

CRIMINAL LAW ONLINE SERVICE

Issue 8

September/October 2009

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EDITORIAL

In recent years, we have witnessed the gradual, somewhat silent, encroachment of “Big Brother” into all our lives as we increasingly move in the direction of a “society of surveillance.” This is evident in a number of areas including the use of CCTV cameras on public streets and in business premises; biometric ID cards; social security numbers; nanny cams; the monitoring of e-mails and internet usage; passports with computer chips; the tracking of mobile phones, and the use of digital surveillance via credit cards, bankcards, internet accounts, gym membership, library cards, health insurance records, and workplace identification badges.

The increasing use of surveillance and surveillance technology has of course many positive aspects. It can increase efficiency and discipline, monitor wrongdoing, facilitate investigations (the fact, for example, that information can be more accurately accessed in retrospect), promote security, dissipate feelings of insecurity, and encourage self-regulation. As one commentator noted:

“Surveillance instils discipline by forcing self-regulation. Constant surveillance brings forth loyal citizens, trained soldiers, obedient patients, productive workers, and docile, useful bodies. External observation recruits us to monitor and police ourselves: we confess, count calories, open our doors to the Census long form, sign our real names on hotel registers, pay our taxes, reel off our social security numbers and dates of birth. The entire edifice of modern life is built as much upon the primacy of files, record keeping, and everyday surveillance as it is upon nature and labour.”

The danger, of course, is that the creeping nature of this surveillance, though enhancing security, concedes too much to individual freedoms such as the right to respect for a person’s private life, family life, home and correspondence. Moreover, the technologies employed are often premised on a dystopian societal vision of exclusion, precariousness, insecurity, and fear of fellow citizens. They are not, for example, designed to treat individuals as individuals and alter their behaviour through an educative or re-integrative course of action. Rather, they are pre-emptive and preventive. In effect, they often seek to manage citizens by employing low visibility, high transferability techniques which neutralise the dangers that citizens pose.

In the criminal justice system, most people would accept that reasonable and proportionate

surveillance is an essential Garda tool in the fight against crime. In this regard, the Criminal Justice (Surveillance) Act 2009 is an interesting piece of legislation for two reasons. First, and at a sociological level, it provides evidence of this drift in the direction of a surveillance society. Secondly, and on a more juristic level, it provides for the first time a legal framework to allow covert electronic surveillance material to be used in criminal trials. As the Minister for Justice, Equality and Law Reform, Dermot Ahern, noted in launching the Bill:

“With the advent of better and increasingly sophisticated surveillance gathering technology and the growing ruthless nature of gangland criminals in particular, the stage has been reached where surveillance evidence can play a crucial role in the fight against crime. We live in a modern world and if covert recordings will help nail crime gang bosses then we must advance this new law as quickly as feasible.”

The Act applies to surveillance carried out by An Garda Síochána, the Defence Forces and officers of the Revenue Commissioners. Surveillance is defined in the Act as the

“monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications, or the monitoring or making a recording of places or things, by or with the assistance of surveillance devices.”

Significantly, the term “surveillance device” does not, *inter alia*, encompass the use of CCTV cameras. An application for surveillance can be made, for example, by a superior officer of the Gardaí to a judge assigned to any District Court on any of the following grounds:

- The surveillance application relates to a Garda operation or investigation concerning an arrestable offence;
- the surveillance being sought to be authorised is necessary for the purpose of preventing the commission of arrestable offences; or
- the surveillance is necessary for the purpose of maintaining the security of the State.

If authorised, the authorities are permitted to enter, if necessary by the use of reasonable force, any place for the purposes of initiating or carrying out the authorised surveillance, and withdrawing the authorised surveillance device, without the consent of a person who owns or is in charge of the place. The authorisation of surveillance has a maximum life span of 3 months from the day on which it is issued, though it can be renewed for a further period of 3 months if the authorising judge considers it necessary. There is also provision for surveillance without judicial authorisation (for 72 hours) in cases of urgency.

Section 8 of the Act provides for a separate system of authorisation for “tracking devices.” This section empowers the relevant authorities to monitor the movements of persons, vehicles or things using a tracking device for up to 4 months where the use of a tracking device has been authorised by a superior officer. It is therefore a more self-substantiating process which circumvents the need for judges (or peace commissioners) to be independently satisfied that reasonable grounds exist for the use of such devices and for the crossing of thresholds.

Section 11 provides for a complaints procedure. Where a person believes that he or she might be the subject of surveillance he or she can apply to a Referee for an investigation into the matter. Where the Referee forms the view that a contravention of the legislation was material and it is justified in all the circumstances, he or she can refer the matter to the Garda Síochána Ombudsman Commission, the Minister for Defence in the case of a contravention by the Defence Forces, and the Minister for Finance in the case of a contravention by the Revenue Commissioners

Section 12 of the Act sets out the procedure to be followed for the designation of a High Court judge

to oversee the operation of the legislation and outlines the powers and duties of the judge. The judge is required to report to the Taoiseach from time to time and at least once every 12 months concerning any matters relating to the operation of the relevant sections of the Act.

On the whole, this legislation is to be welcomed, particularly given that it places the use of covert surveillance on a statutory footing. By enhancing the investigative powers of the Gardaí, these measures will also better ensure that Irish citizens can enjoy the fruits of fair justice and public order. All of this contributes to public protection and security needs of citizens and can be considered necessary for their self-preservation, well-being and happiness. It is disappointing, however, that, the legislation did not entrust supervisory control of the tracking device powers to the judiciary. Given that surveillance powers offers the potential for abuse and infringement of rights, it would have been far better if supervision was entrusted to an independent judge rather than the 'low visibility exercise' of executive decision-making provided by a superior officer of the Gardaí.

Criminal Law Cases for September/October

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Balaz (applicant) v. His Honour Judge Kennedy and the Director of Public Prosecutions (respondents) HC (05/03/2009) FL 16530

Criminal procedures – Judicial review – jurisdiction – Bias – Error of law – Offences – Change of plea – Conduct of judge – Criminal Justice (Theft and Fraud Offences) Act 2001

Facts: The applicant, a Czech national, sought an order of *certiorari* quashing the decision of the first named respondent to affirm conviction and sentence imposed by the District Court for offences pursuant to the Criminal Justice (Theft and Fraud Offences) Act 2001 for bias and error of law. The applicant had pleaded guilty to all of the offences and had sought leave to change his plea, alleging that he had not understood the seriousness of the offences concerned. Bias and prejudice was alleged *inter alia* to exist on the part of the first named respondent for retiring with prosecution witness statements in his possession.

Held by Hedigan J. that the applicant's conviction on the s. 18 charge was not secured in breach of natural justice or by error of law and the reliefs sought would be refused.

O'Brien (applicant) v. Member in Charge Bridewell Garda Station (respondent) HC (05/03/2009) FL16531

Practice and procedure – Judicial review – Detention – validity – Jurisdiction – Warrant – Validity – Whether

detention was unlawful – Offences Against the State Act 1939

Facts: The applicants sought orders for their release pursuant to Article 40.4.2 of the Constitution on the basis that their continued detention was unlawful. They had been arrested and detained pursuant to s.30, Offences against the State Act 1939, as amended. The issue of the precise time at which the applications for extension of their detention was commenced arose as well as whether the evidence heard on the application was sworn evidence and whether the form of the warrants as issued by the District Justice was sufficient to indicate the time that her decision as made. A first application for extension had been concluded prior to 9.15pm on the night in question and then shortly thereafter it was indicated to the Court that several other applications would be made. It was argued *inter alia* that the manner in which the Detective had indicated to the Court at 9.15pm that he had further applications to make did not suffice to confer jurisdiction on the Court.

Held by Peart J. that the application of each of the applicants should have been deemed to have commenced at the time noted by the District Judge on each of the warrants given to her at 9.15pm. The Court had regarded the evidence given as sworn evidence and the manner in which the evidence was given did not entitle them to an order for release. The warrants were not defective

on their face and the detention of the applicants was lawful.

C (R) (applicant/appellant) v. Director of Public Prosecutions (respondent) SC (01/04/2009) FL16545

Evidence – Duty on prosecution to obtain and preserve evidence – Application to restrain further prosecution – Whether absence of evidence giving rise to real risk of unfair trial – Whether further prosecution should be restrained.

Facts: The applicant had been charged, *inter alia*, with sexual assault of a minor during a period between May and August, 2001. An important aspect of the complainant's description of events was that the applicant would call or text her and request her to visit him in his apartment. The applicant stated that whenever he called her it was in response to a call or text from her. He denied the allegations. While the prosecutor procured the applicant's telephone records and exhibited them, he did not, despite being requested to do so, seek to procure the complainant's telephone records. The High Court dismissed his application for judicial review which sought to prohibit the prosecution on the basis that the prosecutor had failed in his duty to procure the said evidence and had prejudiced his right to a fair trial on the basis that the telephone records would have corroborated his account of contact with the complainant during the material period. He also complained of prosecutorial delay. The applicant appealed to the Supreme Court.

Held by the Supreme Court (Denham J., Hardiman and Geoghegan JJ. concurring) in allowing the appeal and granting an order restraining the prosecutor from proceeding with the prosecutions that An Garda Síochána had a duty to preserve and disclose material evidence having a potential bearing on the issue of guilt or innocence so far as was necessary and practicable. That duty had to be interpreted in a fair and reasonable manner and it did not require An Garda Síochána to engage in disproportionate commitment of manpower and resources. If evidence had not been obtained or no longer existed the reason for its absence was part of the factual matrix but it was not a determining factor in the test to be applied as to whether an order prohibiting a prosecution should be made. That test was whether there was a real risk of an unfair trial which could not be avoided by rulings and directions by the trial judge as an order prohibiting a prosecution should generally be made only in exceptional circumstances. In all the circumstances, the telephone records of both the applicant and the complainant were important,

relevant and probative evidence which went to the core issue of the credibility of the complainant and the applicant and the prosecutor had a duty to seek both sets of telephone records.

Dunne v. Director of Public Prosecutions [2002] 2 I.R. 305 and *Murphy v. Director of Public Prosecutions* [1989] I.L.R.M. 71 applied.

Minister for Justice, Equality and Law Reform (applicant) v. Walas (respondent) HC (19/03/2009) FL16553

European arrest warrant – Surrender – Correspondence – Where offence took place – Prohibition of surrender – Delay – European Arrest Warrant Act 2003

Facts: The surrender of the respondent was sought by a judicial authority in Poland so that the respondent could be prosecuted for an offence "against economic relations." The respondent argued *inter alia* that there was undue delay in seeking his surrender, that there was no correspondence as to the offence at issue under Irish law and that it was not clear that the offence took place in Poland and thus was prohibited by s.44 of the European Arrest Warrant Act 2003.

Held by Peart J. that the Court was entitled to take the view that the offence was alleged to have occurred in Poland. The information contained in the warrant was sufficient for the purposes of s.11, Act of 2003 and his surrender was not prohibited by s. 44 of the Act. An order for his surrender to Poland would be made.

P(J) (plaintiff) v. DPP, Ireland and Attorney General (defendants) HC (19/12/2008) FL16556

Constitutional Law – Sexual Offences – Locus standi – Jus tertii – Mistake as to age – Defences – Change of plea – Criminal Law (Sexual Offences) Act 1993 – Criminal Law (Sexual Offences) Act 2006

Facts: The plaintiff pleaded guilty to offences of buggery contrary to s.3, Criminal law (Sexual offences) Act 1993, which had been repealed by the Criminal law (Sexual Offences) Act 2006. The plaintiff sought a declaration that s.3 was unconstitutional by denying a defence as to mistake as to age, irrespective of the fact that the age of the complainant was known to the defendant. The defendant contended that the plaintiff lacked *locus standi*. The complainant was 16 at the time of the alleged offences and in a relationship with the plaintiff who was then 19.

Held by Murphy J. that the expression of the marital defence in s.3 did not exhaustively state the

defences available. The Act of 2006 could not be relied upon to determine the intention underlying the 1993 Act. To do so would import unacceptable uncertainty into statutory interpretation. The offence under s.3 was not a strict liability offence and incorporated some mental element as to the age of the complainant. The mental element as to age could be proven by the prosecution or be raised as a defence. The plaintiff had pleaded guilty but did not fully appreciate the nature of the offence charged against him and the trial judge could allow him to change his plea. The lack of *locus standi* of the plaintiff could be overlooked due to weighty countervailing considerations that existed in the case.

**C(J) (applicant) v. DPP (respondent) HC
(13/03/2009) FL16557**

Judicial review – Sexual abuse – Delay – Prohibition – Whether there was a real risk the applicant would not receive a fair trial due to the delay in the making of complaints regarding the alleged offences.

Facts: The applicant who was charged with a number of offences of rape and indecent assault against three complainants alleged to have been committed in January 1969 and August 1973 sought to have his trial prohibited on the grounds of delay. The applicant submitted that he suffered prejudice due to the unavailability of certain witnesses, including his mother who has passed away and with whom he shared a room at the time of the alleged abuse, one of the complainant's husband, two individuals who had access to his office building and would have been able to give evidence in relation to the lock mechanism of the building. The applicant also submitted that the loss of medical records in relation to one of the complainants, JN, resulted in prejudice to him.

Held by Peart J. in dismissing the application: That the trial judge would be in a position to give warnings to the jury related to the evidence given by each complainant, and any relevant witnesses. The prejudice said to arise from the absence of medical records for JN was purely speculative as to what they may or may not have contained. Furthermore, the absence of the witnesses in relation to the manner in which the door of the applicant's office premises was capable of being locked was not of sufficient importance and relevance to amount to real prejudice. The applicant failed to demonstrate that as a matter of probability there was a real risk of an unfair trial. The particular prejudices alleged related to relatively tangential matters going only to credibility and in some instances on a purely speculative basis.

**DPP (respondent) v. Anthony O'Reilly
(applicant) CCA (02/04/2009) FL16559**

Murder – Leave to appeal conviction – Direction of no case to answer – Expert evidence – Whether the learned trial judge erred in failing to withdraw the case from the jury upon the application by the defence for a direction of no case to answer.

Facts: The applicant sought leave to appeal against his conviction for murder on the ground that the learned trial judge should have withdrawn the murder charge from the jury because the prosecution case contained an inherent contradiction in the evidence necessary to sustain that charge. In consequence, it was argued that the jury could not safely have been allowed by the learned trial judge to determine the case. The charge arose out of an incident wherein it was alleged the applicant drove his vehicle at one Daniel McDonald thereby resulting in his death. Evidence was given by eyewitnesses to the incident at the trial and there was also evidence to the effect that the applicant had threatened to kill Mr. McDonald. The application for a direction before the learned trial judge was based upon an argument by the defence that the testimony of Garda Daven had established an inherent inconsistency within the prosecution case.

Held by the Court of Criminal Appeal, Charleton J. (Finnegan, Budd JJ.) in refusing the application: That it is not the law that any inconsistency within a prosecution case should cause a trial judge to grant a direction of no case to answer. Admitting an alternative possibility on a matter on which an expert may express an opinion was not a ground upon which a direction should be granted. There was no basis upon which it could be said that the testimony of Garda Davan rendered the prosecution case so inherently contradictory that the thrust of the prosecution case had lost reason and common sense.

**DPP (prosecutor) v. Patrick Duffy and Duffy
Motors (Newbridge) Limited (defendants) CCA
(23/03/2009) FL16566**

Competition law – Criminal Law – Sentencing – Cartel – Price fixing – Principles – Car dealers association – Mystery shopper – Object – Agreement – Implementation – Plea – Distress – Competition Act 1991 – Competition (Amendment) Act 1996 – Companies Act 1990, as amended

Facts: The defendants were charged with offences pursuant to s.4(1), Competition Act 1991 and s.2, Competition (Amendment) Act 1996, arising from an investigation by the Competition Authority into the activities of the Citroen (Car) Dealers Association, where the defendants were

involved in entering and implementing by its object a price-fixing agreement. The defendant director had pleaded guilty to the charges. The association had employed mystery shoppers to police their agreements and breaches resulted in fines. The association had existed for approximately ten years. The accused submitted that he had an unblemished reputation, no previous convictions, that he had co-operated with the authorities, that he had pleaded guilty and submitted the relevance of the circumstances of the offence and his personal circumstances.

Held by McKechnie J., that the Court had to have regard for the gravity of the offence, the circumstances of the offence, the nature of the offence, its continuing duration, the role played by Mr Duffy, his personal circumstances, any aggravating and mitigating factor and the principles of proportionality and totality. For five years he had involved himself in significant ongoing efforts as part of the criminal cartel. That the crime was a first offence or that he was unlikely to re-offend was of limited relevance in cartel cases. He was not required to engage in anti-competitive acts and the fact that the association had some legitimate purpose could not shroud the illegal activities of the association. Its success was irrelevant to the issue of guilt. He was more than a passive attendee. For co-operation with the authorities to count, it had to have a greater beneficial value. Disqualification pursuant to s.160, Companies Act 1990, as amended, would not have a real or substantial disabling effect.

Price fixing was unlawful for 20 years. Mr Duffy had pleaded guilty to implementing the agreement, which was a significant additional crime. A sentence of six months for entering the plea would be entered and nine months in respect of the implementing plea, but the entirety of both sentences would be suspended for five years upon him entering the usual bond. A fine of €20,000 on Mr Duffy and an implementation fine of €30,000 would be entered and a fine of €20,000 on the entering plea and €30,000 for the implantation plea would be entered on the company. Both would be given three months to pay one half of the total fine and a further three months to pay the remainder. If he failed to pay he would serve 28 days in default and distress would apply if the company defaulted.

DPP (respondent) v. Shovelin (appellant) CCA (27/04/2009) FL16591

Sentence – Severity – Appeal against severity of sentence – Factors to be considered – Conduct of defence – Failure of appellant to concede any matter

during trial – Whether sentencing judge unlawfully taking that fact into account in imposing sentence – Whether sentence should be varied.

Facts: The appellant was sentenced to seven and a half years by Circuit Court in respect of his conviction for dangerous driving causing death contrary to s.53 of the Road Traffic Act 1961 and six years in respect of his conviction for dangerous driving causing serious harm, both sentences to run concurrently. In addition, the appellant was disqualified from driving for life. The appellant appealed against the severity of the sentences imposed on the basis, *inter alia*, that the trial judge failed to take mitigating factors into account and unlawfully took into account that the appellant had filed to concede any matter during his trial.

Held by the Court of Criminal Appeal in substituting a sentence of five years imprisonment in respect of the first offence and four years in respect of the second offence and confirming the disqualification that as each case of dangerous driving causing death turned so uniquely on its own facts, it was an area of sentencing which did not lend itself to uniformity or consistency. The trial judge adopted an excessively punitive approach to the issue of sentence having regard to failure of the appellant to make any concessions at any point during his trial.

DPP v. Sheedy [2000] 2 IR 184 considered.

Director of Public Prosecutions (prosecutor/respondent) v. Hannon (defendant/appellant) CCA (27/04/2009) FL16598

Criminal Procedure – Miscarriage of justice – Sexual assault – Withdrawal of allegations – False evidence – Criminal Procedure Act 1993

Facts: The applicant was convicted of sexual assault and had received a four year suspended sentence. Nine years after the alleged offence the complainant retracted her allegations and admitted that the evidence given was false in its entirety and resulted from family animosities between the parties. The applicant sought a certificate pursuant to s.9, Criminal Procedure Act 1993 that there had been a miscarriage of justice. The respondent contended that there was no miscarriage of justice as there was no fault on the part of either the prosecutor, the Gardai or the agents of the State.

Held by the Court of Criminal Appeal *per* Hardiman J. (Herbert & MacMenamin JJ. concurring), that the applicant was entitled to a certificate, as the fact of the retraction of the allegation and admission as to false testimony was both new and newly discovered given that the complainant had fabricated the allegation.

The People (DPP) (appellant) v. Gerard O'Brien (respondent) CCA (14/01/2008) FL16615

Drugs offence – Some offences committed while out on bail – Consecutive sentences under Act – Whether power to suspend such sentences – nether sentences for offences committed while on bail unduly lenient – Sentences served at time of appeal – Criminal Justice Act 1984, s.11

Facts: The respondent was convicted of nine drug related offences, two of which were committed while out on bail. The DPP was not appealing the sentences on sever of the offences but was on the two committed while on bail as been unduly lenient. Here the respondent got two years but they were suspended.

Held by the Court of Criminal Appeal (Finnegan, Hanna and McCarthy JJ.) that the appropriate sentences for the offences committed while on bail were four years, concurrent and consecutive, however, through no fault of the respondent he served his time and was now free. This caused an issue for the court. The court suspended the four years sentences on condition that he enters a bond of the peace and be of good behaviour for a period of five years.

DPP (respondent) v. Lonergan (applicant) (CCA (08/05/2009) FL16624

Evidence – Hearsay evidence – Exceptions to rule against admission of hearsay evidence – Words forming part of res gestae – Contemporaneity of statements – Possibility of fabrication – Whether admissible as forming part of res gestae – Whether statements properly admitted into evidence.

Trial – Fair procedures – Jury – Approach to jury member – Possible interference with jury member – Test to be applied – Whether reasonable apprehension that accused would not receive fair trial.

Facts: The appellant was convicted in the Central Criminal Court of the murder of his brother by stabbing. Evidence given by witnesses as to statements made by the victim shortly after the stabbing were admitted into evidence on the basis that they formed part of the *res gestae* and as such were admissible as evidence of the truth of their contents. The appellant appealed that conviction to the Court of Criminal Appeal on the basis that those statements had been improperly admitted into evidence. He also contended that the trial judge should have discharged the jury because of possible interference by a member of the victim's family with a jury member.

Held by the Court of Criminal Appeal (Kearns J., Murphy and Clarke JJ. concurring) in dismissing the appeal that spontaneous declarations constituted an exception to the hearsay rule.

Admissibility of evidence should not be determined solely by reference to a given time period as to do so would lead to arbitrary and unfair results. Time was an important factor but not a determinant. The true importance of contemporaneity was to eliminate the possibility of concoction. Where it was clear that that no such opportunity existed on the facts of a given case it would be wrong to exclude statements on some arbitrary time basis. In every case, the trial judge had to exercise his discretion having regard to the particular circumstances of the case. The statements of the witness, having been made ten minutes after the stabbing, were correctly admitted as they were sufficiently contemporaneous and formed part of the same transaction and there had been no opportunity on the part of the witness to concoct or fabricate an explanation.

In relation to the allegation that a jury member had been interfered with during the trial, the trial judge applied the correct test which was an objective one as to whether a reasonable person would have a reasonable apprehension that the accused would not receive a fair and impartial trial. *Attorney General v. Crosbie* [1966] IR 490 and *DPP v. Mulder* [2007] 4 IR 796 applied. *Ratten v. R* [1972] AC 378 considered.

DPP (prosecutor/appellant) v. Freeman (accused/respondent) HC (21/04/2009) FL16639

Statutory interpretation – Words and phrases – “duly completed” – Penal statute – Strict interpretation – What constitutes duly completed certificate – Drink driving – Sequence of signing of certificate – Whether garda should have signed certificate prior to accused – Nature of evidential deficit – Whether non-compliance vitiating evidential presumption – Road Traffic Act 1994 (Section 17) Regulations 1999, reg. 5 – Road Traffic Act 1994, s.17.

Facts: Section 17 of the Road Traffic Act 1994 provides, *inter alia*, as follows:

“where, consequent on a requirement under s.13(1)(a) of him, a person provides... specimens of his breath and the apparatus referred to in that section determines the concentration of alcohol... the specimen... shall be taken into account for the purposes of section 49... of the principal Act... (2) where the apparatus... determines that... the person may have contravened section 49... he shall be supplied forthwith by a member of the Garda Síochána with 2 identical statements, automatically produced by the said apparatus in the prescribed form and duly completed by the

member in the prescribed manner, stating the concentration of alcohol in the said specimen determined by the said apparatus. (3) On receipt of the statements aforesaid, the person shall on being requested to do so by the member aforesaid, (a) forthwith acknowledge such receipt by placing his signature on each statement, and (b) thereupon return either of the statements to the member.”

The member is further required, by reg.5 of the Road Traffic Act 1994 (Section 17) Regulations 1999 to sign the said statements. Pursuant to s.21(1) of the Act of 1994, such a duly completed certificate shall be evidence that the accused was over the limit delimited under section 49. On a trial of the accused for drink driving, the District Court stated a case to the High Court at the request of the prosecutor as to whether the court was correct in holding that the s.17 certificate was not duly completed as the member had requested the accused to sign it prior to him signing it and thereby dismissing the charge. The accused contended that as the form was not “duly completed” it did not carry with it the presumptions which arose under s.21(1) of the Act of 1994.

Held by Mr Justice MacMenamin, in answering the case stated in the affirmative, that where there had been a clear failure to comply with a mandatory requirement in a penal statute which according to the statute had to be followed to produce a “duly completed” certificate which could be used as an evidential presumption, that certificate would not amount to evidence. A form not signed by the garda prior to the accused was not “duly completed” and therefore the statutory presumption could not apply to it. Once signed by the garda, it is “duly completed” and must then be signed by the recipient.

A court should lean against the creation or extension of penal liability by extension or a purposive approach to statutory interpretation. *DPP v. Keogh* (unreported, High Court, Murphy J., February 9, 2004) followed. *DPP v. Moorehouse* [2006] 1 I.R. 421 distinguished.

The People (DPP) (respondent) v. Timothy Kavanagh (applicant) CCA (02/04/2009) FL16644

Manslaughter – Admissibility of evidence – Appeal against conviction – Whether the learned trial judge erred in allowing certain evidence to be admitted and leaving certain issues to be determined by the jury in this case.

Facts: The appellant sought to appeal his

conviction on a single count of manslaughter. The appellant’s six grounds of appeal related to the admission of evidence and the trial judge’s decision to leave certain issues to the jury for consideration. The first ground of appeal related to the time of death of the deceased, which was sought to be determined by way of forensic evidence regarding insect activity. It was submitted on behalf of the appellant that the trial judge erred in failing to withdraw the case from the jury because of the inconsistent evidence regarding the date of death. The second ground of appeal regarded the cause of death and the appellant submitted that the case should have been withdrawn from the jury as the prosecution did not produce any consistent evidence that death could have been caused by a stab wound. Thirdly, it was argued the trial judge erred in allowing the jury to view the deceased’s shirt as there was no blood visible on it. The fourth ground regarded evidence adduced to the effect that the appellant owned a particular knife and that a knife of that kind could have caused the wound on the deceased’s body. The fifth ground of appeal related to the admission of evidence regarding the deceased’s mobile telephone and the sixth ground was based on the admission in evidence of certain inculpatory admissions made by the appellant whilst in Garda custody. The appellant argued that those admissions were obtained by way of trick or through oppressive questioning. Following a *voir dire* in relation to that evidence, where conflicting evidence was given by the parties, the trial judge admitted the statement as evidence at the trial.

Held by the Court of Criminal Appeal (Charleton J., Finnegan and Budd JJ.) in dismissing the appeal: That any argument as to the correctness of the approach taken by the forensic scientist regarding the date of death or any doubt as to this fundamental proof offered by the prosecution was properly to be argued out before the jury. Similarly the evidence regarding the cause of death was a point to be argued in front of the jury and learned trial judge was correct not to grant a direction in respect of it. The issue regarding the deceased’s shirt and lack of visible blood thereon was properly left by the trial judge to be argued before the jury. The argument regarding the knife was an issue of fact which therefore was properly left to be argued before the jury. The telephone evidence was legally admissible and was relevant in relation to the time of death of the deceased. There was no evidence of any trick in relation to the questioning of the appellant and the statement obtained from him. Furthermore, there was nothing to suggest that the judgment regarding oppressive questioning arrived at by the trial judge following the *voir dire* was incorrect.

**DPP (applicant/prosecutor) v. Connolly
(respondent/appellant) CCA (14/05/2009)
FL16665**

Evidence – Forensic evidence – Sampling procedures – Testing for presence of Controlled drug in sample of substance found on accused – Whether consideration of evidence properly left to jury by trial judge – Whether conclusion of jury reasonably grounded upon evidence.

Facts: The appellant was convicted in the Circuit Criminal Court of possession of a controlled drug with intent to supply at a time when the market value of the drug was €13,000 or more. A forensic scientist on behalf of the prosecutor conducted a sampling exercise on a portion of the substance found in the appellant's possession and concluded, with a high degree of confidence, that the entire substance was the drug. The appellant appealed that conviction to the Court of Criminal Appeal on the basis that there had been no evidence on which a properly directed jury could come to the conclusion that the market value of the drugs was €13,000 or more.

Held by the Court of Criminal Appeal (Denham J., Herbert and Hanna JJ. concurring) in dismissing the appeal that there had been sufficient evidence upon which a jury, properly directed, could safely and reasonably deduce or conclude, without speculation, that all of the material found was in fact the same as the material which, on analysis, was determined to contain the drug. Probability theory could be used to estimate from a properly representative sample, the probability of the presence of a particular substance in a greater amount of the same material, to such a degree of accuracy that the contrary could not reasonably be supposed.

DPP v. Finnamore [2008] IECCA 99 applied.

**DPP (prosecutor/applicant) v. Lenihan
(respondent) CCA (14/05/2009) FL16671**

Practice and procedure – Jurisdiction – Jurisdiction of Court of Criminal Appeal in reviewing a sentence – Criminal law – Sentence – Application for leave to appeal to Supreme Court – Point of law of exceptional importance – Whether point of law of exceptional public importance – Whether desirable in public interest that appeal should be taken to Supreme Court – Criminal Justice Act 1993, s.2.

Facts: The appellant was convicted in the Circuit Criminal Court and sentenced to four years' imprisonment with the final two and a half years suspended. The prosecutor appealed that sentence to the Court of Criminal Appeal on the basis that it was unduly lenient. The Court of Criminal

Appeal allowed the appeal and substituted therefore a sentence of seven years. The accused applied to the Court of Criminal Appeal for leave to appeal to the Supreme Court on the basis that its determination involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken.

Held by the Court of Criminal Appeal (Denham J., de Valera and McGovern JJ. concurring) in certifying the following point of law for determination by the Supreme Court: "is the Court of Criminal Appeal entitled to regard an aspect of the sentence or the sentence itself as being unduly lenient when the prosecutor has not indicated that it is his view that it is unduly lenient in an application to Court under s.2 of the Criminal Justice Act 1993" that its determination involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court.

**The People (DPP) (prosecutor) v. C(T)
(applicant) CCA (23/06/2009) FL16710**

Appeal – Court of Criminal Appeal – Sentence– Non disclosure of evidence – Prejudice to defence – previous abuse of complainant – Fair procedures – Rights of the defence – Whether non disclosure of evidence resulted in prejudice to the applicant

Facts: The applicant was charged with fifteen counts, relating to sexual offences including sexual assault and rape and was sentenced to fourteen years imprisonment with one year suspended. One complaint was severed. The primary ground of appeal related to non-disclosure. It was submitted that non-disclosure of previous abuse of a complainant prejudiced the applicant's ability to cross-examine both complainants with regard to credit and breached the applicants right to a fair trial. It was alleged that the failure to sever the indictment in accordance with an applications made resulted in prejudice to the defence of the applicant. The prosecutor only learned of the evidence after the conviction.

Held by the Court of Criminal Appeal (*per* Denham, McKechnie, O'Keeffe JJ.), that as a consequence of the non disclosure there was a real risk of an unfair trial and the appeal would be allowed. It was open to the Prosecutor to prosecute a re-trial. It was open to the trial judge to make the decision which was made on the issue of severance. The issue of fairness as to the new information disclosed coloured the situation. The convictions would be quashed.

Murphy (applicant) v. District Judge Early (respondent) & Director of Public Prosecutions (notice party)

HC (26/05/2009) FL16711

Criminal procedure – Judicial review – Certiorari – Order for return for trial – Severability – Inclusion of summary charge – Whether summary charges included were severable

Facts: The applicant sought, *inter alia*, an order of *certiorari* quashing the order of the respondent sending the applicant forward for trial to the Circuit Court on five indictable offences and one summary charge. One of the six charges included in the order was a summary offence contrary to s.13, Criminal Justice (Public Order) Act 1994, whereas the remainder of the offences related to property. The applicant alleged that the return for trial was invalid due to the inclusions of the summary charge. The entire return was alleged to be tainted by the error. The notice party contended that the inclusion was severable.

Held by O’Neill J: that the court would grant an order of *certiorari* quashing the part of the return for trial which returned the applicant for trial on the summary charges. The return for trial was severable.

Minister for Justice, Equality & Law Reform (applicant) v. Doyle (respondent) HC (22/05/2009) FL16714

European arrest warrant – Surrender – Sentence imposed – United Kingdom – Unexpired period – Fled – Whether surrender appropriate – European Arrest Warrant Act 2003

Facts: The surrender of the respondent was sought by a judicial authority in the United Kingdom under a European arrest warrant. The respondent was convicted for offences and sentenced to a period of 39 months imprisonment and was released but failed to comply with the terms of the release. His surrender was sought so as to serve the unexpired period of his sentence. The respondent alleged, *inter alia*, that he had applied for repatriation to Ireland and that he had come here openly and had not fled the UK.

Held by Peart J. that the Court was required to make the surrender sought and would so order. An incomplete account had been provided by the respondent and so surrender was appropriate.

Ryan (applicant) v. Governor of Cloverhill Prison & DPP (respondents) HC (23/04/2009) FL16720

Habeas corpus – Article 40 of the Constitution – Unlawful detention – Return for trial – Committal

warrant – Whether the committal warrant authorising the detention of the applicant until such time as he was sent forward for trial to the present sittings of the Circuit Court was spent once those sittings terminated, the applicant not having been brought before the Circuit Court prior to that time.

Facts: The applicant was sent forward for trial in custody from the District Court on March 12, 2009 to “the present sittings of the Circuit Criminal Court.” However, the applicant was not brought before the Circuit Court prior to the end of the “present sittings” and had not been produced before the Circuit Court to date. It was submitted therefore that the applicant was no longer in lawful custody on foot of the Committal Warrant signed by the District Judge upon the making of the said order sending him forward for trial. It was submitted that the warrant did not authorise the detention of the applicant beyond the end of what was at the time of the making of the return for trial “the present sittings of the Circuit Court... for the disposal of criminal business”, and that since that date passed without the applicant being brought before those sittings, the warrant was now spent.

Held by Peart J., in directing the immediate release of the applicant, that the intention of the District Judge when returning the applicant for trial to the “present sittings” was that the Committal Warrant signed by him following the making of the order was to endure until such time as that occurred. The prescribed form of the Committal Warrant included a recital to the effect that the applicant was returned for trial to the present sittings thus ensuring that the respondent was not authorised to detain the applicant indefinitely pending trial. The Committal Warrant on which the applicant was being held by the respondent was spent since the end of the “present sittings” and was no longer valid for the purposes of lawfully detaining the applicant, he not having been brought before the Circuit Criminal Court before the end of last sittings.

In the Matter of Paul Singer 97 ILTR 130 followed and applied.

DPP (prosecutor) v. Cooke (applicant) CCA (11/05/2009) FL16729

Appeal – Evidence – Application to adduce new evidence at appeal – Principles to be applied – Delay – Charge to jury by trial judge – Whether charge on issue of delay adequate – Whether accused entitled to raise charge to jury as ground of appeal when no objection thereto had been taken at trial – Whether appeal should be allowed.

Facts: The accused had been convicted in the Circuit Criminal Court of assault against two complainants and sentenced to a total of ten years

imprisonment. The accused applied to the Court of Criminal Appeal for leave to appeal against conviction on the grounds, *inter alia*, that the trial judge's charge on the issue of corroboration and on the issue of delay had been inadequate. He also applied to adduce new evidence at the appeal and introduce further grounds of appeal based thereon.

Held by the Court of Criminal Appeal (Macken J., Hanna and MacMenamin JJ. concurring) in refusing the application to adduce new evidence and to add consequential new grounds based on it that, given that the public interest required that a defendant bring forward his entire case at trial, exceptional circumstances had to be established before the court of appeal would allow further evidence to be called. The evidence must not have been known at the time of the trial and had to be such that it could not reasonably have been known or acquired. It had to be evidence which was credible and which could have a material and important influence on the result of the case. The assessment of credibility of materiality had to be conducted by reference to the other evidence at the trial and not in isolation. *DPP v. O'Regan* [2007] 3 I.R. 805 applied.

Held, in refusing the application for leave to appeal, 1, that corroboration could not, as a matter of law, be ousted from a case simply because collusion between the corroborating witnesses had been alleged by the accused. The eye witness evidence of one complainant of the assault of another person, provided that eye witness evidence had been accepted by the jury as being credible and independent, could validly corroborate the evidence of the other complainant. *DPP v. Gilligan* (unreported, Supreme Court, November 23, 2005) applied.

2. That as counsel for the accused had not raised the issue of the trial judge's charge to the jury on the issue of delay to any significant extent during the trial he was therefore not entitled to raise it as a ground of appeal therefrom, not having raised any exceptional reason as to why he should be allowed to.

DPP v. Cronin [2006] 3 I.L.R.M. applied. That the trial judge's charge to the jury on the issue of delay was, in any event, adequate.

McGlinchey as nominee of the Golden Grill (Letterkenny) (applicant) v. District Judge Conal Gibbons & Others (respondents) HC (27/05/2009) FL16770

Constitutional law – Judicial review – Warrant – Pro-forma document – Statutory basis – licensed premises – Reasonable grounds – Seizure – Licensing Act 1874, s.24

Facts: The applicant sought reliefs by way of judicial review to *inter alia* quash a warrant obtained to enter and search premises pursuant to the provisions of s.24, Licensing Act 1874 and an injunction to deliver up items seized. It was alleged that the applicant had not renewed a Publican's Licence since 2006. The applicant claimed that its constitutional rights had been violated and that the warrant comprised of a pro forma document was not part of the District Court rules. It was claimed that the warrant was issued pursuant to a statute that did not exist.

Held by O'Keefe J., that there was no statutory obligation under s.24 that the warrant would contain the recital in the warrant precedent suggested, namely that the District Judge was satisfied from the particulars that there was reasonable ground for the belief of the Judge. The Court was satisfied that the requirements for information on oath which were set out conformed to the requirements of s.24. The applicant had not made out a case to quash the warrant. The application would be refused and the stay lifted on the District Court prosecution.

Director of Public Prosecutions (respondent) v. Griffin (applicant) CCA (22/06/2009) FL16774

Court of Criminal Appeal – Multiple grounds of appeal – Trial judge – Excusal – Witnesses – publicity – Missing witnesses – Venue – Discharge of jury – Warning – Corroboration – Criminal Law (Rape) Amendment Act 1990

Facts: The applicant sought leave to appeal against his conviction for sexual offences on 23 grounds of appeal. The applicant alleged, *inter alia*, that the learned trial judge had failed to excuse himself as he had professionally represented the applicant previously, that he was wrongly in possession of a security report not previously disclose, that the trial had been permitted to proceed at a venue which was inappropriate and prejudicial to the applicant, that there had been a failure to discharge the jury and that the jury had been inadequately charged in several respects. Complaints had been made in respect of media coverage also and missing witnesses.

Held by the Court of Criminal Appeal *per* Macken J. (De Valera and Gilligan JJ.), that the approach of the trial judge had been appropriate in all of the circumstances. The charge given to the jury was adequate and no particular format was required in respect of the warrant. There were no grounds for alleging that the trial was unfair or that the verdicts were unsafe. There was no factual basis to support the claim that the trial venue was unfair. The ground in respect of media publicity would fail

as it had simply disappeared from the trial. The trial judge had dealt with issues of witnesses and their availability correctly.

The Minister for Justice, Equality and Law Reform (applicant) v. Ciepły (No.1 and No.2) (respondent) HC (24/04/2009) FL16799

European arrest warrant – Correspondence – Fleeing – European Arrest Warrant Act 2003, s.10(d) – Whether the surrender of the respondent ought to be ordered – Whether the respondent ought properly be regarded as someone who fled the issuing state.

Facts: The surrender of the respondent was sought on foot of two separate European arrest warrants issued in Poland by a different judge in two distinct District Courts. In respect of the first warrant, the surrender of the respondent was sought so that he could serve a sentence of two years imprisonment which was imposed on him following a conviction in respect of an offence described as a “material forgery of a document” and “fraud.” The respondent was present in court when the court lifted the suspension in relation to that sentence and ordered that he serve the sentence. In relation to both warrants, it was submitted on behalf of the respondent that he did not “flee” Poland and therefore was not a person who came within s.10(d) of the European Arrest Warrant Act 2003. The second warrant sought the surrender of the respondent in respect of eleven offences. All but two of the offences were Article 2.2 offences. The facts relating to those two offences stated that the respondent ‘took in order to appropriate a bag together with purse’ and other items and secondly that he “took a car for short term use.” The respondent deposed to the fact that he was living in Germany at the time the sentences were imposed or ordered to be executed. Accordingly, it was submitted on his behalf the he had not fled from the issuing state but rather that he came to Ireland from Germany.

Held by Peart J. in ordering the surrender of the respondent: That the offence set out in the first warrant, if it had been committed in this State, would have given rise to an offence of making a gain by deception contrary to s.6 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and/or an offence of forgery contrary to s.25 of the same Act. The two non Article 2.2 offences covered by the second warrant corresponded to offences pursuant to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001. In relation to one of the sentences covered by the second warrant, which was ordered to be executed on October 11, 2001, the respondent was living in

Poland at the time. Furthermore, he was present in court when the sentence covered by the first warrant became enforceable. Consequently, in respect of each of those two sentences, the respondent must be regarded as having fled the issuing state. The fact that the other sentences were imposed or ordered to be served after he had fled Poland did not alter the fact that he was a person within the ambit of s.10(d).

The People (DPP) (respondent) v. O’Brien (applicant) CCA (24/04/2009) FL16806

Sentencing – Sexual offences – Risk of re-offending – Whether sentences imposed excessive – Criminal Law (Rape) Amendment Act 1990 – Sexual Offenders Act 2001.

Facts: The applicant had been convicted of forty six counts of sexual assault against eight separate victims. All the victims were young children who had been living near the applicant. In passing sentence, the trial judge had selected a number of offences in respect of the victims who had suffered most of the offences and had passed sentence in relation to these. The applicant brought an application for leave to appeal against the sentences opposed.

Held by the Court of Criminal Appeal in refusing the application. There had been a significant element of grooming involved in the offences. The sentence imposed of fifteen years with three years suspended was an appropriate sentence and not excessive. The application for leave to appeal would be refused.

Director of Public Prosecutions (respondent) v. McEnroe (applicant) CCA () FL16845

Sentencing – Drug offences – Evidence – Guilty plea – Whether sentence imposed unduly severe.

Facts: The applicant had been charged with drug offences and at trial had pleaded guilty. The applicant had been found by Gardaí in a warehouse with a large amount of drugs. It was contended that the trial judge should have taken more account of his guilty plea, the fact that there were no relevant previous convictions, his age at the time of the offences and his family circumstances. It was also contended that there had been a disparity in the sentence that a co-accused had received. The applicant sought leave to appeal against the severity of the sentences imposed.

Held by the Court of Criminal Appeal in refusing the application. Having regard to the amount of drugs seized, the severity of the sentence was well justified and the Court would not interfere.

Director of Public Prosecutions (respondent) v. O'Sullivan (applicant) CCA (24/04/2009) FL16846

Sentencing – Consecutive sentences – Burglary – Whether sentences imposed excessive – Whether sentences imposed unduly lenient – Non-Fatal Offences Against the Person Act 1997 – Firearms and Offensive Weapons Act 1990

Facts: The applicant had been convicted of a number of offences and had also committed offences whilst out on bail. The applicant had received a two year sentence in respect of the burglary offences and had received a consecutive eight year sentence for an offence committed while out on bail. The applicant brought an application for leave to appeal against the sentences imposed.

Held by the Court of Criminal Appeal in refusing the application. Although the sentences passed did not reflect the seriousness of the offences committed, the court in this instance would not increase the sentences. The application for leave to appeal would be refused.

Director of Public Prosecutions (respondent) v. Vardoshilli (applicant) CCA (09/02/2009) FL16847

Sentencing – Evidence – Sexual offences – Rape – False imprisonment – Mitigating factors – Whether conviction safe – Whether sentences imposed excessive – Criminal Law Rape (Amendment) Act 1993 – Criminal Law Rape Act 1993. Offences Against the Person Act 1861 – Non Fatal Offences Against the Person Act 1997.

Facts The applicant had been found guilty in respect of charges of rape, false imprisonment and assault. The applicant had received ten year sentences in respect of the first two charges and two years in respect of the assault charge. The applicant brought an application both against the conviction and the sentences imposed. It was alleged that the evidence tendered by the victim to the court was inconsistent and that the learned trial judge should have directed a verdict of not guilty.

Held by the Court of Criminal Appeal in making the following order: If there were inconsistencies in evidence tendered by the victim these inconsistencies were peripheral to the main issues in the case. The court however in considering the applicant's different ethnic and cultural background would suspend the last two years of the ten year sentences.

Director of Public Prosecutions (respondent) v. Michael O'Brien (applicant) CCA (26/03/2009) FL16849

Sentencing – Sexual offences – Sexual Assault –

Mitigating factors – Consecutive sentencing – Severed indictment – Whether sentence imposed excessive

Facts: The applicant had pleaded guilty to two counts of sexual assault. Sentences were imposed of three years imprisonment to run concurrently but to also run consecutively in respect of a 14 year sentence imposed on a rape charge in respect of another victim. The applicant sought leave to appeal against the sentence imposed. The rape charges had been brought before the Central Criminal Court while the other charges were brought on a separate indictment before the Circuit Court.

Held by the Court of Criminal Appeal in reducing the sentence. Because the charges were brought in separate courts the need for the overall sentence to be proportionate was lost sight of. The Court would direct that the sentences would remain consecutive but that half of the three year sentence would be suspended.

People (DPP) (respondent) v. Barker (applicant) CCA (26/06/2009) FL16855

Sentencing – Drugs offences – Mandatory ten year sentence – Whether sentences imposed excessive

Facts The applicant had been charged with possession of drugs, cocaine with a street value of €22,000. The applicant had pleaded guilty and had received the mandatory ten year sentence. The applicant sought leave to appeal against the sentence imposed.

Held by the Court of Criminal Appeal in refusing the application. The sentencing judge had dealt appropriately with the matter having incorporated a review procedure after five years into the sentence. The application would be refused.

R (M) (applicant) v. DPP (respondent) HC (20/02/2009) FL16857

Judicial review – Prohibition – Sex abuse – Delay – Loss of evidence – Whether there was a real risk the applicant would not receive a fair trial having regard to the delay in prosecuting this matter and the investigation of the alleged offences.

Facts: The applicant sought by way of judicial review an injunction, restraining the respondent from proceeding further to prosecute the applicant in respect of charges of indecent assault alleged to have occurred over thirty years ago. The applicant, who was 83 years old at the time of this application and was suffering from medical difficulties, claimed that he could not receive a fair trial having regard to the passage of time since the date of the alleged offences, the delay by the respondent in the investigation and prosecution of the charges and

the failure of the respondents to conduct a proper investigation into the allegations. Following complaints from the applicant's solicitor further statements were taken from the complainant's friends and were served as additional evidence. It was argued on behalf of the applicant that no attempt was made to seek out those persons named in the complainant's statements as persons with whom she had discussed the alleged incidents in order to ascertain the consistency of the allegations. Specifically, the applicant submitted that the lack of any statement by the complainant's mother created a real risk of an unfair trial as the complainant's mother could have dealt with a number of matters relevant to the complainant's credibility.

Held by O'Neill J. in granting the application: That the complaints made by the complainant in this case were unusually bereft of relevant detail and the witness statements from the complainant's friends and family members were for the most part vague and wanting in detail also. Due to the lapse of time, it would be very difficult for certain relevant witnesses to have a clear or reliable recollection of matters pertaining to the complainant's credibility and the loss of that evidence resulted in a real risk of an unfair trial for the applicant. Furthermore, the refusal by the respondent to obtain a witness statement from the complainant's mother was extraordinary and wholly unjustifiable. That factor taken in conjunction with the other factors of the case, including the applicant's age, his health, cumulatively warranted the prohibition of the trial on the ground that there was a real risk of an unfair trial.

Director of Public Prosecutions (respondent) v. Conlon (applicant) CCA (31/03/2009) FL16859

Sentencing – Offences committed on bail – Consecutive sentencing – Technical error in sentencing – Whether sentences should be reduced or quashed

Facts: The applicant had pleaded guilty to a number of offences. At the sentencing hearing it emerged that the accused had committed another offence (a firearm offence) whilst on bail. The sentencing judge sentenced the applicant to periods on five and six years in respect of the first batch of offences, and sentenced the applicant to six years, to run consecutively, with three years suspended on the firearm offence committed whilst on bail. Technically, the sentence in respect of the firearm offence should have been a mandatory five year term without any element of suspension.

Held by the Court of Criminal Appeal in refusing

to lessen the total length of the sentences, that although there was a technical error in the sentences passed, the Court could not ignore the gravity of the offences. The Court would reduce the first sentence to that of four years and the second sentence would be the mandatory five years thus the original total sentence of nine years would stand with no suspension of any portion.

People (DPP) (applicant) v. Foley (respondent) CCA (23/04/2009) FL16860

Sentencing – Assault causing harm – Custody – Whether sentence imposed unduly lenient – Whether appropriate to suspend entire sentence – Criminal Justice Act 1993 – Non Fatal Offences Against the Person Act 1997

Facts: The respondent had pleaded guilty to assault causing harm contrary to s.3 of the Non Fatal Offences Against the Person Act 1997. The assault had taken place in Temple Bar and had involved the respondent biting off part of the victim's ear. It had not been possible to re-attach that portion of the ear. The respondent had pleaded guilty on the morning of the trial, had apologised to the victim and paid €1,500 in compensation. The sentence imposed was three years imprisonment suspended for five years.

Held by the Court of Criminal Appeal in altering the original sentence that there was very little to be said by way of mitigation for the respondent. The guilty plea was not offered until the morning of the trial. An apology through counsel some three years after the assault was also of limited value. In the circumstances the sentence that should have been imposed was one of two years imprisonment with 18 months of that sentence suspended for five years and the Court would make such an order.

People (DPP) (prosecutor) v. Belousova (applicant) CCA (24/04/2009) FL16861

Sentencing – Attempted murder – Attempted robbery – Whether sentences imposed excessive – Non-Fatal Offences Against the Person Act 1997

Facts: The applicant had been convicted of serious offences committed against a French student living in Dublin. The applicant had inflicted stab wounds on his victim who had almost bled to death. The applicant had received a number of sentences the longest of which was for fifteen years for attempted murder. The applicant sought leave to appeal against the severity of the sentences imposed.

Held by the Court of Criminal Appeal in refusing the application that the applicant had received every concession he had been entitled to by the

trial judge. There had been no error in the sentences imposed.

Director of Public Prosecutions (respondent) v. Idowu (applicant) CCA (30/03/2009) FL16863

Sentencing – Consecutive sentencing – Forgery – Credit card fraud – Possession of false passports – Previous convictions – Mitigating factors – Guilty plea – Whether sentences imposed unduly harsh – Criminal Justice (Theft and Fraud Offences) Act 2001 – Criminal Justice Act 1984 – Bail Act 1997

Facts: The applicant had received sentences in respect of a number of offences relating to the possession of false instruments and credit card fraud. The applicant was on bail when he committed some of the offences and received a consecutive sentence of 18 months. The applicant sought leave to appeal against the sentence imposed.

Held by the Court of Criminal Appeal in refusing the application. The court did not see why a lesser sentence should have been imposed and could identify no error in principle by the trial judge.

The People (DPP) (respondent) v. Kelly (applicant) CCA (31/03/2009) FL16864

Sentencing – Drug offences – Evidence – Guilty plea – Prior convictions – Co-operation with Gardaí – Whether sentence imposed unduly severe – Whether error of principle identified in sentencing.

Facts: The applicant had pleaded guilty to the possession of a quantity of ecstasy tablets. The applicant received a sentence of eight years with the final two years suspended. The applicant

sought leave to appeal against the severity of the sentences imposed.

Held by the Court of Criminal Appeal in granting the application that given the co-operation with An Garda Síochána, the Court would reduce the sentence to that of five years with the last two years suspended.

People (DPP) (respondent) v. Callaghan and Farrell (applicants) CCA (22/06/2009) FL16865

Sentencing – Joint enterprise – Evidence – Rehabilitation – Whether disparity in sentencing – Whether error in principle identified in sentencing

Facts: Both applicants had been involved with a number of others in a criminal enterprise to rob a person of monies. The application was brought on the basis that a disparity of sentencing had occurred in the sentencing of the applicants when compared with other parties who were sentenced for the same offence. The applicant Callaghan had received an eight year sentence whilst the other applicant Farrell had received a seven year sentence.

Held by the Court of Criminal Appeal in altering one of the sentences that in the case of Callaghan, the eight year sentence was justified but to take account of rehabilitation the court would impose a new sentence of eight years with the final two years suspended with the attachment of conditions. In the case of the other applicant (Farrell) the sentence of seven years that had been imposed was an appropriate one given the significant role he had played and no error in principle in sentencing could be identified.