Neutral Citation: [2015] IEHC 746

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 248 JR]

BETWEEN/

BOBY BOGDAN

APPLICANT

AND

DISTRICT JUDGE HUGH O'DONNELL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 27th day of November, 2015

Introduction

1. In these proceedings the applicant seeks an order of certiorari quashing his conviction for the offence of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. He also seeks declaratory relief and an order of prohibition preventing his further trial in respect of the offence.

2. It is complained, in a general plea, that the first named respondent, in convicting the applicant, acted in breach of the rules of natural and constitutional justice and/or in a manner contrary to fair procedures; and that the second named respondent acquiesced in that process.

3. The specific complaints are that the first named respondent, in dealing with submissions made on behalf of the applicant, failed to consider those submissions individually and on their own merits; that he admitted eyewitness identification into evidence in breach of the applicant's rights; and that he admitted items obtained as a result of an unlawful search into evidence in breach of the applicant's rights.

Background facts

4. The applicant was alleged to have robbed a Mr. Barry McGuckian of his mobile phone, jewellery, and cash with a value of approximately €750.00 at 424 North Circular Road, Dublin 7 on 5th August, 2013.

5. The case was listed for trial before the first respondent on 22nd January, 2014. The applicant was represented by counsel but failed to appear on this date, despite having been present when the date was fixed. The matter was allowed to stand until second call, at which point the trial proceeded in the absence of the applicant. No objection was taken to this by his counsel. It is apparent that the injured party had travelled from Northern Ireland to give evidence and that the court was anxious to facilitate him.

6. The injured party said in evidence that he had been walking along a street late at night when he was accosted by a man who grabbed him by the arm and pulled him down into the basement area of a house. Another man helped to pull him inside the building. He said that there were four or five other men and women in the basement who all came running up, pinned him against a wall and searched him. They took his watch, ring, phone and cash. A man he described as *"the young fellow"* took the phone but was unable to get a signal. The injured party told him that he would show him how it worked, and then managed to get away and run across the street. He rang the gardaí from a nearby location. They arrived and he pointed out a house to them. He continued:

> *"The guards went into the house and took everybody out of the house. Then they searched the house and they found the back of my phone. They found my watch. They found my ring."*

7. The injured party said that he thought he recognised two people but that he was *"more confident about the younger fellow"* and was *"definitely sure"* about him.

8. Cross-examination of the injured party was limited to establishing the fact that there had not been a formal identification parade.

9. At the end of the cross-examination the respondent District Judge issued a bench warrant for the applicant and the case was adjourned to the 24th March, 2014.

10. The bench warrant was executed and the applicant was present at the hearing on 24th March, 2014. On this occasion he was represented by a different counsel, who applied for an adjournment. Counsel said that he had now been given instructions that conflicted with the evidence given by the injured party, and that he wished the latter to be recalled so that he could cross-examine on those instructions. He accepted that his client was wholly to blame for failing to appear on the previous date and offered no excuse for his non-attendance. The first named respondent decided to proceed with the hearing and the adjournment application was refused.

11. The prosecuting officer, Garda Kelly, then gave evidence that he and his colleague Garda Moran attended the scene of the robbery as pointed out by the injured party. This was at 424 North Circular Road, which was described as *"a house broken up into flats".* He said that he knocked on the door, which opened *"under the force"* of the knock. He and Garda Moran had walked down some steps into a basement area which was described as *"a communal hallway"*, with about three flats off it, where they were met by 10 to 15 Romanian nationals.

12. Garda Kelly said that, as the hallway was *"a small confined area"*, the men were requested to step outside into the front garden. The gardaí began to take their details there. The injured party, who was standing outside the garden beside the garda patrol car, approximately 12 feet away, identified the applicant as one of two men who had committed the alleged robbery.

13. According to the transcript, Garda Kelly's evidence as to what he then said to the applicant was as follows:

> *"I then spoke to Boby Bogdan and I cautioned him as follows: 'You are not obliged to say anything unless you wish to do so, but anything you do say will be taken down in writing and may be given in evidence. I informed Mr Bogdan that he had been identified as being involved in the commission of a crime and I then informed him that I would –I was going to search him, as I believed that there may be evidence relating to this crime to be found on his person."*

14. During the search Garda Kelly recovered a watch and a chain ring, which were identified by the injured party as being his

property. The applicant was then arrested.

15. In cross-examination Garda Kelly accepted that the time was in and around midnight. Mr. McGuckian had identified the applicant by pointing him out. The applicant was, at the time, standing in a group of approximately ten Romanian nationals who were, he agreed, *"packed closely together".*

16. Garda Moran said that he became aware of the identification of the applicant. He was present when Garda Kelly conducted a cursory search of the applicant and said that Garda Kelly informed the applicant of the reason for the search. He was not cross-examined.

17. The garda evidence was that while in custody the applicant gave his address as Flat 2, 424 North Circular Road. No other relevant comments were made by him in interview.

18. At the conclusion of the prosecution case counsel for the applicant made a submission that the identification of the applicant was *"entirely insufficient to jump the reasonable doubt hurdle"* having regard to the circumstances in which it was made. The injured party had not given a physical description of his assailant's features or clothing and had identified the applicant some time after the event as he stood in a *"huddle"* of Romanian men, at a distance of about 12 feet and in the hours of darkness. Counsel said that the judge would be well aware of the decisions of the superior courts as to the appropriateness or otherwise of identification other than in a controlled, formal garda station setting. Any conviction arising from the purported identification would be wholly unsatisfactory and incapable of surmounting the reasonable doubt test.

19. The first named respondent indicated that he was holding against this submission on the basis that the identification evidence could not be looked at in isolation from the rest of the case. The applicant had been identified, then searched and the stolen goods were found on him. He concluded (on this issue):

> *"Take it all together, you have a case to answer."*

20. Counsel then made a submission on the search. This submission appears to have been based on a note that Garda Kelly had said only:

> *"I informed [him] that he was suspected of committing an offence and I searched him."*

21. However, the extract from the transcript quoted above makes it clear that the garda went somewhat further than that.

22. Counsel referred to his note and said:

> *"Judge, I'm not sure what legal basis for a search that purports to be, but, in my respectful submission, it's wholly inexact. There is no lawful evidence for search. The case of DPP v. Rooney, Judge, again, it's very clear that not only does the guard have to ground his search power and explain it to an accused person, he has to also tell him the reason for a search. So, it's not enough alone that he tells him the reason, he has to tell him the search power, Judge."*

23. Counsel said that if the garda had been relying on his power under the Criminal Justice (Theft and Fraud Offences) Act 2001 he ought to have said so.

24. The first named respondent initially said simply that he was "holding against" the submission and that there was a case to answer. When asked by counsel to clarify the basis for the ruling he said:

> *"I'm holding against you on the totality of the evidence that's been adduced by the State that you have a case to answer."*

and added that

> *"the search was lawful".*

25. The judge then asked whether the defence was going into evidence. Counsel responded as follows:

> *"Very good. And just one final submission, Judge, on the basis of the entry itself into the premises, whereby it was my client's dwelling. The Court, just by its demeanour, doesn't seem to be holding with me on that basis, Judge, but there was no--"*

26. The respondent then interjected

> *"No. No."*

27. Counsel said

> *"Very well. Yes, Judge."*

which appears to have been in answer to the question as to whether the defence would go into evidence.

28. The applicant then gave evidence. He gave an exculpatory account of his evening. He described the arrival of the gardaí, and then going out into the garden and hearing a man say *"He is the one".* He denied involvement in the robbery and suggested that Mr. McGuckian had mistaken him for someone else in the group.

29. The applicant was then asked about the garda evidence as to what was found on his person. He denied that the gardaí had found anything in his pockets.

30. At the close of the evidence counsel renewed his submissions on the basis that the case had now reached the point where it was necessary for the court to apply the standard of proof beyond reasonable doubt.

31. Counsel began to make a submission on the reliability of the identification evidence. The first named respondent interrupted to say

that the applicant's story was *"unbelievable"*. Counsel responded that he was *"in the court's hands"*. According to the transcript, counsel for the prosecution inquired as to whether the respondent wished to hear from the prosecution. The first named respondent said:

> *"I'm perfectly satisfied that the guards found the stuff on him".*

32. The applicant was then convicted. Having heard that the applicant had no previous convictions and was 20 years old, the first named respondent imposed a fine of €350 with six months to pay.

Submissions on behalf of the applicant
33. On behalf of the applicant, Mr. O'Hanlon SC says that no direct complaint is made about the refusal of the adjournment application, but that it *"highlights"* some of the difficulties in the case.

34. He submits that the fundamental issue in the case is the failure of the respondent judge to deal with each application separately, on its own merits. The applications related to an unlawful incursion into the applicant's dwelling, an unlawful search and a dubious identification. It is argued that the respondent treated each of them as an application for a direction, to be dealt with by considering the totality of the prosecution evidence. Rather than engaging with the submissions and ruling upon them, he engaged with the ultimate issue – the guilt or innocence of the applicant.

35. It is accepted that the judge would have been entitled to consider that the fruits of the search strengthened the reliability of the identification, but only if the search was lawful. On this issue, however, Mr. O'Hanlon notes that the property was not exhibited or produced for identification in court, in circumstances where the applicant denied that anything was found.

36. The specific arguments on the merits of each submission are as follows.

Unconstitutional invasion of the dwelling
37. It is submitted that the absence of a specific ruling on the admissibility of evidence flowing from the entry by the gardaí without warrant, the direction to the people inside to leave the house so that the victim could observe them and the consequent search of the applicant amounted to a fundamental flaw in the fairness of the trial. It was more than merely a "routine mishap" (quoting the phrase from *Sweeney v. Judge Brophy* [1993] 2 I.R. 202).

38. On the merits of the argument, Counsel submits that the gardaí had no lawful entitlement to enter the premises. The entrance hall was not a public area, but was part of the dwelling of the applicant. It is submitted that if this argument is incorrect, it was in any event not a public place. No specific power of entry was invoked, and the purpose is described as having been to bring the occupants outside.

39. The interjection by the first named respondent when counsel attempted to address him on this issue is said to have amounted to a breach of fair procedures, contrary to the precepts of natural and constitutional justice. The applicant contends that a summary court's refusal to entertain relevant submissions constitutes a fundamental flaw in the proceedings. The Court is referred to the decision in *Coughlan v. District Judge Patwell* [1993] 1 I.R. 31 where the respondent District Judge refused to permit counsel to make submissions as to the legality of the process by which the applicant had been brought before the court. Denham J. (as she then was) quashed the conviction. At p. 37 of the judgment she said:

> *"The first respondent herein exceeded his jurisdiction in refusing to allow the applicant to make any submission in relation to the alleged breach of constitutional rights, and in refusing to listen to such a submission, and in proceeding to trial without considering the said submission and any steps which might or might not be taken thereon."*

40. It is submitted that in the present case the refusal to hear the submission was even more fundamental and was simply a *"blunt unwillingness"* to hear a point or to allow counsel to expand upon it. Reference is also made to *McNally v. District Judge Martin* [1995] 1 I.L.R.M. 350. In that case counsel for the defence, in a case involving two charges, had sought to rely on a particular High Court authority in making submissions on them. The presiding judge had responded:

> *"I know the case and the point raised in the case and will refuse it or any other point you make."*

41. The subsequent conviction in relation to that charge was quashed by the High Court, where the following observations were made by Murphy J. at p. 352:

> *"Where the accused is represented by counsel this involves hearing counsel both on fact and on the law. Whilst there must be a wide area of discretion for every court or other tribunal as to the manner in which it manages and conducts proceedings before it, including the limitation or abbreviation of excessive arguments or submissions, the rulings in the present case excluding the right to open the crucial legal report were so extreme as to render the judgment of the court unconstitutional."*

42. However, both Murphy J. and, on appeal, the Supreme Court considered that the flaw in the trial judge's handling of this aspect did not affect her ruling in relation to the second charge before the court.

43. The applicant submits that the ruling given by the respondent in relation to the identification evidence failed to provide the applicant with a sufficiently precise or satisfactory answer to the submissions made on his behalf.

Submissions on the identification evidence
44. On the evidence, it is submitted that various factors detracted from a fair identification including the time of night, the distance from the observer to the defendant, the lack of information about comparators, and the failure to carry out a formal identification parade. The courts have consistently expressed a preference for a formal identification unless the suspect declines to participate.

45. The applicant relies upon *DPP v. Mekonnen* [2012] 1 I.R. 210 and *DPP v. Duff* [1995] 3 I.R. 296 as authority for the proposition that the proper, regular, and optimum method of holding an identification for a witness was an identification parade. No explanation had been offered to the court for the failure to hold a parade.

46. In *Mekonnen* the Court of Criminal Appeal held that, while recourse might be had to other appropriate informal identification processes, the Court would require an explanation as to why a formal identification parade was not undertaken. Having considered the authorities on visual identification, McKechnie J. noted that in *DPP v. Lee* [2004] 4 I.R. 166 the Court of Criminal Appeal had held that

there was an onus on the gardaí to obtain the most reliable form of identification evidence, which would be a formal identification, but had gone on to say that the lack of such a procedure would not mean in all circumstances that a jury would not be permitted to consider the evidence. He continued (at p. 220):

> *"…where no explanation is offered, or where that offered could not be objectively justified, it will only be in quite exceptional circumstances that visual identification evidence, obtained otherwise than by a formal parade, would be permitted to go to a jury. We strongly believe that this should be and is the situation. In addition, we highlight the very limited nature of this exception, which does not in any way permit the gardaí to resort to an alternative method as a matter of course or routine. The rule prevails: the exception must be exceptional."*

47. The main evidence against the accused in Mekonnen was an informal identification carried out at Busáras. The Court declined to quash his conviction, holding that on the facts of the case the gardaí had acted in a *bona fide* manner in circumstances where they did not have sufficient grounds to arrest the suspect. The Court also accepted that there would have been no benefit in holding a parade after the arrest, when the witness had already made the informal identification.

48. The applicant submits that it was not open to the first respondent to make a finding as to the admissibility of evidence by reference to other aspects of the case, or to rule that the identification process adopted was vindicated post hoc by the fruits of the consequent search. This being a judicial review, the Court is not asked to review the correctness of the respondent's finding but to consider the procedural issue.

The Garda Power of Search

49. Mr. O'Hanlon submits that the garda made no reference to any authority for the search of the applicant. *DPP v. Rooney* [1992] 2 I.R. 7 is relied upon for the proposition that, as a prerequisite to a lawful search, a garda must inform the subject of that search of his or her suspicion and of his or her lawful authority to carry out the search. However, in the present case, Garda Kelly's broad assertion that the applicant was identified as being involved in the commission of *"a crime"* was insufficiently specific to satisfy the test in Rooney. In any event, even if the Court were to find that the reason for the search was adequately conveyed, it is contended that there was no evidence that a power to search existed and was outlined to the applicant.

50. In *Rooney* a garda officer had put his hand into the suspect's pocket in search of counterfeit currency. In a consultative case stated from the District Court, the questions asked were whether the officer was obliged to inform the suspect of his suspicion that he was in possession of anything stolen or unlawfully obtained; whether he was obliged to arrest the suspect before carrying out the search and whether he had to inform the suspect of his power of search under the relevant statutory provision.

51. O'Hanlon J., applying the principles established in *Christie v. Leachinsky* [1947] A.C. 573 and *The People (Attorney General) v. White* [1947] I.R. 247, held that there was no requirement to exercise the power of arrest but that the suspect must be informed of the suspicion and of *"the nature and description"* of the statutory power being invoked.

52. It is contended that on this issue also, the first respondent failed to engage with the specific submissions of counsel and offered only a broad response to a question from counsel as to his precise reasons for his ruling.

Failure to engage with submissions and give adequate reasons

53. It is submitted that the first respondent's responses to various submissions on behalf of the applicant were insufficiently precise and insufficiently related to the evidence given and the arguments raised. In the case of *O'Mahony v. Ballagh* [2002] 2 I.R. 410 Murphy J. stated at p. 416 –

> *"I would be very far from suggesting that judges of the District Court should compose extensive judgments to meet some academic standard of excellence. In practice it would be undesirable - and perhaps impossible - to reserve decisions even for a brief period. On the other hand it does seem, and in my view this case illustrates, that every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing. As I have already said, there is no suggestion that Judge Ballagh conducted the case otherwise than with dignity and propriety. It does seem to me, however, that in failing to rule on the arguments made in support of the application for a non-suit he fell "into an unconstitutionality" to use the words of Henchy J. in The State (Holland) v. Kennedy [1977] I.R. 193 at p. 201. In those circumstances it seems to me that the appeal must be allowed and the matter remitted to the District Court for rehearing."*

54. In *O'Mahony*, the trial judge's only response to the submissions made by counsel in a drunk driving case was to say "he was drunk, wasn't he."

55. In *Smith v. Judge Ní Chondúin* [2007] IEHC 270 (an ex tempore judgment) McCarthy J. assessed the adequacy of the District Judge's reasoning in the following terms:

> *"Now I want to emphasise again the fact that this is a court of summary jurisdiction. No great detail was required. No Reserved Judgment was required. Dare I say it, perhaps a little more would have been sufficient. What was required was that those issues which I have identified were specifically referred to and, again, I think there was too high a level of generality in relation to the manner in which she gave reasons."*

56. In the present case, it is submitted that the bald declaration that a submission was rejected, coupled with a reference to *'totality'*, was of limited assistance to the applicant in allowing him to understand the reasons for that rejection. The applicant submits that, as in Smith, there was *"too high a level of generality"* in the first respondent's remarks.

57. Reference is also made to *Kenny v. Judge Coughlan* [2008] IEHC 28, where O'Neill J. said –

> *"If evidence has been given by a number of witnesses for the prosecution, and contradictory evidence given by the defence and the Judge says he prefers the prosecution evidence or he accepts that the charge is made out on the prosecution evidence, that is sufficient to convey to any reasonable person that the Judge has made his decision on the basis of accepting the prosecution evidence and rejecting the defence evidence and in my opinion, such a formulation of the decision is ample to convey to the defendant, the party affected the basis upon which the decision is reached i.e. the reason for the decision."*

European Convention on Human Rights
58. The applicant submits that the case of *Torija v. Spain* (18390/91) (9th December, 1994) (1994) 19 EHRR 553 confirmed that Article 6 of the European Convention on Human Rights, which sets out the right to a fair trial, obliges courts to give decisions for their rulings.

59. It is submitted that while the first respondent was not required to go into minute detail or to provide anything akin to a reserved judgment, it was however incumbent upon the first respondent to give such reasons as would tend to demonstrate that he had heard and engaged with counsel's submissions. The reasons for rejecting such submissions must be readily understandable.

Submissions on behalf of the second named respondent
60. On behalf of the second named respondent, Mr. Dwyer BL submits that there was no failure on the part of the trial judge to entertain a submission in relation to the constitutional protection of the dwelling. If counsel wants to proceed with a submission, he or she should make that clear and not appear to acquiesce in the judge's initial reaction. What occurred in this case was not to be compared with the facts of *McNally v. District Judge Martin*.

61. It is contended that the case made in the trial on behalf of the applicant in relation to the identification was in fact in relation to sufficiency, not admissibility. In any event, the applicant was not convicted on the basis of the identification. The prosecution was entitled to rely upon the fact that the applicant was found in the vicinity of the robbery soon after it occurred and was in possession of the injured party's property.

62. It is submitted that the identification in the present case was only necessary for the purpose of providing a reasonable basis for the search of the applicant by the Garda. The second respondent contends that the rules of evidence do not require a Garda opinion, on which a search is based, to be based on admissible evidence provided it is validly held. Reference is made to *DPP (McConnell) v. McDonnell* [2014] IEHC 35, where this Court followed the decision of the Supreme Court in *DPP (Walsh) v. Cash* [2010] IESC 1, holding as follows –

> *"The opinion grounding the demand must be genuinely and reasonably held, and obviously the demand must not be made for a purpose other than that authorised. However, there is no requirement that the opinion be based upon matters that would in themselves be admissible. To rule otherwise would be to import the rules of evidence into the process of investigation, and to require the prosecution to establish that no part of the material revealed by the investigation were tainted by illegality. That has been definitively ruled upon in Cash."*

63. It is submitted that the argument relating to the dwelling of the applicant is, in any event, without merit. The evidence, it is submitted, was that the gardaí did not enter the dwelling of the applicant, but rather entered a communal hallway through an open door. Such a hallway does not form part of a dwelling. Reliance is placed on the cases of *DPP v. Corrigan* [1986] I.R. 290 and *DPP v. McMahon* [1986] I.R. 393 as authority for the proposition that the common hallway outside an apartment could not be considered part of a dwelling.

64. In relation to the submission on the absence of a formal identification parade, it is submitted that a spontaneous "on street" identification can be admissible in certain circumstances. In the case of *R. v. Oscar* [1991] Crim L.R. 778 Lord Taylor C.J. observed –

> *"When however, as in the present case, a suspect is found within metres of the crime in suspicious circumstances and close to the scene, it may very well be that the provisions of code D:2 do not apply. It may very well be that the best course for the police to take is to drive the suspect back to the witness of the crime to find out whether that witness thinks the suspect is or is not the offender. If the answer is no, then the police will probably have no reason for detaining the suspect any further. If the answer is yes, then the judge will have the task of deciding whether the evidence, including all the surrounding circumstances, is sufficient to leave it to the jury to decide the matter."*

65. The second respondent submits that the case of *DPP v. Mekonnen* as relied upon by the applicant refers to a situation *"where the conviction of a person is wholly or substantially dependent on visual evidence".*

66. In relation to the applicant's contention that the garda who searched the applicant failed to properly inform him of the reasons and authority for the search, the second respondent refers the Court to the transcript of Garda Kelly's evidence at the trial where he said that he informed the accused why he was being searched. It is pointed out that the stolen property was recovered during the search.

67. It is further pointed out that Garda Kelly was cross-examined on various issues but not in relation to the search, and that Garda Moran was not cross-examined at all.

68. The respondent submits that the facts of the *Rooney* case as relied upon by the applicant are distinguishable from the present case. There, the sergeant reached into the suspect's pocket without any reference to a power of search. In the present case, the accused was informed he was being searched as the gardaí believed he might have evidence in relation to the robbery on his person. In any event, this case, unlike in *Rooney*, is a judicial review and this Court is not in a position to address the merits of the first respondent's decision in relation to the validity of the search but rather the jurisdiction to make it.

69. In relation to any suggestion by the applicant that there was a deficiency in the evidence tendered by the prosecution, it is submitted that it is well established that judicial review proceedings can not serve as an appeal against a decision of an inferior court or tribunal, unless in extreme circumstances.

70. In *Doyle v. Connellan* [2010] IEHC 287, a case where the applicant complained of inadequacies in the prosecution evidence and an alleged misdescription of the proofs required in a prosecution under s.49 of the Road Traffic Act, 1961, Kearns P. stated –

> *"I am quite satisfied that the present application for relief cannot succeed. In my view the appropriate remedy for the applicant was to proceed by way of appeal as this case manifestly falls to be considered as one which revolves entirely around the question of the adequacy of the evidence adduced in the District Court. Where that is the true position, I do not believe a judicial review remedy should be granted save in cases where the proceedings are fundamentally flawed by reason of some inherent unfairness or impropriety in the hearing taken in its entirety."*

71. Kearns P. cited with approval the following dicta of Hederman J. in *Sweeney v. Brophy* [1993] 2 I.R. 202 –

"In my judgment certiorari is an appropriate remedy to quash not only a conviction bad on its face or where a court or tribunal acts

without or in excess of jurisdiction but also where it acts apparently within jurisdiction but where the proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law. I take this opportunity of emphasising that certiorari is not appropriate to a routine mishap which may befall any trial; the correct remedy in that circumstance is by way of appeal."

72. The second respondent further denies that there was a failure on the part of the first respondent to give adequate reasons for his decisions and contends that the duty to give reasons in summary criminal trials is set at a very low threshold and one sentence explaining a judge's reasoning is often sufficient.

73. It is submitted that in *O'Mahony v. Ballagh* [2002] 2 I.R. 410, as relied upon by the applicant, that the relevant judge's engagement with the issues went no further than the simple remark "he was drunk wasn't he". In the present case however, the second respondent contends that each application was dealt with in turn and in an appropriate manner. In *O'Mahony*, Murphy J. described the duty to give reasons in summary criminal trials as follows at p. 416–

> *"At the conclusion of the State's case the applicant and his legal advisors were required to decide whether they should go into evidence or not. To make that decision it was essential to know which of the arguments were accepted and which rejected.*
>
> *I would be very far from suggesting that judges of the District Court should compose extensive judgments to meet some academic standard of excellence. In practice it would be undesirable - and perhaps impossible - to reserve decisions even for a brief period. On the other hand it does seem, and in my view this case illustrates, that every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing."*

74. In the recent Supreme Court decision in *Kenny v. Coughlan* [2014] IESC 15, Denham C.J. emphasised that the duty to give reasons is context specific at para. 24 –

> *"…the degree and extent to which a decision of the District Court must be explained by giving reasons will depend in turn on the nature and circumstances of the case. In some cases it may be necessary to succinctly but fully explain the reasons for the decision so that the parties have a proper understanding of the reasons upon which it was based. In this case the offence was simply that of speeding and the mode of trial was summary. This was one of hundreds of such cases that come before the District Court routinely every day of the week. There had been a clear presentation of the issues by the parties, in adversarial proceedings. The District Court Judge indicated that he preferred the evidence given on behalf of the prosecution. The District Court Judge said that he was accepting the evidence of the prosecution. In the circumstances that was sufficient reason. There was no requirement for the trial judge in such a situation to elaborate on the obvious."*

75. Insofar as the applicant relies upon the European Convention on Human Rights and the decisions of the European Court of Human Rights in *Torija v. Spain* (18390/91) and *García Ruiz v. Spain* (30544/96) (2001) 31 EHRR 22, the second respondent submits that the Strasbourg Court, in a passage cited by Denham C.J. in Kenny, observed that the duty to give reasons was context specific – *García Ruiz v. Spain* (30544/96) at para. 26-

> *"The Court reiterates that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see the Ruiz Torija v. Spain and Hiro Balani v. Spain judgments of 9 December 1994, Series A nos. 303-A and 303-B, p. 12, § 29, and pp. 29-30, § 27; and the Higgins and Others v. France judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, p. 60, § 42). Although Article 6 § 1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument (see the Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, p. 20, § 61). Thus, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision."*

Discussion and conclusions

76. In my view this application is misconceived.

77. In the first place, it is difficult to understand the complaint that the first named respondent treated counsel's submissions as an application for a direction. That is what they were, at the point when the prosecution had closed its case, and how they are described in paragraph 16 of the statement of grounds. Counsel began with a critique of the weaknesses in the identification evidence – this submission was clearly directed to weight and reliability as opposed to admissibility. The argument was that, because of the various specified infirmities, the evidence could not discharge the burden of proof beyond reasonable doubt.

78. The trial judge's response indicated his view that whatever weakness might be present, the reliability of the identification was bolstered by the fact that the stolen property was found on the applicant. This was a view he was entitled to take. It had not up to that point been suggested, either by way of cross-examination or submission, that there was anything unlawful about the search. No authority has been advanced to support the proposition that a trial judge considering an application for a direction must examine each piece of evidence in isolation, without regard to the fact that it may be supported by other evidence. On the contrary a trial judge is, as is well known, obliged to consider the prosecution case at its height for the purpose of determining the application.

79. It must be stressed that this was a direction application and that the judge's conclusion, at this stage of the hearing, was that the accused had a case to answer.

80. Counsel then moved on to make submissions about the search. As a matter of fact, his submissions were based on an incomplete note of the evidence of Garda Kelly. That unchallenged evidence was that the applicant had been informed that he had been identified as having been involved in an offence, that the garda believed that evidence relating to that offence might be found on his person and that he was going to be searched. The submissions made by counsel were, in summary, that there was *"no lawful evidence"* for the search, that no reason had been given and that the source of the search power had not been explained. Again, as a matter of fact, the first two contentions were simply inaccurate having regard to the evidence. It is not, in my view, appropriate to maintain an argument in judicial review proceedings on this basis, suggesting that *certiorari* is to be granted if a trial judge does not spell out the mistakes of practitioners.

81. It is clear that the first named respondent did not consider it legally necessary for the garda to specifically invoke a statutory

power. Whether he was correct or not about that does not appear to be a matter for the judicial review jurisdiction but a point to be taken on appeal, or perhaps in a case stated.

82. Counsel then indicated that he wished to make a submission on the basis of the entry into his client's dwelling. (This, as a matter of logic, should have been made first, since the argument was presumably going to be made that the other evidence flowed from it). It is not correct, having regard to the transcript, to suggest that the first named respondent refused to hear him on the issue. Rather, it is apparent that counsel detected a lack of receptivity and decided not to press the matter. That is a decision that practitioners may sometimes have to take, depending on how meritorious they feel the argument to be. If counsel considered it to be a good point, it was up to him to persevere and attempt to persuade the trial judge of its merits.

83. In any event, I think it likely that the trial judge thought that there was no possible merit in it. I consider this to be correct. No authority has been advanced to support the argument that the entrance hall of a multi-unit building is part of the dwelling of any one of the residents for the purposes of invoking the protection of the Constitution. If the argument was correct it would mean that any visitor to one of the residents would, in crossing the common area, be a trespasser as against the other residents. It would also mean that gardaí entering on foot of a search warrant for one flat would be trespassing as against the other occupants.

84. After the evidence of the applicant, counsel sought to renew his argument on the identification evidence. It is certainly the case that the first named respondent interrupted him, to comment that he found the applicant's evidence *"unbelievable".* Counsel then made no further submissions and the judge said – obviously with reference to the applicant's denials of the evidence that the items were found in his pockets – that he was perfectly satisfied that the property was found on him. He then convicted the applicant.

85. The conviction in those circumstances was, in my view, self-explanatory. The case at the close of the prosecution case rested upon the identification evidence, such as it was, and the as-yet unchallenged evidence that the property was found on the applicant. The applicant was under no obligation to give evidence in the trial and, if he had not, that could not have been held against him. However, once he elected to give evidence, that evidence became part of the case as a whole. If the trial judge disbelieved it, as was his right, he was entitled (subject of course to the fact that the burden of proof remained on the prosecution) to draw such inferences as seemed appropriate as to the reasons for any lie told.

86. In the circumstances I refuse the relief sought.