THE COURT OF APPEAL

RECORD NO. CA308/2015

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

PAUL BRANNIGAN

APPELLANT

JUDGMENT of the Court delivered 3rd of March 2017 by Mr. Justice Edwards

Introduction
1. On the 1st December 2015 the appellant was arraigned and pleaded not guilty to each of three counts on an indictment before Dublin Circuit Criminal Court. Count no. 1 charged the appellant with the manslaughter of Jason Saunders on the 18th March 2014. Count no. 2 charged the appellant with assaulting Jason Saunders on the same date contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997 and count no. 3 charged him with producing an article capable of inflicting serious injury, to wit, a golf club during the course of a dispute in a manner likely to unlawfully intimidate another, at the same date and place, contrary to s. 11 of the Firearms and Offensive Weapons Act 1990.

2. On day 5 of the trial, just prior to the commencement of closing speeches, and by agreement between the prosecution and the defence, count no. 2 was severed into two s. 3 assaults. Count no. 2 was amended to charge that *"Mr. Brannigan did … assault one Jason Saunders by head butting him, thereby causing him harm"* and an additional count was added to the indictment charging that *"Mr. Brannigan did … assault one Jason Saunders by striking him with a golf club, thereby causing him harm".*

3. On day 6 of the trial, the appellant was found guilty by the jury in unanimous verdicts on counts nos. 2 and 3 respectively and guilty by a majority verdict on count no. 4. The jury disagreed in respect of count no. 1.

4. The appellant appeals against his conviction in respect of count no. 2 (i.e. assault by head butt) and count no. 4 (i.e. assault by striking with the golf club) on the following grounds:-

> (i) The trial judge erred in law in relation to count no. 2 by misdirecting the jury in respect of the application of the principles of self defence to the facts of the case, by removing from the accused any consideration of his subjective view of the threat as he saw it.
>
> (ii) The trial judge erred in law in refusing to allow the jury to consider self defence in respect of count no. 4.

The evidence before the jury
5. A party took place in the appellant's flat, which was located on Fassaugh Avenue in Cabra, on a section of the street that comprised a number of grocery shops, a Chinese restaurant, a pub and some other establishments. The entrance to the flat was next door to a Spar shop at 70, Fassaugh Avenue. When one entered the street level door to the premises, one went up a stairs and then through a further door to access the flat itself. Various witnesses gave evidence of being at the party and of consuming large amounts of alcohol and it appeared that there were no difficulties or incidents at the party and it was effectively an open house with various people coming and going into the early hours of the 18th March 2014.

6. The court heard further evidence from a number of witnesses who were socialising with the deceased man, Jason Saunders, on the 17th March 2014 at the Autobahn pub in Finglas and that the group were drinking in the pub throughout the day until they left at approximately 8 p.m. and went back to the house of one of the girls in Finglas for a party. The court heard in particular from Darren Mulholland that he met Mr. Saunders for the first time that day, in circumstances where Mr. Saunders was in the company of the cousin of Mr. Mulholland's girlfriend, and that Mr. Mulholland and Mr. Saunders were *"sniffing coke and doing E's all day".* The court heard that an argument had taken place between Mr. Mulholland and his girlfriend while at the party in Finglas and that Mr. Mulholland and Mr. Saunders left that party at approximately 6 a.m. on the 18th March 2014.

7. After leaving the party in Finglas, the two men were out on the street sharing a bottle of vodka between them and they then crushed an ecstasy tablet on the back of a phone and inhaled it before getting into a taxi and making their way to Cabra, where Mr. Saunders lived.

8. On arriving at Fassaugh Avenue, they went into the door of No. 70 and entered the appellant's flat. The time at this stage was between 6.30 a.m. and 7.00 a.m.. The court heard from witnesses who were in the flat at the time that Mr. Saunders arrived. The evidence was that Mr. Saunders was drinking from a bottle of vodka and was talking loudly. The appellant turned down the music on a number of occasions and then was overheard telling Mr. Saunders that he would have to leave. The appellant and Mr. Saunders then left the flat through the upstairs door that led to the stairs, which in turn led down to the street. Witnesses had not noted arguments or aggression prior to the two men leaving the flat.

9. A Mr. Kevin Coffey gave evidence that he was working as the store manager of Spar at 72, Fassaugh Avenue on the morning of the 18th March 2014. While he and other staff members were getting ready to open the shop, he heard two people shouting outside the shop. The shouting was loud and unfriendly but he could not hear what was been said. He was some distance back inside the shop at the time and when he heard the shouting he moved towards the door of the shop. He recognised the appellant and Mr.

Saunders and saw the two of them having a bit of a scuffle. He saw Mr. Brannigan head butt Mr. Saunders following which Mr. *Brannigan "kind of turned to walk away and he then went back to him and proceeded to hit him…well, I didn't see him hit him with the golf club but he certainly swung it a number of times".* Mr. Coffey's recollection was that after the initial head butt Mr. Saunders looked as if he was just turning away as though he was going to go home, and Mr. Brannigan headed towards his door. When asked what did Mr. Brannigan do after that he replied *"They then…both seemed to turn around and they gave…they went again".* The interaction ended when Mr. Saunders walked away and Mr. Brannigan proceeded back to his door. The incident was partly captured on CCTV and Mr. Coffey acknowledged that he had watched the CCTV of the incident prior to giving his full statement to the gardaí but maintained that he gave his evidence from memory and that it was not coloured by the CCTV recording he had viewed.

10. Under cross examination he acknowledged that he had said in his statement that Mr. Brannigan had a golf club in his hand and was swinging it at Jason Saunders. He had *said "He was swinging it like mad. He didn't seem to have any preference for where he was looking to hit Jason. From what I witnessed I can't be sure if he made contact with Jason with the golf club. I did see him head butt him though. After this, I saw Jason walk away and I went back into the shop".* He was asked whether he was able to observe whether Mr. Saunders had something with him and he said he couldn't see it. When pressed on whether Mr. Saunders may have had something with him he replied *"He may have but I couldn't see it".*

11. The jury also heard evidence from Aidan Kenna who was working as the manager of the Centra on Fassaugh Avenue and who saw a taxi pull up and two men get out at a point between 6.30 a.m. and 7 a.m. on the 18th March 2014. He recognised one of the men as Jason Saunders. Mr. Saunders was holding a bottle of vodka in his hand and went into the door leading to the flat at 70, Fassaugh Avenue. The taxi man lingered outside and Mr. Kenna got the impression he had been waiting for his fare. Sometime after that Aidan Kenna was inside his shop when he saw Jason Saunders stumble across the front of the shop window. He had his head down and was heading towards the road and Mr. Kenna was concerned he might get hit by a car. He went out to the door and he saw that Mr. Saunders had fallen face first onto the ground and that a bottle of vodka he had been holding had smashed underneath him.

12. Following Mr. Saunder's collapse it was apparent to people who went to his assistance that he was in extremis. An ambulance was called and he was taken to hospital but unfortunately he was declared dead on arrival. A post mortem was carried out by Prof. Marie Cassidy. It transpired that Mr. Saunders had died from a very unusual cause. Prof. Cassidy had noted in the course of her post mortem a *"tulip shaped abrasion"* in the middle of the deceased's chest. She stated that:-

> *"This injury was due to a direct blow to the chest. It is likely that such an injury was caused by being struck in the centre of the chest by a blunt instrument. I was shown a golf club and this could have caused the fatal blow to the chest, most likely due to a swipe from the club head."*

13. Under cross examination it was suggested to her that the mark could have been caused in the course of the deceased falling down onto a hard unyielding object. Prof. Cassidy agreed that was possible. Her attention was drawn to a number of photographs of the location where the deceased had fallen. These photographs showed a broken Smirnoff 1 litre vodka bottle. Her attention was drawn to a particularly thick and heavy piece of the broken bottle, what counsel described as *"a knuckley bit that goes to the bottom of the bottle".* She stated that those pieces had not been shown to her and she had not given consideration to whether the injury might have been caused by the thick piece of broken glass in the photograph. She agreed that if somebody falls heavily onto something that is projecting it could cause a localised injury *"not dissimilar from what we are talking about here".* The direct cause of death was attributed to a condition known as "Commotio Cordis" which is quite rare. It involves a lethal disruption of heart rhythm occurring as a result of a blow to the chest directly over the heart. Samples were taken from the deceased for toxicological analysis and this analysis identified that the deceased had consumed a cocktail of drugs including ecstasy and cocaine. The evidence was that these could have stressed the deceased's heart and sensitised it to further insult, increasing his risk of a serious and potentially fatal cardiac arrhythmia following a blow to the chest.

14. The appellant did not give evidence at the trial. However memoranda of his interviews with members of An Garda Síochána were read to the jury. In the course of being interviewed he was *asked "Can you now tell us in your own words exactly what happened this morning between 7a.m .and 8a.m.".* He answered

> *"For starters there was a bit of a party in my flat at 70, Fassaugh Avenue. I asked the partygoers to leave, I asked J to leave. I don't know the time. When J got down to the front door he was kicking off. He was fuelled out of it on cocaine and vodka. Jason said he would come back and either shoot me or stab me one or the other. Then a golf club was there, behind the door, I picked it up. That's the door of the flat out onto the street beside Spar. When I picked up - when I picked the golf club up I went outside and told him to fuck off. I thought he would just have went. When I stepped out with the golf club in my right hand down by my side, Jason then got in and stuck to me. He got right up in my face. I couldn't punch him because he was too close to me. I couldn't swing the golf club so my natural reaction was to head butt him. I head butted him straight into the forehead. Jason lifted up the litre bottle of vodka and was going to hit me with the litre bottle of vodka and that's why I head butted him. I had no other option. When he went back a bit he went to throw it at me so I turned and ducked away. I went back into my flat then and had a cigarette. I didn't think too much more of it. I told the lads inside what had happened and when I came back down again the ambulance was then and Jason was been put into the ambulance."*

15. Later in the same interview the appellant said:-

"He told me he was going to shoot me as he going out the main entrance onto Fassaugh. The usual bullshit, shoot, stab, the usual."

> *Question: "So you knew he was just making idle threats?"*
>
> *Answer; "Yeah, I didn't care about that. I was saying go home sober up but he kept going. The golf club was in behind the door. I thought that when I picked up the golf club and stepped out with it he would run off but instead he went face to face with him. When he went face to face to me, he tried to strike me with a litre bottle of vodka and I head butted him. I only have one arm. It was only self defence. What could I do?"*
>
> *Question: "So you are saying that out on the path at Fassaugh Avenue that Jason Saunders was carrying a litre bottle of vodka?"*
>
> *Answer: "Yeah he tried to strike me with it."*
>
> *Question: "When you head butted him, what did he do?"*

Answer: "He stood back, was going to launch the bottle at me and I got in behind me door and he ran off. I thought nothing more of it. Went up, had a smoke, told the lads what happened and after five minutes went back down and an ambulance was driving off. The fella out of Spar, the manager, approached me and told me I was lucky I didn't get struck with the bottle."

16. The appellant was shown CCTV footage in the course of being interviewed and he identified himself in that footage. Sgt. Gavin Ross, one of the interviewers, gave evidence that the interview then took the following course:-

[Mr Brannigan:] "That's right on the corner. See him going head-to-head with me. That's when I gave him a loaf and that's when he ran off down the road"?

Question: "So you can identify yourself from the CCTV?"

Answer: "Yeah, that's him roaring and shouting at me. He's standing at the door saying, 'Blah, blah, blah' at me. He kept saying this to me. That's when I ran out with the golf club. He's at my front door confronting me. Then he walks off shouting, 'Watch, watch'. The usual. When I went out with the golf club, he stuck it up to me. You can see it. I just pure back down. Remember I was saying we were that close - if I'd swung that I'd hit you with the rubber bit, if even that."

Question: "Why if you knew he was just mouthing off at you and he had left your flat did you run out to him?"

Answer: "I just tried to scare him. I thought he would have run when he'd seen the golf club"?

Question: "Why did you not just close the front door? He was gone the other side of the path."

Answer: "That's on the other side of this room in distance. He did draw me out. I thought he'd run if I stepped out with the golf club. I thought I would have frightened him away. As I say, I don't drink. I was after putting up with this at that hour"

Question: "So, Paul, again, we will look at this piece of CCTV. Jason Saunders is at the other side of the path away from your door and you have only one good arm. Why didn't you close the door?"

Answer: "Do you know why? Because I thought he was going to do something spiteful like run up the back lane and smash me windows. They're sneaky over there. It's like if they can't get you one way, they'll do something sly on me. He already told me that "you have to live over there", remember that.

Question: "But you think that was enough to make you run out with a golf club?" Answer: "I couldn't really run out with me hands. I have only one good arm. He's the kind of person who walks out that road, around the lane and smash all me windows. I thought if I ran out with a golf club he'd fuck off, yeah. I had no intention of hitting him with it. Just for fright. I have no power in this left arm and I did not hit him with it"

Question: "Were you swinging the golf club?"

Answer: "Not that I know. I remember putting it up in the air when he had the vodka bottle. When he held up the vodka bottle, I head butted him. Then he stepped back to throw it and I stepped back and held up the club. I walked back, held up the club and got into my flat"

Question: "You can see that point there when you hit him with a head-butt?"

Answer: "We can all agree on that. You see me hit him with my head, yeah." Question: "But then you don't immediately back off. You go forward. What are you doing there? You go forward four or five steps after him with your right arm up. What are you doing there?"

Answer: "I'm trying not to get hit with a bottle of vodka"

Question: "Are you swinging the club to keep him back from you?"

Answer: "I have the club up, to block"

Question: "Did you swing the club at all?"

Answer: No, I put it up"

17. At different later points in the same interview the appellant utters the following further relevant statements.

"And I was like that (shows holding right arm up) to protect myself. At the end of the day I've only one arm, there's a fella coked up full of drugs"

"I tried to tell him enough was enough. It was either get a bottle of vodka in the face or give him a head butt"

"The reason I put the golf club up in the air like that was because he held a bottle of vodka up in the air. I was too close to hit him with the golf club. We were too close together. When Jason leaned back he was going to throw the bottle of vodka at me so I said I was going to throw the golf club at him if he was going to throw the bottle at me. That's why I held the golf club up in the air."

"He's on one side, I'm on the other side, he stepped back to swing a bottle of vodka and I was stepped back. I was swinging the golf club and he was swinging the bottle of vodka. This was after the head butt. He was threatening to throw the bottle of vodka and I was threatening to throw the golf club. I only head butted him"

18. There were then the following further exchanges:

"Question: "Did you hit him with the golf club? Where did you hit him with the club? Did you hit him in the head?"

Answer: "I didn't hit him with the golf club anywhere at all."

Question: "Did anyone hit him in the flat?"

Answer: "No, nobody did. There was no fight in the flat."

Question: "What's the truth about swinging the golf club? The witness said you swung it like mad so how did you swing it?"

Answer: "I put it back behind my head like I was going to throw it."

Question: "Did you swing the club in front of you to protect yourself from Jason Saunders with his bottle of vodka?"

Answer: "Yes, I did swing it in front of me to protect myself and keep Jason away from me, but I didn't hit him and it was after I'd held it up in a threatening manner first. I want to say he was 10 or 15 feet away so I couldn't hit him anyway." Question: "Why did you swing it then if he was 10 or 15 feet away?"

Answer: "The reason I swung it was he had a bottle of vodka threatening to throw it at me. I only swung it once or twice after I was holding it up over my head and then I went in."

Question: "How many times did you swing the golf club in front of you?"

Answer: "Two to three times max."

Question: "You've now changed from one to two and now to three times."

Answer: "He wasn't in my range when I was swinging."

Question: "What if I produced CCTV footage showing the golf club actually hitting him, what would you say then?"

Answer: "Self-defence but I know he's out of range."

Question: "Paul, we think this bruise was caused by his being hit with the golf club." Answer: "I don't think I hit him with the golf club 100%. He was too far out of my reach."

Question: "It's a long thin bruise."

Answer: "I know."

Question: "Did you connect at all?"

Answer: "No, I loafed him in the head with my head"

The Judge's Charge on Self Defence

19. In the course of his charge to the jury, the trial judge discussed the ingredients of the offence of assault causing harm and went on to explain the necessity for the perpetrator to act without lawful excuse, and had this to say:

> *"The issue that arises essentially in the trial in respect of the concept of assault is whether it can be done with lawful excuse and the law allows for the lawful excuse of the use of force in circumstances where someone is defending himself. It is provided for under the same Act, again, and says that: 'The use of force by a person for any of the following purposes, if only such as is reasonable in the circumstances as he or she believes them to be, does not constitute an offence.' And it says: '(a) to protect himself or herself or a member of the family of that person or another from injury, assault or detention caused by a criminal act.' So in the course of the evidence of this case the concept of defence itself arises in respect of count No. 2 on the indictment and on that only. This is the allegation that the accused assaulted Jason Saunders by head-butting him, thereby causing him harm. The defence does not arise in respect of count No. 4 which is the allegation that the accused assaulted Jason Saunders by striking him with a golf club, thereby occasioning him harm because the accused's defence to count No. 4 is that he never struck with the golf club, he didn't use the golf club as a weapon of assault and that he did not hit the late Mr Saunders. So, that's the issue for you there. It is a determination of the facts of the case. In view of all of the evidence, did he strike or did he not? If he did, he's guilty of the offence; if you're left with any reasonable doubt in that proposition, well then you'll acquit him of that offence.*
>
> *But in coming back to the offence as contained in count No. 2, that of assault of one Jason Saunders by head-butting, here different considerations arise because here the accused tells you in the course of his interview that he did so to defend himself; that the late Mr Saunders faced him off, that he wasn't in a position to do anything else, that he was in fear of being struck by him, either with or without the bottle, and so he head-butted him. Now, the law says that it is lawful to use force in defence of yourself but it isn't an open, so to speak, licence. It is subject to certain strictures. The first thing to say to you is that once the issue is raised as a matter of defence on the evidence, the onus rests still on the prosecution to rebut it, to satisfy you beyond reasonable doubt that it couldn't arise. The standard that the State must, in establishing their facts, is to satisfy you beyond reasonable doubt that the assault by head-butt was done without lawful excuse by the accused and that there is no reasonable defence to it. The defence, on the other hand, in raising it must raise with you the mere possibility of it. If it is possible on the evidence, well then the benefit of the doubt is given to the accused and you must acquit him. So the onus rests on the State to make a tie of it; to disprove it. Secondly, if I am threatened by someone to say, who raises his fists and says: 'Now I'm going to knock your block off' or words to that effect, it isn't a defence to you to pull out your sword and run it through them or pull out a gun and shoot them and say: 'I'm only defending myself.' The law says that what you do in response to the threat must be proportionate, must be measured considerably, what threat is presented to you. And in assessing what that threat is, you look at it from the point of view of the accused: what did he see? What's threatening him at the time? How did it present to him as he believed it? It is open to you to assess that evidence to see if his belief, as he expresses, is*

reasonable, if it is reasonable, having regard to all of the facts of the case as you know it. And, equally, it is open to you to have regard in that respect as to whether or not there was a need to engage with the assailant, in any event with Mr Saunders, on this occasion, was there a way to escape to avoid contact, to avoid encounter? The obvious other thing to say to you is that if the accused man, in your view, was the instigator of the row, he cannot rely upon the defence of self. So the law doesn't allow you to start a row and then say: 'Oh, well, I was only defending myself.' If you are the instigator, the originator of the fracas, the row, well then you cannot rely upon the defence of self-defence, a defence of the person."

The alleged misdirection as to the subjective test

20. The appellant complains that the trial judge misdirected the jury in relation to Count 2 in respect of the application of the principles of self defence to the facts of the case by removing from the accused any consideration of his subjective view of the threat as he saw it.

21. In non-fatal offences the test to be applied to self defence is undoubtedly subjective at all stages. S. 18(1) of the Act of 1997 provides:

> "The use of force by a person for any of the following purposes, if only such as is reasonable in the circumstances as he or she believes them to be, does not constitute an offence—
>
> (a) to protect himself or herself or a member of the family of that person or another from injury, assault or detention caused by a criminal act;"

22. The critical thing is the subjective belief of the person under attack. The standard by which he or she is to be judged is what was "reasonable in the circumstances as he or she believes them to be". It does not matter how objectively unreasonable the person's subjective belief might be, as long as it is an honestly held belief.

23. However, s.1(2) of the Act of 1997 introduces an important nuance. It provides that:

> "For the purposes of sections 17, 18 and 19 it is immaterial whether a belief is justified or not if it is honestly held but the presence or absence of reasonable grounds for the belief is a matter to which the court or the jury is to have regard, in conjunction with any other relevant matters, in considering whether the person honestly held the belief."

24. This does not introduce an objective element into the self defence test. The self defence test remains wholly subjective provided the asserted belief is honestly held. However, in assessing the "honesty" of the asserted belief, a jury can have regard to the presence or absence of reasonable grounds for that belief in conjunction with other matters. This nuance is highlighted in the leading authority, namely *The People (Director of Public Prosecutions) v O'Reilly* [2004] IECCA 27, which the appellant relies upon.

25. While there is no doubt that the trial judge explained the law on self defence correctly in the first instance, it is the appellant's contention that he went on to undo that good work and to sow confusion in seeking to develop his theme.

26. In telling the jury that *"in assessing what that threat is, you look at it from the point of view of the accused: what did he see? What's threatening him at the time? How did it present to him as he believed it?"* the judge was perfectly correct, and was conveying unambiguously that the test was a subjective one.

27. Unfortunately, he immediately then went on to add that *"[i]t is open to you to assess that evidence to see if his belief, as he expresses, is reasonable, if it is reasonable, having regard to all of the facts of the case as you know it."* This suggests the polar opposite to what he had just said, and introduces the idea that the accused's belief has to be an objectively reasonable one, rather than a belief honestly held regardless of whether it is reasonable or unreasonable.

28. He then further *added "[a]nd, equally, it is open to you to have regard in that respect as to whether or not there was a need to engage with the assailant, in any event with Mr Saunders, on this occasion, was there a way to escape to avoid contact, to avoid encounter?"* This would have been a perfectly legitimate comment if it had been linked to an instruction that the jury needed to be satisfied that the asserted belief was one that was honestly held, because, as already pointed out, s. 1(2) of the Act of 1997 allows a jury to have regard to the presence or absence of reasonable grounds for an asserted belief in conjunction with other matters, in making that assessment. However, in circumstances where this sentence followed on from a suggestion that the accused's belief had to be an objectively reasonable one, the appellant contends that it was likely to have been interpreted by the jury as a further elaboration on that incorrect instruction.

29. Counsel for the respondent has sought to argue that the trial judge properly set out the subjective test for the jury. The trial judge had clearly stated that the jury must look at the events from the appellants' viewpoint. Moreover, after the completion of the judge's charge no requisition was raised respect of Count No. 2 and the manner in which the judge explained self-defence to the jury. In particular, no complaint was made, to quote the first ground of appeal, that he had misdirected the jury on the *"principles of self-defence … by removing from the accused any consideration of his subjective view of the threat as he saw it".* The respondent objects to the point being raised now, and in that regard seeks to rely on *The People (Director of Public Prosecutions) v Cronin (No 2)* [2006] 4 I.R. 329.

30. It was submitted that the sentence in which an objective test is seemingly introduced ought not to be viewed in isolation. On the contrary, the passage in which it appears must be read as a whole. It was submitted that the trial judge's use of the word "reasonable" has to be combined with the words *"what did he believe"* and *"what did he see"* and *"look at it from his point of view"*. In other words he was saying that it was open for the jury to consider self-defence from the appellants' point of view if his belief was reasonable to him and if the situation was open to **him**.

31. The Court has little doubt but that the trial judge simply expressed himself infelicitously and that he never intended to convey to the jury that the self defence test in the case of a non-fatal offence was anything but subjective. Regrettably, however, we cannot foreclose on the possibility that the jury were confused or misled by the ostensibly contradictory and incorrect instructions they in fact received.

32. Nevertheless, the Court has been tempted to uphold the *Cronin* based objection raised by the respondent, in circumstances where no explanation has been proffered for the failure to raise a requisition. However, although we regard the matter as having been

very finely balanced, we have decided not to do so, and to allow this ground of appeal to be relied upon, lest a fundamental injustice be done to the appellant. In doing so we have been significantly influenced by the approach of the Court of Criminal Appeal who faced a similar dilemma in *The People (Director of Public Prosecutions) v O'Reilly* cited earlier. Giving judgment for that court, McCracken J said:

> "Counsel for the respondent argues that, as no specific requisition was raised in relation to self-defence, the applicant ought not to be allowed to rely on defects in the charge in that regard. Whilst certainly the failure to make a requisition is a matter which may be taken into account in this Court in considering an appeal, particularly in cases where the failure to requisition may possibly have been a technical decision, in our view such considerations do not apply to the present case. The question of self-defence is absolutely central to the guilt or innocence of the applicant, and if this Court is of the view that a jury may have been under a misapprehension in convicting the applicant then justice requires that the absence of a requisition ought not to prejudice the applicant's rights."

33. In adopting a similar approach in this case, we again wish to emphasise that the issue has been a finely balanced one. However, we are convinced that, having regard to the evidence in the trial, possible self defence was the central issue in the case in so far as Count No 2 was concerned. It is the centrality of that issue in the circumstances of the present case which has tipped the scales for us, as it also did for the Court of Criminal Appeal in the *O'Reilly* case.

34. We will therefore allow the appeal on ground No 1.

Refusal to allow the jury to consider self defence on Count No 4

35. The first thing to be said in regard to this aspect of the case is that possible self defence either arises, or it doesn't arise, for the jury's consideration on the evidence that has been adduced. It is for the prosecution to negative self defence where it arises as a possibility on the evidence, and not for an accused to prove that he or she acted in self defence. If self defence arises as a possibility on the evidence, the trial judge must leave the issue to the jury. Unlike in a case where it is sought to rely on a defence of provocation in a murder case, where the trial judge has a discretion as to whether or not to allow that issue to go to the jury, a trial judge has no such discretion in the case of possible self defence.

36. The trial judge in this case was correct in suggesting that there must of course be some evidential basis for contending self defence, and that it cannot be merely asserted as a possibility without at least some evidence to support. However, we are satisfied that the threshold is low in that regard. In this case, in deciding not to allow the jury to consider self defence in respect of Count No 4, the trial judge appears to have been heavily, and counsel for the appellant contends unduly, influenced by the appellant's asserted belief at interview that although he swung the golf club in Mr Saunders' direction he never made contact with him. It will, however, be recalled that he was equivocal to the extent that when asked *"What if I produced CCTV footage showing the golf club actually hitting him, what would you say then?"* he responded: *"Self-defence but I know he's out of range."*

37. The problem with the trial judge's approach is that it forecloses on the possibility that the appellant may genuinely, but mistakenly, be of the belief that he did not strike the deceased. Quite apart from the appellant's stated belief as to whether the golf club did or did not make contact with the deceased, there was other evidence from him suggesting that at the material time Mr Saunders was advancing on the appellant in a menacing way while brandishing a Vodka bottle. The appellant said in terms to the interviewing Gardai *that "The reason I swung it was he had a bottle of vodka threatening to throw it at me."* Moreover, there was evidence that at the time of the deceased's collapse he was still holding the Vodka bottle, in as much as the broken remnants of it were found proximate to his body.

38. We are satisfied that on this evidence alone the low threshold for allowing self defence to be considered by the jury was met, and that the trial judge was in error in refusing to allow the jury to consider self defence as a possibility in the context of Count No 4.

39. We would therefore also allow the appeal on ground no 2.

Conclusion

40. In circumstances where we are upholding both of the appellant's grounds of appeal we will quash his conviction on Count's 2 and 4 respectively.

41. We will hear submissions concerning whether or not the Court should direct a re-trial on those counts.