

An Chúirt Uachtarach**The Supreme Court**

MacMenamin J
Dunne J
Charleton J
Baker J
Woulfe J

Supreme Court appeal number: S:AP:IE:2021:000013
[2020] IESC 000

Court of Appeal Record Number: A:SP:IE:2018:000293
[2019] IECA 00

Dublin Circuit Criminal Court record number DUP0392/2017

Between

**The People (at the suit of the Director of Public Prosecutions)
Prosecutor/Respondent**

- and -

**Aidan Conroy
Accused/Appellant**

Judgment of Mr Justice Peter Charleton delivered on Monday 26 July 2021

1. The issues arising on this appeal concern confessions to crime, their reliability, the safeguards as to taking and recording such confessions, and how a jury should be instructed by the trial judge where the confession or its recording is contested. Section 10 of the Criminal Procedure Act 1993, provides, where a confession is uncorroborated, for the mandatory delivery to a jury from a trial judge of a warning to have due regard to the absence of such corroboration. This section is the subject of a comprehensive judgment by O'Malley J in *The People (DPP) v Power* [2020] IESC 13. While this case was tried when that judgment was not available to the Circuit Criminal Court, in Dublin in October 2018, the trial judge ruling that no warning was required in the circumstances of this case, the judgment of the Court of Appeal dated 30 November 2020, McCarthy J, upheld, on the same basis, the conviction of the accused for possession of cocaine for supply and importation at Dublin Port. The confession in question, heard by one officer, a verbal admission not under caution and subject to no electronic recording, was denied by the accused. Hence, an issue arises as to the *Power* case and how it may properly be interpreted, and as to the Judges' Rules and their application to situations of temporary detention for search.

Determination

2. By determination dated 12 May 2021, this Court granted to the accused further leave to appeal from the judgment of the Court of Appeal and specified that the appeal was as to “significant issues” that arose “as to the potential application of s 10 [of the Criminal Procedure Act 1993] in cases of this nature” related to warnings to the jury by the trial judge where a confession was not corroborated; [2021] IESCDET 56. The parties, however, have treated this appeal as encompassing the Judges’ Rules, fairness and the proviso in addition. The case management judge assented.

Circumstances

3. Since the order of this Court will be for a retrial of the accused, the background facts, all of which will have to be found by a jury into the future, will necessarily be referenced with circumspection. The accused, Aidan Conroy, is a truck driver. He arrived in Dublin Port on 20 August 2015. He was driving a lorry and a trailer. Apparently, as a professional driver, he owns the cab to which a refrigerated trailer load of fruit was attached. In the normal course of events, the driver of such a cab may not have been expected to have loaded that fruit or perhaps closely supervised its loading. Customs were in possession of some confidential information, apparently, or else drew on some other unspecified reasonable suspicion. Briefly, they told the accused that they suspected the possession of controlled drugs under the Misuse of Drugs Acts 1977 to 2017 and as to offences under the Customs Code and legislation; that is not in issue. He and his lorry and trailer were to be detained under s 2 of the Customs and Excise (Miscellaneous Provisions) Act 1988; again, the legality of this is not in issue. The accused was brought to what is called “the detention room” and supervised. Meanwhile the truck and trailer were thoroughly searched. Cocaine was found in two places: the trailer among the fruit and in a fire extinguisher situated in the driver’s cab. An initial test, prior to proper analysis by the Forensic Science Laboratory in Phoenix Park, indicated by reagent that the powder found was cocaine. That was later confirmed.

4. Customs officers returned to the detention room and one of the officers said to the accused: “Come on, I’ve something to show you.” It is not to be ruled that showing an accused who may be charged with a possession offence the relevant contraband, is an aspect of fairness, or in any way implies that there is a right to be told about the circumstances, which in an interview will arise anyway. But it is worth noting that there is nothing unfair about confronting a suspected possessor with what he or she is thought to have possession of and it is not unfair to ask about the circumstances. What is in issue here is whether a caution was called for and the central contest which grounds this appeal is as to the ensuing conversation on the way from the detention centre over towards the cab and trailer. The accused is alleged to have said: “You found the drugs then.” This was heard by one officer only, not by any other accompanying person. That declaration against interest is denied by the accused. Despite that denial, an issue arose at the trial as to whether, if said, the definite article might have been absent from the alleged admission or whether, as supposedly later recounted by one officer to another, it might have been: “So, you found drugs so.” No useful or appropriate comment may be made on any such issue here or as to the conditions of noise or lack thereof or proximity of persons which might explain any asserted anomaly or that only one person heard whatever the admission was. It suffices that these are jury matters. The issue is as to the proper approach to the admission of the alleged statement and as to, if admitted, any warning which might attach to it from the trial judge in instructing the jury. The officer

did not write down the alleged statement then, the accused as a detained person had not been cautioned against self-incrimination and his words were written down later and put to him only in an interview later in the day.

5. There was no warning about uncorroborated confessions to the jury from the trial judge. Section 10 of the 1993 Act was not part of the charge. While the Judges' Rules were argued at trial, the trial judge admitted the words of the accused in evidence. In terms of the building blocks of the prosecution case, these were: the drugs in the fire extinguisher in the cab, the drugs in the trailer, the alleged admission by the accused, certain text messages sent by the accused, scientific analysis of the cocaine and the amount and purity thereof, and the overall circumstances from which possession might be inferred or rejected by the jury. Perhaps it might be possible, no comment is appropriate, to argue that the nature of the text messages support the alleged admission to knowing there were drugs in the cab. That is a matter for the trial and for the trial judge. The accused went into evidence in his own defence and explained the text messages and gave a detailed account of his work activities and this importation in particular and denied the alleged admission; with what degree of cogency this Court can have no idea and makes no comment. In the event, the jury convicted on the cocaine in the cab but not in the container. Did the Judges' Rules apply to the alleged confession? Should there have been a warning? Those are the central issues in the case.

The Court of Appeal

6. The Court of Appeal dismissed the appeal. No warning was necessary about the statement heard by only one officer. It was fine. There was no breach of the Judges' Rules. McCarthy J said as to the Judges' Rules:

14. It was contended in the first instance that the appellant was in custody in as much as he could not have left the waiting area or customs building had he sought to do so. The contention of the appellant that this was so, that is to say, he was under an obligation to remain pending the search, has not been questioned. It is said when Officer Griffin approached the appellant and told him he had something to show him in the vehicle such a statement or request was, in reality, a question. Thus, it is contended that a caution should have been administered. This is because of the provisions of rule 3 of the Judges Rules, which is as follows:-“Persons in custody should not be questioned without the usual caution being first administered.”

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

16. It is also submitted that a breach occurred of Rule 9, which is as follows – “Any statement made in accordance with the above rules should, whenever

possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish”

17. The purpose of this rule was identified by O’Higgins CJ. in the *People (DPP) v Pringle* (1981) 2 Frewen 57, as follows: “It seems clear that this Rule, which, of course is not a rule of law but rather an admonition for the carrying out of fair procedures of interrogation, was designed to achieve a situation which (a) there would be accuracy in the recording of any statement made to be achieved by the early writing down of it so as to obviate errors of recollection and (B) in which an accused person would, at a time when he should have sufficient memory of what he had said, beginning opportunity of challenging the accuracy of the record made.”

18. Officer Rafferty was clear as to what had been said, although Officer Griffin (who had not heard it) recollected the use by Officer Rafferty of a slightly different form of words when Officer Rafferty had recounted to him what he claimed to have heard. We think it would have been preferable if Officer Rafferty had written down what was said forthwith. We do not think that there was any reality in the idea that, having done so, she should, then and there, immediately prior to the appellant’s arrest, have read over to him what it was alleged he had said. We think therefore that there was compliance with this Rule when what was allegedly said was put to him later on the same day when he was being interviewed in custody. In truth, however, and in any event, this issue does not hinge on the precise form of words used but rather on whether or not anything inculpatory was said at all, and it is clear that the appellant was not prejudiced by the timing of when the words spoken were recorded in writing and read over to him. He gave evidence on the *voir dire* and what was in debate was not the correctness of Officer Rafferty’s recollection as to the precise wording but rather whether he had said anything at all.

19. Officer Rafferty did not proffer her physical note to the appellant to sign (i.e. to sign a note agreeing with its accuracy when he denied it) (this would have been a violation of common sense) after its contents had been put to him on the occasion of his third interview (Thursday 20th of August 2015) in the Garda station. The interviewing Garda (D.Gda. Griffin) did make a note of what was said by Officer Rafferty and the appellant’s responses and referred to the circumstances so that there was compliance with the rule. Officer Rafferty was present at the time. The note of the relevant interview, containing in its body the full detail of the alleged admission and what was said at interview about that topic was agreed by the appellant to be correct and signed (in fact, to put the matter shortly, a denial that the words alleged to have been spoken were so spoken). We therefore think that there was no breach of rule nine.

20. We should say that addressing the question of breaches of the rules has occasioned us a degree of difficulty because the issue was raised with a very high degree of generality by counsel for the defence at the trial, and not addressed at all by prosecuting counsel or by the trial judge in her ruling. The latter is perhaps understandable due to that level of generality and prosecuting counsel’s silence. What we have sought to do is to address the substance of the point, however, based on the evidence. With respect to the second limb of the argument presented in support of this ground of appeal, the proposition upon which Mr

Gageby seeks to build is encompassed by what was said in *The People (DPP) v. Sean Breen* (Unreported, Court of Criminal Appeal, March 1995) where Egan J., for the court, said that: -“The crucial test is whether it (the statement) was obtained in compliance with basic or fundamental fairness... The test of basic fairness... superimposed on the need for voluntariness, has the merit of ensuring, if the judicial discretion is correctly exercised, that an accused is not wrongfully or unfairly to be convicted out of his own mouth.”

21. It was submitted under this head that in certain situations, as it is put in the appellant’s submissions, it may be necessary to caution earlier than the time referred to in the rules: it is said that this proposition is relevant because the appellant’s truck was “a particular target” (due to the fact that it was, apparently, suspected to contain controlled drugs, based on intelligence from an undisclosed source or obtained on an undisclosed basis) and it was in consequence of that that the vehicle was stopped and searched. In *Breen* the court held that a caution should have been given when the Garda Officer knew or ought to have appreciated that the suspect was likely to be on the threshold of admitting some involvement in the crime. There is nothing here to suggest that prior to the time when he made the incriminatory utterance anyone might have supposed that he was anywhere near that threshold. It would, perhaps, have been appropriate to caution him as soon as he was shown the item because it would then be rational to expect that he might comment one way or another and of course the position would be even clearer should any question have been asked of him. In any event, notwithstanding that it is plain that the authorities had a “tipoff” and searched the vehicle accordingly, the mere fact that there was suspicion concerning the vehicle does not imply that it would be unfair, in a subsequent prosecution, for the State to rely on a verbal admission volunteered by the appellant and unprompted by any questioning, just because he had not been cautioned at the stage that it was made.

7. The analysis by McCarthy J on the s 10 point should be quoted:

38. On the premise that the *Power* decision does not speak to a case, such as the present, where the fact of the admission is in question, Mr Gageby submits that the following principles emerge from O’Malley J.’s examination of the section, namely:-

- (1) The rationale for section 10 flows from the apprehension that convictions based upon unsupported confessions can result in miscarriages of justice and that juries may be insufficiently aware of this.
- (2) The question for a jury in relation to confession is whether it can be relied upon as a true admission to the commission of the offence.
- (3) The section goes beyond the evidence that the confession was made by the accused and is also concerned with the factual content of the confession.
- (4) In a trial where there is evidence of a confession the section requires the trial judge to rule or find that the section is applicable because the confession is uncorroborated.
- (5) The trial judge must make a qualitative assessment of the evidence to decide whether the confession is uncorroborated and then decide whether or not to give a particular warning.

(6) Even where a trial judge might rule that there is possible corroboration in a case and decides to give a warning under section 10 the ultimate decision on whether that evidence amounts to corroboration rests with the jury.

39. Mr Gageby submits that what was required (if it was required) of corroboration in the present case was independent evidence of whether or not the appellant had made the admission in the light of the fact that the defence being made was that the appellant did not know nor had he any reasonable grounds for suspecting that what he had was controlled drugs (something which might be described as the statutory defence under section 29 of the Misuse of Drugs Act, 1977); effectively he says that if this is not so the fact that the appellant was found in possession of the controlled drugs would always be corroborative.

40. It seems to us that Mr Gageby's submissions are misconceived. It may or may not be the case that whether or not an admission or confession has been made or indeed its terms are in debate, it seems to us that when evidence of such an admission or confession is adduced corroboration of the fact that it has been made, *per se*, is not what is contemplated by the section. Of course, the jury in due course will be called upon to decide whether or not the admission or confession is true. It is hardly possible to make a decision on that without first deciding whether or not it was actually made – in reality, the issues are likely to be conflated because no jury could accept the contents of a statement as true if they had a reasonable doubt as to whether the words had been spoken at all. If corroboration is to be understood as evidence showing or tending to show that the accused has committed the offence whether or not the making of the utterance or statement is in dispute, a considerable protection is afforded to an accused by an appropriate warning, against the evil or mischief against which the provision is directed.

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

Investigative powers

8. Section 2 of the Customs and Excise (Miscellaneous Provisions) Act 1988, as amended, enables an officer of Customs and Excise “who with reasonable cause suspects that a person at or in the vicinity of any port or airport or the Land Frontier is in possession of a controlled drug” which is being or was “or is intended to be” in breach of any “prohibition or restriction”, without warrant to “search the person and, if he considers it necessary for that purpose, detain the person for such time as is reasonably necessary for carrying out the search” and to “search any vehicle, vessel or aircraft” in which it is suspected that contraband may be found. While that search of a vehicle is

happening, under the legislation the person driving may be required to remain pending its completion. It is an offence not to abide by a direction under these powers which include requiring the person to stop, to bring the vehicle to a suitable place and to open compartments and other necessary ancillary powers detailed in the legislation in a comprehensive way. An arrest may follow non-cooperation. The legislation is drafted as if it might spring leaks since the detention is for the duration of the search “but such search shall be carried out as soon as is practicable”; the powers do not override or cancel other powers of Customs officers, and, for comprehensiveness sake, a “vessel” includes a hovercraft and an aircraft encompasses “a glider, balloon and model aircraft.” The person to be so processed is to be given information in simple and general terms as to the powers being exercised.

9. What if something is found? It may be useful to put that article to the accused but that is not to rule that such a good and practical step, if omitted, has any effect in legal terms. If there is an arrest for, as might be likely, drug importation or possession of drugs for the purpose of supply under s 15 or s 15A of the Misuse of Drugs Act 1977 as amended, or another offence under the Misuse of Drugs Acts 1977-2017 or the schedules or regulations thereto, it may be expected that any competent interview will be about the circumstances of alleged possession, which is the foundation offence for almost all of this code, what and how much was found, the state of mind or movements and intentions or awareness of the accused. When arrested, the accused may be given an opportunity to comment on the case that may be made against him by the Garda or Customs. That can be an aspect of good practice but is not here stated to have any impact on admissibility. In *The People (DPP) v Lamless* (1985) 3 Frewen 30, 34 McCarthy J commented in a context where powers of detention under the Criminal Justice Act 1984 were not yet in force, and where on arrest the suspect should have been brought before a judge for formal charging as soon as practicable:

The mere production of an exhibit, indeed of the critical incriminating articles found in or about the premises where the accused was arrested, whilst awaiting arrangements to bring him before a court or a judicial officer is in no way a breach of that duty; it might forcefully be suggested that it would be unfair to the accused not to produce these incriminating articles to him at the earliest possible opportunity.

Possession

10. Since the prosecution argue that the presence of the drugs in the fire extinguisher in the cab corroborates the contested verbal confession, and since the nature of the charge required the prosecution to prove just that fact and to link the drugs to the accused, some brief remarks based on standard authorities need to be addressed to what that proof involved. On behalf of the accused it is contended that to claim that what needs to be proven, possession, corroborates an alleged admission of possession is a circular argument. Since argument has not been addressed to the concept of possession, that not being in contention, what follows is germane only to the circularity/corroboation dispute.

11. In Salmond, *Jurisprudence* (10th edition, London, 1947) 287 the author wrote that “A complete theory of possession, falls into two parts: first an analysis of the conception itself, and secondly an exposition of the manner in which it is recognized and applied in the actual legal system.” As a concept, however, possession is easier to describe than to define. As to when a person has possession of an article is a matter of legal definition. As to when circumstances may be insufficient to fix a particular accused with what is a core

building block of many offences, drugs, firearms, explosives, etc, rather than produce a comprehensive definition, is a matter of fact. It is to be noted, but expressly here is not approved, that Article 2 of the Model Penal Code of the American Law Institute, requires a voluntary act for a serious criminal offence. Article 2(4) states: "Possession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession." Other attempts at definitions in other codes embrace the core concepts of control, intention to control and knowledge.

12. Conceptually, possession offences bypass any legislative model which might make purpose or inchoate constructs of the preparation for, or agreement to commit, a crime; basing instead criminal definition on the nature of the article as contraband and establishing the accused's control over that article as the offence. Once the article is proven to be the proscribed item and the relationship of the accused to it is of power to use, direct the use of, or handle the item, possession may be established. Proof of ownership is not a concept in modern legislation since the mischief which these kind of offences seek to criminalise is the use to which the object may be put. Possession is a concept which leaves the accused's purpose out of the equation for basic possession offences; though there may be an add on of a more serious offence involving possession with a purpose, such as having a firearm with intent to commit an offence or having controlled drugs with the intention of selling or supplying same to another person. Liability is based on the accused's control over a defined object, perhaps in common design with another person, or by using another person as an agent, as in a courier, and the degree of awareness, often variously defined, which establishes the accused's relationship to the outlawed object.

13. It may be easier to state the indicia against possession than to comprehensively define the concept itself. There are standard and helpful authorities: it is not proposed to add to or qualify the existing law and nor is that necessary to this decision. Thus, in *The People (DPP) v Ebbs*, [2011] 1 IR 788 [16-17] O'Donnell J for the Court of Criminal Appeal recognised that "what is criminalised is a state, rather than an activity" and that "the concept of possession ... necessarily involves an irreducible element of knowledge." The external element must involve awareness that the accused "person possesses 'something'". In many cases this is illustrated by the negative proposition that a person cannot be said to possess something which is slipped into his or her handbag, pocket, or some other place over which he or she has control." Two obvious problems arise. The first is the issue of control and the proof of physical possession. Passengers at airports are asked before bag inspection if they packed the luggage themselves. Control of a container may not be control of what is in the container and that, unless there is a presumption in aid of proof placing the burden of disproof on the accused, is a requirement of proof. In some statutory models, such as the Misuse of Drugs Acts, upon proof of possession of the container and upon proof that contraband was inside, a legal burden shifts to the accused of disproof of control over what was in the container. Secondly, while a gun is distinctive in appearance, plastic explosive may look like putty and drugs may just seem to be a general powder. Still, a reasonable person would wonder why there is a bag of powder which some person at an airport is asking them to bring to a friend on arrival. Possession cases are about circumstances. Being asked to keep a tank of tropical fish while a friend is on holidays is different to being asked to give space to assorted electrical components and a tub of plasticine-like substance.

14. Possession is a state of affairs which may be proven by activity and by circumstance; *Charleton & McDermott's Criminal Law and Evidence* (2nd edition, Dublin, 2020) chapter 9 refers but is not here approved. Absent an admission, such as that claimed in this case,

since possession may be by various degrees of control over an object, of which the accused is aware, proof of possession is by inference from circumstances as to the relationship between the item and the accused and his or her control over that item. The case most often cited as a standard authority is the judgment of Davitt P on a case stated in the High Court in *Minister for Posts & Telegraphs v Campbell* [1966] IR 69, 73 that:

person cannot ... be properly said to keep or have possession of an article unless he has control of it either personally or by someone else. He cannot be said to have actual possession of it unless he personally can exercise physical control over it; and he cannot be said to have constructive possession of it unless it is in the actual possession of some other person over whom he has control so that it would be available to him if and when he wanted it.

15. In conformity with that analysis, in *The People (DPP) v Tanner* [2006] IECCA 151, p 5-6, Kearns J explained that possession requires “some degree of control ... either personally, through leaving it with in a particular place, or through ordering it to be delivered somewhere or by someone, or having power to direct another person as to how the object should be managed or controlled on the accused’s behalf.” Do the circumstances demonstrate the proof by the prosecution of such control or are they consistent with control? This is often the question at issue. The second issue is awareness. Here is the object: control is established. But, since something may be slipped into a letterbox mistakenly, when meant to be delivered to someone else, or a malicious person might seek to destroy another by planting something on them, the mental element of intention to control that object with whatever degree of awareness which the definition of the offence requires is the second element. The internal element, meaning what was going on in the accused’s mind, may be knowledge or reasonable suspicion or suspicion of what the object is. That depends on the definition.

16. For this case, in these drug offences, the mental element is defined by the defence section, which is s 29 of the Misuse of Drugs Act 1977. This defines the mental element by placing the burden on an accused of raising a reasonable doubt where the prosecution prove that he or she was in possession, of showing they did not suspect that the package/fire extinguisher/load of fruit/whatever it might be in whatever presentation, was a controlled drug:

(1) In any proceedings for an offence under this Act 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 only of proving that he neither knew nor suspected nor had reason to suspect that the substance, product or preparation in question was the particular controlled drug alleged.

(2) In any such proceedings in which it is proved that the defendant had in his possession a controlled drug, or a forged prescription, or a duly issued prescription altered with intent to deceive, it shall be a defence to prove that—

(a) he did not know and had no reasonable grounds for suspecting—

(i) that what he had in his possession was a controlled drug or such a prescription, as may be appropriate, or

(ii) that he was in possession of a controlled drug or such a prescription, as may be appropriate, or

(b) he believed the substance, product or preparation to be a controlled drug, or a controlled drug of a particular class or description, and that, if the substance, product or preparation had in fact been that controlled drug or a controlled drug of that class or description, he would not at the material time have been committing an offence under this Act, or

(c) knowing or suspecting it to be such a drug or prescription, he took or retained possession of it for the purpose of—

(i) preventing another from committing or continuing to commit an offence in relation to the drug or document, as may be appropriate, or

(ii) delivering it into the custody of a person lawfully entitled to take custody of it,

and that as soon as practicable he took all such steps as were reasonably open to him to destroy the drug or document or to deliver it into the custody of such a person.

17. At common law possession offences are almost unknown. Thus, all depends on the statutory definition. Under the 1977 Act, suspicion, or reason to suspect, suffices. This is an ordinary word. Once a person thinks an item may be drugs, they have no business accepting control over it, or if they have an item and that idea occurs to them, illegal possession occurs on their continuing with control. Once the object is proven to be contraband as defined and that there was intentional control by the accused over it, the burden shifts. In *The People (DPP) v Smyth and Smyth* [2010] 3 IR 688, [22-23] the Court of Criminal Appeal decided that the legal burden, which is to be differentiated from a mere evidential burden, is that the accused must demonstrate to the jury, either by calling evidence or by pointing to some evidence on the prosecution case, whereby the accused proposes to prove that it is to be doubted that he or she knew or suspected or had reason to suspect that the object or package was, or contained, a controlled drug.

The warning

18. Protection against mistaken evidence about what the accused had said against interest, procedures for properly recording confessions and forms of treatment that militate against illegal inducements to confess, oppression of suspects, and tricks which might undermine those high on the Gudjonsson suggestibility index, have grown over time. Disquiet in the 1980s over contested confessions and instances of accusations of oppression during the interrogation of suspects led in 1989 to the Report of the Committee to Enquire into Certain Aspects of Criminal Procedure, under the chairmanship of Judge Frank Martin SC, which was published in 1990. Among the recommendations were for the electronic recording of interviews and for custody records to be kept in bound volumes. Other recommendations concerned the possibility of reviewing convictions where new evidence came to light. That report was referenced on the appeal in *The People (DPP) v Quilligan and O'Reilly (No 3)* [1993] 2 IR 305. In the context of extremely detailed narrative confessions to murder, the Supreme Court decided not to place any obligation to warn a jury that a confession was not corroborated. The majority, however, emphasised the role of the jury in assessing what weight might be attached to a confession in the particular circumstances of its making. Finlay CJ for the majority stated at 333-4:

A jury is not bound by a finding of fact made by a trial judge in the course of his ruling on the admissibility of a statement such as, for example, a rejection by him of an allegation that a member of the Garda Síochána assaulted the accused whilst in his custody and thus obtained the statement from him. It must be made clear, whether by specific warning or by a positive direction to a jury that their function in having to be satisfied beyond a reasonable doubt as to the truth of a voluntary statement admitted into evidence before them necessarily involves an examination by them of allegations of any description which are relevant to the question as to whether the statement was truly voluntarily given or not. It should be made clear to them that if they have a reasonable doubt as to whether a statement was truly voluntarily given that that would form a very solid ground for also entertaining a reasonable doubt as to whether it was true.

19. Dissenting, holding that there should be a warning requirement in the case of an uncorroborated confession, McCarthy J emphasised that the jury should look at external facts to determine whether any admission of guilt was to be accepted as reliable. At 344:

There is no difficulty as to the direction as to corroboration itself – this may be found in a variety of other evidence, including, as in this case, the fact that a significant detail in the admission was born out by subsequent discovery at the instance of the person in detention. Corroboration does not depend upon the evidence of other gardaí, one should look elsewhere. ... [Once a statement has been admitted by the trial judge into evidence, that], however, does not in any sense preclude the jury, when evaluating the admission, from looking for support or corroborative evidence in a material particular from outside the admission itself.

20. This is part of the background to the Criminal Procedure Act 1993 which in s 10 provides for a warning but states that the form of the warning “any particular form of words” being unnecessary is for the trial judge:

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

(2) It shall not be necessary for a judge to use any particular form of words under this section.

Confessions and admissions

21. A confession is any admission of guilt. There is no distinction, as was sought to be argued on this appeal, as between an admission and a confession. While a tape recorded admission may be thought worthy of more weight and while a written and signed document may be differentiated from a remark, where what is said admits a crime, that is a confession. It is also just as easily and correctly described as an admission. As an exception to the rule against hearsay, whereby a confession/admission is admissible, as a matter of principle, that exception is there because of the inherent reliability of stating something against one’s interest. In civil and in criminal cases such declarations are admissible. They may take many forms: a letter admitting a breach of contract or a murder; telling a fellow inmate in a prison cell that you raped the victim; feeling the pull of conscience leading to a public revelation years after a notorious crime; confessing

generally to relatives on your death bed, or while very ill, as to some wrong in the past; and, most familiarly, getting around after a number of police interviews to giving a narrative as to how you committed the crime for which you were arrested.

22. This last setting is subject to multiple safeguards: including warnings against self-incrimination, the presence of a solicitor during sessions, private legal advice prior to questioning, the keeping of custody records, regulations against oppressive questioning or lengthy sessions or interviews through the night, the video-recording of interviews and the keeping of a written record, to which a person has confessed may give his written assent. The development of this set of safeguards is set out in the judgment of Charleton J in *The People (DPP) v Doyle* [2017] IESC 1 [2018] 1 IR 1 and need not be repeated here. And, in addition, there is a general requirement of fairness overall in questioning a suspect though with the development of specific rules, those mentioned, this rather amorphous concept has receded.

23. In the *Power* case the point in contention was whether s 10 of the 1993 Act was to be read as requiring that the making of the confession be corroborated or whether the admission constituting the confession, the actual statement by the accused of what he or she had done wrong, needed to be corroborated. The issue there was not the actual making of the confession but what was confessed to. The interview was recorded. The prosecution posited that the making, or non-making, of a confession is not covered by s 10. That is wrong. The section cannot be read that narrowly, nor can O'Malley J's judgment. What was said can be important. Important too is: does the confession stand without support that the accused committed the crime as he or she claims to have done in a disputed confession? A side issue arose in that case whereby focus was sought to be directed at any aspect of a written confession. This contention by the prosecution in the *Power* case was unsupportable. Like the confession/admission distinction argued on this appeal it misunderstands the nature of a declaration against interest as the essence of the admissible exception to the hearsay rule. Hence, it does not corroborate a confession that when the accused says "I am 40 years of age" a birth certificate is produced. That has nothing to do with the operative text admitting to a crime. Nor does it corroborate, in the sense that s 10 requires, that two or three policemen testify to an alleged admission, usually contested because it is not recorded electronically but merely written down on "a half sheet". What matters, rather, is the admission: "I became furious and picked up a knife and stabbed the victim multiple times". That is clearly what the 1993 Act is directed at.

24. It is the admission that the trial judge is looking at and whether there is any evidence apart from the accused's own admission against interest; the confession. There is such evidence where, for instance, a fingerprint of the suspect who confesses to a burglary is found at the scene of a burglary. There is such evidence where a person confesses to sexual violence and the victim gives evidence against that individual of rape. There is such evidence when a person confesses to stabbing the victim to death and another witness was present and saw the event.

25. Also in the *Power* case was an argument that in every single case a warning must be given where any admission against interest is in issue in a trial because it was for the jury to decide if a particular piece of evidence was in fact such as to tend to prove the commission by the accused of the crime, following on a ruling by the trial judge that such evidence might as a matter of law be properly regarded as corroboration. That contention was rejected by O'Malley J. The procedure for corroboration, for instance in

an accomplice warning case, is well known. At the close of the case, absent the jury, counsel may address the judge as to what item or items of evidence may legally be corroboration; the fingerprint, the DNA, the distress of the victim, the finding of something where only being subjected to the crime would give the victim knowledge of that item. The judge rules that a piece or pieces of evidence may tend, if the jury take that view, to demonstrate the accused's participation in the crime, or that the accused was the sole perpetrator. Speeches by counsel may reference this evidence and make argument as to whatever the judge has ruled may legally be corroboration. The judge tells the jury about the evidence and suggests that they assess if they accept it beyond reasonable doubt as tending, not necessarily proving on its own, to demonstrate that the accused committed the crime. Then, the other evidence, that to be corroborated, the accomplice's evidence for instance, is considered together with any corroboration accepted. If no corroboration is accepted, the warning about the dangers of uncorroborated evidence applies. In either case, with or without corroboration, on the overall state of the evidence, the prosecution must prove the case beyond reasonable doubt: but with merely an uncorroborated accomplice testifying, there are dangers in proceeding to a conviction, though the jury may do so bearing in mind the warning; see *The People (DPP) v Fitzgerald* [2018] IESC 58.

26. The decision in *Power* construed the 1993 Act as leaving to the trial judge the decision as to whether or not to issue a warning to the jury. The judge had to decide, not the jury, where "evidence is given of a confession made by" the accused that the operative "evidence is not corroborated", which is the statement against interest admitting to the crime. If, on the state of the evidence, the admission against interest by the accused is not supported by other evidence tending to demonstrate his or her involvement in the crime "the judge shall advise the jury to have due regard to the absence of corroboration." This is a legal analysis for the trial judge: there is a confession but is there other evidence apart from the confession tending to demonstrate, and which on a legal analysis by the judge does tend to show the accused's commission of the crime? That is the test. It is only when there is no such evidence that the judge will tell the jury: there is a confession here but have regard to the absence of other evidence tending to demonstrate the involvement of the accused in the crime in deciding whether the accused is proven by the prosecution evidence to be guilty.

27. Some quotations from the judgment of O'Malley J demonstrate the nature of the concerns. The point of such a trial is that the case will be about a contested confession which is not corroborated. If the confession is not contested, it is hard to see how the accused would not plead guilty, but that is still his or her right. If a confession, meaning an admission to the commission of the crime, is corroborated, there does not have to be any drawing the attention of the jury to the fact that it is not corroborated. As to safeguards, even with electronic recording, issues with confessions may still arise:

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

81. The introduction of audio-visual recording of garda interviews has been of very significant assistance in dealing with allegations by accused persons that alleged admissions were fabricated. It has not, however, entirely removed concerns about the reliability of confessions. It remains possible that a confession may be the product of improper pressure or inducement. Indeed, it may be a fabrication on the part of the suspect, intended perhaps to shield another person or even simply because the suspect is a highly suggestible person. While unusual, the latter scenario is not unknown in this jurisdiction –for a relatively recent example see the insightful report on the case of Dean Lyons, by Mr. George Birmingham SC (now President of the Court of Appeal).

82. It may be helpful to consider the issues arising in this case using, in the first instance, non-technical language. The question for a jury, in relation to a confession, is whether it can be relied upon as a true admission to the commission of the offence. In that context, I do not see it as necessarily helpful for a trial judge to distinguish between truth and reliability, since both are integral to the decision to be made by the jury – if the jury feels that they can rely upon the confession as truthful, and are satisfied beyond reasonable doubt that it is in fact true, they may convict. If they are left with a reasonable doubt as to whether they can or cannot rely upon it, then in the absence of other sufficiently probative evidence of guilt they must acquit. Reliability is therefore, in this context, intrinsically bound up with truth. As Finlay C.J. said in *Quilligan (No. 3)*, doubt about whether the confession was the product of assault, threats, inducement or harassment is a very solid ground for doubt about its truth. Similarly, doubt about whether it was actually made by the accused, or about the reasons why it was made, would mean that it could not be relied upon to be true.

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

28. O'Malley J then returned to the purpose of the section:

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

87. Secondly, to apply the section in every case where a confession is part of the prosecution case has the potential to cause significant confusion for juries. It could have the radical and, in my view, unintended consequence that evidence that is clearly probative of guilt in its own right (such as robust forensic evidence, eyewitness evidence or circumstantial evidence) could be relegated to the role of

supporting evidence. Such evidence might not even be accepted as corroboration in some cases, if it does not come from a witness who is independent from the gardaí who say that the accused confessed. To take one simple example, gardaí who witness an offence may arrest the suspect and receive a confession from him. It would be absurd, and confusing, for the jury to have to treat the confession as uncorroborated simply because the eyewitness evidence comes from the same gardaí. On the other hand, it would be even more confusing if they were instructed to assess the evidence twice – once as potential corroboration and once in its own right.

88. I appreciate that traditionally, in other categories of cases where corroboration may be an issue, the judge does not determine whether any corroboration exists. He or she has to decide only whether the threshold criteria are met – for example, whether a particular witness can or cannot be treated by the jury as an accomplice, or whether the circumstances of a trial for a sexual offence are such that a discretionary corroboration warning should be given. Once that decision is made, it is clearly not for the judge to determine whether any part of the evidence does in fact amount to corroborative evidence. That is a matter for the jury, subject to appropriate guidance as to what evidence can, or cannot, be taken as corroborative if accepted by them.

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

29. Helpful in this context, given the argument by the prosecution that this confession statement alleged against the accused about the drugs was corroborated, is O'Malley J's reaffirmation of the traditional analysis of what corroboration is. That corroboration does not in itself have to prove a crime beyond reasonable doubt, though it might, and that consideration of corroboration and whether to accept it should come before an overall consideration of the evidence and the testimony in respect of which a warning is given; as in *Fitzgerald*. O'Malley J stated:

92. In *The People (Director of Public Prosecutions) v. Gilligan* [2006] 1 I.R. 107 this Court was concerned with the necessity to seek corroboration of evidence given by witnesses who were participating in a State witness protection programme. The Court found that the rationale behind the common law rule requiring a warning before acting on the uncorroborated evidence of an accomplice applied equally to such witnesses. The judgment (delivered by Denham J.) considers the nature of the corroboration required to forestall the necessity for a warning. Citing *R. v. Baskerville* [1916] 2 K.B. 658 and *Attorney General v. Levison* [1932] I.R. 158, Denham J. laid out the three strands to corroborative evidence.

93. Firstly, it must tend to implicate the accused in the crime. As the Court of Criminal Appeal subsequently said in *The People (Director of Public Prosecutions) v. Meehan* [2006] 3 I.R. 468, this leaves a margin of discretion to the court. It is necessary for the trial judge to determine what may constitute corroboration on

the facts of the case. On the evidence in Meehan, the Court described some of the evidence in issue as relevant, independent and probative evidence that could be acted upon as “confirmatory and supportive” of the account offered by a witness who was an accomplice.

94. Secondly, it must be independent of the evidence that makes corroboration desirable. However, on this aspect Denham J. referred to the following passage from the judgment of Lord Reid in *R. v. Kilbourne* [1973] A.C. 729: “There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it.”

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

96. I think it bears emphasising here that the evidence offered as corroboration does not, itself, have to directly prove that the accused person committed the offence.

97. Thirdly, corroboration should be credible, and should be supporting evidence that has a degree of credibility. Here, the judgment of Lord Morris in *R. v. Hester* [1973] A.C. 296 was cited by Denham J: “The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence will only fulfil its role if it itself is completely credible.”

98. Denham J. agreed that this was a matter of common sense, but stressed that corroboration was not a “two-stage” process where the credibility of a witness was assessed before determining whether there was corroboration. The evidence of an accomplice did not need to be considered separately, and categorised, prior to an analysis of corroboration. Rather, the evidence that is the subject of the warning should be considered in the light of all of the evidence in the case, to see how it fits in with that evidence. She adopted the approach taken by Lord Bridge in *Attorney General of Hong Kong v. Wong Muk Ping* [1987] 1 A.C. 501, where he said: “Where the prosecution relies on the evidence of an accomplice and where...the independent evidence is not by itself sufficient to establish guilt, it will have become obvious to the jury in the course of the trial that the credibility of the witness is at the heart of the matter and that they can only convict if they believe him. The accomplice will inevitably have been cross-examined to suggest that his evidence is untrue. The jury will have been duly warned of the danger of relying on his evidence without corroboration. Their Lordships can see no sense in the proposition that the jury should be invited, in effect, to reject his evidence without first considering what, if any, support it derives from other evidence capable of providing corroboration.”

99. Denham J. concluded, on this aspect, by adopting the formulation of Maguire J. in *The People (Attorney General) v. Trayers* [1956] I.R. 110 and Sullivan C.J. in *The People (Attorney General) v. Williams* [1940] I.R. 195 – what is to be explained to the jury is that corroboration means independent evidence of material circumstances tending to implicate the accused in the crime with which he was charged. It may be found in circumstantial evidence. It might be, in a given case, that not every piece of circumstantial evidence implicates the accused but that the collection of circumstantial evidence as a whole tends to do so. It may be noted that the authorities use words such as “support” or “confirmation” in referring to such evidence.

30. A judge’s direction to a jury is not mechanical or formulaic and is not to be hidebound by a requirement to use particular forms of words. If a confession is not corroborated, meaning the part that is an admission against interest of involvement in or sole perpetration of a crime, then the legislature has determined that attention be drawn by the trial judge to this in the form of the need to look at that issue. As O’Malley J stated:

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

101. As I said earlier, the judge’s charge to the jury is an exercise in communication. It should, therefore, avoid the use of technical language where possible, and where that is not possible clear explanations must be given that get across to the jury the nature of the task that is before them. In that context, I can see no difficulty with the approach of the trial judge in this case. She decided, in my view correctly, that this case was one in which a warning was appropriate. She informed the jury, correctly, that the case stood or fell on the confession. She gave an appropriately worded explanation of the need to examine the other evidence, and in particular the evidence about the car, to see whether it confirmed the truth and reliability of the confession but made it clear that the jury were entitled to convict in any event provided they were satisfied beyond reasonable doubt that the confession was true.

This case

31. These lengthy extracts have proven necessary because of the misunderstanding that have been floated on this appeal. Section 10 applies to all admissions against interest. Section 10 requires the judge to draw attention to such admissions where there is not other evidence implicating the accused in the crime, as assessed by the trial judge, pointing to the absence of such corroboration and inviting the jury to have due regard to

that. A basic point. If a confession is not contested at trial, then surely the accused will have pleaded guilty? If a confession is contested at trial, the judge must look and see what other evidence of substance is in the case: does it corroborate the accused's commission of the crime? If it does, no direction under s 10 is needed. If not, then apply the section.

32. What about here? The prosecution had to prove control by the accused over the fire extinguisher. It is argued that the fire extinguisher in the cab proves possession and that thereby this is evidence tending to demonstrate, but not necessarily prove in itself beyond all reasonable doubt, that the accused possessed the drugs. The argument is circular: there are drugs in the fire extinguisher, the accused referred to drugs being found, therefore the proof of the crime, which is the possession, a state of affairs which the prosecution must prove, is proved by the admission and corroborated by the essential proof of the crime.

33. That is not the correct approach. Firstly, the admission is contested. The issue for the jury is: did the admission happen, if admitted into evidence as a matter of law, and if so in what form was the admission, with or without the definite article, what does it mean, and how reliable might it be given the circumstances and only one person asserting to having heard it? Section 26 of the 1977 Act does not establish proof of possession. It requires the prosecution to prove the circumstances whereby the control over the item is established. In reality, the alleged admission is part of that proof and would not have been adduced in evidence otherwise.

34. Since, on no proper analysis could the trial judge say that the prosecution had proven not an individual item of evidence as corroboration, but the entire case, the admission alleged was not corroborated but was in fact the central allegedly incriminating fact. Added to that is the contest over the text and, most fundamentally, over the making of the admission. There should, in consequence, have been a s 10 direction in a form chosen by the trial judge.

The Judges' Rules

35. In a quasi-legislative context are the Judges' Rules. These are not rules of law but guidelines designed to protect people against mistaken evidence; prevent them from being unaware of their right to contest in a timely fashion what is later ascribed to them; and to draw attention to the fact that no matter what the apparent circumstances of the authority of the State being exercised over them, a suspect in detention, or one who the authorities have made up their mind to charge, does not have to answer questions. Back when formulated, over one hundred years ago, there were no electronic recordings, merely pen and paper but the Rules require the use of what was then the most up-to-date safeguards. Nothing stops an officer of the law conducting enquiries. Citizens don't have to answer their questions. When in custody or where a charge is decided on outside custody, there has to be a self-incrimination warning, but not when a potential witness or potential suspect is at liberty. When, or if, the suspect says something, there has to be a warning first, pen and paper must be used and the suspect given a chance to affirm or deny an admission against interest. Reading over the confession of a co-suspect, covered by number 8, which implicates another, the suspect to whom it is read does not make that other person's confession admissible against the person to whom it is read. It is all pretty simple:

1. When a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons, whether accused or not, from whom he thinks that useful information may be obtained.
 2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such a person before asking him any questions, or any further questions as the case may be.
 3. Persons in custody should not be questioned without the usual caution being first administered.
 4. If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words 'to be given in evidence'.
 5. The caution to be administered to a prisoner when he is formally charged should therefore be in the following words: 'Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence'. Care should be taken to avoid the suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.
 6. A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely because no caution has been given, but in such a case he should be cautioned as soon as possible.
 7. A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to that individual of what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.
 8. When two or more persons are charged with the same offence and their statements are taken separately, the police should not read these statements to the other persons charged, but each of such persons should be given by the police a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply the usual caution should be administered.
 9. Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.
36. Breaches are not lightly excused. But this is a matter of judicial assessment as to the circumstances. This was set out by O'Higgins CJ giving the judgment of the Court of Criminal Appeal in *The People (DPP) v Farrell* [1978] IR 13, 21 and requires reiteration:

The Judges' Rules are not rules of law. They are rules for the guidance of persons taking statements. However, they have stood up to the test of time and will be departed from at peril. In very rare cases, such as *R v Mills and Lemmon* [1947] KB 297 a statement taken in breach may be admitted in evidence but only in very exceptional circumstances. Where however, there is a breach of the

Judges' Rules, such as a failure to make a written record of the alleged confession, or a failure to invite the accused to accept or reject the statements, each of such breaches calls for adequate explanation. The breaches and the explanations (if any) together with the entire circumstances of the case are matters to be taken into consideration by the trial judge before exercising his judicial discretion as to whether or not he will admit such statement in evidence.

37. The statement of the case circulated to the parties prior to the hearing sought clarification on a number of legal issues. The relevant question here put by the Court was: "The Judges' Rules do not appear to apply to temporary detentions for searches; or do they?" To this the accused responded thus:

- (a) The Court raises the issue that the Judge's Rules do not appear to apply to temporary detentions for searches? It is submitted by the Applicant that they do.
- (b) The Judge's Rules date back to 1912, pre-dating our Constitution and the European Convention on Human Rights. They also pre-date later powers given to An Garda Síochána to stop, detain and search people.
- (c) Since the decision in *Gormley v White* [2014] IESC 17, it can be argued that a suspect is now entitled to access to a lawyer from the commencement of his detention. Clarke J. in *Gormley* considered it clear that:-

"the protection against self-incrimination which is guaranteed by the European Convention on Human Rights is breached where a person makes an incriminating statement which forms a substantial part of the evidence leading to their conviction in circumstances where the relevant person does not have the benefit of legal advice at the time in question and where they have not waived any entitlement to legal advice."

- (d) The Judges' Rules were formulated for the protection of individuals who were subjected to questions by a police officer investigating a crime. It would appear that rule 3 must apply to persons the subject of temporary detentions for searches.
- (e) It is clear that the Applicant was detained while his truck was searched. The provision allowing for his detention post-dates the formulation of the Judge's Rules, and therefore such detention must equate to the word "custody" as contained in rule 3 of the Judge's Rules. The Applicant therefore was in custody and therefore he should not have been questioned, or invited to view what was found, before first being administered with a caution. The cases of *Breen* and *O'Loughlin* [1979] I.R. 85 establish that overall principles of fairness act in conjunction with but independently of the requirements contained in the Judge's Rules.

38. The prosecution replied thus:

There is no authority directly on point. In *Buckley v Convening Authority* [1998] 2 IR 454 the Court of Criminal Appeal found that the "enforced presence" of a soldier as part of an investigation by the military police amounted to de facto custody for the purposes of Rule 3. Each case must be considered in its own circumstances. However, in principle there is no reason why the Judges' Rules do not apply to the type of temporary detention for search purposes that is envisaged by section 2 of the Customs and Excise (Miscellaneous Provisions) Act, 1988 or sections 23 or 26 of the Misuse of Drugs Act, 1977. Generally such

a search is limited to a physical examination of a person or a vehicle and detailed questioning would not be appropriate. If drugs or another prohibited item is found that may lead to a change in circumstances in which it would be appropriate to caution the person. However, just because a person makes a comment prior to being cautioned does not mean it should be automatically excluded where the trial judge is satisfied that the comment is one that was made voluntarily. After all, Rule 3 enjoins against the “questioning” of a suspect who is in custody and who has not been cautioned. This is also covered by Rules 2 and 6.

Whether a particular rule applies must depend on a number of factors such as the nature of the investigation and the extent of the information available to the gardaí at the time – is it clear that the accused is reasonably suspected of having committed an offence? It will also depend on how the investigation is being progressed – are the gardaí or the officers of customs actively questioning the accused in relation to a specific offence or are the enquiries of a more general nature. In this regard the Respondent relies on the decision in *Director of Public Prosecutions v Baxter* [2021] IEHC 256.

39. Both submissions are helpful and to the point. There was in reality a form of custody here. The Judges’ Rules were formulated for the purpose of ameliorating the pressure of custody, what in other circumstances would be, without legal authorisation and reasonable suspicion, the tort of false imprisonment, and to introduce a balance of fairness to an unrepresented individual. This accused did not then have legal advice but that is not to rule that legal advice is required once there is any temporary detention for search, a necessary aspect of the rule of law. Rather, the principles were developed in relation to custody and the exercise of authority. By requiring a warning as to self-incrimination, a suspect in custody knows what he or she is doing and by engaging a notebook and pen and repeating what is allegedly said, a good practice is introduced of verification either of what was said or the establishment at the earliest practicable opportunity of a contest.

40. As the Judges’ Rules state, sometimes circumstances may be rushed but this was a planned operation. A caution could have been given from the outset where the efficient work engaged in had to encompass a detention, a search and a confrontation and the taking down of any response. Also, it is very hard to see how, once drugs were found, the officers could not have made up their mind that there had to be a charge. If a caution was omitted from early on, it could have been given on the way over to view what was found. A note in early course was essential and the accused was entitled to be warned as to what he may have said and given a chance to confront those words and change the sense or qualify or deny.

Result and summary

41. To summarise. Firstly, s 10 of the Criminal Procedure Act 1993 applies where there is a disputed confession and the issue at trial is whether it was made by the accused or not. Where a confession is disputed and where there is no other evidence tending to demonstrate the involvement of the accused in the commission of the offence, a trial judge should draw attention to the confession and direct the jury as to the absence of such support. Here the issue was possession. The support could not consist of the very issue which the prosecution were required to prove; namely the crime alleged. Secondly, the Judges’ Rules apply where a person is detained. Detention for the purpose of a

search, a general power under s 2 of the Customs and Excise (Miscellaneous Provisions) Act 1988 and under s 23 of the Misuse of Drugs Act 1977 as amended, constitute vital police powers exercisable on a reasonable suspicion. There are other ample police powers as well. These powers enable the gardaí to observe a suspicious situation and to engage in a temporary detention where a suspicion is reasonable; *CRH plc v Competition & Consumer Protection Commission* [2018] 1 IR 521 at [236] where it is explained that a reasonable suspicion is not an unsupported hunch nor is it bound by the rules of evidence or of hearsay, but is the presence of some ground for rationally thinking a person may be involved in an offence. Detention for a search, where people are asked questions, and situations where an officer of the law has decided to charge a suspect with an offence, constitute detention within the meaning of the Judges' Rules. A caution is appropriate if asking questions; noting the answer is appropriate; reading over the answer as soon as practicable is appropriate. Breaches may be excused, or mis-steps corrected, as the Judges' Rules themselves indicate within the text. As to how the trial judge may approach the exercise of discretion in this regard is for the trial judge. The law has been clarified. Thirdly, a wider issue as to spontaneous admissions has been raised but is properly for another case since these points decide this result.

42. It has not been appropriate, since the order is for a retrial, to refer to any evidence in detail. As to what evidence may be sufficient to establish possession will be a matter for the trial judge to rule on and for the jury to assess. As to how any alleged admission is dealt with is to be similarly approached. There should be a retrial and at trial an appropriate use of s 10 of the 1993 Act.