COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.
22/14

24CJA/14

Between

The People at the Suit of the Director of Public Prosecutions

Applicant

And

Gerard Mounsey

Appellant

JUDGMENT of the Court delivered by Mr. Justice Birmingham on the 19th day of October 2015

1. On the 27th July, 2013 the appellant was convicted of seven counts of knowingly or wilfully delivering to the Office of the Collector General an incorrect return in connection with Income Tax, contrary to s. 1078(2) of the Taxes Consolidation Act 1977, the returns in question relating to the years of assessment 2003 to 2009 inclusive. The offences were the subject of counts two to eight on the indictment on which Mr. Mounsey had been arraigned. Subsequently, on the 13th January, 2014, sentences were imposed. The sentences imposed were sentences of imprisonment for six months on counts two, three and four. These sentences were consecutive and were suspended. In respect of counts five and six, a fine of €5,000 was imposed on each count. Mr. Mounsey was allowed twelve months to pay and there was provision for one month's imprisonment in default of payment. The appellant has appealed against his convictions.

2. For her part, the Director of Public Prosecutions has sought to review the sentences imposed on grounds of undue leniency. However, the Director has sought to defer the determination of the undue leniency application, pressing for this course of action at a number of management lists. She was seeking a deferral in circumstances where it was suggested that the Circuit Court, in imposing sentence, was, or might have been, influenced by a suggestion which had been canvassed on behalf of the accused that when the appeals which had been lodged with the Commissioners against the assessments which had been raised were finally determined, that it was possible that there would be no liability for tax on his part. The appeals to the Appeal Commissioners against the assessments remain outstanding to this day, and the Director was concerned that she would find herself in the same position in this Court as she had been in the Circuit Court, with the possibility that there would be no tax liability at the end of the day being floated, and notwithstanding the firm view of the Revenue authorities that there would be a very substantial liability indeed that this possibility would influence the Court to a significant extent.

3. The point made on behalf of the Director was that it would be a very unsatisfactory state of affairs if the review of sentence was dealt with and so the question of sentence finalised on the basis of the possibility that there was no tax due, if when the appeals against assessment were finally determined, it emerged that there was in fact a very substantial tax liability. In a situation where neither side could, for understandable reasons, give any indication of when the assessment appeal process would be finally concluded, the judge having charge of the management list (Birmingham J.) was not prepared to merely leave the sentence review in abeyance. In the event, when this case was listed for hearing before this Court on 23rd July 2015, both aspects, conviction and undue leniency, were listed. However, the actual hearing was confined to the conviction appeal brought by Mr. Mounsey and the Court indicated that it would turn to the sentence review when the conviction appeal had concluded and would, at that stage, if it became necessary, decide how to proceed. The result of all this is that this judgment deals only with the appeal against conviction.

4. By way of factual background, it should be explained that the appellant was a single man aged 48 years at the time of trial, who was at all relevant times employed by Lyons of Limerick Ltd., motor dealers, at their Nenagh garage in County Tipperary. He had commenced employment with that company in 1988 as a mechanic before converting to a salesman's position. At the time of the events giving rise to the prosecution, he was the senior salesman in the Nenagh branch.

5. In late July 2010, gardaí attached to the Criminal Assets Bureau obtained warrants authorising the search of the appellant's home and place of work and those warrants were executed on the 4th August, 2010. Documentation obtained during the course of the search of the appellant's workplace indicated that he had been involved in the sale of numerous cars to an entity described as 'Tom Ryan Car Sales'. However, follow-up enquiries indicated that Tom Ryan Car Sales did not exist and that the cars were sold to various other individuals. Subsequently, orders were obtained under s. 14 of the Criminal Assets Bureau Act 1996 directing a number of financial institutions to provide information in relation to accounts held by the appellant with them.

6. On the 15th March, 2011 the appellant was arrested on suspicion of having committed the offence of making a gain by deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and was then detained under s. 4 of the Criminal Justice Act 1984. That this original arrest and detention was for the offence of making a gain by deception is a matter of some significance in the context of arguments that have been advanced on this appeal.

7. After the appellant had been interviewed on three occasions, the basis for his detention was changed so as to permit questioning of the appellant in respect of offences contrary to s. 1078 of the Taxes Consolidation Act 1997. The appellant was then interviewed by gardaí and Revenue officers attached to the Criminal Assets Bureau.

8. Subsequent to his release from detention, eight notices of assessment in respect of the years 2002 to 2009 were served on Mr. Mounsey. These indicated that there was a tax liability for the relevant period of approximately €485,000 before penalties. Up to then the appellant had made returns in respect of the years 2003 to 2009 and paid a sum of approximately €16,000 by way of tax. It seems he had not delivered a return of Income Tax at that stage for the year 2002.

9. In response to the assessments served upon the appellant, he made a return for the year 2002 and made revised returns for the years 2003 to 2009. These indicated that there was an additional tax liability of just under €33,000 and this was discharged in April 2011. Then, on the 28th October, 2011, in the context of an appeal to the Tax Commissioners, a further set of returns were furnished which suggested tax liability of almost €60.000.

10. The trial began on the 16th July, 2013 and ran for nine days. It was by any standards a particularly hard-fought one, but on the 27th July, 2013 the jury returned unanimous guilty verdicts in respect of counts two to eight, count one having resulted in a direct acquittal.

11. A significant number of grounds of appeal have been argued and the issues raised might be summarised as follows:

> Ground 1: The admission of evidence relating to transactions involving Tom Ryan Car Sales, a fictitious entity.
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> Ground 2: The admission of evidence relating to Amended Returns made by the appellant.
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> Ground 3: The refusal to permit certain expert evidence from Mr. Pat Clery, an accountant engaged by the defence to be adduced.
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> Ground 4: The refusal of the trial judge to exclude certain portions of interviews conducted with the appellant while he was detained on suspicion of having made a gain by deception.
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> Ground 5: The refusal to exclude the final interview which was conducted with the appellant after the basis for his detention had been changed.
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> Ground 6: The failure to grant a direction.
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> Ground 7: The trial judge's charge to the jury was inadequate when it came to deal with the mental element of the offences under consideration.
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> Ground 8: The trial judge failed to deal adequately with requisitions that were raised by the defence, in particular complaints that the judge's treatment of concepts such as gross profits, gross receipts/gross turnover and income was inadequate and indeed likely to confuse the jury.

Ground 1: The Admission of Evidence relating to Tom Ryan Car Sales

12. Prior to the opening of the case, Senior Counsel for the appellant submitted that all evidence relating to the fictitious entity should be excluded. Later, in the course of the trial itself, he returned to this issue. Counsel contended that it was not relevant to the offence of making incorrect returns of Income Tax, particularly in a situation where the prosecution was only in a position to prove a single transaction involving a Daewoo motorcar which involved a gain of €250. In the alternative, he submitted that if the evidence had any probative value at all, that this was clearly exceeded by its considerable prejudicial effect. The prosecution submitted that the evidence in question was of "enormous value", speaking of it as being "a spinal column through the entire case". The defence says that the charges here were ones of making incorrect tax returns over a lengthy period. This required the prosecution to prove that the returns submitted were incorrect, and that, in submitting them, Mr. Mounsey had done so "knowingly or wilfully". So far as the actus reus was concerned, the presentation of incorrect tax returns, any reference to the fictitious entity offered no assistance to the prosecution. The defence challenges the justification contended for by the prosecution that it does assist in establishing a motive. Establishing motive, according to the defence, is not a relevant consideration as motive in such cases is self-evidently to evade tax. It may be noted that the submissions in this case use the word 'avoid' but clearly it is evasion that is in issue.

13. In the view of the Court, the evidence in relation to Tom Ryan Car Sales provided relevant evidence for the jury as to how the appellant was operating; his methods of operation as distinct from the scale, and as such, was relevant to a fact centrally in issue. While the evidence must have had some prejudicial effect, it cannot be said that this effect was such as to outweigh the probative value of the evidence. An incorrect return may be made in a variety of circumstances. It may be the result of an error in calculation; the result of a misunderstanding of accountancy advice or as a result of erroneous accountancy advice on some issue such as whether particular expenditure was deductable or not, to mention just a few. On the other hand, the incorrect return may have been made knowingly or wilfully. A jury required to consider this issue will be assisted, if it understands how the income was generated, and will correspondingly be handicapped if that information is kept from it. Given the view of the Court that this evidence was relevant, that it was probative and that its probative value was not exceeded by its prejudicial effect, this ground of appeal fails.

The Admissibility of Evidence of Amended Returns

The restrictions on the ability of the Defence to challenge the Assessments which preceded the Amended Returns

14. A feature of the trial was that the appellant's tax liability for the years in question had not been finally determined at the time of trial and that remains the situation to the present day. In these circumstances, a Revenue official, referred to at trial as RBO42, gave evidence of assessments that were raised by him following an investigation of the appellant's tax affairs. In addition, the prosecution submitted in evidence a document entitled 'Comparison of Returns', which summarised what had been returned by the appellant at various stages on both a profit and loss basis as well as Income Tax returns.

15. On the opening day of the trial, the defence made an application to the trial judge relating to the refusal of the prosecution to provide information by way of disclosure about the basis on which the assessments raised by RBO42 had been arrived at. The application for disclosure was strongly resisted by the prosecution. When the objection taken to disclosure was successful, the defence objected to the assessments being put in evidence, the contention they made being that the assessments were a form of opinion evidence, and as such fell foul of the rule that opinion evidence should not be adduced in relation to the ultimate issue in the case, the so-called ultimate issue rule. Slightly surprisingly, given what had gone before, the prosecution indicated that they had no intention of proving the assessments, but merely intended to have witness RBO42 state that he had raised assessments. The prosecution went on to explain that they were not putting the assessments in evidence because they had been raised on the basis of incomplete information which was what was before the Revenue officer at the time. Counsel for the appellant submitted that no evidence ought to be adduced in relation to the Income Tax paid or in relation to computation of Income Tax liability in respect of any of the returns that were actually made. Following an overnight break which came during the direct evidence of RBO42, an application was then made to exclude the evidence of Amended Returns that were submitted on behalf of the appellant. Essentially, the

application to exclude was based on the contention that the Amended Returns had been precipitated by, and were a direct response to, the assessments that had been raised. The defence said that given that the prosecution did not appear to be standing over the assessments and were not in a position to stand over them, that accordingly, it was, in the view of the defence, unfair to have evidence admitted in relation to the Amended Returns which were the product of these very assessments.

16. This controversy had its origin in the role played in the course of the Revenue investigation by "lodgements unidentified". A forensic accountant called by the prosecution, refereed to at trial as BFA2, dealt with this issue in the course of his evidence, indicating that from his perspective there were lodgements unidentified of €753,000. However, a document prepared by an accountant engaged by the appellant, referred to during the course of the trial as PC2, was put to the witness and that document purported to provide an explanation for the €753,000 "lodgements unidentified". This document had been served on the prosecution prior to trial. It was contended that more than half of the €753,000 in issue could have been readily explained through referencing documents that were in the possession of the Bureau, but that had just not occurred.

17. BFA2 concluded his evidence later on the afternoon of the 19th July, 2014, Day 4 of the trial. Following the weekend break and prior to resumption on the 23rd July, 2014, a statement of additional evidence of RBO42 was served. That statement included the following passage:-

> "I now refer to the document entitled 'Appendix PC2' prepared by Mr. Pat Cleary, accountant, and entered by the defence as an exhibit in the trial. I say that per Mr. Cleary's calculations, the gross receipts from the above mentioned sources total €473,517.80. I say that based on this calculation, Mr. Mounsey has under-declared his gross receipts by €328,536.80."

18. When Counsel for the appellant sought to exclude evidence in relation to the assessment, Counsel for the prosecution, in response, stated that the decision not to adduce evidence in relation to the assessments was because the prosecution had formed the view that evidence of very high assessments would be more prejudicial than probative when there was new evidence from the defendant's own accountant explaining the lodgements. At a later stage, prosecuting Counsel indicated that it would call or not call evidence in relation to the assessments on the basis of what the defence wished to happen.

19. Ultimately, RBO42 did give evidence of the assessments, the Amended Returns and the additional Income Tax liability said to arise. The defence says that the putting in evidence of the assessments after the exercise that had been engaged in and elaborate manoeuvring was unfair and that this was compounded by the fact that the trial judge refused to direct that disclosure be made in relation to the basis on which the assessments were arrived at. The effect of this, the appellant says, was to effectively reverse the burden of proof and to place an onus on him to prove that the assessments raised were incorrect.

20. The prosecution, for its part, appears to have been influenced significantly by the fact that the request for disclosure, as formulated, had contained a reference to working papers. The prosecution says, very firmly indeed, that seeking the disclosure of the working papers of anyone engaged in any professional activity is a fundamentally unreasonable request. In summary, then, the prosecution says that the sequence of events that occurred was that it was always the intention of the prosecution to adduce evidence of the Amended Returns and of the further Amended Returns, as well as evidence of the original returns, and that this was obvious to all concerned. The evidence in question was referred to during the opening of the case. The contents of the opening had been discussed in the ordinary way between Counsel, and because of what was indicated in those discussions, the opening contained no reference to certain aspects of the evidence which the prosecution intended to call, such as the contents of the memoranda of interviews, because it was indicated that there was an issue in relation to admissibility. However, the question of the admissibility of the evidence of the assessments was raised for the first time on Day 5 of the trial. This objection was made without prior notice, and when Counsel for the prosecution indicated that he did not intend to adduce evidence of the details of the assessments, but only of the fact that assessments had been raised. Once there was evidence at trial, introduced at the behest of the appellant through his accountant and through spreadsheet PC2, that the appellant had a gross turnover of €298,300 from the sale of cars for the eight years ending on the 31st December, 2009, the issue was then readdressed by RBO42. Once the prosecution showed a willingness to move away from the assessments, Counsel for the defence, according to the prosecution, latched on to this exercise in self-restraint in order to seek to exclude the Amended Returns.

21. It is self-evidently the case that there was a link between the raising of assessments and the delivery of Amended Returns. The Amended Returns were a response to the assessments. Any assessment is just that and there is always the possibility of further information coming to hand leading to a recalibration. If there was going to be evidence of Amended Returns, then the defence had an obvious interest in challenging or otherwise undermining the assessments which precipitated the returns. Anyone intending to challenge the assessments, whether by way of cross-examination or otherwise, will have an obvious interest in obtaining as much information as possible about the basis on which the assessments came to be arrived at in order to make use of that information.

22. The Court has already referred to the fact that the prosecution, in determining its approach, seems to have been influenced by the belief that the request was, in substance, one for working papers. The debate on the issue at trial would suggest that the prosecution also seems to have drawn much comfort from the decision of Gilligan J. in the case of *T.J. v. Criminal Assets Bureau* [2008] IEHC 168. However, in the course of his response to that debate, defence Counsel, having referred to the fact that his colleague was contending that the defence was seeking the working papers of RBO42, was at pains to stress that he did not care in what form he got the breakdown [of how the assessments were arrived at], but that he had to get the breakdown before he could challenge the evidence in relation to the assessments.

23. The trial judge dealt with the submissions made to him on this topic in the following terms:-

> "I have listened to the evidence very carefully in respect – sorry, not the evidence, but the submissions of Counsels on both sides and the case law that has been handed into Court which I have had the opportunity to read over lunchtime. I have to be conscious that this is a, I won't say an unusual prosecution, but it is not the normal run-of-the-mill prosecution insofar as that it is a prosecution under the Tax Code, as such, and insofar as matters are concerned, I am satisfied not to make an order for discovery in respect of the assessment notices that were made. I feel that in the context of what we have – and having taken into consideration the *T.J. and Revenue* case, that this case is a different case insofar as, first of all, it is a criminal prosecution, and secondly, that the State will be calling evidence in respect of the assessments that were raised and that there will be the opportunity to cross-examine, and cross-examine at length, as to the basis of these particular assessments, and I do view it in the context of what has been described by the prosecution as the working notes aspects of matters."

In the view of the Court, there is substance in the complaint that, absent any element of disclosure, there was an effective reversal of the burden of proof. The judge's comment that this was not a run-of-the-mill prosecution, but a case under the Tax Code followed

by a reference to the *J.T.* case, gives rise to some concern that he saw this as some form of hybrid case where the usual rules of disclosure in criminal cases did not apply.

24. The run of this case was by any standard unusual with the prosecution shifting the basis on which it was putting forward its case. However, it is beyond dispute that the initial assessments precipitated a response. At trial, there was at least a limited retreat from the assessments. In these circumstances, it was inevitable that the defence would be keenly interested in exploring the assessments. The prosecution response to the request for disclosure was a blanket refusal, notwithstanding the specific statement by Counsel for the defence that he did not care in what form he got "the breakdown". This blanket refusal links to a failure to explore whether there were mechanisms that could be put in place which would meet the defence concerns, while sensitive to the interests to the authorities, was unfortunate. It is equally unfortunate that the judge accepted the absolutist position adopted by the prosecution. The reference to an entitlement to cross-examine, or to cross-examine at length, does not meet the situation. Absent information before commencing the cross-examination means that little is likely to be achieved. Indeed, cross-examining without information as to the basis on which the assessments were raised would be extremely hazardous.

25. The assessments/returns issue was one of central significance. That the defence should be spancelled in engaging with the issue is unsatisfactory, and so this ground of appeal succeeds.

The Restriction on the Admission of Certain Expert Evidence
26. The background to this issue was that prior to trial, the defence served a document entitled 'Summary of Findings of Pat Cleary' on the prosecution. The document contained three Appendices, including PC2, the document dealing with "lodgements unexplained" to which reference has already been made.

27. Section 7 of this summary report is headed 'Approach of Gerard Mounsey to Returns and their Global Accuracy'. This section identifies a number of errors which were made which operated against Mr. Mounsey's interests and compared the original assessments for the years 2003 to 2007, amounting to €16,589, and compared this with what was calculated as the correct Income Tax liability for the eight years in question which was calculated as amounting to €13,562. When called to give evidence on Day 7 of the trial, Mr. Cleary made reference to amended accounts for the eight years ended the 31st December, 2009. These amended accounts were not appended to the summary reports. The defence was anxious to put these amended returns before the jury and set out doing this. Strenuous objection was taken by the prosecution on the basis that they had not been served with the amended accounts prior to trial, and indeed had not seen the documents before they were being put before the jury. The point was made that the material now being referred to had not been put to BFA2 or RBO42.

28. In this case, the trial judge approached the case on the basis that he had a discretion to admit the evidence, even if the notice requirements specified in s. 34 of the Criminal Procedure Act 2010 had not been complied with, and the parties were and are in agreement that that was the correct approach. However, in exercising that discretion, he upheld the prosecution objection.

29. One unfortunate aspect of this controversy was that, speaking just after the application for a direction had been refused, Counsel for the appellant indicated that evidence would be given on behalf of the defence by Mr. Pat Cleary, accountant, Counsel going on to add "there are, I think, there are two further documents that Mr. Cleary will deal with in evidence which have to be served on the prosecution, so maybe they may wish to reserve their position until they get those, Judge, I don't want a difficulty arising in the course of Mr. Cleary's evidence in front of the jury".

30. Despite the clear indication that two documents were going to be handed over, this, for some reason or another, did not happen, and instead, the issue really only emerged when Mr. Cleary came to give evidence, which was precisely what Counsel had said he did not want to see happening. At that stage, Counsel and solicitor for the prosecution, the trial judge and the jury were all seeing, for the first time, the documents to which Mr. Cleary was referring. By any standards, this was not a satisfactory situation and that the prosecution were moved to object was hardly surprising. Had the documents been handed over when Counsel indicated that this was going to happen, or had the prosecution sought the documents at that stage, or alternatively sought assurances that the documents would not be referred to in an unacceptable fashion, this whole controversy might have been avoided.

31. However, if one goes behind the failure to comply with s. 34, it is the case that the summary report which was served made clear that it was Mr. Cleary's view that far from it being the case that a very large amount of tax was due, that there had in fact been a slight overpayment.

32. While there was no specific reference in the report to accounts, it could certainly be said that there was an implicit reference to the fact that the exercise of preparing amended reports had been undertaken. The fact that there were amended accounts could certainly not be regarded as having come as a bolt from the blue. For this reason, the point made about the failure to put matters to BFA2 or RBO42 is of less substance than might at first appear. In fact, BFA2 did not give evidence in relation to the returns made or the appellant's liability for tax. It is not clear, therefore, that it was necessary that the topics should have been raised with him. It certainly would have been appropriate to raise the issue with RBO42. In the ordinary course of events, if there is a failure during any trial, civil or criminal, to put a question to a witness that ought to have been put, the first response will usually be to consider recalling the witness so that can be done. Insufficient thought seems to have been given to whether this was possible in the present case. Had this approach been considered, it might have involved a short adjournment, or perhaps an overnight adjournment, so that RBO42 could prepare himself to deal with the issue. This Court would prefer if that had happened. However, the Court does accept that this is a situation where a trial judge must be afforded a significant margin of appreciation. The practical effect of the ruling was somewhat limited. The defence was not in a position to put the actual accounts prepared by Mr. Clarke before the jury, but Mr. Clarke was in a position to give evidence in relation to the exercise he had undertaken and in relation to the views that he had formed. In all the circumstances, the Court cannot conclude that the handling of the issue was such, of itself, as to render the trial unsatisfactory. Accordingly, this ground of appeal fails.

The failure to exclude from evidence certain portions of the interviews conducted with the appellant while he was detained on suspicion of having made a gain by deception
33. This point arises in circumstances where, as we have seen, the appellant was arrested in respect of an offence under s. 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001. Following the arrest, the appellant was brought to Nenagh Garda Station where he was detained, following a request in that regard to the Member in Charge. In the course of a *voir dire* that was conducted in relation to this issue, it emerged that from an early stage there was an intention on the part of investigators to change the basis of the detention to one that focused on Revenue offences. Arrangements were made to have Revenue Bureau officers available in Nenagh Garda Station later in the day to take part in anticipated questioning.

34. In the course of an interview, during what might be described as the deception stage of the detention, conducted by Detective Sergeant Harrington and Detective Garda Anderson, a limited number of questions were put as to whether the activity had been

declared and had been the subject of returns to the Revenue. The argument made on behalf of the defence is that it was fundamentally unfair to question about Revenue matters while the appellant was detained in respect of deception, and that that was more particularly so in a situation where there was an intention to change the basis of the detention and question him about Revenue matters later on that day.

35. If the question of changing the basis of detention was not on the agenda from an early stage, the point would seem to have little substance at all. Gardaí conducting an interview as part of an investigation are not confined to asking the question whether the interviewee had committed the offence under investigation, but are entitled to explore surrounding circumstances. The question of whether the activity had been disclosed to the Revenue, while not determinative of the issue as to whether the activity was deceitful, does have a relevance to the issue. It was, therefore, a legitimate line of enquiry. The question that arises then is whether what would ordinarily have been a legitimate subject for enquiry was put off-limits by reason of the fact that there was an intention to change the basis of the detention at a later stage. The Court has concluded that that was not the case. While there was an intention to change the basis of the detention, and there must have been an expectation that that would happen, there cannot have been absolute certainty in that regard. For that reason, the focus has to be on the fairness of the individual interview at the time that it was conducted. On that basis, the questions put by Detective Sergeant Harrington and Detective Garda Anderson were not unfair and, accordingly, there was no requirement to exclude the responses obtained. This ground of appeal, therefore, fails.

Failure to exclude evidence of a fourth interview conducted after the basis of the appellant's detention had changed
36. Again, this issue was dealt with in the course of a *voir dire*. This issue arose in circumstances where Garda Carney took up duty as Member in Charge at 2.00pm. While Garda Carney was performing that role, an interview that was being conducted by Detective Garda Pemberton concluded at 5.40pm. Following this interview, there followed an exchange between Detective Garda Pemberton and Garda Carney. As that exchange is central to this ground of appeal, it is necessary to look in some detail at what both gardaí had to say in relation to it. Detective Garda Pemberton's evidence was as follows:

> "A. I informed Garda Carney that I was finished questioning Mr. Mounsey in relation to the original offence for which he was arrested and I informed Garda Carney that I was also investigating or wished to speak to Mr. Mounsey in relation to offences contrary to s. 1078 of the Taxes Consolidation Act.
>
> Q. Yes?
>
> A. Which was effectively filing incorrect returns.
>
> Q. Yes?
>
> A. I informed – I asked Garda Carney that I was seeking his – him – that Gerard Mounsey be further detained pursuant to the provisions of the Miscellaneous Provisions Act.
>
> Q. Now, what did you inform Garda Carney that Mr. Mounsey was being investigated for?
>
> A. It was tax offences and that it was filing incorrect returns in relation to his – his car dealing.
>
> Q. And what was the actual offence that he was being questioned or potential offence that he was going to be questioned in relation to?
>
> A. It was filing incorrect returns contrary to s. 1078.
>
> Q. Of what Act?
>
> A. Of the Taxes Consolidation Act.
>
> Q. Yes? And what did you request Garda Carney to do?
>
> A. That Gerard Mounsey be further detained in order for me to fully investigate – for the proper investigation of that offence.
>
> Q. And what did you hear or see Garda Carney then doing?
>
> A. Garda Carney then informed Gerard Mounsey of this."

Garda Carney's evidence on this topic was as follows:

> "Q. And before he was brought in for the – sorry, before he was brought in for the interview which involved, not just Detective Garda Pemberton but two Revenue Commissioner officials with Registration Numbers RBO42 and RBO46, had you any conversation with Detective Garda Pemberton before the interview started?
>
> A. I did, and Detective Garda Pemberton explained to me that he – that he now wished to question Gerard Mounsey in relation to offences under s. 1078 of the Taxes Consolidation Act 1997, and that the provision for the – the provision for this was under s. 2 of the Miscellaneous Provisions Act – for the change of detention was under s. 2 of the Miscellaneous Provisions Act 1997.
>
> Q. And in your capacity as Member in Charge, when you were informed that Detective Garda Pemberton wished to conduct the questioning under that – for that particular offence, what did you proceed to do?
>
> A. At 5.42pm on that date, 15th March 2011, in the Public Office, I explained to the prisoner, Gerard Mounsey, that I had a conversation with Detective Garda Pemberton and that he was now being questioned in relation to offences under s. 1078 of the Taxes Consolidation Act 1997 and this was now what he is being detained in relation to. He understood this and was placed in a cell at the time. Before placing him in the cell, I also explained to the prisoner that the change of – that the grounds of detention was provided under s. 2 of the Miscellaneous Provisions Act 1997.
>
> Q. Now?

A. And this was further explained to him in ordinary language.

Q. Yes, now what you have just said there, you just said a 'moment ago? Do you understand this?'

A. Yes, yes I have wrote in, in my own words, it says here that he understood this and was placed in the cell at this time. Before placing him in the cell, I also explained the – to the prisoner that the change in detention was provided for under s. 2. So, me writing that in is from my point of view that he understood what I was explaining to him.

Q. Yes, now, just so that we are absolutely clear about this, could you just hold up the custody record please and just show us precisely where you wrote all that in?

A. Yes, just here at 5.42pm on 15th March from here down at 6.07pm.

Q. Yes, and the evidence you've just given is – were you reading verbatim from the custody record in the evidence you've just given to the Court?

A. That's correct. That's correct, Judge, yes. That's correct.

Q. And could you just – for the sake of completeness then, could you just read out the next entry please.

A. At 6.07pm on 15th March 2011, prisoner taken by D. Garda O'Keeffe and myself from the cell to the doctor's room. His photographs and prints are to be taken."

37. The combined effect of the two accounts is to establish:

(i) That Detective Garda Pemberton was anxious to see the basis for the detention of Mr. Mounsey changed.

(ii) That he informed Garda Carney of that fact and asked him to change the basis of the detention.

(iii) Garda Carney authorised the continued detention of Mr. Mounsey on the altered basis.

It is true that Garda Carney does not actually say this in clear terms, but it is clear that that is what happened. What the accounts do not establish though was that Garda Carney personally concluded that the detention on an altered basis was required or that he applied his mind to that question. On its face, the evidence adduced does not go further than establishing that a request was made and acted upon. The evidence does not establish whether Garda Carney saw his obligation as being to act on foot of the request or to exercise an independent judgment as to whether to accede to the request.

38. Section 4(5A) of the Criminal Justice Act 1984, inserted by s. 2 of the Criminal Justice (Miscellaneous Provisions) Act 1997, is the section which deals with the possibility of a person being detained for the investigation of an offence other than the one for which he was originally detained. It provides as follows:

> "If at any time during the detention of a person pursuant to this section a Member of the Garda Síochána, with reasonable cause, suspects a person of having committed an offence to which this section applies or an offence in respect of which the person's detention has been suspended under s. 3A and *the Member in Charge of the Garda Síochána station has reasonable grounds for believing that the continued detention of that person is necessary for the proper investigation of that other offence,* the person may continue to be detained in relation to that other offence as if that offence was the offence was the offence for which the person was originally detained." [Emphasis added]

39. It is noteworthy that the wording of s. 4(5A) reflects the wording of s. 4(2) which deals with the original decision. In the case of an original decision to detain, it is well established that the Member in Charge deciding to authorise detention must have a subjective belief that the detention is necessary, and objectively, there must be reasonable grounds for that belief. See in that regard *DPP v. Birney* [2007] 1 I.R. 337. In this case, there was no direct evidence as to the subjective state of mind of Garda Carney or any direct evidence of any information having been provided to him which would provide an objective basis for a conclusion that continued detention was necessary for the proper investigation of the Revenue offences.

40. The question is whether the existence of both a subjective state of mind and objective grounds can be inferred. There is both academic and judicial authority that actual evidence is required and that the existence of a subjective state of mind and the existence of reasonable grounds cannot be inferred merely from the fact that a power was exercised. Professor Walsh, in his seminal text *Criminal Procedure*, (Dublin, 2002) observes as follows at p. 230:-

> "It is worth noting that where an accused has been detained under s. 4 of the 1984 Act, the fact that the Member in Charge of the relevant garda station had the necessary belief to authorise the detention will normally have to be proved. The necessary proof cannot be adduced by the Member's signature on the detention record or by hearsay evidence or by the mere fact that the detention was authorised. The Member will have to appear and give evidence in person about his state of mind at the time."

41. In the case of *DPP v. Tyndall* [2005] 1 I.R. 593, delivered on the 3rd May 2005, the Supreme Court was concerned with an arrest pursuant to s. 30 of the Offences Against the State Act 1939. Section 30 authorises an arrest by a garda when he or she suspects an individual of having committed or being about to commit or being or having been concerned in the commission of an offence. The evidence of the arresting garda there was that he knocked on the door of the suspect; that the door was opened by the suspect; that the Detective Sergeant identified himself as a Member of An Garda Síochána and immediately arrested the suspect under s. 30 of the Offences Against the State Act 1939 for a scheduled offence. In the course of her judgment, Denham J., as she then was, commented that s. 30 requires the arresting Member of An Garda Síochána to have the suspicion set out in the section, adding "this is an essential condition precedent to arrest". She continued as follows at p.602:-

> "Suspicion is not defined in the Act. It should be *bona fide* and not irrational. It is a fact to be proved by direct evidence, or it may be inferred from the circumstances. It is an essential proof. The circumstances of this case were not such as to enable a Court to infer the suspicion. The trial judge was not entitled to conclude that the circumstances were sufficient to compel an inference that the necessary suspicion existed. If the fact of an arrest by a Detective Sergeant, who was an investigating officer, was sufficient from which to infer the required suspicion of the Member of An Garda Síochána, when the arrest is only valid if the Member has the necessary suspicion, it would be to apply reasoning which is circular

and flawed. There must be circumstances other than the arrest itself by a Member of An Garda Síochána from which the suspicion of the arresting Member may be inferred."

42. The prosecution have argued that the analogy with the s. 30 Offences Against the State Act arrest is not a valid one and says that the Offences Against the State Act code is altogether more draconian, requiring a stricter and more restrictive interpretation than is appropriate in the case of the Criminal Justice Act. This Court cannot agree. Both arrest and detention involve a significant interference with the liberty of the individual, and it is on that basis that both must be approached.

43. Applying the statement of Denham J., as she then was, to the present case in order to conclude that Garda Carney was of the view that the continued detention was necessary for the proper investigation of the new Revenue offence because he extended the detention would be circular and flawed. The question arises as to whether the recent decision of the Supreme Court in *DPP v. J.C.* [2015] IESC 31 can assist the prosecution in any way. Even making the assumption in favour of the prosecution that *J.C.* has a relevance beyond the area of search warrants, the Court cannot regard that case as having any relevance. The present situation was not one where information was put before the Court as to how the gardaí acted and, insofar as there was a departure from prescribed procedures, an explanation was put before the Court that the departure could be explained by inadvertence. Rather, this was a case where no evidence that the statutory basis for a continuing detention existed was ever addressed to the Court. In the circumstances, this Court is satisfied that the challenge to the continued detention and to the fruits of the detention, being the contents of the fourth interview, is well-founded. Accordingly, this ground of appeal succeeds.

The Failure to Grant a Direction
44. This point is not one that has been pressed particularly hard and understandably so. The basis on which the application for a direction was made was that the prosecution had failed to adduce sufficient evidence so that a jury could conclude beyond reasonable doubt that the requisite mental element was present.

45. In what appears to be an implicit criticism of the trial judge, his ruling on this topic is described in the written submissions as "terse". While it is true that the ruling was not a particularly elaborate one, it is clear that the judge applied his mind to the appropriate test: whether the state of the evidence at that stage was such that the matter could safely and properly be left to the jury. He concluded that it was such a case. In the view of the Court, he was fully entitled to reach that conclusion and this ground of appeal is thus rejected.

Inadequate Direction as to the Requisite Mental Element
46. Really, the point made by the defence on this issue is that while the trial judge did say "in short, Ladies and Gentlemen of the jury, if you are satisfied beyond reasonable doubt that the accused knowingly and wilfully delivered incorrect returns with the purpose of defrauding the Revenue, you are entitled to return the appropriate verdict. Likewise, on the other hand, if you are not satisfied that the State has proved its case beyond reasonable doubt, then the accused is entitled to be acquitted" and there is no criticism of that sentence, but it said that the context in which it was uttered, which was immediately after the judge had summarised the defence contentions, meant that it was open to the interpretation that the judge was continuing to summarise or paraphrase the defence submissions rather than himself, as trial judge, giving a clear direction. The complaint is that there was never a direction given with the full *imprimatur* of the trial judge that the prosecution had to prove that the appellant acted with the requisite intent.

47. In support of this argument, an extract from Day 9, p. 10, of the transcript was included in the written submissions which began "the defence, for its part" and then concluded with the sentence already quoted. However, if the paragraphs in the transcript immediately preceding those extracted for inclusion in the submissions are considered, it is clear that what the judge had done was introduce the topic with an observation or direction of his own, to then refer to what the prosecution had to say, then to what the defence had to say and to then go on, as trial judge, to say what was at the core of the case. He introduced the topic in these terms:

> "This is a prosecution by the Revenue, taken by the Revenue in respect of the alleged charges. And there are ingredients that are involved there, the main ingredient that the accused knowingly or wilfully delivered incorrect tax returns. And the words 'knowingly' or 'wilfully' connote a deliberate act. I must again remind you, Ladies and Gentlemen of the jury, that the onus is on the prosecution to prove the case beyond reasonable doubt. I have read some of the counts to you and again I have – it is important to remind you that this case is about the returns and not about the accuracy of the tax assessment figures."

48. In these circumstances, it is not surprising that the judge seems to have been somewhat bemused to be requisitioned on the basis that he, as trial judge, should direct the jury on this aspect of the law and had not done so, and that he would react to the requisitions by saying that he had already done so. In the Court's view, reading the entire section of the transcript dealing with this issue, it is clear that he had indeed done so, and accordingly, this ground of appeal fails.

Failing to Recharge the Jury in Response to Requisitions
47. The criticism made is that the trial judge, when summarising the evidence, which it must be said he did in a very careful, painstaking fashion at times, confused concepts such as gross profit, gross receipts/turnover and income. It is true that when dealing with the evidence of RBO42, and in particular when dealing with the interaction between the evidence of RBO42 and the accountant, Mr. Cleary, that there was some imprecision of language. However, read as a whole, the transcript comes across as fair and balanced and was clearly the product of considerable work and preparation. The Court does not believe that any imprecision of language that might be identified could have misled or confused the jury on a significant issue in the trial. The jury had heard both RBO42 and Mr. Cleary give evidence and heard what they had to say, and by that stage of the trial must have been fully aware of what the basic positions taken were. Such limited criticisms as can be made of the judge's charge in this regard would not justify interfering with the conviction and so this ground of appeal does not succeed.

48. In summary, the defence has succeeded in relation to two of the grounds advanced, that dealing with disclosure of information as to the basis on which the assessments were made, and that dealing with the extension of the appellant's detention. The Court has been asked to consider applying the so-called *proviso*. However, in the view of the Court, this is not an appropriate case for the *proviso*. The points on which the appellant has succeeded are points of substance. It is noteworthy that in the *Tyndall* case, the Court concluded its judgment as follows:-

> "Having regard to the views I have formed of the arrest, I would allow the appeal. I would set aside the order of the Court of Criminal Appeal and substitute therefore an order:
>
> (i) granting leave to appeal;

(ii) treating the hearing of the application for leave to appeal as the hearing of the appeal itself and

(iii) quashing the conviction and sentence of the Circuit Court."

49. It is clear that the Supreme Court saw the validity of the arrest as a point of major substance such that the question of applying the so-called proviso did not arise. Likewise, in the present case, it is the view of this Court that the conviction cannot be allowed stand and must be quashed.