APPROVED JUDGMENT

NO REDACTION NEEDED

THE COURT OF APPEAL

[2024] IECA 274

Record No: 211/2021

Edwards J.

Kennedy J.

Burns J.

Between/

THE PEOPLE

(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

GERARD HARRINGTON

Appellant

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 16th of May 2024.

Introduction

1. On the 26th of July 2021, Mr. Gerard Harrington (i.e., "the appellant") was convicted by a jury in the Circuit Criminal Court for the Midlands Circuit, sitting in Tullamore, of one count of making a false report or statement tending to give rise to apprehension for the safety of persons or property, contrary to s. 12 of the Criminal Law Act 1976 (i.e., "the Act of 1976"). Having been duly convicted of the said offence, the Circuit Criminal Court passed

sentence on the appellant on the 20th of October 2021 whereupon a fine of €6,500.00 was imposed.

2. The appellant by Notice of Appeal dated the 9th of November 2021 has appealed against both his conviction and sentence. The present judgment deals with the conviction module of the said appeal.

Circumstances of the Case

3. Although the appellant has filed written submissions running to 60 pages, those submissions do not provide a convenient summary of the evidence adduced at trial. Accordingly, we adopt for the purposes of this judgment the summary of the evidence contained in the respondent's submissions, which seems to us from reading the transcript to be a fair one and to which counsel for the appellant has raised no objection.

4. The appellant, on Tuesday the 6th of October 2015, attended Boyle Garda station where he met with Garda Catriona McGrath. He reported to her that he was missing cattle. She made notes of this initial conversation to which she referred during her evidence. He went on to report last seeing them on the previous Saturday evening (being the 3rd of October 2015), giving a description of the missing cattle, and reporting an awareness of a collision between a Ms. Ann Keaveney's car and a black bull, which he asserted could not be his, on the previous Thursday (being the 1st of October 2015). He reported searching for them since discovering them missing on Sunday the 4th of October 2015 and canvassing neighbors to no avail.

5. It was arranged that the appellant would return to the station with further details in relation to the cattle's tag numbers and make a statement. He did so at approximately 5 pm on the same date and made the statement to Garda McGrath which was the subject matter of the charge. This was exhibited and read into evidence. In it, he stated that ten of his cattle were

missing when he checked them on the evening of Sunday the 4th of October 2015, giving details of the breed, tag number and value of each.

6. After taking the statement, Garda McGrath made enquiries and received information which led her to go to a shed at Breedogue, County Roscommon at approximately 6.30 pm on the same date. She entered the shed and found a number of cattle. She had brought the appellant's original statement with her and, by comparing the tag numbers on the statement with the tag numbers on the cattle, concluded that six of the adult cattle reported by the appellant as being missing were present, as well as an untagged calf which matched the description of a calf reported missing.

7. Garda McGrath established the owner of the shed to be a Ms. Mary McCrann and from that made contact with her two sons, Mr. Padraig McCrann and Mr. Kenneth Drury, taking statements from them later that same evening. Padraig McCrann gave evidence that he was a cattle farmer with land adjoining the appellant's land. He became aware, on Thursday the 1st of October 2015, of cattle breaking out of his land onto the road. Mr. Drury, who also gave evidence went looking for the cattle but was unable to locate them, given the time of night and foggy conditions. They both went out the following morning, the 2nd of October 2015, and located their cattle in a neighbour's field, mixed with between seven and ten of the appellant's cattle. Both were in a position to recognise the appellant's cattle, as they had trespassed on their land on previous occasions.

8. They gathered the cattle and brought them to their shed in Breedogue the following day, Saturday the 3rd of October 2015. Prior to that, Mr. McCrann gave evidence of meeting the appellant on Friday the 2nd of October 2015, during the course of which the appellant became aware of the location of cattle belonging to him and the intent to bring them to the shed in Breedogue. He also gave evidence that he rang the appellant on Monday the 5th of October 2015 asking when the appellant intended to collect his cattle. Additionally, Mr.

McCrann gave evidence of visiting the shed after the cattle had been moved there and observing two buckets present which did not belong to him, and observed the cattle to have been moved to different pens within the shed.

9. On the basis of this information – i.e. the statement of Mr. McCrann to the effect that the appellant had been made aware of the location of at least some of his cattle prior to the making of his statement – Garda McGrath made contact with the appellant on the 8th of October 2015 and invited him to attend Boyle Garda station.

10. On meeting the appellant on foot of that invitation, Garda McGrath advised the appellant that she suspected him of knowingly making a false statement, cautioned him and explained to him that she proposed asking him questions and noting his answers if he was agreeable. The appellant was cautioned and Garda McGrath then conducted a voluntary cautioned interview with him.

11. In it, the appellant, in essence, stood over the contents of his original statement and denied Mr. McCrann's account to the effect he was aware of the location of at least some of his cattle prior to making his statement.

12. The appellant called evidence from the following witnesses:

a. Mr. Frank Abbott, consultant engineer, in relation to photographs taken on the 5th of July 2017 of parts of the appellant's land and the shed at Breedogue;

b. Retired Detective Sergeant Noel Canning in relation to Garda McGrath's comment to him on the 3rd of October 2019 that this case should not have gone to trial, the failure of Garda McGrath to preserve buckets observed by Mr. McCrann in his shed, and the failure to obtain forensic samples from the collision between Ann Keaveney's car and the cow/bull she collided with;

c. Mr. John Anderson, scientist, in relation to the absence of traces of silage on the appellant's original handwritten statement; and

d. Dr. Orla Doherty, veterinary surgeon, in relation to the impossibility of Garda McGrath's account of correctly identifying tag numbers on the 6th of October 2015.

13. The appellant also testified himself at the trial and, in summary, gave the following evidence:

- He was a cattle farmer with 45 acres in Kingsland, County Roscommon;
- He checked his stock on the 1st, 2nd, 3rd and the morning of the 4th of October 2015. When he checked them on the evening of the 4th of October 2015, he noted only 8 of his 18 cattle present. He searched for his cattle at neighbouring farms on the 5th and 6th October 2015, before he attended with Garda McGrath on the afternoon of the 6th of October 2015 to make a report;
- He attended Garda McGrath later that day to make a statement and attended on the 8th of October 2015 when Garda McGrath told him of her suspicion and interviewed him;
- He, while working on his land, met Mr. McCrann on the 2nd of October 2015 and Mr. McCrann told the appellant that Ms. Keaveney collided with his bull (something which was not put to Mr. McCrann);
- He denied having any conversation with Mr. McCrann in relation to his cattle's presence in the shed in Breedogue prior to making a statement to Garda McGrath on the 6th of October 2015;
- He stood over the contents of his voluntary cautioned interview, it having been put to him during his examination-in-chief;
- The morning after being interviewed by Garda McGrath, he attended the shed on the 9th of October 2015, and located seven of his cattle.

14. There was evidence that a further two of the cattle that had been reported missing were subsequently located in December 2015, but that one animal was never located.

15. The defendant's case, per his counsel's closing speech to the jury, was that the case against him was largely circumstantial. Defence counsel beseeched the jury rhetorically, *"is my client to be hung on this circumstantial rope?"*. The case was made that the garda investigation had been deficient in various respects and that the evidence of the principal garda witness, Garda McGrath, should be regarded as unreliable and not credible in various respects. It was contended that the jury should find that the ingredients of the offencewere not proven beyond reasonable doubt, and they were invited to acquit. In particular, it was contended that the jury could not be satisfied that the statement made by the appellant was a falsehood, and that it tended to give rise to an apprehension as to the safety of persons or property,

16. After five days of trial, the jury retired and deliberated for a total of 2 hours and 19 minutes, before returning a unanimous verdict of guilty on the sole count on the indictment.

Notice of Appeal

17. By any standards the Notice of Appeal is prolix, running to 12-and-a-half A4 pages of single spaced type, and asserting eighty one (81) grounds of appeal in total, comprising an initial thirty four (34) grounds (designated "i" to "xxxvi" inclusive), then followed by an additional seven (7) grounds under the sub-heading *"In addition"* (designated 1(a) to 1(g) inclusive), and followed by yet another forty (40) grounds under a second sub heading *"More particularly"* (designated 1 to 40 inclusive).

18. Moreover, a great many of the complaints made in the numerous grounds of appeal pleaded appeared on their face to be patently misconceived, in that they related to matters that were not clearly raised with, or made the subject matter of any application to, the judge at trial, and in respect of which the respondent was understandably seeking to rely upon the

jurisprudence based on the *People (DPP) v Cronin (No 2)* [2006] 4 I.R. 329 (i.e., "*Cronin (No 2)*; and/or they pleaded alleged failures on the part of the trial judge to give the jury instructions which, had such instructions been issued, would have amounted to a usurpation of the jury's function.

19. Counsel for the appellant was confronted with these issues at the outset of the oral hearing, and in response indicated that he accepted the criticisms being made about not raising requisitions but had believed in reliance on *The People (DPP) v. Richard O'Carroll* [2004] IECCA 16 that he had not been obliged to do so, and said that certain grounds had been included in error. He said that in the circumstances he would only be pressing the initial 34 grounds (designated "i" to "xxxvi" inclusive). Moreover, he acknowledged that his client's complaints had been sensibly grouped into nine categories at paragraph 2 of the respondent's written submissions (the first eight of which relate to conviction appeal issues, and the ninth of which relates to sentence appeal issues) and indicated agreement with them being addressed in that way at the oral hearing.

20. The eight categories concerned with conviction appeal issues, relate to:

i. Rulings concerning the admissibility of all or parts of the accused's voluntary cautioned interview (grounds of appeal i. to vi.);

ii. Criticisms of/rulings related to prosecution counsel's cross-examination of the accused (grounds of appeal vii., and ix. to xi.);

iii. The refusal of applications to discharge the jury (grounds of appeal xii. to xiv.);

iv. That the weather was hot during the course of the trial (ground of appeal xv.);

v. The refused application for a direction (grounds of appeal xvi. to xix., and xxi.);

vi. That the learned trial judge ruled that chain of evidence was established (ground of appeal xx.);

vii. Criticisms of the learned trial Judge's charge to the jury (grounds of appeal xxii. to xxx., and xxxii.).

Rulings on the Admissibility of the Memorandum of Interview

21. The grounds which fall under this heading comprise grounds of appeal nos. i. to vi., inclusive. In essence, it is complained that the trial judge erred in ruling admissible in evidence a cautioned memorandum of interview with the appellant at Boyle Garda station dated the 8th of October 2015, as having not been obtained in breach of the Judges' Rules, and specifically Rules 2 and 7 respectively; and/or in breach of the investigating member's obligation under s. 4 of the Criminal Justice Act 1994 to arrest the appellant having reasonable cause to suspect the appellant of having committed the offence contrary to s. 12 of the Act of 1976, the effect of which, it is contended, was to deprive him of access to and the assistance of a solicitor. It is further complained under this heading that the trial judge incorrectly excised the cautioned memorandum of interview and admitted portions of it in evidence that had no probative value, and which prejudiced the appellant having regard to the manner in which the memorandum had been excised.

22. On the 8th of October 2015, at approximately 8 pm, Garda McGrath contacted the appellant by telephone and enquired with him whether he was looking for her. She asked if he would be amenable to attend at Boyle Garda Station to discuss his cattle, and he agreed. The appellant arrived at the station at approximately 10 pm. She initially spoke to him at the hatch and invited him to come inside, which he did. The pair went to the interview room where she explained to the appellant that further to the enquiries she had carried out on foot of his statement, the course of her investigation into the reportedly missing cattle had taken a change and that she now had reason to believe that she was investigating a complaint where

the appellant had made a false report to the gardaí in relation to his cattle. Garda McGrath stated that she then cautioned the appellant, following which she then outlined to him what she proposed to do, namely, to question him if he was agreeable and note his answers. She said that at no stage did she suggest to him that he was going to be under arrest; rather it was her perception that at all times that he knew that he was free to go at any stage. She then proceeded to take a cautioned memorandum of interview.

23. A copy of the cautioned memorandum of interview, dated the 8th of October 2015, was furnished to this Court in advance of the hearing of the appeal. For completeness, it is quoted in full herein:

"*You are being cautioned that you are not obliged to say anything unless you wish to do so but anything you do say will be taken down in writing and may be given in evidence.*

Q. Do you understand the caution?

A. I do

Q. I am informing you that I am investigating you making a false report to Gardaí last Tuesday 6th October and wasting Garda time.

A. I didn't make a false report to anyone.

Q. You reported a number of cattle missing to me. Is that correct?

A. Yes 10 altogether 9 and a calf.

Q. How many cattle have you in total.

A. 52 or 53.

Q. Were these cattle all on the same land?

A. No they were on 2 different farms.

Q. The last day you were in Boyle Garda Station. You told me you had no yard to enclose cattle on your land at Kingsland.

A. I have no yard to handle cattle. That's correct.

Q. Out of your 52/53 cattle how did you ascertain which 9/10 were missing.

A. There were 18 cattle on one block of land and there was only 8 on the Sunday evening.

Q. What time of evening did you check your livestock on Sunday?

A. It was half 7 or 8 it was getting dark.

Q. Did you check the tag numbers of the 8 that were remaining?

A. No. Because I know them by sight and it was getting dark.

Q. When you made the initial report at Boyle Garda Station at approx 1.30pm on Tuesday last you reported as per my Gardai notes, 4 charolais heifers and 3 Aberdeen angus heifers among the missing. When you made your statement that evening you reported 4 Aberdeen Angus heifers and 3 charolais. Can you explain this?

A. I think I said it correctly the first time. Are you sure your notes are saying that. I'm saying I said it 4 Angus three charolais heifers, there was a cow and a calf and a short horn cow.

Q. When is the last time you saw these cattle?

A. I saw them Saturday for definate.

Q. You missed them on Sunday. Is that correct.

A. Yes - well I didn't get a right count on them as it was late and it was dark. I had just finished bailing and wrapping and it was later than I hoped to get to see the stock.

Q. So when did you get a proper count of them to know what was missing?

A. It would have been Monday morning, Monday afternoon.

Q. Did you enquire with neighbours about your cattle?

A. I did.

Q. Many neighbours?

A. Anyone I met. Whoever I met on the Road.

Q. Was anyone able to tell you where your cattle were?

A. No.

Q. Do you want to name any of the neighbours that you told?

A. No I don't.

Q. Why is that?

A. I can but I just don't want to.

Q. Does your cattle go into neighbours land?

A. They can do. There's a river down the back, they can cross it. I've had other people's cattle in on my land as well.

Q. When you reported the cattle missing to me you requested that I find out the background details to an accident involving an animal the previous Thursday night.

A. I had heard about it. A woman from beside Breedogue church had been involved in an accident.

Q. Who told you that?

A. I just can't think of it at the minute.

Q. Did anybody tell you the previous Friday that your cattle had been out on the road the previous night Thursday?

A. No because they weren't out because I had checked them on the Thursday in the middle of the day/evening. It would have been earlier in the day on Thursday that I seen them as I got silage cut on the Thursday around 3pm or 4pm. I had seen my stock before he came.

Q. I put it to you on last Friday you were informed by Padraig McCrann that your cattle and his had got out the previous night loose on the road and were now in Johnny

Harrington's land. This conversation took place on McCrann's land when he met you and you were looking for your cattle.

A. No that didn't happen. He was looking for a bull. I was in the river doing a bit of fencing.

Q. Did he tell you where your cattle were?

A. I knew where my cattle were.

Q. Where were they?

A. They were on my land.

Q. I put it to you that you told Padraig McCrann to bring your stray cattle along with his off Johnny Harrington's land and put them into his sheds at Breedogue.

A. No I didn't tell him that.

Q. I put it to you that you visited at McCrann's shed on the Sunday and saw your cattle in it.

A. I went to McCrann's shed but when there I couldn't see into the shed it was all locked up.

Q. Why did you go to the shed?

A. I was looking for me cattle that were missing.

Q. What time was this?

A. It would have been late on.

Q. Did you leave feeding buckets at the shed?

A. No I don't think so.

Q. Did you see into the shed?

A. No I couldn't see into the shed, it was all locked up.

Q. Did you talk to anyone?

A. No I don't think so. I don't think I saw anyone.

Q. Did you swap the cattle in the pens they were in?

A. I couldn't get into the shed.

Q. Did you tell Padraig McCrann your cattle were missing?

A. I didn't meet Padraig McCrann to tell him my cattle were missing, when I was talking to him on the Friday he was looking for his bull.

Q. I put it to you that Padraig McCrann rang you on Monday and asked you how long more you were going to leave your cattle in his shed and that you abused him verbally.

A. I didn't say any of that.

Q. Did Padraig McCrann tell you about the accident on the road with Anne Keaveney's car the previous Thursday night at this stage?

A. I already knew about the accident I think.

Q. Did Padraig McCrann tell you should pay for half the damage to Anne Keaveney's car as it was unclear whether it was his animal or yours that had caused the damage?

A. In that phone call all he was talking about was fences and thieving and my talk to him about fencing and thieving was that there was several of his cows and calves in with my heard for most of the summer.

Q. Was that why you were mad with him for not giving your cattle silage.

A. I wasn't mad with him about that I was mad that he was saying it was my stock that was thieving with him when it was the other way around all summer.

Q. Have you been to McCrann's shed since?

A. No the place was locked up so there was nothing to see.

Q. Did you go back another time to see if it was open again?

A. No I haven't been back.

Q. I put it to you, that from Garda enquiries I went to McCrann's and I saw your cattle inside in it.

A. Good that's good news.

Q. Are you surprised?

A. Yes I am yes.

Q. Will you be taking them back out of the shed?

A. If that's ok, sure.

Q. How do you think they got in there?

A. Somebody put them in there.

Q. Who do you think put them in there.

A. I assume some of the McCranns.

Q. I put it to you that I've already asked you about you requesting Padraig McCrann to put them in there when his and yours had broken out. I also put it to you that Padraig McCrann has made a statement outlining that on the Monday 5th October he told you over the phone that they were there and he was wondering how long more he was going to be stuck with them.

A. No when he rang me all he was wondering about was fences and thieving and it was his cattle that were thieving with me all summer.

Q. Is there anything you want to add to this?

A. No. This memo has been read over to me and I've been invited to make any changes alterations.

Signed: Gerard Harrington

Witnessed :Catriona McGrath Garda

Witnessed Maura McGarry Sgt".

24. Although it had been originally contended in the appellant's grounds of appeal and written submissions that there had been a breach of Rule 2 of the Judge's Rules, it was accepted at the appeal hearing by counsel for the appellant that there was no breach of Rule 2. Whether or not Garda McGrath had made up her mind to charge the appellant, the appellant was in fact cautioned, which is what the rule requires.

25. As regards Rule 7 of the Judge's Rules, it is not clear on what basis it was contended that Rule 7 was breached. Rule 7 provides:

> "*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 what individual or what place he intended to refer to in some part of his statement, he may be questioned sufficiently to clear up the point*.".

26. It was conceded at the appeal hearing that no complaint had been made at the trial, and in particular during the *voir dire* on the admissibility of the cautioned memorandum of interview, that Rule 7 had been breached. No explanation has been furnished for the failure to do so, and it is not suggested that any alleged breach (which is not particularised) was of such fundamental significance as to have raised the spectre of a fundamental injustice having been done to the appellant. In circumstances where the respondent has invoked the *Cronin (No 2)* jurisprudence, we must reject the invitation to adjudicate on a complaint that Rule 7 had been breached. In any case, we are talking here about a cautioned memorandum of interview and not a voluntary statement. Rule 7 only applies to voluntary statements. It is patent from Rule 1 of the Judge's Rules that the police are entitled to ask questions where a person is not under arrest and they are endeavouring to discover the author of a crime.

27. The third facet of the appellant's complaints concerning the admissibility of the memorandum of interview is his contention that Garda McGrath was, by virtue of s. 4 of the Criminal Justice Act 1994 (i.e., "the Act of 1994"), under an obligation to arrest the appellant before interviewing him. The first thing to be said is that s. 4 of the Act of 1994 in fact deals with confiscation orders in relation to drug trafficking offences and does not create any power of arrest or detention. Although the Act of 1994 was referenced throughout grounds ii to v inclusive of the appellant's grounds of appeal, we are prepared to infer that he may have intended to refer to s. 4 of the Criminal Justice Act 1984 (i.e., "the Act of 1984"). The appellant's contention is that if he had been arrested, he would have been advised as to his rights, and would have had to be afforded the opportunity to avail of legal advice before being interviewed. It was emotively put by counsel for the appellant in argument before the Court of Appeal that his client had been *"inveigled"* to attend the Garda station and that this had been cynically done to avoid him having the opportunity to get legal advice.

28. We should say immediately that there was not a scintilla of evidence to support the suggestion that the appellant had been tricked or trapped in any way, or that Garda McGrath was manoeuvring to ensure that he would not have the benefit of legal advice before or during being questioned. The appellant had attended the Garda station voluntarily. He was not under arrest. He agreed to answer questions. Garda McGrath was entitled to ask questions of him under Rule 1 of the Judge's Rules. The law is quite clear following the decision of this court in *The People (DPP) v. AB* [2021] IECA 235 that there was no obligation to facilitate him in those circumstances in the obtaining of legal advice, or any entitlement on his behalf to have a solicitor present. In *AB* the court said (at paras 18 and 19 of the judgment):

> *"18. The appellant here seeks to extend the rights of a suspect, accordingly, to the right to legal advice before engagement in the giving of a voluntary statement or questioning by the Gardaí even before arrest and in particular before the coercive*

power of the State is exercised either by such arrest or thereafter, … . The decision in Gormley and White could not be clearer. The Gardaí are perfectly entitled before arrest to speak to suspects. …

19. The judge correctly added, in relation to Gormley & White that:- '… The Court is satisfied that there is no positive duty where a person is being asked voluntarily questions, even a foreign national, once proper procedures are followed that a solicitor actually has to be physically present for that interview or that there is a positive duty on Garda Síochána to have a solicitor physically present before voluntarily interviewing can proceed.'".

29. The point must also be made that s. 4(2) of the Act of 1984 is in the following terms:

"Where a member of the Garda Síochána arrests without warrant a person whom he, with reasonable cause, suspects of having committed an offence to which this section applies, that person may be taken to and detained in a Garda Síochána station for such period as is authorised by this section if the member of the Garda Síochána in charge of the station to which he is taken on arrest has at the time of that person's arrival at the station reasonable grounds for believing that his detention is necessary for the proper investigation of the offence.".

It creates no obligation to arrest a person at any particular point. Rather, it is permissive with respect to an arresting officer taking a person whom he (or she), with reasonable cause, suspects of having committed an offence, and who has been arrested, to a Garda station so that that person might be detained and questioned. It is permissive because a Garda is not obliged to do this. Rather if they have enough evidence their obligation is to immediately seek to charge the arrested person; alternatively, they could release the arrested person. Section 4 of the Act of 1984 merely provides an option with respect to possible detention for

questioning in custody for the proper investigation of the offence for which the person has been arrested.

30. We have no hesitation in rejecting the argument that there was something untoward in the fact that a voluntary interview was conducted with the appellant in circumstances where he had not been arrested.

31. The various grounds of appeal relevant to this heading are all couched as complaints by the appellant that the trial judge was for various reasons incorrect in his ruling that the cautioned memorandum of interview could be admitted in evidence. For completeness we should set out relevant parts of the trial judge's ruling. He stated (inter alia):

> *"I accept the basic proposition that if a garda came up with a plan of meeting someone at whatever location for this purpose of taking a voluntary cautioned statement with the intent that the accused person would be deprived of the right to liberty, and that was the intention in the garda's mind that it was a question that they knew that this was a case where they had the power to arrest but the garda deliberately considered matters and said: "No, I'm not going to carry out an arrest because that would involve contact with a solicitor. I am going to instead take a voluntary statement and then be able to get some information out of that", I'm convinced if that was established that that was a reasonable possibility that was the reason why the gardaí followed a certain course of action, there would be grounds for ruling the statement inadmissible by being taken in breach of fair procedures and in breach of rights.*
>
> *I am satisfied beyond reasonable doubt that wasn't the intent of Garda McGrath. I accept Garda McGrath's evidence that she didn't at this point intend to arrest*

Mr Harrington and if he didn't answer questions, she wasn't going to arrest him then and there. That's her sworn testimony and I accept it.

…

I don't think that bringing Mr Harrington to the station without telling him beforehand that he was going to be asked would he agree to a voluntary cautioned interview -- I don't believe that is of itself a trap or some breach of fair procedures. The gardaí are allowed to approach people and allowed to ask them questions as part of investigating offences and they are entitled to do that.".

32. We are quite satisfied that the trial judge's ruling on this aspect of matters exhibits no error.

33. The final issue arising under this heading relates to a controversy that developed in the following circumstances. The original memorandum of interview had contained the following exchanges between Garda McGrath and the appellant:

"*Q. Do you want to name any of the neighbours that you told?*

A. No I don't.

Q. Why is that?

A. I can but I just don't want to".

34. The trial judge had expressed concern to counsel that it would be undesirable for the memorandum of the interview to go to the jury with these exchanges included in it, as arguably it represented a disrespecting of an assertion by the accused of his right to silence on the discrete matter at issue. Counsel on both sides agreed that the memorandum should be redacted and the four lines at issue excised from the version that should go to the jury. Such editing is entirely commonplace and routine in criminal trials.

35. However, when counsel for the appellant stood up to cross examine Garda McGrath, after she had given evidence in chief concerning the conduct of her interview with the

appellant, in the course of which she had identified a typed version of the memorandum of the said interview (which was the agreed redacted version) as exhibit 2, the following occurred:

> *"DEFENCE COUNSEL: Now I want to go -- I think the jury have exhibit 2, I want to go to that and put a number of matters to you, Garda McGrath. But if you look at exhibit 2, I don't know if you have it, do you have one of these typed copies? You have one, do you? Do you have a typed copy?*
>
> *A. Is this the typed memo of --*
>
> *Q. This is the typed copy that was given to the jury. I don't know --*
>
> *A. I wouldn't be in a position to have the redacted one from yesterday.*
>
> *DEFENCE COUNSEL: Sorry, Judge, sorry, I have an application now. Sorry.*
>
> *JUDGE: Very good. Ladies and gentlemen of the jury, I have to ask you to go to the jury room for a moment.*
>
> *<u>In absence of jury</u>*
>
> *DEFENCE COUNSEL: Judge, it's about the reference to redacted now. I appreciate this is a retrial but this is an experienced garda and to now say -- to blurt out something like that: "Don't have a copy of the redacted one." Obviously this raises suspicion in the minds of the jury that what they have is not what's going on."*.

36. Defence counsel proceeded to apply for a discharge of the jury. The witness was profusely apologetic for what she had said, claiming it was inadvertent. The application for a discharge was opposed by prosecuting counsel. The trial judge refused to discharge the jury and the complaint on appeal is that he was wrong not to discharge the jury.

37. The trial judge's ruling on this issue was as follows:

"JUDGE: Very good. Well I have to make a ruling on this and it's a question on whether the jury should be discharged. Discharge of the jury is very much the last resort. It does occasionally happen that juries become aware that the document, which has been given to them, isn't the same as what was written down by the gardaí. It does happen in trials. It's clear that there's a gap missing when the garda is being asked questions about matters and it is better that the garda works from a copy, which is the same as what went to the jury. And I understand that's what was done here. That the prosecution ensured that the proper copy went to the garda. The garda was not aware of that. Mr McCoy was not aware of that. That resulted in this issue arising. It was a proper step taken by the prosecution to do that.

The application then is, the jury having been made aware that there may be some questions and answers that weren't given, whether or not that's sufficient reason of itself - I'll deal with the next aspect of the application after that - but whether that's sufficient reason in itself to discharge the jury. And I'm of the view it is not. The jury will be told about the right to silence. They'll be told there's a right not to answer questions. And they'll be told that a person is perfectly entitled to exercise that right. They will be told that, in the course of interviews, extraneous matters are discussed, which are not proper evidence. They can be told when a situation like this arises that in the course of an interview extraneous matters can arise, which are not proper evidence and should not be in the public statement, in the public record. And so what they are seeing is anything that resulted from the interview that was of evidential significance. Matters that were not of evidential significance were excluded. And I'll give them that direction now when they come back because the issue has been highlighted the way it has been highlighted.

Now that's jumping ahead to the next question. The next question is that it's not just -- it's been urged on behalf of the defence that it's not just a question of the jury were told that the -- that the copy of what they're seeing doesn't record every question and answer that arose in the course of the interview. It's said that there's a particular prejudice here because of the use of the word "redacted" and that the use of the word "redacted" was -- had a sinister connotation to it. I don't believe the use of the word "redacted" necessarily has a sinister connotation. It's used frequently by counsel in respect of documents they are presenting to say to the Court: "This is a redacted version." If it carried all the implications that it's said to be freighted with those would be avoided. "Redacted", is, in my view, it's probably less prejudicial than "edited". I would have thought if it's edited, it's editorial control in deciding that certain things will or won't be told. And I think that a jury are perfectly capable of being told that there is nothing sinister about the fact that not everything that was said in his interview is in the statement. The jury will be told -- can be told that, they can be told they should decide the case solely on the evidence and not on any speculation as to what might or might not have been said that was evidentially relevant in any event. And I think if a jury are given those instructions the trial can continue. So I'll have the jury back. I'm going to give them an indication of what's happened and the cross-examination can continue.".

38. The trial judge subsequently gave the jury the supplemental instructions that he had flagged that he would give to them.

39. We are completely satisfied that the trial judge dealt appropriately with this issue. In our view it would have been a disproportionate response to discharge the jury. We consider that the unfortunate disclosure of the existence of some redaction was perfectly capable of

being addressed by supplemental instructions to the jury. The trial judge was correct in adopting that course and we find no error of principle in how he dealt with this issue.

40. For the reasons given, we are not disposed to uphold any of the appellant's grounds of appeal relating to the memorandum of interview, those being grounds "i" to "vi" inclusive.

Rulings on the Scope of Cross-Examination / Comments by Counsel for the Prosecution

41. The grounds which fall under this heading comprise grounds of appeal nos. vii., and ix. to xi, inclusive. In essence, it is complained that the trial judge erred in permitting counsel for the prosecution to refer to certain matters that were prejudicial to the appellant and/or gave rise to a trial that was unsatisfactory. These were particularised as (i) references to the previous trial of the appellant that had resulted in the jury disagreeing as to verdict; (ii) cross-examination by counsel for the prosecution in relation to the defence relied upon by the appellant; (iii) suggestions that the appellant knew the motivation and identity of those who initially moved his cattle, which suggestions went outside the allegation faced by the appellant at trial; and (iv) certain comments by counsel for the prosecution concerning the fact that the appellant was unable to call a particular witness, namely Ms. Anne Keaveney, to give evidence at trial.

42. Insofar as references to the previous trial were concerned, we dismiss the complaint made *in limine* in circumstances where prosecuting counsel was seeking to put a previous inconsistent statement to the appellant and there is no inhibition in law to a previous inconsistent statement being put to a witness.

43. Ground ix complains that *"the trial was unsatisfactory by reason of the cross examination before the jury by counsel for the prosecution in relation to the defence relied upon by the appellant that Mr P McCrann was lying"*. The submissions on behalf of the appellant particularise the complaint (at paras 47 and 48) in this way:

"**Ground 9**

47. At page 83 line 1 of the transcript, counsel for the prosecution asked the appellant the following:

'A. Oh for God's sake. Sorry. Apologies. The reason Ann Keaveney would've been relevant was, she struck one animal. There was on animal on the road. Okay?'

48. It is submitted that counsel for the prosecution inappropriately commented here.".

(The transcript reference is to 23 July 2021)

44. The point is made in the respondent's submissions, and it seems to us to be a point well made, that the quotation complained of was not a question asked by counsel, but rather was an answer received from a witness. Having reviewed the transcript, the question which had elicited the answer in question was entirely anodyne. Counsel had merely asked, *"He couldn't give you a lead into how he found that out. No?"*. There was no inappropriate commentary by prosecution counsel.

45. In so far as ground x is concerned, that complains that *"counsel for the prosecution's cross examination went outside the allegations faced by the appellant of making a false statement when putting to him that he knew the motivation and identity of those who initially moved his cattle."*. The complaint is particularised at paragraph 49 of the appellant's written submissions by means of a quotation from page 88 of the transcript of the trial proceedings on 23 July 2021 (the quoted passage actually appears on pages 85 and 86 of the transcript provided to the court). It is not necessary to quote it. Suffice it to say that we have considered the quotation relied upon and find no basis to criticise the subject matter or manner of prosecuting counsel's cross examination of the appellant. There is nothing to indicate non-adherence to the rules of evidence, or unfairness of any sort, in the passage relied upon. It is fundamental to the adversarial system of criminal justice that counsel on both sides should

have extensive latitude in the conduct of cross-examination, and a trial judge, or reviewing court, should be slow to restrict that freedom, and should only do so where a line has clearly been crossed in terms of legality or fairness. We have no such concerns here.

46. In ground number xi the appellant complains that *"the trial was unsatisfactory by reason of the comments of counsel for the prosecution concerning the fact that the appellant was unable to call Mrs Anne Keaveney to give oral evidence of the trial"*. The appellant's written submissions particularise this complaint by pointing to a line of questioning by prosecuting counsel in cross examining the appellant as to why he had sought to subpoena Ms. Anne Keaveney, a lady whose car was damaged when colliding with a bull owned by a Mr. McCrann, in circumstances where the lady in question had made a statement in which she could not identify what it was that she had collided with. It was put to the witness that, in contrast, the appellant had knowledge of a person who could say from his own knowledge what it was that the lady's car had collided with. Counsel pressed the appellant as to why he had been prepared to subpoena Ms. Keaveney, but not to subpoena that person. The submissions do not make plain in what respect this line of cross examination was said to have been objectionable.

47. We have considered prosecuting counsel's cross examination in regard to the subpoenaing of Ms. Keaveney and find nothing inappropriate or unfair about it.

48. The point must also be made that no complaints were made to the trial judge concerning the manner in which prosecuting counsel conducted that aspect of his cross examination of the appellant. In those circumstances the *Cronin (No 2)* jurisprudence *prima facie* applies in any event.

Failure to discharge jury / withdraw case from the jury

49. The grounds which fall under this heading comprise grounds of appeal nos. xii to xiv, inclusive (failure to discharge the jury) and grounds of appeal nos. xvi to xxi, inclusive (failure to withdraw case from the jury).

50. The grounds which relate to the contended for failure on the part of the trial judge to discharge the jury essentially complain that the jury ought to have been discharged in circumstances (i) where the jury could not hear part of the oral evidence, (ii) where the trial judge failed to establish what evidence the jury had and had not heard, (iii) where it was revealed by Garda McGrath in the course of her oral evidence that the statement of the appellant was "*redacted*", and (iv) where hot weather conditions during which the trial was held meant that the jury were subjected to oppressive conditions. We have already dealt with item (iii).

51. In relation to the grounds relating to the contended for failure on the part of the trial judge to withdraw the case from the jury, the complaints were that the prosecution had failed to establish the necessary proofs for the particular offence; that the offence in question was vague and inchoate in its nature and/or extent; and further that the trial judge erred in ruling that the prosecution had established a sufficient chain of evidence.

52. An important contextual detail to be appreciated is that the appellant's trial was conducted during the Covid 19 pandemic. One consequence of that is that extraordinary social distancing measures were in place which meant that the jury were not seated together in close proximity in the jury box as would be the case in normal times but were dispersed more widely across the courtroom. The trial judge had anticipated that this might give rise to acoustic difficulties and at the opening of the trial had said the following to the jury:

> "*"suppose a member of the jury wasn't able to hear witnesses and wanted to have something -- wanted to bring that to my attention so that we made sure we were able*

to hear what was going on, ordinarily you'd be all in the one jury box there and you'd be able to just tell the foreperson. In this trial, if one of you has that kind of difficulty just raise your hand and I'll speak to you directly because of the way you have to be scattered.".

53. During the course of the trial, the foreperson raised an issue in relation to some of the jurors having difficulty hearing. The trial Judge advised the jury that if they had concerns in relation to that issue, the facility was available to them to hear the recording of the evidence. No request was made, however, on behalf of the jury that anything should be played back to them.

54. The trial judge returned to the issue in the course of his charge and again reminded them that if they had missed anything due to hearing difficulties, he would readily play back for them the digital audio recording. He said:

"*"There is a particular difficulty in this case that arose in the second day of the trial, the first day of the first day of evidence that some of the jurors in the back had difficulties hearing what some of the questions that were put to Mr. McCrann, maybe to a lesser extent Mr. Drury and then some of the answers that were given to Mr. McCrann and Mr. Drury.*

There is the facility, as I indicated to you, that if you wish I can bring you back in here in the court again and we can play an audio recording of that evidence, if you want to hear the evidence anything from the evidence of any witness in the case, I do require you hear all the evidence of that witness and not just bits and pieces of it. But I would play, I would that could be played back for you, if it's necessary and if you want that done.".

55. Again, notwithstanding having been reminded of the facility there was no indication from the jury that they had missed anything, or that it was necessary for the judge to playback the recording.

56. Insofar as a complaint is made that the trial judge did not sufficiently probe the complaint that was made on the second day of the trial concerning acoustic difficulties, and seek to ascertain exactly how much of the evidence had been missed, we think that it was unnecessary for him to do so having regard to how he addressed the issue. The jury were clearly told the facility was there for the replaying of the digital audio recording. There was an express invitation to them to flag if they required a replaying of the recording. The fact that they did not request anything to be replayed is an implicit affirmation in our view that the difficulty had been a fleeting one, which was immediately brought to the attention of the Court, and that nothing substantive was in fact missed. We have no hesitation in dismissing the grounds of appeal relating to the acoustics issue. It was properly and appropriately dealt with by the trial judge and there was no unfairness to the accused.

57. Insofar as the appellant complains that the charge was vague and inchoate, such an issue was not justiciable in the context of the appellant's trial in circumstances where the appellant had taken no challenge to the constitutionality of the statutory provision of foot of which he had been charged, namely s. 12 of the Criminal Law Act 1976, nor had he sought to contend that he was charged with an offence unknown to the law. We dismiss this complaint *in limine.*

58. Insofar as it is suggested that the trial judge erred in failing to withdraw the case from the jury, effectively on *Galbraith* grounds, we are satisfied from reading the transcript that there was sufficient evidence on foot of which a jury properly charged could have convicted the accused. We are satisfied that the trial judge was correct to allow the case to go to the jury.

59. The complaint insofar as the chain of evidence is concerned is contained in ground xx.. That comprises a complaint that *"the learned trial judge incorrectly ruled that a sufficient chain of evidence had been established by the prosecution."*. The nature of the exact complaint is not precisely understood. Insofar as it is purportedly particularised in the appellant's written submissions, the complaint there appears to be one of a failure on the part of the gardaí to seek out and preserve evidence, not anything to do with the chain of evidence. The concern raised, as particularised in the submissions, relates to a bucket or buckets that were said to have been in Mr. McCrann's shed, and to which Garda McGrath had alluded in the course of her interview with the appellant. However, there is no extant ground of appeal which deals with a failure to seek out and preserve the buckets in question.

60. To deal with the ground actually pleaded, suffice it to say that even if there was a deficiency in the chain of evidence relating to a particular exhibit, this is a matter that would only go to weight in any event. It would not affect admissibility. However, the entire basis of the complaint in ground xx is far from clear, and it is the responsibility of the appellant to clearly articulate what his complaints are. He has not made out any clear basis for complaint in support of what is pleaded in ground xx..

61. The complaint about oppression of the jury in having to participate in the trial and deliberate in hot weather conditions, and without adequate air conditioning, is the subject matter of ground xv.. The transcript reveals that complaints about the heat, and associated complaints about the noise generated by fans and cooling equipment provided by the Courts Service, and discourse concerning whether they should be turned on or off, emanated not from the jury but from the defence legal team. The jury themselves made no complaint about the heat, and communicated no view that their conditions were oppressive. On the day that the defence legal team raised concerns (the 22nd of July 2021) the trial judge responded to

those concerns by canvassing the following with the jury (page 90 of the unpaginated transcript provided to the Court) :

> *"JUDGE: There are two points. Unless that -- I know it's sweltering -- I know it's warm in here and unpleasant and with these yokes it isn't any better, but I'm going to go to about half 4 or so today. Will that cause anyone any difficulties?*
>
> *FOREMAN: No."* .

62. In circumstances where no complaint about oppressive conditions had emanated from the jury itself, and where the foreman of the jury confirmed to the judge that continuing until approximately 4.30 on the day in question caused the jury no difficulties, we are not disposed to uphold the complaint in ground of appeal xv..

Alleged failure to put the Defence Case adequately or at all

63. The grounds which fall under this heading comprise grounds of appeal nos. xxii to xxv, inclusive. In essence, it is complained that the conviction of the accused is unsafe on account of the trial judge failing to summarise the defence case adequately or at all in his charge to the jury. It is specifically alleged that there was a failure to reference: (i) that the appellant had believed that in reporting missing cattle to An Garda Síochána he was acting in compliance with the "*Explanatory Handbook on Cross Compliance Requirements*" published by the Department for Agriculture, Food and the Marine; (ii) that the appellant had, at all times, believed that his cattle were missing; (iii) that where, having regard to the appellant's belief that his cattle were missing, three of the appellant's cattle were not amongst those found by Garda McGrath, his report had been properly and reasonably made; and (iv) that it had at all times been put by the defence that Garda McGrath had said in the presence of two expert witnesses for the defence that the case should never have gone to trial.

64. The point is validly made by counsel for the respondent that no requisition was raised by the defence legal team following the charge asking for any such issues to be addressed. No

cogent explanation has been provided for why no requisitions were raised. In the circumstances the *Cronin (No 2)* jurisprudence, on which the respondent relies, ostensibly applies.

65. In any case, the complaints the appellant makes do not appear to be borne out on the transcript. For example, in the course of a detailed charge the trial judge did remind the jury about the "*Explanatory Handbook on Cross Compliance Requirements*". He said (transcript 26 July 2021, page 39 , ln 19 – 31):

> *"The explanatory handbook is evidence in the case. I do have to say, and this is a comment by me, and you can reject this completely, it is evidence you can rely upon. What all this says is that the explanatory handbook for cost compliance requirements to the Department of Agriculture, food and marine -- I'm not sure what date this document is. But anyway, I think there's no issue but that this was an obligation that existed at the time. Sorry, that the document is August 2016, but I'm taking it there was a similar obligation back in 2015.*
>
> *So you have to take that -- but anyway, but in any event what that document says is if you think your cattle are stolen, you have to tell the gardaí immediately. That's a proposition no one is going to disagree with. Mr Harrington's evidence was he didn't think his cattle were stolen, so I don't see really what relevance that handbook has. But that's a matter for you and you can deal with that."*.

66. The trial judge also thoroughly reviewed the appellant's evidence, including referencing his assertion that he believed his cattle to be missing, and his assertion that his report to that effect had been true and accurate.

67. He also reminded the jury of the comment that the defence were attributing to Garda McGrath. He said (26 July 2021 at p 49, lines 26 – 34, and p 50, lines 1-9):

"Now, that's going to bring me then to just make a comment on the issue concerning the conversation over the cup of tea. Where on two witnesses account, Garda McGrath said this case should never have gone to trial, or else on her own account said, I don't know -- this is me paraphrasing it slightly, but I don't know if it's me or Mr Harrington who is cursed, but this trial has haunted me. Maybe both were said for all we know. But anyway, there's that conflict there on the evidence. But there's a lot of ways you can read those comments, a lot of ways you can read the comment, this case should never have gone to trial, many different ways. But can I suggest to you that that's pure matter of opinion as well. It's Garda McGrath's opinion and it's most likely -- I'm suggesting to you, it might well be irrelevant what she thinks or doesn't think about whether the case should have gone to trial.

Now, against that if you think she said that because she knew the case was unfounded, if that's what you think, you think she said that because she knew the case was unfounded, that might well raise a reasonable doubt in your mind. But it's up to you to decide whether that's what she was conveying or whether there was -- or whether there was -- whether that wasn't -- it was just her opinion that this matter shouldn't have gone to trial.".

68. In the circumstances we have no hesitation in rejecting the complaints made concerning alleged failures to put the defence case.

<u>Alleged Failure to Instruct Jury in Relation to Certain Legal Issues</u>

69. The grounds under this heading comprise ground of appeal nos. xxvi, xxvii, xxix, and xxx. The certain legal issues on which it is complained that the trial judge failed to properly instruct the jury include: (i) the law relating to inference evidence and the manner in which the jury should deal with inference evidence in the course of deliberations; (ii) the law

relating to *mens rea* in respect of the appellant knowingly making a false statement tending to show that the appellant had information material to any inquires by the gardaí and thereby causing the time of the gardaí to be wastefully employed; and (iii) the standard of proof required in the within case and the manner in which the jury should approach same in the course of their deliberations. It was further complained that the trial judge's charge was in all the circumstances unsatisfactory.

70. A perusal of the trial judge's charge reveals that the trial judge did in fact deal with inferences (26 July 2021 , p. 21 lines 22 to p. 22 line 6; also p. 29 line 17 to p. 30 line 12); did in fact deal with what he characterised as the "*mental element*" (p. 35, line 31 to p. 37, line 12); and did in fact deal with the standard of proof to be employed (p. 26 line 11 to p. 29, line 15).

71. Moreover, there were no requisitions raised in respect of any alleged deficiencies in the charge. Furthermore, no cogent explanation has been furnished for the failure to raise requisitions.

72. In the circumstances we are not disposed to engage with these complaints.

Perversity of Verdict / Weight of Evidence Insufficient to Support Conviction

73. This heading covers grounds of appeal nos. xxxi and xxxii. Amongst the complaints made under this heading (which is self-explanatory), it was said that the trial judge gave insufficient weight to a number of matters pointing towards the innocence of the appellant.

74. In our view the contention of perversity is untenable. There was clearly sufficient evidence, viewed from the high-water mark of the prosecution's case, to allow the case to go to the jury and for a jury properly charged to convict upon it. That is what happened. There is no tenable basis for suggesting that the verdict was perverse.

Conclusion

75. We are satisfied that the trial was satisfactory and that the verdict is safe. The appeal against conviction is dismissed.