



Record No: CCAOT135/2020

**The President
Edwards J.
McCarthy J.**

Between/

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

RESPONDENT

V

W. D.

APPELLANT

JUDGMENT of the Court delivered by Mr Justice Edwards on the 24th of March, 2022.

1. On the 23rd of October 2019 the appellant was convicted by a jury in the Central Criminal Court of (i) a count of attempted (anal) rape contrary to common law and (ii) a count of sexual assault contrary to s.2 of the Criminal Law (Rape)(Amendment) Act 1990 following a six day trial.
2. On the 15th of June 2020 the appellant was sentenced on Count No 1 (charging attempted anal rape) to 5 years and 6 months imprisonment, with the final 18 months thereof suspended for 2 years upon certain conditions, and to date from the 19th of February 2020. He was further sentenced on Count No 2 (charging sexual assault) to 2 years imprisonment, once again to date from the 19th of February 2020, the said sentence to run concurrently with the sentence on Count No 1.
3. The conditions upon which the sentence on Count No 1 was partially suspended were:
 - 1) He should enter a bond in the sum of €100 to keep the peace and be of good behaviour for a period of two years from the date of his release, and further that during the said suspended period he should:
 - 2) not consume alcohol or any unprescribed drugs;
 - 3) attend all appointments offered to him by the Probation Service and all directions given in respect of therapeutic supports;
 - 4) reside at an address agreed with his Probation Officer;

- 5) participate and cooperate with offence related assessments and treatment while in prison as deemed appropriate;
 - 6) cooperate with the Probation Service for the purpose of any required ongoing offence related assessment and comply with any recommended assessment and intervention;
 - 7) attend for assessment for vocational training as deemed appropriate by his supervising officer;
 - 8) not approach or contact the injured party.
4. The appellant has lodged an appeal against his conviction and also against the severity of his said sentences. Clearly the latter will only require to be engaged with in the event of the court dismissing the appeal against conviction.

The background to the matter

5. The incident giving rise to the prosecution of the appellant allegedly occurred on the night of the 29th/ 30th of May, 2017 outside the Simon Community Hostel on Anderson Street in the city of Cork. Both the appellant and the complainant ("S.W") were homeless men who from time to time availed of shelter or hostel accommodation. However, while the complainant regularly stayed at the Simon Community Hostel, the evidence was that the appellant had never stayed there but instead used to avail of a variety of other homeless persons' hostels/shelters across Cork City.
6. The main entrance to the Simon Community's hostel premises is on Anderson Street and that entrance is and was at all material times monitored by a CCTV camera system.
7. The complainant, a 62-year-old man at the time of the incident, in addition to being homeless, had a long-standing drink problem. On the 29th of May 2017 he had been drinking cider and vodka with friends by the City Hall on Anglesea Street, across from the Anglesea Street Courthouse. He agreed under cross-examination that he had purchased and consumed three flagons (approximately 12 pints) of cider. He stated in evidence that when he had finished drinking he went back to "*the Simon*". He contended that he was drunk and "*under the influence*".
8. It was explained in evidence by the complainant that staff at the Simon Community did a handover to other staff at 11.00 pm following which the door would be closed. If an intending resident turned up after 11.00 pm he would need to ring the bell and seek admittance. If staff observed that the person seeking admittance was under the influence of drink they would tell that person to go away for an hour's walk, and to then come back again.
9. The complainant's evidence was that when he arrived back at the Simon Community Hostel on the evening in question, it was after 11.00 pm. He said that when he got to the hostel he felt so tired that, rather than immediately ringing the bell and seeking admittance, he had just lain down on a blanket outside the entrance door. Before doing

so he had noticed that the blanket was lying on the footpath a short distance away from the entrance door to the hostel.

10. The complainant's evidence was that the next thing that he remembered was a hand touching him. It touched him inside his pants. It was someone else's hand. He was nearly asleep when this happened. He then became very fidgety. The hand that had touched him inside his pants had touched his penis. He became conscious of someone behind him but he didn't react because, he stated, "*I was still half drunk*". He then recalled that the hand "*went near my bum*", and added that "*A penis went into my bum*", and that he felt raw because "*it never happened to me in my life, never.*" Later under cross-examination, the complainant accepted the suggestion put to him by defence counsel that it had been painful and that he had had to apply cream. When asked during his examination in chief what was the state of his clothes, he said, "*Just me pants was pulled down me*". He confirmed that he was wearing underpants and that they were pulled down as well.
11. The complainant stated that he did not do anything when he felt this happening to him because he was not a violent man. It had lasted a couple of minutes and when it stopped he (the complainant) got up off the blanket and went to the door of the hostel. There had been other people around, trying to get in. Some were buddies of his, and they were drunk. He rang the bell and was spoken to by staff, a lady called Emily Barrett and a gentleman called Stephen Minihan, following which the staff called the gardaí. When the gardaí arrived the complainant talked to the them. He said he told them exactly what had happened to him. The complainant said he felt "*shook*" after the incident. He was allowed into the hostel. He was asked if he went to sleep then, and replied that, "*I was tormented for a while*", and that "*my head was rocking all over the world*". The complainant stated that he had not consented to anybody putting their hands on his penis or to somebody putting their penis into his bum.
12. Although the complainant had testified that he was conscious that a penis had been inserted into his anus, it was put to him in cross-examination that the incident had been observed by the hostel staff on CCTV and that they had noted the complainant to be asleep at the time. The complainant persisted in maintaining that he was "*wide-awake*". It was suggested to him that he was completely comatose. It was put to him that when the gardaí arrived and spoke to him he had said that he did not wish to make a formal complaint or wish for the gardaí to investigate the matter. Moreover, it was put to him that a Garda Dowling had made a note of this in her notebook and that the complainant had signed the record. The complainant had no memory of this. It was put to him that Garda Dowling had also recorded that the complainant "*was spoken to by myself and said he was awake and that [D] was fondling him back and front, but stated he was not penetrated.*" The complainant responded, "*It makes me sick as a dog about this.*" It was further put to him that he had been asked if he had consented to the sexual activity he had described and that he had stated "*No*", and that he had told him (i.e. his assailant) to stop. When asked if he remembered saying that to the guard, the complainant responded, "*Oh God*", and that "*I was concussed as well, like*", adding "*from drink, you know what I mean?*" The complainant agreed with defence counsel that he had a great

memory, that he was a memory man on the same level as the late Jimmy Magee. He was asked why if that was so, he did not recall telling Garda Dowling that he had not been penetrated, and responded *"I can't recall to be honest with you now."*

13. It was further put to, and accepted by, the complainant that he had made a formal statement of complaint to a Garda Crotty who had visited him at the Simon hostel later on the morning of the 30th of May 2017. The complainant initially claimed that he could not recall what he had said to Garda Crotty. It was then put to him that Garda Crotty had made a note in his notebook during this visit to the effect, *"I recall that during my meeting with [SW] in the bedroom I asked him 'what did he do to you?'"*, and that he, the complainant, had replied, *"he stuck his fingers up my ass the dirty bastard."* The complainant then responded to defence counsel, *"To be honest with you now, yes, as far as I can recall."*
14. After the complainant had testified the jury heard evidence from, *inter alia*, both Emily Barrett and Stephen Minihan. Ms Barrett testified to observing on the CCTV monitor the complainant lying down on a blanket outside the door. Earlier, upon her arrival at work on the evening of the 29th, she had observed a male outside the shelter in a white T-shirt who was drunk. Between 12.00am and 1.00am on the 30th she again observed this person hanging around outside and she asked him over the intercom to leave. This was not an uncommon occurrence. Then at 1:07 am she was watching the CCTV monitor and saw this same male arrive at the hostel door and proceed to lie down next to the complainant who appeared to be asleep on the left hand side of the door, facing the exterior hostel wall. The other man in the white T-shirt lay on his side facing the complainant's back. At 1:09 am her view of the complainant and the man in the white T-shirt was partially obscured by the arrival of another resident outside the hostel. However, she could see the man in the white T-shirt pull down the complainant's trousers. At 1:10 am she observed the man in the white T-shirt putting his hands around the complainant. She initially thought that the man in the white T-shirt was trying to rob the complainant, but it became apparent to her that this was not the case as the man in the white T-shirt could be seen placing his hand in the front of the complainant's underwear. This was at 1:12 am. Then at 1:14 am she observed the man in the white T-shirt pulling down the complainant's underwear and undoing his own trousers. At this point, due to concern that this was happening without the complainant's consent the gardaí were contacted. The witness believed that the man in the white T-shirt was attempting to initiate sexual intercourse with the complainant. Throughout the incident the complainant was lying on his side facing the wall. The gardaí arrived at 1:18 am, three minutes after they had been called. Stephen Minihan gave evidence to similar effect, adding that after Ms Barrett had called the guards *"[The complainant] did not move or wake up. The gentleman in the white T-shirt then unzipped his trousers. It appeared that he took his penis out. I did not see his penis but the movement led me to believe it was his penis. He moved into [the complainant], lifted one of [the complainant's] buttock cheeks, the left one as he was on his side and moved his hips into [the complainant] as there was no space at all between him and [the complainant]."* The witness further commented, *"From what I was looking at and his motions, the gentleman*

in the white T-shirt was either having sexual intercourse or trying to have sexual intercourse with [the complainant]."

15. The CCTV recording of the incident was recovered by gardaí and was played for the jury.
16. The jury also received evidence from the two gardaí who had responded to the call, namely the aforementioned Garda Dowling and a Garda Walsh. Garda Dowling testified that she and Garda Walsh arrived at the scene at 1:26 am, and that they were met by a staff member and spoke to Ms Barrett and Mr Minihan. Two males were pointed out to them who were located outside the door of the hostel to the right. One (the complainant) was identified to them as a Simon resident. In fact, Garda Dowling recognised both males as they were known to her. The other male was the appellant. Both the complainant and the appellant were on a white duvet which was on the ground. Garda Dowling observed the complainant's pants and underpants to be pulled down, almost to his knees at the back and slightly less so at the front. She asked the complainant what had happened to him and received an account from him that he had been fondled and inappropriately touched. He stated, in response to being specifically asked, that he had not been penetrated, but that he had told "him" to stop and that he had not consented to any act that "he", while pointing to the other male, had carried out on him. The complainant did not at any stage refer to the appellant by name. He did not wish to make a formal complaint at that stage and was unwilling to attend a Sexual Assault Treatment Unit (SATU). However, he expressed a willingness to speak to gardaí again later in the day. Garda Dowling was of the view that the complainant was sober at the time. In contrast, the appellant appeared to her to be intoxicated. His behaviour was extremely erratic, he was stumbling on his feet and there was a strong smell of alcohol from him. Garda Dowling then entered the hostel premises, leaving Garda Walsh outside with the appellant and the complainant, and she viewed the CCTV recording. On exiting again from the premises, and having formed the view that the appellant in his intoxicated state was a danger to himself and others in the vicinity, she invoked s.4 of the Criminal Justice (Public Order) Act 1994 (the Act of 1994) and arrested him pursuant to s.24 of the same Act for intoxication in a public place. He was then conveyed to the Bridewell Garda Station. Garda Dowling was extensively cross-examined, in the course of which she produced her notebook entries which were in the terms put earlier in the cross-examination of the complainant. It was suggested to her that the suspect person she had identified on the CCTV as being the appellant, was not in fact the appellant, and that the appellant would say that it was not him. Garda Dowling was emphatic that the appellant was known to her and that the person she encountered outside the hostel, and who could be seen on the CCTV recording, and whom she subsequently arrested, was the appellant. It was further suggested to her that she had misused her power under s.24 of the Act of 1994 on the basis that it was nothing more than a pretext to arrest the suspect in circumstances where at that point no formal complaint had been made by the complainant. She rejected that contention and reiterated that in circumstances where she had formed the opinion that the suspect was highly intoxicated on the night, and having taken all factors into account, she feared that he was a danger to himself and to others in the vicinity.

17. Garda Walsh gave brief evidence essentially confirming the factual position as related by his colleague Garda Dowling.
18. The jury further heard that after the suspect, whom Garda Dowling maintained was the appellant, had arrived at the Bridewell Garda station his details were taken by the member in charge, Sgt James Morrisey, following which he was placed in a cell because he was still intoxicated. Evidence was also adduced from Detective Garda Crotty. He stated that at 7.00 am on the 30th of May 2017 he had a conversation with Garda Dowling in the course of which he learned that there had been an allegation of sexual assault outside the door of the Simon Community Hostel on Anderson Street. As a result of speaking to Garda Dowling he went to the Bridewell Garda station where there was a male who had been arrested under the Public Order Act. He visited the male in question in his cell and explained to him that there had been an allegation of sexual assault which was being investigated by gardaí. He told him that he was present to seize his clothing under section 7 of the Criminal Justice Act 2006. The male in question handed over his clothing and Detective Garda Crotty bagged them in the usual way in evidence bags which he later passed to the exhibits officer. He further testified to visiting the complainant at the Simon Community Hostel later that day, and concerning the taking of a formal statement of complaint from him. He also took possession of the clothing that the complainant had been wearing at the time of the alleged incident.
19. Further evidence adduced by the prosecution concerned the forensic analysis of the items of clothing taken from both the suspect and the complainant. The jury heard from Dr Annette Forde, a forensic scientist, to the effect that fibres recovered from the clothing of the suspect matched those from various items of clothing of the complainant. She concluded that her findings offered strong support for the view that the suspected person was in physical contact with the complainant rather than the alternative view that he had nothing to do with the incident. The phrase "strong support" was chosen from a scale ranging between weak support, moderate support, moderately strong support, strong support, very strong support and extremely strong support. The scale was not a linear one, rather the degree of support provided with each step up on the scale was 10 times greater than that provided by the preceding step.
20. The court also heard about the subsequent arrest of the appellant on the 18th of October 2017, approximately 4 ½ months after the incident, on suspicion of sexual assault. He was later charged and in response to being charged he had stated, "*No reply*". A photograph taken of the appellant when he was being processed in the garda station on this occasion was exhibited.
21. The appellant gave evidence in his own defence. He described his personal circumstances and background, indicating *inter alia* that he was 30 years old. He stated that he had had various employments after leaving education up until he was 23 years of age, but that thereafter he "*just drank*". He stated that he was heterosexual and not bisexual or homosexual. He described a typical day's drinking after he had become homeless and confirmed the various hostels in which he stayed from time to time. He denied ever

staying at the Simon Community Hostel. He claimed that he had no recollection of meeting Garda Dowling or of ever talking to her, or of ever having any dealings with her. He denied that he had been the person whom she had arrested in the early hours of the morning of the 30th of May 2017 under section 24 of the Act of 1994. He was shown the custody record from the Bridewell Garda station which had been signed by the suspect who had been brought there and he denied that it bore his signature. He was shown the photograph that had been taken on the latter occasion in question and agreed that it was him. Two of the items of clothing that had been taken from the suspect in the cell at the Bridewell Garda station on the 30th of May 2017, being trousers and a top, were produced and shown to him and he denied that they were his.

22. Under cross-examination he asserted positively that Garda Dowling was lying when she said that she had encountered him outside the Simon Community Hostel, and that she had later arrested him, on the night in question. He also asserted that certain other gardaí who claimed to have had dealings with him in the past, and to have known him had lied in their evidence. He accepted that it was he who had been arrested on the 18th of October 2017. He asserted that the arresting Garda, a Garda Twomey, had it in for him.
23. The jury returned a unanimous verdict of guilty on both counts following a deliberation time of one hour and eight minutes.

Grounds of appeal against conviction

24. Two grounds of appeal were pursued before us, namely:-

- 1) that the trial judge erred in fact and/or in law in holding that the arrest of the appellant pursuant to s.24 of the Criminal Justice (Public Order) Act, 1994 was exercised lawfully by the gardaí and consequently the evidence obtained on foot of the said arrest was admissible against the appellant herein;
- 2) that the trial judge erred in fact and/or in law in holding that the gardaí lawfully seized the appellant's clothing pursuant to s.7 of the Criminal Justice Act 2006 on foot of his detention and arrest pursuant to s.24 of the Criminal Justice (Public Order) Act, 1994 and consequently the evidence obtained was admissible against the appellant herein.

The legality of the arrest under s.24 of the Act of 1994.

25. It is appropriate at the outset to set out (to the extent relevant) the terms of s.4 and s.24, respectively, of the Act of 1994.

26. Section 4(1) of the Act of 1994 provides:

“It shall be an offence for any person to be present in any public place while intoxicated to such an extent as would give rise to a reasonable apprehension that he might endanger himself or any other person in his vicinity.”

27. Section 24(1) and (5) of the Act of 1994 provide:

“(1) Where a member of the Garda Síochána finds any person committing an offence under a relevant provision, the member may arrest such person without warrant.

(5) In this section “relevant provision” means section 4, 6, 7, 8, 11, 13, 14, 15, 16, 17, 18 or 19.”

28. At the trial defence counsel sought to have the arrest declared unlawful, and a ruling that any evidence obtained from the accused while he was in detention was inadmissible, on the basis that there had not been a true basis for arresting the suspect under s.24 of the Act of 1994 and that it had been used as a colourable device. It was contended that all evidence gathered from the suspect while he was in tainted detention represented fruit from a poison tree and should be excluded. The basis for this argument was that Garda Dowling did not effect her arrest until almost an hour after she had arrived at the scene. The arrest was effected 54 minutes after her arrival. Moreover, Garda Walsh, in whose company she had left the suspect while she went into the hostel premises to review the CCTV footage had not seen fit to arrest the suspect on the grounds that he was a danger to himself or to any member of the public in the vicinity. In substance the case was made that, although Garda Dowling may have desired to arrest the suspect on suspicion of sexual assault, there was doubt as to whether she could do so in circumstances where a formal complaint had not been received from the complainant. In such circumstances Garda Dowling had, it was suggested, therefore contrived to arrest the suspect using the power under s.24 of the Act of 1994, on the pretext of an asserted belief he represented a danger to himself and to others in the vicinity and notwithstanding that, that was not truly the case. This represented, it was contended, a deliberate and conscious breach of the suspect’s constitutional rights.
29. An immediate difficulty that occurs in respect of this argument is that the accused, i.e. the appellant, was maintaining that the person arrested by Garda Dowling on the 30th of May 2017 was not him. It is true that this proposition was not put in those exact terms to Garda Dowling during her cross-examination, although it was very strongly implied. What was put was that the assailant seen on the CCTV recording was not the accused, which she rejected. It was further suggested to her that the complainant had not identified his assailant by name and that it was she who had purported to recognise the other man present at the scene as being the accused. She accepted that that was so but stood over her recognition on the basis that she knew the accused from previous dealings with him. However, the appellant later swore on oath before the jury that he had never had any dealings with Garda Dowling, that the assailant had not been him, and that he had not been the person arrested at the scene under s.24 of the Act of 1994. Moreover, he expressly contended that Garda Dowling was lying when she said she recognised him and that he was the person that she had arrested. While he hadn’t yet given evidence to that effect when the trial judge was asked to rule on the legality of the arrest, he later did so and his evidence in that respect was rejected by the jury. The problem for the appellant is this: if he was not the person arrested he cannot rely on an alleged breach of another person’s rights. It is not possible for an accused at trial to seek to rely upon an alleged breach of a third party’s constitutional rights. If a colourable device was being used, as

was suggested, the party whose rights were being breached was the person being arrested.

30. Insofar as this appeal is concerned we do not understand it to be the case that the appellant has at any point conceded that he was the person arrested by Garda Dowling under s.24 of the Act of 1994 in the early hours of the morning of the 30th of May 2017. It seems to us that he cannot have it both ways. The appellant can't be heard in one breath to be positively asserting on oath that "*I was not the person arrested*" and then to be heard saying in the same breath "*but if it was me, my constitutional rights were breached.*" If he wants to seek to rely upon an allegedly unlawful arrest, he can only do so by accepting that he was the person who was arrested and that it was his rights that were allegedly breached. He has made no such concession.
31. However, this point does not appear to have been argued at trial. Be that as it may, the trial judge in any case rejected the substantive argument being advanced, namely that the arrest was unlawful for having been effected on a contrived pretext that the suspect was a danger to himself or others when that was not in fact the case, and that in the circumstances it represented a colourable device. The trial judge ruled as follows:

"So, in terms of the exercise of the power in terms of the two elements which are required to be established in relation to the exercise of that power reasonable grounds in relation to the intoxication of a [the appellant] and reasonable grounds that he's a danger to himself or others well, in terms of the danger to self, there might be grounds for that but it seems to me it's the danger to others that is of more importance and in relation to the exercise of this public order offence the power of arrest. It seems there's overwhelming evidence to me that Garda Dowling exercised a power in full knowledge that this man was intoxicated, was behaving erratically, she could clearly see from the CCTV screen and from her outside observations. She observed the CCTV footage over a period of approximately it appears 20 minutes and she gave careful consideration to what she was looking at having regard to the very serious allegations being made by the staff as to what they thought they had viewed in relation to the footage. She looked at the footage, became clearly concerned herself in relation to that footage as to what she was looking and that [the complainant] had been, from her own observations of that footage and the immediate preceding minutes prior to her arrival been the subject of what I am satisfied for the purpose of this issue was a clear sexual assault upon [the complainant]. The extent of that sexual assault I don't need to come to a conclusion in relation to it. It's certainly an arrestable offence what he did on that occasion.

Insofar as the situation then is in relation to her conclusion I'm satisfied that she had ample grounds to come to the conclusion that he was intoxicated to the extent that he was a danger to others and indeed to himself having regard to the fact that he was unsteady on his feet and staggering and that evidence was available to her to exercise the power. Now, there's a passage of time during the course of which

she considers the situation. She has to view the footage and does that and it is suggested that he sobered up in the meantime and that the moment had passed so to speak in relation to the basis for her conclusion. I'm not satisfied that is so. In fact I'm satisfied of the contrary beyond reasonable doubt having regard to the evidence of her colleague also notwithstanding the fact that he didn't exercise a power. He hadn't seen the CCTV footage and he had some observations to make but it was in effect, her decision and her exercise of the power that is in issue in this case, not his, and I'm satisfied that his failure or non-exercise of the power really is not determinative of the issue. Really the question is what I'm satisfied of in relation to her exercise of the power.

So, I'm satisfied that she exercised it on grounds which are available to her and I'm satisfied of that beyond reasonable doubt. I am asked however to come to the further conclusion that in respect of the exercise of that power, the exercise of that power was contaminated by the colourable device of securing his detention in circumstances where she did not have a complaint and she had an unwilling complainant at that stage who didn't want to move to the next phase or the matters had not progressed to where he may have made a formal complaint in relation to the more serious element of the present charges which is the penetration and section 4 rape. And in terms of that issue it is said that she and perhaps Garda Harrington but particularly Garda Dowling made a deliberate decision to flout the law, to wrongfully and inappropriately exercise a power that wasn't available to her and contrived to advance grounds -- to invent grounds in relation to the arrest at the time. To contrive the unlawful detention of the accused, to mislead the member in charge when she brought him to the detention centre and to engage with Detective Garda Crotty in what is in essence a conspiracy to pervert the course of justice by concocting a basis upon which a power under section 7 could be used and to come to court then and to tell untruths on oath in relation to that before this Court having regard to the detention of the -- in relation to the detention of the accused and the seizure of his clothing which now it is sought to use in the course of this trial in relation to the two serious charges which are laid against [the appellant]. If I had any reasonable doubt in relation to that matter, if I thought that there was any doubt in my mind in relation to the evidence advanced by Garda Dowling in relation to that or Detective Garda Crotty I would have to come to the conclusion and consider whether the evidence so obtained should be excluded. I have no such doubt. In relation to this matter, I'm satisfied beyond reasonable doubt that no such conspiracy existed and that no such concoction has been put forward and that there's not a deliberate and conscious attempt to flout the law and put before the Court evidence that has been obtained by a conspiracy of members of An Garda Síochána, to contrive to get his clothes off him for the purposes of pursuing a complaint, if it was ever made by [the complainant] at a later date, in circumstances where they didn't have a basis to do so because he hadn't been arrested, that complaint hadn't been made and they weren't able to effect an arrest in respect of the aggravated -- or in respect of the section 4 rape and the sexual assault at the time. I'm simply not satisfied that that

is so. So therefore, in those circumstances, I'm satisfied that the factual basis has not been laid for the consideration of the exclusion of the material, which is sought to be advanced as a result of the seizure of clothing made by Detective Garda Crotty under section 7, and therefore it's not necessary for me to consider whether there was indeed -- the consequences of any such behaviour, because I don't believe and I'm not satisfied beyond reasonable doubt -- sorry, I am satisfied beyond reasonable doubt that it didn't occur. So, in the circumstances therefore, the evidence is admissible and I'll admit it and insofar as JC is concerned, I'm not satisfied that any of those principles have been violated in this case."

32. We consider the complaint based upon the lawfulness of the arrest to be wholly misconceived in circumstances where it has always been the appellant's case that the person arrested under s.24 of the Act of 1994 was not him. He cannot assert the constitutional rights of a third party. However, notwithstanding that that is our view, it seems to us that in any case the trial judge's ruling was a correct one on the evidence before him. He was satisfied on the evidence that the person arrested was the appellant. There was clear evidence as to the highly intoxicated state of the person concerned and clear evidence from Garda Dowling that she perceived him to represent a danger to himself and others on that account. While the nature of the dangers perceived by Garda Dowling were not explored, or identified in terms, it may readily be inferred as a matter of common sense that, in circumstances where they were in an inner city location, her concerns very likely revolved, at least in part, around the possibility that if left to wander the streets in a highly intoxicated state the person concerned might be struck by a vehicle and either be injured himself or be the cause of a person or persons in such a vehicle suffering injury. (She may also legitimately have had other concerns based on what she had seen on the CCTV footage, but as concerns in that respect were not specifically identified in evidence, and are not readily susceptible to inference, it would be wrong to speculate in that respect.) In conclusion, we find no error in the trial judge's ruling that the arrest under s.24 of the Act of 1994 was a lawful one and that it did not represent a colourable device.
33. We therefore dismiss this ground of appeal.

The seizure of clothing under s.7 of the Criminal Justice Act 2006

34. The same point as was made in relation to the last ground of appeal applies here. The appellant denies that he was a person being held in a cell in the Bridewell Garda station in the early hours of the 30th of May 2017. He says that they had the wrong man. Accordingly, it follows, if clothing was unlawfully seized from someone in a cell in that Garda Station on that date it could not have been his clothing. He is therefore faced with the same fundamental problem. If it was not him he cannot seek to rely upon a breach of a third party's rights. By the same token he equally cannot be heard to have positively asserted on oath that "*it wasn't me in the cell*" and later be heard to say "*but if it was me, my constitutional rights were breached.*"

35. Be that as it may, we will nonetheless again proceed to examine the substantive complaint being made, for what it is worth. The power invoked was the power under s.7 of the Criminal Justice Act 2006. Section 7 provides (to the extent relevant):

7.(1) Where a member of the Garda Síochána who is in—

- (a) a public place, or
- (b) any other place under a power of entry authorised by law or to which or in which he or she was expressly or impliedly invited or permitted to be,

finds or comes into possession of any thing, and he or she has reasonable grounds for believing that it is evidence of, or relating to, the commission of an arrestable offence, he or she may seize and retain the thing for use as evidence in any criminal proceedings for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act 1897 shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act.

(2) [Not relevant]

- (3) The power under this section to seize and retain evidence is without prejudice to any other power conferred by statute or otherwise exercisable by a member of the Garda Síochána to seize and retain evidence of, or relating to, the commission or attempted commission of an offence.

36. It was submitted on behalf of the appellant that the provision in question was never intended to be used for the purpose of seizing evidence from a person detained in a Garda station. We do not think that that is correct. It may not have been within the contemplation of the legislature that the provision would routinely be used in that way but the legislation does not preclude it. The section provides a power of seizure to a member of An Garda Síochána in two specified situations. Clearly the first situation, i.e. that provided for in s.7(1)(a), could not have applied as the cell area of a Garda station is not a public place. However, the second situation provided for, i.e., that provided for in s.7(1)(b), is couched in terms that the power may be availed of by a member of An Garda Síochána who is in "*any other place ... in which he or she was expressly or impliedly invited or permitted to be.*" The trial judge held that the Garda who seized the clothing, i.e. Detective Garda Crotty, was permitted to be in the cells area of the Bridewell Garda station and accordingly he could lawfully avail of the power in question. We think that the trial judge's ruling was entirely correct in that respect and that it was based upon a correct interpretation of the statute. We would therefore have had no difficulty in dismissing this ground of appeal on the merits, were it necessary for us to do so. However, in circumstances where the appellant continues to maintain that he was not the person detained in the Garda station, that the gardaí had got the wrong man, and where, that being his position, he is ostensibly asserting and seeking to rely upon the

constitutional rights of a third party, we regard this ground of appeal as being misconceived and untenable in any event.

Conclusion on the conviction appeal

37. We are satisfied that the appellant's trial was satisfactory and that his conviction is safe. We will dismiss the appeal against conviction.

The appeal against the severity of the appellant's sentence

38. In sentencing the appellant, the sentencing judge, having described the circumstances of the offending conduct, the aggravating and mitigating factors and the appellant's personal circumstances, said the following:

"The section 4 offence is one which if completed would not have involved aggravating features such as preplanning, coercion, force or the use of a weapon and would not therefore require the imposition or attract the more serious type of penalty that may go beyond the headline range before mitigation of seven to 10 years' imprisonment. It is of course a case of attempted section 4 penetration. The offence wasn't completed and the Court must be careful not to impose a penalty that is greater than that which applies to the completed offence, but also recognise that attempts generally attract penalties which are lower than that of the completed act, particularly when not accompanied by such of the aggravating circumstances as I've outlined above

It is, however, both of these offences are serious offences. A section 4 offence is a very serious offence and I am satisfied that if completed it would have attracted a penalty in the range of seven years' imprisonment. It was an attempt. It appears to have occurred spontaneously. It does not appear to be part of his usual behaviour or offending and occurred when he was drunk which is not a defence or excuse, but provides some context for how it occurred. I am satisfied that an appropriate sentence before mitigation in respect of the section 4 offence is one of six years' imprisonment. The limited mitigating factors allow reduction to five years and six months' imprisonment. The sentence will be backdated to the 19th of February.

Because of the fact that he has significant difficulties which are outlined in the reports which can be addressed, I will suspend the last 18 months of that sentence for a period of two years."

39. It was contended on behalf of the appellant that the headline sentence nominated by the sentencing judge for the attempted rape was too high. However, this argument was given what might be colloquially described as "only a light rub". It was put forward on the basis that an attempted offence should in general attract a lighter sentence than the completed offence, if only because the harm done is usually less. This idea was in fact expressly referenced by the trial judge in the passage just quoted. He indicated that a completed offence would attract a sentence of seven years and he was prepared to start at six years in the circumstances of the present case. We find no error with respect to the headline sentence nominated.

40. The main complaint advanced on behalf of the appellant with respect to the severity of the sentence is that the trial judge failed to afford sufficient weight to the many mitigating factors in the case and most particularly to the psychological difficulties the appellant was operating under. It is suggested that the trial judge failed to adequately assess the appellant's personal circumstances, his homelessness, substance abuse and psychological issues and the possibility of rehabilitation in that regard.
41. We should say in that respect that the court had before it a psychological report from a Dr Patrick Randall, a consultant clinical and forensic psychologist. This report described the appellant's clinical presentation and his personal and criminal history. It considered the index offence and assessed the appellant's cognitive functioning and social, emotional and personality functioning. Dr Randall found the appellant to be a psychologically vulnerable man with poor insight, and one who represented an above average risk of committing a sexual offence in the future. The appellant was considered to be emotionally isolated and somewhat alienated from society and this contributes towards his vulnerability to committing future offences. The psychologist recommended that he undergo individual psychotherapy while in prison, but stated that given his insistence that he did not commit the offences it was not recommended that he attend the Building Better Lives program. Further, he recommended that the appellant engage in group programs and activities to help him feel less isolated and to promote his developing relationship skills and empathy for others.
42. There is no doubt that the sentencing judge was alive to the details of the appellant's background. The sentencing judge specifically stated:

"I have to consider of course the mitigating factors that arise in the case and I have considered the reports furnished to the Court from the Probation Service and the consultant psychologist retained by the defence which have been of great assistance. The accused cannot benefit from the considerable leniency and mitigation that is otherwise available to a person who pleads guilty and expresses genuine remorse for such offences. He denies his guilt. He is entitled to do that and he has maintained that position. He also has, and it's clear from both reports, deep seated and troubling problems. He is himself a homeless man. He is himself an alcoholic. He has significant limitations as set out in the psychological reports, I'm not going to go into them in detail, but they are very clear from the report. I have to take account of those difficulties as mitigating features in the case and look forward to the potential for helping him in the future if that is possible.

It can't be said that he has no previous convictions, though nothing like the offences of which he is convicted. All his prior convictions are for drink related offending, petty theft, public order offences, public drunkenness. The Probation Service has attempted to assist him in the past with no great success. I acknowledge all of the difficulties under which he lives and the fact that he is socially isolated from others, including family members. He has very little support available to him. Though he made some progress while in custody in addressing

his drink problem, this quickly fell away when in the community. However, the hope must be that further work can be usefully done with him and by him while in custody both in respect of his drinking and the sexual offences which he has committed. At present he cannot progress in any programme directed towards sexual offending because he doesn't accept that he committed the offences.

The indicators for potential further sexual or nonsexual offending are not good at present if these matters are not addressed and it's important therefore that he be encouraged to address the two issues."

43. We have no hesitation in the circumstances in rejecting any suggestion that the sentencing judge failed to have regard to the appellant's personal circumstances and psychological background. However, the complaint is couched primarily in terms that insufficient weight was afforded to the evidence in that respect. We have carefully considered the reports, and the sentencing judge's remarks, to assess if that complaint is justified. In that respect we are acutely conscious of a trial judge's margin of discretion and that we should not lightly interfere. While we acknowledge that this appellant could not avail of the substantial mitigation that would have been provided to him by a plea of guilty, we do feel that the amount discounted for other mitigating circumstances was low. He received a direct discount of six months and a further effective discount of 18 months by way of a partial suspension of the resultant post mitigation sentence. However, we are not persuaded that the combined effect of the direct discount and the partial suspension made adequate allowance for this man's very considerable vulnerability and the significant adversities in his life. This was a man who had been educated to university standard and who had had employment but who due to a combination of life circumstances, addictions to alcohol and substances, and other adversities, had become homeless and was now on the margins of society. In so far as reaching rehabilitation and being reintegrated into society is concerned, he has further to travel and has more difficulties to overcome than many other offenders would have. We do not believe sufficient allowance was made for this. Accordingly, insofar as that is the case we find that the trial judge erred in principle.
44. A custodial sentence was undoubtedly required in this case. In the circumstances we will interfere to alter the sentence imposed for the attempted anal rape in the following respect only. We will increase the partial suspension from 18 months to 2 years and 6 months, and it will be subject to the same conditions as were imposed by the judge at first instance. The net effect of this is that the appellant, providing he keeps to the conditions upon which part of his sentence is being suspended, will now serve a period of three years in custody rather than four years.
45. No complaint has been made with respect to the sentence imposed for the sexual assault and we will not interfere with that.