



**THE COURT OF APPEAL**

**Record Number: 172/2021**

**Edwards J.  
Kennedy J.  
Donnelly J.**

**BETWEEN/**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS  
RESPONDENT**

**- AND -**

**DAVID LYNCH**

**APPELLANT**

**JUDGMENT of the Court delivered on the 14th day of November 2022 by Ms. Justice Isobel Kennedy.**

1. This is an appeal against conviction. On the 23rd July 2021, the appellant was convicted of possession of a knife contrary to s. 9(1) and (7) of the Firearms and Offensive Weapons Act, 1990 as amended by s. 39 of the Criminal Justice (Miscellaneous Provisions) Act, 2009, burglary contrary to s. 12(1)(b) of The Criminal Justice (Theft and Fraud Offences) Act, 2001, criminal damage contrary to s. 2(1) of the Criminal Damage Act, 1991 and obstruction of a peace officer contrary to s. 19(3) of the Criminal Justice (Public Order) Act, 1994, as amended by s. 185 of the Criminal Justice Act, 2006.

**Background Circumstances**

2. On the 26th of January 2019, Gardaí attended at the scene of a burglary at a house in the suburbs of Dublin. On arrival, they noted the alarm going off and that a rear window of the property had been smashed. The property was described by the Gardaí as having been "ransacked." A black Samsung mobile phone was recovered on the floor inside the property amongst the broken glass where the window had been smashed and entry gained. Gardaí subsequently made contact with the injured party, the owner of the house, who informed them that the mobile phone recovered did not belong to anyone in the house.
3. Garda White seized the phone which rang while it was in his possession. He answered the phone to a male who identified himself as Paulie and said that he had lost his phone in the area. The Garda informed him that his name was Steve. They made arrangements to meet at the Molly Malone Statue in Dublin City Centre.

4. Garda White stated that he believed that the phone belonged to this man and that therefore, he was responsible for committing the burglary.
5. At approximately 5pm, Garda White, dressed in plain clothing and accompanied by three other Gardaí attended at the Molly Malone Statue. He was approached by a male, the appellant herein, who asked him if his name was Steve, the appellant then asked him if he had his phone and the Garda said that he did. The Garda observed that the appellant was wearing a knife on a lanyard around his neck. Before handing over the phone, the Garda asked the appellant if he could identify some feature about the phone and the appellant identified a phone number which was sellotaped to the back of the phone.
6. Garda White then handed the phone to the appellant, who offered him €10 for finding the phone, which he refused. Garda White then identified himself as a member of An Garda Síochána and informed the appellant that he was arresting him pursuant to s. 4 (3) of the Criminal Law Act, 1997 for an offence of burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. He then cautioned the appellant. The evidence disclosed that the appellant vigorously resisted arrest causing the other two Gardaí to intervene. He was conveyed to Donnybrook Garda Station where he was searched. During this search, Gardaí recovered a bag of jewellery which, it transpired, had been taken from the burgled property.

#### **Grounds of Appeal**

7. The appellant relies on three grounds of appeal, as follows: -

- "1. *The Learned Trial Judge erred in admitting into evidence the alleged verbal admission of the Applicant that a mobile phone found at the scene of the burglary was his property given the improper manner in which it was obtained.*
2. *Given that this alleged admission specifically grounded the Applicant's arrest and the consequential search of his person, the Learned Trial Judge erred in admitting into evidence the items seized as a result of the search.*
3. *Alternatively, the Learned Trial Judge erred in law or on a mixed question of fact and law in ruling that, in all the circumstances, the arrest of the Applicant and subsequent search and seizure was not unlawful, did not fall short of the basic requirements of fairness and/or was not in breach of the Applicant's Constitutional rights."*

#### **The Arguments**

8. The appellant contends that the trial judge erred in admitting into evidence the admission of ownership of the mobile phone. Moreover, the appellant argues that as the arrest was grounded in this admission, all matters that flowed therefrom were tainted and thus it is said the judge erred in admitting into evidence the items of jewellery seized on foot of the search following arrest.
9. The appellant makes two arguments which can be briefly stated, firstly, that the Garda had sufficient information so that the appellant might be charged, and consequently, he

ought to have been cautioned. The fact that this was not done constitutes a breach of Rule 2 of the Judges' Rules.

10. Secondly, that the failure to administer a caution violated the requirement of fundamental fairness.
11. The appellant's position is that there was a failure on the part of the Garda involved to issue a timely caution. *Police Powers in Ireland* by Mr Orange is relied on in this respect where the author states at para 7.12:

*"If a garda has decided to charge a person with an offence he should administer the usual caution before asking him any further questions. If the garda is questioning a person and the garda is in possession of sufficient information to give rise to a possibility that a person may be charged with an offence, the member should administer a caution before asking any further questions."*

12. With reference to the argument on basic fairness, the appellant relies on *The People (DPP) v Breen* [1995] WJSC-CCA 2054 and again refers to *Police Powers in Ireland* at para. 7.13:

*"In Breen, the gardaí were conducting a search of the applicant's farm for firearms. One of the gardaí had previously known the applicant's family and had called to, and was invited into, the farmhouse. The garda stated in evidence that he was not in contact with the other members of the search team, and that he was not aware at that time of any discovery of significance having been made. The member was engaged in a general conversation with the applicant. It became apparent during the conversation that the applicant realised that the gardaí were resuming the search at which point he became very agitated and upset saying 'I can't talk. Don't ask me. I'll end up like those in the North.' The garda stated that he believed this change in the applicant's behaviour was connected to the ongoing search. At this stage the garda said 'Tell me, Sean,' but he did not administer a caution."*

And:

*"However, the Court went on to hold that having regard to the circumstances the garda 'knew or ought to have appreciated' that the applicant 'was on the threshold of admitting some involvement in crime.' The Court held that 'the failure to administer a caution in the circumstances of this case violated the requirements of basic fairness and the evidence was wrongly admitted.'"*

13. The appellant contends that Garda White ought to have appreciated or did in fact appreciate that the appellant was on the threshold of implicating himself in the burglary.
14. The appellant says that the Garda held back identifying himself and actively encouraged the admission without caution, and therefore, having regard to the basic requirements of fairness, the verbal admission ought not to have been admitted. The trial judge took the view that *Breen* was distinguishable because it involved a direct admission to criminal

behaviour rather than to ownership of a phone as in the instant case. The appellant submits that the trial judge erred in this regard pointing out that the admission to ownership of the phone was incriminating as it was found at the scene of the burglary at the very point of breaking and entering.

15. Finally, it is said that as the appellant's admission grounded the arrest, the arrest is tainted and amounts to a deliberate and conscious breach of the appellant's constitutional rights with a consequential impact on the items found during the search
16. It is the respondent's position that at the point of first meeting between Garda White and the appellant, the Garda did not have the requisite suspicion to charge the appellant and that this suspicion could only have been present once the appellant accepted ownership of the phone. The respondent rejects the contention that the Garda knew or ought to have appreciated that the appellant was on the threshold of implicating himself once he met the Garda at the Molly Malone statue.
17. It is acknowledged, with reference to the transcript, that the Garda suspected the person who owned the phone was responsible for the burglary, but it is said that that suspicion did not crystallise until ownership of the phone was established.
18. Rule 1 of the Judges' Rules which provides that: "*when a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information may be obtained.*" The respondent says that this rule permits Gardaí to ask questions of a person where they are striving to achieve a suspect and reiterates that it is not until the appellant confirmed his ownership of the phone that the Garda suspected the appellant of having committed the offence.
19. The respondent further relies on *The People (DPP) v Conroy* [2021] IESC 48 at para. 35:

*"...[N]othing stops an officer of the law conducting enquiries. Citizens don't have to answer their questions. When in custody or where a charge is decided on outside custody, there has to be a self-incrimination warning, but not when a potential witness or potential suspect is at liberty."*
20. The respondent says that the Garda merely asked a question to establish whether the person before him was the true owner of the phone and that there was no encouragement and no unfairness attaching to such question.
21. In essence, it is the respondent's position that once Garda White confirmed ownership of the phone, he had the requisite suspicion to ground a lawful arrest, as a consequence, no issue arises as to the legality of the search.

### **The Relevant Evidence**

22. In direct testimony on the issue, Garda White stated:-

*"I arrived at the Molly Malone statue. Garda Coffey and Garda Walsh were in the vicinity very close to where I was, as was Garda Enright. A male approached me while at the Molly Malone statue. He asked me was my name Steve, I said it was. He asked me did I have his phone. I stated yes. Before handing the phone the male now known to me as David Lynch, I asked him if there was anybody he could identify on the phone so that I'd know it was his. He identified a very distinctive mark on the phone which was a sticker with his phone number attached to the back of the phone."*

23. On being cross-examined, he agreed that it was possible that the man he was going to meet had committed the burglary.

*"Q. Yes. And you're seriously suggesting you weren't very suspicious of him?"*

*A. Well, I may not have been. He may not have turned up. It may have been another male. It could have been a friend.*

*Q. So you're saying that the person who kept the appointment, you weren't suspicious of. You didn't like him for this burglary?"*

*A. As I've stated previously I believe that the person who was going to claim ownership of the phone is the person that was responsible for the burglary.*

*Q. And the gentleman that approached you to keep the appointment in your mind must have been such a gentleman, no?"*

*A. I never met him before so I couldn't say.*

*Q. So you weren't at all suspicious of the man who approached you to keep this appointment?"*

*A. Suspicious is what you're saying, it's not what I'm saying, no.*

*Q. You weren't suspicious of him at all.*

*Q. JUDGE: Sorry, you must have held the view that it was possible that the man you were going to meet did the burglary?"*

*A. Yes, of course, Judge, but –"*

**Rule 2**

24. Whilst the Judges' Rules are not rules of law, as stated in excess of 40 years ago in *The People (DPP) v Farrell* [1978] IR 13 at p. 21: "[t]hey have stood up to the test of time and will be departed from at peril."

Rule 2 thereof provides:-

*"Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such a person before asking him any questions, or any further questions as the case may be."*

25. A Garda is entitled to ask questions of a person whether or not the person is suspected of an offence. As stated in *Conroy*: "*Citizens don't have to answer their questions*", but this of course does not mean that enquiries cannot be made. It is only when a member of An Garda Síochána has decided to charge the person, that the caution must be given.
26. As stated in *McGrath on Evidence*, 3rd ed, at para 8-207 with reference to *The People (AG) v Cummins* [1972] IR 312:

*"It is clear that the question of whether the garda had the requisite intention [to charge a person] falls to be tested subjectively, on the basis of whether the garda had, as a matter of fact, made up his or her mind to charge the person and not objectively according to whether the garda was in a position to charge the accused."*

27. It was necessary for the Gardaí to establish the owner of the phone. Arguably, the person who ultimately showed up to collect the phone may not have been the owner of the phone and until this was established, the Garda had not decided he had sufficient grounds to arrest and charge the appellant.
28. So, it is obvious on the evidence that Garda White had his suspicions that the owner of the phone was involved in the burglary and indeed he so stated in evidence that:

*"at the time I believed, and I do believe, that the person who was meeting me with the phone was a culprit and responsible for the burglary."*

However, when asked about his level of suspicion he said:

*"...[H]e may not have turned up. It may have been another male. It could have been a friend."*

He followed this with:

*"As I've stated previously I believe that the person who was going to claim ownership of the phone is the person that was responsible for the burglary."*

### **Decision on Rule 2**

29. It is clear that only when the appellant was able to identify the sticker on the phone that the Garda's suspicion hardened, and he then arrested the appellant and administered the caution. We find no error in the trial judge's ruling in this regard.

### **Basic Fairness**

30. Garda White made certain enquiries as to the ownership of the phone which he was entitled to do without cautioning the appellant. It is argued with reliance on *Breen* that the failure to administer a caution in the circumstances violated the requirements of

fundamental fairness. In *Breen*, while the Court rejected the argument relating to a breach of Rule 2, it excluded the statement made by the appellant on the basis of a breach of the requirements of fundamental fairness. This was in circumstances where the appellant became agitated during a search of his farm for firearms, saying: "I can't talk, don't ask me. I'll end up like those in the North." Following which, the Garda said, "Tell me Sean." He did not caution Mr Breen.

31. The particular circumstances were such that the principle of basic fairness was found to require a caution even though the Garda had not decided to charge the appellant as it was said that the Garda ought to have appreciated Mr Breen was on the verge of an admission.
32. In the present case, it is argued that by failing to identify himself as a member of An Garda Síochána, engaging with the appellant and encouraging an admission, such fell below the required standard of fairness. Moreover, it is argued that the arrest is similarly tainted and in breach of the appellant's constitutional rights.

**Conclusion and Decision**

33. We are not persuaded that there is merit in this argument on the facts disclosed. Garda White was undoubtedly entitled to ask questions of the appellant regarding ownership of the phone. The fact that he was in plain clothes and did not identify himself as a garda could be said to be appropriate to garda investigation. He could have received several answers to his question regarding ownership. The facts are entirely different to that of *Breen*, where it was clear that the appellant in that case was about to incriminate himself in circumstances where his farm was being searched for firearms and explosives.
34. Accordingly, as we find no error in the trial judge's ruling, the appeal is dismissed.