



## THE COURT OF APPEAL

**Sheehan J.  
Mahon J.  
Edwards J.**

**124/2014**

**Bill LK7/2014**

**The People at the Suit of the Director of Public Prosecutions**

**V**

**Patrick Scanlon**

**Respondent**

**Appellant**

**Judgment of the Court delivered on the 29th October 2015, by Mr. Justice Sheehan**

### **Introduction**

1. Following an eight day trial at Limerick Circuit Court, the appellant was convicted on the 21st May, 2014 of possessing just under 4kgs of cannabis valued at €79,000 for the purpose of sale or supply and was also convicted of importing the said amount of cannabis. He was sentenced to fifteen years imprisonment in respect of each of these offences which were committed in August 2013.

2. The appellant now appeals against conviction and sentence.

3. This judgment is concerned solely with the appeal against conviction.

### **Grounds of Appeal**

4. The appellant challenges his conviction on two grounds.

5. The first ground of appeal relied on by the appellant and described by his counsel as the centrepiece of his appeal relates to his contention that his arrest and detention were tainted by a period of illegal detention immediately prior to his arrest. As a result of this earlier illegal detention, the appellant, relying on the judgment of the *Court of Criminal Appeal in People (DPP) v. Boylan* [1991] 1 I.R. 477 and on *Oladapo v. Governor of Cloverhill Prison* [2009] IESC 42, maintains that the prosecution was not entitled to rely on inculpatory statements made by the appellant during his detention and that accordingly his conviction should be set aside on this ground.

6. The second ground of appeal relates to the trial judge's charge. The appellant contends that the trial judge's charge was inadequate and unsatisfactory when dealing with the question of circumstantial evidence.

7. In order to consider these two grounds of appeal it is necessary to consider the background to the case and the evidence of the gardaí who stopped and searched the appellant at the roadside in Co. Limerick on the 8th August, 2013 and who subsequently brought him to Henry Street garda station for a further search prior to his arrest. It is also necessary to consider the adequacy of the judge's charge in light of the evidence in the case and to examine what the trial judge actually said about circumstantial evidence in the course of his charge.

### **Background**

8. The prosecution allege that the appellant had inveigled a former employee of his in the restaurant business, Mr. Stephen Quinn of 18 Church View, Pallaskenry, Co. Limerick, to receive on his behalf a parcel being delivered by DHL. This parcel, which originated in Malaga in Spain, was inspected by customs officials at Shannon Airport on the 7th August, 2013, who then alerted the gardaí as to its contents.

9. The gardaí immediately put in place a significant operation under the direction of Detective Inspector Eamon O'Neill involving the Regional Armed Response Unit and the Divisional Drugs Unit, both units being based at Henry Street garda station in Limerick.

10. The gardaí organised a controlled delivery of the package to Mr. Stephen Quinn at the said address disguising themselves as DHL staff. Shortly after this delivery a number of plainclothes gardaí entered Mr. Quinn's home. At the time the appellant had been seen sitting on a wall some distance from 18 Church View, but within sight of that house. The prosecution case was that the appellant shortly afterwards left the area as a passenger in a van. When Mr. Quinn was confronted about the package that had been delivered to him he told the gardaí he had been asked to accept delivery of it by the appellant.

11. Mr. Quinn had previously worked for the appellant in the restaurant trade and it was common case that there had been a discussion between Mr. Scanlon and Mr. Quinn concerning the opening of a restaurant in Askeaton with Mr. Quinn to work once again for Mr. Scanlon. It was the prosecution contention that the appellant used this as a pretext to dupe Mr. Quinn into accepting delivery of the DHL package. Mr. Quinn gave evidence that Patrick Scanlon had approached him on the subject claiming that there had been a falling out between himself and his brother and asking Mr. Quinn if he could use Mr. Quinn's address for the delivery of the package. Mr. Quinn gave evidence that he agreed that Mr. Scanlon could arrange to have a parcel posted to his house whereupon Mr. Scanlon would be able to collect it himself. According to Mr. Scanlon, the parcel was to contain bits and pieces purchased by him for the restaurant.

12. It was not disputed by the defence that the accused was seen sitting in the vicinity of 18 Church View, Pallaskenry, on the 8th

August, 2013, the morning the delivery was affected, or that he had phoned the Quinn household. Shortly after the controlled delivery, gardaí had raided the house, found the drugs there in an unbroken package and questioned Mr. Quinn. In response to information which he received over the radio, Sergeant Brennan and a colleague stopped the appellant in a car nearby some time afterwards and searched the car. Sergeant Brennan searched the appellant and the car pursuant to s. 23 of the Misuse of Drugs Act, as amended. When he was stopped in this car in which he was a passenger, the appellant gave his name as Michael O'Brien, but a passport found by Sergeant Brennan in his pocket was in the name Patrick Scanlon. During the course of this search, the gardaí also found a mobile phone. The appellant disputed that the mobile phone was his, though it was shown to have the same number as the phone number which he had given to his then girlfriend and the same number as the one which he had written on a copy book in the Quinn home and on a hotel registration card which was proved to have been signed under his name the previous evening.

13. During the course of the search, the gardaí observed that the accused was chewing something thought later to be the sim card which was found to be missing from the phone. The appellant later admitted in his direct evidence that the phone was his, but he denied eating the sim card.

14. While he was still detained at the roadside by Sergeant Brennan, Detective Garda Boland arrived and directed that the appellant be brought to Henry Street garda station for a search pursuant to s. 23 of the Misuse of Drugs Act, as amended.

15. The garda evidence was that there was less than two minutes between the arrival of the two sets of gardaí, although the appellant said that he was kept at the roadside for twenty minutes. It was this direction to proceed to Henry Street garda station which gave rise to the defence submission that the accused had been unlawfully detained from this point onwards, tainting his subsequent arrest and rendering inadmissible the contents of interviews with him while he was in detention following his arrest in relation to the possession of drugs.

16. Mr. Quinn stated in evidence that the accused had rung him five or six times asking if the package had come and he also recounted how Patrick Scanlon had told him during one call that the package was due to arrive and that half an hour later the DHL courier had called to his house. This evidence was corroborated by evidence given by his wife and his son Jordan, who described phone calls received from Mr. Scanlon including one on the morning of the 8th August.

17. Mr. Quinn's wife Siobhan Quinn said that a phone message had been left by the appellant on the family landline concerning the delivery of a package. She said she had recognised the voice as being that of Mr. Scanlon and she said that he had a distinctive way of speaking. She recounted how his phone number came up on the handset and that she recognised it. The prosecution referred to a resume of phone calls which corresponded with the times being given in the evidence by the Quinns and by the gardaí. Reliance was also placed on the fact that a message was left on the 6th August, which was just after the package had left Malaga in Spain.

18. At the close of the prosecution case the appellant went into evidence and said that Mr. Quinn had approached him about some personal problems including his son's drug addiction and that he had said that he would give Mr. Quinn a job. The appellant accepted that he had lied to the gardaí about a large number of things including his recent movements, his ownership of the mobile phone, and he accepted that he had deliberately and falsely denied having anything to do with Stephen Quinn which included all the particulars of their various contacts. The appellant explained that he had told these lies as he had hoped the whole thing would just go away. He also said that he had lied to the gardaí about his name when he was stopped as he thought that he was being pursued by gangster types that he had had seen in Pallaskenry earlier and he had mistakenly believed that the gardaí were these people.

**Evidence of gardaí who had detained the appellant for searches pursuant to s. 23 of the Misuse of Drugs Act 1977, as amended.**

19. The principal relevant evidence on the question as to whether or not the appellant might be deemed to be in unlawful custody was given by Sergeant Pat Brennan and Detective Garda David Boland. Evidence was also given by Sergeant Michaela Maloney, the station sergeant on duty at Henry Street garda station when the appellant was brought there by Detective Garda Boland.

20. Sergeant Brennan was on duty with a Garda Murphy at 13.20 on the 8th August, 2013, when he received a message from Detective Inspector Eamon O'Neill about a red Volkswagen Golf motor car bearing a particular registration number that was heading towards Limerick from the Pallaskenry direction. Sergeant Brennan and a colleague went in pursuit of this car and stopped it at Clarina village. Sergeant Brennan stated that when the car stopped he approached the passenger side of the door and opened it. He shouted at the men in the car that they were being stopped for a drug search. He took the passenger out of the car and asked him what his name was. Sergeant Brennan said that this man who was the appellant told him his name was Michael O'Brien. He said that seconds later while doing a cursory search of his person, he came across a passport in the name of Patrick Scanlon and asked the appellant was that his name or was it Michael O'Brien, to which the appellant made no reply. He said at that point the car was being searched. The occupants had been searched and members from the drugs unit had arrived as well as other members and the two men in the car were subsequently taken to Henry Street garda station for a further search. He said that he also recovered a phone from the passenger seat of the car. The phone had the back removed and the sim card was missing. When he picked up the phone he turned to look at Mr. Scanlon and he could observe that he appeared to be chewing something white, but he could not identify what it was. He said it could have been the sim card from the phone which was missing, but it had been swallowed by the time he tried to get a better look.

21. Under cross examination Sergeant Brennan agreed that in the course of the search of the appellant he had patted the appellant down and searched his trouser pockets and that apart from the passport had found nothing of interest. Having done this he agreed that the appellant was then taken in charge by Garda Boland, who he said had arrived within two minutes of his own arrival. He also stated that following the finding of the passport, the appellant's demeanour changed as a result of which he deemed it appropriate to handcuff the appellant.

22. Detective Garda Boland stated in evidence that when he found out that a car had been stopped in Clarina village he went there. He observed Patrick Scanlon at the passenger side of the car and Sergeant Pat Brennan standing beside him. He told the appellant that he was taking him to Henry Street garda station for a search under s. 23 of the Misuse of Drugs Act, on the basis that he believed he was in possession of a controlled drug. He noticed that the appellant was chewing something which he swallowed and he stated that Sergeant Brennan had told him that Mr. Scanlon had given a false name. Under cross examination he agreed he did not speak to Sergeant Brennan before telling the appellant that he was taking him to Henry Street garda station for a search. He also agreed that he became aware before bringing the appellant to the garda station that Sergeant Brennan had searched the appellant.

23. When asked under what power did he believe he was entitled to take the appellant to Henry Street garda station for a second search he repeated that he was searching the appellant pursuant to s. 23 of the Act.

24. Sergeant Michaela Maloney also gave evidence. While Sergeant Maloney stated that the appellant was detained for the purpose

of a search under s. 23 of the Misuse of Drugs Act, she recorded the appellant as having been arrested at 13.40 by Detective Garda Boland. The respondent in her replying submissions contends firstly that what is described by counsel for the appellant as multiple searches was in effect a single continuing search. The respondent also contends that this view is supported by the fact that on the prosecution case there is only a minute or so between the stop and search of Sergeant Brennan and the arrival of Detective Garda Boland. The respondent makes a number of observations about s. 23 of the Misuse of Drugs Act, including the following:

1. A search under s. 23 may be physically executed by more than one garda. Indeed the involvement of several will often be essential.
2. A number of gardaí may share a suspicion in relation to the same accused person either simultaneously or successively. For example if a person dropped a patently suspicious package in the presence of several gardaí such would be inevitable.
3. Several gardaí could make a decision to perform a search collectively perhaps after consulting and resolving to proceed accordingly.

25. Section 23 of the Misuse of Drugs Act 1977, as amended, states as follows:

"23(1) A member of the Garda Síochána who with reasonable cause suspects that a person is in possession in contravention of this Act of a controlled drug, may without warrant –

- (a) search the person and, if he considers it necessary for that purpose, detain the person for such time as is reasonably necessary for making the search,
- (b) search any vehicle, vessel or aircraft in which he suspects that such drug may be found and any substance, article or other thing on or in the vehicle, vessel or aircraft and for the purpose of carrying out the search may, if he thinks fit, require the person who for the time being is in control of such vehicle, vessel or aircraft to bring it to a stop and when stopped to refrain from moving it, or in case such vehicle, vessel or aircraft is already stationary, to refrain from moving it, or
- (c) examine (by opening or otherwise) and seize and detain anything found in the course of a search under this section which with such cause appears to him to be something which might be required as evidence in proceedings for an offence under this Act.

(1A) Where a member of the Garda Síochána decides to search a person under this section, he may require the person to accompany him to a Garda Station for the purpose of being so searched at that station.

(1B) Where a member of the Garda Síochána decides to search a vehicle, vessel or aircraft under this section he may as regards the person who appears to him to be the owner or in control or charge for the time being of the vehicle, vessel or aircraft make any one or more or all of the following requirements:

- (a) require such person, pending the commencement of the search, not to remove from the vehicle, vessel or aircraft, as may be appropriate, any substance, article or other thing,
- (b) in case the decision relates to a vehicle and the place at which he finds the vehicle is in his reasonable opinion unsuitable for such search, require such person forthwith to take the vehicle or cause it to be taken to a place which he considers suitable for such search and which is specified by him,
- (c) require the person to be in or on or to accompany the vehicle, vessel or aircraft, as may be appropriate, for so long as the requirement under this paragraph remains in force.

(1C) Where there is a failure to comply with a requirement made under this section the following provisions shall apply—

- (a) In case the requirement was made under subsection (1A) of this section, the member of the Garda Síochána concerned may arrest without warrant the person of whom the requirement was made, and
- (b) in case the requirement is a requirement mentioned in paragraph (b) of subsection (1B) of this section, such member may take the vehicle concerned, or cause it to be taken, to a place which he considers suitable for a search under this section.

(1D) Where a requirement is made of a person under this section—

- (a) in case the requirement is a requirement mentioned in paragraph (c) of subsection (1B) of this section, if at any time while the requirement is in force the person of whom it was made is neither in nor on nor accompanying the vehicle, vessel or aircraft, as may be appropriate, in relation to which the requirement was made, he shall be guilty of an offence,
- (b) in case of any other requirement under this section the person who fails to comply with the requirement shall be guilty of an offence.

(1E) A requirement mentioned in paragraph (c) of subsection (1B) of this section shall remain in force until the search in relation to which it is made is completed.

(1F) Where a requirement described in paragraph (a) of subsection (1B) of this section is made of a person, the search in relation to which the requirement is made shall be carried out as soon as is practicable.

(2) Nothing in this section shall operate to prejudice any power to search, or to seize or detain property which may be exercised by a member of the Garda Síochána apart from this section.”

26. As can be seen from the above, s. 23 provides for a two stage search process where the gardaí deemed it necessary.

27. It is not at all unusual for a suspect to be detained and searched on the side of the street and subsequently brought to a police station for a further search. Normally this would be done by the same garda officer, but not always.

28. What happens will depend on the nature of the garda operation and matters that may arise in the course of that operation.

29. This Court accepts that the observations about s. 23 of the Misuse of Drugs Act made by counsel on behalf of the respondent and outlined above are reasonable observations.

30. The actions of the gardaí in this particular case can properly be described as a single continuing search given the closeness in time between the arrival of Sergeant Pat Brennan and Detective Garda Boland and it does not matter that the initial detaining for the initial search is carried out by one member of An Garda Síochána and the second detention for the more thorough search is carried out by another member. This Court rejects the suggestion implicit in the appellant's submission that the powers of search under s. 23 become in some way the property of the garda who first invokes it and that as a result it is only he or she who can decide whether the second phase of the search process can be called in aid. Indeed it does not matter whether the search process is described as two searches, an initial search and a further search or effectively one continuing search. It is clear that the Act contemplates an initial search and a subsequent police station search, if deemed necessary, both searches arising under s. 23 of the Misuse of Drugs Act. Nor, as the Court has already said, does it matter that the two parts to the search or separate searches are carried out by different members of An Garda Síochána. Accordingly, this Court holds that Detective Garda Boland was entitled to invoke s. 23 of the Misuse of Drugs Act 1977 and take the appellant to the garda station and as a result there was nothing unlawful about the appellant being detained and brought to Henry Street garda station for a more thorough search of his person, which in fact took place. Accordingly, this ground of appeal fails.

#### **Adequacy of Judge's charge in relation to the circumstantial evidence.**

31. Counsel for the appellant contends that, in light of the appellant's allegation that a telephone message had been fabricated, the trial judge's charge was inadequate in relation to the issue of circumstantial evidence and in support of this submission relies on the following observation of the Privy Council made in *R. v. Teper* [1952] A.C. 480:-

“Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded the steward of his house, ‘put my cup, the silver cup in the sack's mouth of the youngest’, and when the cup was found there Benjamin's brother hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

32. This submission must be seen first of all in light of the evidence in the case. The prosecution was based on the sworn testimony of Mr. Stephen Quinn and his wife Siobhan Quinn, without which the accused could not have been deemed to have been in possession of the package. As the respondent submits, this evidence was direct and testimonial in character. The basic issue that the jury had to decide related to the credibility of the Quinns and to a lesser extent the credibility of the appellant.

33. The possibility that the telephone message was fabricated was adverted to in the charge when the judge was summarising the prosecution case. When considering this evidence, there was effectively only one question for the jury to decide. Was it the accused on the phone or had someone fabricated this evidence? In considering this question, the jury had the benefit of hearing directly from the appellant as well as from Siobhan Quinn and they could weigh up each account in the normal way.

34. In the course of that part of his charge dealing with circumstantial evidence, the trial judge stated:-

“Now a jury may convict on circumstantial evidence, but to do so, you have to be satisfied not only that all the circumstances are consistent with the accused having committed the particular offence, but also those facts are not consistent with any rational conclusion that he was other than guilty. They have to be consistent only with his guilt and not with any rational explanation that he might be innocent. The prosecution have to be able by such circumstantial evidence to negative a credible possibility of the innocence of the accused.”

35. This warning clearly addressed the most important aspect of circumstantial evidence, namely that the evidence must be consistent with guilt and inconsistent with any other rational possibility. The complaint of the appellant ought not to be viewed in isolation, but must be considered in light of all the evidence surrounding the telephone message. This Court is satisfied that the learned trial judge's charge on this matter, taking into account the context in which the appellant's concern arises, was entirely satisfactory and accordingly the appeal against conviction is dismissed.