THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Record No. 26/14

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V.

CHARLES TWESIGYE

Appellant

Judgment of the Court delivered on the 13th day of May, 2015 by Mr. Justice Edwards

Introduction
1. On the 17th December, 2013 the appellant was convicted by a jury in the Circuit Criminal Court of counts one and two respectively upon a three count indictment. Count number one charged possession of a controlled drug, contrary to s. 3 of the Misuse of Drugs Act 1977 and count number two charged possession of a controlled drug for the purposes of selling it or otherwise supplying it to another, contrary to s. 15 of the Misuse of Drugs Act 1977. These guilty verdicts were both by a majority of eleven to one.

2. On the same occasion the jury acquitted the appellant of count number three on the indictment, which had charged possession of a controlled drug with a market value of €13,000 or more for the purposes of selling it or otherwise supplying it to another, contrary to s. 15A of the Misuse of Drugs Act 1977.

3. The appellant was subsequently sentenced on the 31st January, 2014 to six years imprisonment with the final three years suspended on count number one, and to ten years imprisonment with the final three years suspended on count number two, the sentences to run concurrently and to date from that date.

4. The appellant has appealed against his conviction and, in the event that he is unsuccessful in that, against the severity of his sentences.

5. This judgment relates to the conviction issue only.

Uncontroversial evidence
6. On the 21st August, 2012, Customs Officer Donna Kenwright was on duty in a FedEx warehouse attached to Dublin airport, and physically located in Santry. While examining packages there, in the course of a spot check, Officer Kenwright selected a package originating in Brazil, with a final delivery address in the Lucan area.

7. The package contained a number of articles including clothing, handbags and a cot bumper set. However, upon closer examination it became apparent that the lining of the handbags, and of a leather jacket amongst the clothing, along with the duvet from the cot bumper set, contained what appeared to be a hard white substance. After coming to the view that this may be a controlled substance, namely cocaine, Officer Kenwright conducted a field test.

8. The package was then seized, and An Garda Síochána were called. Custody of the package was handed over by Officer Kenwright to Detective Garda John Dunning of the Garda National Drugs Unit and it was determined that a 'controlled delivery' would take place.

9. In effecting this 'controlled delivery' Detective Garda John Dunning posed as a FedEx delivery man, and attended at the premises in Lucan on a number of occasions throughout the following week. A number of unsuccessful attempts were made to deliver the package and communication between Detective Garda Dunning and the intended recipient of the package occurred in order to organise a time to deliver same.

10. On the morning of the 28th August, 2012, Detective Garda Dunning was advised by telephone that the person intending to collect the package was not available, and that a friend of his would receive delivery of same. Detective Garda Dunning went to the delivery location, wherein he observed the appellant approach him for collection of the package on behalf of the intended recipient "Sean Kelly". The appellant produced identification when requested, and then proceeded to sign for and accepted receipt of the package. The appellant was then observed approaching a nearby vehicle, placing the package in the back seat and then getting into the front seat, wherein he had a brief conversation with the driver before exiting the vehicle again.

11. The vehicle containing the package was followed for a time by members of An Garda Síochána, who then stopped it and arrested the driver. The package was subsequently removed from the vehicle and was taken to Ronanstown Garda Station. Following being subjected to forensic analysis, the items in the package were confirmed as having quantities of cocaine secreted within them, which in aggregate weighed 2,042.3 grams with an estimated street value of in excess of €140,000.

12. Later on the same day, the home of the appellant at 60 The Village, Porterstown, Dublin 15, was searched pursuant to a search warrant and a customer copy of the FedEx receipt related to controlled delivery effected by Detective Garda Dunning was located there. Nothing else of evidential value was located. The appellant was present in the house during the said search, but throughout it had remained seated in the sitting room on the instructions of gardaí.

13. Following the said search, at 2.58pm on the 28th August, 2012, the appellant was purportedly arrested at his home by Sergeant Richard Byrne, for an offence contrary to s. 15 of the Misuse of Drugs Act 1977 and was conveyed to Ronanstown Garda Station. He was presented to the member in charge, Sergeant Stephen Martin, who decided, under the provisions of s. 2 of the Criminal Justice (Drug Trafficking) Act 1996, that he should be detained for a period of up to six hours commencing from the time of his arrest for the

proper investigation of the offence for which he had been arrested. The appellant's said detention was later purportedly extended for a further period of up to eighteen hours. The appellant was interviewed on five occasions in total while he was being detained at Ronanstown Garda Station.

14. The appellant was interviewed once during the initial period of his detention. The appellant's responses to the questions that were asked in the course of that interview were entirely exculpatory.

15. The appellant's detention was purportedly extended by Superintendent Dermot Mahon at 8.48pm on the 28th August, 2012 with the intention that it would take effect upon the expiry of the initial period of six hours commencing from the time of his arrest.

16. The appellant was then interviewed on a further four occasions during the period of the purported extension. Unlike in the case of the first interview, the appellant's responses to questions asked in the course of these four interviews were inculpatory.

17. These inculpatory responses were placed before the jury at the trial and were relied upon by the prosecution as evidence of the appellant's guilt.

The Voir Dire

18. At the trial, the defence had sought to have the evidence comprising these inculpatory responses excluded on the basis that they had been procured during a period when the appellant was in unlawful detention. While it was accepted that the appellant had been validly arrested, it was contended that it was incorrect to say that the appellant had been arrested at 2.58pm on the 28th August, 2012. Rather, it was contended, the appellant's liberty was constrained from 2.00pm on that date and he was *de facto* under arrest from that time. If the defence were correct in this, it meant that the period of six hours from the appellant's arrest expired at 8.00pm on that date, and not at 8.58pm on that date as the prosecution were contending. The significance of this was that if the time of arrest was in fact 2.00pm on the relevant date then the first period of extension would have expired before Superintendent Mahon purported to extend it. As the appellant's detention had not been purportedly extended until 8.48pm, this meant that any extension was 48 minutes too late if the defence were correct, although still within the permitted time by a 10 minute margin if the prosecution were correct.

19. There is no provision in law whereby an expired period of detention can be reactivated or extended. Accordingly, if the first six hour period had expired at the time of the purported extension it meant that the extension was ineffective and the appellant was in unlawful detention at the time that he made his inculpatory responses. If that was so, the trial judge was obliged to exclude them.

20. In the circumstances the trial judge decided to hear evidence in the absence of the jury concerning the circumstances of the appellant's arrest.

21. Evidence had already been adduced before the jury from Sergeant Byrne who had stated that he arrived at the address where the appellant lives at 2.00pm on the 28th August, 2012, that the appellant was there, that a search was conducted and that an item, the FedEx receipt, had been seized in the course of that search. He had further stated that he personally had arrested the appellant at 2.58pm on suspicion of having committed an offence contrary to s.15 of the Misuse of Drugs Act, following which the appellant had been conveyed to Ronanstown Garda Station.

22. Sergeant Byrne then gave further evidence upon the *voir dire* that when he first saw Mr Twesigye he was in the front room of his house, and he was already with some gardaí at this point. These were gardaí from the Garda National Drugs Unit (GNDU). He could not remember the names of these gardaí. He did not know at that point that the appellant had been in his car outside the house when approached by these gardaí and that he had been brought back into the house. He was unaware whether it had been indicated to the appellant whether or not he was free to leave.

23. While Sergeant Byrne was being subsequently cross examined by counsel for the appellant the following exchange took place:-

> "Q. Now, in the time he was in the house when you were searching it, was he free to leave?
>
> A. I'm unaware was he free to leave. Yes, he was free -- I imagine he was free to leave. He wasn't under arrest at that point.
>
> Q. Legally he wasn't under arrest?
>
> A. Legally he wasn't under arrest.
>
> Q. Would he have been allowed to leave?
>
> A. He was being questioned at the time -- well, not being questioned. He was present at the time of the search, he was legally free to leave from --
>
> Q. Would you have let him leave?
>
> A. Would I have let him leave? At that point, I hadn't made my decision to arrest. I can't really comment on that."

24. The appellant himself gave evidence on the *voir dire* and described the circumstances in which he was first accosted by members of the gardaí. He described being seated in his parked car outside his home, accompanied by his girlfriend, and being about to leave when his phone rang and he paused to take the phone call. He then described in the following exchange what had happened while he was on the phone, and subsequently:-

> "A. … Then I was on the phone. A car came in front of the house. What happened we are coming this way, my girlfriend was shouting, "What is -- is he driving? What is he driving?" There and then, some men came out, shouting, "Guards, guard, guards, guard." They observed the --
>
> Q. Are these uniformed officers or not?
>
> A. No.
>
> Q. Okay. Go on?

A. They opened the door, told me to step out. The phone was collected from me, so --

Q. You were on the phone; is that what you're saying?

A. I was on the phone.

Q. Okay?

A. And it was collected from me. I stepped out of the car. They asked me where I was at in the morning. I said I was in Lucan. I don't understand. One of them said, told me to go into the house. I said of course. We now went into the house. I vividly remember Sergeant -- I don't know his name, but he's at the back, he's now sitting --

Q. A guard, is it?

A. He's a sergeant like this.

Q. Sergeant Byrne, the man wearing glasses or --?

A. No, he's not wearing glasses.

Q. Okay. Another member who was present?

A. I remember about him. He now asked me if I have any child. I said yes. He asked me how old is the child. I said five. He now said to me that I'm in big trouble, that I'm not going to see the child to the next 15 years. So, the other sergeant arrested me was just there, they were just there, and the other people were just walking in the house. Then the -- the warrant was presented to me that the house would be searched. Then after searching they --

Q. Can you just explain, Mr Twesigye, just from the point when you were in the car on your phone to the point when you got to the house, if you just explain to the judge what happened in between those two?

A. What happened was that I was separated from my family. My girlfriend was told to stay with the kids and I was taken to the house. Then I was left to sit in the sitting room of the house and I was told not to go anywhere. Then the guards are walking in the house. They went into the kitchen, some went upstairs, and I was told to sit in the sitting room of the house. When they were done, they now took me in the car and took me to Ronanstown Garda Station.

Q. And prior to that you were told just to -- you were told that you weren't to go anywhere and you were to sit in the front room; is that correct?

A. Yes, I was told to sit in the sitting room.

Q. Do you remember which garda told you that?

A. Do you know what, I remember, what I remembered was him telling that I am in big trouble, to get -- I remember that thing because he mentioned about my child, that I'm not going to see the child for the next 15 years, that's what keep occurring. The image was still in my brain, 15 years, 15 years --

Q. And I take it that when you were conveyed to the patrol car, the garda car, that were handcuffed; is that right?

A. Yes, of course.

Q. At what point were you handcuffed?

A. In the sitting room when they must have gone up and down in the house, they came and told me that I'm under arrest and put the handcuffs on me and took me away."

25. While the appellant was under cross-examination there were the following additional exchanges between counsel and the appellant:-

"Q. You were told to wait in the sitting room; is that correct?

A. Yes.

Q. Yes. Was that -- that was while the guards were searching the house presumably; is that correct?

A. They read the warrant, one of guards --

Q. Yes?

A. -- told me that this house is under search based on drugs offence.

Q. Yes. Yes. And you waited in the sitting room while the guards searched the house?

A. Yes. And one of them was just in the sitting room.

Q. Yes?

A. One of them was just standing in the sitting room, maybe to check my movement if I'm going to leave or not.

Q. Yes, yes, indeed. And you were about 20 minutes in the sitting room, is that right, that's your evidence?

A. Thereabout.

Q. Yes. And you weren't in handcuffs for all of that period?

A. No.

Q. And if I understand your evidence you did have handcuffs placed on you when you were arrested?

A. When after he read me -- after he said to me I was arrested and he placed the handcuffs on me and I was taken away.

Q. I see, I see. And then you were taken away?

A. Exactly."

26. Somewhat unsatisfactorily, the gardaí who had encountered the appellant on the phone in his car, and who had accompanied him back into the house, were not called as witnesses either on the *voir dire* or before the jury. This Court infers that these gardaí, who have not at any stage been identified by name either to the court of trial or to this Court, may have been the gardaí from the GNDU who were with the appellant in the front room of the house when Sergeant Byrne arrived. At any rate, there were no statements from these gardaí included in the Book of Evidence, nor were any such statements served as additional evidence, nor were any such statements disclosed to the defence as unused material. In fact there is nothing to suggest that statements were ever taken from the gardaí in question. Such explanation as has been proffered for this ostensible omission is to the effect that the issue raised on the *voir dire* was not one that had been anticipated, and it had not been recognised that these gardaí might be needed or that they might have anything to contribute to the trial.

27. Relying on *The People (Director of Public Prosecutions) v Boylan* [1991] I.R. 477, counsel for the appellant submitted to the trial judge that his client had not in fact been at liberty from at least 2.00pm; that the evidence pointed only one way, namely that the appellant would not have been allowed to leave if he had attempted to do so, and that accordingly the first period of detention should be calculated as running from 2.00pm.

28. It was further argued in the alternative that if the appellant was not in fact arrested until 2.58pm, that arrest followed on from the appellant having been held in unlawful detention for 58 minutes and that had negative implications for the lawfulness of his subsequent detention.

29. In response, counsel for the respondent contended that the appellant was not arrested until 2.58pm and that prior to that point he was not in detention. He stressed that the appellant was not restrained and was not physically deprived of his liberty until after Sergeant Byrne had effected the formal arrest at 2.58pm, following which he was then handcuffed. He submitted that, on the evidence before the court, it would be going too far to find that the appellant had been *de facto* in detention from the moment that the gardaí entered the house.

30. The trial judge, having heard the evidence adduced, and counsel's submissions, ruled as follows:-

"JUDGE: He was arrested at 2.58.

MR BAKER: Yes.

JUDGE: Sergeant Byrne hadn't made up his mind to arrest him prior to that. When he was asked was he free to leave prior to that, he hadn't made his mind to arrest him, he answered, so he can't comment on that. He was seated in the sitting room, and his -- Mr Twesigye's evidence was that he was told not to leave. The arrest was at 2.58, the search was going on prior to that. In Mr Twesigye's evidence, it went on for about 20 minutes, and he said that he was 20 minutes in the sitting room and he was told to sit in the sitting room and he could not go anywhere. Sergeant Byrne said that he hadn't made up his mind to arrest him, so the arrest was at 2.58, and that is the time of the arrest and the time flows from there. That person, Mr Twesigye, had come from the earlier incident in his house, and it's not correct to say that the evidence of the prosecution was that it was obvious he was going to be arrested. The sergeant's clear evidence is that he hadn't made up his mind to arrest him prior to 2.58, so time runs from 2.58 until the period of extension."

The Judge's Charge

31. The judge's charge in the case was uncontroversial. However, one aspect of it requires to be highlighted for reasons that will become apparent. Having explained the ingredients of all three offences on the indictment she initially told the jury:-

"Consider each of those counts separately as if you were considering three different cases. When you come to decide the verdict, you write guilty or not guilty in the box applicable."

32. Subsequent to this counsel for the respondent raised the following requisition which was agreed to by the trial judge:-

"MR BAKER: Yes, Judge, just something that springs to mind. I don't think there's a hard and fast rule about this but there is certainly a view that the charges are alternative charges in the sense that some judges, as I understand it, take the approach that the 15A should be looked at first, and that they will work backwards from that point. In other words, if the 15A if they are satisfied that is there, that's the end of the matter, they don't need to consider the 15 or the 3.

JUDGE: All right, okay, we'll bring them back and tell them that; are you in agreement?

MR DEVALLY: I think that might be sensible. We agree the facts are 15A but I think --

JUDGE: Yes, that's fine. All right."

33. The trial judge then recharged the jury as follows:-

"JUDGE: All right, just for your assistance, you know there's three counts: first of all the possession count, next the possession for the drugs for selling or otherwise supplying it to another, and the third, possession for the purpose of selling or otherwise supplying it to another when the market value of same exceeded €13,000 or more. Consider count No.

3 first, all right, that's where the market value exceeds €13,000 or more, and if you're satisfied beyond a reasonable doubt of that, there's no need to go back to the other two, okay? It just makes sense really, all right, okay."

The grounds of appeal
34. The appellant's Notice of Appeal against his conviction advances two grounds of appeal. These are that:

> (i) The learned trial judge erred in law by holding that the memoranda of interview should be admitted in evidence and by rejecting the argument put forward by Counsel for the appellant as to their inadmissibility
>
> (ii) The jury verdict convicting the Appellant of an offence contrary to section 15 of the Misuse of Drugs Act 1977 was perverse and should be quashed by this court in circumstances where the proofs necessary for that offence were the same for those necessary for an offence contrary to section 15A of the Misuse of Drugs Act 1977 as amended and the value of the drugs had not been put in issue by the defence.

The First Ground of Appeal

Submissions on behalf of the appellant
35. Counsel for the appellant has submitted to this Court that the trial judge erred in law in deciding that the detention of the appellant should not be calculated from the moment he was detained in his property i.e. 58 minutes prior to the formal arrest of the appellant by Sergeant Byrne.

36. The Court was referred to the case *of People (DPP) v Conroy* [1986] 1 I.R. 460 where the Supreme Court held that the onus of proof is on the State to establish either that a person's custody was legal or, further, that he was not in custody. The Court was asked to note that in his judgment in that case Finlay C.J. had also stated that the mere fact that a person did not ask to leave was not determinative of the issue as to whether they were present voluntarily or against their will.

37. The Court was also referred to *Dunne v. Clinton* [1930] I.R. 366 wherein Sullivan P. held that: "In law there can be no half-way house between the liberty of the subject, unfettered by restraint, and an arrest". Accordingly, it was submitted, the consequence of the appellant being put in the sitting room of his house, away from his family and being told by gardaí that he may not leave there, was that the appellant was under *de facto* arrest. It was submitted that Sergeant Byrne's evidence that he hadn't made up his mind to arrest the appellant before completing the search was irrelevant to the fact that the appellant was not free to leave his own house.

38. It was further submitted that in this case the members of An Garda Síochána had the reasonable suspicion required to affect an arrest when they arrived at the appellant's home by virtue of the fact that the appellant had been witnessed by numerous members of An Garda Síochána both signing for, and taking possession of, the package containing the drugs. Counsel for the appellant contends that, given that the standard of reasonable suspicion, required to ground an arrest, is no higher than that the garda must consider that there is a "possibility which is more than fanciful, that the relevant facts exist" (see *The People (Director of Public Prosecutions) v. O'Driscoll* [2010] IESC 42), any garda acquainted with the investigation would have been entitled to effect an arrest based on what they knew before the search.

39. It was further submitted that it was casuistic to suggest that the decision to arrest the appellant was made subsequent to the search of the property. If that had been the case, there was no reason to prevent the appellant from continuing his clearly intended car journey.

40. Counsel for the appellant placed emphasis on the fact that no explanation was proffered on behalf of the prosecution as to why a delay of 58 minutes occurred in effecting the formal arrest of the appellant.

41. Counsel for the appellant has also once again advanced the alternative argument that if the appellant was not in fact arrested until 2.58pm, his subsequent detention was tainted by the fact that he was unlawfully deprived of his liberty during the 58 minute period that immediately preceded his arrest.

42. Once again, reliance was placed on *The People (Director of Public Prosecutions) v Boylan* [1991] I.R. 477. The Court was also referred to *Oladapo v Governor of Cloverhill Prison* [2009] I.L.R.M. 166 in that context. It was submitted by counsel for the appellant that "these judgments are clear authority for the proposition that unlawful detention will render what flows from it unlawful, i.e. that any following arrest will be unlawful where it follows an illegal period of detention in a direct manner and where there is no interlude of liberty between the earlier illegal detention and the later arrest."

43. The Court was also referred to *O'Malley The Criminal Process* (Dublin, 2009), where the author states at paragraph 10.23, that:-

> "It has been said that a person can properly be treated as under arrest when he is taken into custody whether from a state of freedom or while already under arrest...
>
> It also appears that an arrest is lawful even though it is made after a period of unlawful detention. In such circumstances, however, the person should be released from unlawful custody as soon as the illegality becomes known or apparent...
>
> Any later arrest is likely to be tainted with illegality if it follows upon an earlier unlawful arrest and detention without any intervening period of liberty, no matter how short that may be."

Submissions on behalf of the respondent
44. Counsel for the respondent contends that it was implicit in the trial judge's ruling that she did not accept the evidence given by the appellant that he had been unlawfully detained for 58 minutes prior to the arrest of him effected by Sergeant Byrne at 2.58pm on the 28th August, 2012.

45. It was pointed out that even on the appellant's own evidence there was no suggestion of physical restraint in the sitting room. It was common case that handcuffs were only placed on the appellant upon his arrest at 2.58pm and physical force was not a feature

of the evidence at any stage. No family member present at the scene was called by the appellant to support his version of events.

46. In addition, the court had heard the evidence of Sergeant Byrne who had expressly stated that the appellant was not under arrest during the relevant period, that he was merely present at the time of the search, and that while the search was continuing he (Sergeant Byrne) had not made up his mind to arrest the appellant.

47. The Court is asked to note that, admittedly subsequent to the ruling on the *voir dire*, it became manifestly clear on any view of the evidence that, in respect of certain matters, the appellant had either lied to the gardaí, or alternatively he was lying to the jury. The appellant had made admissions during formal interviews that he himself claimed in evidence were lies. He freely accepted that he had told lies during the course of said interviews when making inculpatory assertions. Indeed, having lost the issue on the *voir dire* it was an integral part of his defence later in the trial to seek to minimise the effect of such admissions by claiming that they were fiction. One thing was abundantly clear, however: either he had told lies to the gardaí or he was lying in the witness box. Either way, there was clear evidence that he had a propensity for lying.

48. While this propensity for lying had only been conclusively demonstrated after the ruling on the voir dire, it was submitted that the Court should not lose sight of the fact that the trial judge heard the relevant evidence first hand and was best placed to assess and form a view concerning the credibility and reliability of the witnesses testifying before her.

49. The respondent submitted that the trial judge was fully within her rights, based on the evidence heard, to implicitly reject the appellant's version of events and find that there was no unlawful detention. She was further entirely within her rights to accept Sergeant Byrne's evidence that he had not made up his mind to effect an arrest prior to 2.58pm and that the appellant's detention time correctly starts from that point.

50. It was further submitted that the case of *The People (Director of Public Prosecutions) v Boylan* was distinguishable on its facts. In *Boylan* the applicant was the driver of a truck with a container vehicle which, on being searched by the gardaí, was found to contain a quantity of cannabis. This was at the ferry port at Alexandra Road in the city of Dublin. The applicant was subsequently arrested and was brought to a garda station where he was detained under s.4 of the Criminal Justice Act 1984. Whilst the drug was found in his possession in the sense that it was in the truck, the case for the prosecution depended upon a statement made by him whilst in the garda station. In this statement he admitted his involvement in the smuggling of the parcel of cannabis, for which he was to be paid a fee of £2,000. The admissibility of this statement depended upon him being in lawful detention at the time it was made. As in the present case, whether or not he was in lawful detention at all material times depended upon the time at which the six hour period allowed for under s.4 of the Criminal Justice Act 1984 commenced to run. That in turn depended on the time at which he was *de facto* arrested.

51. The evidence was to the effect that the vehicle was stopped at about 9.30pm on the night of the 21st July, that the hold-all containing the cannabis was found in a contrived well in the centre of the loaded vehicle and that the search continued for some time after that, although it was common case that no other parcel, of which there were a number in the vehicle, was opened and that a number of carboys which contained a dangerous chemical were not interfered with. But the applicant was detained at the ferry port for about two hours; his detention there before he was brought to the garda station was purportedly justified by reference to s. 23 of the Act of 1977, as amended by s. 12 of the Act of 1984, to the effect that, where a member of the Garda Síochána decides to search a vehicle 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 make any one or more or all of certain requirements and, in particular, may 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 the paragraph remains in force.

52. The requirement made of the applicant was not that he be in or on or accompany the vehicle, but rather that he go to a shed down at the Alexandra Road ferry port to meet, if not to be interviewed by or questioned by, a number of members of the Garda Síochána; that continued for a period of two hours.

53. This case was made on his behalf at the trial when, at the trial within the trial, the judge found that he was detained there so that the search might continue. He himself was not searched; the actual search of the vehicle was minimal at that time, further searching taking place the following day. The Court of Criminal Appeal was not satisfied that he was other than arrested at 9.30am or approximately shortly thereafter when he was detained by the gardaí at the ferry port.

54. In *Boylan*, the applicant's detention in a shed for two hours prior to him being brought to the Garda Station was carried upon the untenable pretext that it was covered by s.23 of the Act of 1977 when it was manifestly not so covered. It was clearly unlawful. However, counsel for the respondent has submitted, there was nothing of the sort in the present case. It was legitimate for the gardaí to request the appellant to accompany them into his home and remain there while it was being searched. It was also reasonable to request him to remain in one room in the house so as not to impede the search. In requesting his co-operation in that regard they were not arresting him, nor constraining his liberty in any way.

55. The Court was further referred to the case of *The People (Director of Public Prosecutions) v. Jerry O'Shea* [1996] 1 I.R. 556. This concerned a drugs case where the applicant had been initially arrested by a customs officer under s.186 of the Customs Consolidation Act 1876. The gardaí were contacted and on arrival a member of An Garda Síochána effected another arrest approximately 90 minutes later. An inculpatory statement was made thereafter whilst he was in s.4 detention. It was submitted that the arrest by the garda was invalid since at that time the applicant was still under arrest by the customs officer. However, the Court of Criminal Appeal held that the fact that the applicant had previously been arrested by the customs officer did not invalidate the subsequent arrest by the member of An Garda Síochána, and that his s.4 detention had commenced at the time of his arrest by the garda.

56. It was further submitted, without prejudice to the respondent's primary submission, that the trial judge had implicitly rejected the applicant's testimony that even had some form of illegality been present, its consequential effect was minimal and the interviews in dispute ought to have been ruled admissible in any event.

57. In support of this last submission, the Court was referred to *The People (Director of Public Prosecutions) v. Liam Bolger* [2013] IECCA 6 (unreported, Court of Criminal Appeal, 14th March, 2013). In that case the applicant alleged he had been placed in unlawful detention for a period of approximately 45 minutes prior to his arrest. The vehicle in which he had been traveling was stopped by Gardaí at 4.45pm on the date in question. There were discussions between him and the gardaí and he was invited to produce his documents. He contended that from 5pm onwards his freedom was unlawfully constrained although he was not formally arrested until 5.45pm. It was submitted that this tainted the arrest and his detention and thus the exclusionary rule would apply to any evidence obtained. While the trial judge made a ruling that there was indeed a detention which was unlawful, he held that the first arrest in relation to the proceedings at hand was at 5.45pm and thus there was no issue of an arrest upon an arrest, or the necessity of a

release prior to the arrest, and therefore, in all the circumstances of the case, there was no unlawful arrest. The Court of Criminal Appeal affirmed this ruling. It found (paragraph 13, per Denham C.J., giving judgment for the court):-

> "While the Court has considered the finding of the Learned Trial Judge and the submission of counsel, it does not believe that the matter warrants any consequent effect, in all the circumstances of the case. The arrest was based upon reasonable suspicion, which was independent of any issue of detention."

58. The Court was told by the respondent to bear in mind that during the course of the disputed 58 minutes under which a search was conducted in the present case, the appellant did not make any inculpatory admissions. Further, all that was gleaned from the search while the appellant waited in the sitting room of his own house was a FedEx slip. The item was found in the house and it was submitted that it is reasonable to infer in the circumstances that the suspicion grounding the arrest was, to quote the *Bolger* case cited above, "independent of any issue of detention."

Analysis and Decision

59. This Court considers that it is, in effect, being asked by the appellant to find that on any fair assessment of the evidence before her, the trial judge could not have arrived at the conclusions that she did, namely that the appellant was not in *de facto* detention from 2.00pm on the relevant date, and that he was in fact arrested and detained for the first time at 2.58pm on that date; and have been satisfied in respect of them to the standard of beyond reasonable doubt. The Court does not agree with this contention.

60. It is certainly the case that the trial judge was faced with somewhat conflicting evidence. She had the evidence of Sergeant Byrne, and of the other gardaí concerning the background which led to the decision to search the appellant's home, on the one hand and the evidence of the appellant himself on the other hand. To find as she did required her to regard the evidence of Sergeant Byrne and his colleagues as being credible and reliable, and to be satisfied to the standard of beyond reasonable doubt as to the correctness of their account; and equally to reject the conflicting aspects of the appellant's testimony as being not credible and/or as being unreliable and as not having raised any reasonable doubt in her mind as to the correctness of the alternative account.

61. In her ruling on the *voir dire* the trial judge expressly referred to the evidence of Sergeant Byrne that he had not made up his mind to arrest the respondent prior to 2.58pm, and it is clear from the tenor of her remarks that she was accepting his evidence in that regard. The trial judge also referred to the evidence that had been given by the appellant, and while she does not state in terms that she was rejecting it, and, if so, her reasons for rejecting it, it is nonetheless clear from the ruling read as a whole that she was rejecting his evidence. It is implicit that she preferred the evidence of Sergeant Byrne and his colleagues to that of the appellant, and regarded the testimony of the former as both credible and reliable, and the latter to the extent that it conflicted with it as not credible and/or reliable.

62. In the Court's view the trial judge was the person best placed to assess the credibility and reliability of the various witnesses who gave evidence relevant to the issue. Unlike an appellate court, which has to operate solely on the basis of the transcript of what was said in the court below, the trial judge is in the unique position of being able not just to note what is being said by a witness but also to observe the relevant witness while he is giving his evidence, and to form an impression of the witness's credibility and reliability. The judge can observe the witness's body language and general demeanour while he is in the witness box, and particularly while under cross-examination. The trial judge may pick up on nuances that will not be apparent to an appellate court from a mere reading of the transcript. For these reasons an appellate court should exhibit great reluctance to interfere with the assessment of a trial judge as to a finding of fact on a *voir dire* if there was any evidence capable of supporting it.

63. The trial judge's determination involved a mixed question of fact and law. To the extent that it involved issues of fact, the trial judge accepted Sergeant Byrne's evidence that he had not made up his mind to arrest the respondent prior to 2.58pm. This finding was against the background of undisputed evidence that no restraint was used prior to 2.58pm; the appellant's own evidence that when asked to return to the house having been accosted while on the phone in his car he had replied "of course"; the ostensible purpose for which he was asked to return to the house, namely to be present and available to the gardaí during their search of his home; and the specific evidence of Sergeant Byrne that the appellant was not under arrest prior to 2.58pm. Accordingly there was evidence capable of supporting the trial judge's finding and this Court finds no basis to interfere with it. While it might have been preferable if the court of trial had had the opportunity to hear from the gardaí who actually requested the appellant to return to the house and remain in the sitting room, the fact that such evidence was not adduced would not have prevented the trial judge from being satisfied beyond reasonable doubt as to what had occurred, particularly in circumstances where the appellant's own testimony was that he had indicated immediate agreement to returning to the house.

64. It is necessary to comment that it is entirely reasonable for members of the gardaí who are about to conduct a search of a dwelling house to want the householder to be present and available to them, while at the same time to remain in one location within that premises or in the vicinity so as not to impede the search operation. They may wish to ask questions of him in connection with facilitating the ongoing search operation, or to explain items found in the search, or to provide assistance such as locating the key to a locked door, or some locked cupboard door, in the premises. There is nothing wrong with requesting a householder to remain while a search is being conducted. To do so will not, *per se*, amount to the detention of that person. A householder is not obliged in those circumstances to remain but as it is his home that is being searched it could hardly be regarded as remarkable if, as the evidence suggests occurred in the present case, such a request was readily complied with. It must also be appreciated that there is no obligation on a garda who possibly has grounds to perform an arrest, or who has in mind to perform an arrest, to proceed immediately to effect the arrest. Whether or not a person in whom the gardaí are interested is to be regarded as having been held in *de facto* detention during a search will depend on the circumstances of the particular case. In the present case the trial judge considered that the appellant was not in detention while the search was proceeding and this Court does not consider that the validity of that assessment has been impugned.

65. The Court agrees with counsel for the respondent that the case of *The People (Director of Public Prosecutions) v Boylan* is readily distinguishable on its facts. The pre-arrest detention in *Boylan* was effected on a clear pretext, and was patently unlawful. Moreover, the fact that the applicant in that case was detained (i.e., held against his will in a shed) was beyond dispute. The purported justification of it on the basis of s.23 of the Act of 1977 was wholly untenable. There was nothing of the sort in the present case.

66. The Court is satisfied that the trial judge's ruling was lawful, and that accordingly the appellant's first period of s. 2 detention ran from 2.58pm on the 28th August, 2012 when he was lawfully arrested by Sergeant Byrne. That being so, his detention was lawfully extended by Superintendent Mahon at 8.48pm on the same date, and the inculpatory responses that he made to questions asked of him in subsequent interviews were properly admissible before the jury.

The Second Ground of Appeal

Submissions on behalf of the appellant
67. It was submitted on behalf of the appellant that for the jury to have convicted him of an offence contrary to s.15 of the Act of 1977, while acquitting him of an offence contrary to s.15A of that Act, in circumstances where he was not disputing the prosecution's evidence as to the value of the drugs was inconsistent.

68. The Court was referred to *The People (Director of Public Prosecutions) v. Maughan* [1995] 1 I.R. 304 as being authority for the proposition that this Court has jurisdiction to quash a conviction in circumstances where a jury has returned inconsistent verdicts.

69. It was submitted that it was clear that the jury did not properly consider the evidence which was before them.

70. It was further submitted that in the instant case, in applying their minds to the evidence before them, the jury could not reasonably have come to the conclusion that the appellant had committed an offence contrary to s. 15 of the Act of 1977 without also reaching the conclusion that he had committed the more serious offence contrary to s. 15A of the same Act. It was submitted that it was logically impossible for the jury to have reached the decision that they did. The decision to convict the appellant of one offence while acquitting him of the other was a decision which no reasonable jury, properly applying itself to the evidence of the case, could have reached. Counsel for the appellant contended that on any objective viewing of the facts in the instant case, it was patent that no confidence could be had in the jury's decision to convict the appellant of the s. 15 offence.

71. Finally it was further submitted that the jury had ostensibly acted "in flagrant disregard" of the judge's recharge to them following counsel for the respondent's requisition, and that this rendered their [insert] all the more extraordinary and unreasonable.

Submissions on behalf of the respondent
72. It was observed by counsel for the respondent if any verdict was objectively inconsistent with the evidence, it was the verdict in respect of the acquittal of the appellant regarding the 15A count.

73. It was submitted that it is not the case that the proofs in respect of s.15 and s.15A offences are the same. A s.15A offence has an additional ingredient that must be proven, i.e., that the value of the drugs possessed was €13,000 or more.

74. The respondent also relies upon the *Maughan* decision but contends that the Court in *Maughan* made it clear that an appellate court may only intervene to quash a conviction where the appellant establishes that no reasonable jury could properly have reached the verdicts that it did. Counsel for the respondent emphasises that the power to quash is discretionary and before it may be exercised in favour of quashing of a verdict the specified pre-condition must be satisfied. He submitted that in the present case the precondition has not been satisfied because this Court could not be satisfied that no reasonable jury could properly have reached the verdicts that it did.

75. In development of the last point, it was further submitted that while the jury's deliberations are necessarily conducted in private and the Court is not privy to the rationale behind its verdicts, it is nonetheless possible to conceive of a reasonable basis upon which they could have arrived at the conclusion they did in respect of the s.15A count. While the trial Judge's charge referred to the requirement of knowledge and control in relation to possession of the drugs at several points, it was never expressly stated to the jury that in respect of the s.15A count specifically, there is no requirement in law for the prosecution to prove that the accused had knowledge that the value of the drugs in his possession had a market value of €13,000 or more, as was held in *The People (Director of Public Prosecutions) v. Ronan Power* [2007] IESC 31 (unreported, Supreme Court, 26th July, 2007).

76. It was submitted that the issue of requisite intent may have been on the jury's mind because they returned with a question prior to their verdicts seeking further "clarification on possession, the legal term, and intent to sell, or an intent to sell or supply". While their request was not specific to the extra ingredient that has to be proven to establish the s.15A offence, counsel for the respondent has submitted that the jury may well have incorrectly formed the view that they needed to be satisfied beyond a reasonable doubt that the appellant was aware that the drugs were of a value in excess of €13,000, and may not have been so satisfied on the evidence before them.

Analysis and Decision
77. A detailed consideration of the *Maughan* case is instructive. The facts are summarised in the headnote as follows. In October, 1991, two men, armed with knives, broke into a house in Dublin; they bound and gagged the occupant and left with certain property including a bottle of brandy. Shortly thereafter, the applicant was arrested nearby when he had in his possession the bottle of brandy and a piece of glass which had been broken from a chandelier in the victim's house. The victim was unable to give evidence identifying the applicant as one of the two men who had broken into his house. The applicant was tried and convicted in the Circuit Criminal Court on three counts, *viz*., aggravated burglary, false imprisonment and handling stolen property; he was sentenced to concurrent terms of five and a half years imprisonment on each of the first two counts. Leave to appeal against conviction and sentence was refused. The applicant appealed this refusal to the Court of Criminal Appeal. Counsel argued, on behalf of the applicant, that the verdict of guilty in respect of the first two counts was inconsistent with the verdict of guilty in respect of the third count, that the trial judge had directed the jury that the third count was an alternative to the first two and that the applicant was, accordingly, entitled to have the convictions quashed.

78. The Court of Criminal Appeal quashed the convictions. Giving judgment for the court, Blayney J. explained their reasons for doing so:-

> "The principal ground of appeal relied upon by the counsel for the applicant was that 'the verdicts of guilty returned in respect of counts 1 and 2 in the indictment were (in all the circumstances of the case) inconsistent with the verdict of guilty returned in respect of count 3 thereof.' Counsel submitted that the applicant could not in law be guilty both on count 1 of an offence which involved theft, and on count 3 which related to the handling of stolen property. The verdicts were accordingly inconsistent and the applicant was entitled to have them quashed.
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> In support of his submission counsel cited the following passage from Archbold *Criminal Pleading, Evidence and Practice* (1993 edition) at paragraph 7-66:—
>
> > 'An appellant who seeks to obtain the quashing of a conviction on the ground that the verdict against him was inconsistent with his acquittal on another count has a burden cast upon him to show not merely that the verdicts on the two counts were inconsistent, but that they were so inconsistent as to call for interference by an appellate court. The court will interfere if it is satisfied that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion which was reached.

Counsel also referred to *The Attorney General v. Byrne* (1966) 1 Frewen 303. That was a case tried before His Honour Judge Conroy in the Circuit Court. There were two counts in the indictment, the first one being for theft and the second for receiving stolen goods. The jury returned a verdict of guilty on both. Judge Conroy told them that they could not convict on both charges and the foreman of the jury replied that they had a doubt about the second count. Judge Conroy then suggested that the jury should strike out their finding on count 2 and the verdict on this count was duly changed. The Court of Criminal Appeal held that in the circumstances the accused's conviction on the first count should be quashed and they ordered a retrial. It held that the proper course for a judge to take in those circumstances was to redirect the jury and send them back again to reconsider their verdict. They held that it was inappropriate for a judge at the trial to join with the jury in amending a verdict. Counsel for the applicant submitted that if we were to attempt to interpret what the jury had meant to do in the present case we would be falling into the same error. He submitted that what the trial judge ought to have done was to have told the jury again that they could convict on one or other of the charges but not on both. That would then have given a consistent verdict.

The Court is satisfied that counsel's submission on this ground of appeal is well-founded. In *R. v. McKechnie* (1992) 94 Cr. App. R. 51, Auld J. dealt as follows in his judgment with the question of inconsistent verdicts: (p. 59)

> 'Not every inconsistency between verdicts justifies interference by this Court. The principle well established in a number of cases is that where there is such an inconsistency the Court of Appeal will only intervene to quash a conviction where the appellant establishes that no reasonable jury could properly have reached the verdicts that they did.
>
> In *Drury* (1971) 56 Cr. App. R. 104 a decision of this Court, Davies L.J. (as he then was) at p. 105 referred to the verdicts which the Court set aside because of inconsistency as "wholly incomprehensible".
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> In *Durante* (1971) 56 Cr. App. R. 708, (1972) 1 W.L.R. 1612 the Court approved, at p. 714, and p. 1617, the following passage from a judgment of Devlin J., (as he then was) in the unreported case of *Stone* cited in *Hunt* (1968) 52 Cr. App. R. 580, 583. Devlin J. put the test in this way:—
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> > "When an appellant seeks to persuade this Court as his ground of appeal that the jury has returned a repugnant or inconsistent verdict, the burden is plainly on him. He must satisfy the Court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they were an unreasonable jury, or that they could not have reasonably come to the conclusion, then the convictions cannot stand. But the burden is on the defence to establish that".'
>
> In the instant case, the learned trial judge in his charge to the jury made it clear that the charge in count 3 was an alternative to the charges in counts 1 and 2. At p. 6a of his charge he said:—
> > 'You can only consider count 3 if you consider that counts 1 and 2 do not meet the situation that has emerged on the evidence heard yesterday.'
>
> And at p. 16a he said:—
> > 'The third offence, ladies and gentlemen, which I have dealt with briefly already, is alternative to the first two, that is to say, you could only consider the offence of handling stolen goods if you are satisfied that Mr. Maughan could not be convicted of counts 1 or 2, because the essence of handling stolen goods, ladies and gentlemen, which is a new and revised description of an offence that used to be known as receiving stolen property, is that somebody other than the handler must have stolen the actual goods.'
>
> In the light of the very clear directions given by the learned trial judge to the jury the Court takes the view that no reasonable jury who had applied their minds properly to the facts of the case could have convicted the applicant both on counts 1 and 2 and on count 3. Apart from the fact that in law a person cannot be convicted, in regard to the same incident, of both theft and handling of stolen property, the verdicts disclosed a clear factual inconsistency. A verdict of guilty on counts 1 and 2 meant that the jury was satisfied that the applicant was one of the two men who had broken into No. 7 Mespil Road and had perpetrated the offences committed there whereas a finding that he was guilty on count 3 meant that he had not taken part in the burglary in No. 7 Mespil Road but had received the bottle of Hennessy brandy and the piece of glass from the chandelier from one of the men who had taken part in it. Essentially, the verdict of guilty on counts 1 and 2 placed the applicant in No. 7 Mespil Road at the time of the burglary, and the verdict of guilty on count 3 implied that he had not been there and that he simply received the bottle of brandy and piece of glass subsequently. Apart from this, since the applicant could only be convicted on counts 1 and 2 or alternatively on count 3, one or other of the verdicts is bad with the result that there was a lack of certainty as to the offence in respect of which the jury intended to convict.
>
> For these reasons the Court is satisfied that the applicant's convictions should be quashed ...."

79. It is clear from this detailed extract from the judgment in *Maughan* that counsel for the respondent is correct in his contention that while that case does confirm the existence of the discretionary jurisdiction to quash for inconsistency, it is a jurisdiction only to be exercised where the appellant establishes that no reasonable jury could properly have reached the verdicts that it did.

80. This Court agrees with counsel for the respondent that the appellant has failed to establish that no reasonable jury could properly have reached the verdicts that it did. The Court further considers that the hypothesis advanced by counsel for the respondent as a possible explanation for the jury's acquittal in respect of the s.15A charge is entirely plausible.

81. It is all the more so in circumstances where, prior to the Supreme Court's decision in *The People (Director of Public Prosecutions) v. Ronan Power* [2007] IESC 31 (unreported, Supreme Court, 26th July, 2007), very many lawyers were of the belief that to establish the *mens rea* necessary to convict of a s. 15A offence it was necessary to prove beyond reasonable doubt that the accused person knew or had reasonable grounds to suspect that the drugs that he had in his possession for the purposes of sale or supply had a value of €13,000 or more. Although the *Power* case has now established conclusively that s. 15A is not a crime of specific intent in so far as the value of the drugs are concerned, the wording of the provision itself does not make that readily and immediately apparent. Accordingly, in the absence of a specific instruction from the trial judge to the effect that it was not necessary for the prosecution to

prove that the accused knew or ought to have known that the drugs were worth €13,000 or more, the jury, acting on foot of the general direction given to them, reflecting the golden thread principle enunciated by Viscount Sankey *in Woolmington v The DPP* [1935] A.C. 462, that it was for the prosecution to prove every element of the accused's guilt, may well have erroneously believed that such proof was in fact necessary. If they so believed, it is also conceivable that they were not satisfied beyond reasonable doubt that the accused knew or had reasonable grounds to suspect that the drugs that he had in his possession for the purposes of sale or supply had a value of €13,000 or more, and that would reasonably explain the acquittal.

82. It does require to be further stated that the facts of the present case are radically different from those in *Maughan*. While the Court of Criminal Appeal was persuaded on the particular facts of that case that it was appropriate to quash all verdicts and direct no re-trial, the fact that it did so has no implications for how the present Court should decide the present case.

83. The Court also agrees with the observation of counsel for the respondent that if any of the verdicts were ostensibly perverse, it was the acquittal in respect of the s.15A charge. However that has inured to the benefit of the appellant and he is entitled to bank it. That having been said, however, the Court considers that in an appeal against conviction, the focus must be on the conviction appealed against, rather than in respect of any concurrent acquittal(s). There was abundant evidence on foot of which the jury could reasonably have convicted the appellant of the s. 15 charge against which he is appealing.

84. The Court is not disposed to uphold this ground of appeal.

Conclusion
85. In circumstances where this Court has not seen fit to uphold either ground of appeal, the appeal is dismissed and the convictions are affirmed.