THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

62 CPA /16

IN THE MATTER OF S. 2 OF THE CRIMINAL PROCEDURE ACT 1993

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

STEPHEN EGAN

Applicant

Judgment of the Court delivered 21st March 2017 by Mr. Justice Edwards.

Introduction
1. This is an application pursuant to s. 2 of the Criminal Procedure Act 1993 ("the Act of 1993") brought by the applicant for the purpose of seeking a review of a life sentence imposed upon him for the crime of manslaughter by the Central Criminal Court, and subsequently upheld by the Court of Criminal Appeal, on the grounds that a new or newly discovered fact shows that the sentence imposed was excessive.

Background to the application
2. In this case the applicant, who at the material time was a prisoner in Mountjoy prison, was charged with the murder of a co-prisoner, one Gary Douch. The applicant had beaten and kicked Gary Douch to death in circumstances where he seemingly believed, entirely incorrectly, that Mr. Douch was a sex offender and that he represented a threat to others. At his trial for the said alleged murder before the Central Criminal Court a jury found him "Not guilty of murder but guilty of manslaughter by reason of diminished responsibility", pursuant to s. 6 of the Criminal Law (Insanity) Act, 2006 (the Act of 2006).

3. The evidence before the jury from a consultant psychiatrist, a Dr. Fahy, had been to the effect that the applicant was suffering from a mental disorder within the meaning of the Act of 2006 at the material time, which was stated to be schizoaffective disorder on a background of anti-social personality disorder, with his schizoaffective disorder exhibiting features both of psychosis and disturbance of mood. Dr. Fahy had given it as his expert opinion that at the time of the killing the appellant had been experiencing delusional beliefs due to his mental disorder, and that his responsibility for the killing of Gary Douch was diminished on account of this *"because, in his paranoid state, he – his judgment was impaired".*

4. On the 26th of June 2006 the applicant was sentenced to life imprisonment for the said manslaughter, the sentencing judge being of the view that while the applicant's responsibility was *"significantly reduced"* on account of his mental disorder it was not eliminated. In the sentencing judge's view the applicant's responsibility, albeit significantly reduced, remained *"a substantial one"* in the circumstances of the case. The sentencing judge referred specifically to Dr. Fahy's evidence that the applicant had been labouring under delusional beliefs, and he commented:

> *"In relation to those delusional beliefs, it must be said, clearly and unequivocally, that they are utterly and totally false but it also has to be said that even if they were true, they could provide no explanation or justification for what happened because the offence involved quite appalling levels of extreme violence. Not only was Mr. Douch the victim of a savage assault, his attacker also set out to degrade and humiliate him."*

5. The sentencing judge explained in detail his reasons for imposing a life sentence. In summary, the sentencing judge was greatly influenced by a perceived need to protect the public, and while acknowledging that a life sentence imposed purely for public protection purposes would be a form of impermissible preventative detention, he felt, citing the judgment of Kearns J. in the Court of Criminal Appeal *in The People (Director of Public Prosecutions) v Crowe* [2010] 1 I.R. 129 that the applicant's case fell fairly and squarely into the category of *"special and exceptional cases"* where a maximum sentence might legitimately be imposed notwithstanding substantial mitigating factors. (We note in passing, though nothing turns on it, that the phrase actually used in the Crowe judgment was *"rare and exceptional cases*", and that it originated in fact in Kearns J's earlier Supreme Court judgment in *The People (Director of Public Prosecutions) v R McC* [2008] 2 I.R. 92 which he in turn quotes in the *Crowe* judgment).

6. The applicant appealed the severity of his sentence to the Court of Criminal Appeal, which heard the case on the 29th of October 2010. We have been provided with a full transcript of the appeal hearing and it is clear that the grounds upon which the appeal was pursued included complaints both that the sentence imposed had failed to adequately reflect the jury's finding, in accordance with the Act of 2006, that the applicant's responsibility for the killing of Gary Douch was *"substantially diminished"* on account of his mental disorder; and further that it amounted to impermissible preventative detention.

7. In relation to the former complaint much reliance was placed upon an addendum report of Dr. Fahy, which had been before the sentencing judge, in which he had criticised aspects of the medical management of the applicant's mental illness in the weeks and days leading up to the killing of Gary Douch. That report had stated (*inter alia*):

> *"The only significant point of possible criticism concerns the very short duration of Mr. Egan's first admission to hospital. This is an unusually short treatment episode for a first episode of psychotic illness. There appears to have been a degree of inappropriate uncertainty about the validity of Mr. Egan's reported symptoms despite the fact that these symptoms could be traced back over several months and despite the absence of any obvious secondary gain to be obtained from reporting of any such symptoms."*

8. After opening this quotation from the addendum report to the Court of Criminal Appeal, counsel for the applicant went on to summarize its further contents as follows:

> *" in any event what happened was that he was discharged back into Cloverhill from where he had come after that short stay in the Central Mental Hospital and he was discharged on the basis that his medications, anti psychotic medication ought to continue while in prison until otherwise prescribed and having returned to Cloverhill on the 14th with that prescription he was then moved, for reasons which are not entirely clear, into the environment of Mountjoy and that was on the 29th of July 2006, three days before the offence, and unfortunately when he was transferred he was not transferred with his medication and the uncontested evidence was that between the 29th and the 1st of August he was left without his Olanzapine, his anti psychotic medication and his condition quickly deteriorated culminating in this appalling attack on his fellow prisoner in an overcrowded cell in the basement of Mountjoy Prison. And Professor Fahy went on then, by way of chronology, to explain that he was then readmit he was admitted briefly to Cloverhill immediately after the attack and very shortly thereafter, I think within the next 24 hours, readmitted to the Central Mental Hospital.*
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> *MR. JUSTICE HARDIMAN: Yes.*
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> *MR. AYLMER: He was kept there for a further two months over August and most of September before he was ultimately discharged back into the prison environment and Professor Fahy carefully reports, with reference to all of his notes, his medical history notes, that he was entirely satisfied that throughout that period, two month period after the offence he was slowly recovering from what he describes as an acute psychosis in the form of schizoaffective disorder. And having been returned to the prison environment the situation has been ever since that he has remained on Olanzapine - -."*

9. The Court of Criminal Appeal rejected the applicant's said complaints and dismissed his appeal in a judgment delivered *ex-tempore* by Hardiman J, also on the 29th of October 2010. In the course of his said judgment Hardiman J. had remarked:

> *"Now, the sentencing remarks of the learned judge are quite lengthy and very impressive in the Court's view. He was quite aware of the law and showed himself quite aware of the law in relation to sentencing generally and the extent to which it might be applied, by analogy or otherwise, in this particular case. He first identified the case, as he was obliged to do, as being at the very top end of cases of manslaughter. It is a notorious thing expounded by this court in the case of DPP v. Kelly some years ago that manslaughter varies more than almost any other offence from the defendant doing something that has just evolved, common assault, to something which is on very borders of murder and this the judge found, this example, the judge found was at the very top of the scale and in the Court's opinion it's quite impossible to disagree with that.*
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> *He then made the obvious but important point that the applicant had been convicted, not of murder, but of manslaughter and not merely of manslaughter but of manslaughter on the specific ground of diminished responsibility. He said that that was diminished responsibility. It didn't abolish the applicant's responsibility which he held was substantial and Mr. Aylmer complains that there was no analysis of the degree of responsibility and the Court can't at all agree with that. I propose to refer only to what I might describe as the uncontroversial parts of Professor Fahy's reports. He said, I'm looking at page 40 of the report, "It is clear ..." that's based on Mr. Egan's own account of events "It is clear that he was aware of the nature of his behaviour and that he made a decision to carry out an assault on Mr. Douche. It is likely that he knew the assault was wrong, at least in legal terms. The assault, according to his account, was carried out as a type of punishment." Again in deference to the late Mr. Douche I won't mention the full detail of why that was. He says: "The assault identified a degree of calculation and involved a degree of calculation and humiliation of the victim" and again the detail is given which it's unnecessary to rehearse.*
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> *Now, in those circumstances it doesn't seem possible to the Court to quarrel with or to go behind the learned trial judge's finding that this man exhibited a substantial I think was the word used degree of responsibility for what was done and that is undoubtedly so. And the learned trial judge then went into the options which were available and he did so showing first of all that he was acquainted with the jurisprudence which is grown up with this matter in England and secondly that he was fully aware of the absence of such jurisprudence in this country by reason of the statutory lacuna which I've mentioned. The learned trial judge seriously considered, and said that he was seriously considering, a part suspended sentence and that obviously would have some attractions but he rejected it for the reasons which he gave. He then constructed a form of sentence which seemed to be based on his desire that the applicant should be subject to, into the indefinite future, to a regime of supervision and he said that his re-entry into the community is going to involve rigorous supervision and it seems to be also that it's going to have to be supervision which will be backed by this sanction of indefinite re incarceration if he doesn't comply. Now, that procedure after, once identified, could only be achieved by imposing a life sentence. He recognised in these remarks that the sentence would eventually be such as would lead to his release into the community.*
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> *He referred to the case of Crowe and other cases which have said that while it's possible to impose a maximum sentence in the face of a plea of guilty, and this is effectively what it was here, a plea of guilty, has to explain why it has taken that course, the Court must explain, and in this court's view the learned judge over some five or six pages explained meticulously and in great detail why he was taking the course he did. Now, we must also say that the phrase "preventive detention" has been much mentioned and it is an important point in Irish constitutional law that our system has set its face completely against preventive detention. Preventive detention, as Mr. Gillane points out, is denounced, not too strong a word, in the O'Callaghan case but plainly as meaning a form of detention of a person who has not been convicted of a crime. That is not what's in question here."*

10. Hardiman J, subsequently added:

> *"In the Court's opinion the learned trial judge approached this matter correctly and not merely correctly but thoughtfully and even ingeniously and attempted to work out a system or a sanction, a type of sanction to be imposed on this applicant which is very much in his interest as well as the interest of the community as a whole. We see absolutely no ground to consider the sentence wrong in principle … ."*

11. Following the killing of Mr. Gary Douch a Commission of Investigation was established on the 2nd of May 2007 by Order of the Government made under s. 3 of the Commissions of Investigations Act 2004 which was tasked with enquiring into the circumstances surrounding the death of Mr. Douch. On the 8th of June 2007 Ms Grainne McMorrow S.C. was appointed as Sole Member of that Commission of Investigation.

12. Because the criminal proceedings concerning the applicant were ongoing up until the Court of Criminal Appeal had delivered its judgment on the 29th of October 2010 the Commission of Investigation was not in a position to conduct much of its work and to produce its report until after that date, lest to do so would prejudice those proceedings. In April 2012 the Commission of Investigation circulated a draft report for commentary by interested parties, and then on the 1st of May 2014 it published its finalised report entitled *Report of the Commission of Investigation into the Death of Gary Douch.*

13. This report is exhibited with an affidavit of the applicant's solicitor, John M Quinn, sworn in support of the present application and certain of its findings are said to constitute the new or newly discovered facts upon which the applicant now seeks to rely.

14. Those findings of the said report which are particularly relied upon as constituting new, or newly discovered, facts are set forth at paragraphs 26 to 32 of Mr. John M Quinn's said affidavit as follows:

> "26. The psychiatric evidence before the Commission was that the applicant was in an 'acute psychotic state' on 26th July, 2006 and that 'the only place for him was Dundrum' (p. 161 of the Report). The applicant was transferred from prison to the Central Mental Hospital in Dundrum where he remained from 5th July, 2006 to 14th July, 2006 before being discharged to Cloverhill Prison.
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> 27. The conclusions of the Commission included the following:
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> 'Given the complexity of Mr. Egan's history and presentation, and the lack of information concerning his mental health state between February and June 2006, the Commission considers he should not have been discharged from the Central Mental Hospital back to the prison system on 14th July 2006, nine days after admission.' (p. 188 of the Report)
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> 28. Elaborating on this finding, the Commission stated:
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> 'The Commission also agrees with the view expressed by Dr. Lelliott that, although Stephen Egan posed a risk of violence towards others which was independent of his mental health, there were some risk factors for violence towards others which were or may have been related to his mental illness, and warranted a longer period of observation than nine days. These factors as listed by Dr. Lelliott were:
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> • Paranoid delusions about plots against him by individuals with whom he will have contact (other prisoners, psychiatric staff and prison staff)...
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> • Auditory hallucinations directed at him by others.
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> • A previous history of at least one act of violent behaviour (setting fire to his cell on 18th December 2005) apparently in response to symptoms of mental illness.
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> • Agitated behaviour when actively considering his delusional beliefs.
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> • History of poor compliance with medication.'
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> 29. The Commission makes a series of further findings in relation to the mishandling of my client's transfer from the Central Mental Hospital to Cloverhill Prison. These include:
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> • 'The Central Mental Hospital did not inform Cloverhill or Mountjoy Prisons that Stephen Egan was being discharged solely on the basis that he was going to Cloverhill Prison only or in particular to D2 at Cloverhill Prison.' (p. 189 of the Report)
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> • 'The Central Mental Hospital discharged Stephen Egan to Cloverhill Prison in the full knowledge that once discharged back to prison, in the absence of any specific guidance or instruction to the prison authorities regarding accommodation and management, he could be placed in the general prison population or transferred to another prison at any time, without reference to the CMH or to the Psychiatric In-reach Service at Cloverhill.' (p. 190 of the Report)
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> • 'No meaningful consultation appears to have taken place with the Minister for Justice (or his representative) as required by section 18 of the Criminal Law (Insanity) Act 2006. in relation to Stephen Egan's proposed transfer to prison from the Central Mental Hospital on 14th July 2006.' (p. 191 of the Report)
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> • 'Notwithstanding his recent return from the Central Mental Hospital, Stephen Egan's management at Cloverhill Prison from 14th—29th July 2006 was governed primarily by his reputation as a potential security problem, rather than as a vulnerable prisoner with a psychiatric illness.' (p. 193 of the Report)
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> 30. In relation to the finding mentioned above from p. 190 of the Report, the Commission elaborates on this, *inter alia*, as follows:
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> "Under s.18 of the Criminal Law (Insanity) Act 2006, a prisoner can only be discharged from the CMH if the Clinical Director forms the opinion that they no longer require in-patient care or treatment. Two possible scenarios arise:
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> (i) a prisoner no longer requires psychiatric care or treatment of any kind
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> (ii) a prisoner still requires some psychiatric care and treatment, but of a kind which can be administered in a setting outside of the Central Mental Hospital
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> The evidence of Professor Kennedy to the Commission is that on 14th July 2006, Stephen Egan fell into the latter category only insofar as there was a place - D2 Wing at Cloverhill Prison - which had the necessary resources to ensure that Mr. Egan would continue to receive medication and would be kept under appropriate review. This implies that if Stephen Egan could only have been discharged to Mountjoy Prison, the absence of such resources would have meant that Professor Kennedy could not have formed the opinion necessary to discharge him."

31. My client was transferred to Mountjoy Prison on 29th July, 2006. In relation to my client's transfer, the Commission made, inter alia, the following findings:

☐ "It was not necessary for Stephen Egan to be transferred from Cloverhill to Mountjoy Prison on 29th July 2006." (p. 195 of the Report)

☐ "It was not in the best interests of Stephen Egan to be transferred from Cloverhill to Mountjoy Prison on 29th July 2006." (p. 196 of the Report)

☐ "The transfer of Stephen Egan on 29th July 2006 does not appear to have been directly related to the transfer of four other prisoners from Mountjoy to Cloverhill on the same day. Even if it had been, Cloverhill Prison had the capacity to accept those additional prisoners without having to transfer Stephen Egan." (p. 199 of the Report)

☐ "There were fundamental systemic failures in every aspect of Stephen Egan's transfer from Cloverhill Prison to Mountjoy on the 29th July 2006." (p. 201 of the Report)

☐ "The Governors of both Mountjoy Prison and Cloverhill Prison at the time of Stephen Egan's transfer on 29th July 2006 failed to ensure delivery of acceptablc standards of prisoner management, health, and safety." (p. 201 of the Report)

☐ "The decision to transfer Stephen Egan to Mountjoy on 29th July 2006 was arrived at without any regard to his on-going need for psychiatric care and treatment as set out in the Discharge Summary from the Central Mental Hospital." (p. 202 of the Report)

☐ "The fact that Stephen Egan's transfer to Mountjoy took place on a weekend increased the risk that he would not receive appropriate medical and psychiatric attention." (p. 202 of the Report)

☐ "Mountjoy Prison management should not have agreed to accept Stephen Egan on 29th July 2006." (p. 202 of the Report)

☐ "There was inadequate oversight by the Irish Prison Service of the transfers which took place on 29th July 2006." (p. 204 of the Report)

☐ "The management at Cloverhill Prison exhibited what this Commission regards as a reckless disregard for the health and safety of Stephen Egan in transferring him to Mountjoy Prison without any consultation with his Doctors or with the Psychiatric In-Reach Service. This was not helped by the transfer taking place on a weekend when staff complement might reasonably have been expected to be reduced." (p. 205 of the Report)

☐ "In selecting Stephen Egan for transfer, Cloverhill also exhibited a reckless disregard for the health and safety of staff and prisoners at Mountjoy Prison, which they knew was under severe pressure from overcrowding. He was wholly unsuitable for transfer, given that he was a prisoner with known violent history, still under psychiatric care and on anti-psychotic medication. The transfer also involved moving him from the safety of a high observation single cell on Cloverhill's D2 wing to Mountjoy, where they must have known he could not be accommodated in anything approximating the facilities available in D2." (p. 205 of the Report).

32. The Commission also found that 'Stephen Egan was not given a proper medical assessment on arrival at Mountjoy Prison on 29th July 2006. There were evident deficits in management, decision-making, record-keeping and communication in this regard.' (p. 255 of the Report)"

15. At the oral hearing of the present application counsel for the applicant evinced the intention, in the event of being able to satisfy us that the said material does indeed constitute new or newly discovered facts, to seek to re-ventilate, in the light of that material, both of the complaints that were previously rejected by the Court of Criminal Appeal, and to again argue that the life sentence that was imposed upon the applicant was unduly severe. It follows, and counsel for the applicant accepts, that any entitlement to do this must be contingent upon satisfying this Court on the preliminary issue, which is contested by the respondent, as to whether the material upon which he relies does in fact disclose a new or newly discovered fact or facts within the meaning of s. 2 of the Act of 1993. If he fails to do so, that is the end of the matter. Proceeding on this understanding, we have allowed him to make his arguments both on the preliminary issue, and also de bene esse on the substantive issues.

16. Accordingly, in this judgment we will proceed in the first instance to deal with the preliminary issue, and whether or not we then proceed to address the substantive issues that the applicant has raised will depend upon what we have decided in respect of the preliminary issue.

The relevant legislation

17. Section 2 of the Act of 1993 provides:

2.—(1) A person—

(a) who has been convicted of an offence either—
(i) on indictment, or

(ii) after signing a plea of guilty and being sent forward for sentence under section 13 (2) (b) of the Criminal Procedure Act, 1967 , and

who, after appeal to the Court including an application for leave to appeal, and any subsequent re-trial, stands convicted of an offence to which this paragraph applies, and

(b) who alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive,

may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence.

(2) An application under subsection (1) shall be treated for all purposes as an appeal to the Court against the conviction or sentence.

(3) In subsection (1) (b) the reference to a new fact is to a fact known to the convicted person at the time of the trial or appeal proceedings the significance of which was appreciated by him, where he alleges that there is a reasonable explanation for his failure to adduce evidence of that fact.

(4) The reference in subsection (1) (b) to a newly-discovered fact is to a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings.

(5) Where—

(a) after an application by a convicted person under subsection (1) and any subsequent re-trial the person stands convicted of an offence, and

(b) the person alleges that a fact discovered by him or coming to his notice after the hearing of the application and any subsequent re-trial or a fact the significance of which was not appreciated by him or his advisers during the hearing of the application and any subsequent re-trial shows that there has been a miscarriage of justice in relation to the conviction, or that the sentence was excessive,

he may apply to the Court for an order quashing the conviction or reviewing the sentence and his application shall be treated as if it were an application under that subsection."

Jurisprudence relevant to s.2 of the Act of 1993

18. It was accepted by both sides that the principal authorities on the correct application of s. 2 of the Act of 1993 are *The People (Director of Public Prosecutions) v. Willoughby* [2005] IECCA 4 (unreported, Court of Criminal Appeal, 18th February, 2005) and the subsequent decision of the Supreme Court in *The People (Director of Public Prosecutions) v. O'Regan* [2007] 3 I.R. 805, which approved of, and followed, the approach previously commended in *Willoughby's* case.

19. In *The People (Director of Public Prosecutions) v. Willoughby* the Court of Criminal Appeal, having considered the relevant Irish jurisprudence up to that point in time, as well as a number of English authorities, formulated a number of principles which it considered to be appropriate to an application to introduce new or fresh evidence in the Court of Criminal Appeal. The Court stated (at pp 21 and 22):

"(a) Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.

(b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.

(c) It must be evidence which is credible and which might have a material and important influence on the result of the case.

(d) The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation."

20. The leading judgment in *The People (Director of Public Prosecutions) v. O'Regan* was delivered by Kearns J. (with whom Murray C.J., Geoghegan J, Fennelly J. and Macken J. all expressed agreement). Referring to the so-called "*Willoughby* principles" , Kearns J. stated (at paras 71 & 72):

"71 The court sees no reason to substitute for the principles enunciated in The People (Director of Public Prosecutions) v. Willoughby [2005] IECCA 4, (Unreported, Court of Criminal Appeal, 18th February, 2005) those which are contained in the English Criminal Appeal Act 1968, as amended. Counsel for the accused has, wrongly in the opinion of the court, characterised the " Willoughby principles" as rigid and inflexible preconditions to the making of an application for the admission of new evidence. In the view of the court, the "saver" for exceptional circumstances defeats this submission. While the requirement for "exceptional circumstances" may be seen as setting the bar at a fairly high level, the policy considerations to which reference has already been made demand no less. The entire criminal justice system would be incapable of functioning if every trial was subject to a re-run on new grounds or new evidence in an appellate court. Thus it is entirely reasonable to insist upon a "due diligence" test in respect of evidence which was known to exist, or which could reasonably have been obtained at the time of trial but was not. Equally, it can only be seen as entirely reasonable and proportionate to incorporate in the principles a requirement that the proposed new evidence is credible and, if admitted, that it might have a material or important, though not necessarily decisive, influence on the result on the case. The court is also satisfied that any consideration of materiality must be conducted by reference to all the other evidence at the trial and not be considered in isolation.

72 The application of these principles should not be seen as displacing or negativing in any way the overarching requirement that justice be seen to be done having regard to all the circumstances and facts of the particular case. In this regard, the court is again satisfied that the "saver" contained in the first of the stated principles is adequate to safeguard that particular requirement. No statement of principle enunciated in The People (Director of Public Prosecutions) v. Willoughby [2005] IECCA 4, (Unreported, Court of Criminal Appeal, 18th February, 2005) is to be seen or understood as abrogating that requirement."

21. Counsel for the appellant has drawn our attention to three further cases in his written submissions, namely *The People (Director of Public Prosecutions) v. Johnston* 1998 WJSC-CCA 5579 (unreported, Court of Criminal Appeal, Blayney J, 1st of July 1996); *The People (Director of Public Prosecutions) v. Gannon* [1997] 1 I.R. 40 and *The People (Director of Public Prosecutions) v. Kelly* [2008] 3 I.R. 697, which he suggests may be relevant to the issues that we have to consider; while counsel for the respondent has also drawn our attention to the *Kelly* decision as being relevant, but in a different respect.

22. The *Johnson* case, which was one of the earliest arising under s. 2 of the Act of 1993, had concerned an applicant who had been sentenced to penal servitude for life in respect of manslaughter. A co-accused had received a sentence of four years penal servitude for manslaughter before a different Judge. On appeal, the Court of Criminal Appeal had reduced the applicant's sentence to one of 15 years and 5 months penal servitude. The Court of Criminal Appeal was aware of the sentences imposed on the applicant's co-accused but had proceeded on the misunderstanding that the co-accused had not been convicted of manslaughter. The applicant and his co-accused had had the same counsel and so it was accepted that the court had been misinformed by inadvertence. On an application pursuant to s.2 of the Act of 1993 for a review of the sentence of 15 years and 5 months penal servitude imposed by the Court of Criminal Appeal, the court held that this was a newly-discovered fact giving it jurisdiction to entertain an application for a review of sentence.

23. The *Gannon* case involved an appeal to the Supreme Court pursuant to s. 29 of the Courts of Justice Act 1924 arising out of a review of a conviction by the Court of Criminal Appeal under s. 2 of the Act of 1993. Although the Court of Criminal Appeal had concluded that there was indeed a newly discovered fact, it had found that the newly discovered fact did not render the conviction unsafe and unsatisfactory, and it had confirmed the conviction. However, the court certified that the decision involved a point of law of exceptional public importance, namely, whether the material that became available after the conviction of the applicant rendered the conviction unsafe and unsatisfactory, having regard to the course that the defence took at trial or otherwise. The Supreme Court dismissed the appeal and answered the point of law certified in the negative. The leading judgment was given by Blayney J, (with which Denham J, Barrington J, Murphy J, and Lynch J. all agreed) who stated (inter alia):

> *"The real issue here, it seems to me, is whether the Court of Criminal Appeal, in considering the effect of a newly-discovered fact, is entitled to hold that, because of the manner in which the defence was conducted at the trial, no reliance would have been placed on the newly-discovered fact, had it been available. In other words, is the court entitled to say: in the light of what the transcript discloses of the course taken by the defence at trial, we are satisfied that the newly-discovered material would not have resulted in any change in the manner in which the defence was conducted and accordingly the newly-discovered material did not render the conviction unsafe and unsatisfactory. In my opinion, the court would not be entitled to approach the issue in this way. The court could not conclude for certain that the advent of the newly-discovered material would have no effect on the manner in which the defence was conducted. The furthest one could go would be to say that it is possible that it might not have had any effect and this would not relieve the court from examining what the position would have been if the defence had availed of the newly-discovered material and altered its strategy accordingly.*
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> *In my opinion, the answer to the first part of the question should be that the question of whether a newly-discovered fact has rendered a conviction unsafe and unsatisfactory, cannot be determined by having regard to the course taken by the defence at the trial. What the Court is required to do is to carry out an objective evaluation of the newly-discovered fact with a view to determining in the light of it, whether the applicant's conviction was unsafe and unsatisfactory. The Court cannot have regard solely to the course taken by the defence at the trial."*

24. The approach commended by Blayney J. in Gannon was reiterated and further nuanced in the *Kelly* case, where Kearns J. (giving judgment for the Court of Criminal Appeal) stated (at paras 91 and 92):

> *"91 Thus what the court is required to do is to carry out an objective evaluation of the newly discovered fact with a view to determining in the light of it whether the applicant's conviction was unsafe and unsatisfactory in the context of what the legal advisors might have done with the material if it had been available to them. The court can not simply have regard only to the course actually taken by the defence at trial.*
>
> *92 The court must therefore evaluate the evidence in relation to the newly discovered fact, firstly to ascertain if the evidence establishes the newly discovered fact, secondly to assess the weight and credibility of such evidence by reference to an objective standard to determine whether defence counsel could have utilised the newly discovered material in such a way as to raise a reasonable doubt in the minds of the jury about a significant element in the prosecution case."*

25. The *Kelly* case had been concerned with an attempt to have a conviction overturned on the basis of alleged newly discovered facts comprising several newly commissioned expert reports questioning evidence that had been given at the trial. In particular there was a report questioning the pathology evidence, an expert report on the origin of a fire and a report disputing the voluntary nature of the inculpatory statement made by the applicant to gardaí before his trial based on a CUSUM (cumulative sum) analysis, a technique not available at the time of trial. Moreover, during the preparation of the application, the solicitor for the applicant Kelly received from the Chief Prosecution Solicitor a booklet of photographs taken during the post mortem examination of the victim that had not been disclosed to defence at the time of trial. A further expert report was produced that addressed these photographs.

26. The Court of Criminal Appeal held, *inter alia*, that while the photographs of the post mortem that had not been disclosed to the defence and the CUSUM analysis were capable of being newly discovered facts within the meaning of the Act of 1993, the newly commissioned expert opinions were not. Counsel for the respondent in the present case refers us with particularity to that part of the judgment of Kearns J. in which he deals with this issue, and contends that it may be relevant to the issue which we must decide concerning whether the findings of the Commission of Investigation, which counsel submits amounts to no more than a legally sterile "opinion", and which would not be admissible under normal rules of evidence, can constitute a new or newly disclosed fact or facts. Kearns J. stated (at para 41):

> *"In ruling on the present application, the court is strongly of the view that opinion evidence, subject to the qualification hereinafter expressed, should not constitute a newly discovered fact within the terms of the Act of 1993. Firstly, to so interpret opinion evidence would be to give a meaning to the word "fact" which is quite different from its ordinary and natural meaning. Secondly, it would have the effect of rendering virtually every conviction, even one upheld by this Court following an appeal, open to later challenge if a further or new expert could be found to offer an opinion which went further than a defence expert had done at trial, or which tended to contradict or undermine experts called on behalf of the prosecution at trial. It would open the door to the introduction of additional evidence in circumstances which were plainly contra-indicated by this Court in The People (Director of Public Prosecutions) v. Willoughby [2005]*

IECCA 4, (Unreported, Court of Criminal Appeal, 18th February, 2005)."

27. Having proceeded at that point to set out the Willoughby principles, Kearns J. then continued (at paras 42 to 44):

> *"42 This approach to the admissibility of new evidence on appeal was expressly endorsed by the Supreme Court in The People (Director of Public Prosecutions) v. O' Regan [2007] IESC 38, [2007] 3 I.R. 805 and must now be seen as settled law in this respect.*
>
> *43 It would in my view be altogether impermissible for this Court to adopt an approach to opinion evidence which both ignores the express terminology of s. 2 of the Act of 1993 and also, by implication at least, goes totally against the thrust of the two decisions to which I have just referred.*
>
> *44 That is not to say that opinion evidence is in all circumstances inadmissible, as the court's present ruling will make clear. There may be cases where a state of scientific knowledge as of the date of trial may be invalidated or thrown into significant uncertainty by newly developed science. There may also be cases where the opinion of an expert at trial may later be shown to have been tainted by dishonesty, incompetence or bias to such a degree as to render his evidence worthless or unreliable. Once such "facts" are established, expert opinion evidence must clearly then be admissible so that such new "facts" can be properly interpreted."*

Submissions on the Preliminary Issue

28. The applicant has submitted that the findings of the Commission of Investigation represent established "facts", and that moreover they are new facts or newly discovered facts.

29. Counsel for the applicant accepts in his written submissions that the law on the admissibility of new evidence on appeal is as set out in *The People (Director of Public Prosecutions) v. Willoughby* [2005] IECCA 4 (unreported, Court of Criminal Appeal, 18th February, 2005), subsequently endorsed by the Supreme Court in *The People (Director of Public Prosecutions) v. O'Regan* [2007] 3 I.R. 805.

30. In purporting to addressing the four *"Willoughby"* principles, counsel for the appellant have submitted in their written submissions, and re-iterated in oral argument, that:

> "(a) The matters set out in the Gary Douch report indicate that the circumstances of this case are exceptional.
>
> (b) The report was published on the 1st of May, 2014 and post-dates in time the applicant's trial and also his appeal to the Court of Criminal Appeal.
>
> (c) The newly discovered evidence is credible and could well have had a material and important influence on Birmingham J's deliberations on the question of sentence.
>
> (d) It is proper to assess the materiality of the newly discovered facts by reference to the other evidence at trial. Adopting that course, it is submitted that the newly discovered material and findings made by the sole member are significant and of core relevance to the question of the applicant's level of culpability, and therefore his responsibility, for the offence charged."

31. Responding to counsel for the applicant's said submissions, counsel for the respondent make two main points. First, they submit that the Report of the Commission of Investigation into the death of Gary Douch cannot constitute "evidence" as its findings are sterile of legal effect. Secondly, they submit, the findings of the Commission do not in any event amount to new or newly discovered facts such as come within the statutory framework of S.2 of the Act of 1993.

32. In support of the first point, this Court was referred to the judgment of McCarthy J. in the Supreme Court in *Goodman International & anr v Hamilton, Ireland & the Attorney General* [1992] 2 I.R. 542 at 608 where he cited with approval the following passage from the judgment of Brennan J. in the Australian case of *Victoria v. Australian Building Construction Employees' and Building Labourers' Federation* (1982) 152 C.L.R. 25:

> "What the common law and the early statutes forbade to the executive was the assumption of any judicial function or interference with the judicial process. A commission of mere inquiry and report - affecting no rights, privileges or immunities, imposing no liabilities, exposing to no new legal disadvantage - cannot be (unless the circumstances are exceptional) either an authority for the assumption of judicial functions or an interference with the judicial process. Even if a commissioner be directed to inquire into and report upon a contravention of the law, the inquiry and report are sterile of legal effect."

33. In further support of this contention we were also referred to the late Hardiman J's judgment in *Murphy v. Flood* [2010] 3 I.R. 136, where he said (at 186):

> "In the words of Costello J., or in the words of the judicial authorities cited with approval by him, the tribunal of inquiry is 'not imposing any liabilities or affecting any rights' (at p. 557); its conclusions have merely the status of opinion and 'this opinion is devoid of legal consequences' (at p. 557), its findings are 'sterile of legal effect' and its purpose is 'merely' to inquire and report (at p. 562). A tribunal of inquiry is 'a simple fact finding operation' according to Finlay C.J. (at p. 588). The tribunal has no power to inflict a penalty and its determinations cannot 'form any basis for the punishment by any other authority of that person' at p. 588. Its function is to 'make a finding of fact, in effect, *in vacuo* , and to report it to the legislature' (at p. 590).

34. It was submitted on behalf of the respondent that the findings by the single member in the Douch Inquiry are of no legal effect and cannot impact upon the judicial process in this case, in particular on the sentence imposed (as well as the appeal of that sentence – which appeal was dismissed) for the applicant's unlawful killing of the deceased. The respondent submits that this Court should be extremely hesitant in acceding to a submission that the report of the Commission, or any aspect of its findings, could amount to admissible evidence in these proceedings.

35. It was further submitted that that report is the culmination of an inquiry which was conducted separately and distinctly from the criminal process and which was confined to its own terms of reference, which included matters of public importance such as the

future management of the State's prisons. However, it was no part of the Commission's function to address, inquire into or consider issues which would interfere (or which would be relied upon to seek to interfere) with either the verdict or the affirmed sentence in the criminal proceedings against the applicant. Indeed, the respondent points out, it is clear from the report itself, at page vii thereof, that the sole member understood that she could not complete her report *"until* **all** *criminal proceedings* **and** *appeals had been dealt with."* (emphasis added).

36. In support of the respondent's second point, it was submitted that a new or newly discovered fact is one that is defined in the legislation as set out at s.2(3) and s.2(4) of the Act of 1993. In a consideration of these provisions in *The People (Director of Public Prosecutions) v Kelly* the Court of Criminal Appeal, per Kearns J., held;

> *"It is a basic principle of statutory interpretation that words be given their natural and ordinary meaning. The Concise Oxford English Dictionary contains the following useful definition of the word "fact": "a thing that is indisputably the case"; "the truth about events as opposed to interpretation". The word "opinion" on the other hand is defined as: "a view or judgment not necessarily based on fact or knowledge".*

37. Counsel for the respondent argues that the findings of the Commission amount to the member's opinion or interpretation as to events and thus do not constitute *"facts"* as understood in light of Kelly.

38. It was further submitted that even if we were to hold that the Commission's findings amounted to the truth about the events which occurred surrounding the lead up to the applicant's fatal assault on Mr. Douch in the holding cell in Mountjoy Prison, (and thus constituting "facts") there is nothing intrinsically new in the findings as published. At their height the findings of the Commission relate to systemic failures within the prison system in terms of the transfer and management of a violent prisoner with a mental condition. It was submitted that on its own that is not a legitimate basis for requesting this Court to review the sentence pursuant to the provisions of s.2. Failures of the system cannot impact on the criminal culpability of the offender for which he falls to be sentenced.

39. Counsel for the respondent goes on to make an even more fundamental submission, namely that the matters upon which it is now sought to place reliance as constituting new or newly discovered facts were issues that were in fact ventilated before the sentencing judge and of which he was entirely cognisant prior to pronouncing sentence.

40. He submits that an analysis of the transcripts in the case reveal the following:-

> 1. As a consequence of the evidence from Professor Fahy both vive voce at trial and in his report which was handed into court on the date of sentencing Birmingham J. was fully apprised of the following:
>
> • The applicant was in an acute psychotic state at the time of his transfer to the Central Mental Hospital in July 2006.
>
> • At the time of his transfer from the Central Mental Hospital to Cloverhill Prison (after only 9 days) the applicant was still suffering residual psychiatric symptoms in that he remained paranoid and unwell, despite being medicated.
>
> • He was transferred to Mountjoy Prison after only a further 15 days with no medical review and without his anti psychotic medications.
>
> • Professor Fahy was critical of the decision to discharge the applicant from the Central Mental Hospital to Cloverhill Prision on 14 July 2006.
>
> • It was likely that the disruption in his treatment was one of the factors leading to the exacerbation of his psychotic symptoms, namely the deprivation of anti-psychotic medication was one of the factors leading to the exacerbation of psychotic symptoms that culminated in the killing of the deceased – a matter of greater significance that the fact that the applicant was in an over-crowded prison holding cell.
>
> 2. In his plea in mitigation on behalf of the applicant defence counsel referred the court to the fact that Mr. Michael Dempsey, a Senior Clinical Psychologist, had interviewed the applicant in Cloverhill Prison just some days prior to his transfer and had concerns about his delusional and paranoid beliefs together, significantly, with his potential for aggression. Counsel also reiterated the fact that the medication had not been continued and the relevance of that fact to Professor Fahy's opinion that the applicant perhaps ought not to have been discharged from the Central Mental Hospital after only some 9 days.
>
> 3. Crucially, submissions were advanced on behalf of the applicant at the sentence hearing relating to his non-treatment whilst in Mountjoy Prison in the days leading up to the offence. Specifically, reference was made to a prisoner's right to medical care and the Executive's duty to protect the health of those in custody. Concerns were also expressed about the applicant's Convention Rights and counsel criticised the alleged failure to properly vindicate the applicant's right to proper care in a custodial setting. It was submitted to Birmingham J. that the fact that he was unfit to be discharged from the Central Mental Hospital was further evidence of failure by the State to vindicate his rights. In concluding his plea in mitigation counsel specifically suggested that the deprivation of the antipsychotic medication exposed the applicant to the opportunity of committing this offence.

41. Counsel for the respondent submits that it is therefore manifest that the core issues which were the subject matter of the findings of the Commission – and which essentially related to the confluence of factors which preceded the applicant being in the holding cell with the unfortunate Mr. Douch – were fully ventilated before the sentencing judge. He was, it was submitted, entirely cognisant of those factual issues which underpin the findings of the Commission in terms of systemic failures and was specifically addressed on same through the evidence adduced on behalf of the prosecution via Professor Fahy, as well as from the plea in mitigation advanced on behalf of the applicant.

42. It was further submitted that whilst it is true to say that the sentencing judge indicated that… *"the circumstances in which the accused and the deceased came to be in the cell together are circumstances that have given rise to concern and an inquiry has been established under the Commission of Inquiries Act chaired by Ms Grainne McMorrow SC and given that an inquiry is pending I think it's proper that I should be careful to avoid expressing any views on how that situation came to arise."* ….nevertheless his caution about interfering with Commission findings is not indicative of blindness on his part to the core background facts and which form the basis of the applicant's submission.

43. It was submitted that on no reasonable interpretation could the findings of the Commission be deemed to be "new" or "newly discovered" facts either unavailable to or unavailed of by the defence at the original sentence hearing. On the contrary, Birmingham J. was fully apprised of the existence of these factors, albeit not in the in-depth nature in which they were subsequently examined by the Commission of Investigation, However, it was submitted, they were manifestly before him as part of the sentencing process and were matters to which he could properly have had regard and to which, it was submitted, he did have regard.

44. It was submitted that it cannot therefore be said that the applicant has met the *Willoughby* test, in particular, limb (b) thereof, i.e:-

> *"(b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial."*

Analysis and Decision

45. We wish to state at the outset that we find ourselves in ready agreement with the last of the respondent's submissions, in particular. Neither the written submissions filed on behalf of the applicant, nor the oral arguments put forward by his counsel at the appeal hearing, have sought to substantively address the issue as to how the findings of the Commission, if facts they be, represent "new" or "newly discovered" facts.

46. In considering this issue we will assume for the moment, just for the purposes of the argument, that the respondent's further contentions (i) concerning the sterility of the findings in terms of their legal effect, and (ii) that they constitute "opinions" rather than facts, could be overcome.

47. The only matter put forward by the applicant to suggest that the facts on which he now wishes to rely are "new" or "newly discovered" is the circumstance that the Commission's Report post-dates in time the applicant's trial and also his appeal to the Court of Criminal Appeal. In our judgment that is simply not enough in the circumstances of this case.

48. If one refers back to the matters listed at paragraph's 26 to 32 of Mr. John M Quinn's affidavit (quoted above at paragraph 14 of this judgment), all of the evidence underpinning those findings was available, or certainly was discoverable and obtainable with reasonable due diligence, at the time of the applicant's trial and sentencing. Relevant psychiatric evidence was clearly obtainable concerning the assessment and treatment of the applicant, both from those directly involved, and in terms of an independent peer review had it been sought. Professor Kennedy was available to be subpoenaed and examined in his capacity as Clinical Director of the Central Mental Hospital, concerning the management of the applicant while he was a patient there and the circumstances of his discharge to Cloverhill Prison. Relevant personnel from the Prison Service were also available to be subpoenaed and examined concerning their management and care of the applicant, concerning his various transfers, and concerning prisoner management and care generally in both Cloverhill and Mountjoy Prisons, respectively. No piece of evidence has been identified as having been examined by the Commission that was either unavailable, or not discoverable with reasonable due diligence, at the time of the applicant's trial and sentencing.

49. Far from it, in fact. As the respondent identifies, many of the core issues which were the subject matter of the findings of the Commission were in fact ventilated before the sentencing judge, albeit that they may not have been delved into in the same depth. The critical matter, however, is that they could have been, and all the necessary underlying evidence was known about and available, or discoverable with reasonable due diligence, at the material time.

50. We therefore agree that the applicant has failed to satisfy limb (b) of the *Willoughby* test and the application to adduce the findings of the Commission as evidence of new or newly discovered facts must be refused on that account.

51. We have already alluded to the further, serious, legal issues raised by the respondent. He argues that the findings of the Commission ought not to be regarded as evidence capable of being admitted pursuant to s.2 of the Act of 1993 both on account of being sterile of legal effect, and on account of being "opinions", rather than facts. Notwithstanding these ostensibly strong arguments we consider that, in circumstances where even if these issues were to be resolved in the applicant's favour, he would not in any event be able to satisfy the Willoughby principles, and in particular limb (b) thereof, it is unnecessary for us to rule definitively on them and we therefore will not do so.

Conclusions

52. In the circumstances the application for leave to rely on further evidence is refused. That being the case, the applicant has no basis for seeking to re-open his appeal against the severity of his sentence, and the Court will not permit him to do so. The application under s. 2 of the Act of 1993 is refused.