THE COURT OF APPEAL

Edwards J.
Hedigan J.
McGovern J.

Record No: 90/2013

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

BRIAN RATTIGAN

Appellant

JUDGMENT of the Court delivered on the 10th of October 2018 by Mr. Justice Edwards.

Introduction
1. On the 12th of February 2013 the appellant was convicted by the Special Criminal Court following a trial on indictment of the following offences:

- Count No. 1, being in possession of a controlled drug, to wit Diamorphine, with a market value of €13,000 or more, for the purpose of selling or otherwise supplying it to another, contrary to s.15A of the Misuse of Drugs Act, 1977, as inserted by s.4 of the Criminal Justice Act 1999 and as amended by s.81 of the Criminal Justice Act, 2006;

- Count No. 2, being in possession of a controlled drug, to wit Diamorphine, for the purpose of selling or otherwise supplying it to another, contrary to s.15 of the Misuse of Drugs Act, 1977;

- Count No. 3, being in possession of a controlled drug, to wit Diamorphine, contrary to s.15 of the Misuse of Drugs Act, 1977.

2. The appellant was acquitted on two additional charges being Count No's 4 & 5, respectively, on the same indictment, each of which alleged offences under s.36 of the Prisons Act 2007, involving having possession of a mobile telecommunications device within a prison without the permission of the governor of the prison.

3. On the 20th of March 2013, the appellant was sentenced to imprisonment for seventeen years on Count No. 1 and Count No. 2, respectively; and to imprisonment for five years on Count No. 3; all sentences to run concurrently and to date from the 1st of June 2008.

4. The appellant now appeals against his conviction.

The evidence on which the appellant was convicted.
5. The Special Criminal Court heard evidence that, on the 21st May 2005, a search took place at 9 Hughes Road South, Walkinstown, Dublin 12, and this search took place on foot of a search warrant that had been obtained in circumstances wherein Detective Inspector Brian Sutton had come into receipt of confidential information that there was a large quantity of drugs to be found at the abovementioned address and it was going to be moved quickly.

6. A search warrant was therefore obtained and a team of Gardaí arrived at 9 Hughes Road South and a search was subsequently carried out. As a result of the search a large quantity of diamorphine, which was said to have a street market value of close to €1 million, was discovered in a shed at the back of the house. Additionally, a red and white Nokia phone and charger, which were charging at the time, were found in the same garden shed. Furthermore, an electric weighing scales was also found in the house itself, which was the house of Mr Anthony O'Connell. In Mr O'Connell's bedroom a large sum of money at the base of the bed, and another smaller sum elsewhere in the bedroom, and another small sum in pockets, with a total value of €36,000 were also found.

7. During the search of 9 Hughes Road South a number of other telephones and telephone devices, namely SIM cards, were also found and seized. During the search a man by the name of Mr Anthony Cannon called to the house. He was searched and his phone was seized.

8. On the red and white Nokia phone there was a text message and the content of that text message appeared to be for the break-up of a large amount of drugs into particular portions and for the division of a large quantity of heroin. That text message had been sent from a telephone device with the phone number - 0858102394. This number was associated with the appellant. At that stage he was a prisoner in Portlaoise Prison and had been in custody since 2003.

9. As a result of that discovery, search warrants were obtained on the following day, the 22nd of May 2008, to search a number of cells at Portlaoise Prison, including the cell occupied by the appellant on Landing E1, cell 42. The Gardaí attended at Portlaoise Prison, presented their warrants, were subjected to security procedures, searched, etc., and were brought to Landing E1. The Gardaí thereafter searched the appellant's cell. This was a single cell which was not shared with anyone else. He was on his bed with a mobile phone in his hand but, as the Gardaí were entering his cell, he threw the mobile phone out the door onto the landing. There was also CCTV footage which showed the mobile phone landing out on the landing. The phone that came out on the landing had two SIM cards, one of which was located in the actual mobile phone while the other was attached to the back of the mobile phone. A further search of the cell uncovered a Samsung mobile phone, another SIM card and some notebooks. The text message found on the red and white Nokia phone found charging in the garage of 9 Hughes Road South had been sent from the same number, 0858102394, which was the number of one of the devices thrown by the appellant from his cell onto the landing.

10. There was a text message found on Mr Anthony Cannon's mobile phone (this man arrived at 9 Hughes Road South as the Gardaí were conducting a search) and this shows as having been received at 10.29 am which reads: *"That dark is there."* The trial court had heard evidence that *"dark"* is a slang word for heroin and that this was a message from a device in the control of the appellant in Portlaoise Prison to Mr Cannon, informing him that the consignment of drugs had arrived at 9 Hughes Road South. That message was sent from the same mobile phone number, 0858102934, the same phone that had sent the text message to the charging phone in the garage with the drugs.

11. There was another text message from the same number, 08581023894, which read: *"Can you give me half a box of the bad thing for 13? I'm waiting for a few bob so I can sort you out."* Another message from the same SIM card was addressed to the addressee called "Lip" and the investigating Gardaí were satisfied to attribute this to Ms Tasha McEnroe, who was the then partner of the appellant. This message read: *"Drop €30 up to Parrot man."* The evidence was that this was the nickname of Mr Anthony O'Connell in whose house the drugs were found. The reference to *"€30"* was understood by Gardaí to refer to €30,000. The prosecution case was that this was significant in light of the very large sum of money found in the house (in excess of €30,000).

12. There was then another text sent from the device in the control of the appellant, addressed to a person described as Dicko which read: *"Change your number. They got greasy with five nasty. He fucked, it's on text."* The prosecution case was that this was a reference to Mr Anthony O'Connell, having being caught in possession of five kilos of heroin. Furthermore, there was an additional text sent to *"Lipps"* which the Prosecution contended belonged to Ms McEnroe which read: *"Get rid of your phones quick."*

13. Notebooks were found in the appellant's cell in Portlaoise Prison when the Gardaí searched it. There was also a subsequent search conducted of Ms Natasha McEnroe's house wherein a notebook was found. The material contained in the notebook in the appellant's cell was very similar to the material contained in the notebook found at Ms McEnroe's house. Specifically, there was a list of names and numbers which appeared to be a tick list for drugs.

14. Expert evidence was also adduced showing a telephonic connection between the various phones, i.e., between the appellant's phone, Ms McEnroe's phone, and a number of other phones, including Mr Cannon's phone.

15. The defence did not go into evidence.

The judgment of the Special Criminal Court
16. Following a trial lasting twelve hearing days the Special Criminal Court gave judgment on the 12th of February 2013. Following a review of the evidence which the court had heard, and a consideration of the submissions made on behalf of both the prosecution and the defence, respectively, the court made the following findings:

> *"Findings.*
>
> *1. The Court is fully satisfied beyond reasonable doubt that Mr Rattigan, upon the entry of the gardaí to the cell, threw a mobile telephone out of that cell, which telephone had its own SIM card and another which was attached to its battery.*
>
> *2. Mr Rattigan was found in possession of that device and SIM cards and other devices found in the cell. The foregoing findings do not of themselves amount to a finding that Mr Rattigan was guilty of an offence under section 36 of the Prison Act aforesaid.*
>
> *3. Counts 4 and 5. The evidence that the Court heard in respect of these matters was from John Sugrue, Mr Edward Whelan, Fergus Downey, all of whom said they were governors of the prison. The Court also then heard from a number of senior prison officers, all of whom replied when asked by the prosecution that they did not give permission to the accused man to have a telephone in his cell on the date in question. Two persons who could give evidence who were assistant governors, Martin O'Neill and Chris McCormack, were not called. The legislation is drafted without any presumption that a person does not have permission and, that being the case, the onus is on the prosecution to prove the matters. The prosecution submitted that the Act does not require evidence from the various governors and others, that there is evidence from the governor and the governor is Mr Whelan, who gave evidence that he didn't give permission. The Court is not satisfied beyond reasonable doubt in respect of the evidence adduced in respect of these two matters.*
>
> *5. The Court is satisfied on all the evidence that what we will describe as the "tick list" transmitted by text message from Portlaoise Prison to the telephone found with the drugs emanated from Mr Rattigan and, taken in conjunction, in particular with the notes found in his cell, amounted to directions as to the distribution of the said drugs. No other reasonable inferences can be drawn from the evidence. Mr Rattigan was therefore in possession of the drugs in question.*
>
> *6. On the question of the value of the drugs, which is relevant to count 1, the Court of course fully accepts the rationale of the Connolly decision aforesaid. However, on the facts of this particular case, having particular regard to the expert evidence of Detective Sergeant Roberts, the Court is satisfied that in these circumstances purity of the drugs had little or no bearing on their street value. As the evidence of the street value of these drugs exceeded by an enormous factor the sum of €13,000 without having regard to the purity of the drugs, the Court can have no doubt that a test of the purity of the drugs could not affect the street value to such a very large extent, and we conclude beyond reasonable doubt that the value thereof exceeded €13,000.*

Verdict. Having regard to the foregoing, the Court finds, on counts 1, 2 and 3, the accused guilty; on counts 4 and 5, not guilty."

The grounds of appeal
17. The appellant appeals against his conviction on the following eight grounds:

> (1) The trial court erred in law and in fact in upholding the lawfulness of the search warrant for 9 Hughes Road South.
>
> (2) The trial court erred in law and in fact in upholding the lawfulness of the warrant to search cell 42 in El landing in Portlaoise.
>
> (3) The trial court erred in law and in fact in admitting any evidence with regard to the Nokia phone (Garda exhibit number JMG1) and printouts and analysis of same.

(4) The trial court erred in law and in fact in accepting that Sergeant Brian Roberts was entitled and/or that he had sufficient expertise and knowledge to give evidence in respect of the valuation of the drugs seized.

(5) The trial court erred in law and in fact in accepting that Sergeant Brian Roberts was entitled, and/or that he had sufficient expertise and knowledge, to give evidence in respect of the understanding of what various language, words, symbols or items meant in the context of the prosecution herein.

(6) The trial court erred in law and in fact in upholding the lawfulness of the search warrant for 290 Cooley Road.

(7) The trial court erred in law and in fact in convicting the appellant of Count 1 on the indictment (a charge of possession of drugs contrary to section 15 A of the Misuse of Drugs Act, as amended) in circumstances where there was no evidence of the purity of the drugs seized at 9 Hughes Road South.

(8) The trial court erred in law and in fact in convicting the appellant of Counts 1, 2 and 3 on the indictment (charges of possession of drugs contrary to the Misuse of Drugs Act, as amended) in circumstances where there was insufficient evidence that he was in possession of the drugs seized at 9 Hughes Road South.

Ground of Appeal No (1)

18. The complaint here is that the trial court erred in law and in fact in upholding the lawfulness of the search warrant for 9 Hughes Road South. Numerous complaints are made both with respect to the procedure followed in obtaining the warrant and with respect to the form of the warrant. The Court has received eighteen pages of written submissions from the appellant with respect to this ground, which were further amplified in oral submissions. The essence of them is captured in the following paragraph:

> *"In the first place, the warrant in this case lacked any hallmark of the independent exercise of a discretion which would have to be exercised judiciously in terms of balancing of rights. The Peace Commissioner depended entirely on the petitioning Garda for the provision of the documentation in the case, for all the required information (which he did not test or query in any way) and for his recollection of the issuing of the search warrant in order to make his statement of proposed evidence. The evidence was of use of pro forma documents, carelessly prepared and completed, including a misleading heading indicating that the warrant had been issued by a court. The Peace Commissioner rather than being asked or expected to play a quasi-judicial role, was simply put in a position where he was presented with documentation to effectively sign and rubberstamp. Finally, there was no exercise of independent judgment as to whether or not a search warrant was necessary or whether there was any basis for the Garda belief that a warrant was required to search Mr O'Connell's home."*

19. The respondent has filed replying submissions; in which she seeks to refute each of the appellant's said complaints.

The form of the warrant

20. It is convenient to deal in the first instance with the complaints as to the form of the warrant. The type of warrant involved was a warrant under s.26 of the Misuse of Drugs Act 1977, which provides:

> *"26.(1) If a Justice of the District Court or a Peace Commissioner is satisfied by information on oath of a member of the Garda Síochána that there is reasonable ground for suspecting that—*
>
> *(a) a person is in possession in contravention of this Act on any premises of a controlled drug, a forged prescription or a duly issued prescription which has been wrongfully altered and that such drug or prescription is on a particular premises, or*
>
> *(b) a document directly or indirectly relating to, or connected with, a transaction or dealing which was, or an intended transaction or dealing which would if carried out be, an offence under this Act, or in the case of a transaction or dealing carried out or intended to be carried out in a place outside the State, an offence against a provision of a corresponding law within the meaning of section 20 of this Act and in force in that place, is in the possession of a person on any premises,*
>
> *such Justice or Commissioner may issue a search warrant mentioned in subsection (2) of this section.*
>
> *(2) A search warrant issued under this section shall be expressed and operate to authorise a named member of the Garda Síochána, accompanied by such other members of the Garda Síochána as may be necessary, at any time or times within one month of the date of issue of the warrant, to enter if need be by force the premises named in the warrant, to search the premises and any persons found therein, to examine any substance or article found therein, to inspect any book, record or other document found therein and, if there is reasonable ground for suspecting that an offence is being or has been committed under this Act in relation to a substance or article found on the premises or that a document so found is a document mentioned in subsection (1) (b) of this section or is a record or other document which the member has cause to believe to be a document which may be required as evidence in proceedings for an offence under this Act, to seize and detain the substance, article or document, as the case may be."*

21. The warrant in question in this case was issued by a Peace Commissioner, a Mr Fergus Nestor, not by a District Court judge. However, a standard court form was used which was headed *"The District Court – Dublin Metropolitan District"* and which had a harp on it, which the appellant contends was apt to mislead a person reading the warrant so as to suggest to them that it had been issued by a District Court judge rather than by a Peace Commissioner. However, at the bottom of the form the status of the issuing authority was correctly stated, in that it was signed by Mr Nestor and his signature was clearly identified to be that of a *"Peace Commissioner for Dublin and Surrounding Counties".*

22. There were no other irregularities in the form of the warrant. The appellant's written submissions complain, erroneously, that the warrant issued in this case contains permission to search for items unrelated to the case, such as for *"a forged prescription",* or for *"a duly issued prescription which has been wrongfully altered",* or for *"opium poppy, a plant of the genus cannabis, or a plant of the genus Erythroxylon"* suspected of being cultivated on the premises; which items were not deleted from the pro-forma warrant when it was being completed. However, an examination of the relevant documentation indicates that that complaint is not in fact made out.

While it is true that the superfluous items referred to were not deleted from the *"Information for Warrant to Search"* prepared by Garda Shane Curtis to ground the application to Mr Nestor for a warrant, in circumstances where Garda Curtis had used a standard form of information that was more properly intended for use in applications to a District Judge for such a warrant, but had failed to follow an instruction on the bottom of the form to *"delete as appropriate"* from a list of recitals thereon. However, the superfluous items were in fact deleted on the standard form utilised for the warrant itself.

23. The appellant relies on a number of authorities in support of his contention that, by reason of having an incorrect title headed *"The District Court – Dublin Metropolitan District"* and which had a harp on it, the form of the warrant *"was entirely misleading to anyone who saw it"*. These include *Dunne v DPP* (unreported, High Court, Carney J, 14 Oct 1994, [1998] WJSC-HC 1468); *DPP v Edgeworth* [2001] 2 IR 131; *DPP v McCarthy* [2010] IECCA 89 and *DPP v Collins* [2014] IECCA 30. The *Dunne* case was put forward as one in which the late High Court judge, Carney J, criticised the use of a pre-printed form of search warrant and held that if the prosecuting authority could rely on words on such a form that had been crossed out by claiming inadvertence *"such an approach would facilitate the warrant becoming an empty formula"*. The more recent cases of *Edgeworth, McCarthy* and *Collins* involved the distinction between fundamental errors in a warrant which have the potential to mislead and mere errors which are not likely to mislead, concerning which O'Donnell J was moved to remark in Collins that *"[i]t is apparent … that these distinctions are very, and perhaps excessively, refined."* The appellant maintains that the errors as to form in the case of this warrant were fundamental and apt to mislead.

24. In reply to the appellant's submissions, the respondent contends that *DPP v Edgeworth* is distinguishable from *DPP v McCarthy* and *DPP v Collins*. In all three cases a warrant issued by a Peace Commissioner was entitled *"The District Court"*. However, in both *Edgeworth* and *McCarthy*, the person who issued the warrant was a Peace Commissioner. In *Edgeworth* the person issuing the warrant was clearly identified as being a Peace Commissioner. The Peace Commissioner had signed the warrant and in doing so had crossed out the words on the printed form *"Judge of the District Court"* and had written in the words *"Peace Commissioner"* instead. In the present case the words *"Judge of the District Court"* did not appear at all, and therefore did not require to be crossed out, but the words *"Peace Commissioner for Dublin and Surrounding Counties"* were typed in immediately below the signature line on which Mr Nestor subsequently appended his signature. In contrast to the present case, and that of *Edgeworth,* in the *McCarthy* case the words *"Judge of the District Court"*, which were pre-printed below the place for the issuing person's signature on the particular standard form used in that instance, were neither struck out nor removed, thereby, it was claimed, creating uncertainty or ambiguity as to the status of the person issuing the warrant. In the case of *Collins*, there was a different irregularity in the warrant which was a judicial s.26 warrant. It was entitled *"The District Court – Dublin Metropolitan District"*, and was correctly shown as having been issued by a District Judge. However, the District Judge who signed the warrant was not assigned to the Dublin Metropolitan District.

25. The warrant in the *Edgeworth* case was upheld as valid notwithstanding the erroneous title. However, the warrants in the *McCarthy* and *Collins* cases were condemned. The reasons for the different approaches are explained succinctly by O'Donnell J, giving judgment for the Court of Criminal Appeal in the *Collins* case:

> *"15. At first sight it is somewhat difficult to reconcile this decision of the Supreme Court in Edgeworth, with that of the Court of Criminal Appeal in McCarthy at least on a broad reading of the decision in Edgeworth. The reasoning of the Court of Criminal Appeal in McCarthy is however contained in the final substantive paragraph of the judgment:*
>
> > *'On the law, this Court is satisfied that the learned Circuit Court judge was correct when he found that the error on the face of the search warrant document is a "fundamental error", and it is so because, in contrast with the position in The People (DPP) v. Edgeworth, supra., the status of the party issuing the warrant, and therefore the jurisdiction to issue it, is claimed to be a judge of the District Court, and therefore discloses no proper jurisdiction in law, and is wholly misleading, particularly, when combined with the inclusion of the erroneous title "An Chuirt Duiche" and "The District Court" in the title of the search warrant.'*
>
> *In McCarthy it was pointed out that in Edgeworth (at page 136) Hardiman J. had observed that in that case the status of the person actually issuing the warrant appeared clearly on its face. In that way Edgeworth was distinguishable. The key feature of McCarthy was that the Court read the warrant as asserting that the peace commissioner was a judge which was not the case.*
>
> *16. It is necessary to observe that the fine distinctions made by the case law (of which Edgeworth and McCarthy are only a sample) and the careful debate over what in another context would seem to be obvious but forgivable errors, is given particular focus by the rigidity of the rule laid down in Kenny, which has been understood (and was understood in the case) as requiring that once a warrant is invalid, any search would be treated as a deliberate and conscious breach of the constitutional right of the citizen, and accordingly that all evidence obtained thereby must be excluded, almost automatically, subject to exceptions which certainly do not arise in this case.*
>
> *17. The reasoning in Edgeworth might lead the conclusion that since the statutory requirements of s.26 of the Misuse of Drugs Act 1977, as amended, have been complied with, the reference to "Dublin Metropolitan District" in this case and "within the said District" are merely erroneous and of less significance than the error in Edgeworth, since there was no error as to the status of the person issuing the warrant. On the other hand, the reasoning in McCarthy could be understood as holding that where a warrant asserts, states, or suggests a jurisdiction that is incorrect (even if the person authorising the warrant had a jurisdiction in fact) then it is invalid. If that reason is applied here then the fact that the warrant asserts an incorrect jurisdiction by reference to the Dublin Metropolitan District is fatal to its validity.*
>
> *18. In this case, the Court considers it cannot distinguish this case satisfactorily from the decision in McCarthy. In one sense the problem here was more substantial. The District Court is a court of local and limited jurisdiction. The geographical area of the Court's jurisdiction is essential to the jurisdiction of the judge. The decision in McCarthy treats Edgeworth as being a case in which there was no confusion in fact because the status of the person issuing the warrant was clear and the heading could be ignored. Here the heading "Dublin Metropolitan District" is relevant to the content of the warrant since it relates to the jurisdictional district within which the premises are alleged to be found. The warrant states a jurisdiction which the District judge did not have, and which would not justify the issuance of the warrant for the location in question. The learned Circuit Court Judge in this case treated this error as one which was fundamental and in the context of a local and limited jurisdiction it was perhaps appropriate to so describe it. It is not a 'mere error' which 'does not mislead', as in the case of Mallon. Accordingly, on the basis of authority, this Court must conclude that the learned judge was correct to hold the warrant invalid and the evidence inadmissible."*

26. Apart from the form of the warrant, other complaints made on behalf of the appellant concerned the fact that the Gardaí made no attempt to contact a judge, contending that the urgency of the situation did not render it practical to do so; the fact that the Peace

Commissioner, Mr Nestor, had no training in the issuing of warrants; that he had been provided with no guidance in that regard, and had nobody from whom he could seek independent advice with regard to the exercise of his functions; that the Peace Commissioner had asked no questions of the applicant Garda beyond asking him, after the Garda had taken the oath, whether the contents of the written information he had prepared were correct, which the Garda confirmed was the case; and that the Peace Commissioner had kept no records.

27. Further, in the appellant's written submissions, it is contended that s.88 of the Courts of Justice Act 1924, which entitles Peace Commissioners to sign warrants, did not survive the coming into force of the Constitution of Ireland. However, no separate proceedings, seeking a declaration in that regard, have been initiated, and this point was therefore not pressed in oral argument.

28. In this case the Special Criminal Court ruled:

> *"This ruling arises out of Mr Grehan, on behalf of the accused, challenge to the warrant and the search in this case. And, first of all, we should say in relation to one thing raised by him, and both the information and the warrant bear the heading "the District Court", in fact it looks like a District Court document, and that is most unfortunate. It should not happen. It's entirely inappropriate. But there is no evidence that it has misled anybody, and the signatures on the documents clearly don't purport to be that of a District judge or a District Court clerk and, in those circumstances, while it's unfortunate it is certainly not fatal in this case. There could be cases with different circumstances where it could be fatal, but people should be just more careful of such things.*
>
> *Another matter in relation to technicalities, if you like, is in the information, apart from the diamorphine other matters are mentioned, such as an alleged forged prescription. These were crossed out on the warrant and they hadn't been crossed out on the information. That is most unfortunate because it makes that part of the information, on its face, incorrect. However, we're satisfied that, on reading the entire document, it is very clear that what's concerned here is information in relation to heroin or diamorphine on the premises in question.*
>
> *So, in the first place Mr Grehan says that a warrant issued by a peace commissioner should be approached with grave circumspection. Whether we agree with the wording or not is one matter, but certainly such a warrant should be more closely looked at by this Court as it is not a warrant issued on the direction of a judge, and we do so. Also the point was made that the statute in question is a pre-constitutional statute, we accept that, and it may or may not be a matter for argument elsewhere, but this Court has no constitutional jurisdiction whatsoever.*
>
> *The next criticism relates to the evidence. We are told that there is a difference between the two statements signed by peace commissioner in this case. Those statements have not been put before us so we are relying on the evidence that was given in this court. We have heard the evidence of Mr Nestor. We accept that he is an honest and straightforward witness. He issued the warrant on the strength of the information that was sworn before him. That information was very extensive, in that it went right -- it went back to a briefing by the Detective Inspector Sutton, from whom we have already heard in this case, and it dealt with the investigation targeting an organised gang in Dublin 12 and says that 'As a result of enquiries I'm satisfied …' I'm sorry, some of the writing is missing in my copy, but in short it does say that there is a suspicion of drugs being present on the premises. He was cross examined very competently and very extensively on this and in the end of the day his evidence is to the effect that he satisfied himself. He wasn't shifted in that evidence and, in view of all the circumstances, we accept that he did so satisfy himself and that the warrant was validly issued."*

29. We find no error in the approach of the Special Criminal Court. Their ruling with respect to the deficiencies in the form of the warrant was one that was open to them on the authorities, and in particular having regard to the *Edgeworth* decision. We agree that the situation in *Edgeworth* was distinguishable from that in *McCarthy* and in *Collins*, respectively.

30. With respect to the other complaints made, in the context of this ground of appeal, we are satisfied that the Court's decision was correct and should be upheld. The Special Criminal Court heard the evidence of Mr Nestor, the Peace Commissioner, and observed him being rigorously and forensically cross-examined, as well as hearing the evidence of the Gardaí. The Special Criminal Court was best placed to form a view concerning the credibility and reliability of Mr Nestor's testimony. It is of significance in our view that the written information prepared by Garda Curtis to ground the application for the warrant, and which he subsequently confirmed on oath to be correct, contained quite a significant amount of detail. The court below was satisfied that the Peace Commissioner was provided with adequate information to justify the issuance of the warrant. We find no error in the trial court's approach.

Ground of Appeal No (2)

31. This ground concerns the lawfulness of the warrant to search cell 42 on E l. landing in Portlaoise Prison.

32. The relevant evidence was that, on the 22nd of May 2008, Detective Sergeant Emmet Casserly, who was involved in the ongoing investigation into a seizure of heroin at 9 Hughes Road South on the 21st of May 2008, attended a special sitting of Portlaoise District Court at 8pm. Detective Sergeant Casserly gave evidence of swearing several *"informations"*, seeking warrants under s.10 of the Criminal Justice (Miscellaneous Provisions) Act 2009, that would authorise Gardaí to search four cells on landing E 1. of Portlaoise Prison, including cell No. 42 (the appellant's cell) on that landing. Detective Sergeant Casserly identified both the search warrant and the information for cell 42 to the trial court. He agreed that it was his idea to obtain warrants to allow Gardaí to search the prison cells.

33. The Detective Sergeant testified that he had prepared all of the relevant documentation before he went to court, based on prepared forms which were saved on the computer in his office. The relevant documentation included typographical errors and errors in the heading and incorrect references to the rules of court. The Detective Sergeant gave evidence that he signed the documents comprising the *"informations"* when he arrived at the court, and he handed them to the court clerk before he went in to see the Judge. When he handed in the *"informations"*, he told the clerk that he would be looking for a certified copy. Three different versions of certified documents purporting to be true copies of the information were served on the defence, one of which was not even signed by a Judge.

34. Detective Sergeant Casserly gave evidence that he swore the information before the District Court sat, and presented the sworn information to the court clerk prior to the Court sitting. He said that the District Judge read through it and asked Detective Sergeant Casserly if the application related to other applications that he was making at that time. Having been told that it was, the District Judge read through the information again and then he granted the warrant, having ascertained that the signature on it was Detective Sergeant Casserly's. Under cross-examination, Detective Sergeant Casserly said that he *"just took the normal oath"* and that all four applications were dealt with together, the information for each being the same. No questions were asked about the actual information

itself, nor were any questions asked about the grounds for the search warrant or the basis for the Sergeant's belief that such warrants were necessary.

35. Having obtained those search warrants, the Gardaí left the court and went to Portlaoise Prison, where they identified themselves to the prison guards working there. They went through normal security when entering the prison and were escorted by prison officers to the cells in respect of which they had warrants to search.

36. The appellant complains that there was ambiguity relating to the status of the sworn information, resulting from the existence of multiple copies which differed from each other. Detective Sergeant Casserly was extensively and forensically cross-examined about how this might have arisen. While a definite explanation could not be provided by Detective Sergeant Casserly, a Ms Catherine Magner, Chief Clerk of the District Court, was also called by the prosecution. Ms Magner testified that original sworn *"informations"* were retained by the District Court office and that they were kept in a particular filing cabinet in a certain office, and that she was in a position to produce the original of the document in controversy. The Special Criminal Court had produced to it both the original sworn information that had been retained in the District Court office, and the warrant based upon it, and the certified copies of same as verified by Ms Magner. The original produced contained the signature of the District Judge, while the copies were acknowledged to be ambiguous.

37. The trial court took the view that with the adducing of the original document that there was at the end of the day no ambiguity. We are satisfied that there was evidence to support the Special Criminal Court's ruling in that regard, and that it was entitled to so rule.

38. The next basis for complaint was that the information provided to ground the issuing of the search warrant was inadequate, as it did not set out such information as the Detective Sergeant had and could lawfully have provided for the District Court Judge. The sworn information had stated, inter alia, that:

> *"I suspect that evidence in relation to this s.15 Misuse of Drugs Act 177/84 offence is to be found in the prison cell of one Brian Rattigan, which is cell 42, Landing E 1., Portlaoise Prison. The evidence is specifically mobile phones, mobile phone call receipts, mobile phone chargers and ancillary items. I suspect this because of confidential information that I am in possession of. This information is from a previously reliable source. I have conducted a number of enquiries into the veracity of this information and am satisfied as to its accuracy and I hereby apply for a warrant …"*

39. Counsel for the appellant complains that there were no questions asked to test the assertions made. He has submitted that a crucial aspect of the matter was that there was believed to be a connection between a phone found at the scene at 9 Hughes Road and a phone which Gardaí believed was connected to the appellant who had been in prison for some years at that stage. It was submitted that cogent and relevant evidence concerning that was not put before the District Judge. For example, it was suggested, the District Judge was not told that the phone which was being searched for was likely to be in the appellant's cell. The provision of that detail would not involve disclosing confidential information and it was relevant to his determination. It was submitted that the issue of the search warrant was not reasonable in those circumstances.

40. In response, counsel for the respondent has submitted that it was not necessary for the District Judge to be provided with the detail suggested. The respondent maintains that there was more than adequate information for the Court to be satisfied on reasonable grounds that the issuance of a search warrant was appropriate.

41. We agree with the submission made by counsel for the respondent. Under the relevant statutory provision, a District Judge must be satisfied that *"there are reasonable grounds for suspecting that evidence of, or relating to the commission of"* an indictable offence was to be found at the suggested search location. The warrant, which in this instance was a judicial warrant, expressly states that the District Judge was so satisfied. The court below expressed itself satisfied that it would be inappropriate to seek to go behind the District Judge's order, and we agree that the evidence did not provide any basis for doing so. The District Judge was not obliged to conduct a trial of the assertions made in the information. He was of course entitled to seek clarifications, or supplementary information if he felt he needed it, but he was not obliged to do so. If on the information contained in the sworn information he could be satisfied, and was in fact satisfied, that there were reasonable grounds for suspecting that evidence of, or relating to the commission of an indictable offence was to be found at the suggested search location, he was entitled to issue the warrant. We see no basis on which to criticise the ruling of the Special Criminal Court upholding the warrant.

Ground of Appeal No 3.

42. This ground is concerned with a complaint that the trial court erred in admitting any evidence with regard to the Nokia telephone (Garda exhibit number JMG1) and printouts and analysis of same.

43. There was a considerable amount of evidence relevant to this ground. The Nokia telephone in question was seized from the person of Anthony Cannon at 9 Hughes Road South. Evidence was given at trial about Garda examinations of that telephone by Sergeant Amanda Timmons and by video-link from New Zealand by a Mr Colm Gannon who had been a Garda at the relevant time. Sergeant Timmons gave evidence that when she received the telephone, it was switched on. She said that she did not do any XRY analysis of that exhibit and under cross-examination, she agreed that she did not undertake any process involving the cloning of the SIM card. She said that she had advised Sergeant Flanagan that further examination would be required and that this would have to be undertaken in Garda HQ.

44. Sergeant Tony Flanagan gave evidence that, having spoken to Sergeant Timmons, he contacted Garda headquarters and they advised him that they would revert to him. In the interim, he *"made further inquiries with other people that were qualified to carry out this type of examination"* as he had *"met with a brick wall in relation to getting this further XRY'd"* He said it was *"left up to me, the phone was in my possession, the information was on the phone, it was required, so… I got every message, everything that was recorded on the phone, photographed."* Sergeant Flanagan gave evidence that while that was being done, he powered the phone off and inserted a blank SIM into it. Sergeant Flanagan admitted that he had no training but he said that *"I had taken an interest in phones and I believe that during that interest that somebody had given me one of these and said to me, 'If you're ever in a situation where you have a crime you need to get one of these in to stop it linking onto the network.'"* Sergeant Flanagan was unable to say who gave him the card he inserted into the phone and the card itself was unavailable for examination, as Sergeant Flanagan said that he took it out of the phone afterwards with the intention of using it again and he no longer had it in his possession. He could not say where it was.

45. Mr Gannon gave evidence of receiving exhibit JMG1 on the 18th of April 2010. He said that he carried out a visual examination on the device and noted that the Meteor SIM card was placed under the battery and that in the ICC slot of the device there was a cloned SIM card. Mr Gannon gave evidence that a cloned SIM card is a way of keeping the device away from network communications

and that they are used as part of the forensic retrieval of information from the device, doing a logical acquisition of the device to ensure that it is kept at best seizure point. He identified the card in the slot as being the type of card associated with Micro Systemations or the XRY software that was currently being used by An Garda Síochána.

46. Under cross-examination, Mr Gannon agreed that the presence of that cloned SIM card indicated that someone else had *"been at"* or had examined the telephone before he examined it, and that the cloned card is not part of normal telecommunications hardware. He had no direct knowledge of where the telephone had been or what had been done with it in the almost two-year interval until he was asked to examine it on the 18th of April 2010.

47. Mr Gannon further explained that the reason for downloading SIM cards is to obtain the best evidence at point of seizure because the phone is not connecting to the telecommunication network and that prevents the phone from receiving text messages or from receiving calls. The cloning of the SIM card permits access to be gained to a device as well as keeping a device off the network.

48. The thrust of the complaint now being made is that there was evidence that the exhibit had been interfered or tampered with prior to Mr Gorman's examination. It is said that the prosecution were not able to prove the integrity of the exhibit as a result of that interference or tampering, and further were unable to prove the integrity of the data subsequently retrieved. Moreover, it could not be ascertained what exactly had occurred during the interference or tampering that had undoubtedly taken place. Consequently, it was contended, the evidence which the prosecution sought to adduce was not reliable or safe. The court of trial ought not to have admitted the phone into evidence nor any of the unreliable evidence which was obtained once the integrity of the exhibit had been compromised whilst in the possession of Gardaí.

49. In response, counsel for the respondent emphasises that the evidence was that the only persons who had dealt with this phone for examination purposes were Sergeant Flanagan and Mr Gorman, both of whom had given evidence. If there was doubt as to the integrity of the exhibit that was something which would potentially go to weight but not to admissibility. However, it was not accepted that there was a reason to doubt the integrity of the exhibit. The chain of possession was intact from the time of its seizure until its subsequent examinations. There was no reason to speculate that some unnamed party had interfered with the exhibit simply because of the cloned SIM card that had been found in the device. Sergeant Flanagan had described using such a card and explained why he had done so. Moreover, this cloned SIM card was recognised by Mr Colm Gorman as one that would be widely used by forensic examiners of mobile phones.

50. Counsel for the respondent points out that no complaint is made concerning the reliability of the photographs taken by Garda Pidgeon on the 8th June 2008, both of the phone, and of information displayed on its screen. Garda Flanagan gave evidence concerning what he had photographed without objection.

51. The respondent maintains that the complaints made lack any merit and ought to be rejected.

52. We are satisfied that the Special Criminal Court was correct to admit the evidence in question. In general, complaints such as those made by the appellant go to weight rather than to admissibility. That having been said, a court of trial always retains a discretion to exclude evidence the prejudicial effect of which so outweighs its probative value as to render it unfair that the prosecution should be entitled to rely upon it. However, the threshold for such an intervention is a high one, and we are satisfied that the evidence of unreliability, if any, in this case did not remotely approach that threshold. The court of trial was right to admit the evidence. However, notwithstanding its admission, the defence were perfectly at liberty to suggest to the court at the appropriate time that, in the exercise of its function as the tribunal of fact, it ought not to rely on that evidence, alternatively that it should attach little weight to it. However, it was ultimately a matter for the court as to what weight, if any, it felt it could attach to that evidence. We are therefore not disposed to uphold this ground of appeal.

Grounds of Appeal No's 4 & 5.
53. In these grounds it is suggested that the trial court erred in accepting that Sergeant Brian Roberts was entitled, and/or that he had sufficient expertise and knowledge, to give evidence in respect of the valuation of the drugs seized; and that it further did so in accepting that Sergeant Brian Roberts was entitled and/or that he had sufficient expertise and knowledge to give evidence in respect of the understanding of what various language, words, symbols or items meant in the context of the prosecution herein.

54. Section 15A (3) of the Misuse of Drugs Act 1977 provides:

> *"If the court is satisfied that a member of the Garda Síochána or an officer of customs and excise has knowledge of the unlawful sale or supply of controlled drugs, that member or officer, as the case may be, shall be entitled in any proceedings for an offence under this section to be heard and to give evidence as to—*
>
> *(a) the market value of the controlled drug concerned, or*
>
> *(b) the aggregate of the market values of the controlled drugs concerned."*

55. The Prosecution called Sergeant Brian Roberts to give evidence which purported to be expert evidence relating to the value of the drugs seized and the slang language used in the various text messages which the prosecution believed to be of importance in the case. The defence objected to the admissibility of that evidence, submitting that absent a specific statutory provision, such as that providing for the giving of evidence of belief of membership of the IRA, or belief as to the existence of a gangland organisation, the belief of a Garda, who has not otherwise been proffered and credentialed as an expert in a field of scientific endeavour or in an acknowledged area of knowledge and learning, represents inadmissible opinion evidence. It was submitted that Sergeant Roberts did not have the expertise envisaged by the relevant legislation, i.e., the Misuse of Drugs Act 1977, as amended, relating to either the value of the drugs, or for that matter concerning the slang language used by drug dealers. However, despite these objections, the court of trial accepted that Sergeant Roberts had the expertise required to give the necessary evidence, subject to satisfactory proof as to the purity of the drugs, and the appellant contends that it was in error in so ruling.

56. Sergeant Roberts gave evidence that he had been a Garda for 18 years and had spent 15 years attached to the Garda National Drug Unit. He gave evidence that he is on Europol's expert group in an advisory capacity with regard to new synthetic drugs and on sub groups of the National Advisory Committee to the government on drugs. He said he was a supervisor on an operational test purchase unit, which involves the controlled purchases of controlled drugs throughout the country on a daily basis in an undercover capacity, with the objective of determining and monitoring the market prices of illicit drugs at any particular time. Most of the supervised transactions were at street level involving lower level deals. He estimated that in the preceding five years, there had been 2,500 controlled purchases of diamorphine alone.

57. Under cross-examination, Sergeant Roberts said that he had undertaken a number of courses in the UK and in Europol with regard to undercover operations, test purchase operations, decoy operations and expert dismantling of cannabis cultivation sites and new synthetic drugs. He said he had no formal qualifications in relation to the valuation of drugs and that he was relying purely on his experience in relation to same. Moreover, Sergeant Roberts was not in a position to give evidence as to the purity of the drugs seized. With regard to the valuation of the drugs seized, Sergeant Roberts gave evidence that he had had no direct dealing with controlled drug purchases in the preceding five years and that he was relying entirely on information conveyed to him by others involved in such purchases.

58. Sergeant Roberts further gave evidence that his knowledge of the argot or slang terminology used in the drugs trade was not based on data personally gathered. He gave evidence that he had no formal qualification in the field of argot or slang terminology. He said his knowledge was acquired from a UK produced reference work, which comprised a 400 page glossary of drug trade terminology, that is used by police forces across the globe. He acknowledged that some such terminology in use here may be different to that used in the UK. However, in May 2008, no document existed which recorded the terminology being used in Ireland at that time. Sergeant Roberts conceded he had no direct knowledge himself of that terminology.

59. The defence contended that Sergeant Roberts's expertise had not been established on the evidence adduced. However, despite the objections raised the court of trial accepted that Sergeant Roberts had the expertise required to give the necessary evidence, subject to satisfactory proof as to the purity of the drugs, and the appellant contends that it was in error in so ruling.

60. In response to the appellant's submission, counsel for the respondent has contended before this Court that the terms of s.15A(3) alone were sufficient to entitle Sergeant Roberts to give the evidence as to the value of the drugs that was in controversy. Moreover, and in any event, he submitted that the witness's evidence established that he had expertise in valuation of drugs. The evidence that Sergeant Roberts gave as to value, and as to the meaning of the slang terms, was not hearsay. Rather, it was submitted, he gave a personal opinion based on his learning and acquired knowledge, and that was admissible evidence, counsel for the respondent says.

61. We agree with the submission made by counsel for the respondent. The fact that the source of some, or even all, of Sergeant Robert's knowledge was hearsay was neither here nor there in terms of whether or not he had expertise. Most expertise is in large measure based on knowledge acquired concerning what others, perhaps long dead, have either written, or have discovered in research, or in experimentation, or have recorded through observation. Some experts may, of course, add something themselves to the field of knowledge concerned, but being an expert does not depend on making a personal contribution. It is based on having acquired and possessing expert knowledge and understanding, whatever the source of one's learning might have been. Knowledge does not have to have been obtained first hand. That is not to suggest that the fact that expertise is based solely or largely on second hand knowledge may not be relevant to weight. It might or might not be, depending on the circumstances of the case, but that is an entirely different issue. The complaint made is based on alleged inadmissibility.

62. On the question of evidence as to value, we are satisfied in the first instance that Sergeant Roberts was entitled to give evidence as to value based on s.15 A (3) of the Misuse of Drugs Act 1997. Quite apart from that, however, we are satisfied that the evidence given by Sergeant Robert's concerning his experience and learning in what we consider to be a recognised area of police science, namely the profiling of the actors, activities and methods of those engaged in the criminal drugs trade subculture, was also sufficient to allow the court of trial to be satisfied that he had the necessary expertise to testify as an expert, both with respect to street value and with respect to argot or slang in usage in the drugs trade, and that the evidence was therefore properly admitted. We are not therefore disposed to uphold this ground of appeal.

Ground of Appeal No 6

63. It is complained here that the trial court erred in upholding the lawfulness of the search warrant for 290 Cooley Road. This was the home of the appellant's former partner.

64. It is complained that the judicial signature on the copy of the search warrant obtained from the District Court under s. 26 of the Misuse of Drugs Act 1977 is illegible. There is a squiggle on the line above the words "Judge of the District Court" which is incapable of discernment. The complaint in that regard, and in so far as it goes, is correct. The Court has viewed the signature and it is not possible to make out a name. However, the warrant is clearly in the correct form, and it is clear in its terms. It is clearly entitled *"The District Court for the District Court area of the Dublin Metropolitan District"*. Moreover, while the actual signature is not legible, it is plain to any addressee that it was purportedly granted by a Judge of the District Court, and as to the date on which it was granted and the basis on which it was granted. There is no suggestion that it was not signed by a District Judge, and the Garda who applied for the warrant, namely Detective Garda Ronan Doolan, gave evidence before the court of trial that the warrant was issued by a District Judge, whose name he could not recall, who had been sitting in District Court No 46 on the 28th of October 2008. In our view this is a complaint without substance. Nobody was misled or prejudiced in any way by the illegibility of the signature. It is not the personal identity of the judge concerned that is important. What it was important for the addressee, or an interested party to know, was that the warrant in this instance was issued by a judicial office holder. Such warrants prove themselves, unlike those issued by a Peace Commissioner whose viva voce evidence is required once there is a challenge to the warrant. The information that the signatory was a Judge of the District Court was clear to see on the face of the warrant.

65. A somewhat fanciful suggestion has been put forward that the appellant was prejudiced because he was to be tried before a three judge judicial panel of the Special Criminal Court, a member of which was going to be a District Court judge. It is suggested that in circumstances where the signature on the warrant was illegible, neither the appellant nor his lawyers had any way of knowing if the District Judge who would be on the panel to try the appellant might not have been the judge who signed the warrant, and that it was vital to know this in order to consider whether a recusal application should be made. We dismiss this complaint *in limine*. As it was a judicial warrant, a simple enquiry at the relevant District Court office would have solved the mystery for anyone concerned to verify ownership of the illegible signature.

66. We are not disposed to uphold ground of appeal no 6.

Ground of Appeal No 7

67. This relates to a complaint that the trial court erred in convicting the appellant of Count 1 on the indictment (a charge of possession of drugs contrary to section 15 A of the Misuse of Drugs Act, as amended) in circumstances where there was no evidence of the purity of the drugs seized at 9 Hughes Road South.

68. In that regard Superintendent Sutton gave evidence that the market value of a kilogram of diamorphine, on the 21st of May 2008,

would have been worth €200,000. He stated that 4,973.6 grams, which was the quantity found at 9 Hughes Road, would therefore have a street value of €994,720. Superintendent Sutton relied upon the weight as certified in the Certificate of Rodney Lakes, Forensic Scientist, issued for the purposes of s.10 of the Misuse of Drugs Act 1984. He did not personally weigh, or even see, the drugs.

69. Mr Lakes gave evidence at the trial. He stated that the total weight of powder in this case was 4973.6 grams, that samples were analysed and found contain diamorphine, which is a controlled drug, under the Misuse of Drugs Act, and that the purity, or the diamorphine content, of the powder was not determined.

70. Mr Lakes explained that the Forensic Science Laboratory uses a sampling policy based on the hyper geometric probability distribution which is based on the European Network of Forensic Science Institutes, or ENFSI, and the United Nations Office of Drugs and Crime, UNODC standard. He explained that sampling procedure as follows:

> *"The scientist satisfied themselves that they are dealing with what we consider to be one population, so one set of tablets or one set of packs of powders, that there isn't two different populations or that we can separate one set from another. So, once we're satisfied that we're dealing with just one population, we can apply the statistical model to this. So, we take the total number of packs - it was 18 in this case in item two - we then look at our sampling policy which tells us how many packs to analyse. In this case I analysed nine of the packs. Therefore, where each of those packs is found to contain diamorphine, we are obviously 100 % positive that each of those nine packs contain diamorphine. But equally, we're allowed then to state that we are 99 % confident that a minimum of 75 % of these packs in total, if analysed, could contain diamorphine. So, the fact that we've analysed nine of them and they're all positive for diamorphine allows us to have a certain confidence that the rest of the packs also contain diamorphine."*

71. Mr Lakes further stated in his evidence that: -

> *"Whilst the only way you could be 100 % positive that something contains diamorphine would be to analyse it, but because the other two contain diamorphine, we can have a strong amount of confidence that the third pack would also contain diamorphine, even though it wasn't analysed."*

72. Sergeant Roberts also gave evidence. He described his experience which extended to fifteen years with the Garda National Drugs Unit. He was in a position to describe his role within that Unit and to demonstrate his familiarity with the controlled purchasing of diamorphine in this jurisdiction. He stated *"It's the main drug that we would be involved in purchasing"*, and further stated:- *"...I could give a quite accurate estimate in the last five years of 2,500 controlled purchases of diamorphine alone."*

73. Sergeant Roberts stated that in his experience, the market value of diamorphine seized on the 21st of May 2008 was €200 per gram. He said that in this case, he had seen Mr Lake's certificate *"which found that a quantity of 4,973.6 grams of brown powder determined to contain diamorphine"* and that the value of the powder, based on simple multiplication, amounted to €994,720. Later in his evidence, Sergeant Roberts said that at a wholesale level of the market, the value of a kilogram of diamorphine would be in the region of €26,000 to €28,000. He agreed that a street deal of heroin would contain 0.1 gram of heroin, and that that quantity mixed with a kilo of brown sugar would still test positive for diamorphine. However, his evidence was that heroin purity in Ireland ranged from 30% to 50% but said that the street value did not depend on the quantity of heroin in the deal. The witness elaborated on this in response to questions asked in cross-examination. He said *"In Ireland with regard to purity or quantitative analysis on large amounts of drugs, it's* [i.e., testing for purity] *generally not done, not reported by the laboratory for the -- a number of reasons. From our perspective, when it comes to market value at street level, i.e. when the person is buying the lowest or the most common amount of a drug, be it a gram or a 0.1of a gram, the purity is not particularly relevant at that end of the market because the buyer is blind on the street as to what purity the substance might be."* The witness accepted that it was not established whether the diamorphine found was already adulterated before being seized by Gardaí or whether it was pure.

74. When further questioned about purity, this witness confirmed that:- *"…the weight and the volume is what achieves the cash price on the street."* He also observed, having initially commented on the range for purity being between 30% to 50% within this jurisdiction, that :- *"....if the heroin was 10% or if it was 40%, the value from my point of view would be the same because what ends up in these 0.1gram bags on the street being sold isn't determined by the quantity in them."*

75. Sergeant Roberts confirmed that diamorphine is bulked up using other substances to increase its volume. In this case, no forensic test was carried out to establish whether the substance recovered was pure or contained other substances, as is common in drugs cases. Sergeant Roberts conceded that his valuation of the drugs in this case *made "no allowance whatsoever for purity"* and he said that the forensic science laboratory personnel were the scientists to answer those questions. The diamorphine seized in this case was not analysed to establish the level of its purity. He conceded that without specifically testing the purity of the drugs, it was not possible to say for certain how much diamorphine was present.

76. The appellant contends that, in the absence of evidence as to the purity of the powder found in the search, the evidence adduced was simply insufficient to establish that the drugs had a value in excess of €30,000, which is an ingredient of the offence charged under s. 15A of the Act of 1977, as inserted and amended. Counsel for the appellant has referred us to the decision in *The People (Director of Public Prosecutions) v Connolly* [2011] 1 I.R. 755, in support of this contention. It was submitted that the evidence in this case, at its highest, established a probable value for the drugs recovered and that that is not sufficient in light of the decision of the Supreme Court in *Connolly*. The appellant contends that any evidence which places a valuation on the drugs recovered in this case, without an analysis of purity or some evidence of the composition of the illegal drugs recovered, fails to meet the standard of proof beyond reasonable doubt. No explanation was given for the failure to test the purity of the drugs even at a late stage in the proceedings.

77. In the *Connolly* case, the appellant was charged with two counts of possession of controlled drugs, namely Amphetamine in powder form, for sale or supply, including one count that the drugs had a market value of €13,000 or more contrary to s. 15A of the Misuse of Drugs Act 1977, as amended. The appellant had made certain admissions in relation to possession of drugs. An expert witness for the prosecution gave evidence that only half of the packages had been examined in accordance with statistical sampling methods. Nevertheless, on the basis of such sampling as had been done she was prepared to offer the opinion, as a matter of 99% certainty, that amphetamine was present in seven of the packages seized. The witness went on to say that she had not determined the extent of the amphetamine content and was unable to say *"for definite"* what the level of presence of amphetamine was. She added that she could *"give a range in which amphetamine purities generally fall"*. She said that they *"generally fall between that is maybe 10% and 40% …"*. During the trial the appellant sought a direction that the case should be withdrawn on the grounds that the prosecution had not provided sufficient evidence that the drugs had a market value of €13,000 or more. This application was refused and the appellant was convicted. The appellant appealed against his conviction to the Court of Criminal Appeal on the ground that

there was no evidence on which a properly directed jury could be satisfied beyond reasonable doubt in relation to the market value of the drugs. The appeal was refused, but the Court of Appeal certified a question of law of exceptional importance in relation to the appeal permitting him to appeal to the Supreme Court.

78. The Supreme Court allowed the appeal, and set aside the conviction without directing a retrial. In doing so they held, 1, that proof of value of the drugs was an essential ingredient of the offence with which the appellant had been charged and distinguished the offence from the sale or supply of drugs which had not been quantified or valued. They ruled that that essential ingredient must be proven to the satisfaction of the jury beyond reasonable doubt.

79. The Supreme Court further held that it was the totality of evidence before the jury which was important and that evidence must be such that, having regard to the onus of proof beyond reasonable doubt, if accepted, the evidence would entitle a jury to reach a verdict of guilty. The admissions of the accused carried some weight, however, the proof of the market value of the drugs was an objective matter.

80. It was further held that it was not sufficient for the prosecution to prove a mere presence of a particular drug and then to rely upon an unexplained range of values which generally applied without giving evidence which addressed the extent to which cases might fall outside that range. The word *"generally"* was central to the evidence given by the prosecution witness, the normal usage of that word leaving open the very real possibility that there were cases which fell outside the range given.

81. The respondent rejects the appellant's contentions on the issue of the failure to establish the purity of the drugs seized. Her counsel has submitted that the present case can be readily distinguished from the *Connolly* case. He contends that the Special Criminal Court accepted the rationale in *Connolly* but was satisfied that the present case could be distinguished on the basis that the evidence of Sergeant Roberts was to the effect that what determined the price of a street *"deal"* was the quantity of the powder being sold rather than its quality or purity. The quantity involved in this case was such that, regardless of the purity of the powder in sale, it was possible to infer beyond reasonable doubt that once broken down into typical street deals the threshold value of €13,000 would be readily exceeded.

82. The precise finding of the Special Criminal Court on this issue was as follows:

> *"On the question of the value of the drugs, which is relevant to count 1, the Court of course fully accepts the rationale of the Connolly decision aforesaid. However, on the facts of this particular case, having particular regard to the expert evidence of Detective Sergeant Roberts, the Court is satisfied that in these circumstances purity of the drugs had little or no bearing on their street value. As the evidence of the street value of these drugs exceeded by an enormous factor the sum of €13,000 without having regard to the purity of the drugs, the Court can have no doubt that a test of the purity of the drugs could not affect the street value to such a very large extent, and we conclude beyond reasonable doubt that the value thereof exceeded €13,000."*

83. We agree that the circumstances in *Connolly* can be meaningfully distinguished from those of the present case. A close reading of the judgment of Fennelly J in *Connolly* does not indicate that there was any evidence in that case, which involved powder containing Amphetamine rather than Heroin or Diamorphine, as to whether that determined price at street level was simply the weight or volume of the powder involved in the deal, i.e., the physical amount of powder being sold, on its own; or whether it depended on both the quantity involved and the quality of the product being sold, i.e., its purity. In the present case there was such evidence. The relevant evidence was that in the case of Diamorphine, otherwise Heroin, the street value in this country was determined by the weight or volume involved in the deal regardless of its purity. We are satisfied in the circumstances that this evidence, coupled with the evidence of the physical quantity seized, and the evidence given concerning the value of a gram of powder sold at street level, regardless of the degree to which it might be adulterated or cut or bulked up with other substances, entitled the court of trial to draw the inferences that it did.

84. We therefore reject Ground of Appeal No 7.

Ground of Appeal No 8

85. Finally, it is complained that the trial court erred in convicting the appellant on Counts 1, 2 and 3 on the indictment (charges of possession of drugs contrary to the Misuse of Drugs Act 1977, as amended) in circumstances where there was insufficient evidence that he was in possession of the drugs seized at 9 Hughes Road South.

86. The prosecution's case in that regard was always one of constructive possession of the drugs based on control, rather than actual physical possession of them. Moreover, it was a case based on circumstantial evidence. The appellant complains, however, that the Court drew impermissible inferences from the available evidence and unjustly convicted him. In particular, in so far as physical evidence was relied upon, reasonable and plausible explanations were in many cases available that did not necessarily incriminate the appellant. An example is given in the appellant's written submissions suggesting that items, comprising drug dealers' paraphernalia, found in the home of Natasha McEnroe, the appellant's partner, were open to the explanation that they belonged to Ms McEnroe if she herself was engaged in drug dealing. It is said that, in this respect, the evidence, at its height, indicated an involvement in drug-related activity but fell short of proving the element of possession beyond a reasonable doubt.

87. It was submitted that the Garda evidence about the meaning of words, phrases and slang used in this case did not establish the appellant's role to be anything more significant than the other people in this case, even if this Court were to uphold the admissibility of those beliefs in the case. It was submitted that a considerable amount of weight was attached to a few text messages, with meanings being ascribed to those messages by Gardaí to try to bring them within a statutory definition of possession. However, those meanings were not necessarily the only possible meanings of the texts in question. Garda Curtis under cross-examination said that in his analysis, the various texts and documents found *"relate to drug dealing and activity, and are commonly known as tick lists"* and that *"it indicates activity consistent to drug activity."* He went no further. It was submitted that it was not possible to conclude that the only possible inference from those messages was that the appellant was the person who was directing the operation. The court was obliged to adopt the inference in favour of the appellant.

88. It was also complained that while telephone evidence was presented by Detective Garda Eamon O'Brien to support the thesis that the appellant was the central cog in the machine in this case, there was also evidence of direct telephonic communications between all of the parties to the transaction, including "Nat", Anthony Cannon and Anthony O'Connell on the days in question, which was not highlighted by the court below as being significant in any way.

89. It was submitted that there was insufficient circumstantial evidence to permit the Court to exclude the other possibilities suggested by the defence. It is said that the available evidence supports the possibility that other persons were involved in directing

and controlling the drug transaction which is the subject matter of the prosecution.

90. The items found at the home of Natasha McEnroe were capable of demonstrating that she was controlling the distribution of drugs through tick lists in her own notebooks and managing the proceeds of crime through betting. The search of her home took place after Ms McEnroe had been stopped by Gardaí in October, 2008 with €49,880 in the boot of her car. She had been in telephone contact on the day of the drugs offence with the phone of Anthony Cannon and had been seen by Gardaí associating with Mr O'Connell. The appellant had been in custody since 2003. It is suggested on behalf of the appellant that there is a far more patent possibility in terms of who was directing operations in this matter.

91. It is pressed that there was no evidence in the case to establish that the appellant had any direct involvement in the possession of the drugs in this case. There may have been a genuine belief on behalf of the Gardaí who gave evidence that the appellant was the person directing the distribution of the drugs in question, but it is suggested that when the evidence is analysed, it is not possible to exclude the other possibilities.

92. The respondent emphatically rejects the complaints made in this regard. Reliance is placed on s. 1(2) of the Misuse of Drugs Act 1977, which provides that *"For the purposes of this Act, any controlled drug ..... of which a person has control and which is in the custody of another who is either under the person's control or, though not under the person's control, acts on his behalf, whether as agent or otherwise, shall be regarded as being in possession of the person.."*

93. The respondent points to the *"two views rule"*, and correctly identifies that the requirement to adopt the view or version favourable to the accused only arises where the tribunal of fact is not satisfied to the standard of beyond reasonable doubt that the other view or version is correct. The respondent's case is that the alternative views/explanations contended for by the appellant were all either expressly, or by implication, rejected by the Special Criminal Court in circumstances where they were satisfied beyond reasonable doubt that the inferences invited by the prosecution were the correct ones to draw.

94. We were referred to various authorities which it is not necessary to specifically review. The appellant has referred us to *The People (Director of Public Prosecutions) v Nevin* [2003] 3 IR 321 at p 348 concerning how circumstantial evidence should be approached, and to the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Cronin* [2003] 3 IR 377 at 389 concerning the *"two views rule*. The respondent in turn has referred us to *The People (Director of Public Prosecutions) v Foley* [1995] 1 IR 267 and to *The People (Director of Public Prosecutions) v. Tanner* [2006] IECCA 151, concerning the establishment of possession of drugs by means of circumstantial evidence. The respondent also referred us to the judgment of Geoghegan J in the Supreme Court on the appeal to them in the *Cronin* case, in relation to what he had to say concerning the two views rule.

95. We have considered the judgment of the Special Criminal Court and find no evidence to support the suggestion that the court of trial may have misunderstood or misapplied the two views rule. We are satisfied that there was evidence to support the inferences that they drew, and that in so far as alternative views/explanations/versions were possible on the evidence that they had rejected those alternatives on the basis of being satisfied beyond reasonable doubt that the ones adverse to the appellant, and invited by the prosecution, were correct.

96. We therefore reject Ground of Appeal No 8.

Conclusions

97. In circumstances where we have seen fit to reject all of the appellant's grounds of appeal, we are satisfied that his trial was satisfactory and that his conviction is safe. We dismiss the appeal.