Neutral Citation: [2015] IEHC 125

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 17 JR]

BETWEEN

SHANE DONNELLY

APPLICANT

AND

THE JUDGES OF DUBLIN METROPOLITAN DISTRICT COURT, THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered the 3rd day of March, 2015.

Introduction

1. In the within proceedings, the applicant seeks an order of prohibition restraining the first named respondents from trying the applicant on foot of proceedings entitled *The Director of Public Prosecutions (Garda Wayne Gilgunn) v. Shane Donnelly*, the subject matter of national charge sheet 14002529, an injunction restraining the second named respondent from prosecuting the applicant in the same proceedings, a declaration that s.9 (6) of the Firearms and Offensive Weapons Act 1990 ("the Act") is invalid having regard to Articles 38.1 and 40.4.1 of the Constitution of Ireland and a declaration under s. 5 of the European Convention on Human Rights Act 2003 that the subsection is incompatible with the State's obligations under the Convention.

Background Facts

2. There is no dispute on the facts. On the 8th August, 2013 at around 11.20 pm, Garda Gilgunn was on patrol as an observer in an unmarked police car with a colleague at Sundrive Road, Crumlin when he observed the applicant appearing to conceal an object in his left sleeve before entering a Chinese restaurant. Shortly thereafter, the applicant ran out of the restaurant onto a green area in front where the Garda observed the applicant drop a long wooden object beside a tree and continue running away. Garda Gilgunn stopped him and went back to the tree where he found the wooden object which he describes as a baseball bat. He returned to the applicant and asked him why he would have the bat whereupon the applicant denied all knowledge of it. Garda Gilgunn then proceeded to arrest the applicant, caution him in the usual manner and convey him to Crumlin Garda Station. Shortly thereafter, the applicant was charged with an offence contrary to s. 9 (5) of the Act and released on station bail.

3. The matter came before the District Court on the 2nd September, 2013 when evidence of arrest, charge and caution was given and a copy of the prosecuting Garda's statement furnished to the applicant's solicitor and the matter adjourned to the 4th November, 2013. On the latter date the summary trial was fixed for hearing on the 22nd November, 2013, when the applicant applied to vacate the date in order to bring the within judicial review proceedings. Leave was granted by Peart J. on the 13th January, 2014.

The Legislation

4. Section 9 of the Act insofar as relevant to these proceedings provides as follows:

> "(5) Where a person has with him in any public place any article intended by him unlawfully to cause injury to, incapacitate or intimidate any person either in a particular eventuality or otherwise, he shall be guilty of an offence.
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> (6) In a prosecution for an offence under subsection (5), it shall not be necessary for the prosecution to allege or prove that the intent to cause injury, incapacitate or intimidate was intent to cause injury to, incapacitate or intimidate a particular person; and if, having regard to all the circumstances (including the type of the article alleged to have been intended to cause injury, incapacitate or intimidate, the time of the day or night, and the place), the court (or the jury as the case may be) thinks it reasonable to do so, it may regard possession of the article as sufficient evidence of intent in the absence of any adequate explanation by the accused."

The Pleadings

5. In his statement of grounds, the applicant contends that subsection (6) in allowing a court to draw an adverse inference from the silence of an accused person and failing to require the administration of a caution to such person that such inference may be drawn from his failure to provide an adequate explanation constitutes an unlawful infringement of his right to silence and of his right to be tried in due course of law contrary to Articles 38.1 and 40.4.1 of the Constitution. He contends further that the reference to "adequate explanation" is insufficiently precise to enable the accused to know what form of explanation may suffice to avoid prosecution.

6. In their statement of opposition, the respondents plead that the applicant failed to institute these proceedings within the three month time limit provided for in Order 84, rule 21 of the Rules of the Superior Courts. They plead in the alternative that the proceedings are premature and the applicant does not enjoy the requisite *locus standi* to bring them. They contend that the evidentiary burden placed upon an accused person by the subsection is not incompatible with his or her right to silence and the explanation contemplated by the subsection may be provided through a variety of means up to and including during the course of the trial. The respondents deny that the subsection breaches any provision of the Constitution or Convention by failing to provide for cautioning a suspect but if it does, same can be read into it. They contend that if the Act impinges upon the applicant's rights under the Constitution or Convention, it does so in a manner which is proportionate and lawful.

Submissions
7. Mr. Devally SC for the applicant submitted on the time issue that the delay was very modest and was explained in the grounding affidavit of the applicant's solicitor. He relied on *Damache v. DPP* [2012] 2 I.R. 266, where there had been an unexplained nine month delay in bringing a constitutional challenge to legislation by way of judicial review where the court held that as the proceedings might yet be brought by plenary summons, dismissal on that ground would merely serve to increase costs. In any event, there is no prejudice to the respondents herein.

8. With regard to prematurity, he relied on *East Donegal Co-op v. Attorney General* [1970] 1 I.R. 317 and *Curtis v. Attorney General* [1985] I.R. 458 as authority for the proposition that where there was a reasonable apprehension of rights being adversely affected, it was unnecessary to wait until that actually occurred before challenging the provision in issue. He argued further that there was no person with better *locus standi* than the applicant and cited *Cahill v. Sutton* [1980] 1 I.R. 269 in that regard.

9. On the substantive issue, the applicant accepted the proposition that in general, legislation which allows the court to draw adverse inferences from silence is capable of being constitutional as in *Heaney v. Ireland* [1996] 1 I.R. 580. He referred to *Rock v. Ireland* [1997] 3 I.R. 484, where the Supreme Court upheld the validity of ss. 18 and 19 of the Criminal Justice Act 1984, which permitted inferences to be drawn from a person's failure to account for certain matters. However, that statute expressly provided for the administration of a caution regarding the consequence of failing to provide an account and further that an accused person could not be convicted solely on the basis of failing to give an account. There are no such safeguards in the provision under challenge here.

10. Mr. Devally further contended that in *Murray v. United Kingdom* (1996) 22 E.H.R.R. 29, the European Court of Human Rights held that the drawing of inferences where there is no access to a lawyer violated Article 6 of the Convention. He said that the impugned section further failed the proportionality test posited in *Heaney*.

11. Finally, he submitted that there was a close similarity between the requirement to provide an adequate explanation and the requirement to provide a "satisfactory explanation" which was found unconstitutional in *Dokie v. DPP* [2011] 1 I.R. 805.

12. Mr. Power SC for the respondents submitted that the Act was entitled to the presumption of constitutionality and it was further to be presumed that a court operating its provisions would act in accordance with natural and constitutional justice. Even if a particular reading of the Act rendered the impugned provision unconstitutional, the court was obliged to adopt any available construction that rendered it compatible with the Constitution.

13. He emphasised the importance of the distinction between an evidential burden and a legal one which shifted the onus of proof. The provision in issue dealt with the former, not the latter. He said that the applicant's complaint that he was not warned about the consequences of failing to account for possession of the bat was both factually and legally irrelevant. It was factually irrelevant because the applicant denied the bat was his. It was legally irrelevant because the section was not concerned with accounting to a member of An Garda Síochána.

14. He said the application was premature because the subsection may not be relied upon at all at the trial as the offence was provided for separately in a different subsection. If on the other hand it was not premature, then it was out of time and he also relied on *Damache*.

15. On the substantive issue, he argued that "reverse onus" provisions of this nature were not unusual and had been upheld in a number of cases where shifting the evidential burden was found to be permissible. He relied on *O'Leary v. Attorney General* [1993] 1 I.R. 102 (High Court) and [1995] 1 I.R. 254 (Supreme Court) and *Hardy v. Ireland* [1994] 2 I.R. 550. He said that similar provisions had been considered in *O'Leary, McNulty v. Ireland* [2013] IEHC 357, *The People (DPP) v. Smyth* [2010] 3 I.R. 688, *The People (DPP) v. PJ Carey* [2012] 1 I.R. 234 and *McNally v. Ireland* [2011] 4 I.R. 431 and all found to be valid.

16. In fact, Mr. Power went further and said that there had never been a case where a reverse onus provision of this nature had been condemned. The right to silence was not absolute and the subsection satisfied the proportionality test as in *McNally*. He distinguished *Dokie* on the basis that it involved a legislative provision creating an offence with the failure to account being an ingredient of the offence. Thus, the legal burden was shifted unlike here. He further submitted that if the court felt a caution was required, it could be read into the subsection and cited *DPP v. Galligan & Daly* (Unreported, High Court, Laffoy J., 2nd November, 1995) in support.

Relevant Case Law
17. In *O'Leary v. Attorney General* [1993] 1 I.R. 102, [1995] 1 I.R. 254, the plaintiff was charged with membership of an unlawful organisation contrary to s. 21 of the Offences Against the State Act 1939. Section 24 further provided that possession of an incriminating document as defined "shall, without more, be evidence until the contrary is proved" of such membership. The plaintiff was convicted by the Special Criminal Court of membership on foot of such documents. He sought a declaration that s. 24 was unconstitutional as it infringed his right to a trial in due course of law and the presumption of innocence.

18. His claim was dismissed by Costello J., whose judgment was affirmed by the Supreme Court. He noted that there were a considerable number of statutes containing provisions which had the effect of shifting the onus of proof from prosecution to accused. However he noted that the phrase "the burden of proof" was commonly used in two different senses. The burden of establishing guilt beyond reasonable doubt always rests on the prosecution. He stated (at p. 109):

> "This burden is fixed by law and remains on the prosecution from the beginning to the end of the trial. It is this burden which arises from the presumption of the accused's innocence and it is the removal of this burden by statute that may involve a breach of the accused's constitutional rights. It is now usual to refer to this burden as the legal or persuasive burden of proof but the phrase is also used to describe the burden which is cast on the prosecution in a criminal trial of adducing evidence to establish a case against an accused, a burden which is now usually referred to as the evidential burden of proof. In criminal cases the prosecution discharges this evidential burden by adducing sufficient evidence to raise a "prima facie" case against an accused. It can then be said that an evidential burden has been cast on to the accused. But the shifting of the evidential burden does not discharge the legal burden of proof which at all times rests on the prosecution. The accused may elect not to call any evidence and will be entitled to an acquittal if the evidence adduced does not establish his or her guilt beyond a reasonable doubt. Therefore if a statute is to be construed as merely shifting the evidential burden no constitutional infringement occurs…
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> Whilst it may not be desirable or indeed possible to lay down any hard and fast rule for the construction of statutes involving the shifting of a burden of proof, it is clear that if the effect of the statute is that the court *must* convict an accused should he or she fail to adduce exculpatory evidence then its effect is to shift the legal burden of proof (thus

involving a possible breach of the accused's constitutional rights) whereas if its effect is that notwithstanding its terms the accused *may* be acquitted even though he calls no evidence because the statute has not discharged the prosecution from establishing the accused's guilt beyond a reasonable doubt then no constitutional invalidity could arise."

19. Commenting on the constitutional guarantees in Article 38, Costello J. said (at p. 110):

> "…the Constitution should not be construed as absolutely prohibiting the Oireachtas from restricting the exercise of the right to the presumption of innocence. The right is to be implied from Article 38, which provides that trials are to be held "in accordance with law", and it seems to me that the Oireachtas is permitted in certain circumstances to restrict the exercise of the right because it is not to be regarded as an absolute right whose enjoyment can never be abridged. This is how the European Convention has been construed."

20. A similar approach was adopted by the Supreme Court with the sole judgment being delivered by O'Flaherty J., who rejected the submission that the 1939 Act imposed on the accused the burden of proving his innocence. Referring to possession of incriminating documents, he said (at p. 265):

> "It is clear that such possession is to amount to evidence only; it is not to be taken as proof and so the probative value of the possession of such a document might be shaken in many ways: by cross-examination; by pointing to the mental capacity of the accused or the circumstances by which he came to be in possession of the document, to give some examples. The important thing to note about the section is that there is no mention of the burden of proof changing, much less that the presumption of innocence is to be set to one side at any stage."

21. In *Rock v. Ireland* [1997] 3 I.R. 484, the Supreme Court considered whether the accused's constitutionally guaranteed right to silence was infringed by ss. 18 and 19 of the Criminal Justice Act 1984, which require a person, when so requested by a Garda, to account for the presence of any object, substance or mark that might be connected with a crime or the presence of the person at a particular place. The court considered that the right to silence and the presumption of innocence are implicitly guaranteed by the Constitution but that the right to silence is not absolute and is subject to public order and morality, following the earlier decision in *Heaney v. Ireland* [1996] 1 I.R. 580. Delivering the court's judgment, Hamilton C.J. stated (at p. 497):

> "In deciding what inferences may properly be drawn from the accused person's failure or refusal, the court is obliged to act in accordance with the principles of constitutional justice and having regard to an accused person's entitlement to a fair trial must be regarded as being under a constitutional obligation to ensure that no improper or unfair inferences are drawn or permitted to be drawn from such failure or refusal.
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> As stated by O'Flaherty J. in delivering the judgment of this Court in [*O'Leary*] at p. 266:-
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> > 'Courts, whether comprising a judge sitting with a jury or a judge or judges only, will not act as automatons in the assessment of evidence. With a statutory provision setting out what is to be regarded as evidence - and whether it is called a presumption or not is of no moment - the court must always approach its task in a responsible manner and have regard to the paramount place that the presumption of innocence occupies in any criminal trial.'
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> It is clear from the provisions of the said section that it does not interfere in any way with the accused person's right to the presumption of innocence or the obligation on the prosecution to establish guilt beyond all reasonable doubt."

22. The Chief Justice went on to consider the right to silence (at p. 500):

> "The question to be considered by this Court is whether the restrictions which the impugned sections place on the right to silence is any greater than is necessary to enable the State to fulfil its constitutional obligations.
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> The principle of proportionality is by now a well-established tenet of Irish constitutional law. It surfaced obliquely in *Cox v. Ireland* [1992] 2 I.R. 503, in which the Supreme Court held s. 34 of the Offences Against the State Act, 1939, to be "impermissibly wide and indiscriminate" in its restriction of the constitutional right to earn a livelihood. In [*Heaney*] at p. 607 it was explained by Costello J. as follows:-
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> 'In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (see, for example *Times Newspapers Ltd. v. United Kingdom* (1979) 2 E.H.R.R. 245) and has recently been formulated by the Supreme Court of Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-
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> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
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> (b) impair the right as little as possible, and
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> (c) be such that their effects on rights are proportional to the objective: *Chaulk v. R.* [1990] 3 S.C.R. 1303 at pages 1335 and 1336."

23. In *The People (DPP) v. Smyth* [2010] 3 I.R. 688, the accused was convicted of possession of a controlled drug for sale or supply contrary to the Misuse of Drugs Act 1977, s. 29(2)(a) of which provides that it is a defence for the accused to prove that he did not know and had no reasonable grounds for suspecting that what he had in his possession was a controlled drug or that he was in possession of a controlled drug. The accused appealed his conviction arguing that the trial judge's charge to the jury was erroneous because he directed the jury that they had to be satisfied beyond reasonable doubt that the defence had been made out. The Court of Criminal Appeal agreed that this was an error.

24. Delivering the judgment of the court, Charleton J. discussed reverse onus provisions (at p. 694):

> "A decision to reverse on to the accused an element of the proof of the commission of a crime that might normally be

expected to be borne by the prosecution, or to set up a special defence such as insanity, is a matter of legislative competence. It is for the Oireachtas, in each case, to set the parameters of proof in a criminal charge; to decide whether there should be a reversed burden of proof in respect of any element of a crime; and to indicate expressly, or by implication, the nature of the burden of proof that is to be discharged by the defence."

24. He continued (at p. 696):

> "The fundamental principle of our criminal justice system is that an accused should not be convicted unless it is proven beyond reasonable doubt that the accused committed the offence. The legal presumption that the accused is innocent, until his guilt is proven to that standard, operates to ensure objectivity within the system. It is a matter for the Oireachtas to decide whether on a particular element of the offence an evidential burden of proof should be cast on an accused person. Of itself, this does not infringe the constitutional principle that the accused should be presumed to be innocent until found guilty."

25. The Court of Criminal Appeal followed Smyth in adopting a similar approach to another reverse onus provision in *The People (DPP) v. PJ Carey (Contractors) Limited* [2012] 1 I.R. 234.

26. The High Court more recently considered a reverse onus provision in *McNulty v. Ireland and the Attorney General* [2013] IEHC 357, which concerned the offence of intimidating a witness with the intention of obstructing, perverting or interfering with an investigation or the course of justice contrary to s. 41 of the Criminal Justice Act 1999. Section 41(3) provides that proof of the act shall be evidence of the requisite intention. The plaintiff having been charged with such an offence brought proceedings seeking a declaration that the section was in breach of Article 38 of the Constitution of Ireland and Article 6 of the ECHR. The plaintiff contended that proof of the act was sufficient to sustain a conviction without any further evidence. Gilligan J. referred to the presumption of constitutionality enjoyed by the Act and went on to say:

> "38. Section 41(3) of the 1999 Act does not provide, as submitted by the plaintiff, that the evidence is conclusive; all it does is provide that the act of harming, threatening, menacing or putting in fear "shall be evidence" that the act was done with the intention required. There is no onus on any court to accept that evidence. There is no reference in the section to the burden of proof altering or the presumption of innocence being set aside. There is nothing in the section that provides for a conclusive situation or that it is incumbent on the judge or jury to accept the evidence.
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> 39. Further s. 41(3) does not *oblige* the court to draw any inferences but the court has discretion to do so. As the section stands, it provides for the court to evaluate and assess the significance of the evidence before it. It does not infringe on the accused's right to the presumption of innocence.
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> 40. Similarly the Supreme Court in [*Hardy v Ireland* [1994] 2 I.R. 550] in dismissing the appeal held:-
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> > '…in the course of a trial for an offence under s. 4, sub-s. 1 of the Explosive Substances Act, 1883, the prosecution remained under an obligation to prove all the elements of the offence beyond a reasonable doubt; the principle that an accused must be tried in due course of law was not infringed by a statutory provision which permitted the drawing of inferences from facts proved beyond a reasonable doubt by the prosecution.'

27. Gilligan J. dismissed the claim. The plaintiff appealed to the Supreme Court whose judgment is reported at [2015] IESC 2. The Court dismissed the appeal. The sole judgment was delivered by Denham C.J. who said:

> **"The Presumption of Innocence**
> 23. In a criminal trial the burden of proof is on the prosecution to prove all elements of the offence beyond all reasonable doubt. This principle is part of the constitutional protection of the presumption of innocence which is implicit in Article 38.1 of the Constitution, requiring as it does, that no person shall be tried on any criminal charge save in due course of law. As Costello J. stated in *O'Leary v. The Attorney General* [1993] 1 I.R. 102 at p.107:-
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> > '…[I]t has been for so long a fundamental postulate of every criminal trial in this country that the accused was presumed to be innocent of the offence with which he was charged that a criminal trial held otherwise than in accordance with this presumption would, prima facie, be one which was not held in due course of law.'
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> 24. Some statutory provisions permit adverse inferences to be drawn from a failure to account for certain matters: [*Hardy*]; [*O'Leary*] and [*Rock*]."

28. In dealing with the distinction between evidence and proof, the Chief Justice stated:

> "39. However, the effect of the section in this case is different, and is that, once an act as provided for in s. 41(1)(a) of the Act of 1999 is proven, it shall, in accordance with s. 41(3), be evidence of the intention required under s. 41(1) of the Act of 1999.
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> 40. As stated by the Earl of Halsbury in *The Laws of England* (Butterworth & Co., 1910) at p. 419:-
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> > '…Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Evidence, if accepted and believed, results in proof, but it is not necessarily proof of itself…"

29. The issue of proportionality was examined by the High Court in *McNally v. Ireland* [2011] 4 I.R. 431. Section 99(1) of the Charities Act 2009 creates the offence of selling Mass cards other than pursuant to an arrangement with a recognised person as defined. Subsection (2) goes on to provide that in a prosecution for such offence it shall be presumed, until the contrary is proved on the balance of probabilities, that the sale was not done pursuant to such arrangement. The plaintiff challenged the section on the grounds, *inter alia*, that it was inconsistent with Articles 38 and 44 of the Constitution. The Article 38 challenge was based on grounds which included the reversal of the onus of proof and proportionality.

30. On the issue of the reverse onus, MacMenamin J. referred to *O'Leary* and then considered the question of proportionality:

"[180] Furthermore, it has been held that rights under Article 38.1 are not absolute and a proportionality analysis may be applied to assess the legitimacy of restrictions on such rights.

Proportionality

[181] The well established framework of the proportionality tests was most recently summarised in *Montemuino v. Minister for Communications* [2008] IEHC 157, [2009] 1 I.L.R.M. 218. The High Court (Feeney J.) referred to the consideration of proportionality by the Supreme Court in *The Employment Equality Bill, 1996* [1997] 2 I.R. 321. There Hamilton C.J. stated at p. 383:-

> 'In effect a form of proportionality test must be applied to the proposed section. (a) Is it rationally designed to meet the objective of the legislation? (b) Does it intrude into constitutional rights as little as is reasonably possible? (c) Is there a proportionality between the section and the right to trial in due course of law and the objective of the legislation?'

[182] This same issue was also discussed by Irvine J. in *Whelan v. Minister for Justice* [2007] IEHC 374, [2008] 2 I.R 142.

[183] I would identify the following principles as being applicable to the applicable test of proportionality: (a) the necessity to establish whether the means it employs to achieve its aim correspond to the importance of the aim; (b) whether the means adopted are necessary for the achievement of the objective; (c) whether the means actually becomes the end in itself; (d) whether the objective can be attained by other methods which may be more conveniently applied; (e) whether the method chosen is the least restrictive and the disadvantage caused is least disproportionate to the aim; and (f) whether the means may be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations."

31. Having considered how those criteria might be applied, the court then discussed whether the reverse onus in the Act of 2009 was a proportionate response:

> "[187] Accordingly, it may be seen that there is a rational connection between the means and the objective of the legislation. It is minimally intrusive into the constitutional rights of a potential accused. It is an attenuated intrusion into the right to trial in due course of law. No other means have been suggested to attain the object. The subsection does not "create" guilt. It provides a framework within which the existence of the offence may be proved or disproved. Absent such a legislative framework the existence of an offence would be simply not susceptible to proof in any practical sense, as an onus would lie on the prosecution to negative literally thousands of possible avenues which might be called in aid as constituting "validation" or "authentication"."

32. *Dokie v. DPP* [2011] 1 I.R. 805 concerned the constitutionality of s. 12 of the Immigration Act 2004, which empowered an immigration officer or Garda to demand from a non-national production of a document establishing his or her identity and nationality, unless he or she gave a satisfactory explanation of the circumstances which prevented him or her from so doing. Failure to do so was an offence. Kearns P. held that s. 12 was inconsistent with Articles 38.1 and 40.4.1 as it was not sufficiently precise to reasonably enable an individual to foresee the consequences of his or her acts or omissions or to anticipate what form of explanation might suffice to avoid prosecution. The failure to define the term "satisfactory" gave rise to vagueness and uncertainty and the section lacked the clarity necessary to legitimately create a criminal offence. There was no requirement in the section to warn of the possible consequences of any failure to provide a "satisfactory explanation" and it had considerable potential for arbitrariness in its application. The President felt that the section had the potential to offend the right not to incriminate oneself. Silence equated with the failure to provide a satisfactory explanation and thus became proof of the commission of the offence. However, he went on to hold that it was not a disproportionate legislative response to the requirement of having effective immigration control procedures and thus did not infringe Article 40.1.

Analysis

33. The right to silence is an incident of the presumption of innocence and a cornerstone of our criminal justice system protected by constitutional guarantees. It is not an absolute right and may be circumscribed by legislation. Such legislation will be valid provided it is proportionate and does not represent an unnecessary incursion on the rights of the accused. It falls to be weighed and assessed by reference to a number of different factors. *Prima facie*, a statutory reversal of the legal onus of proof onto the accused will be incompatible with these guarantees. Our law does not permit a presumption of guilt until proven innocent. Thus, a requirement to convict in the absence of evidence from the accused is constitutionally dubious. It always remains for the prosecution to prove the guilt of the accused beyond reasonable doubt. It is however well settled that it is legitimate to shift the evidential as distinct from legal burden onto the accused where the test of proportionality is satisfied. That test recognises the inevitable tensions between protecting the rights of the accused and maintaining law and order in the interests of the common good.

34. The objective of the statutory provision under challenge must be sufficiently important to warrant the abridgement of the right in issue. The provision must be rationally connected to achieving the objective and minimally intrusive on the right of the accused. The objective ought not admit of attainment by alternative means that are more convenient and the measure in question must not be unfair or arbitrary.

35. Section 9(6) of the Act creates no offence. That is to be found in the preceding subsection. The essential ingredients of the offence are first that the accused be in a public place, secondly that he has an article in his possession and thirdly that he intends the article to cause injury to, incapacitate or intimidate any person. The Oireachtas has taken the view, as is its right, that the creation of this offence is necessary in order to maintain public order and morality and it is not difficult to see why. It has also taken the view that it in order to secure that objective, it is necessary to cast an evidential burden on the accused in relation to the third element of the offence, a matter most likely peculiarly within his knowledge. Absent such a burden, proof of the offence would in many, perhaps even most, cases be virtually impossible. There are no obvious alterative means by which the offence could be proved.

36. In enacting s. 9(6) of the Act, the legislature has done no more than provide that the court *may* regard the act as evidence of the intent but only in the absence of any adequate explanation by the accused. There is no compulsion on the court to so regard the act of possession less still any requirement to convict where no explanation is forthcoming. Indeed, as has been pointed out, even were the subsection struck down, the offence still remains and the accused would still face trial.

37. There are evident similarities here with the provision recently found valid by the Supreme Court in *McNulty* where the statute provided that proof of the act *shall* be evidence of the intent. The provision under challenge there contained no saver for an

explanation or as is sometimes seen, "until the contrary is shown". The subsection here might be said to be considerably less draconian in its operation where the court merely may so regard the act and only then in the absence of adequate explanation.

38. As remarked by O'Flaherty J. in *O'Leary*, judges are not automatons and must be presumed to operate the provision in a manner that is fair to the accused in accordance with the principles of natural and constitutional justice, as is their obligation. I am satisfied that there is no basis for suggesting that the provision in issue is a disproportionate legislative response to the objective it seeks to achieve. The limitation it imposes on the right to silence of the accused could not be said to be oppressive, arbitrary or more than minimal. There is no compulsion on the accused to offer an explanation nor any requirement to find him guilty if he declines to do so. Indeed, the accused may well be able to elicit an adequate explanation through cross examination or other means without necessarily having to give evidence.

39. In that regard, it is important to note that there is no temporal limitation on when the explanation may be offered or to whom. The applicant submits that he is disadvantaged by not having received a caution from the Garda about the consequences of his failure to offer an adequate explanation. There is nothing in the section to suggest that the explanation must be offered to a Garda at the time the offence is committed as sometimes appears in such statutory provisions. It is thus open to the accused to proffer an explanation, should he decide to do so, at any time either before or during the trial. As a matter of fact, he has proffered such an explanation through the affidavit he has sworn in these proceedings.

40. The applicant however submits that an explanation which comes later in time might not be regarded as having the same probative value as one offered spontaneously and there is thus unfairness in the fact that he received no appropriate caution. Even were that the case, which I do not accept, it seems to me that there is an air of unreality about this suggestion in circumstances where the accused was asked for an explanation by the Garda when apprehended and his response was to deny all knowledge of the item in question. How then could the Garda have been expected to caution him about the consequences of failing to adequately explain his possession of an item he denied possessing?

41. In my view, *Dokie* does not advance the applicant's case. There, the failure to provide a satisfactory explanation in itself constituted the offence. The court concluded that the use of the term "satisfactory" lacked the precision necessary to create a criminal offence and further that the impugned section potentially offended the privilege against self incrimination. It thus reversed the burden of proof rather than merely the evidential burden. No such consideration arises in this case.

42. I do not find the decision in *Murray* of assistance as that case concerned the right of an accused person to access to his lawyer during the initial stages of police interrogation.

Conclusion

43. In the circumstances therefore, I find that s. 9(6) of the Act is not incompatible with the Constitution or the European Convention on Human Rights. In the event, it is not necessary to consider the time or *locus standi* issues that have been raised.

44. I will therefore dismiss this application.