# THE COURT OF APPEAL

**UNAPPROVED** **NO REDACTION NEEDED**

**[182/19]**

**Neutral Citation Number: [2021] IECA 45**

**The President**

**McCarthy J**

**Donnelly J**

**BETWEEN**

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

**RESPONDENT**

**AND**

**THOMAS BATES**

**APPELLANT**

**JUDGMENT of the Court delivered on the 18th day of February 2021 by Birmingham P.**

**1.** On 30th May 2019, in the Circuit Criminal Court sitting in Clonmel, the appellant, who had stood trial alongside one Nigel Gartland, was convicted of offences of conspiracy to possess firearms, ammunition, and explosives. Mr. Gartland was acquitted by a direction of the trial judge and Mr. Bates has now appealed against his conviction. The offences in respect of which convictions were recorded were as follows:

**(i) Count No. 1**

Statement of Offence:

"Conspiracy to possess a firearm in circumstances that would give rise to an inference that the possession of the firearm was not for a lawful purpose and

was contrary to section 27A of the Firearms Act, 1964 as substituted by section 59 of the Criminal Justice Act, 2006 and as amended by section 38 of the Criminal Justice Act, 2007, contrary to section 71 of the Criminal Justice Act, 2006 as amended by section 4 of the Criminal Justice (Amendment) Act, 2009."

Particulars of offence:

"Thomas Bates on a date between the 24th October, 2017 and the 10th November, 2017 (both dates inclusive) within the State conspired with another person or persons to possess or control a firearm in circumstances that would have given rise to an inference that the possession or control of the said firearm was not for a lawful purpose."

**(ii) Count No. 2**

Statement of offence:

"Conspiracy to possess ammunition in circumstances that would give rise to an inference that the possession of the ammunition was not for a lawful purpose and was contrary to section 27A of the Firearms Act, 1964 as substituted by section 59 of the Criminal Justice Act, 2006 and as amended by section 38 of the Criminal Justice Act, 2007, contrary to section 71 of the Criminal Justice Act, 2006 as amended by section 4 of the Criminal Justice (Amendment) Act, 2009."

Particulars of offence:

"Thomas Bates on a date between the 24th October, 2017 and the 10th November, 2017 (both dates inclusive) within the State conspired with another person or persons to possess or control ammunition in circumstances that

would have given rise to an inference that the possession or control of the said ammunition was not for a lawful purpose."

**(iii) Count No. 3**

Statement of offence:

"Conspiracy to possess an explosive substance in circumstances that would give rise to an inference that the possession of the explosive substance was not for a lawful object and was contrary to section 4 of the Explosive Substances Act, 1883, contrary to section 71 of the Criminal Justice Act, 2006 as amended by section 4 of the Criminal Justice (Amendment) Act, 2009."

Particulars of offence:

"Thomas Bates on a date between the 24th October, 2017 and the 10th November, 2017 (both dates inclusive) within the State conspired with another person or persons to possess or control an explosive substance in circumstances that would have given rise to an inference that the possession or control of the said explosive substance was not for a lawful object."

A fourth count relating to the possession of six rounds of ammunition (.38 calibre Super Comp) did not result in a conviction.

## Background

**2.** While a significant number of grounds of appeal have been formulated, and indeed, significant legal issues were raised at trial, the background to the case is, in fact, a very straightforward one, albeit a slightly unusual one.

**3.** A transaction was negotiated over the internet by parties who were not previously known to each other. The negotiations took place between an individual using the moniker 'Snow4' and a vendor. In fact, the vendor was an official of the Federal Bureau of

Investigation. At trial, he was referred to as 'Agent Peter' and had been referred to by that codename on a previous occasion in the course of an unconnected appeal before this Court. Agent Peter routinely monitors the "dark net" for traffic in contraband and illegal materials. Snow4 was anxious to purchase firearms, ammunition and explosives and Agent Peter agreed to sell the requested items with payment being made in the form of Bitcoin.

**4.** There was never any suggestion that the appellant, Mr. Bates, was Snow4. The appellant's involvement arises from the fact that the online purchaser requested delivery of the items to 'Tim Bates, Abbey Street (Green Door), Cahir, Tipperary, Ireland' which is his address. The FBI liaised with An Garda Síochána and this led to Detective Inspector Roberts organising delivery of a firearm, ammunition and inert explosives to Mr. Bates' address. This controlled delivery was on foot of the order placed by Snow4 with Agent Peter.

**5.** At trial, Detective Garda Dowling gave evidence to the effect that at 11am on 10th November 2017, he went to the Green Door on Abbey Street in Cahir, but there was no answer. He made a second attempt at 12.50pm. Again, there was no answer, but on this occasion, the appellant interacted with the Garda who was posing as a delivery man. The appellant accepted delivery of the firearm, ammunition, and inert explosives. He did so on the street outside the Green Door, Abbey Street, Cahir. The evidence of Detective Garda Dowling was that as he waited outside the door, he was approached by a male. Detective Garda Dowling's evidence was that the male was the appellant who asked "have you got a delivery there?" to which Detective Garda Dowling replied "I do. What's the name?" This male then said "Thomas Bates". Detective Garda Dowling then said "I have a delivery for Mr. Tim Bates", to which the male replied "That's my son, he's in hospital. I can take delivery for him". The evidence at trial indicated that the appellant did not have a son, Tim, and did not have any son in hospital. The appellant then signed for the package in the name

of Thomas Bates. The area was under surveillance by members of the National Surveillance Unit and photographs were taken of the transaction.

**The Grounds of Appeal**

**6.** The grounds of appeal that have been formulated are as follows:

(i) That the trial judge erred in law and in fact in permitting the trial to proceed on the basis of the indictment as drafted;

(ii) That the trial judge erred in law and in fact in acceding to an application to allow the witness known as 'Agent Peter' give evidence without revealing his name to the accused and the accused's legal representatives while at the same time providing the information to the Court;

(iii) That the trial judge erred in law and in fact in acceding to an application to allow members of An Garda Síochána attached to the National Surveillance Unit give evidence without revealing their names to the accused while providing the information to the Court;

(iv) That the trial judge erred in law and in fact in admitting a document into evidence which purported to record an exchange between the witness known as Agent Peter and another;

(v) That the trial judge erred in law and in fact in ruling that the extension of detention of the appellant on foot of a direction issued by Chief Superintendent Anthony Howard was in accordance with law;

(vi) That the trial judge erred in law and in fact in admitting into evidence portions of a memorandum of interview during which interview the provisions of sections 18 and 19 of the Criminal Justice Act 1984, as amended by the Criminal Justice Act 2007, were invoked;

(vii) That the trial judge erred in law and in fact in failing to direct a verdict of not guilty;

(viii) That the trial judge's charge was unsatisfactory. That the trial judge erred in law in failing to charge the jury adequately or at all on:

- Essential ingredients of the offence of conspiracy.
- The evidential value of the exchange between Agent Peter and another.
- The consequences of directing the acquittal of Nigel Gartland in circumstances where the crime of conspiracy demands an agreement between at least two people.
- That if the defence was reasonably capable of belief, the benefit of doubt should be given to the appellant unless the prosecution had proved guilt beyond a reasonable doubt.

**Ground 1: The Form of Indictment**

**7.** The appellant's grievance rests on the phrase "conspired with another person or persons to possess or control [a firearm/ammunition/explosives]". While separate counts were laid in respect of a firearm, the ammunition and explosives, they were - in all material respects - identical, and the criticism applies to each. The appellant complains that the reference to conspiring with another person or persons does not identify a co-conspirator or confirm that the co-conspirator or co-conspirators is a person or are persons unknown. It is said that there was, in consequence, a failure to provide "such particulars as may be necessary for giving reasonable information as to the nature of the charge" as required by s. 4 of the Criminal Justice (Administration) Act 1924, which provides:

> "4.–(1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is

charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."

**8.** The appellant draws attention to a passage in *Archbold: Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, 2002) where, at para. 33.42, it is stated:

> "Where the evidence discloses that the accused conspired with other persons who are not before the Court, this should be averred in the indictment. Their names should be inserted, unless they cannot be identified, where it is sufficient to describe them as persons unknown. Sometimes, although the Crown contends that the evidence discloses the conspiracy to have been with persons not before the Court, the evidence may be unclear as to which identifiable persons were involved. In such circumstances there can be no objection, either to "other persons unknown" or to "other persons". However where during the course of the trial the uncertainty is resolved by evidence, which is capable of founding the assertion, that an identified person, not before the Court was a conspirator with the accused, then the indictment should be amended accordingly".

The appellant draws attention to sample conspiracy counts offered in Charleton, McDermott and Bolger on *Criminal Law* (Butterworths, 1999). It is said that the authors are in agreement with what is set out in *Archbold*. This is contended despite the fact that one of the samples is in these terms:

> "You, AB, between the (date) and (date) within the Dublin Metropolitan District, did conspire with a person or persons unknown to defraud CD of (specify)."

The appellant contends that the failure to include reference to a co-conspirator renders the indictment defective and that the Circuit Court judge erred in not directing that the indictment be amended so as to provide minimum necessary information.

**9.** The respondent says that the indictment, as drafted, closely mirrors the terms of s. 71 of the Criminal Justice Act 2006, which created a statutory offence of conspiring to commit a serious offence. The respondent also draws comfort from the indictment rules which are scheduled to the Criminal Justice (Administration) Act 1924. Rule 7 is in relation to "description of persons" and it provides as follows:

> "**7.**—The description or designation in an indictment of the accused person, or of any other person to whom reference is made therein, shall be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree, or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such description or designation shall be given as is reasonably practicable in the circumstances, or such person may be described as 'a person unknown'."

The respondent says that while this was a case where there was suspicion as to the identity of Snow4, the evidence was limited and would not be sufficient to prove the involvement of the individual beyond reasonable doubt. Equally, the possibility that more than one person was using the moniker 'Snow4' at different times could not be excluded.

**10.** It seems to us that, really, not a great deal is required in order to provide *reasonable* information as to the nature of the charge. We are satisfied that in the circumstances of this case, the appellant had considerable information about the nature of the charge that he was facing. Accordingly, we are not prepared to uphold the grounds of appeal relating to the form of the indictment.

**Grounds 2 and 3: Allowing Witnesses to give Evidence without Disclosing their Names**

**11.** During the course of the trial, the prosecution asked that certain witnesses be allowed to give evidence without disclosing their actual names to the defence. There were three such witnesses: the FBI witness known as Agent Peter and two members of An Garda Síochána: Garda DF and Garda AK, both members of the National Surveillance Unit. In relation to Agent Peter, Detective Superintendent Gibbons explained that the witness was a member of the FBI who worked, based in the United States of America as an undercover operative. He said that if Agent Peter's name was made available in open court, it would put his life at risk and compromise the work he was engaged in at that time, as well as work he had done in the past or might do in the future. In relation to the National Surveillance Gardaí, Detective Superintendent Johnson, who is attached to that unit, explained to the Court that it was necessary that Gardaí from that unit give evidence without revealing their names to the defence so as to protect their identities. He said that if such details were revealed, that this would risk the personal safety of the Gardaí in question as well as the safety and wellbeing of their families. Furthermore, he said that to reveal their names would pose a risk to the integrity of present and future operations. The trial judge allowed the witnesses give evidence while using codenames. The appellant says that in so ruling, the judge erred as a matter of law. It is said that there is no power, either at common law or by statute, to enable witnesses give evidence at criminal trials in the Circuit Court on an anonymous basis.

**12.** The appellant says that Article 38 of the Constitution protects the fair trial rights of the accused and that those rights include an entitlement to confront one's accusers. Attention is also drawn to the provisions of the Criminal Procedure Act 1967, as amended by the Criminal Justice Act 1999. Section 4A(5) of the 1967 Act (as amended), which provides that prior to being sent forward for trial, an accused will be served with the following: a statement of the charges against the accused; a copy of any sworn information in writing upon which the proceedings were initiated; a list of the witnesses the prosecutor proposes to call at the

trial; a statement of the evidence that is expected to be given by each of them; a copy of any document containing information which it is proposed to give in evidence by virtue of Part II of the Criminal Evidence Act 1992; and where appropriate, a copy of a certificate under s. 6(1) of the Act and a list of exhibits (if any). The appellant says that the statutory requirement for the giving of a list of witnesses offers statutory support and recognition of the common law rule that an accused is entitled to confront one's accusers. It is said that there is no provision by statute, or by rule of court, or by common law,which would allow the Court to depart from the established common law rule, bolstered by statute, so as to allow a witness give evidence anonymously or under a pseudonym. The appellant says that the situation in the case of criminal trials in the Circuit Court can be contrasted with other areas. It is pointed out that the Criminal Assets Bureau Act 1996 makes specific statutory provision so that the identities of Bureau Officers are not revealed in any proceedings. Moreover, it is said that the rules of the Special Criminal Court, certainly on one view, provide a basis for witnesses giving evidence without revealing their names other than to the Court.

**13.** We do not take the view that the Criminal Procedure Act 1967 precludes what occurred. The statutory requirement is to provide a list of the witnesses whom it is proposed to call at trial. While, normally, that would be done by providing a list of potential witnesses referred to by name, there would be nothing to prevent a witness proposed to be called being referred to by the office they hold and the role they will be expected to play at trial, *e.g.* a witness from Ordnance Survey Ireland to produce maps of relevant townlands. There has also been reference to the District Court Rules. Order 24, r. 6 provides that:

> "Where an accused person is before the Court charged with an indictable offence not being dealt with in accordance with rules 1, 2, 3, or 5 hereof and the prosecutor consents to the accused being sent forward for trial the Judge shall remand the

accused to a further sitting of the Court to allow service of the documents specified in section 4B(1) of the Act."

Again, the comment can be made that the documents specified involve a requirement for "a list" of the witnesses whom it is proposed to call. Rule (7), which is headed 'Time for Service of Documents', states that the documents specified in section 4B(1) of the Act should be in accordance with Forms 24(3) to 24(7), Schedule B and shall be served personally upon the accused or upon his solicitor. Form 24(5), when dealing with the list of witnesses, refers to number and name, in that it states:

"The following is a list of the witnesses whom it is proposed to call at the trial:

No. Name"

We do not believe that referring to a witness by a description rather than providing a full name involves any material conflict with the District Court Rules. In any event, O. 12, r. 15 of the Rules of the District Court 1997 (as amended) provides the following in relation to non-compliance:

"15. Subject to any provision of an enactment, non-compliance with these Rules does not render any criminal proceedings void, but in case of non-compliance, the Court may direct that the proceedings be treated as void, or that they be set aside in part as irregular, or that they be amended or otherwise dealt with in such manner and on such terms consistent with statute as the Court thinks fit."

There is, perhaps, the most basic point which is that even if there was a departure from the District Court Rules in terms of the procedure that was followed in the District Court, that would not serve to deny the Circuit Court jurisdiction, in a situation where there was no challenge to the order returning the appellant for trial.

**14.** The appellant places heavy reliance on the decision on *R v Davis* [2008] 1 A.C. 1128, a decision of the House of Lords from 2008. As it happens, that decision was centre stage in

another appeal heard by this Court as constituted at present earlier this year, the case of *DPP v Jonathan Hawthorn* [2020] IECA 107. Coincidently, that was another case where Agent Peter was actively monitoring the dark web when he was contacted by an individual wishing to purchase firearms and explosives. As in the present case, following liaison between the FBI and An Garda Síochána, arrangements were made for a controlled delivery.

**15.** As we pointed out in *Hawthorn*, the factual background to the *Davis* case is of some importance if the speeches delivered by the Law Lords are to be given their proper context. On New Year's Day 2002, towards the end of an all-night New Year's Eve party held in a flat in Hackney in London, a shot was fired which killed two men. Both men were shot with the same bullet. At trial, the appellant admitted that he had been at the party, but claimed that he had left before the shooting took place. Seven witnesses claimed to be in fear for their lives if it became known that they had given evidence against the appellant, among them were three witnesses who identified the appellant as the gunman. To ensure the safety of these three witnesses, and to induce them to give evidence, the trial judge made orders to the following effect:

> "(1) The witnesses were each to give evidence under a pseudonym.
>
> (2) The addresses and personal details, and any particulars which might identify the witnesses, were to be withheld from the appellant and his legal advisers.
>
> (3) The appellant's counsel was permitted to ask the witnesses no question which might enable any of them to be identified.
>
> (4) The witnesses were to give evidence behind screens so that they could be seen by the judge and the jury but not by the appellant.
>
> (5) The witnesses' natural voices were to be heard by the judge and the jury but were to be heard by the appellant and his counsel subject to mechanical distortion so as to prevent recognition by the appellant."

The appellant was convicted and appealed. The appeal was dismissed by the Court of Appeal of England and Wales. There, the judgment delivered by Igor Judge P. (*R v Davis* [2006] 4 All E.R. 648) is notable for what it has to say about the issue of witness intimidation. The appellant further appealed to the House of Lords. As is clear from the speech of Lord Bingham of Cornhill, the appellant's challenge did not rest on the anonymity of the witnesses alone, but on the combination of restrictions applied which he referred to as "protective measures". In assessing the extent to which the defence was handicapped, it is of some significance that the argument advanced at trial was that witnesses had conspired to give false evidence against him, having been procured to do so by a former girlfriend with whom he had fallen out. Thus, as was specifically adverted to by Lord Carswell, the credibility of the prosecution witnesses was squarely in issue.

**16.** In the course of the various speeches of the Law Lords, there were reviews of the occasions when courts in the United Kingdom were called on to confront the issue, a comprehensive review of the Strasbourg jurisprudence (a task undertaken by Lord Mance), as well as references to decisions from the United States, South Africa, New Zealand, and Australia. The review of the developing practice in the United Kingdom included committal proceedings, extradition proceedings, and cases from England and Wales and Northern Ireland. One of the Northern Ireland decisions, the case of *R v. Murphy* [1990] N.I. 306, is of particular interest. It had its origin in a murder trial arising from the murder of two British army corporals near Milltown cemetery. At trial, the prosecution adduced the evidence of a number of television journalists who, in the course of their work, had filmed the scene of the killing. At trial, these witnesses were not identified by name, and when giving evidence, were screened so that their faces were seen only by the judge and lawyers, but not by the defendants or public. Lord Bingham felt that if the case represented a departure from established principle, it was, nonetheless, a small one. It was pointed out that the evidence of

the witnesses, although a necessary formal link in the prosecution case, did not implicate the defendants in the commission of the crime. The identification of individuals from the footage was the task of police officers, and the credibility, as opposed to the reliability of the witnesses, was not in issue.

**17.** Another Northern Ireland case considered to fall within the same territory was *Doherty v. The Minister for Defence* [1991] 1 NIJB 68. This was a civil action in which the defendant Minister sought that military witnesses would be screened while giving evidence. They were also to be identified by letters and not names, but the claimant raised no objection to that aspect. In delivering his speech, Hutton LCJ., who had been the trial judge in *R v. Murphy*, distinguished his earlier judgment on the grounds that the evidence given by the media witnesses in that case had been of a very limited nature, as proof of real evidence, whereas the evidence to be given by these military witnesses would be directly detrimental to the plaintiff's case. Lord Carswell pointed out that the media witnesses' testimony in *Murphy*, though of some importance, was not like direct identifying evidence. The credibility of the witnesses was not in issue, nor was there any necessity to enquire about their background or motives. Lord Brown of Eaton-Under-Heywood commented that he, too, had no difficulty with the decision of the Northern Ireland Court of Appeal in *Murphy*, nor, he noted, did the European Commission on Human Rights, which found *Murphy*'s application under Article 6 of the European Convention to be manifestly ill-founded. He commented that he felt that that case seemed to him close to the limits to which the courts should go in permitting any invasion of the core common law principles that the accused has a fundamental right to know the identity of his accusers, adding "by 'accusers' I mean in this context, those giving the sole or decisive evidence pointing to the accused's guilt as the three identifying witnesses in the present case".

**18.** At para. 72, Lord Mance referred to cases from the USA, South Africa, and New Zealand. He did so in these terms:

> "[i]n many cases, particularly cases where credibility is in issue, identification will be essential to effective cross-examination. In both *Smith v Illinois* 390 US 129 (1968) and *State v Leepile and Others* (5) (1986) (4) SA 187, the credibility of the witness was central to the case against the defendant, and it was said in the former case (at p 132), that ignorance of the witness's identity was 'effectively to emasculate the right of cross-examination'. In *R v Hughes* [1986] 2 NZLR 129, 149, Richardson J was referring to the potential significance of credibility when he said that 'I cannot presently perceive any circumstances at common law under which a witness whose credibility may be in issue depending on the results of inquiries should be allowed to hide his real name and in the result foreclose any inquiries of that kind'."

**19.** In the following paragraph, Lord Mance dealt with the *R v. Murphy* case in the following terms:

> "[i]n *R v Murphy and Anor* [1990] NI 306, the situation was quite different, and the cases of *Smith v Illinois* and *State v Leepile* (5) were distinguished accordingly. The photographers' evidence was relied on to do no more than prove the video film and photographs that they had taken of the funeral, from which police officers identified the defendants. The photographers' evidence 'did not implicate either appellant' (*per* Kelly LJ, p 334), except in the sense that they produced objectively unchallengeable material from which others were able to do so. In the later Northern Irish case of *Doherty v Minister of Defence* (5 February 1991), Sir Brian Hutton LCJ highlighted this distinction. Lord Bingham observes that, if *Murphy* was a departure from established principle, it was a small one (para 12). Courts

have an inherent power to control their own proceedings, and I consider that *R v Murphy* involves a limited qualification on the right to know the identity of prosecution witnesses which represents no threat to the fairness of the trial and which the common law can and should accommodate."

**20.** Apart from reviewing the Strasbourg jurisprudence, Lord Mance also considered the position that prevailed in international criminal courts. He pointed out that detailed consideration of the issue had been given by the International Criminal Tribunal for the former Yugoslavia in the case of *Prosecutor v. Tadic*, Case No. IT-94-1 (10th August 1995) which, by a majority of two to one, allowed a number of witnesses to give anonymous testimony. Lord Mance pointed out that Sir Ninian Stephen dissented after a review of the case law of the European Court of Human Rights, as well as decisions from the United States, Victoria, and the United Kingdom. Interestingly, Lord Mance pointed out that Judge Stephen did not, as a matter of principle, exclude anonymity in all circumstances, citing the case of *Jarvie v. Magistrates Court of Victoria* [1995] 1 VR 84. He accepted that where an accused had known a witness in the past, but only under an assumed name, as in the case of an undercover police witness, that in such a case, justice might require, when protection of witnesses is important, that only the false name should be revealed.

**21.** In *DPP v. Hawthorn,* we concluded our treatment of *R v. Davis* by commenting that it appeared to represent the high-water mark of the case on behalf of the appellant, but that even by reference to it, it could not be said that granting anonymity is precluded in all circumstances. We commented that it was necessary to focus on the decision of the Special Criminal Court to grant anonymity in that case.

**22.** It must be said that there are significant distinctions between the present case and the *Hawthorn* case. In *Hawthorn,* the charge was one of membership of an unlawful organisation and there were a number of layers to the prosecution case, of which the evidence relating to

the controlled delivery was but one. Here, the charge was one of conspiracy to possess firearms/ammunition/explosives. As such, the evidence in relation to the controlled delivery is highly significant. Secondly, in *Hawthorn*, the trial took place in the Special Criminal Court so that the prosecution could seek to rely on or pray in aid the Rules of the Special Criminal Court. Here, the trial was in the Circuit Criminal Court and there were no comparable rules to offer assistance to the prosecution.

**23.** It is, however, necessary to focus on the evidence in question. In the case of the two Gardaí from the National Surveillance Unit who were described as Garda Derek Fahy and Garda Aidan Keogh, their evidence was almost entirely non-controversial. In the case of Garda Fahy, he was challenged on evidence that at one point, Mr. Bates ran from a newsagent towards the delivery man, but that was the extent of the controversy. In the case of Garda Keogh, he had no evidence which appeared to be relevant to Mr. Bates. He had seen him in Cahir earlier on the morning of the controlled delivery at various locations including at a credit union and a coffee shop, but this evidence does not seem of any relevance. Counsel for Mr. Bates did not ask any questions.

**24.** Agent Peter was undoubtedly a more significant witness. His evidence was that he was operating "a persona" on the dark web marketplace and that he had received an unsolicited message from an individual enquiring about the purchase of several products that he had seen listed. Agent Peter explained that he had a variety of products available for purchase at that time, including fragmentation grenades, explosives, detonation caps, *etc.* He explained that he was an "online covert employee" and had been working for the FBI for 15 years, operating as an undercover operative for approximately six of those years. However, while his evidence could not be described as insignificant, in a situation where it was never suggested that he had any direct contact with Mr. Bates, neither could it be suggested that it was of very great significance. The purpose of Agent Peter's evidence was really designed to

provide a background or context as to why Gardaí made arrangements for a controlled delivery in Cahir on the occasion in question.

**25.** In the course of our judgment in *Hawthorn*, we commented:

> "The Constitution had contemplated the establishment of Special Criminal Courts, the Offences Against the State Act 1939 had addressed the subject, and a Special Criminal Court, or more recently, courts, has been a feature of the Irish legal system since 1972. Applications for anonymity and/or other special measures were always likely to arise and one might have expected that it was an issue that would have been dealt with in some detail with the Legislature specifying the circumstances in which anonymity and other protective measures could be put in place, and specifying in some detail the limitations to which the procedures would be subject. As is pointed out in by Harrison in *The Special Criminal Court: Practice and Procedure* (Bloomsbury Professional, 2019), such legislation is already in place in England and Wales, Northern Ireland, and Scotland ."

We can only express our surprise, once more, that this is an area that has not received attention from the legislature. As we have seen in the context of the Criminal Assets Bureau, legislation has been enacted to provide for the giving of evidence under the veil of anonymity, but it is less than satisfactory that it is left to the courts to work this out on a case-by-case basis. We do not believe that there is any common law prohibition that would require a request for anonymity to be denied in all circumstances. Neither do we believe that the situation is altered by the provisions of the Criminal Procedure Act 1967. The accused in this case received the documentation contemplated by the statute, including a list of witnesses. It is true that the list referred to surveillance Gardaí by initials rather than full names, and referred to the FBI employee as 'Agent Peter', but it was, nonetheless, a list of witnesses

proposed to be called. It seems to us, therefore, that the judge was not precluded from permitting the surveillance Gardaí to give evidence using initials or, as in fact happened, pseudonyms which reflected the initials that had been provided. Neither does it seem to us that the trial judge was precluded from allowing Agent Peter give evidence under that description.

**26.** There is no suggestion that the rulings caused any prejudice to the defence or operated as an unfairness in any way. Rather, the point that is taken is that the judge simply had no jurisdiction to make the orders that he did. While we regard it as less than desirable that the judge was placed in the position of having to make rulings of this nature on a case-by-case basis, we have not been persuaded that the rulings gave rise to any unfairness or rendered the trial unfair or unsatisfactory, or rendered what occurred at trial other than in accordance with law. We therefore reject this ground of appeal. We would add that had we been persuaded that the judge fell into error in permitting witnesses to give evidence without disclosing their full names, we would not have concluded that this would have meant that the appellant had not received a trial that was not in accordance with law. We would have had regard to the fact that the error, if error it had been, would not have given rise to any prejudice (as much, indeed, was admitted) and we would have regarded this as a case to apply section 3(1) of the Criminal Procedure Act 1993, commonly known as 'the proviso', which provides as follows:

> "**3**.— (1) On the hearing of an appeal against conviction of an offence the Court may -
>
> (a) affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred)".

**Ground 4: The Admission into Evidence of a Document Which Purported to Record Exchanges between the Witness known as Agent Peter and Another Unknown Individual known as Snow4**

**27.** Agent Peter explained to the Court that in October 2017, in his role as an online covert employee with the FBI, he had received an unsolicited message from Snow4 on a part of the internet known as the "dark web", enquiring about the purchase of products which he had indicated that he had available for purchase at the time. Agent Peter explained that the dark web was a series of websites, marketplaces, and blogs only accessible using specialised software, including Tor. The initial communication was made on an external communication platform called 'Wickr', which is part of the clear web that most people use on a daily basis, from a user known as "thesquirrel789". This was associated with a named individual who was arrested as part of the investigation. The subsequent communications with Snow4 took place on a dark web marketplace known as "Berlusconi". An escrow account was used as a payment system and Bitcoins were used in order to pay for the illegal purchases. The message with Snow4/thesquirrell789 commenced as follows:

> "I am looking for two of your products you have advertised".

Agent Peter was not able to identify that advert or produce a copy. One would surmise that Agent Peter had posted more than one advertisement.

**28.** Privilege was claimed by Agent Peter in respect of a number of matters:

- The email address that he used to receive the message from Snow4 as this was a uniquely identifiable law enforcement account;
- The moniker that he worked under; and
- The name of a particular website.

While Agent Peter told the court that he had received basic general training on computers, general training on various components of weaponry, and extensive legal training on policy

and procedures, he was not in a position to share any more information than that, and again, Agent Peter told the court that he had numerous supervisors and that his communications with those supervisors were documented, but privilege was claimed in respect of same.

**29.** Two issues are raised on behalf of the appellant. It is said that the document that was produced recording the exchanges did not accord with the established case law on *agent provocateur*. It is said that the admission of the document in evidence was contrary to the rules of evidence as it amounted to hearsay.

**30.** So far as the question of *agent provocateur*/entrapment is concerned, we begin our consideration of this issue by making the fairly obvious point that there was never any suggestion or any contact between Agent Peter and Mr. Bates. Whoever or whatever caused Mr. Bates to become involved in this offence, it was not Agent Peter. As Charleton and McDermott point out at paragraph 19.02 of *Criminal Law and Evidence* (Bloomsbury Professional, 2020):

> "All of the authorities that have considered entrapment consistently differentiate between the inevitable use of techniques to spy on criminal activity, which is legitimate, and the use of *agent provocateurs* who go beyond 'mere solicitation and encouragement and initiate a criminal design for the purpose of entrapping a person in order to prosecute the person so caught'. Any sensible argument justifying entrapment as a defence focuses on the latter category of conduct. The rationale behind the defence is the maintenance of civilised standards of investigation by agents of the State: it is not the function of the courts to allow the prosecution of a previously blameless person who has had criminal intentions implanted into his or her mind by agents of the State. It is also regarded as repugnant to the common good and the rule of law that the State can manufacture a crime and then use the courts to obtain a conviction in respect of what is, in effect, of their own creation. A defence

> of entrapment, however, cannot sensibly arise simply because an opportunity was provided to a person to commit a crime to which there was already a predisposition. Entrapment as a defence can arise only where a person who is not minded to commit a crime is inveigled into that disposition and later commits an offence in consequence of persuasion by agents of the State." (footnotes omitted)

In this case, the evidence of Agent Peter was that he received an unsolicited approach from thesquirrel798/Snow4. It is true that the reference to "unsolicited" has to be seen in the context that Agent Peter was offering his wares for sale on the dark web, however while recognising that thesquirrel798/Snow4 launched the transaction by contacting Agent Peter. The involvement of Mr. Bates was at a stage further removed still, when he agreed to receive a parcel. It seems to us that even if there had been contact between the appellant and Agent Peter, this is not a case where the defence of entrapment would be available, but given that there was no such contact, the issue does not even arise for consideration. Accordingly, this ground fails.

**31.** The second issue relating to the reports of exchanges between Agent Peter and Snow4 is a contention that the records offend against the rules of evidence, and in particular, the ruling by the trial judge saw inadmissible hearsay evidence admitted. This issue was the subject of debate at trial and has featured very prominently in the hearing of this appeal. At trial, the battleground was drawn around the contention on behalf of the then accused, now appellant, that the prosecution was seeking to prove the truth from what emerged from Snow4, with the Director responding that they were doing nothing of the sort.

**32.** As to how the records came into existence, it should be explained that the main platform used was Wickr. Messages on this platform are automatically deleted after a specified period of time. Agent Peter took steps to "screengrab" the various messages that had been exchanged so that they were backed up. Then, during the trial, he gave evidence of

the contents of the communications. The Director says that the screengrabs are a record in document form showing the communications and making them available for consideration by the jury. The Director says that the document to which objection was taken at trial, and to which there is now objection, is simply a copy of the various screengrabs, redacted to remove privileged information.

**33.** At trial, and initially, the respondent argued that the purpose of adducing the evidence was not to prove any fact other than that the conversation had taken place, and that it provided a background and explanation for the subsequent actions of the Gardaí. It was contended that the evidence in issue was adduced as background evidence. The phrase 'background evidence' was perhaps an unfortunate one, in that it is a term of art and appeared to introduce the line of jurisprudence found in cases such as *DPP v. McNeill* [2011] 2 IR 669. However, in the course of the appeal hearing, counsel on behalf of the respondent appeared to resile somewhat from the very clear position that he had previously taken, that the truth of what was said by Snow4 was not an issue.

**34.** In Cross & Tapper on *Evidence* (12th Ed., Oxford, 2010) at p. 551-552, the rule against hearsay evidence is described in the following terms:

> "[a]ccording to the rule against hearsay at common law, 'a statement other than one made by a person while giving oral evidence in the proceedings was inadmissible as evidence of any fact stated'."

This definition was endorsed in Heffernan & Ní Raifeartaigh on *Evidence in Criminal Trial* (Bloomsbury Professional, 2014) which described the definition as having the merits of brevity, simplicity and accuracy. They point out that the definition includes the crucial qualification that out of court statements are inadmissible only when offered as proof of what was stated.

**35.** Discussing the issue, Heffernan & Ní Raifeartaigh make the point that a statement constitutes hearsay only when it is offered to prove the truth of an assertion contained in the statement. Presenting the statement for that purpose generates a likely need to cross-examine the declarant about matters such as perception and memory. They go on to say that the probative purpose of hearsay evidence limits significantly the scope of the rule, because if the party offering the statement can show that it is relevant on some other theory, the statement is not excluded.

**36.** The matter was put thus by Lord Wilberforce in *Ratten v. R* [1972] AC 378 as follows:

> "[t]he mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to his admissibly. Words spoken are facts just as much as another action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially' *i.e*. as establishing some fact narrated by the words."

If we apply this language to the present situation, the words typed by Snow4 involved an action on his part as much as any other action by a human being. The relevance stems from the fact that the words were typed and communicated.

**37.** The classic discussion of this issue in the Irish courts is found in the Supreme Court case of *Cullen v. Clarke* [1963] IR 368, and in particular, the judgment of Kingsmill Moore J. He observed that where the utterance of the words is itself a relevant fact, the testimony of a witness who heard the words spoken constitutes direct evidence of that fact and "in no way encroaches on the general rule against hearsay". By way of example, Heffernan & Ní Raifeartaigh offer that a party may adduce written or electronic correspondence in order to prove the ability of the declarant to communicate or, more plausibly, the fact that the parties

communicated with each other at a certain time. Again, applying that to the facts of the present case, what is in issue is that Snow4 and Agent Peter were in communication with each other, and that arising from the fact of those communications, the FBI were in contact with An Garda Síochána who arranged for a controlled delivery. At para. 7.59, Heffernan & Ní Raifeartaigh make the point that "hearsay statements are by their nature assertive or declarative. They assert or declare facts. In contrast, statements which are imperative, interrogatory, or exclamatory, are admissible as evidence". They go on quote from Imwinkelreid on *Evidentiary Foundations* (6th Ed., LexisNexis, 2005) at para. 10.02(2)(a), where it is stated:

> "Imperative sentences giving orders, exclamatory sentences, and interrogatory sentences posing questions, usually fall outside the definition of hearsay, if those sentences are relevant at all, it is usually relevant that the sentences were uttered, and for that purpose, the attorneys can question the person who heard the declarant utter the sentence. There is little or no need to cross-examine the declarant of an imperative, exclamatory or interrogatory sentence about perception or memory."

Again, it seems to us that if that approach is applied to the present case, what was uttered by Snow4 was not assertive or declarative. He was interrogating as to whether particular items were for sale, the terms on which business could be transacted, and placing an order. The position would be quite different if he stated that he was acting on behalf of a particular individual or individuals, or provided an explanation as to why the articles were required or provided information about the use to which they would be put.

**38.** In *DPP v. K(B)* [2000] 2 IR 199, speaking in the context of system evidence, Barron J. commented that rules of evidence should not be allowed to offend common sense. It seems to us that to suggest that written communications in relation to the illegal purchase of arms, ammunitions and explosives, would not be admissible in a prosecution for conspiracy to

possess firearms, ammunition and explosives, would very definitely offend against the rules of common sense.

**39.** We think the force of our remarks about common sense will be apparent if regard is had to the fact that this was a prosecution for conspiracy, that the prosecution case was that because of communications emanating from an individual who they could establish was not the appellant, or, indeed, his co-accused at trial, that a controlled delivery was arranged, that the prosecution would say that they were in a position to adduce evidence which would establish that the acceptance of the package by the appellant was not innocent or coincidental. They would point to the fact the appellant said that the packages were purportedly for his son, Tim, who was in hospital in circumstances where the appellant had no son called Tim. Further, there is the fact that one of the items contained in the delivery was a disabled Glock pistol which was later found concealed outside the appellant's dwelling. Indeed, it was found in a sock, and the matching sock of the pair was found in a drawer in the said dwelling. Part of the delivery comprised rounds of dummy ammunition, a number of live rounds of ammunition were found with the dummy ammunition, and those live rounds matched the calibre of the firearm that was delivered on foot of the order placed.

**40.** We are satisfied that the judge acted properly in admitting the evidence as to the communications between Snow4 and Agent Peter. Therefore, this ground of appeal is dismissed.

**Ground 5: Extension of Detention**

**41.** On 11th November 2017, Detective Chief Superintendent Howard, Head of the Special Detective Unit, extended the detention of Mr. Bates. He did so following conversations with and at the request of Detective Inspector Hanrahan who was leading the Garda operation on the ground. While Detective Inspector Hanrahan was based in Cahir,

Detective Chief Superintendent Howard was in Dublin and the conversations between them were over the telephone.

**42.** There was a challenge to the validity of the detention, specifically, on the basis that the Detective Chief Superintendent had not addressed his mind to all of the necessary criteria so as to render the extension of detention lawful. The arguments on behalf of the appellant relied on the case of *DPP v. Quilligan and O'Reilly (No.3)* [1993] 2 IR 305. It was pointed out that in that case, the Supreme Court had commented:

> "[i]f the detention of a person arrested under s. 30 is extended by a Chief Superintendent for a further period after the first period of twenty-four hours, he must entertain also the necessary *bona fide* suspicion of the suspect that justified his original arrest and must be satisfied that his further detention is necessary for the purposes provided for in the section."

The argument on behalf of the appellant is that there was no evidence before the Court, either direct evidence or evidence from which an inference could be drawn, to suggest Detective Chief Superintendent Howard held the requisite suspicion in relation to the appellant that had justified the original arrest. It is said that his evidence, rather than addressing this issue, was focused entirely on the justification for extending the period of detention, *i.e.* the need for further questioning and so on.

**43.** Having heard argument on the issue, the trial judge ruled as follows:

> "[w]ell, Detective Chief Superintendent Howard was contacted by Detective Inspector Hanrahan, it was Detective Inspector Hanrahan who was essentially in charge of the investigation. He contacted Detective Chief Superintendent Howard by telephone from Cahir Garda Station at about 2.30[pm] on the date in question, the date after arrest when the 24-hour period was about to expire under s. 30, and the Detective Chief Superintendent recorded the conversation in his diary, but he

said Detective Inspector Hanrahan outlined the details of the case to him. There was then a discussion of the reasons why an extension of detention was sought in relation to Thomas Bates and the Detective Inspector set out a number of reasons for this, various matters had to be investigated further and the 24 hours which had elapsed to that time were clearly not sufficient, but the details of the case were outlined to the Detective Chief Superintendent and he ultimately made the decision to direct a further period of detention, and, in my view, it would fly in the face of logic that he would make such a decision without having the necessary details grounding the reasons for the arrest of Mr. Bates in the first place, and the details which I have heard in the course of the evidence in this case would give reason, good reason, for the arrest in the first instance. So, I am deeming this admissible, this evidence before the jury, and in my view, the Detective Chief Superintendent complied with the requirements as laid down in the case of *DPP v. Quilligan and O'Reillly* by Chief Justice Finlay. I say that all of the requirements were met, in my view."

**44.** It is a condition precedent to a valid arrest that the arresting Garda must have held the suspicion at the time of the said arrest. The presence or absence of the necessary suspicion may be the subject of judicial oversight. Evidence of the suspicion may come in the form of either direct evidence or indirect evidence. However, the mere fact that an arrest is made, and by extension, that a detention is extended, is insufficient in itself to furnish either direct or indirect evidence of suspicion (see *DPP v. Tyndall* [2005] 1 IR 593). It must be acknowledged that what the Detective Chief Superintendent had to say on this issue was surprisingly terse, to the extent that it would give rise to a concern that the Court was being asked to conclude that because the Detective Chief Superintendent extended the detention, that he must, by implication, have had the requisite suspicion.

**45.** However, even if the treatment of the issue in this case was suboptimal, it is clear that the Detective Chief Superintendent had been provided with the name, address and date of birth of the detainee; details of the arresting member; time, date and place of arrest; and what the alleged offence was. It is also clear that the Detective Chief Superintendent was aware of high level cooperation with the FBI in respect of this investigation. Prior to extending the detention, Detective Chief Superintendent Howard had a conversation lasting some ten minutes with Detective Inspector Hanrahan. The Detective Inspector's evidence is significant in this regard. When asked whether he kept up to date with the matter under investigation during the course of direct examination, he said yes, that he was present at all times in Cahir. When asked if he was in a position to discuss the unfolding investigation with his colleagues, he responded yes and that he did so with Detective Chief Superintendent Tony Howard. He said that he apprised the Detective Chief Superintendent of the level of his own knowledge, of how the investigation was progressing and his knowledge of it. He also referred to a further conversation with the Detective Chief Superintendent at 2.30pm on 11th November wherein again, he apprised him of the ongoing investigation.

**46.** It seems to us that, from the available information provided by the Detective Chief Superintendent and Detective Inspector, the judge was entitled to conclude that the Detective Chief Superintendent was aware that there was a Garda operation in progress in Cahir arising out of involvement in aspects of the matter by the FBI; that Detective Inspector Hanrahan was apprising his superior officer about his knowledge of the investigation which, the judge was entitled, indeed, bound to conclude must have included the fact that on foot of cooperation with the FBI, a controlled delivery operation was put in place; that the packages assembled by the Gardaí were accepted by the appellant; and that the packages were sent to a particular address and purportedly were addressed to a particular individual, namely, Tim Bates.

**47.** It seems to us that in those circumstances, the judge was well within his rights in concluding that the extension of detention was lawful. Accordingly, this ground of appeal fails.

**Ground 6: The Admission of Portions of Memorandum of an Interview in the course of which the provisions of Sections 18 and 19 of the Criminal Justice Act 1984 were Invoked**

**48.** The background to this issue is to be found in the fact that over the course of his detention, the appellant was interviewed on some nine occasions. On certain occasions, he exercised his right to silence, but on others, probably the majority, he answered questions put to him. On the third day of questioning, the interviewing members invoked the legislative provisions providing for the drawing of adverse inferences from a suspect's failure or refusal to provide an account when requested to do so.

**49.** The following exchange was led from that interview:

> "Q. I am requesting you to account for the presence of a brown cardboard separation piece that was used to fill a space in the pre-prepared package delivered to you on Friday 10th November 2017, located in the kitchen of your address on Abbey Street, Green Door, Cahir, County Tipperary on 10th November 2017.
>
> A. I have no knowledge of that, I have no way of explaining it.
>
> Q. This object was located on top of a bag of groceries in the kitchen of your address at Abbey Street, [Green Door], Cahir, County Tipperary and that it was under your possession and under your control, and we believe that you were at this location between 12.53[pm] and 2.45[pm] on 10th November 2017. Can you account for this?
>
> A. Once again, I have no knowledge of this.

Q. We believe that the presence of this object indicates that you participated in the offence of conspiracy to unlawfully possess firearms, ammunition and explosives on 10th November 2017. We are requiring you to account for the presence of the brown cardboard separation piece that was used to fill a space in the pre-packaged delivery to you on Friday 10th November 2017?

A. Once again, my answer is the same. I have no knowledge and I am unable to answer or give clarification."

**50.** The submission on behalf of the appellant is that the relevant sections of the Criminal Justice Act 1984 do not allow answers to questions or failures to answer questions to be admitted for any purpose other than allowing the jury to draw inferences. In this case, there had not been a failure or even a refusal to answer the questions, the prosecution were not seeking to have the inferences drawn and it is said that the answers that were given to the question were, in the circumstances, inadmissible. In the Court's view, the interpretation placed on sections 18 and 19 by the appellant are incorrect. If the appellant's submissions were correct, any answers, even answers amounting to full, comprehensive and unequivocal admissions, would be inadmissible. Recognising the implausibility of such a scenario, counsel on behalf of the appellant was prepared to concede that if there was a full and unequivocal admission in a particular case, that might well be admissible, but that anything short of that was not admissible, and in the case of anything short of that, questions asked and answers and responses given only became relevant if they provided a basis for drawing inferences pursuant to statute. We are unable to agree. The appellant was asked questions; it is true that the option of not responding or declining to respond without any consequences of taking such a course was not available to the appellant at the point at which the 1984 Act was invoked. Nonetheless, he answered questions, and in our view, the answers that he provided were admissible in evidence.

**Ground 7: The Application for a Direction**

**51.** At the close of the prosecution case, the judge directed the jury to acquit the appellant's co-accused, Nigel Gartland. This application was judge-led with the judge, of his own motion, enquiring of prosecution counsel where the evidence was against Mr. Gartland. Following the acquittal of the co-accused, counsel on behalf of Mr. Bates then applied for a directed verdict of not guilty on two alternative bases; that there was no evidence that the crime of conspiracy had been committed by the appellant, and alternatively, that if there was any evidence in the case, that it was of a tenuous and inconsistent nature and it was a case that could not be safely left to the jury.

**52.** The application for a direction focused on the fact that the essential ingredient of a conspiracy offence is agreement with another. It was said that there was no evidence, and certainly no evidence of the requisite standard, that Mr. Bates had ever agreed with anybody to possess firearms, ammunition, and explosives. Counsel for the appellant was prepared to accept that different considerations might apply if her client was facing a charge of attempting to possess the said material.

**53.** The judge's approach to the application was to consider the arguments and then rule in these terms:

> "Well, in all contested cases *mens rea* must be proved. What is in the mind of the alleged perpetrator[?] It is relatively rare that we get evidence as to what exactly was in the mind of the perpetrator, but time and again, that can be gleaned from the surrounding circumstances, from the actions of persons and from the evidence taken as a whole. The evidence which emerged during the prosecution case was that an employee of the FBI, named here as Agent Peter, was in communication with somebody in Ireland with regard to the possible sale and importation into

Ireland of a firearm and ammunition and explosives. And in the course of that, the evidence of Agent Peter was that agreement was reached in the course of interaction *via* the Internet. The Dark Net, indeed, in this case. And subsequently, on foot of that, a delivery was made to the address which was set out in that correspondence. Mr. Bates met the undercover Garda who posed as a delivery man and stated that he was not Tim Bates, but that Tim Bates was his son who was in hospital and that appears to have been an untruth, because when he was questioned by Gardaí, he talked about having extended family, but the only immediate family that he referred to was his father, who was in a nursing home, and his son of a different name as I recall, who was in Liverpool. And he duly signed. He told the Gardaí that he was the only person living in the house. Within a short time of the delivery, although he denied having ever taken any delivery, and although he was asked about persons calling into the house and mentioned a number of other people, but not the delivery man, he took them inside the house. That was the evidence. And subsequently, within a short time, there was a communication *via* the Internet to Agent Peter that there was no clip with the Glock pistol. That could only have come from somebody within the house. Subsequently, the contents, the illicit contents of the three packages, were hidden and disposed of in a field just beside where Mr. Bates and Mr. Gartland were seen running, very fast, towards a car which they entered. So, with regard to the assertion that there is no evidence of an agreement here, that is something that can be implied. What Mr. Bates told the Gardaí in relation to his use of the Internet would strongly indicate that it was not he who was in contact with Agent Peter, but another. There was another, or possibly others, who were involved.

. . .

> So, in all the circumstances, I apply the test which I always do on these occasions, and which, indeed, the Court of Appeal, most recently, having considered *Galbraith*, effectively said is this: '[c]ould a jury, properly instructed, depending on their view of the facts, bring in a verdict of guilty here which could be regarded as safe?' In my view, they could, and that being so, there is a case to be met'."

**54.** In our view, counsel on behalf of the appellant was correct to focus attention on the fact that an agreement is at the heart of a conspiracy charge and to ask, where was the evidence of conspiracy? She was also correct to focus on the possibility of people working independently towards a common objective, but in the absence of an agreement to do so. It seems to us that this was a case where there was evidence which, if accepted by a jury, pointed strongly to the fact that Mr. Bates was acting in the manner that he was because he had agreed, had arranged that he would so act. There was significant evidence to suggest that his actions were attributable to prior agreement rather than coincidence. In our view, the trial judge was correct that this was a case that ought properly be left to the jury.

**Ground 8: The Judge's Charge**

**55.** The judge's charge is the subject of severe criticism on behalf of the appellant. It is said that that it dealt inadequately with the nature of the crime of conspiracy; that it failed to address the issue of the evidential value of the exchange between Agent Peter and Snow4; that it neglected the requirement to prove an agreement between two people in the circumstances of the acquittal of a co-accused; and overall, that it was inadequate when dealing with the question of the benefit of the doubt. As is usually the case, when there is an issue as to the adequacy or appropriateness of a trial judge's charge, it is necessary to consider that charge in its entirety.

**56.** It is said that the judge failed to charge the jury adequately as to the nature of the crime of conspiracy. At trial, there was a requisition on behalf of the accused, asking the judge to make clear that the prosecution had to establish that for there to be a conspiracy involving Mr. Bates, it had to be established beyond reasonable doubt that there was at least one other person who was a party to the conspiracy. The judge's response to that requisition was to say that he had made that clear. Reading the charge as a whole, while the judge's legal directions were quite concise, the jury were left in no doubt but that for the offence of conspiracy to be made out, it had to be established that there was an agreement, involving more than one person.

**57.** The judge is criticised for failing to give fuller and more elaborate directions in relation to how the jury should deal with the exchanges between Snow4 and Agent Peter. However, it seems to the Court that those criticisms have to be seen in the context of what those exchanges involved. To the extent relevant, all that was involved was a request by Snow4 that particular items be despatched to a particular location and that they be addressed to a named individual, or, more accurately, that they should be addressed to a purported to be an individual. It seems to us that in those circumstances, little by way of elaboration was required. Obviously, the situation would be very different if Snow4 had purported to say anything about Thomas Bates *i.e.* that he required the illicit materials, or that he had use for the illicit materials or anything of that nature.

**58.** It is said, particularly having regard to the form of the indictment and the fact that Mr. Gartland had been acquitted by direction, that it was necessary to say more to the jury about what they needed to be satisfied about in terms of the agreement with another to do an unlawful act. However, the nature of the offence of conspiracy is an agreement with another. It is not necessary that the prosecution establish the identity of the other party to the

agreement, but simply that there was an agreement and that there was another party. The judge's charge was adequate to perform that purpose and to make that clear.

**59.** Finally, on behalf of the appellant, counsel submitted that the summation of the defence's case needed to be contextualised with regard to the benefit of the doubt owed to an accused where multiple readings of the evidence are possible and particularly so in what was a circumstantial evidence case. It is said that some, indeed, much of the evidence in this case came into existence after the time when it could be said, even on the prosecution view of the case, that the appellant was a party to the agreement. It is said that this was not an aspect that was pointed out the jury. Reliance is placed on observations of Walsh J in *People (AG) v. Keane* [1975] 1 Frewen 392 who said the following:

> **"**[t]hose whose duty it is to determine the issue of fact . . . must always keep uppermost in their minds that the liability of the person accused of conspiracy is limited to the common purpose while he remains in it. The question is whether the facts are such that they cannot fairly admit of any other inference being drawn from them, save that of conspiracy, and whether the person accused is a party to the criminal agreement, and if so, whether he be a party to it at the time in question. If the conspiracy is shown to exist, then evidence may be given that the defendant acted upon it as evidence that he was a party to it, but a conspiracy cannot be established by evidence which is only admissible after the conspiracy itself is shown to exist."

The appellant says that in this case, the substantive offence was possession of firearms and that the possession offences were consummated while the delivery was completed.

**60.** For our part, we are not persuaded that the *Keane* case bears the interpretation contended for. The observations were made in a situation where the appellant had stood trial on an elaborate and complex indictment. One person with whom he was alleged to have conspired and with whom he stood trial was acquitted. The indictment was then amended to

remove reference to this person, a course of action which the Court of Criminal Appeal appeared to regard as quite unnecessary. A key aspect of the evidence against the appellant was that subsequent to his arrest, when his apartment was searched, a notebook was found which contained diagrams and information on the making of explosives. In the case of a co-accused, a Mr. Murray, in a lockup garage under his control, explosive substances were found and a Calvita cheese box which contained a delayed action timing device, and a paper bag which also contained a delayed action timing device. The appellant's fingerprints were found upon the cheese box in question and on the brown paper bag in question. In addition, there was evidence putting the appellant and Mr. Murray in each other's company on a date proximate in time. The Court of Criminal Appeal was of the view that there was evidence to support the conviction of the appellant on the charge of conspiring with Mr. Murray, and that accordingly, the application for leave to appeal should be refused. In the case of another person named on the indictment, Longmore, on whose premises explosives were also found, the Court felt that the evidence of any association between the appellant and Longmore was very tenuous, confined to a fingerprint of the appellant on a Ferry timetable. The Court felt that even if the fingerprint on the timetable was regarded as sufficient to establish that the appellant had visited Longmore's flat, or was acquainted with Longmore, that would not be sufficient evidence upon which to establish a conspiracy, even if it were established that Longmore and the appellant were each engaged in unlawful activity in connection with explosives and explosive devices. It is against this background that the observations of the Court of Criminal Appeal, on which the appellant seeks to rely, have to be considered.

**61.** In the present case, the appellant says that the offence was completed when the delivery took place in Cahir, and that at that stage, the conspiracy was at an end. The fact that there were communications between Snow4 and Agent Peter subsequent to delivery, both raising the absence of a clip on the Glock pistol and then making the point that the operation

had been rumbled, it is argued could never be of evidential value. We do not agree. Whenever there is an agreement, or conspiracy to commit a crime, part of that agreement must inevitably be that the crime should be carried out effectively and part of that must be that those involved in the conspiracy should be in a position to extricate themselves. Accordingly, we are not at all persuaded in relation to the arguments relating to the *Keane* case. Moreover, it is important to appreciate the limitations of the evidence and the reliance placed on it. The fact that communications were sent after the appellant had been taken into custody was significant, only because it established that the appellant was not acting alone and established that there were other people out there. It was not the detail of the communication that was significant; it was the fact of the communication and the time it occurred.

**62.** Overall, we have not been persuaded to uphold any ground of appeal. We have not been caused to doubt the fairness of the trial or the safety of the verdict. Therefore, this Court must dismiss the appeal against conviction.