

THE SUPREME COURT

206 & 258/07

Murray C.J.
Denham J.
Hardiman J.
Geoghegan J.
Fennelly J.
Macken J.
Finnegan J.

BETWEEN:

**THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF DETECTIVE GARDA
BARRY WALSH)**

RESPONDENT/PROSECUTOR

- AND -

JOHN CASH

APPELLANT/DEFENDANT

JUDGMENT of Mr. Justice Fennelly delivered the 18th day of January 2010

1. This appeal has narrowed down to a single point. Does the prosecution have to prove that material (fingerprints), which is not produced in evidence at trial, but which grounded the suspicion which justified the arrest of the accused, was lawfully obtained?
2. There is a separate point concerning the lawful taking of a second set of fingerprints from the accused while in detention. This does not appear to be any longer in issue and I will refer to it briefly.
3. The appellant appeals against a number of rulings made by Charleton J. in the High Court on a case stated from the District Court.

The Essential Facts

4. The appellant was born on 24th August 1986. He stands charged before the District Court with committing burglary by entering a building at Kylemore Rd, Clondalkin, Dublin 22 as a trespasser on 21st July 2003, with intent to commit the offence of theft, contrary to section 12 (1) (a) and (3) of the Criminal Justice (Theft and Fraud Offences) Act 2001. Sub-section 3 of the section provides that a "*person guilty of burglary is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 14 years or both.*"
5. The facts are as found by the learned District Judge. They are set out in the case stated, which has been sent forward at the end of the prosecution case. I relate only those facts

necessary for an appreciation of the legal points in issue on the appeal. The case is all about three sets of fingerprints, as I will now explain.

6. On 21st of July 2003, Detective Garda Barry Walsh attended at the house at Kylemore Road, where the burglary was alleged to have taken place, and met the owner. A bedroom window had been smashed and property taken. Garda William Jordan found finger marks on two pieces of glass in the window frame. The prints of these finger marks were retained at the Fingerprint Section of the Garda Technical Bureau. The matching of these fingerprints is central to the case. I will call them Prints 2, because they are the second set of prints in point of time.
7. Detective Garda Walsh gave evidence that he later received "confidential information" from the Garda Technical Bureau identifying the accused as a suspect. Having initially insisted that the information was confidential, the Garda told the court that he was referring to information to the effect that Prints 2 had been matched with an earlier set of fingerprints (Prints 1) found on record at the Garda Technical Bureau and said to belong to the accused. Detective Garda Walsh said, in evidence, that he did not know whether Prints 1 had been lawfully taken or lawfully kept by the Gardaí in accordance with the requirements of section 8 of the Criminal Justice Act, 1984.
8. On 23rd September 2003 Detective Garda Walsh arrested the accused pursuant to section 4 of the Criminal Law Act, 1997 on suspicion of commission of an arrestable offence as there defined, namely burglary. In evidence, he agreed that the sole basis for that suspicion was the information that Prints 2, taken from the broken window, had been matched with Prints 1 which were in Garda records..
9. Following arrest, the accused was taken to Clondalkin Garda Station and there detained pursuant to the provisions of section 4 of the Criminal Justice Act, 1984. It has not been contended that this detention was unlawful.
10. While he was in detention, the accused signed a written consent to the taking of his photograph and fingerprints. His fingerprints (Prints 3) were accordingly taken by Detective Garda Joseph Maguire. The Gardaí maintained in the District Court that they were taking the fingerprints on the basis of the consent of the accused and not pursuant to the statutory power conferred by section 6 of the Act of 1984 to take fingerprints from a person detained pursuant to section 4 of that Act. They would, on the other hand, have resorted to the statutory power, if the accused had refused consent. Insofar as the admissibility of Prints 3 is raised in the case stated and on this appeal, it must be assumed that the prints were taken with the consent of the appellant. Whether there was consent in fact is a matter for the learned District Judge to decide, having heard all the evidence. At this point, she has merely said that she is minded to admit the evidence. It is entirely possible that, having heard all the evidence, she will decide that Prints 3 were not taken with the consent of the appellant.
11. Prints 3 were produced to Detective Garda Gannon, a fingerprint expert. His evidence was that he was satisfied beyond doubt that Prints 2 and 3 were made by the same person.

12. Detective Garda Gannon also gave evidence regarding Prints 1. He produced these fingerprints which bore the name of the appellant and were dated 31st March 2002. He did not know whether those prints had been taken pursuant to section 6 of the Act of 1984. It was put to him that he could not “stand over whether these prints were lawfully taken or kept” and he agreed. The potential significance of this point is that section 8 of the Act of 1984 requires, subject to certain conditions, that a fingerprint and any record of it taken pursuant to section 6 be destroyed after six months, if there is no prosecution. Prints 1 were taken more than six months before the burglary of July 2003.

District Court Proceedings and Case Stated

13. The proceedings were conducted before Judge Aingeal Ní Chondúin, a judge assigned to the Dublin Metropolitan District, sitting at the Children’s Court at Smithfield commencing on the 14th of October 2003. The substantive hearing took place on 30th January 2004. Some prosecution evidence was then heard. The matter was adjourned for further evidence and, for various reasons, from time to time. Ultimately it came on for further hearing on 20th December 2004, when further evidence was given.
14. At the end of the prosecution case, counsel for the appellant submitted that there was no case to answer. He sought a direction. It was common ground that the fingerprints represented the only evidence. The learned judge indicated that she was *“minded to admit all the prosecution evidence and on that basis that the prosecution had made out a prima facie case and the accused had a case to answer.”*
15. The learned judge decided to present a consultative case stated to the High Court pursuant to the provisions of section 52 of the Courts (Supplemental Provisions) Act, 1961. She posed the following questions:

“Whether I was correct in determining, on foot of the evidence before me, that the prosecution evidence be admitted and that the accused had a case to answer, and in reaching this decision:

- (i) *Whether, in circumstances where the basis of a Garda investigation is a record of the accused’s fingerprints, retained by Gardaí which, on being so challenged by the Defence, the Gardaí are not in a position to “stand over whether they were lawfully taken or kept”, the evidence obtained during that investigation can form the legitimate basis for an arrest and subsequent detention pursuant to section 4 of the Criminal Justice Act, 1984?*
- (ii) *If the answer to the above question is No, must any evidence obtained during and consequential upon the said section 4 detention be excluded?*
- (iii) *Whether the Gardaí, following the entry into force of section 6 of the Criminal Justice Act, 1984 have a power to take fingerprints from a person who is in section 4 Garda detention, other than pursuant to the said section 6, in circumstances where a person has signed a written consent?*

- (iv) *If such a power does exist, is it lawfully exercised where a Garda witness has given evidence on oath that the 'consent procedure', rather than the procedure under section 6, is preferable so as to avoid the requirements of section 8 of the Criminal Justice Act pertaining to the keeping and destruction of fingerprints?*
- (v) *If such an exercise of power is not lawful, is any evidence obtained as a result inadmissible?*
- (vi) *If a Garda has the power to take a fingerprint from a detainee who has given signed consent to the taking of the print, is it open, as a matter of law, for me to find that he consented voluntarily in the circumstances where a Garda witness agreed with the assertion of Counsel for the Accused that it was his intention that the fingerprints would be obtained from the accused 'one way or another' and it was conveyed to the accused that if he did not wish to give consent to have his fingerprints taken that permission would be sought from a Superintendent?*
- (vii) *If the answer to the previous question is No, is the consequential evidence admissible?"*

In reality, only paragraphs i) and ii) are now relevant.

16. All the other questions concern the admissibility of evidence of fingerprints (Prints 3) taken with the consent of a person detained pursuant to section 4 of the Act of 1984 and without resort to the statutory procedures laid down by section 6 of that Act. Charleton J answered the questions to the effect that the Gardaí were entitled to seek the consent of an accused person to the giving of relevant samples and that a judge is entitled to assess the evidence in deciding whether there was in fact consent. Since the High Court decision, this Court, in *DPP v Boyce*, [2008] IESC 52; [2009] 1 I.L.R.M. 253 (judgment of 18th November 2008) has dealt with the admissibility of evidence based on a sample of the blood of an accused person taken in analogous circumstances. In that case, the Gardaí did not avail of the power to take blood samples conferred by section 2 of the Criminal Justice (Forensic Evidence) Act, 1990. Denham J, delivering judgment on behalf of the majority of the Court held that the statute had not ousted the common law. The availability of a statutory procedure for taking a sample of blood did not prevent the Gardai from taking the sample with the consent of the detained person. At the hearing of the appeal in the present case, counsel for the appellant accepted that he could not distinguish this case from *DPP v Boyce*. In effect, if the blood sample taken with consent was admissible in evidence in that case, the same would apply to the fingerprints taken from the appellant while in detention in this case.

The Relevance of the Lawfulness of Facts Relied on to Found Suspicion

17. I turn then to the question raised by the first two questions. The High Court judge answered the first question as follows:

"A suspicion which gives rise to a reasonable cause for arrest does not have to be justified on the basis that every element of it arose solely on the basis of evidence that was properly obtained.

18. In the course of his judgment, he expressed the following views, which I will quote more extensively later:

"It has never been held that what would found a reasonable suspicion in law, requires to be based on the kind of evidence that would be admissible under the rules of evidence during the hearing of a criminal trial..... [citation from authority omitted]

The crucial issue in this case is whether a suspicion arising from a piece of evidence the origin of which is uncertain as to whether it was properly obtained, or arriving from an illegally obtained piece of evidence, destroys the legality of an arrest. In that regard, it is claimed that the prosecution must prove that upon which a reasonable suspicion was founded was lawfully obtained. This argument seeks to import the rules of evidence into police procedures. It has no place there."

The Appeal

19. The fundamental assumption underlying the appellants arguments is that the decision of this Court in *People (DPP) v. Kenny* [1990] 2 I.R. 110 regarding the admissibility of unconstitutionally obtained evidence in criminal trials can be extended to encompass the lawful provenance of facts, such as Prints 1 in the present case, which do not form part of the evidence proffered at trial but which provided the basis for the suspicion justifying the arrest of the accused person.
20. Writing for the majority of the Court in *Kenny's* case, Finlay C.J., at page 133 of the report, carefully balanced two possible rules or principles governing the exclusion of evidence obtained as a result of the unconstitutional invasion of the personal rights of the citizen. On the one hand, the rule could be applied only to evidence obtained by a person who knows or ought reasonably to know that he is invading a constitutional right. This he described as a *"negative deterrent."* The alternative was, an *"absolute protection rule of exclusion,"* which, *"whilst providing also that negative deterrent, incorporates as well a positive encouragement to those in authority over the crime prevention and detection services of the State to consider in detail the personal rights of the citizens as set out in the Constitution, and the effect of their powers of arrest, detention, search and questioning in relation to such rights."*
21. The Chief Justice opted for the latter formulation, concluding as follows:

"I am satisfied that the correct principle is that evidence obtained by the invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are

extraordinary excusing circumstances which justify the admission of the evidence in its (the court's) discretion".

22. Also underlying the appellant's case are certain statutory provisions requiring the destruction, in certain circumstances and after certain times, of fingerprints in Garda records. Section 8 of the Criminal Justice Act, 1984 provides in relevant part:

"(1) Every photograph (including a negative), fingerprint and palm print of a person taken in pursuance of the powers conferred by section 6 and every copy and record thereof shall, if not previously destroyed, be destroyed as this section directs.

(2) Where proceedings for an offence to which section 4 applies are not instituted against the person within the period of six months from the date of the taking of the photograph or print and the failure to institute such proceedings within that period is not due to the fact that he has absconded or cannot be found, the destruction shall be carried out on the expiration of that period."

23. There was, of course, no evidence as to whether the fingerprints (Prints 1) had been taken pursuant to these provisions or by consent. However, given the date (31st March 2002), the statute would, in circumstances such as those which prevail in the present case, have required their destruction if they had been obtained by virtue of section 6 of the Act.
24. The question posed in the present case is whether the absolute exclusionary rule laid down in *Kenny* should be extended to cover facts, not being offered as part of the evidence at a criminal trial, but giving rise to the suspicion which led to the arrest.
25. Counsel for the appellant was unable to point, either in written or oral submissions, to any authority in support of the desired extension of the principle laid down in *Kenny*. The decision of this Court in *Director of Public Prosecutions v. McCreesh* [1992] 2 I.R. 239 was, however, relied on as offering support by analogy. The Court, in that case, held that the arrest was invalid. I will discuss it more fully later.
26. At the hearing of the appeal, Mr Gerard Hogan, Senior Counsel for the appellant, argued that the appellant's constitutional rights had been infringed when he was arrested pursuant to section 4 of the Act of 1997. The prints dated 31st March 2002 could not have been lawfully used to ground the arrest.

Consideration of the Appellant's Case

27. The appellant seeks to persuade the Court to extend the boundaries of *Kenny*. Under the absolute exclusionary rule laid down by this Court in that case, which the Chief Justice described as *"the absolute protection rule of exclusion,"* a trial judge is absolutely precluded, subject only to the extraordinary excusatory circumstances described in *The People (Attorney General) v O'Brien* [1965] I.R.142, from admitting into evidence any

testimony obtained as a result of the breach of the constitutional rights of the accused person. The rationale for the rule, as explained by Finlay CJ is that:

“As between two alternative rules or principles governing the exclusion of evidence obtained as a result of the invasion of the personal rights of a citizen, the Court has, it seems to me, an obligation to choose the principle which is likely to provide a stronger and more effective defence and vindication of the right concerned.

To exclude only evidence obtained by a person who knows or ought reasonably to know that he is invading a constitutional right is to impose a negative deterrent. It is clearly effective to dissuade a policeman from acting in a manner which he knows is unconstitutional or from acting in a manner reckless as to whether his conduct is or is not unconstitutional.

To apply, on the other hand, the absolute protection rule of exclusion whilst providing also that negative deterrent, incorporates as well a positive encouragement to those in authority over the crime prevention and detection services of the State to consider in detail the personal rights of the citizens as set out in the Constitution, and the effect of their powers of arrest, detention, search and questioning in relation to such rights.

It seems to me to be an inescapable conclusion that a principle of exclusion which contains both negative and positive force is likely to protect constitutional rights in more instances than is a principle with negative consequences only.

The exclusion of evidence on the basis that it results from unconstitutional conduct, like every other exclusionary rule, suffers from the marked disadvantage that it constitutes a potential limitation of the capacity of the courts to arrive at the truth and so most effectively to administer justice. I appreciate the anomalies which may occur by reason of the application of the absolute protection rule to criminal cases.

The detection of crime and the conviction of guilty persons, no matter how important they may be in relation to the ordering of society, cannot, however, in my view, outweigh the unambiguously expressed constitutional obligation “as far as practicable to defend and vindicate the personal rights of the citizen.”

28. The Chief Justice delineated the precise boundaries of the rule as follows:

“I am satisfied that the correct principle is that evidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in its (the court's) discretion”.

29. The rule laid down in that judgment, in its own terms, applies only to the exclusion of evidence proffered at a criminal trial. The word "exclusion" or its cognates, exclude, excluded or exclusionary occur seven times and the word "evidence" four times. More to the point, the Chief Justice was referring to "*evidence obtained as a result of the invasion of the personal rights of a citizen*" or which "*results from unconstitutional conduct.*" (emphasis added). The object of the rule is to provide positive encouragement to state authorities, when gathering evidence, to consider in detail the constitutional rights of persons affected by the exercise of their "*powers of arrest, detention, search and questioning...*"
30. *DPP v Kenny* was not concerned with the lawful provenance of evidence used to ground a suspicion, nor does the Chief Justice's judgment advert to the possibility that the principle propounded could be applied to such an issue.
31. The appellant wishes to extend this rule in two respects. Firstly, it is to include matter providing the basis for the formation of suspicion of guilt, though it is not offered in evidence. Secondly, it is to apply to material already in existence and not obtained for the purpose of the particular criminal investigation.
32. Charleton J. commented very fully on the essence of the contention advanced in the following passage:

12. *It has never been held that what would be found a reasonable suspicion in law, requires to be based on the kind of evidence that would be admissible under the rules of evidence during the hearing of a criminal trial. On the contrary, a reasonable suspicion can be based on hearsay evidence or can be inferred from discovering that an alibi which a suspect has given to the police turns out to be false. In Hussein v. Chong Fook Kam [1970] A.C. 942 the issue of the parameters of what was a reasonable suspicion came up before the Privy Council in the context of the criminal code of Malaysia. A car was travelling home one night with five people in it when, on passing a lorry, a log fell from that vehicle on to the car. One passenger was killed and another was injured. The lorry did not stop. A registration number had been obtained which resulted in the arrest of the driver and passenger of the lorry. On questioning, they denied they had driven past the place where the accident had occurred. The Privy Council explained that reasonable suspicion should not be equated with prima facie proof, as that concept is understood in the law of evidence. The police force was entitled to act on a lesser standard of reasonable cause, or reasonable suspicion. Lord Devlin offered the following analysis, which I would follow: -*

"The test of reasonable suspicion prescribed by the Code is one that has existed in the common law for many years. The law is thus stated in Bullen and Leake, 3rd ed. (1868), p. 795, the "golden" edition of (1868):

"A constable is justified in arresting a person without a warrant, upon a reasonable suspicion of a felony having been committed and of the person being guilty of it".

Their Lordships have not found any English authority in which reasonable suspicion has been equated with prima facie proof. In Dumbell v. Roberts [1944] 1 All E.R. 326, Scott L.J. said, at p. 329:

"The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called upon before acting to have anything like a prima facie case for conviction; ...".

There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. There is a discussion about the relevance of previous convictions in the judgment of Lord Wright in McArdle v. Egan (1934) 150 L.T. 412. Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case. Thus the fact that the accused has given a false alibi does not obviate the need for prima facie proof of his presence at the scene of the crime; it will become of considerable importance in the trial when such proof as there is being weighed perhaps against a second alibi; it would undoubtedly be a very suspicious circumstance."

13. *The crucial issue in this case is whether a suspicion arising from a piece of evidence the origin of which is uncertain as to whether it was properly obtained, or arriving from an illegally obtained piece of evidence, destroys the legality of an arrest. In that regard, it is claimed that the prosecution must prove that upon which a reasonable suspicion was founded was lawfully obtained. This argument seeks to import the rules of evidence into police procedures. It has no place there. If the prosecution was obliged to prove legality in respect of every step leading to an arrest or charge, this would have the result that the prosecution, in presenting a case, would be required not only to show, against objection by the defence, that the evidence which they proposed to lead was lawfully obtained, but to open to the court every facet of the investigation to ensure that no illegality ever tainted any aspect of police conduct."*

33. The appellant would transpose a rule applicable to evidence presented at a criminal trial and apply it to material grounding a suspicion of guilt of a particular crime which influenced the mind of the arresting Garda. If material could not be admitted in evidence, it could not justify a reasonable suspicion that an offence had been committed. The appellant would blur the distinction between the arrest and the trial. The first is an essential prerequisite of the second. The courts have always been astute to control the

exercise of powers of arrest, to ensure that they are lawfully used and that they are not abused.

34. Firstly, an arrest will not be lawful if it is not justified by a power conferred by common law or by statute. In the present case, the appellant was arrested pursuant to a power conferred by section 4(3) of the Criminal Law Act, 1997 as follows:

“Where a member of the Garda Síochána, with reasonable cause, suspects that an arrestable offence has been committed, he or she may arrest without warrant anyone whom the member, with reasonable cause, suspects to be guilty of the offence.”

35. It is accepted that the offence with which the appellant is charged is *“an arrestable offence”* i.e., that it potentially attracts a sentence of imprisonment for a term of five years at a minimum. The focus is on the expression, *“with reasonable cause,”* which equates to reasonable suspicion. Professor Dermot Walsh in his invaluable work on *Criminal Procedure* (Thomson Round Hall, Dublin 2002) lists a number of statutory formulations (see page 176 par. 4-39). The appellant submits that the onus rests on the prosecution to prove that the basis for the reasonable cause for the arrest was lawful. It has, of course, to be emphasised that the requirement of *“reasonable cause”* is not to be overlooked. An arrest without reasonable cause or suspicion or however that requirement is expressed in a particular statute is an unlawful act and may give rise to a claim for damages. As it happens, the Privy Council case of *Hussein v Chong Fook Kam*, cited above, is an example of a case where the suspicion was held not to have been reasonable: damages were awarded against the police.
36. Secondly, an arrest will be unlawful if it is effected for a purpose other than that for which it is authorised. If a person is arrested under a statutory power to arrest on suspicion of commission of a particular offence it can only be used for that purpose. In *Oladapo v Governor of Cloverhill Prison* [2009] IESC 42, a Nigerian national had been arrested pursuant to section 13 of the Immigration Act, 2004 on suspicion of having committed offences contrary to that Act. In reality, the purpose of his arrest was not to charge him but to go through the process of denying him *“permission to land”* pursuant to another provision of the Act and thus to facilitate his deportation. Murray C.J., (with whom Denham and Fennelly JJ agreed) said: *“A person may only be lawfully arrested on a criminal charge, where, apart from other criteria, there is a bona fide intention of charging that person with that offence.”* Similarly, this Court has held that the Special Criminal Court did not have jurisdiction to try a person who had been arrested but not charged before the court forthwith, as required by a statutory provision then in force. (see *O'Brien v Special Criminal Court* [2008] 4 I.R. 514).
37. Thirdly, a person who has been lawfully arrested on a particular criminal charge must be brought before a court for that purpose as soon as is reasonably possible (Dunne v Clinton [1930] I.R. 366.). Walsh J expressed the matter as follows in *Director of Public Prosecutions v Shaw* [1992] 1 I.R. 1 at page 29:

"No person may be arrested (with or without a warrant) save for the purpose of bringing that person before a court at the earliest reasonable opportunity. Arrest is simply a process of ensuring the attendance at court of the person so arrested."

38. As Charleton J. observed, it has never been held that *"what would found a reasonable suspicion in law, requires to be based on the kind of evidence that would be admissible under the rules of evidence during the hearing of a criminal trial."* Counsel for the appellant was unable to refer to any authority to undermine that conclusion. Reliance was, however, placed on *Director of Public Prosecutions v McCreesh* [1992] 2 I.R. 239. In that case, the defendant's car had been seen parked on a public highway by members of the Garda Síochána, who had decided to investigate it in connection with reports of break-ins in the area. The defendant's car had taken off and had been followed by Gardaí, who had been unable to catch up with it until the defendant had turned into the driveway of his home. The Gardaí pursued him into the precincts of his own home. One Garda formed the opinion that he was intoxicated as a result of smelling of intoxicating liquor. He was arrested pursuant to a provision of the Road Traffic Acts and taken to a Garda station for the purposes of requiring a sample of blood or urine. Ultimately, he was prosecuted under a provision relating to his refusal to provide a sample of urine. It was a component of the offence that he be "an arrested person." This Court held that his arrest had been unlawful, as the Gardaí had been trespassers on his property at the time of the purported arrest. The acts did not authorise the Gardaí to enter upon the defendant's property for the purpose of making an arrest.
39. The appellant submits that *McCreesh* is authority for the proposition that, where a suspicion used to ground an arrest is itself based on illegality, the subsequent arrest is unlawful together with the detention which follows and any subsequent procedures reliant upon the arrest. I do not accept that *McCreesh* stands as authority for any such broad proposition. In that case, the prosecution had to prove the arrest, as an element of the offence. It was the fact that the arrest was performed, without statutory authority, on private property which rendered it unlawful, not the contemporaneous suspicion formed by the Garda as to the intoxicated condition of the defendant.
40. I prefer to return to the essentials of the appellant's proposition. It is that there is an onus on the prosecution to prove that any material forming the basis of the suspicion or, using the language of the Act of 1997, *"reasonable cause"* which led to the arrest has a lawful origin. Professor Dermot Walsh in his *Criminal Procedure*, cited above, discusses the Privy Council decision in *Hussein v Chong Fook Kam*, which was cited by Charleton J. At page 177, having made reference to the exposition by Lord Devlin, he explains: *"The prima facie proof would have to rest on the basis of admissible evidence, while a reasonable suspicion may take into account matters which would not be admissible at all."*
41. The lawfulness of an arrest and the admissibility of evidence at trial are different matters which will normally be considered in distinct contexts. Infringement of any of the basic rules regarding the first may give rise to a challenge to the lawfulness of the detention

extending potentially to the jurisdiction of the court of trial. Normally, such matters require to be asserted in advance of trial. These issues emerge from the decisions of this Court in *O'Brien v Special Criminal Court*, cited above, and *Brennan and others v Governor of Portlaoise Prison* [2008] IESC 12. Geoghegan J discusses, in the latter case, the extent to which it is necessary to advance a challenge to jurisdiction before or at trial.

42. I conclude that the appellant has not established that an onus rests on the prosecution to establish the lawful provenance of material relied upon by a member of the Garda Síochána or that such material was obtained without breach of a constitutional right to form reasonable cause justifying an arrest. I would dismiss the appeal and affirm the order of the High Court.