

APPROVED
NO REDACTION NEEDED



THE COURT OF APPEAL
CIVIL

Appeal Number 2026 60

Neutral Citation Number [2026] IECA 138

Allen J.
Meenan J.
Egan J.

BETWEEN

JOHN PAUL CONWAY

APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 24th day of July, 2026

1. This is an appeal from the judgment of the High Court (Twomey J) delivered on 12th February, 2026 ([2026] IEHC 76) and consequent order made on 19th February, 2026 refusing the appellant's application for an order of *certiorari* by way of judicial review quashing an order of the Circuit Court made on 8th November, 2023 which refused an

application made on behalf of the appellant pursuant to s. 4E of the Criminal Procedure Act, 1967 for a dismissal of the charges against him.

2. On 29th May, 2023 the appellant was sent forward for trial on indictment in the Circuit Court on four charges under the Misuse of Drugs Act, 1977, as amended. Before that, as required by s. 4B of the Act of 1967, he had been served with the documents listed in section 4B(b), including a statement of the charges against him, a list of the witnesses the prosecutor intended to call at trial, a statement of the evidence expected to be given by each of them. This is commonly referred to as the book of evidence.

3. Counsel for the appellant took the view that there were shortcomings in the evidence and on 22nd June, 2023 sought a date for the hearing of an application pursuant to s. 4E of the Act of 1967 to dismiss the charges on the ground that there was not a sufficient case to put the appellant on trial. The date for the hearing of the s. 4E application was fixed for 24th July, 2023.

4. In the meantime, the DPP identified two problems – or at least potential problems – in the documents already served on the appellant and on 21st July, 2023 served a notice of additional evidence listing two additional Garda witnesses; and a list of additional exhibits listing two additional exhibits, which were notes of interviews of the appellant while he was in custody.

5. When the s. 4E application came before the Circuit Court on 24th July, 2023, counsel for the appellant identified three aspects in which he contended that the evidence was insufficient, one of which was the chain of evidence linking the certificate of analysis with the material seized at the time of the appellant's arrest. One of the additional statements which had been served on 21st July, 2023 was a statement by the Garda who had brought three sealed evidence bags to Forensic Science Ireland ("*FSI*"), in which the Garda stated that she had delivered the bags to Sarah Kirk, an executive officer at FSI. This, counsel

suggested, could not be correct. In the ordinary way, exhibits would be received by an executive officer. Sarah Kirk of FSI is not an executive officer but Dr. Sarah Kirk, one of the scientists. Separately, counsel identified another alleged shortcoming in the chain of evidence, which does not appear to be centrally relevant. The third alleged shortcoming identified by counsel was the absence of evidence as to the receipt, handling, transmission and storage of the evidence while it was with FSI. This, counsel argued, was something that could be proved by a certificate of an officer of FSI pursuant to s. 10 of the Misuse of Drugs Act, 1984 but there was no such certificate. There was in the material which had been served on the appellant pursuant to s. 4B a certificate of analysis signed by Dr. Kirk but it was submitted that there was a substantial gap in the chain of custody of evidence leading to the certificate of analysis.

6. At the s. 4E hearing on 24th July, 2023 counsel for the DPP acknowledged that “*there are certainly a number of deficiencies in the original book of evidence as served.*” In relation to the chain of custody, counsel pointed to the statement which had been served on 21st July, 2023 which showed – he said – that the evidence had been brought to FSI by that Garda and handed to Dr. Kirk, who had provided the certificate.

7. In the course of the submission of counsel for the DPP an issue arose as to the entitlement of the DPP to call a garda witness in relation to a separate custody issue which had been raised by counsel for the appellant and the application was adjourned to 27th July, 2023 to allow counsel to make submissions on that point.

8. On 26th July, 2023 the appellant was served with a further notice of additional evidence and a further list of additional exhibits. The further additional evidence was another statement by the Garda who had brought the evidence bags to FSI in which she confirmed that she had not given them to Dr. Kirk but to a staff member, a Mr. Gary O’Daly. The additional exhibit was a certificate of receipt, handling, transmission and storage pursuant to

s. 10 of the Misuse of Drugs Act, 1984, as substituted by s. 170 of the Criminal Justice (Forensic Evidence and DNA Database System) Act, 2014. This additional evidence, if the Circuit Court judge was entitled to have regard to it, would plug the gap in the evidence of receipt, handling, transmission and storage which had been exposed by counsel for the appellant on 24th July, 2023.

9. The s. 4E application came back into the list on 27th July, 2023. Counsel for the DPP commenced by acknowledging that – as counsel for the appellant had previously submitted – he had been mistaken in proposing to call oral evidence at the previous hearing. In fact, he acknowledged, oral evidence is only available at such hearings if the interests of justice require it.

10. When the Circuit Court judge came again to the chain of custody question, counsel for the DPP said that the DPP would be relying on the s. 10 certificate. Counsel for the appellant objected, pointing to s. 4E(6) of the Act of 1967 which, he submitted, precluded reliance on additional evidence on a s. 4E application unless the court was satisfied that it was the interests of justice required that such a document be served. The application – said counsel – had been put back solely to deal with the question of oral evidence but the prosecution was treating his objection to the sufficiency of the evidence as an advice on proofs. Counsel for the DPP countered with an argument that it was open to the prosecution to serve notice of additional evidence at any time. Counsel for the DPP relied on *Director of Public Prosecutions v. Tuite* (Unreported, Court of Criminal Appeal, 2nd May, 1983). Counsel for the appellant relied on section 4E(6) of the Act of 1967 which, he contended, prescribed different rules for a s. 4E application to those applicable to a trial. The Circuit Court judge suggested that the argument advanced by counsel for the appellant was a novel argument and said that she would put the matter back to October.

11. The case was listed for judgment on 4th October, 2023 but was put back because of the unavailability of the appellant until 8th November, 2023, when the Circuit Court judge gave an oral judgment giving her reasons for refusing to dismiss the charges.

12. The appellants' lawyers understood the Circuit Court judge, in assessing the sufficiency of the evidence against him, to have taken into account the further additional evidence served on 26th July, 2023 and applied to the High Court by way of judicial review for an order quashing the decision on the ground that it was incorrect in law. The DPP, in response, conceded that the legal submission which had been made to the Circuit Court on behalf of the appellant was correct, but contended that the Circuit Court judge had not, in fact, had regard to the further additional evidence: a submission which was accepted by the High Court.

13. As in the High Court, the appeal turns on what the Circuit Court judge said but before looking at what precisely she said, it is important to note that the Circuit Court judge in dealing with the s. 4E application accepted the submission on behalf of the DPP - which is now acknowledged to have been erroneous – that she was entitled to have regard to the additional evidence served on 26th July, 2023.

14. At para. 18 of the judgment under appeal, the High Court judge noted this concession:-

“18. In its written submissions to this Court, the DPP put the matter as follows: ‘It is accepted that only such proposed evidence as is served on an accused prior to the commencement of the [s. 4E] application is admissible on the issue. Any proposed evidence served after the commencement of the [s 4.E] application can only be considered if the judge is ‘satisfied that it is in the interests of justice’. As a result, only the proposed evidence contained in the Book [of Evidence] and [the Notice of Additional Evidence] served on the 23rd July 2023 was available to be considered,

absent a determination that it was in the interests of justice that the proposed evidence contained in the [Notice of Additional Evidence] dated the 26th July 2023 could be considered.”

15. It will be recalled that at the commencement of the resumed hearing on 27th July, 2023, counsel for the DPP said that he was relying on the additional evidence served on 26th July, 2023: that is, the corrected Garda statement as to the transmission of the evidence bags to FSI and the s. 10 certificate signed by an officer of FSI. The Circuit Court judge was invited by counsel for the DPP to deal with the application on the basis that the DPP was entitled to rely on the additional evidence and – as will be seen – accepted that submission.

16. The High Court judge identified the key question as being whether the Circuit Court judge did or did not rely on the additional evidence in reaching her decision to refuse to dismiss the charge. He noted that the DPP had accepted in the High Court that if the Circuit Court judge did have regard to the additional evidence, the DPP would not be opposing the judicial review. Thus – as the High Court judge put it – the net issue was whether the Circuit Court judge, in assessing the sufficiency of the evidence, did or did not take into account the further additional evidence. I would articulate the same issue slightly differently. In my view, what the case boils down to is the proposition that although the Circuit Court judge found – after hearing argument and taking time for consideration – that she was entitled to have regard to the additional evidence, she nevertheless disregarded it.

17. The material part of the transcript of the Circuit Court judgment is set out verbatim at para. 23 of the High Court judgment but it is clear that the punctuation has gone slightly astray and I have corrected it in bold type.

“The chain of custody and the exhibits and the certificate of analysis: it was asserted at the first hearing that the chain of custody was insufficient. In the intervening period between the first hearing on the 24th of July and the 27th of July notices of

additional evidence were served which purport to deal with these matters. Issue was then taken by the defence with the service of additional evidence. It is of course the case that the prosecution has a wide latitude in respect of the service of additional evidence right up to and including, less ideally, sometimes during the running of a trial, and the case of DPP v Gerard Anthony Tuite was opened to me and is authority for that proposition stretching back some time. In relation to the service of additional evidence, the serving of a notice pursuant to section 4E does not act as a bar on the prosecution adducing additional evidence in the view of this Court. Indeed, it is often done right up to the start of the trial or even during trial, and I accept that proposition as proffered by the prosecution. ”

18. From this it can be seen that the Circuit Court judge accepted the submission on behalf of the DPP, which was later acknowledged to have been erroneous. This was the basis of her consideration of the arguments which had been advanced on behalf of the appellant as to the sufficiency of the evidence.

19. The Circuit Court judge then dealt with the appellant’s arguments as to the sufficiency of the evidence as follows:-

“Arguments raised in respect of the chain of evidence and the certificate of analysis should they be relevant, are matters in my view which should be dealt with at the trial and in that regard I note the decision of the Court of Appeal [recte. the Supreme Court] in Cruise v. O’Donnell in [2008] 3 I.R. 230. It is notable that the determination of disputed issues of law and fact remains the preserve of the trial judge, and they are most appropriate to be dealt with by a trial court on an application for dismissal. The Court confines itself to the evidence presented in the book of evidence taking the prosecution case at its strongest on the assumption that the evidence disclosed is admissible, and that is what this Court has to do in this

particular case. Here there are plainly contested issues of fact requiring resolution, but which are in the view of this Court not suitable for disposal other than by the trial court and therefore, I am refusing the application in relation to the matters that have been outlined.”

20. As the High Court judge did, I have emphasised the single phrase in the transcript of the judgment of the Circuit Court on which the appeal turns.

21. The foundation of the judgment of the High Court, as it was the foundation of the submission made there and again on appeal to this Court, is the statement by the Circuit Court judge that “*the Court confines itself to the evidence presented in the book of evidence*” which was emphasised in the High Court judgment. The argument was, and the High Court judge found, that the “*book of evidence*” was a term of art which was confined to the evidence served on the appellant before he was returned for trial. This would have excluded the additional evidence served on 21st July, 2023 before the commencement of the s. 4E hearing – to which it was common case the Circuit Court judge was entitled to have regard – as well as the additional evidence the subject of the notice of 26th July, 2023, on which the DPP had expressly relied and which the DPP had contended she was entitled to serve but to which counsel for the appellant and objected.

22. The High Court judge in his introduction had something to say about the extent of scrutiny that *ex tempore* judgments of the District Court and the Circuit Court in busy lists can reasonably be expected to withstand. It is certainly the case that judges of the District Court and the Circuit Court will frequently not have the same time for consideration and writing as judges of the Superior Courts but, with respect of the High Court judge, I do not agree that in principle this goes to the requirement for clarity.

23. More to the point, the Circuit Court judgment in this case was not an *ex tempore* but a reserved judgment. There had been contrary submissions as to the legal test to be applied and

judgment was reserved to allow the Circuit Court judge to consider the arguments and decide whether there was a sufficient case to put the appellant on trial. To do that, she would first have to decide whether – as the DPP had submitted – she was entitled to have regard to the further additional evidence or whether – as counsel for the appellant had submitted – she should confine her assessment to the original book of evidence plus the first notice of additional evidence. It bears emphasis that neither side contended that she should confine herself to the original book of evidence.

24. To my mind, it makes no sense to contemplate that the Circuit Court might have taken time to consider the arguments which had been presented as to what she could and could not take into account in determining the s. 4E application; come to a conclusion that she was entitled to have regard to the further additional evidence; and then disregarded it. Moreover, it seems to me that it would be wrong in principle to contemplate that the Circuit Court judge, having identified what she found to be the correct test, applied what she had found to be an incorrect test.

25. This Court did not have – nor did the High Court have – the statements and exhibits served on the appellant before he was returned for trial. It is significant, however, that the issues identified by counsel for the appellant were regarded as of sufficient moment that they at least ought to be addressed. It can, I think, be confidently inferred from the fact that the DPP first of all served and then relied on the additional evidence that it was thought that there was at least a risk that the charges would be dismissed without it. That said, I do not believe that this Court has sufficient information to conclude that the Circuit Court judge was compelled to dismiss the charges without it.

26. It was suggested by counsel for the DPP in the course of oral argument that there was sufficient detail in the statements originally served – in the way of exhibit labels and the like – to establish a chain of evidence without the s. 10 certificate. That may or may not have

been so (and this Court did not have the material which it would have needed to express any view on the question) but the point is that that was no part of the answer to the s. 4E application; and it was no part of the Circuit Court judge's reasoning. It was further argued at the hearing of the appeal that evidence of the chain of evidence went to the weight of the certificate of analysis and not to the admissibility of that certificate. That, too, may or may not be so but, again, it was not the basis on which the s. 4E application was opposed or decided.

27. This is a case which turns on the correct interpretation of the judgment pronounced by the Circuit Court judge. In principle, this Court is in as good a position as the High Court judge to construe the judgment of the Circuit Court but the onus is on the appellant to establish as error. In my view, he has done so.

28. "*Book of evidence*" is not a term of art. The description is universally applied to the material served on an accused before his return for trial and at that stage is necessarily limited to the s. 4B material because there is nothing else. The issue before the Circuit Court judge was whether, in deciding whether the appellant had a case to answer, she was entitled to take into account the further additional evidence served – or purportedly served after the commencement of the s. 4E application. It was common case that the Circuit Court judge was entitled to have regard to the additional evidence served on 21st July, 2023, so that, on any view, this was part of the "*book of evidence*".

29. The DPP accepts that if the judge took the further additional evidence served on 26th July, 2023 into consideration, her order cannot stand. The fact is that the Circuit Court judge was led into error by what is now acknowledged to have been an erroneous submission as to whether she could or could not have regard to the further additional evidence. The premise of the opposition in the High Court and on the appeal is that the judge correctly identified what she had been told was the correct test, but went on to apply what she had been told and

what she accepted as the incorrect test. I cannot accept that. It is not inconceivable that the Circuit Court judge, having reflected on the arguments, could have come to the conclusion that the evidence disclosed to the appellant before his return for trial by itself sufficient disclosed a sufficient case to put him on trial so that the legal issue did not arise, but I accept the submission of counsel for the appellant that if she had come to that conclusion she would surely have said so. Put another way, if the Circuit Court judge had come to the conclusion that she did not need to take the further additional evidence into account, she would surely have said so.

30. At the hearing of the appeal, counsel for the DPP carefully took the Court through the transcripts of the hearings in the Circuit Court on 24th and 27th July, 2023 highlighting the repeated identification of the material served on the appellant before he was returned for trial as the book of evidence and the later material as additional evidence. Counsel also quite properly identified a reference by counsel for the DPP in the Circuit Court to “*the original book of evidence*”. It was submitted on behalf of the DPP, and I accept, that in practice, “*book of evidence*” is used to refer to the material disclosed before the return for trial and that any material served later is referred to as additional evidence. That, of course, tallies with the requirement under s. 4B as to the service of documents on the accused, and the possibility under s. 4C to serve additional documents.

31. It seems to me that the distinction between the “*book of evidence*” and the “*additional evidence*” which is evident from the transcript was necessarily drawn to identify the arguments on both sides as to what they contended could and could not be taken into account by the Circuit Court judge in deciding whether there was a sufficient case to answer. As I have emphasised earlier, it was common case that the Circuit Court judge was entitled to have regard to the additional evidence served on 21st July, 2023. Accordingly, to interpret the Circuit Court judge’s observation that she was confining her assessment to the book of

evidence which was served before the appellant was returned for trial would exclude this material.

32. In argument, counsel for the DPP recalled the regular admonition of Hardiman J. to counsel in judicial review appeals that they should engage with the facts. That, I agree, provides useful general guidance and in this case points to a requirement to construe text in context. The context was that the Circuit Court judge was required to decide whether the material relied on by the DPP was sufficient to put the appellant on trial.

33. Neither “*book of evidence*” nor “*additional evidence*” have a defined legal meaning. The shoulder note to s. 4B is “*Service of documents on accused etc.*” and the note to s. 4C is “*Additional documents*”. Neither are they terms of art. The only authority that counsel were able to identify was what counsel were agreed was an *obiter* observation by Hardiman J. in a case *Breslin v. McKenna* [2009] 1 I.R. 298 that:-

“10. The ‘book of evidence’ is a compendium of the documents required by our law to be served on an accused person pursuant to the Criminal Procedure Act 1967.
...”

34. *Breslin* was a case in which the High Court in Northern Ireland had made orders requiring the defendants to produce for inspection the books of evidence and transcripts of their criminal trials before the Special Criminal Court, with the proviso that there was no impediment in Irish law preventing the defendants from producing them for inspection. The issue in the Irish proceedings was whether the defendants should be granted leave to produce the documents sought. The High Court granted leave to produce the books of evidence. The Supreme Court by a majority, granted leave to produce both the books of evidence and the transcripts. It is, I think, of some assistance to contemplate whether so much of the orders made in that case as granted consent to the disclosure of “*the books of evidence*” not only did not capture, but deliberately excluded, any additional evidence served on the defendant after

their return for trial. I cannot imagine that the Northern Ireland court, the Irish courts, or the parties, can have been in any doubt but that the orders captured any additional evidence as well as the original book of evidence.

35. It seems to me that the reasoning of the High Court depends on attributing to the expression “*book of evidence*” a precise and very narrow meaning which is inconsistent with the issue which had been argued and substance of the judgment. In the context in which the Circuit Court judge used that expression, I believe that the judgment is clear: in assessing whether the evidence against the appellant was sufficient case to put the appellant on trial, the Circuit Court judge did have regard to the further additional evidence.

36. As to the appropriate order, the parties were agreed that if the appeal were to be allowed, the appropriate order would be to quash the order of the Circuit Court and to remit the s. 4E application to the Circuit Court for determination in accordance with what the DPP acknowledges are the correct legal principles. Counsel for the DPP portended an application for leave to serve the further additional evidence on the grounds that it would be in the interests of justice but the parties were agreed that any such application would be a matter for the Circuit Court to determine.

37. I would allow the appeal; quash the decision of the Circuit Court pronounced on 8th November, 2023; and remit the appellant’s s. 4E application for consideration by the Circuit Court in accordance with what the DPP now acknowledges are the correct legal principles.

38. As the appellant has been entirely successful on the appeal, it seems to me that he is entitled to an order for costs in both the High Court and in this Court. If the DPP wishes to contend for any other costs order, notice should be given to the Court of Appeal office and to the appellant’s solicitors within fourteen days of the electronic delivery of this judgment, in which event – and in the event that agreement cannot be reached as to the appropriate costs order - the panel will reconvene for a short costs hearing.

39. As this judgment is being delivered electronically, Meenan and Egan JJ. have authorised me to say that they agree with it and with the orders proposed.