THE COURT OF APPEAL

Record Number: 174/23

Edwards J.
McCarthy J.
Burns J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

NOEL NOONAN

APPELLANT

JUDGMENT of the Court delivered on the 15th day of October, 2024 by Ms. Justice Tara Burns

1. This is an appeal against conviction. Following a 9-day trial between 25 January 2023 and 8 February 2023, the appellant was convicted by unanimous verdict of the jury of all counts on the indictment, to include unlawful possession of controlled drugs with a value greater than €13,000, for the purpose of sale or supply, contrary to s. 15A of the Misuse of Drugs Act 1977, as amended ('the 1977 Act'). The appellant was sentenced to a 9 year term of imprisonment with the final 6 months suspended on certain terms and conditions.

Background

2. On 13 February 2017, the appellant was stopped by Garda Dave Farragher, driving a Toyota Corolla, on the N7 motorway close to Kildare. He was stopped because the Automatic Number Plate Recognition System installed on Garda Farragher's patrol car detected that the vehicle which the appellant was driving was not taxed. The appellant was the sole occupant of the vehicle. The appellant gave his name and an address. He indicated that the car belonged to his girlfriend and he did not realise that it was not taxed. When asked for insurance, the appellant retrieved a certificate of insurance from the glovebox, having made enquiries with his girlfriend. However, the certificate of insurance revealed that the appellant was not insured to drive the car. In addition, the appellant was not in a position to produce his driving licence. Garda Farragher decided to

seize the vehicle, pursuant to s. 41 of the Road Traffic Act 1994, as amended ('the 1994 Act'). A tow truck was called to remove the vehicle to a secure compound nearby.

3. Having been informed that he had the option to remain with the car, the appellant indicated that he was going to get the train back to Limerick. Garda Farragher gave the appellant a lift to a crossroads near the train station in Kildare.

4. After Garda Farragher dropped the appellant off at the crossroads, he drove to the secure compound where the car was to be brought and stored. The tow truck carrying the Toyota Corolla subsequently arrived at the compound, approximately 1 hour and 15 minutes after it had left the location on the N7 where it collected the Toyota Corolla. Another car had been collected by the tow truck driver in the intervening period. Garda Farragher opened the boot of the car to find a quantity of Xannax drugs and a tightly packed package which, when forensically examined, transpired to contain amphetamine. The controlled drugs found in the car had a market value of €137,858.

5. The appellant and his girlfriend, accompanied by a child, presented at Naas Garda Station the following day seeking to have the vehicle released to the appellant's girlfriend who was the registered owner of the car. The appellant was arrested and detained for the purpose of the garda investigation in relation to the discovery of the controlled drugs. At interview, the appellant denied knowledge of the drugs in the boot of the car, indicating that he *"saw no drugs".* Inference interviews were held with the appellant at the end of his detention period in the course of which he declined to answer any questions.

6. On 18 April 2017, the driver of the tow truck passed away without having provided a statement to An Garda Síochána. At trial, this became significant in light of the considerable amount of time it took for the tow truck to arrive at the yard after it had collected the Toyota Corolla; the fact that another car had been collected by the tow truck driver; and the theory postulated by Counsel on behalf of the appellant as to what had occurred during this period.

7. In March 2017, the appellant was charged with respect to this incident.

8. In April 2017, the Toyota Corolla was destroyed by An Garda Síochána.

Grounds of Appeal

9. By Notice of Appeal dated 19 June 2023, the appellant appealed against his conviction and sentence. The grounds of appeal against conviction which were ultimately pursued for the purpose of the appeal were that the trial judge erred in ruling as follows:-

    2) The search of the Toyota Corolla was lawful;

    3) All evidence obtained from the search of the Toyota Corolla and, in particular, Exhibits EMCG1 and EMCG2 ('the controlled drugs exhibits') were lawfully obtained and admissible as evidence at trial;

4) There was not a break in the chain of evidence;

5) Admitting a chain of evidence chart prepared contemporaneously with the evidence at trial;

6) All evidence obtained from the search of the Toyota Corolla and in particular the controlled drugs exhibits were admissible as evidence at trial, in circumstances where there were gaps in the chain of evidence;

7) All evidence obtained from the search of the Toyota Corolla and in particular the controlled drugs exhibits were admissible as evidence at trial, in circumstances where there was conflicting evidence regarding the chain of evidence;

8) All evidence obtained from the search of the Toyota Corolla and, in particular, the controlled drugs exhibits were admissible as evidence at trial, in circumstances where there were discrepancies in the identification of the aforementioned exhibits;

9) All evidence obtained from the search of the Toyota Corolla and, in particular, the controlled drugs exhibits were admissible as evidence at trial, in circumstances where all exhibits had not been forensically tested;

10) The Toyota Corolla had been available to the Defence in order for it to carry out its own forensic analysis of the said vehicle;

11) All evidence obtained from the search of the Toyota Corolla and, in particular, the controlled drugs exhibits were admissible as evidence at trial, in circumstances where there was an incomplete analysis of EMCG1 (i.e., one of the controlled drugs exhibits) in particular;

12) All evidence obtained from the search of the Toyota Corolla and, in particular, the controlled drugs exhibits were admissible as evidence at trial, in circumstances where there was incomplete identification of the exhibits, in particular EMCG1;

13) The statement of Inspector Sugrue was not hearsay;

14) The statement of Inspector Sugrue was admissible as evidence at trial;

15) All counts on the indictment, in particular, counts 1, 2, 3 and 4, could proceed to the jury, in circumstances where there was insufficient evidence that the appellant possessed or was in control of unlawful drugs;

16) CCTV footage from the locus of where the Toyota Corolla was searched was reliable;

18) Failing, refusing or neglecting to give the jury a warning in respect of the reliability of the CCTV footage.

10. In his written submissions, the appellant grouped the grounds of appeal under 6 headings, namely: unlawful search of vehicle, admissibility of evidence and possession and control (Grounds 2, 3 and 15); chain of evidence and exhibits chart (Grounds 4, 5, 6 and 7); analysis and identification of exhibits (Grounds 8, 9, 11 and 12); failure to seek out and preserve evidence (Ground 10); admissibility of hearsay evidence (Grounds 13 and 14); and reliability of CCTV footage and failure to give a warning (Grounds 16 and 18).

11. At the hearing before us, Senior Counsel for the appellant, who had not appeared at the trial, where the appellant was represented by Junior Counsel alone, made oral submissions in relation to the lawfulness of the search of the Toyota Corolla and the destruction of it by the guards. However, it was indicated that the appellant was relying on his written submissions in respect of all other grounds of appeal.

The Run of the Trial

12. The defence pursued at trial was that the appellant did not have knowledge of or control over the controlled drugs found in the boot of the Toyota Corolla. A theory was proferred on behalf of the appellant that the drugs had been deposited in the Toyota Corolla after it had been taken onto the tow truck. Reliance was placed on the excessive amount of time it took for the tow truck to arrive to the yard and the fact that CCTV evidence established that another vehicle had been collected by the tow truck driver after the Toyota Corolla had been taken onto it. It was specifically suggested by Counsel for the appellant that the people associated with the other car *"threw the drugs"* into the appellant's car. It was asserted that at the time the controlled drugs were found in the Toyota Corolla, the appellant was no longer in possession of the car and that constructive possession of the controlled drugs by the appellant could not be established on the evidence.

13. The trial ran in quite an unconventional manner, which has made it difficult to be definitive about what legal arguments arose and what legal questions the trial judge was asked to determine from time to time. This difficulty is compounded by the fact that the written submissions filed by both sides fail to identify the legal rulings of the trial judge which are now being challenged. It appears that in relation to the grounds of appeal, very many of these grounds were only raised before the trial judge during a direction application by Counsel for the appellant when seeking to have the case withdrawn from the jury on the basis of an asserted lack of evidence with respect to the charges proffered. Accordingly, while the grounds of appeal frequently refer to the trial judge erring, for various reasons, in admitting evidence, the fact of the matter is that the

evidence was already before the jury, as an objection had not been taken to its admission at the appropriate time. Accordingly, it would appear that a ruling of the trial judge, admitting the evidence at issue, does not exist in respect of many of the complaints now made.

Search of the Seized Motor Vehicle

14. Garda Farragher seized the Toyota Corolla pursuant to s. 41 of the 1994 Act. He indicated that he subsequently searched the motor vehicle, at the secure compound, pursuant to a common law power he thought he had, in the particular circumstances arising. At the hearing before us, Counsel for the respondent indicated that it was the respondent's position that the search was lawfully carried out pursuant to common law, although at trial, Counsel for the respondent asserted that the search was lawfully carried out pursuant to s. 23 of the 1977 Act.

15. Very unusually, a challenge did not arise to the search by Garda Farragher of this motor vehicle prior to evidence of the search, and what was found in the search, being adduced before the jury. Indeed, having given the evidence that he conducted the search of the vehicle under a common law power to ensure that contraband was not in the car and that the car was safe, the response from Counsel for the appellant was *"Very well".* It appears that the focus of the appellant's case, and the cross examination of Garda Farrragher, was to establish that the motor vehicle was not in the possession of the appellant at the time of the search.

16. Garda Farragher was recalled, at a later stage in the trial, to give evidence of a conversation which he had with Inspector Sugrue, after he had dropped the appellant off to get the train, but prior to him reaching the yard where the car was being brought, to the effect that confidential information had been received by the Inspector that there was a large quantity of drugs within the Toyota Corolla. A *voir dire* was held in relation to whether this conversation could be admitted into evidence before the jury.

17. In the course of the *voir dire*, Garda Farragher was challenged about whether this asserted conversation with Inspector Sugrue had in fact occurred. This appears to have been the appellant's principal interest in relation to this proposed evidence. However, a notebook entry made by Garda Farragher, at the time of the incident, having detailed the event of stopping the appellant on the N7 and what occurred, recorded:-

> *"Call received to contact Inspector Brian Sugrue, Limerick. Contacted after I dropped SO to crossroads in Kildare."*

18. On this second occasion when Garda Farragher gave evidence, he also gave evidence of why he conducted the search of the Toyota Corolla, the issue having been revisited by Counsel for the appellant. He said:-

> *"[T]he car was now in garda possession, under our control and there was civilians in that area, we have an onus to protect those people as well […] in case there's any explosives or any other dangerous materials even in the car and it would be*

> *[…] dangerous to […] keep a car in a pound, if we weren't to know what was inside. So, we have a common law power to kind of search a car like that […] in our possession.*
>
> *[…]*
>
> *[A]ny section 41 car that's seized it would always be checked to see if there's any contraband or anything illegal in the car. It would be farcical to think that you'd seize a car and bring it back to a civilian compound and it could be anything from drugs, a body, explosives in the car and that car could be released back to that person again. So, for that reason under common law, it's just a cursory search to look in the boot and look in the car to make sure it's safe and there's no contraband in the car."*

19. At the conclusion of this *voir dire,* while submissions were made to the trial judge that the common law did not permit such a power of search, the trial judge was not requested to rule on this issue but rather on the issue of whether Garda Farragher could give evidence of the conversation he asserted he had with Inspector Sugrue in evidence before the jury. The trial judge permitted the evidence to be adduced before the jury, which is the basis of another ground of appeal, which we will return to shortly.

20. The trial judge was finally asked to make a determination on the question of whether the common law provided for the power asserted by Garda Farragher prior to the close of the respondent's case. The trial judge determined that the search was lawful and was conducted under s. 23 of the 1977 Act (this having been the respondent's position), although she accepted that a common law power to search the car in the circumstances arising also existed.

21. Unusually, the issue was raised again by Counsel for the appellant when seeking a direction from the trial judge that the case be withdrawn from the jury on Galbraith grounds (See *R v. Galbraith* [1981] 1 WLR 1039 ('*Galbraith*')). The trial judge reiterated her view that there was a common law power to search the car in the circumstances arising, but also determined that there was a power to search the car on the grounds of a reasonable suspicion that drugs would be found in the car, pursuant to s. 23 of the 1977 Act.

Discussion and Determination

22. Garda Farragher was definitive that the search which he conducted of the Toyota Corolla was pursuant to common law rather than pursuant to any statutory power. While Counsel for the respondent submitted before the trial judge that the search was conducted pursuant to s. 23 of the 1977 Act, he indicated at the hearing before us that his position now was that the search was conducted pursuant to common law.

23. Section 41 of the 1994 Act, pursuant to which the car was seized, does not provide for a power to search a seized car. It seems that s. 23 of the 1977 Act is not applicable to the instant search either, as the section appears to envisage that the person reasonably

suspected to be in possession of a controlled drug remains in the vicinity of the vehicle to be searched. However, we are not deciding this legal issue, as it was not argued before us in light of the respondent's position that the search was conducted pursuant to common law.

24. Of note, s. 23(2) of the 1977 Act provides:-

> *"Nothing in this section shall operate to prejudice any power to search, or to seize or detain property which may be exercised by a member of the Garda Síochána apart from this section."*

25. Counsel for the appellant submitted that a common law power to search a vehicle does not exist. It was submitted that, if it did exist, there would not have been a necessity to enact s. 23 of the 1977 Act, with respect to the search of a vehicle, or s. 8 of the Criminal Law Act 1976 ('the 1976 Act'), which also provides for the search of vehicles when certain specified offences are reasonably suspected to have been, of being, or about to be committed.

26. The analogy with either s. 23 of the 1977 Act or s. 8 of the 1976 Act, to the circumstances surrounding the instant search, is not apposite, principally because the Toyota Corolla was not in the company of a person in control of the vehicle at the time of the search. Accordingly, a reasonable suspicion regarding a person in control of the vehicle within the meaning of s. 23 or s. 8 did not arise.

27. Garda Farragher gave clear evidence, detailed earlier, that he conducted the search from the dual perspectives of discovering whether there was contraband in the vehicle and the safety of members of the public. While he was later recalled and gave evidence of information he had received that controlled drugs were within the car, he reiterated his stance that safety was a prime concern leading him to conduct the search.

28. In *The People (at the suit of the Director of Public Prosecutions) v. Quirke* [2023] IESC 5, Charlton J., delivering the judgment of the Supreme Court, gave an extremely detailed and informative analysis of the common law powers of search. He referred at para. 65 of his judgment to the traditional doctrine of self-protection and explained, at para. 66, that:-

> *"The original common law rule had been that a constable may search a prisoner if he behaves with such violence of language or conduct as to make prudent a search for weapons with which the prisoner might do mischief […] The origin of the common law rule was in the sensible necessity to protect the arresting officer."*

29. It seems to us that, in the circumstances of the instant case, where a car was stopped without tax; being driven not by the owner, but by a person without insurance; and where that person was not in a position to produce his driver licence, an onus arose on Garda Farragher to ensure that the car was safe after it had been taken into the custody of An Garda Síochána, to be kept in a third party's compound. We are of the opinion that

the doctrine of self-protection arose, which extended to ensuring the protection of the third party, his staff, and other users of the compound where the car was being stored on behalf of the guards, thereby permitting a search of the car to ensure that it was safe.

30. Whilst the trial judge found that the search was lawful pursuant to s. 23 of the 1977 Act, on foot of the respondent submitting to her that s. 23 permitted the search of car, she also found that, in the particular circumstances arising, Garda Farragher was entitled to search the car to ensure that it was safe whilst being detained in the secure compound.

31. Accordingly, we are of the view that the trial judge did not err in determining that the initial search of the Toyota Corolla was lawful. The grounds of appeal relating to this issue fail.

Chain of Evidence and Exhibits Chart

32. The appellant made a complaint that an exhibits table, which had been prepared the day before the exhibits officer gave evidence, was made an exhibit in the trial rather than the exhibits chart. Apparently, the exhibits table was intended to reflect the evidence given in the course of the trial regarding the handling of the controlled drugs exhibits. As such, unless an inaccuracy arose in that document (which was not brought to our attention in the appellant’s written submissions), it must have reflected the evidence already before the jury.

33. In a separate complaint, the appellant submitted that the exhibits chart, compiled by the exhibits officer, did not reflect some handling of the controlled drugs exhibits after the forensic analysis had been conducted. However, evidence relating to the handling of the exhibits which extended beyond what was noted in the exhibits chart, was called on behalf of the respondent.

34. At the direction application, Counsel on behalf of the appellant made submissions to the trial judge which included an assertion that, in light of discrepancies which arose with respect to the handling of the controlled drugs exhibits, the case should be withdrawn from the jury, as the jury could not be satisfied to the requisite standard that the exhibits before them were the exhibits which had been in the Toyota Corolla.

35. The trial judge determined that while there were discrepancies in the evidence, this was a matter for the jury to consider.

Discussion and Determination

36. *The People (DPP) v. Hawkins* [2014] IECCA 36 (‘Hawkins') is determinative of this issue and we are surprised that this point was made in the manner it was at trial and pursued before us. *Hawkins* establishes that issues in relation to the chain of custody of an exhibit are a matter for the jury to consider rather than a legal issue for the trial judge to determine.

37. The chain of custody of a particular exhibit is established, in the normal way, by *viva voce* evidence (if the respondent is put on full proof of this issue) and not via an exhibits chart or an exhibits table, as was prepared in this case. Accordingly, the fact that a

discrepancy existed between the exhibits chart and the exhibits table is of little importance as the evidence called regarding the handling of the exhibits is the significant matter. With respect to the complaint that an exhibits table was produced to the jury, it has not been brought to our attention that there was an error in what was recorded. In light of the fact that it apparently reflected the evidence before the jury, a difficulty cannot arise by the provision of this document to the jury, although there was no necessity to do so.

38. The chain of custody of an exhibit is required to be established from the time of seizure of an item to the time it is forensically examined so that it can be established that the item at issue is the item which was examined and that therefore the results of the forensic examination relate to the exhibit seized which has not been interfered with since its seizure. It appears that the issue with the chain of custody which arose in the instant case, occurred after the forensic analysis of the controlled drugs exhibits was conducted. The significance of any break in the chain of custody is not apparent to the Court, but if there was a significance, it is clear that extensive cross examination took place of the various witnesses who were called by the respondent with a view to establishing a chain of custody of the relevant exhibits. Accordingly, the jury were well positioned to determine whatever issue arose in relation to this particular matter, if an issue did indeed arise at all.

39. The trial judge did not err in refusing to withdraw the case from the jury on this basis. Accordingly, the grounds of appeal relating to this issue fail.

Analysis and Identification of Exhibits

40. The appellant complained in his written submissions that the contents of one of the controlled drugs exhibit bags was not properly identified before the trial court. This was asserted to be of significance in that the appearance of the contents of the exhibit was different in colour to that described at the time of seizure and analysis. In addition, there was a complaint that only three of the four bags seized were sampled.

41. The trial judge determined that this was a matter which fell to the jury to consider.

Discussion and Determination

42. The complaint regarding the appearance and identification of the controlled drugs exhibit bags is connected to the previous heading relating to the chain of evidence. Whatever point the appellant sought to make in relation to this issue fell to the jury to determine in circumstances where significant cross examination had taken place in relation to same.

43. With respect to the analysis of exhibits and the failure by the respondent to have all four bags analysed rather than three bags, this was a matter for the jury to consider in their deliberations relating to whether the respondent had proved all constituent elements of the offences before them.

44. The trial judge did not err in refusing to withdraw the case from the jury on this basis. The grounds of appeal relating to these issues also fail.

Destruction of Toyota Corolla

45. The Toyota Corolla was destroyed in April 2017. The tow truck driver passed away on 18 April 2017 without a statement being taken from him in relation to his dealings with the Toyota Corolla on the day he towed the vehicle. The appellant was charged in relation to these offences on 14 March 2018. The appellant asserts that he lost the opportunity to analyse the Toyota Corolla and that this, coupled with the failure to take a statement from the tow truck driver, resulted in him being deprived of a realistic line of defence. Counsel for the appellant made submissions regarding this issue in the course of a direction application made to the trial judge on Galbraith principles.

Discussion and Determination

46. As stated by the appellant and accepted by the respondent, it has long been established that there is an onus on An Garda Síochána to seek out and preserve all relevant material in a criminal prosecution.

47. It is also well established that if missing evidence results in an accused being deprived of a realistic line of defence, his trial is rendered unfair. However, as explained in *The People (at the suit of The Director of Public Prosecutions) v. CCE* [2019] IESC 94, an accused does not have the right to a perfect trial and the question which must be asked in a missing evidence case is whether the missing evidence is no more than a lost opportunity or, instead, the loss of a realistic line of defence.

48. The line of defence suggested at trial by Counsel on behalf of the appellant was that people connected with the other car which had been collected by the tow truck driver, after he had collected the Toyota Corolla, threw the drugs into the boot of the Toyota Corolla to distance themselves from the drugs.

49. It would have been preferable had the Toyota Corolla not been destroyed before the trial. That said, the evidence was that before a destruction of a motor vehicle seized pursuant to the 1994 Act takes place, the owner of the car is written to on three occasions (one of which is by registered post), to notify him/her of the intended destruction. No suggestion was made, on the appellant’s behalf, that such correspondence was not received by the appellant’s girlfriend, who was the registered owner of the car, or that a request was made on behalf of the appellant, on foot of this correspondence, to delay the destruction of the vehicle.

50. The question which must be asked, and which has not been specifically addressed by the appellant, is what evidence might have been lost to him by the destruction of the vehicle; the failure to have a forensic report compiled (which the appellant suggests should have occurred in light of the destruction of the vehicle); or the failure to examine the vehicle for fingerprints or DNA evidence.

51. Logically, the interest of the appellant can only be with respect to fingerprints or DNA of another person being located on the Toyota Corolla, in light of his connection to the car through his girlfriend. However, even if there was evidence of someone else’s fingerprints or DNA being present on the boot, the question must be asked as to what significance this would have for the appellant, in circumstances where this was not his car. Any such

fingerprint or DNA could be attributed to a range of persons, such as his girlfriend; a family member; an acquaintance; or a garage worker, with no indication as to when any such hypothetical fingerprint or DNA evidence was left on the Toyota Corolla or in what circumstances.

52. Furthermore, there is no evidence that a request was made of An Garda Síochána to preserve the car or to examine the car after the appellant was arrested and questioned in relation to the possession of the controlled drugs. Neither is there any suggestion that such a request was made after notice was provided to the appellant's girlfriend that her car was to be destroyed, it not being controverted that she received such notice.

53. In light of these particular facts, it seems to us that the destruction of the Toyota Corolla is, at its height, best described as a lost opportunity rather than the denial of a realistic opportunity of a defence. Accordingly, we are of the view that the trial judge did not err in refusing to withdraw the case from the jury on this basis. This ground of appeal also fails.

Admission into Evidence of Inspector Sugrue's Utterance to Garda Farragher

54. As referred to earlier in this judgment, having conducted a *voir dire* in relation to this issue, the trial judge permitted Garda Farragher to give evidence before the jury of a phone call he had with Inspector Sugrue, wherein Inspector Sugrue informed him that he had received confidential information to the effect that there was a large quantity of drugs in the Toyota Corolla. The appellant put in issue whether this conversation occurred at all, although a notebook entry made by Garda Farragher recorded a call with Inspector Sugrue at the relevant time.

55. The trial judge permitted this evidence so that Garda Farragher could explain the complete circumstances of his reason for searching the Toyota Corolla before the jury and because she viewed this evidence as probative. She stated in her ruling:-

> *"My view is that it is relevant in the sense that this is the, I suppose, the truth of the matter according to Garda Farragher, not only the truth but the whole truth of the matter and it is my view that, certainly, it is more probative than prejudicial and therefore should be admitted."*

56. As already commented upon, this trial was conducted in an unconventional manner in many respects, to include the search of the Toyota Corolla not initially being challenged. However, the matter was revisited at a much later stage in the trial when the respondent sought to adduce this evidence.

57. The appellant asserted that this was a hearsay statement and should not have been admitted before the jury, particularly in the absence of Inspector Sugrue giving evidence. The respondent fails to deal with this ground of appeal in her submissions.

Discussion and Determination

58. The conversation between Inspector Sugrue and Garda Farragher was potentially of importance in terms of any suspicion which Garda Farragher might have formed in

relation to the Toyota Corolla which caused him to search it. For the purpose of a *voir dire* relating to the lawfulness of the search of the Toyota Corolla, this evidence was admissible to prove the state of mind of Garda Farragher with respect to his suspicion about the Toyota Corolla. In terms of s. 23 of the 1977 Act (which the respondent relied on to establish the lawfulness of the search of the Toyota Corolla at the trial), this information was relevant to the question of whether Garda Farragher had a reasonable suspicion with respect to the contents of the car. Admitting the evidence for this purpose, where it is not being admitted to prove that the contents of the statement are true, but rather is admitted to prove that the statement was simply made, does not offend the rule against hearsay

59. However, the application determined by the trial judge, on foot of an application by the respondent, which was opposed by the appellant, was to permit the evidence before the jury. This was an unusual determination for the trial judge to make as the only relevance which the statement could properly have, related to the effect of this information on Garda Farragher's state of mind regarding the contents of the Toyota Corolla. The trial judge's reasoning for permitting this evidence be adduced was so that the *"whole truth"* of why the search occurred could be placed before the jury, together with it being probative.

60. Admitting this evidence so that the *"whole truth"* would be before the jury is problematic in itself, as it confuses the role of the jury and the trial judge. The question as to whether the search was lawful was a matter for the trial judge and not the jury, whereas the trial judge appears to have a view that the jury might have an opinion about why the search was conducted and for that reason it was appropriate that they hear all the circumstances surrounding same. While this was an unusual course to take, in and of itself the admission of this evidence for this purpose would not cause a legal difficulty with respect to the subsequent guilty verdict returned.

61. However, the difficulty which arises with the admission of this evidence is how it was subsequently dealt with and the trial judge's view that it was probative.

62. Counsel for the respondent, in his closing speech to the jury, when summarising the respondent's evidence, stated:-

> *"Garda Farragher himself was told to ring an inspector down in Limerick, which he did. And he was told there will be drugs in the car. And when he got there, there were drugs in the car, and they were photographed in situ by the gardai."*

63. The trial judge informed the jury, in the course of her charge to them, when summarising the respondent's case:-

> *"[The prosecution] rely on the evidence of Garda Farragher to the effect that he received the confidential report, if you like, that drugs were in that vehicle. And they rely upon the fact that when the vehicle was opened by Garda Farragher in the yard, these drugs were in fact contained in the boot".*

64. The trial judge returned to the issue when summarising the appellant's case, by stating:-

> *"And counsel makes the case that the alleged telephone call between the inspector, who didn't give evidence, but Garda Farragher's evidence that he received this confidential information, that there was a controlled substance in the vehicle – they say that that's a fabrication. You'll have to weigh his evidence. You have to assess his credibility, just as you would any other witness. And it is true to say that the inspector did not give the evidence. He's not here to establish the truth or otherwise of that statement. But what you have to do is consider whether or not you accept the evidence of Garda Farragher and assess its credibility."*

65. The manner in which the trial judge handled this evidence and the instruction she gave to the jury is flawed for a number of reasons. Principally, a hearsay statement which Inspector Sugrue allegedly received from a confidential source, and allegedly passed to Garda Farragher, was admitted as a plank of the respondent's case. Finding that there was a probative value in this hearsay evidence offends against the rule against hearsay as, in that instance, the hearsay statement is being admitted to prove the truth of its contents, which is prohibited by the rule.

66. Rather bizarrely, the principal complaint made by Counsel for the appellant during the *voir dire* relating to the admission of this evidence, was that Inspector Sugrue was not called to give evidence of this alleged phone call with Garda Farragher, resulting in the appellant not being in a position to cross examine Inspector Sugrue about the veracity of whether the call in fact was made. That position completely missed the point that, not only was the evidence given by Garda Farragher hearsay evidence, the same difficulty would have arisen if Inspector Sugrue gave evidence of the confidential information it was asserted he received. Counsel for the appellant returned to this issue during a direction application which he made seeking to have the case withdrawn from the jury. In the course of that application, he again made the complaint of not being in a position to cross examine Inspector Sugrue, however, on this occasion, he also referred to the statement being prejudicial and admitted for an incorrect purpose.

67. In light of the fact that the legal difficulty arising from this evidence does not appear to have been sufficiently appreciated by Counsel for the appellant, and that the trial judge was of the view that the evidence was probative, it is perhaps no surprise that a requisition was not made of the trial judge to properly direct the jury in relation to this evidence. In the normal course, the failure to raise a requisition in this regard might be fatal to this omission, pursuant to *The People (as the suit of the Director of Public Prosecutions) v. Cronin* [2006] IESC 9.

68. In the instant case, the breach of the rule against hearsay has a particular significance in light of the defence case which was being run, which was that the controlled drugs were placed into the car after the appellant departed from it. The hearsay statement, incorrectly admitted, had a direct relevance to the defence case, as it implied that the drugs were in the Toyota Corolla before it was stopped and before the defence theory of the drugs *"being thrown"* into the Toyota Corolla by the people associated with the other

car could have taken place. In those circumstances, this hearsay evidence was in direct conflict with the defence case.

69. While this legal point was not properly focused on by Counsel for the appellant, and whilst raised, not pursued with any great vigour, it seems to us that the incorrect admission of the hearsay evidence had a significant prejudicial effect on the case which the appellant was running and created an unfairness with respect to the jury's consideration of the defence case. Accordingly, we are of the view that grounds of appeal 13 and 14 should be upheld.

Reliability of CCTV footage

70. The CCTV which was made an exhibit in the trial had been downloaded by an employee working in the compound where the Toyota Corolla was brought. Apparently, the material provided had time gaps in the recording, which was caused by motion detection cameras. An expert CCTV witness, who serviced the system, explained that the cameras were always recording but what had been downloaded related to the motion sensor recording. He stated that it was possible to get footage of the entire time period, but that is not what had been obtained.

71. The difficulty arising with the omitted CCTV has not been explained to the Court.

72. The appellant asserted that the trial judge should have given a warning to the jury about the reliability of the CCTV footage in light of the evidence relating to same.

Discussion and Determination

73. The specific time periods which the appellant raised an issue about and the fact that the CCTV footage was not a complete recording was examined in detail before the jury, who were therefore in a position to assess the evidence in light of these matters. Furthermore, in her charge to the jury, the trial judge reminded the jury of the issues which the appellant raised with respect to the CCTV footage.

74. A legal requirement to give a warning regarding the CCTV footage simply does not arise. It was evidence for the jury to assess, cognisant of the issues which the appellant raised with respect to the CCTV footage. We are unaware of any legal basis which would require the warning suggested to be given.

75. While the Court can see, as a result of a trawl through the transcripts in relation to all of the grounds of appeal, that the issues complained of in relation to the CCTV were agitated before the trial judge, the Court has been unable to find a reference to the trial judge in fact being asked to warn the jury about this issue. Regardless of whether she was asked, the necessity to give a warning has no legal basis.

Conclusion

76. In circumstances where we have upheld two grounds of appeal relating to the admission of the hearsay evidence before the jury, which had a direct effect on the case being made by the appellant, the appellant's conviction will be quashed and we will order a retrial.