

UNAPPROVED



THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 13

Record No.: 155/2018

Birmingham P.
McCarthy J.
Donnelly J.

BETWEEN/

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

RESPONDENT

-and-

SLAWOMIR GIERLOWSKI

APPELLANT

JUDGMENT of the Court delivered by Ms. Justice Donnelly on the 19th day of January, 2021

1. This is an appeal by the appellant against his conviction on various counts of sexual assault, false imprisonment and assault causing harm in respect of three separate incidents involving three unrelated victims. The offences relating to the three incidents were joined on the same indictment and were tried together. Following conviction by jury at the Dublin Circuit Criminal Court, the appellant was sentenced on the 17th May, 2018 to a total of 22½ years' imprisonment with the final 4 years suspended with conditions. In brief synopsis, the appeal is brought under four headings; holding a joint trial in relation to the three incidents, failure to discharge the jury, a delay in detaining the appellant under s. 4 of the Criminal Justice Act, 1984 after his arrest and an error in extending his detention in a subsequent arrest authorised by s. 42 of the Criminal Justice Act, 1999.

The Offences

2. In her evidence, Ms. A (also referred to as, “the first complainant”) stated that on the 11th September, 2011, she was returning to her home from a night out at approximately 3am when she was attacked by a man on Monastery Walk in Clondalkin. The man brought her to the ground, placing one hand on her mouth and the other on her genital area under her skirt but outside her underwear, for approximately three to five seconds. The first complainant managed to stand but was brought to the ground again. She managed to bite and scrape the man’s face. She was punched a number of times to her face before she was released and managed to get inside her home. She attended Tallaght hospital and was found to have significant swelling and bruising to her nose and around her right eye, and a fracture to her nose. The appellant was convicted of offences of false imprisonment, sexual assault and assault causing harm (counts 7, 8 and 9 on the indictment).

3. Ms. B (also referred to as “the second complainant”) gave evidence at trial that on the 3rd September, 2015, she was returning home from a night out at approximately 1am when, while on Monastery Walk in Clondalkin, she was restrained from behind by what felt like a thick leather belt around her neck. She was brought to the ground where tape was wrapped around her head and hands. The second complainant heard sounds from her assailant like he was getting pleasure by touching his genital area. Gardaí arrived in response to an emergency call by local residents, causing the assailant to run away. The second complainant was assisted by Gardaí. The appellant was convicted in respect of this incident of false imprisonment, sexual assault and assault causing harm (Counts 4,5, and 6 on the indictment).

4. The final incident occurred on the 16th May, 2016. Ms. C (also referred to as, “the third complainant”) gave evidence at trial that she left her home at approximately 6:40am to walk to the Red Cow Luas to go to work. She entered a pedestrian laneway and said that two arms came from behind her, each on either side of her. She saw a cloth in the left hand and a knife

in the right hand. The knife was raised to her right cheek and then down towards her neck. She grabbed the knife with her left hand, pulled it down, screamed and turned around, at which point the appellant ran back towards the entrance to the laneway. She ran in the opposite direction emerging onto Monastery Road, at which point she was aided by civilian witnesses and emergency services were contacted. The third complainant was taken to hospital and evidence of her injuries were given by way of a section 25 certificate. She suffered significant tendon injuries to her left middle, ring and little fingers. She was discharged on the 18th May, 2016. The tendons ruptured while she was performing hand exercises and had to be repaired subsequently on the 31st May, 2016. She was expected to suffer long-term mobility issues.

Forensic Evidence Obtained

5. The first complainant's clothes were seized and submitted for forensic analysis; her underwear was analysed by Dr. Connolly and a minor DNA profile was obtained which at that time was designated as "unknown male 1". Later this was matched to the appellant's DNA profile.

6. In relation to the second complainant, the tape, belt and her clothes were seized by the Gardaí and DNA swabs were taken by Dr. Bates as well as replacement underwear worn by the second complainant following the initial seizure of her clothes, all of which were submitted for forensic analysis. A partial DNA profile was obtained from a trace of semen on the perineal swab. Insufficient DNA for a profile was present in semen from the peritoneum swab. A full DNA profile was obtained from a trace of semen on the replacement underwear. Insufficient DNA for a profile was present on the jeans worn by the second complainant. A full DNA profile was obtained from blood on the belt. These DNA profiles were, at that time, designated as "unknown male 1". Later these were found to match the appellant's DNA profile.

7. Members of the Gardaí arrived and preserved the scene of the incident involving the third complainant. Photographs were taken and a number of items were seized from the

laneway and from the area around the entrance to the laneway on St. Brigid's Cottages. Among the items seized were black cable ties found in the laneway and on St. Brigid's Cottages, a bottle of beer found on a wall of St. Brigid's Cottages and a roll of grey duct tape found on a wall near the entrance to the laneway. A partial DNA profile from the mouth of the beer bottle matched the appellant's DNA profile. Fingerprint analysis was conducted by Garda Kiely in relation to the roll of duct tape, found near the scene of the false imprisonment of the third complainant. Two marks were found to match the appellant's fingerprints.

CCTV Footage

8. Prior to entering the pedestrian laneway, the *locus* the of the third incident, the third complainant noticed a white van parked on St. Brigid's Cottages on the laneway side, facing the N7. She had seen it previously while driving to work over the previous two months, parked on St. Brigid's Cottages, on three or four occasions. A number of witnesses gave evidence in relation to a similar white van parked on St. Brigid's Cottages on different occasions prior to the 16th May, 2016. The witnesses provided partial registration numbers to Garda Dolan. Garda Dolan obtained CCTV footage from St. Brigid's Cottages which captured what he identified as a White Volkswagen Crafter driving on St. Brigid's Cottages. Garda Dolan did a wildcard search for an 08D white Volkswagen Crafter and found a registration similar to the partial registrations provided and with an address reasonably close to the scene of the incident. A certificate was issued by the Motor Tax Office confirming that the appellant was the registered owner of the vehicle in question and the date of sale was the 18th April, 2016.

9. CCTV footage was harvested from a number of different locations in the surrounding area, some of which were marked on maps created by Garda Harley and entered into evidence as exhibits. From that, a compilation was entered into evidence and linked to the location maps during the course of Garda Farrell's evidence. The compilation showed a white van parking outside an address at New Road and a person going in. It later showed a person getting into

the same van and travelling past various locations including on Monastery Road and St. Brigid's Cottages. Then, at 7:04am on the 16th May, 2016, the white van was parked outside the same address provided by the Motor Tax Office being that of the appellant as registered owner.

Grounds of Appeal

10. At the hearing, counsel for the appellant distilled the issues in this appeal to four grounds. These grounds are:-

- (i) that the trial judge erred in refusing an application to sever the indictment in relation to offences pertaining to the first complainant;
- (ii) that the trial judge erred in refusing to discharge the jury in the light of the prejudicial material placed before the jury;
- (iii) that evidence obtained during the appellant's detention was inadmissible due to a delay in detaining the appellant for the proper investigation of the offences for which he was initially arrested; and
- (iv) that evidence obtained after the extension of his second arrest was inadmissible due to a failure to follow the legal provisions permitting such an extension.

The Refusal to Sever the Indictment

11. Counsel for the appellant applied to the Court to have Counts 7, 8 and 9, the offences pertaining to the first complainant, severed from the indictment. The appellant's grounds for severance of the indictment were that each of the complainants were unrelated, the incident pertaining to the first complainant happened approximately four years before the offences concerning the second complainant and four and a half years before the offences pertaining to the third complainant. The appellant argued that no articles/implements were used to commit offences against the first complainant and that the detention of the appellant and the taking of

his DNA sample in relation to the first complainant was on a separate occasion to the second and third complainant's offences.

12. The prosecution submitted that the offences were sufficiently similar in character and the appellant's DNA profile was connected to each of the three incidents and on that basis, the evidence in each case was admissible as corroboration in respect of the others. The trial judge found in favour of the prosecution and refused to sever the indictment.

13. The appellant relies on *The People (DPP) v. BK* [2000] 2 I.R. 199 which sets out the principles to be applied in considering severance:-

"(1) The rules of evidence should not be allowed to offend common-sense.

(2) So, where the probative value of the evidence outweighs its prejudicial effect, it may be admitted.

(3) The categories of cases in which the evidence which can be so admitted, is not closed.

(4) Such evidence is admitted in two main types of cases:-

(a) to establish that the same person committed each offence because of the particular feature common to each; or

(b) where the charges are against one person only, to establish that offences were committed.

In the latter case the evidence is admissible because:-

(a) there is the inherent improbability of several persons making up exactly similar stories;

(b) it shows a practice which would rebut accident, innocent explanation or denial."

The appellant submits that the principles applicable to "*the latter case*" above (*i.e.* 4(b)), are not applicable in this case. The issue in the present case is whether the offences were

committed and the issue surrounding the identification of the appellant. The appellant submits that the only significant common feature between the first complainant's offence and the other two offences was the DNA link and that this does not make the similarities sufficiently unusual to support joinder of the offences.

14. The respondent submits that the appellant's argument here is without merit. The respondent refers to the First Schedule to the Criminal Justice (Administration) Act, 1924 (hereinafter, "the Act of 1924") which provides that charges may be joined on the same indictment if those charges are "founded on the same facts, or form or are a part of a series of offences of the same or a similar character." The respondent also relies on s. 6(3) of the said Act of 1924.

15. The respondent argues that under the *dicta* of Barron J. in *The People (DPP) v. BK*, the trial judge must consider whether the probative value of the proposed evidence outweighs its prejudicial effect and if it does, then the evidence may be admitted through the joinder of counts. The respondent submits that Barron J. put forward two purposes where evidence would be admitted and these are:-

- "(a) To establish that the same person committed each offence because of the particular feature common to each; or*
- (b) Where the charges are against one person only to establish that offences were committed."*

In relation to the second purpose outlined above, Barron J. put forward the rationale for the admission on a two-fold basis. The first is where there is the inherent improbability of several persons making up exactly similar stories and the second is that it shows a practice which would rebut accident, innocent explanation or denial. The respondent rejects in its submission, the requirement in this jurisdiction to satisfy the "striking similarity" test. The respondent submits that the DNA samples obtained from the appellant assists in the interconnectedness between

all three injured parties. The DNA taken from the appellant matched the DNA from the crime scenes pertaining to the three complainants in the present case but also to the injured parties at other crime scenes. This DNA evidence, it is submitted by the respondent, was highly probative of the guilt of the appellant especially so where the particular feature common to each of the offences was the presence of his DNA either on the victim, or in close proximity and within the crime scene. This therefore rebuts any possible defence of accident, innocent explanation or denial. Since the DNA links all three of the crime scenes, this DNA evidence must, as submitted by the respondent, be considered as being an independently verifiable detail common to the three sets of offences.

16. Other than the DNA evidence, which the respondent submits is the strongest factor in linking the appellant to the three incidents, the respondent submits that there are other common features which warranted the counts to be joined on the indictment. These were:-

- (i) the attacks were all on small, petite, lone women and in two of the cases there was a sexual motive;
- (ii) all of the cases involved force to the *neck* of the women and in all of the cases the suspect ran off when interrupted;
- (iii) all of the attacks were on lone women, in the Clondalkin area, in the early hours of the morning;
- (iv) in particular, the attacks on the second complainant and the first complainant took place on the same road - Monastery Walk;
- (v) all of the attacks involved stealth and were instigated from a rear approach to the victim;
- (vi) in all three offences the assailant used force to knock his victims to the ground and in relation to the second complainant and the first complainant, further serious sexual assaults ensued whilst prone on the ground;

- (vii) all of the attacks involved pre-planning in the sense that the victims were clearly pounced on when isolated and alone, with the appellant essentially appearing out of nowhere;
- (viii) in relation to the second and third complainants, the use of equipment was deployed for the purposes of restraint including duct tape, a belt, a knife, cloth, and in the case of the third complainant, cable ties. Such items were used to restrain and immobilise the victims. There was a further common thread in that the suspect was described as sounding and being of Eastern European origin; and
- (ix) there was a high degree of force used against all three complainants.

17. The respondent submits that it is of no relevance that DNA evidence was taken from the appellant on separate occasions and the trial judge correctly pointed out the fact that the DNA of the appellant was linked to the first complainant's crime scene even before the second DNA sample was obtained from the appellant.

Analysis and Decision

18. Rule 3 of the First Schedule of the Act of 1924 provides that:-

“Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character.”

19. Section 6(3) of the Criminal Justice (Administration) Act, 1924 gives the trial judge a discretion to order separate trials to protect the accused against prejudice or embarrassment. It is not mandatory in its terms. This is evident from the wording of the section which provides:-

“Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is

desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.”

20. A person can be charged in the one indictment for charges pertaining to separate complainants provided the offences are founded on the same facts, or form or are a part of a series of offences of the same or a similar character. In the present case, the appellant’s ground of appeal claimed an error on the part of the trial judge in failing to sever counts 7,8 and 9 from the indictment. On its face that would appear to indicate that the complaint lies not so much with the joinder of the counts but with the failure by the trial judge to order a separate trial on those counts. In submissions however, the appellant made arguments that encompassed both joinder and the subsequent discretion to sever an indictment; although the concentration of the arguments was on severance by the trial judge.

21. In *The People (DPP) v Nevin* [2003] I.R. 321 the Court of Criminal Appeal considered the First Schedule to the Act of 1924 when considering if four counts of soliciting to murder were correctly joined and tried together on the same indictment. In holding that the counts were properly joined, the Court of Criminal Appeal at pp. 340-341 reasoned as follows:

“In Reg. v. Ludlow [1971] A.C. 29, the House of Lords confirmed that, in order to show the existence of a series of offences the prosecution must be able to point to some nexus between them. Lord Pearson delivered the leading opinion of the court defining the appropriate nexus at p. 39 as ‘... a feature of similarity which all the normal circumstances of the case enables the offences to be described as a series’ and stating that, in deciding whether offences exhibit the similarity demanded by the rule, the court should take into account both their legal and their factual characteristics.

Applying that test the court was satisfied that a charge of attempted larceny from a public house in Acton could validly be joined on the same indictment with a charge of robbery at a different public house in Acton some sixteen days later. The offences were similar in law in that they each had the ingredients of actual or attempted theft and they were also similar in fact because they involved stealing or attempting to steal in neighbouring public houses within an interval of only sixteen days. A sufficient nexus was therefore present to make the offences a series of a similar character within the meaning of the rule, even though the similarity was not nearly “striking” enough to bring them within the similar - fact evidence rule.

The court went on to confirm the view expressed in Reg. v. Kray (Ronald) [1970] 1 Q.B. 125 that whilst a nexus is clearly established where offences are so connected and the evidence of one would be admissible to prove the commission of the other in accordance with the rules on similar - fact evidence, the application of the rule was not confined to such cases.

In the instant case, all four counts joined on the indictment had the common characteristics outlined earlier and were further factually similar because all four charges were supported by evidence suggesting a conspiracy or attempted conspiracy on the part of the applicant to murder her husband and to do so by means which were similar in character.

They were similar in law also comprising, as they did, charges of murder and of soliciting to murder.

The offences therefore exhibited such similar features as to establish, prima facie that they could properly be tried together in the interests of justice and convenience.

The nexus which existed between the four charges joined on the indictment on this case was, in the opinion of this court, sufficient to amount to a series of offences of the same or similar character within the meaning of r. 3 of the First Schedule of the Criminal Justice (Administration) Act 1924 and that accordingly, the court is satisfied that the joinder of the charges on the indictment was valid ab initio having regard to that rule and to established principles.”

22. In the present case, each individual group of offences contained a common offence of false imprisonment. Two of the incidences contained a common offence of sexual assault whereas the third set of offences contained an offence of assault causing harm. The main counts in each of the three incidents were therefore similar in law.

23. The main counts were also similar in fact having the characteristics set out by the prosecution and referred to at para. 16 above. The fact that the appellant’s DNA was alleged to have been found at the crime scene or relevant exhibits also establishes a *nexus* between the offences. To apply the words of the Court of Criminal Appeal in *The People (DPP) v. Nevin*:-

“The offences therefore exhibited such similar features as to establish, prima facie that they could properly be tried together in the interests of justice and convenience”.

This Court is therefore satisfied that it was appropriate to join these offences on the same indictment.

24. Joinder of the offences being appropriate, the next issue is whether the offences regarding the first complainant should have been severed from the indictment. Both the prosecution and the appellant relied upon *The People (DPP) v. BK* to say that the court, when examining the issue of severance should assess whether the evidence in relation to each set of counts is cross-admissible in the trial on the other counts. Even in cases where evidence on

one count is inadmissible on another, there may be situations where joint trials are still permitted. This was acknowledged by Barron J. in *The People (DPP) v. BK* who stated:-

“While there may be cases where the trial judge may be able to charge a jury so that an accused is not unfairly prejudiced where evidence admissible on one count is inadmissible on another, in most cases the real test whether several counts should be heard together is whether the evidence in respect of each of several counts to be heard together, would be admissible on each of the other counts.”

That approach is consistent with the later decision in *The People (DPP) v. Nevin* where at p. 341 the Court referred in apparently approving terms of the decision in *Reg. v. Ludlow* that joinder is permissible even where evidence in one count is not admissible on another. The implication of that statement is that severance is not necessarily required in those cases unless the prejudicial value outweighs the probative value of the evidence.

25. Barron J. in *The People (DPP) v. BK* distinguished similar fact evidence to system evidence. The former being inadmissible and the latter being admissible. The reasons for this is, as stated by Barron J.:-

“In practice, this test is applied where there is a similarity between the facts relating to the several counts. On the one hand, there is system evidence which is so admissible; and, on the other hand, there is similar fact evidence, which is inadmissible. In the latter case, the reason is that, just because a person may have acted in a particular way on one occasion does not mean that such person acted in the same way on some other occasion. System evidence on the other hand is admissible because the manner in which a particular act has been done on one occasion suggests that it was also done on another occasion by the same person and with the same intent.”

26. In the context of whether to order a joint trial, Barron J. relied on the test espoused by Lord Herschell L.C. in *Makin v. Attorney General for New South Wales* [1984] A.C. 57:-

“It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.”

In explaining the applicability of this test, Baron J. cited Lord Hailsham of Marylebone in *Reg v. Boardman* [1975] A.C. 421. The Court in *Reg. v. Boardman* held that the probative value to be attributed to evidence of bad character or to connect the accused to similar crimes committed is nil. However, the second part of the test, which is not an exception to the first part, but rather an independent proposition, where the mere fact that the evidence adduced tends to show the commission of other crimes in order to rebut the defence of accident is admissible. Lord Hailsham stated that the *“rules of logic and common sense are not susceptible to exact codification when applied to the actual facts of life in its infinite variety.”* Lord Hailsham thereby determined that the application of the test is dependent on the facts of each given case. In formulating a test, he held that:-

“The truth is that a mere succession of facts is not normally enough whether the cases are many or limited to two... There must be something more than mere repetition. What there must be is variously described as ‘underlying unity, ‘system, ‘nexus’, ‘unity of intent’, project, campaign or adventure’, ‘part of the same criminal conduct’, ‘striking resemblance’.”

The evidence pertaining to each victim must, in a joint trial, strengthen the suspicion that the accused committed the offence with which he is charged. Lord Hailsham stated at p. 454 that:-

“The ‘striking resemblances’ or ‘unusual features’, or whatever phrase is considered appropriate, to ignore which would affront common sense, may either be in the objective facts...or may constitute a striking similarity in the accounts by witnesses of disputed transactions. For instance, while it would certainly not be enough to identify the culprit in a series of burglaries that he climbed in through a ground floor window, the fact that he left the same humorous limerick on the walls of the sitting room, or an esoteric symbol written in lipstick on the mirror, might well be enough.”

27. In the present appeal, each offence on its own linked the appellant to each of the complainants by way of DNA evidence. This is in itself, an independent corroborator of each of the offences pertaining to the complainants and is separate to the similar facts that are present in each of the offences against the complainants. Whether the DNA sample of the first complainant was taken at a different time to the other complainants is immaterial. The fact is that the appellant is linked, not merely by the evidence given by the complainants (indeed, these were complainants who were previously unknown to each other and therefore, no possibility of conspiracy arises) but by the uncontroverted DNA evidence that was obtained in respect of each of the incidents that occurred in 2011, 2015 and 2016. This type of evidence in respect of offences correctly joined in the one indictment, establishes a system, a chain between the appellant and each of the incidents that occurred and therefore, under the authority of *The People (DPP) v. BK*, the trial judge was correct in refusing the application to sever the indictment.

28. Indeed from the evidence before the Circuit Court, common sense could only dictate that the rules of evidence permit each of the offences being tried together given the clearly similar characteristics outlined previously which included location and *modus operandi*

especially the stealthy approach from behind, the application to the neck of woman of reasonably similar body type) and where the probative value of such evidence is very high. There is no prejudice to the appellant in the sense of prejudice that is meant in the case of *Makin v. Attorney General for New South Wales* and referred to by Barron J. in *The People (DPP) v. BK*. The offences were not being proffered for the purpose of leading to the conclusion that the appellant was a person likely from his criminal conduct or character to have committed the offence for which he is being tried. The evidence was being proffered to demonstrate that he had committed each offence and to rebut a defence that might be available to the appellant by way of explanation for why his DNA might appear at any single crime scene. In the context of the overall evidence, the argument of the appellant that there were no articles used in the offences against the first complainant is not decisive in this consideration. Indeed, I would go so far as to say that in cases of this type of “system” evidence, the escalation of violence be it in terms of weapons used or violence inflicted, bolsters the argument in favour of holding that a system exists. This is because the escalation (or refinement of *modus operandi*) is in fact evidence of the honing or attempt thereof to perfect the system of offending.

29. The overall facts in this case provide a textbook example of how the rules of evidence permit this type of alleged serial offending to be joined together on an indictment. In the view of the Court, to hold otherwise would be an affront to common sense. There was no basis for sustaining a plea for separate trials based upon the evidence before the trial judge. In all the circumstances, the trial judge correctly permitted the counts to be tried together and refused to sever the indictment. This ground of appeal is dismissed.

The Refusal of the Trial Judge to Dismiss the Jury

30. During the course of the trial, counsel for the appellant made an application to discharge the jury on the grounds that Detective Superintendent O’Malley adverted in his evidence of a link between the appellant and the offences not before the Court. The factual basis for the

application arose in circumstances where, during the course of the evidence in chief of Detective Superintendent O'Malley, the lead investigating officer, on being questioned regarding the link between the appellant's DNA and the three complainants in the instant prosecution, mentioned the name "XY". Offences pertaining to XY were not before the Court and the appellant contends that this error on the part of Detective Superintendent O'Malley created prejudice to the appellant. The exchange that occurred was as follows:-

“Q. Now, at that point in time, were you aware of two other investigations concerning women in the Clondalkin area?

A. I was, yes. I had been the senior investigating officer with overall responsibility for the investigation of these collective incidents.

Q. Yes. And were you aware of any particular information that had arisen -- arisen from crime scenes in relation to those other two women?

A. I was aware that there was a DNA link in relation to them. If I could just explain that further. It was a DNA link of a male, but at that time the -- it was referred to as unknown male because the male had not been identified, in other words, that the DNA sample wasn't within the system to identify or associate the sample to -- to the unknown male.

Q. Okay. And who were those two other women?

A. [B] was one of the women, and [XY]. It was -- sorry, I just get facts here. [B] and [A].

Q. And if you can't -- sorry?

A. [A].

Q. [A]?

A. [A].”

31. The grounds for the application were as follows:-

- (i) the witness was the lead investigating officer;
- (ii) the name was clearly not a mispronunciation;
- (iii) the name was given in evidence in the context of the appellant's DNA being linked with other complainants;
- (iv) a direction to the jury in relation to it would serve only to highlight the matter;
- (v) the name XY was of a person who was in fact the complainant in relation to offences alleged against the appellant and so the difficulty could not be cured through cross-examination; and
- (vi) the prejudicial effect of the jury hearing inadmissible evidence in relation to the existence of a fourth complainant was such that there was a real risk of an unfair trial.

The trial judge refused the appellant's application to discharge the jury and made the following ruling:-

"I'm conscious that the detective superintendent gave the evidence in a very specific context and I do accept that. However, he gave the name in the context of naming two women and two women only and had he gone on to say that there was a DNA hit, for example, in respect of three women, and named [XY] then, I think I would be acceding to the defence's application. But it was the name was given in a very specific context and that was in the context of two other crime scenes and two other women and he did apparently struggle to come up with the second name and while the name is of significance to the parties here in court now, it is not of any significance to the jury and they cannot know the context of that. He then quickly corrected himself to say the name of [A] and that's the name he gave."

32. Counsel for the respondent submits that no prejudice was suffered by the appellant. Rather, the error merely highlighted to the jury that he was a busy Detective Superintendent

who momentarily forgot a name and then recalled it. Also, the respondent submits that the mistake occurred in the context of a number of incorrect utterances by Detective Superintendent O'Malley in the course of his giving of evidence. The respondent referred to a number of these instances but it is not necessary to detail them. It is submitted by the respondent that these cumulative errors gave the impression to the jury was a very busy Detective Superintendent with difficulty recalling the facts of one of the many cases under his direction.

33. The respondent relies on *DPP v. Coughlan Ryan* [2017] IECA 108 where Mahon J. at para. 18 held that the general rule is as follows:-

“Inadmissible evidence finds its way into many trials, usually accidentally and inadvertently. When it does, its prejudicial effect will vary from case to case, obviously very much depending on what has been stated to the jury or how it might be interpreted by the jury. It is well established and long accepted that a jury should only be discharged where the prejudicial effect is significant and it is not possible to counter that prejudicial effect by suitably warning or directing the jury. Juries have proven themselves time and time again to be willing and capable of heeding judicial warnings and instruction and of acting appropriately in response thereto.”

34. In support of this ground of appeal, counsel for the appellant submits that the prejudice suffered by the appellant was further compounded when the forensic scientist, Dr. Casey, gave evidence, referring to his contemporaneous notes in relation to his actions on receiving the appellant's DNA sample on the 1st June, 2016.

35. Dr. Casey then held up a copy of his contemporaneous notes before the trial court which contained large black redactions. They appear, as submitted by the appellant, to have been made to redact the DNA links specifically concerned with two other complainants referred to on the s. 42 warrant; the complaints from DE and XY. The appellant's case is that the

combination of Detective Superintendent O'Malley's evidence in relation to DNA links and the visible redactions on the document shown to the jury by Dr. Casey gave rise to a real risk that a juror would conclude that the appellant was suspected of involvement in offences not before the trial court.

36. The respondent submits that during the course of his evidence, Dr. Casey made no reference to XY or to any other woman or investigation but only referred to the first and second complainants' investigations. There was no reference by Dr. Casey to any Forensic Services Ireland laboratory identifying numbers or labels or reference numbers that might have led the jury, even if they were alive to such matters, to the conclusion that different numbers had been adduced and/or redacted. Furthermore, the respondent submits that Dr. Casey made no reference to any other crime scene and it can be assumed that members of the jury would apply their common sense to such handwritten notes and would give appropriate consideration to the fact that in the ordinary course of events such notes may contain references to private matters such that they would require redaction. The respondent also submits that from a physical perspective, what Dr. Casey held up whilst he was in the witness box could in no conceivable way even have been decipherable by the jury sitting in their box. At its height, all that the jury could have seen was something blacked out on a document, which, absent any other evidence, could just as easily have related to personal data pertaining to the witness.

Analysis and Decision

37. It is not enough in law to merely find that the evidence admitted was prejudicial. If it is found to be prejudicial, it is necessary to consider whether they were prejudicial to the extent that the jury ought to have been discharged, as held in the Court of Criminal Appeal in *The People (DPP) v. Fahy* [2007] IECCA 102. The Court in *The People (DPP) v. Murphy* [2015] IECA 201 held at para. 14 that:-

“[f]irst of all this Court notes the general jurisprudence in this area to the effect that a trial judge should always be slow to accede to a request to discharge a jury and in particular the court also notes what Mr. McGrath states in para. 918 namely, ‘a trial judge is afforded a broad discretion to deal with inadvertent disclosure of evidence of bad character as he or she sees fit and in general an appellate court will be reluctant to interfere with the course adopted by him or her.’”

38. The Court in *The People (DPP) v. Murphy* held that the impermissible evidence, namely that bad character evidence was disclosed inadvertently in evidence, was of “*limited significance in the overall context in the case*”. It is therefore important, when reviewing an exercise of the trial judge’s discretion at appellate level, to only interfere with that discretion if omitting to do so would have an operative effect on the crux of the issue before the trial court.

39. In *The People (DPP) v. Cleary* [2009] IECCA 142, the issue was whether the prosecution had referred to inadmissible material when asking a defence expert witness to give an opinion. The case was a five day trial and the appeal before the Court was concerned with a single question that was put to the defence expert witness. In refusing the relief sought, the Court of Appeal referred approvingly to the decision of *Dawson and Dawson v. Irish Brokers Association* [1998] IESC 39 wherein O’Flaherty J. stated:-

“Once again, it is necessary to reiterate, as this Court is doing with increasing frequency, that the question of having a jury discharged because something is said in opening a case or some inadmissible evidence gets in should be a remedy of the last resort and only to be accomplished in the most extreme circumstances. Juries are much more robust and conscientious than is often thought. They are quite capable of accepting a trial judge’s ruling that something is irrelevant or should not have been given before them as well as in the face of adverse pre-trial publicity.”

40. While the prosecution's case was centred around the speed of the cars, the Court of Appeal held that:-

“The issues for determination by the jury were clearly dealt with in the trial judge's charge and no objection is taken to the charge on behalf of the applicant. The court has regard to the effect of the answer to the question by the expert witness being in the negative. Having regard to the evidence, the facts and the circumstances of the trial as a whole the learned trial judge exercised his discretion appropriately and refused to discharge the jury.”

41. *The People (DPP) v. Cleary* reasserts a common principle. Juries are robust and conscientious and are capable of carrying out their functions in accordance with their oath or affirmation. A trial judge must be slow to discharge a jury as it is a remedy of last resort although there are clearly cases where it may be the only remedy available. Moreover, an appellate court must only interfere where the exercise of the discretion to refuse to discharge a jury was wrongly exercised.

42. In the present case, information was given inadvertently by Detective Superintendent O'Malley. It was one of a number of errors or slips that he made while giving evidence. The reference to XY was made without context. There was no specific information divulged about any specific complaint or investigation involving XY that could lead the jury to think that the appellant may have perpetrated an offence against another complainant not before the Court. It was an error that was rectified immediately by the Detective Superintendent. In all the circumstances this was a slip regarding names. Nothing turned upon it and the trial judge correctly exercised her discretion in refusing to discharge the jury.

43. In relation to the document held up by Dr. Casey containing the redactions, the high threshold required before the jury could be discharged is also relevant. The trial judge was of the view that there was no prejudice arising from the evidence. Indeed where this part of the

ground is highly contingent on the “live” and “visual” nature of the event leading to the application - the holding aloft of a redacted scientific document to the jury from the vantage point of the witness box - the appellant faces an almost insurmountable task in asking this Court to overturn the trial judge’s ruling. That task is made all the more impossible where this Court has not seen the document and has not seen the dimensions on how far the jury were from the witness box in this particular courtroom. In all the circumstances we are satisfied that we should not interfere with the trial judge’s view that there was no prejudice and secondly that the matter was not such as would warrant discharging the jury. We are also satisfied that there is no basis for considering that a combination of the matters arising from the evidence of Detective Superintendent O’Malley and Dr. Casey warranted the discharge of the jury. For these reasons we reject this ground of appeal.

The Custody Record and the Delay in Detaining the Appellant

44. To give background to this ground of appeal, it is necessary to outline what transpired from the moment the appellant was arrested, to his detention at Clondalkin Garda Station.

45. A search warrant for the appellant’s address was obtained on the 26th May, 2016 and executed on the 1st June, 2016. The operation to execute the search warrant was planned with care by the investigating team. The appellant was arrested outside his home at 7:10am in respect of the offence of false imprisonment in respect of the third complainant. The Gardaí searched the appellant’s home. The appellant’s van was searched and the Gardaí found two grey rolls of duct tape and an open pack of cable ties inside.

46. Garda Finola Heeney gave evidence that following his arrest, the appellant was conveyed to Clondalkin Garda Station arriving at 7.22am. The appellant was introduced to the station gaoler, Garda Kilpatrick.

47. Garda Kilpatrick gave evidence that she had no custody record at the time of the appellant’s arrival. She only noticed the absence when she sought to commence one for the

appellant. She made arrangements for one to be obtained. While waiting for this to be obtained, Garda Kilpatrick gave the appellant the information required under regulation 8(1) of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 (hereinafter, “the Custody Regulations”) at 7:40am and gave him his notice of his rights in accordance with regulation 8(2). A copy of this notice of rights was given to him in Polish. The appellant indicated to Garda Kilpatrick that he understood the information on his rights. A Polish speaking Garda had been present at the arrest but was not in the station at that time. The custody record records that these actions were completed at 7.40am and 7.45am. Garda Kilpatrick’s evidence was that she had written down the times on her hand and entered it when the record became available. At 7.50am it is recorded that the accused was informed of the reason for a search.

48. The custody record arrived at 8am and the appellant was taken to a cell and searched at 8:03am. At 8:05am, Garda Heeney spoke to the Member in Charge, Sergeant Coughlan, who made an application to detain the appellant under s. 4 of the Criminal Justice Act 1984 (hereinafter “the Act of 1984”) in relation to the false imprisonment of the third complainant. This application was granted at 8:15am. When giving evidence, Garda Heeney stated that to the best of her recall, she did not speak to the Member in Charge between her arrival at the station at 7:22am and 8:05am.

49. Sergeant Coughlan gave evidence that he was aware of the arrival of the appellant in the station and became aware that no custody record was available. He believed Garda Kilpatrick was seeking to obtain a custody record. Her duty was to carry out the required functions relating to provision of rights and recording of details in the custody record, so Sergeant Coughlan had little contact with her prior to being asked to detain the appellant under s. 4 of the Act of 1984. Sergeant Coughlan gave evidence that he uses the custody record to access the name of the prisoner and relevant details on times. At 8.18am he went into the cell

to inform the appellant of his decision on detention. He gave evidence that throughout his entire experience as a gaoler or later as a Member in Charge, the completion of the custody record with details of the prisoner and notification of rights always preceded the application for detention.

50. Counsel for the appellant takes issue with the finding of the trial judge that the detention of the appellant by the Member in Charge was lawful. The appellant submits that the appellant was not in fact detained until 8:15am. The appellant argues that this delay between the appellant's arrival at the station at 7:22am and his detention at 8:15am was in breach of the terms of s. 4(2)(a) of the Act of 1984 which provides as follows:

“Where a member of the Garda Síochána arrests without warrant, whether in a Garda Síochána station or elsewhere, a person whom he or she, with reasonable cause, suspects of having committed an offence to which this section applies, the person -

(i) if not already in a Garda Síochána station, may be taken to and detained in a Garda Síochána station, or

(ii) if he or she is arrested in a Garda Síochána station, may be detained in the station,

for such period as is authorised by this section if the member of the Garda Síochána in charge of the station to which the person is taken on arrest or in which he or she is arrested has at the time of the person's arrival at the station or his or her arrest in the station, as may be appropriate, reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence.”

51. While the appellant accepts that *The People (DPP) v. Birney* [2007] 1 I.R. 337 permits a reasonable period for the booking in process, the appellant submits that this case should be distinguished as the Member in Charge in *Birney* himself, conducted the booking in process of

the arrested persons whereas in this case, this task was delegated to Garda Kilpatrick. It is further submitted that there is no objectively justifiable explanation as to why this occurred.

52. The appellant also argues that the failure to have a custody record available at the time of the appellant's arrival at the station was a breach of Reg. 6(2) of the Custody Regulations which provides that the Member in Charge shall record or cause to be recorded in the custody record as soon as practicable such information as is required to be recorded by the regulations.

53. The respondent referred to the facts of the case which showed there was clearly a planned operation leading to his arrest. Counsel accepted that the custody record should have been present in the station but submitted that even if that amounted to a breach of the Custody Regulations under the Act of 1984, that did not affect the validity or lawfulness of the detention.

54. Counsel also referred to the fact that no prejudice was suffered by the appellant. When the appellant arrived at the station, the reasons for his arrest, his entitlement to a solicitor and legal aid and the entitlement to notify others of his arrest was communicated to him. The respondent relies on *The People (DPP) v. Birney* which permits a reasonable time to be allowed for the booking in period.

Analysis and Decision

55. At issue here are two separate matters which may have different legal consequences. The first concerns the issue of whether there was a breach of the Custody Regulations in not entering the required matters into a custody record as soon as practicable as no such record was available. The Act of 1984 provides that a breach of the Custody Regulations does not of itself affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him or her. The second aspect concerning the delay in detaining the appellant relates to a breach of the Act of 1984 itself and the appellant argues that his detention was rendered unlawful by that delay.

56. In finding that there was no breach of the regulations, the trial judge held:-

“... I must consider whether there was a breach of the regulations. The Court finds that while the lack of availability of a custody record and the ensuing small periods of delay, and I do accept there was some delay interspersed in the processing, first, at the very beginning in that 18-minute period, but not for the full 18 minutes, and then in the 10 minute period later on. And that wasn't satisfactory, although not to such a degree that it undermines the unlawfulness (sic) of the detention of the accused. It's clearly desirable and appropriate that a custody record be available on arrival at the station, but I find that this breach is not such as to give rise it (sic) any breach of the accused's legal or constitutional rights, particularly in circumstances where he was not effectively 'put on ice', to use the prosecution counsel's expression, while the custody record was awaited, but was processed by the jailer

[...]

Even if I'm wrong in relation to the lack of an illegality, I'm satisfied that if a breach did occur it related to the lack of availability of the custody record, and there was no infringement of any constitutional right, no prejudice has been established by the accused. I'm satisfied that the evidence obtained on foot of the arrest is admissible.”

57. There is no basis for interfering with these findings by the trial judge with respect to the breach of the Custody Regulations. While this Court echoes the comments of the trial judge about the desirability of having a custody record available in every station, there was no resulting illegality as regards his detention arising from this. The custody record was sought immediately, the appellant was processed as per usual with the times being noted on the hand of the gaoler and subsequently entered onto the custody record when it was available. No

prejudice arose during the period of absence of the custody record and therefore, even if it is accepted that there was a breach of the regulations, there was no resulting illegality.

58. The issue regarding the lapse of time/delay subsequent to his arrival at the Garda station but prior to his detention engages a consideration of whether s. 4 (2)(a) of the Act of 1984 was violated. It was held in *The People (DPP) v. Birney* at para. 57:-

“that ‘arrival at the station’ can be given the broader meaning to embrace not just the physical arriving at the station but also the booking in process.”

It therefore follows, that the correct construction of s. 4(2) of the Act of 1984 is to not merely consider “arrival at the station” as being the appellant’s physical arrival, but also, the booking in process is a part of his arrival at the station.

59. In *The People (DPP) v. Birney*, the court found that the forty three minutes (from 1:25am to 2:08am) it took to process each of the five applicants who arrived at the station did not render the detention unlawful. Sergeant Mythen, who was the Member in Charge in the investigation processed each of the five applicants. The applicants had advanced the argument that s. 4 of the Act of 1984 had to be construed strictly and therefore the Member in Charge was not entitled to defer a decision as to whether or not the applicants should be detained under section 4. The applicants submitted that the Member in Charge had no power under the Act to investigate the matter. The Member in Charge, before granting the detention of the applicants, viewed the items in the van the subject matter of the investigation before making up his mind on whether to detain the applicants or not. It was this alleged “investigation” undertaken by the Member in Charge that the applicants argued, rendered the detention of the applicants from their arrival at the Garda Station until each was formally detained forty three minutes later, unlawful. The Court of Criminal Appeal held that while s. 4 of the Act of 1984 was not literally complied with by the Member in Charge, the section *“has to be construed as necessarily allowing a reasonable period to allow the member in charge to process the arrested person*

and a reasonable period to enable the member in charge to satisfy himself that it is appropriate to detain the arrested person.”

60. *The People (DPP) v. Birney* is different to the present case in so far as the delay arising from the Member in Charge in that case arose from him booking in the applicants himself and also determining whether to detain the applicants. In those circumstances, the Member in Charge took a considerable period of time to satisfy himself that it was appropriate to detain the arrested persons. In the present case, the Member in Charge did not commence his enquiry until a period of time had elapsed during which time the appellant was being processed by another member of An Garda Síochána while also awaiting the arrival of the custody record.

61. In determining whether the delegation of duties to another member is permitted under the Custody Regulations, it is important to review the wording of Regulation 6(2). Regulation 6(2) of the Custody Regulations provides that “[t]he member in charge shall record or cause to be recorded in the custody record as soon as practicable such information as is required to be recorded by these Regulations. Each entry in the record shall be signed or initialled by the member making it” (Emphasis added). “Member” is defined in the Custody Regulations as meaning a member of the Garda Síochána. From the definition of “member” and the reference to “cause to be recorded”, it follows that the correct interpretation of the Custody Regulations permits the task of filling out the custody record to be undertaken by a member other than the Member in Charge. Therefore, the fact that the task of booking-in the appellant was delegated to Garda Kilpatrick does not render the detention of the appellant unlawful. That is part of the booking-in process.

62. In relation to the delay in furnishing the custody record, the custody record was not furnished to the station until 8am. Between 7:22am and 8am, the appellant was given information as required under Regulation 8(1) of the Custody Regulations and was given his notice of his rights under Regulation 8(2). A decision to search was made and information

about the search was given to him. In *The People (DPP) v. Birney*, the Court held that informing the accused of their legal (and constitutional) rights is the “*cornerstone and basic purpose of the regulations governing the treatment of a person in Garda custody.*” These requirements were fulfilled by the Gardaí in the present case.

63. Like the situation in *The People (DPP) v. Birney*, the process between the appellant’s arrest and his formal detention at 8:15am that day was found by the trial judge to be a continuous process. There is no reason to interfere with this finding. There is no evidence to suggest that Garda Kilpatrick dealt with any other matter. While the custody record was not available when the appellant physically arrived at the station, Garda Kilpatrick used this time to inform the appellant of his rights – a crucial requirement. In *The People (DPP) v. Birney* the Court held:-

“It is quite clear on the factual evidence of this case that there was a continuous process between the applicant's arrival at Bray Garda Station at 1.25 am, the processing of the applicants which concluded at 2.08 am and their detention pursuant to s. 4 of the Act of 1984 between 2.30 am and 2.39 am. There was no evidence that the member in charge dealt with any other matter and the ultimate decision as taken by him in the particular circumstances of this case stems from the arrival of each applicant at Bray Garda Station against a background where five applicants had to be processed and the request to detain each pursuant to s. 4 considered. There is no evidence of any improper motive by the member in charge.”

64. Moving on to the delay itself, the task before this Court is whether the delay between 7:22am until 8:15am when the appellant was lawfully detained rendered the detention between these times unlawful. First, under *The People (DPP) v. Birney*, the Member in Charge, who was informed by Garda Heeney at 8:05, is entitled to a reasonable period to determine whether

to detain the appellant. The 10 minutes he took to make the decision do not on their own amount to an unreasonable delay. Therefore, it is the Court's view that the reckonable time for considering the delay in detaining the appellant is between the hours of 7:22am and 8:05am.

65. The procedures that took place between 7.22am and 8.05am were as found by the trial judge as part of a continuous process. The delegation of booking-in was not unlawful, rights were explained and records maintained and entered on the required custody record when it became available, in fulfilment of the Custody Regulations. Perhaps the only period that might be said to be a delay was the 10 minutes between the provision of information relating to the search and the arrival of the custody record itself. The trial judge did not find this unreasonable and there is no basis for overturning that conclusion. If that 10 minutes had occurred immediately after the start of the booking in process in circumstances where for example the gaoler had sought to find a misplaced custody record, such a period would be considered part of the booking in process and would not of itself be unreasonable. In an ideal world there should always be a custody record available, a gaoler immediately available to commence processing a person in custody and a Member in Charge ready to commence his enquiry as to whether detention is necessary within seconds of the initial processing of a person in custody. The question for this Court in accordance with the decision in *The People (DPP) v. Birney* is whether the trial judge was correct in finding that the 10 minute period, considered on its own or as part of the overall period of 53 minutes prior to the decision being taken to detain this appellant, was not an unreasonable period.

66. The question of what is a reasonable period is a matter of fact within each case. The processing of this appellant took time but was carried out lawfully and diligently by the gaoler. The Member in Charge was entitled to wait for the completion of the custody record prior to embarking upon his decision to detain. Indeed, as the decision in *The People (DPP) v. Birney* indicates, the provision of information to a person in custody about his or her legal and

constitutional rights is the cornerstone and basic purpose of the Custody Regulations. When viewed objectively, the finding of the trial judge that there was no unreasonable delay was a decision she was entitled to reach on the evidence and this Court should not interfere with that finding. In the absence of a finding of unreasonable delay in the appellant being brought to the station following his arrest, and no improper motive being displayed by Garda Kilpatrick or the Member in Charge in delegating the task of booking-in to Garda Kilpatrick, there was no breach of the Act of 1984 and the lapse of time/delay does not render the detention unlawful. Therefore, this ground of appeal is dismissed.

The Appellant's Detention pursuant to Arrest on the 27th June 2016

67. On the 27th June, 2016, the Chief Superintendent Mangan applied for and was granted a warrant to arrest the appellant under s. 42 of the Criminal Justice Act, 1999 (hereinafter, "the Act of 1999"). This provision allows for the arrest and detention of persons who are already prisoners. The warrant was executed on the appellant at 2:37pm that day and he was arrested for the offences listed on the warrant which included the offences against the first complainant but also offences pertaining to DE and XY.

68. The Member in Charge, Sergeant Loughrey gave evidence that he was aware of all the offences and complainants on the warrant and that he was requested by the arresting officer to detain the appellant. The request for detention, made by the arresting officer, Garda O'Malley were for the offences relating to XY. Sergeant Loughrey granted the detention.

69. At 20:12pm on the 27th June, 2016, Superintendent Connelly extended the detention of the appellant by a further six hours pursuant to s. 42(3) of the Act of 1999 (hereinafter, "the first extension"). No issue has been raised in respect of this extension of detention.

70. Chief Superintendent Clavin received an email from Detective Superintendent (Inspector at the time of the detention) O'Malley at 9:36am on the 28th July, 2016, following which he had a conversation with Detective Superintendent O'Malley and on foot of which he

granted the extension at 9:55am (hereinafter, “the second extension”). An issue in the trial was the nature of the extension granted by Chief Superintendent Clavin. The appellant submits that the extension was being sought by Detective Superintendent O’Malley in respect of the offences regarding A, the first complainant. As he was not being detained in respect of matters concerning the first complainant, A, the detention could not be extended. From the transcript it appears that Chief Superintendent Clavin gave evidence was that “the further detention of the prisoner was necessary for the proper investigation of the offence that he was currently being detained in respect of.” At that time, Chief Superintendent Clavin had been informed that interviews were being conducted and inquiries happening. It appears to be a matter of fact that at the time of the second extension, the appellant was being interviewed in relation to offences against XY. Chief Superintendent Clavin also stated that he made the extension because he believed “that the offence was being diligently and expeditiously investigated by the investigation team and that his detention was necessary for the proper investigation for the offence that he was currently being detained and indeed, for the additional offence that he would have to be detained in respect of”

71. The trial judge held that Chief Superintendent “*Clavin and Detective Inspector O’Malley acted fully in good faith and in the honest belief that an extension of time was needed to investigate all matters in respect of which the accused was arrested, including those matters in respect of which he had not yet been detained.*” The trial judge having concluded that at the time Chief Superintendent Clavin authorised the second extension he was aware that the appellant was still being detained in respect of the offences concerning XY, went on to conclude “*taking into account all of the evidence [...] that when he extended them time, he was aware that the [XY] matter was still being investigated but that an extension was needed to allow the investigation to proceed into the matters in respect of which the accused was not at that time being detained.*”

72. The reference to the accused “not at that time being detained” was a reference to the belief of the Gardaí that the only matters for which he had originally been detained were related to XY matters because that was what the Member in Charge had detained him for upon arrival at the station.

73. At 9:55am, the Member in Charge, Sergeant McDonnell was advised by Detective Superintendent O’Malley that this extension was authorised. At 10:05am, Sergeant McDonnell informed the appellant of this fact. The appellant’s first extension was due to expire at 10:28am. At 10:50am Sergeant McDonnell acceded to a request to change the questioning from offences pertaining to XY to those relating to the first complainant and at this time the appellant was notified of this change.

74. The issues for this Court on appeal are:-

- i. must a Member in Charge expressly authorise the detention of a person arrested pursuant to a s. 42 warrant or, does the District Court Judge’s granting of the warrant thereby authorise the detention of a person for the investigation of *all* offences on that warrant?
- ii. Did the trial Judge err in law in finding that the change in the appellant’s detention from the investigation of offences against one complainant to the investigation of offences against another complainant was lawful?

75. The appellant submits that since the appellant was only detained in respect of the XY offences because the Member in Charge detained the accused only in respect of those offences, Chief Superintendent Clavin was not entitled to extend his detention in respect of offences regarding the first complainant as he had not been detained in respect of these offences at the time the extension was sought. It was submitted that the trial judge erred in so far as she held that the extension of detention was valid.

76. The respondent submits that under s. 42, it is the District Court Judge who authorises not only the arrest, but the detention, of the accused. The respondent submits that the machinery for arrest and detention set out in s. 42 is different to that which applies in the more usual s. 4 detention. The authorisation for the arrest made by the Judge of the District Court is based, *inter alia*, on the condition that the arrest is necessary for the proper investigation of the offences which the prisoner is suspected of having committed. In arrests made other than under this power, the arrest is not subject to such a condition. The subsequent detention by a Member in Charge under s. 4 in the usual type of detention is based upon the Member in Charge being of the opinion that detention is required for the proper investigation of the offence for which he has been arrested.

77. The respondent submits that the offences contained in the warrant give rise to an automatic entitlement of the Gardaí to detain the accused in respect of all of the offences contained in the warrant. There is no requirement for the Member in Charge to assess whether detention is necessary for the proper investigation of the offence(s), as required under s. 4 of the Act of 1984. The respondent argues that this is the case because it is the District Court Judge, under his powers in s. 42(2) that “takes over” this initial screening process at the s. 42 hearing. A s. 42 warrant is only issued whereby the District Court Judge is satisfied, upon hearing sworn information of a Garda Superintendent (or higher rank) that:-

- a. There are reasonable grounds for suspecting the person has committed an offence(s); and
- b. The arrest is necessary for the proper investigation of the offence

78. With regard to point b. above, the respondent submits that while s. 42 does not refer to “detention”, but rather “arrest”, this is immaterial. The reason being that an “arrest” is purely the initial step in order to secure a detention of the accused. The respondent submits that the legislature intended that the arrest authorised by the District Court Judge will invariably lead

to a detention in order to properly investigate the offence. An arrest without a detention, as submitted by the respondent, cannot be a “necessary” part of a Garda investigation.

79. The appellant argues that the wording of s. 42 is clear. Section 42(3) expressly states that a person arrested under s. 42 “shall [...] be dealt with as though he or she had been detained under [s. 4 of the Act of 1984]” and therefore, the Member in Charge needs to carry out the assessment as required under s. 4 of the Act of 1984 to determine if the accused should be detained and if so, for what offences. The respondent argues here however, that a person arrested under s. 42 is only treated as a person detained under s. 4 of the Act of 1984 in so far as the time limitations for detention are concerned. The respondent supports this argument by reference to s. 42 (3) which provides that:

“(3) A person arrested under this section –

- (a) shall be taken forthwith to a Garda Station and may, subject to subsection (5), be detained there for such a period as is authorised under section 4 of the Act of 1984”

The respondent argues that it is clear that after the authorisation of the District Court Judge, the accused is “taken forthwith to a Garda Station”. There is no discretion contained in s. 42(3)(a) on authorisation of the detention except for the period of the detention as authorised under s. 4 of the Act of 1984.

80. The respondent argues that this is further bolstered by the fact that s. 4(4), 4(5) and s. 10 of the Act of 1984 are explicitly disapplied in s. 42(4). The reason why these are not applied to a s. 42 detention is that s. 4(4) and s. 4(5) (which provide for termination of the detention where there are no longer reasonable grounds for suspecting that the accused has committed an offence and there are no longer reasonable grounds that detention is necessary for the proper investigation of the offence) as these are effectively reapplied to a s. 42 detention by the terms of s. 42(5) which provides:-

“(5) If at any time during the detention of a person under this section there are no longer reasonable grounds for –

- (a) suspecting that the person has committed the offence or offences in respect of which he or she was arrested under this section, or
- (b) believing that his or her detention is necessary for the proper investigation of that offence or those offences,

the detention shall be terminated forthwith.”

The respondent submits that s. 4(5A) of the Act of 1984 which permits a Member in Charge to change the detention of a person to another offence for which the accused is not originally detained for, is explicitly disapplied to a s. 42 warrant because there is no such authorisation to do this in a s. 42 arrest and detention. This is because it is only the matters that are contained in a s. 42 warrant that can be investigated by the Gardaí and once there are no reasonable grounds for detaining the accused to investigate the matters contained in the s. 42 warrant, then the accused must be released from custody under s. 42(5).

Analysis and Decision

81. In order to determine whether authorisation from the Member in Charge is required to detain a person under s. 42, this Court must interpret the Act of 1999 and its interplay with the Act of 1984. The Court considers the following *dicta* of McKechnie J. in *A.W.K. v. Minister for Justice* [2020] IESC 10 apposite:-

“33. The main elements of a literal approach are now so well described that individual authority for what follows is hardly necessary. The most basic obligation of such an exercise is to determine the intention of parliament, to assess what the legislative wishes are. Whilst some may say that even such phraseology is in itself ambiguous, at least one aspect of any uncertainty in this respect, can be immediately resolved. It is that which the court is searching for, to identify the objective intention

of the legislature as a whole, and not any subjective intention which it, or its members may have. (The State (O'Connor) v. O'Caomhanaigh [1963] I.R. 112, and Crilly v. T&J Farrington Limited [2001] IESC 60, [2001] 3 I.R. 251).

34. The most appropriate way to achieve this objective is by reference to the words used by the Oireachtas itself: when given their ordinary and natural meaning, the outcome should best reflect the plain intention of that body. The text published is the basic material involved because it is the most pre-eminent indicator of intention. As stated by the Law Reform Commission, in a publication later referred to (para. 45 infra), this approach remains the primary method of construction. Regard to alternative means, by reference to the various and multiple subsidiary rules, which collectively are called aids to interpretation, are resorted to only where this primary approach lacks the capacity to resolve the issue or is otherwise found wanting. This method of construction is variously described as the literal method or, as giving the words then original meaning or their ordinary and natural meaning. There is no difference in effect between any of these descriptions. They all entail the same substantive drivers in the exercise undertaken.

35. As part of this approach however, it has always been accepted that context can be critical. It is therefore perfectly permissible to view the measure in issue by reference to its surrounding words or other relevant provisions and, if necessary, even by reference to the Act as a whole. Furthermore, it is presumed that the legislature did not intend any provision enacted by it to produce an "absurd" result. That rule, admittedly in a different context, was put as follows in Murphy v. G.M.; Gilligan v. Criminal Asset Bureau [2001] 4 I.R. 113. 'A construction leading to so patently absurd and unintended a result should not be adopted unless the language used leaves no alternative: see Nestor v. Murphy [1979] I.R. 326' (Keane C.J. at 127 of the report).

Accordingly, whilst not in any way trespassing upon a purposive approach, certainly not that as provided for by s. 5 of the 2005 Act, I believe that it is permissible to have regard to the underlying rationale for the provision(s) in question. On this basis, I propose to examine meaning.”

82. The following passage from Blayney J. in *Howard v. Commissioners of Public Works*, [1994] 1 IR 101 (and cited with approval in the Supreme Court in *DPP v. Moorehouse* [2006] 1 I.R. 421) is in the same vein:-

"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver. The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view."

83. Section 42 provides as follows:

“(1) In this section—

‘Act of 2001’ means the Children Act 2001;

‘board of management’ in relation to a remand centre that is not situated in a children detention school, means the board of management of the remand centre appointed under section 88(9) of the Act of 2001;

‘child detainee’ means a person who—

(a) is detained in a children detention school, or on remand in a remand centre, pursuant to the Act of 2001, or

(b) is under the age of 18 years and is detained or remanded in a place of detention;

‘children detention school’ has the same meaning as it has in section 3 of the Act of 2001;

‘Director’ has the same meaning as it has in section 157 of the Act of 2001;

‘place of detention’ means—

(a) Saint Patrick's Institution, or

(b) a place of detention provided under section 2 of the Prisons Act 1970;

‘offence’ means an arrestable offence as defined in section 2 of the Criminal Law Act, 1997;

‘prison’ means a place of custody, other than a place of detention in respect of the detention or remand of child detainees therein, administered by the Minister for Justice, Equality and Law Reform;

‘prisoner’ means a person who is in prison on foot of a sentence of imprisonment, on committal awaiting trial, on remand or otherwise;

‘remand centre’ has the same meaning as it has in section 3 of the Act of 2001.

(2) A member of an Garda Síochána may arrest a prisoner or child detainee on the authority of a judge of the District Court who is satisfied, on information supplied on oath by a member of the Garda Síochána not below the rank of superintendent, that the following conditions are fulfilled:

(a) there are reasonable grounds for suspecting that the prisoner or child detainee has committed an offence or offences other than the offence or offences in connection with which he or she is imprisoned, detained or remanded, as the case may be;

- (b) the arrest of the prisoner or child detainee is necessary for the proper investigation of the offence or offences that he or she is suspected of having committed; and
 - (c) where the prisoner or child detainee has previously been arrested for the same offence or offences, whether prior to his or her imprisonment, detention or remand, as the case may be or under this section, further information has come to the knowledge of the Garda Síochána since that arrest as to the prisoner's or child detainee's, as the case may be, suspected participation in the offence or offences for which his or her arrest is sought.
- (3) A person arrested under this section—
- (a) shall be taken forthwith to a Garda Station and may, subject to subsection (5), be detained there for such period as is authorised under section 4 of the Act of 1984, and
 - (b) shall, subject to this section, be dealt with as though he or she had been detained under that section.
- (4) Sections 4(4), (5), (5A) and 10 of the Act of 1984 shall not apply to a person arrested and detained under this section.
- (5) If at any time during the detention of a person under this section there are no longer reasonable grounds for—
- (a) suspecting that the person has committed the offence or offences in respect of which he or she was arrested under this section, or
 - (b) believing that his or her detention is necessary for the proper investigation of that offence or those offences,
- the detention shall be terminated forthwith.

(6) On termination of the detention in accordance with subsection (5) or by reason of the expiry of the period referred to in subsection (3)(a), the member of the Garda Síochána in charge of the Garda Station where the person is detained shall transfer him or her, or cause him or her to be transferred, forthwith back into the custody of, as the case may be—

- (a) the governor of the prison where the person was imprisoned at the time of the arrest,
- (b) [...]
- (c) [...]
- (d) [...]

(7) This section shall not prejudice any power conferred by law apart from this section in relation to the arrest, detention or transfer of prisoners or child detainees.”

84. The trial judge found as a matter of law:-

“The Court finds and so holds that this subsection provides for a number of things.

(1) That the use of the word ‘may’ relates to a discretion as to the time periods pursuant to which the accused may be detained. If one were to leave out the sub-clause, ‘Subject to subsection 5,’ that’s how it reads: ‘Shall be taken forthwith to a garda station and may be detained there for such a period as is authorised.’ There’s no comma there.

(2) That the time periods are governed, the time periods in respect of the detention, are governed by the periods of time authorised by section 4 of the 1984 Act.

(3) The detention at a garda station is subject to section 42(5) which provides for the termination of such detention forthwith, “If at any time there are no longer reasonable grounds for” -- and I’m just going to go to subsection (b) -- “believing that

his detention is necessary for the proper investigation of the offence for which he has been arrested." That's what subsection (a) provides and that's my emphasis, "for which he has been arrested."

85. The trial judge then went on to hold:-

"The issue that then arises is whether the fact that the member in charge Sergeant Loughrey chose to detain the accused only in respect of the [XY] matters when the accused was brought to the garda station invalidated the continuation of the detention for other matters contained in the warrant once the detention in respect of [XY] was purportedly terminated by the second member in charge, namely Sergeant McDonnell, and continued in respect of [A]. Once the accused was arrested and detained under section 42 warrant, it appears to the Court from a reading of section 42(5)(a) and (b) that the import of the legislation is that, provided that either of the preconditions at (a) and (b) can be satisfied in respect of the extended detention, then he could be questioned about any of the matters in respect of which he had been lawfully arrested in the first instance, in this case, in respect of the [A] matters. The Court is satisfied beyond a reasonable doubt that regardless of the purported change in detention, once the accused's questioning was confined to those matters for which he'd been arrested in the first place, the detention remains lawful and valid."

86. Finally the trial judge held:-

"Now, if I am incorrect about the interpretation of the warrant as extending to a power to detain and if the word "may" in section 42, subsection 3(a) relates to a discretion on the part of a member in charge to detain the accused in respect of some or any of the offences in the warrant, then I hold as follows; I'm satisfied beyond a reasonable doubt that in light of the wording of section 42(5) when read in conjunction with section 42(3) that the offences which the member in charge Sergeant McDonnell

was concerned about, that's [A], came within the scope of the offences for which the accused was arrested. The change of detention to question him about the [A] matters were in those circumstances a lawful and valid change in the detention.

It's noted by the Court that the extension in respect of the [A] matters or the change in detention in respect of the [A] matters was not done in a vacuum. At all times, it was understood that the accused had been arrested for and was detained regarding those offences, i.e. the [A] offences, and in circumstances where she bona fide suspected him of involvement in those offences and changed the purpose of the detention accordingly."

87. It is necessary to have regard to the context in which the legislation arose. The context for the enactment for the Act of 1984 is particularly revealing. Apart from arrests under the Offences Against the State Act, 1939, generally regarded as an exceptional piece of legislation, arrest in this jurisdiction was only permitted for the purpose of effecting charge. As far back as the decision in *Dunne v. Clinton* [1930] I.R. 366 it was held that it was:-

"...clearly the law that, once a person is detained by the guards, or, in other words, in custody of the guards, on suspicion of having committed a felony, it is the duty of the police officer arresting him to take him with reasonable expedition before a Peace Commissioner. He can be retained in custody only during such a time as is reasonable for that purpose. Any question of the time necessary to investigate the offence, or to obtain evidence upon which to found a charge, is quite irrelevant. It is for the Peace Commissioner and not the guard to determine whether the suspected person is to remain in custody or to be released on bail".

88. It was against the background where the common law (and certain statutory provisions) required an arrested person to be charged and brought before a court within a reasonable time or, if not charged, to be released without delay, that the Act of 1984 was so ground breaking.

It provided for the first time (absent the Offences Against the State Act, 1939) for Gardaí to have access to a mechanism which would permit detention necessary for the proper investigation of the offence for which the person had been arrested. The mechanism chosen was to provide for the concept of a Member in Charge of a Garda Station who was given the power to detain persons where she or he was satisfied that it was necessary for the proper investigation of the offence for which the person had been arrested. The right to access a solicitor was provided for in the legislation. The legislation included provision for regulations to be made regarding the treatment of persons in custody in Garda stations. It was recognised under the Act of 1984 that the power to detain a person for the purpose of investigation was a significant incursion into the right to liberty and the Act provided for ancillary safeguards.

89. The Act of 1999 has to be seen against that background. In the absence of a specific power to arrest a prisoner with a view to detaining them in a Garda station, there was no means of subjecting a prisoner to detention for the proper investigation of offences. In the Act of 1999, the Oireachtas chose to grant the ability to subject a prisoner to arrest and detention for the purpose of investigation in a specific fashion. The Oireachtas chose to permit the arrest where the judge of the District Court must not only be satisfied that there are reasonable grounds for suspecting that the prisoner has committed an offence (or offences) other than the offence for which they are imprisoned, but that the arrest is necessary for the proper investigation of that offence(s).

90. Thus, the Act of 1999 permits a judge to authorise the arrest, but it goes further and requires the judge to be satisfied, *inter alia*, that the arrest is necessary for the proper investigation of the offence for which he is suspected of having committed. From the point of view of the protection of rights, that is a significant difference to other arrests as there is judicial scrutiny in advance of the arrest. Moreover, that scrutiny extends to the requirement that a judge is satisfied that the arrest is necessary for the proper investigation of the offence for which

the prisoner is suspected of having committed. The reference to “arrest” being necessary for the proper investigation differs from the language of s. 4 under which the Member in Charge makes the decision to detain. Under s. 4(2)(a) the Member in Charge makes the decision that his detention is necessary for the proper investigation of the offence. The judge is making the decision that the arrest is necessary for that purpose.

91. The Oireachtas could have permitted the authorisation for arrest to be made on the basis that the judge would find reasonable suspicion but went further and added the requirement that the judge be satisfied that it was necessary for the proper investigation of the offence. Is that indicative that the authorisation granted by the judge of the District Court extended beyond a mere authorisation to arrest? Or was it a superfluous provision or perhaps an overly cautious one?

92. The interplay between s. 4 of the Act of 1984 and s. 42 of the Act of 1999 must be assessed in order to examine the underlying rationale for s. 42. Section 42(3)(a) provides that a person arrested under the section “shall be taken forthwith to a Garda Station and *may*, subject to subsection(5), be detained there for such period as is authorised under section 4 of the Act of 1984.” Section 42(5) of the Act of 1999 provides that:-

“(5) If at any time during the detention of a person under this section there are no longer reasonable grounds for –

- (a) Suspecting that the person has committed the offence or offences in respect of which he or she was arrested under this section, or
- (b) believing that his or her detention is necessary for the proper investigation of that offence or those offences, the detention shall be terminated forthwith.”

The term “offence or offences in respect of which he or she was arrested under this section” is indicative that the detention relates only to the offences that are contained in the arrest warrant

granted by the Judge. When viewed in its ordinary and natural meaning, s. 42(3)(a) requires a person to be taken to a Garda station and may be detained there for a period authorised under s. 4 of the Act of 1984 but such detention cannot continue where there are no longer reasonable grounds for suspecting that the person has committed the offence or that detention is necessary for the proper investigation of the offence. What the section does is mandate that the prisoner arrested under s. 42 be brought to a Garda station. There is a permission to detain them there up to the time periods permitted in s. 4 but the only mandate in that regard is that if there is no longer a suspicion that they committed the offence or that detention for investigative purposes is no longer necessary they must be released from detention and returned to the prison. It is also noteworthy that s. 42(5) also refers to the detention of a person “under this section”, *i.e.* s. 42, which distinguishes it from a detention pursuant to s. 4 of the Act of 1984.

93. Crucially, s. 42(3)(b) goes on to provide that the person arrested by the Gardaí pursuant to s. 42 “shall, subject to this section, be dealt with *as though* he or she had been detained under that section”. (*Emphasis added*). The phrase “that section” refers to s. 4 of the Act of 1984. The reference to “as though he or she had been detained” under s. 4 is a significant indication that detention of a prisoner is being authorised under s.42 and not merely authorising an arrest for the purpose of permitting a Member in Charge to make the decision on detention under s. 4 of the Act of 1984. That interpretation is also bolstered by the provisions of subsection 4 of s. 42 of the Act of 1999. That subsection, cited above, provides that certain subsections of s. 4 of the Act of 1984 “shall not apply to a person arrested and detained under [s. 42]”. That provision, in its ordinary and natural meaning, indicates that it is both the arrest and detention that is being provided for under s. 42 of the Act of 1999.

94. The provisions of s. 10 of the Act of 1984 provide for the rearrest of a person where such re-arrest is authorised on the authority of a judge of the District Court who is satisfied of certain conditions. What is of particular note is how re-arrest pursuant to an authorisation under

s. 10 of the Act of 1984 is clearly different from arrest pursuant to an authorisation issued under s. 42 of the Act of 1999. Under s. 10 of the Act of 1984 (both in its original and amended form) it is stated that “a person arrested under that authority shall be dealt with pursuant to section 4”. That section treats the re-arrest in an entirely different manner to arrest under s.42. The re-arrest authority directs that the person shall be dealt with pursuant to s. 4 of the Act of 1984 whereas the arrest under s. 42 leads to the person being dealt with as though they have been detained under that section *i.e.* the arrest under s. 42 amounts to an arrest and detention under s. 4 of the Act of 1984.

95. Section 4(3)(bb) provides that “ a member of the Garda Síochána not below the rank of superintendent may direct that a person detained pursuant to a direction under paragraph (b) be detained for a further period not exceeding twelve hours if he or she has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.” The appellant argues that “the offence concerned” must refer to the offence that the appellant is at that time detained for. The appellant argues that the accused was only detained in respect of the XY matters and not for all of the offences contained in the warrant as the detention was only authorised by the Member in Charge to deal with the XY matters. The appellant argues that on that basis, the extension could not be granted to deal with other matters that the appellant was not originally detained for as the extension was not for the proper investigation of the offence concerned – *i.e.* the XY matters.

96. In the view of the Court, once the arrest was made pursuant to the authorisation granted under s. 42, the appellant was to be dealt with as though he had been detained pursuant to s. 4 of the Act of 1984. It was therefore not required of the Member in Charge that he or she make an actual decision to detain the appellant as the authorisation by the District Court judge provided the authority. The detention was in relation to offences alleged to have been carried out against the three women, namely, A (the first complainant), DE and XY. The fact that the

Member in Charge was only asked to detain the appellant in respect of offences against one of those women did not affect the underlying legality in respect of his detention on all three sets of offences. There was no basis, and indeed it is not being argued that there was any basis, to believe that the appellant should have been discharged from detention pursuant to s. 42(5) of the Act of 1999.

97. In those circumstances he was lawfully detained on all offences during his detention as there is no evidence, nor indeed was any case made, that there were no grounds for keeping him in detention as he was no longer sought for the proper investigation of the offence. The appellant's argument was that as he was being detained only in respect of XY, there could be no extension in respect of the first complainant, falls as a matter of law, because, contrary to what may have been the belief of the Gardaí at the time, the authorisation was for his detention in respect of all matters so an extension could relate to all matters. Moreover, as a matter of fact, the trial judge found that the Chief Superintendent at the time of the second extension knew he was being investigated regarding XY but that an extension was needed to allow the investigation proceed into matters including that of the first complainant. There is no basis for this Court interfering with the findings of the judge as a matter of fact.

98. I should add at this time, that the prosecution did not seek to argue that once an authorisation was granted under s. 42 of the Act of 1999 a person was liable to be detained for the full period of 24 hours without further authorization by a Superintendent or Chief Superintendent. It is unnecessary to decide in the present case if the phrase contained in s. 42(3)(a) of the Act of 1999 "such period as is authorised under section 4" actually extends beyond that initial 6 hour period. The phrase "such period" includes the plural by virtue of the Interpretation Act, 2005 and it may well be that once a s. 42 authorisation is granted, detention may continue until the position is reached under s. 42(5) subject to a maximum time frame of 24 hours. It is unnecessary to decide this issue in this case as the matter can be decided on the

ground argued before us *i.e.* that the only issue with the second extension was a legal and factual issue concerning whether he had been in detention for the offences relating to the first complainant, in circumstances where the Member in Charge had purported to make a decision only to detain him in respect of offences concerning XY.

99. The Court is satisfied that although there was an initial purported erroneous authorisation of the detention of the appellant in respect of only detaining him for offences pertaining to XY, any such authorisation was not necessary in the first place. Moreover, there was no evidence that the Gardaí questioned or investigated the appellant on matters that were not covered by the s. 42 warrant issued by the District Court Judge. There has also been no evidence that the appellant was in way material way been prejudiced by the manner in which the Member in Charge or the Chief Superintendent addressed his detention other than the fact that he has submitted that he was in unlawful custody. In other words, there was no claimed breach of rights such as breach of his right to access to a solicitor or lack of information about the offences in the s. 42 authorisation or as to the particular offences for which he was then being questioned. The appellant has not satisfied this Court that the extension of the detention by Chief Superintendent Clavin rendered his detention unlawful on the ground that the Member in Charge had initially purported to detain him with respect to the matters concerning XY only.

100. In relation to the second issue before this Court is whether the trial judge finding that the change in the appellant's detention by Sergeant McDonnell from investigating the offences against XY to the first complainant was erroneous. Sergeant McDonnell's authorisation of the change in detention is in apparent compliance with s. 4(5A) of the Act of 1984. This action by Sergeant McDonnell was not necessary as both the offences pertaining to XY and the first complainant were contained in the s. 42 warrant and therefore, no authorisation was required by Sergeant McDonnell in the first place to change the detention. Indeed, s. 4(5A) is expressly disapplied in s. 42(4) of the Act of 1999. Section 4(5A) provides:-

“If at any time during the detention of a person pursuant to this section a member of the Garda Síochána, with reasonable cause, suspects that person of having committed an offence to which this section applies, other than an offence to which the detention relates or an offence in respect of which the person's detention has been suspended under subsection (3A), and the member of the Garda Síochána then in charge of the Garda Síochána station has reasonable grounds for believing that the continued detention of that person is necessary for the proper investigation of that other offence, the person may continue to be detained in relation to the other offence as if that offence was the offence for which the person was originally detained.”

Section 42(4) of the Act of 1999 expressly disapplies s. 4(5A). It provides:-

“Sections 4(4), (5), (5A) and 10 of the Act of 1984 shall not apply to a person arrested and detained under this section.”

No authority to change the detention for the investigation of offences is contained in s. 42. It is clear that the reason for this is that the warrant is the only authorisation for the detention of the accused. Therefore, the investigating garda was free to question the appellant on all three complainants contained in the warrant without having to authorise each extension or change in the detention as is required under s. 4 of the Act of 1984, because the authorisation for his detention was already given by the judge of the District Court pursuant to s. 42 of the Act of 1999. When there are no longer reasonable grounds for detaining the accused to investigate the offences contained in the s. 42 warrant, then the accused is released from custody under s. 42(5) of the Act of 1999.

101. In order to ensure that the objective intention of the legislature is not lost when undergoing statutory interpretation, it is important, per McKechnie J. in *AWK* to try and determine the underlying rationale of the provisions. It would be illogical for the warrant, which is based upon the sworn information of a Superintendent to be dispensed with as soon

as the accused is brought to a Garda Station for questioning. The only reason that can explain why s. 42(4) of the Act of 1999 expressly disapplies the above sections, is due to the fact that the Act of 1999 was designed to be a self-contained permission to allow for a detention for the proper investigation of offences for which a judge had authorised. There is therefore a strict prohibition against permitting the detention to be extended by a Garda to allow for any other detention for the purpose of investigation. If a prisoner's arrest is no longer justified or if his detention for investigation is no longer justified, the detention pursuant to s. 42 ceases and he must be returned to the prison.

102. For the foregoing reasons this ground of appeal is dismissed.

Conclusion

103. This Court has held that the trial judge was correct in her refusal to sever the indictment and was correct in refusing to discharge the jury upon application of counsel for the appellant. In relation to the detention of the appellant, this Court has found that there was no unreasonable delay in detaining the appellant which rendered the detention unlawful. Further, an authorisation for arrest under s. 42 of the Act of 1999 amounts to an authorisation to detain a person for such period as is authorised under s. 4 of the Act of 1984. Therefore, the authorisation of the Member in Charge that the detention is necessary for the proper investigation of the offence(s) is not required as this important protection of the rights of a suspect has been assessed by the judge of the District Court. It is on this basis that the extension by Chief Superintendent Clavin and the subsequent change in the detention by Member in Charge, Sergeant McDonnell did not render the detention unlawful as they were not even required to undertake that exercise in the first place.

104. This Court dismisses the appeal against conviction.