THE COURT OF APPEAL

Record Number: 272/2019

McCarthy J.
Kennedy J.
Donnelly J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

RAFAL KLUBIKOWSKI

APPELLANT

JUDGMENT of the Court delivered on the 18th day of May 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 5th November 2019, the appellant was convicted of an offence contrary to s. 15A and s. 27 of the Misuse of Drugs Act, 1977, as amended and other drugs offences under the 1977 Act, in relation to possession of cannabis and cocaine.

Background Facts

2. At approximately 2:20pm on the 30th November 2017, Garda Peter O'Loughlin was travelling southbound on the M8 motorway in an unmarked Garda patrol car, when, between Mitchelstown and Fermoy, he overtook a vehicle being driven by the appellant. He stated that there were three males in the vehicle and that when they spotted the unmarked patrol car, they appeared to be uneasy with the patrol car overtaking them.

3. Garda O'Loughlin decided to pull in front of the line of traffic and reduce his speed to 80km/h. He stated that all of the other vehicles in that line of traffic behind him overtook the patrol car, whereas the appellant's vehicle stayed back behind him. The Garda slowed down further, waiting for the appellant's vehicle to overtake him so that he could do a vehicle registration check. He stated that he pulled into the hard shoulder and had almost come to a stop before the appellant's vehicle overtook him.

4. At this point, Garda O'Loughlin radioed Fermoy Garda Station seeking assistance as he intended to stop the vehicle. Once he received confirmation that Gardaí from Fermoy Garda Station were on their way, he activated the blue lights and the appellant pulled into the hard shoulder and stopped. The Garda approached the passenger window. There were three men in the vehicle, the appellant, and two other males.

5. When the front seat passenger opened the passenger window, the Garda immediately noted a strong smell of cannabis coming from the vehicle. He asked the appellant for his driving licence, and he complied. The two other passengers also gave the Garda their identification. The appellant recognised Garda O'Loughlin as he had previously stopped him for a road traffic matter.

6. The Garda informed the three males that due to the strong smell of cannabis coming from the vehicle, he intended to search the vehicle pursuant to s. 23 of the Misuse of Drugs Act, 1977. He asked them to step out of the vehicle and they complied. At this point, Garda O'Loughlin was accompanied by Sergeant Lyons from Fermoy Garda Station.

7. Garda O'Loughlin searched the appellant's person and discovered €850 cash. He then searched the front of the vehicle and the back seat. Upon the Garda opening the boot of the vehicle, the front passenger ran down an embankment and disappeared out of sight. The appellant and the other male remained at the scene.

8. The Garda removed a blue Adidas sports bag, a Lidl shopping bag and a brown leather wallet from the boot. Inside the sports bag was what appeared to be three bundles of cannabis wrapped in cling film. Inside the Lidl bag, there appeared to be cannabis and some white powder wrapped up. This white powder appeared to the Garda to be cocaine. Inside the wallet, there was €5,001. Garda O'Loughlin then cautioned the appellant and the other male.

9. A further two Gardaí arrived at the scene. At approximately 2:50pm, the two men were conveyed to Fermoy Garda Station. Initial estimations by the Gardaí were that the drugs recovered from the vehicle driven by the appellant were worth somewhere in the region of €40,000. The appellant was arrested under s. 25 of the 1977 Act.

10. Ms O'Neill of Forensic Science Ireland confirmed that the weight of the cannabis was 1,156.3 grams and that the weight of the cocaine was 49.8 grams. This was valued by Detective Sergeant Leahy at €20 a gram for cannabis giving a total as €23,126 and at €70 per gram for the cocaine giving a total of €3,486. This gave an overall total value of controlled drugs of €26,612.

Grounds of Appeal

11. This Court was furnished with nine grounds of appeal, however, at oral hearing, it was indicated that grounds 2, 7, 8 and 9 were not being pursued. The grounds are as follows:-

> *"1. The Learned Trial Judge erred in fact and law in finding in a voir dire that the stop of vehicle 07LS6179 alleged to have been driven by the Applicant on the 30th day of November 2017 at M8 Motorway, Corrin, Fermoy, in the County of Cork by Garda Peter O'Loughlin was lawful.*
>
> *3. The Learned Trial Judge failed to explain or clarify for the Jury, adequately or at all, the meaning of material terms, including possession and control.*
>
> *4. The Learned Trial Judge failed to explain or clarify section 29 of the Misuse of Drugs Act, 1977 (as amended) .*

5. The Learned Trial Judge failed put the Applicant's defence pursuant to section 29 of the Misuse of Drugs Act, 1977 (as amended) to the Jury adequately or at all.

6. The Learned Trial Judge failed put the Applicant's defence of duress to the Jury adequately or at all.

Submissions

Ground 1

The Appellant

12. It is the appellant's position that the stop of his vehicle was unlawful. Garda O'Loughlin gave the following account in direct evidence as the basis for stopping the appellant's vehicle:-

> *"Judge, I was on patrol on the M8 motorway on the 30th of November 2017. Approximately 14.20 I was traveling southbound between Mitchelstown and Fermoy. There was a few cars in front of me driving in lane 1. I was overtaking them in lane 2. I observed the accused's vehicle, Judge, a grey Audi A8 07LS6179. As I overtook this vehicle, I saw three males briefly and they -- they looked to be -- have immediately spotted the unmarked patrol car and seemed to be uneasy with the patrol car overtaking them. I pulled in in front of the line of traffic and I reduced my speed to approximately 80 kilometres an hour. All the other vehicles in the line that were behind me overtook me and Mr Klubikowski's vehicle stayed back about a hundred yards behind me. I again slowed down, waiting for Mr Klubikowski's vehicle to overtake me so I could do a vehicle registration check. I pulled in on the hard shoulder and almost came to a stop before Mr Klubikowski's vehicle overtook me. Having seen the three males which I thought were uneasy in the car, I radioed the Fermoy Garda Station, informed them that I was going to stop the vehicle and if I could get assistance as I was on my own at the time."*

13. In cross-examination the Garda confirmed that:-

> *"I would have no reason to have stopped the car, Judge, bar the -- the -- the way the people in the vehicle were acting and the fact that it refused to overtake me. It had copped that it was an unmarked garda car."*

14. Attention is also drawn to the following exchange:-

> *"Q. And there was nothing in terms of the driving of this car that in any way caused you concern that there might be a breach of the provisions of the Road Traffic Act?*
>
> *A. They just -- it just didn't look right for me, Judge, whatever it was. It just drew my attention and I pulled in to do a further check on the vehicle and that's when they refused to overtake me and slowed down, stayed behind me, which drew further ..."*

15. It is submitted that while the Road Traffic Acts provide for the power to stop a motorist, this power is limited in scope. The following extract from Prof. Walsh on *Criminal Procedure* is relied on:-

> *''A failure to stop or remain stationary when required is an offence. The full ambit of this provision is yet to be tested in the Irish courts. A possible interpretation is that it*

permits a member of An Garda Siochana to stop motorists at random simply where he is acting in the course of his duty. Since a member's duties can be defined in very broad terms, this interpretation would give the power a very broad ambit. The likelihood, however, is that the lawful exercise of the power is confined to the discharge of a member's road traffic duties. When discussing the provisions in DPP (Stratford) v. Fagan, both Denham and Blayney JJ distinguished between a garda power to stop a motorist and a motorist's obligation to bring his vehicle to a halt when required to do so by a member of An Garda Siochana. Both agree that section 109(1) did not go beyond the latter. In other words, it was available only to assist the member in the discharge of his traffic duties. It did not afford a member an independent power to stop motorists. Such statutory powers of stop are available on suspicion." (emphasis added)

It is argued that neither a reasonable suspicion nor a road traffic issue were present in the instant case.

16. The appellant says that the trial judge found that the Garda was exercising the statutory power under s. 109 of the Road Traffic Act, 1961, as amended, which provides:-

> *"109.-(1) A person driving a vehicle in a public place shall stop the vehicle on being so required by a member of the Garda Siochana and shall keep it stationary for such period as is reasonably necessary in order to enable such member to discharge his duties.*
> *(2) A person who contravenes subsection(1) of this section shall be guilty of an offence."*

17. It is submitted that s. 109 only pertains to where a member of An Garda Síochána is discharging road traffic duties and that this does not apply to the appellant's case.

The Respondent

18. It is the respondent's position that the trial judge did not err in ruling that the stopping of the appellant's vehicle was lawful. It is submitted that the judge correctly found that Garda O'Loughlin was acting in discharge of his duties as a member of An Garda Síochána Traffic Corp when he stopped the vehicle.

19. The following from Prof. Walsh on *Criminal Procedure* is referenced:-

> *"A very broad police power of stop which affects a wide section of the population is the power to compel a motorist to stop his vehicle. Although it does not specifically impose an obligation on the motorist to answer questions, it can provide an opportunity for a member of the Garda Siochana to question motorists on a range of matters."*

20. It is accepted by the respondent that the power to stop a vehicle is only exercisable by a member of An Garda Síochána in discharging his or her duties, however, it is submitted that Garda O'Loughlin was discharging his duties when he stopped the vehicle as he observed suspicious behaviour on the part of the persons in the car.

21. The respondent maintains that each step taken by Garda O'Loughlin in bringing the appellant's vehicle to a stop and approaching the appellant's vehicle whereupon he detected the presence of suspected cannabis was taken as part of his duties as a member of the Traffic Corp and in accordance with the Road Traffic Acts.

Discussion

22. The arguments advanced by Mr Bowman SC, for the appellant, are twofold; firstly, that the Garda could not have relied on s. 109 of the Act, as there was no evidence of any traffic violation enabling him to use that section and secondly, that even though there is a common law power to stop a vehicle, that power must be exercised fairly and with a good basis and not simply arbitrarily.

23. Section 109 of the Road Traffic Act, 1961 places an obligation on a motorist to stop their vehicle when required to do so by a member of An Garda Síochána and keep it stationary for a reasonable period. Failing to stop or remain stationary is an offence.

24. The case of *DPP (Stratford) v Fagan* [1994] 3 IR 265 discussed the provision on foot of a consultative case stated where two questions were submitted; first, as to whether a Garda, holding no suspicion in respect of any offence, may stop an individual and secondly, if such power exists, whether evidence obtained as a result is admissible at trial. The questions were answered in the affirmative with Carney J. finding that s. 109 authorised a Garda to stop a vehicle to determine whether there had been a breach of s. 49 of the Road Traffic Act and secondly, that a Garda holds a common law power to conduct random traffic checks, the latter includes situations where there may not be any *"immediate suspicion that an offence had been committed."*

25. On appeal to the Supreme Court, the applicant's appeal was dismissed with Denham J. (as she then was) dissenting. O'Flaherty J. found that the Gardaí have a broad common law power to check motor vehicles in order to detect and prevent crime, but the power must not be exercised capriciously.

26. It was submitted on the part of the DPP in *Stratford v Fagan* that s. 109 also gave the Gardaí a power to stop a motorist, but the Court found that the provision did not give the power to the Gardaí to so stop, but simply imposed an obligation on the driver of a vehicle to stop when required to do so by a member of An Garda Síochána. The rationale for this appears to be drawn from the decision in *Steel v Goacher* [1983] RTR 88, where Griffiths LJ, in considering s. 159 of the English Road Traffic Act, 1972, stated at p. 103: -

> *"For purely practical reasons, there must be a rule that motorists stop when called upon to do so by a constable in uniform. The motorist must assume for the purpose of stopping that he is being lawfully required to stop, otherwise a dangerous and chaotic state of affairs would result. But once the motorist has stopped he can, thereafter, challenge the constable's right to stop him, for nothing in the wording of the section gives any power to the constable to stop the motorist. It is a section designed to ensure safety and good order rather than to confer any specific power on a police constable."*

27. O'Flaherty J. stated in giving judgment in *Fagan* that:-

> *"At a time when crime involving motor vehicles is so rampant it would be anomalous to suggest that while the gardai have wide powers to stop for mundane road traffic matters (and I am of opinion that the statutory provision quoted pertains to these matters essentially) they do not have the wider power to check all motor vehicles in their performance of their duty to detect or prevent crime."*

28. Therefore, s. 109 places an obligation on a motorist to stop if required to do so by a member of An Garda Siochana. There exists a broad common law power vested in a member of An Garda Síochána, in the exercise of their duty to detect and prevent crime, to stop a motorist. That power must not be exercised capriciously or in an arbitrary or improper manner and a motorist stopped on foot of such a common law power, may enquire the reason therefor.

29. Finlay CJ was of the opinion that setting up a road check proximate to a public house around closing time, in order to identify those driving while over the legal limit, fell within the common law powers of the Gardaí to stop a motorist.

30. The principles established in *Fagan* have been considered several times by the courts. In *DPP (Higgins) v Farrell* [2009] 4 IR 689, an appeal by way of case stated which concerned a situation where a member of An Garda Síochána decided to stop and search a vehicle under the Misuse of Drugs Act, 1977, as a consequence of the drug problem in the area.

31. Clark J. said that while the Gardaí have a common law power to stop a vehicle and seek permission to search to prevent and detect crime, the Garda in that case had utilised the Misuse of Drugs legislation and so was required to have a reasonable suspicion. He could, however, have relied on the common law power to stop without holding any specific suspicion regarding the driver of the vehicle.

32. Turning now to the present appeal, the bases for stopping the vehicle driven by the appellant are set out above. Garda O'Loughlin, whilst on patrol, observed the vehicle and his attention was drawn to its failure to overtake his unmarked patrol car. He was of the view that that the three males in the car were uneasy having realised that his patrol car had overtaken their vehicle. He gave evidence that he would have had no reason to stop the car except for the manner of the people in it and that in his words: *"It had copped that it was an unmarked garda car."*

33. He felt that the situation just did not look right to him, and he further slowed and then pulled over in order to conduct a check on the vehicle.

34. Following the *voir dire*, the trial judge found that:-

> *"The stop and arrest here happened in circumstances where the garda was on road traffic duty on the southbound course of the motorway between Mitchelstown and Fermoy when he came upon this car. Something brought---something in the car brought the occupants to his attention. Having overtaken the car, he slowed down. Other cars overtook and for some extraordinary reason this car not alone didn't overtake him but appeared to slow down even further. That driving on the motorway on that day brought the driving of the car very much to the guard's attention and as a result of which he exercised his duty in accordance with the Road Traffic Act to stop the vehicle."*

35. While the witness gave evidence in cross-examination that the reason he sought to stop the vehicle was the manner of driving and the way the occupants looked at him while he was overtaking the car and his view that something was not right, it is apparent from a consideration of the evidence that the Garda did not stop the appellant's vehicle on the basis of a concern regarding the driving of the car per se or any other matter pertaining to driving, such as whether the driver was over the legal limit. His concern came about as a result of the demeanour of the three occupants having spotted the unmarked car.

36. Consequently, it is our view of the evidence that the Garda was exercising the broader common law power to stop a motorist in terms of *Fagan.* That is, in accordance with his duty to detect and prevent criminal activity. Having stopped the vehicle, the occupants were fully entitled to ask Garda O'Loughlin why he had required the driver to stop, however, once the vehicle had stopped, and the front seat passenger opened the window, Garda O'Loughlin immediately detected a strong smell of cannabis and exercised the power under s. 23 of the Misuse of Drugs Act,1977 to search the vehicle. The appellant had no issue with this.

Conclusion

37. Returning to stopping the vehicle, there is no evidence that the Garda acted *mala fides* or that his conduct in stopping the vehicle was capricious or, indeed, arbitrary. Whilst the trial judge found that the Garda exercised a duty in accordance with the Road Traffic legislation, it seems to us that he, in fact, exercised his common law power to stop the vehicle in accordance with his duty to detect and prevent criminal activity. This, he may do without harbouring any specific suspicion. However, in the present case, he seems to have held a concern regarding the three occupants given their demeanour and acted on foot of that. We are not persuaded that he acted outside the scope of his powers. The judge correctly identified that the Garda had a power to stop for the reason identified by the Garda. It is not material to the issue that the trial judge wrongly described the source (common law instead of legislative) which was in fact exercised by the Garda on the day.

38. On the issue of the search, he would not have been entitled to search the vehicle without the necessary suspicion, however, when the window of the car was opened, he immediately detected a strong smell of cannabis, thus giving him the required suspicion to exercise his powers under the Misuse of Drugs Act, 1977. In any event, the appellant raised no objection to the search.

39. As we are satisfied that the Garda had a common law power to stop the vehicle, the fact that the judge wrongly attributed his exercised of this power as being under statute does not impact on the lawful exercise of the common law power to stop the appellant's vehicle. Moreover, it simply seems to be the position that Garda O'Loughlin's concerns regarding the conduct of the three occupants arose in the context of a road traffic patrol.

40. Accordingly, this ground fails.

Ground 3

The Appellant

41. Complaint is made by the appellant that the trial judge failed to explain possession and control in his charge to the jury.

42. Reliance is placed on the following portion of the judgment in *People (DPP) v Tuma* [2015] 3 IR 360:-

> *"It is appropriate at this point to focus in particular on the ingredient of possession. We all understand what it means to be in possession of something in the colloquial or commonly understood sense, i.e., to have physical custody of something. However, to possess something in the legal sense involves more than that. To say that somebody possesses an item in the legal sense requires the concurrent existence of two sub- ingredients or, as they are sometimes referred to, elements of possession. The first element is that the*

person has physical custody of the item as evidenced by his or her control of it, and the second element is that the person has mental awareness of and by inference an intention to exercise, that control, evidenced by that person having knowledge, or reasonable grounds to suspect, that the item, in this instance a quantity of controlled drugs, is under his/her control."

43. Defence counsel raised a requisition that the trial judge provide further guidance to the jury as to how possession, control and knowledge applied to the facts of the case. It is contended that the trial judge ought to have acceded to this requisition.

The Respondent

44. The respondent says that the trial judge's direction to the jury in respect of the terms possession and control was appropriate and correct and further, that it was contextualised and grounded in the evidence.

Discussion

45. It is clear that the judge explained the legal concept of possession and indeed no issue is taken in this respect. Having explained the two elements of possession to the jury the judge went on to say: –

> *"So they have to prove to your satisfaction that Mr Klubikowski knew what he was doing, knew that what was in the bag, in the car on the journey were illicit drugs and that he had control over them, that he was ferrying them or carrying them or allowing or managing or helping with the distribution or the driving around of the drugs."*

46. The judge then instructed the jury that they must have regard to the overall circumstances, the location of the drugs and whether there was a smell of cannabis in the vehicle. He referred to the appellant's account when interviewed by the Gardaí; that one of the passengers came along with the bag, that the bag may have initially been in the vehicle and then in the boot of the vehicle, that the smell became obvious, and that it was obvious to him at some stage before the vehicle was stopped. He then said as follows: –

> *"So at some stage, even if you accept initially he didn't know, at some stage during the journey did he know and did he continue in control or exercise control over the drugs, because at any stage if he knew they were drugs and if he had control over them, you can find him in possession. But it is essential that you believe the evidence to be strong enough to put him with the knowledge and with the control or the direction of the drugs before he was stopped."*

47. Therefore, it is clear that the judge, having instructed the jury as to the essential elements of possession, then went on to explain how the legal concept interacted with the factual matrix.

48. The judge continued in his charge to set out that the appellant said that he did not know of the substance in the vehicle, that he was on the journey to Cork and shortly thereafter was stopped by the Gardaí. The judge specified that the appellant's case was that having been stopped by the Gardaí, he informed the Gardaí of what had happened and that he, accordingly, was never in possession of the drugs as they were in the possession of somebody else over whom he had no control.

Conclusion

49. It is clear that the judge not only properly instructed the jury regarding the legal concept of possession and the necessary elements but that he also, clearly, concisely and logically set out the facts for the jury, including the appellant's defence. We are not at all persuaded that the erred in this respect.

Grounds 4 and 5

The Appellant

50. It is submitted by the appellant that the trial judge failed to explain or clarify to the jury s. 29 of the 1977 Act, or to put the appellant's defence pursuant to that section to the jury. In essence, it is said that the judge failed to broach s. 29 of the 1977 Act at all in his charge. counsel requisitioned the trial judge as follows: –

> *"Then there was the question of section 29 and the Court doesn't seem to have given the jury any help in regard to the application of section 29 and the defences."*

The Respondent

51. The judge declined to recharge the jury and the respondent contends that he was correct in so declining. The respondent argues that while not explicitly referencing s. 29, the trial judge addressed the scenario where the appellant did not know and had no reasonable grounds for suspecting that what he had in his possession was a controlled drug and also the scenario where the appellant did not know and had no reasonable grounds for suspecting that he *was* in possession of a controlled drug and made it clear to the jury the requirement for the prosecution to have demonstrated beyond reasonable doubt that those scenarios did not obtain. It is the respondent's position that neither situation was made out on the evidence.

Discussion

52. The relevant portion of s. 29(2) of the 1977 Act provides:-

> *"In any such proceedings in which it is proved that the defendant had in his possession a controlled drug […] it shall be a defence to prove that—*
> *(a) he did not know and had no reasonable grounds for suspecting—*
>
> *(i) that what he had in his possession was a controlled drug…, or*
>
> *(ii) that he was in possession of a controlled drug…or"*

53. Mr Bowman, on behalf of the appellant, clarified in oral hearing that he relies on s. 29(2)(a)(i) and (ii). The section centres on an assessment of an accused person's knowledge as to what he has in his possession. It places an evidential burden on an accused requiring him/her to establish the presence of a reasonable doubt that he/she did not know and had no reasonable ground for suspecting that what he/she had in their possession was a controlled drug. In *People (DPP) v Smyth and Smyth* [2010] 3 IR 688, Charleton J. stated at p. 696:-

> *"The court notes that bearing the burden of proving a defence as a probability could have the effect that in respect of an element of the offence an accused person might raise a doubt as to his guilt, but not establish it as a probability. This might lead to a situation where the charge was not proven as to each element of the offence beyond reasonable*

doubt, but nonetheless the accused could be convicted. That would not be right. Proof of a guilty mind is integral to proof of a true criminal offence, in distinction to a regulatory offence. In s. 29 of the Misuse of Drugs Act 1977, as amended, the normal burden of proving the mental element of possession of a controlled drug is removed from the prosecution and the accused is required to prove that it did not exist.
In consequence, the court considers that an evidential burden of proof is cast on the accused by s. 29 of the Misuse of Drugs Act 1977, as amended, which is discharged when the accused proves the existence of a reasonable doubt that he did not know, and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. This is not a burden merely of adducing evidence. It is a legal burden discharged on the lowest standard of proof, namely that of proving a reasonable doubt."

54. In effect, an accused is required to demonstrate the presence of a reasonable doubt concerning his knowledge.

55. The charge emphasised where the burden of proof lay, resting with the prosecution to prove beyond reasonable doubt that the appellant was in possession of a controlled substance and that he knew or ought to have known this. The jury were then instructed in the following terms:-

"Do you think the State have made out the case against him, that he was in possession of drugs, the combination of drugs, that he knew they were all in the Adidas bag, that he knew that they were distributed in this manner and that when he took them into the car, that he was taking control or possession of items that he knew to be ought to have known to be illicit drugs, either from the smell or the distribution or knowledge that the State have established for you." (our emphasis)

56. The judge then went on to say:-

"So they have to prove to your satisfaction that Mr Klubikowski knew what he was doing, knew that what was in the bag, in the car on the journey were illicit drugs and that he had control over them, that he was bringing them or carrying them or allowing or managing or helping with the distribution or the driving around of the drugs."

57. The appellant said in his interviews with the Gardaí that he did not know what was in the Adidas bag, that he went on the journey to Cork innocently, became aware of a smell and was stopped by the Gardaí. In interview, the following exchange took place:-

"Question: What did you think he was bringing to in this bag? Answer: I think first time it was steroid but after first I got a smell from the car from the boot. Can you describe the smell? A smell like weed. Question: Going back to the steroids, you believed it was steroids? Answer: Yeah, because he sent me a picture of steroids before. Question: Did you believed they were illegal steroids? Answer: He said he would give me €800 when I bring him to Cork. Question: Did you believe he was bringing illegal steroids to Cork? Answer: Yes, I believe, yes. Question: You then smell the cannabis? Answer: Yes, real smell of cannabis in the car. Question: How long after it was put in the car did you smell it? Answer: After 45 minutes when I was on the motorway. Question: At that stage you realised that you were driving illegal drugs to Cork; is that correct? Answer: Yes…"

58. Therefore, he had discharged the evidential burden and it was then for the respondent to prove beyond reasonable doubt that the appellant either knew or had reason to believe that the package in his possession contained controlled drugs.

59. The judge directed the jury that the respondent was obliged to prove beyond reasonable doubt the elements of possession of the goods in question and that it was a controlled drug, however, he did not point out to the jury that the burden then shifted to the appellant to establish the existence of a reasonable doubt regarding his knowledge.

60. He did, however, place the burden on the prosecution to prove to the required standard that the appellant knew or ought to have known that the goods in question were controlled drugs. Thus, giving directions to the jury which were in fact more favourable to the defence than if he had directed them in terms of s. 29(2) and the reverse onus of proof.

Conclusion

61. Consequently, as the charge favoured the appellant in this regard, we are not persuaded that any injustice arose rendering the conviction unsafe.

Ground 6

The Appellant

62. Finally, the complaint is made that the trial judge failed to put the appellant's defence of duress to the jury. S. 29(7) of the 1977 Act clarifies that a person accused of an offence under the Act is not prevented from raising a defence other than those contained in the section.

63. Requisition was raised by counsel for the appellant who submitted that the defence of duress was made out on the evidence. The trial judge declined to re-charge the jury as it was his view that there was insufficient evidence to ground a defence of duress.

64. The appellant points to extracts from his memoranda of interviews with the Gardaí as evidence of his duress. Particular emphasis is placed on the following:-

> *"I speak to Michael. Michael say: 'I need a favour' and he say: 'You need to bring me to Cork' and I tell him I have a dental visit and I need to collect my children and girlfriend and that Cork is too far as I meet him around 12.15 or 12 and Cork is too far." Question: "Okay. " Answer: "He say: 'You don't have a choice. You need to bring me to Cork.' I tried to explain to him I can't collect children and girlfriend. it's too far. and he say: 'You don't have a choice. You need to bring me to Cork or you are fucked […] Question: "You were in fear, is that fair enough to say?" Answer: "Yes. ""*

And:-

> *"After I got the smell of weed he said: 'It's not too far from Cork.' I keep saying: 'I see exit for Thurles or something like that.' He said: 'You keep going. You drive' and after guards stopped me I think exit Mitchelstown."*

65. The following extract from Coonan and Foley on *the Judge's Charge in Criminal Trials* is relied on as providing guidance on the optimum charge to be given by a trial judge where duress is raised as a defence:-

> *"Having directed the jury on the burden of proof and, having referred to the fact that the accused relies on the defence of duress, the trial judge should then provide an outline of the facts which are relevant to that defence. In relation to the legal principles relevant to*

duress, it is submitted that the trial judge should then proceed to outline the threats that will suffice for the defence to be made out. The jury should be instructed to ask itself whether the accused was, in fact, driven to act as he did because he genuinely and reasonably believed that if he did not so act either he or the person he claims he was acting to protect would be killed or seriously injured, either immediately or almost immediately. It may be prudent at this point to re-mention the requisite burden and standard of proof required (i.e. that the jury must be satisfied beyond a reasonable doubt that the prosecution have disproved the existence of the defence). The jury should be directed that if it is satisfied beyond a reasonable doubt that the prosecution has shown that one of the relevant elements is not present (e.g. that there was no immediacy or no threat at all), then the defence is not made out. If, however, the jury is satisfied that the prosecution has not proven beyond a reasonable doubt that the above matters do not attain, then it falls to consider how the accused person reacted to the threat."

66. The following quotation from Blackstone's *Criminal Practice* as cited in *People (DPP) v O'Toole* (Unreported, Court of Criminal Appeal, 25th March 2003) is also relied on:-

"however distasteful the offence, however repulsive the defendant, however laughable his defence, he is nevertheless entitled to have his case fairly presented to the jury both by counsel and by the judge."

67. Reliance is also placed on *People (DPP) v Dickey* (Unreported, Court of Criminal Appeal, 7th March 2003) in which this Court's predecessor quashed a conviction on the basis that the trial judge, in charging the jury, had failed to outline the evidence upon which the appellant's plea of duress has been raised.

68. Attention is drawn to the following extracts of the Supreme Court's judgment in *People (DPP) v Gleeson* [2019] IR 186:

"[…]a defence may only be left for consideration by a jury if it actually arises on the evidence. Once there is some evidence capable of raising the issue the persuasive burden of disproving a defence is on the prosecution."

And:-

"Before the possible defence can be left to the jury as an issue there must be some evidence from which the jury would be entitled to find that issue in favour of the appellant."

69. In the context of a consideration of the defence of provocation, this Court, in *People (DPP) v Almasi* [2018] IECA 372 stated that:

"Nothing, beyond the existence of a threshold level of evidence of reasonably (sic) cogency, i.e., a credible narrative of events suggesting the presence of the various elements of the defence, was required to be "established.""

70. The appellant points to the following comments of Murnaghan J. in *People (AG) v Whelan* [1934] IR 518 as providing guidance as to what constitutes a "*credible narrative*":-

"It seems to us that threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as a justification for acts which would otherwise be criminal. The application of this general rule must however be subject to certain limitations. The commission of murder is a crime so heinous that

murder should not be committed even for the price of life and in such a case the strongest duress would not be any justification. We have not to determine what class of crime other than murder should be placed in the same category. We are, however, satisfied that any such consideration does not apply in the case of receiving. Where the excuse of duress is applicable it must further be clearly shown that the overpowering of the will was operative at the time the crime was actually committed, and, if there were reasonable opportunity for the will to reassert itself, no justification can be found in antecedent threats.

In the case before the Court we consider that the finding of the jury was meant to imply that the coercion was present when the act, otherwise criminal, was committed, and we are of opinion that the conviction must be quashed and a verdict of acquittal entered."

71. It is submitted that the threats made to the appellant were of a serious nature, that they operated upon him at the time of the offence and that the appellant was stopped by An Garda Síochána before he had an opportunity to extricate himself from the situation. It is submitted that in these circumstances the trial judge ought to have directed the jury on the question of duress.

72. Reference is made by the respondent to Charleton J.'s definition of the defence of duress in his work *Criminal Law*:-

"*The defence of duress is based on the accused having been threatened in order to force him to commit a crime."*

73. It is submitted that the trial judge was correct and acted in accordance with the jurisprudence in refusing to re-charge the jury on the defence of duress. It is further submitted that no such defence arose on the evidence.

74. Emphasis is placed on the following as indicating an absence of duress on the appellant's part:-

"Question: Who asked you to drive?
Answer: Yesterday Michael asked me to drive. He ring me to go to hotel and bring me back in two days on Sunday."

And:-

"Question: The two lads that were with you in the car today, how long do you know them?
Answer: About a year.
Question: Do you ever go socialising with them?
Answer: No, never in pubs or discotheque.
Question: How do you know the two boys?
Answer: In the gym about one year ago, Michael in the gym, Christopher I know him. I see him in Dublin and not see for a long time until a few months ago.
Question: How did you meet firstly Christopher first?
Answer: Connection Hotel gym in July.
Question: When did you first see him?
Answer: In Tallaght shopping centre. We exchanged numbers.
Question: Why?
Answer: Because we are both Polish. I have loads of Irish friends.

Question: Where are your Irish friends?
Answer: Most of my customers are Irish.
Question: How often do you speak to Michael and Christopher?
Answer: Michael ring me twice, three times a month. Christopher we speak every second day on the phone."

And:-

"Question: Is it fair to say you were going to get the €800 to drive from Carlow to Cork?"

Answer: Yeah.

Question: Had you been paid the €800 at this stage?

Answer: No.

Question: Would you accept that €800 is a lot of money to make that journey and you know this, when you're doing this, you were being asked to do something illegal?"

Answer: Yeah, I accept that. I don't think it was something big. I thought it was steroids. After I got the smell of weed he said: 'It's not too far from Cork.' I keep saying: 'I see exit for Thurles or something like that.' He said: 'You keep going. You drive' and after guards stopped me I think exit Mitchelstown."

Question: So when gardaí stopped you and we located what we believed to be cannabis and cocaine were you surprised?"

Answer: Not too surprised to see weed but surprised to see it was such a very big parcel."

75. It is submitted that the above is not indicative of a person acting in fear of immediate threats of death or serious personal violence so great as to overbear the ordinary power of human resistance rather, of a person acting in concert with his friends to transport controlled drugs for financial gain.

Discussion and Conclusion

76. The height of the evidence asserted of duress is that of the appellant's contention in interview that he was in fear, and the following from his interview where he said that one of the persons in the vehicle said to him:-

"Answer: "He say: 'You don't have a choice. You need to bring me to Cork.' I tried to explain to him I can't collect children and girlfriend. it's too far. and he say: 'You don't have a choice. You need to bring me to Cork or you are fucked […]

77. The defence of duress may apply where an individual feels under a compulsion to commit an offence as a result of threats made to him or to another person. The person will of course have the necessary *mens rea* but his will is overborne by virtue of the threats made to him and so he commits the offence.

78. There are three aspects to the defence as stated by Murnaghan J. in *Whelan*; that is first, that the threats must be of death or serious harm, second, the threats must be immediate, and

third, those threats must be so great so as to overbear the resistance of the person to whom they are made.

79. In our view, the appellant falls at the first hurdle. The remarks alluded to in the memoranda of interview could not be taken to mean, on any rational analysis, to be threats in the sense envisaged in *Whelan*.

80. Reference is made in support of the defence to the following exchange in interview:-

> "*"He say: 'You don't have a choice. You need to bring me to Cork.' I tried to explain to him I can't collect children and girlfriend. it's too far. and he say: 'You don't have a choice. You need to bring me to Cork or you are fucked […] Question: "You were in fear, is that fair enough to say?" Answer: "Yes. "*"

81. That, in effect, was the height of the nature of the alleged threat made to the appellant. Later, in interview, he says that he knows the man in question and that he *asked* him to drive him to Cork and that he was to be paid the sum of €800.00 to do so.

82. Before a defence may be left for a jury's consideration, there must be some evidence of reasonable cogency as stated in *Almasi*:-

> "*A credible narrative of events suggesting the presence of the various elements of the defence, was required to be "established."*"

83. In our view, the threshold has not been met in the present case. The trial judge refused the requisition to visit the defence of duress and properly in the opinion of this Court. Accordingly, this ground fails.

84. As we have not been persuaded that any of the grounds of appeal have been made out, the appeal is dismissed.