THE COURT OF APPEAL

Record No: 138/2011

Birmingham J.
Sheehan J.
Edwards J.

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- V -

REMIGIJUS TUMA

APPELLANT

Judgment of the Court delivered on the 27th of March 2015 by Mr. Justice Edwards.

Introduction.
1. The appellant was convicted by a jury on the 25th of May 2011, following a six day trial in the Circuit Criminal Court, of three drugs offences arising out of the same seizure. In descending order of seriousness, he was convicted (i) of an offence under s. 15A of the Misuse of Drugs Act, 1977 (hereinafter "the Act of 1977") (as amended) i.e., unlawful possession of controlled drugs, to wit cannabis, worth in excess of €13,000, for the purposes of sale or supply (count No 3 on the indictment); (ii) of an offence under s. 15 of the Act of 1977, i.e., unlawful possession of controlled drugs, to wit cannabis, for the purposes of sale or supply (count No 1 on the indictment); and (iii) of an offence of possession of controlled drugs contrary to s. 3 of the Act of 1977, i.e., unlawful possession of controlled drugs, to wit cannabis (count No 2 on the indictment)

2. The appellant was sentenced to seven years imprisonment for the s. 15A offence to date from the 20th of May 2011, and the other two offences were taken into consideration.

3. The appellant appeals against his convictions only.

4. While various grounds of appeal were pleaded in the notice of appeal filed in accordance with the Rules of the Superior Courts, the substance of his appeal has ultimately resolved into a challenge based upon a single net point. However, in order to be permitted to argue the net point in question, which was not amongst those initially pleaded, the appellant sought, and was granted leave to do so from the Court. In indicating that it was disposed to allow the appellant to argue the further ground of appeal in respect of which leave was sought the Court stated that it would give its reasons later. The Court will do so at the end of its judgment on the substantive issue.

5. The sole ground of appeal now relied upon is pleaded in the following terms:

> "The trial and convictions of the appellant are unsafe and unsatisfactory having regard to the [fact that the] learned trial judge incorrectly charged and misdirected the jury in relation to the burden and standard of proof applicable when a jury are considering a defence pursuant to the provisions of s. 29 of the Misuse of Drugs Act, 1977 and how such a defence contained therein applied to the accused."

6. Accordingly, this is yet another case concerned with the conceptually difficult reverse burden of proof in a case involving possession of drugs. It seems that the correct understanding of s. 29(2)(a) of the Act of 1977, and the need to effectively explain and communicate to a jury how it is to be applied in practice, is continuing to cause difficulty for judges and legal practitioners alike.

7. This is ostensibly so notwithstanding a series of cases in this jurisdiction, and elsewhere, dealing with statutory provisions that expressly reverse the onus of proof with respect to a particular issue in a criminal trial, and in particular the judgment of this Court's predecessor, the Court of Criminal Appeal, dealing specifically with the statutory provision at issue in this appeal, in *The People (Director of Public Prosecutions) v. Smyth* [2010] 3 I.R. 688. Indeed, there is an even later *ex-tempore* judgment of the Court of Criminal Appeal on the same issue, and to similar effect, in a case that is very close to being on all fours with the present case, in *The People (Director of Public Prosecutions) v. Stephen Kelly* (Court of Criminal Appeal, Hardiman J, *ex tempore*, 10th of February, 2014). However, in fairness to all concerned, the *Kelly* judgment postdates the appellant's trial.

8. While this Court's principal task must be to determine the specific issue raised on the appeal, it will also, though with some trepidation in circumstances where it is mindful that the ground is already well trodden, endeavour to be of further assistance in elucidating how, in future cases where s. 29(2)(a) of the Act of 1977 is relevant, juries might be helped in understanding what is required of them. In doing so, it will approach this matter on the basis that *The People (Director of Public Prosecutions) v. Smyth* [2010] 3 I.R. 688 was correctly decided and ought to be followed by this Court in this and in future cases, in circumstances where neither party to this appeal has sought to argue the contrary.

The evidence adduced before the jury.
9. In the early hours of the 2nd of May, 2008 three members on An Garda Siochána were returning from a patrol in the Dublin mountains in a marked patrol car, when at 1.50am on the Killakee Road in south county Dublin they observed a male standing on the top of a ditch beside a navy BMW car. On seeing the marked patrol car the male got off the ditch and jumped straight into the car, which immediately drove off in the direction of Rathfarnham. The gardaí activated their blue lights and sirens. The car failed to stop. The patrol car then overtook the BMW car and stopped it about 100 to 150 yards down the road.

10. The driver of the patrol car, Garda Sheehan, approached the BMW car, which was a left hand drive vehicle, and cautioned the driver and then asked him why he had failed to stop. The driver failed to answer. As he was doing this Garda Sheehan noted two male

passengers in the vehicle, one in the front passenger seat and one in the left hand rear seat behind the driver. He also observed a large plastic holdall (approx two foot in length by one and a half foot high) to the right of this person on the rear seat.

11. At this point one of the two observers in the patrol car, who had both also alighted from the patrol car to assist Garda Sheehan, namely Garda Brennan asked the driver of the BMW to produce his licence, and he did so. While this was happening Garda Sheehan asked the passengers what was in the holdall bag. They did not respond to him but rather all three men immediately became fidgety and started to speak among themselves in a foreign language, which Garda Sheehan now surmises was Lithuanian. Previously, and up to that point, they had been speaking English. Garda Sheehan repeated his question and again received no reply.

12. Garda Sheehan then informed the occupants of the car that he was going to search the vehicle under s.23 (1) (b) of the Misuse of Drugs Acts 1977 to 1984, in circumstances where he had reasonable grounds for believing that they were in possession of a controlled substance. He proceeded to open the rear door of the BMW beside where the holdall bag was, and then slightly opened the holdall bag. He could see immediately that it contained a substantial quantity of cannabis herb. As Garda Sheehan was conducting his search the front seat passenger, and the rear seat passenger, both got out of the vehicle and ran from the scene. Garda Sheehan instructed the second observer from the patrol car to detain the driver, and then pursued the fleeing passengers himself but he was unsuccessful in apprehending them and they got away.

13. One of the fleeing passengers left a jacket behind him in the BMW which was later recovered by the Gardai. A Nokia mobile phone was found in the pocket of that jacket.

14. In the meantime the driver had been apprehended Garda O'Donoghue, following a struggle. The BMW car had an automatic gearbox and, as the passengers were fleeing the scene, the driver was observed by Garda O'Donoghue attempting to select "Drive". Garda O'Donoghue then leaned in the open front passenger window of the car and struggled with the driver to put the car back into "Neutral" and then "Park". He had succeeded in doing so, had gotten back out through the front passenger window, and was in the process of opening the front passenger door when the driver again selected "Drive" and the vehicle began to move forward. However, Garda O'Donoghue succeeded in getting in to the front passenger seat and he then wrestled with the driver a second time. He again succeeded in taking the car out of gear and he also wrestled the keys out of the ignition. In the course of some further struggle with the driver Garda O'Donoghue drew his ASP baton and instructed the driver to comply. Immediately upon Garda O'Donoghue drawing his baton the driver became compliant and allowed Garda O'Donoghue to arrest and handcuff him.

15. The driver was later established to be the appellant, Remigijus Tuma, who is a Lithuanian national.

16. Following the arrest of the appellant under s. 25 of the Act of 1977 on suspicion of unlawful possession of controlled drugs for the purpose of sale or supply, contrary to s.15 of the Act of 1977, the appellant was conveyed to Rathfarnham Garda Station where he was subsequently detained by the member in charge, Sergeant Lynam, under s. 2 of the Criminal Justice (Drug Tafficking) Act 1996 for the proper investigation of the drugs offence for which he had been arrested, and he was interviewed several times while in custody. The memoranda of these interviews were all placed before the jury.

17. In the course of the first of three interviews the appellant admitted owning the BMW car in question. He claimed that he did not know the two men that were in the car with him, and denied that they were friends of his. He stated that he had picked them up at a named hotel in Tallaght because he had been asked to do so as a favour by a person called "Leon". The favour requested was that he should bring the other two men to Bray. He stated that after he had picked up the two men they had given him directions as to the route he should take, which was via the Dublin mountains. He claimed that he did not know either mans name and had never met them before. When he picked them up at around 12 midnight they had a bag with them. He had no idea where the two men were coming from. He stated that Leon had told him that the two men would give him €500 for taking them to Bray. He agreed that €500 was a lot of money for a taxi ride, but claimed that he had not thought about that before picking up the men. He stated that he had not seen, nor had he asked, what was in the bag. There was no unusual smell in the car.

18. When asked if he had thought that something suspicious was going on, he stated that he did realise that after he had picked up the men and he was asked to go to Bray via the Dublin mountains and not by the normal route. He claimed he felt afraid and unable to withdraw from driving the men at that point, because they might have a knife or something. When asked if he thought he was doing something illegal, he replied that he had realised that, once the men were in the car and he was required to go through the mountains.

19. In the course of being interviewed a second time, the appellant claimed that Leon had contacted him by telephone. Leon was a person he had met in a club. He had an English accent. He had known Leon for about two months and had only met him twice. This was the first favour Leon had asked of him. Having described the instructions that he received, and the location at which he picked up the two men, the appellant stated they had just sat down and said, in English, that they were going to Bray. He did not know what nationality they were. Their English was not great. He denied having spoken to them in a foreign language when they were all still in the BMW car after it had been stopped. The men told him when they were in the car that they would give him €500 after he had brought them to Bray.

20. He was asked why he had lied to Garda Brennan, telling her that he was heading for Clondalkin, when she spoke to him at the roadside, and he stated he did not know. He was then asked:

> *Q: You said earlier that you were intimidated by these men. Surely when you came along you could have given us some indication of this?*
>
> *A: I don't know.*
>
> *Q: Why didn't you tell me you were giving these two men a lift to Bray If this was the case.*
>
> *A: Don't know. I was shocked.*
>
> *Q: You obviously had something to hide. Is that why you are lied to the gardaí?*
>
> *A: No.*
>
> *Q: Why did you lie then?*
>
> *A: Because I don't want to say that I was going to Bray.*

Q: But why? What's the difference telling the gardaí you were going to Bray or Clondalkin?

A: No difference now. It might have made some difference then.

21. At this point in the second interview the appellant was shown the holdall, which had been established as containing approximately 15 kgs of cannabis herb. He acknowledged that he recognised it, and that it had been in the backseat of the car. He denied knowing what was in the bag. It was put to him that he knew exactly what he was doing, i.e., that he was transporting drugs, but he denied this. He accepted that the men had not threatened him, nor had they told him to do anything except go over the mountains. When it was put to him that if the arrangement was as casual as he was contending he could have backed out at any time, he stated that he had been shocked at what was going on, and felt he couldn't back out from it.

22. When the appellant was interviewed on a third occasion, it was put to him that the Nokia phone that had been recovered from jacket left behind by one of his passengers contained messages and names that were all in Lithuanian. He was asked if he had anything to say about that. He again asserted that the man had not been speaking in his language. It was put to him that the men had not spoken to him in English, but rather in Lithuanian, and that he knew both men. The appellant denied all these suggestions.

23. The jury also heard evidence concerning a technical analysis of the material contained in the holdall. The evidence was that it contained 14,869.2 grams of dried cannabis plant material, and that cannabis is a controlled drug.

24. The appellant did not personally give evidence at the trial, and no other witnesses were called for the defence.

The relevant statutory provision

25. To the extent that it is relevant to the present case, s. 29(2)(a) of the Act of 1977 provides:

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

26. In The People (Director of Public Prosecutions) v. Smyth [2010] 3 I.R. 688 the Court of Criminal Appeal construed s. 29(2)(a) of the Act of 1977 in this way:

> "[19] The court considers … that the proper construction of the burden of proof in s. 29 of the Misuse of Drugs Act 1977, as amended, and the correct direction to a jury hearing such a charge, is to be derived from Article 38.1 of the Constitution. This provides:-
>
> "No person shall be tried on any criminal charge save in due course of law."
>
> [20] 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. Reasons of policy may perhaps require that any reversed element of proof cast on the accused should be discharged as a probability. That should either be stated in the legislation or be a matter of necessary inference therefrom. The construction of a criminal statute requires the court to presume that the core elements of an offence must be proven beyond reasonable doubt; otherwise the accused must be acquitted. A special defence, beyond the core elements of the offence, may carry a different burden; insanity and diminished responsibility are examples of such a defence which casts a probability burden on the accused. Where, however, in relation to an element of the offence itself, as opposed to a defence, a burden is cast upon the accused, the necessary inference that the accused must discharge that burden on the balance of probability is not easily made. The court notes that bearing the burden of proving a defence as a probability could have the effect that in respect of an element of the offence an accused person might raise a doubt as to his guilt, but not establish it as a probability. This might lead to a situation where the charge was not proven as to each element of the offence beyond reasonable doubt, but nonetheless the accused could be convicted. That would not be right. Proof of a guilty mind is integral to proof of a true criminal offence, in distinction to a regulatory offence. In s. 29 of the Misuse of Drugs Act 1977, as amended, the normal burden of proving the mental element of possession of a controlled drug is removed from the prosecution and the accused is required to prove that it did not exist.
>
> [21] In consequence, the court considers that an evidential burden of proof is cast on the accused by s. 29 of the Misuse of Drugs Act 1977, as amended, which is discharged when the accused proves the existence of a reasonable doubt that he did not know, and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. This is not a burden merely of adducing evidence. It is legal burden discharged on the lowest standard of proof, namely that of proving a reasonable doubt. This has consequences for the trial of charges based on possession of a controlled drug. The prosecution must prove possession as against the accused. They must also prove that the substance in question was a controlled drug as defined in the Misuse of Drugs Act 1977, as amended. Regulations may need to be proven by handing in an official copy of them. These elements must be proven by the prosecution beyond all reasonable doubt. A burden is then cast on the accused to make out a reasonable doubt in accordance with s. 29. This may be done by pointing to a weakness in the prosecution case, by reference to a statement made to the gardaí, or by the accused himself giving evidence. Because this is a legal burden of proof, the decisions as to what evidence on that issue will be sufficient so as to raise a reasonable doubt are for the accused. He must decide if he has put sufficient evidence by way of proof to raise a reasonable doubt before the jury. This carries practical consequences. Once the prosecution has proved possession of a controlled drug, the accused cannot make an application of no case to answer at the close of the prosecution case based upon any failure on their part to prove that he did not know, and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. In terms of making out the defence on the standard of showing a reasonable doubt, it is a decision for the accused as to whether he gives evidence or not. The prosecution

may argue in closing submissions to the jury that the particular defence is not made out so as to show a reasonable doubt."

27. The Court of Criminal Appeal went on to add:

> "[22] In directing the jury on this issue, trial judges should in future, in the view of the court, give the ordinary direction as to the burden and standard and proof and the presumption of innocence. In stating the burden and standard of proof, however, a trial judge should point out that the prosecution are obliged to prove the elements of possession of the substance, and that the substance is a controlled drug, beyond reasonable doubt. A trial judge should then tell the jury that the burden of proof shifts to the defence to prove the existence of a reasonable doubt that the accused did not know and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. It should be clearly stated that this burden cast on the accused is discharged if the defence prove a reasonable doubt, and no more than that, on that issue.
>
> [23] Finally, we should add that there is nothing improper in the prosecution seeking in their case to show evidence whereby that defence, of not knowing or having no reason to believe that what the accused had in their possession was a controlled drug, could be argued by them not to have been made out by the accused. … ."

Engagement of s. 29(2)(a) of the Act of 1977

28. It is clear from the evidence as a whole as summarised earlier that the provisions of s. 29(2)(a) of the Act of 1977 are engaged in this case, and that the defendant was entitled to seek to rely upon the statutory defence thereby created.

29. That engagement in turn created an imperative that the trial judge should properly charge the jury with respect to the statutory defence under s. 29(2)(a) of the Act of 1977.

The Trial Judge's Charge

30. At an early point in her charge the learned trial judge gave the jury the ordinary direction concerning the burden and standard of proof, and the presumption of innocence. She told the jury:

> "Now, I'm going to once again remind you of the three absolutely basic principles that must govern your deliberations when you go into your jury room. You've heard them before, but they must be to the forefront of your mind when you're deliberating in the case. The first is that the defendant is presumed to be innocent until proven guilty to your satisfaction. Secondly, the onus of proof rests on the prosecution at all times. It is for them to prove the defendant's guilt and not for him to establish his innocence. And thirdly, the prosecution's task is to prove the defendant's guilt beyond a reasonable doubt and not to any lower standard. You must be satisfied that there's no reasonable doubt of the defendant's guilt before you can convict on any of the charges."

31. They were further instructed that:

> "Now, it's the prosecution's task to convince you by the evidence of the defendant's guilt. It's not for him to prove his innocence. He's already presumed innocent. Lawyers say that the prosecution bears the onus or burden of proof, and that is something, as I said, you have to bear in mind at all times. They have the duty of positively convincing you of the defendant's guilt. The defendant has no duty to positively prove his innocence, and indeed in many cases it will be impossible for him to do so."

32. Then, at a point approximately one third of the way through her charge, the trial judge sought to deal with the fact that the accused had not given evidence, and informed the jury:

> "Now, there's one further matter that I want to tell you at this stage, before going on to deal with the facts of the case. There's no obligation on a defendant to give evidence in a criminal trial, and in this particular case he has chosen not to do so. But you should not speculate or draw any inferences or conclusions from the fact that he did not give evidence. There's no obligation on him whatsoever to give evidence because the onus of proving the case rests entirely with the prosecution and effectively never shifts from the prosecution to the defendant. Equally, there was no obligation on him to answer any questions in the garda station, but, as you know, he did, and those memos of interviews will be available for you to consider in your jury room. And they do have an important role in cases of the type we're dealing with, and I'll explain that to you in due course."

33. The trial judge then turned to reviewing the evidence. Having done so, and at a point approximately two thirds of the way into her charge, she then moved to address the ingredients of each of the offences on the indictment. The trial judge made it clear to the jury that before the accused could be found guilty on any of the three drugs counts on the indictment there was a common ingredient the existence of which required to be established, namely that, at the material time, the accused was in possession of a controlled drug.

34. The trial judge then told the jury:

> "Now, turning to the issue of possession, and this is certainly the kernel of the ingredients of the three drug-related allegations against Mr Tuma. Now, I've told you that the state must prove its case beyond a reasonable doubt, and I've also explained that the defendant is presumed innocent in every respect until you find otherwise. Now, in this case the prosecution are obliged to prove the elements of possession. In other words, the prosecution must prove that the defendant had and knew he had in these circumstances the suitcase in his control and also that the suitcase contained something. In this case the prosecution say that the suitcase was in his car and that he was the owner and driver of the car, and they also point out that the suitcase was a pretty big suitcase, and again it's an exhibit for you in the case, so you'll have it. They must also prove that the suitcase contained the drug alleged in this case, and the drug alleged was cannabis resin. In this case they say that the analysis of the substance found in the bag was cannabis. I shouldn't actually say cannabis resin because it was kind of a herbal plant. It was cannabis. That's the more correct definition, just simple cannabis. But what they say is that the analysis of this substance, and you heard the witness give evidence of that, showed that it was cannabis. Now, if you're satisfied that the prosecution have proved these elements, then the burden of proof, and this is -- may seem slightly unusual but I will go over it again, it shifts to the defence to prove the existence of a reasonable doubt, and that is that the defendant did not know and had no reasonable ground for

> suspecting that what he had in his possession was cannabis. And all you have to be satisfied in relation to that is on the balance of probability, and basically what you have to consider is the interviews that he gave at the garda station. And basically, I suppose the nub of that interview was that what he was doing was he had collected those men. He received a phone call. He'd collected these men. He didn't know those men. He barely knew the man who asked him to do a favour, and that they arrived at his car somewhere near the [named] Hotel in Tallaght and he was asked -- they asked him to take them to Bray and he was to get €500 for that. And that's what he told gardaí. So, and if you're satisfied that on the balance of probability, which is, as I say, the lower standard that applies in a civil case, if you are satisfied with that, then he has raised a reasonable doubt and he is entitled to be acquitted."

35. Counsel for the appellant has submitted that this was an incorrect charge with respect to the statutory defence under s. 29 (2) (a) of the Act of 1977 in as much as it suggested to them, not once but twice, that the accused was required to prove the existence of a reasonable doubt to the standard of the balance of probability. Unquestionably, this was an incorrect statement of the law. The jury should simply have been told that in order to sustain the defence it was sufficient for him to raise a reasonable doubt either as to whether he actually knew that the holdall under in his control contained drugs, or as to whether he had reasonable grounds for suspecting that that holdall contained drugs.

36. It will be recalled that in giving this initial charge with respect to the law on possession and the statutory defence under s. 29 (2) (a) of the Act of 1977, the trial judge had said she would "go over it again". In fulfilment of that promise the trial judge sought to do so as follows:

> "I'm just going to go over that because that does seem to be in slight conflict with what I've been saying, and, as I say, it's a peculiar aspect of drugs cases, and I suppose the thinking behind it, and if I'm wrong about this, counsel will correct me on this, was that if somebody was found in possession of drugs, it was a strict liability offence. They were -- simply they couldn't say, give any excuse why they were in possession of the drugs, and strict liability, and it was felt that that was too severe because somebody could be innocently in possession of drugs, and they were entitled to give that explanation. Now, as I said, the defendant doesn't have to prove his innocence. It's important to realise that. The first question you have to ask yourself is: have the prosecution proved that the contents of the suitcase was cannabis, and have they proved that the defendant was in possession of the suitcase? If they have not, then the defendant must be acquitted. If they have proved these two things, then for the first time there is a burden on the defendant. That burden is to show a reasonable doubt that he did not know and that he had no reasonable ground for suspecting that what he had in his possession was a controlled drug."

37. Counsel for the appellant contends that while this portion of the trial judges charge to the jury represented an appropriate instruction to them, the problem was that it was in stark conflict with the trial judge's previous instruction to the jury. In so far as this Court is concerned, while this portion of the charge may be considered as having been correct in so as far as it went, at least to the extent of correctly stating the nature and extent of the burden cast on the accused by s. 29 (2) (a) of the Act of 1977, it was not as clear as it might have been in that it failed to sufficiently contextualise the exception to the general rule.

38. In particular, there was a failure to distinguish mere physical possession of an item in the colloquial sense from possession of an item in the legal sense. The jury received no explanation whatever as to the fact that possession in the legal sense requires the concurrent existence of both physical possession of the item as evidenced by control, and mental awareness of that control as evidenced by actual knowledge of the item in the person's control or reasonable grounds to suspect what it is that is in the person's control. There was also no clear elucidation of the fact that, while the general rule is that it is always for the prosecution to demonstrate the existence of each and every ingredient of an offence to the standard of beyond a reasonable doubt, the narrow exception to that general rule that operates in drugs cases does so with respect to one component, and one component only, of the ingredients of possession in the legal sense, namely the mental component. In regard to that discrete component, but only that component, the normal burden of proving the mental element of possession of a controlled drug has been removed from the prosecution by the Oireachtas, and the accused is required to prove that the required mental element did not exist by raising a reasonable doubt either as to his state of actual knowledge, or as to having reasonable grounds for suspicion concerning that which he controlled.

39. Be all of that as it may, the point made by counsel for the appellant as to the inconsistency in the instructions given to the jury by the trial judge at different stages of her charge is entirely well made.

40. However unsatisfactory the trial judge's charge concerning the law as to possession was up to that point, the situation was then further compounded when she added:

> "It is possible that this was a case of innocent transportation. By law, a defendant claiming innocent transportation, he must show that he had no reasonable ground to suspect the contents of the packages, in this case the suitcase, that it contained drugs. So, basically I think what I would suggest to you when you're looking at it, you have to look at it from the defendant's point of view, warts and all. And bearing in mind all the circumstances of the case, the time of morning, as it was, the amount of payment involved for the journey to Bray, the way he was contacted, his lack of acquaintances with his passengers, and you must ask had he reasonable grounds on that particular morning in question for suspecting that the suitcase contained drugs. You should use your ordinary common sense really in approaching that question."

41. Again, as counsel for the appellant points out, this was misdirection in that it is not the duty of the jury to inquire whether the accused person had reasonable grounds to suspect that the holdall contained drugs. It was sufficient for the accused person to raise a doubt either that he did not know, or had no reasonable suspicion, that it contained drugs.

Requisitions on the Charge.

42. Neither side in the case requisitioned the trial judge concerning the correctness or adequacy of her charge with respect to the law on possession, and the reverse onus of proof where the statutory defence under s.29(2)(a) of the Act of 1977 is being relied upon.

43. Indeed, counsel for the accused ostensibly sought to endorse the charge on those issues as being both correct and adequate. She did so in the following circumstances. Two days previously, on day four of the trial, in the course of legal argument in connection with an application by the defence for a direction, counsel for the appellant had handed in a paper, written by Garnet Orange, Barrister at Law, that had been delivered by him on the previous Saturday at a continuing professional education seminar. That paper had dealt, *inter alia*, with the statutory defence under s.29(2)(a) of the Act of 1977. Both counsel referred again to this paper on day six in respectively making, and responding to, a requisition (raised by the prosecution) that the trial judge should tell the jury that in considering whether or not the accused had satisfied the burden imposed upon him under s.29 (2) (a) of the Act of 1977 they ought

to consider whether the accused had shut his eyes to the obvious, and was reckless in his disregard of that which he had in his control. In her response, counsel for appellant stated:

> "Just on that last matter, in terms of the question of recklessness, I think the Court has drawn the jury's attention to all of those matters in a sufficient way, and Mr Orange, in summing up in his penultimate page of the handout, the issues arising from the *Lambert* and *Henby* cases, he sets out seven matters in terms of how the procedures should be approached and in particular the defence that arises under section 29(2), and he makes the final point at 7: "The trial judge should exercise care in charging the jury as to the manner in which the accused is obliged to prove his defence," and he cautions against being very strong on this shift, lest the jury do understand that somehow the total onus of the case has shifted to an accused, and I think, in the way the Court has summed up the matters, pointed out the warts and all in terms of Mr Tuma's explanations, the balance suggested has been then hit in that regard."

Decision on the Substantive Issue

44. This Court considers that in circumstances where the jury were misdirected in a number of material respects, and were given contradictory and confusing instructions, with respect to matters as fundamental as the applicable burden and standard of proof in a trial of offences involving possession of drugs, where the issue of a possible statutory defence under s. s.29 (2) (a) of the Act of 1977 had been raised, renders the appellant's conviction unsafe and his trial unsatisfactory.

45. In all the circumstances of the case the appeal will be allowed, and the Court will direct a re-trial on all three counts.

Decision on the Preliminary Issue - Reasons

46. The appellant's motion seeking leave to argue a further ground of appeal was opposed by counsel for the respondent, essentially on two linked grounds that he contended entitled him to invoke and rely upon the decision of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Cronin (No 2.)* [2006] 4. I.R. 329.

47. First, counsel for the respondent pointed to the fact that at the trial the appellant had been represented by experienced senior counsel, junior counsel, and solicitor, and no requisition had been raised to the judge's charge. He contended that it was reasonable to infer, in circumstances where no explanation was advanced by the appellant as to why the point that he was now seeking to argue had not been raised at the trial, that a tactical decision had been made not to do so, based on the rest of the contents of the judge's charge or the judge's charge as a whole.

48. Secondly, while the affidavit of the appellant's solicitor grounding the motion purported to contend that the desire to add an additional ground was not the result of a trawl of the transcript, a practice deprecated in the *Cronin* case, it was clear in counsel for the respondent's submission that that was exactly what had occurred. The facts of the matter were that, the respondent having discharged his previous legal team and a new legal team having come on board, the transcript was gone through by the new legal team and it was as a product of that process that the appellant was now seeking to add an additional ground.

49. The Court was urged to refuse to grant the leave sought in all the circumstances.

50. Responding to these submissions, counsel for the respondent contended that the simple explanation for the point not having been taken at trial was that it was obviously missed, and by both sides. He contended that for understandable reasons there had been a degree of reticence about criticising the former legal team in express terms in the grounding affidavit and written submissions. However, the simple reality was that the nature and extent of the misdirection on what was, on any view of it, a conceptually difficult issue had manifestly not been appreciated at the time.

51. Counsel for respondent further contended that there was no conceivable tactical advantage to be gained in not raising the point, and there was therefore no tenable basis for inferring that the decision not to do so was strategic. Counsel for the appellant openly challenged his opponent to identify what conceivable tactical benefit might have been derived for the appellant by acquiescence in the jury being incorrectly told that the defendant had to discharge a higher standard of proof than was actually the case in respect of the burden that was reversed and placed upon him in respect of the statutory defence under s.29 (2) (a) of the Act of 1977.

52. Counsel for the respondent took exception to the contention that there had been transcript trawling in the circumstances of the case. He submitted that it was obviously necessary for a new legal team to read themselves into the case, and the only way that could be done was by a reading of the transcript, in the course of which the misdirection sought to be relied upon had been recognised. In counsel's submission, this was an entirely different situation to that in which an existing legal team, continuing to act in respect of an appeal, trawled through the transcript in the hope of coming up with additional grounds to bolster the appeal. It was submitted that nothing of the sort had occurred in this case.

53. Counsel for the respondent went on to submit that the Cronin case established, inter alia, that it is appropriate for an appellate court to permit an additional ground to be argued, that had not been raised at the trial, where it was of the view that, due to some error or oversight of substance, a fundamental injustice had occurred and an explanation had been furnished as to why the point had not been not raised at trial. In counsel's submission, the appellant's case satisfied both requirements.

54. This Court accepted that, in the circumstances of the case, it was reasonable to infer that the matter sought to be ventilated as an additional ground of appeal was not raised at the trial for the reasons postulated by counsel for the appellant. Reverse burden provisions are conceptually difficult to appreciate and, as the Court has acknowledged at the beginning of its judgment, anecdotal evidence exists to suggest that some judges and legal practitioners are continuing to have difficulties in comprehending and communicating to juries how such provisions will operate in a particular case. Moreover, although challenged to do so, counsel for the respondent had been unable to identify any specific tactical advantage or strategic benefit that might have been gained by the defendant by not raising the point at first instance.

55. In the circumstances the Court was satisfied that an adequate explanation had been put forward.

56. The Court was further of the view that the ostensible misdirection of the jury related to a fundamental issue that went to the heart of this particular trial, and it recognised the jury could have been seriously misled in their deliberations. In these circumstances it seemed to the Court that the point that the appellant was seeking leave to argue raised a significant concern as to the safety of the verdict such that it would be unjust not to grant the leave sought.

Charging Juries as to the effect of s.29 (2) (a) of the Act of 1977

57. The majority of the guidance provided to trial judges in criminal cases by appellate courts in this jurisdiction is provided by the

appellate court's consideration and determination of a specific issue arising in a particular case. Where an appellate court offers such guidance it is not generally intended to be didactic or prescriptive.

58. In *The People (Director of Public Prosecutions) v. Smyth* [2010] 3 I.R. 688 the Court of Criminal Appeal offered certain guidance to judges charging juries concerning the operation of s.29 (2) (a) of the Act of 1977 as to how an issue might be approached in future cases, and we fully concur with that guidance.

59. However, as noted at the beginning of the judgment in this case, there is anecdotal evidence that the provision is continuing to cause difficulty. It may therefore be of some further assistance to set out, in this case, what an appropriate charge to the jury on this issue might have looked like.

60. Bearing in mind Charlton J's recommendation in *Smyth* that trial judges should give the ordinary direction as to the burden and standard of proof and the presumption of innocence in the first instance, before then going on to deal with s. 29 (2) (a) of the Act of 1977, such a charge might have looked like this:

> "Ladies and gentlemen of the jury, in this case the accused is charged with three offences. The prosecution say that he is guilty of the offences with which he is charged. However, at the present time his status is that he is merely accused. He does not have to prove his innocence; rather he is presumed innocent and accordingly is now innocent and will remain innocent unless and until you by your verdict decide otherwise. In that regard, the general rule is that he who asserts must prove. The asserter of the proposition bears what is known as the burden of proof. In criminal cases the burden of proofing the guilt of the accused rests on the prosecution and never shifts, on the basis that it is the prosecution that brings the case against accused and seeks to displace his presumed status of innocence.
>
> Further, the prosecution must prove their case, i.e., discharge their burden of proof, to the standard of beyond reasonable doubt. This is known as the standard of proof.
>
> Applying the general rule as to the burden of proof, it is for the prosecution to satisfy you as to the existence of each and every ingredient of the offences with which the accused is charged, and these matters must be proven to the standard of beyond reasonable doubt.
>
> It requires to be borne in mind, however, that the Oireachtas has power to create, by means of legislation, an exception or exceptions to the general rule as to the burden of proof, and to reverse on to the defendant in a criminal case the burden of proving the existence of a particular circumstance or state of affairs. As the Oireachtas has in fact done this with respect to one potential issue in drugs possession cases, I will be saying more about this later in my charge."

61. Clearly, the judge would have been expected to go on to elaborate in the usual way about what is involved in proof beyond a reasonable doubt, making the necessary contrast with the civil standard of proof etc., and to give all of the other standard directions. For brevity, this Court intends omitting all of this. The charge might then have continued:

> "At this point in my charge it is necessary to say something about the offences on the indictment. All three offences with which the accused is charged are drug possession offences. In each instance, the law renders it a crime to be in unlawful possession of controlled drugs in particular circumstances. The particular attendant circumstances differentiate one type of drugs possession offence from another or others. So, to be in unlawful possession of a controlled drug without more constitutes, in and of itself, one type of such offence. To be in unlawful possession of a controlled drug for the purpose of selling it or supplying it to someone else constitutes another type of such offence. To be in unlawful possession of a controlled drug, amounting in value to more than €13,000, for the purpose of selling it or supplying it to someone else, is yet another type of such offence. Each offence has its own specific ingredients the existence of which must all be proven to exist to the standard of beyond reasonable doubt before you can convict of it. In due course I will be going through the specific ingredients comprising each offence.
>
> However, though there may be additional ingredients depending on the specific offence, there are three core ingredients that are common to all drugs possession offences. Those are (a) that the contraband at issue is a controlled drug, (b) that it was in the possession of the accused at some material time, and (c) that such possession was unlawful. To establish the guilt of an accused charged with a drugs possession offence the prosecution are obliged to prove the existence of those three ingredients, and to do so beyond a reasonable doubt, as well as the existence of any other specific ingredients peculiar to the individual offence e.g. intended sale or supply.
>
> It is appropriate at this point to focus in particular on the ingredient of possession. We all understand what it means to be in possession of something in the colloquial or commonly understood sense, i.e., to have physical custody of something. However, to possess something in the legal sense involves more than that. To say that somebody possesses an item in the legal sense requires the concurrent existence of two sub-ingredients or, as they are sometimes referred to, elements of possession. The first element is that the person has physical custody of the item as evidenced by his or her control of it, and the second element is that the person has mental awareness of, and by inference an intention to exercise, that control, evidenced by that person having knowledge, or reasonable grounds to suspect, that the item, in this instance a quantity of controlled drugs, is under his/her control.
>
> As mentioned earlier, the generally applicable rule places the burden of proving the existence of each and every ingredient or element of an offence on the prosecution, and they must do so to the standard of beyond reasonable doubt.
>
> In so far as the first element of possession is concerned, the general rule as to the burden of proof applies. Accordingly, in considering whether the first element of possession exists you will require evidence sufficient to satisfy you beyond reasonable doubt that the accused was exercising physical control over the drugs.
>
> However the general rule as to the burden of proof does not apply with respect to the second element of possession. It does not do so by virtue of a specific statutory exception to the general rule created by s.29 (2) (a) of the Misuse of Drugs Act of 1977, about which I will say more in just a moment.
>
> Before doing so, may I invite you to consider what would have been the situation if the general rule as to the burden of proof did apply in the case of the second element of possession. Adopting the same approach as before, and applying the same logic, you would require to have evidence adduced before you sufficient to satisfy you beyond reasonable doubt that the accused had actual knowledge of the item in his control, or that he had reasonable grounds to suspect what it

was that he had in his control. However, that is emphatically not now the position.

It is not now the position because the Oireachtas, by enacting s.29 (2) (a) of the Misuse of Drugs Act of 1977, has created an exception to the general rule as to the burden of proof and has reversed on to a defendant the burden of proving that the second element of possession does not exist.

S.29 (2) (a), to the extent relevant, provides:

"In any such proceedings in which it is proved that the defendant had in his possession a controlled drug, … , it shall be a defence to prove that-

(a) he did not know and had no reasonable grounds for suspecting –

(i) that what he had in his possession was a controlled drug …, or

(ii) that he was in possession of a controlled drug …."

The practical effect of the exception created, which is quite narrow in scope, is that a jury need not concern itself with the second element of possession, i.e., mental awareness of physical control, unless the accused seeks to put the existence of that second ingredient in issue. If he does do so, it is for him to prove the existence of a reasonable doubt as to his mental awareness.

In other words, where physical possession or custody of controlled drugs by the accused is established, the concurrent existence of mental awareness is in effect presumed to exist, as though it had been proven to the standard of beyond reasonable doubt. However, the law permits an accused to challenge that which is effectively presumed, and to seek to prove the contrary, but the burden is cast on him to prove the contrary, i.e., the existence of a reasonable doubt as to his mental awareness. The contrary is proved if he establishes at least a reasonable doubt as to the existence on his part of actual knowledge of the drugs in his control or of reasonable grounds on his part to suspect that he had drugs in his control.

It is necessary to emphasise that this exception to the general rule as to the burden of proof only applies with respect to the second element of possession. In respect of the other ingredients of drugs possession offences the general or default rule with respect to the burden of proof applies.

So to briefly recap, as regards possession in the legal sense, a jury need only be concerned with looking for evidence of the first element of possession, i.e., physical possession or custody of the drugs evidenced by control. The second element is in effect presumed to exist, though that effective presumption may be rebutted. The accused bears the burden of proving that the effective presumption is rebutted, should he wish to make that case, and he will have discharged that burden if he has adduced evidence sufficient to create a reasonable doubt in your minds as to the existence on his part of actual knowledge of the item in his control, or of reasonable grounds on his part to suspect what it was that he had in his control."

62. In proffering this illustration, it is not our intention to be prescriptive. At the end of the day the charging of a jury is intended to be an exercise in the effective communication of the necessary legal principles and rules to enable the jury to fulfil their task and bring in an appropriate verdict in accordance with the evidence. It is a matter for the discretion of each trial judge as to how this is to be done. The illustration is proffered merely as an indication of how core issues in respect of which a jury needs to be instructed in any case in which s.29 (2) (a) of the Act of 1977 is engaged might be covered, in the hope that it may be of assistance. It is not intended that it should be reproduced verbatim. This Court fully recognises that it will be a matter for the individual trial judge in any case as to how he or she constructs his or her charge and tailors it to the needs of the particular case and, indeed, to the needs of the particular jury. A judge might, for example, prefer to deal with issues in a different order, or to use simpler language, or if the jury appears to be having difficulty in comprehending an aspect of the charge, to deal with certain matters in greater detail than others. The important thing is that the key concepts are clearly explained and effectively communicated.

63. The Court will conclude by remarking that the debate as to whether the burden which is reversed by s.29 (2) (a) of the Act of 1977 is legal or evidential in nature is a somewhat arid one; though by no means unimportant to appreciate for anyone seeking a deep understanding of the true nature of the provision at issue. However, at the best of times this type of discourse is difficult material to digest, even for lawyers. It is respectfully suggested that in charging a jury with respect to the statutory defence under s.29 (2) (a) of the Act of 1977 there should be no need for a trial judge to descend into that level of theoretical detail.