THE COURT OF APPEAL

Ryan P.
Birmingham J.
Edwards J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Joseph Cullen

Applicant

Judgment of the Court delivered on the 20th of January 2015 by Mr. Justice Edwards.

Introduction.

1. This is a case in which the applicant was convicted by the unanimous verdict of a jury on the 3rd of November 2010, following a five day trial in the Circuit Criminal Court, of causing serious harm, contrary to s. 4 of the Non Fatal Offences Against the Person Act, 1997.

2. The case was concerned with an alleged assault by three men, who were said to have been acting in joint enterprise, one of whom was alleged to be the applicant, on a Mr Kevin Byrne in the early hours of the morning of the 2nd of March 2008 at St Helena's Road in the Dublin suburb of Finglas. The injured party suffered a number of injuries in the incident, the most serious of which were injuries to his right lower leg and foot, ultimately necessitating the amputation of his right foot on the 13th of March 2008.

3. Following his conviction, the applicant was sentenced on the 20th of December 2010 to imprisonment for twelve years for the offence in question, backdated to the date on which he went into custody.

4. The applicant appeals against both his conviction and sentence.

Evidence before the jury

5. The injured party is the managing director of a company business. On the night of the 1st of March 2008 he was attending a company function at a bar in Leeson St in Dublin city along with other staff members. The function continued until 2.30am or 3.00 am on the 2nd of March 2008, following which some staff members went on to a nightclub. The injured party, however, decided to go home and he arranged to share a taxi with two other staff members, Warren Edgely and Jackie White who, like the injured party, were going northside.

6. The taxi proceeded first to Beaumont where Warren Edgely was dropped off at his home, and it then proceeded to Finglas where Jackie White was in turn to be dropped off at her home, and it was intended that the taxi would ultimately proceed from Finglas to Swords so that the injured party could be dropped off last at his home.

7. When the taxi pulled up outside Jackie White's home at 13 Hazelcroft Road, Finglas south, the injured party required to use the bathroom. The taxi driver, although requested to do so, was unwilling to wait outside, and so the injured party paid the taxi fare and went into the house with Jackie White. It was a cold night and Jackie White had difficulty putting the key into the door. She kept dropping it, and the injured party picked up the key and helped her in the door.

8. The injured party's evidence was that he had had about five bottles of Corona beer over the course of the night out. He also testified that Jackie White "had some drink taken but was not falling down drunk." However, Jackie White stated in her own evidence that she was "very drunk".

9. The injured party and Jackie White proceeded into the house. The injured party went into a room off the entrance hall and sat down on a settee whilst Jackie White proceeded upstairs. The injured party's evidence was that Jackie went upstairs to use the bathroom first. It was put to the injured party in cross-examination, and it was subsequently confirmed in the evidence of Jackie White, that there was no bathroom upstairs. The injured party responded "I don't know the layout of the house. She said she was going up the stairs to use the bathroom so I assumed that the bathroom was upstairs."

10. The injured party told the jury that about 10 or 15 seconds after he sat down there was a very loud bang at the front door, and he thought that somebody was kicking the front door. Jackie White came "probably halfway down the stairs" and enquired as to what the bang was. There was then another large crash or bang at the front door. The door opened and a man came in. The injured party described the man as wearing an orange padded jacket; as being the same height as himself – about six foot; as wearing "kind of like a skull cap" and as looking "very gaunt around the face".

11. The injured party could not say if Jackie had opened the door or if the door was kicked open, all he could say was that the door had opened. However, under cross examination he stated he assumed that Jackie had opened the door. Jackie White subsequently told the jury that the man in question was her ex-boyfriend Joseph Cullen; that he came into the house under his own steam; that she did not open the door for him; that she did not remember any bangs; and that he must have had a key.

12. In the course of being interviewed by the Gardai while being detained under s.4 of the Criminal Justice Act, 1984, the applicant admitted that it was he who had entered the house, and that he had had a key.

13. The injured party stated in evidence in chief that when the man in the orange padded jacket came in, he looked at him and roared at him two or three times. He stated that the man looked incensed. The injured party denied a suggestion later put to him in cross-examination that he had been kissing Jackie White just prior to this.

14. The injured party's evidence was that the man in question then ran over towards Jackie White who was over by the kitchen doors, and that Jackie said "It's only Kevin from work". The evidence was that the man then went through the double doors into the kitchen and that Jackie followed him. The injured party stated that he then heard a cutlery drawer being opened, and Jackie roaring, in a terrified manner, "No, Joey. Run, Kevin".

15. The injured party got up and ran from the house. He ran out the front door and turned left on to the road. At this point he heard

the man who had been called "Joey" running after him. He was shouting out the injured party's name. The injured party kept running. He had crossed to the other side of the road and then stopped and turned around and faced his pursuer. The man in question was on the other side of the road and was shouting "I'm going to get you, I'm going to …".

16. The injured party told the jury that he turned and ran again, in the direction of Hazelcourt Green, which was a small green area at the top of the road along which he was running. He stated "I made it to the edge of it when I was hit from behind by a car and I went rolling for about 30/40 feet on to that green area". His evidence was that he was knocked to the ground and then was rolling. A car then came up behind him. He stated "three men came from that car, including the man who had been wearing the orange padded jacket, and they proceeded to beat me on the ground". In cross-examination the injured party clarified that he didn't see the three men actually exiting the car. He saw them coming from the direction of the car.

17. The man in the orange jacket "came from the side of the car with two other men", and they punched and kicked the injured party while he was on the ground. He was trying to curl up to stop the beating, which he characterised under cross-examination as "vicious". He was punched in the face, as a result of which he sustained a chipped front tooth, and was kicked at random. It seemed to him to last a long time.

18. The injured party's evidence was that his assailants stopped momentarily and he then got up and started running again. He ran onto a road, and 10 -15 seconds later he was hit by a car again. He recalled being flipped up in the air and coming down and landing on the ground. His evidence was that when he landed on the ground his legs were under the car, which was pinned right up against him. Under cross-examination he elaborated "The car didn't come towards me and strike me. It struck me up in the air and drove on top of me." "It drove over my legs". The injured party felt as if he had lost his right leg. He had complete numbness from the bottom down and shooting pains. Every part of him was sore, but he was particularly conscious of right leg.

19. The injured party told the jury that the three men got out of the car again. He was unable to say from what doors they emerged. They appeared around by the side of the bonnet of the car. One of them was "the man with the orange puff jacket", who he recognised and knew to be "Joey" having seen him, and having heard his name, in Jackie White's house. The other two men were wearing dark coloured clothes. The injured party pleaded with them not to attack him again. One of them then said "Leave him alone, he's had enough". The three men then got back into their car, the car reversed quickly and "did a kind of a U-turn or spin in the road" and drove off in the direction of St Helena's Road.

20. It was suggested to the injured party in cross-examination that one, or perhaps two, of the men were not in the car and that they could have come from behind the car. The injured party stated: "I don't know. There was three I was hit, I was upside down, I was still conscious. The car stopped, the doors opened and there was three people standing either side of the wheel arches or beside the door of the car."

21. Returning to the narrative, the evidence was that the injured party then contacted 999 on his mobile phone but was unable to give the emergency services his exact location. Eventually a passer-by who was walking a dog came to his assistance and that person was able to specify the location for the emergency services. The injured party was removed from the scene by ambulance shortly thereafter. He spent 18 days in hospital and underwent seven operations under general anaesthetic in connection with his various injuries. Ultimately, his right foot required to be amputated.

22. The injured party stated that the car involved was a small car and that he thought that it was beige in colour. He accepted when it was put to him in cross examination that Garda Ní Muircheartaigh, who had spoken to him in the early aftermath of the event, had recorded him as referring to "a white car". He then told the jury that "I thought it was a white-beigey colour", but that "I wouldn't be 100% on the colour".

23. The injured party denied a suggestion put to him by counsel for the applicant that he was mistaken in believing that the man in the house had chased him, or that he had done anything to him.

24. As already alluded to, the jury also heard evidence from Jackie White. She described her recollection of the events of the night in question as being blurry and hazy, and contended that she was confused about it all. She recalled being in the house with the injured party for a few minutes when her ex-partner, Joseph Cullen, who she also described elsewhere in her evidence as "Joey", "came in the door, the sitting room door". She stated that "I just know when Joey come in I think then Kevin left and then Joey went after him. That was it." She stated that the injured party "left quickly" and that Joseph Cullen was "running as well". They went out the door and she remained in the house. She stated in evidence in chief that she did not leave for the rest of the night, but under cross-examination conceded that she had told the guards that she could not remember whether or not she had done so, and that that was so. She added "I thought I went to bed and that was it". When it was put to her that Joseph Cullen, having left the house, didn't get very far from the house and in fact returned to it, Jackie White responded "I just know Joey left the house".

25. Jackie White told the jury that the applicant was her ex-boyfriend, that they had split up six weeks before the night in question and that the last time she had seen him prior to that night had been about two weeks previously.

26. The jury heard evidence from Detective Sergeant Andrew O'Rourke that he arrested the applicant at 11.50 on the 7th of April 2008 at Chancery St, Dublin 7 on suspicion of having committed an offence under s.3 of the Non Fatal Offences Against the Person Act, 1997 in assaulting the injured party on St Helena's Road on the 2nd of March 2008. The applicant was taken to Finglas Garda Station where the the member in charge was satisfied to detain him under s.4 of the Criminal Justice Act 1984 for the proper investigation of the offence for which he had been arrested. The applicant could be lawfully detained on that basis for up to six hours from the time of his arrest. That six hours was therefore due to expire at 17.50 on the 7th of April 2008. However, his initial detention was subsequently extended by order of Superintendent Hartnett, from whom the jury heard on day 4 of the trial, for a further six hours. The extension was granted at 17.46 on the 7th of April 2008.

27. The applicant was interviewed by Detective Garda Colin O'Rourke, accompanied by Detective Garda McDonagh, during the first period of his s.4 detention from 14.02 until 15.29. The format of the interview involved a question and answer session. The interview was recorded on video and, in addition the questions asked and the applicant's responses were recorded in a memorandum of interview. That memorandum was read over to the applicant at the end of the interview, and he signed it. This memorandum was placed before the jury as exhibit 4.

28. In the course of this interview the applicant stated that on the night on the night of 1st of March 2008 into the morning of the 2nd of March 2008 he was in the Bottom of the Hill pub, playing pool, and left it to go down to Jackie White's, whom he characterised as his girlfriend. He stated that he went down first at 12 o'clock but she wasn't in, and went down again at about 2.30 am. He borrowed a friend's car to get down there. It was a green car, "something like a Hyundai". The friend was "Eugene" who "lives up at

Clancy". The applicant stated that he became aware that there was someone in the house with Jackie. He stated "I went into the house and asked what he was doing. He jumped up all defensive, and I chased him up to the front door.

29. The interview continues:

"Question: What happened then?

"Answer: I slipped and fell at the front door, but he kept running up the road, and I went back into the house.

"Question: What did you do when you went back into house, Joe?

"Answer: Me and Jackie started talking. I asked her what was going on, bits and pieces.

"Question: What do mean by bits and pieces?"

"Answer: Asking what was going on, why was he in the house.

"Question: What did she say?

"Answer: I made a mistake; he was only having tea.

"Question: And what happened then?

"Answer: The two of us went up to bed. Before that, I became aware there was a commotion on the road and then just went to bed.

"Question: Do you remember what you were wearing that night, Joe?

"Answer: I think I had runners, tracksuit bottoms and a stripy hoodie on, but it's that ago I can't be sure to tell the truth."

"Question: Did you threaten this man that was in Jackie's house?

"Answer: No, I just chased him out of the house.

"Question: Did you know him?

"Answer: No.

"Question: Had you ever seen him before?

"Answer: No.

30. Later in the course of that interview the applicant was further asked:

"Question: The man in the house with Jackie states he heard a bang at the door. Did you have a key or did breakdown the door?

"Answer: No, I had a key.

"Question: When you came in you were in the sitting room, did you go into the kitchen?

"Answer: No, I ran around to the table to get near to him and I chased him out the door.

"Question: Did you know him by name?

"Answer: No, that chap no. I probably heard of him through her job. I just wanted to know what was going on.

"Question: Where did you leave your friend's car?

"Answer: Right outside the house. I left it running. I just looked in the window and I seen them on the sofa."

31. At this point in the interview Detective Garda O'Rourke, read over to the applicant the statement of Kevin Byrne, the injured party. The applicant was then asked:

"Question: Have you anything to say to that, Joe?

"Answer: No, I don't own an orange puff jacket.

"Question: What about the fact that he says that it was you that chased him and that it was you again that was involved with the other men that assaulted him?

"Answer: I fell on the ground at the gate. I didn't even touch the man. He was kissing her on the sofa. Jackie wasn't even upstairs. I seen what I seen, and Jackie has told me since what had happened. She told me that they had been interrupted on the sofa from what they were doing.

"Question: It's fairly serious?

"Answer: I feel sick, I feel sick. I had nothing to do with that assault. I was led to believe that he got a few slaps. No one deserves that. I heard that there was six people involved, not three.

"Question: Does Jackie know how serious that it is?

"Answer: She's back in work so she would be aware of it.

"Question: Were they in a relationship, Jackie and Kevin?

"Answer: No, I'm with her for seven years. I know what it's about. They went out for drinks. They were drunk. Jackie was locked. He had to open the front door himself. He was all over her when I walked in. I know what I seen.

"Question: So, obviously you were pissed off and went to grab a knife to assault him?

"Answer: I was confused. I am not that type of person. I knocked on the door. I saw them in the house.

"Question: But you seen them kissing. Surely you wanted to sort it out?

"Answer: No, I was confused, not angry. I said, 'What's going on here?' He got up and ran out.

"Question: Is it fair to say that the man is saying that came into the house wearing an orange jacket and that is you?" Do I have that right?

A. That's correct.

Q. "Answer: It could have been me. There were one or two others at my hall door as well.

"Question: Did they go in?

"Answer: I couldn't tell you. He was langered. He is telling you lies. The taxi man didn't want to wait. Sure that's wrong. Jackie has admitted to me what had happened that night. She was drunk. He is her boss. You know what happens at the office parties, you know yourself.

"Question: So, you didn't drive the car at Kevin, who did?

"Answer: I don't know.

"Question: Did you have permission to drive this car yourself?

"Answer: Only to drive down to the house, yes.

"Question: Why did he give you his car? Why didn't you get a taxi?

"Answer: We are friends. I actually went to Eugene's house after the pub. He gave me the car then.

"Question: Would it be a plausible excuse to say that the taxi man wouldn't wait for Kevin because the taxi man was hardly going to sit around in Finglas south if there was a crowd of lads hanging around the corner. He would obviously be afraid?

"Answer: Yes, it is, but I know what he was trying to do. I knocked on the window and I saw them on the sofa. I ran out of the house but fell and went back in.

"Question: But Jackie said that you left the house and she never saw you again that night?

"Answer: But about 20 minutes later myself and Jackie went into Tesco to buy cigarettes.

"Question: But we're not investigating what went on with Jackie and Kevin, we are investigating the assault on Kevin?

"Answer: I know you are but I didn't assault him.

"Question: Why would he say it was you that was hitting and kicking him on the ground, he is being fair. He is not saying anything about you driving the car. He is saying that you were in the car then got out?

"Answer: I don't know why he is saying that.

"Question: So, you just left the car ticking over outside the door, you weren't worried about it?

"Answer: No, it's only a banger. It was bought for €100 or something.

"Question: When did you tell Eugene about his car?

"Answer: The very next day. I don't have his mobile, lost. If I did it I would tell you. There was five or six lads hanging around. There was a Micra used as well. They were flying around in it. I heard all about what had happened the very next day.

"Question: Where did you go the next day?

"Answer: Up to my ma's.

"Question: Where does she live?

"Answer: Adare Avenue.

"Question: Why is Jackie lying to us then?

"Answer: Because it's her boss. I went back into Jackie that night and we made love."

32. Later again in the course of the interview the applicant was asked:

"Question: So, you came home, knocked on the window, saw what you saw, came into the house, asked Jackie and Kevin what was

going on, Kevin ran out of the house and turned left, that's the last time you saw him, then yourself and Jackie went over to get smokes at Tesco, you came in home and that's that?

"Answer: Yes.

"Question: What time did you leave the house the next morning?

"Answer: Around 7.30 am.

"Question: What time did all this happen?

"Answer: Was about 3 am, was it?

"Question: Did you see any ambulance or guards around when you left the house?

"Answer: Jackie said something about an ambulance.

"Question: Did you go down to see what was going on?

"Answer: No." "Did Jackie say anything about going for smokes?" "No".

"Question: Have you anything else to say about all of this Joe?

"Answer: I feel sorry for the man. I feel sick what's happened to him."

33. The applicant was further interviewed in the course of the second period of his detention. This interview was also conducted by Detective Garda Colin O'Rourke, accompanied by Detective Garda McDonagh, and took place from 20.04 until 21.21 on the 7th of April 2008. Once again, the format of the interview involved a question and answer session. The interview was recorded on video and, in addition the questions asked and the applicant's responses were recorded in a memorandum of interview. That memorandum was read over to the applicant at the end of the interview, and he signed it. This memorandum was placed before the jury as exhibit 5.

34. Shortly after the commencement of this interview a statement that had been made to the Gardai by Jackie White on the 2nd of March 2008 was read over to the applicant.

35. The applicant was then asked:

"Question: What do you have to say to that?"

"Answer: She says she is drunk and can't remember anything. She is making it easy for herself, isn't she? Get the tape from the garage and it will show me and her in the garage."

"Question: She is saying that you chased Kevin Byrne out of her house; is that true?

"Answer: I think that she is making it convenient for herself. I know Jackie she is thinking about her job and that is it. She doesn't want to be made out to be this kind of a tramp or that kind of a tramp. I have nothing else to say. It's funny how she can't remember anything else about the night but still she remembers that I was in her house and chased your man out of it.

"Question: You yourself said you were in the house and you chased Kevin Byrne out of the house after you had seen them on the couch; is that right?

"Answer: Garda, can I stop you there. The best thing you can do is to get the tape from Tesco to prove I wasn't involved."

36. The memo then records that there was a general conversation regarding the assault and how it took place. After this, the applicant was further asked:

"Question: "Why do you think that Kevin Byrne will say that the man who chased him from the house was one of the men that was assaulting him down the road moments later after he had been run over by a car?

"Answer: Don't know.

"Question: I don't see why Kevin Byrne would say this unless it was what happened. What do you think?

"Answer: He's just mistaken with the amount of drink he took.

"Question: How do you know how much drink he took?

"Answer: I seen them they were locked.

"Question: Kevin Byrne is positive that the man that chased him from the house was one of the men that came from the car that knocked him down and then began to assault him. Is this true?

"Answer: No.

"Question: Do you know who the other men were that also assaulted Kevin Byrne?

"Answer: No.

"Question: Were you driving the car that knocked Kevin Byrne down twice?

"Answer: No.

"Question: But you believe that it was Eugene Bowen's car that was in your possession that was used to knock Kevin down and almost kill him and leave him with injuries that resulted in him losing his leg. How do you explain that?

"Answer: I can't.

"Question: Is it true that you had possession of this car, 95D50274, a green Suzuki motorcar?

"Answer: Yes.

"Question: And you say you weren't driving it when it knocked Kevin Byrne down?

"Answer: Yes.

"Question: Who was driving it then, Joe?

"Answer: I don't know.

"Question: Do you care was driving it?"

"Answer: From the injuries I hear about the man I do, yes, I think it's wrong.

"Question: Joseph, is it fair to say that the evidence that we have at hand suggests that you chased Kevin Byrne down Hazelcroft Road, that you then were in a motorcar that knocked him over. That you got out of the car and began assaulting Kevin Byrne along with the two other men. That you along with the two others then got back into the car and drove at Kevin Byrne again, again knocking him down?

"Answer: I don't know nothing about that."

37. The jury also received evidence that while the applicant was in s.4 detention on the 7th of April 2008 Detective Inspector Fox had granted an authorisation at 17.35 on that date for the applicant to be photographed and fingerprinted. The jury further received evidence that, pursuant to this authorisation, the applicant's photograph was taken by Detective Sergeant O'Rourke during the second six hour period of his detention. A print of the photograph was placed before the jury as exhibit 3. The prosecution relied on this photograph as illustrating the applicant's appearance not long after the incident, i.e., on the date of his arrest, having regard to the injured party's description of the man in the orange padded jacket as having been "gaunt." In his closing speech counsel for the prosecution specifically invited the jury to consider the photograph in that context.

38. Finally, the jury received medical evidence in the form of two statements placed before them in reliance upon s.21 of the Criminal Justice Act, 1984 from Dr Shahab Khalil and Dr Peter Keogh, respectively, concerning the specifics of the injured party's injuries.

The Applicant's Appeal Against His Conviction

39. Although the Notice of Appeal filed in this case raised six grounds of appeal against the applicant's conviction, the Court was informed by counsel for the applicant at the commencement of the hearing that the appeal would be focused primarily on one ground, namely the refusal of the learned trial judge to grant a direction, which was ground No 6 in the Notice of Appeal. He then clarified that, as his argument would incorporate, in part, a complaint that up to the point at which a direction had been applied for there had been no indication by the prosecution that they were seeking to rely upon the doctrine of joint enterprise, which complaint had formed the main basis of ground No. 5 in the Notice of Appeal, the applicant's appeal would in truth be based upon a combination of grounds No's 5 and 6 in the Notice of Appeal.

40. Ground No 5 in the Notice of Appeal had been pleaded in terms that the trial Judge had erred in permitting the doctrine of common design to be introduced to the jury by the prosecution in its closing speech at the end of the case. Ground No 6 in the Notice of Appeal was pleaded in terms that the learned trial Judge erred in refusing to grant a direction at the close of the prosecution case.

41. At the point in the case at which the application for a direction was made there were two counts on the indictment. Count No 1 charged the applicant with causing serious harm contrary to s.4 of the Non Fatal Offences Against the Person Act 1997. The particulars pleaded in respect of that offence were that the applicant "on the 2nd day of March 2008 at St Helena's Road, Finglas, Dublin 11, in the county of the city of Dublin, intentionally or recklessly caused serious harm to Kevin Byrne". Count No 2 charged the applicant with assault causing harm, contrary to s.3 of the Non Fatal Offences Against the Person Act 1997. The particulars pleaded in respect of that offence were that the applicant "on the 2nd day of March 2008 at St Helena's Road, Finglas, Dublin 11, in the county of the city of Dublin, assaulted Kevin Byrne causing him harm". The application for a direction was in respect of Count No 1 only.

42. There were two main components to the application. The first was that, as the prosecution had not identified up to that point in the trial whether they were contending that what had occurred was all one incident in respect of which alternative counts had been preferred, or two discrete incidents occurring within a short space of time in respect of which separate charges had been preferred, the accused was entitled to approach the matter on the basis that he was in peril of being convicted on both counts. It was contended that, as it was open to the jury to consider that there had an initial incident at Hazelcourt Green in respect of which a s.3 charge had been preferred, and another more serious incident at St Helena's road in respect of which the s. 4 charge had been preferred, he was entitled to argue that, in respect of the s.4 charge, the prosecution had failed to establish that there was sufficient evidence as to the applicant's participation in the causing of serious injury, and accordingly that that count should be withdrawn from the jury. The second component was that it was urged that, in examining the evidence relating to the s.4 charge, the court should not consider whether there was evidence to support the notion that the applicant had been party to a joint enterprise, because the doctrine of joint enterprise had neither been introduced to the jury, nor mentioned in the case at all, up to that point in time.

43. The principles governing applications for a direction to the jury to find the accused not guilty were set out by the English Court of Appeal (Criminal Division) in *R v Galbraith* [1981] 1 W.L.R. 1039. They have been consistently followed in Ireland. Those principles were framed by Lord Lane in the following terms:

> *"(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 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."

44. The Court has considered both the indictment and the evidence in the present case, and has concluded that the charges were preferred as alternatives and that the applicant did not have a legitimate basis for believing that he was in peril of being convicted on both counts. The counts on the indictment did not differentiate between acts committed at Hazelcourt Green and those committed at St Helena's Road and the Court considers that they would have done so if it had been intended to prosecute in respect of separate incidents. In addition, while the *actus reus* of the s.4 offence was only completed on St Helena's Road at the point at which the car drove over the injured party's right leg and foot thereby causing the serious injury, the reality of the case was that the offending conduct, consisting as it did of the pursuit and serial assaulting of the injured party culminating in his leg being seriously damaged, comprised one continuing transaction. The *res gestae* of the offence began in Jackie White's house when the man in the orange jacket ran out the door after the injured party, pursued him down the road while shouting and roaring threats, joined up with two others and having done so participated with them in kicking and punching the injured party on the ground at Hazelcourt Green, the injured party having been struck by a car for the first time, and culminating shortly thereafter in the events that occurred around the corner at the top of the T junction on St Helena's Road.

45. In the Court's view it would have been readily apparent to the applicant, and his legal team, upon a consideration of the book of evidence, the indictment and having regard to the run of the case up to the close of the prosecution case, (i) that the applicant faced alternative counts rather than separate counts, and (ii) that joint enterprise was being alleged and would be relied upon.

46. The Court considers that in circumstances where the learned trial judge correctly adjudicated that the two counts on the indictment were alternative counts pertaining to a single course of offending conduct, and in due course directed the jury accordingly during her charge, any apprehension by the applicant, whether reasonably or unreasonably held, that he was in peril of being convicted on both counts was baseless and rendered nugatory.

47. There is no rule of evidence or of law which requires that a jury be informed at the outset of the case, or at any point before closing speeches and the judge's charge, that the prosecution will be relying on joint enterprise, and in fairness counsel for the applicant accepted before this Court that that is so. The Court accepts that an accused's entitlement to fair procedures mandates that there should not be trial by ambush, and that an accused should know in advance the case that he is required to meet. However, there was no such thing in this case. It was clear from the injured party's statement in the book of evidence, and from the evidence he gave in court, that he had been consistently saying from the outset that he was assaulted by a group of three men acting together, and that one of those three was a man in an orange padded jacket that he had seen in Jackie White's house only moments before the attack, whom Jackie White ostensibly knew and had referred to as "Joey", and who had pursued him out of the house and down the road. The entire run of the case was on that basis. The applicant cannot credibly claim to have been embarrassed or unprepared when counsel for the prosecution eventually stated in terms in the course of submissions on the direction application that he was relying on joint enterprise and that, if the matter went to the jury, he proposed to address the jury on that basis. There was no unfairness such as would have required intervention or action by the learned trial judge.

48. Notwithstanding the able submissions of counsel for the applicant, the Court considers that the prosecution evidence, taken at its highest, was such that a jury properly directed could convict upon it in respect of the s.4 count. Indeed, taking the most optimistic view of the matter there was a strong case against the applicant. The injured party was a clear historian. He had recognised one of his assailants as being a man in an orange padded jacket that he had seen in Jackie White's house only moments before the attack, and whom she ostensibly knew and had referred to as "Joey", and who had pursued him out of the house and down the road. Jackie White had confirmed that the respondent had called, found the injured party in the house and that he had run out of the house after the injured party. Further, the applicant although not admitting to assaulting the injured party, did admit, *inter alia,* to calling to the house, to finding the injured party there, and to chasing him from the house.

49. Further, a car was used in the attack and there was the circumstantial evidence that the applicant had available to him a car which he had borrowed from his friend Eugene and which he had left parked on the street just outside Jackie White's house. That having been said, the evidence did not go so far as to establish that the car that had been borrowed by the applicant was the one that was actually used in the attack. Indeed, the borrowed car was green in colour and the injured party, although he was not 100% sure of the colour of the car that had struck him, believed that it was beige or white beigey in colour.

50. Be that as it may, it is undoubtedly the case that some car was used to assault the injured party and that it was in the part of the incident where a car was driven over the right lower leg and foot of the injured party on St Helena's Road that the devastating injury that ultimately necessitated the amputation of his right foot was caused. While the evidence did not establish that the accused was the driver of that car, nor could it be inferred that he was the driver, three men including the man in the orange jacket, whom the prosecution says was the applicant, were seen at the side of the car after it first struck the injured party at Hazelcourt Green, before they each then engaged in kicking and punching the injured party while he was on the ground. The same three men were then seen again, less than a minute later, after the injured party had been struck by a car for the second time on St Helena's Road, once more in the vicinity of the car in question. Indeed, the injured party said initially that the three men got out of the car. He agreed under cross-examination that he could not specify from what door or doors they had emerged. He was invited to agree that in the circumstances the possibility that one or two of the men in question might have come from behind the vehicle could not be foreclosed upon. He did not in fact indicate agreement with this. He said "I don't know". He was, however, adamant that "The car stopped, the doors opened and there was three people standing either side of the wheel arches or beside the door of the car."

51. While it is correct to say that it is the law that mere presence with others at the scene of a crime does not, in and of itself, establish participation in a joint enterprise, the totality of the available evidence provided a clear basis for a jury to possibly infer that all three men were acting in concert, and that the common design to which they had subscribed embraced driving a car at, and over, the person of the injured party in an attempt to do him harm.

52. Although the prosecution depended heavily on the evidence of the injured party, a review both of his evidence in chief and cross examination reveals that he stood up well to cross examination and was substantially consistent in his evidence. While it is true to say that some minor inconsistencies were exposed in cross-examination, little real progress was made in undermining the evidence given in chief. For the most part the injured party stuck to his account, and was clear and unequivocal in his testimony.

53. The main complaint made by counsel for the applicant with respect to the refusal to grant a direction is that, because it was elicited during the trial that the injured party was unable to say whether the applicant had emerged from the car which had struck him, there was no evidence as to the participation of the applicant in the assault resulting in serious injury to the injured party. The Court is unimpressed with that complaint and considers that it does not stand up to critical analysis. While it correct to say that the injured party, while on the ground having been struck for the first time by the car, did not clearly see the man in the orange padded jacket, or indeed any of the other assailants, actually exiting the car, he nevertheless gave clear evidence that the man in the orange jacket "came from the side of the car with two other men", and they punched and kicked the injured party while he was on the ground. He further gave evidence of getting up and being further pursued and of being struck again by a car. After he had been struck the second time, and seriously injured, he was kicked and beaten again by three assailants, amongst whom he clearly recognised the man in the orange padded jacket. In regard to how the three men came to be there that his evidence was that "The car stopped, the doors opened and there was three people standing either side of the wheel arches or beside the door of the car." One of them then said "Leave him alone, he's had enough" and the injured party saw all three men back into their car, the car reversing quickly, doing a kind of a U-turn or spin in the road, and driving off in the direction of St Helena's Road. In the Court's view, even in the absence of evidence of the injured party's assailants exiting the car, the jury had a clear basis for inferring that the said assailants, acting in joint enterprise, had pursued the injured party in a car and had used that car in the course of assaulting and causing him serious injury. While joint enterprise might not have mentioned up to that point in the case, it did not have to be mentioned, and the clear run of the case was such that nobody could have been under any illusions but that the prosecution was at all times relying on joint enterprise.

54. The Court is not disposed to uphold the appeal, and is satisfied that the learned trial judge was correct in allowing the s.4 count to proceed to a jury. It was manifestly a case to be considered and decided by a jury.

The Applicant's Appeal Against His Sentence

55. The applicant contends that the sentence imposed was excessive in all the circumstances of the case, and that to impose such a sentence represented an error of principle in itself.

56. At the sentencing hearing on the 29th of November 2010 the learned trial judge heard evidence from Detective Garda Colin O'Rourke. In the course of his evidence he produced a victim impact statement from the injured party which was accompanied by a medical report of Mr Brian Kneafsey, Consultant Plastic and Reconstructive Surgeon.

57. Mr. Kneafsey states that the injured party was initially treated for multiple fracture and severe crush injuries to his right lower foot and leg at James Connolly Hospital. He was initially treated by a Consultant Orthopaedic Surgeon in conjunction with Vascular Surgeon. He underwent several surgeries there and multiple pins were inserted in his foot. However, there was concern about the extent of the injuries and vascular compromise and the opinion of Mr. Kneafsey was sought. Mr. Kneafsey assessed the injury and arranged for the injured party's transfer to Beaumont hospital in order to fully assess the foot in theatre with a view to carrying out a major complex flap reconstructive surgery in order to try to salvage the foot.

58. During surgery at Beaumont hospital, Mr. Kneafsey found that there had been extensive de-gloving of the entire sole of the foot and that there was an extensive amount of de-vascularised muscle throughout the foot including the sole and dorsum. There was severe ischaemia to the muscles of the foot. The entire first, second and third toe were all non-viable and severely ischaemic. There were multiple fractures of the bones of the right foot. The medial plantar artery, while intact, was very damaged and the medial plantar nerve had been completely avulsed off. It was obvious that the foot might not survive due to the extent of the injuries. Extensive debridement was carried to the obviously necrotic wound, muscles and tissues.

59. Over succeeding days the injured party underwent three further debridement procedures. However, it became evident that the foot could not be saved. The injured party was transferred back to James Connolly hospital where a Syme's amputation of his foot was performed. Following this the injured party was in hospital for some further weeks and eventually went home on crutches. He was eventually fitted many months later with a prosthesis for his foot, returned to work part initially and is back to working full time.

60. The injured party continues to have pain, limited mobility, significant problems with his prosthesis, cold intolerance and psychological and psychiatric problems. According to Mr. Kneafsey the injured party will probably require further amputation below the knee, once his tibial fracture has healed sufficiently, in order to improve his mobility and to reduce problems with prosthetics.

61. The injured party, who was 42 years of age at the date of sentence hearing, stated that the assault has had a profound effect on his life and that of his family. He underwent a total of six operations from the 2nd of March to the 12th of March 2008 in effort to save his foot. He found the days lying in hospital truly frightening. He went from being an active, healthy 39-year-old man who lived a full life to someone signing a consent form for a foot amputation. He stated that waking up after the amputation was numbing in both body and spirit and the pain after the amputation was intense, unlike anything he had experienced before. Looking down at the bandaged stump made him cry and he knew he would never be able to walk again unaided or do the normal things previously taken for granted. Most of all he was concerned about the effect it would have on his ability to work again and to provide for his family. In some ways he felt his life was over.

62. After leaving hospital, he became increasingly withdrawn and depressed. He couldn't look at the stump without its bandages and had to avert his head when it was being dressed. He had nightmares every night reliving the sequence of events of the night of the assault. He became afraid of people, afraid of leaving of his house, afraid to be alone in his house and started to have suicidal thoughts. He found he was unable to cope and, in June of 2008, suffered a breakdown as a result of which he was hospitalised for six weeks. In September of 2008, he was fitted with a prosthetic foot. However, he states that the stump is off-centre and the bottom of his ankle bone remains which rubs against the prosthetic foot and causes enormous discomfort, meaning he can only walk for periods of 5 to 10 minutes before having to rest. The nerve endings in the heel remain, causing pain and a sense of crushing. He is limited also in the type of prosthesis he can wear. His foot doesn't bend which causes difficulty going up and down inclines and stairs. He still has pain on a daily basis. The thoughts of further amputation surgery frighten him. Moreover it is by no means certain that the likely second amputation procedure will be successful in resolving his continuing physical sequellae. He can no longer do the physical things he enjoyed, such as going for walk, playing golf, swimming in the sea or playing football with his son. He tires easily because of the constant pain and finds it hard to work for long periods. He needs to plan every day around the distances he intends to travel. He does not look to the future with much optimism.

63. The Court heard evidence that the applicant was born on the 20th of August 1968, is originally from the Coolock area, and had resided for some time at Hazelcroft Road with Ms White, although he was not residing there at the time of the incident. He is the father of two children who, in November 2010, were aged 14 and 17 respectively. The Court was told that he was a labourer by occupation, but out of work due to the downturn in the economy.

64. The applicant has twenty four previous convictions recorded between February 1987 and January 2009. Most of them were dealt with in the District Court as minor offences. These included a conviction under the Vagrancy Act, a public order conviction, a number of theft convictions, a number of road traffic convictions including convictions under s. 112 and s. 113 of the Road Traffic Act, 1961, and a fairly recent conviction in 2009 for handling under the Criminal Justice (Theft and Fraud Offences) Act, 2001 which was dealt with by way of a fine.

65. However, there also a number of matters dealt with on indictment before the Circuit Court. They included another offence under s. 112 of the Road Traffic Act for which he received a three year sentence in 1988. Further, in 2000, the applicant has two recorded convictions for possession of drugs for sale or supply contrary to s.15 of the Misuse of Drugs Act 1977 as amended, giving rise to a sentence of three years and six months imprisonment, a portion of which (approximately half) was suspended upon a review. He also has two convictions for production of an instrument under s. 11 of the Firearms and Offensive Weapons Act, 1990 for which he received sentences of four months and nine months respectively.

66. Having heard a plea in mitigation, the learned trial judge said:

> *"The Court is dealing here with a section 4, causing serious harm, and this went on for approximately five days in the Circuit Court. And Mr Cullen was convicted by a jury of the section 4 assault on the 02/03/2008 at St Helena's Road in Finglas, and Detective Garda Colin O'Rourke outlined the evidence which was given in court. And the injured party was hit by a car and then kicked and punched, and then was struck a second time by a car, and where the car was driven over him. And three men were involved in each incident and Mr Cullen was identified as one of those men. It's correct to say that the identity of the driver of the car was not given in court and it was not the evidence of the injured party that Mr Cullen was driving the car, but he was there when the first and second incidents occurred and in -- and his evidence was given in court about his involvement in that. He sustained injuries in the first incident and he sustained injuries as a consequence of the second incident, and the Court has the benefit of the medical reports in this regard, having a very serious injury of his right foot being amputated.*
>
> *The -- Mr Cullen was born in 1963 and has two children and he has 24 previous convictions and it was put back because of a difficulty about recollection about the conviction in the mid-1990s. The Court is taking into account the fact that he has 24 previous convictions and he doesn't come before the Court as a first time offender.*
>
> *The aggravating -- the Court has the benefit of the victim impact report and the Court is taking into account the evidence of the injured party and the contents of that victim impact report. The aggravating factors, it appears to the Court, are the very serious nature of the charge. This was a vicious assault; it was a crime of violence. The Court is taking into account the consequences for the injured party and the Court is taking into account, not as an aggravating factor, but taking into account again that he isn't coming before the Court as a first-time offender but stresses that is dealing with this case of the section 4 assault and the evidence given by Detective Garda Colin O'Rourke on the sentencing hearing. The Court is taking into account, because I have been asked to take into account, that the review -- and it did not require a review of sentence in -- on that 19 -- mid-90s charge.*
>
> *The mitigating factors appear to the Court are the family background of Mr Cullen and he lives at home with his parents and he has had a relatively good employment record.*
>
> *The Court has to mark the seriousness of the offence but also take into account the personal circumstances of Mr Cullen and in the Court in so doing will impose a prison sentence of 12 years imprisonment."*

67. The sentence was backdated to the date on which the applicant went into custody.

68. The applicant contends that the sentence imposed by the learning sentencing judge was excessive, and disproportionate to other sentences imposed for comparable assaults, and that by imposing such a sentence the learned sentencing judge was guilty of an error of principle. In particular, the applicant complains that it was an error of principle to place this offence at the higher end of the spectrum for the offence of assault causing serious harm. It was further submitted that to do so was inconsistent with the sentencing guidance offered in the *People (Director of Public Prosecutions) v Fitzgibbon* [2014] 2 I.L.R.M. 116, where the Court of Criminal Appeal indicated three sentence ranges:

> *"However, in the absence of … unusual factors, a sentence of between 2 and 4 years would seem appropriate, before any mitigating factors are taken into account, for offences at the lower end of the range. A middle range carrying a sentence of between 4 and 7 ½ would seem appropriate. In the light of authorities to which counsel referred, and which have been analyzed in the course of judgment, it seems that the appropriate range for offences of the most serious type would be a sentence of 7½ to 12½ years."*

69. Counsel for the applicant submitted that this is not a case that is properly rated as being at the upper end of the range which is appropriate to offences of the most serious type i.e. the range between 7½ years and 12½ years. He has submitted that this assault should be more appropriately rated as falling in the upper end of the middle range, i.e., the range between 4 and 7 ½ years, in all the circumstances including that the applicant was not identified as the driver of the motor vehicle.

70. It was further submitted that the learned sentencing Judge placed excessive weight upon the aggravating factors in the case rather than appropriately balancing both aggravating and mitigating factors within this context. In particular, reliance is placed on the fact that the appellant did not have any previous convictions for assault and that he was a person who had availed of an opportunity afforded to him previously in the context of a review of the sentence imposed upon him for the s.15 drugs offences referred to above. It is suggested that in the circumstances the learned sentencing judge did not have sufficient regard to the sentencing objective of rehabilitation, that he failed to get the balance right as between deterrence and rehabilitation, and that he erred in failing to consider suspension of any portion of the sentence.

71. In the Court's view this case was properly characterised by the learned sentencing judge as involving a vicious assault. There were significant aggravating factors and these were correctly identified by the learned trial sentencing judge as the serious nature of the charge, i.e., the specific offending conduct in this case, and the very severe injuries caused to the injured party and the

consequences for him and the way in which he has been affected in his life.

72. That having been said, the learned sentencing judge in imposing a sentence of 12 years imprisonment after taking into account the mitigating factors that she identified, principally the applicant's family background and circumstances, and his relatively good employment record, appears to have rated the offence as belonging not just in the category of the most serious and culpable manifestations of the s.4 offence of assault causing harm, but as meriting a sentence at the upper end of the indicative range set out by the Court of Criminal Appeal *in People (Director of Public Prosecutions) v Fitzgibbon*. The Court considers that notwithstanding the very serious nature of the offence in the present case, and the devastating effects of the injury perpetrated on the injured party, the learned sentencing judge was in error in placing the case at the upper end of the sentencing range appropriate to the most serious and culpable manifestations of the offence in question. The Court considers that while the learned trial judge could not be criticized for regarding the offence as being in the uppermost of the three indicative ranges if, after taking into account aggravating factors and before taking into account mitigating factors, she had so assessed it, but that she was in error in effectively rating it, after mitigating circumstances had been taken account of, as being at the very upper end of that range. Though this is a very bad case indeed, it could not be regarded as amongst the worst manifestations and most culpable of s. 4 offences, particularly after mitigating circumstances were taken into account.

73. In so far as culpability is concerned, there was relatively little that could be taken into account by the learned sentencing judge by way of mitigation. The applicant had fought the case and therefore was not entitled to the mitigation that is usually associated with a plea of guilty. Furthermore, the applicant had twenty four previous convictions, including a number for indictable matters, and had been to prison on a number of occasions in the past. While it was true to say that none of his previous convictions were for assaults, he could not be regarded as a person coming before the court as a first time offender and the learned sentencing judge was correct in not regarding him as a first time offender. However, the applicant ought to have been afforded some mitigation on the basis that the attack appears to have been spontaneous rather than pre-planned, and also on the basis that the evidence did not establish the applicant to be the actual driver of the vehicle that drove over the injured party, and there was no basis for inferring that he was the actual driver. The failure to take account of these factors, which speak to the culpability of the individual offender in this case, was also an error of principle.

74. The Court does not agree that the learned sentencing judge was in error in failing to consider suspending a portion of the sentence that she intended imposing, in the interests of rehabilitation. It is true that the applicant had been afforded some leniency in the past when he was released from custody, following a sentence review, midway through a sentence of three years and six months that had been imposed on him for two s.15 drugs offences. However, while he did not re-offended again during the period of the suspension of his sentence, nor at all in so far as drugs are concerned, he has re-offended in respect of other matters since his suspended sentence elapsed. The Court considers that the fact that he has re-offended having previously been given a chance would make it difficult to justify the taking of a chance on him again. Taking those circumstances into account, in conjunction with the very serious nature of the offending conduct, the Court considers that the learned sentencing judge was entitled to view the case as meriting an immediate and substantial custodial sentence without suspension of any portion of it.

75. In circumstances where the Court has identified errors of principle in the original sentencing of the applicant it will set aside the sentence of 12 years imposed upon him and proceed to impose the appropriate sentence as of this date.

76. Without this Court having prejudged either the conviction or sentence appeals, the Court invited counsel for the applicant at the end of the appeal hearing to place before the Court, on an entirely contingent basis, any new material that the applicant would wish to have taken into account in the event of it being necessary for the Court to proceed to sentence the applicant afresh.

77. The Court has received a number of additional documents that the applicant wishes to have taken into account, including a report from the Governor of Wheatfield Prison, and a large number of certificates in respect of courses he has successfully completed while in prison. The picture is a positive one. The applicant is clearly getting on well in prison. He appears to be a model prisoner, and in particular is attempting to address his anger management issues. The Court notes with particular approval his successful completion of a number of stages of an "Alternatives to Violence" program, and his engagement with counselling services offered to him.

78. The Court takes into account the entirety of the evidence that was given in the Circuit Court at the sentence hearing. It further takes into account the aggravating circumstances, which were correctly identified by the learned sentencing judge as being principally the serious nature of the offending conduct in this particular case, and the injuries to and effects on the victim. The Court rates the offence as belonging in the middle of the highest of the three indicative ranges identified in *People (Director of Public Prosecutions) v Fitzgibbon*, before any account is taken of mitigation.

79. The Court takes account of the mitigating factors identified by the learned sentencing judge. The Court further takes account of the fact that the attack appears to have been spontaneous rather than pre-planned, and that the evidence did not establish the applicant to be the actual driver of the vehicle that drove over the injured party, and there was equally no basis for inferring that he was the actual driver. The Court also notes and further takes into account that, belatedly, some mercy was shown to the injured party by his assailants at the point at which one of them said "Leave him alone, he's had enough". In accordance with established jurisprudence the Court also takes into account the new material proffered on behalf of the applicant.

80. Taking all of the evidence into account the Court considers that a sentence of 9 years imprisonment is the appropriate sentence in this case, backdated to the date on which the applicant went into custody.