THE COURT OF APPEAL

[217/18]

The President
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND –

LAURENCE CARTHY

APPELLANT

JUDGMENT of the Court delivered on the 29th day of March 2019 by Ms. Justice Kennedy

Introduction
1. This is an appeal against conviction concerning the conviction of the appellant in Naas Circuit Court on 26th October 2017 for the offence of assault causing harm, contrary to section 3 of the Non-Fatal Offences Against the Person Act, 1997. The appellant was sentenced on 2nd July 2018 to three years' imprisonment with 18 months suspended.

Background
2. The injured party in this case is the appellant's ex-wife. On the night of 5th May 2016, she woke up to find a man's hand over her face and was pushed from the bed to floor where she managed to escape. She gave evidence that she was able to identify the intruder as the appellant by his voice when he uttered the phrase: - "It's just because I miss you so much."

3. Following a call from a neighbour, two Gardaí called to the injured party's house that night. They were informed that the appellant had committed the assault and the next afternoon they met with the appellant and took him to Leixlip Garda Station. They did not interview the appellant and later charged him in respect of the assault.

Grounds of appeal
4. The appellant has put forward the following six grounds of appeal:

> 1. The learned trial judge erred in refusing to withdraw the case from the jury, on the application on counsel on the conclusion of the State's case;
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> 2. The learned trial judge erred in principle in refusing to discharge the jury following the admission of inadmissible evidence regarding the existence of a "safety care plan" pertaining to the Accused by state witnesses and following an application from counsel to discharge the jury, consequent on their asking questions as to what the "safety care plan" was and why it was in place;
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> 3. The learned trial judge erred in law in applying the test application to prohibition in judicial review as the standard for determining whether the case should be withdrawn from the jury during a criminal trial;
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> 4. The learned trial judge erred in refusing counsel's application for an adjournment to allow the applicant to comply with the Court's requirement to present evidence as to what information could have been sought out by Gardaí to demonstrate a "real risk of an unfair trial", as required by the Court;
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> 5. The learned trial judge erred in fact and law in holding that the voice identification evidence given by the injured party was supported by other evidence;
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> 6. The learned trial judge erred in law in holding that hearsay accounts of the injured party having identified the applicant as her assailant amounted to evidence of identification.

Submissions of the parties

Voice recognition evidence
7. During the trial, the injured party gave evidence that she recognised the voice of the assailant as that of the appellant, describing the following exchange: -

> "'Is that you Lar, really?" And he was up against my ear and he said, "It's just because I miss you so much"'

The injured party went on to say: -

> "I knew it was him. You know, I knew the way he was breathing, whatever grunt or whatever…"

The trial judge, in his charge, gave the following warning in relation to the recognition evidence:

> "With regard to the evidence, in cases where there is evidence of a recognition, visual or voice, where such evidence is adduced and is relied upon by the State, the prosecution, and it is challenged by the accused, as in this case. I am referring to the conversation alleged to have taken place which commenced with the question, "Is that you, Lar?" and the replies given to it. Where such evidence is adduced and is being relied upon, I must say to you that you should be especially cautious before accepting such evidence of recognition as being correct. But if after careful examination of such evidence, in the light of all of the circumstances and with due regard to all the other evidence in the case, you feel satisfied, indeed convinced beyond reasonable doubt, of the correctness of the recognition by the alleged victim of the voice, you are at liberty to act upon that evidence. Quite simply, people who think, or are even certain, that they recognise someone's voice can make a mistake; and all I'm saying to you is to remind yourselves of that fact when considering the evidence."

8. The appellant submits that the reliance on this voice recognition evidence renders the conviction unsafe. The appellant submits that the trial judge did not have due regard to the dangers of the voice recognition evidence, particularly in relation to a "lay listener" and the warning given to the jury was not sufficiently strong in circumstances where the case wholly or substantially rested on the voice recognition evidence. The appellant relies on the case of of *DPP v. O'Brien & Stewart* [2015] IECA where the Court, in considering voice recognition evidence, stated at para 52: -

> "if the trial judge can be satisfied that the controversial evidence is capable of being adequately tested then it may be safely admitted…".

The appellant submits that the evidence in this case could not be so tested and, unlike *O'Brien and Stewart*, there was no independent evidence available to the jury which counteracted the dangers of the voice recognition evidence.

9. The respondent submits that in general, recognition evidence is more reliable when there is a close bond between the parties and in this case the parties had known each other for seventeen years. The respondent submits that the two points of recognition i.e. the grunts and the uttered sentence were sufficient evidence and furthermore, the witness was thoroughly cross-examined on her recognition of the appellant's voice, and thus the evidence was adequately tested.

Sparseness of evidence and the failure to seek out evidence

10. The appellant submits that the Gardaí failed in their obligation as laid out in *Dunne v. DPP* [2001] IEHC 45 and *DPP v. Braddish* [2001] 3 IR 127 to seek out and obtain evidence with a potential bearing on the case. In particular, the appellant points to the failure of the Gardaí to attend the home of the appellant until the next day; the lack of forensic testing in relation to the injured party, the site of the assault and the appellant; the lack of CCTV; the failure to take photographs and the decision of the Gardaí not to interview the appellant.

11. The appellant submits that the decision of the Gardaí not to interview the appellant effectively compelled the appellant to give evidence in order for him to put across his version of events as he had been given no previous opportunity to do so.

12. The appellant submits that in respect of all of the above, this failure to investigate led to a scarcity of evidence which, when coupled with the weaknesses of the voice recognition evidence, should not have allowed the case to go to the jury

13. The respondent refers, in written submissions, to Heffernan and Ní Raifeartaigh in *Evidence in Criminal Trials*, where the authors sought to summarise the principles in this area and two points are of particular relevance at para 11.150: -

> "Exceptionally the obligation resting on the Gardaí may go beyond simply retaining and preserving evidence and extend to seeking out evidence that may assist the defence. However, the Courts have not laid any general obligation on the Gardaí to seek out and take possession of evidence.
>
> 4. Expectations as to what is reasonably required of the Gardaí are tempered by considerations of necessity and practicality in contemporary policing. Thus, the duty must be interpreted in a "fair and reasonable" and can't be construed as requiring the Gardaí to engage in a "disproportionate commitment of manpower and resources in an exhaustive search for every conceivable kind of evidence"

14. In light of such, the respondent submits that given the time of the early morning when the Gardaí called out, and the fact that they contacted the appellant later that day, it is difficult to be critical of the subsequent investigation by the Gardaí where they had established that there was no break in of the house. Although they did not interview the appellant they charged him almost immediately and the Gardaí confirmed there was no CCTV available, though they had sought it out.

15. The appellant advances the argument that the matter ought to have been withdrawn from the jury at the close of the prosecution case in circumstances where the only evidence against the appellant was that of the voice recognition evidence by the appellant's ex-wife and where the Gardaí had conducted an inadequate investigation; the reliability of the recognition evidence could not properly be tested. Consequently, it is submitted that it was unsafe to allow the matter to be considered by the jury. In oral submissions; some discussion took place as to whether the appellant was taking issue with the admissibility of the voice recognition evidence or whether the issue concerned the failure of the trial judge to grant a direction. Ultimately, it was accepted on behalf of the appellant, that the voice recognition evidence was relevant and probative.

16. As a result of the foregoing; namely the voice recognition evidence and the sparseness of evidence; it is advanced on behalf of the appellant's that the evidence of the prosecution contained inherent weaknesses rendering it so infirm that no jury properly directed could convict on the evidence. Furthermore, it is advanced that in assessing the application as to whether the case should be withdrawn, the trial judge applied the incorrect standard. On the latter issue, it is contended that the trial judge applied the civil standard of proof such as in the instance of an application for judicial review and moreover, where the judge refused the appellant a brief adjournment in order to call evidence on this issue, the appellant was denied a fair trial.

17. The respondent submits that the matter was properly left to the jury to decide.

Inadmissible evidence
18. During deliberations, the jury asked several questions of the Court in relation to the evidence. The first of these questions concerned passing references made by two witnesses to a "safety care plan" in respect of the appellant's children. The jury were directed to ignore this evidence.

19. The second question asked by the jury related to the timing of the service of a notice of alibi by the appellant, but this was not pursued on appeal.

20. The appellant submits that the answers by the trial judge to the questions of the jury were insufficient and the trial judge erred in refusing the appellant's application to withdraw the case at that juncture.

21. The respondent says that the response of the trial judge to the jury's question regarding the safety care plan was pragmatic and there can be no meaningful criticism of such.

22. In relation to the alibi, the respondent submits that the trial judge was wholly within his competence to decide not to have further evidence on the point in the middle of the jury's deliberations.

Grounds 1, 3 and 4
23. These grounds can be taken together. The appellant contends that the trial judge erred in refusing to withdraw the case from the jury, applied the incorrect legal test in his determination and erred in refusing a brief adjournment.

The evidence
24. In order to properly consider these grounds, it is necessary to refer to the crucial portion of the evidence of the injured party Joanne Carthy. In the course of her direct testimony she said that she had been with the appellant for 17 years and they have been separated for a year. She said that her ex-husband retained the keys to the house. On the date in question, their children had left the family dog with the appellant and he returned the dog on the evening in question around 7 PM. She retired for the evening around 11:30 PM and went to sleep. The salient portion of the evidence for the purposes of this appeal is as follows: –

> "Q. All right. And you're asleep then and can you tell the jury in your own words what happened next then?
>
> A. First, I knew I was on the ground. I have kind of vague recollection of not being on--- and then I was on the ground on all fours kind of and I can remember the carpet against my face and the bed at the time had this little narrow walkway up the side, my side of the bed, and I was on all fours facing downwards and I was trying to figure out what was going on like, I suppose still kind of asleep or not knowing what was happening. I knew I couldn't breathe.
>
> Q. All right. Were you being touched or anything like that?
>
> A. Yes, like I couldn't breathe. I couldn't--- I know I was pulling my face, I couldn't breathe. And I was trying to figure out what is it one of the kids lying on top of me or--- for that one minute. And I know I pulled back then. I was kind of crawling backwards on my face, on--- facing down. And the only time I could breathe, it was like over my face, and I remember the hand over my face was slimy. It was like it was aftershave or something. I don't know, but it was wet. And the only reason I could --- the only thing I could move was my fingers. I could get my fingers in between their fingers into my mouth and take a breath.
>
> Q. All right?
>
> A. So every couple of bits, I was trying to work my way back; but I was still down on all fours trying to take a breath.
>
> Q. All right. What was your breathing like at that stage? Was it---
>
> A. Well it was just I-- to be honest that was the only thing I was focused on was getting my fingers into my mouth to take a breath. It was only then as I was crawling, it was like the length of the bed like; but it seemed to be for ages just trying to take breaths, trying to get my fingers into my mouth
>
> Q. Were you conscious that this was a male or female in the room?
>
> A. At that time when I was on all fours I didn't--- I just-- I just couldn't breathe. I was like why-- why are you doing this. I remember thinking at. I don't know whether I could say it, because I know every time I got to kind of pull the hand down, it was back up again…
>
> Q. Was there any talk or conversation?
>
> A. At that stage, no. Not--
>
> Q. All right?
>
> A. I could hear breathing. I could hear because it was right up beside. I could hear that breathing. And I-- like I would say the penny didn't drop that it was actually until he pulled me up onto-- onto my back….
>
> Q. All right. You say "he", were you conscious that it was a male?
>
> A. Oh, definite. At that stage the penny--- when I had fallen over, when I'd come down, I knew it was him. You know, I knew the way he was breathing, whatever grunt or whatever---
>
> Q. All right. And when you say it was "him", who was that?
>
> A. Lar.
>
> Q. All right. Now, there was still no conversation at this stage?
>
> A. No.

Q. And did the struggle kind of continue or

A. It continued.

Q. Did anyone say anything?

A. Not until-- not until I was-- I had gone up and down a couple of times, so I was only kind of halfway across the end of the bed. And at one stage it was-- I just felt, "well, this is it now, this is it", and I don't know whether I relaxed whether I kind of gave in or-- because I thought, "I can't get out of this", and I was on my side and he was lying behind me lying, he was against the bed and I was in front of him and he was still holding me. And I managed to pull the hand, the same thing with these fingers against my face and it was a really surreal thing, because it was so quiet. It wasn't-- I wasn't screaming anything. It was just, "is that you, Lar, really?" And he was up against my ear and he said, "it's just because I miss you so much". And then he said something else, but it was like-- it was like the sound was turned down.

Q. All right?

A. It's like somebody turning down the sound. And the next thing-- the next thing I knew I was lying on my side. He wasn't there. I can't remember getting up, leaving, anything, and I just could not breathe.

Q. When you say he said what he said, "it is just because I miss you so much", how close was the voice to you?

A. It was here. It was like he was-- it was there up beside my face.

Q. All right, all right. Do you know how long the entire incident lasted?

A. I don't know. On the one happened [sic] it seems like it went on for ever; on the other hand, it could have been five minutes…."

The crucial words attributed to the appellant arose from a question asked by the injured party;

"is that you, Lar, really?"

To which the reply was: –

"it's just because I miss you so much".

25. Concerning ground 1, the appellant submits that the trial judge erred in failing to direct the jury to return a verdict of not guilty at the close of the prosecution's case where there was no supporting evidence and in circumstances where the investigation, as contended by the appellant, was inadequate. To paraphrase, it is contended on behalf of the appellant that it was unsafe to have allowed the matter to be considered by the jury as there was insufficient scope for effective cross examination to test the complainant's evidence.

26. On ground 3, it is contended on behalf of the appellant that the investigation by the authorities was inadequate in that the prosecuting authorities failed to attend the appellant's address on the night; failed to obtain forensic samples from under the fingernails of the appellant for the purposes of analysis failed to take photographs of the injured parties house, failed to obtain CCTV footage and failed to interview the appellant. These failures on the part of the prosecution led to a paucity of evidence, and thus hampered the ability to properly test the injured party's evidence in a meaningful way. Therefore, it is argued that the trial judge ought to have directed a verdict of not guilty or should have stopped the trial in accordance with the inherent jurisdiction of the trial court.

27. The appellant relies on the decisions of *Dunne v. DPP* [2001] IEHC 45 and *DPP v.Braddish* [2001] 3 IR 127 in contending that the prosecution failed to seek out and obtain evidence with a potential bearing on the facts in issue. As a consequence, cross-examination on behalf of the appellant was severely hampered. At the conclusion of the prosecution's evidence, albeit this was not expressly stated, it appears that an application was made to stop the trial on the basis of a risk of an unfair trial.

28. Moreover, it is argued that the trial judge erred in refusing counsel's application for an adjournment to enable evidence to be presented to demonstrate that there was a real risk of an unfair trial on the basis of the prosecution's failure to seek out and obtain certain evidence. This is the subject of ground 4.

Decision Ground 1

29. This ground is advanced primarily on the basis that the only evidence against Mr Carthy was that of the injured party and that in the absence of supportive evidence, the evidence was so frail so as to give rise to a potential miscarriage of justice. It was contended on behalf of the appellant, that without some other evidence, the potential to test the evidence by way of cross-examination was severely limited. Ms Egan BL, counsel for the appellant, argued at trial that voice recognition evidence is weaker than visual identification evidence or recognition evidence. She argued that the injured party had very limited opportunity from which to conclude that her assailant was the appellant by virtue of what was said by him in the course of, what must have been, an extremely fraught situation.

30. It is the position that where a trial judge concludes that the quality of the identifying evidence is poor, he or she may withdraw the case from the jury, unless of course, there is evidence which supports the veracity of the identification. However, if the quality of the identification in any given case is good, the case can then be left to the jury even though there is no supporting or corroborative evidence. Naturally, the quality of the evidence will depend on the circumstances in any given case and in the instant case, whilst the opportunity for the injured party to recognise the appellant may not have been over a protracted period of time, this was not one of those cases where the opportunity could have been described as fleeting. We are satisfied that the voice recognition evidence was of good quality. This was a case where the witness was very familiar with the voice she identified, as the injured party and the appellant had been in a relationship for some 17 years. Whilst it is so that the identification arose from circumstances of stress, factors which lent weight to the evidence included the manner in which the assailant was breathing or grunting, clearly something with which a spouse or partner would be familiar, the proximity of the assailant, that he spoke, in effect into her ear, and crucially that her assailant responded to a question by the injured party when she said, "is that you, Lar, really?"

31. It is difficult to conceive of a situation of greater familiarity than such as pertained in this case, which included not only familiarity

with the voice in issue but also with other features. It is apparent also from the cross examination, that Ms Egan BL cross-examined the complainant extensively and skilfully. Obviously, given the circumstances of the assault and as the witness was so familiar with the voice in question, the holding of a formal voice identification procedure would have served little purpose. As recognised in *the People (DPP) v. O'Brien and Stewart* [2015] IECA 312, it would be almost impossible to recreate the circumstances of identification.

32. The issue for the trial court was whether the state of the evidence taken as a whole was so unsatisfactory that no jury properly directed could convict on it in terms of *R v Galbraith*. It has previously been emphasised by this Court that the second limb of the test in Galbraith is concerned with the issue of fairness. This is not a situation where there is no evidence of an element of the crime, but that it was unsafe to allow the jury to consider the matter on the recognition evidence alone.

33. We do not find merit in this argument. We are satisfied that the evidence of voice recognition in the instant case was cogent and suitable for the jury's consideration. We appreciate that the primary evidence was that of the injured party but in circumstances of such familiarity and where there was evidence such as the manner of breathing and the proximity of her assailant, there was no question of a miscarriage of justice. This was not a situation such as in *People (DPP) v. Crowe* [2015] IECA 9, where the witness listened to a 15 second excerpt from a recorded interview with a suspect who was detained in garda custody and identified the voice as the caller from whom the witness received a menacing phone call the previous day. The situation in the instant case was quite different. This ground therefore fails.

Decision Ground 3
34. This ground is inextricably bound up with the complaint advanced by the appellant that the Gardaí failed to seek out and obtain relevant evidence which would have enabled the defence to meaningfully cross-examine the complainant.

35. It is clear from the facts in the case that it was established in early course that there had been no forced entry to the house in question, furthermore it was also demonstrated on the evidence that the appellant retained a key to the house and had earlier in the day returned the family dog. Furthermore, there was no evidence that the family dog had barked on an intruder entering the house.

36. At the conclusion of the prosecution case, in addition to the application to withdraw the case from the jury, it was pointed out to the judge there was no evidence other than that of the complainant. Towards the conclusion of the application, the judge indicated that he was satisfied that the appellant's application was twofold; firstly, an application to direct a verdict of not guilty on the basis of tenuous evidence and secondly, a failure on the part of the prosecution to seek out and adduce potentially relevant evidence.

37. It is well established that the power to seek and retain evidence exists for the purpose of the due administration of justice but it is the position that the evidence which it is claimed is missing as a result of an inefficient investigation must be material to the defence case. It cannot be so that the evidence would do no more, if available, than show a hypothetical argument on the part of the defence. Therefore, it is always imperative to assess a complaint of this nature in the context of the prevailing circumstances. In the instant case, it is difficult to see how the failures contended for by the defence would have impacted on the issue of the reliability of the voice recognition evidence.

38. In his ruling, the trial judge firstly set out the legal position as regards an application to withdraw a case from the jury and having refused the application under that heading, then proceeded to refer to the decisions of *Dunne v. DPP* [2001] IEHC 45; *DPP v. Braddish* [2001] 3 IR 127 and *Murphy v. DPP* [1989] ILRM 71 in the context of the submission of investigative failure and stated as follows: –

> "The Court is satisfied that in these particular circumstances that it has not been shown to this Court that there has been a failure on the part of the prosecution to seek out such additional evidence which would be relevant, available and could have had a bearing on the innocence or guilt of the accused. Nor has it been shown to this Court -- or demonstrated, to use the words of the judgments -- has been demonstrated that the absence or the potential absence of such potential evidence creates a real risk of an unfair trial. Accordingly, the Court refuses the accused's application on this ground and accordingly rules that having dealt with both aspects of Ms Egan's application, that the accused has a case to answer and that the matter should proceed before the jury. "

39. It is quite clear therefore that the trial judge considered the principles applicable to an application to withdraw a case from the jury and having refused that application, then proceeded to consider the application that he stop the trial, exercising the Court's inherent jurisdiction to do so in accordance with the well-known principle that a court has an inherent jurisdiction to protect a fair trial and due process. We are satisfied that the trial judge applied the correct test in assessing the second application in effect to stop the trial on the issue of unfairness. This ground therefore fails.

Decision on Ground 4
40. In making the application to withdraw the case from the jury at the conclusion of the prosecution's case, Ms Egan BL submitted to the Court there was no evidence other than that of the injured party which would enable her to properly test the injured party's evidence of voice recognition. Whilst counsel did not expressly refer to the well-known decision of *P. O'C v. DPP* [2006] 3 IR 238, it is quite clear that when the judge clarified that the application was a twofold one, counsel quite properly did not demur from this proposition. When the trial judge refused the application to stop the trial, Ms Egan BL sought an adjournment to adduce evidence to demonstrate that there was a real risk of an unfair trial. This application was to our mind properly refused. An application to stop the trial, if made, is invariably made at the conclusion of the prosecution's case on the basis of the evidence as it stands at that point. The trial court has an inherent jurisdiction to stop the trial if there is a real risk of an unfair trial which cannot be avoided by appropriate directions. The standard in such an application is the civil standard and the burden is borne by the defendant. The instant case, the trial judge having refused the application was correct in refusing the adjournment sought. This ground therefore fails.

Ground 5
41. This ground concerns a contention that the trial judge erred in holding that the voice recognition evidence by the injured party was supported by other evidence. This ground has been addressed by the more substantive ground concerning voice recognition evidence and the rejection of the applications to withdraw and/or stop the trial. The judge was fully entitled to consider the surrounding circumstances as relevant to the assessment of the reliability of the complainant's evidence of voice recognition.

Ground 2
42. This ground concerns the failure of the trial judge to discharge the jury following the admission of evidence of a 'safety care plan' which the appellant contends was inadmissible evidence.

43. An application was made on behalf of the appellant, following questions raised by the jury in the course of deliberations. It is necessary firstly, to refer to the evidence which gave rise to the questions asked by the jury. In the first instance, in the course of the complainant's direct testimony the following exchange took place: –

"Q. All right. Did you go to Naas Hospital then?

A. I did, yes. Well, I went to the doctor on the Thursday morning, but we were more worried about getting to the court to get-- try and get a safety order."

This response by the complainant then gave rise to a series of questions in cross examination where the issue of a barring order was raised as follows: –

"Q. Did you succeed in getting a barring order?

A. I got a safety order with permission to change the locks.

Q. Okay. But the judge refused your barring order; isn't that right?

A. Yes"

Ms. Yvonne Murphy, a witness for the prosecution gave evidence of a conversation held with the complainant after she had been assaulted. She said the following: –

"Q. All right. And was there any further conversation with ye?

A. I did say we have to call the guards and we have to get the safe – care plan in action."

The witness was not cross-examined and a Ms Louise Burns, the complainant's sister, gave evidence and she informed the jury that having received a phone call from the complainant, she arrived at the house around 4 AM and she said the following in evidence: –

"Q. All right. And how did you find things when you got there?

A. When I got there, Yvonne was there and Joanne told me-- went through what had happened.

Q. All right?

A. And I went up then, decided to go up and check the children, so I went up and checked the children and they were all asleep. And then Yvonne wanted to put the-- there was a safety care plan and she wanted to put that into action and move the children."

The witness was not cross-examined. In the course of their deliberations, the jury returned with the following questions: –

"FOREMAN: the first one is it was mentioned by two witnesses, what is their safety care plan, why was it mentioned and why did these people feel they needed to put it in action in the immediate aftermath of the incident?"

The jury then asked a question as regards the timing of the appellant's alibi notice, however this point was not pursued on appeal.

44. After the question was asked by the jury, counsel for the appellant indicated that she had a concern regarding the questions asked and that indeed she held that concern at the time when the evidence was given. She indicated that the evidence was prejudicial to her client. Clearly the concern held by Ms Egan was heightened by the fact that the jury had engaged with this evidence. The trial judge indicated that he intended to deal with the matter by directing the jury that they should disregard the evidence of the safety care plan given by the two witnesses. Ms Egan applied for the jury to be discharged; no objection had been raised when the evidence was given, counsel was concerned in light of the question posed by the jury and was not satisfied that any potential prejudice could be cured by a direction from the trial judge. The application to discharge the jury was refused.

45. The trial judge addressed the matter by directing the jury that any reference made by any witness to a safety care plan was irrelevant to their deliberations and was to be disregarded by them. He stated specifically as follows: –

"any reference made by any witness to a safety care plan or any other plan has no relevance to this case and any mention thereof made by any witness should be disregarded by you and should not influence your deliberations."

Discussion and decision on Ground 2.

46. When the issue first arose on direct examination, it is clear from a consideration of the actual evidence given, that the witness Ms Carthy expressed a concern regarding an application before a court in order to obtain a safety order. The language used clearly envisages such an application be made after the incident, which could not be said to be prejudicial to the appellant. Ms Egan's cross examination confirmed that the complainant was unsuccessful in obtaining a barring order but that she was granted a safety order with permission to change the locks. This arose in the course of cross-examination and the replies given did not prejudice the appellant and indeed could be said to have been to his advantage which no doubt was the reason why counsel addressed the issue. When Ms Murphy and Ms. Burns, in the course of their evidence, made reference to getting "the safety care plan in action", it must be emphasised that this evidence was given after the complainant's evidence and must be considered in light of that evidence, which referred to a future application for such a plan. However, even on a consideration of Ms Murphy and Ms Burns evidence, excluding the complainant's evidence, we do not consider that the evidence given was of any great moment in the trial and did not cause prejudice sufficient to give rise to the jury being discharged notwithstanding that the jury raised a question in this respect. The trial judge addressed the issue in the clearest of terms. He gave the jury a specific direction that they were to disregard the evidence and were not to allow the evidence to influence them in any way. We see no reason why the jury would have ignored a direction in such terms by the trial judge. Therefore, this ground fails.

Ground 6

47. This ground was not pursued.

48. Accordingly, the appeal against conviction is dismissed.