THE COURT OF APPEAL

Birmingham J.
Sheehan J
Edwards J.

Appeal Number : 181/2015

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Choung Vu

Appellant

Judgment of the Court delivered the 16th day of November 2015 by Mr. Justice Edwards

Introduction
1. In this case the appellant appeals against his conviction by a jury at Trim Circuit Criminal Court on the 8th of July 2015, following a five day trial, of three offences, namely: count No 1, possession of a controlled drug for the purpose of selling or otherwise supplying it to another, contrary to s. 15 and s.27 of the Misuse of Drugs Act 1977, as amended; count No 2, possession of a controlled drug, contrary to s. 3 and s.27 of the Misuse of Drugs Act 1977, as amended; and count No 3, cultivation (of cannabis plants) contrary to s.17 and s.27 of the Misuse of Drugs Act 1977, as amended.

2. The appellant appeals on a single ground further particularised in eleven discrete points as set forth in his Notice of Appeal. However, the essence of his appeal may distilled into the single complaint that the trial judge erred in refusing to withdraw the case from the jury and to direct them to find the accused not guilty at the close of the prosecution's case.

The evidence adduced by the prosecution
3. The appellant, a Vietnamese national, was jointly tried with a Mr Kham Tu and a Mr Tuan Cong Le.

4. The jury heard evidence from a Mr Donal Corrigan who told them he was the owner of a house at Ballinlough, Kells, Co Meath, and identified his house in scene of crime photographs taken by the Gardai. He stated that he had rented the house in August of 2011 to an Asian man, whose name he could not immediately recall, who had said that he wanted to rent it for his wife and for his daughter who was studying accountancy. He agreed to do so, and thought no more about it. He was subsequently contacted on the 6th of June 2012 by Detective Garda Dorrigan. As a result of what he learned from the Garda he went to the house and found that it had been converted to what was referred to as a "grow house", i.e., that it was being used to cultivate cannabis. Mr Corrigan identified a white van that was present at the time of his visit as being a vehicle that he had previously seen being driven by the Asian man to whom he had let the house. Under cross examination he agreed that the Asian man had signed the lease as Andy Lu. He also accepted that he had since become aware that the Asian man's name was Kham Tu, also known as David Tu.

5. Garda Barry Crudden told the jury that, having obtained a search warrant from a Peace Commissioner to search the said house at Ballinlough, Kells, Co Meath, he proceeded there accompanied by Detective Sergeant Dorrigan, Garda Shaughnessy and Garda Flynn. Upon arrival Garda Crudden encountered a male who gave his name as Kham Tu, otherwise David Tu, and showed the warrant to him. On entering the house he found that the sitting room had been fitted with lighting, fans, and ventilation equipment and the windows had been covered over. There was plastic on the ground in the sitting room. He then proceeded to go upstairs and found that there was also plastic sheeting on the landing. There were three bedrooms, in each of which there was plastic on the ground and the windows were covered over. There were numerous lights hanging from the ceiling and in one of the bedrooms he found approximately 130 plants growing, which he believed were cannabis plants. He concluded that the house had been used to facilitate the cultivation of cannabis plants intended for sale or supply.

6. Garda Crudden told the jury that having gone back downstairs he was speaking with Mr Tu when he observed a red Chevrolet Aveo car, registration number 08D 20409 arrive at the rear of the property. There were two males present in the vehicle. The driver identified himself to Garda Crudden as Tuan Cong Le. The passenger gave his name as Choung Vu, and provided a date of birth and an address in England. This was the appellant. Garda Crudden made a quick search of the car. He accepted in his evidence that "I didn't necessarily carry out a full search of that car". On foot of the search that he did conduct he found that it contained a number of items that he believed would be used for the cultivation of cannabis plants, namely, lighting, power units or ballast boxes, plant food, nutrients and tools. Garda Crudden concluded at that point that the occupants of the car were involved in the cultivation of cannabis plants in the house for sale or supply, and he proceeded to arrest the appellant. Mr Kham Tu and Mr Cong Le were arrested by his colleagues. The appellant was then conveyed to Kells Garda Station.

7. Garda Crudden further told the jury when he and his colleagues arrived at the house there was a white Hiace type van parked outside, and that Kham Tu had accepted ownership of that van.

8. The jury were shown scene of crime photographs of the interior of the house at Ballinlough and received a more detailed further description from Garda Crudden of exactly what was found there. Garda Crudden further stated to the jury that he was a member of the Meath Divisional Drugs Unit, and that he was in a position to estimate the value of the cannabis plants found at €100,800.

9. The jury heard that the red Chevrolet Aveo car and its contents were seized as evidence. Further scene of crime photographs were produced to the jury showing the contents of the red Chevrolet Aveo car, and Garda Crudden identified for them what was to be seen in each one. However under cross-examination he accepted that the car was not photographed until the 17th of October

2013 at Kells Garda station, and that he could not confirm that everything in the photographs was in the same position that it had been in at the time the car was seized. Further, he accepted that some of the items had been covered up and might not have been visible to a passenger in the car. Garda Crudden further accepted under cross-examination that there was nothing of forensic value to connect the appellant to the house or to the contents of the house.

10. The jury then heard from the exhibits officer in the case, Garda Sean McLaughlin, concerning the seizure of various exhibits, both from the house at Ballinlough and from red Chevrolet Aveo car, and various items of physical evidence were produced to the jury including, *inter alia*, sodium lamps and reflector units and an associated power unit or "gearbox" taken from the house, a "B&Q receipt", a "JCB hammer drill" and an "825ml B&Q canister of expanding foam" taken from the car. Garda McLoughlin characterised the items found in the car as "cultivation equipment" The B & Q receipt was from B & Q Naas and related to nine items including cable ties, miniature circuit breakers (MCB's), B & Q foam, and a JCB drill purchased there on the 6/6/12 at 14:27. The witness could not state the position of the items in the car at the time that the car was seized. Nor could he state that the drill and the foam found in the car were the same items as those referred to in the receipt. He stated that the drill was definitely in the back seat but he could not say whether the canister of expanding foam had been on the back seat or in the boot of the car.

11. The jury was told that 20 cuttings were taken by way of samples from the plants observed in the house. Later in the course of the trial a certificate of analysis in respect of plant material seized by the Gardai during their search of the house at Ballinlough was produced to the jury, certifying that upon analysis at the Forensic Science Laboratory the material was found to be from a plant of the genus cannabis. samples were taken

12. The jury were also shown CCTV footage taken from B & Q in Naas showing two men, identifiable as Tuan Cong Le and the appellant, leaving that particular branch of B & Q just after the receipt had been generated, and possibly carrying certain items. There was no CCTV footage showing the actual purchase of the items referred to on the receipt. While there was no third party identification of the appellant as one of the men to be seen on the footage shown to the jury, counsel for the appellant conceded on day three in the course of submissions to the court in the absence of the jury that his client was to be seen walking out of the door and carrying an object.

13. The jury further heard from Garda Flynn who had accompanied Garda Crudden during the search of the house. He told the jury that the interior of the house had been completely altered, and that a number of rooms had a lot of lighting and power packs, which in his experience were used in the cultivation of cannabis. He had also noted the presence in the house of bags of compost, and drums of plant food and chemicals. Moreover many of the windows in the house were sealed with black polythene.

14. The jury also heard from Garda Brendan Mulligan, a scenes of crime examiner, concerning his examination of the red Chevrolet Aveo car at Kells Garda Station on the 17th of October 2013. He found the vehicle quite overloaded and he photographed the vehicle as he found it. The jury were supplied with the photographs which show, inter alia, the back seat piled high with goods including a blue suitcase case (later found by him to have contained within it lighting units), a brown cardboard box case (later found by him to have contained within it a power unit or ballast box), a grey plastic powertool case (later found by him to have contained within it a JCB electric drill), a red blue and white check pattern fabric bag (later found by him to have contained within it a black plastic powertool case, which in turn contained a yellow electric jig saw) an opaque green plastic container labelled "Rhizotonic" (later found by him to contain plant food), and a clear plastic container labelled "Bio Grow" that visibly contained a blue liquid (later identified as another plant food). Garda Mulligan then removed these various items and opened them and examined and photographed their contents. Again these photographs were placed before the jury. He also photographed the contents of the boot in situ, before again removing the items found therein (cardboard boxes later found to contain yet more lighting units). He then examined each box and photographed their contents. These photographs were also placed before the jury.

15. The jury then heard from the Gardai who had interviewed the appellant during the course of his detention. There were two cautioned interviews with him which were video and audio recorded, and also recorded in writing as required by the Judge's Rules, and which were conducted on a question and answer basis. The notes taken, which the appellant had refused to sign, were read to the jury by Garda Michael Fitzpatrick. As they are both reasonably short it is proposed to reproduce them in full in this judgment.

16. The first interview was conducted by Garda Grainne Shaughnessy and D/Sgt Michael Dorrigan and commenced 22.51 on the 6th of June 2012 and concluded at 23.28 on the same date. The substantive portion of it was as follows:

> Q. "You were arrested at Ballinlough, Kells, on suspicion of possession for sale or supply and cultivation of cannabis. Do you understand this?"
>
> A. "Yes."
>
> Q. "How long have you been in Ireland?"
>
> A. "A week."
>
> Q "Can you elaborate on how you came here, where you were staying etc?"
>
> A. "I came here by train. I'm staying with a friend."
>
> Q. "From where?"
>
> A. "From London."
>
> Q. "What do you mean, by train?"
>
> A. "London, Euston Station, then I catch a ferry from Holyhead to Dublin."
>
> Q. "When did your ferry arrive?"
>
> A. "Last Sunday the 27th of May, possibly, or maybe after that."
>
> Q. "The 27th?"
>
> A. "Yes."

Q. "What time did your boat arrive at?"

A. "Five or six."

Q. "Who was it with?"

A. "Irish Ferries."

Q. "What was the purpose of your visit?"

A. "Lots of research, business. A new place to live. Visiting friends."

Q "What's your line of business?"

A. "I'm doing a spa business."

Q "What sort of spa?"

A. "A fish spa."

Q "Where are you operating this business?"

A. "In England. I install the spa in saloon. People will buy the spa or rent it from me."

Q. "What is your company name?"

A. "I'm self-employed. Choung Vu Fish Spa, CV Fish Spa."

Q. "Is this company registered?"

A. "It's self-employed. I visit shops and spa and tell them about the benefits, and they tell me, then rent -- and they will benefit -- the benefits of fish, and they will then rent or buy the spa from me."

Q. "Do you have a website?"

A "No."

Q. "What's your mobile number?"

A. "I can't remember at the moment."

Q "What sort of phone is it?"

A. "An Apple iPhone."

Q. "Is this the phone that was seized from you at Ballinlough?"

A. "Yes."

Q "Is it an English -- an Irish or English SIM?"

A. "Irish. My English one doesn't work so I bought an Irish one here."

Q. "When did you buy it?"

A. "A couple of weeks ago. I was on another visit a few weeks ago."

Q. "Do you travel regularly to Ireland?"

A. "This is my second time. I flew in the first time."

Q "Where did you fly from and to?"

A. "Stansted to Dublin."

Q "What was the purpose of this visit?"

A. "Just looking at Ireland, just visiting."

Q. "Who do you stay with when you come to Ireland?"

A. "A friend."

Q. "Who?"

A. "Yen, a girl."

Q "Where does she live?"

A. "I don't know much about Dublin. It is quite close to the centre."

Q. "How did you come to be in Ballinlough today with a friend? What is his name?"

A. "Tuan Lee."

Q. "How long do you know him?"

A. "About a week."

Q. "Where did you meet?"

A "Through a friend."

Q. "Where?"

A. "In Ireland. Just chance, through friends."

Q. "What did you spend the day at today?"

A. "He wanted to take me around to see Ireland, so I travelled with him."

Q. "Where did you meet this morning?"

A. "In a restaurant, where we bought takeaway. I can't remember the name of it. It was in Dublin."

Q. "Had you arranged to meet?"

A. "Yes. He offered to take me around, so I said yes. No arrangement. It just happened."

Q. "So where did you go today?"

A. "Here, somewhere here."

Q. "Straight from Dublin to Meath?"

A. "Yes. We did not go anywhere else today."

Q. "The other man that was there at the house, did you know him?"

A. "No, I don't know him."

Q. "What was the conversation in the car?"

A "Varied. General conversation."

Q. "What roads did you travel? Country roads, toll roads or where?" "On a motorway, where you stop and pay." "What did your friend say you were going to do today?"

A. "He said, 'I am going to go to this place'. I want to travel. I want to see, so I came along."

Q. "Do you have Tuan's phone number in your phone?"

A. "I don't think so. I don't."

Q. "Do you have the other man's number?"

A. "No."

Q. "When were you leaving Ireland?"

A. "Two days' time."

Q. "Had your tickets bought?"

A. "No. I was going to take the ferry."

Q. "Why do you travel by ferry?"

A. "It's cheaper compared to flights."

Q. "How long have you lived in London?"

A. "Nearly 30 years."

Q. "So you were young when you left Vietnam?"

A. "Yes, eight or nine."

Q. "Have you any other friends living in Ireland?"

A. "No. I don't have much friends here."

Q. "What else did you do in the last ten days?"

A. "I travel, visit places."

Q. "Where were you yesterday?"

A. "Dublin, Navan. I viewed a property in Navan, house."

Q. "Where?"

A. "I can't remember."

Q. "For what?"

A. "If I'm planning to move here and I'd like to move here, I'd like to look at property."

Q. "Why Navan?"

A. "To be honest, anywhere where I can find reasonable rent, good area, where I can travel to do my work."

Q. "This business not going well in London?"

A. "There was much competition."

Q. "Do you have family there?"

A. "No."

Q. "Okay." "Have you family here?"

A. "No."

Q. "Okay, so you came to Ireland a couple of times to set up spa shops, and you just had the misfortune of arriving at a property being used for the preparation of cannabis for sale and growing it?"

A. "Yes, unfortunately, yes. What can I say, I mean?"

Q. "Did your friend say what he was going to the house for?"

A. "I didn't ask him. I came along as a come-along person."

Q "Did you not ask about the suitcases?"

A. "Why should I bother? I just came for the free travel."

Q. "You came from Dublin to this house."

A. "Yes."

Q. "Did you view any other properties?"

A. "I did have some viewings."

Q. "Where?"

A. "One in Laois."

Q. "When?"

A. "A few days ago."

Q "Any other -- any others?"

A. "First day I came here, I viewed one. I believe it's near Laois too.

17. The second interview was conducted by Garda Michael Fitzpatrick Shaughnessy and D/Gda Pat Muldowney commencing at 10.51 on the 7th of June 2012, and the substantive portion of it was as follows:

Q. "Why were you at Kells yesterday, 6th of June?"

A. "I was just a passenger in a car."

Q. "Was that 08 D 20409, a red Chevrolet Aveo?" I think that's A-V-E-O.

A. "I was in that car yesterday, yes."

Q. "Where did you get into that car?"

A. "I don't know."

Q. "Who was the driver of that car?"

A. "I believe the driver is Tuan Lee."

Q. "How long do you know Tuan?"

A. "About a week."

Q. "How did you get to know him?"

A. "Just through conversation."

Q. "Where did you meet him?"

A. "I just came to Ireland. I didn't know anyone here. I just met him."

Q. "Where did you meet him?"

A. "I've no idea."

Q. "Why did you come to Ireland?"

A. "My purpose here is to work."

Q "What do you work at?"

A. "I'm self-employed.

Q "Doing what?"

A. "I set up fish spa. I sell them to beauty spa. I just set them up. They can let them from me or they can buy them from me."

Q. "Did you bring any of these to Ireland with you?"

A. "No. Just some pictures of some spas that I took."

Q. "Who did you come to Ireland to meet?"

A. "I just come here to do research. I didn't come here to meet anyone."

Q. "Where are you staying in Ireland?"

A. "I'm staying with a friend."

Q. "Is there a friend?"

A. "I'm just staying with a friend is all."

Q. "We need to know the friend's name."

A. "I just called the person" -- now, my pronunciation may be very poor. Is that Xyen? X-Y-E-N.

Q. X-Y-E-N.

A. "I just called the person Xyen."

Q. "Where do you live?"

A. "Xyen lives in Berlin and then in Dublin."

Q. "Where in Dublin?"

A. "Somewhere in Dublin. I don't know the address."

Q. "I don't know." "I'm just asking. You did -- you have a phone, yes or no?"

A. "I did"

Q. "Is it your English phone or is it a phone you brought when you came to Ireland?"

A. "It's my English phone."

Q. "What is the number of this phone?"

A. "I can't remember."

Q. "Do you hold a passport, Tuan (sic)?"

A. "I have a British passport."

Q. "Is that with you in Ireland?"

A. "I don't think I brought it here."

Q. "The reason I have asked you the last question is to see if you needed your passport to enter the country. What ID do you have with you?"

A. "I have a driving licence."

Q. "Is that a UK driving licence?"

A. "Correct. It's a UK driver's licence."

Q. "Do you have that with you?"

A. "Yes. It is in my wallet."

Q. "Is this the ID that you used -- used to at border control?"

A. "Yes."

Q. "Was this at an airport?"

A. "No."

18. The jury also heard evidence in the form of a s.21 statement from Garda Grainne Shaughnessy who stated, inter alia, that on the 6th of June 2012 at Ballinlough Kells she had searched the white Hi Ace van and the red Chevrolet Aveo car. Amongst the things she found within the Chevrolet Aveo, and seized, were an Irish Driver's licence in the name of Tuan Lee Cong, as well as €1800 in cash and three keys on a ring with a yellow tag. She checked to see if these keys would open the back door of the house, and she found that they did.

19. The jury also heard from D/Sgt Michael Dorrigan who had also been present during Garda Crudden's search of the house and he also described what was found. He was asked:

Q. In respect of the plant food and the lights and suchlike, what would you associate that with?

A. With the cultivation of cannabis.

Q. What's the basis for that association?

A. From my experience in drug investigations for -- since 2009. There was light -- the lights -- specific lights and ballast used and plant food would be a common denominator in almost all grow houses that we've discovered in the Meath division at that time.

20. That concluded the case for the prosecution.

The application for a direction

21. Following the close of the prosecution case counsel for the appellant applied to the trial judge for a direction, and the Court was referred to various authorities including *R v Galbraith* (1981) 73 Cr App R 124, [1981] 1 W.L.R. 1039; *The People (Director of Public Prosecutions) v Leacy* (unreported, Court of Criminal Appeal, 3rd July 2002) in support of the contention that the prosecution evidence, taken at its highest, was such that a jury properly directed could not properly convict upon it, and that accordingly the judge's duty was to stop the case.

22. While it was accepted and understood that the prosecution was basing their case upon joint enterprise, and seeking in that regard to have the actions of Mr Kham Tu and Mr Tuan Cong Le as co –participants in the common design, attributed to the appellant, counsel for the appellant sought to emphasise that mere presence alone at the scene of the crime cannot justify an inference of participation in a joint enterprise. In support of this argument counsel opened to the trial judge the case of and *The People (Director of Public Prosecutions) v Jordan and Deegan* [2006] 3 I.R. 425.

23. It was further submitted that the totality of the evidence adduced went no further than to establish suspicion that the appellant may have been involved. It was submitted that suspicion alone was not sufficient to establish guilt beyond reasonable doubt and that therefore the case should be withdrawn from the jury. The Court was referred in this context to *The People (Director of Public Prosecutions) v Jordan and Deegan* (unreported, Court of Criminal Appeal, 21st July 1990) where Lardner J, giving judgment for the court had said:

> "It is not clear from the evidence what was Harrington's part in the deal or how much he knew about it. There might well be suspicion as to the degree of his involvement and to the extent of his knowledge, but in the view of this Court, the evidence at the end of the case for the prosecution cannot reasonably be regarded as going beyond establishing suspicious circumstances. It's not capable of being regarded as establishing beyond a reasonable doubt the standard of proof, namely his knowledge that the dollars bills in the bags were forged. In these circumstances the application at the end of prosecution case that no sufficient case had been made out should have been acceded to."

24. Further it was submitted that in respect of the possession counts which referred to cannabis, as opposed to the cultivation count which referred to plants of the genus cannabis, there was no evidence that any cannabis had been found. While cannabis (strictly cannabis resin) might have been expected to be extracted later from female cannabis plants, if there were any, there no evidence concerning the gender of the plants, there was no evidence of the presence of any actual cannabis at all. In addition, even if what was found came within the statutory definition of cannabis there was no evidence that any such cannabis was for sale or supply.

25. Finally, it was submitted that there was no evidence of possession of cannabis by the appellant in the legal sense, and that such possession could simply not be imputed on the basis of joint enterprise alone

26. In reply, counsel for the respondent submitted that the prosecution was not relying on the appellant's mere presence alone, but rather his presence combined with significant circumstantial evidence tending to suggest that he was an active participant. In that

regard the prosecution were relying, inter alia, on his presence at the scene in association with the other two persons suspected of involvement, particularly Mr Tuan Cong Le in whose car he had been travelling, and his proximity to the paraphanalia contained within the car associated with a grow house, some of which had been on open display within the car and of which he must have been aware, and what the prosecution contended were a combination of a demonstrable lie told by him and vague or incredible answers given by him during his interviews. The lie referred to was his assertion that he and Tuan Cong Le had gone straight from Dublin to Meath on the day in question when there was clear evidence that that was not so, and that they had gone first to B & Q in Naas.

27. In support of this argument, counsel for the respondent referred the trial judge to the section in *Criminal Law* by Charleton, McDermott & Bolger (Butterworths, 1999) concerning "The Minimum Conduct for Participation" (para 3.34 et seq) and the references therein to *The Attorney General's Reference (No 1 of 1975)* [1975] 2 All E.R. 648 and *R. v Coney* (1882) 8 QBD 534; and also to the further section in the same work concerning "Joint Possession" (para 5.36 et seq) and the reference therein to the Northern Ireland case of *R.v Whelan* [1972] NI 153. In addition the judge was further referred to *The People (Director of Public Prosecutions) v Foley* [1995] 1. I.R. 267 where it was held, *inter alia*, that an inference of knowledge and control can be drawn from the open and obvious presence of an article in circumstances where the accused's relationship to it would lead to a conclusion that he had knowledge of its presence.

28. Counsel for the respondent further submitted that cannabis plants come within the definition of cannabis as contained in the interpretation section of the Misuse of Drugs Act. The Court had earlier been referred to s. 2 of the Misuse of Drugs Act, 1984 which amended the definition of cannabis in the Misuse of Drugs Act 1977 (the Act of 1977). The new definition reads "cannabis' (except in 'cannabis resin') means any plant of the genus Cannabis or any part of any such plant (by whatever name designated) but includes neither cannabis resin nor any of the following products after separation from the rest of any such plant, namely—

(a) mature stalk of any such plant,

(b) fibre produced from such mature stalk, or

(c) seed of any such plant"

29. Counsel for the respondent submitted that nowhere in the interpretation section of the Misuse of Drugs Act does it exclude male plants. It excludes a number of by-products of cannabis plants explicitly. But nowhere does it say: "Possession of male plants is not an offence." Counsel for the respondent also made the further point that the Act of 1977 provides that where it is proved that a person was in possession of a controlled drug and the court, having regard to the quantity of the controlled drug which the person possessed or to such other matter as the court considers relevant, is satisfied that it is reasonable to assume that the controlled drug was not intended for the immediate personal use of the person, he shall be presumed, until the court is satisfied to the contrary, to have been in possession of the controlled drug for the purpose of selling or otherwise supplying it to another.

30. Having heard the submissions of counsel on both sides the trial judge gave a lengthy and detailed ruling. As the appeal is centrally concerned with its correctness and adequacy it is necessary to set out in full the main portion of it which deals with the sufficiency of the evidence generally. It is not proposed to set out the remainder which deals with the technical points made concerning the ingredients of the possession offences. It is sufficient in that regard to simply record that the trial rejected the arguments advanced by defence counsel. With respect to the main issue, however, the trial judge said the following:

> *"With regard to the application that relates solely to section 15 and section 3, it is quite clear that any possession can only be founded upon a finding of common design. There isn't anything to link Mr Vu in any way to the items barring a finding of common design by the jury. And anything I say about possession is completely subject to that. But if the jury were to make a finding that there was a joint enterprise to engage in the cultivation of cannabis within it it wouldn't be one of those situations where the possession was something that went beyond the agreement or was outside the terms of the agreement giving rise to common design. That being so, if any one person in the group was in possession Mr Vu would also be deemed to be in possession. So as far as the possession goes, if there is evidence of participation of common design there could be evidence of possession.*
>
> *I don't accept the submission that possession for section 3 can only arise where the person is in possession for their own immediate personal use. I don't believe that is a correct statement of law. I believe the statement of law is that if you are in possession for any purpose you can fall foul of section 3. Equally, the fact that the cannabis, which did qualify as a controlled drug for the purpose of the act wasn't in a fit state then to be used as a drug and arguably if they were male plants and would never be in a fit state to be used wouldn't alter the fact of possession and section 3 possession could arise.*
>
> *With regards to section 15, if the other matters arise there is the quantity which could give rise to the presumption of sale and supply but equally the other surrounding circumstances would indicate that they have also been grown for the purpose of sale and supply. I think the surrounding circumstances of setting up the house in a rural area, blacking out the windows, bringing all this equipment in to -- the harvest equipment and all these matters, I think there is ample evidence there from which the presumption for sales and supply could arise. There are the other relevant matters the Court would take into account. So I believe that if the charges survive overall counts 1 and 2 are capable of going to the jury. But the issue in this case, the prime issue in this case is whether or not, taken at its highest, the prosecution have raised enough circumstantial evidence to prove two matters. One that there was some tacit agreement by Mr Vu with other persons to be involved in some way in the cultivation of cannabis, whether there's circumstantial evidence that would establish that agreement, it doesn't have to be an express agreement, if can be inferred from the circumstances but was there agreement to operate on that basis and secondly whether Mr Vu did something which was either encouragement of this agreement or else was actually participation in carrying out steps of the agreement.*
>
> *From that I have to consider the evidence that is taken by the prosecution at its highest. And it is very much taking the evidence at its height. For example, it would seem to me that if the case must go to the jury, the jury will have to decide whether or not it was Mr Vu who came out of B&Q. They would have to make effectively a view as to whether or not he was the person who walked out of the shop and was recorded on CCTV camera. That would be a class of identification where they would have to be cautious. That would be a class of identification of the person of different racial characteristics, which has its own warnings. It is an identification effectively made by the jury rather than their assessment of the identification by a third party, but it is still something they would have to be satisfied beyond all reasonable doubt.*
>
> *So for the purpose of this application I am assuming that there is no question but that it was Mr Vu who came out of*

the B&Q shop and in that instance I have taken the case at its highest. But I can use that as an illustration for every point that arises. On every point I have to assume the jury will take the prosecution evidence that says it says that it establishes, that doesn't mean the jury in considering the matters will accept any of that. They may well reject all of it as not being established beyond all reasonable doubt and not allow these pieces of information in, but I have considered the evidence in that light and I think the test - and I am taking this really from the commentary in R v. Foley - going back to a very old case of 1866 about circumstantial evidence is that: "A combination of circumstances, no one of which would raise a reasonable conviction on more than a mere suspicion but ..." -- and there is a gap -- "... then taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of."

It seems to me that there's two issues. The first issue is whether or not there are factual circumstances from which a conclusion could be drawn that the accused person was involved in the criminal activity here. I think that really this is where there is a degree of uncertainty perhaps in my mind as a correct statement of law, and I'm indicating this, it seems to me that if I hold that that conclusion could be drawn from the evidence, the question of whether or not the jury would have a reasonable doubt about it and decide whether it has been drawn beyond a reasonable doubt is a matter for themselves than for the Court. If I hold that the jury could draw that conclusion I shouldn't say that they can't draw that conclusion because on my own assessment I think there is a possibility there is a reasonable doubt. I think that I have to leave that to the jury.

When I charge the jury I would be indicating to the jury that -- in any case where I charge the jury, I would be indicating to the jury that it is for them to say what "beyond all reasonable doubt" says. It is for them to find reasonable doubt. It is not for the Court to do it. The Court gives guidance as to what that means but it is ultimately a matter for the jury. And if they can draw a conclusion from the facts, whether they can draw a conclusion beyond all reasonable doubt is a matter for them. Now, that isn't the whole picture though because I think it is an essential protection, and the second limb of that then is it's an essential protection for every accused person that if the Court - and this is quite clearly the Galbraith position - is of the view that no jury properly charged could on the evidence come to the view that the matter is proved beyond a reasonable doubt, that it would be impossible for them to come to that conclusion, no matter how they define reasonable doubt, having done so in accordance with the guidance they're given, then the Court would have to intervene and withdraw the case from the jury.

Now, it seems to me in the present situation there is no doubt but that the circumstances in which Mr Vu was found are highly suspicious and to be found driving up to the house in any -- nothing more, if he just drove up there, arrived at the house and stopped from entering into the house, that would be highly suspicious. The question is whether or not as well as being highly suspicious, because in every circumstantial evidence case the conduct will be suspicious, there are sufficient indicators in the case that go beyond suspicion to indicate that there was some actual involvement.

In this case Mr Vu arrived at the house in a car which, taking the prosecution case at its highest, did contain a significant amount of materials which would be useful in carrying out the operations of cultivating cannabis and their arriving together in conjunction would indicate -- would certainly make them useful for that purpose. He was in the car, Mr Vu himself admits that he knew there were items in the car although he doesn't admit he knew precisely what they were and he was arriving there. So it isn't a question of being quite just a mere spectator, he's arriving in a car which is bringing supplies to the premises. Now, whether he's involved or not is the matter at issue, but that is a matter. So it isn't quite being a mere spectator travelling as a passenger in the car in those circumstances.

Now, in addition to that then, the evidence after that which establishes some involvement on the prosecution case taken at its highest, is that he did, on the basis of the prosecution case being accepted, attend B&Q and did come out of B&Q carrying supplies. These may or may not have been the exact same supplies as were found in the car but were identical to supplies that were found in the car and were matters which weren't directly relevant to cultivation in the sense expanding foam could have been used for anything, a drill could've been used for anything but which could've been used for those purposes. So he is tied to effectively bringing supplies into the car that could've been of a nature that would be used for these matters.

After that the evidence that the prosecution are relying upon is really the evidence that comes from Mr Vu's own statements to the gardaí. And this evidence isn't a conclusive admission, it is only circumstantial evidence as well, it doesn't go beyond that. And one of the circumstances was the denial, and I think it can be construed for these purposes now, it is a matter for the jury to decide whether it is or isn't a denial if it comes to that. The denial that he at the B&Q, the indication he went straight to these premises. And I think that is a surrounding circumstance which goes to his state of mind. Why would there be that denial but for the fact he knew the visit to B&Q was involved -- this is taking the prosecution case in the light most favourable to the prosecution, why would he be denying going to B&Q but for the fact that of his awareness that supplies were being purchased for this purpose. There may be other reasons and the jury might see other reasons but I think it's open to that interpretation by the prosecution.

Following that, in deciding what the circumstances are, the jury are entitled to take into account all the evidence in the case, including all the statements that Mr Vu did or didn't make and he did, and this is -- I don't think this was canvassed to any great extent but it was mentioned in the argument. He did indicate he'd been travelling around areas in the previous days looking for houses. I don't think the jury can be told that that's an indication that he was carrying out any kind of recognisance. It wouldn't be appropriate to mention to them but it is a circumstance of the case. I don't know what the jury would or wouldn't do with that. They would certainly be told they can't speculate and I think they'll have to be given a very, very strong warning not to speculate. There is a danger of allowing that type of evidence to come into their considerations at all. But not going down speculation, there is that dimension. But more significant, and the jury will be warned very strongly about speculation if they are to make any determination on the matter, in those circumstances. But there is a matter then generally that there was a very evasive account of Mr Vu's movements and that, of itself, wouldn't establish guilt but having given account of his movements the quality of the account he gave is a matter that I think a jury could take into account in surrounding circumstances.

In all of those circumstances I think it's possible for a jury to come to a conclusion that Mr Vu was involved in a joint enterprise of preparing the -- of being engaged in cultivation. Now, that test being met the question arises after that, well just because we've come to that conclusion the Court has to have regard to the fact they have to come that conclusion beyond all reasonable doubt. And if it's impossible for the jury to come to a conclusion beyond all reasonable doubt on the basis of those matters which are wholly circumstantial, the Court should remove the case from the jury.

Now, it is a question of where the lines and boundaries between the functions of the Court and the functions of the jury

do become blurred. It's not appropriate for the Court to embark upon any consideration as to whether the Court would have reasonable doubt itself because that isn't the Court's function, but it is certainly appropriate the Court has to embark upon a consideration whether any person could believe this beyond all reasonable doubt, whether it's possible for any person to believe it beyond a reasonable doubt. Which does involve the Court in putting some kind of assessment of the evidence on that. It's hard to see how the Court could actually do that without forming its own views on what a reasonable doubt is or isn't. But whether or not the Court thinks there's a reasonable doubt that is insufficient. It is not sufficient for the Court to say on viewing this evidence the Court would have a reasonable doubt about it. The Court has to say a jury weighing all this evidence together, would it be impermissible for a jury to conclude guilt beyond all reasonable doubt? And I think that is ultimately a function for the jury in this case, not a function for the Court and the Court should decide whether or not the circumstantial evidence does meet that test. It's a high test and the jury will have to be warned about it, the high test of giving with such certainty of human affairs can require or admit of. It is for the jury to decide whether someone coming to the house in these circumstances, having given the account he gives, having come in the company of the goods that he came in the company of, it's a matter for the jury to decide whether they are satisfied beyond all reasonable doubt that it is consistent with guilt or not. I am not going to trespass on the function of the jury and take the case from the jury."

31. In an extraordinary exchange after the judge had delivered his ruling, counsel for the appellant then sought to argue with the judge as to the correctness of his ruling:

COUNSEL: I hear what the Court saying, with respect, but I don't see how the Court's ruling is in line with 2(a) of Galbraith's decision where the judge comes to the conclusion that the prosecution evidence taken at its highest is such that the jury properly directed could not properly convict upon it, is duly upon a decision they made to stop the case.

JUDGE: Yes, but if I was of the view that it was impossible for the jury to come to a conclusion beyond all reasonable doubt I would have to take the case from the jury.

COUNSEL: Yes, but the Court in his judgment has said that there is a possibility that the jury couldn't convict upon it. That you have a concern about the prosecution evidence. Clearly if you have a concern about the prosecution evidence it is your duty to take it from them?

JUDGE: No, but if I was sitting hearing this case without a jury --

COUNSEL: Yes.

JUDGE: -- for some reason, it would be up to me to decide if I had reasonable doubt or not. Now, the fact that I may or may not have a view on that matter doesn't allow me to trespass on the function of the jury.

COUNSEL: Well, it clearly does in respect of that if you have a problem with the prosecution case, even taken at its highest, then it's your duty to withdraw it. Not allow the jury to decide upon it.

JUDGE: I think I would be trespassing on the functions of the jury.

COUNSEL: No, I know but that's clearly what Galbraith says and the Court doesn't --

JUDGE: No, no, but there are going to be many cases where a case goes to a jury where the judge who is deciding it might acquit but that isn't enough. The judge has to say that no person, no person at all, could convict on this evidence.

COUNSEL: No, no, I'm not saying that. What I'm saying is that in this regard there is the law, the whole aspect of law and the possession and that is a matter for the Court to decide upon. And if the Court hasn't determined that there is evidence of possession or knowledge of possession then the Court has a duty to take it from them, but the Court --

JUDGE: So the only basis on which there can be evidence in this case, a conviction in this case, would be if the jury feel that the evidence establishes there was some tacit of Mr Vu to act in conjunction with others to cultivate cannabis, which necessarily involves a degree of possession, and then, secondly, he actually did take some steps on foot of that agreement.

COUNSEL: But the Court's use of some tacit agreement, that would seem to suggest that there isn't sufficient evidence to say that there was agreement or that there was a joint enterprise that will essentially cause trouble. Very good.

JUDGE: Well, I gave my ruling."

Discussion

32. In this appeal counsel for the appellant criticises the trial judge's approach in a number of respects. He contends in the first instance that the trial judge erred in law in misinterpreting what he describes as "the first limb of the *Galbraith* test", as approved in Ireland in *The People (Director of Public Prosecutions) v Leacy* and other case.

33. The seminal statement of principle was contained in the judgment of Lord Lane, who stated:

"How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.

> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

34. It is clear from this quotation that there are in fact three limbs to the *Galbraith* test. The first is designated (1) in the quotation above and the second and third are designated (2)(a) and 2(b), respectively. The Court understands the appellant's reference to the first limb of Galbraith as in fact referring to proposition 2(a). At any rate the case is advanced that because the trial judge made the following remarks he in some respect departed from proposition 2(a):

> *'The Court has to say a jury weighing all this evidence together, would it be impermissible for a jury to conclude guilt beyond all reasonable doubt? And I think that is ultimately a function for the jury in this case, not a function for the Court and the Court should decide whether or not the circumstantial evidence does meet that test'*

and

> *'Now, the fact that I may have a view on that matter doesn't allow me to trespass on the function of the jury'*

35. Specifically, it is contended that the trial judge limited his assessment to *'…whether it's possible for any person to believe it beyond a reasonable doubt,'* and counsel points to the post ruling exchange where the judge further stated *'Yes, but if I was of the view that it was impossible for the jury to come to a conclusion beyond all reasonable doubt I would have to take the case from the jury',* and *that 'The judge has to say that no person, no person at all, could convict on this evidence.'* It was submitted that these remarks indicate that the trial judge had reformulated the test in terms that were far wider and easier to satisfy than the test formulated in *Galbraith* and approved in *Leacy* and other cases. It was further submitted that the test is not one of 'impossibility' because that could never be satisfied. It was complained that the trial judge had failed to make reference to the conditions that the jury be *properly* directed and for the need for there to be evidence upon which a jury could *properly* come to the conclusion that the defendant is guilty, in other words that the jury collectively must act rationally and properly. It was argued that allowing for a possibility, however remote, that the jury would convict allows for a perverse decision by a jury which is exactly what the test is designed to prevent.

36. In response, counsel for the respondent has argued that the trial judge was simply recasting the second leg of the *Galbraith* test, and did so without departing from its central tenet, namely if the evidence was "so weak that no reasonable jury properly directed could convict" the case should be withdrawn from the jury. It was further submitted that any reference to 'impossible' or 'impermissible' was made in the context of a reference by the trial judge to the requirement of the court to balance the functions of the court and the jury when determining the *Galbraith* test, rather than any departure from the test itself.

37. Earlier this year in *The People (Director of Public Prosecutions) v J.R.M.* [2015] IECA 65, (unreported, Court of Appeal, 27th of March 2015) this Court sought to address a misperception in certain quarters that the second limb of Lord Lane's celebrated statements of principle in *R v Galbraith* represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. We said:

> "This Court wishes to emphasise that it is not authority for that proposition.
>
> On the contrary, the emphasis in *Galbraith* is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in *Galbraith* was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, <u>unless</u> the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what *Galbraith* is in fact concerned with is fairness.
>
> Moreover, implicit in the *Galbraith* principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction."

38. This Court has carefully considered the ruling of the trial judge, and agrees with the submission made by counsel for the respondent. It was a careful and well reasoned ruling given in circumstances where the trial judge was manifestly aware of, and properly understood, the *Galbraith* test. The construction which counsel for the appellant seeks to put on the trial judge's words is simply not tenable. Though the words "impossible" and "impermissible" were used it is clear from the ruling considered as a whole, that while the trial judge obviously regarded the case as being very finely balanced, he did not believe that it was only in circumstances of literal impossibility of conviction that a case had to be withheld from a jury, and that every other case had necessarily to be allowed through the gate to the jury, even those in which there was only a remote and fanciful prospect of the jury convicting. It is manifest to this Court that the trial judge was saying no such thing, and that he properly understood the true import of the second limb of *Galbraith,* which is that a case can and should be withdrawn from a jury as an exceptional measure if adjudged to be one in which no jury properly charged could properly convict.

39. Counsel for the appellant further contends that, even if the trial judge was to be regarded as having had recourse to the correct test as laid down in *Galbraith* he erred in determining that the prosecution evidence, taken at its highest, was such that a jury properly directed could properly convict on it. It was submitted that certain of the possible conclusions that the trial judge had regarded as being open to the jury could only be arrived at through speculation. It was submitted that the potential results of a jury's improper speculation is not evidence that can be taken into account for the purposes of the exercise, and it was further submitted that the trial judge had again failed to have regard to the purpose of test which is to prevent perverse jury convictions.

40. In support of this argument counsel for the appellant referred this Court to *R v Shippey* [1988] Crim L. R. 767 where Turner J had rejected the proposition that the effect of *Galbraith* was that, if there are parts of the evidence which go to support the charge, then no matter what then state of the rest of the evidence, that is enough to leave the matter to the jury. Turner J stated that taking the prosecution case at its highest *"did not mean picking out the plums and leaving the duff behind"*. It was necessary to assess the evidence as a whole.

41. It was further submitted that a corollary of the decision in *Shippey* is that when considering an application of 'no case to answer' weight should be given to the matters on which a jury must or should be warned when being charged. So, in this case, the learned trial judge should have also taken into account that a perverse verdict might be reached by the jury because of matters such as inherent identification difficulties from CCTV and photographs, the appellant's ethnic origin and that it was the same as those who were involved in the offences alleged, speculation in relation to who made payment in B&Q and language difficulties in interview. It is submitted that the learned trial judge should have engaged in a balancing exercise between the all difficulties of and weaknesses in

the case and the prosecution's case at its highest.

42. Counsel for the respondent makes the point that in the very passages that the appellant's submissions refer to in support of the complaint based on possible speculation the trial judge was at pain to emphasise that the jury would very strongly warned not to speculate. The judge had said:

> *"…in deciding what the circumstances are, the jury are entitled to take into account all the evidence in the case, including all the statements that Mr Vu did or didn't make and he did, and this is -- I don't think this was canvassed to any great extent but it was mentioned in the argument. He did indicate he'd been travelling around areas in the previous days looking for houses. I don't think the jury can be told that that's an indication that he was carrying out any kind of recognisance. It wouldn't be appropriate to mention to them but it is a circumstance of the case. I don't know what the jury would or wouldn't do with that. They would certainly be told they can't speculate and I think they'll have to be given a very, very strong warning not to speculate. There is a danger of allowing that type of evidence to come into their considerations at all. But not going down speculation, there is that dimension. But more significant, and the jury will be warned very strongly about speculation if they are to make any determination on the matter, in those circumstances. But there is a matter then generally that there was a very evasive account of Mr Vu's movements and that, of itself, wouldn't establish guilt but having given account of his movements the quality of the account he gave is a matter that I think a jury could take into account in surrounding circumstances."*

43. Counsel for the respondent submitted that the trial judge did not fortify his decision with any evidence based on possible speculation, which he was conscious of the need to take steps to prevent, but rather the evasiveness of the appellant's account, which he was entitled to do. Again this Court finds itself in agreement with this submission. Counsel for the respondent has made the further point, which we also accept as valid and correct, that the possibility that a jury might speculate on certain matters, such as for example a prior connection between the parties arising from their ethnic origin, is not a basis for withdrawing a case from a jury but rather ought to form the substance of a warning to the jury. It is very clear from the trial judge's remarks that he fully understood this and was conscious both of his duty in that regard and of the fact that such a possibility was not, on its own, a good ground for withdrawing the case from the jury.

44. With reference to the arguments based on *R v Shippey* counsel for the respondent asserts that there is no evidence to support the contention that the trial judge picked out the plums in the evidence and left the duff behind. He submitted that at all times the trial judge had correctly proceeded on the premises that there was no evidence that the appellant ever entered the house at Ballilough. Furthermore, he specifically identified and explored potential frailties in the prosecution evidence, which were not raised by counsel for the appellant at the trial, namely visual identification. Finally, on this topic, it was submitted that the appellant cannot criticise the trial judge for not properly engaging with the issue of cross racial identification, when the issue was not raised at the trial, and particularly where in submissions prior to the judge's ruling it was conceded that one of the persons to be seen on the CCTV at B &Q was the appellant.

45. The Court has carefully considered the entire ruling of the trial judge and is completely satisfied that it comprised a careful and fair assessment of what evidence existed in support of the prosecution case when viewed from its height. It did not pick out the plums and leave the duff behind. The judge expressly acknowledged that it was a circumstantial evidence case, and one based on joint enterprise at that, which required a basis to be found in the evidence for inferring the necessary tacit agreement in order to sustain it. Moreover he acknowledged that the case was finely balanced and seemed to imply that he personally might have had a reasonable doubt. However, he was not satisfied that a jury would necessarily be of that view, and he was therefore disposed to leave the matter go to the jury. In the Court's view the trial judge's ruling is unassailable on *Shippey* grounds.

46. There is a further criticism of the trial judge's ruling which is directed specifically towards the two possession charges. In order to sustain charges of possession of drugs, whether under s.3 or s.15 of the Act of 1977, it must be proven beyond reasonable doubt that the accused possessed the drugs in the legal sense, namely that he exercised control over them and had knowledge of that which he controlled. Counsel for the appellant has submitted that the trial judge erred in determining that the jury could reasonably infer, beyond reasonable doubt, possession of the cannabis in the house by the appellant.

47. The judge allowed the matter to go to the jury based upon his assessment that there was sufficient evidence on foot of which a jury could have been satisfied beyond a reasonable doubt that the appellant was party to a common design to possess, and sell or supply, the cannabis plants. He fairly stated:

> *'With regard to the application that relates solely to section 15 and section 3, it is quite clear that any possession can only be founded upon a finding of common design. There isn't anything to link Mr Vu in any way to the items barring a finding of common design by the jury'*

47. In response counsel for the respondent, while accepting that the prosecution rested on common design, submitted that whilst there is no direct evidence that the appellant was in complete physical control of the cannabis, there was significant circumstantial evidence which, when taken in the round, provides a clear basis for inference that the appellant had knowledge of the cannabis and was involved in a joint enterprise in respect of the cultivation thereof, and in respect of the possession of it.

48. While it is possible to possess something constructively, and to have possession attributed to one on the basis of participation in a joint enterprise, it requires the establishment in evidence of a clear basis for inferring the necessary tacit agreement to possess in the legal sense the thing in question as a joint principal participant. Participation in the secondary sense, ie of aiding and abetting another who is in possession of contraband, will not always be enough to render the secondary participant also liable to be found guilty of the possession in the legal sense. The requisite control and knowledge may not always exist in the case of a secondary participant. That having been said, the line between primary and secondary participation is not always clear, and for many crimes it does not need to be. However, proof of guilt of a possession offence generally requires primary participation.

49. The same is not true in the case of the offence of cultivation. To be guilty of cultivation it is not necessary to have control over that which is being cultivated. Accordingly a person who is a secondary participant in cultivation, by aiding and abetting another or others in that concern, is liable to be convicted of the principal offence of cultivation notwithstanding that the plants under cultivation are under the control of somebody else.

50. After careful consideration of the evidence available to the jury, this Court has concluded that there was not sufficient evidence to provide a basis for a jury, properly directed, to infer beyond a reasonable doubt the existence of a common design, in which the appellant could be regarded as a primary participant, to possess in the legal sense the cannabis found in the house at Ballinlough. In the circumstances the Court considers that Count No 1 and Count No 2 respectively should have been withdrawn from the jury, and

the Court will allow the appeal in respect of those counts.

51. However, there was certainly evidence on foot of which a common design to cultivate cannabis in the house at Ballinlough could be inferred, and in which the appellant could be further inferred as having been involved at the level of secondary participation at the very least i.e., acquiring and delivering supplies for use in connection with the growing of cannabis plants within the grow house. Although counsel for the appellant again referenced the cases of *The People (Director of Public Prosecutions) v Jordan and Deegan*, and *The People (Director of Public Prosecutions) v Harrington*, and also drew the Court's attention to *The People (Director of Public Prosecutions) v Hourigan & O'Donovan* (unreported, Court of Criminal Appeal, 19th of March 2004) the Court is satisfied that this was not a case of mere presence of the scene of a crime. It was presence in association with being in close proximity (*i.e.,*within the same vehicle) with goods and paraphanalia used in cultivation, presence at Ballinlough in association with others clearly connected to the house which had been found to have been converted to a grow house, and other suspicious circumstances. The prosecution case relied upon the contents of the house at Ballinlough; the location of the house; the arrival of the appellant at the house in a vehicle loaded with equipment commonly associated with the cultivation of cannabis; the fact that appellant had admitted seeing the suitcase on the back seat and therefore could not but have been aware of the large containers of plant food adjacent thereto; the presence of the appellant in the company of his co-accused at B&Q in Naas at approximately 14:30 that afternoon, carrying a drill and expandable foam; the fact that the drill was located on the back seat of the car at the time of search; the lies told by the appellant in interview regarding his movements on the day he was arrested, namely, and in particular, that he travelled straight to Ballinlough and had not gone anywhere else, and the evasiveness and improbability of the account given by the appellant.

52. In the circumstances the Court is satisfied that Count No 3, being the cultivation charge, was properly allowed to go to the jury and the Court will dismiss the appeal in respect of Count No 3.