term indicates that the section is directed towards the risk of a miscarriage of justice that arises when the only evidence against an accused is that of a confession or inculpatory statement made by him. In any event, this question has been settled in favour of the latter view by the decisions of the Court of Criminal Appeal in ... *Connolly*... and *The People (DPP) v. Brazil* (Unreported, Court of Criminal Appeal, 22nd March, 2002)."*

Though it must be said that the latter did not deal with the matter in any degree of detail and the former was, until *Power*, the leading authority, Mr McGrath's conclusion correctly states the law.

31. Here it is argued that there is no corroboration of the fact of the making of the confession and Mr Gageby contends that *Power* is distinguishable because it simply does not deal with a situation where it is disputed as to whether the alleged admission was made at all, as opposed to the truth of its contents. He so submits because, on the facts of *Power*, there was no dispute about the fact that the confession was made whereas, here, the fact of the utterance of the admission was denied. Furthermore, he submits, that in a case such as the present the effect of an interpretation that the section is directed towards corroboration of the fact of guilt, rather than of the fact that there had been a confession, is that it affords no protection against the mischief or evil which it was designed to address namely, convictions based on fabricated confessions. In effect, he says, anybody alleged to have made a verbal admission in such circumstances is left without protection.
32. It is appropriate at this juncture to refer again to the judgment on behalf of the Supreme Court in *Power*: O'Malley J. further said (at para. 80) that:-

*"Section 10 is one of a number of measures in the Criminal Procedure Act, 1993 that are concerned with the potential for miscarriages of justice to occur within the criminal justice system. Some of these measures are directed towards ways of remedying a miscarriage of justice after it has occurred, but this particular provision is aimed at prevention rather than cure. In my view the Court of Criminal Appeal in Connolly correctly identified its rationale as being the apprehension that convictions based upon unsupported confessions could result in miscarriages of justice, and that juries might be insufficiently aware of this."*

She also pointed out that:-

*"The obligation imposed on the trial judge by section 10 is to give particular advice to the jury if the evidence of the confession is not corroborated. Since the legislative intent is to avoid miscarriages of justice by warning juries to take particular care in cases involving unsupported confessions I am satisfied that the provision goes beyond the evidence that the confession was made and is also concerned with the factual content of the confession. I agree with the statement of the Court of Criminal Appeal in Connolly that what is to be assessed is whether or not there is objective, relevant confirmation of the material".*

33. She addresses what is or is not corroboration. She adopted what we might describe as the traditional formula, quoting with approval from the judgment of Denham J., as she then was, in *The People (DPP) v. Meehan* [2006] 3 IR 468 who, in turn, had adopted the following passage from the judgment of Lord Reid in *R. v. Kilbourne* [1973] A.C. 729:-

*"There is nothing technical in the idea of corroboration when in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter, the better it fits in, the more one is inclined to believe it."*

34. O'Malley J. went on to say:-

*"Denham J. therefore considered that the nature of corroborative evidence would depend on the facts and circumstances of the case. That included the nature of the defence, which might be critical in determining what was corroborative evidence. Since corroborative evidence is evidence that establishes a link which tends to prove that the accused person committed the offence, then evidence that rebuts a particular statement or denial by the accused could be corroborative."*

and added that:-

*"... There is no particular reason to suppose that in enacting section 10 the legislature intended some meaning to be given to the word "corroboration" other than that generally understood in the criminal law. I am also of the view that the distinction sought to be drawn by the appellant, between the truth of the confession and the commission of the crime, is not valid. Certainly, evidence establishing that peripheral details in a statement of admission are true will be of little weight. However, if the accused person has confessed to the commission of the offence charged, then it seems to me that evidence supporting the truthfulness of the account in the confession of any material particular will necessarily also be evidence implicating the accused in the offence."*

35. She also addressed the issue of the role of the judge in deciding whether or not to give a corroboration warning and in that regard she said (at para. 83) that:-

*"The obligation imposed on a trial judge by section 10 is to give particular advice to the jury if the evidence of a confession is not corroborated. Since the legislative intent is to avoid miscarriages of justice by warning jury's to take particular care in cases involving unsupported confessions, I am satisfied that the provision goes beyond the evidence that the confession was made by the accused and is also concerned with the factual content of the confession. I agree with the statement to the Court of Criminal Appeal in Connolly that what is to be assessed is whether or not there is objective relevant confirmation of that material."*

36. As to deciding whether or not such a warning should be given she said:-

*"However, I do not consider that the section is intended to have the effect that a warning is to be given in all cases where confession evidence is adduced. Firstly, the wording of the provisions specifically imposes the obligation to address special advice to the jury if a confession is uncorroborated, rather than an obligation in respect of every confession in every case. That seems to me to require a ruling or a finding by the judge, solely for the purpose of instructing the jury, that the section is applicable because the confession is uncorroborated."*

37. She referred to the fact that traditionally, where the issue of corroboration arises, it is not for the judge to determine whether or not any corroboration exists but whether or not given evidence is capable of being corroborative. She went on to say that:-

*"However, if, as I believe, section 10 requires the trial judge to determine whether the confession is uncorroborated, for the purpose of deciding whether or not some special advice as contemplated by the section should be given to the jury, it follows that the judge will have to make some qualitative assessment of the evidence. I would emphasise that this is for the purpose of deciding whether or not to give a particular warning, and not for the purpose of instructing the jury that there is, or is not, corroboration in the case."*

38. On the premise that the *Power* decision does not speak to a case, such as the present, where the fact of the admission is in question, Mr Gageby submits that the following principles emerge from O'Malley J.'s examination of the section, namely:-
- (1) The rationale for section 10 flows from the apprehension that convictions based upon unsupported confessions can result in miscarriages of justice and that juries may be insufficiently aware of this.
  - (2) The question for a jury in relation to confession is whether it can be relied upon as a true admission to the commission of the offence.
  - (3) The section goes beyond the evidence that the confession was made by the accused and is also concerned with the factual content of the confession.
  - (4) In a trial where there is evidence of a confession the section requires the trial judge to rule or find that the section is applicable because the confession is uncorroborated.
  - (5) The trial judge must make a qualitative assessment of the evidence to decide whether the confession is uncorroborated and then decide whether or not to give a particular warning.
  - (6) Even where a trial judge might rule that there is possible corroboration in a case and decides to give a warning under section 10 the ultimate decision on whether that evidence amounts to corroboration rests with the jury.
39. Mr Gageby submits that what was required (if it was required) of corroboration in the present case was independent evidence of whether or not the appellant had made the admission in the light of the fact that the defence being made was that the appellant did not know nor had he any reasonable grounds for suspecting that what he had was controlled drugs (something which might be described as the statutory defence under section 29 of the Misuse of Drugs Act, 1977); effectively he says that if this is not so the fact that the appellant was found in possession of the controlled drugs would always be corroborative.
40. It seems to us that Mr Gageby's submissions are misconceived. It may or may not be the case that whether or not an admission or confession has been made or indeed its terms are in debate, it seems to us that when evidence of such an admission or confession is adduced corroboration of the fact that it has been made, *per se*, is not what is

contemplated by the section. Of course, the jury in due course will be called upon to decide whether or not the admission or confession is true. It is hardly possible to make a decision on that without first deciding whether or not it was actually made – in reality, the issues are likely to be conflated because no jury could accept the contents of a statement as true if they had a reasonable doubt as to whether the words had been spoken at all. If corroboration is to be understood as evidence showing or tending to show that the accused has committed the offence whether or not the making of the utterance or statement is in dispute, a considerable protection is afforded to an accused by an appropriate warning, against the evil or mischief against which the provision is directed.

41. We think, accordingly, that whether or not the fact that a statement has been made is in dispute will not require some form of more elaborate warning or give rise to some separate necessity for addressing whether or not there is an admission at all (and in a particular case a corroboration warning) on that aspect. We think that on any view of *Power* corroboration in this context has its long established meaning elaborated by O'Malley J. We reject the proposition that *Power* is not authority on the issue which he raises; we think it is quite plain from its terms that the court addressed what was or was not corroboration under this section and hence the answer on this appeal to this ground is clear, namely that the complaint made in the second ground of appeal is not made out.

**Conclusion**

42. We must accordingly dismiss this appeal.