APPROVED **REDACTED**

THE COURT OF APPEAL

Court of Appeal Record No. 133/CPA/24

Edwards J
McCarthy J
MacGrath J

In the matter of an appeal pursuant to section 4E(7) of the Criminal Procedure Act, 1967 Application: -

BETWEEN/

THE PEOPLE (AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS)

APPELLANT/PROSECUTOR

-AND-

D.T.

RESPONDENT/ACCUSED

JUDGMENT of the Court delivered on the 17th day of October 2024 by Mr Justice McCarthy

1. This is an appeal by the Director of Public Prosecutions against the dismissal of a number of charges by the Circuit Court under section 4E of the Criminal Procedure Act, 1967. D.T., the respondent herein, was charged with ten counts as follows: -

> **[Kitchen/Living Room] Count 1:** Unlawful possession of a controlled drug, contrary to sections 3 and 27 of the Misuse of Drugs Act, 1977, as amended by section 6 of the Misuse of Drugs Act, 1984.
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> **[Kitchen/Living Room] Count 2:** Possession of a controlled drug for sale or supply, contrary to sections 15 and 27 of the Misuse of Drugs Act, 1977, as amended by section 6 of the Misuse of Drugs Act, 1984.
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> **[Kitchen/Living Room] Count 3:** Possession of a controlled drug for the purpose of sale or supply, where the market value of the controlled drug amounts to €13,000 or more, contrary to section 15A of the Misuse of Drugs Act, 1977, as inserted by section 4 of the Criminal Justice Act, 1999, and section 27 of the Misuse of Drugs Act, 1977, as amended by section 5 of the Criminal Justice Act, 1999.
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> **[Kitchen/Living Room] Count 4:** Unlawful possession of a controlled drug, contrary to sections 3 and 27 of the Misuse of Drugs Act, 1977, as amended by section 6 of the Misuse of Drugs Act, 1984.

[Kitchen/Living Room] Count 5: Possession of a controlled drug for sale or supply, contrary to sections 15 and 27 of the Misuse of Drugs Act, 1977, as amended by section 6 of the Misuse of Drugs Act, 1984.

[Upstairs Grow House] Count 6: Cultivation of plants of the genus cannabis, contrary to sections 17 and 27 of the Misuse of Drugs Act, 1977, as amended by section 11 of the Misuse of Drugs Act, 1984 and section 8 of the Irish Medicines Board (Miscellaneous Provisions) Act, 2006.

[Upstairs Grow House] Count 7: Unlawful possession of a controlled drug, contrary to sections 3 and 27 of the Misuse of Drugs Act, 1977, as amended by section 6 of the Misuse of Drugs Act, 1984.

[Downstairs Grow House] Count 8: Cultivation of plants of the genus cannabis, contrary to sections 17 and 27 of the Misuse of Drugs Act, 1977, as amended by section 11 of the Misuse of Drugs Act, 1984 and section 8 of the Irish Medicines Board (Miscellaneous Provisions) Act, 2006.

[Downstairs Grow House] Count 9: Unlawful possession of a controlled drug, contrary to sections 3 and 27 of the Misuse of Drugs Act, 1977, as amended by section 6 of the Misuse of Drugs Act, 1984.

[Downstairs Grow House] Count 10: Possession of a controlled drug for sale or supply, contrary to sections 15 and 27 of the Misuse of Drugs Act, 1977, as amended by section 6 of the Misuse of Drugs Act, 1984.

2. On the 10th of April 2024 counsel for the respondent made the application, to which the trial judge acceded, in respect of Counts 6-10 only. The relevant provision of the Criminal Procedure Act, 1967, as amended, is as follows: -

"*Section 4E.—(1) Subject to subsection (1A), at any time after the accused is sent forward for trial, the accused may apply to the trial court to dismiss one or more of the charges against the accused.*

(1A) Where—

(a) a court makes a relevant order within the meaning of Part 2 of the Criminal Procedure Act 2021 at a preliminary trial hearing (within the meaning of that Part) to the effect that evidence shall not be admitted at trial, and

(b) the order is appealed under section 7 of that Act,

the accused may not make an application under subsection (1) to dismiss a charge to which the order relates until that appeal is determined or withdrawn.

(2) Notice of an application under subsection (1) shall be given to the prosecutor not less than 14 days before the date on which the application is due to be heard.

(3) The trial court may, in the interests of justice, determine that less than 14 days notice of an application under subsection (1) may be given to the prosecutor.

(4) If it appears to the trial court that there is not a sufficient case to put the accused on trial for any charge to which the application relates, the court shall dismiss the charge…"

The evidence

3. It is necessary to refer to the evidence which we now do; we use the term 'evidence' for clarity's sake even though, in strictness, one is concerned with the proposed evidence. On the 14th of November 2022 Gardaí obtained a warrant to search the underground car park at Prospect Hill Apartments in Finglas, County Dublin. A search was conducted on the 18th of November 2022 when cannabis and fireworks were found hidden in storage areas.

4. The Gardaí were tipped off that Apartment 18 within that block was being used to store drugs. This was a two-storey apartment which Gardaí proceeded to search on the same date. Upon entering the property Gardaí found the respondent and two others to be present in a communal area upstairs in the nature of a kitchen/living room. In that area Gardaí found what appeared to be a makeshift factory for the production of cannabis sweets resembling the gelatine-based jellies commonly known as gummy bears ('*gummy bears*'). As part of this setup Gardaí observed kitchen utensils, moulds, syringes, food colouring and flavourings, and, on a stovetop, a pot which contained green gelatinous material. Photographs were taken of approximately 1,400 gummy bears—identical in colour to the green gelatinous material observed on the stovetop. Gardaí also found bags of cannabis plant in the kitchen as well as numerous vacuum-sealed packs of red gummy bears similar to those that appeared to be in production at the time. The quantity of gummy bears found ultimately amounted to 4,331 and were valued at €10 each with an overall street value of approximately €43,000. The gummy bears found at the property were the subject of Counts 1-3. The quantity of cannabis found in bags in the kitchen/living room area was valued at in or around €4,000 to €5,000 and was the subject of Counts 4 & 5 on the indictment.

5. In the kitchen/living area Gardai retrieved two iPhone branded mobile phones. One of these had a black cover whilst the other, found on top of a radiator, had a clear cover and contained a bank card bearing the respondent's name. Though the respondent was not a named resident of the property, his passport was found on an extractor fan immediately above the stovetop on which the pot of green gelatinous material was observed on arrival. A photograph of the extractor shows that it was being used as what we might call a 'makeshift' shelf or storage area and crowded untidily with domestic and personal items.

6. Elsewhere in the property, Gardaí seized €1,400 in cash which was located in a bedroom, and recovered a quantity of cocaine. They also uncovered two locations for the cultivation of cannabis ('*grow houses*'). The first grow house was in an upstairs hot-press whilst the other was located in a downstairs room. The upstairs grow house contained 12 small cannabis plants and an unspecified number of others, smaller in size, in a container. What was so found in the upstairs grow house gave rise to Counts 6 & 7. The downstairs grow house contained four large maturing cannabis plants giving rise to Counts 8-10. Both grow houses availed of a sophisticated apparatus to assist with cultivation and Gardaí observed *inter alia* fans, heaters, extensive electrical wiring, and a cylinder of carbon dioxide, which was in operation, in this respect.

7. The respondent was charged on the 18th of November 2022 and sent forward for trial with two others who were also present in the apartment at the time of the search. The charges aforementioned were thus broken down by location. Counts 1-5 concerned the possession of drugs in the kitchen/living room whereas Counts 6-10 concerned the possession of drugs and cultivation charges pertaining to the two grow houses.

8. A preliminary procedural issue arose at the hearing about whether or not the appeal extended to the dismissal of Count 6. We do not think it is necessary to go into any detail on this point but to put the matter shortly it was contended on one reading of the Notice of Appeal that the appeal was only taken on Counts 7-10 inclusive. An application was made on behalf of the Prosecution to amend the notice. We do not think that the latter was necessary, and we think that the original Notice of Appeal makes it sufficiently clear that the appeal is taken against all of the dismissals. Counsel for the Director submitted that the judge erred in law in dismissing the charges in question and, though it is not directly the subject of this appeal, contend that he erred in his *obiter dicta* as to what he might do with the balance of the charges – this is not relevant and we do not refer to it further.

Section 4E Application Ruling

9. We set out the judge's ruling as follows: -

"*This is a 4E application. Obviously, this Court must take the prosecution case at its highest and make its determination on that basis. Now, it seems what the State are saying is that presence beside this jelly-making operation and his response to interview, or the inference in the interviews, is enough for a jury to decide or could decide that he was guilty of that particular offences. Now, there's a myriad of offences here, some involving the jelly factory, if I want to call it that, and others involving the cannabis growing operation. Now, it seems to me that whatever connection a jury may infer to the jelly making or the jelly operation if you want to call it that, it's very difficult to see a connection to the cannabis plants. So therefore, it seems to me, I'm going to grant 4e in relation to all of the offences apart from those involving the manufacturing of the jellies. Does everyone understand what I have done?*"

Inferences

10. Pursuant to the provisions of the Criminal Justice Act, 1984, the respondent was asked to account for his presence at the apartment under section 19. It is not clear from the notes of the interviews whether he answered, "no comment", or did not respond. This does not matter either way. He was also asked under section 18 of the Criminal Justice Act, 1984 to account for a number of objects found at the scene including the cannabis, gummy bears, moulds, food colouring, the cannabis plants in both grow houses, as well as other items associated with the offending charged. His response (or lack of it) was similar when section 18 was invoked.

11. Section 18 of that Act, so far as relevant, states as follows: -

"*18.— (1) Where in any proceedings against a person for an arrestable offence evidence is given that the accused—*

(a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or

(b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,

was requested by the member to account for any object, substance or mark, or any mark on any such object, that was—

(i) on his or her person,
(ii) in or on his or her clothing or footwear,
(iii) otherwise in his or her possession, or
(iv) in any place in which he or she was during any specified period,

and which the member reasonably believes may be attributable to the participation of the accused in the commission of the offence and the member informed the accused that he or she so believes, and the accused failed or refused to give an account, being an account which in the circumstances at the time clearly called for an explanation from him or her when so questioned, charged or informed, as the case may be, then, the court, in determining whether a charge should be dismissed under Part IA of the Criminal Procedure Act 1967 or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure or refusal is material.

(2) A person shall not be convicted of an offence solely or mainly on an inference drawn from a failure or refusal to account for a matter to which subsection (1) applies.…"

Section 19 of that same Act, as far as relevant, states: -

"*19.— (1) Where in any proceedings against a person for an arrestable offence evidence is given that the accused—*
(a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or
(b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,

was requested by the member to account for his or her presence at a particular place at or about the time the offence is alleged to have been committed, and the member reasonably believes that the presence of the accused at that place and at that time may be attributable to his or her participation in the commission of the offence and the member informed the accused that he or she so believes, and the accused failed or refused to give an account, being an account which in the circumstances at the time clearly called for an explanation from him or her when so questioned, charged or informed, as the case may be, then, the court, in determining whether a charge should be dismissed under Part IA of the Criminal Procedure Act 1967 or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of

the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure or refusal is material.

(2) A person shall not be convicted of an offence solely or mainly on an inference drawn from a failure or refusal to account for his or her presence at a particular place under subsection (1). …"

Arguments and Conclusions

12. Counsel for the respondent premised his application for dismissal primarily on the basis that there was no evidence to suggest that the respondent was any more than a visitor to the property. He made reference to the fact that the respondent was not charged with offences in relation to controlled drugs found in the underground car park or with offences in relation to the money seized at the apartment. He further contended that the respondent was merely found in the kitchen/living room with his phone on the radiator at the time of the arrival of Gardaí and that there was no evidence of what he was doing on their arrival beyond the subsequent discovery of his passport which, it had been suggested, provided a stronger link than that of a mere visitor. Counsel for the respondent made specific reference to the absence of fingerprint evidence or forensic analysis linking the respondent to any of the objects found in the property or the two grow houses uncovered therein.

13. Counsel for the respondent submitted that any questions (and the 'answers') in respect of items found at the scene pursuant to section 18 of the Act are inadmissible. He says they seek to prove (in his contention) what they assume, namely possession; we are not persuaded that this is correct. He also submitted that the inferences sought to be drawn in respect of the respondent's presence in the apartment (said to arise by virtue of the invocation of section 19) cannot be used save in respect of the respondent's presence in the kitchen/living room. He argued that this was of central importance to the dismissal of Counts 6-10 where, he contended, there was no evidence linking him to those separate locations and furthermore, counsel for the respondent relied upon the fact that inferences alone cannot secure a conviction.

14. Counsel for the Director submitted that the judge ought to have made his own determination as to the extent to which the respondent's failure or refusal to answer for his presence corroborated the circumstantial evidence (which it was), including the placement of his mobile phone (with which his bank card was found) and passport there. He contended that the judge should have determined what inference should be drawn from this failure or refusal so he could then determine whether or not it corroborated the prosecution case taken at its highest point. By not doing so, counsel for the prosecution submitted that the trial judge fell into error.

15. Counsel for the prosecution accepted that a jury would be required to consider what adverse inferences (if any) could be drawn by the use of the legislation and, indeed, the weight of any inference so drawn as a result of the respondent's failure or refusal to account for his presence in the apartment in the circumstances but that ultimately it is a matter for the jury and the trial judge erred in his decision.

16. The respondent has engaged with the evidence for the purpose of contending that the elements of possession cannot be made out by, for example, referring to the fact that the doors of the grow houses were not open or that there was no obvious direct link between the cannabis being used in the living room and the cannabis plants being grown elsewhere. Furthermore, it is said that there is no evidence as to the behaviour or activity in the living room of the respondent when the Gardaí first entered. These are legitimate observations to make upon the merits but do not undermine the prosecution evidence in the context of a section 4E application in the present case. The fact that the respondent was not charged with money laundering in relation to the cash found or an offence in relation to the cocaine is neither here nor there—he cannot complain that because he has not been charged with an offence of which evidence might exist but was not, the other charges should fall away. The jury, as the prosecution contended, could properly conclude on the proposed evidence that the operation was a 'factory' or, to put it another way, was a continuous operation beginning with growth of cannabis and ending with the production of gummy bears.

17. The prosecution rightly contended that the *People (DPP) v. Wilson* [2019] 2 IR 158, relied upon by the respondent, should be distinguished on the basis of *People (DPP) v. Sheehan* [2021] 1 IR 33 (per O'Malley J at paras 109-111). The argument based on *Wilson* was that the inference provisions can only be relied upon where the offence in respect of which they were invoked is the same as that with which the accused had been charged. The respondent was in custody when sections 18 and 19 aforesaid were invoked and had been detained in respect of the offence of possession of controlled drugs for sale or supply. Counts 7 & 9 concern possession of a controlled drug *simpliciter* whereas Count 10 pertains to possession of a controlled drug for the purpose of sale or supply. In *Wilson* the accused was prosecuted for burglary rather than for possession of a firearm (or a kindred offence) but the appellant had been specifically informed by the Gardaí that he had been arrested on suspicion of being involved in the unlawful discharge of a firearm. It was held in *Sheehan* that: -

> "…*the trial judge can permit evidence to be given of failure or refusal to answer questions, and can instruct the jury that they may draw inferences from that failure or refusal, if the section was invoked for that purpose (and the attendant safeguards duly observed) in questioning the accused about the offence with which he or she is standing trial. That offence may or may not be the same, or the only, offence in respect of which the accused was arrested, since there are circumstances in which a suspect may lawfully be questioned about other offences, or in which the relevant evidence may disclose the commission of more than one offence*."

18. By definition in the context the concepts of growing cannabis and possessing it are inextricably linked. The evidence, as set out in the statements, i.e., on the prosecution case, disclosed the commission of more than one offence. The provisions are not set at nought just because a multiplicity of offences may be disclosed on the same facts. The crucial point is that it must be clear about what the suspect was being asked on the totality. This is what happened here.

19. The provisions giving rise to inferences are relevant when a judge is deciding whether or not to dismiss charges under section 4E. The judge does not have to decide whether or not they could be relied upon by a jury but rather must decide himself on the existence or admissibility of such evidence and reach his conclusion accordingly. A jury might not ultimately rely upon them in deciding

whether an accused is guilty or not guilty, but this is a separate matter. This must follow because the judge must take the prosecution's evidence at its height, and he fell into error here in effect in asking or answering the wrong question. Thus, in effect, he did not take into account the inference provisions (to put the matter shortly) in his decision or did not do so properly.

20. As to control or possession, counsel for the prosecution relied, correctly in our view, on the following statement of principle from *People (DPP) v. Foley* [1995] 1 IR 267 in this regard: -

> "…*an inference of knowledge and control would be drawn from the open and obvious presence of an article in circumstances where the accused's relationship to it would lead to a conclusion that he had knowledge of its presence and in the circumstances the trial court had been entitled to draw the inference that all the occupants of the bed-sit were in joint possession of the firearms and ammunition*".

21. Counsel for the respondent referred to *People* (*DPP) v. Ebbs* [2011] 1 IR 778 where O'Donnell J (as he then was) referred with approval to the definition of possession articulated by Lord Guest in *Reg v. Warner* [1969] 2 A.C. 256. This definition was taken from the *Dictionary of English Law (Earl Jowitt)* (1959), at page 1367, which articulated it as follows:

> "*First, there must be actual or potential physical control. Secondly, physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs...*".

All elements of that test for possession or control are capable of being proved here on the evidence.

22. We conclude that the judge was wrong in taking the view that the evidence was insufficient to permit the matter to proceed and to dismiss the charges. There is little point in reprising the evidence but we might say that the crucial elements are the open activities in the living room manifest for all to see associated with a sophisticated growing operation in its immediate vicinity (cannabis was also found in that room) and evidence sufficient to exclude a transitory presence in the house in the midst of open criminality because of the presence of the respondent's mobile phone and bank card in one area and the passport elsewhere (in circumstances where the passport was found above the pot of green gelatinous material). As a matter of common sense, individuals do not leave valuable items in two separate locations unless they have something more than a transitory connection with premises. We also take into account on the present appeal, the proper application of the inference provisions. This case is worlds away from one involving mere presence as a visitor or otherwise.

23. The appeal is accordingly allowed.