



THE COURT OF APPEAL

[255/2017]

**Edwards J.
McCarthy J.
Kennedy J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

HENRY ALINTA

APPELLANT

JUDGMENT of the Court delivered on the 10th day of December 2019 by Mr. Justice McCarthy

Background to the Appeal

1. This is an appeal against the conviction of the appellant on the 29th May 2017 at Trim Circuit Court for the offence of money laundering contrary to s.7(1) of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010 ("the Act of 2010"). The offence pertained to possession of the proceeds of alleged criminal conduct, namely, cash in the amount of €127,100 and £146,940 in circumstances where the prosecution alleged that the appellant knew or believed that the property was the proceeds of crime or was reckless as to whether it was.
2. On the 2nd August 2014, the appellant, who resided in Newry, Co. Down, was arrested under s. 7 of the Act of 2010 having been stopped by Gardaí at the M1 Toll Plaza, outside Drogheda, while he was a passenger in a BMW X6 bearing a Northern Irish registration JFZ 4304. Also in the vehicle at the time that it was stopped were the appellant's wife, who was driving the vehicle, and a number of their children. The Gardaí conducted a search of the vehicle pursuant to s.23 of the Misuse of Drugs Act, 1977 and discovered cash in the sums of €127,100 and £146,940 in a hold-all bag in the boot of the vehicle.
3. The appellant was arrested under s.7(1) of the Act of 2010 on suspicion of being engaged in money laundering and was conveyed to Drogheda Garda Station, where he was detained and interviewed. He was fully co-operative at interview, did not avail of his entitlement to have access to a solicitor, and answered all questions put to him. At interview, he stated that he had lived in Newry with his family for the previous fourteen years. He said that he was the sole owner and a director of a company called "Aligreen Recycling Limited", whose business was the recycling of clothing, on a salary of Stg£50,000 per year, plus "add-ons". He said that he and his family had travelled that day from Newry to Liffey Valley Shopping Centre, where he met an Irish individual, whose name he did not know, and collected a bag from the boot of this individual's vehicle. He said that he did so on the instructions of a friend of his, a Nigerian man, named Sanni, who was a "money changer" operating a Bureau de Change business in Nigeria. He said that he knew that the bag contained money belonging to his friend, but not the amount.

He provided Gardaí with a description of the Irish man from whom he had collected the bag.

4. Later it was established that the appellant had obtained the number of the Irish individual from a Dutch phone number, not mentioned by him in the course of his interview.
5. The appellant was subsequently charged on indictment with money laundering contrary to s. 7(1) of the Act of 2010, and unsuccessfully contested the charge in the course of a three-day trial before a jury at Trim Circuit Criminal Court. The jury's verdict was unanimous, and he was subsequently sentenced to four years' imprisonment with the final eighteen months suspended on conditions.
6. The appellant initially appealed against both his conviction and sentence. However, the appeal is now being confined to his conviction only.

The Grounds of Appeal

7. The appellant sets forth five generic grounds of appeal in his Notice of Appeal relating to his conviction, not all of which were pressed. There were two ultimately relied upon may be summarised as follows:-

- It is complained that in various respects the trial judge erred in his rulings and in his directions to the jury. Flesh was put on the bones of this generic complaint in the appellant's written legal submissions which complain, in substance, that the trial judge misdirected the jury as to the ingredients of the offence charged; that he further misdirected them as to the nature and applicability of various presumptions provided for in the Act of 2010; that the trial judge's charge was potentially confusing for the jury; that he inadequately dealt with matters raised on requisitions, and that he may have incorrectly left the jury with impression that the accused bore a legal burden of proving that the monies seized were not the proceeds of crime;

and:-

- It is complained that the jury's verdict was contrary to the weight of the evidence and was perverse.

The Statutory Framework

8. In order to address the complaints made by the appellant it is necessary to set out the relevant statutory provisions. The key provision with which we are concerned is s.7(1) of the Act of 2010. Clearly it is necessary to have regard to what this provision itself says (to the extent relevant), but also, and in order to interpret it properly, regard must be had to related provisions and other relevant provisions in the same Act.
9. Part 2 of the Act of 2010, which contains ss 6 to 16 inclusive, is entitled "Money Laundering Offences". Pursuant to the provisions of s.7(1) of the Act of 2010 a person commits an offence ("money laundering") if:-

- “(a) the person engages in any of the following acts in relation to property that is the proceeds of criminal conduct:
- (i) ...
 - (ii) converting transferring handling acquiring possessing or using the property;
 - (iii) ...
- and
- (b) the person knows or believes (or is reckless as to whether or not) the property is he proceeds of criminal conduct.” Subsections (4) and (5) respectively of s.7 of the Act of 2010 deal with knowledge and recklessness, respectively, and provide:
- (4) A reference in this section to knowing or believing that property is the proceeds of criminal conduct includes a reference to knowing or believing that the property probably comprises the proceeds of criminal conduct.
 - (5) For the purposes of subsection (1) ... a person is reckless as to whether or not property is the proceeds of criminal conduct if the person disregards, in relation to property, a risk of such a nature and degree that, considering the circumstances in which the person carries out any act referred to in subsection (1) ..., the disregard of that risk involves culpability of a high degree.”

10. Subsection (6) of the Act of 2010 adds:-

- “(6) For the purposes of subsection (1) ..., a person handles property if the person—
- (a) receives, or arranges to receive, the property, or
 - (b) retains, removes, disposes of or realises the property, or arranges to do any of those things, for the benefit of another person.”

11. The concept of the “proceeds of criminal conduct” is defined in s.6 of the Act of 2010. It states:-

“In this Part-

‘criminal conduct’ means:-

- (a) conduct that constitutes an offence or
- (b) conduct occurring in a place outside the state that constitutes an offence under the law of the place and would constitute an offence if it were to occur in the State;”

Moreover, the section goes on to state:-

“ ‘Proceeds of criminal conduct’ means any property that is derived from or obtained through criminal conduct, whether directly or indirectly, or in whole or in

part, and whether that criminal conduct occurs before, on or after the commencement of this Part (of the Act).”

12. Section 11 of the Act of 2010 deals with “Presumptions and other matters”. It provides (to the extent relevant):-

11.—(1) In this section “specified conduct” means any of the following acts referred to in section 7 (1) ... :

- (a) concealing or disguising the true nature, source, location, disposition, movement or ownership of property, or any rights relating to property;
- (b) converting, transferring, handling, acquiring, possessing or using property;
- (c) removing property from, or bringing property into, the State or a place outside the State.

(2) In proceedings for an offence under section 7 ..., where an accused has engaged, or attempted to engage, in specified conduct in relation to property that is the proceeds of criminal conduct, in circumstances in which it is reasonable to conclude that the accused—

- (a) knew or believed the property was the proceeds of criminal conduct, or
- (b) was reckless as to whether or not the property was the proceeds of criminal conduct,

the accused is presumed to have so known or believed, or been so reckless, unless the court or jury, as the case may be, is satisfied, having regard to the whole of the evidence, that there is a reasonable doubt that the accused so knew or believed or was so reckless.

(3) In proceedings for an offence under section 7 ... , where an accused has engaged in, or attempted to engage in, specified conduct in relation to property in circumstances in which it is reasonable to conclude that the property is the proceeds of criminal conduct, those circumstances are evidence that the property is the proceeds of criminal conduct.

(4) For the purposes of subsection (3), circumstances in which it is reasonable to conclude that property is the proceeds of criminal conduct include any of the following:

- (a) the value of the property concerned is, it is reasonable to conclude, out of proportion to the income and expenditure of the accused or another person in a case where the accused engaged in the specified conduct concerned on behalf of, or at the request of, the other person;
- (b) the specified conduct concerned involves the actual or purported purchase or sale of goods or services for an amount that is, it is reasonable to conclude,

out of proportion to the market value of the goods or services (whether the amount represents an overvaluation or an undervaluation);

- (c) the specified conduct concerned involves one or more transactions using false names;
- (d) the accused has stated that he or she engaged in the specified conduct concerned on behalf of, or at the request of, another person and has not provided information to the Garda Síochána enabling the other person to be identified and located;
- (e) where an accused has concealed or disguised the true nature, source, location, disposition, movement or ownership of the property, or any rights relating to the property, the accused has no reasonable explanation for that concealment or disguise.

(5) Nothing in subsection (4) limits the circumstances in which it is reasonable to conclude, for the purposes of subsection (3), that property is the proceeds of criminal conduct.

(6) Nothing in this section prevents subsections (2) and (3) being applied in the same proceedings.

(7) (not relevant)

(8) In proceedings for an offence under this Part, ..., it is not necessary, in order to prove that property is the proceeds of criminal conduct, to establish that—

(a) a particular offence or a particular class of offence comprising criminal conduct was committed in relation to the property, or

(b) a particular person committed an offence comprising criminal conduct in relation to the property.

(9) In proceedings for an offence under this Part, ..., it is not a defence for the accused to show that the accused believed the property concerned to be the proceeds of a particular offence comprising criminal conduct when in fact the property was the proceeds of another offence.”

13. Thus, the *actus reus* of the offence, in the circumstances of the present case, is the possession of the proceeds of criminal conduct contrary to s.7(1)(a)(ii) of the Act of 2010. The *mens rea*, as provided for in s.7(1)(b) of the same Act, is knowledge or belief that the property concerned is the proceeds of criminal conduct, or recklessness as to that possibility.

14. At the core of this appeal is the adequacy of the trial judge’s charge to the jury concerning the presumption created by s. 11(2) of the Act of 2010, and how subss (3) and (4) of the Act of 2010 may be engaged in support of that which the Act says may be presumed in certain circumstances; and how these provisions might potentially operate in the circumstances of the case that the jury were concerned with. It is therefore necessary

to consider what instructions the trial judge gave to the jury in the course of the charge concerning the s.11(2) presumption, and also concerning subss. 11(3) and 11(4) of the Act, and how to apply them correctly.

15. The trial judge then told the jury:

"Then, members of the jury, there is another section at section 11(1) of the said Act:

"In this section 'specified conduct' means any of the following acts referred to in section 7(1) ... (a) concealing or disguising the true nature, source, location, disposition, movement or ownership of property, or any rights relating to the property; (b) converting, transferring, handling, acquiring, possessing or using property; and (c) removing property from, or bringing property into the State or a place outside the State." The relevant section is 11(1) (b), acquiring or possessing. Then I must go on to read section 11, subsection 2: "In proceedings for an offence under section 7, where an accused has engaged, or attempted to engage, in specified conduct in relation to property that is the proceeds of criminal conduct, in circumstances in which it is reasonable to conclude that the accused (a) knew or believed the property was the proceeds of criminal conduct, or (b) was reckless as to whether or not the property was the proceeds of criminal conduct. The accused is presumed to have so known or believed, or been so reckless, unless the Court or jury, as the case may be, is satisfied, having regard to the whole of the evidence, that there is a reasonable doubt that the accused so knew or believed or was so reckless." In respect of the words "in which it is reasonable to conclude", this is my interpretation, that it must be sensible, fair and in accordance with reason. Then at 11, subsection 3: "In proceedings for an offence under section 7, where an accused has engaged in, or attempted to engage in, specified conduct in relation to property in circumstances in which it is reasonable to conclude that the property is the proceeds of criminal conduct, those circumstances are evidence that the property is the proceeds of criminal conduct." And again, reasonable to conclude, I am satisfied it's the same interpretation so it would be sensible, fair and in accordance with reason. And in respect of that, this is a presumption to be made by the jury, but I will deal with that later on. Then in respect of section 11(4): "For the purposes of subsection (3), circumstances in which it is reasonable to conclude that property is the proceeds of criminal conduct include any of the following: (a) the value of the property concerned is, it is reasonable to conclude, out of proportion to the income and expenditure of the accused or another person in a case where the accused engaged in the specified conduct concerned on behalf of, or at the request of, the other person." And again I am satisfied "reasonable to conclude" in the context it must be sensible, fair, and in accordance with

reason. And again, this is a presumption that the jury must make in respect of the matter.

Then there is section 11(5): "Nothing in subsection (4) limits the circumstances ... " meaning it doesn't confine " ... in which it is reasonable to conclude, for the purposes of subsection (3), that property is the proceeds of criminal conduct." And again, "reasonable to conclude" should be the same as I've already stated in respect of my interpretation in respect of "reasonable to conclude". And then finally there's another section 11(8): "In proceedings for an offence under this part, or an offence under section 7(1) of the Criminal Law Act 1997 referred to in subsection (7)(b), it is not necessary in order to prove that property is the proceeds of criminal conduct, to establish that (a) a particular offence or a particular class of offence comprising criminal conduct was committed in relation to the property, or (b) a particular person committed an offence comprising criminal conduct in relation to the property." This section means that it is not necessary for the prosecution to prove that the money is the proceeds of criminal conduct to establish that a particular offence or a particular class of offence comprising criminal conduct was committed in relation to the money or that a particular person committed an offence comprising criminal conduct in relation to the money.

Members of the jury, in respect of sections 11(1) subsection 1, subsection 2 and 3 and subsection 4 of the said Act, in respect of presumptions in relation to the money, these are presumptions to be made by the jury. Members of the jury, all presumptions are rebuttable where the party, the accused, against whom the presumption operates, succeeds in rebutting the presumptions. This has the effect of cancelling it out, such that it is as if the presumption has never applied at all. In those circumstances, the party, the prosecution, who relied on the presumption, bears the normal onus of proving the existence of the presumed fact. In a case of presumptions, it suffices to defeat the operation of the presumption if the party against whom the presumption operates, being the accused, where the accused adduces evidence as to the nonexistence of the presumed fact, it merely places an evidential burden on the opposing party, the accused, to adduce some evidence that the presumed fact does not exist. The accused's defence relies on the rebuttal evidence of such presumption against him. Rebuttal evidence can be by oral evidence or by statement or interview of an accused. The defence is relying on the interviews of the accused by way of rebuttal evidence against the presumptions. Members of the jury, if you are satisfied beyond a reasonable doubt of the presumptions that the accused was in possession of the money knowing or believing or was reckless as to whether or not the money was the proceeds of criminal conduct has not been rebutted, then the presumptions applies and you may convict of the offence. If, however, you are not so satisfied, then you must have a reasonable doubt as to whether the presumption applies and you should acquit. There is no onus on the accused to establish anything. You must consider all the evidence including the interviews of the accused and you must ask yourselves has the prosecution satisfied you beyond a reasonable doubt that the

presumption has not been rebutted and therefore applies, and depending on your answer, you proceed accordingly to convict or acquit the accused of the offence. The prosecution must prove beyond a reasonable doubt that the accused had possessed and acquired the money knowing or believing the money was the proceeds of criminal conduct and that the accused was reckless as to whether the money was the proceeds of criminal conduct."

16. At trial, defence counsel was unhappy with how the trial judge had instructed the jury. She had several complaints. The first was that the judge had, it was suggested, indicated that it was not necessary for the prosecution to prove that the money was the proceeds of criminal conduct to establish that a particular offence was committed with respect to the money or by a particular person in relation to the money. There was a concern on the part of the defence legal team that this part of the charge may have confused the jury as it was clear that proof of possession of money which was the proceeds of criminal conduct was a necessary and essential ingredient of the offence, yet the jury may have believed that this was not necessary in light of the manner in which they were charged.
17. Following the charge to the jury, defence counsel requisitioned the trial judge on his contention that the prosecution did not have to prove that the money was the proceeds of crime, and reiterated that the prosecution had to prove that the proceeds were from criminal conduct, and that if the monies came from another jurisdiction, they had to be satisfied that the monies came from conduct that was criminal conduct in that jurisdiction. It was accepted that the jury had to consider the statutory presumption arising under s.11, but it was argued that the way they were directed could have confused them on the necessity of proving that the property was the proceeds of criminal conduct.

18. The judge had accurately read out the verbatim terms of s.11(8) of the Act of 2010:-

"In proceedings for an offence under this part, or an offence under section 7(1) of the Criminal Law Act 1997 referred to in subsection (7)(b), it is not necessary in order to prove that property is the proceeds of criminal conduct, to establish that (a) a particular offence or a particular class of offence comprising criminal conduct was committed in relation to the property, or (b) a particular person committed an offence comprising criminal conduct in relation to the property."

19. He then added the following:

"This section means that it is not necessary for the prosecution to prove that the money is the proceeds of criminal conduct to establish that a particular offence or a particular class of offence comprising criminal conduct was committed in relation to the money or that a particular person committed an offence comprising criminal conduct in relation to the money."

20. These additional remarks by the trial judge, in the choice of wording used, represented an accurate paraphrasing of the s.11(8) provision, providing they were delivered in a manner that suggested appropriate internal punctuation. It is the case that they appear on the

transcript without internal punctuation, and we acknowledge the possibility that the trial judge, who was well known to be a rapid speaker, may have delivered those remarks with his customary rapidity of speech, and by doing so may have caused the transcriber not to include appropriate punctuation in compiling the transcript. To reflect the proper sense of those remarks on the transcript they should ideally have been punctuated with two commas, one after the word "prosecution" on the first line, and the second after the word "conduct" on the second line. With that punctuation added, the correct sense is immediately clear:

"This section means that it is not necessary for the prosecution, to prove that the money is the proceeds of criminal conduct, to establish that a particular offence or a particular class of offence comprising criminal conduct was committed in relation to the money or that a particular person committed an offence comprising criminal conduct in relation to the money."

21. Be that as it may, the jury were listening to an oral charge and were not reading a passage from a transcript or other document so as to be relying on recorded punctuation. They heard the sentence at issue being delivered live and the question is: were they possibly confused by the manner of delivery of this instruction which they listened to first hand? While defence counsel apprehended the possibility of confusion from the manner of the delivery, and requisitioned the judge, counsel for the prosecution did not join in that requisition. However, the Court has listened to the DAR and we are satisfied that defence counsel's concern was justified. The transcript reveals that the judge read out the verbatim words of s.11(8) of the Act of 2010, and his informal paraphrasing of what it meant followed on immediately after that. We consider that notwithstanding that the jury received the judge's paraphrasing in close proximity to having heard the verbatim words of the statutory provision in question, the instruction may nonetheless have created the apprehended confusion. It seems to us that arising from the judge's instructions the jury might potentially have been led to conflate the presumption in relation to *mens rea* with the requirement on the prosecution to prove the fact that the money was the proceeds of crime, and to approach the matter as though the latter was also the subject of a presumption. Of course, there was nothing in the nature of a presumption in regard to the latter - the presumption relates solely to the *mens rea*.
22. For these reasons we are inclined to find that the judge's words which are complained of constituted a misdirection and would allow the appeal on that account.
23. Counsel's second complaint is that the jury, following the trial judge's charge, had been left with the impression that there was a legal burden on the accused by virtue of how he had dealt with the statutory provisions. This was in circumstances where the previous Friday, the trial judge had assured counsel in the absence of the jury, that when he was dealing with the statutory presumptions under the Act, he would tell the jury that the presumptions were only capable of creating an evidential, but not a legal burden, on the accused, if the jury had to consider whether the presumptions arose. It was submitted that this had not happened in the charge; that the jury had been left with the impression

that there was a legal burden on the accused to disprove that concerning which there was a statutory presumption, and further that the standard of proof on the accused was that of beyond reasonable doubt. It was submitted that this made a mockery of the presumption of innocence.

24. This second complaint relating to the charge is the most significant of the complaints made about the charge, and we will be returning to address the substance of it in some detail later in this judgment. It may be helpful however to complete the procedural chronology before doing so.
25. Notwithstanding the raising of a requisition in respect of how the jury had been charged with respect to the burden of proof, and where it lay having regard to the statutory presumptions, the judge was not disposed to accept defence counsel's submission and refused to re-charge the jury on this issue stating that "... another court if I'm incorrect can correct me." Whereas the judge did subsequently endeavour to clarify for the jury as to how evidence tending to rebut that which was to be presumed might operate, he did not revisit the conceptual difference between an evidential burden and a legal burden. Moreover, it has been submitted to us that the terms of his re-charge entirely subverted the burden of proof, could only have served to further confuse the jury, and perpetrated an error of law.
26. In that regard, one of counsel for the appellant's complaints, although not her main one, concerning how the judge recharged the jury was that the process provided for in the Act of 2010 is a two stage one in which the jury are required in the first instance to consider s. 6 and s.11(8) of the Act of 2010, before going on to consider the implications of s. 7(4) of the Act of 2010 in the circumstances of the case. It is claimed that in his recharge the trial judge insisted on dealing first with s.7(4) before going on to deal with s.6 and s.11(8). In other words, he effectively reversed the order in which matters required to be approached. This was likely to have confused the jury, suggests counsel for the appellant.
27. We do not agree on this discrete point having read the entirety of the charge and re-charge. While the trial judge's initial attempt to explain the stages of the process in the course of the recharge were not a model of clarity, he reprised what he was saying with the following passage:-

"Then in respect of 11 (8): 'In proceedings for an offence under this Part, or an offence under section 7(1) of the Criminal Law Act 1997 referred to in subsection (7)(b), it is not necessary, in order to prove that property is the proceeds of criminal conduct, to establish that (a) a particular offence or a particular class of offence comprising criminal conduct was committed in relation to the property, or (b) a particular person committed an offence comprising criminal conduct in relation to the property.' This is also the first stage. And members of the jury, the prosecution must prove beyond a reasonable doubt that the money was the proceeds of criminal conduct, that is in respect of the first stage. If the jury are so satisfied beyond a reasonable doubt the money is the proceeds of criminal conduct, then they move on to the second phase to consider whether the accused knew or

believed that the money was the proceeds of criminal conduct or was reckless as to whether the proceeds or was reckless as to whether the money was the proceeds of a criminal conduct."

28. We are satisfied that this was a correct and sufficiently clear instruction concerning the order in which the different issues should be approached.

29. Unfortunately, the trial judge then went on to add:-

"If you, members of the jury, are not satisfied beyond reasonable a doubt that the money is not from the proceeds of crime or criminal conduct -- of criminal conduct, that is the first phase, then you do not have to consider whether he knew or believed or was reckless as to whether the money was from the proceeds of crime and in those circumstances he is entitled to an acquittal."

30. It is entirely clear to us what the trial judge was trying to say, but because of his use of a double negative (the word "not" on the second line of the quotation should have been omitted), he skewed the sense of that instruction. However, he had correctly told the jury earlier in his main charge to them that *"There is no onus on the accused to establish anything. You must consider all the evidence including the interviews of the accused and you must ask yourselves has the prosecution satisfied you beyond a reasonable doubt that the presumption has not been rebutted and therefore applies, and depending on your answer, you proceed accordingly to convict or acquit the accused of the offence."*

[Transcript, Day 3, 29 May 2017, page 41, lines 5-10].

31. We consider that against this backdrop it would have been as obvious to the jury as it is to us what the judge had been attempting to say, but unfortunately did not say effectively, due to his inappropriate use of a double negative. We do not believe in the circumstances that the jury would have been materially misled or confused by that single sentence. If the appellant's complaints stopped there, we would not be disposed to intervene. However, they do not stop there.

32. It is appropriate at this point to return to, and engage with, what is the appellant's main complaint. It is apparent from the transcript that the judge agreed with defence counsel that the statutory presumption at issue in this case imposed no legal burden on the accused to disprove any aspect of the prosecution case whether in the light of the presumption to which we have referred or otherwise. Nor did the prosecution seek to advance that proposition either at the trial or on appeal. Were such a legal burden to be imposed by that provision on what is an essential element of the offence, namely, the *mens rea of the offence*, such an approach, to quote O'Malley J. (who spoke for the majority) in *The People (DPP) v Forsey* [2018] IESC 55, at para. 133 of her judgment, would represent *"an inroad"* into the fundamental principle of the presumption of innocence. In that respect O'Malley J stated:-

"In attempting to discern the impact of a particular measure on the presumption of innocence, the court must consider a number of questions. Has the provision

transferred a burden in respect of an essential element of the offence, that would otherwise have fallen to be proved by the prosecution beyond reasonable doubt? Does it require the accused to prove that the element in question does not exist? If so, it is an inroad into the presumption of innocence, since the accused person may be convicted if he or she cannot positively prove that the element is absent."

33. We do not think that there is any such inroad here on the plain and ordinary meaning of the provision creating the presumption. There is no reason to suppose that the ordinary rule of law that it is for the prosecution to prove beyond a reasonable doubt that the presumption has not been rebutted does not apply. Thus, if circumstances arise, rendering it reasonable to conclude that given property is the proceeds of crime, the prosecution has the aid or benefit of the presumption in discharging the onus of proof upon it; in the same way, for example, as the prosecution has the aid or benefit of the presumption that an accused person intended the natural and probable consequences of his actions when, say, killing or causing serious injury to someone, in the offence of murder. It does not detract from the necessity of proof beyond reasonable doubt, having regard to the whole of the evidence.
34. A legal burden is of course quite different from an evidential one. O'Malley J.'s explanation in *Forsey* of the terminology used in the context of legal or evidential burdens is comprehensive. She points out at para. 81:-

"The "legal burden" is a burden of proof "properly so called" and is the burden fixed by law on a party to satisfy the tribunal of fact as to the existence or non-existence of a fact or matter. Where the legal burden is borne by a party in relation to an issue, he or she is required to persuade the tribunal of fact to the criminal or civil standard of proof, as appropriate."

and, at para. 83, that:-

"An "evidential burden" is the burden borne by a party who contends that a particular issue should be put before the decision-maker. It is discharged by adducing (or by pointing to relevant evidence adduced by the other party) sufficient evidence for that purpose, to the point that the trial judge is satisfied that it should be left for consideration."

35. The following passage from O'Malley J's judgment (para 84) is of particular relevance:-

"...the prosecution bears the evidential burden in respect of the guilt of the accused. It is discharged by adducing sufficient evidence – generally referred to as a prima facie case – to go to the jury in respect of each of the essential elements making up the offence under consideration. If evidence is lacking in respect of an essential element, the evidential burden will not have been discharged and the trial judge will direct a verdict of not guilty. Where a trial judge finds that the evidential burden has been discharged, and a prima facie case has been made out, it does not remove the legal burden from the prosecution and does not mean that the jury

must convict even if no defence evidence is called. It remains open to the defence to attempt to persuade the jury that they should not convict because, for example, the prosecution evidence is weak or lacks credibility. The legal burden still remains with the prosecution to establish guilt beyond reasonable doubt, and if they do not succeed in this the jury must acquit."

36. It is of course the case, by definition, that an accused person, simply as a matter of practicality, and in order to give rise to an issue, may give or adduce evidence, if it is otherwise not before the jury. However this does not import any obligation to do so. The prosecution evidence may or may not disclose a possible defence in a given case; it is a matter for the accused to give evidence or adduce evidence should he wish to raise an issue since a jury can only act on evidence. Were a judge in his or her charge, either expressly or by implication, to imply otherwise or to suggest that any so-called evidential burden might be legal in nature, or potentially to cause confusion between the two, the charge might be fatally deficient and the verdict therefore unsafe. Ultimately, that is the complaint in the present case. We therefore turn to the contents of the charge.

37. The judge dealt with the presumption as follows:-

"Members of the jury, in respect of sections 11(1) subsection 1, subsection 2 and 3 and subsection 4 of the said Act, in respect of presumptions in relation to the money, these are presumptions to be made by the jury. Members of the jury, all presumptions are rebuttable where the party, the accused, against whom the presumption operates, succeeds in rebutting the presumptions. This has the effect of cancelling it out, such that it is as if the presumption has never applied at all. In those circumstances, the party, the prosecution, who relied on the presumption, bears the normal onus of proving the existence of the presumed fact. In a case of presumptions, it suffices to defeat the operation of the presumption if the party against whom the presumption operates, being the accused, where the accused adduces evidence as to the nonexistence of the presumed fact, it merely places an evidential burden on the opposing party, the accused, to adduce some evidence that the presumed fact does not exist. The accused's defence relies on the rebuttal evidence of such presumption against him. Rebuttal evidence can be by oral evidence or by statement or interview of an accused. The defence is relying on the interviews of the accused by way of rebuttal evidence against the presumptions. Members of the jury, if you are satisfied beyond a reasonable doubt of the presumptions that the accused was in possession of the money knowing or believing or was reckless as to whether or not the money was the proceeds of criminal conduct has not been rebutted, then the presumptions applies and you may convict of the offence. If, however, you are not so satisfied, then you must have a reasonable doubt as to whether the presumption applies and you should acquit. There is no onus on the accused to establish anything. You must consider all the evidence including the interviews of the accused and you must ask yourselves has the prosecution satisfied you beyond a reasonable doubt that the presumption has not been rebutted and therefore applies, and depending on your

answer, you proceed accordingly to convict or acquit the accused of the offence. The prosecution must prove beyond a reasonable doubt that the accused had possessed and acquired the money knowing or believing the money was the proceeds of criminal conduct and that the accused was reckless as to whether the money was the proceeds of criminal conduct.” [Transcript, Day 3, 29 May 2017, page 41, lines 4-13].

and later upon requisition:-

“Oh sorry, I should say just finally in respect of the rebuttal evidence, just I nearly I said rebuttal evidence can way of it can be by oral evidence or by statement or interviews of an accused and that the defence are relying on the interviews of the accused by way of rebuttal evidence against the presumptions. And actually, in fact, members of the jury, the accused is also, in addition to relying on rebuttal evidence by way of these interviews, these two interviews, the defence is also relying in respect of the telephone evidence also in addition to the interviews by way of rebuttal evidence. Thank you very much. And again, if you have any query arising from this or any other matter, feel free to come out. Thank you very much.” [Transcript, Day 3, 29 May 2017, page 65, lines 22-30].

38. There is no doubt but that the charge must be considered as a whole and throughout the charge the trial judge made extensive reference to the burden or onus of proof, especially at the earlier stages where he dealt with the general legal principles applicable to every trial. When elaborating those general principles, he said *inter alia*:-

“The onus, burden and the responsibility of proving the charge, the facts and guilt rests with the prosecution. The onus burden and responsibility of proof never switches to the accused. There is no onus on the accused to prove or disprove anything or to explain himself. The accused is under no obligation to give or call evidence on his behalf” [Transcript, Day 3, 29 May 2017, page 34, lines 5-9].

and later,

“the onus of proving the charge, facts and guilt never shifts from the prosecution throughout the trial” [Transcript, Day 3, 29 May 2017, page 34, lines 16-17].

39. Further, as to the standard of proof, he stated *inter alia* that:-

“A jury must not convict the accused of the offence charged unless they are satisfied that the accused is guilty beyond a reasonable doubt. The prosecution must prove the charge against the accused beyond a reasonable doubt. If the jury have a reasonable doubt they must find the accused not guilty.” [Transcript, Day 3, 29 May 2017, page 34, lines 20-25].

40. The judge also distinguished the civil and criminal standards of proof, referred to the necessity for a jury to give the benefit of the doubt to the accused, and in the event that

there were two views of a particular piece of evidence, both of which were at least reasonable, the jury should adopt the view favourable to the accused.

41. We think that on any interpretation of the passages quoted at paragraph 38 above, namely, those pertaining to the explanation of the presumption, confusion fatal to the integrity of the charge arose. Whilst we accept that there is reference to the evidential rather than the legal burden, this is in itself something which cannot have been of any assistance to the jury. The distinction between the two terms, legal and evidential, in the context of burdens, may be lost on a jury. These are legal terms of art and they were not well explained. In our judgment, there is a real and significant risk that the jury were left under the impression that there was some responsibility on the accused to negative the statutory presumption or to disprove that he had required *mens rea*. Indeed, the use of such terms and the distinction between them has given rise in the past to confusion even amongst lawyers to the point where it may be inappropriate to use them in charging a jury. We think that the risk that we have identified exists notwithstanding the judge's extensive references to the general rules relating to the burden or onus of proof, to the standard of proof and to the other basic or traditional rules underpinning every criminal trial. Accordingly, we will uphold the complaint that the charge was deficient in the manner complained of. The verdict therefore cannot stand and so we are also prepared to allow the appeal on this account.
42. We think that there was *prima facie* evidence of the fact that the money was the proceeds of crime, and accordingly, we think that, rightly, the jury were then called upon to consider whether or not the accused had the necessary state of mind, possession having been admitted. A complaint is made that a record of an interview which was to be redacted by agreement went to the jury in unredacted form due to an error. It is accepted that what occurred was unintentional and an error. We think that the portion of what the accused said to the Gardaí, which it had been agreed should be redacted but which was not redacted, could not have been prejudicial to him, all else being equal. Indeed, we wonder why it was excluded in the first place. We are not therefore disposed to uphold this complaint.
43. Be that as it may, for the reasons stated earlier in this judgment we will quash the conviction. It is unnecessary in the circumstances to address the suggestion that the jury's verdict was contrary to the weight of the evidence and was perverse.
44. We accordingly allow the appeal against conviction. We will not order a retrial since the accused has served the sentence that was imposed upon him.