

IRELAND / JUDGMENT

DPP -v- Craig White [2011] IECCA 78 (19 October 2011)

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[2011] IECCA 78 [New search] [Help] Judgment Title: DPP -v- Craig White Neutral Citation:

[2011] IECCA 78 Court of Criminal Appeal Record Number : 218/09 Date of Delivery: 19/10/2011
Court: Court of Criminal Appeal Composition of Court: Macken J., Budd J., O'Keefe J.
Judgment by: Macken J. Status of Judgment: Approved Judgments by Result Macken J.
Leave to Appeal v Conviction refused Outcome: Leave to Appeal v Conviction refused THE
COURT OF CRIMINAL APPEAL Macken, J. [CCA No: 218/09] Budd, J. O'Keeffe, J. DIRECTOR
OF PUBLIC PROSECUTIONS Respondent -and- CRAIG WHITE Applicant Judgment of the
court delivered by Macken, J. on the 19th day of October, 2011 This is an application for
leave to appeal against conviction. The applicant was convicted by unanimous verdict on
29th July, 2009 of having murdered a man called Noel Roche, and was sentenced to
mandatory life imprisonment. An application for leave to appeal that conviction was filed
on 8th December, 2009. The grounds of that application are as follows. The learned trial
judge erred in law:

1. In ruling that fingerprints of the applicant were admissible.
2. In ruling that the arrest of the appellant pursuant to section 42(2) of the Criminal Justice Act, 1999 on 13th February, 2008 was lawful in circumstances where the warrant to arrest the appellant did not show jurisdiction on its face.
3. In ruling that the taking of samples from the applicant pursuant to the Criminal Justice (Forensic Evidence) Act, 1992 was lawful in circumstances where the same breached the appellant's right of reasonable access to his solicitor.
4. In failing to withdraw the case from the jury upon an application of the defence that there was no case to answer.

5. In failing adequately to charge the jury on the presumption of innocence and the prosecution's onus of proof with respect to that presumption.
6. In failing to adequately to charge the jury that it could draw no inference from the fact that the appellant had not given evidence.
7. In charging the jury that if they were to convict the appellant they must be of the view that not to find the appellant guilty would be an affront to common sense. Although there was a ground 8, this was subsumed at the hearing into Grounds 6 and 7. Background Factual Matters Helpful details of relevant background matters are set out by Counsel on behalf of the applicant and of the respondent in their respective written submissions. In synopsis format, they are the following. The applicant was charged that on 15th November 2005 he murdered Noel Roche. On that date Noel Roche was at a concert at what was then known as The Point (now O2) Theatre in Dublin. He left there, having received a phone call at about 9.30 p.m. He then travelled as a front seat passenger in a Ford Mondeo motor car, registration No. 97 D 1917. A blue Peugeot 307 car, which had been stolen and which bore the registration 04 TS 839, came alongside the Ford motor car in which Roche was travelling on the Clontarf Road, and from the Peugeot 307 a firearm - a Glock semi-automatic pistol - discharged four bullets, three of which hit him. He died from his injuries. Forensic evidence was of considerable importance in the trial. At this point it is sufficient to say that the prosecution contended that this forensic evidence linked the applicant to the blue Peugeot car. The car was later found, locked and abandoned, at Furry Park Road, Clontarf, some distance from where Roche was shot. Eyewitness testimony of two witnesses at the trial described two persons running away from the direction of that vehicle shortly after the murder. A Glock semi-automatic pistol was found in a brown paper bag in the car. The gun was connected by ballistics experts to shells and bullets recovered from the Roche shooting. Fingerprints, said to be a match of the applicant's fingerprints, were recovered from the handles of the brown paper bag in which the pistol was recovered from the car. Relevant fingerprints were found only on the handles of the paper bag. There was no evidence as to when the fingerprint marks were made on the bag. No other fingerprints were found connecting the applicant to the pistol or to the car. Also found in the car were a balaclava, a tea cloth and a pair of gloves, the latter unused and still in the manufacturer's original wrapping. DNA evidence was adduced on behalf of the prosecution to the effect that a likely DNA match had been established between the applicant's DNA and DNA found on the handles of the bag. Two other gloves were found, on the morning of 17th November, 2005, one in a hedge, and the other on a footpath some distance from where the car had been found, and in another part of the Furry Park Road area. They were collected by two gardai, placed in bags and labelled as at the time when they were found. Neither was photographed in situ . An expert witness gave evidence that the DNA found on these gloves matched the DNA of the applicant. The expert witness could not say whether this came from the inside or outside of those gloves. It was not possible to rule out its having come about as a result of what was called, "secondary transfer". The expert gave evidence explaining that a person, who had a lesser propensity than the applicant to a shared DNA, could have worn the gloves

for a short period of time, and such a person might have left either low level, or no, DNA. She stated that the additional relevant low level element found was indicative of an additional source, but this was unlikely to be as a result of recent wear for any reasonable period of time. No gunpowder or gunfire residue was found on these gloves. Fibre evidence from the gloves suggested that the gloves were similar to the pair of gloves recovered from the Peugeot car, from which the fatal shots were fired. Ground 1: The Argument Relying on case law to which reference will be made later, senior counsel for the applicant Mr. Grehan, argues that the learned trial judge erred in law in permitting Detective Garda Kane to express the opinion that he “had no doubt” that fingerprints found at the crime scene matched those of the applicant, and that by permitting him to do so, his opinion evidence, as expressed, trespassed on the exclusive domain of the jury. He argued that such a phrase had given to the expert evidence a degree of infallibility which did not sit well with the requirement that the jury and they alone, are the sole arbiters of fact and must not allow their own considered assessment to be overborne by the expert’s opinion. His opinion, in law, must be confined to just that, and the expert may not express certitude in his findings. To express such an opinion is not supported either by established scientific principles in the field of fingerprinting. As to the indicators themselves, counsel for the applicant submits that, in the present case, three out of four purported matches fell below what is contended to be the “customary standard of 12 points of comparison”. Counsel invoked, in the course of the trial, the American case of *Brandon Mayfield v. United States of America* [Oregon District Court, summary judgment, 26th September, 2007] in relation to a partial print left by a Madrid subway bomber, and to the Scottish case, *McKie v. Strathclyde Joint Police Board & Ors*

[2003] ScotCS 353, as examples of circumstances in which expert opinion, expressed in unduly adamant terms, was later found to be erroneous. Notwithstanding incidences of errors occurring in those cases, invoked by him at the trial, Detective Garda Kane was erroneously permitted by the trial judge to state his opinion as being one of which he had “no doubt”. A trial judge is obliged to rein in witnesses from expressing their opinions under the dangerous cloak of infallibility. Counsel points out in this Court that, in the course of the trial, he had also invoked a ruling in the case of *DPP v. Rattigan* (Unreported, Central Criminal Court, 2nd February, 2009), in which a witness was found to be entitled to give his opinion, but could not state this as being one of “no doubt”. Counsel invokes in this Court also two further Irish cases, *DPP v. Abdi* (Court of Criminal Appeal, 6th December, 2004, and *People (DPP) v. Kehoe*

[1997] 1 LRM 481, and an English case, *R v. Buckley*

[1999] All. E. R. [D] 1523. The respondent submits that the learned trial judge did not err in law at all. Senior counsel Mr. Sammon, points out that the applicant accepts that fingerprint evidence is admissible as a matter of law, provided it is of probative value. Its admissibility thereafter is a matter of judicial discretion: if its prejudicial effect outweighs its probative value, it may not be admitted. Counsel submits that a tribunal of fact, such as the jury in

the present trial, can only exercise its functions properly and based on reason, taking into account the onus of proof, the burden of proof, and any defence arising in the course of trial. The issue as to the certainty expressed by an expert is a matter for the trial judge and for the jury. If the jury has received information from a recognised expert in the area of his specialisation, it is the duty and function of the jury to decide what weight to place on that information. This primary function and focus of the jury is not something which should be encroached upon by an expert, who may properly give his evidence as to the strength of his findings. The respondent also relies on the judgment of this court in *DPP v. Kenneth Allen*

[2003] 4 I. R. 295 in support of his argument, which, although dealing with DNA as opposed to fingerprint analysis is, he says, of relevance in that it criticises the lack of specificity and certainty of the DNA results as expressed by the expert in that case, by reason of which the verdict was considered unsafe and a retrial ordered. In the present case the opposite and contrary position exists, in that the expert, specialising in the area of fingerprint analysis, is in a position, based on his level of experience and expertise, to give evidence which is both specific and certain, and he was examined and cross-examined as to his high level of certainty in the results obtained from the crime scene. Further, it is submitted that, as in the *Allen* case, the learned trial judge in this case in charging the jury, emphasised this very point after legal argument on whether or not the expert could say what he did. Such an expert, having no doubt about the reliability of the results, on the basis of his training, his analysis of samples and his production of results, does not trespass on the function of the jury, in giving his opinion in the terms in which he did.

Conclusion

The basis for the ground that the verdict in the present case was unsafe, and that the conviction ought to be set aside, is the applicant's contention that the learned trial judge permitted the expert to give evidence in terms which indicated that he had "no doubt" as to its correctness. Such absolute certainty, it is contended, intrudes on and usurps the particular prerogative of the jury. The applicant, in relying first on *R. v. Buckley*, *supra.*, invokes a case in which principles relating to the admissibility of fingerprint evidence are explained as being that such evidence is admissible "if it tends to prove the guilt of an accused", and is treated in the same manner as all other evidence. Fingerprints may also be admitted even if there are only "a few similar ridge characteristics" and even if in such circumstances the evidence carries little weight. A second principle of law applicable not only to fingerprint evidence but to all evidence is that it may be, and in appropriate cases ought to be, excluded in the exercise of judicial discretion, if its prejudicial effect outweighs its probative value. It seems to the Court that in the present case there could be no dispute about the applicability of these two well established principles. Equally, on the basis of these two principles, there is no evidence that the fingerprints evidence ought to have been, *per se*, excluded, in this case. The two questions which *R v. Buckley*, *supra.*, suggests the prosecution ought to consider are both met in the present case: first, whether there are ridge characteristics in the control print from the applicant, and how many of them; and secondly,

whether the print made on the item relied on was made by the accused. Although counsel refers to a “12 point standard” as being applicable, presumably meaning an acceptable and appropriate measure, *R. v. Buckley*, supra., does not, in reality, support the existence of such a standard. Instead, in the course of judgment there is a mention, *per curiam*, of certain comments which were considered might be useful to trial judges given the state of knowledge, in 1999, of fingerprint science. These comments, although useful, cannot be proposed as a standard, and this Court can find no principle of law which automatically excludes from evidence ridge similarities which are below a particular number, or below an alleged standard of twelve points of comparison. Nor has the applicant adduced any case law which supports the contention that this is so, either in the United Kingdom or in this jurisdiction. On the contrary, in the course of the trial, counsel on behalf of the respondent pointed out that the so-called 12 point comparison, while it had been adopted at times, as a practice, nevertheless was never established as a rule of law, and had in any event been abandoned in the United Kingdom, and no such required minimum existed. That contention was not challenged by the applicant, by evidence or otherwise. The Court considers the contended for standard not to exist, and has not been sufficiently recognised or accepted, and the germane issue for the jury is to consider the weight, if any, to be attached to any evidence tendered in relation to the number of purported matches. Secondly the applicant relies on the High Court decision in a criminal trial *DPP v. Rattigan* (Unreported, Central Criminal Court, 2nd February, 2009) in which, it was said, the learned trial judge had ruled that a witness, while entitled to give his opinion could not state his opinion as being one of “no doubt”. In that regard counsel for the applicant relies on this case as a precedent which he considers the learned trial judge, in error, did not follow in this case. It is, however, unclear to this Court what the precise basis was for the ruling in that case. The ruling was not opened to this Court, and is not cited in the transcript, although it is clear the learned trial judge had it before him. It would not necessarily constitute a “precedent”, although appropriate respect must be accorded to it. A review of the decision of this Court in *DPP v. Abdi*, supra., does not support the applicant’s case either. That case concerned the admissibility of evidence in the context of a contested determination as to insanity or otherwise of the accused, where insanity had been raised as a defence to a murder trial, and where the accused had sought to prohibit the admission of opinion evidence tendered on the part of a well known expert, in the face of evidence to the contrary tendered by two experts on behalf of the accused. In that case, the expert who tendered evidence on behalf of the prosecution did so by being permitted to make statements, including the following:

1. “I am of the opinion that Mr. Abdi does not fulfil the McNaghton criteria for legal insanity”
... “In summary Mr. Ali was not legally insane at the material time.”
2. “I believe that Mr. Abdi’s alleged actions were motivated by ...”
3. “I do not believe that Mr. Abdi fulfils the criteria for (a) ‘guilty but insane’. Even if there were an option of diminished responsibility available to the jury, I am firmly of the opinion that his responsibility was not diminished.” (emphasis added) All of the foregoing matters were matters essentially for the jury to decide, but this Court found that the expert evidence of

the psychiatrist was admissible, and that his actual opinion was based on fact, even in a case where it was clear there was a significant dispute between experts. In passing, having regard to the admissibility of, and the correct basis for, the opinion which the expert expressed, this Court, at the very end of its 20 pages of analysis of the legal arguments and of the materials in question, issued a general reminder as to the central role of the jury on the issue of insanity, including the following: “ where there is a conflict of expert evidence it is to be resolved by the jury or by the judge, if sitting without a jury, having regard to the onus of proof and the standard of proof applicable in the particular circumstances ”. Although the Court also stated “ expert opinion should not be expressed in a form which suggests that the expert is trying to subvert the role of the finder of fact ”, this Court specifically stated that there was “ no question of any such thing ” arising from the expert evidence in that case, including the above extracts. In the present case, there was no question of a conflict between experts, but rather a question of whether or not the manner in which the opinion was proposed to be tendered by the fingerprint expert made inadmissible evidence which otherwise was accepted by the applicant as being, *prima facie*, not so. The issue which arises for consideration is whether or not that expert opinion was expressed in a manner which suggested the expert was trying to subvert the role of the jury, by his use of the words “ no doubt ”. The expert evidence tendered in the present case was not in conflict with expert evidence tendered by any other party, save, of course, by way of appropriate challenge from counsel by way of cross-examination, and was not given in terms significantly different to that accepted by this Court in *DPP v. Abdi*, *supra.*, as being appropriate, including the statement “ Mr. Abdi was not legally insane at the material time ”. The fact that in two cases, one in the United States and one in Scotland, epitomise and exemplify the dangers associated with “ giving a degree of infallibility to fingerprint evidence ”, does not assist this Court in determining whether the learned trial judge erred in this case. There is no evidence before the Court as to whether or not either of these two cases “ epitomised the dangers associated with giving a degree of infallibility to fingerprint evidence ”. Nor can it be the case that because an error has occurred, that error occurred as a result of any claim to infallibility. It would appear that other, perhaps more serious, issues were also considered to have been the underlying basis for the evidence tendered, at least in the American case cited, and that malice or an attempt to protect the police investigation was the main issue in the Scottish case. Nor does the extract from *Human Factors in Forensic Evidence*, assist the Court, since it is unclear what the parameters were for any study which might have included the above “ no doubt ” statement, or in what context the statement relied upon was made, or the extent to which any independent analysis was carried out of any particular instances of errors, and so forth. Nor does it even say that an expert giving evidence should not be permitted to express evidence in the manner complained of in the present case. As to the case of *DPP v. Kenneth Allen*, *supra.*, cited by the respondent, that was a case which concerned expert evidence given in relation to the DNA of an accused. The respondent adopts and invokes the following excerpt from the decision of McCracken J. in the Allen case: “Expert evidence comparing DNA profiles is a comparatively recent scientific technique and indeed it would appear that it is still being

perfected. As in many scientific advances the jury have to rely entirely on the expert evidence. One of the primary dangers involved in such circumstances is that the matter, being so technical, a jury could jump to the conclusion that the evidence is infallible. That, of course, is not so in the case of DNA evidence, at least in the present state of knowledge". (emphasis added) However, that case is only of some general assistance to the Court. It is important to note this Court's other comments in which the context for the above statement is properly positioned and understood. While this Court found that the expert was "very careful in her evidence to rebut any possibility of presumption of infallibility", the expert's primary evidence, according to the judgment, was that "the chances of the DNA belonging to anybody other than Kenneth Allen were so remote as to lead them to the view that they would not have a reasonable doubt that the DNA was that of the applicant". However, evidence was given by the expert in cross-examination in relation to the possibility of a matching profile being more likely "between siblings". Arising out of that evidence the applicant had sought to adduce additional evidence concerning (i) the existence of three full brothers of the applicant, and two half brothers; (ii) the fact that at least one full brother had been convicted of a criminal offence, and (iii) the fact that the probability of DNA profiles matching among siblings is one in ten thousand, as opposed to the one in one thousand million for unrelated persons as given in evidence by the expert. While this additional evidence was not admitted (for reasons unconnected with the existence or otherwise of the possibility of closely similar matching DNA), the court very carefully and properly considered the evidence of the expert, finding an absence of detail as to the likelihood of a match of the type which the expert contended for in the case of siblings or half siblings, and an absence of detail relating to the statistical likelihood of such DNA evidence matching that of the applicant. This Court considered that, although other helpful evidence was given by the expert, the absence of statistical evidence specific to siblings and half siblings in that case would likely have misled the jury, the Court stating: "... the failure to elicit, either in direct or in cross-examination, the actual statistics concerning brothers, had the potential to confuse or mislead the jury into believing that, even among brothers, an increased probability starting from a base of one in one thousand million would still be so improbable that they could disregard it. This court has no way of knowing what attitude a jury would have taken had Dr. Smith been asked to give further statistical evidence in relation to brothers, but the court does feel that the way in which the evidence was left was such as to render the trial unsafe ...". (emphasis added) The comment concerning the status of DNA evidence was entirely based on the fact that evidence comparing DNA profiles "is a comparatively recent scientific technique", and "it would appear that it is still being perfected", and should be understood in that light, having regard to the important context in which it was made. The helpful extract from DPP v. Abdi, supra., case is in the following terms: "Expert opinion should not be expressed in a form which suggests that the expert is trying to subvert the role of the finder of fact." This, in reality, is a statement of the law. As to whether or not that occurs in each and every circumstance where an expert expresses a strong, or very strong, confidence in his opinion, even "no doubt" in his opinion, depends on the circumstances of the case, the type of evidence being tendered, the manner in which

the evidence has been tendered, even perhaps the tenor in which the evidence is tendered, the charge to the jury, and all other relevant factors enabling a court to determine whether or not there has been, in reality, an attempt by an expert to usurp the role of the finder of fact (whether judge or jury), or whether his/her evidence might reasonably be interpreted as being such an attempt, or as having that effect. The Court now turns to see how the matter was dealt with in the present case. On the fourth day of the trial, and towards the end of the day, counsel on behalf of the applicant drew the attention of the Court and of counsel for the prosecution, to an objection which he wished to make in relation to the statement of intended evidence of the fingerprint expert. On the following day the legal argument continued. The particular difficulty concerned the inclusion in that statement of proposed evidence (and presumably the intention of the expert to give evidence in the same vein) that he was “satisfied beyond reasonable doubt” as to matters relating to his opinion on the fingerprints discovered on the handle of the brown paper bag. Mr. Grehan, as mentioned above, relied on the ruling in *DPP v. Rattigan*, supra., which was described by him as being a “fairly short ruling”. Mr. Sammon, on behalf of the prosecution, objected to any attempt to limit the fingerprint expert in giving his opinion in the manner intended, including giving an opinion “beyond doubt” in his own mind. It was clear in the course of the exchanges with counsel for the applicant, that the learned trial judge, based on first principles, considered that any expert witness is permitted to give evidence in order to offer assistance to a jury in a trial, to which no objection was taken, and that a jury is assisted if they are told by the expert, be it fingerprint or ballistics expert, or anybody else, with what confidence the expert is offering his/her opinion, to which there was not agreement, Mr. Grehan expressing the view that the expert was entitled merely to give his opinion, and no more. The learned trial judge, again in exchanges, pointed out that, if there was a particular difficulty in relation to the phrase appearing in the statement of proposed evidence, he would invite counsel on behalf of the prosecution to discuss with the witness an alternative formula, so as to avoid use of the phrase “satisfied beyond all reasonable doubt”, or “satisfied beyond all doubt”, this being too similar in content and meaning to the role which the jury itself is involved in, that is, to be satisfied on the basis of the evidence tendered, that the prosecution had/had not established “beyond reasonable doubt” that the accused was guilty. Mr. Grehan, for the applicant, secondly, contended that an opinion must conform to scientific principles as to how, in fact, the opinion is expressed, and pointed to evidence being tendered by other experts in the course of the trial. He argued that, notwithstanding the learned trial judge pointing out that experts, including experts in fingerprinting regularly indicate the degree of confidence which they have in their opinion, “fingerprint experts are out of kilter with the entire expert community in terms of expressing themselves as being of no doubt”. In that regard he contended that experts were not entitled to do so, having regard to the errors which had occurred in above mentioned cases. That was so even if the jury would be told, in the course of the charge, that the expert is permitted to give evidence of his opinion because he is an expert, but that this is purely an expression of an opinion, and that it is for the jury to decide the case, and ultimately for them to decide whether or not to accept or reject the prosecution case. Counsel on behalf of the respondent

submitted that the view being put forward on behalf of the applicant had no basis, but was the opinion of counsel for the applicant, who was, of course, entitled to call a fingerprint expert to say that the high degree of certainty in the state of knowledge of fingerprints which had existed for many years, was no longer as definite. This did not deprive the expert, called on behalf of the prosecution, to give evidence in positive (or positively certain) terms and to indicate the degree of confidence he attached to the evidence he was giving. The learned judge made his ruling in the following terms: "Alright. Well, the starting point is why are experts permitted to give evidence? They are permitted to give evidence in order to assist a jury. In the case of fingerprints, rarely, but in the case of other disciplines, frequently, juries have to choose between conflicting expert testimony, and certainly judges in cases that are tried by judges alone day in day out have to choose between conflicting testimonies. In deciding how to make that choice the jury, where there is one, or a judge, will have regard to a number of factors. It may have regard to the particular expertise and qualifications of the expert, to what extent the, as it were, subspecialty is engaged by the expert, and also, and perhaps more importantly, to the extent to which the expert is entirely confident in the opinion he is expressing. And it seems to me that any expert is perfectly entitled to indicate that he has particular confidence in an opinion, and the corollary of that is that it's appropriate that an expert should qualify an opinion when it isn't expressed with the same confidence, so I see no objection whatever to Detective Garda Kane expressing the view that he has considerable confidence, complete confidence or whatever. I do understand Mr. Grehan's sensitivities about using language that so closely reflects the task of the jury, though as I have said, ultimately the jury will be getting cautions as to how they deal with any expert testimony, but for that reason I would prefer if – and it's a matter – I am not insisting on this – but I will strongly prefer if Detective Garda Kane, perhaps in consultation with Mr. Sammon, came up with an alternative formula designed to indicate to the jury the strength of his convictions, and his confidence in the correctness of his convictions, but without using the phrase "satisfied beyond all doubt", because it so closely reflects the ultimate task of the jury. Subject to that invitation, there are no constraints on Detective Garda Kane." On the following morning the debate resumed, for reasons which do not have to be gone into in detail, and still during the course of the voir dire, the fingerprint expert gave evidence on oath as to the approach he was likely to take, or as to the language he was entitled to use, counsel for the prosecution, very properly, indicating to the court that he, counsel, could not put words into the witness's mouth, and could not suggest to the witness what kind of words he could, or should, use. After further brief exchanges, the matter was disposed of by the learned trial judge acknowledging that, as he understood it, the witness was indicating that the phrase "I have no doubt" was one that he was comfortable with, and this was confirmed by the witness, which phrase was, according to the evidence tendered during the course of the latter exchanges, a phrase which had also been acknowledged in *DPP v. Rattigan*, supra., as being acceptable, at least in cross-examination. The Court is satisfied that the learned trial judge made no error in law in the manner in which he heard and dealt with the issue arising in relation to the strength or otherwise of the view to be expressed, and as expressed, by the expert, and that there could

be no objection to his rulings in the matter, which were based on exchanges with counsel, on a consideration of counsels' submissions and of the law, and for good and stated legal reasons. On the basis of the case law, and the trial judge's ruling, the Court does not accept that the giving of the evidence relating to fingerprinting in the manner which occurred subsequently in the present trial, namely, the expert expressing the view he had "no doubt" about his results, was in any way, or could have been considered to be in any way suspect or open to criticism, and did not seek by such expression to usurp the role of the jury. Nor was it likely to have had that effect. This Court is satisfied it did not lead to an unfair trial or to an unsafe conviction.

Ground 2: The Argument The second ground arises from the provisions of s.42(2) of the Criminal Justice Act, 1999 ("the Act of 1999"), attacking the validity of the arrest warrant issued in respect of the applicant, and all matters flowing from it. The factual background against which it arises is as follows. The applicant had been arrested in 2005 in relation to the investigation of the killing of Roche, and forensic samples were obtained from him at that time. He was not, however, charged. In February, 2008 the applicant was serving a sentence in Mountjoy Prison for unrelated offences. An application for an arrest warrant was made to the District Court on the 7th February, 2008 on foot of Information presented by Detective Superintendent Byrne, pursuant to the above provision. According to the transcript, further evidence was also put before the District Court, in response to questions put by the District judge. The arrest warrant issued and was subsequently executed on the 13th February, 2008 at Mountjoy Prison by Detective Sergeant Scott. In the course of the hearing the District Court judge expressed herself in the following terms: "I am satisfied that the arrest of the said prisoner is necessary for the proper investigation of the offence", and the arrest warrant contains this statement also. Mr. Grehan argues that s.42(2) of the Act of 1999 requires a District Court judge to be satisfied of the three matters therein set out, and, more importantly, he contends, the warrant must so state. According to the argument, an essential precondition for the warrant to show valid authority on its face to permit the applicant's arrest and detention, is compliance with s.42(2) of the Act of 1999 by the inclusion in the warrant itself of the three matters set forth at s.42(2)(a) – (c). The District Court judge, having expressed herself satisfied only in relation to one of the three bases mentioned, the warrant was bad on its face, and therefore lacked jurisdiction. The appellant's arrest on foot of the warrant, as well as his subsequent detention at Raheny Garda Station, and all matters flowing therefrom, were therefore unlawful. In oral argument Mr. Grehan submits further that there is no presumption in law that a court document is valid on its face, as validity on the face of the document must be proven (see DPP v. Owens

[1999] 2 I. R. and other cases in that regard). A warrant, whether a search warrant, or an arrest warrant, must be declared invalid if it does not show jurisdiction on its face. Conditions must be strictly met. Counsel relies before this Court, having relied also before the trial court, inter alia, on the case of *Simple Imports Ltd. v. Revenue Commissioners*

- [2000] 2 I. R. 243, and in particular on the following statement of Keane, C. J.: “What then is the consequence of a recital in the warrant which, if it correctly records the basis on which the warrant was issued, shows on its face that a statutory precondition for the exercise of the jurisdiction was not satisfied?” Similarly, the applicant argues that the case of DPP v. Henry Dunne
- [1994] 2 I. R. 537 supports his contention, that being a case in which the search warrant had an essential averment struck out from its body, in that case the phrase “ on the premises to which the warrant related ”, this being one of the requirements of the relevant section of the Act, and in which case Carney, J. held that he could not act on the proposition that the words struck out of the body of the warrant had been struck out by inadvertence because “ such an approach would facilitate the warrant becoming an empty formula ”. He also relies on DPP v. Edgeworth
- [2001] IESC 31 concerning a search warrant issued by a Peace Commissioner. The learned trial judge had erred in ruling that the matter was a drafting point, rather than a point of substantive defective procedures, and was wrong in finding that that unhappy drafting did not rob the warrant of its effect. Insofar as the respondent is concerned, Mr. Sammon argues that the learned trial judge was correct in his ruling in relation to the arrest warrant and the subsequent arrest of the applicant, and in his application of DPP v. Balfe
- [1998] 4 I. R. 50 to the facts of this case. The legal authorities relied upon by the applicant relate to search warrants, and the issue before this Court concerns a warrant to arrest the applicant while detained in Mountjoy Prison. The arrest warrant, he submitted, was obtained pursuant to the provisions of the District Court Rules 1997 (as amended), and was based on “ an Information ” made in accordance with the terms prescribed by Statutory Instrument No. 448 of 2001. In consequence, the District Court judge must, of necessity, have had all these matters in her mind when, having questioned the garda, she expressed the opinion that the warrant for the arrest of the applicant “ was necessary for the proper investigation of the offence ”. While the face of the warrant requires certain matters to be indicated, the warrant in pro-forma style, approved by the District Court Rules Committee, remained at all times valid. Finally, counsel for the respondent invokes the decision in DPP v. Edgeworth, supra., relating to the issue of a search warrant by a non-judicial person, and points out that, on the contrary, the warrant in the instant case was lawfully issued by a judicial person, because of the necessity to do so when a party is in prison, as opposed to being at liberty, and as such, constitutional safeguards were in place and were maintained throughout the entire procedure of laying the necessary Information before the District Court, and issuing the arrest warrant thereafter.

Conclusion

In the course of trial, on the application on this point, the learned trial judge ruled as follows: “The warrant in question was pre-prepared by the gardai in the incident room. It is certainly a terse document. Section 42 provides that a judge can issue a warrant if certain preconditions are

met and in place. Mr. Grehan says that it was essential that the fact that these preconditions were met should appear on the face of the warrant. Instead the warrant recites ‘I am satisfied that the arrest of the said prisoner is necessary for the proper investigation of the offence’. It must be said that this document, which as I have said is certainly a terse document, in strict terms is in accordance with the terms provided by Statutory Instrument 448 of 2001. The statutory instrument in question is unusual, in that recitals that might be relevant, or potentially relevant, are asterisked, and the asterisk is indicated as a direction to delete that recital, if the recital is applicable. Mr. Grehan says that the gardai cannot rely on the statutory instrument and that a procedure, however widespread, and however long standing, can’t be permitted if it is not, in fact, a proper one. He relies on the Kenny case for this. In relation to his criticism of this warrant, he relies in particular on the Simple Import case and the line of authorities there which I am referred to. In my view, the cases are distinguishable. In Simple Imports the warrants showed on their face that statutory preconditions had not been satisfied. It is sufficient I think just to refer to the headnote.” Having considered certain extracts from Simple Imports, *supra.*, and in particular the judgment of Keane, C. J. (as he then was), he relied on the decision of Murphy, J., in *DPP v. Balfe*, *supra.*, and continued by stating that Murphy, J: “... analysed the different approaches taken to what in short I will describe as problem warrants, and he did so in these terms, and did so ... when he traced this area right back to the case, celebrated case, of *People v. O’Byrne*. So I am satisfied that this was not a case such as *Kenny* where the statutory procedure was not followed. That is in reality a drafting point rather than a point of substantive defective procedures and the unhappy drafting does not rob the warrant of its effect .” (emphasis added) Section 42(2) of the Criminal Justice Act, 1999 provides as follows: “(1) ... “prison” means a place of custody administered by the Minister for Justice, Equality and Law Reform; “prisoner” means a person who is in prison on foot of a sentence of imprisonment, on committal awaiting trial, on remand or otherwise.

- (2) A member of the Garda Síochána may arrest a prisoner on the authority of a judge of the District Court who is satisfied on information supplied on oath by a member of the Garda Síochána not below the rank of superintendent that the following conditions are fulfilled –
 - (a) there are reasonable grounds for suspecting that the prisoner has committed an offence other than an offence in respect of which he or she is imprisoned;
 - (b) the arrest of the prisoner is necessary for the proper investigation of the offence which he or she is suspected of having committed;
 - (c) where the prisoner has previously been arrested for the same offence, whether prior to his or her imprisonment or under this section, further relevant information has since come to the knowledge of the Garda Síochána.
- (3) A person arrested under this section –
 - (a) shall be taken forthwith to a Garda Station and may, subject to subsection (5), be detained there for such period as is authorised under section 4 of the Act of 1984, and

- (b) shall, subject to this section, be dealt with as though he or she had been detained under that section. ...
- (5) If at any time during the detention of a person under this section there are no longer reasonable grounds for –
- (a) suspecting that the person has committed the offence in respect of which he or she was arrested under this section, or
- (b) believing that his or her detention is necessary for the proper investigation of that offence, the detention shall be terminated forthwith.” S.42(6) provides that in such circumstances as arise under s.42(5), the person who has been detained shall be transferred back forthwith into the custody of the Governor of the Prison where the person was imprisoned at the time of arrest. Certain provisions of the Criminal Justice Act, 1984 expressly do not apply to a person arrested and detained under s.42 of the Act of 1999. It is clear from the transcript of the trial, and in particular of the evidence of Detective Superintendent Michael Byrne, that the District Court was informed that the gardai had received, inter alia, confidential information and technical mobile phone network information to the effect that the applicant had made statements to other persons that he was involved in the murder of Roche, and that the applicant’s mobile phone was in operation in the Ratoath area of Meath thirty-five minutes after the murder. In addition, an alibi previously contended for was in doubt and an additional statement dated 5th February, 2008, in that regard, was taken. All the foregoing information was received by gardai after the applicant’s original arrest. It is also clear from the transcript that Detective Superintendent Byrne informed the learned trial judge that he put this new information before the District Court when seeking an arrest warrant, and informed the District Court judge that the arrest of the applicant was necessary for the proper investigation of the offence. It is helpful to note the observations, comments and guidance given in cases concerning warrants opened to the Court, mainly on the part of the applicant, but these all concern search warrants. Search warrants can raise particularly difficult issues, frequently of a constitutional nature. In light of the constitutional protection attaching to the dwellinghouse and/or private property of a citizen, courts have been particularly careful, and properly so, to ensure that the right to enter a home is not countenanced, except where all technical and legal requirements are strictly met. Similarly, in the cases of jurisdiction to issue a search warrant, because this is ordinarily issued under the hand of a District judge, but can be issued also by a Peace Commissioner, strict interpretation may arise in a case where the jurisdiction of a Peace Commissioner is in issue, either because the search warrant is wrongly completed, or because a search warrant in a pro forma format is issued purportedly under the authority of a judge, but, in fact, by a Peace Commissioner. Courts have been careful, on review of these, not to approve a search warrant where this has not been issued under the claimed authority, although an incorrectly indicated status does not automatically invalidate a warrant. The decisions in *Simple Imports*, supra., and *DPP v. Henry Dunne*, supra., both concern search warrants and both relied on the important protection, in constitutional law, of the dwellinghouse of every

citizen. The cases of DPP v. Edgeworth, *supra.*, and DPP v. Gareth McCarthy

[2010] IECCA 90, both concerned how the jurisdiction of an authorised person to issue a search warrant was noted on the warrant, and the effects of the same. *The People (DPP) v. Veronica Balfe*

[1998] 4 I. R. 50 concerned an error in the warrant, in that it did not correctly transpose the description of the goods for which the search warrant was sought under the provisions of The Larceny Act, 1916. This Court having considered authorities, concluded that this defect, although serious, was a patent defect rather than an inherent or fundamental defect, and therefore the goods in question could properly be admitted in evidence. While the facts were quite different, the seminal case of *Simple Imports v. Revenue Commissioners*

[2000] 2 I. R. 243 is invariably invoked in this context, and in which Keane, C. J. stated: “Search warrants, such as those issued in the present case, entitle police and other officers to enter into the dwellinghouse or other property of the citizen, to carry out searches and (in the present case) remove material which they find on the premises and in the course of so doing use such force as is necessary to gain admission and to carry out the search and seizures authorised by the warrant. These are powers which the police and other authorities must enjoy in defined circumstances for the protection of society, but since they authorise the forcible invasion of a person’s property, the Courts must always be concerned to ensure that the conditions imposed by the legislature before such powers can be validly exercised are strictly met.” (emphasis added) It is clear from the authorities cited in support of the interpretation of s.42(2), contended for by the applicant, that they all concern search warrants. Since, as is evident from the above, such a warrant can have draconian effects which, without the backing of a valid warrant, would constitute an obvious infringement of a citizen’s constitutional rights, they must be interpreted strictly. It is not clear to this Court how the case law on search warrants relied on, on behalf of the applicant, can be readily applied to a warrant to arrest a person in prison. In the present case, there is no question of any search of any premises, no question of being entitled to use force to gain entry, and no question of being authorised forcibly to invade a person’s property. There is no suggestion in the case law that a warrant to secure the arrest of a prisoner is subject to the constitutional protections attaching to a search warrant of a dwellinghouse or private property. The issue which arises in this application does so in the exclusive context of a person being held as a prisoner. In the ordinary course of events, and provided there are reasonable grounds for so doing, a garda may arrest a person pursuant to the provisions of the Criminal Justice Act, 1984 bring the person to a garda station, detain him for questioning and take forensic and other samples, without in any way being constrained to invoke any judicial intervention by way of application to the District Court, or otherwise. A prisoner is detained in prison pursuant to a valid court order in that regard, and is therefore under the care and control of the Prison Governor. No person, not even a garda, may enter a prison and demand the production and removal

of a prisoner, not even for the purposes of arresting him for the investigation of an offence. This requires a specific intervention by a judicial authority, in the present case in the District Court pursuant to the provisions of the Act of 1999. The real question therefore which arises is what is the rationale behind s.42(2) of the Act of 1999? Its intention, as is clear on its face, is to enable a garda, in respect of a person imprisoned or otherwise detained under the control of a Prison Governor, to satisfy a judicial authority, namely the District Court, that there are sufficient grounds to arrest a person. The purpose of securing an arrest warrant is to permit the Garda Síochána to carry out, or in appropriate circumstances, to continue, the investigation of an offence by a prisoner whose sentence cannot otherwise be disturbed. Not even a prison governor may permit a prisoner's arrest without a Court Order. But the rationale of the section appears to be to permit a garda in possession of the warrant to require the prison governor to yield up a prisoner in circumstances which, without an arrest warrant, would not be possible. In such circumstances, the questions which arise, in turn, are twofold: (a) whether for the warrant to be valid all three matters mentioned in s.42(2)(a) – (c) must appear on the face of the arrest warrant itself as signed by the District judge, or, as is contended for on behalf of the respondent, whether for the arrest warrant to be valid it is sufficient, provided it is established that evidence/information has been tendered in respect of (a), (b) and (c), that it recites only that the District Court is satisfied the prisoner is necessary “for the proper investigation of the offence”, on the basis that the District Court judge must be deemed to have been satisfied on the evidence tendered that (a) and (c) had also been established; and (b) whether, if all three must appear on the face of the warrant in order to comply with s.42(2), the non-appearance of any one of them is fatal to the validity of the arrest warrant, such that the subsequent arrest, detention and questioning of a prisoner are all also invalid. It seems to this Court that when considering the sub-sections, so as to avoid a person being improperly removed from a prison, the Court must have clear information from a Garda Síochána, not below the rank of Superintendent, that the three conditions mentioned in the three sub-sections are fulfilled. If there is adequate evidence before the trial court indicating that those matters were before the court, then the District Court judge will ordinarily be satisfied on the information supplied, and the arrest warrant will issue. First, there must be information as to the nature of the offence in question. In the present case it was stated in the Information, and in the warrant, that the offence in question was unlawful possession of a firearm, used in the unlawful killing/murder of Noel Roche, and that he is sought for an offence other than the one for which he is in prison. Secondly, there must be information establishing that the prisoner is necessary for the proper investigation of the offence in question, and, finally, where the prisoner has previously been arrested for the same offence (and that could be either prior to or while in prison), further relevant information must be supplied, which information must be subsequent to the earlier arrest, if there was one. The reasons for these conditions are clear. They permit a District judge to be satisfied that there is good and valid reason for encroaching on the effect and consequence of another, earlier, court order sentencing the person sought to a term of imprisonment. In the case of an arrest warrant issued by a

District judge, that warrant is, as in the case of a search warrant (and as confirmed in the case law), an administrative act. It is equally clear from the case law that there is no lis, as such. Indeed the party affected in the case of a warrant issued for the arrest of a person in prison under the authority of a District judge, is more likely to be the prison governor, to whom the arrest warrant will be presented so as to authorise a garda to arrest a prisoner under his care and control, when that person's arrest would not otherwise require any judicial intervention. In such circumstances there is no clear or obvious constitutional issue in question concerning the prisoner, and in fairness to counsel for the applicant, none was claimed. Indeed, the only basis for the invalidity argument is that the case law in relation to search warrants, cited above, requires that such warrants be strictly scrutinised, and Mr. Grehan argues that that case law must apply equally to an arrest warrant. There being no constitutional protection invoked, and no allegation that the arrest warrant was secured on the unconstitutional invasion of the personal rights of the applicant, it is unclear to the Court why the same scrutiny attaching to search warrants, the reasons for which are clearly enunciated in the above case law, should automatically, or at all, apply equally to the issue of an arrest warrant permitting the arrest of a person who is a prisoner. Nor is there any legally valid argument put forward as to why, in the absence of such application to arrest warrants, the subsequent arrest detention and questioning of the applicant, or the subsequent taking of forensic samples, should be held to be invalid. In *DPP v. Balfe*, supra., as the learned trial judge stated, this Court had also stated: "It is to be presumed that the District Judge issuing the warrant would act in accordance with the requirements of the relevant legislation and the onus of establishing that he or she failed to do so rested on the person challenging the validity of the warrant." There is no evidence that the District Court judge in the present matter did not act in accordance with the legislative requirements, as such. There is no dispute but that the Information in the present case, as supplemented by the oral evidence, included all material complying with the provision of s.42(2)(a) – (c). On a review of the arrest warrant itself it is in the following terms: "WHEREAS from the Information on oath and in writing sworn before me by D Superintendent Michael Byrne, member of An Garda Siochana not below the rank of Superintendent, That Craig White is currently a prisoner in Mountjoy prison And is suspected of having committed an offence to wit, the unlawful possession of a firearm at Clontarf road on the 15th November 2005. That firearm been used in the murder of Noel Roche. I AM SATISFIED that the arrest of the said prisoner is necessary for the proper investigation of the offence. Dated, etc. " It might be said, also, having regard to s.42(2) that the terms of (a) are, at least in part, sufficiently recited in the warrant. As to (c), if evidence to comply with that sub-section is given, as was the case here, it is inevitable that (b) would follow from that, and also from proof of (a). It is not, therefore, clear why, in such a case as this one, the terms of s.42(2)(b) would not be, and should not be, deemed adequate to support the warrant. Provided that there is adequate evidence, as here, that all of the matters provided for in s.42(2)(a) and (c) were put before the learned District Court judge, which is the conclusion to be drawn from the evidence, it appears to this Court that it was adequate for the purposes of permitting the arrest of the

applicant, as a prisoner, and the arrest warrant was not invalid by the failure independently to recite the judge's satisfaction as to the existence of each (a) and (c) of s.42(2) on the face of the warrant. In the circumstances, the applicant cannot succeed in his contention that the arrest warrant was invalid and so too all consequences flowing therefrom. But, even if the arrest warrant was incorrectly completed, in that the specific recitals of (a) and (c) were not included expressly on the face of it, no argument has been advanced that the warrant was thereby secured in infringement of a constitutional right, and no suggestion is made that the arrest warrant was procured by means of a ruse, or a deceit intended to evade those rights. If, therefore, the arrest warrant in the present case, was not in breach of any constitutional protection, but was nevertheless not in strict conformity with the statute and was therefore illegal in that sense, such illegality does not have as its automatic consequence that the warrant is thereby invalid or of no effect. The illegality in this case is not such as to persuade this Court to conclude that the subsequent arrest, detention and questioning of the applicant pursuant to the arrest warrant, were themselves, in turn, invalid, and indeed no argument on that basis was made. The learned trial judge did not commit any error in law in his finding that the arrest warrant was valid.

Ground 3: The Argument The next ground is the allegation that the learned trial judge erred in law in ruling that the taking of samples from the applicant, pursuant to the Criminal Justice (Forensic Evidence) Act, 1990 was not lawful, because there was a breach of the applicant's right of reasonable access to his solicitor. Under this heading the applicant invokes the provisions of s.3 of the Criminal Justice (Forensic Evidence) Act, 1990: "(1) Where a consent required under section 2 of this Act is refused without good cause, in any proceedings against a person for an offence –

- (a) the court, in determining –
 - (i) whether to send forward that person for trial, or (ii) whether there is a case to answer, and
- (b) the court (or, subject to the judge's directions, the jury), in determining whether that person is guilty of the offence charged (or of any other offence of which he could lawfully be convicted on that charge), may draw such inferences, if any, from the refusal as appear proper; and the refusal may, on the basis of such inferences, be treated as, or as being capable of amounting to, corroboration of any evidence in relation to which the refusal is material, but a person shall not be convicted of an offence solely on an inference drawn from such refusal." A second legislative provision is also of significance, which is the (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, of which Article 11(1) states: "(1) An arrested person shall have reasonable access to a solicitor of his choice and be enabled to communicate with him privately." Article 12(6) of the same Regulations states: "(6) Where an arrested person asks for a solicitor, he shall not be asked to make a written statement in relation to an offence until a reasonable time for the attendance of the solicitor has elapsed." The context in which this issue arises is as follows. The applicant was, as stated earlier, arrested at Mountjoy Prison on the 13th February, 2008. This arrest was made at 7.45 a.m., and the applicant arrived at Raheny Garda Station at about 7.50

a.m. He requested access to his nominated solicitor at 7.58 a.m. The evidence at the trial was that a garda left a message on the nominated solicitor's phone at 7.58 a.m., but the phone call had not actually been answered. The garda then contacted Detective Superintendent Byrne at 8 a.m., seeking permission to take blood, hair and other samples, photographs and fingerprints of the applicant. Permission was granted at 8.05 a.m. The applicant provided the requested samples, and all of this was done by 8.30 a.m. The forensic materials were then taken to the Forensic Science Laboratory. According to the evidence, at 7.58 a.m. Garda McCoy made her first effort to reach the applicant's solicitor, Miss Banbury, by ringing a landline. There was no answer, but there was a recorded message notifying callers that in the case of an "extreme emergency", the caller should contact a different number. Garda McCoy informed the applicant that she could not get through to his nominated solicitor, and asked whether she could contact another solicitor, which was declined. She also told the applicant that she would make a further effort to contact the nominated solicitor, which she did at 8.15 a.m. on the emergency number, which was also not answered, and on which she left a message. The solicitor returned the call within one minute stating that she would attend "straight away" in person at the Garda Station. Garda McCoy, according to the evidence, asked the solicitor if she wished to speak on the telephone to the applicant, but she declined as she was coming to speak to him in person "immediately". According to Garda McCoy's evidence, she immediately informed the applicant of this development. The applicant, in the course of a voir dire on this issue, stated that he did not object to providing samples, but allowed these to be taken only because he believed that if he did not, they would be taken forcibly. In cross-examination he did, however, agree that he had consented to them being taken. After the samples were taken, he declined to sign the form confirming his consent. His solicitor arrived at the station, the custody records indicating that this was at 9.42 a.m. At that stage the applicant was brought to the detention room for a consultation with his solicitor. Counsel for the applicant relies on *The People (DPP) v. Healy*

[1990] 2 I. R. 73, confirming that the right of access to a solicitor in favour of a person in detention is a constitutionally protected right. This is not demurred from by the respondent. The applicant also invokes the decision of this Court in *The People (DPP) v. Buck*

[2002] 2 IR 268 , to the effect that where a person is in custody and requests a solicitor, and makes an incriminating statement prior to the arrival of the solicitor, that statement is admissible in evidence unless there has been a deliberate and conscious violation of the applicant's constitutional right of access to a solicitor, where a failure to observe reasonable standards of fairness requires the exclusion of the statement, and *DPP v. Raymond Gormley*

[2009] IECCA 86 . That, too, is not demurred from by the respondent. The applicant relies on the following extract from the judgment in the *DPP v. Buck*, *supra* . case, delivered by Keane, J.: "Assuming that, in the present case, the trial judge was entitled to conclude that the

arrest and detention of the defendant was lawful and did not constitute a mala fide attempt to ensure that he was without legal advice while he was being interrogated and that the gardaí made bona fide attempts to secure the presence of a solicitor when the defendant requested them to do so, it would follow that there was in this case no deliberate and conscious breach of his constitutional right of reasonable access to a solicitor and, on that assumption, his detention remained lawful. It would also seem to me that, where a person being detained under a statutory provision asks for a solicitor to be present and the gardaí make bona fide attempts to comply with that request, the admissibility of any incriminating statement made by the person concerned before the arrival of the solicitor should be decided by the trial judge as a matter of discretion in the light of the common law principles to which I have referred, based on considerations of fairness to the accused and public policy.” The applicant finally relies on DPP v. Creed

[2009] IECCA 9, in which this Court considered the taking of samples under the Criminal Justice (Forensic Evidence) Act, 1990, and in which the court stated as regards to the taking of hair: “A deliberate and conscious violation of rights may indeed render a detention wholly unlawful and render any evidence taken as a consequence of it, inadmissible. ... Given that under the (Act) the hair sample could be procured without consent, it would have been reasonable to assume that the applicant did not require a solicitor in connection with it. His request for a solicitor the previous evening was clearly related to the questioning which he was about to undergo.” Counsel on behalf of the applicant submits as follows. Although it is accepted that attempts were made to contact the solicitor, a reasonable time should have been permitted to elapse before any samples were taken, so as to enable the applicant consult with his solicitor, invoking in this Court the decision of the Supreme Court in DPP v. McCrea

[2010] IESC 60 . In that case, the garda continued operating the intoxilyzer, when the applicant sought access to his solicitor, and indicated he could access his solicitor later. It was held that the garda was not entitled to do so, even if she was mistaken in thinking she had to finish the test once it had commenced. The same position, it is said, arises in the present case, because the samples “ could have a huge bearing ” on the outcome of the trial, and could have been refused. The far reaching nature of the change in the law occasioned by the Criminal Justice (Forensic Evidence) Act, 1990 has, counsel contends, been the subject of judicial comment, including in *The People (DPP) v. Boyce* (Unreported, Court of Criminal Appeal, 21st December, 2005). Counsel also points out that, in the course of the voir dire , the applicant gave evidence that “ he believed he had no choice but to give the samples ” that were asked of him. The existence of such a choice as being his entitlement was something that could have been clarified, had he secured access to a solicitor before the taking of samples from his person. It is also argued that in circumstances where the offence had occurred in 2005, the appellant had previously been arrested in 2005, but was released without charge; he had given samples pursuant to the Act of 1990, but these had not been maintained by the State; the applicant had been re-arrested in February, 2008 at 7.45 a.m; the applicant had refused to give samples voluntarily outside the provisions of

the Act of 1992; the applicant had requested his solicitor be contacted, and the applicant's solicitor having responded quickly and informed the prison authorities she was coming to the Garda Station "immediately" to speak to him. In proceeding to take samples from the applicant, this was an unreasonable step, and breached the applicant's legal rights under the Regulations, and his constitutional right to access to legal advice, as elucidated in *The People (DPP) v. Healy*, supra., and subsequent judgments. The fact that his solicitor was known to be "en route" and did arrive to speak to the applicant at 9.42 a.m; the fact that complex legislation with possible adverse inferences was being utilised to secure samples from the applicant, in circumstances where the samples taken in 2005 had not been maintained; all these factors, it is alleged, lead to the conclusion that it would have been reasonable to await the arrival of the solicitor, on the facts of this particular case, in order to ensure that the applicant enjoyed his constitutional right to reasonable access to his solicitor: further, the effect of the refusal to postpone the taking of samples until after the applicant had an opportunity to consult with his solicitor, it is submitted, was to prevent his reasonable access to legal advice. Moreover, this amounted to a deliberate and conscious denial of the applicant's constitutional right of access to his solicitor. In such circumstances, it is contended that the evidence obtained ought to have been excluded by the learned trial judge, in accordance with the decision in *The People (DPP) v. Kenny*

[1977] I. R. 336, and *DPP v. Madden*, supra. Counsel for the respondent, on the contrary, submits that the learned trial judge did not err in law in ruling that the taking of samples from the applicant was lawful, as there was no breach of the applicant's right of reasonable access to his solicitor, even on the sequence of events as set out by the applicant. The respondent points out that the decision in *The People (DPP) v. Healy*, supra., confirms that the right of access to a solicitor is one of "reasonable access", and the respondent cited the judgment of Griffin, J. in that case, in the following terms: "When the detained person himself requests a solicitor, it is the duty of the garda in charge of the investigation to take all reasonable steps to carry out the request. If he refuses or neglects to communicate with the named solicitor there is a clear breach of that duty and of the detainee's right, but delay in carrying out the request may, in certain circumstances, be tantamount to a denial or frustration of that right." On the facts of the present case, it is submitted that there was neither delay, refusal nor neglect in contacting the applicant's nominated solicitor while the applicant was in detention. The garda in charge made bone fide and appropriate attempts, to give effect to a request by an accused to consult with his solicitor. A difficulty arose, but not from any lack of diligence on the part of the gardai, in contacting her. The applicant was immediately informed of the difficulty in making contact with her, and asked if he wished to nominate another solicitor, which he declined. The applicant voluntarily consented to the taking of samples. Further attempts to give effect to the wishes of the accused took place, and when contact was finally made, the accused was immediately notified of his solicitor's intention to come to the Garda Station. Immediate access was permitted to the solicitor when she arrived. The respondent points to *DPP v. Buck*, supra., in which the Supreme Court upheld the trial judge's decision to admit the

statement made, Keane, C. J., as he then was, stating that “ he was satisfied that in the circumstances the trial judge had been entitled to conclude that there had been no breach of the accused’s constitutional rights ”, that is of reasonable access to his solicitor. In the present case the learned trial judge was entitled to conclude that there was no breach of the accused’s right of access to his solicitor. What had occurred was in accordance with the principles set out in DPP v. Healy, supra . The respondent also relies on the decision of this Court in DPP v. Cash

[2007] IEHC 108 that samples which are mechanical in nature and which never change would have remained the same both prior to and after consent. Reliance is also placed on the decision of this Court in DPP v. Boyce (Unreported, Court of Criminal Appeal, 21st December, 2005) concerning the right to silence and the right not to incriminate oneself by making admissions when questioned, which are subject to consideration which differ greatly from the considerations which cover the taking of samples. Having regard to the case law, the taking of samples, which was consented to, was in accordance with law, and there was no breach of the applicant’s constitutional right to access to a solicitor, all reasonable efforts having been made to contact his nominated solicitor by telephone, and access having been given to the solicitor upon her arrival at the Garda Station.

Conclusion

There are two matters which should be stated at the commencement of the conclusions on this particular ground. The first is that the decision of the Supreme Court in the case of DPP v. Cash

[2010] 1 ILRM 389 , has now supplanted the determination of this Court in that case. That judgment makes it clear that a distinction exists between cases concerning the admissibility of incriminating statements made without access to a solicitor, on the one hand, and the admissibility of technical or forensic material on the other hand, which is clear from the following extract from the judgment of this Court: “A fingerprint, in common with a blood sample or scraping for the purposes of obtaining DNA evidence, and such like, is in no way affected by the mood of a suspect giving same. Whether it is voluntary or involuntary, a fingerprint, or a sample of an accused’s DNA, or blood or urine for the purposes of testing for the presence of particular substances, does not change its nature. If a scraping of cells from the accused’s cheek is taken by a trick, or if a hair is taken in an illegal search of his home, the later match of DNA that might be analysed in consequence to a semen sample from a rape victim will always be the same, no matter the circumstances in which it was obtained.” While the decision in that case has been affected by the judgment of The Supreme Court, the above statement was not disturbed. In the case of DPP v. Boyce (Unreported, Court of Criminal Appeal, 21st December, 2005) this Court (Murray C. J.) stated: “It has long been the case that the prosecution are entitled to introduce such forensic evidence obtained from a person in custody at a trial, provided that it was obtained voluntarily and with the full consent of the person in custody ... that is an essential part of the evidence gathering aspect of a criminal investigation provided it is

done within the ambit of the law but it has not always been and is not necessarily dependent, as such, on the existence of express statutory powers to collect such voluntarily provided forensic evidence. In short it is not unlawful to take voluntarily provided forensic samples from a person in custody.” It is important to bear in mind that the law relating to the taking of samples, such as those which were taken in the present case, has been definitively clarified in the judgment of the Supreme Court in *DPP v. Boyce*

[2009] ILRM 253. In that case, a question was certified by the Court of Criminal Appeal in the following terms: “Is it lawful for a member of An Garda Síochána when taking a sample of blood from a person in custody who voluntarily agrees to provide that sample for the purpose of forensic analysis to do so without having invoked the provisions of Section 2 of the Criminal Justice (Forensic Evidence) Act 1990?” It was determined that the answer to this question is in the affirmative, there being a facility to take samples with the consent of the arrested person in conformity with the common law, and there is a parallel statutory entitlement to request such samples. In the present case, the request was clearly made in the context of the applicable statute, but the samples were given voluntarily. The applicant is not assisted in relation to his argument arising from the decision in *DPP v. McCrea*, which concerned a request for a solicitor against the context of it being explained to the person who had been brought to the Garda Station for the purposes of being breathalysed, that he could request a solicitor “ at any time ” while in the Garda Station. In that case access to a solicitor, which the applicant declined to invoke initially, was subsequently sought by him in the course of the intoxicilyzing exercise being carried out, and was, in fact, expressly refused. The determination of the Supreme Court on the Case Stated was of a limited nature, and specifically associated with the particular regulations invoked, and with the specific information which had been given by the garda to the applicant, that he could request a solicitor “ at any time ”, and, having done so “ at any time ” his request had, in fact, been refused. The judgment of Hardiman, J. states: “There is no need in my opinion for this Court to scrutinise that finding [of the District Judge] or any other finding of the learned District Judge other than to enquire whether these findings were such as were open to her on the evidence. That is, the question of whether her findings were findings which this Court would itself make on the same evidence simply does not arise.” ... Accordingly, it seems to me sufficient to say that, having considered the grounds of the learned District Judge’s decision, ... the Court need only say that it was open to the learned District Judge, on the specific facts she found in this case , to dismiss the charge. She was entitled to find that Mr. McCrea was reasonably entitled to rely literally on what the gardaí told him as to when he could take legal advice from a solicitor ; entitled to find that a solicitor’s advice would have been of benefit to him and entitled to find that he had not had reasonable access to it”. (emphasis added) It is true that in that particular case that the court expressed the view that a solicitor could have advised the applicant in relation to the options available to him. In contrast, in the present case, even if the samples had been taken, as the garda was entitled to take them, without the consent of the applicant (as the applicant acknowledged could be done) the results would not, by virtue of that sequence

of events, have been inadmissible, unless there was some ruse or trickery involved which might have supported the invocation of a constitutional right in respect of the taking of them, which has not been suggested in the present case. The application is made on the basis that the legislation was complex, that it was reasonable, once the solicitor indicated that she was coming to the station “immediately”, to defer taking any samples, and that there had been a form of refusal to allow the constitutional right of access to a solicitor effectively by the failure to await the arrival of the solicitor. Although, the solicitor did not arrive until 9.42 a.m., it does not seem to this Court that this timescale can be taken into account as being relevant, because at the time when the samples were requested and consent was given to them being so taken it was not known how long it might take for the solicitor to arrive at the Garda Station. The Court finds that in the present case there was no refusal to postpone the taking of samples, as alleged. The factors set out above do not appear to this Court to render the taking of samples from the applicant with his consent unlawful. In passing, the Court notes that when the solicitor arrived at 9.42 a.m. she was given immediate access to her client. No complaint was made at that stage to the taking of the samples, and no objection was made that the solicitor, when she arrived, had not had an opportunity to consult with her client, or to advise the applicant as to whether or not he should or should not have consented to the taking of the samples. That is not to say that the absence of any complaint is in any way conclusive, but it is indicative of the fact that the giving of the samples did not suggest any immediate cause for concern. In the present case the applicant was formally cautioned prior to the taking of the samples and having been informed of his rights, voluntarily elected to give the samples. In the absence of any refusal to give the samples, and having regard to the fact that the applicant consented to the taking of samples (his reservations remaining secret and undisclosed to the gardai until the trial), it seems difficult to criticise the learned trial judge for finding that the applicant was not deprived of reasonable access to his solicitor. In light of the foregoing the Court is satisfied that the learned trial judge was entitled, in the exercise of his discretion, to rule that the taking of samples from the applicant was lawful and that the applicant’s right of reasonable access to his solicitor was not infringed. Ground 4: The Argument The applicant contends that the learned trial judge erred in law in failing to withdraw the prosecution case from the jury upon the defence application that there was no case to answer. Mr. Grehan relies on the classic formulation of the principle applicable to the exercise by the trial judge of the discretion to withdraw a case at the end of the prosecution case. This stems from the decision in *R v. Galbraith*

[1981] 1 WLR 1039. The classic test is readily expressed in the extract of Lord Lane L. C. J., in the following terms: “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. 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. 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. 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." Counsel for the applicant argues that the prosecution evidence in the present case, taken at its highest, was such that a jury should not have convicted and could not have properly convicted upon it. It was therefore the duty of the learned trial judge to stop the case once application had been made. He set out the various elements of the prosecution case. Mr. Grehan had challenged the value or the weight to be attached to fingerprint evidence found on the handles of the brown paper bag, on the basis that this was a moveable object and could not necessarily be presumed to have been placed there on the occasion of the murder of Roche. He made a similar argument in relation to the DNA profiles. As to the DNA evidence on the two gloves subsequently found and which showed some trace of DNA evidence associated with the applicant, with there being some DNA possibly associated with another party, this evidence too was challenged. Having set out the evidence in full, Mr. Grehan contends that in order for the jury to conclude that the applicant had been in the car, and had played a part in the murder, this would require an impermissible act of speculation on their part. As to the paper bag, since it was a moveable object, it would be speculative of the jury to conclude that the prints were put on the bag in connection with the gun, and not innocently on an earlier occasion. Similarly, the evidence did not establish that the applicant definitely wore the gloves that were found a distance away, at all or indeed that he was the last person to have contact with them. No finger print evidence was found connecting the applicant to the pistol or to the car itself. On analysis no gunpowder or gunfire residue was found on those gloves. It is submitted, therefore, that the prosecution evidence, even taken at its highest, was such that a jury, properly directed, should not, and could not have lawfully convicted upon it. As such, the learned trial judge erred in law in failing to withdraw the case from the jury. In answer to this the respondent argues that there was a sufficiency of evidence to establish that the applicant was implicated in the murder of Roche, to the extent that this was established by the totality of the evidence, and the correct interpretation to be put on it. It is for the jury in such circumstances, to weigh the evidence and to draw, or reject, any appropriate inferences that may be capable of being drawn from that evidence. Further, it is submitted that the learned trial judge had fully analysed the position concerning the existence of all of the elements which he calculated to be three, or possibly four, separate elements, in the case. These, taken together, were sufficient to permit the matter to go to the jury. This was so, even if, had there been only one of the elements established, then this might not have been sufficient to enable the Court to allow the case that the matter should be left to the jury. In such circumstances, the learned trial judge had applied the principles in *R v. Galbraith*, *supra.*, as adopted in this jurisdiction, and did so correctly.

Conclusion

The sufficiency of evidence for the purposes of an application of this type at trial has been considered in several cases, including most recently by this Court in DPP v. M (Unreported, 15 February, 2001, Court of Criminal Appeal) and DPP v. Dunbar (otherwise McManus)

[2011] IECCA 32 , and in the other cases cited in those judgments. The principles enunciated in R. v. Galbraith, supra., as adopted in this jurisdiction are now well established. The essential principle is found in the extract from R v. Galbraith, supra. , itself. In his ruling, the learned trial judge pointed to several matters or elements making up the prosecution case, and declined to accept defending counsel's contention that the jury would be relying on suspicion. The learned trial judge considered that if there were simply one of the several elements present, as the only available evidence, the case could not go to the jury. The learned High Court judge ruled, however, that this was not the position, as there were three, or possibly four, elements which, together, were sufficient to permit a jury to be "absolutely entitled to conclude" that the link had been established between the applicant and the car, and if so established, the jury would be entitled to conclude that they were satisfied beyond reasonable doubt that he was a participant in the murder, whether as a driver, or a shooter, or was present in the car at the time of the shooting, in whatever capacity, and that this conclusion was consistent only with his role of active participation. The several elements in question must be considered in context. First, the evidence was that Roche had been killed or had died as a result of the firing of several rounds or shots from a Glock semi-automatic pistol, fired from a car driving alongside the car in which he was a passenger, which event took place on the Clontarf Road. The evidence was that the same car was subsequently found, locked, on Furry Park Road in Clontarf, without any occupants, it being evidence that two unidentified occupants were seen leaving that car at a point in time not long after the shooting occurred. In the car, as identified by counsel on behalf of the applicant, was found in a brown paper bag, and a Glock semi-automatic pistol in respect of which forensic evidence was given linking it by way of ballistics and shells to bullets recovered from the shooting of Roche. Fingerprint evidence of experts was given to the effect that fingerprints matching those of the applicant were found on the handles of the brown paper bag in which the Glock semi-automatic pistol was recovered, along with other materials including, of relevance, a pair of gloves still unused and still in their manufacturer's original wrapping. Another piece of evidence was forensic evidence that a match of the DNA of the applicant was also found on the handles of the bag in which the pistol was found, although in low levels. A further piece of evidence was that there was DNA evidence on two gloves later found (as earlier described, one in a hedge and the other on a footpath) matched that of the applicant. Finally, there was evidence that the fibres in the two later found gloves, on which DNA evidence of the applicant was found, to some extent or another, also matched in terms of fibre, those of the unused pair of gloves found in the motor car. The trial judge set out in his description, all of the relevant evidence which was before him and upon which basis he was obliged to reach his decision. This Court is satisfied that this is not a case in which there was no evidence upon which the jury

could not convict the applicant, or no evidence upon which a jury, properly charged, should not convict, within the principles enunciated in the case law, such as to oblige him to withdraw the case from the jury. There was evidence of DNA connections between the applicant and the brown paper bag which contained the pistol, and which was found in the car from which Roche was shot. There was evidence concerning fibre connections, evidence concerning fingerprint evidence, and so forth. This Court is satisfied that, taking the prosecution evidence at its highest, a jury, properly charged, could conclude either by way of direct evidence or by appropriate lawful inferences to be drawn from such evidence that the applicant was involved in the shooting of Roche. The arguments tendered on behalf of the applicant to the contrary effect, and which criticise the strength of the evidence, do not withstand the principles originally enunciated in *R. v. Galbraith*, supra., and as adopted and applied in this jurisdiction. The learned trial judge did not commit any error in law. Grounds 5 & 6: The Argument Both grounds 5 & 6 concern the charge to the jury, as does ground 7. However, grounds 5 & 6 can be dealt with together, since they concern related matters. The first concerns the allegation that the learned trial judge failed adequately to charge the jury on the presumption of innocence, and the onus of proof with respect to that. The second alleges a failure on the part of the judge to charge the jury adequately that it was time honoured law that they must not draw any adverse inference from the fact that the applicant had not given evidence. An accused is entitled to remain silent; the onus of proof rests on the DPP on behalf of the State to bring forward evidence to prove the prosecution case. On the first of these, Mr. Grehan contends, having regard to the actual content of the charge, and notwithstanding requisition made in relation to it, that the jury was not recharged and the original charge was inadequate. He relies on the decision in *The People (Attorney General) v. McMahon*

[1946] I. R. 267, in which it was stated that since the onus in a murder charge lies on the prosecution to prove every element necessary to constitute guilt, there is an obligation on the prosecution to negative every supposition consistent with the innocence of the accused. It is contended that the statement “negating every supposition consistent with the innocence of the accused” is a necessary component in a judge’s charge, and a judge must therefore state in his charge, both that the onus lies upon the prosecution to prove every element, and also that it is must negative every supposition consistent with innocence. A failure on the part of the learned trial judge to do so in this case was, it is argued, an error in law, rendering the subsequent conviction of the applicant unsafe. Counsel for the applicant also relies on *The People (DPP) v. D. O’T*

[2003] 4 I. R. 286 in which Hardiman, J. stated: “The rule that, generally speaking, the prosecution bears the burden of proving all the elements of the offence necessary to establish guilt is a corollary of the presumption. To state the incidence of the burden of proof without indicating its basis in the presumption is to risk understating its importance and perhaps relegating it to the status of a mere technical rule. The presumption is the basis of the rule as to the burden of proof and not merely an alternative way of stating it. ... It is therefore important that the presumption itself should be explained as an essential

feature of the criminal trial. The prosecution's burden of proof, the corollary of the presumption, should be itself separately explained. ... One would expect to see a statement that the presumption is that every accused person is innocent until a jury is satisfied to the contrary to the appropriate standard and that this presumption is the basic, constitutionally guaranteed, condition of a trial in due course of law. One might then expect to see instruction as to the onus of proof, described as a consequence of that presumption to which every accused is entitled." In light of the foregoing, it is submitted that the learned trial judge failed to give due weight to the principle of the presumption of innocence, and that the statement " the responsibility is on them [the prosecution] to prove their case, and that onus never shifts at any time during the course of the trial ", followed by a reference to the right of an accused person not to give evidence in a trial. This is said to have possibly caused confusion in the minds of the jury, and in the context of the absence of a specific reference to the requirement of the prosecution to " negative every supposition consistent with the innocence of the accused ", the charge constituted an insufficient explanation of the onus on the prosecution, and rendered the conviction unsafe. On the second of the grounds, counsel argues that the charge of the learned trial judge was also inadequate. In the course of requisitions to the learned trial judge, counsel for the accused contended that it should have been explicitly pointed out to the jury that they should draw no inferences from the fact that the applicant did not give evidence. Notwithstanding that requisition, the jury was not recharged on the point. Counsel relies on *The People (DPP) v. Finnerty*

- [1999] 4 I. R. 364 and on the decision in *The People (DPP) v. Coddington* (Unreported, Court of Criminal Appeal, 31st May, 2001) in which the approach adopted in *Finnerty* was approved by this Court. It is accepted by the applicant, in accordance with *The People (DPP) v. M. K.*
- [2005] 3 IR 423 that the appropriate statement can be in words that may differ, but that, in the present case, the learned trial judge failed adequately to charge the jury on the point, and thereby rendered the subsequent conviction of the applicant unsafe. Mr. Sammon, for the respondent, contends that the learned trial judge adequately charged the jury on the presumption of innocence, and on the onus of proof with respect to the presumption of innocence, and that the jury should not draw any inference from the fact that the accused had not given any evidence. He draws the Court's attention to the precise content of the learned trial judge's charge, and to the exchanges in relation to requisitions raised after the charge, and argues that the learned trial judge made it absolutely clear in the course of his charge, in terms sufficiently simple for the jury to understand and apply, and which did not require any further recharge, all the necessary principles and rules relating to the presumption of innocence and the burden of proof on the prosecution, such that there is no question of the jury not understanding this fully. Nor was there any undermining of the security of the conviction. Insofar as the charge to the jury concerning the drawing of any inferences is concerned, Mr. Sammon cites detailed extracts from the charge of the learned trial judge, and contends that in the context of the charge, taken in its entirety, the charge was perfectly adequate, and the instruction to the jury was in sufficiently plain and

simple language for the jury to be under no misapprehension in relation to the matter.

Conclusion

The Court commences with the issue of inference being drawn from the applicant not giving evidence. Counsel for the applicant relies on *The People (DPP) v. Finnerty*, supra., in which Keane, J. (as he then was) delivering the judgment of the Supreme Court stated: “It is not in dispute that the exercise by an accused person of his right not to give evidence in his own defence, cannot lead to any inference adverse to him being drawn by the court and that, in the case of a trial by jury, the jury must be expressly so advised by the trial judge.” (emphasis added) This statement was approved by this Court in *DPP v. Coddington*, supra. (Murray, J.) stating: “While the trial judge may remind the jury of the fact that the accused had, as it is right, not given evidence in the trial they must be expressly instructed not to draw any inference from the exercise of that right.” (emphasis added) The first thing to say is that it is well established, having regard to the foregoing statements, that the charge to the jury, on any point, does not have to be in a standard form or in a formulaic set of words (such as sometimes occurs in other jurisdictions), provided that an appropriate and sufficient charge on all relevant legal or other issues is made in terms sufficiently clear to enable a jury (a) to understand precisely what their role is and how they should go about carrying it out, and (b) where any type of warning has to be given, that the warning must be in terms sufficiently clear to enable the jury exercise the appropriate caution and proper approach in complying with the warning. Clearly, no adverse inference should be drawn by the jury from the fact that an accused person does not give evidence in his own defence. In the first of the above extracts it is expressly stated that this exercise of the right not to give evidence “cannot lead to any inference adverse to him being drawn”, while in the extract relied upon in the case of *DPP v. Coddington*, supra, it is stated that the jury “must be expressly instructed not to draw any inference from the exercise of that right”. In the latter extract it is clear, without being expressly stated, that what is involved is an instruction to the jury not to draw any inference adverse to an accused. In the present case the learned trial judge in addressing the jury on this issue stated in his charge: “Now, arising from the presumption of innocence it follows that the onus of proof is on the prosecution. It is the prosecution that has decided that there should be a criminal trial and that being so, they having decided that there is going to be a trial, it’s for them to bear the onus of proving the case. The responsibility is on them to prove their case and that onus never shifts at any time during the course of the trial. At no point is there any onus on the defence to prove anything and it’s perhaps time to say that, because there is no obligation on the defence to prove anything, that any accused person is perfectly entitled to choose not to give evidence in a trial. That is the absolute right of any accused person and it certainly would be entirely wrong if you would for a minute take the view that you would hold against an accused person the fact that he has exercised his rights.” (emphasis added) Requisitions were raised on this part of the charge. It seems to the Court, however, that the question which arises is whether or not the charge to the jury in the above terms (as underlined), following on from the charge in relation to the presumption of innocence, and the fact that the onus of proof is on the prosecution and never transfers to the

defence, was sufficiently clear to enable the jury understand that they could not draw any “inference adverse to him” as expressed in *The People (DPP) v. Finnerty*, supra. The underlined portion of the above charge in the present case made it clear that it would be “entirely wrong” if the jury “would hold against an accused person” the fact that he did not give evidence. It seems to this Court that this explains, in a very clear and express format, that the jury should not draw “any inference adverse” to an accused from the fact that he “exercised his right not to give evidence”. In some ways it might be said that this is a broader prohibition expressed in a more simple format not to draw “any inference adverse” against an accused. It would be wrong for this Court to find in such circumstances that a jury made up of ordinary people of reasonable intelligence, could not or would not understand or would in any way be confused by the actual words used by the learned trial judge in the present case. The applicant has failed to make out the allegation that by reason of the words used in the charge, in the context in which they were used, the charge was in any way inadequate or required further clarification on that ground. Turning now to the question of the presumption of innocence, and the allegation that this too was not dealt with properly in the charge to the jury, the Court has set out the respective arguments of the parties, including the complaint made that the charge did not comply with the judgment of this Court in *The People (DPP) v. D. O’T.*, supra. The basis upon which that claim is made is that while the learned trial judge stated “the responsibility is on them to prove their case and that onus never shifts at any time during the course of trial”, this statement was followed by reference to the right of an accused person not to give evidence in a trial, and this may have caused confusion in the minds of the jury, in the absence of a reference (that is to say an explicit or express reference) to the requirement of the prosecution to “negative every supposition consistent with the innocence of the accused”, the extract taken from the decision in *The People (Attorney General) v. McMahon*, supra. The judgment in that case sets out the principle applicable in the case of all criminal trials, and not simply all murder trials, but it does not follow, as the applicant contends, that the precise statement contained in that case must be “a necessary component of a judge’s charge”, or that the failure to state this particular set of words was an error in law rendering the conviction of the appellant unsafe. Nor is it the case, nor indeed was it proposed in the case of *The People (DPP) v. D. O’T.*, supra, that a precise and express format of wording must be adopted in the charge to a jury in every criminal case or indeed in every murder trial. On the contrary, the terms of the extract invoked by the applicant from *DPP v. D. O’T.*, supra., does not suggest either expressly or implicitly that a particular format or use of express wording of a particular type must be adopted, nor that the formula found in *The People (Attorney General) v. McMahon*, supra., has to be used. This Court is unaware of any authority which requires all trial judges to adopt the express phrase “negative every supposition consistent with the innocence of the accused”, possibly because the ambit of such a phrase is so general that it is not likely to be entirely obvious in the actual circumstances of each case. The law relating to assessing the content of a charge is extremely well established. It requires this Court to consider the charge as a whole, and to assess the objections raised to the content of the charge in the context in which the impugned elements arise. The case made under this ground is that the learned trial judge failed adequately to charge the jury on the presumption of innocence and on the onus of proof in respect of that presumption of innocence. In his charge on this point, the learned trial judge

stated as follows: “Now there are some basic principles that apply to every criminal trial conducted in this country and the first of those , from which everything else flows, is that an accused person is presumed innocent . He enjoys a presumption of innocence. That’s a phrase that all of you, I think, will be familiar with from the Press and T. V., films and so on. But the fact that it is a familiar phrase doesn’t mean that it’s a matter that can be treated lightly, because it’s for you to see that it is a concept that is given life and reality. And what that means is that you approach the prosecution case in a sceptical frame of mind. Now arising from the presumption of innocence , it follows that the onus of proof is on the prosecution . It is the prosecution that has decided that there should be a criminal trial and that being so, they having decided that there is going to be a trial, it’s for them to bear the onus of proving the case . The responsibility is on them to prove their case and that onus never shifts at any time during the course of the trial. ” (emphasis added) He continued: “At no point is there any onus on the defence to prove anything, and it’s perhaps the time to say that because there’s no obligation on the defence to prove anything, that an accused person is perfectly entitled to choose not to give evidence in a trial. That’s the absolute right of any accused person and it certainly would be entirely wrong if you would for a minute take the view that you would hold against an accused person the fact that he has exercised his rights.” It is this latter few sentences that trouble the applicant, it being submitted that this explanation may have caused confusion in the minds of the jury, the applicant contending that the last three sentences were preceded by the sentence “ the responsibility is on them to prove their case and that onus never shifts at any time during the course of the trial ”. However, that phrase, which is expressly invoked by the applicant, is only part of the above extract. The above extract, in its entirety, emphasises that the first principle, from which everything else flows, is that an accused person is “ presumed innocent ”. This is emphasised when the trial judge then states “ he enjoys a presumption of innocence ” in the above extract. He then exhorts the jury to ensure that this concept of a presumption of innocence is given life and reality. He follows this by stating in clear and unequivocal terms the following: “ now arising from the presumption of innocence, it follows that the onus of proof is on the prosecution” and he explains that the prosecution has decided to bring the trial and having done so “ it’s for them to bear the onus of proving the case ”. This approach of the learned trial judge falls squarely within the ambit of the extract from *The People (DPP) v. D. O’T*, supra . But quite apart from the above extract which is positioned in the charge to the jury after the learned trial judge had explained the respective roles of the judge, of counsel and of the jury, is followed by the following words: “Now, not only is the onus of proof on the prosecution, the responsibility of proving the case is to prove the case beyond reasonable doubt and that is to a high standard indeed.” This was followed, in turn, by an explanation of what precisely is meant by “ proving the case beyond a reasonable doubt ”. The onus of proof is referred to further in the charge to the jury in relation to the question of inferences, and specifically also in relation to how circumstantial evidence is to be dealt with, the judge advising the jury that in that exercise it must “ at all stages keep to the forefront of their mind that there is a presumption of innocence and that the presumption of innocence can only be displaced when a jury is satisfied beyond reasonable doubt of the guilt of the accused ” (emphasis added), and again in dealing with the difference between relying on suspicion and being convinced of guilt beyond reasonable doubt.

Taking the learned trial judge's charge as a whole, and in its particular phases, the Court is satisfied that there is no basis upon which it could be said that the learned trial judge erred in law or failed to apply all of the principles appropriate to the presumption of innocence, the burden of proof and adverse inferences, as established in the case law, including that invoked on behalf of the applicant. Ground 7: The Argument Under this ground it is alleged that the learned trial judge erred, again in the course of the charge in directing the jury that if they were to convict the applicant they must be of the view that not to find the applicant guilty would be an affront to common sense. Essentially, what is contended is that by the use of the language "not to find the accused guilty" would be "an affront to common sense", was such as potentially to confuse the jury. In charging the jury in this manner, the subsequent conviction of the applicant was thereby rendered unsafe. This argument is dependent on the particular extract from the charge to the jury, which will be set out in the course of the conclusions on this ground. On the other hand, the respondent, in answer to the challenge under Ground 7, contends that the learned trial judge did not err in law in charging the jury that if they were to convict the applicant they must be of the view that to do otherwise would be an affront to common sense, on the basis that this statement needs to be taken within the totality of the statement, and in the context of the charge of the learned trial judge. Mr. Sammon points out that the learned trial judge charged the jury in a manner which made wholly clear the precise basis upon which they could find the applicant guilty, and the fact that the presumption of innocence could only be displaced where the jury was satisfied beyond reasonable doubt of the guilt of the accused. In particular, the learned trial judge had stated: "In order for you to convict in a case, as this one is, entirely dependent on circumstantial evidence, you have to be satisfied not only that the circumstances were consistent with the accused being guilty and having participated in this murder, but also that the evidence is such as to be inconsistent with any other rational conclusion other than that he is a guilty man." Further, Mr. Sammon points to the introductory part of the judge's charge, where he drew specific attention to the position concerning a consideration of circumstantial evidence, which thereby set the context for the statements which were subsequently made. Counsel for the respondent also relies on the judgment of Geoghegan, J. in *DPP v. Nevin*

[2003] 3 I. R. 348, which concerned the charge of the learned trial judge in that case, and to the following passage: "I want you to be sure that when you apply your minds to all the facts, all the facts which you have accepted as true, that you can come to the conclusion that to treat the matter as pure coincidence is an affront to common sense. So, you have got to work towards being satisfied that not to find her guilty would be an affront to common sense. But keep in mind all the time that there is in this the presumption of innocence, which is only displaced when you are satisfied beyond reasonable doubt that she is guilty. The Court considers that these directions to the jury were most appropriate." Having regard to the foregoing, it is submitted that the learned trial judge in the present case did not stray beyond what was appropriate in the charge, and indeed that the charge was, in principle, and in fact, wholly appropriate in the context in which the evidence in this case was to be treated.

Conclusion

The learned trial judge stated: “If you are to convict in a case dependent on circumstantial evidence, you have to come to a stage where after the individual items of evidence relied on are considered, that you as a jury would take the view that bearing in mind all that evidence that you had accepted, that not to find the accused guilty would be an affront to common sense or an insult to common sense.” (emphasis added) The Court has set out above the particular statement which is complained of by the applicant as leading to confusion in the minds of the jury. This Court emphatically does not agree that it was likely to do so. The learned trial judge spent a considerable period of time in the course of his charge, and over a number of pages, emphasising the fact that the trial involved evidence produced on the part of the prosecution which consisted entirely of circumstantial evidence. He explained the precise meaning of “circumstantial evidence”, and compared it to “real evidence” in language sufficiently simple to enable a jury to appreciate the role which they had to play in assessing the evidence which was actually tendered. He gave several examples of the meaning of circumstantial evidence, in plain language and by reference to everyday examples, readily understandable by a cross section of the public making up a jury. He drew attention to the difference between having mere suspicion, as opposed to being persuaded beyond a reasonable doubt, and also explained the meaning of a reasonable doubt, and inferences and circumstantial evidence. The particular extract which he used in relation to advising them that, when a case is dependent on circumstantial evidence, the level to which the prosecution must establish proof beyond reasonable doubt may be a higher one or, if not a higher standard than is the case when direct or visual evidence is available, it still may be more difficult to achieve. Indeed the portion of the charge impugned is one which was approved by this Court (Geoghegan J.) in *DPP v. Nevin*, supra, or is so close in content to that extract as to make no difference. This Court is satisfied that the charge on this issue was one which, taken in context, allowed a jury to afford to a defendant an element of protection in the case of circumstantial evidence that might not otherwise be the case. It tells the jury in no uncertain terms how convinced they must be by the circumstantial evidence, before they can safely convict a person in such circumstances. The Court is satisfied that the charge was perfectly proper, taken as a whole, and having regard to the extensive explanations given by the learned trial judge as to the nature and consequences of circumstantial evidence, as not to be capable of rendering the conviction unsafe or the trial in any way unsatisfactory. Having regard to the foregoing the application for leave to appeal is rejected. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/ie/cases/IECCA/2011/C78.html>

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Prepared on 26 October 2026 · Esheria