THE COURT OF APPEAL

Record No. 83/2015

Birmingham J.
Mahon J.
Hedigan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

DAVID O'LOUGHLIN

APPELLANT

JUDGMENT of the Court delivered on the 9th day of February 2018 by Mr. Justice Mahon

1. This is an appeal by the appellant against his conviction for the murder of Liam Manley on the 12th May 2013 at Garden City Apartments, in Cork. The appellant pleaded not guilty. His trial commenced on the 11th March 2015 and concluded, with the unanimous guilty verdict, on the 31st March 2015. He was sentenced to life imprisonment on the same date.

2. The appellant lived in an apartment in Cork city. On the night of the 9th May 2013 he found the deceased sitting on the pavement outside a shop in Cork city. The appellant said he felt sorry for the deceased because he himself had previously fallen on hard times. He took the deceased back to his apartment. Shortly afterwards a friend of the appellant, Mr. O'Mahony, called to his apartment. Both the deceased and Mr. O'Mahony had previously on occasion, stayed with the local Simon Community. In conversation between the three men reference was made to paedophiles staying at the Simon Community, and there was a reference by Mr. O'Mahony to the deceased having previously been involved in a paedophile incident. This appeared to annoy the appellant who then assaulted the deceased. He then proceeded to ejected the deceased from his apartment having helped to wipe blood from his bleeding lip before doing so. When the deceased tried to regain entry into the apartment, the appellant forcibly pushed him into a rubbish chute which was used to take bags of rubbish from the various apartment floors down to the basement area of the apartment block. The appellant maintained that he did not in any way intend to harm the deceased and he assumed that he would simply have slid safely down into the basement area and then left the building.

3. On the following Monday, the 13th May 2013 Mr. Ford, whose job it was to clear out rubbish from the apartment block, found the bin chute in the apartment block to be blocked. Because of a slight bend in the chute black refuse bags occasionally jammed and blocked the chute. As he attempted to unblock it on that day the deceased's body was released itself and dropped out of the chute.

4. Dr. Margaret Bolster, the Assistant State Pathologist gave evidence that the cause of death was mechanical asphyxia, associated positional asphyxia and hypoxia or lack of oxygen due to being trapped inside the waste chute.

5. Evidence given in the course of the trial indicated that the deceased had been homeless for some period of time and had lived in homeless accommodation in the city. He had a problem with alcohol, and on the night of the 9th May 2013 had been turned away from a hostel facility because he was intoxicated, and told to return later in the evening when he had sobered up. It was within this space of time that the deceased met the appellant and was taken by him back to his apartment.

6. The appellant gave evidence in the course of his trial. He emphasised that he had never wished to harm or kill the deceased and that he was devastated as a consequence of what had occurred.

Grounds of appeal
7. A number of grounds of appeal are maintained on behalf of the appellant. They are:-

> (i) erred in law when allowing into evidence statements made by the appellant to Detective Garda Harrington and Detective Garda Maher at the appellant's apartment on the evening of the 13th May 2013. ("The un-cautioned interview").
>
> (ii) erred in law in refusing the appellant's application at the close of the prosecution case to direct the jury to find the appellant not guilty.
>
> (iii) erred in law in incorrectly charging the jury with regard to oblique intention and / or with regard to s. 4(2) of the Criminal Justice Act 1964 in that he failed to charge the jury at all regarding the level of certainty required in relation to a person being presumed to intend the natural and probable consequences of his actions, the law being that the level of certainty is that of a virtual certainty or certainty to a very high degree.
>
> (iv) erred in law in his charge when he charged the jury that the death that had occurred in this case had been clearly "unlawful" thereby trespassing on matters of fact which were solely within the province of the jury.
>
> (v) erred in law by permitting the jury to visit the rubbish chute whilst they were engaging in their deliberations, no application having been made by the prosecution or defence for a visit to the locus during the course of the evidence being given at the trial, but in respect of which photographs of same had been adduced in evidence and were exhibits in the case before the jury. He further erred by permitting the jury to visit the said rubbish chute and to view same in the absence of the appellant himself and his legal representatives who were not present and by permitting the jury to throw a stone down the chute being something far beyond merely visiting the locus and failing to give the legal representatives any opportunity to make submissions as to whether or not same should be permitted.
>
> (vi) erred in law and in fact by failing to give any adequate summary to the jury with regard to the evidence adduced by

the appellant at the trial.

8. For convenience, and having particular regard to the oral submissions made to the court, it is proposed to deal with the grounds of appeal under the following headings:-

a. The un-cautioned Garda interview.

b. The rejection of the application to direct the jury to find the appellant 'not guilty'

c. Issues arising in relation to the charge to the jury.

d. The visit of the jury to the chute.

The un-cautioned Garda interview

9. Following the discovery of the deceased's body by the maintenance worker on the 13th of May 2013 Gardaí commenced an investigation which included the questioning of apartment residents, including the appellant, described by Detective Garda Harrington as "house to house enquiries". Detective Garda Harrington and his colleague spoke to the appellant shortly after 8 p.m. for about half an hour. They also spoke separately to a French woman resident of another apartment on the same floor. They then left and returned to the appellant's apartment at about 10 p.m. The appellant and other apartment residents were asked to vacate the apartment complex overnight to facilitate the crime investigation. Alternative accommodation was arranged by the gardaí. The appellant fully co-operated with the gardaí and the request to vacate.

10. In the course of interviewing the appellant on the night in question no caution was issued by the gardaí. On entering the appellant's apartment Detective Garda Harrington noticed what appeared to be a blood smear on the wall inside the door and a cut to a knuckle of the appellant's hand. However, he said he did not immediately consider the appellant to be a suspect. He said that the blood stain and the cut knuckle did not particularly surprise him because he knew the appellant to be a *volatile* character. Detective Garda Harrington said that he and his colleagues had to keep an open mind at that point in time as the investigation had just begun, and they were unaware of the cause of the deceased's death. The appellant was subsequently formally interviewed under caution on the 23rd May 2013.

11. The admission into evidence of the notes as prepared by Detective Gardai Harrington and Meagher as to what the appellant had told them on the night were objected to in the course of the trial. The basis of the objection was that the appellant had not been cautioned in circumstances where he ought to have been. Furthermore, objection was taken to their admission on the basis that the notes in question had not been read back over to the appellant nor was he invited to make any changes he wished to make to same, nor was he asked to sign the notes.

12. The learned trial judge's ruling that the notes were admissible in evidence was terse and absent of detailed reasoning. He said:-

> "Very good. It's a long time since I've thought of anybody as having a policeman's mind and I am not prepared to go back to that sort of thought. I find no basis on which the evidence tendered is inadmissible."

13. The appellant complains that the learned judge's ruling was *inadequate* and that it failed to deal with the submissions made by his counsel, Mr. Nix S.C. His complaints are certainly not unreasonable or without basis. A more detailed and reasoned ruling would have been more appropriate and would have made the task of this Court in reviewing it more straightforward. Indeed, a reasoned ruling might have avoided any appeal relating to the issue.

14. The substantive criticisms of the ruling are made on the basis that the garda notes ought not to have been admitted into evidence because they were in breach of the Judges Rules and were not read back to the appellant at the time nor was he invited to make any amendments to them or to sign them.

15. The relevant Judges Rules are:-

> *"When a police officer is endeavouring to discover the author of a crime there is no objective to his putting questions in respect thereof to any person or persons whether suspected or not from whom he thinks that useful information may be obtained.*
>
> *And*
>
> *Whenever a police officer has made up his mind to charge to charge a person with a crime he should first caution such a person before asking any questions or any further questions as the case may be."*

16. It was submitted on behalf of the appellant that the circumstances in which the gardaí attended at the appellant's apartment, and what they saw when the appellant opened the door to them, ought to have served as a strong indicator that the appellant was on the verge of admitting involvement in a crime and in those circumstances a caution should have been given. Particular emphasis was placed on the fact that when the gardaí were speaking to the appellant on the night in question they noticed what appeared to be a blood stain on the wall of the apartment and a cut on the appellant's hand and also that his hands were shaking. The appellant, in support of this contention, referred the Court to the judgment of Egan J in *Breen* when he said:-

> *"In the present case, the applicant was quite clearly troubled and afraid. He informed Detective Garda Heverin of this. His agitation was visible. The Court of trial was of opinion that the officer knew or ought to have appreciated that he was on the threshold of admitting some involvement in a crime relating to the use of his property for the purposes of a subversive organisation. In these circumstances he ought not to have been encouraged to make any admission without first being cautioned. Instead, however, Detective Garda Heverin said "Tell me, Sean". This Court holds that the failure to administer a caution in the circumstances of this case violated the requirements of basic fairness and that the evidence was wrongly admitted."*

17. It was submitted on behalf of the respondent that there was no requirement for Detective Garda Harrington to caution the appellant on the occasion as he had not made up his mind to charge the appellant with any crime. It was submitted that even if the appellant had been a suspect at the time, the absence of a caution did not render the content of the relevant interview with

Detective Garda Harrington inadmissible as no decision had been made to charge the appellant with a crime, nor was he in custody at the time. The case of *DPP v. Joseph O'Reilly* [2009] IECCA 18 is relied upon. In that case, Murray C.J. stated:-

> *"In the present case it is obvious from the circumstances in which the statement in issue was made that it did not come within the ambit of the Judges Rules and accordingly there could be no breach of those rules. The obligation to administer a caution referred to in rule 2 and rule 3 of the Judges Rules as cited above did not apply, and it was not contended that they did apply, because the applicant, even though a suspect, was not a person in respect of whom the garda officer had made up his mind to charge with a crime nor was he in custody."*

18. He also said:-

> *"If a trial judge has a discretion to admit an inculpatory statement notwithstanding a breach of the Judges Rules, a voluntary statement (and in this case it was both voluntary and exculpatory) made when there was no breach of such specific rules must enjoy a strong presumption of admissibility unless there are quite exceptional circumstances like those referred to in the case of The People (D.P.P.) v. Breen (Unreported, Court of Appeal, Egan J., 13th March, 1995)"*

19. The facts of the instant case are distinguishable from those in Breen. It is apparent from the decision of the learned trial judge that he was not of the opinion that Detective Garda Harrington knew or ought to have appreciated that the appellant was on the threshold of admitting an involvement in the death of the deceased. Furthermore, the appellant was not encouraged to make any admission. Everything points to the fact that the gardaí were engaged in a preliminary investigation as to the circumstances which led to the deceased's death. It may have been the case, and indeed it probably was, that in the aftermath of these preliminary investigations there was a strong suspicion on the part of the gardaí as to the appellant's involvement.

20. The appellant was arrested on the 21st May 2013, approximately one week after Detective Garda Harrington and his colleague interviewed him in his apartment. In the interim, and in the course of their investigations, the gardaí viewed CCTV footage which showed the appellant out and about in Cork city. This information was in conflict with what the appellant had told the gardaí on the 13th May 2013 when he said that he had not left the apartment at all since the previous Friday. That information had been very unequivocally given to the gardaí on the night of the 13th May 2013 and is unlikely to have been altered by the appellant even if Detective Garda Harrington had read over his notes to the appellant on that evening and offered him the opportunity to change any information provided by him. When subsequently, following his arrest, the notes were read to him after caution the appellant said *"I don't think they are very accurate"*. It was at this point that he told the gardaí that he had completely forgotten that the deceased had been in his company on the date in question.

21. The Court is satisfied that the evidence established that on the evening of the 13th May 2013 the appellant was interviewed by gardaí in the ordinary course of their house to house enquiries following the discovery of the deceased's body and that the appellant was not a suspect at that time and that therefore there was no necessity to caution him before speaking to him. There was therefore no breach of the Judges Rules and no unfairness to the appellant. In those circumstances, the decision of the learned trial judge to admit the garda notes into evidence was correct. It is regrettable that his ruling on the issue was not more detailed and reasoned, but that deficiency in itself does not render it flawed.

22. This ground of appeal is therefore dismissed.

The Application for a Direction

23. At the close of the prosecution case counsel for the appellant applied to the learned trial judge for a direction to the jury to find the appellant not guilty on the basis that it was clear from the evidence tendered by the prosecution that what had occurred (*i.e.* the death of the deceased) was not the natural and probable consequence of the actions taken by the appellant in forcing him head first into the chute. He relied on a number of factors including the following:-

> (i) The appellant's own evidence to the effect that he was unaware that the chute was blocked. He referred to the fact that the appellant had said in evidence that he put bottles into the chute at a later stage and would not have done so if he believed the chute was blocked. Further reliance was placed on the evidence of Mr. O'Mahony who said that he had overheard the appellant stating words to the effect that it was his belief that the deceased would have crawled out of the chute and left the building.
>
> (ii) The clear statement made by the appellant to the gardaí to the effect that he had no intention of killing anyone, and his denial to the interviewing garda that he had murdered the deceased.
>
> (iii) The evidence from Dr. McCarthy, a physicist, that if the chute had not been blocked, the deceased's exit from the chute at approximately 27 miles per hour would have been greatly broken if he had landed in a wheelie bin filled with domestic refuse. This sequence of events was the *natural and probable consequence* of the appellant's action in the circumstances.
>
> (iv) The mannequin experiment resulted in no damage to the mannequin and this established that the *natural and probable consequences* of the appellant's actions were that the deceased would pass through the chute and exit without injury.
>
> (v) Dr. Bolster (the State Pathologist) gave evidence that the deceased had a number of bruises to his face which were consistent with a number of punches. These injuries did not cause the deceased's death. This did not prove, it was submitted, that such injury equated to serious bodily harm or actual bodily harm.

24. The application for a direction was strongly contested by the respondent. In submissions made to this Court by the respondent it was argued that the various matters raised on behalf of the appellant in support of his application for a direction were matters which were properly left for decision to the jury. In particular the respondent submits that denials of culpability by an accused are a common feature in criminal cases and are not ordinarily by themselves evidence of guilt or innocence. In relation to Dr. Bolster's evidence, it was submitted that it was never the case that the punches to the face amounted to serious injury and that the injuries relevant to the prosecution were those which caused the deceased's death, namely mechanical asphyxia associated with positional asphyxia due to being trapped in a waste chute. In relation to the issue of the appellant's awareness of the blockage in the rubbish chute it was submitted that the natural and probable result of placing a human being in a vertical rubbish chute of forty feet in length is the death of, or serious injury to, that person. There was a risk of, at least, serious injury to the deceased even in circumstances where the chute was clear. Finally, in relation to the mannequin issue the purpose of the experiment conducted with it was to identify the approximate speed at which it passed through the chute. The mannequin, it was argued, was an inanimate object and incapable

of suffering injury or showing evidence of injury.

25. In *R v. Galbraith* [1981] 1 WLR 1039, Lord Lane set out a number of principles covering directions to acquit. These were:-

> *"(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.*
>
> *(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.*
>
> > *(a) Where the judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.*
> >
> > *(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by a jury."*

26. The principles set out in Galbraith were approved by the Court of Criminal Appeal in *DPP v. Leacey* (Unreported) Court of Criminal Appeal, 3rd July 2002. That Court also approved the summary of the law as set out in *Blackstone's Criminal Practice*. That summary is as follows:-

> *(1) If there is no evidence to prove an essential element of the offence, a submission of no case to answer must succeed.*
>
> *(2) If there is some evidence which, taken at face value, establishes each essential element, then the case should normally be left to the jury. The judge does, however, have a residual duty to consider whether the evidence is inherently weak or tenuous. If it is so weak that no reasonable jury properly directed could convict upon it, then a submission (of no case to answer) should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies and the evidence from it being the type which the accumulated evidence of the Court's is shown to be of doubtful value..*
>
> *(3) The question of whether a witness is lying is nearly always one for the jury, but there maybe exceptional cases (such as R v. Shippey) where the inconsistencies (whether in the witness's evidence as viewed by itself or between him and other prosecution witnesses) are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful. In such a case (and in the absence of other evidence capable of founding a case), the judge shall withdraw the case from the jury.*

27. The learned trial judge refused the application for a direction. He ruled on the basis, primarily, of Dr. Bolster's conclusions that the appellant had died from *"mechanical asphyxia, associated with positional asphyxia or hypoxia or lack of oxygen due to being entrapped in a waste chute"*. The learned trial judge went on to state:-

> *"…Now, Mr O'Loughlin in my view is responsible directly for these matters which gave rise to the cause of death as found by Dr Bolster and I'll allow the case go to the jury."*

28. The learned trial judge did not specifically respond to the other submissions made by the appellant's counsel in support of his application for a direction.

29. The Court is satisfied however that notwithstanding the failure of the learned trial judge to deal with all matters raised in the application for a direction, the refusal of the application was correct. The various matters raised on behalf of the appellant in support of his application for a direction were matters properly left for consideration by the jury. None of the matters raised on behalf of the appellant were *so weak that no reasonable jury properly directed could convict upon it….*

30. This ground of appeal is therefore dismissed.

The learned trial judge's charge

31. This ground of appeal is based on the contention that the learned trial judge erred in law in incorrectly charging the jury with regard to oblique intention and / or with regard to s. 4(2) of the Criminal Justice Act 1964 in that he failed to charge the jury at all regarding the level of certainty required in relation to a person being presumed to intend the natural and probable consequences of his actions, the law being that the level of certainty required is that of virtual certainty or certainty to a very high degree.

32. Section 4 of the Criminal Justice Act 1964 provides as follows:-

> *"(1) Where a person kills another unlawfully the killing shall not be murder unless the accused intended to kill, or cause serious injury to, some person, whether the person actually killed or not.*
>
> *(2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted."*

33. In the course of his charge to the jury, the learned trial judge stated:-

> *Now, the crime of murder is defined in section 4 of the Criminal Justice Act 1964 which provides as follows… . Now, rebutted means set aside, not to operate in the particular case by reason of the facts and circumstances of the particular case.*
>
> *Now the second part of the definition provides… . Now, as I have told you rebutted means set aside not to operate in the circumstances of the particular case by reason of the facts of this case, but it is not, as you might think, for the defence to show that the presumption has been rebutted. It is for the prosecution to prove to the standard of beyond reasonable doubt to the satisfaction of all 12 of you that it has not been rebutted because, as I have told you, the onus*

of proving or disproving anything never shifts over to the accused man.

Now, where a person kills another unlawfully, and the death of Mr Manley was an unlawful killing, that can never be - such a killing can never be less than manslaughter but if the statutory intent is there it will be murder and we cannot lift back a flap on the skull and have a peak inside and see what intent is lurking in there so intent has to be ascertained by presumptions and I am accordingly deemed to intend the natural and probable consequences of my conduct, but the law also provides for the situation where, by reason of particular facts and circumstances, that is not appropriate and accordingly the presumption may be rebutted.

Now to take an example away from the facts of this case. If I plunge a knife into a vulnerable part of somebody else's body, what is the natural and probable consequences of that? Well, the natural and probable consequences of that is that I will cause that person at least serious injury, if not kill that person stone dead and I am presumed to have intended that, though it may, in appropriate circumstances, be rebutted and it is for the prosecution to prove it has not been rebutted rather than for the defence to prove that it has.

Now, after 50 years of this I still find that a difficult concept so I am going to, as I am entitled to do, adopt the words of somebody else as my own. The late Mr Justice Brian Walsh was considered a person having great clarity of thought and giving judgment in the Supreme Court in 1972 he said:

> *"It is important to note that the effect of the provision is that unlawful homicide shall not be murder unless the necessary intent is established. The onus of establishing this beyond reasonable doubt remains at all times upon the prosecution and so also does the onus of proving beyond reasonable doubt that the presumption that the accused person intended the natural and probable consequences of his conduct has not been rebutted.”” (emphasis added)*

34. Following the conclusion of the charge, Mr. Nix made a requisition in relation to the foregoing extract. At the core of his submission was his client's contention that when he pushed the deceased into the chute he was unaware that it was blocked and he believed that the deceased would simply slip through the chute, that his exit from the chute would be broken by falling onto garbage sitting in a wheelie bin, and that he would not sustain any physical injury. He asked the learned trial judge to explain the different categories of manslaughter to the jury, which he listed as voluntary manslaughter, involuntary act manslaughter, unlawful and dangerous act manslaughter and gross negligence manslaughter. He referred to the English decisions of *R v. Nedrick* [1986] EWCA Crim J0710-1, and *R v. Stephen Leslie Woolin* [1999] 1 AC 82. He concluded his submission in the following terms:-

> *"…But I would rest my case, my lord, on the virtual certainty as enumerated in the English decision which I have opened to your lordship and I would ask your lordship as a matter of fairness and a matter of balance and as a matter of indicating that the presumption in this case has not been rebutted by the State, by reason of the forensic evidence adduced by Professor O'Malley, or Dr O'Malley, or Dr McCarthy."*

35. Counsel for the appellant quoted extracts from the judgment in *Nedrick*, including the passage from Lane C.J. judgment when he stated:-

> *"Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case."*

36. Oblique "intent" is defined in *The Judge's Charge in Criminal Trials* (Coonan & Foley) in the following terms (para 12.21):-

> *"On occasion it has been argued that an accused did not have the requisite intention because although his acts may have brought about a prohibited consequence, he did not desire nor wish that consequence to occur. In a nutshell, the accused may argue that he did not act with the prohibited consequence being the purpose he was trying to achieve (emphasis added).*

37. In English law a number of decisions, such as that in *R. v. Woolin* [1999] 1 Cr. App. R. 8, are authorities for the contention that in such cases the prosecution must show a high probability of cause and effect between the act and the consequence as well as knowledge of that probability. In *Woolin* it was stated that the jury ought to be instructed:-

> *"…that they are not entitled to find the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case."*

38. However, the position is somewhat different in this jurisdiction because of s. 4(2) of the Criminal Justice Act 1964 and the provision that an *accused person shall be presumed to have intended the natural and probable consequences of his conduct, but this presumption may be rebutted.*

39. In the instant case the learned trial judge stated that the *natural and probable consequences* of being pushed into the chute was either that the deceased would be killed or would suffer serious injury, and that if this presumption had not been rebutted, then the correct verdict was one of murder. It was open to the jury, and they were properly directed in this respect, to conclude, beyond all reasonable doubt, that there was an absence of an intention to bring about the *natural and probable consequences* of the act of pushing the deceased into the chute. It was the task of the prosecution to establish that presumption had not been rebutted and the charge to the jury was reasonably clear in that respect. The jury had heard the evidence of what would have likely occurred if somebody had been pushed in to the chute by reference to the mannequin evidence. It also had the evidence of the appellant as to his understanding of what would happen to the deceased once he had been pushed into the chute. It was a matter for the jury to accept or reject such evidence.

40. It was also submitted on behalf of the appellant that the charge to the jury was erroneous in that they were told by the learned trial judge that the death had been clearly unlawful, and that this trespassed inappropriately into the province of the jury.

41. In the course of his charge to the jury, the learned trial judge also stated:-

> *"Now what's capable of going into the box headed verdict? You could write in the words "Not guilty" and if you did that you really haven't believed a word that's been going on here for the last couple of weeks. Your finding could be manslaughter. If you found that the accused unlawfully killed Mr Manley but (were) satisfied that the statutory intent had been proved and if you are finding manslaughter you must get the formula right and it's very important that you do get the formula right for that and the formula for a finding of manslaughter is "Not guilty of murder but guilty of manslaughter." Now, thirdly you could write in the words "Guilty" and that would mean that you found that Mr O'Loughlin unlawfully killed Mr Manley and in relation to so doing he had the statutory intent."*

42. Mr. Nix requisitioned the learned trial judge in relation to that part of his charge. He requested that the jury be told it was open to them to acquit the appellant if they considered that what he had done *"was outrageously stupid but if he did honestly hold the belief that this person would pass through, as the mannequin passed through, without any injury whatsoever, landing as he might in a wheelie bin of rubbish"*.

43. The learned trial judge then recharged the jury in the following terms:-

> *"Now in this, as in every other case, you take all the circumstances of the case into account. Subsection 2 of the definition in the 64 Act provides, "The accused person shall be presumed to have intended the natural and probable consequences of his conduct but this presumption may be rebutted" and the accused doesn't have to rebut anything. It's up to the prosecution to prove that it has not been rebutted. Now there has been evidence in this case of a test conducted with a mannequin. It's in the evidence. You'll have to consider that. Was the accused of a state of mind that he considered somebody could have passed down through this chute, pick himself up, dust himself off and walked away without any adverse consequences whatsoever or not. It's a matter of credibility. It's for you to assess the witnesses and for you to assess the evidence."*

44. It is contended on behalf of the respondent that this criticism of the learned trial judge's charge to the jury is in conflict with what was conceded by counsel for the appellant in his address to the jury, when he said:-

> *"Now, this is not a case of there's no smoke without fire, he wouldn't be here unless he did something. He acknowledges that he assaulted Mr Manley. That's not the end of it. That's not what it's about. It is that he intended to cause him serious bodily injury or to kill him. That's what he's here for and that's what you must decide and his lordship will give you the tests for it."*

45. It was very much the line of defence run by the appellant that having admittedly assaulted the deceased, he pushed him into the chute head first in the genuine belief that he would slide though the chute and emerge unscathed at the other end. He said that he believed that there was a wheelie bin with rubbish in it to break his fall and he was completely unaware that the chute had become blocked with rubbish bags.

46. The learned trial judge did advise the jury that a 'not guilty' verdict was a possibility. This was done in response to a requisition by counsel for the appellant, thus:-

> *"Now what's capable of going into the box headed verdict? You could write in the words "Not guilty" and if you did that you really haven't believed a word that's been going on here for the last couple of weeks.*

47. Undoubtedly this re-charging of the jury might have been more comprehensive than in fact it was. However, the Court is satisfied that, overall, the charging of the jury was fair and sufficiently addressed those issues in the trial properly left for determination by the jury.

48. This ground of appeal is therefore dismissed.

The visit by the jury to the chute

49. It is contended on behalf of the appellant that the learned trial judge erred in law by permitting the jury to visit the rubbish chute whilst they were engaged in their deliberations, and particularly so in the absence of any application by either the prosecution or the defence for such a visit. It is further contended on behalf of the appellant that a member of the jury, whilst engaged in their examination of the chute, was permitted to throw a stone down the chute. This was done in the absence of the appellant or his legal representatives. In the course of the trial the jury had been shown photographs of the chute, both at its entrance and exit points and they had also heard expert evidence as to the speed at which the appellant would have travelled through and exited the chute had his passage not become blocked by rubbish bags. In the appellant's evidence during the trial he said that when he put the deceased into the chute he honestly believed that he would simply slide down and exit into a bin of rubbish below which would act to break his fall, and that he would not have been injured, let alone died.

50. Following the conclusion of the learned trial judge's charge to the jury, and after the jury had begun its deliberations for some considerable time, and after the learned trial judge had indicated to the jury that a majority verdict of 11 to 1 or 10 to 2 would now be acceptable, the Foreman of the jury requested the opportunity for the jury to view the rubbish chute before making a final decision. There was no objection to the requested inspection by either the prosecution or the defence. Arrangements for the inspection were then made.

51. By the time the appellant and his legal representatives arrived to the location of the chute in the apartment complex they found the learned trial judge getting into the lift to exit the building. No one was present on behalf of the prosecution, they having had apparently completed their visit to the location. It transpired that the learned trial judge, the jury and prosecution legal team had examined the chute in the absence of the appellant and his legal representatives.

52. When the Court reconvened following the inspection, the learned trial judge announced that in the course of their inspection of the chute the jury had performed an experiment of throwing a stone down the chute to see how it travelled. This was the first occasion when the appellant and his legal team representatives were aware that such an experiment had been carried out. No explanation was given as to why this experiment had been undertaken or what information it had revealed to the jury. Clearly a stone thrown down the chute was an altogether different event than an adult male being forced head first into the chute and in circumstances where his shoulder to shoulder measurement almost equalled the width of the chute.

53. The appellant's criticism is two fold. Firstly, he contends that the visit to the chute ought not to have been permitted as it was in effect the introduction of new evidence well after the jury had commenced its deliberations. Secondly, it included the stone experiment in circumstances where the precise basis on which it was carried out were unknown. Furthermore the experiment had not

been witnessed by the appellant or his legal advisors and the reason and result of that experiment was also unknown and unexplained.

54. The fact that counsel for the appellant did not make known any objection to, or concern about, the proposed visit to the chute is heavily relied upon by the respondent. Reliance is placed on the judgment of the Supreme Court in *DPP v. Cronin (No. 2)* [1996] IR329. Briefly stated, *Cronin* is authority for the contention that, generally, matters or issues not objected to or challenged in the course of a trial should not later be permitted to be challenged before an appellate court. It is, of course, the case that an appellate court may, in the absence of any such challenge being taken in the trial court, nonetheless, consider the merits of such a challenge in circumstances where justice requires it.

55. In his judgment in *Cronin* Kearns J. (as he then was) said:-

> *"It seems to me that some error or oversight are of substance, sufficient to ground an apprehension that a real injustice has occurred, must be demonstrated before the Court should allow a point not taken at trial to be argued on appeal. There must in addition be some sort of explanation tendered to explain why the particular point was not taken. Furthermore, as noted above, the Court of Criminal Appeal is concerned only with a review of the trial an the rulings made therein, and not with other suggested errors, or oversights which may pre-date the trial or have been amenable to remedy in some other manner.*
>
> *Without some such limitations, cases will continue to occur where a trawl of a judge's charge years after the event will be made to see if a point can be found which might have been argued or have been the subject of a requisition at the end of the judge's charge at the original trial, even though competent lawyers at the trial itself did not see fit to do so. It is an entirely artificial approach to a review of a trial and one totally disconnected from the reality of the trial itself. For these reasons and for the reasons offered by Hardiman J. when this case was in the Court of Criminal Appeal, this case should abhor the practice and strongly discourage it."*

56. An affidavit sworn by the junior counsel who represented the appellant at the trial, Mr. Donal O'Sullivan B.L. has been made available to the Court in circumstances where the senior counsel briefed in the trial, Mr. Nix, has since died. While Mr. O'Sullivan helpfully recounts the circumstances in which the visit to the chute by the jury came to pass he is not in a position to throw any light on the reasons why no issue or application was made by his leader, Mr. Nix, to object to the proposed visit to the chute or indeed to the stone experiment albeit after it had taken place. He does confirm that at no point did the defence legal team decide not to seek to discharge the jury on a tactical basis. It is noteworthy that, according to Mr. O'Sullivan's account, while the decision not to object to the proposed visit to the chute was taken after instructions had been taken on the issue from the appellant by his legal team, no instruction had been sought from the appellant in relation to the subsequent revelation that the jury had conducted the stone experiment at the chute's location.

57. The request from the jury, in the course of their deliberations, and indeed at a point well advanced into those deliberations, to view the chute in the apartment block was highly unusual. The fact that it was made in the absence of an application by either the prosecution or the defence and prior to any direction by the learned trial judge that such an inspection take place is itself in conflict with s. 22 of the Juries Act 1976. That provides as follows:-

> *"(1) In the trial of any issue with a jury the judge may, at any time after the jurors have been sworn and before they have given their verdict, by order direct that the jurors shall have a view of any place specified in the order which in the opinion of the judge it is expedient for the purposes of the trial that the jurors should see, and when any such order is made the judge may adjourn the trial at such stage and for such time as appears to him to be convenient for the execution of the order.*
>
> *(2) …*
>
> *(3) In the trial of a criminal issue, an order under this section shall be made only on the application of the prosecution or of the accused person or of one or more of the accused persons and the expenses of the conveyance of the jurors to and from the place specified in the order shall be paid by the county registrar or other officer acting as registrar to the court during the trial out of moneys to be provided by the Oireachtas.*
>
> *(4) Whenever a judge makes an order under this section, he shall give such directions as appear to him to be expedient for the purpose of preventing undue communication with the jurors during the execution of the order."*

58. It is clear therefore, at least technically, that the learned judge's permission to the jury to view the chute was itself unlawful. The fact that no issue was taken in relation to the proposed visit by either the prosecution or the defence is somewhat puzzling, although it is likely that neither party considered the proposed visit to be inappropriate or objectionable. It may be the case that the appellant's legal representatives may have been concerned that if the proposed visit was disallowed because of an objection on their part (coupled possibly with a concern that the jury, although absent from the courtroom when that objection was made, would assume the objection had emanated from the defence) would reflect negatively on the appellant in the minds of the jury. Furthermore, at the time when the request was made by the Foreman of the jury, no mention was made of any intended (if indeed it was planned in advance of the visit) staging of a demonstration or a reconstruction.

59. Be that as it may, the conduct of the stone experiment places the event of visiting the location of the chut at an entirely different level. Unknown to the appellant or his legal advisors the jury, or at least a member of the jury, conducted a form of experiment by throwing a stone down the chute. This was apparently done with the knowledge of the learned trial judge who, in any event, properly disclosed it to the parties on their return to court. It is unclear what information the jury expected to learn from the experiment having regard to the evidence they had heard in the course of the trial. A further criticism is levelled at the process which took place by the appellant to the effect that the visit to the chute by the jury was undertaken in the absence of the appellant or his legal advisors. This was due to the fact that the appellant and his legal advisors arrived at the location a little later than the jury, the prosecution and the learned trial judge. While there is every good reason why the appellant should not have been present in the immediate company of the jury while the jury inspected the chute, there was no reason why that inspection could not have been delayed until at least a member of the appellant's legal team was present.

60. In his book *The Criminal Process* Professor O'Malley (at para 20.36) states in a commentary on s. 22 of the Juries Act 1976 the following:-

> *"..While this section provides for a view only, there is no expressed prohibition on the staging of a demonstration or a reconstruction. As the names suggests, a view usually consists of visiting a particular scene; a demonstration usually*

involves an explanation of how an incident occurred, how a particular piece of equipment works or some similar matter, while a reconstruction goes further and tries to recreate, though with the benefit of witnesses, the incident in question. As far back as 1705 Courts were given a statutory power to order a view provided it was considered necessary and proper. Views, demonstrations and reconstructions must be conducted in a manner which is procedurally fair. <u>After all, any one of these events may influence a jury just as much as any conventional piece of evidence tendered in Court and perhaps more so at times</u>". (Emphasis added)

61. The Court is satisfied that the jury ought not to have been permitted to attend the location of the chute in the course of their deliberations in the absence of any application that they do so from either the prosecution or the defence. Of greater concern to the Court however is the fact that the jury were permitted to conduct a stone throwing experiment at the chute. That ought not to have been permitted.

62. The fact that the defence did not take issue with the stone throwing experiment when they subsequently became aware that it had taken place is unfortunate. It may be that they were taken by surprise or did not fully appreciate at the time what had occurred or the potential prejudice that would accrue to the appellant if the matter was not addressed in an appropriate fashion.

63. In the circumstances it is the Court's view that the decision in Cronin should not operate to prevent or curtail this court from considering this ground of appeal. It is in the interests of justice that it do so.

64. The Court is satisfied that the proper course to have been taken by the learned trial judge in the particular circumstances in which these events occurred was to discharge the jury. Accordingly, this ground of appeal must succeed. The Court will quash the verdict of the jury and will in due course hear submissions as to the question of a retrial.