



THE COURT OF APPEAL

Record Number: 168/2019

**Birmingham P.
Edwards J.
McCarthy J.**

BETWEEN/

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

RESPONDENT

- AND -

MACIEJ MASZNICZ

APPELLANT

JUDGMENT of the Court delivered on the 18th of October, 2022 by Mr Justice Edwards

Introduction

1. In the case of *The People (Director of Public Prosecutions) v. Cronin (No 2.)* [2006] 4 I.R. 329, the Supreme Court (Geoghegan, Fennelly, McCracken, Kearns and Macken JJ) heard an appeal brought under s. 29 of the Courts of Justice Act 1924 from a decision of the Court of Criminal Appeal (Hardiman, O'Sullivan and Quirke JJ) refusing an application by the applicant, Mr Cronin, for leave to appeal to that Court from his conviction for murder in the Central Criminal Court. In hearing Mr Cronin's s. 29 appeal the Supreme Court considered, inter alia, the circumstances in which an appellate court, concerned with an appeal against a criminal conviction following a trial on indictment, might allow a point not raised at trial to be argued on appeal.
2. The Supreme Court held that only in circumstances where the appellate court was of the view that, due to some error or oversight of substance, a fundamental injustice had occurred, should the court allow a point not raised at trial be argued on appeal. Moreover, and in addition, it said that an explanation should be furnished as to why the point was not raised at trial.
3. The rationale for the Supreme Court's approach was explained in the following passage from the judgment of Kearns J. in that case (at p.346 of the report):

"47. Without some such limitations, cases will continue to occur where a trawl of a judge's charge years after the event will be made to see if a point can be found

which might have been argued or been the subject matter of a requisition at the end of the judge's charge at the original trial, even though competent lawyers at the trial itself did not see fit to do so. It is an entirely artificial approach to a review of a trial and one totally disconnected from the reality of the trial itself. For these reasons and for the reasons offered by Hardiman J. when this case was in the Court of Criminal Appeal, this court should abhor the practice and strongly discourage it."

4. Earlier, in giving judgment on behalf of the Court of Criminal Appeal in the same case, as reported at [2003] 3 I.R. 377, Hardiman J. had said (at p. 390 of the report), under the sub-heading "Point not taken at trial", that:

"Throughout the history of this court considerable emphasis has been placed on whether a point relates to something which was thought at the time, by those involved in the case, to be of real importance, as opposed to a point devised much later, perhaps by persons who had no connection with the trial and only after a "trawl" of the transcript. The decision of the early case of *The Attorney General v. Gilligan* (Unreported, Court of Criminal Appeal, 2nd May, 1929), is unreported but is noted at p. 180 of the second edition of Sandes *Criminal Practice Procedure and Evidence in Éire* (2nd ed., 1939) as follows: -

'The specific grounds of appeal must be stated in the notice of appeal ... The [Court of Criminal Appeal] will not permit a defendant or his counsel, after he has read through the transcript of evidence and has made a meticulous scrutiny of it, then to formulate grounds of appeal.'

This attitude has been restated on numerous occasions since."

5. Hardiman J. then went on to illustrate his point with examples, including *The People (Attorney General) v. Michael Coughlan* (1968) 1 Frewen 325; *The People (Director of Public Prosecutions) v. Moloney* (Unreported, Court of Criminal Appeal, 2nd March, 1992); *The People (Director of Public Prosecutions) v. Redmond* [2001] 3 IR 390; and *The People (Director of Public Prosecutions) v. Noonan* [1998] 2 IR 439.
6. Notwithstanding these strong previous statements of judicial policy, the appeal to which the present judgment relates seeks to raise numerous points not raised at trial, and in respect of which no requisitions were raised, and no explanation or explanations have been advanced for not doing so. However, the appellant asks us to overlook this, contending that a fundamental injustice may have occurred. Notwithstanding that it is our view that a mere contention or assertion does not entitle a party to automatically secure a particular level of scrutiny or review, we have in this instance considered in detail his arguments in that respect. The fact that we have opted to do so here is not to be regarded as the setting of a precedent. However, having done so on this occasion, we feel obliged to say that this appears to us to be a classic instance of the situation postulated by Kearns J., where a new legal team which did not represent the appellant at trial has now come on board and has trawled the transcript of the judge's charge to, adopting the words of the learned Supreme Court judge, "*see if a point can be found*

which might have been argued or been the subject matter of a requisition at the end of the judge's charge at the original trial, even though competent lawyers at the trial itself did not see fit to do so."

7. In circumstances where we further consider that the case made on appeal has failed to engage with the reality of how the trial was run and conducted; and where we have not been persuaded that the trial, when it is considered as a whole, was either unsafe or unsatisfactory, much less conducted in a manner tending to suggest that a fundamental injustice may have occurred; we are disposed to dismiss this appeal.
8. In the remainder of this judgment we will set out in more detail our reasons for why we have arrived at these conclusions, and for our decision.

Background to the appeal

9. The accused was charged on indictment before the Circuit Criminal Court for the South Western Circuit, and County of Kerry, with six counts, being: -
 - Count 1: Possession of controlled drugs with a value of €13,000 or more for sale or supply, to wit, cannabis and methylamphetamine, contrary to s. 15A of the Misuse of Drugs Act 1977;
 - Count 2: Possession of a controlled drug for sale or supply, to wit, cannabis, contrary to s. 15 of the Misuse of Drugs Act 1977;
 - Count 3: Possession of a controlled drug for sale or supply, to wit, methylamphetamine, contrary to s. 15 of the Misuse of Drugs Act 1977;
 - Count 4: Possession of a controlled drug, to wit, cannabis, contrary to s. 3 of the Misuse of Drugs Act 1977;
 - Count 5: Possession of a controlled drug, to wit, methylamphetamine, contrary to s. 3 of the Misuse of Drugs Act 1977;
 - Count 6: Possession of an unauthorised firearm, to wit, a stun gun, contrary to s. 2 of the Firearms Act, 1925 as amended by s. 15 of the Firearms Act 1964 and s. 3 of the Firearms Act 1971.
10. The appellant pleaded guilty on arraignment to Count 4, and not guilty in respect of the other counts on the indictment. He was tried before a jury on Counts 1, 2, 3, 5 and 6 at Tralee Circuit Criminal Court in a 5-day trial that took place on the 13th, 14th, 15th, 19th and 20th of February 2019. He was convicted on all counts, and subsequently received various sentences following sentencing on the 16th of July 2019. He now appeals against his said convictions by the jury.
11. The first day, i.e., the 13th of February 2019, was taken up with the opening speech by prosecuting counsel, followed by a challenge to a search warrant at a trial within a trial, conducted in the absence of the jury. The validity of the impugned warrant was ultimately upheld, and that issue is not being revisited on this appeal. Evidence in the case was then

heard by the jury over two and a half days, i.e., on the 14th, 15th, and 19th of February 2019. Finally, on the 20th of February 2019, the jury heard closing speeches from counsel, followed by the judge's charge, before retiring to deliberate. They returned unanimous verdicts of guilty on all counts after deliberating for a total period of 41 minutes.

12. In broad outline the case against the appellant was that on the 17th and 18th of February 2015 he was the tenant and occupier of a property known as "The Red House" Knocknaclogher, Ballyroe, Tralee, County Kerry. This consisted of a farmhouse, a farmyard and a number of appurtenant old farm buildings which were in use as sheds. The appellant resided in the farmhouse and used the farmyard and the sheds, *inter alia*, in connection with a car restoration/car dismantling business in which he was engaged. The case was that on the 17th of February 2015, gardaí attached to the Kerry Divisional Drugs Unit, obtained a search warrant under s. 26 of the Misuse of Drugs Act 1977 permitting them to search the said property. The search warrant was executed on the following day, the 18th of February 2015 when a team of gardaí entered upon and conducted a search of the appellant's said property. In the course of the search quantities of both cannabis and methylamphetamine, to a total value of €39,000, were found in a number of locations on the property, as well as an unauthorised stun gun. This led to the appellant being charged with the offences the subject matter of the indictment.

The Opening Speech

13. In opening the case to the jury, prosecuting counsel told them, *inter alia*, that:

"... the gardaí allege that they found certain items in the property and they allege that the accused was in possession of those items. All six counts - now all five counts - use that word "possession", and it's very important that you understand that "possession" is a legal term. The judge at the end of the case, his obligation is to explain the law to you so that you know the issues of what you're deciding. But I'm going to indicate to you roughly at this stage what is encompassed by the legal term "possession". And there's really two aspects to possession. The first aspect of possession is a physical aspect. Imagine this pen. If I'm given this pen and I have it in my hand, it mightn't be my pen but I have possession of it. It doesn't mean that I own it. What it means is I have it in my control. And that's first and foremost what the law about possession is. Do you have something in your control? It is obviously the case if I have it in my hand that I have it in my control. But equally, if I took the pen and went out to a locker outside, put it in the locker and locked it, even though I'm not physically touching it, it remains in my control. So that's the first aspect of possession you must think of. Does the person have physical control over the object, be it the stun gun or the methylamphetamine or the cannabis? Does the person have possession and physical control?

But there is another aspect, of course, of possession, which is a mental aspect. Does the person know they have it and do they know that it's an illicit drug? One can imagine being in an airport, someone slipping a package into your hand luggage. You don't know it's there; you don't know it's drugs. You are caught in

customs. You are not committing an offence because you don't have the mental element required for possession. The prosecution say that this gentleman had possession, that he had control over the drugs, he knew they were illegal drugs. That's what the prosecution are saying. They can prove these two aspects of possession. I should say as a comment, with regard to proving any mental ingredient of an offence, there is no x-ray machine that enables a jury to see inside someone's head as to what they thought at a particular time. The law supposes and the law requires a jury to look at all the circumstances of a case to see if something can be inferred. To give a very simple example, suppose when you came in this morning the ground was dry. When you finished doing your duty, at 1 o'clock you go out and the ground is wet. The entire street is wet. The law allows you to infer that it has been raining. It commenced to rain while you were in your jury room and it has been raining. That is not a mental leap. That is using your common sense. And the law expects you as jurors here today to use common sense, to look at all the surrounding facts in relation to the search, what was found, where it was found, what it was wrapped in, to consider all of those matters to see if one can infer this guilty knowledge or that the prosecution must prove."

The Evidence Adduced before the Jury

14. In terms of evidence led before the jury, the first witness they heard from was Garda Paul Moore, a Scene of Crime Examiner, who had photographed the farmyard on the date of the offending. There were various old motor vehicles in the farmyard. There were two sheds in the yard, which he designated as Shed No. 1 and Shed No. 2 (Shed No. 2 would later be otherwise referred to in evidence as "the garage"). He photographed the interior of Shed No. 1 which had a chest of drawers containing a green and yellow bag (which contained a quantity of a substance that was later established as cannabis). Photos of Shed No. 2 showed that domestic items associated with household use were stored there, such as boxes of baby formula, nappy boxes, a quantity of "Glad" sandwich bags; but nearby to these was a black rucksack which was also photographed (and which later evidence established contained large quantities of substances suspected to be drugs, and which were subsequently established as comprising cannabis and methylamphetamine). Garda Moore also photographed a room ("the office") inside the main farmhouse itself. In this room there was a TV monitor attached to external CCTV cameras, a mobile telephone and a tub containing a small number of cannabis wraps.
15. They also heard from Garda Pat Naughton, who was the "exhibits officer" in the case. He gave evidence that when he entered the property on the date in question, present there was the accused (i.e., the appellant), his partner and their infant child. Garda Naughton said that he entered Shed No. 1 and with the assistance of a drugs dog found the green and yellow bag previously referred to, which contained two plastic vacuum bags, each in turn containing a quantity of suspected cannabis which he seized. He gave evidence that the door to the garage (i.e., Shed No. 2) was shut and he said that "*the key was provided to us.*" On entering the garage, it seemed to him to be like a workshop. There was a black car there that was being repaired. They commenced a search of that garage, again using a drugs dog, and found the black rucksack previously referred to, which contained an Aldi

bag. Inside this were two translucent wrappings which contained suspected cannabis and one "Glad" sandwich zip lock bag which contained suspected amphetamine. Also, in the same shed he found a discarded vacuum bag which was of a similar type to the wrappings in the Aldi bag. He also found seven boxes of empty zip lock bags, each box containing twenty-five one-litre zip lock bags. The manufacturer was "Glad" and they were identical to the bag containing the suspected amphetamine. Finally, Garda Naughton testified that he entered the office in the main dwelling, i.e., the farmhouse, where he seized the previously mentioned tub containing wraps of cannabis, as well as the accused's black phone and the previously mentioned stun gun, having found the latter in a small press.

16. Before Garda Naughton was cross-examined defence counsel sought leave, and was permitted, to raise an issue in the absence of the jury. When the jury had gone out he complained that although the witness had said in evidence that the door to the garage was shut and that "*the key was provided to us*", the witness had made no mention of that in his statement in the Book of Evidence. Counsel stated that he was entitled to full disclosure, and that:

"before embarking on any cross-examination of this witness or any other garda witness touching on this area, I'm seeking by way of disclosure what key was provided, key or keys, because there's two padlocks evident from the photographs, by whom, at the request of whom, and who actually opened this door and the padlock or padlocks on same."

17. The trial judge put the matter back for a short time to enable the State to make enquiries as to the extent to which further information could be provided to the defence by way of further disclosure or otherwise. As it transpired the issue was ultimately resolved by Garda Naughton making a short additional statement which was served on the defence as a Notice of Additional Evidence.
18. The jury was then brought back, and the witness was cross-examined. The cross examination elicited, *inter alia*, that the witness's statement in the Book of Evidence had made no mention of the door being locked, or of a key being provided. The witness acknowledged that he had only recorded this in writing for the first time in his additional statement made during the court's short recess. Pressed in cross-examination as to whether he had a specific memory of asking someone to provide him with a key, and then being provided with a key on foot of that request, he said he could not say. However, he had no doubt that a key was asked for. He testified that a key was got from the house and that the door was opened with the key. He could not recall opening two padlocks but could recall opening one padlock.
19. The jury further heard from Sgt. Eoin Donovan who was attached to the Kerry Divisional Drugs Unit. He gave evidence with regard to the obtaining of the search warrant, and concerning what was found by him, and by colleagues who accompanied him, when it was executed on the 18th of February 2015. He testified, *inter alia*, that he had personally accompanied the appellant to the office inside the farmhouse. There was a computer monitor there and it had a live feed from CCTV cameras which were located on the

exterior of the premises. The screen was broken up into different views from the different cameras. One of the views that he saw on the monitor, showed the entrance to the garage (i.e., Shed No. 2). Sergeant Donovan agreed, under cross-examination, that when asked to account for the stun gun the appellant had said, *"It's mine but it's broken. I don't know if it can be fixed."*

20. On the second day of evidence before the jury the prosecution adduced evidence concerning both the chain of evidence, and the forensic analysis of the suspected drugs, and their packaging, by a forensic scientist from Forensic Science Ireland. Some of this evidence was adduced from witnesses who testified in person, and some of it was presented in statement form, pursuant to s. 22 of the Criminal Justice Act 1984. The jury heard that in all there was 1,445.91g of plant material, which upon analysis was found to be cannabis. There was also 182.7g of powder, which upon analysis was found to contain methylamphetamine. Further, there was evidence from a ballistics expert in relation to the stun gun, which was to the effect that it was a firearm as defined in s. 1(1)(d) and (f) of the Firearms Act 1925.
21. The jury further received evidence of the value in respect of the cannabis, which was said to amount to €28,918; and in respect of the methylamphetamine, which was said to amount to €10,962; making a total of €39,880.
22. Finally, they heard evidence concerning the examination of the appellant's mobile phone, which had been seized by Garda Naughton. They learned that it had been subjected to XRY examination, and that an incoming message was recorded on the phone as having been received on the 4th of February 2015 at 16.53. The message was in Polish and was from a person identified as Szabla. It was translated as *"Maciej, could you give weed to Kuba and I'll give you money later."*
23. The jury heard that the appellant had been arrested by gardaí in accordance with their statutory powers under the Misuse of Drugs legislation, that he was taken to Tralee Garda Station where he was detained for a period of time, following which he was released and then charged shortly afterwards and brought before the District Court. None of that was in any way disputed or the subject of controversy at the trial.
24. Following the close of the prosecution's case, there was no application for a direction. However, the appellant opted to give evidence in his defence. He confirmed his work history and that he was buying cars and restoring them at his home, and he said that four of the cars in the yard were undergoing restoration or were being harvested for parts. He stated that while Shed No. 1 was unlocked (this was accepted by the prosecution), he had no idea how the yellow and green bag (which contained some of the cannabis seized) had gotten in there. He also claimed that Shed No. 2 was at all times unlocked, and that the keys to the padlocks on the door, which he asserted were not securing the doors from being opened, had been lost. Under cross-examination he said he had lost one, and his friend Kuba had probably lost the other one. In the course of his testimony the appellant produced still images from his CCTV system, purporting to show the direction in which the cameras concerned were pointing, and their field of view in each case. He claimed that

while there may have been CCTV cameras operating at the time covering both the entrance to the property and the entrance to Shed No. 1, there was no camera operating which covered the entrance to Shed No. 2. He claimed that during examination by the police of his monitor, their actions had caused it to record. In respect of the text message found on his phone, he said it was from the partner of a friend. They (i.e., he and his friend) shared cannabis together and the first part of the message related to that. However, he said, the second part of the message, which had alluded to an intention by the friend's partner to give him money later, had had nothing to do with cannabis but was related to money he had lent her for fuel so that she could take her son who was ill to Connolly Hospital.

25. Under cross-examination, the appellant confirmed that he lived at the property with a partner and infant child. He accepted that it was remote and enclosed with gates, to one of which was affixed a "*Beware of the Dog*" sign. He claimed that it was his landlord that used Shed No. 1 but admitted that he had gone in there. He sought to contradict the evidence of Garda Naughton who had stated that he was required to open the door to Shed No. 2 with a key. He said the door to Shed No. 2 was not locked. He agreed that he used Shed No. 2 as a garage and to store baby food, nappies and other items but denied any knowledge of the seven boxes of Glad sandwich bags, or indeed of the contents of the rucksack. In relation to the message on the 4th of February 2015, he accepted that it was a message from a contact saved on his phone as "Szabla", and that it was addressed to "Maciej", which was him. He suggested that Szabla and Kuba (sometimes also spelt Cuba in the transcript, but we are satisfied nothing turns on this) were the same person, and that Kuba had been with him at the time that the message was received. He agreed that it had said, "*Could you give weed to Kuba and I'll give you money later.*" He said that this message was actually sent by Kuba's (or Szabla's) girlfriend from his, i.e., Kuba's, phone. This girlfriend knew that he and Kuba smoked cannabis together quite often. The first part of the message referred to the supply of cannabis but that the second part related to money which he was owed for fuel. He explained,

"This message was sent by Cuba's or Szabla's girlfriend from his phone because Cuba was with me at the time. She didn't want to abuse my hospitality; I mean that she didn't want to take anything else from me because she was aware that she owes me some money for the fuel."

26. The appellant further agreed under cross-examination that there was a video monitor in the farmhouse, but he said it was only connected to two CCTV cameras, one trained on the laneway entrance and one trained on the entrance to Shed No. 1. While Sgt. Donovan had said that he saw the monitor displaying a live feed covering the door to the garage (Shed No. 2) the accused maintained that he, i.e., the garda, could not have seen this. However, in that regard it had never been put to Sgt. Donovan that he was not telling the truth and that he could not have seen what he was claiming to have seen.
27. Finally, with respect to the stun gun, the appellant accepted in evidence that he had had physical control of it, that he knew what it was, and what its function was. He said that he

didn't know it was a device banned in Ireland. He had treated it as "*a device possibly useful in future experiments*" and had retained it on that account.

28. Following the appellant's evidence, the prosecution recalled Sgt. Donovan who was afforded the opportunity to comment before the jury on the appellant's implicit claim that he had not told the truth in as much as it had been asserted that he could not have seen the monitor displaying a live feed covering the door to the garage. He was adamant that he had, as he had originally stated, observed a live feed that showed the entrance to Shed No. 2. It was suggested to him that when he had checked the system to see if it was recording that he had done something to cause the system to record for the first time. Sergeant Donovan responded, "*Possibly, I wouldn't be a CCTV guru by any stretch of the imagination and the operation was in Polish.*"

Closing Speeches

The Prosecution's Closing Speech

29. Following the conclusion of the evidence, prosecuting counsel closed his case in a further address to the jury. In the course of doing so, and being acutely aware of the run of the case, he characterised the credibility of the prosecution's witnesses as being "*the real issues*" and "*the principal issues*" in the case. In that regard he said the following, *inter alia*, to the jury:

"The issue paper will have on it the five remaining counts. Those counts have the factual matters the prosecution have to prove. They are five separate trials for the convenience of the prosecution being conducted together, one of the counts, you have heard, the accused pleaded guilty to possession. Simple, we call it simple possession, section 3 possession of cannabis. He admits he was in possession of cannabis in his house. He admits that. The four other counts with regard to Misuse of Drugs Act, that he was in possession of them, crystal meth for his own use, it has been submitted you consider that first. If you're happy that he was, to move on to see if he had with respect to both those drugs an intent to sell or supply. The prosecution, you know, says there was so much drugs here, it couldn't be for his personal use. And then if you're happy with that, to consider the count under 15A that the valuation of the drugs he had for sale or supply exceeded €13,000 or more. The prosecution says €39,000. Leaving then the final count. And, if I might, I want to say one thing about the final count, possession of a stun gun.

I spent some time explaining physical control and that you would know you had it. If you have an illegal drug in your possession and you know it's a drug, that the offence is committed. It is not a defence in Irish law to any crime to say I did not know that was the law. It's a very simple motto which would be explained. Ignorance of the law is no defence. That's -- no one's going to disagree with me when that's part of Irish criminal law. So if you had a gun in your possession, and you knew it was a gun, you can't say, well, I didn't know it was an illegal firearm. Just because you don't know the law doesn't provide you with a defence. In this, the prosecution say is the relevant legal principle to the possession of the stun gun.

This man readily admits he had it. He does not dispute that the evidence of the garda from the ballistics who says this is an illicit firearm. There's no dispute about that. But he says, but I didn't know the law. Tough, the prosecution say. Ignorance of the law is no defence. That's what I have to say in respect of that matter.

But the real issues I want to go to in the case, if I might, and the principal issues in the case which I have to address are of course credibility because, first and foremost, you -- bear in mind, the onus of proof is on me to satisfy you that the gardaí are credible. That's a key issue in any drugs case because you've only heard the evidence from An Garda Síochána, and, of course, you are all aware that there have been cases here and in other jurisdictions where the gardaí have not been believed, where the gardaí, when the jury have heard the evidence, that there has been shifting of ground, ducking and diving. And a jury in those cases would say, hold on a minute, are those guards credible? Well, that is a very important function in a democracy because trial by jury does involve oversight of the actions of An Garda Síochána by citizens. Isn't that what it's all about? And that's one of the critical things that you have to decide here today. Are Garda Naughton and Garda Donovan credible witnesses? Do I believe them? Are they people on whom I can put store? Am I happy with them? Or has the issues [that] have arisen in the case -- have they caused shift in ground because the prosecution are really saying that Garda Naughton and Sergeant Donovan -- I do apologise to Sergeant Donovan -- are reliable witnesses, witnesses in which you can put store. They're competent. They carried out a competent search, and they gave credible evidence."

30. Counsel then proceeded to address the jury on specific credibility issues arising in relation to Sergeant Donovan's evidence concerning the CCTV, alluding to the failure by the defence to put to the Sergeant initially that he was not telling the truth, and to the Sergeant having stood his ground when recalled and having insisted that he did indeed see a live feed monitoring the entrance to Shed No. 2. He alluded to the conflict in the evidence concerning whether the door to Shed No. 2 had been locked, and whether the gardaí had been provided with a key, and whether the keys to the padlocks on the door were lost. He invited the jury to consider the credibility of the appellant's testimony in light of his explanation concerning the text message, urging them to accept the prosecution's contention that both parts of the message referred to the sale and supply of cannabis. He suggested that the appellant's testimony, and indeed his plea to Count 4, had been self-serving. The jury were urged to have regard to the nature and remote location of the property, the existence of CCTV cameras monitoring the entrances to the property and buildings within it, to the locations within that property in which the drugs were found, and to other items found in their vicinity. It was urged upon them that if somebody completely unknown to the appellant was using his shed for storage of drugs, they would hardly leave the material which they were storing in the property in such an obvious place, and so openly to be seen and discovered. He invited the jury to consider the credibility of the appellant's explanations and of his denials, including those of not having seen the Glad sandwich bag boxes, or the packaging. It was emphatically urged

upon them that they should apply their common sense, accept the State's witnesses as having been competent, professional, truthful and reliable, and that they should reject the evidence proffered by the appellant as not being credible.

The Defence Closing Speech

31. The prosecution's closing speech was immediately followed, as is customary, by a closing speech for the defence by the appellant's counsel. Without any preliminaries or introductory remarks, the appellant's counsel launched straight in to a direct engagement with the suggestion that had been made to the jury by prosecuting counsel that the garda witnesses were to be regarded as competent and reliable, focussing in particular on the testimony of Garda Naughton suggesting that Shed No. 2 was locked, that gardaí were provided with a key, and that he had opened the door to it with the key provided. Pointing to various details of the witness's testimony, he poured scorn on the idea that the jury should attach any weight to it. Asserting that there had been police incompetence, he finished on this issue of the reliability of Garda Naughton's said evidence by urging the following upon the jury:

"So you cannot, in my respectful submission, put any great weight upon this. It's a crucial area of the case because if a person does have keys to -- my car keys, I've locked my car, I accept responsibility for anything that's in my car. It's locked. Nobody has been at it and can get at it unless they have a key or break into it. But I can say -- vouch for that, for my keys and when I've used them. This should be absolutely clear. If that door was locked, and if a key was obtained to open it, that should be -- should have been documented at the time. It's an absolutely crucial part of the case. I hark back to [Prosecuting Counsel] when he perfectly well and adequately and impressively, I thought, explained to you the concept when he was opening the case to you -- the concept of possession and control and physical control, but clearly if a person has keys to a locked shed in their possession, that is strong evidence of their seeking to have physical control of the contents. But it's left in the way it is, and, in my respectful submission, that is utterly unsatisfactory."

32. The defence closing speech then went on to briefly address the conflict in the evidence concerning whether there was a live CCTV feed from a camera covering the entrance to Shed No. 2, as the prosecution had claimed, and counsel suggested to the jury that *"[y]ou can use the recording for evidential purposes or to assist the investigating members of An Garda Síochána, but it's not going to decide the case for you, and what will decide the case for you, in my respectful submission, is close attention to the principles at play"*, those being, in counsel's submission, the presumption of innocence and the requirement that the prosecution should establish guilt to a standard of beyond reasonable doubt before a jury would be justified in convicting. He then added:

"I hark back to the key thing. Do you think that's been dealt with in terms of proof beyond a reasonable doubt by the investigating guards and the quality of the evidence you've heard? Ask yourself that question. Answer it honestly, and you will deal with the key issue and what is being suggested to you there."

33. Counsel then moved on to deal with the evidence given by his client, emphasising that while his testimony had become part of the overall body of evidence received by the jury in the case, the onus of proof remained on the prosecution. He alluded to various details in the testimony given by his client and urged them to pay great attention to those. He asserted that evidence that other persons had had access to Shed No. 2, including evidence that Kuba had had a key to it which he had lost, had not been contested by the prosecution. Counsel further commented critically that the prosecuting authorities had not availed of forensic scientific tools that might have been available to them, pointing out that no fingerprint or DNA evidence was being relied upon.
34. The charge relating to the stun gun was addressed at some length, with emphasis being placed on the "broken" or inoperable condition of the item. The issue of the text message was also very briefly addressed, with counsel, ostensibly pointing to his client's explanation as to what it conveyed, saying to the jury *"the point I want to make to you is this, is you must regard evidence as one thing and then what you do with it as another. The what you do with it is this. You say to yourself what does that evidence mean, what weight am I going to attach to it."* In seeking to illustrate his point he again alluded to the issue of the weight to be afforded to Garda Naughton's evidence concerning the key to Shed No. 2.

35. The speech concluded with the following exhortation:

"And when you give weight and add the thing up, in my respectful submission, and hopeful submission to you on behalf of Mr Masznicz, you will come to the view that this case has not been proven beyond reasonable doubt, and when I talk about this case, I'm talking about the counts alleging the possession of contraband drugs in shed number one and shed number two, and of course then there's the overriding and most serious count of all, the count where the value is given as being on the evidence of the good retired Detective Sergeant Liddane, worth, I think, in excess of €13,000 because that's the figure that has been set in law by the Oireachtas, and that is regarded as the most serious of offences against the Misuse of Drugs cases. And it is a most serious offence. And nobody should in a fair-minded world be convicted of a most serious offence on willy-nilly evidence or evidence that is not within terms of the prosecution duty or the -- to have a matter adequately investigated and put before a jury to try. Should a person -- first of all, should a jury be asked to make very important decisions when questions have been left unanswered that ought to have been answered, when tools that could have been used -- and here I'm referring to the DNA tool that could have been used to make matters clear or clearer when there has been a decision made not to bother. Is that satisfactory? When the whole issue of multi -- multiple access because I'm referring to this gentleman, Kuba, having access to it, when that has been left utterly in the air by the investigation. It's -- in my respectful submission, in this case it couldn't be said to be made out in terms of what is alleged against Mr Masznicz as to the contraband drugs in shed one and two, it couldn't be fairly said

to be made out beyond a reasonable doubt, and I'd ask you hopefully to adopt that submission and to acquit him of those charges. Thank you."

The Trial Judge's Charge to the Jury

36. Following counsel's speeches, and before embarking on his charge to the jury, the trial judge had the following engagement with counsel.

"There are one or two issues that I want to discuss with you, and it's a conundrum in a lot of these cases, drugs cases. The question of possession/control and the issue of knowledge, and then if insofar as the knowledge aspect of it is concerned, how does one reconcile that with section 29(1) and the defence is where -- effectively section:

'29: In any proceedings for an offence under this section in which it is proved that the defendant had in his possession or supplied a controlled drug the defendant shall not be acquitted of the offence charged by reason of proving that he neither knew or suspected nor had reason to suspect the substance'

as such. That --

PROSECUTING COUNSEL: The issue -- that issue and reverse burdens was considered last November, November 2018, in the case of the DPP v. Forsey, which wasn't a misuse of drugs case at all. In fact, it's a corruption case against a councillor from Waterford.

DEFENCE COUNSEL: It's a Waterford case.

PROSECUTING COUNSEL: And the Supreme Court, I think it wasn't -- Mr Justice MacMenamin dissented, but the judgment of the majority is of Ms Justice O'Malley, and she has really made it clear that that burden -- while the statute suggests that it is a legal burden, it is a form of evidential burden, and the conviction in that case, which was obtained in reliance of the reversed burden, was set aside. And a retrial was not directed. And if I can get a copy of that judgment for you because it's very, very clear. What Ms Justice O'Malley said is, look, if there's a reasonable doubt whether it arises on the prosecution case or it arises on the defence case, this is a criminal trial and the jury must [not] convict the accused. And it is not possible for a prosecution --

DEFENCE COUNSEL: It is not --

PROSECUTING COUNSEL: Yes, I'm saying it's not possible to rely -- for the prosecution to rely on a presumption if the jury have a reasonable doubt. And I don't -- it's very difficult to explain the terms of the statute tend to suggest otherwise, but really that's an evidential burden, and in the facts of this instant case I fully accept on behalf of the prosecution that it does not assist me in this case if there's a reasonable doubt whether it arose on the prosecution case or

whether it arose on the defence case. In our law no one gets convicted if there's a reasonable doubt, reverse burden or no reverse burden.

JUDGE: All right. Well --

PROSECUTING COUNSEL: And I will hand that case to you and --

JUDGE: Well, the issue of knowledge.

PROSECUTING COUNSEL: The issue of knowledge can only be determined by inference, by looking at the factual scenario, what someone knows or has in their mind must be decided from the surrounding circumstances of the case.

JUDGE: I see.

PROSECUTING COUNSEL: And the prosecution have set out very clearly, more in cross-examination than in my closing speech, what we say that material is, and that is a classic jury matter. It is to those bits and pieces in terms of the paraphernalia found, where the drugs were found, the security system in place, does -- and, I suppose, the message obtained. Does that -- can knowledge be inferred? Can guilty knowledge be inferred from the surrounding circumstances?

JUDGE: I see.

DEFENCE COUNSEL: I agree with everything [Prosecuting Counsel] has said.

JUDGE: Okay. Well, it's nice to see the two of you in agreement now and again.

PROSECUTING COUNSEL: I should have -- I had it in my mind to give you a copy of that decision and I will do so forthwith, Judge.

JUDGE: Now, can I just address -- please sit down. Can I just address both of you? In trying to work matters out last night, I hit into the territory, believe it or not, close to Pythagoras's theorem, but I just want to read something that I have drafted that I intend to read to the jury. I just have it titled "advice to the jury". The accused in this case is charged with six counts. Count 1 is a section 15A matter. Count 2 and 3, section 15, cannabis and methylamphetamine. Count 4, simple possession of cannabis, which the accused has pleaded guilty. Count 5, simple possession of the amphetamine, and count 6 is the possession of the firearms without the appropriate certificate. Can I suggest you approach matters in the following order, but I stress that you're entitled to proceed and consider matters in whatever order you wish. Can I suggest to you that you look at count 5 first, the simple possession of the methylamphetamine. If you are satisfied that the state has proved its case beyond reasonable doubt you are entitled to convict. In the event that you convict of this charge, can I suggest that you would then proceed to consider counts 2 and 3, the section 15 sale and supply charges of the cannabis and the methylamphetamine. Again, in the event that you are satisfied

that the state has proved its case in respect of each count, each of these counts, beyond reasonable doubt, then you're entitled to convict on either or both charges. In the event that you are not satisfied that the state has proved its case in respect of one or both of these charges, then you must acquit. In the event that you convict on count 2, the section 15, cannabis for sale or supply, and count 3, then you should proceed to consider count 1, section 15A, that the combined value of the drugs exceeds €13,000. This is the aggregate market value of the drugs as we've heard in evidence. It is €28,918 in respect of the cannabis, count 2, and the estimated market value of the methylamphetamine was 10,962. If, however, you were to acquit the accused on count 2, the possession of the cannabis for sale or supply, i.e. the 28,918, then -- and that you convicted the accused on count 3, there is no need for you to proceed to count 1, as the value of the methylamphetamine is less than the €13,000. Likewise, if you acquit the accused on both counts 2 or 3, then there's no need for you to consider count 1. Again I remind you that the onus is on the state to prove its case beyond reasonable doubt. The defence does not have to prove anything. Does that --

PROSECUTING COUNSEL: That seems logical to me, Judge.

JUDGE: Yes.

DEFENCE COUNSEL: Yes, I agree with [Prosecuting Counsel] and with you obviously.

JUDGE: I didn't -- I didn't wish to turn it into Pythagoras's theorem, but it went --

DEFENCE COUNSEL: No.

JUDGE: -- pretty close there. I see. Okay. Very good. Two o'clock then.

PROSECUTING COUNSEL: I will have that decision, the DPP v. Forsey. It's from the Supreme Court. It's November, last November. I'll have that handed into you, Judge.

JUDGE: Great."

37. Following a luncheon break, the trial recommenced before the jury and the trial judge commenced his charge. Most of it is uncontroversial and was accurate and correct in so far as it goes. While we will refer in some detail in due course to the specific complaints now being ventilated on appeal, it is fair to say that the majority of the appellant's complaints relate to what the charge does not contain, rather than to what it does contain. In brief outline at this point, it is complained that there was a failure to adequately instruct the jury concerning what legally speaking constituted possession; a failure to instruct the jury as to how to approach their consideration of circumstantial evidence in the case and concerning the drawing of inferences; and a failure to instruct the jury as to how to approach "the two views" rule in the context of circumstantial evidence.

38. With regard to the standard instructions concerning the presumption of innocence, the burden of proof, the standard of proof, and what may constitute proof beyond reasonable doubt, the charge is impeccable and nothing arises with respect to any of that. The jury were further instructed, *inter alia*, that:

"As was mentioned to you this morning, the accused is always entitled to the benefit of the doubt, and when two views on any part of the evidence are possible you must adopt the view which is favourable to the accused unless the prosecution has satisfied you as to the other view beyond reasonable doubt.

Now, ladies and gentlemen, you decide this case only on the evidence given by the witnesses in the witness box. You may draw inferences from the evidence you have heard. However, you may not speculate about matters which have not been introduced in evidence. Your function as the jury is to decide the matter on the evidence and not on comments on the facts given by counsel or indeed myself if I make such facts, if such comments are not based on the evidence. You cannot regard statements made earlier by witnesses as evidence and you cannot rely on them as such. The only relevance of such earlier statements is [is] that they may be used to test the credibility of what's now being said in the witness box.

Just an aside in respect of that. Some of the evidence, in fact, was read in by consent, and I will be referring to that. Even though it was read by [Prosecuting Counsel] as such, it forms part of the evidence of the case, and it forms part of your considerations as such.

Now, ladies and gentlemen, in this case the accused has testified. However, even if you reject his evidence or think he has lost credibility when under cross-examination, the burden of proof still rests on the prosecution. So that it might happen that a jury rejects the testimony of the accused but, at the same time, the jury is not satisfied that the prosecution has proved its case beyond reasonable doubt. In such instance the jury would be obliged to acquit the accused so that you clearly understand that the onus rests on the prosecution at all times."

39. As regards the ingredients of the offences, the jury received the following instructions:

"Now, ladies and gentlemen, I'm going to turn to the actual charges themselves, and you will have the issue paper in this particular matter, and there are six counts on the indictment, but there are five counts for your consideration. And I'm going to give you some advice in respect of your approach, but I'll do that at a later stage.

Count 1 is a charge contrary to section 15A of the Misuse of Drugs Act, and I will -- that reads that the accused on the 18th of February 205 [2015] at the red house, Knocknaclogher, Ballyroe, Tralee, in the county of Kerry, had in his possession one or more controlled drugs, namely cannabis and methylamphetamine, for the purposes of selling or supplying the drugs to another in contravention of the Misuse

of Drugs Regulations '88-'93 made under section 5 of the Misuse of Drugs 1977, and at the time while the said drugs were in his possession the market value of the controlled drugs amounted to €13,000 or more.

Count number 2 is a section 15 sale and supply charge in respect of the cannabis alone at the same place and the same venue. Count number 3 is a charge of section 15, again sale or supply, in respect of the methylamphetamine alone.

Count number 4 is the possession of the controlled drug -- what we call simple possession of the controlled drug, cannabis, to which the accused has pleaded guilty, so you don't have to concern yourself with that.

Count number 5 is possession that the -- simple possession charge contrary to section 3, that the accused on the 18th of February 2015 at the red house, Knocknaclogher, Ballyroe, Tralee, in the county of Kerry, had unlawfully in his possession a controlled drug, namely methylamphetamine.

And count number 6 is the possession of the firearm contrary to section 2 of the Firearms Act 1925, as amended, that the accused on the 18th day of February 2015 at the red house, Knocknaclogher, Ballyroe, Tralee, in the county of Kerry, had in his possession a firearm, namely a stun gun, such possession not being authorised by a firearms certificate granted under the Firearms Act of 1925 to 1990, for the time being in force.

Now, in the context of this particular case, ladies and gentlemen, the accused has been charge[d] with a count contrary to section 3, it's count number 5, which we refer to as simple possession, and it's a charge of simple possession of the methylamphetamine. Section 3 reads in brief: 'Subject to subsection (3)(iii) a person shall not have a controlled drug in his position. A person who has a controlled drug in his possession in contravention of this section shall be guilty of an offence.' Again, I just have to remind you that the accused has already pleaded guilty to count number 4, which is the simple possession of the -- simple possession contrary to section 3 of the cannabis, the cannabis in the tub.

Now, in respect of counts 2 and 3, the accused is charged with possession of both the cannabis and the methylamphetamine for the purposes of selling or otherwise supplying the same to another. In relation to these charges, the onus of proof rests with the prosecution to prove beyond reasonable doubt that the accused had unlawfully in his possession both the cannabis, count 2, and the methylamphetamine, count 3, for the purposes of selling or supplying it, and supply includes without payment, to another.

In relation to the section 15 charges, count 2 and 3, if you are satisfied beyond reasonable doubt that, having regard to the quantity of the controlled drug which the accused had in his possession, and having examined all the evidence carefully, you are entitled in those circumstances to reasonably assume that the controlled

drugs were not intended for the accused's immediate personal use and therefore to assume unless you are satisfied to the contrary that he was in possession of the controlled drugs for the purposes of selling or supplying the same to another in contravention of the regulations.

It is open to you in this case that if you are not satisfied beyond reasonable doubt that the accused was in possession of the controlled drugs for sale and supply, but you are satisfied that he was in possession of the controlled drug, methylamphetamine, count 5, simpliciter, then you're entitled to convict on that charge. Again, I have to remind you at all times the onus is on the state to prove its case beyond reasonable doubt if it can. The defence does not have to prove anything.

Now, I will be coming back to you in respect of the approach to the charges, ladies and gentlemen, shortly."

40. The trial judge then embarked, at this point, on quite a detailed review of the evidence. No issue is raised in respect of the adequacy of his review or summarisation of the evidence. At the end of this, he returned as he had promised to do, to the issue of how the jury should approach their task. He said this to them:

"Can I suggest to you, ladies and gentlemen, that you might approach the indictment in the following matter, but, I stress, it's a matter for yourselves to proceed in whatever order you wish. Can I suggest to you that you'd look at count 5 first. That is the section 3, simple possession of the methylamphetamine. If you are satisfied that the state has proved its case beyond reasonable doubt, then you're entitled to convict the accused on that count. In the event that you convict the accused on this charge, can I suggest that you would then consider counts 2 and 3, that is, the section 15 sale and supply of the cannabis and the methylamphetamine. Again, in the event that you are satisfied that the state has proved its case on each of these counts beyond reasonable doubt, then you are entitled to convict on either or both charges. In the event that you are not satisfied that the state has proved its case in respect of one or both of these charges, then you must acquit.

I want to try and keep this as simple as possible. In the event that you convict on count number 2, the cannabis for sale or supply charge, and/or count 3 -- sorry, and count 3, then you should proceed to consider count 1, the section 15 charge, that the value exceeds €13,000. The aggregate market value of the drugs which we've been told is in the region of €38,000. If, however, you were to acquit the accused on count number 2, which is the possession of the cannabis with the estimated market value of €28,000, and you were to convict the accused on count number 3, the possession of the methylamphetamine, you need not proceed to count number 1, as the value of the methylamphetamine does not exceed €13,000. Am I making any sense to you in that regard? It's just in respect of the sums.

Likewise, if you acquit the accused on both count 2 and 3, then there's no need for you to consider count number 1. Do you understand that?

Again I remind you that the onus of proof is on the state to prove its case, if it [c]an, beyond reasonable doubt. The defence do not have to prove anything.

Now, in respect of count 6, the firearms offence, the state has to prove its case beyond reasonable doubt that the accused had possession of the stun gun. I don't think there's any huge controversy about that, that the weapon constituted a firearm under the 1925 Act, as amended. Again you have the report of the ballistics expert in that regard, and that the accused was in possession of such item, not being authorised by a firearms certificate under the Firearms Act of 1925 to 1990. In the context of this case the accused has admitted possession of the item but states it was not working. You will also have to consider the evidence that has been read into court by consent. That is the evidence of Detective Garda O'Leary. Again you were told this morning, and it is correct, that ignorance of the law is not a defence.

Now, ladies and gentlemen, the issues in this particular case were mentioned to you this morning. Credibility is an issue in the matter. The state allege that it's quite clear that the accused was in possession of these items. The state say that, after careful examination of all the evidence, you should be satisfied beyond reasonable doubt as to the guilt of the accused. The questions for you are, are you satisfied that the state has proved to the high standard required of beyond reasonable doubt that the accused was in control and possession of the methylamphetamine, the simple possession charge, are you satisfied beyond reasonable doubt that the accused was in possession for the purposes of sale or supply to another of the cannabis and the methylamphetamine, are you satisfied beyond reasonable doubt that the value -- the combined value of the controlled drugs exceeded €13,000, and are you satisfied that the state have proved beyond reasonable doubt that the accused was in possession of the firearm which was not authorised by a firearms certificate.

The defence, in a nutshell, say that the items found in the various sheds were not his. He had no knowledge of them and he didn't know how they got there. Again it is a matter for you to consider, having analysed all the evidence that you have heard very, very carefully. If you have a reasonable doubt that the state has failed to prove all or any of the charges, you must acquit. Again I have to ask you to use your common sense at all times, and I urge you all as members of the jury to participate in the deliberations. Don't be shy to express your views in respect of matters."

41. At the conclusion of the charge, the jury were asked to retire and commence their deliberations. When they had gone out, counsel on both sides confirmed to the trial judge that they had no requisitions with respect to his charge. As alluded to already, the jury

returned after 41 minutes of deliberation, and delivered unanimous verdicts convicting the appellant on all counts.

The Grounds of Appeal

42. Four grounds of appeal were pleaded in respect of the appellant's convictions by the jury. However, only two were ultimately relied upon at the appeal hearing, being grounds (1) and (4), which were pleaded in these terms:

(1) The trial judge erred in law and in principle in his charge to the jury;

(4) That no reasonable jury correctly charged could have convicted the accused.

Submissions

Submissions on behalf of the Appellant

43. The appellant now complains that the trial judge's charge was deficient in that it did not instruct the jury as to what the legal concept of possession involved. He says that it was not explained to the jury by the trial judge that to be in possession of something a person must have that thing in their physical custody or under their control; and further that that person must know that they have that thing in their custody or control. The appellant further complains about the absence of any explanation by the trial judge to the jury of the following matters:

(a) A person cannot be convicted of possession of drugs where a reasonable doubt as to his knowledge that they were in his possession remains at the conclusion of the evidence.

(b) There is no presumption that a defendant has knowledge of the presence of an item in his dwelling just because it is in his dwelling.

(c) For a person to be in control of an item, there must be some evidence showing more than a mere acquiescence as to its presence in a particular location.

44. It was further submitted that despite the fact that the prosecution case had relied heavily on circumstantial evidence the trial judge had failed to instruct the jury in the course of his charge as to how they ought to approach circumstantial evidence. In that regard reliance was placed on passages from *The People (DPP) v. Wyse* [2020] IECA 190; *The People (DPP) v. Nevin* [2003] 3 I.R. 321 and *The People (DPP) v. Cumberton* [2020] IECA 136.

45. In the *Wyse* case, Birmingham P., giving judgment for the Court of Appeal, said (at para 10):

"There is no general practice of *warning* a jury about or against circumstantial evidence. Rather, in a case significantly or wholly dependent on circumstantial evidence, the jury will be guided by the trial judge as to how to approach their consideration of whatever circumstantial evidence is available. A direction will draw the jury's attention to the fact that what is in issue is the cumulative effect of the

individual pieces of evidence. *In R v. Exall* [1866] 176 ER 850, Pollock CB, speaking in relation to circumstantial evidence, said:

'[a] combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion, but . . . taken together, may create a conclusion of guilt . . . with as much certainty as human affairs can require or admit of.'

46. In the *Nevin* case, Geoghegan J., giving judgement for the former Court of Criminal Appeal said (at p.347 of the report):

"It is the combined effect of the circumstantial evidence which is of importance even though, in respect of each item of such circumstantial evidence, the jury has to consider whether it accepts it or not and also has to consider whether an inference suggested to be drawn from it is warranted or not."

47. In *Cumberton*, we said (at paras 124 to 126):

"124. Circumstantial evidence, as understood in Irish law, was defined by the former Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Lafferty and Porter* (unreported, CCA, Keane C.J., 22nd of February 2000) as 'any fact from the existence of which the judge or jury [i.e., the trier(s) of fact] may infer the existence of a fact in issue.' It is to be contrasted with direct evidence which involves proof of a relevant fact by means of positive witness testimony concerning something which the witness perceived sentiently, i.e., something they personally saw, heard, smelt, felt, tasted etc; or production of a conclusive record or document, or piece of real evidence.

125. Legitimate inference is to be differentiated from speculation. An inference is the drawing of a common-sense conclusion from the existence of known facts and/or evidence. It arises where two, or more, facts and/or pieces of evidence considered in conjunction suggest a common-sense conclusion. In those circumstances the conclusion or "inference" follows or is to be "inferred" from the facts and/or evidence that were considered. In some cases, the same facts or evidence may possibly support more than one inference, or alternative inferences. Speculation, in contrast, involves conjecture or guesswork, and yields a conclusion that is unsupported, or not fully supported, by the known facts and/or evidence

126. Circumstantial evidence is in no way inferior to direct evidence. Both may serve to prove the existence of a fact in issue. However, in terms of the ultimate issue in a criminal case, while no one piece of circumstantial evidence may be sufficient on its own to justify an inference that the accused is guilty of the crime with which s/he has been charged, the cumulative effect of several pieces of circumstantial evidence may, in an appropriate case, justify such a conclusion. It is often said with respect to circumstantial evidence that "many strands may make a

rope". The analogy is apt and was first employed by Pollock C.B. in *R v Exall* (1866) 4 F & F 922 when he described circumstantial evidence as:

"... a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."

48. The appellant now complains that in the present case the trial judge gave no directions or advice whatsoever concerning how circumstantial evidence might be approached or utilised by the jury, and gave only a very limited explanation in respect of inferences in which he did not specifically draw it to the attention of the jury that they must adopt, to quote the former Court of Criminal Appeal in *The People (DPP) v. Costigan*, [2006] IECCA 57, any "*rational explanation which can point to innocence.*" We would observe that the observation (of Macken J.) in *Costigan* to which the appellant points, applies only where alternative inferences are accepted by the jury as being equally open (in the sense of being at least reasonably possible having regard to the evidence in the case as a whole), rendering it impossible for the jury to be satisfied beyond reasonable doubt that it would be correct to accept the inference consistent with guilt and reject that consistent with innocence.
49. It is further complained that the trial judge failed to tailor his explanation of the benefit of the doubt (or the "two views" rule) in light of the fact that this was a case in which circumstantial evidence was being heavily relied upon.
50. With respect to the contention that the verdict was perverse and against the weight of the evidence, it was submitted that:
 - (a) There was a clear absence of direct evidence of possession. Fingerprints of the accused were not found and no DNA analysis was conducted.
 - (b) Anyone, including the informant relied on in the search warrant application, could have had access to the unlocked shed and a reasonable doubt has clearly been raised as to whether people other than the accused would have had access to the garage.
 - (c) There was no evidence of behaviour on the part of the accused having been such as would allow for an inference to be drawn that he was in possession of the drugs.
 - (d) This was not a case where knowledge could be inferred from an attempt to escape, such as in *DPP v Tuma* [2015] 3 IR 360.
 - (e) There was no "inferences" interview in this case.
 - (f) There was nothing implausible in the account given in evidence by the accused that a key for the garage had been lost, or at least that a friend with access to the shed had claimed that it had been lost.

51. It is acknowledged in the appellant's submissions that no direction was sought at the close of the prosecution case. Further, it is acknowledged that the alleged failures of the trial judge in charging the jury which are now complained of were not raised by way of requisition. No explanation is offered, or even suggested, by the appellant for this. However, the appellant says that if he is not allowed to rely upon the matters of which he complains it would result in a fundamental injustice to him. He further says that if it is the case that the individual deficiencies identified in his submissions are not each sufficient on their own to persuade this Court that he has, or may have, suffered a fundamental injustice, their combined effect is such as to demonstrate a fundamental injustice.

Submissions on behalf of the Respondent

52. The submissions on behalf of the respondent concentrate on the complaint that there was inadequate instruction concerning how to approach circumstantial evidence. With regard to the complaints that there were no, or no sufficient instructions to the jury concerning the legal concept of "possession", this core complaint is not addressed at all in the written submissions, beyond making the point that no requisitions were raised. At the oral hearing of this appeal it was accepted that the charge did not specifically define the concept of possession, but the point was made that it had been clearly explained to the jury in prosecuting counsel's opening speech, and they had been reminded of what had been said in both closing speeches. Moreover, it had been expressly accepted and acknowledged by senior counsel for the defence in his closing speech that prosecuting counsel had *"perfectly well and adequately and impressively, I thought, explained to you the concept when he was opening the case to you -- the concept of possession and control and physical control."* It is again emphasised that no requisitions were raised with respect to the charge, and this suggested that there was an absence of concern by defence counsel, who was very experienced, and by prosecuting counsel, that the jury could be in any doubt as to what might constitute possession in the circumstances of the case. In truth, it was submitted, the case was not about whether the evidence adduced by the prosecution was capable in principle of proving the case against the accused to the standard of beyond reasonable doubt by establishing the presence of the necessary ingredients. That had been implicitly accepted. There had been no suggestion that, viewing the prosecution's case at its high-water mark, the evidence adduced would be insufficient, even if the jury were minded to accept it, to establish the essential ingredients of the offences charged. There had been no application for a direction (based on the first limb of Lord Lane's celebrated test in *R v. Galbraith*). Rather, the case had been all about whether the prosecution's witnesses had been credible and reliable, and whether in light of the evidence as a whole, including the testimony provided by the defendant to the jury, the jury could be satisfied beyond reasonable doubt that he was guilty of the offences with which he was charged, or would be left with a reasonable doubt as to his guilt. It was suggested in substance that even if the charge had been sub-optimal in some or all of the respects complained of, there was no basis for being concerned about the possibility of a fundamental injustice having been done. The complaints made had to be considered in the light of how the case had actually run. Nobody who had heard the charge, including very experienced counsel on both sides, had

been in the least concerned with the adequacy of the instructions given, having regard to the run of the case and the issues that the jury were likely to be concerned with having regard to how the case had been run. In the circumstances it was submitted that this Court should not find it necessary to depart from the *Cronin* jurisprudence.

53. As to the complaints concerning the claimed inadequacy of the instructions given to the jury concerning how they should approach circumstantial evidence, counsel for the respondent makes the following points. He says that although there was certain reliance on circumstantial evidence to establish the mental element of possession, the case put before the jury went far beyond what might be regarded as a case based on purely circumstantial evidence. The credibility and reliability of the prosecution witnesses was called into question in cross examination. It was suggested that Garda Naughton was not correct when he stated that he obtained the key to the pedestrian entrance to Shed No. 2 from within the farmhouse. It was further suggested that Sergeant Donovan was not correct when he stated that he saw the monitor with live feed in the office and could see that it had footage covering the entrance to Shed No. 2.
54. Further and unlike the "classic" circumstantial case, the accused had given direct evidence in the case and had in sworn testimony averred that he had no knowledge that there were illicit drugs in either shed. Further, the bits and pieces of circumstantial evidence were put to him, and his responses were before the jury in relation to those aspects, including the explanation he had provided for the ostensibly incriminating text message found on his phone suggesting that he was in the business of supplying drugs for money. Had the trial judge proceeded to deal with his charge as if the case were one relying wholly or substantially on circumstantial evidence, it is submitted that he would have fallen into serious error. Yes, there was a circumstantial evidential component to the case, but the jury were clearly going to be primarily concerned with issues of credibility in respect of both the prosecution's witnesses and in respect of the accused himself. It was suggested that in the circumstances the instructions given to the jury on the "two views rule" and concerning their entitlement to draw inferences but not to speculate had been adequate. The point was again made that no requisition had been raised, and it was again suggested that there was no basis having regard to the run of the case, to be concerned about a possible fundamental injustice, such as might justify this Court in departing from the *Cronin* jurisprudence.

Discussion and Decision

55. We have read and considered the full transcript in this case and having done so are satisfied to accept the respondent's submissions that there is no basis for a concern that the appellant has, or may have suffered, a fundamental injustice.
56. While we do regard it as sub-optimal, and indeed erroneous in principle, that the trial judge did not give the jury specific instructions concerning what the legal concept of possession involves; and we consider that unquestionably it would have been better if he had done so; we also regard it as being highly significant that no requisitions were raised and that no complaint was made about the adequacy of the charge during the trial. It is patent that whatever might have been the reason, the failure to do so was not due to an

oversight. On the contrary, counsel on both sides appear instead to have been content that the jury had received a clear and accurate explanation as to the legal concept of possession, albeit not an explanation received from the trial judge but rather one provided by prosecuting counsel and which, tellingly, was explicitly endorsed by defence counsel in his closing speech as having "*perfectly well and adequately and impressively, I thought, explained to you the concept ... of possession and control and physical control.*" It appears to us that in so far as counsel on both sides were concerned, the case was never going to turn on whether the evidence adduced by the prosecution (if accepted by the jury as being credible and reliable) was capable in principle of establishing the necessary ingredients of the offences, but rather whether the evidence adduced by the prosecution was in fact credible and reliable, and such that it ought to be accepted by the jury in the light of the evidence as a whole that they had heard, including the evidence given by the appellant in his defence disavowing any knowledge of the drugs found on his property, and suggesting that another or others may have had access to that property. Notwithstanding the trial judge's undoubted error in not independently providing an explanation to the jury of the legal concept of possession, the run of the trial, as revealed by a close examination of the transcript, has served to allay any concerns that we might have that the jury could have been in any doubt as to what might constitute sufficient possession in the legal sense to allow them to convict.

57. Moreover, while more detailed instructions concerning how to approach the circumstantial evidence component of the case might certainly have been given in the charge, the extent to which that needed to be done was a matter for the trial judge's discretion. The jury were told that they had to decide the case on the evidence, that they could draw inferences but that they ought not to speculate, and the two views rule was explained to them. We are not persuaded that these admittedly relatively limited instructions regarding how to approach circumstantial evidence were necessarily inadequate in the circumstances of the case.
58. In light of these matters, we re-iterate that we do not harbour concerns about the possibility of a fundamental injustice, such as might justify this Court in departing from the *Cronin* jurisprudence. The fact of the matter is that the complaints now being raised were not raised at the trial. No express explanation for not doing so has been provided. It is clear to us that it did not strike any of the those who heard the trial judge's charge that there was a basis to be concerned about it. Yes, the charge could be said to have been deficient in certain technical respects but, having regard to the run of the case, it is clear to us that nobody who listened to the charge was concerned that what had been said, or had not been said, to the jury was going to cause them any difficulty in fulfilling their oaths and in bringing in a true and just verdict in the case. In the circumstances we consider that this is not an appropriate case in which to permit reliance on points not made at the trial.
59. In so far as a case is advanced that the verdicts were perverse, we have no hesitation in rejecting it. It was, in our view, open to the jury to accept the evidence of the prosecution's witnesses, and equally to reject that given by the accused. There was

evidence from which inferences could be drawn that the appellant had both control and knowledge of relevant items, and there was direct evidence as to the nature and quality of the items in question. It cannot be said that there was no evidence that could support the convictions recorded.

60. The appellant's appeal against his convictions is therefore dismissed.