



## THE COURT OF APPEAL

**The President  
Sheehan J.  
Edwards J.**

**No. 198/13**

**The People at the Suit of the Director of Public Prosecutions**

**V**

**Alan Boggans**

**Appellant**

**Judgment of the Court delivered on the 9th day of March 2015, by**

**Mr. Justice Sheehan**

1. This is an appeal against conviction and sentence. Following a six day trial in the Dublin Circuit Criminal Court, the appellant was found guilty of an offence contrary to s. 15A of the Misuse of Drugs Act, as amended, in respect of the possession with intent to supply of cannabis resin to the value of approximately €2 million together with two related offences contrary to ss. 3 and 15 of the Misuse of Drugs Act 1977.
2. The appellant was sentenced to thirteen years imprisonment in respect of the s. 15A offence and the two other offences were taken into consideration.
3. This judgment is solely concerned with the appellant's conviction.
4. The appellant challenges the conviction under eight different grounds of appeal which he sets out as follows:
  1. The learned trial judge erred in law in his rulings and in his determinations.
  2. Without prejudice to the generality of the foregoing, the learned trial judge erred in his rulings and in his determinations concerning (a) the validity of the search, (b) the validity of the arrest, and (c) the admissibility of evidence.
  3. The conduct of the trial was unsatisfactory and in all the circumstances the appellant was denied a fair trial and/or a trial in due course of law.
  4. Without prejudice to the foregoing, the appellant's trial was unsatisfactory because:
    - (a) the prosecution did not make full disclosure,
    - (b) the learned trial judge required the trial to proceed notwithstanding the late and/or incomplete disclosure,
    - (c) the trial judge refused to afford facilities and/or permit counsel for the appellant to play relevant CCTV footage whilst cross-examining prosecution witnesses in respect of matters depicted thereon and in circumstances where the judge was requested by counsel to cause or permit the CCTV footage to be played,
    - (d) the learned trial judge erred in denying the appellant the opportunity to play the CCTV in the course of cross-examination and that refusal was very prejudicial to the appellant as the jury very clearly, in its deliberations, sought to view that CCTV footage.
    - (e) the trial judge interrupted and interjected during the trial and did so during the cross-examination by defence counsel in a manner prejudicial to the appellant.
  5. The trial judge refused to discharge the jury when asked to do so in circumstances where he should have so acted after unsolicited prejudicial testimony touching on the appellant's exercise of his right to silence was proffered by a witness for the prosecution.
  6. The learned trial judge failed to properly consider and/or determine the submissions made on behalf of the appellant and, without prejudice to the foregoing, he so erred in law or in fact when considering the issues pertaining to the search and arrest.
  7. The legislation, pursuant to which the gardaí purported to act, is unconstitutional and the evidence gleaned as a result is inadmissible.
  8. The trial judge misdirected himself in law and he fell into error, and he so erred in his charge to the jury.

5. In order to consider these grounds of appeal it is necessary to set out the circumstances of the offences.

**The background**

6. On the 1st September, 2009 as a result of confidential information, the Garda National Drugs Unit put in place a surveillance operation in the Rathcoole area of Dublin, which was focused on the appellant.

7. At approximately 8.15 pm, a van driven by the appellant's brother-in-law and suspected to contain a large quantity of drugs was observed entering the premises of Celtic Truck Wash and Parking in the Green Oak Business Park, Rathcoole. About twenty minutes later, at about 8.35 pm, the appellant was seen driving into the said premises in a silver BMW vehicle. He was followed by a taxi.

8. At this point it was decided to obtain a search warrant for Celtic Truck Wash and Parking. Having ascertained that it would take some hours before a judge would be available to entertain an application for a warrant and learning when they called to a local Peace Commissioner's house that he was not at home, an application was made to a Superintendent for a warrant pursuant to s. 26(2) of the Misuse of Drugs Act 1977, authorising entry and search of the Celtic Truck Wash and Parking premises and the warrant was then issued.

9. There was some dispute about exact timings, but the evidence suggested that the gardaí entered the premises shortly after 9.00 pm and a garda van went directly to the area of the park where a white Mercedes van was parked between a bus and a large container facing outwards.

10. The appellant and his brother-in-law were observed looking around the side of the white van in the direction of the gardaí who had announced their presence and who were wearing distinctive garda clothing. Detective Sergeant O'Connell identified the appellant being at the back of the white Mercedes van. Both men ran to the rear of the van when the gardaí arrived, but the appellant doubled back and ran across the front of the garda van which had been driven into the premises of Celtic Truck Wash and Parking by Detective Garda Barber. The appellant ran to another part of the park where he was stopped by gardaí. Drugs were found inside the white Mercedes van in boxes, some of which had been opened. Fingerprints were found inside the van which matched those of the appellant.

11. Two mobile phones connected to the appellant were recovered, one from the BMW motor car in which he had arrived at Celtic Truck Wash and Parking and the other was found in the back of a flatbed truck in the area to which the appellant had initially been seen to run. The appellant's DNA was on this phone and an analysis of these phones and a third mobile phone taken from the appellant's brother-in-law showed extensive contact between the phone of the appellant's brother-in-law and the two phones connected to the appellant, up to and after the time the white Mercedes van had arrived at the premises. The later contacts were found to be between the phone found on the flatbed truck and the phone found in possession of the appellant's brother-in-law.

12. During the course of garda interviews, the appellant said that he was at the premises to buy repossessed cars. He declined to account for the presence of his fingerprints when the inference provisions of the Criminal Justice Act 1984, as amended, were put to him while he was in custody. At his trial he called a witness who stated that he had previously offered to sell him the white Mercedes van which he subsequently sold to a foreign national. He said that in the course of these negotiations, the appellant had access to the van at the time, thereby suggesting that the appellant's fingerprints might have come to be innocently in the van.

#### **The search warrant**

13. The appellant attacks the validity of the warrant on three grounds. He alleges that Detective Superintendent O'Leary, who issued the warrant, was not an independent party as he was involved in the investigation into the offence and that on this ground alone the warrant is invalid. While this was the main thrust of his attack on the warrant in the course of his oral submissions, the appellant also submitted that the circumstances of urgency which must exist to allow a Superintendent to issue a search warrant did not exist at the time or arose from a failure by the gardaí to ensure that they had a judge of the District Court or a Peace Commissioner on standby to issue a warrant when that became necessary. Finally, the appellant says that Detective Superintendent O'Leary could not have given proper consideration to the matter as his evidence disclosed that he had issued the warrant within one minute of being asked to do so.

14. In order to understand these submissions it is necessary to set out the circumstances which gave rise to the issuing of the warrant and the relevant law.

15. Section 26 of the Misuse of Drugs Act 1977, as amended by the Criminal Justice (Drug Trafficking) Act 1996, provides as follows:

"26(1) If a Justice of the District Court or a Peace Commissioner is satisfied by information on oath of a member of the Garda Síochána or, if subject to the provisions of subs. (2) of s. 8 of the Criminal Justice (Drug Trafficking) Act 1996, a member of the Garda Síochána not below the rank of superintendent is satisfied that there is a reasonable ground for suspecting that

(a) a person is in possession in contravention of this Act on any premises of a controlled drug a forged prescription or a duly issued prescription which has been wrongfully altered and that such drug or prescription is on a particular premises or

(aa) opium poppy, a plant of the genus Cannabis or a plant of the genus Erythroxylon is being cultivated contrary to section 17 of this Act on or in any premises or other land, or

(b) a document directly or indirectly relating to or connected with a transaction or dealing which would if carried out be an offence under this Act or in the case of a transaction or dealing carried out or intended to be carried out in a place outside the State an offence against the provision of a corresponding law within the meaning of s. 20 of this Act and in force in that place is in the possession of a person on any premises,

such Justice or Commissioner or, as the case may be, member may issue a search warrant mentioned in subsection 2 of this section.

(2) A search warrant issued under this section shall be expressed and operate to authorise a named member of the Garda Síochána, accompanied by such other members of the Garda Síochána and such other persons as may be necessary, at any time or times within one month of the date of issue of the warrant, to enter (if need be by force) the premises or other land named in the warrant, to search such premises or other land and any persons found therein, to examine any substance, article or other thing found thereon or therein, to inspect any book, record or other document found thereon and, if there is reasonable ground for suspecting that an offence is being or has been committed under this Act in relation to a substance, article or other thing found on such premises or other land or that a document so found is a document mentioned in s. 1(1)(b) of this section or is a record or other document which the member has reasonable cause to believe to be a document which may be required as evidence in proceedings for an offence under this Act, to seize and detain the substance, article, document or other thing, as

the case may be.

(3) Where any premises or other land is entered pursuant to a warrant issued under this section, the member of the Garda Síochána named in the warrant may do either or both of the following:

(a) arrest without warrant any person or persons found on such premises or other land for the purpose of searching him or them,

(b) so arrest any such person or persons and keep him or them, as may be appropriate, under arrest until such time as such of the powers of search or examination as he wishes to exercise pursuant to the warrant have been exercised by him."

16. Section 8 of the Criminal Justice (Drug Trafficking) Act 1996 provides at subs. (2):

"(2) A member of the Garda Síochána not below the rank of superintendent shall not issue a search warrant under the said s. 26 unless he or she is satisfied –

(a) that the warrant is necessary for the proper investigation of a drug trafficking offence, and

(b) that circumstances of urgency giving rise to the need for the immediate issue of the search warrant would render it impracticable to apply to a judge of the District Court or a Peace Commissioner under the said s. 26 for the issue of the warrant."

17. At the outset of the hearing on this issue in the absence of the jury, the respondent pointed out that the search did not relate to any premises in which the appellant had any proprietary interest, let alone an interest protected by a constitutional right such as a right to the inviolability of one's dwelling.

18. Prosecution evidence on this issue was to the effect that the gardaí had confidential information connecting the appellant to an importation of a substantial quantity of drugs that day. Detective Superintendent O'Leary was aware of this and the possibility of an operation later in the day. Detective Inspector Smith, who had received the confidential information, briefed members of the Garda National Drugs Unit and the National Surveillance Unit at lunchtime on the 1st September, 2009, and they were given tasks depending on how the information developed.

19. At around 7.00 pm, as a result of further information, Detective Inspector Smith directed Detective Sergeant Quinn to the Rathcoole area.

20. It was only when the gardaí had ascertained that the appellant had entered the premises that a decision was taken to enter those premises. Detective Sergeant Quinn contacted the sergeant in charge of the Bridewell garda station to see if a judge of the District Court was available to hear an application for a warrant and was told that it would take a couple of hours to arrange that. He immediately inquired about the availability of a Peace Commissioner in the Rathcoole area and was directed to a house in the area where he was told that the Peace Commissioner would not be there until the following day. In the meantime, Detective Superintendent O'Leary, who had been kept informed about the operation during the day, had gone to Rathcoole and was now in the company of both Detective Sergeant Gerard Quinn and Detective Garda Paul Carroll. Detective Carroll stated that when they could not get the Peace Commissioner, Detective Superintendent O'Leary said that he would issue the warrant "because of the urgency of it" and they all immediately drove to Celtic Truck Wash and Parking.

21. In support of his contention that s. 8 of the 1996 Act requires the issuing Superintendent to be independent of the investigation, the appellant relies on the decision of the Supreme Court in *Damache v. Director of Public Prosecutions* [2012] 2 I.R. 266 and also contends that, in view of the fact that the relevant section was subsequently amended in 2012 to require the Superintendent to be independent of the investigation, this Court should construe the section as it was then as requiring the superintendent or officer of a higher rank to be independent of the investigation before a warrant could be issued.

22. Section 3 of the Criminal Justice (Search Warrants) Act 2012 states:-

"3(1) Section 8 of the Criminal Justice (Drug Trafficking) Act 1996 is amended by the insertion of the following subsections after subsection (2):

(2A)(a) A member of the Garda Síochána not below the rank of superintendent may issue a search warrant under the said s. 26 only if he or she is independent of the investigation of the offence in relation to which the search warrant is being sought.

(b) In this subsection 'independent of', in relation to the investigation of an offence, means not being in charge of, or involved in, that investigation.

(2B) A member of the Garda Síochána not below the rank of superintendent who issues a search warrant under the said s. 26 shall, either at the time the warrant is issued or as soon as reasonably practicable thereafter, record in writing the grounds on which the warrant was issued, including how he or she was satisfied as to the matters referred to in subsection (2)."

23. The respondent contended that the trial judge was correct in holding as follows:

"It is suggested finally that Superintendent O'Leary, in signing the warrant, did not give adequate consideration or take time to consider the application being made to him. Again, factually this has no serious basis on the evidence. Superintendent O'Leary was familiar throughout the day of what was afoot. He was sent specifically to the Rathcoole area to be available in the case of emergency. He was aware that there was no District Judge available. He was aware that there was no Peace Commissioner available, sitting in the car outside, and he was aware that the drugs were on the premises, that Mr. Boggans was there and that there was time to move, time to enter and time to search. In all of these circumstances he was fully familiar with the basis upon which the warrant was being applied for. Whilst it was done instantaneously in his description of it, it was done with fair and proper consideration and he was in a position to make that decision."

24. It is clear from the circumstances that arose at the premises following the appellant's arrival that it then became a matter of great urgency for the gardaí to enter the said premises. It is doubtful whether the gardaí at that point needed to make an effort to apply to a judge of the District Court or a Peace Commissioner, but they did make such efforts prior to the issuing of a warrant by Detective Superintendent O'Leary who had gone to Rathcoole partly in case an emergency arose in respect of the application for a warrant.

25. This Court holds that the circumstances of this garda operation were such that it was wrong to characterise the evidence as being contrived in the sense that procedures could have been put in place at an earlier stage and the Court agrees with the respondent's submission that this proposition ignores the fact that the presence of the appellant at the location was necessary prior to any application for a warrant.

26. The fact that the Oireachtas subsequently introduced a requirement of independence for the purpose of issuing a s. 8 warrant cannot be interpreted as suggesting that this Court should imply an independent requirement to the 1996 Act as it then was.

27. The facts of the Damache case can be clearly distinguished from the present case. The Damache case involved the issuing of a search warrant relating to the applicant's home. In this case the premises were a commercial premises owned by a third party in circumstances where the appellant was unable to invoke any proprietary or constitutional interest. Furthermore, the Supreme Court in Damache was not dealing with the power to issue a search warrant in circumstances where a judge or Peace Commissioner was unavailable and the Supreme Court specifically reserved its position in relation to situations of urgency. In the course of her judgment, Denham C.J. stated as follows at paragraphs 37 and 57:

"37. In exceptional circumstances, such as urgent situations, provision has been made in statutes for a member of An Garda Síochána to issue a warrant, which usually has a short duration. The requirement of urgency is an important factor in determining the proportionality of legislation which may infringe a constitutionally protected right.

...

57. No issue of urgency arose in this case, and the Court has not considered or addressed situations of urgency."

28. Accordingly, the court holds that the appellant's challenge to the validity of the warrant must fail. The warrant was necessary for the proper investigation of a drug traffic offence and the urgency was so great that there was need for the immediate issue of a search warrant. At that time the law did not require the issuing Superintendent to be independent of the investigation and to imply such independence would amount to this Court amending the said legislation. The Court is satisfied that the Superintendent O'Leary who had been kept informed of the ongoing investigation during the days was fully informed at the time he issued the warrant and it did not require any further consideration by him. The court is equally satisfied that the situation or urgency was not contrived and it arose naturally when the appellant entered Celtic Truck Wash and Parking. Accordingly the court rejects the appellant's challenge to the warrant.

### **The arrest**

29. The appellant's contention that his arrest was unlawful arises in circumstances where he maintains that his detention for a short while prior to his arrest was unlawful because Detective Garda Carroll, to whom the search warrant was addressed, was not present at the time when this occurred. He says that as a result of this, his arrest is tainted and was unlawful.

30. In the course of his written submissions on this matter the appellant states:

"The primary submission of law is that the garda named in the warrant should be present for the execution of the warrant as it is he who is purportedly authorised to act, albeit accompanied by such other persons as he deems appropriate."

31. The appellant goes on to further submit that it is inconceivable that the named member can be rendered redundant and need not even attend at the commencement of the search.

32. The evidence before the court was that Detective Garda Farrell arrested the appellant at 9.05 pm at the Celtic Truck Wash and Parking premises, having stopped him shortly before this for the purpose of a search authorised by the warrant. However, before he commenced to search the appellant he was informed that a large quantity of drugs had been found and on receipt of this information he arrested the appellant under the Misuse of Drugs Act.

33. Detective Garda Farrell had entered the premises on foot of a warrant that had been issued to Detective Garda Carroll at 9.00 pm. Detective Garda Carroll's unchallenged evidence was that once the warrant was issued by Superintendent O'Leary, this fact was communicated to other members of the surveillance and search teams by radio and that he then went immediately to the premises. In direct evidence he said that he was two to three minutes away from the premises when he received the warrant, but conceded under cross-examination that it could have taken him five minutes to get to the scene. Other evidence from the prosecution witness who provided the jury with location maps suggested that the Detective Garda O'Leary was between 2.25 and 3kms from the Celtic Truck Wash and Parking when the warrant issued.

34. The respondent submitted in reply to the appellant's claims that the authority to enter the premises accompanied by other members is not exceeded in circumstances where, for good reasons, other members of the garda team entered in advance of the member named on the warrant.

35. While the appellant may have established a doubt as to whether or not Detective Garda Carroll was present at the premises when he was first stopped, this is of no avail to him. There was a warrant in existence at the time authorising that he be searched.

36. In the particular circumstances of this case, this Court holds that the authority of the search warrant was not exceeded when, for very good reasons other members of the search and surveillance team entered minutes before Detective Garda Carroll's arrival. To hold otherwise would be entirely disproportionate. In these circumstances the detention of the appellant for the purpose of a search on foot of the warrant was lawful, the subsequent arrest was lawful and untainted in any way as the appellant suggests and was a

lawful arrest.

37. The appellant further contended that his trial was unsatisfactory on four other grounds, each of which entitled him to have his conviction set aside. These related to the absence of full disclosure, the refusal of the trial judge to allow CCTV footage to be played during cross-examination of a prosecution witness, allegedly unfair interventions by the trial judge and a refusal by the trial judge to discharge the jury following a particular answer given by a prosecution witness under cross-examination. The court will now consider each of these grounds.

#### **Disclosure**

38. The appellant contends that the prosecution did not make full disclosure of all CCTV footage in its possession. Apart from the fact that the appellant made no application at any stage of the trial for an adjournment because of incomplete disclosure neither did he dispute the respondent's assertion that he had received all relevant CCTV footage.

39. The appellant had been furnished with a compilation disc of all relevant footage of CCTV recovered from the scene. This footage involved a number of cameras, two at the entrance and one inside the office which was situated close to the entrance of Celtic Truck Wash and Parking. All footage relating to the arrival of the Mercedes van, the arrival of the appellant, the movements of these parties and the arrival of the gardaí up to the time of the arrest of the appellant had been forwarded to the appellant. Since the appellant has at no time suggested any reason as to why other footage outside relevant times might have been relevant, his application on this ground must fail.

#### **Refusal to allow CCTV footage to be played during cross examination**

40. This ground relates to the trial judge's refusal to permit the appellant to have relevant CCTV footage played whilst his counsel was cross-examining Detective Garda Barber on matters pertinent to the crime scene.

41. This request arose on the afternoon of the third day when Detective Garda Barber's cross-examination was about to commence. The following is the exchange between the trial judge and counsel for the appellant.

Mr. Finlay: To cross-examine this witness I will need the video recording. It was also indicated that it was part of this trial, judge. It is leading evidence – it's major evidence in the case and I am very surprised you are in a courtroom where there isn't a facility to...

Judge: Well the function of lawyers is to advise the Court Services as and when they anticipate video evidence will be required.

Mr. Finlay: Well. . .

Judge: However the jury have seen the video, as have all of the parties, and it's brief and it's succinct. It need not be re-run. Reference can be made to it if there are any questions and ultimately when the jury go to deliberate as and when they will, they will have the video available to them and they can make reference to it.

Mr. Finlay: Well, for – very good judge.

Judge: But you have seen the video. So if you have any aspect or any questions in respect of it, you have to work from memory at this juncture.

Mr. Finlay: Well very good judge, but I want for the record to indicate that I have formally requested this video evidence to be available to me while cross-examining this garda and that it is refused.

42. At paragraph 5.7 of his outline written submissions, the appellant submits that in denying his counsel the opportunity to play the CCTV in the course of cross-examination, the trial judge fell into error, perpetrated a constitutional unfairness and denied the appellant fair procedures and failed to afford him a trial in due course of law. The trial judge's refusal to permit the playing of the CCTV was very prejudicial, he says, to him, insofar as the CCTV was very material to the jury decision. He goes on to submit that early in its deliberations, the jury sought to view that CCTV. He says that, shorn of the ability to cross-examine the prosecution witness in light of the CCTV footage, he was unfairly prejudiced and his defence hampered. He goes on to point out that the jury retired to commence its deliberations at 12.09 pm and at 12.32 pm returned to court to ask for the CCTV evidence.

43. The respondent submits that the appellant submissions under this heading must be viewed in light of the following additional matters which are not in dispute and which are set out in the respondent's written submissions. At all times the parties to the case were aware that CCTV facilities were not available in the court where the trial was taking place. Following the initial ruling by the learned judge in respect of the validity of the search warrant on the second day of the trial arrangements were made for the court to sit in the afternoon in a different court where CCTV viewing facilities were available. The CCTV was fully played before the jury and was replayed during cross-examination of a witness at the request of the defence, in the course of which the appellant's counsel clarified aspects of the footage with the witness. The trial returned the following day to the original courtroom and a number of gardaí who had entered the Celtic Truck Wash and Parking gave evidence. No application was made at that point by the appellant's counsel to utilise CCTV footage in cross-examining the first five garda witnesses called. These witnesses included four gardaí who were present in the lead van and who gave evidence inter alia of seeing two men at the back of the Mercedes van.

44. Detective Garda Barber gave evidence in chief before lunch and continued his evidence after lunch. No indication was given by the appellant's counsel that CCTV footage would be required until that afternoon when senior counsel for the appellant, as can be seen from the transcript extract already quoted, stated that he wished to put the CCTV footage to the witness.

45. No specific reason was given by counsel for the appellant as to why he required the CCTV footage to be put to the witness. He simply stated that the record would reflect his request. In addition, counsel for the appellant had available to him photographs of the scene together with aerial photographs. It was not disputed that the activities in the area between the garda van and the Mercedes van were not visible from the CCTV footage as the van was parked at the rear of the yard furthest away from the camera which was at the entrance.

46. No specific reason was given by counsel for the appellant as to why he required the CCTV footage to be put to the witness apart from saying that it would assist him in cross examination. He used an aerial photograph in the course of his cross-examination of Detective Garda Barber and this Court finds that he has failed to show how that cross-examination was either hampered or unfairly

prejudiced by the absence of the CCTV footage.

47. In short, he seems to suggest that the fact that the jury asked for the CCTV footage in some way supports his argument. In the first place the CCTV footage was an exhibit which the jury was entitled to have. The fact that it had asked for it does not support his contention that he was unfairly prejudiced or hampered. Accordingly, the Court rejects the appellant's contention that the trial judge fell into error, perpetrated an unconstitutional unfairness and denied the appellant fair procedures by directing that the cross-examination proceed in the absence of the CCTV footage.

48. The appellant has failed to establish that there was material on the CCTV footage which would have assisted him in his cross-examination and this ground of appeal is therefore refused.

#### **Interventions by the trial judge**

49. The appellant contends that his trial was unfair because the learned trial judge interrupted and interjected during the trial and did so during the cross-examination by his counsel in a manner prejudicial to him.

50. In support of this contention, the appellant relies in particular on two examples which he singles out in the course of his submissions. The first relates to an intervention during the course of the appellant's cross-examination of Detective Sergeant O'Connell. The interaction is noted on day 5, p.25 of the transcript:

Judge: Mr. Grant got stopped by the stream possibly.

Counsel: Yes

Judge: Mr. Boggans got stopped by the garda who said I'm –

Counsel: That's correct judge.

Judge: "I'm arresting you"

Counsel: That's correct judge

Judge: Neither could go any further

Counsel: Yes correct I am putting that proposition to the guard

Judge: Yes so you weren't involved in his arrest isn't that the situation?

51. In considering the appellant's submissions in respect of this interchange, this Court notes that it occurred at a point in the cross-examination where the appellants counsel was purporting for a third time to put to Detective Sergeant O'Connell a proposition that he was ascribing to the appellant actions that were in fact related to his co-accused. Detective Sergeant O'Connell had twice refuted this suggestion and the learned trial judge was perfectly entitled to intervene when the proposition was put for a third time in order to encourage counsel to progress his cross-examination.

52. The second intervention relates to the cross-examination of Detective Garda Farrell who had arrested the appellant and who, according to the transcript, had said he had arrested the appellant for an offence under s. 15A of the Misuse of Drugs Act. In the course of the appellant's cross-examination of this witness the following exchange occurred:-

Q. OK. And subsequent to his detention because of the search warrant you heard over the radio that the drugs had been found and then you affected the arrest that you recounted in your evidence, isn't that the situation?

A. Correct I arrested the accused for an offence under s. 15A of the Misuse of Drugs Act.

Q. Very good but in any event I suppose the issue is Mr. Boggans was not free to go at any stage once you had detained him, would that be fair enough to say?

A. Once he was arrested, no, absolutely not.

Q. And that arrest was purportedly I understood from your direct evidence for an offence under s. 15A of the Misuse of Drugs Act, is that right?

A. Yes.

Q. Ok say did the radio?

A. Section 15 of the Misuse of Drugs Act.

Q. Ok just in your direct evidence you said section 15A.

A. Alright may be slip of the tongue.

Q. In that regard did you commit. . . ?

Judge: I don't accept that, Mr. Kelly, just my note says that he referred to s. 15.

53. While the learned trial judge's note may have been incomplete, he was perfectly entitled to intervene as he did, a dispute having arisen as to what the witness had actually said. There is nothing unusual in this type of intervention in a criminal trial and the Court

holds that there was nothing improper about the learned trial judge's intervention on this matter.

**Refusal to discharge the jury**

54. In the course of the cross-examination by appellant's counsel, it was suggested to Detective Sergeant O'Connell that the appellant vehemently and emphatically denied knowledge of any drugs. "Isn't that the situation?" Detective Sergeant O'Connell was asked, to which he replied that the appellant had not replied to the majority of questions but, for the ones he did reply to, his answers were noted.

55. When this response was made, the appellant sought to have the jury discharged, an application which the trial judge refused, although he stated at the time that Detective Sergeant O'Connell should not have said what he did. The trial judge said he would deal with this matter in the course of his charge to the jury and he duly did so saying as follows:

"There are myriads of reasons why an accused will opt not to give evidence and it is for you ladies and gentlemen to draw no adverse conclusion nor to speculate as to why that is and as I say that is his right. He has not remained entirely silent then or so and in fact his right to remain silent as is his right at trial is reflected in almost the first words that were spoken to him after he was called upon to stop. He was cautioned and this is the duty of the garda officer to say to him "you need say nothing, but if you do, it may be given in evidence against you". However in this case the accused when he was arrested and taken to the garda station and interviewed on the seven occasions you have been told about, he did not stay silent, he did speak and he has told the gardaí time and again that he had no involvement with the drugs that he was innocent of any involvement that was not near any van, he did not run and he was there for a reason and he explained the reason being to survey or look or to search out cars that he was interested in, vehicles that were there. You have that evidence ladies and gentlemen because it is what he said to the gardaí in interview and it has been adduced by the prosecution as part of their case. It is therefore evidence and you have to have regard to it."

56. This Court is satisfied that any potential prejudice to the appellant's rights to a fair trial as a result of Detective Sergeant O'Connell's answer was adequately dealt with by the trial judge in his charge. The Court holds accordingly that the answer by the witness did not affect the fairness of the trial and any potential prejudice was adequately counteracted by the judge's charge the relevant part being set out above.

57. The appellant did not pursue ground 7 in which he contends that the legislation under which the gardaí purported to act in this case was unconstitutional and the resulting evidence inadmissible.

58. This Court is satisfied that the appellant received a fair trial in accordance with law.

59. Accordingly, this appeal is dismissed.