THE COURT OF APPEAL

[63/17]

Birmingham P.

Mahon J.

Edwards J.

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V.

PHILIP MCKEVITT

APPELLANT

JUDGMENT of the Court delivered on the 20th day of June 2018 by Birmingham P.

1. On 21st December 2016, the appellant was convicted of the offence of possession of an explosive substance in such circumstances as to give rise to a reasonable suspicion that he did not have it in his possession for a lawful object contrary to s. 4 of the Explosive Substances Act 1883 as amended by s. 15(4) of the Offences against the State Amendment Act 1998. The particulars of the offence, as recorded on the Court order, were that he, on 22nd May 2010 at Aghaboys, Mount Pleasant, Dundalk, knowingly had in his possession an explosive substance, to wit, an improvised trailer and two cylinders adapted to cause, or aid in causing, an explosion in or with any explosive substance, in such circumstances as to give rise to a reasonable suspicion that he did not have them in his possession for a lawful object.

2. It is of some significance to some of the issues raised on the present appeal against conviction that the conviction in December 2016 followed a retrial. The appellant had been convicted of the same offence in February 2012, when he had stood trial along with a co-accused, Mr. Conan Murphy. This earlier conviction was quashed by the Court of Appeal on 6th November 2015 on the basis that the Special Criminal Court had refused to allow counsel for the then accused address it on the significance of the decision of the Supreme Court *in Damache v. DPP & Ors* [2012] 2 IR 266 which had been delivered shortly before but after the evidence had concluded.

3. A large number of Grounds of Appeal have been formulated and put forward by the appellant. Counsel, in opening the appeal, stated that his oral presentation would focus on the issue of fairness. In doing so, counsel made clear that while he was not abandoning any point canvassed in the Notice of Appeal or in the written submissions, merely focusing his oral submissions.

4. Before dealing with the details of the issues raised, it is appropriate to say a little about the background to the case. The evidence at trial arose from a Garda surveillance operation. Gardaí mounted an operation and at a certain stage entered a shed which was located on the lands of the appellant at Aghaboys. The shed contained a large number of items, but in particular contained a trailer with a triangular-shaped advertising unit, which had an improvised access panel with two low-pressure gas cylinders that had undergone certain modifications. There was also over 300m of bell wire that had been spray painted with green paint. 26kg of glucose was found in a vehicle in the appellant's yard. Evidence was given on behalf of the prosecution by Detective Garda Curran, who had an established expertise in the area, that the gas cylinders and trailer with the advertising unit together with the glucose and the wire constituted an explosive substance within the meaning of the Explosive Substances Act 1983.

5. The Garda evidence at trial was that they entered pursuant to s. 6 of the Criminal Law Act 1997. It is the case that a warrant was issued pursuant to s. 29 of the Offences against the State Act 1939. The said warrant was issued by Detective Superintendent Liam King, who was involved in the investigation, to a Detective Sergeant William Piper. The latter was not present when the decision was taken by Gardaí to enter the shed. Detective Sergeant Piper did, however, arrive some short time later. Following entry to the shed, the appellant and his co-accused were arrested. There was an issue at trial about the circumstances of the arrest in question. The appellant contends that he was struck with a machine gun and then kicked while on the ground by Gardaí.

6. The Grounds of Appeal are summarised as follows:

(i) That the trial Court erred in holding that it had jurisdiction to amend the indictment that had originally proffered;

(ii) That the trial judge erred in permitting the prosecution to amend the indictment upon which a retrial was ordered;

(iii) That the trial court erred in proceeding with the trial and not adjourning in circumstances where the co-accused entered a plea of guilty after the indictment was amended;

(iv) The trial court erred in failing to hold that there was an obligation on Gardaí entering a premises under s. 6 of the Criminal Law Act to specifically invoke that section and inform those present on the premises that entry was being made pursuant to the Act;

(v) That the trial court erred in law in finding that an arrestable offence and a schedule offence are not to be distinguished for the purpose of an entry pursuant to s. 6 of the Criminal Law Act 1997;

(vi) That the trial court erred in holding that it was open to Gardaí to arrest for a scheduled offence under s. 30 of the Offences

against the State Act 1939, having entered a premises under s. 6 of the Criminal Law Act 1997;

(vii) That the trial court erred in holding that it was lawful for Gardaí to enter the premises pursuant to s. 6 of the Criminal Law Act in circumstances where there was in existence what purported to be a search warrant issued pursuant to s. 29 of the Offences against the State Act;

(viii) That the trial court erred in law in finding that the appellant was not in unlawful detention from the moment he was secured by Gardaí and in failing to hold that the appellant was arrested from that moment;

(ix) That the trial court erred in law in finding that the appellant's arrest was lawful where it was not open to the Court to find that the injuries sustained by the appellant were not inflicted by a member of the Gardaí;

(x) That the trial court erred in holding that the evidence before the Court was sufficient to allow it to conclude that the appellant was knowingly in possession of an explosive substance, to wit, an improvised trailer and two gas cylinders made or adapted to cause an explosion in circumstances where the evidence was the trailer and gas cylinders were not capable of causing an explosion;

(xi) That the trial court erred in holding that there was sufficient evidence before the Court to allow it to conclude that the appellant was knowingly in possession of an explosive substance;

(xii) That the trial court erred in law in deeming admissible evidence arising from the seizure of clothing and footwear of the appellant in circumstances where the items had been seized from the appellant without informing him of the purposes for which the seizure occurred;

(xiii) The trial court erred in law in permitting the prosecution to adduce evidence of items, the glucose and the bell wire, in support of the indictment in circumstances where these items were not charged on the indictment;

(xiv) That the trial court erred in law in permitting the prosecution to adduce evidence of samples obtained from the appellant on foot of an authorisation which, on its face, permitted the recovery of saliva, but where the evidence was of the recovery of buccal cells;

(xv) That the trial court erred in holding that what was alleged against the appellant constituted an offence within the meaning of the Act 1883;

(xvi) That the trial court erred in holding that what was alleged against the appellant constituted an offence within the meaning of the Act of 1883;

(xvii) That the trial court erred in holding that the appellant knowingly had in his possession an explosive substance, to wit, an improvised trailer and two gas cylinders adapted to cause or aid in causing an explosion in or with any explosive substance in circumstances where the evidence was that the trailer and gas cylinders were not capable of causing an explosion;

(xviii) That the trial court erred in holding that the trailer and two gas cylinders constituted and explosive substance within the meaning of the Explosives Substances Act 1883 as amended, and in particular, section 9 thereof;

(xix) That the trial court erred in holding that the appellant was knowingly in possession of an explosive substance in circumstances where there was no sufficient evidence to that effect before the Court.

Grounds 1 and 2 the Amendment of the Indictment and the Refusal to Adjourn the Case to a Different Division of the Special Criminal Court following the Amendment of the Indictment

7. The background to this issue is that at the first trial, the indictment in relation to Mr. McKevitt was in the form:

"Philip McKevitt on 22nd May 2010, at Aghaboys, Mount Pleasant, Dundalk in the County of Louth had in his possession an explosive substance, to wit, an improvised trailer and two gas cylinders made or adapted to cause an explosion, under such circumstances as to give rise to a reasonable suspicion that he did not have it in his possession for a lawful object."

8. At the first trial, there was a challenge to the form of the indictment. The prosecution prevailed, but were anxious to avoid a similar controversy at the second trial and so proposed to amend the indictment. In fact, they lodged an amended indictment before making an application to the Court for the requisite leave to do so. The indictment, as amended, provided:

"Philip McKevitt on 22nd day of May 2010, at Aghaboys, Mount Pleasant, Dundalk in the County of Louth knowingly had in his possession an explosive substance, to wit, an improvised trailer and two cylinders adapted to cause, or aid in causing an explosion, in or with any explosive substance in such circumstances as to give rise to a reasonable suspicion that he did not have it in his possession for a lawful object."

9. At trial, the appellant argued that the Court did not have jurisdiction to amend an indictment, relying in that regard on the case of DPP v. Hamill [1983] 5 JIC 1802. The State, however, submitted that as the amendments sought were not material amendments, such as would have been the case if the dates of the offences were charged or something of that nature that the question of the Court acting without jurisdiction did not arise. The appellant said that whatever might be the situation in other circumstances that regard had to be had to the fact that this was a case where a retrial was ordered by the Court of Appeal and the retrial ordered was, by definition, a retrial on an indictment as in the first trial.

10. In the Court's view, what was ordered was a retrial for "the offence". This said offence, being one contrary to s. 4 of the Explosives Substances Act 1883, as amended by s. 15(4) of the Offences against the State Amendment Act 1998, remained unchanged notwithstanding the amendments made to the indictment. What was sought to be amended, and ultimately was amended, was the particulars of the offence, rather than the classification of the offence itself. The Special Criminal Court had power to do that by virtue of section 41(4) of the Offences against the State Act which adopts the procedures of the Central Criminal Court. As such, regard must be had to Section 6 of the Criminal Justice (Administration) Act 1924 which provides that where, before trial, or at any stage of a trial it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case unless the required amendments cannot be made in the opinion of the Court without injustice.

11. The appellant says that the Court's jurisdiction is to amend an indictment is limited to those that appear to be defective. Mr. McKevitt submits that this could not be the case as Director of Public Prosecutions had argued successfully at the first trial that the indictment was not, in fact, defective. In the Court's view, while the point raised is interesting, there is a sense in which the indictment could be regarded as defective in that it was an indictment which would be the subject of argument and a genuine dispute. In those circumstances, it was open to the prosecution to seek to obviate that argument by amending the indictment and removing an area of controversy. In summary, in the view of the Court, the Special Criminal Court was entitled to make the amendment sought.

Ground 3: The Failure to Adjourn

12. When the Special Criminal Court acceded to the application to amend the indictment, the response of the co-accused was to enter a plea of guilty. The appellant then sought that his trial would be adjourned and would be dealt with by a differently constituted division of the Special Criminal Court. The appellant acknowledges that the nature of the Special Criminal Court is that it hears issues of law and fact. There will sometimes be occasions when member of the Court are exposed to evidence which is then ruled inadmissible. It is said that such occurrences are unavoidable but they should be kept to a minimum. The Court recognises that every effort should be made to prevent such occurrences arising. It is said that, here, it was entirely unnecessary for the members of the Court who had seen a co-accused enter a plea to proceed with the hearing of the case on that same date.

13. In the view of the Court, the members of the Special Criminal Court were within their rights in deciding to proceed with the trial. Even in cases heard by a judge and jury, it is not unusual for one accused, during the course of a trial, to decide to enter a plea of guilty. In this case, the plea was being entered before three professional judges and the notion that they would be influenced to the extent of being unable to decide the case against Mr. McKevitt fairly lacks reality. These grounds are dismissed.

Ground 4: The Entry into the Shed

14. As explained, this issue arose in circumstances where a warrant had been issued pursuant to the provisions of s. 29 of the Offences against the State Act 1939. However, before the Detective Sergeant to whom the warrant was issued arrived at the scene in possession of the warrant, a decision was taken by Gardaí to enter. It appears that they formed the view that the people inside the shed were committing an offence or were about to move the suspect items that they were working on. The written submissions on behalf of the appellant proceeded on the basis that arrestable offences did not include scheduled offences. However, counsel made clear that he was not relying on that point. Lest there be any uncertainty in that regard, the Court is absolutely satisfied that the definition of an arrestable offence at s. 2 of the Criminal Law Act 1997 is broad enough to include both scheduled and non-scheduled offences. The definition is "any offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit such offences".

15. The offences in issue here – membership of an unlawful organisation and possession of explosives in suspicious circumstances – both carry penalties substantially in excess of five years and so are beyond doubt arrestable offences. The Court is quite satisfied that s. 6 of the Criminal Law Act 1997 was available to Gardaí and the finding by the trial Court that entry was validly effected by Gardaí pursuant to their powers under that section is not one with which this Court could interfere.

Grounds 5 to 9: Unlawful Arrest, Detention and Alleged Assault of the Appellant

16. It is only fair to the appellant and his legal advisers to say that in arguing the grounds related to this topic, counsel on behalf of the appellant was unequivocal in acknowledging that safety concerns had to be paramount for those armed members of An Garda Síochána who entered the shed. That was an appropriate and sensible concession. Clearly, safety had to be to the forefront for those required, in the course of their duty, to enter on what was believed to be, and indeed turned out to be, a major IRA bomb factory. The argument arises from the fact that the appellant was physically detained inside the shed for a period prior to his arrest being formally effected. On his behalf, it is submitted that the trial Court erred in holding that the subsequent detention of the appellant was lawful. It is submitted on the appellant's behalf that the Special Criminal Court erred in finding that the appellant was not in unlawful detention from the moment he was secured by Gardaí. The true position, it is said, was that he had been arrested from the moment he was secured by members of An Garda Síochána who had entered, but that the arrest and detention was and remained unlawful in circumstances where he had not been informed of the power of arrest being invoked.

17. This matter was the subject of extensive evidence at trial and it is clear that it is a matter that was carefully considered by the trial Court. Their ruling merits quotation:

"[t]he evidence shows that in order to arrest the accused, the Gardaí needed to secure the premises and the ERU were tasked with this function. Once this was done, the Gardaí then arrested the accused for the offences of membership of an unlawful organisation and the possession of explosive substances. The timeframe was in minutes and was a continuing process.

It is clear that Mr. McKevitt was informed in very short order the reason for the Garda presence, which was to arrest him for the alleged offences. Section 6 does not suggest that the section must be invoked before the Gardaí can enter. It would be utterly unrealistic, in the view of this Court, that to suggest that in every circumstance before entering a premises the Gardaí must first indicate their position.

As is stated by McKechnie J. *in DPP v. Carlos Byrne* [2011] 1ECCA 105 and I quote:

'Surprise may be the very essence of the operation. We cannot, therefore, accept any suggestion that operational needs, as a matter of principle, could not also give rise to a necessity for enforced entry if, on assessment, that can be objectively justified'.

The Court finds that the factual matrix in the decision of DPP v. Laide [2005] 1 IR 209 (citation inserted) was very different from the facts which existed on the evidence in this case. It is the position that the Gardaí have given evidence of a stated intention to enter

pursuant to s. 6 of the Act to effect an arrest. Upon gaining entry to the premises, it is the position on the evidence of the arresting Gardaí that prior to arresting the accused, the arresting officer, that is Detective Garda Regan, gave the accused the relevant information. We are satisfied that the Gardaí acted reasonably in carrying out their powers in this respect and that there is no merit in this argument . . .

the alleged assault: it is argued on Mr. McKevitt's behalf in the issue that he was assaulted and injured on the relevant date. Mr. McGuinness [Senior Counsel for the appellant] submits that the alleged assault amounts to a conscious and deliberate violation of Mr. McKevitt's constitutional rights and, as a consequence, such assault renders his arrest and detention and everything that flows therefrom inadmissible. We have, in this respect, considered the evidenced adduced on this particular aspect of the issue by the prosecution and the evidence of Mr. McKevitt himself. The Court is of the view that certain aspects of Mr. McKevitt's testimony on this particular issue in relation to his recollection of events is somewhat selective. The Court finds favour with the evidence of Detective Sergeant Brennan regarding his evidence as to what he noted when he came into the shed. Detective Sergeant Brennan said that he noted a sort of sheeting and that Mr. McKevitt was located at that point. Mr. McKevitt himself gave evidence that he had never seen that plastic sheeting before and that he did not notice it on 22nd May. Furthermore, the evidence of Detective Sergeant Roche was that Mr. McKevitt told him at the scene that he had slipped on the plastic. It has been submitted by Mr. McGuinness on behalf of Mr. McKevitt that Detective Sergeant Roche, in giving this evidence on a previous occasion, gave evidence which differed in terms from the evidence which he gave before this Court. The relevant extracts were put to Detective Sergeant Roche. It is the position that while some aspects of what was said to him by Mr. McKevitt as to how he sustained the injury differ slightly, such variation is, in the view of this Court, of no moment. It is clear that Mr. McKevitt told him that he slipped on the plastic sheeting. We find Detective Sergeant Roche to be a credible witness.

A further important feature is that Detective Sergeant Roche said in his evidence that no allegation of assault was made to him by the accused at the relevant time. The Court has assessed the entirety of the evidence on this particular aspect of the issue and has reflected carefully upon Mr. McKevitt's own evidence. It is the finding of this Court on this issue that we are satisfied beyond a reasonable doubt on the evidence that the injury was not caused in the manner contended for by Mr. McKevitt. In coming to this finding, it is the position that Mr. McKevitt was somewhat confused in his recollection of events surrounding the injury, and while he appeared on his evidence to recollect certain matters, he had a lack of recall in relation to other matters and the Court is satisfied that the prosecution have discharged the necessary burden in relation to this aspect of the issue."

18. As this lengthy quotation makes clear, this was essentially a question of fact. In those circumstances, where there was clearly evidence to support the findings of fact by the trial Court, this Court, in accordance with its well-established jurisprudence, cannot interfere. The grounds of appeal relating to the arrest and detention are therefore dismissed.

Grounds 15 and 16: An Offence under the Explosive Substances Act 1883

19. This section of the case overlaps with the argument about the application to amend the indictment. It will be recalled that the prosecution was permitted to amend the indictment by adding the word 'knowingly' as in "knowingly had in his possession", and also to add "or aid in causing an explosion in or with any explosive substance". In this case, it is pointed out that the items discovered that were then referred to in the indictment, the trailer and two gas cylinders, were not themselves capable of causing an explosion as there was no explosive contained in the cylinder. Even if account is taken of the other items of evidential significance, the reel of bell wire and the glucose, the position is that what was found in the shed and yard would not of itself cause an explosion.

20. The evidence on this issue came from Detective Garda Shane Curran who was extensively cross-examined on the issue. Ultimately, the Special Criminal Court ruled on the matter as follows:

"[f]irstly, Mr. McGuinness argued in closing that there is no evidence that the articles in question specified in the indictment, specifically, the trailer and the two gas cylinders alone or in conjunction with the bell wire and glucose are capable of being considered as an explosive substance. The Court notes the extended meaning of explosive substance pursuant to s. 9 of the Explosive Substances Act 1883. We conclude that s. 9 of the Act, in its broad definition of explosive substances, includes many items and could include, for example, a timer or some such item or articles which perhaps might be said to be more obvious explosive substances, such as a stick of gelignite or detonators. The Court disagrees with the defence interpretation of the Explosive Substances Act, and we find on a careful perusal of sections 4 and 9 of the 1883 that the broad definition of an explosive substance under the statute includes items, which, on their own may cause an explosion, items which, on their own may not cause an explosion, but which items were adopted to cause or aid in causing an explosion in or with any explosive substance."

The Court is quite satisfied that the Special Criminal Court was entitled to conclude that the materials referred to in the indictment on their own, and certainly when seen in conjunction with the other material found came within the terms of the statute.

Grounds 10 to 11: Whether the Appellant was Knowingly in Possession of the Offending Material

21. The appellant further submits that even if the items come within the category of prohibited material that there was no evidence on which the Court could conclude beyond a reasonable doubt that he was knowingly in possession. The Court regards this submission as slightly surprising. This was not a case of a small concealed object in the boot of a car. The trailer and cylinders would be clearly visible to anyone in the shed. Further support for the prosecution case was to be found in the fact that a DNA profile from the right cylinder handle matched that of Mr. McKevitt. The Court was told that the chances that a person unrelated to Philip McKevitt would share this profile was considerably less than one in a thousand million. Even further support was provided by evidence of the appellant's attendance at the property in the days prior to the Garda entry into the shed. Overall, the Court is quite satisfied that the Court of trial was fully entitled to conclude that the prosecution had proved beyond reasonable doubt that Mr. McKevitt, on the date in question, knowingly had in his possession the explosive substance referred to in the indictment and that, accordingly, the prosecution had proved its guilt.

Grounds 12 to 14: The Seizure of Clothing and Footwear and the Taking of Samples from the Appellant Whilst in Custody

22. The appellant has submitted that the clothing and footwear was seized from the appellant unlawfully in circumstances where he

had not been informed of the purpose for which the clothing and footwear was seized or what power was invoked and has further argued that there was no authorisation for the taking of a buccal swab.

23. So far as the clothing and footwear are concerned, Garda Drew Morgan gave evidence of seizing clothing and footwear belonging to the appellant at a time while he was in custody at Drogheda Garda station. The appellant contended that Mr. Morgan did not inform the appellant of the power he was employing, merely saying that the items were required for evidence. In the Court's view, the fact that the appellant was told that his clothing and shoes were being taken for evidential purposes relating to the reasons for which he had been arrested and the fact that the Court had evidence did not raise any objection, but rather was very cooperative meant that the Special Criminal Court was justified in permitting the evidence to be adduced.

24. So far as the saliva/buccal swab point is concerned, this arises in circumstances where Detective Superintendent Diarmuid O'Sullivan authorised the taking of a sample of saliva. Garda O'Leary gave evidence at trial of removing buccal cell samples from the appellant's mouth by way of three swabs. It was submitted that the authorisation was specific to saliva and did not cover the removal of buccal cells from the inside of the appellant's cheek.

25. The Court ruled on the matter as follows:

"[w]e have examined the evidence which has been adduced regarding the authorisation to take samples. Detective Sergeant Boyce in his evidence on this issue was very clear that Detective Superintendent O'Sullivan granted the permission orally to take samples including saliva to be taken from the buccal area of the mouth.

This evidence was confirmed by the entry already mentioned at 10.40 in the custody record. Detective Sergeant Boyce then tasked Detective Garda O'Leary to take the relevant samples, which he did, without objection from the accused and indeed with his cooperation. It is clear from the evidence of all three witnesses that the method for taking a saliva sample was by taking a swab from the inside of the mouth which would harvest cells and saliva. The evidence shows that an oral authorisation was given to take samples which was recorded in the custody record to be buccal swabs and oral swabs. Detective Superintendent O'Sullivan said that his intention in giving the authorisation was to have saliva swabs by the use of a buccal swab and Detective Sergeant Boyce was alerted to this procedure which was confirmed in evidence by Detective Sergeant Boyce. Clearly, Detective Superintendent O'Sullivan authorised the taking of a saliva sample and believed that Head B included a sample from the mouth, which of course it does, pursuant to the 2006 Act. The 1990 Act, as amended by the Criminal Justice Act 2006, permits at B for the taking of a swab from any part of the body including the mouth. This Act was operated on in 2010. It was established in evidence that (i) the accused did not object to the procedures carried out by Detective Garda O'Leary; (ii) that the procedure used by the Gardaí in taking a saliva sample was by way of buccal swab and (iii) the procedure was followed by Detective Garda O'Leary, which procedure involves the swabbing of the cheek and gums and has the effect of harvesting both cells and saliva.

Mr. McGuinness argues that the procedure adopted by the Gardaí was not authorised by the Superintendent and therefore amounts to a breach of the accused man's constitutional right to bodily integrity.

Mr. Greene [Senior Counsel for the DPP] argues that the Gardaí were authorised to take the samples taken and that Detective Superintendent O'Sullivan, in granting the authorisation, purported to authorise the taking of a saliva sample by using a buccal swab. The State's position is that the sample which was taken was authorised, that being a salvia sample, but using the buccal swab method which was authorised by statute. It appears that in filling out the form, the Superintendent used the form under the 1990 Act. This form does not include a specific reference to the taking of a buccal swab. It would have been preferable if the correct form had been used. However, this lapse is mitigated by the fact that the use of a buccal swab expressly involves the taking of saliva as well as cells and it is possible that in taking a saliva sample, this would also include the taking of cells. In fact, Detective Sergeant Boyce gave evidence that he never came across any other method for the taking of saliva other than by way of a swab. The practice is to take a swab from the mouth, cheek and gums. We are satisfied that there was no lack of authority on the part of Detective Garda O'Leary when he took the sample on the date in question. Detective Superintendent O'Sullivan clearly had in mind the taking of a saliva sample by using a swab and he so authorised . . . . as Detective Superintendent O'Sullivan stated, he authorised saliva to be taken by means of a buccal swab. Even if we are wrong on our view that the actions of Detective Garda O'Leary were fully authorised and that the use of the swab kit was in fact unauthorised and thereby constituted a breach of the accused's constitutional right, it must be borne in mind that this is not a case where the accused would have had any legal choices in respect of the taking of the samples, given that his consent was unnecessary. So, even if there was any breach of the accused's right to bodily integrity, we are satisfied that the test propounded by Clarke J. in DPP v. JC applies and would permit in the circumstances of the admission of the evidence. We bear in mind that the onus rests on the prosecution, that the objection to the evidence relates to the manner of the gathering of the evidence and that the prosecution seek to argue that it is appropriate to admit the evidence on the assumption that the material was gathered unconstitutionally.

We are satisfied that there was no deliberate and conscious violation of the accused's constitutional right to bodily integrity in the sense that that is now understood. We are satisfied that the intention of Detective Superintendent O'Sullivan that saliva was to be taken by means of buccal swab, that this was the method of harvesting the saliva, is not unreasonable and is readily understandable in practical terms in that it appears from the evidence the buccal swabs are the means used by the Gardaí in the taking of such saliva samples. Any deficiency in the form can be regarded as regrettable but inadvertent. Therefore, we are satisfied on the facts that any putative breach of the accused's constitutional rights arose by virtue of inadvertence. It cannot be said that there was not in existence a constitutional way of gathering the evidence under the law. Therefore, even if we are incorrect in finding that there was no breach of the accused's constitutional rights, we are satisfied in the circumstances that the prosecution have provided the necessary material to satisfy the test in JC so as to render the evidence admissible."

26. In the Court's view, this was never a point of real substance. Nonetheless, it was a point that was considered very carefully by the trial Court. We are entirely satisfied that the conclusions reached by that Court were proper ones. We reject this Ground of Appeal.

27. In summary, the Court is not prepared to uphold any Ground of Appeal that has been advanced. For the purpose of avoiding doubt, we want to confirm that we have considered all of the issues raised in the course of both written and oral submissions, this in a situation where counsel for the appellant made clear that he was not abandoning grounds raised in the written submissions while concentrating his oral arguments on particular aspects. We are quite satisfied that the trial was a fair one and that the outcome was safe. Indeed, we would simply observe that the prosecution case was a very strong one, the accused was in effect caught red-handed and any other outcome would have been almost inconceivable.

28. The Court will therefore dismiss the appeal against conviction.