THE SUPREME COURT

[Supreme Court Appeal No: 174/2018]

Clarke C.J.
Kelly P.
Charleton J.
O'Malley J.
Irvine J.

BETWEEN:

The People (At the Suit of the Director of Public Prosecutions)

PROSECUTOR/RESPONDENT

-AND-

POWER

ACCUSED/APPELLANT

JUDGMENT of Ms. Justice Iseult O'Malley delivered on the 3rd day of April 2020.

Introduction

1. This appeal is against the decision of the Court of Appeal upholding the appellant's conviction for murder (see *The People at the Suit of the Director of Public Prosecutions v. Maurice Power* [2018] IECA 119). Shane Rossiter was murdered in Golden, Co. Tipperary in the early hours of the 17th October 2012 by a man who came to his house in a car and shot him twice with a shotgun. The appellant was arrested on suspicion of murder and spent some four days in extended detention. Evidence was adduced in the trial that in the course of that detention he confessed to killing Mr. Rossiter.

2. The issues in the appeal can be grouped under three headings. Taking them in the order in which they arose in the trial, the first substantive heading concerns the challenge to the lawfulness of an extension of the appellant's detention in garda custody by the District Court, with a question raised in the judgment of the Court of Appeal as to whether or not it was legally possible to mount such a challenge in the course of a trial. The second relates to s.10 of the Criminal Procedure Act 1993. The section provides that where evidence of a confession is uncorroborated the trial judge should advise the jury to have due regard to that fact. The dispute between the parties centres on the circumstances in which the section is applicable, the interpretation of the word "corroboration", and the appropriate direction to be given by a trial judge.

3. Finally, the determination of this Court granting leave to appeal posed a question as to the application of s.3(1) of the same Act, which permits an appellate court to dismiss an appeal against conviction notwithstanding a finding in favour of the appellant. However, it may not be necessary to consider this issue. If the Court considers that the detention was lawful and that the jury was appropriately charged, the question as to the proviso will not

truly arise. On the other hand, the Director of Public Prosecutions accepts that the proviso should not be applied if the jury was materially misdirected in relation to the confession warning. Instead, the conviction should be quashed and a retrial ordered.

Relevant evidence

4. For the purposes of this appeal only a relatively short summary of the facts is required. A number of people had been present in Mr. Rossiter's house during the night of the 16th/17th October 2012. There was evidence that at some stage the appellant was contacted by phone and was asked to bring some cannabis to the house. At about 6.30 am on the 17th a car arrived and Mr. Rossiter, accompanied by another man, went outside. A gun was produced from inside the car and Mr. Rossiter was shot. The man with him ran away, and was not in a position to describe the gunman or the car. Mr. Rossiter was shot a second time and the car departed.

5. On the evening of the 17th October a car was seen on fire in the mountains. It turned out to be a black Audi A4. There was evidence that the appellant's former partner had given him the use of her black Audi A4 some months previously. Vehicle registration documentation indicated that it had been sold to a man in Waterford on the 16th October 2012 and the tax book had been sent to an address there. However, the address provided for the putative purchaser was in fact occupied by a woman who had never had any dealings with the car. No person of the name given in the documentation was traced. Witnesses described meeting the appellant on the afternoon of the 16th October and at about 2.30 am on the morning of the 17th. On each occasion he was driving a black Audi. There was also CCTV footage from a Tesco premises showing a man said to be the appellant putting fuel into a black Audi A4 on the evening of the 16th.

6. The appellant was, from the outset, one of a number of persons of interest to investigators, by reason of his past relations with Mr. Rossiter. He attended at a Garda station on the 18th October, on a voluntary basis, and was formally interviewed after caution and in the presence of his solicitor. He stated that he had spent the night of the 16th October and the morning of the 17th in his father's home.

7. A prosecution witness who lived near the appellant's father gave evidence that in the days after the murder a friend of the appellant called to her and asked her about her domestic security camera. After some discussion with him, she had a phone conversation with the appellant. She said that he told her that he wanted the chip from the system for his own "peace of mind".

8. The appellant was arrested on suspicion of murder on the 11th December 2012 and was detained in Clonmel Garda station until the 15th December. While in detention he admitted to gardaí that he had shot Mr. Rossiter, stating that he had feared that Mr. Rossiter intended to kill him.

The extension of detention

The legislation

9. The appellant asserted that he was in unlawful custody at the time when the alleged admissions were made. The issue here concerned the extended detention permitted pursuant to a warrant granted in the District Court under the provisions of the Criminal Justice Act 2007.

10. In summary, the initial provisions of s.50 of the Act of 2007 provide for the detention of an arrested suspect for, in the first instance, a period of six hours if the member in charge of the garda station has reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence for which he or she was arrested. The detention may be extended at the end of that period, for a further 18 hours, by a member of the Garda Síochána not below the rank of superintendent. A further 24 hours may be authorised by a member not below the rank of chief superintendent.

11. Thus, a total period of up to 48 hours detention may be authorised at increasing levels of seniority. However, an application to court is necessary for any further extension. The procedure is governed by subsections (3) to (6) of s.50, the relevant parts of which are set out here:

> *(3)(g)(i) A member of the Garda Síochána not below the rank of chief superintendent may apply to a judge of the Circuit Court or District Court for a warrant authorising the detention of a person detained pursuant to [a direction given by a chief superintendent] for a further period not exceeding 72 hours if he or she has reasonable grounds for believing that such further detention is necessary for the investigation of the offence concerned.*
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> *(ii) On an application pursuant to subparagraph (i) the judge concerned shall issue a warrant authorising the detention of the person to whom the application relates for a further period not exceeding 72 hours if, but only if, the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.*
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> *(h)(i)….*
>
> *(ii)…*
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> *(4) On an application pursuant to subsection (3) the person to whom the application relates shall be produced before the judge concerned and the judge shall hear any submissions made and consider any evidence adduced by or on behalf of the person and the member of the Garda Síochána making the application.*
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> *(5) When issuing a warrant pursuant to subsection (3) the judge concerned may order that the person concerned be brought before a judge of the Circuit Court or District Court at a specified time or times during the period of detention specified in the warrant and if, upon the person's being so brought before such a judge, he or*

she is not satisfied that the person's detention is justified, the judge shall revoke the warrant and order the immediate release from custody of the person.

(6) If at any time during the detention of a person pursuant to this section there are no longer reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence to which the detention relates, he or she shall…be released from custody forthwith unless he or she is charged or caused to be charged with an offence and is brought before a court as soon as may be in connection with such charge or his or her detention is authorised apart from this Act.

12. The emphasis throughout is on the need to justify extended detention by reference to the proper investigation of the offence. At all times, the gardaí are under an obligation to release the person if it transpires that there are no reasonable grounds for believing that further detention is necessary. If the stage is reached where judicial authorisation is sought, there must be evidence from a garda at the level of Chief Superintendent or above that he or she has reasonable grounds for believing that further detention is necessary. Quite separately, the judge must be satisfied of that necessity. The judge must also be satisfied that the investigation is being conducted diligently and expeditiously. Such a conclusion must be based on the evidence adduced and submissions made in an *inter partes* hearing.

The detention issue in the trial

13. In this case, the appellant was arrested on the 11th December. He was detained from the 11th to the 13th December 2012, in accordance with the section, on foot of decisions made by various senior gardaí. His detention was extended for a further 72 hours on foot of a warrant granted in the District Court on the 13th December. A challenge was mounted in the trial to several aspects of the arrest and extended detention, and to the admissibility of all evidence emerging from the interviews with the appellant. However, in this appeal the Court is concerned only with the extension authorised by the District Judge.

14. The period of time for which authorisation by senior officers could be given was due to expire early in the evening of the 13th, and accordingly the gardaí applied that afternoon for a warrant authorising his further detention. The hearing commenced at approximately 4 pm, and concluded about an hour later when the District Judge signed the warrant.

15. The basis for the application was set out in an information sworn by Chief Superintendent Roche of Wexford Garda Station. It is agreed that the information was put, on oath and in its full terms, before the District Judge.

16. The information was made an exhibit in the trial for the purposes of a voir dire in relation to the lawfulness of the appellant's detention, although it obviously contained material that would not have been admissible before the jury. It is a seven-page document that commences with a brief description of the murder. Some of the content is explanatory in

nature, setting out some of the information received from witnesses to date and the reasons why the appellant became a suspect. The situation, as of the time of the application, was that three men (of whom the appellant was one) had been arrested on suspicion of murder, while two women had been arrested on suspicion of having relevant information.

17. In terms of the need for further detention of the appellant, there is a description of a number of matters specific to the appellant, such as his previous history of animosity with Mr. Rossiter. The appellant had not yet been interviewed in relation to certain incidents. There was an allegation that the appellant had been seen with a shotgun some time before the murder and had stated that it was for Mr. Rossiter. Further time was needed to interview him in relation to the location of the shotgun. There was information linking his girlfriend to a burnt-out car believed to have been used by the murderer, and information gleaned from her might form a line of enquiry with the appellant. There was what the gardaí believed to be a significant allegation by a witness that the appellant had removed the memory card from a domestic CCTV system near his father's home on a day after the murder. Gardaí believed that this was done to frustrate investigation into his claim that he was in his father's home at the time of the murder, and needed to question him further about it. Information had been received to the effect that the appellant and one of the other men burned clothing on the morning of the 17th October 2012. It was said that the gardaí needed to question him as to the identity of persons present at the time and as to the clothing.

18. There is a considerable amount of detail in the information about phone contact between the suspects, and between the phones of suspects and with Mr. Rossiter's phone, at relevant times before and after the murder. It was stated that more time was needed for the identification of the relevant cell site locations, and for questioning on this aspect. Further, the memoranda of all the interviews with each of the suspects were being analysed, and relevant information needed to be put to the appellant in interview.

19. According to the information, the investigation to date had employed over forty-five members of the Garda Síochána, who were working up to eighteen hours a day on this phase. The expertise of the Garda Technical Bureau, the Forensic Science Laboratory, An Garda Síochána Analysis Service and Divisional search teams had been drawn upon. The investigation team itself comprised a senior investigating officer, incident room co-ordinators, mobile phone forensic analysts and enquiry teams.

20. The sworn information was supplemented by oral evidence from the Chief Superintendent and from the senior investigating officer, Detective Inspector Leahy. The purpose of calling the Detective Inspector was to deal with some of the more detailed questions asked in cross-examination of the Chief Superintendent by the appellant's solicitor.

21. As it happens, the appellant had, in the course of an interview that commenced at 12.03 that day and ended at 13.42, admitted to shooting Shane Rossiter. This fact does not appear to have been raised in the hearing. It was not either put to the garda witnesses,

or suggested in argument, that the extension of detention might be considered unnecessary because the appellant had made admissions.

22. As already noted the issue as to the legality of the extension was dealt with in the course of a *voir dire* in the trial. In cross-examination in the *voir dire*, Chief Superintendent Roche confirmed that he had not been informed, as of the time of his application to the District Judge, that the appellant had confessed to involvement in the shooting. Counsel for the defence, in arguing that the detention was unlawful, submitted on this aspect that the extension had been obtained on an incomplete, or factually unsound, basis, because the fact that the appellant had begun to make admissions had not been taken into account. Counsel characterised this as a "hugely relevant fact", that the officer should have been aware of and which should have been brought to the attention of the District Judge. He queried whether the information might have been deliberately withheld from the Chief Superintendent, out of a concern on the part of the investigators that the judge would not grant an extension if he knew that an admission had been made. It was submitted that if the District Judge had known that certain admissions had been made, he would have looked at the application in a different light, although counsel conceded that it could not be said that he would necessarily have made a different decision.

23. Counsel for the prosecution submitted, in reliance on *The People (DPP) v. O'Toole and Hickey* (unreported, Court of Criminal Appeal, 20th July 1990), that the fact that a confession had been made was not central to the question whether further detention was necessary. In that case the Court of Criminal Appeal had said:

> *"This Court rejects the submission that once an accused has made a statement involving himself directly or indirectly in the crime for which he is charged that that fact necessarily concludes that there is no necessity for his further detention for the proper investigation of the offence. It is not only the right, but also the duty of Gardaí investigating the crime of murder, to fully investigate all the circumstances in an effort to establish all the facts relevant to the crime and to the guilt or innocence of the person or persons accused of that crime. The taking of statements, whether exculpatory or inculpatory, is only a part of an investigation, but in the opinion of this Court is most certainly not a full and proper investigation of the offence."*

24. It was therefore submitted that there was no basis on which it could be said that the failure to put the information in question before the District Judge was fatal to the legality of that Judge's decision. Counsel for the appellant responded that he was not making the case that the confession meant that the detention had to come to an end, but that there was no way of knowing whether it would have had an effect on the judge's decision.

25. In her ruling on the issue, the trial judge considered the chronology of the events on the 13th December 2012. She stated that it was "highly likely", given the timing, that the preparatory notes for the District Court application had been prepared in advance of the conclusion of the interview. She described as "unclear" the suggestion of counsel that the District Judge's decision might have been different if he had been told about the

admissions, since, even if admissions had been made, as in *O'Toole and Hickey*, investigations remained to be carried out. Accordingly, she was not persuaded that the information would have made a material difference. She also noted that the appellant had been present for the hearing, and that his solicitor had cross-examined witnesses on his behalf.

The Court of Appeal

26. This aspect is dealt with in paragraphs 83 to 85 of the judgment of the Court of Appeal as follows:

> *"83. In this Court's view the trial judge's ruling was correct. Unlike the first two extensions, which involved administrative, or at most quasi-judicial, decisions by Garda officers, the third extension was qualitatively different, and was designed to be by the Oireachtas. It was a judicial decision by a court established under the Constitution, i.e. the District Court, which is a court of record. It was a decision based upon a court hearing at which all interested parties were present and represented, in which evidence was adduced, in which there existed an opportunity to cross-examine witnesses and test the evidence adduced, and in which interested parties had the right to be heard both with respect to the law and the facts. As provided for in the statute, the District Court's decision was given effect to by a judicial warrant authorising the continued detention of the appellant. There is no suggestion that the warrant in this case was made other than within jurisdiction.*
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> *84. We do not consider that a judicial warrant of this sort, made within jurisdiction, is susceptible to challenge in the course of a trial on indictment in the manner in which the appellant seeks to do so in this case. As the trial judge clearly recognised, what she had before her was an ostensibly valid District Court order that had been made within jurisdiction. The only legitimate means open to the appellant if he desired to look behind that warrant was to initiate judicial review proceedings to condemn it on some justiciable grounds. There was ample opportunity for the appellant to do this as he personally would have known at all times at what point he had begun to make admissions. Moreover, even if he had never mentioned it to his solicitor, it would have been obvious to his solicitor when it was that he had begun to do so once the Book of Evidence was served. The appellant did not, however, bring judicial review proceedings, and there is simply no jurisdiction or scope for a trial judge, even in the Central Criminal Court (which is the High Court exercising its criminal jurisdiction), and obviously impossible in any Circuit Criminal Court case, to judicially review an order of the District Court within the four walls of a trial on indictment.*
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> *85. However, quite apart from this we consider the trial judge's reasons for dismissing the misconceived challenge were valid in any event. The evidence actually put before the District Judge, even though he was not told that the appellant had begun to make admissions, was clearly sufficient in any event for the District Judge to have been satisfied that the appellant's continued detention was*

necessary for the proper investigation of the offence for which he had been arrested. The interviewing process was clearly on-going and had not concluded. The case of The Director of Public Prosecutions v O'Toole 1990 WJSC-CCA 1662 to which the trial judge referred was apposite, and the trial judge was correct in her decision in our assessment. We therefore reject this complaint also."

Discussion

27. The parties in the appeal are now agreed that in its *obiter* remarks, on the jurisdiction of a trial court to consider the legality of detention in these circumstances, the Court of Appeal fell into error. This appears to have come about through a lack of debate or formal submissions on the issue, which did not arise from any ruling of the trial judge. The respondent had not, in the trial, argued that the appellant should have sought judicial review. Conversely, the appellant had no interest in seeking a formal order quashing the warrant. It was spent, and his interest was in the admissibility of the evidence obtained while he was in detention.

28. It is agreed that there is a well-established principle that a dispute about the legality of pre-trial investigatory actions, where the ultimate issue is the admissibility of evidence gathered by such actions, is in general a matter to be resolved within the trial process, and not by way of separate judicial review proceedings. Thus, in *Byrne v. Grey* [1988] I.R. 31 and *Berkeley v. Edwards* [1988] 1 I.R. 217 Hamilton P. held that, even where there were grounds for finding a search warrant to be invalid, the High Court should not quash it by way of *certiorari*. The issue as to the admissibility of the evidence was a matter for the trial judge.

29. The Court of Appeal in the instant case laid considerable emphasis on the fact that what was in issue here was a court order, which was ostensibly made within jurisdiction and after an *inter partes* hearing. It is certainly the case that a trial judge, whether sitting in the Central Criminal Court, the Circuit Court, or the District Court, could not formally quash the detention warrant. However, as observed above, the appellant here was not seeking such an order, but rather was challenging the admissibility of evidence.

30. This type of situation was the subject of full discussion in the judgment of Fennelly J. in *Blanchfield v. Hartnett* [2002] IESC 41, and it is necessary to refer to that judgment in detail. The appellant in the case, who was awaiting trial in the Circuit Court, had sought certiorari in relation to several orders made in the District Court pursuant to the Bankers' Books Evidence Acts 1879 to 1989. Since the orders in question had been acted upon and were therefore spent, the appellant's ultimate objective was to exclude the resulting evidence in the trial. It was accepted by the prosecution that many of the orders had been made without jurisdiction. Counsel for the appellant argued that it was necessary to seek relief in the High Court because the Circuit Court had no judicial review jurisdiction.

31. Fennelly J. pointed out that the courts in this jurisdiction had not taken the view that modern procedures for judicial review provided an exclusive remedy for complaints of infringements of public law rights. He described the appellant's arguments as a far-

reaching attempt to establish exclusivity for judicial review even in criminal trials. However, there were many situations in which courts trying criminal cases could inquire into the validity of at least some types of orders or decisions that were relevant to the criminal proceedings. The overwhelming responsibility reposed by the law and the Constitution on the trial judge was to ensure the fairness of the trial, and adjudication on the evidence to be placed before the jury was an "exceptionally important aspect of this function".

32. It was said to be inherent in that function that the trial judge be clothed with the power to judge the validity of legal procedures that had been taken in order to extract, collect or gather evidence. For example, trial judges could rule on the legality of an arrest or detention, or the validity of a search warrant issued by the District Court, for the purpose of ruling on the admissibility of evidence that might have been obtained in breach of the accused's constitutional rights. This power is not affected by the fact that they would have no jurisdiction to quash the warrant, or to make an order directing the release of a person from unlawful custody.

33. The judgment quotes the following passage the judgment of Walsh J. in *The People (Attorney General) v. Lynch* [1982] I.R. 64:

> *"It is important to recall that the District Court and the Circuit Court, which deal with the great bulk of criminal trials in the State, are courts set up under the Constitution. Like their brethren in the Supreme Court and in the High Court, each judge of the Circuit Court and of the District Court is obliged by Article 34, s.5, of the Constitution to make and subscribe in open court to the solemn and sincere promise that he will uphold the Constitution and the laws. Therefore, the judges of the District Court and judges of the Circuit Court are not dispensed from, or expected to overlook, their constitutional obligation to uphold the Constitution in the discharge of their constitutional and legal function of administering justice. It would be most incongruous if they were to apply a general test of basic fairness because the Constitution requires it, and not to rule on questions of the admissibility of evidence obtained as a result of breaches of the constitutional rights of the accused. The judicial obligation is to uphold all of the Constitution."*

34. Fennelly J. found no reason to deprive courts of trial of such powers as were inherent in the process of deciding on the legality of steps taken to enable the prosecuting authorities to gather evidence.

> *"Those authorities exercise a wide range of powers enabling them to gather evidence. Relevant enabling orders or decisions may be made, depending on the subject-matter, by judges of the District Court, Justices of the Peace or Garda Superintendents. All orders or decisions of that type directly concern the individual who is or who later becomes the accused at a criminal trial. I can identify no principle which should withhold from the trial judge the power to rule, for the purposes of the trial, on the legality of such measures insofar as may be relevant to*

the admissibility or the exercise of discretion to exclude evidence gathered in the course of such procedures.

The judge, it must be remembered, is charged only with the task of assuring the fair conduct of a criminal trial. Where, for that purpose, he rules that evidence is inadmissible because, for example, an invalid search warrant has permitted it to be found, he makes no order in respect of the search warrant. His ruling does not prejudge the validity of the act in question in other proceedings. I would adopt, with necessary adaptation, the reasoning of Webster J. in Portsmouth City Council v. Quetlynn [1988] QB 114: '…although justices sometimes, for the purpose of the case immediately before them, have to rule upon the validity of a bye-law or the decision of a local authority, that ruling is binding in no other case and it could not be suggested that justices or the Crown Court are a competent authority to strike down any such decision in the sense of declaring it invalid for all purposes.'

35. The judgment continues:

"Typically only the State and the accused are directly concerned…In my view the learned High Court judge was correct when he said that the trial judge would have 'ample jurisdiction to deal with all questions related to the legality of these orders'.

Measures of a more generally applicable or normative character will usually enjoy a different status. The trial court should not have to decide issues affecting the rights of non-parties to the criminal trial. The extreme case is that of a statute whose constitutionality may only be raised in the High Court. Intermediate cases will deserve special consideration which does not arise here.

It is sufficient to say that, in a case such as the present, the Circuit Court would have the power to adjudicate on the validity of the orders made under the Bankers Books Evidence Acts to the extent that it considers necessary for the purpose of ruling on whether to admit evidence…"

36. Fennelly J. concluded that while judicial review was available in principle, it was appropriate only in the most exceptional cases. It would however be granted if it was the just solution to a particular problem. (An example here would be the situation that arose in *Simple Imports v. Revenue Commissioners* [2000] 2 I.R. 243, where no criminal charges had been laid and the issue concerning the seizure of property could properly be determined in judicial review proceedings.)

37. I see no grounds for departing from these principles. While the passage in the Court of Appeal was *obiter* in the circumstances of this case, it is necessary to state clearly that it should not be followed by trial courts.

38. On the substantive issue – whether or not the trial judge erred in holding that the extended detention was lawful – I consider that the appellant's argument is misconceived.

39. The question of the legality of the appellant's detention depended upon the legality of the decision of the District Judge. The procedure mandated by the statute is intended to vindicate the right to liberty of the arrested person by ensuring that he or she is not detained unnecessarily for prolonged periods of time, and it provides for the full participation of the person, with legal representation, in an independent judicial determination of that issue.

40. The obligation of the District Judge under the statute, and having regard to the constitutional right to liberty of the individual concerned, was to make a decision based on the evidence and submissions put before him in an *inter partes* hearing. If he came to a rational conclusion, having regard to that material, it is difficult to see how the decision could be characterised as unlawful, simply on the basis that there was some other piece of evidence that might, theoretically, have cast a different light on the issue.

41. I should stress that if it were to become apparent in a particular case that the gardaí had misled the District Judge, either by misstating material facts or by withholding material information from both the court and the suspect, there might well be consequences in terms of the admissibility of evidence. In such circumstances the trial court might potentially find that the accused's right to liberty had not been vindicated by the process in the District Court, and that there had therefore been a breach of the suspect's right not to be detained other than in accordance with law. The matter would then fall to be assessed under the criteria set out in *DPP v JC* [2015] IESC 31.

42. Here, however, the information in question was within the knowledge of both the gardaí (collectively, although not communicated to the chief superintendent) and the appellant. Neither saw fit to inform the District Judge. That may or may not have been an oversight on the part of the gardaí, resulting from the early preparation of the sworn information. There was no evidence directed towards this issue, and submissions as to possible motivation are not evidence.

43. However, it was also a matter of choice on the part of the detained person as to whether to ventilate the matter at that stage. It is true that the burden of proof on the issue of the extension is on the gardaí, but the hearing is the opportunity for the suspect to argue against the case as made out by them, in order to defend his right to liberty. That is why legal aid is available for the process. A decision not to raise, in that process, a fact that is entirely within the knowledge of the individual in the District Court may be made for a variety of perfectly rational reasons. The suspect may not necessarily want it to be known by family or associates that he has made some admissions of guilt to the gardaí. That, however, cannot transform an otherwise proper decision on the part of the judge into an unlawful one. This is particularly so where it cannot plausibly be contended that the additional information *would* have brought about a different decision.

44. When detention on foot of a warrant of this nature is challenged in a trial, it must be remembered that the trial judge is not acting as an appellate judge. The question is not whether the trial judge thinks that the right decision was made, or whether (subject to the possibility outlined above) a different decision could have been made if additional

information had been provided, but whether the decision made was lawful, such that the resulting detention was lawful. So long as the decision was reasonable having regard to the evidence and submissions of the parties, the trial judge is entitled to hold that it was lawful. In the circumstances of this case, having regard both to the ample information put before the District Court and the authority of *DPP v O'Toole and Hickey*, I can see no basis for holding that the trial judge erred. Accordingly, I would reject this ground of appeal.

Section 10 of the Criminal Procedure Act 1993

45. The next issue is the interpretation of s.10 of the Criminal Procedure Act 1993 ("s.10"), which provides as follows:

> *10. – (1) Where at a trial of a person on indictment evidence is given of a confession made by that person and that evidence is not corroborated, the judge shall advise the jury to have due regard to the absence of corroboration.*
>
> *(2) It shall not be necessary for a judge to use any particular form of words under this section.*

46. The law, both before and after the introduction of this measure, is that a jury may convict an accused person solely on the basis of evidence that he or she confessed to the crime. The extent of the change brought about by the section may be gauged by reference to the case of *The People (DPP) v. Quilligan* (No.3) [1993] 2 I.R. 305, where the trial pre-dated the enactment. One of the grounds of appeal argued before this Court was that the trial judge should have warned the jury of the dangers of convicting on the uncorroborated evidence of the alleged admissions of the accused. In essence, the Court was being invited to lay down a direction akin to that applied in cases of visual identification since the decision in *The People (Attorney General) v. Casey (No. 2)* [1963] I.R. 33.

47. The majority held against such a proposition, with Hederman and O'Flaherty J.J., in particular, rejecting the introduction of a rule that would, as they saw it, put garda evidence in the same intrinsically unreliable category as the evidence of discredited witnesses such as accomplices. O'Flaherty J. queried what the rationale would be for a warning requirement. He preferred to urge the implementation of the regulations providing for audio-visual recordings of garda interviews, which at that stage had not yet been brought into force, as a better way to ensure a just verdict.

48. Finlay C.J. considered that the problems that could arise in relation to confessions were not amenable, as a matter of principle, to a general requirement for a judicial warning. However, he went on to say that where it was alleged that a confession had been obtained by an unlawful method such as threats, assault, inducement or harassment, juries should be clearly directed to have regard to all of the evidence, including the evidence supporting such an allegation, for the purpose of ascertaining whether they were satisfied beyond reasonable doubt that the confession was true and was a sufficient proof of guilt. It should also be made clear that if they had a reasonable doubt as to whether it was voluntary that would form "a very solid ground" for also entertaining a reasonable

doubt that it was true. The judgment notes that juries are not bound by any finding of fact made by a trial judge in the course of ruling on the admissibility of the admissions.

49. In dissenting on the issue, McCarthy J. found the rationale for a warning in the recurring public disquiet about convictions in Ireland and the United Kingdom that had been based upon uncorroborated evidence of admissions allegedly made in police custody, where no warning had been given of the dangers of acting on such evidence. In his view, there would be no difficulty as to the content of a direction on corroboration. Corroboration could be found in a variety of other evidence, such as where a significant detail in the statement was borne out by a subsequent discovery. The jury would not be precluded from looking for support or corroborative evidence in a material particular from outside the terms of the admission. The minority also pointed to the fact that the courts had in *The People (Attorney General) v. Casey (No.2)* [1963] I.R. 33 introduced the requirement for a warning in identification cases, where such a warning is necessary even if no imputation is made against the witness, because of concerns about reliability.

50. There do not appear to have been many considered judgments in relation to the section in the first decade after its introduction. The earliest that has been cited in argument in this case is the approved note of an ex tempore judgment in *The People (Director of Public Prosecutions) v. Brazil* (unreported, Court of Criminal Appeal, 22nd March 2002). The evidence against the accused had centred on an identification and some unsigned verbal statements made to gardaí. On appeal, the Court of Criminal Appeal was satisfied that the identification evidence had been properly admitted. Turning to an argument that the trial judge should have warned the jury that they were dealing with uncorroborated admissions, the Court said:

> *"But of course that assumes that the jury would feel that they could not act on the identification evidence. If this was a case in which a jury should not have acted on the identification evidence, then of course, that is only another way of saying that the identification evidence should not have been before them in the first place."*

51. The first point to be noted here is that the Court clearly considered that the concept of corroboration, as referred to in s.10, related to evidence of guilt, as opposed to evidence confirming that the admissions were actually made by the accused. The second is that the Court does not appear to have found relevant the possibility that, although the identification evidence was admissible, the jury might have found it to be unconvincing having taken into account the *Casey* warning, and might therefore have come to their verdict purely on the basis of the statement.

52. The first reported authority on the section is *The People (Director of Public Prosecutions) v. Connolly* [2003] 2 I.R. 1. This was a case in which the prosecution depended entirely on a signed confession, the contents of which were alleged by the defence to have been fabricated by the gardaí. The defence having referred the trial judge to s.10, he told the jury that the fact that the statement was unsupported by exterior evidence was something that they should "bear in mind". The Court of Criminal Appeal held that this was an inadequate explanation.

53. The judgment, delivered by Hardiman J., goes into some detail in relation to the context in which s.10 came to be enacted. The analysis in the 1993 Annual Review of Irish Law – describing the measure as "the legislative reaction to the fallout from recent well publicised cases of miscarriages of justice, including the Guildford Four and the Birmingham Six in Britain and, in Ireland, the Nicky Kelly case" – was quoted and endorsed. The report of the committee chaired by Judge Frank Martin, which in its conclusions recommended that garda interviews be audio-visually recorded, was also cited. The judgment suggests that it was perhaps to be inferred from the enactment of s.10 that the legislature was of the view that juries might not be sufficiently aware of the need to have regard to the lack of corroboration in cases where the only evidence was an "unsupported" confession.

54. As far as the application of the section is concerned, it may be noted that the Court saw no difficulty in deciding what would constitute "corroboration":

> *"I would have thought that the most obvious form of corroboration is some relevant, objective confirmation of the factual material in the confession."*

55. The Court observed that the section was unspecific, because it was intended to leave a good deal of discretion to the trial judge to be exercised in accordance with the requirements of the individual case. The phrase "due regard" was intended to connote an objective, normative standard of regard or attention to be paid in the absence of corroboration. Hardiman J. said that this phrase was not self-explanatory, and called for an explanation to juries. Such an explanation would have to relate to the facts of the case, since what was "due" would vary from case to case. The explanation would have to involve a proper, not merely technical, explanation of the meaning of corroboration. Significantly, the judgment continues:

> *"This will often, of course, be necessary in any event because in many cases there is evidence which could amount to corroboration if the jury accepted it. Because the trial judge cannot know in advance whether they will accept it or not, it will be necessary in such cases, even apart from s.10, to explain the meaning of corroboration in law. As a result of s.10, it will then be necessary to give the advice required by that section for the guidance of the jury if they do not accept the evidence said to constitute the corroboration."*

56. The Court of Criminal Appeal "very diffidently and without in any way suggesting a particular form of words" ventured the following as a form of model charge on the issue:

> *"This case stands or falls on the confessions which the prosecution allege the accused made. Either you are satisfied beyond doubt that that confession is true and reliable, in which case you will convict, or you are not so satisfied, in which case you will acquit. The law requires me to point out to you that there is no corroboration of the evidence of the confession. Corroboration means independent*

confirmation. In a case like this, it would mean some evidence independent of that of the gardaí who say they heard the accused confess, which you could fairly and reasonably regard as confirming the truth of the confession."

57. The offences in the case with which the Court was concerned related to a burglary, and the next part of the model charge proposed in the judgment is geared towards that scenario, before returning to general principle.

> *"There might have been some forensic evidence placing the accused in the injured party's house, which would certainly confirm the truth of the alleged confession. He might have been found in possession of the stolen property or he might have been identified by some person as the robber. On the other hand, there are cases which, of their nature, make it hard to find corroboration. You must consider what sort of case this is from the point of view of corroboration. When you are considering whether you can feel sure that the statement is true and reliable beyond reasonable doubt, you must ask yourselves whether the absence of any corroboration or independent confirmation of the statement should reduce your trust in it to the point where you are not confident of its truth beyond reasonable doubt. Since the earliest times, people face with important decisions have sought to make their task easier by looking for independent confirmation of one view or another. But if it is absent, the decision still has to be made. If it is absent where you would expect to find it, that fact in itself may affect the decision.*
>
> *I am obliged to give you this warning because of a law passed by the Oireachtas in 1993, which says that I must advise you to give due regard to the absence of corroboration. It is essential that you do so. You must also bear in mind that, despite the absence of corroboration, you are perfectly entitled to convict if you are indeed satisfied of the truth of the accused's confession beyond reasonable doubt. The law does not say that you cannot convict without corroboration, merely that you should specifically consider the absence of corroboration and what weight, if any, you should give to this factor. Once you do this, your decision is a matter for your own good sense and conscience."*

58. It will be noted that, as in *Brazil*, the emphasis is on evidence, other than the admissions, which would tend to confirm the guilt of the accused. In the overall context of the model charge, the statutory reference to "corroboration of the evidence of the confession" was clearly seen by the Court as meaning corroboration of the evidential content of the confession, quite apart from the issue in the case as to whether the accused actually made the admissions attributed to him. However, the approach differs from that in *Brazil* insofar as the Court in *Connolly* did not appear to contemplate a ruling by the trial judge that because of the presence of corroboration in the case a warning would be unnecessary. The judgment appears therefore to require that a s.10 warning should be given in every trial involving admissions, in case the jury does not accept any other prosecution evidence as probative of guilt.

59. In *DPP v. Colm Murphy* [2005] 2 I.R. 125 one of the issues in the appeal was whether the Special Criminal Court should have treated certain alleged admissions as uncorroborated. On the evidence in the case, the Court of Criminal Appeal considered that, had the issue arisen in a jury trial, there would have been sufficient grounds for a trial judge to have concluded that there was sufficient corroboration to avoid the necessity to give the advice required by s.10 of the Act of 1993. The consequences of such a finding by the judge were then outlined:

> *"In those circumstances it would have been for the jury to decide whether each piece of evidence allegedly offering support to the prosecution case did in fact do so and did so to a sufficient degree to discharge the burden of proof upon the prosecution. Whether any of the elements which might offer such support would or would not properly amount to corroboration would not then be a matter material to the jury's consideration. In the circumstances it is not necessary to consider whether each and every one of the items relied upon by the trial court amounts to corroboration in the formal legal sense of the word. Provided the trial court:-*
>
> *(a) Was properly satisfied that there was some corroboration, or*
>
> *(b) Even if there was no such corroboration properly considered the dangers of convicting in the absence of such corroboration,*
>
> *the court would nonetheless have been entitled to convict on the basis of the admission alone."*

60. This judgment differs from that in *Connolly*, therefore, in that it would leave to the assessment of the trial judge, in the first instance, the question whether there was corroboration of the confession.

61. *DPP v. Colm Murphy* was followed in *Director of Public Prosecutions v. Herda* [2017] IECA 260, where the appellant had been convicted of murdering a passenger in her car by driving it at speed into a harbour. Part of the evidence concerned comments she had made to gardaí and to two hospital nurses, that were interpreted by the prosecution as indicating that she had done it deliberately, in the knowledge that the passenger could not swim. The Court of Appeal held that there had been no requirement for a corroboration warning in that the confession evidence was not uncorroborated. The statements made individually to the two nurses were capable of corroborating each other, and were also corroborated by evidence as to the manner of driving. As in *Brazil*, the Court does not appear to have considered what might have happened if, for example, the jury had found any of that evidence to be unconvincing.

The s.10 issue in the trial

62. It is helpful to refer briefly here to the nature of the admissions made by the appellant. All of the garda interviews with the appellant were audio-visually recorded. In the course of one he referred to the history of animosity between himself and Shane Rossiter and then

gave an account of the shooting. He stated that he had received a phone call from Mr. Rossiter asking him to drop some hash out to his house. He said that he was told that Mr. Rossiter was alone in the house with his girlfriend. He felt that it did not "sound right" but went anyway. When he arrived at the house Mr. Rossiter came out with a man he did not know. They were zipping up their jackets. He therefore assumed that something was wrong and fired at Mr. Rossiter. When the second man ran away, the appellant went after him briefly and then returned and shot Mr. Rossiter again. He said that he had used a single-barrelled shotgun. The appellant said that the car was an Audi A4 that had previously belonged to his girlfriend and that after the shooting he burned it. The garda asked "So, it wasn't ever sold to anyone by you?" He replied "No, I had people just believe that, that's all".

63. The interpretation of s.10 was debated before the trial judge, who described the dispute between the parties as being whether the need for a warning under the section was triggered by a lack of corroboration of guilt, or alternatively by a lack of corroboration of evidence of the making of the confession.

64. The prosecution contended that in any event there was corroboration, insofar as certain circumstantial evidence, if accepted by the jury, confirmed certain of the admissions. The evidence relied upon for this purpose was the finding of the burned out black Audi A4 suspected to have been the vehicle used in the shooting, the link between the appellant and his former partner's black Audi A4 and the attempt to fabricate evidence that this car had been sold the day before the shooting. The appellant had admitted in interview that he had driven his partner's car and had fired at Mr. Rossiter from it, that he had subsequently burned the car, that the car had never been sold and that he "had people just believe" that it had been. Counsel for the appellant, however, submitted that this evidence could not properly be considered as corroboration, in that any evidence put to the jury as potentially corroborative had to be evidence, independent of the confession, that connected the accused person with the crime.

65. The trial judge considered that the case stood or fell on the confession, and that the section was applicable. Having heard counsel, and having considered the Court of Criminal Appeal judgment in *The People (Director of Public Prosecutions) v. Connolly* along with a passage from McGrath on Evidence, she ruled that the corroboration contemplated by the section was independent evidence tending to show the truth and reliability of the confession. The circumstantial evidence in the case was capable of providing that independent confirmation of truth and reliability.

66. When charging the jury she addressed the matter as follows:

> *"Now, essentially, at the end of the day, this case stands or falls on the confession which the prosecution allege the accused man, Maurice Power, made. Either you are satisfied beyond reasonable doubt that the confession is true and reliable, in which case you convict, or you're not so satisfied, in which case you acquit. Because of the experiences, particularly in the 1970s and 1980s in this country, where undoubtedly false confessions were extracted, sometimes quite brutally from*

people, the law was changed in 1993 and since then the law has been that when reliance was placed on confession evidence, juries should consider whether or not there is independent confirmation of the truth and reliability of the confession. That's –it's called in law corroboration. So, if reliance is being placed on a confession, you must consider whether or not there's independent evidence which confirms the truth and reliability of the confession and independent confirmation is evidence that comes from sources other than the gardaí. If there isn't and if at the conclusion of your analysis of the evidence you find that there's no independent confirmation of the truth and reliability of the confession, you must ask yourselves then whether the absence of independent confirmation diminishes your trust in the confession to the point where you're not confident of its truth beyond reasonable doubt. You must bear in mind, however, that even if there is no independent confirmation, you're still perfectly entitled to convict so long as you are satisfied of the truth of the accused's confession beyond reasonable doubt. The law does not say that you cannot convict without independent confirmation of the truth and reliability of a confession, it merely states you must consider its absence if you find that it's absent and what weight, if any, you should give to the factor and once you do that you can have considered whether or not there is corroboration and if its absence – what weight you should give to that absence, whether that absence diminishes your confidence in the truth of the confession, the decision is yours and is a matter for you."

67. The trial judge went on to state that the circumstantial evidence in the case, if accepted by the jury, was capable of providing independent confirmation of the truth and reliability of material parts of the confession. She observed that most of it connected the appellant to the black Audi, and referred to the evidence given by non-garda witnesses connecting him with that car on the 16th October and at about 2.30 am on the 17th, as well as the evidence indicating a bogus sale of the car. She also referred to the request for the chip from the domestic security camera. All of this evidence was described as being independent of the gardaí and as capable of confirming material parts of the confession.

68. The judge then moved on to the evidence as to the confession and outlined the main points made by the defence in contending that it should not be relied upon – that while the appellant was in custody the investigating gardaí had implemented a strategy of talking to him off-camera, during cigarette breaks; that there were inconsistencies as between some of the admissions made by him and the evidence of prosecution witnesses, including the evidence of the State pathologist; and that there was no forensic or other direct evidence implicating him. She reiterated that it was a matter for the jury to decide whether they were satisfied that the confession was true and reliable.

The Court of Appeal

69. On appeal, the appellant submitted that the trial judge had failed to distinguish between corroboration of the reliability of the confession and corroboration of the commission of

the offence. It was argued that she should have instructed the jury that there was no corroboration of the latter.

70. The Court approved as correct the passage from McGrath (to be found in paragraph 8-282 of the 2nd edition, 2014, Round Hall Thompson Reuters), that had been cited to the trial judge:

> *"The first question that arises in relation to s.10 is whether the warning it mandates is triggered by and relates to a lack of corroboration of the accused's guilt of the offence or a lack of corroboration of the making of the confession. An argument can be made that the mischief that the section is directed at is the fabrication of confessions and, thus, the warning is directed towards circumstances where there is no corroboration of the making of the confession. This interpretation is supported by the wording used in subs.(1) which requires a warning when "evidence is given of a confession made…and that evidence is not corroborated", i.e. the evidence that has to be corroborated is the evidence of the making of the confession. Such a requirement would give a significant evidential impetus to the use of audiovisual technology to record interviews. However, the word "corroboration" is undoubtedly a term of art with a particular technical meaning, i.e. independent evidence that tends to implicate the accused in the commission of the offence. Thus, the use of that term indicates that the section is directed towards the risk of a miscarriage of justice that arises when the only evidence against an accused is that of a confession or inculpatory statement made by him. In any event, this question has been settled in favour of the latter view by the decisions of the Court of Criminal Appeal in People (DPP) v Connolly [2003] 2 I.R. 1 and People (DPP) v Brazil [2002] WJSC-CCA 2938 (unreported, Court of Criminal Appeal, 22nd March 2002)."*

71. The Court considered that the trial judge had adopted an "unorthodox" approach insofar as she had instructed the jury that corroborative evidence should confirm both the truth and the reliability of the confession. At paragraph 121 it said:

> *"If a statement of admission, or any part of a statement containing an admission, is 'true' then it implicates the accused in having committed the offence. To the extent that the trial judge charged the jury that this was a requirement she was correct. Whether she was also correct to tell the jury that for evidence to be corroborative it also had to confirm the reliability of the confession is doubtful. It certainly does not follow that simply because a statement is true that it is reliable. For example, an admission made by an accused while he is in a state of profound intoxication might well in fact be true, but it might not be regarded by a reasonable fact finder as being capable of being safely relied upon. However, we do not believe that it is the law that for evidence to be corroborative that it must tend to confirm both the truth and the reliability of a confession. If it does both, well and good. However, it must at least tend to confirm the truth of the confession. To suggest this is not to say that a jury need not be concerned about reliability. They must of course be concerned about reliability but not in considering whether evidence is or is not*

corroborative. Any concerns they may have about reliability fall to be separately considered in the context of determining the weight, if any, to be attached to confessional evidence, notwithstanding that such confessional evidence may be corroborated by evidence suggesting it is true, in their deliberations on the ultimate issue of whether the accused be guilty or not guilty of the offence with which he is charged."

72. However, the Court held that the trial judge's instructions could only have inured to the benefit of the appellant, in that the requirement that corroborative evidence should confirm both truth and reliability made it more onerous for the prosecution to satisfy their burden.

73. The Court then referred, "for the avoidance of doubt", to the discussion of corroboration in the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Murphy* [2013] IECCA 1. Delivering the judgment of the Court, McKechnie J. had cited *R. v. Baskerville* [1916] 2 K.B. 658 and *The People (DPP) v. Murphy* [2005] 2 I.R. 125 in defining corroboration as "independent evidence which implicates the accused, in a material way, in the offence charged". Having regard to that, the Court rejected the submission of the appellant that the trial judge had failed to instruct the jury that there was no corroboration relating to the actual commission of the offence and found that, apart from the reference to reliability, her charge had been entirely correct and appropriate.

Submissions in the appeal

74. The appellant submits that the legislative intent in s.10 is to require a corroboration warning in a case where there is no independent evidence implicating the accused, in a material way, in the offence charged. It is argued that the statutory reference to corroboration must be understood in the light of the definition of the concept of corroboration in Irish law. *Connolly* and *Brazil* are relied upon insofar as they focus on the desirability of corroborative evidence that connects the accused with the crime, rather than simply confirming that the confession was made by the accused.

75. Counsel agrees that the Court of Appeal was correct in adopting the passage quoted from McGrath. However, it is argued that the trial judge did not in fact follow that analysis but instead formulated a hybrid concept, in which she stated that corroboration would be independent evidence of the truth and reliability of the confession. The Court of Appeal was right to say that in so doing she erred, since evidence that some part of the statement was true (such as the part that related to the burning of the car) would not necessarily be evidence implicating the appellant in the crime. However, it is argued, the Court did not follow through on that analysis.

76. It is submitted that the import of the section is that a trial judge must engage with it in every case involving a confession. There is no requirement and no scope for a qualitative assessment of the evidence by the judge.

77. The respondent submits that since the word "corroboration" is not defined in the statute it should be understood in its ordinary meaning, and not as a term of art. It relates to the confession, not to the offence, and the question is whether there is evidence confirming its truth. The respondent therefore takes the view that the Court of Appeal erred in its citation of the authorities on the meaning of corroboration, submitting that these are not relevant to the interpretation of the section.

78. Counsel observes that the references by the trial judge to "truth and reliability" might have reflected her understanding of the judgment in *Connolly*, or, perhaps, the use of those words in s.16 of the Criminal Justice Act 2006 (which permits the use in evidence of a witness statement made out of court if, *inter alia*, the trial judge is satisfied that it is reliable). It is submitted that, although the Court of Appeal found that she had gone further than *Connolly*, there was nothing wrong with the formulation.

Discussion

79. I think it is necessary to bear in mind that the purpose of this debate is to attempt to discern the most appropriate way, consonant with the right of an accused person to be tried in due course of law, of guiding juries in their task. The trial judge's charge to a jury is an exercise in communication that will rarely be improved by over-elaborate concepts and distinctions, however technically correct they may be on paper. I respectfully adopt the words of Lord Diplock in *DPP v. Hester* [1973] A.C. 296:

> *"…to incorporate in the summing-up a general disquisition on the law of corroboration in the sort of language used by lawyers, may make the summing-up immune to appeal on a point of law, but it is calculated to confuse a jury of laymen and, if it does not pass so far over their heads that when they reach the jury room they simply rely on their native common sense, may, I believe, as respects the weight to be attached to evidence requiring corroboration, have the contrary effect to a sensible warning couched in ordinary language directed to the facts of the particular case."*

80. Section 10 is one of a number of measures in the Criminal Procedure Act 1993 that are concerned with the potential for miscarriages of justice to occur within the criminal justice system. Some of those measures are directed towards ways of remedying a miscarriage of justice after it has occurred, but this particular provision is aimed at prevention rather than cure. In my view the Court of Criminal Appeal in *Connolly* correctly identified its rationale as being the apprehension that convictions based upon unsupported confessions could result in miscarriages of justice, and that juries might be insufficiently aware of this.

81. The introduction of audio-visual recording of garda interviews has been of very significant assistance in dealing with allegations by accused persons that alleged admissions were fabricated. It has not, however, entirely removed concerns about the reliability of confessions. It remains possible that a confession may be the product of improper pressure or inducement. Indeed, it may be a fabrication on the part of the suspect, intended perhaps to shield another person or even simply because the suspect is a highly

suggestible person. While unusual, the latter scenario is not unknown in this jurisdiction – for a relatively recent example see the insightful report on the case of Dean Lyons, by Mr. George Birmingham SC (now President of the Court of Appeal).

82. It may be helpful to consider the issues arising in this case using, in the first instance, non-technical language. The question for a jury, in relation to a confession, is whether it can be relied upon as a true admission to the commission of the offence. In that context, I do not see it as necessarily helpful for a trial judge to distinguish between truth and reliability, since both are integral to the decision to be made by the jury – if the jury feels that they can rely upon the confession as truthful, and are satisfied beyond reasonable doubt that it is in fact true, they may convict. If they are left with a reasonable doubt as to whether they can or cannot rely upon it, then in the absence of other sufficiently probative evidence of guilt they must acquit. Reliability is therefore, in this context, intrinsically bound up with truth. As Finlay C.J. said in *Quilligan (No. 3)*, doubt about whether the confession was the product of assault, threats, inducement or harassment is a very solid ground for doubt about its truth. Similarly, doubt about whether it was actually made by the accused, or about the reasons why it was made, would mean that it could not be relied upon to be true.

83. The obligation imposed on a trial judge by s.10 is to give particular advice to the jury if the evidence of a confession is not corroborated. Since the legislative intent is to avoid miscarriages of justice by warning juries to take particular care in cases involving unsupported confessions, I am satisfied that the provision goes beyond the evidence that the confession was made by the accused and is also concerned with the factual content of the confession. I agree with the statement by the Court of Criminal Appeal in *Connolly* that what is to be assessed is whether or not there is objective, relevant confirmation of that material.

84. Some difficult questions arise at this point, because some of the key features of the common law rules relating to corroboration are not easy to fit into the situation envisaged by the section. The immediate question is whether the section is applicable in any trial involving confession evidence. The answer to that requires consideration of the role of the trial judge and the nature of corroborative evidence.

85. It will have been seen from the discussion above that different divisions of the Court of Criminal Appeal have taken differing views as to when the section requires a warning to be given. In Connolly, the Court considered that it would have to be given whenever the prosecution adduces confession evidence, even if there is other evidence that could amount to corroboration. However, in *Brazil*, *Murphy* and *Herda* the Court clearly considered that it would be open to a trial judge to decide that no warning was required on the facts of a particular case. The rationale for the *Connolly* approach was that the trial judge could not know whether the jury would accept any of the corroborative evidence, and they would therefore have to be advised how to treat the confession if they found it to be uncorroborated. This may be seen as being in keeping with the manner in which the traditional rules relating to corroboration have been applied in other categories of case,

and as stemming from the basic principle that the facts in a criminal trial are found by the jury and not the judge.

86. However, I do not consider that the section is intended to have the effect that a warning is to be given in all cases where confession evidence is adduced. Firstly, the wording of the provision specifically imposes the obligation to address special advice to the jury if a confession is uncorroborated, rather than an obligation in respect of every confession in every case. That seems to me to require a ruling or finding by the judge, solely for the purpose of instructing the jury, that the section is applicable because the confession is uncorroborated.

87. Secondly, to apply the section in every case where a confession is part of the prosecution case has the potential to cause significant confusion for juries. It could have the radical and, in my view, unintended consequence that evidence that is clearly probative of guilt in its own right (such as robust forensic evidence, eyewitness evidence or circumstantial evidence) could be relegated to the role of supporting evidence. Such evidence might not even be accepted as corroboration in some cases, if it does not come from a witness who is independent from the gardaí who say that the accused confessed. To take one simple example, gardaí who witness an offence may arrest the suspect and receive a confession from him. It would be absurd, and confusing, for the jury to have to treat the confession as uncorroborated simply because the eyewitness evidence comes from the same gardaí. On the other hand, it would be even more confusing if they were instructed to assess the evidence twice – once as potential corroboration and once in its own right.

88. I appreciate that traditionally, in other categories of cases where corroboration may be an issue, the judge does not determine whether any corroboration exists. He or she has to decide only whether the threshold criteria are met – for example, whether a particular witness can or cannot be treated by the jury as an accomplice, or whether the circumstances of a trial for a sexual offence are such that a discretionary corroboration warning should be given. Once that decision is made, it is clearly not for the judge to determine whether any part of the evidence does in fact amount to corroborative evidence. That is a matter for the jury, subject to appropriate guidance as to what evidence can, or cannot, be taken as corroborative if accepted by them.

89. However, if, as I believe, s.10 requires the trial judge to determine whether the confession is uncorroborated, for the purpose of deciding whether or not some special advice as contemplated by the section should be given to the jury, it follows that the judge will have to make some qualitative assessment of the evidence. I would emphasise that this is for the purpose of deciding whether or not to give a particular warning, and not for the purpose of instructing the jury that there is, or is not, corroboration in the case.

90. I do not consider that this approach is contrary to the constitutional principle that juries are the finders of fact in a criminal trial. It is true that the judge cannot know which evidence they will accept. However, it is equally true that after a verdict of "Guilty", there is no way of knowing whether the jury accepted all, or only part, of the prosecution case.

Yet that does not prevent an appellate court from determining, by reference to the evidence as a whole, that there was sufficient evidence on a particular issue to sustain the verdict.

91. The question then is whether the section uses the word "corroborated" as a term of art, to be understood in the light of the case-law, or means something else.

92. In *The People (Director of Public Prosecutions) v. Gilligan* [2006] 1 I.R. 107 this Court was concerned with the necessity to seek corroboration of evidence given by witnesses who were participating in a State witness protection programme. The Court found that the rationale behind the common law rule requiring a warning before acting on the uncorroborated evidence of an accomplice applied equally to such witnesses. The judgment (delivered by Denham J.) considers the nature of the corroboration required to forestall the necessity for a warning. Citing *R. v. Baskerville* [1916] 2 K.B. 658 and *Attorney General v. Levison* [1932] I.R. 158, Denham J. laid out the three strands to corroborative evidence.

93. Firstly, it must tend to implicate the accused in the crime. As the Court of Criminal Appeal subsequently said in *The People (Director of Public Prosecutions) v. Meehan* [2006] 3 I.R. 468, this leaves a margin of discretion to the court. It is necessary for the trial judge to determine what may constitute corroboration on the facts of the case. On the evidence in Meehan, the Court described some of the evidence in issue as relevant, independent and probative evidence that could be acted upon as "confirmatory and supportive" of the account offered by a witness who was an accomplice.

94. Secondly, it must be independent of the evidence that makes corroboration desirable. However, on this aspect Denham J. referred to the following passage from the judgment of Lord Reid in *R. v. Kilbourne* [1973] A.C. 729:

> *"There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it."*

95. Denham J. therefore considered that the nature of corroborative evidence would depend on the facts and circumstances of the case. That included the nature of the defence, which might be critical in determining what was corroborative evidence. Since corroborative evidence is evidence that establishes a link which tends to prove that the accused person committed the offence, then evidence that rebuts a particular statement or denial by the accused could be corroborative.

96. I think it bears emphasising here that the evidence offered as corroboration does not, itself, have to directly prove that the accused person committed the offence.

97. Thirdly, corroboration should be credible, and should be supporting evidence that has a degree of credibility. Here, the judgment of Lord Morris in *R. v Hester* [1973] A.C. 296 was cited by Denham J:

> *"The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence will only fulfil its role if it itself is completely credible."*

98. Denham J. agreed that this was a matter of common sense, but stressed that corroboration was not a "two-stage" process where the credibility of a witness was assessed before determining whether there was corroboration. The evidence of an accomplice did not need to be considered separately, and categorised, prior to an analysis of corroboration. Rather, the evidence that is the subject of the warning should be considered in the light of all of the evidence in the case, to see how it fits in with that evidence. She adopted the approach taken by Lord Bridge in *Attorney General of Hong Kong v. Wong Muk Ping* [1987] 1 A.C. 501, where he said:

> *"Where the prosecution relies on the evidence of an accomplice and where…the independent evidence is not by itself sufficient to establish guilt, it will have become obvious to the jury in the course of the trial that the credibility of the witness is at the heart of the matter and that they can only convict if they believe him. The accomplice will inevitably have been cross-examined to suggest that his evidence is untrue. The jury will have been duly warned of the danger of relying on his evidence without corroboration. Their Lordships can see no sense in the proposition that the jury should be invited, in effect, to reject his evidence without first considering what, if any, support it derives from other evidence capable of providing corroboration."*

99. Denham J. concluded, on this aspect, by adopting the formulation of Maguire J. in *The People (Attorney General) v. Trayers* [1956] I.R. 110 and Sullivan C.J. in *The People (Attorney General) v. Wiliams* [1940] I.R. 195 – what is to be explained to the jury is that corroboration means independent evidence of material circumstances tending to implicate the accused in the crime with which he was charged. It may be found in circumstantial evidence. It might be, in a given case, that not every piece of circumstantial evidence implicates the accused but that the collection of circumstantial evidence as a whole tends to do so. It may be noted that the authorities use words such as "support" or "confirmation" in referring to such evidence.

100. Having regard to the foregoing it seems to me that there is no particular reason to suppose that in enacting s.10 the legislature intended some meaning to be given to the word "corroboration" other than that generally understood in the criminal law. I am also of the view that the distinction sought to be drawn by the appellant, between the truth of the confession and the commission of the crime, is not valid. Certainly, evidence establishing that peripheral details in a statement of admission are true will be of little weight. However, if the accused person has confessed to the commission of the offence

charged, then it seems to me that evidence supporting the truthfulness of the account in the confession in any material particular will necessarily also be evidence implicating the accused in the offence.

101. As I said earlier, the judge's charge to the jury is an exercise in communication. It should, therefore, avoid the use of technical language where possible, and where that is not possible clear explanations must be given that get across to the jury the nature of the task that is before them. In that context, I can see no difficulty with the approach of the trial judge in this case. She decided, in my view correctly, that this case was one in which a warning was appropriate. She informed the jury, correctly, that the case stood or fell on the confession. She gave an appropriately worded explanation of the need to examine the other evidence, and in particular the evidence about the car, to see whether it confirmed the truth and reliability of the confession but made it clear that the jury were entitled to convict in any event provided they were satisfied beyond reasonable doubt that the confession was true.

102. In the circumstances I would dismiss the appeal. There is no requirement in this case to consider the applicability of the proviso.