



**THE COURT OF APPEAL**

**Record No.: 81/2020**

**Neutral Citation Number: [2021] IECA 261**

**Edwards J.  
McCarthy J.  
Donnelly J.**

**BETWEEN/**

**THE PEOPLE (AT THE SUIT OF THE  
DIRECTOR OF PUBLIC PROSECUTIONS)**

**RESPONDENT**

**-and-**

**ROY CARROLL**

**APPELLANT**

**JUDGMENT of the Court delivered by Ms. Justice Donnelly on the 13<sup>th</sup> day of October, 2021**

1. This is an appeal brought by the appellant against his conviction on a single count of possession of cocaine for sale or supply contrary to s. 15 of the Misuse of Drugs Act, 1977 (as amended) (hereinafter, “the Act of 1977”). The appellant was convicted on the 25<sup>th</sup> February, 2020 in Cork Circuit Criminal Court.
2. Having heard this appeal on the 5<sup>th</sup> October, 2021, the Court indicated that the appeal was to be allowed on the ground that the trial judge had not charged the jury in relation to the inference-drawing provisions of the Criminal Justice Act, 1984 (as amended) (hereinafter, “the Act of 1984”) in circumstances where the contents of an interview in which the appellant had exercised his right to silence were admitted in evidence. We indicated that reasons were to be given later and this judgment constitutes the reasons for our decision.

3. The appellant was admitted to the bail he had been on prior to the trial with the condition that he appear before the Court on the 15<sup>th</sup> October, 2021 when the issue of whether the Court would remit this matter for a retrial would be heard.

### **Background**

4. The offence of which the appellant was convicted was alleged to have occurred on the 10<sup>th</sup> January, 2018. The appellant was the passenger in a car that was waiting to pass through a toll booth on the Dublin to Cork motorway. This car was stopped by the gardaí as a result of information available to them. The appellant and the driver were asked to vacate the vehicle and a search of the vehicle and of the appellant was carried out. The appellant provided his correct name and address to the gardaí but shortly thereafter, the driver called out “run” to the appellant and the appellant fled from the gardaí, up an embankment and into a field. The gardaí were unable to catch the appellant. Both gardaí gave evidence that they saw the appellant drop a package while he was fleeing across the field. It was the prosecution’s case that this white package retrieved by the gardaí contained 124.6g of cocaine worth €8,722.

5. The appellant was arrested on a subsequent date and interviewed by the gardaí. His final interview was admitted into evidence, despite objection. This interview purported to be one carried out in accordance with the provisions of s. 18, s. 19 and s. 19A of the Act of 1984 which permits a jury to draw inferences from an accused person’s failure to answer certain questions and/or to give an explanation as to certain matters. During the course of this interview, the appellant did not respond to any of the questions that were asked of him.

6. The appellant gave evidence in his defence. He accepted he was in the car at the time. He denied having had the package in his possession at any time. He accepted he had run when he heard the driver shout “run”. He said he had panicked. In cross-examination, the appellant said the reason he had not given this explanation to the gardaí while being interviewed was because he had been advised of his right to remain silent.

7. The appellant was also tried before the jury on the offence of possession of a controlled drug contrary to s. 3 of the Act of 1977. The jury initially returned a verdict on this count also. On direction of the trial judge, the issue paper was amended to reflect “no verdict” on this offence. The prosecution had opened and run the case on the basis that s. 3 was an alternative count to the s. 15 count.

### **Grounds of Appeal**

There are four grounds of appeal put forward by the appellant and they are as follows:-

- i. The trial judge erred in law in admitting into evidence the interviews of the appellant which dealt with the inferences pursuant to sections 18, 19 and 19A of the Act of 1984;
- ii. The trial judge erred in law in his charge to the jury having failed to explain the nature of counts one and two on the indictment, which were alternatives of each other, in circumstances where the jury found the appellant guilty of both the s. 3 and s. 15 of the Act of 1977 offences, which is a perverse verdict;
- iii. The trial judge erred in law in recharging the jury having reached a perverse verdict of guilty in respect of both the s. 3 and s. 15 of the Act of 1977 offences and thereby allowing them to amend the issue paper to record a verdict of “not guilty” in respect of the s. 3 offence; and
- iv. The trial judge’s charge was inadequate in all the circumstances.

8. At the hearing of the appeal the two issues canvassed were the direction of the trial judge with regard to the issue of “no verdict” and the admissibility of the interview particularly where the trial judge did not give the jury any explanation as to the purpose for which this interview had been admitted.

### ***The Admission of the Inference Interviews***

9. The manner in which the fourth interview came to be admitted was somewhat unusual. The prosecution began to lead Sergeant Cahalane through his evidence on the matter of interviewing the appellant without any initial objection by counsel for the prosecution. Objection was then made and following an initial objection concerning certain redactions, counsel went on in the absence of the jury to object to any of this interview being admitted. This objection was primarily based upon a claim that because he denied having the cocaine in his possession that no adverse inference should be drawn from any failure to account. Counsel submitted: “[a]nd other than that the only inference could be that he ran away, which he accepts and he gave his name and address. They knew him. It wasn’t a false name. It wasn’t anything like that”. Counsel went on to say that in those circumstances, to admit the interviews would be more prejudicial than probative.

10. The defence’s application was refused and the interviews were admitted into evidence by the device of Sergeant Cahalane agreeing with counsel for the prosecution who read through the interview. A typed copy of this interview was then given to the jury. It is interesting to note that in this interview the appellant was told that the provisions had been fully explained to him and he was asked if he wanted the interviewers “to re-explain those provisions”. As there was no answer from the appellant, the interview proceeded. It seems that the meaning of the provisions had been read to him and explained to him in an earlier interview and he was given time to consult with a solicitor. That interview was not put before the jury.

***The reliance by the prosecution on this interview***

11. The prosecution did not merely present the interviews to the jury but they relied upon his silence in interview in cross examination of the appellant as follows:

“Q. ... let’s concern ourselves with [the fourth] interview that I read out to the jury, there was an opportunity for you to say ‘I ran because I panicked’, but you didn’t do it. You made no comment in that interview as to why you ran. A perfectly

innocent explanation, 'I ran because I panicked', why didn't you say that at that stage?

A. Correct. Because the guards told me and my solicitor that I have the right to remain silent."

**12.** Before this Court, the prosecution relied upon that cross-examination as the plank upon which this Court ought to be satisfied that the inference provisions did not as a matter of fact cause any concern. Counsel submitted that the jury had an explanation for his reliance on his right to silence and that this was sufficient for the purposes of the trial.

**13.** Counsel for the prosecution referred to the interview in his closing speech to the jury as follows:-

"In this case, members of the jury, in a sense it comes down to the following: The two garda officers have given you an account of what they saw and heard. The answer to that by the accused, I'm going to comment on this but it's a matter for you, is to say that he ran because he panicked. You heard the interview and that's why it was raised by the prosecution. You might take the view that it was the ideal place to say, 'I ran because I panicked', because of the cold, because of whatever reason. You decide, if you accept it, that he did run because he panicked. Because what the prosecution says to you is there is evidence on the prosecution case on foot of which you can take the view that in fact he possessed the object to which I've referred, the small white package. It was not discovered on any search carried out. He got into the field and he let it go as he was running across the field. In fact you might take the view that it worked. It stopped the gardaí from going after him as they had to pick it up to see what it was."

**14.** Counsel submitted to this Court that this indicated a correct and appropriate use of the adverse inference legislation by the prosecution. Unfortunately, the issue as to the appropriate use by the jury of the reliance on the silence of the accused was never ruled on by the judge.

Even more importantly, the trial judge did not give a direction to the jury, in fairness he was never asked to do so, on the reason the interview had been admitted into evidence and the nature of the inference they were permitted to draw from the exercise of the right to silence in that context.

**15.** The failure of the trial judge to direct the jury on the issue of the purpose of the recourse to the inference-drawing provisions of the Act of 1984 were raised for the first time on appeal. For the reasons set out below, we consider this to be an issue of such fundamental importance that in the absence of a clear and obvious tactical decision not to have the jury charged on this issue, this was a trial that was lacking in the fundamental fairness of a trial in due course of law and that the verdict was unsafe as a result.

### ***The Right to Silence as a Constitutional Right***

**16.** The constitutional dimension of “the right to silence” was confirmed in *Heaney v. Ireland* [1996] 1 I.R. 580 albeit that the Supreme Court decision was that the right to silence was a corollary of the freedom of expression contained in Article 40 of the Constitution. The practical implications of having a constitutional right to silence were explored in *The People (DPP) v. Finnerty* [1999] 4 I.R. 364. In that case there had been a cross-examination by prosecution counsel of a defendant involving the refusal of the defendant to answer questions in interview. The Supreme Court held that absent any express statutory provisions entitling a court or jury to draw inferences from such silence, it was a breach of the constitutionally guaranteed right to silence to cross-examine about a refusal to answer questions.

**17.** The Supreme Court (O’Malley J. giving judgment) in *The People (DPP) v. M* [2018] 1 I.R. 810 also confirmed the important practical implications for *fair trial rights* of the exercise of the right to silence. O’Malley J. discussed the constitutional status of the right to silence observing that in *Heaney v. Ireland* and *Rock v. Ireland* [1997] 3 I.R. 484 the Supreme Court had based its status in the provisions of Article 40.6.1° finding that the right to silence was a

corollary of the right of freedom of expression. O'Malley J. said that the Court in *Rock v. Ireland* had also spent time on the impact of the inference-drawing provisions for the fairness of the trial process. She noted that subsequent authorities confirmed that notwithstanding the *Heaney v. Ireland* analysis, the right also belongs to the group of *fair trial rights* protected by Article 38.1 (the right to trial in due course of law).

**18.** *Rock v. Ireland* involved a constitutional challenge to the inference-drawing provisions of s. 18 and s. 19 of the Act of 1984. O'Malley J. noted that the Supreme Court in *Rock v. Ireland* “stressed that the trial court was entitled but not obliged to draw inferences, and that there were safeguards for the accused in the trial process.” O'Malley J. quoted from Hamilton C.J. as follows:-

*“In deciding what inferences may properly be drawn from the accused person’s failure or refusal, the court is obliged to act in accordance with the principles of constitutional justice and having regard to an accused person’s entitlement to a fair trial must be regarded as being under a constitutional obligation to ensure that no improper or unfair inferences are drawn or permitted to be drawn from such failure or refusal.”*

**19.** That is a very powerful statement of the importance of the obligation on the court to protect the *fair trial rights* of an accused person by ensuring that no improper or unfair inferences are drawn or permitted to be drawn from a failure or refusal to answer when the statutory provisions are invoked. Later cases have demonstrated the importance of strict compliance with the provisions of the Act of 1984 and that the statutory safeguards must be enforced. For example, McKechnie J. in *The People (DPP) v. A. McD* [2016] 3 I.R. 123 observed that the Act of 1984 provisions constituted an impairment of a right which had protection at a constitutional level. He emphasised the safeguards that must exist prior to the interviews even being admitted. He also distinguished between these provisions and the

provisions of s. 2 of the Offences Against the State (Amendment) Act, 1998 which permits a court to draw an inference from a failure to answer a relevant question. Dealing with the particular point at issue in that case, McKechnie J. noted that for the failure or refusal (and he distinguished between those situations) to come within sections 18 and 19 of the Act of 1984 the account demanded and not given, must be one which in the circumstances at the time clearly called for an explanation.

***The failure to raise the issue on requisitions***

**20.** There is a long line of authority decrying the raising on appeal of points not raised at the trial. In the Court of Criminal Appeal in *The People (DPP) v. Cronin* [2003] 3 I.R. 377 in which the Court (Hardiman J.) stated as follows:-

*“In the more recent case of The People (Director of Public Prosecutions) v. Moloney (Unreported, Court of Criminal Appeal, 2<sup>nd</sup> March, 1992), the judgment of the Court was delivered by O’Flaherty J. who said at p. 3 of the judgment:-*

*‘We would wish to reiterate the jurisprudence of the Court which has been in place for many years that there is an obligation on counsel on both sides, the prosecution and the defence, to bring to the attention of the trial judge any inadequacies they perceive in his directions to the jury. If an appeal is brought before this Court on a point that was not canvassed at the trial this court will regard any person making such a new point as having an obligation to explain why it is sought to be made on appeal when not made at the trial. That is not to say but that if the essential justice of the case calls for intervention we have an obligation so to intervene.’*

*We would respectfully concur with what is said in this passage. The reason for this rule or statement of principle is not at all a technical one, or one merely designed to assist in the orderly conduct of trials and appeals. It is to ensure a*



*proper relationship, based in reality, between the conduct of an appeal and the task on which the Court is engaged, which is to say whether or not the trial was a safe and satisfactory one.*

**21.** In the Supreme Court in that case reported as *The People (DPP) v. Cronin (No.2)* [2006] 4 I.R. 329, the appeal was also dismissed. Kearns J. stated at para. 46:-

*“It seems to me that some error or oversight of substance, sufficient to ground an apprehension that a real injustice has occurred, must be demonstrated before the court should allow a point not taken at trial to be argued on appeal. There must in addition be some sort of explanation tendered to explain why the particular point was not taken”.*

**22.** Counsel for the appellant referred to *The People (DPP) v. Hussain* [2014] IECCA 26 in which the Court of Criminal Appeal (Clarke J.) allowed an appeal on the basis of a defective charge on provocation where the trial judge, having been requisitioned by the prosecution and defence after his initial charge, gave another charge which was perceived as adequate by counsel at trial. At the appeal there was “*no real answer*” as to why there was no application for a recharge. The Court took into account that provocation was a central issue in the case and that there remained a concern that “*there was a real risk of injustice*” and that “*the essential justice of the case does require*” the Court to have significant regard to the concern that the jury may have remained under a significant misapprehension as to the proper legal basis on which they were to consider the key point in the defence. In those circumstances, the Court of Criminal Appeal allowed the appeal against conviction.

**23.** At the trial leading to this appeal, counsel for the appellant had raised an objection to the exercise of the right to silence by the appellant in his interview being permitted to go to the jury under the inference-drawing provisions of the Act of 1984. To that extent the objection was very much a live issue. Counsel for the prosecution relied upon it in cross-examination

and in his closing. Counsel for the defence did not refer to it at all in closing. When asked by this Court why she had not raised this issue with the trial judge, counsel said it was an error and not deliberate; a reply not challenged by the prosecution. In the circumstances, we do not consider there was any tactical advantage/deliberate decision not to raise this; the jury were told and also had before them pages of an interview where it was striking that the appellant was simply not responding when being challenged in robust terms about matters the gardaí were attributing to his involvement in the alleged offence. This was a situation which called out for the jury to be given some explanation of just what that meant.

### **The essential justice of the case**

**24.** There was no doubt that the fact that the appellant had not given any explanation when challenged by the gardaí to do so was deployed by the prosecution as evidence from which the jury could draw an inference supporting the other evidence they had pointing to his guilt. The appellant had a constitutional right to remain silent and a fair trial meant that any adverse comment on that had to be strictly in accordance with the statutory provisions which permitted a jury to draw inferences as they considered proper from that exercise of his right to silence. The appellant gave an explanation for why he remained silent. The legal implications of the prosecution's reliance on the silence and the appellant's explanation were all matters that required direction by the trial judge so as to ensure that the jury understood clearly the purpose of the introduction into evidence of the silence of the appellant and the limits of their permitted reliance on that silence.

**25.** Undoubtedly the introduction of the interview for the purpose of asking the jury to draw a proper inference from the reliance by the appellant on his right to silence was an issue of fundamental importance to the fairness of the trial which required a careful direction by a trial judge to a jury. There is a real risk of an injustice where the appellant's reliance on his right to silence in an interview was permitted to go to the jury without any direction from the trial judge

as to the legal parameters through which the jury must view and consider the exercise of that right. In those circumstances, the essential justice of the case requires this Court to allow the appeal.

### **Other Grounds of Appeal**

26. We do not consider it necessary to deal with the issue of whether these interviews should have been permitted to go into evidence. We note that the objection to this evidence came late in the day; the Sergeant had already mentioned the fact of the interview before objection was taken. If there is a retrial in this matter, the nature of any objection can be explored in greater detail.

27. The issue of whether the appeal ought to be allowed on the issue of the procedure followed by the trial judge in directing the jury to enter no verdict on the s. 3 issue is no longer a live issue in light of the quashing of the conviction at first instance on another ground. We would observe however that the parties proceeded on an incorrect understanding of the law; s. 3 and s. 15 of the Act of 1977 are not truly alternative counts. That was acknowledged by counsel in the course of the appeal.

### **Conclusion**

28. The appeal is allowed. The trial was unsatisfactory in so far as the jury were not directed on the issue of the inference-drawing provisions of the Act of 1984 upon which the prosecution had relied. In those circumstances, it would be unsafe to permit the verdict to stand. We will consider the question of a retrial when we have heard further submissions from the parties; counsel for the prosecution having sought time for the DPP to give directions.