THE COURT OF APPEAL

Record Numbers: 30/18
21/18
2/18

The President
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

PATRICK ROCHE

APPELLANT

- AND -

PHILIP ROCHE

APPELLANT

- AND -

ALAN FREEMAN

APPELLANT

Judgment of the Court delivered on the 10th day of December 2019 by Ms. Justice Kennedy.

Introduction

1. The appellants seek to appeal against conviction. Following a nine-week trial, the appellants were convicted before Limerick Circuit Criminal Court on the 27th July 2017.

2. Patrick Roche was convicted of two counts of aggravated burglary contrary to section 13 of the Criminal Justice (Theft and Fraud Offences) Act 2001; eight counts of false imprisonment contrary to section 15 of the Non Fatal Offences Against the Person Act 1997; and dishonest handling contrary to section 17 of the Criminal Justice (Theft and Fraud Offences) Act 2001. He received a sentence of 17 years' imprisonment with three years suspended.

3. Philip Roche was convicted of two counts of aggravated burglary contrary to section 13 of the Criminal Justice (Theft and Fraud Offences) Act 2001; eight counts of false imprisonment contrary to section 15 of the Non Fatal Offences Against the Person Act 1997; and possession of stolen property contrary to section 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001. He received a sentence of 15 years' imprisonment with three years suspended.

4. Alan Freeman was convicted of one count of aggravated burglary contrary to section 13 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and five counts of false imprisonment contrary to section 15 of the Non Fatal Offences Against the Person Act 1997. He received a sentence of 14 years' imprisonment with three years suspended.

Background

5. The offences in question relate to two separate incidents of aggravated burglary in Co. Limerick. The first aggravated burglary was committed at Sunville House (the Garvey home) and involved all three appellants and the second aggravated burglary took place at the home of the Creeds and involved Patrick and Philip Roche only.

The Garvey House

6. On the 13th April 2012, a sky-blue BMW was stolen from a location in Cappaghmore, Co. Limerick. This vehicle was then used in the aggravated burglary at Sunville House on the 16th April 2012. On the night in question, Gerard and Anne Garvey were at home with their four children who were aged between 14-16 at the time. At 9:40pm, four men gained entry into Sunville House, breaking the glass of the patio door. The men were armed with various implements including a sawn-off shotgun, sledgehammer and a baseball bat. The men split up inside the house in order to take control of the occupants. Two of the men went upstairs where three of the children were situated along with Anne Garvey. Graham Garvey, who was 14 at the time, was struck by one of the men. At the same time, Gerard Garvey was kept downstairs where he was restrained lying on his stomach with handcuffs. He was assaulted a number of times. Evidence was given that threats to the effect of "We'll blow your head off. We'll kill your daughter. We'll take away your kids. You will never see them again" were made against Mr Garvey in the presence of his daughter Gillian who was 14 at the time. At one point, a shotgun was pressed against Mr Garvey's forehead. Anne Garvey was threatened a number of times in front of her children. She then led the men to a safe in the bedroom from which she removed a white envelope containing 3000 USD and 2000 in sterling which she gave to the men. Once the men received the money, they restrained the rest of the family members with cable ties and fled the scene in a BMW.

7. Approximately an hour after the incident at Sunville House, two Gardaí on mobile patrol became suspicious of two vehicles which appeared be driving in convoy. The Gardaí followed the vehicles, one of the vehicles got away but the other vehicle was stopped; a BMW registration number 08 C 40057 and one of the occupants of that car was identified to be Patrick Roche. He was the front seat passenger. The car was searched and various items including a black balaclava, rubber gloves, handcuffs and a screwdriver were found. When Patrick Roche was searched, it transpired that he was wearing three pairs of pants and two pairs of socks. Patrick Roche was arrested and charged with an offence contrary to s.15(2) of the Criminal Justice (Theft and Fraud Offences) Act 2001 and was released on bail. On the 17th April 2012, he was arrested by Detective Garda O'Connell on suspicion of committing an offence contrary to s.73 of the Criminal Justice Act 2006, namely, on suspicion of a serious offence, for the benefit of, or direction of, or association with a criminal organisation, to wit an aggravated burglary at Sunville House, Co. Limerick. He was detained and his clothing was seized and on later analysis shards of glass were found therein. Samples of these were sent for forensic analyses and were found to offer moderate support for the view that Patrick Roche had contact with the patio window from Sunville House.

8. The black balaclava was found in the front passenger side door, as were the rubber gloves and the screwdriver. 1850 USD were found in the glove compartment and the handcuffs and handcuff keys were found in the pocket of a jacket. Finally, a ski mask described as similar to a balaclava was discovered between the front seats.

9. The evidence disclosed that the handcuffs found in the BMW were similar to those used to restrain Mr Garvey and the keys found opened the handcuffs found in the vehicle and also opened the handcuffs which had been used to restrain him.

The Creed House

10. The second incident took place on the 31st May 2012 in a house located in relatively close proximity to Sunville House. This house was occupied by three siblings, William, Nora and Chrissie Creed who were aged 74, 68, and 72 respectively at the time. Shortly after 9:30 pm on the night in question, Nora and Chrissie were in the parlour when two men broke into the house, roaring and shouting. William, who had gone to bed, heard the commotion and went to the front door where he was then knocked to the ground, pulled along the floor and punched repeatedly in the head and chest. The perpetrators were armed with some form of handle, as well as a butcher knife and a screwdriver. William was punched repeatedly in the face and stabbed in the head several times with a screwdriver. One of the perpetrators shouted that he was on drugs and he could get very violent and threatened to stab him and cut his throat. At one point, one of the perpetrators cut William's hand. Meanwhile, Chrissie and Nora were also subject to serious violence as they were knocked to the ground and punched. All three were tied up with belts and cable ties and told that they would be killed if they did not co-operate and tell them where their money was. After a period of time, the raiders were told where the money was to be found. They located and stole €5,000 from the house and left shortly thereafter. The men fled through the fields and were collected by a third man. The scene was subject to a forensic examination and ten days after the incident, Nora Creed, contacted the Gardaí and gave Garda Vincent Donnellan a fingertip of the glove which she said she had found in the rubbish bin. This was potentially significant as her sister Chrissie had pulled the tip from a glove worn by one of the two raiders.

The Vehicles

11. The bill of indictment originally charged 34 separate counts; five of these charges were severed from the indictment. Some of the charges related to another aggravated burglary and false imprisonment at the Cruise family home on 13th April 2012. The counts referable to that incident were severed from the indictment. In the course of that burglary, **a sky-blue BMW M5, registration number 00 WW 1000** was stolen. This vehicle was then used in the Garvey aggravated burglary.

12. Mr William Gammell gave evidence that sometime around March 2012, he was introduced to Alan Freeman by John Cahill and asked to store a **white Mitsubishi Lancer** for Alan Freeman. It seems that this vehicle was connected to the Cruise aggravated burglary. Subsequently, he was again asked to store a vehicle for Alan Freeman, this time a sky-blue BMW M5; 00WW1000. Mr Gammell gave evidence that some days later, he was contacted by John Cahill, who said he was in trouble and following which he met with

John Cahill and Philip Roche outside Cappaghmore where the sky-blue BMW was parked in an old shed and John Cahill needed a lift for himself and Philip Roche. This was following the Garvey aggravated burglary and Patrick Roche's arrest while a passenger in a **BMW 08C40057**. That car was owned by Christopher Stokes, who was the driver on the relevant date.

13. At some later stage, Mr Gammell said he received a phone call from Patrick Roche who told him that he had a **Volkswagen Touareg Jeep 2006 KY 2112** for him. This jeep was used in the Creed aggravated burglary.

14. Finally, Mr Gammell was contacted to meet Alan Freeman, Philip and Patrick Roche at the Horse and Jockey pub, where he collected a **Toyota Landcruiser Jeep**; registration number 06 KE 8015 which transpired to have been stolen. This was the subject of counts 8 and 34 on the indictment; both handling charges. Count 8 concerned Patrick Roche; he was acquitted of this charge and count 34 concerned Alan Freeman; this count was severed at the outset of the trial.

The Accomplices

The Garvey House accomplice

15. John Cahill was called as a witness in the trial. He contacted the Gardaí while serving a prison sentence and made a statement regarding his role in the aggravated burglary at the Garvey home on 16th April 2012. He gave evidence about his role in that aggravated burglary and said that he was present in the blue BMW M5 waiting to collect the raiders from the Garvey home.

16. Mr John Cahill gave evidence that on the date of the Garvey aggravated burglary, 16th April 2012, he was waiting in this vehicle for the raiders. They travelled in the blue BMW until just outside Cullen village when Patrick Roche and Christopher Stokes got out of the vehicle and into another BMW; registration number 08 C 40057. John Cahill said that Alan Freeman also got out of the car and into a dark Volkswagen Sirocco. The BMW 08 C 40057 was the vehicle which was stopped by the Gardaí; driven by Christopher Stokes and with Patrick Roche in the passenger seat.

17. Thereafter, William Gammell received a phone call from John Cahill stating that he needed a lift, as a result of which Mr Gammell collected Mr Cahill and Philip Roche outside Cappaghmore, at an area known as Kennedys Woods. He testified that Mr Cahill said that Patrick Roche had been arrested and that they had burgled Sunville House. He said that Philip Roche was shouting that they needed to hide a black bag containing items used in the burglary. Mr Gammell drove towards Doon, where he stopped the car and John Cahill and Philip Roche jumped out and hid the bag. He then dropped both men to John Cahill's home. The next day, Mr Gammell collected the blue BMW and drove behind John Cahill, eventually meeting him in a wooded area where John Cahill set the car alight. A witness, Patrick Ryan, testified that he saw a jeep driving behind a blue BMW. The blue BMW was subsequently discovered on fire. A few days later Mr Ryan saw the same jeep being driven by William Gammell.

The Creed House accomplice

18. The accomplice to the Creed burglary, William Gammell, said that on the 31st May 2012 he collected Patrick and Philip Roche from Cappawhite in County Tipperary driving a Volkswagen Touareg, registration number 06KY2112, and dropped them to Pallasgreen County Limerick, close to the home of the Creed family at approximately 9 pm. He gave evidence that the men were carrying a brown Dunnes Stores bag, it seems that Mr Gammell then separated from the two men and some 20 minutes later he was contacted to return and collect them and he did so, on this occasion, he said the men changed clothes and footwear, placing their outer clothing into the Dunnes Stores bag. Significantly, he described Patrick Roche saying that one of the occupiers of the house had pulled a finger from his glove and he, (Mr Gammell) noticed that one of the fingers from Mr Roche's glove was missing. When Patrick Roche got out of the jeep, he told Mr Gammell to burn the Dunnes Stores bag. Instead Mr Gammell stopped near a railway bridge on his way to Monard and hid the bag behind a wall. He subsequently brought the Gardaí to this area; the bag was found which contained various items of clothing which were examined, and DNA was found on the mouth and nose area of a balaclava relevant to Patrick Roche and a black woollen glove relevant to Philip Roche.

Grounds of appeal

19. The appellants put forward a combined total of 34 grounds of appeal, as outlined in their notices of appeal. A number of the grounds of appeal overlap so they will firstly be considered together below, following which the singular grounds of appeal will be considered.

Common grounds of appeal

Ground 9 of Philip Roche and ground 14 of Patrick Roche-Application for a separate trial

The Learned Trial Judge erred in law in failing to order a separate trial following matters prejudicial to the appellant contained in Alan Freeman's memorandum of interview being adduced by the prosecution.

20. During the trial, a memorandum of interview of Alan Freeman was read into the record in the presence of the jury. The memorandum contained a number of statements by Mr Freeman alluding to his co-accused. Patrick Roche and Philip Roche take issue with the following extract from the interview:-

> "Question: "Do you know Christopher Stokes?"
>
> Answer: "He's my wife's cousin, I know of him. As far as I know he is charged and before the Courts with that robbery".
>
> Question: "How did you hear that he had been arrested?"
>
> Answer: "Packie Roche is my wife's brother and the family heard about it."
>
> Question: "Would it be fair to say you and Packie are friendly?"

Answer: “No, it would not be fair to say we are friendly. There are serious allegations against that man, and he should have no friends, so I’m not pally with that man.”

The impugned portion of the memorandum of interview goes on to say:

“Question: Why do you think you are being linked to Packie Roche?"

Answer: "Because he's my wife's brother, I've nothing to do with them, they go around killing people."

Question: "What do you mean by that?"

Answer: "Sure they got arrested for tying up someone."

The interview continues:

Question: “We’re investigating a serious crime and your name has come linked into it?” Answer: “I had not one thing to do with it, I’m a family man myself.”.

Question: “Are you aware of John Cahill/William Gammell?”

Answer: “They’re dangerous people, that Gammell fellow is charged with tying up old people.”

21. Following this, an application for a separate trial on behalf of Patrick Roche was made on the basis that these remarks were extremely prejudicial; specific reliance was placed on the answer given to the question:

“Why are you being linked to Packie Roche, namely; “I have nothing to do with them, they go around killing people.”

22. Mr Lynam BL, counsel for Patrick Roche, argued that the material introduced by virtue of the memorandum of interview prejudiced his client to such a degree that the only remedy was a separate trial. Mr Lynam, in making the application for separate trials, indicated a preference that the trial judge would not advise the jury to disregard the remarks in the memorandum of interview as to do so, would in effect cause further prejudice. He emphasised that the only remedy was that of a separate trial.

23. Counsel for Philip Roche then joined the application seeking a separate trial for his client on the basis that he was tarnished with the same brush and had suffered the same irreparable prejudice as the pronoun “they” had been used.

24. The trial judge refused this application, stating that he was not satisfied that the content of the memorandum of interview caused irreparable prejudice, moreover, that he would hear suggestions as to how the matter could be addressed, if at all.

Submissions of Philip Roche & Patrick Roche

25. The appellants submit that this evidence permitted the jury to infer that the appellants had a propensity for criminal behaviour and therefore was highly prejudicial.

26. The appellants further argue that the trial judge failed to address the jury in relation to this issue and direct that the memorandum of interview of Alan Freeman was not evidence against the appellant. In those circumstances, it is submitted that a failure to order a separate trial jeopardised the appellants' right to a fair trial.

Submissions of the respondent

27. The respondent submits that firstly, the contested part of the interview makes no reference to Philip Roche and therefore his complaint in this regard is without substance. In relation to Patrick Roche, the respondent submits that the prejudicial value of the evidence was inconsequential in the context of the trial: the printed version of the memorandum given to the jury was edited to exclude the evidence in question and the contentious remarks formed part of general antipathy towards the appellant by Mr. Freeman and can be understood in that context. The respondent submits that such prejudicial comments may arise in a joint trial, but this does not mean that a separate trial is required, and in this case the trial judge dealt with the matter adequately in his charge. The respondent accepts that the trial judge did not expressly deal with the evidence in question, but it is submitted that it was sufficient to charge the jury that the evidence in the memos related to Mr. Freeman only.

28. The respondent submits that the general rule in discharging a jury, as considered in *The People (DPP) v. Coughlan Ryan* [2017] IECA 108, emphasises the robustness of juries to consider the evidence in light of judicial warnings. As such, the trial judge exercised his discretion on the issue in a correct fashion.

General Discussion

29. Patrick and Philip Roche both applied for separate trials on the basis of prejudice to them arising from the content of Alan Freeman's interview while in Garda custody. If the application had been successful, the trial would have proceeded, at the time, solely in respect of Alan Freeman.

30. What must be said at the outset is that an unusual approach was taken in that the application was made on day 19 of the trial. Undoubtedly the parties had the book of evidence and disclosure in advance of the trial, yet the application was made at a very late stage in the proceedings. Ordinarily, if a party has a concern regarding memoranda of interview of a co-accused, the party would either ensure the material was not adduced on the basis that its prejudicial effect outweighed the probative value as against the person whose interview it is, or an application is made for separate trials. To make an application for separate trials on the 19th day of a trial, when the concern must have been known is not desirable.

31. As a general principle, where two or more accused are charged with the same offence, or with separate offences arising from the same incident, they will be tried together, unless to do so would give rise to an injustice. As stated by Sullivan P. in *Attorney General v. Joyce* [1929] IR 526:-

> "…the trial judge may direct that they be separately tried if, in his opinion, separate trials are desirable in the interests of justice. The trial judge has a discretion in the matter which must be exercised judicially. The exercise of such discretion may be reviewed by this Court, and a re-trial directed, if we are satisfied that a refusal to direct separate trials has resulted in a miscarriage of justice."

32. In order to properly exercise his or her discretion, a trial judge must assess the evidence before him or her. Separate trials will not necessarily be ordered in circumstances where the content of a memorandum of interview of one accused implicates another accused. It is always a question of discretion.

33. The first observation we make concerns the appellant Philip Roche. The application to sever the indictment was initially made by counsel on behalf of Patrick Roche. Insofar as complaint was made on behalf of Philip Roche, such was made on the basis that the word "they" was used by Alan Freeman in the course of interview, thereby tarnishing Philip Roche's character.

34. As we have observed, the trial judge must exercise his or her discretion judicially, the exercise of which may serve to take either the prosecution or the accused from the risk of prejudice should parties be tried together. It is the long-standing position that mere embarrassment on the part of an accused will not be sufficient to sever an indictment. More than that is required. The central issue is that of the interests of justice, this Court will only intervene if the refusal of an application for separate trials has resulted in a miscarriage of justice.

Conclusion on ground 9 - Philip Roche

35. The interests of justice ordinarily dictate that persons charged with the same offences or offences arising from the same incident ought to be tried together. Leaving aside the fact that joint trials save time and expense and enable juries to be furnished with the complete picture, should each individual be tried separately, each would then be able to blame the other for the offending conduct. This cannot be said to be in the interests of justice. However, should a joint trial result in an unfair trial, this cannot be said to be in the interests of justice. Therefore, every application for the severance of an indictment must be treated with care by the trial judge. We have considered the impugned portion of the memorandum of interview and cannot see that the trial judge exercised his discretion in a manner which resulted in an unfair trial as regards Philip Roche. The application made on his behalf was tenuous indeed and could not be said to have caused him the type of prejudice which would give rise to the necessity for a separate trial or indeed to any prejudice at all.

Discussion – Ground 14 – Patrick Roche

36. As regards Patrick Roche, the application was moved on the basis that the words contained in the memorandum of interview caused him irredeemable prejudice which could only be rectified by a separate trial. Counsel in the course of his application was of the view that the trial judge not advise the jury to disregard the content of the interview but that the only remedy was to order a separate trial.

37. As we have observed, this Court will only intervene if the refusal of the application gives rise to a miscarriage of justice. It is the position that in his interview, Mr Freeman demonstrated an aversion on his part towards Patrick Roche, however, he also described the accomplices John Cahill and William Gammell as dangerous people. In a joint trial, an accused may make remarks disparaging of another accused or indeed may seek to incriminate another accused. However, this does not in and of itself require separate trials and we are satisfied that the remarks made by Mr Freeman in interview were not of such a prejudicial nature so as to require a separate trial, but rather were indicative of his animosity towards Patrick Roche and indeed other persons. Furthermore, we are satisfied that this is precisely the type of situation which underpins the rationale for a joint trial; should each accused be tried separately, attempts can be made to blame the other accused. It is against such a background that the remarks made by Mr Freeman must be viewed.

38. Moreover, in the course of the application for separate trials, counsel for Mr Patrick Roche emphasised that he did not wish the judge draw attention to the material which he considered to be prejudicial and that the only remedy was that of a separate trial. On many occasions during trial, a decision may be taken by a legal team not to draw attention to a remark for fear of aggravating a situation and re-enforcing the material in the jury's mind. In refusing the application for severance, the judge indicated that he would hear submissions as to what, if anything, counsel required him to advise the jury in the course of his charge.

39. In his charge, the judge advised the jury that Mr Freeman was arrested and detained and interviewed whilst in detention. He then went on to deal in substance with the content of those interviews and took care to ensure not to refer to the impugned material which had been redacted from the memorandum of interview furnished to the jury. The trial judge did not specifically instruct the jury that the content of Mr Freeman's interview was only evidence in respect of him and not in respect of the other accused. It is unfortunate that he did not do so but in circumstances where he did not refer (as indeed he was so requested) to the impugned extracts and where the redacted version was furnished to the jury, the judge exercised his discretion appropriately. Moreover, he advised the jury that the position adopted by Alan Freeman was that he knew nothing in respect of either aggravated burglary and therefore, it can be concluded that the jury viewed the impugned remarks in that knowledge.

Conclusion on ground 14 – Patrick Roche

40. We are satisfied that the impugned remarks contained in Alan Freeman's memorandum of interview were not of the order of prejudice to necessitate a separate trial. Alan Freeman demonstrated animosity towards a number of persons in his interviews and his comments could be considered of a type seeking to place the blame other than on himself.

41. Moreover, juries have been shown time and again to be responsible and robust and of sound common sense. The jury was advised by the judge that Alan Freeman's case was that he knew nothing of the Garvey or Creed burglaries and undoubtedly, they were entitled to view the interviews in that knowledge. Therefore, whilst the jury were not

expressly instructed that the content of his interviews was not evidence against the other accused, it was made clear to the jury that his case was that he had no knowledge of either burglary. Patrick Roche's right to a fair trial was further safeguarded in that the memorandum of interview was redacted so as to remove the impugned material. This ground therefore fails.

Ground 7 Philip Roche and Ground 12 Patrick Roche-DNA

The Learned Trial Judge erred in law in allowing unlawfully-retained DNA samples to be admitted into evidence.

42. By way of background, on the 11th June 2012, the Gardaí located a Dunnes Stores bag in which was found various items, including a balaclava and gloves. DNA was extracted from those items, specifically from the mouth area of the balaclava and from inside the gloves and profiles generated. Subsequently, following their arrest on the 18th October 2012, DNA samples were taken from Patrick and Philip Roche by An Garda Síochána pursuant to the Criminal Justice (Forensic Evidence) Act, 1990, as amended. On the 19th October 2012, the samples were analysed, DNA profiles were generated and compared with the samples from the balaclava and gloves. The comparison yielded matching profiles. The appellants were charged on the 15th March 2016 with the offences of which they were subsequently found guilty. The appellants argue that the samples were retained by the Gardaí after the 18th October 2013, without seeking a retention order and thus the samples were unlawfully retained. The Criminal Justice (Forensic Evidence) Act 1990, as amended provides for the destruction of bodily samples after a period of 12 months from the taking of the sample where proceedings for an offence has not been instituted, subject to certain exceptions. During the trial, counsel for the prosecution accepted that there was no excuse offered as to why there had been no application made to retain the samples but urged the trial judge to exercise his discretion to admit the evidence.

43. In admitting the evidence, the trial judge relied on the decision of *The People (DPP) v. Murphy* [2016] IECA 287 and noted that:

> "It seems to me that it is relevant to consider or not whether there had been or the more real question is whether there had been any evidence or whether there is any evidence of a sort of deliberate or conscious attempt to violate the constitutional rights of the accused men by the State in holding on to those samples, and no such violations have been identified by me, having heard the evidence."

Submissions of Patrick Roche and Philip Roche

44. The appellants submit that the trial judge erred in admitting the DNA evidence when the prosecution had conceded that the samples were illegally retained and no explanation as to why this was so was put forward. The appellant relies on *The People (DPP) v. JC* [2015] IESC 31 where Clarke J. (as he then was) stated: -

> "…there is also an obligation on the courts to uphold the law and to discourage illegality.

It should not, therefore, be taken that evidence obtained in circumstances of illegality should readily be admitted. Where the absence of legality arises in circumstances properly described as reckless or grossly negligent, then the relevant evidence should be excluded even if the illegality concerned does not result in a breach of constitutional rights."

Submissions of the respondent

45. The respondent argues that the trial judge was correct in his ruling and in placing reliance on *The People (DPP) v. Murphy* [2016] IECA 287 and submits that the trial judge exercised his discretion, which he was entitled to do, notwithstanding the absence of any reason given for the illegal retention of the samples. Moreover, that the judge was correct to admit the evidence in circumstances where it was not gathered in an unconstitutional manner and there was no conscious violation of the appellants' rights.

Discussion

46. Admissions pursuant to section 22 of the Criminal Justice Act 1984 were made on behalf of both appellants at trial that the samples were lawfully taken in the course of detention. The issue concerned that of the retention of the samples outside of the 12-month period without an order for the retention of the samples.

47. The appellants argued that in circumstances where no explanation was offered as to why an order had not been sought for the retention of the samples, the trial judge erred in exercising his discretion to admit the evidence.

48. The respondent accepted at trial that no application had been made pursuant to statute that the samples taken on 18th October 2012 be further retained on the expiration of the 12-month period thereafter. Mr Costelloe SC argues the samples were lawfully obtained and that the only issue arising concerns the retention of the samples.

49. The relevant portion of section 4 of the 1990 Act (as amended) provides as follows: –

"4 (1) Subject to subsection (5) of this section, every record identifying the person from whom a sample has been taken pursuant to section 2 of this Act shall, if not previously destroyed, be destroyed as this section directs, and every sample identified by such records shall be destroyed in like manner.

(2) Where proceedings for any offence in respect of which a person could be detained under section 30 of the Offences against the State Act, 1939, or section 4 of the Criminal Justice Act, 1984, or section 2 of the Criminal Justice (Drug Trafficking) Act 1996, or section 50 of the Criminal Justice Act 2007 are not instituted against the person from whom the sample was taken within 12 months from the taking of the sample, and the failure to institute the proceedings within that period is not due to the fact that he has absconded or cannot be found, the destruction of the record and the sample identified by such records shall be carried out on the expiration of that period unless an order has been made under subsection (5) of this section.

(5) If a court is satisfied, on an application being made to it by or on behalf of the Director of Public Prosecutions, or the person from whom the sample was taken, that there is good reason why records and samples to which this section applies should not be destroyed under this section, it may make an order authorising the retention of such records and samples for such purpose as it may direct."

50. The proceedings against each of the appellants did not commence until 15th March 2016, a period well beyond the 12-month timeframe under the Act. As can be seen from section 4(2) of the Act, in the ordinary course, samples taken must be destroyed where proceedings for an offence for which a person could be detained under the 1984, 1939, 1996 or 2007 Acts had not been instituted against the individual within a period of 12 months from the taking of the forensic sample. Therefore, the legislation required the destruction of the samples taken from each appellant and the records pertaining thereto to be destroyed before midnight on 17th October 2013.

51. In the course of the trial in the court below, counsel for the appellant applied to the trial judge to exclude the forensic evidence on the basis that the samples had been unlawfully retained and therefore the results of the forensic examination, that is the DNA evidence, ought not to have been admitted. The trial judge concluded that the samples had been lawfully obtained and any issue which arose thereafter concerning the retention of the samples amounted to an illegality and therefore he retained the discretion to admit the evidence. He decided to exercise his discretion in favour of the prosecution and said: –

> "Samples should have been destroyed by 18th October 2013. I am, however, asked to exercise my discretion to allow into evidence the samples and I suppose the results which flow therefrom, notwithstanding the fact that the samples, was properly or, if I could push it, illegally obtained were after a certain period of time illegally detained or stored.
>
> Firstly, I'm satisfied that was no explanation was given to me to assist me in exercising the discretion that I'm being asked to exercise, that the excuse that was given, if you could call it that, in *The People (DPP) v. Murphy* [2016] IECA 287– and I'm going to read out the relevant section and this was given by forensic scientists and what has been described as the excuse is as follows: "that the legislative provisions requiring the destruction of DNA samples and their associated records after the expiry of time permitted for their local retention has been largely ignored by the authorities." That's not much of an excuse. It lacks detail and is such that it doesn't even constitute an explanation as to why there had been a practice of retaining the samples…The more real question is whether there had been any evidence or whether there is any evidence of this sort of deliberate and conscious attempts to violate the constitutional rights of the accused men by the State in holding onto the samples, and no such violations have been identified by me, having heard the evidence. I should also say that it is clear that there was no violations in respect of the collection acquisition of the samples. That all seems to have been done correctly in accordance with law."

52. He continued as follows: –

> "The retention beyond 18th October 2013 was unlawful but was not, as is clear from the judgment in *DPP v. Murphy*, not something which retrospectively breaches the accused's constitutional rights. I'm satisfied that, notwithstanding the lapse of a considerable period, that given the circumstances of the case as I know to be on the basis of the evidence that I've heard to date, it is correct that I exercise my discretion to admit this evidence."

Conclusion

53. In the decision of *McGinley v. Reilly and DPP* [2009] 3 IR 125, Peart J., in considering a sample taken pursuant to s.2 of the Criminal Justice (Forensic Evidence) Act, 1990 and an individual's right to privacy said as follows: –

> "The applicant's rights to bodily integrity and his other undoubted rights, including fair procedures, must be balanced fairly with society's rights.

54. In the present case, samples were taken from each of the appellants whilst they were detained in lawful custody. The samples were taken lawfully in accordance with the provisions of the legislation. If the appellants had been charged with the offences of which they were ultimately convicted within the 12-month time period, no issue could have been taken with the admissibility of the forensic evidence. However, as no application was made seeking to retain the samples of the records pertaining thereto after the 12-month time period had elapsed, the appellants argued that the results of such samples and the records could not be relied upon by the respondent at trial.

55. It is important to look at the timeframe when the appellants' samples were analysed and compared with the profiles generated from the items found in the Dunnes Stores bag. The samples were taken on 18th October 2012 and the analysis was carried out on 19th October 2012. Therefore, the results of the forensic analysis were known within a day of the samples being taken from the appellants. It is clear that the samples were lawfully obtained but it is equally clear that the samples and the records relating to the samples were unlawfully retained beyond 17th October 2013 in the absence of any order extending their retention beyond that date.

56. The purpose of taking the samples in the first instance was for the investigation of the offences for which the appellants had been arrested. The purpose of carrying out the forensic analysis was to seek to obtain evidence in respect of that investigation linking the appellants to the crime. Retention of samples is permissible pursuant to the legislation beyond the 12-month period from the taking of the sample. An application could have been made before the courts for such an order, this was not done, and no explanation was offered before the trial court to explain this failure.

57. The trial judge properly concluded that the retention of the samples and the records beyond the time period permitted amounted to a breach of a legal right and therefore he had a discretion as to the admissibility of the forensic evidence. It is clear that the

samples were lawfully obtained, and it is equally clear that the retention of the samples, albeit contrary to statute, was not done in order to infringe on the appellants' constitutional rights. As was stated by this Court in *The People (DPP) v. Murphy* [2016] IECA 287:-

> "The fact that sometime later the destruction of sample was not effected as provided for by legislation, does not retrospectively create a breach of the appellant's constitutional rights."

58. As we have stated, the samples were lawfully obtained and the use to which the samples were put was a lawful one. The samples were analysed for the purpose of the criminal investigation within the 12-month time period and so, when the analysis took place, the samples were not only lawfully obtained but were lawfully retained. The subsequent retention of the samples, beyond the permitted time period, was unlawful. However, this was a matter within the discretion of the trial judge and in the circumstances of the case, where the samples were lawfully obtained and where the forensic examination was conducted when the samples were lawfully retained, the judge was perfectly within his entitlement to exercise his discretion in favour of the respondent. This is not to say that the Gardaí should be ignorant of the legislation and allow time to pass without seeking an order for the retention of samples and records in appropriate circumstances. However, in the context of this particular case, when the analysis was conducted promptly, the trial judge exercised his discretion appropriately and this ground fails.

Grounds 11 and 13 of Patrick Roche's Grounds of Appeal and Grounds 6 and 8 of Philip Roche's Grounds of Appeal.

59. These grounds of appeal are inextricably linked and concern the validity of the arrest of each appellant. Grounds 11 and 6 concern the validity of a search warrant issued by the District Court to search the home of Patrick and Philip Roche, subsequent to which each was arrested and Grounds 13 and 8 concern the legality of the arrest of both men. The background concerning grounds 13 and 8 is somewhat complex in that the issue initially raised at trial concerned the legality of the arrest of the appellants, where the trial judge found the arrest of each appellant to be unlawful. However, as events unfolded during the trial, the trial judge reversed his ruling and found in favour of the respondent. This ruling now forms the foundation for grounds 13 and 8 which we will address following the determination of grounds 11 and 6.

Ground 11 of Patrick Roche and ground 6 of Philip Roche - Error on the face of the warrant

The Learned Trial Judge erred in law in finding that there was not an error which went to jurisdiction on the face of the warrant dated the 17th October 2012 for 24 Kilcronan Close, Clondalkin, D22.

60. Sergeant Ted Riordan made an application for a search warrant in respect of the first and second-named appellants' home address at 24 Kilcronan Close, Clondalkin, Dublin 22 before Blanchardstown District Court on the 17th October 2012 pursuant to s.10 of the Miscellaneous Provisions Act 1997 as substituted by the Criminal Justice Act 2006. The warrant was issued by the District Court judge and the following morning, on the 18th

October 2012, the search warrant was executed and the first and second-named appellants were arrested.

61. During the course of the trial, counsel for the first and second-named appellants challenged the legality of the warrant on the basis that it contained a significant error on its face as it did not reflect the wording of the statute pursuant to which it was issued, thus depriving the judge of jurisdiction to issue the warrant.

62. The relevant portion of s.10 of the Criminal Justice (Miscellaneous Provisions) Act 1997, as substituted, states that: -

10(1) -" If a judge of the District Court is satisfied by information on oath of a member not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, relating to, the commission of an arrestable offence is to be found in any place, the judge may issue a warrant for the such of that place and any persons found at that place.

(2) A search warrant under this section shall be expressed, and shall operate, to authorise a named member, accompanied by such other members or persons or both as a member thinks necessary –

(a) to enter, at any time or times within one week of the date of issue of the warrant, of production if so requested of the warrant, and if necessary by the use of reasonable force, the place named in the warrant,
(b) to search it and any persons found at that place, and (c) to seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that that member reasonably believes to be evidence of, or relating to, the commission of an arrestable offence."

63. The relevant portion of the search warrant issued did not include the words "as the member thinks necessary" and therefore read as follows:-

"Blanchardstown District Court No. 1, section 10 of the Criminal Justice Miscellaneous Provisions Act 1997, warrant to search. "Whereas it appears to me that as a result of information on oath of Sergeant Ted Riordan, Bruff Garda Station, a member of An Garda Síochána not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of or relating to the commission of an offence referred to in subsection 1 of section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 to wit, aggravated burglary, contrary to section 13(1)(3) Criminal Justice (Theft and Fraud Offences) Act 2001 is to be found namely at 24 Kilcronan Close, Clondalkin, Dublin 22. I, being satisfied that the grounds set out are reasonable, herewith authorise Sergeant Ted Riordan, a member of An Garda Síochána of Bruff Garda Station, accompanied by any other members of An Garda Síochána to enter within one week of the date thereof, if necessary by the use of reasonable force, the place situated at Kilcronan Close, Clondalkin, Dublin 22 in the said District Court, to search the place and any person

found therein and to seize anything found out that place or anything found in possession of any person present at that place at the time of the search which the said member reasonably believes to be evidence of or relating to the commission of aforesaid"

64. In upholding the legality of the warrant, the trial judge ruled that:-

> "...it seems to me that the warrant on the face is not defective. I'm satisfied that when Garda Riordan got that warrant, that he's governed by the provisions of Section 6 of the 2006 Act, which amended the 1997 Act. And there's no evidence to suggest that him, as the member who was named as the person authorised, there's no suggestion at all that he was doing anything other than exercising the powers conferred on him to this warrant, other than in accordance with the Act and in particular in accordance with subsection 6, subsection or, sorry, section 6, the amendment to the 1997 Act. And it seems to me that in those circumstances, he has been operating in compliance with the statute, that he was accompanied by such other members as he considered necessary, him being the person who was responsible for managing and executing the search.
>
> Mr Lynam has not suggested that each individual member ought to be named and it would make no sense whatever that they were. His argument is that the warrant on the face should specify or should add the following word or words to this effect; "accompanied by other members of An Garda Síochána as are necessary or as Sergeant Riordan considers to be necessary". I do not see that there is a requirement for that addition in the warrant on the basis of my reading and rereading and rereading the amendment. And so, I reject that element of the application."

Submissions on behalf of Patrick Roche and Philip Roche

65. It is contended that the trial judge erred in failing to have regard to the significance of the safeguard pursuant to the terms of s.10 of the 1997 Act, as amended and the fact that the warrant purported to disapply that safeguard.

66. The appellants argue that the absence of the words "as the member thinks necessary" is not simply a technical flaw, as suggested by counsel for the prosecution but rather, a sufficiently serious error on the face of the warrant, thus rendering the warrant unlawful.

Submissions of the respondent

67. The respondent submits that there was no error as to jurisdiction to issue the warrant. The warrant was issued on application by a member of An Garda Síochána of the requisite rank on foot of information on oath. The respondent argues that the error on the face of the warrant was simply an inadvertent omission concerning the limitations on those who could accompany Sergeant Riordan in the search of the premises to which the warrant related and thereby amounted to an error of the technical kind. Such an error, it is argued, is insufficient to invalidate the warrant. The respondent relies on the dicta of O'Donnell J. in *The People (DPP) v. Mallon* [2011] 2 IR 544 in this respect where he concluded that a mere error, especially one that is not calculated to mislead or does not

mislead, will not invalidate a warrant. As such, the respondent submits that the warrant contained all the essential ingredients of a valid search warrant and the omission of the words complained of do not undermine that.

Discussion

68. The entry onto private property can only be done in accordance with law as such entry encroaches on the constitutional rights of the individual. In order to be validly issued, there must be compliance with the statutory preconditions for the issuing of the warrant. Section 10 of the 1997 Act as substituted by section 6 of the 2006 Act permits for the issuing of a warrant to search the named premises where there are reasonable grounds for suspecting that evidence of or relating to the commission of an arrestable offence is to be found in that place.

69. Accordingly, a district judge must be satisfied by information on oath of a member not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of or relating to the commission of the arrestable offence is to be found in the place the subject of the application for the warrant.

70. A search warrant issued under this section shall be expressed and shall operate to authorise a named member, in this instance Sergeant Riordan, accompanied by such other members or persons or both as a member thinks necessary to enter the premises at any time or times within one week of the date of the issue of the warrant.

71. The evidence at trial disclosed that an application was made before the district judge on information on oath by Sergeant Riordan. The information on oath set out the grounds for the requisite suspicion and the district judge issued the warrant.

72. The warrant was read into the record at trial and it is clear that the statutory preconditions for the issuing of the warrant were satisfied, namely; that the district judge was satisfied by information on oath by Sergeant Riordan that there were reasonable grounds for suspecting that evidence of or relating to the commission of the stated offence was on the named premises. The warrant authorised Sergeant Riordan accompanied by any other members of An Garda Síochána to enter the property within the requisite time period.

73. While the warrant expressly authorised Sergeant Riordan accompanied by any other members of An Garda Síochána to enter the premises within the requisite time frame, the warrant did not include on its face that Sergeant Riordan was authorised to enter the property accompanied by such other members **or persons or both as he thought necessary.**

74. Consequently, the appellants argue that there was not strict compliance with the terms of the legislation and thus the warrant is invalid.

75. The question is whether this omission amounts to an error which goes to the heart of the jurisdiction to issue the warrant or whether it is an inadvertent error on the face of the warrant which would not in the ordinary course invalidate the warrant.

76. When presented with the warrant, the occupier would be in a position to identify the warrant was issued by a district judge, the statutory provision under which it was issued, namely section 10 of the 1997 Act, the alleged offence of aggravated burglary, the address to be searched, namely; 24 Kilcronan Close, Clondalkin, Dublin 22, that Sergeant Riordan accompanied by other members of An Garda Síochána were authorised to enter the premises, the time period within which the search could be effected, the date on which the warrant issued and that there was a suspicion that evidence in relation to the commission of the stated offence or in connection with the offence was to be found on the premises.

77. Lawful authority for the issue of the warrant must be demonstrated clearly on its face. It must be clear that there was compliance with the jurisdictional requirements. When one compares the wording of section 10 of the 1997 Act with the substituted provision by virtue of section 6 of the 2006 Act, it is apparent that the warrant is more in keeping with the terms of the 2006 Act. There can be no doubt but that this was an inadvertent error and equally there can be no doubt but that this was an error within jurisdiction. It is classically the type of situation where the District Court judge had jurisdiction to issue the warrant but erred in misstating an aspect of the warrant in failing to include the words "as the member thinks necessary". Was this error sufficient to render the warrant invalid? We do not believe this to be so.

78. In *The People (DPP) v. McCarthy* [2010] IECCA 89, the Court distilled a number of principles regarding errors in search warrants:-

"(a) Documents, such as search warrants, must be carefully prepared having regard to the fact that they entitle gardaí or other authorised officers to enter the property of a citizen, and in the course of so doing, to use such force as may be necessary, both to gain admission and to carry out the search and seizure authorised by the warrant.

(b) This cautionary approach is particularly enjoined when the search warrant is in respect of the dwelling house of a citizen, in light of the recognition granted to such property under the Constitution;

(c) Although search warrants should be prepared carefully, not every error in such a warrant will, by virtue of the same, lead automatically to the invalidation of a warrant;

(d) In particular where the substance of the warrant, as opposed to its form, is not open to objection, the invalidation of the warrant will not necessarily ensue.

(e) The nature of the error, or omission, must be scrutinised by the courts to see whether it is of a fundamental nature, including an error going to jurisdiction. Several factors may be taken into account, including whether the error is a mere mis-description, whether it is likely to mislead, whether it undermines the apparent jurisdiction to issue it, according to the warrant on its face, and such matters,

before the courts will find, in an appropriate case, that it should be considered invalid.

(f) It is not possible in relation to non-substantive errors, that is to say, errors which do not affect the substance of the legislative requirements found in the body of the warrant itself, to say that they will never lead to the invalidation of a search warrant, due to the wide variety and nature of errors which may occur."

79. The importance of the constitutional protection of Article 40.5 of the Constitution in respect of the inviolability of an individual's dwelling cannot be overstated and this serves to emphasise the need to carefully scrutinise a warrant. A court may be presented with many different types of errors which may or may not impact on the validity of the warrant. O'Donnell J. clarified this area of the law and extensively analysed the case law in *The People (DPP) v. Mallon* [2011] 2 I.R. 544. In Mallon, the error complained of concerned the fact that the address of the premises to be searched was misstated. At p.567 O'Donnell J. said:-

> "More difficulty arises with those cases which appear to deal only with errors in the body of the warrant. It is now quite clear that although a warrant should be prepared with care, not every error will lead to invalidation of the warrant. In particular, where the substance of the warrant as opposed to the form is not open to objection, invalidity will not necessarily ensue. In such cases, the nature of the error or omission must be scrutinised to see if it is of a fundamental nature. Among the factors which may be taken into account whether the error is a mere misdescription and whether it is likely to mislead."

Conclusion

80. The error in the warrant was a failure to complete the warrant in terms of the statute. The issue is whether such an omission makes the warrant unintelligible. Of note is the approach commended by O'Donnell J in *The People (DPP) v. Mallon* [2011] 2 IR 544 . He said at p.571:-

> "The approach of the court is searching and even sceptical, but not one of deliberate, unreasonable, and unreasoning ignorance which is blind to the communication the document seeks to make.
>
> In approaching any document or indeed any piece of communication, it is necessary to put it in its factual context. Where the document is legal, that may also involve its legal context. That will involve deploying knowledge which is common to any anticipated reader of the document, such as conventions of language, or, may involve receiving evidence as to specific matters known to the particular audience. This is an exercise which is carried out every day in the communication between individuals, and rarely requires to be articulated."

81. We are satisfied that while there was a defect on the face of the warrant, the omission could not be said to lead to a conclusion that the search warrant was issued without

authority. The warrant, even absent the words "as he thinks necessary", made it quite clear to the reader that Sergeant Riordan was authorised to enter the premises accompanied by any other members of the Garda Síochána. The type of defect complained of falls within the scope of an inadvertence error, rather than a fundamental defect. The requirement of the statute is that the warrant shall be expressed to authorise a named member accompanied by other Gardaí or other persons as the member thinks necessary. The warrant must authorise a named member and state that he/she may be accompanied by other members or persons but is not invalidated by the omission of the words "as the member thinks necessary". The state of mind of the named member may be given in evidence or indeed may be implied by virtue of the fact that other members of An Garda Síochána accompany the named member. The trial judge took an admirably rational approach to his consideration of the warrant and we find no error in his ruling.

Ground 13 of Patrick Roche and ground 8 of Philip Roche- Reversal of the ruling on arrest

The Learned Trial Judge erred in fact and in law and acted contrary to fair procedures in reversing his ruling that the arrest of the appellant at 24 Kilcronan Close, Clondalkin, D22 was unlawful.

82. In the course of the trial, on Friday 14th July 2017 (day 17) the legality of Patrick and Philip Roche's arrest on the 18th October 2012 was challenged. The first aspect of the voir dire concerned the validity of the search warrant and the second aspect concerned the legal entitlement of the arresting Gardaí to enter the home of the appellants.; whether the arresting Gardaí were lawfully in the appellants' home when the arrests were effected. Central to the appellants' submission was, and is, the constitutional protection provided by Article 40. 5 of the Constitution in respect of the inviolability of the dwelling house. It is argued that the arresting Gardaí were present in the appellants' home without lawful authority and thus in violation of their constitutional right.

83. Members of the Gardaí entered the dwelling in execution of the search warrant on the 18th October 2012. Two members of the Gardaí; Garda McGlinchey and Garda Young proceeded to arrest Patrick Roche and Philip Roche respectively. In short, the appellants' argument is that the arresting Gardaí had no power to enter the property on foot of the search warrant where their stated purpose was that of arrest. In other words, if the warrant was lawful, it was lawful only for the purpose of search.

84. The appellants submit that the facts of this case illustrate why s.10 of the 1997 Act, as amended, obliges the Garda to whom the warrant issues to ensure that only those who are necessary for the purposes of the search enter a dwelling.

85. To elaborate on the background; the voir dire concerned two issues and the respondent called three witnesses in this regard; namely, Sergeant Riordan who gave evidence regarding the search warrant and the execution thereof, Garda McGlinchey and Garda Young who entered the house following the execution of the warrant. Garda. McGlinchey gave evidence of arresting Patrick Roche and Garda Young gave evidence of arresting Philip Roche. Each appellant was arrested pursuant to s.4(3) of the Criminal Law Act

1997. Evidence was given by the arresting Gardaí that on entering the house, they each immediately arrested the appellants. Garda Young stated that his role was that of arrest and no evidence was given by either member that they took part in the search.

86. The submission on behalf of the appellants can be simply stated; the search warrant authorised a search of the premises but did not authorise entry for the purpose of arrest. The Gardaí ought to have invoked section 6 of the Criminal Law Act 1997 and informed each of the appellants that they were present on the premises for the purpose of arrest.

87. This argument was made at trial and in response, the respondent submitted that the Gardaí were lawfully on the premises on foot of the lawful search warrant as part of the investigative team and were entitled to arrest the appellants. The trial judge ruled that the arresting Gardaí were unlawfully in the appellants' home and found the arrest unlawful and said:-

> "I'm not satisfied beyond reasonable doubt, which is the standard that I'm required to be satisfied to, that the members were on the premises and I'm not criticising the guards for this at all, that the members were on the premises lawfully. There was no evidence adduced to the effect that they were there to carry out a search and that they were there to assist Sergeant Riordan. I accept entirely that they were members of the investigative team and there was nothing illegitimate in their being present; but the evidence is, particularly from Garda Young, that he had no role to play in the search. It wasn't sufficiently clear to me at all that that pertained to only the time after the arrest of Mr Philip Roche. In those circumstances, I'm satisfied that the arrests were not lawful."

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88. Thereafter, following this ruling, counsel for the prosecution sought to have the evidence which flowed from the arrest of each appellant admitted in reliance on *The People (DPP) v. JC* [2015] IESC 31. In pursuit of this objective, the respondent sought to call evidence to address the state of mind of the relevant witnesses. The evidence which the respondent sought to have admitted was DNA evidence which arose from the samples taken from the appellants while in detention following arrest.

89. Gardaí McGlinchey and Young were re-called, following which evidence, counsel for the respondent then applied to the trial judge to revisit the consequences of his ruling concerning the lawfulness of the arrest on the basis of the emergence of new evidence. Garda McGlinchey stated in re-examination that Patrick Roche and his family ordinarily resided in the house at 24 Kilcronan Close. At the conclusion of his evidence, Mr Costelloe SC flagged to the Court that he intended to raise a matter with the trial judge separate from the "JC" application. Garda Young then gave evidence and in cross-examination stated that if the two men had not been present in the house on the relevant date, he would have become part of the search team. Both emphasised that the primary purpose of their presence in the house was to effect the arrest of the two men. Strenuous

objection was taken to the respondent's application by both appellants. In making the application, counsel for the respondent said as follows:-

> "My friends, as I've indicated, may have other witnesses that they want to call in relation to the JC point...But I have a different matter that I'm asking the Court to address. And I want to be clear about this; I'm not asking to you revisit your ruling in the context of what happened this morning; however, I am asking you to revisit the ultimate consequence of this in circumstances where you've now heard direct evidence and cross examination to the effect that both of these guards went there in the knowledge that both of the men ordinarily resided at that address. And under section 6, subsection 4 sorry, subsection 2(d), if the people ordinarily reside at an address, then subsection 2 comes into effect.."

90. The appellants submitted that such an application was fundamentally unfair and procedurally incorrect. Moreover, it was urged on behalf of the appellants that time was needed to consider the approach now being pressed by the respondent. Mr Lynam BL for Patrick Roche made the bulk of the argument in opposition to the respondent's course of action and sought time to consider the position and possibly to call witnesses. The trial judge was disposed to accede to this application and indicated that he would adjourn the matter to the following Tuesday.

91. To further complicate matters, the objection to the admissibility of the DNA evidence was ongoing. This objection was a focused one and concerned the retention of the samples taken from Messrs Roche for the purpose of DNA analyses beyond a period of 12 months in the absence of charge or an order for retention. Senior counsel for Patrick Roche had streamlined the issue and was in a position to make certain admissions on the evidence pursuant to section 22 of the Criminal Justice Act 1984, thus leaving a net point for determination by the trial judge. The trial judge proceeded to deal with this issue and concluded it on Friday, 14 July 2017 and adjourned the application to revisit the issue concerning the lawfulness of the appellants' arrest to the following Tuesday.

Tuesday 18th July 2017

92. Counsel for the respondent firstly indicated that he had misstated the law concerning the use of s.6(2) of the Criminal Law Act 1997, in that he had contended that it was incorrect to suggest that the Gardaí were required to inform occupiers of a dwelling that entry was being gained pursuant to s.6 of the 1997 Act. He submitted on behalf of the respondent that reliance would be placed on *The People (DPP) v. Laide & Ryan* [2005] 1 I.R. 209.

93. The argument was advanced on behalf of the respondent that the trial judge could lawfully review the decision made in light of the fresh evidence from Gardaí McGlinchey and Young and in this respect the respondent relied on *The People (DPP) v. Collins* [2011] IECCA 64.

94. The trial judge accepted the respondent's submission that he was entitled to review his decision in light of additional evidence being introduced and concluded on considering this new evidence, that the Gardaí were there for a dual purpose and therefore the arrest was

lawful. In ruling that he was entitled to revisit his ruling on the voir dire, the trial judge said:-

> "Firstly, I asked if having made a decision on the issue on the voir dire, I was entitled to reconsider the decision I had made, or for that matter, to deal with a new application in respect of what is essentially the same issue. Strong opposition to this has been raised by counsel for the first and second named defendants, understandably so. Having considered the position, it seems to me that the decision of the Court of Appeal and the DPP v. Sharon Collins, 2011, citation IECCA 64 is of some assistance in that it supports the proposition that a trial judge is not precluded from reviewing a previous decision in light of additional evidence being introduced. A trial is a fluid process, and important evidence which provided clarity as to the primary purpose of the arresting gardaí's presence on the 18th was given, and I cannot see how this evidence causes any injustice or unfairness to the accused. It's simply constituted in clarification as to the principal reason for their being present on the morning, that is to effect an arrest and the belief that the men ordinarily resided there, that is the Roches. I am not convinced by Mr Lynam's very eloquent argument that this application and my consideration of the matter is either an abuse of process or that it amounts to or that it amounts in some way to my dealing with matters which I'm estopped from dealing with. The proceedings in this case have not been concluded and the doctrine of res judicata is offended by my considering this application. I'm satisfied, therefore, that it is within my discretion to reconsider the matter or consider the fresh matter, whichever way you prefer to look at it. Trials are an intricate part of the administration of justice. And if my reconsidering the matter in light of additional evidence or clarification of evidence is in the interests of establishing the truth in respect of the issue, I would be in dereliction of my duty not to do so."

95. Having decided that he was entitled to revisit his ruling of the voir dire, the trial judge then distinguished the facts of the instant case and those in *The People (DPP) v. Laide & Ryan* [2004] 1 I.R. 209, and said as follows:-

> "In this case, the case that we're dealing with presently, the warrant is not bad. The entry by the two members of An Garda Síochána was for the purpose of arresting the first and second named defendants which the gardaí were entitled to do under the provisions of section 6. The prior execution of the search warrant made entry for them more convenient. I'm conscious that the sanctity of the dwelling had at this stage already been lawfully breached by An Garda Síochána pursuant to their entry on foot of a search warrant. The subsequent entry thereon, for purposes lawfully permitted, that is arrest, by the two relevant members of An Garda Síochána who gave evidence of being part of the investigation team and one of whom, Garda Young, gave direct evidence that he would probably have taken part in the search if the men weren't there, cannot in all of the circumstances be seen as a violation of the sanctity of the dwelling and a breach of Mr Roche's rights.

> In the circumstances, I'm satisfied that fairness dictates that I set aside my earlier decision, that the arrests were unlawful on the basis of clarification of the evidence and/or additional evidence which served to clarify the circumstances of entry and arrest. I'm satisfied, therefore, that the arrests are lawful.."

96. The appellants contend that the decision of the trial judge to reverse his ruling was contrary to fair procedures and furthermore, that he erred in fact and in law in so doing.

Submissions of Patrick Roche and Philip Roche on the procedural aspect.

97. Both appellants submit that there was no opportunity to cross-examine on the evidence relied on by the prosecution to re-visit the ruling, as when it emerged, only the prosecution were aware of their intention to rely on it in seeking a reversal of the ruling.

98. Furthermore, each submit that the application to re-visit the ruling is an abuse of process and based on a mischaracterisation of the evidence by the trial judge. In this respect, it is submitted that the judge mischaracterised the evidence of Garda Young as Garda Young only referred to himself when he stated that he believed he would have joined the search team in the absence of the appellants. The appellants submit that there is no basis for this belief being extended to both Gardaí and therefore no grounds for the judge to re-visit his ruling.

99. It is also submitted that the appellants' right to fair procedures was breached and occasioned real prejudice to them. It is submitted that in the initial voir dire, once it became apparent that there was a strong argument to be made that the arresting Gardaí were present in the dwelling as trespassers, it was unnecessary to widen the scope of the cross-examination to consider whether members of the ERU who had also entered the property were trespassers or had acted unlawfully.

100. Moreover, the appellants submit that *Collins* can be distinguished from the present case as *Collins* concerned an unfairness to the prosecution as a result of time constraints which the trial judge sought to remedy. The appellants submit that no such circumstances of constraint arose here and the ruling here was grounded on unfair and inappropriate use of the content of a subsequent voir dire related to a different issue. In substance, it is submitted that the respondent wished to make a submission which had not been made on the initial voir dire and that no fresh evidence had in fact emerged.

Submissions of the respondent

101. The respondent submits that the appellants received proper notice of the fact that counsel for the DPP would seek to reopen the issue of the lawfulness of the arrests and counsel for the appellants were informed of the fact that *Collins* would be relied upon as authority for the proposition and had copies of *Collins* with them when the case was recommenced; therefore counsel was given ample time to consider and address the issue. It is further submitted that the trial judge was correct in relying on *Collins* and the evidence in this regard was relevant and probative to the issue in question and the appellants herein had a full opportunity to cross-examine the relevant Gardaí again in relation to any matters that they considered relevant.

102. The respondent argues that it is not unfair or offensive to the principle that trials must be conducted in accordance with law or contrary to fair procedure that the prosecution was permitted on the basis of newly adduced evidence to attempt to convince the Court to revisit its earlier ruling. The respondent submits that there was no basis for considering that the evidence was invented or concocted, it was relevant to the arrest issue and it would have been a grave injustice to the prosecution not to allow the matter to be re-litigated.

103. It is submitted that the trial judge was correct in finding that the arrest was valid on the basis of the evidence given by the Gardaí at the second stage of the voir dire.

Discussion

104. Proceedings leading to this aspect of the ground of appeal evolved over a period of two days. As can be seen from the above summary of events, once the defence indicated a challenge to the legality of the appellants' arrests, the respondent in the usual way, bearing the onus of proof, called evidence.

105. We will firstly address the pertinent aspects of Garda McGlinchey's evidence. When Garda McGlinchey was first called by the respondent, he stated, *inter alia*, that on the relevant date of entry to the appellants' dwelling house, he was part of the investigation team which was involved in the investigation of the aggravated burglary of the 31st May 2012. He went on to say that when he gained access to the house, he arrested Patrick Roche pursuant to the provisions of section 4 (3) of the Criminal Law Act 1997. That in effect, concluded Garda McGlinchey's evidence. No issue arose regarding the manner of arrest, rather the issue lies with the legality of Garda McGlinchey's presence in the house.

106. As can be seen at the conclusion of the voir dire, the trial judge found that the search warrant was lawful but that the presence of the Gardaí for the purpose of arrest was not lawful.

107. As we have outlined, there then followed an application on the part of the respondent seeking to rely upon the decision of *The People (DPP) v. JC* [2015] IESC 31. To lay the evidential foundation for this application, the prosecution recalled Garda McGlinchey. On this occasion, McGlinchey, in cross examination stated as follows: –

> "A. So that's the power of section 6 you're talking about, is it?
>
> Q. Yes?
>
> A. Yes, okay.
>
> Q. And you didn't utilise that power?
>
> A. no.
>
> Q. why is that?

A. well, I was there – I was – Sergeant Riordan had executed the warrant and I followed Sergeant Riordan and then I arrested the defendant, Patrick Roche.

Q. But you were part of the search team?

A. Well, I was part of the overall investigation team. The search team was one part of it; the specialist unit were another part of that particular morning. I was part of the people that were there to do the arrests. You know, there's various different teams, part of the investigation team."

At a later stage in his evidence he replied to a question as follows: –

"A. When the warrant – my brief was when the warrant was executed and if Patrick Roche was present in the house, that I was to come in and to arrest Patrick Roche."

One re-examination, the witness stated that he understood that Patrick Roche and his family ordinarily resided at the address in question.

108. The conclusion of Garda McGlinchey's evidence having been recalled, Mr Costelloe SC immediately indicated to the trial judge, that his intention was to raise a matter unconnected to his proposed application pursuant to the principles in The People (DPP) v. JC [2015] IESC 31.

109. We now look to the evidence of Garda Young. When first called on the issue, Garda Young outlined the sequence of events in which the search warrant was executed and stated that he followed in after Sergeant Riordan and when he went into the house, he arrested Philip Roche pursuant to section 4 (3) of the Criminal Law Act 1997. Again, no issue is taken with the legality of the arrest itself. Garda Young clearly stated that his role was that of arrest.

When he was called, following the trial judge's ruling, he stated as follows: –

"A. Section 10. Judge, so far as I was concerned, my object if Philip Roche was present in the premises, Judge, I was to arrest Philip Roche under section 4(3) under the Criminal Law Act. That was my power of arrest, Judge.

Q. All right. I know that's what you purported to

A. And I entered the premises.

Q. but were you aware that under section 10 that your presence there would be in furtherance of a search rather than for the purpose of arrest?

A. Judge, if the members if, I presume, Judge, if my my thing is, Judge, if the two men hadn't been in the house on the day, I would have been a member of the search team, Judge.."

During re-examination he said: –

"A. Yes, Judge, we all had – we were all part of the briefing, we all had the same information, Judge."

110. Counsel for the respondent then made an unusual application to the trial judge asking the judge to revisit the ultimate consequence of his ruling that the arrest was unlawful in circumstances where he had now heard evidence that the Gardaí were present in the knowledge that both of the appellants ordinarily resided at that address and the prosecution sought rely upon the provisions of section 6 (2) (d) of the 1997 Act.

111. This was strenuously opposed on behalf of the appellants who not only objected in principle but also objected on the grounds that they were taken by surprise by the application and needed to consider the position. The trial judge acceded to this application without any prevarication and the matter stood adjourned from Friday to the following Tuesday.

112. It seems that the appellants' submission on the procedural aspect of matters is twofold. Firstly, revisiting the ruling was contrary to fair procedures and in breach of the appellants' constitutional right to a fair trial. Secondly, that there was no evidential basis to revisit the ruling.

Can a ruling on admissibility be reversed?

113. In this respect, the respondent relies upon the decision in *The People (DPP) v. Collins* [2011] IECCA 64, where the Court found that the determination of inadmissibility following a voir dire is not irreversible. In that case, the Court was satisfied the trial judge could subsequently revisit a ruling made following a voir dire. This obviously depends upon the circumstances in any given case. The appellants argue that the circumstances which could give rise to a reversal of the ruling simply were not present on the facts of this case. They say that the respondent, having failed to make the submission on the conclusion of the evidence on the voir dire regarding the legality of the arrest, sought to do so on the evidence of the Gardaí recalled. The argument being that it was open to the respondent to make the same submission on the evidence at the conclusion of the initial voir dire.

114. In our view, a court can reverse the ruling on admissibility, however, much will depend upon the circumstances and it is not a decision which should be taken lightly. Article 38 of the Constitution guarantees that a person shall be tried in due course of law. Due process demands certain safeguards. In *State (Healy) v. Donoghue* [1976] 1 I.R. 325, O'Higgins C.J. said: –

> "The concept of justice, which is specifically referred to in the preamble in relation to the freedom and dignity of the individual, appears again in the provisions of Article 34 which deal with the Courts. It is justice which is to be administered in the Courts and this concept of justice must import not only fairness, and fair procedures, but also regard to the dignity of the individual…

> The words 'due course of law' in Article 38 make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused will be afforded every opportunity to defend himself."

The present case

115. It is quite clear from the evidence given by Garda McGlinchey and Garda Young when they first gave evidence on the issue, that they were present in the knowledge that Sergeant Riordan was in possession of a search warrant to search the home of the appellants. Each was clearly tasked with the arrest of the respective appellants. Indeed, Garda Young indicates that that was his role.

116. Each witness, when recalled, reiterated they were tasked with the arrest of the appellants with Garda McGlinchey **indicating** that if Patrick Roche was present in the house, he was to arrest him and that he understood that Patrick Roche and his family ordinarily resided at the address in question. Garda Young for his part indicated that if the two men had not been present on that day, he assumed he would be part of the search team. He also confirmed that the Gardaí were all part of the briefing and had the same information.

Conclusion

117. It appears to us that the information given when the Gardaí were recalled did not differ to any significant degree from the evidence which was initially given by them in the voir dire. While they reiterated that they were there for the purpose of arrest, this was evident from their evidence initially. The evidence was amplified to include that Garda McGlinchey was aware that the men ordinarily resided at the address in question and Garda Young stated that if the men were not present, he assumed he would have been part of the search team.

118. Garda McGlinchey stated in his initial testimony that he was part of the investigation team and Garda Young so stated when he was recalled.

119. It seems to us that the crux of this matter is whether the trial judge was entitled to review his previous decision on foot of the amplified evidence and amplified submissions. In that regard, the following circumstances are relevant: The appellants were not denied their right to cross-examine the Gardaí for a second occasion. Nor are we satisfied that the appellants were taken by surprise. Mr Costelloe flagged that he intended to raise an entirely separate issue with the trial judge from the moment the evidence of Garda McGlinchey concluded after he was recalled. Once the evidence of Garda Young concluded, Mr Costelloe raised the issue, the appellants sought time to consider the unusual nature of the application being made and the trial judge adjourned the matter from Friday to the following Tuesday. There can be no question but that ample time was afforded to the appellants to consider the application and to respond. Indeed, this is evident by virtue of an examination of the transcript where fulsome submissions were made in response to the application. These events took place on the same day and the appellants' legal teams were afforded the opportunity to consider the evidence and to respond accordingly. The trial did not proceed in any meaningful way until the issue was

resolved, no evidence was adduced before the jury in the intervening period and finally, the issue itself was not a complex one.

120. In those particular circumstances, the appellants' right to a fair trial was not breached and the trial judge ensured that no prejudice was caused to them arising from the unusual application on the part of the respondent. This type of application should seldom be entertained, but the interests of justice demanded that the judge revisit his ruling in the instant case.

121. Accordingly, we are satisfied that the trial judge did not err in deciding to revisit his ruling. However, there must be finality in the court process and this class of application should be very rare indeed. It is fundamental that parties should ensure to marshal the evidence and submissions. It is imperative, that all parties do so, but particularly the party bearing the onus of proof.

The Lawfulness of the Arrests
Submissions of the Appellants

122. In substance, the appellants advance the argument that while there may have been a dual purpose in the sense that some Gardaí entered the house to search and some to arrest, the Gardaí who effected the arrests were not present to fulfil both functions.

123. It is contended that the trial judge mischaracterised Garda Young's evidence as being evidence that both arresting members were part of the overall search team and hence, there was a dual purpose to their presence in the dwelling. In any event it is argued that no fresh evidence emerged when the Gardaí were recalled.

124. Finally, it is submitted that it was open to the Gardaí to invoke a power of entry on arrival at the house and they did not do so. That it was incumbent on them to indicate that the intention on entering the house was to both search and arrest. The appellants also rely on *The People (DPP) v. Laide & Ryan* [2005] 1 IR 209.

Submissions of the respondent

125. The respondent submits that the evidence disclosed that the Gardaí in attendance at the appellants' home did so on foot of a briefing regarding the investigation of the aggravated burglary at the Creed home on the 31st May 2012. Therefore, those present were aware that a warrant to search the appellants' home had been obtained and the warrant was to be executed on the 18th October 2012. It is further submitted that the transcript of evidence makes it clear that while there were assigned roles, collectively all present were part of the investigation team.

126. The respondent relies on *The People (DPP) v. Laide & Ryan* [2005] 1 IR 209, and argues that the factual position differs in the present case. In the former, the Gardaí entered the dwelling house on foot of a search warrant which was subsequently deemed invalid. This finding removed the foundation on which entry had been effected. No evidence was adduced which indicated an intention to do anything other than carry out a search of the

house. The Court in that case found that as the Gardaí had failed to inform the occupiers of the dwelling that they intended to arrest the accused, s.6(2) could not be relied upon.

127. It is contended in the present case that there was evidence that the Gardaí in attendance were carrying out a lawful search pursuant to warrant in conjunction with the arrest of the appellants, if they were present. It is submitted that the presence of the Gardaí was legally permissible and that the trial judge was correct in ruling that, in light of the decision in *Laide & Ryan*, he should set aside his earlier ruling and deem the arrests lawful.

Discussion

128. Article 40.5 of the Constitution provides that: –

> "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law".

129. The onus of establishing beyond a reasonable doubt that the entry to a dwelling was lawful rests with the respondent. In order to lawfully enter the appellant's home, the Gardaí relied upon the search warrant granted by the District Court. The trial judge upheld the validity of this search warrant. Therefore, the basis of entry to the dwelling house was lawful per se. However, the simple argument advanced by the appellants is that while the warrant authorised the Gardaí to enter for the purpose of search, it did not authorise the Gardaí to enter solely for the purpose of arrest. In lieu of relying entirely on the warrant, it is argued that the Gardaí ought to have explained the basis of entry as being for the purpose of search and arrest. Thus, the appellants say that at the time each was arrested by the Gardaí, the Gardaí were trespassers in the Roche house as there was no lawful basis for their presence in the house.

130. Garda McGlinchey and Garda Young gave evidence that each had attended the briefing regarding the investigation of the aggravated burglary at the Creed house and it is clear from the evidence that the Gardaí entered the Roche house after the warrant was executed by Sergeant Riordan. It is also evident that Garda McGlinchey and Garda Young were tasked with arresting Patrick and Philip Roche. The legality of the arrest of each of the appellants pursuant to section 4 (3) of the Criminal Law Act 1997 was not in question. There can be no doubt that a team of Gardaí went to the appellants' home on the date in question in furtherance of the investigation of the aggravated burglary.

131. A power of arrest is provided pursuant to section 6 (2) of the 1997 Act: –

> "For the purpose of arresting a person without a warrant for an arrestable offence, a member of the Garda Síochána may enter, (if need be, by the use of reasonable force), and search any premises (including a dwelling) where the person is already a member, with reasonable cause, suspects that person to be, and where the premises is a dwelling member shall not, unless acting with the consent of an occupier of the dwelling, or other person who appears to the member to be in charge of the dwelling, entry dwelling unless –

(a) (d) the person ordinarily resides at the dwelling."

132. Section 6 gives the Gardaí the power to enter a dwelling in certain circumstances to effect the arrest of an individual without a warrant. This is a significant encroachment on an individual's constitutional rights. If a member of An Garda Síochána comes to an individual's dwelling without a warrant and with the intention to arrest a person who resides there, an explanation must be given as to the purpose of seeking entry to enable the occupier to permit or refuse entry. If entry is refused, in reliance on the section, the Garda may enter and use reasonable force to do so, if necessary.

Conclusion

133. In the instant case, the team of Gardaí had gained lawful entry to the dwelling on foot of the valid search warrant. Certain Gardaí were tasked with searching the dwelling and the evidence given at trial by Garda McGlinchey and Garda Young indicated a clear and stated intention on their part to arrest the appellants. As was indicated by Garda Young; that was his role. He amplified his evidence when he was recalled by saying that if the men were not present, he would have assumed that he would have been part of the search team. This does not take away from the fact that his and Garda McGlinchey's primary role was that of arrest.

134. The facts of this case can be distinguished from the facts which applied in *The People (DPP) v. Laide & Ryan* [2005] 1 IR 209. In that case, the search warrant, being the foundation for the entry to the dwelling, was found to be unlawful. Therefore, unless the Gardaí were in a position to rely on an alternative lawful power of entry, they were trespassers on the dwelling and any consequential activities on their part from which evidence was gathered was deemed inadmissible under the law as it then was. There was no evidence in that case of any intention on the part of the Gardaí who attended the dwelling that they were there to do anything other than execute the search warrant. There was no evidence that the Gardaí had a dual purpose in entering the dwelling, namely; to search but also to effect arrest.

135. In the present case, the clear and unequivocal evidence of the Gardaí who effected the arrests was of their stated intention to do so. Entry had been lawfully gained by virtue of the search warrant. It is not the position that entry was gained only for the purpose of search. The point is made on behalf of the appellants that the Gardaí ought to have explained, on gaining entry to the dwelling that their intention in so doing, was not only to search but also to arrest.

136. Such a contention is a rather artificial one on the facts of this case in our view. In the particular circumstances of *The People (DPP) v. Laide & Ryan* [2005] 1 IR 209, where the search warrant was found to be invalid; as the Gardaí had failed to inform the occupiers on seeking to gain entry to the house of a dual purpose in entering the house, no lawful basis remained for their presence in the dwelling. As stated: –

> "It follows that in the particular circumstances of the present case the least that would have been required to have been done for the members of the Garda

> Síochána is to have informed the parents that they wished to gain entry for the purpose of search and arrest, if the lawfulness of their presence in the house was not to be removed upon the subsequent finding that the search warrant was bad".

137. Therefore, whilst it would certainly be prudent in any given case where the Gardaí rely on a search warrant to gain entry, but have a dual purpose in gaining entry, that being; not only to search but also to arrest, such should be stated at the point of entry. As stated in *The People (DPP) v. Laide & Ryan* [2005] 1 IR 209 at p.230: -

> "The fact that the power of entry exists does not mean, in the view of this court, that the purpose of entry, namely the arrest of somebody who resides in the house, does not have to be explained before entry is forced on **foot of the power**. The inviolability of a citizen's dwelling is an important constitutional right and it cannot be trespassed upon without explanation in clear and unambiguous terms. It has been recognised that where the restriction of a constitutional right is permitted by law, it must be restricted to the least extent necessary for the achievement of the desired objective".(Our emphasis).

138. But, in the circumstances of the present case, entry to the dwelling was gained on foot of a valid search warrant. That was the basis on which entry was sought, not on the basis of section 6 of the 1997 Act. Therefore, in strict terms, it was not essential for the Gardaí to indicate that their purpose in entering the residence was not just for the purpose of search but was also for the purpose of arrest. Invocation of section 6 is required where that is the sole provision upon which entry is sought to a dwelling. A prudent member of An Garda Síochána might well explain there is a dual purpose of entry, if that is so, notwithstanding his/her belief that he/she holds a valid search warrant, in the event of a subsequent invalidation of a search warrant which would remove the very foundation of lawful entry to a dwelling.

139. In the present circumstances, the presence of the Gardaí on the premises was lawful on foot of the search warrant and consequently it follows that the arrests were lawful. However, if their presence on the premises had not been in accordance with law; that is if the search warrant had been deemed to be invalid, then applying the dicta in *The People (DPP) v. Laide & Ryan* [2005] 1 IR 209, their presence in the dwelling would have been unlawful due to the failure to specifically explain to the occupiers that the Gardaí had another purpose apart from the search of the premises.

140. For the reasons stated these grounds fail.

The Judge's Charge

Grounds 2 & 3 of Alan Freeman; Ground 10 Philip Roche and Ground 15 Patrick Roche.

Grounds 2 & 3 - Alan Freeman;

2. The learned trial judge erred in law and in fact in charging the jury on the meaning and application of corroboration evidence to accomplice witnesses such that the jury were informed that there was corroboration when in law and in fact none such corroboration evidence existed.

3. The learned trial judge erred in law and in fact in failing to accede to an application by counsel on behalf of the above-named appellant to discharge the jury arising from the learned trial judge's failure to properly charge the jury in respect of corroboration evidence.

Ground 10 – Philip Roche and Ground 15 - Patrick Roche

15/10 -The learned trial judge erred in law by failing to accede to the appellant's application to discharge the jury following the judge's charge having regard to severe and irreparable prejudice caused by the said charge and having regard to the inadequate way the learned trial judge had addressed issues such as inferences and corroboration of accomplice evidence.

Corroboration

141. These grounds concern the manner in which the trial judge charged the jury on corroboration. Each appellant contends that the judge misdirected the jury on the meaning of corroboration and in particular misdirected the jury in the context of accomplice evidence. Moreover, insofar as each appellant is concerned; Alan Freeman complains that the judge mis-identified evidence as being capable of corroborating the accomplice evidence and Patrick and Philip Roche contend that the judge not only erred in directing the jury in terms of corroboration but also prejudiced the appellants in the mind of the jury by his charge. While both contend that this arose in terms of the manner in which the judge addressed corroboration and inferences, the inferences only have application to Patrick Roche. The three appellants argue that the trial judge erred in failing to discharge the jury as a consequence of his charge.

The Charge

142. At common law a trial judge is mandated to warn the jury of the dangers of convicting an individual on the uncorroborated evidence of an accomplice; that is, on the testimony of a person who was actually involved in the commission of the offence charged.

143. In the present case the judge charged the jury on the issue of accomplice evidence, directing the jury in the following terms:-

> "What is corroboration? You're going to hear reference to it at a later stage. It's independent evidence which tends to show that the principal evidence is true. That's it in its simplest format".

144. The judge then went on to give examples of corroboration in the ordinary course of life and having done so, advised the jury on the legal concept of corroboration: -

> "But hopefully you understand what I mean when I say "corroboration". So, it's a very simple concept in a lot of ways. So, the ingredients are that he corroborative evidence should be independent and it should, in a criminal context, tend to implicate the accused person in the commission of the crime with which he is charged. So, it's important that you have a good understanding of this concept because, in this case, there are two witnesses who are of importance in the case,

Mr Cahill and Mr Gammell, and they were accomplices, they were the getaway drivers in relation to each of these matters."

Having explained the meaning of corroboration to the jury, the trial judge then proceeded to instruct the jury specifically on the issue of corroboration vis-à-vis accomplice evidence. He said: –

" As a matter of law, I must warn you that it is dangerous to convict an accused person on the uncorroborated evidence of a person who was involved in the commission of an offence. In this case, these two men were getaway drivers in relation to the Creed and Garvey robberies. You are entitled to convict on the uncorroborated evidence of an accomplice but, if you do so, you must bear in mind that there are dangers and you must bear in mind the warning which I'm going to give you. Both Mr Cahill and Mr Gammell were accomplices and, while both have already been convicted following guilty pleas and both have been sentenced, nonetheless, you must look carefully to see whether or not you believe that they have anything to gain from giving the evidence which they have given. You've heard their evidence in this respect and you've heard the different theories advanced by the defendants, ranging from jealousy to the deflection of attention from the real perpetrators of the crime. If you attach any credence to all or any of these theories, or if you are in any way suspicious of the motivations of these gentlemen, you must treat their evidence with suspicion. It is a matter for you to attach the appropriate weight, as you see fit, to the evidence. The object of corroboration in dealing with the evidence of an accomplice is to indicate to you that although a particular witness may be believed, experience in courts has shown that it is unsafe to act on the evidence of an accomplice alone, unless there is corroboration. Accordingly, you should look to see if there is corroboration by evidence independent of the evidence given by Mr Cahill and Mr Gammell. However, if, having considered all that I have said and heeded my warnings to you, you still believe that you can convict on the basis of the accomplices' evidence alone, you are entitled to do so. You might want to look at the corroborating evidence first, see what weight you attach to it and then consider the accomplices' evidence. Then, consider the evidence given by the accomplices in light of whatever corroboration they accept; do they accept the evidence of the accomplice, so as to be satisfied beyond reasonable doubt as to his account implicating the accused? I will identify some of the evidence which is capable of amounting to corroboration of Mr Cahill and Mr Gammell's evidence, but it would be a matter for you, members of the jury, as fact finders, to decide if that evidence actually amounts to corroboration. It's not my job to decide; it's my job to tell you if it's capable of amounting to corroboration. It will be your job to decide whether, in actual fact, it does corroborate Mr Cahill and Mr Gammell's evidence. In this respect, I will now say a few words about the evidence which you're entitled to consider, and that brings me now to the area of inferences. So, when I read out the evidence later on to you, I will identify various portions that are capable of providing corroboration in respect of the Cahill and Gammell testimonies.."

145. The trial judge summarised the evidence, including that of Mr Gammell and Mr Cahill and in so doing identified a number of pieces of evidence which were, as a matter of law, capable of amounting to corroboration. Counsel for Patrick and Philip Roche took issue with several of the examples identified by the trial judge and made an application to discharge the jury on this basis. Counsel for Mr Freeman also took issue with the judge's charge, in particular in the judge identifying evidence as capable of corroborating the accomplice witness; John Cahill. All three asked the judge to discharge the jury as a consequence. The trial judge refused this application.

146. Prior to commencing his summary of Mr Gammell's testimony, the trial judge again repeated the warning he had given to the jury and said: –

> "We now come to the evidence of Mr William Gammell, who is an accomplice in the Creed robbery. You will remember, members of the jury, the warning that I have given you earlier this morning in relation to this evidence and the evidence of Mr Cahill".

The judge then proceeded to summarise the evidence given by the accomplices, Mr Gammell and Mr Cahill.

147. Several of the remarks in the judge's charge with which counsel for the appellants took issue relate to the evidence of the accomplice John Cahill. In particular insofar as Alan Freeman is concerned, the trial judge said as follows:-

> "After a few minutes, he said that the lads came out and got into the car; Alan Freeman, Stokes, Patrick Roche and Philip Roche. He said that Alan Freeman had a screwdriver, Stokes had a baseball bat and Patrick Roche had a gun. He describes himself as a driver. He described Alan Freeman as a passenger. Stokes was sitting beside Philip Roche who was in the middle and Pat Roche was on the other side. He was told to go back to Cullen. He said he saw Alan Freeman pull out an envelope with Sterling and other foreign money in it. You remember that Mr Gerard Garvey gave evidence that he placed the money that was stolen from him – and Anne Garvey also said this – into a white envelope, and this evidence corroborates the evidence given by the Garveys in relation – four, this evidence is capable of corroborating the evidence given by the Garveys in relation to the money in the envelope."

The judge then continued with the evidence of Mr and Mrs Garvey and then said the following: –

> "Members of the jury, it is, of course, a matter for you to decide whether or not to accept or reject the evidence that Mr Cahill has given you in respect of these matters up to this point, and it is entirely a matter for you. And I've already spoken to you in relation to the risks associated with evidence stemming from somebody who, as a matter of fact, was an accomplice and very much involved in the Garvey

robbery, but I thought it might be useful at this point to draw your attention to those matters so as you can see what the links are."

148. The trial judge in continuing with his summary of Mr Cahill's evidence summarised the movements of the vehicles and in particular that Alan Freeman, Patrick Roche and Mr Stokes got into the BMW with an 08 registration and that Philip Roche remained in the blue BMW and drove in the direction of Buttevant, and at some point Alan Freeman got out of that vehicle and drove away in another vehicle leaving Patrick Roche and Mr Stokes in the 08 BMW which was stopped by the Gardaí. The judge then said: –

> "All of that evidence in relation to the changing of the cars and the driving from somewhere outside Mitchelstown to Buttevant, and everything that is associated with it, is evidence which is capable of corroborating John Cahill's testimony in relation to this matter. It is a matter for you as to whether or not you accept that and whether you accept that as corroboration."

149. When the trial judge was dealing with Mr Freeman's case and having exhorted the jury to consider all the evidence and to carefully read the memoranda of interview, he proceeded to remind the jury that Mr Freeman was charged only in respect of the Garvey robbery and that only the evidence pertaining thereto was relevant in respect of his charges. The judge then told the jury as follows: –

> "Members of the jury, though it is a matter for yourselves, it seems to me that you are particularly reliant on the evidence of John Cahill when it comes to Mr Freeman. Whilst Mr Cahill remained in the company of Philip Roche and Patrick Roche -- whilst Mr Cahill remained in the company of Philip Roche and Patrick Roche -- I'll start again. Whilst Mr Cahill remained in the company of Philip Roche and Patrick Roche remained in the company of Christopher Stokes - this is after the incident when they're changing cars - Mr Freeman headed off in his own car or headed off in another car, after having been dropped off at a location by John Cahill. The foreign currency in the envelope, which Mr Cahill says Mr Freeman found in the car during the getaway from the Garveys, is capable of corroborating Mr and Mrs Garvey's testimony in relation to the money stolen, but that does not corroborate Mr Cahill's evidence that Mr Freeman was there. It seems to me that you are reliant greatly on Mr Cahill's testimony in respect of Mr Freeman's involvement in this matter and I have already warned you in relation to accomplice evidence. That said, however, as I have said to you, you are entitled to convict on the evidence of an accomplice, as long as you have carefully considered the dangers that I have outlined to you in respect thereof."

150. On the conclusion of the judge's charge, counsel on behalf of each appellant applied for the jury to be discharged and raised requisitions in respect of the charge. The application to discharge the jury was made on the basis that the trial judge misstated the evidence which could corroboration the accomplices' testimony in the case of Mr Freeman. In the case of Patrick Roche and Philip Roche, it was contended that the trial judge's charge severely prejudiced the appellants in general terms and also in terms of the manner in

which he addressed the accomplice testimony and inferences. The application to discharge the jury was refused and the trial judge re-charged the jury on corroboration in the following terms.

The Re-Charge

"I want to speak to you about corroboration in the context of evidence given by accomplices in the first instance. Remember, accomplices are people who by their own admission, were present at a crime. They are part of -- they see part of, or they see all of what happened at a crime. For this reason, they have information about the crime which, by and large, is correct, clearly, they'd been there. The big question for you, members of the jury, is not whether they're telling the truth about what they saw, but whether they're telling the truth about who was with them. It is for this reason that I gave you the warning about the danger of convicting in the absence of evidence which corroborates the story of an accomplice. So, whilst you can convict on the basis of accomplice evidence alone, I warned you that you should find some evidence which is capable of independently supporting the evidence which those accomplice witnesses give. And that evidence would be such as to tie or link the accused person to the commission of a crime. So, if I caused you to be confused about all of this in my charge, I apologise, and I will now try to give you some clarity. So, some of the evidence which you have heard from William Gammell and Mr Cahill is capable of corroborating matters in respect of which other people have given evidence, but these bits of evidence do not or are not capable of corroborating Gammell's and Cahill's evidence against the accused. These bits of evidence remain perfectly valid, they just can't corroborate what Gammell and Cahill have said. But as I said to you, they remain perfectly valid. They remain important pieces of evidence, which you can, if you see fit, consider as part of your deliberations. And those pieces of evidence that I'm referring to are by and large examples of circumstantial evidence about which I have spoken to you earlier and other people have spoken to you earlier. So, things like the burnt-out BMW, the tyre marks, the finger from the glove, the balaclava that, or the balaclavas that Mr Gammell and Mr Cahill say that they saw the accused wearing, and any other references to balaclavas, other than in the '06 BMW outside of Cork, I'll come to that shortly. When they say they saw handcuffs, weapons, cable ties, that sort of thing. When they say they saw Alan Freeman counting money; all of these things are capable of corroborating other people's evidence, but they're not capable of corroborating the evidence of the two accomplices, that is William Gammell and John Cahill. So, what evidence then is there open to you which is capable of corroborating John Cahill's evidence? Well, the following; the glass shards found on Pat Roche's clothing are capable of amounting to corroboration of Patrick Roche's involvement in the Garvey robbery, capable of doing that, but it is up to you to decide on the weight of that evidence and the importance to which you attach that evidence, as to whether or not you find that evidence to be corroborative. So, that evidence is capable of corroborating elements of Mr Cahill's evidence, but it's up to you to decide whether or not it does so.

> The second area where we have evidence that is capable of corroborating Mr Cahill's evidence in relation to the Garvey robbery, is the discovery of the handcuff, money, one balaclava, one ski mask and the screwdriver in the '08 BMW, this is the one on the Doneraile Road, outside of Buttevant, in which Mr Stokes and Pat Roche were travelling. You'll remember that that was the one that was stopped by the guards. So, the items that were found in that car, together with the time at which they were stopped, those matters are capable of providing corroboration in relation to Mr Cahill's evidence, as against Pat Roche in respect of the Garvey robbery. I turn now to Mr Gammell, what evidence can you consider in relation to corroborating his testimony? The DNA evidence which was extracted from the samples that were taken from the balaclava and the glove and they were both in the Dunnes Store bag, which were allegedly dropped or hidden by Mr Gammell, after having been instructed to set fire to them, you remember that evidence, and this is after the Creed robbery. The samples that were extracted from those two items, were in the words of the scientist from the Forensic Ireland laboratory, they matched the DNA profiles that were extracted from swabs taken from Patrick and Philip Roche, and that evidence is capable of corroborating William Gammell's evidence in relation to Patrick and Philip Roche's involvement in the Creed robbery. Now, that deals with the corroboration side of things."

Submissions of Alan Freeman

151. The appellant submits that the judge's charge was confusing and unfair to the appellant and says that while discussing Mr Cahill's evidence, the judge drew attention to his assertion that the appellant had contact with an envelope containing foreign currency. The judge advised the jury that Mr Cahill's evidence was capable of corroborating the evidence given by the Garveys in this respect. Issue is taken with the following:-

> "She got the key, open the safe, gave them the envelope with the US dollars and Sterling. Members of the jury, it is, of course, a matter for you to decide whether to accept or reject the evidence of Mr Cahill has given you in respect of these matters up to this point, and it is entirely a matter for you."

152. It is accepted on behalf of the appellant that at a later stage in his charge the trial judge instructed the jury that the evidence of Mr Cahill concerning foreign currency was capable of corroborating the Garvey evidence but was not capable of corroborating the accomplice testimony. Nonetheless, it is contended that as the trial judge's comments came about in the course of his summary of Mr Cahill's testimony, the jury were left in a state of confusion.

153. It is submitted that the suggestion that Mr Cahill's evidence was somehow corroborated by Mrs Garvey's testimony concerning the envelope in some way bolstered the evidence of the accomplice was incorrect and unfair to the appellant. The application was made to discharge the jury and it was refused.

154. The appellant argues that the trial judge's recharge of the jury on this issue did not clarify the issue as he re-iterated the evidence which was not capable of corroboration and

acknowledged that they were still "important pieces of evidence" capable of corroborating the evidence of other witnesses.

155. In short, the appellant submits that the trial judge failed to make clear to the jury that there was no corroboration of John Cahill's evidence insofar as he implicated Alan Freeman.

Submissions of Patrick Roche / Philip Roche – Grounds 10 and 15

156. The appellants submit that the trial judge did not correctly address the issue of corroboration or identify correctly pieces of evidence capable in law of corroborating the testimony of the accomplices. Moreover, it is contended that the trial judge displayed a partiality for the prosecution throughout his charge to the jury, as shown by his comments on the accomplice evidence of Mr Cahill and Mr Gammell. In this regard, the bulk of the submissions relate to Patrick Roche as the majority of the corroboration evidence highlighted by the trial judge relates to him apart from the DNA evidence in relation to the woollen glove which concerned Philip Roche.

157. It is contended on behalf of Patrick Roche that the trial judge erred in treating every independently verifiable detail of the events as recounted by Mr Cahill and Mr Gammell, as capable of corroborating their evidence.

158. It is accepted that the trial judge sought to correct his comments following an application to discharge the jury and requisitions, but it is submitted that the errors were so serious that such were likely to skew the jury's assessment of each item which was referred to as being potentially corroborative.

Submissions of the respondent

159. The respondent submits that on the issue of corroboration, all of the appellants have incorrectly identified the law on corroboration as the immutable formalistic rule set out in *R v. Baskerville* [1916] 2 KB 658 when in fact the Irish courts have demonstrated repeatedly that corroboration is a flexible concept. The respondent points to *The People (DPP) v. Gilligan* [2006] 1 IR 107 where Denham J. concluded that circumstantial evidence can be corroborative evidence and endorsed the following definition of corroboration:-

> "Independent evidence of material circumstances tending to implicate the accused in the commission of the crime with which he was charged"

160. Regarding the submissions of Alan Freeman, the respondent refutes the assertion that there was no corroborative evidence in relation to the accomplice evidence of John Cahill. The respondent submits that the evidence of the Garveys, of a white envelope filled with foreign money being handed over to the raiders, was capable of corroborating a material particular of the account of Mr Cahill that he saw Alan Freeman counting money from a white envelope. The respondent submits that *The People (DPP) v. Meehan* [2006] 3 IR 468 and *The People (DPP) v. Gilligan* [2006] 1 IR 107, both concerned with accomplice evidence, establish that direct evidence is not necessary for corroboration, the evidence

must simply show or tend to show a link. In any event, the respondent submits that if the trial judge erred in law in his recharge to the jury, it was in favour of the appellant.

161. In relation to Patrick and Philip Roche, the trial judge identified evidence capable of corroborating the accomplice evidence of John Cahill and William Gammell:-

> "You've heard the evidence given by both the Creeds and the Garveys that the people involved in the robberies were wearing balaclavas and you also heard that gloves were worn. This evidence is capable of corroborating that testimony, but make sure that any conclusions you draw in respect thereof are logical. This evidence is highly suggestive that a glove and balaclava, which came from inside of the Dunnes Stores bag, were, at some stage, worn by Patrick Roche and Philip Roche. You should then consider all of the evidence and satisfy yourself in relation to the circumstances by which the Dunnes Stores bag came to be at that location with those items in it. You've heard the evidence in that respect from Mr Gammell, who said that after he collected Patrick and Philip Roche from the Creed house, they took their clothes off and put them in a Dunnes bag. He was told to burn the clothes bag, but he later hid the bag."

The trial judge went on to say:-

> "In relation to Mr Cahill, he gave a statement -- and I've warned you that it is dangerous to convict somebody on the basis of an accomplice statement alone, and I've just told you as well that you're perfectly entitled to consider all of the other evidence in isolation to the evidence given by both Mr Cahill and Mr Gammell. But in respect of Mr Cahill's evidence, there are certain matters that you can consider that are capable of corroborating his statement. The BMW that was at the ESB pole station in Monard, that was stolen from Mr Cruise. That is a piece of evidence which is capable of corroborating Mr Cahill's statement because he was the man who ultimately drove that car. You heard evidence that there were cable ties and two sets of handcuffs in the possession of the people that were at the ESB pole station in Monard before the Garvey robbery. And you've heard evidence that the Garveys were restrained by handcuffs, by cable ties, and that the people in the house were wearing balaclavas. Once again, that is evidence which is capable of corroborating. It's a matter for you as to what weight you attach to it. The gun, the screwdriver, the baseball bat, they were all described by the raiders and they were described as being in the possession of certain individuals that left Sunville House by Mr Gammell. That is capable of corroborating his testimony; a matter for you as to whether or not you accept it."

Discussion

The trial judge's charge on the definition of corroboration

162. The classic definition of evidence constituting corroboration was stated by Reading L.J in *R v. Baskerville* [1916] 2 KB 658:

> "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime is being committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The language of the statute, 'implicates the accused,' compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime is being committed, but that it was committed by the accused.
>
> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime."

163. The concept of corroboration has been considered in numerous cases in this jurisdiction. In *The People (DPP) v. Gilligan* [2006] 1 IR 107, the Court moved from the formalistic approach in Baskerville in favour of a more pragmatic concept of corroboration. Denham J. at p.140 of *Gilligan* observed that there are three strands to corroborative evidence:

> "Thus there are three strands to corroborative evidence. First, that it tends to implicate the accused in the commission of the offence. It renders it more probable that the accused committed the crime.
>
> Secondly, it should be *independent* of the evidence which makes corroboration desirable…
>
> Thirdly, it should be *credible*. It should be supporting evidence which has a degree of credibility."

164. On the aspect of the independence of the corroborative evidence, Denham J. emphasised a common-sense approach and cited the words of Lord Reid in *DPP v. Kilbourne* [1973] AC 729 at p. 750:-

> "There is nothing technical in the idea of corroboration. When in ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it."

Denham J. went on to say: –

> "Thus the nature of corroborative evidence depends on the facts and circumstances of the case and the defence of an accused. Corroborative evidence establishes a link which tends to prove that the accused person committed the offence. Corroboration may be found in a simple fact. For example, in *Attorney-General v. O'Sullivan* [1930] I.R. 552, a case of sodomy, corroborative evidence was evidence of boxes found in a room."

165. Denham J. then considered the importance of an accused's defence in the context of determining whether evidence was capable of amounting to corroboration: –

> "The nature of the defence may be critical in determining what is corroborative evidence. If, for example, the defence is that a person was not at a premises then evidence by that person as to the interior of the premises may be corroborative, as, there being no suggestion that the person had been there for another reason, it tends to link the accused to the crime."

166. When considering the issue of the credibility of the corroborating evidence, Denham J. concluded that the evidence should be supporting evidence which has a degree of credibility, but stressed that the idea that corroboration is a two-stage process is not correct. In this regard she cited the case of *R v. Hester* [1973] A.C. 296 at p. 315, where Lord Morris of Borth-y-Gest stated:-

> "The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence will only fill its role if it itself is completely credible."

167. In finding that corroboration is not a two-stage process, Denham J said: –

> "Corroboration arises where the evidence to be corroborated has a degree of credibility. However, corroboration is not a two-stage process. It is not a process in which there is first a determination as to whether a witness is credible, and, if he is credible, then the issue of corroboration is addressed."

168. Therefore, the flexibility of the concept of corroboration cannot be in doubt. Issue is taken on behalf of Alan Freeman that the trial judge, in defining corroboration and in providing common day-to-day examples of corroboration, erred in confusing corroboration and supporting evidence. But what is corroboration except evidence which is proffered in order to confirm, support or verify the testimony to be corroborated?

169. In *The People (DPP) v. Meehan* [2006] 3 IR 468 Kearns J., in considering the difficulties caused by the rather rigid definition of corroboration in *Baskerville*, was of the view that the definition seemed to be unsound in principle. He observed that prior to *Baskerville*, there was some controversy over whether corroborative evidence should implicate the accused or whether it was enough that it strengthens the credibility of the accomplice. Kearns J. considered the views of the Supreme Court of Canada in *Vetrovec v. The Queen*

[1982] 1 S.C.R. 811 to be particularly relevant, commending the views of the following passage:-

> "With great respect, on principle Lord Reading's approach seems perhaps over-cautious. The reason for requiring corroboration is that we believe the witness has good reason to lie. We therefore want some other piece of evidence which tends to convince us that he is telling the truth. Evidence which implicates the accused does indeed serve to accomplish that purpose but it cannot be said that this is the only sort of evidence which will accredit the accomplice. This is because, as Wigmore said, the matter of credibility is an entire thing, not a separable one:
>
> '. . . whatever restores our trust in him personally restores it as a whole; if we find that he is desiring and intending to tell a true story, we shall believe one part of his story as well as another; whenever, then, by any means, that trust is restored, our object is accomplished, and it cannot matter whether the efficient circumstance related to the accused's identity or to any other matter. The important thing is, not how our trust is restored, but whether it is restored at all [Vol. VII, para. 2059, at p. 424].'
>
> These views may be taken as reflective of the proposition, which certainly commends itself to this court, makes little sense to relate unreliability to classes of persons – be they accomplices, children or complainants in sexual cases, rather than to the circumstances of cases."'

170. When assessing the definition of corroboration, Kearns J. emphasised the importance of the defence set up by an accused and cited *The People (A.G.) v. Levison* [1932] IR. 158, where O'Byrne J. stated at p. 165:-

> "'What constitutes corroboration must depend on the facts and circumstances of each particular case, on the defence set up by the accused, and on the nature of the question to be determined by the jury … it seems to us evidence of any material circumstance tending to connect the accused with the crime and to implicate him in it would appear to us to be corroboration in the circumstances of this case.'

171. Kearns J. went on to say:-

> "An important feature evident in this definition is that that which constitutes corroboration may depend in an individual case on the 'defence set up by the accused'…
>
> Corroboration as it has been defined and applied in this jurisdiction, does not have to directly prove that the offence was committed. It is sufficient if it confirms a material particular of the witness's evidence implicating the accused. This Court in The People (DPP) v. Murphy [2005] 2 I.R.125 (at 159) approved as correct the reference to corroboration as it appears in Criminal Evidence (2nd ed.) by Richard May at 330:-

> "Material particular' simply means a material fact i.e. a fact which in the circumstances of the case and the issues raised in it is material to the guilt or innocence of the accused of the offence charged. It does not mean that the corroborative evidence has to corroborate the whole of the evidence of the witness who requires corroboration. If this were required the evidence of the complainant or accomplice would be unnecessary. The whole case could be proved by the corroborative evidence. It is sufficient therefore if there is confirmation of a material part of the witness's evidence implicating the defendant in the offence."'

172. In our view corroborative evidence must be viewed in a pragmatic way. The purpose of corroboration is, after all, simply to strengthen or support the evidence desiring of corroboration.

Conclusion on meaning of corroboration

173. The trial judge set out the ingredients of corroboration in simple terms in his charge to the jury. Firstly, he stated: –

> "It's independent evidence which tends to show that the principal evidence is true".

He then proceeded to give examples of ordinary everyday situations which could amount to corroboration and continued: –

> "So, the ingredients are that the corroborative evidence should be independent and
>
> it should, in a criminal context, tend to implicate the accused person in the commission of the crime with which he is charged."

174. At a later stage in his explanation of corroboration in the context of the accomplices, he said: –

> "You might want to look at the corroborating evidence first, see what weight you attach to it and then consider the accomplices' evidence. Then, consider the evidence given by the accomplices in light of whatever corroboration they accept; do they accept the evidence of the accomplice, so as to be satisfied beyond reasonable doubt as to his account implicating the accused?

175. The move from the classic definition of evidence capable of constituting corroboration towards a more pragmatic approach is well-established in the jurisprudence. There is nothing technical about corroboration, moreover, circumstantial evidence can constitute corroboration as observed by Denham J. in *The People (DPP) v. Gilligan* [2006] 1 IR 107. A more nuanced approach to the definition in Baskerville, with its formalistic, narrow approach is to be preferred and more fluid, common-sense approaches are evident as reflected in *Gilligan and The People (DPP) v. Meehan* [2006] 3 IR 468.

176. It is difficult to find fault with the very straightforward definition of corroboration given by the trial judge in the present case. In explaining the meaning of corroboration to the jury, he made it quite clear to them that there are three strands to corroborative evidence,

namely that it tends to implicate the accused in the commission of the offence, that it should be independent and that it should be credible. He highlighted that it is very important that they had a good understanding of the concept of corroboration because of the presence of accomplices in the trial. He then warned the jury of the dangers of convicting on the uncorroborated evidence of an accomplice and he did so repeatedly, and it is fair to say that no issue was taken with the warnings given by the trial judge in this respect. Moreover, the trial judge explained to the jury that it was his function to inform the jury whether evidence was capable of amounting to corroboration, but it was for the jury, as the finders of fact, to decide whether any piece of evidence was in fact corroborative. The trial judge then parked the issue of corroboration and addressed the jury on other matters, returning in his summary of the evidence to the evidence that was potentially corroborative. It is with this aspect of the charge that the appellants take serious objection.

Discussion and Conclusion on grounds 2 and 3- Alan Freeman

177. In each case the judgment must be made by the trial judge in light of all of the circumstances and the defence advanced as to whether material is potentially corroborative. The crux of the complaint advanced on his behalf is that there was no evidence in the case capable of corroborating the testimony of John Cahill and this was not made clear to the jury. The argument is advanced that when discussing the evidence given by Mr Cahill, the trial judge gave the impression that the evidence of Mrs Garvey in particular concerning the envelope containing cash in dollars and sterling, was capable of corroborating John Cahill's testimony. However, the passage relied upon by the appellant does not give this impression in our view. It is worth looking at the passage before the passage complained of where the trial judge said: –

> "…. and Anne Garvey also said this – into a white envelope, and this evidence corroborates the evidence given by the Garvey's in relation –, this evidence is capable of corroborating the evidence given by the Garvey's in relation to the money in the envelope..."

The trial judge then went on to say: –

> "She got the key, opened the safe, gave them the envelope would be US dollars and Sterling. Members of the jury, it is, of course, a matter for you to decide whether to accept or reject the evidence that Mr Cahill has given you in respect of these matters up to this point, and it is entirely a matter for you".

178. At a later stage in his charge the trial judge again addresses the issue of the foreign currency in the envelope and very clearly indicates to the jury that Mr Cahill's testimony in this respect is capable of corroborating the evidence given by Mr and Mrs Garvey in respect of the money stolen but that it did not corroborate Mr Cahill's evidence that Mr Freeman was there. The trial judge emphasised that the jury were very reliant on the testimony of Mr Cahill so far as the allegation against Mr Freeman was concerned. In so saying, the trial judge reiterated that the jury were entitled to rely on the evidence of an accomplice so long as they carefully considered the dangers which he had outlined to

them in respect thereof. As has been repeatedly emphasised by this Court, a jury should only be discharged as a last resort. We have already concluded that the trial judge properly charged the jury as to the meaning and definition of corroboration and we are satisfied that he did not err in the manner in which he addressed the evidence of the accomplice, John Cahill.

179. While the trial judge did not expressly indicate to the jury that there was no evidence capable of amounting to corroboration of John Cahill's testimony concerning Alan Freeman, in recharging the jury on the issue of corroboration, he identified the evidence which was capable of corroborating John Cahill's evidence concerning Patrick Roche. It is quite clear that the trial judge instructed the jury that the counting of money was not capable of corroborating the evidence of Mr Cahill, the accomplice. While it would of course have been preferable had the trial judge expressly stated that there was no evidence capable of corroborating John Cahill's testimony concerning Alan Freeman, the thrust of his closing remarks to the jury make it quite clear that this was in fact the case. These grounds therefore fail.

Discussion grounds 10 and 15 – Patrick and Philip Roche

180. It is contended on behalf of these appellants that the trial judge made comments which were prejudicial and adverse to them. Firstly, it is submitted that the judge, through his comments, disclosed that he was in favour of the respondent's case. In this respect it is contended that when addressing the evidence of the accomplice William Gammell, the trial judge's comments were unbalanced in favour of the respondent.

181. The defence case was that Mr Gammell was motivated by fear of the Gardaí. He said that he had been beaten up at the time of his arrest. Issue was taken with much of the judge's charge in this context and in particular as follows: –

> "Ask yourself the question of whether or not there has been any contact with members of an Garda Síochána during the intervening time periods. Ask yourself what motivations drive Mr Gammell. I'm not telling you that you need to approach the matter in this way; I'm simply making suggestions to you as to what you may wish to consider, what do you take. You are masters in respect of all of the evidence" .

182. Issue is also taken with the manner in which the trial judge addressed the evidence of John Cahill, wherein the appellant submits that the trial judge conveyed to the jury that the accomplice was an honest and truthful witness. In this respect, reliance is placed on the judge's comments concerning the cross-examination of Mr Cahill.

183. Criticism is also made of the trial judge's charge in the context of his concluding remarks on circumstantial evidence where he said: –

> "And you can consider then the matters that were – the items that were found in the car, the handcuffs, the money, the glove, the balaclava, these are items of circumstantial evidence. But you can, if you think that it is appropriate and if you

can't wait to them, you can build them, layer upon layer, until such time as you have a stronger piece of evidence. And don't forget of the requirement that you have and that remains with you at all times is that you must be satisfied beyond reasonable doubt in relation to all of this, but you can use all of those pieces of evidence. Then there is the evidence of the accomplices, and I have given you the warning in relation to those already."

184. Issue is also taken with the manner in which the trial judge to address the evidence of one Robert Mockett, where it is contended that the trial judge, commented adversely on the defence version of events by way of cross-examination of the witness where the trial judge in highlighting conflicting evidence said: –

> "members of the jury, it is a matter for you to assess the credibility of this witness, in light of the two, conflicting versions of events, but it's difficult to see what great significance his evidence is in any event".

185. In respect of Patrick Roche, it is submitted that the trial judge displayed a rhetorical slant in favour of the prosecution when detailing in his charge the circumstances of the inference questions put to the appellant.

186. Both appellants submit that throughout the charge the trial judge displayed a bias towards the prosecution which resulted in an unbalanced charge and adversely affected the defence position.

Submissions of the respondent

187. In relation to Philip and Patrick Roche, the respondent submits that the appellants have lost sight of what can constitute corroboration and there were various strands of evidence which could have been treated by the jury as corroborative of the accomplice evidence.

188. The respondent submits that the narrower approach taken by the trial judge in his recharge was to the benefit of the appellants. However, key pieces of corroborative evidence remained. In relation to Patrick Roche there were the contents of the car in which he was found, the shards of glass on his person and the layers of clothing he was wearing. In relation to Philip and Patrick Roche, there was the DNA material found in the bag shown to Gardaí by Mr Gammell.

189. The respondent concludes that, taken as a whole, the trial judge's charge was fair and balanced, and it was always emphasised that it was a matter for the jury to consider the evidence.

Conclusion on suggested adverse comments

190. We are satisfied on a careful consideration of the entirety of the judge's charge, that the criticisms on behalf of the appellants Patrick and Philip Roche are misplaced. In his opening remarks to the jury, the trial judge stated as follows:-

> "Something that I'm going to be saying to you about anything I say about the evidence or any comment I make about the evidence is that it is just that, a

comment. You're masters of the facts. It is your job to make decisions on the basis of the evidence that you've heard here, and I'm going to be explaining that more clearly to you. So, when I do eventually come to read the evidence, if your version or if your recollection or if any notes you've taken clash with mine, go with yours, okay. I'm not infallible in relation to any of this. So, what do I do here? I'm the Judge, I preside over the case. I'm in charge of the law, as you have been told, and you have to accept the law as directed by me. My job is to ensure that a fair trial is conducted according to the rules of law. I'm obliged to be absolutely neutral in respect of the case and neither in one side's corner or the other. So, I'm not cheerleading for either prosecution or defence."

191. When the trial judge was requisitioned on the basis that he had trespassed on the jury's territory in contending that the accomplice Mr Cahill was upfront about his past criminal conduct, he recharged the jury as follows: –

> "Now, something that I said to you, members of the jury, that I want you to ignore, is that I said to you that Mr Cahill had been reasonably upfront regarding his own past involvements in criminality. It's not a matter for me to say that, members of the jury, you've heard the evidence, you've seen all of the parties involved, that is a matter for you entirely and you alone, and I apologise for having strayed into your territory in that respect. It is a matter solely for you to decide on the credibility of Mr Cahill and any other witness and any other piece of evidence that you heard."

192. We are entirely satisfied that even if the jury did not take on board the judge's instruction from the outset, that they were the masters of fact, and there is no reason to believe that any jury would ignore such an instruction. The judge addressed any possible imbalance by addressing the jury on foot of a requisition. We are satisfied that there was no error in this respect.

Corroboration of the accomplice testimony – John Cahill and William Gammell

Discussion

193. Patrick and Philip Roche submit that the trial judge identified independently verifiable detail of the events recounted by the accomplices as corroborative of their account in respect of the Garvey and Creed aggravated burglaries. The complaint made in this respect is that the evidence identified by the trial judge did not in fact connect the appellants to the crimes. Therefore it is argued that an essential ingredient of corroboration is absent.

194. In his charge concerning the aggravated burglary in the Garvey home, the trial judge, in summarising the evidence to the jury, stated that the evidence disclosed that on 16th April 2012, members of the Garda Síochána were on duty in Buttevant, when they observed two vehicles and decided to follow the first vehicle which had accelerated away from the Garvey's. This vehicle was a BMW with a 08 registration plate. In the vehicle was found the driver, Christopher Stokes and a passenger, Patrick Roche. On searching the

vehicle a sum of money was found, a black balaclava, a pair of gloves and a screwdriver. Also found were a pair of handcuffs and a black ski mask. The judge then said:-

> "The balaclava, gloves, money and handcuffs are, ladies and gentlemen - I'm literally commenting on the evidence, their evidence - and though circumstantial evidence, on an individual basis each one of them may not amount to much, but when you put all of them together and you look at them cumulatively, they're capable of corroborating evidence that was given by the Garveys. It is a matter for you as to whether or not you are satisfied that they do corroborate the evidence that was given by the Garveys in relation to the matter."

195. It is undoubtedly so that circumstantial evidence may constitute corroboration. These items which the trial judge indicated were capable of corroborating the testimony of the Garveys, pieces of circumstantial evidence, when considered together could be said by a jury to be of sufficient strength to not only corroborate that the offence itself was committed but also to connect the appellant with the commission of the offence.

196. The duty of the trial judge was to identify the pieces of circumstantial evidence which were capable of amounting in law to corroboration and this is in fact precisely what the trial judge did in this instance. Having done that he then proceeded to direct the jury as to how they should treat circumstantial evidence in the context of amounting to corroboration. We cannot identify any error in the manner in which the trial judge directed the jury in this context.

197. The appellants criticise the manner in which the trial judge highlighted the evidence given by the Garveys of the aggravated burglary, having pointed to the items found by the Gardaí in the car in which Christopher Stokes and Patrick Roche were travelling. However, it is clearly the position that the evidence of Mr Cahill was capable of corroborating their account.

198. As regards the aggravated burglary in the Creed home, the trial judge summarises the evidence including the evidence of the forensic scientist Mr Hoade, who analysed the items which have been discovered in those Dunnes Stores bags which the accomplice Mr Gammell said he had been asked to dispose of but in fact had hidden and subsequently located for the Gardaí. Various items were found in the Dunnes Stores bags including a hooded top, runners, gloves, balaclava and the fingertip of a glove from which Mr Hoade sought to conduct a forensic analysis. DNA profiles were extracted from the woollen gloves and also from the black balaclava and he concluded that the DNA profile from the glove matched that of Philip Roche's DNA profile and the DNA profile generated from the inside of the balaclava matched Patrick Roche's DNA profile. The trial judge then highlighted the statistical analysis and then said:-

> "You've heard the evidence given by both the Creeds and the Garveys that the people involved in the robberies were wearing balaclavas and you also heard that gloves were worn. This evidence is capable of corroborating that testimony, but make sure that any conclusions you draw in respect thereof are logical. This

evidence is highly suggestive that a glove and balaclava, which came from inside of the Dunnes Stores bag, were, at some stage, worn by Patrick Roche and Philip Roche. You should then consider all of the evidence and satisfy yourself in relation to the circumstances by which the Dunnes Stores bag came to be at that location with those items in it. You've heard the evidence in that respect from Mr Gammell, who said that after he collected Patrick and Philip Roche from the Creed house, they took their clothes off and put them in a Dunnes bag. He was told to burn the clothes bag but he later hid the bag."

199. When one looks to the more nuanced definition of corroboration, as expressed in the decisions of *The People (DPP) v. Gilligan* [2006] 1 IR 107 and *The People (DPP) v. Meehan* [2006] 3 IR 468, the evidence of the finding of the Dunnes Stores bag with its contents was evidence capable of corroborating William Gammell's testimony regarding this bag and the jury were so advised. After all, corroborative evidence is evidence of any material circumstance which tends to connect and implicate an accused in a crime, and it is sufficient if the corroborative evidence proves a material particular of a witness's evidence implicating an accused person. In circumstances where William Gammell gave evidence of hiding the bag following the Creed burglary, the finding of the bag and the evidence of the analyses of its contents was capable of corroborating the accomplice's evidence.

200. Issue is taken with the trial judge identifying other pieces of evidence as capable of corroborating the accomplice testimony, such as the BMW found at the ESB station in Monard, the fact that a gun, a screwdriver, and a baseball bat were described as being used in the raids and were described as being in possession of the appellants as they left the Garvey home. There is justification in this criticism. Following requisitions made on behalf of the three appellants, the trial judge agreed to recharge the jury and to advise the jury that there were two pieces of evidence which were capable of corroborating the testimony of the accomplice John Cahill. Those two pieces of evidence were firstly; the shards of glass found on Patrick Roche's clothing and secondly, the discovery of the various items by the Gardaí in the vehicle driven by Mr Stokes in which Patrick Roche was a passenger.

201. As regards the accomplice William Gammell, the trial judge indicated that he would advise the jury that the items discovered in the Dunnes Stores bag and the DNA analysis arising therefrom were evidence capable of corroborating William Gammell's testimony. In this respect the trial judge then instructed the jury, the pertinent portions being: –

> "So, some of the evidence which you have heard from William Gammell and Mr Cahill …are not capable of corroborating Gammell's and Cahill's evidence against the accused… So, things like the burnt-out BMW, the tyre marks, the finger from the glove, the balaclava that, or the balaclavas that Mr Gammell and Mr Cahill say that they saw the accused wearing, and any other references to balaclavas, other than in the '06 BMW outside of Cork, I'll come to that shortly. When they say they saw handcuffs, weapons, cable ties, that sort of thing. When they say they saw

Alan Freeman counting money; all of these things are capable of corroborating other people's evidence, **but they're not capable of corroborating the evidence of the two accomplices, that is William Gammell and John Cahill**. So, what evidence then is there open to you which is capable of corroborating John Cahill's evidence? Well, the following; the glass shards found on Pat Roche's clothing are capable of amounting to corroboration of Patrick Roche's involvement in the Garvey robbery, capable of doing that, but it is up to you to decide on the weight of that evidence and the importance to which you attach that evidence, as to whether or not you find that evidence to be corroborative. So, that evidence is capable of corroborating elements of Mr Cahill's evidence, but it's up to you to decide whether or not it does so.

The second area where we have evidence that is capable of corroborating Mr Cahill's evidence in relation to the Garvey robbery, is the discovery of the handcuff, money, one balaclava, one ski mask and the screwdriver in the '08 BMW, this is the one on the Doneraile Road, outside of Buttevant, in which Mr Stokes and Pat Roche were travelling. You'll remember that that was the one that was stopped by the guards. So, the items that were found in that car, together with the time at which they were stopped, those matters are capable of providing corroboration in relation to Mr Cahill's evidence, as against Pat Roche in respect of the Garvey robbery.

I turn now to Mr Gammell, what evidence can you consider in relation to corroborating his testimony? The DNA evidence which was extracted from the samples that were taken from the balaclava and the glove and they were both in the Dunnes Store bag, which were allegedly dropped or hidden by Mr Gammell, after having been instructed to set fire to them, you remember that evidence, and this is after the Creed robbery…that evidence is capable of corroborating William Gammell's evidence in relation to Patrick and Philip Roche's involvement in the Creed robbery. Now, that deals with the corroboration side of thing."

Conclusion

202. Whilst it is undoubtedly so that it would have been preferable if the trial judge had not indicated that items which were not capable of corroborating the accomplice testimony were in fact so capable. However, having been requisitioned, the trial judge identified the items which were in law capable of corroborating the accomplice testimony.

203. Before the trial judge proceeded to recharge the jury on these items, he indicated his intention to do so. The trial judge also indicated that he would recharge the jury in relation to other aspects which were the subject of criticism. It appears there was an indication of satisfaction on the part of Patrick Roche and Philip Roche. We acknowledge that those present at trial are in a position to assess whether matters have been addressed adequately or whether fresh issues arise but even leaving the question of the satisfaction of the parties to one side, we are satisfied that the recharge by the judge on the issue of the evidence capable of corroborating the accomplice testimony was, in the circumstances of a long and undoubtedly complex trial, satisfactory in all the

circumstances. Accordingly, we are not persuaded that the charge on corroboration rendered the trial unsafe.

Ground 11- Philip Roche and Ground 16 – Patrick Roche

16/11. The learned trial judge erred in failing to adequately recharge the jury following requisitions.

204. In respect of the recharge, the appellants submit that this did not sufficiently remedy the harm done as the clarification that the judge had trespassed on the jury's function did not alter the underlying fact that the Court believed that the accomplice evidence should be accepted.

The appellants submit that the comments of the judge in relation to the evidence capable of amounting to corroboration were liable to skew the jury's assessment of the evidence and could not be cured by a simple correction that they should be ignored. The appellants submit that the Court's comments further emphasised the prosecution's case and the recharge was insufficient to cure the harm done by the cumulative prejudice that had been caused by the charge.

Conclusion

205. The trial judge took great care in recharging the jury. He apologised for any confusion and proceeded to recharge the jury in the terms we have outlined above. The final directions given by him were very clear. He highlighted for the jury the evidence which was capable of acting as corroboration of the accomplice testimony and did so with clarity. We are not persuaded that there is merit in these grounds.

Ground 1 of Alan Freeman and Ground 10 of Patrick Roche- Cross- Examination

1. The learned trial judge erred in law and in fact in failing to accede to an application by counsel on behalf of the above-named appellant for separate trials on 4 separate occasions in circumstances where counsel for the co-accused for the alleged offending behaviour cross-examined witnesses in such manner as to implicate the accused in unrelated criminality.

10. The learned trial judge erred in law in refusing the appellant's application for a separate trial following evidence of Christopher Stokes' conviction being adduced before the Jury and following other prejudicial matters being adduced by counsel on behalf of Philip Roche.

206. It is necessary to contextualise these grounds. By way of background, the indictment originally preferred 34 counts. Count 8 was preferred against Patrick Roche only and was a count of handling stolen property. The particulars of that count read as follows: –

> "Patrick Roche did, on the 30th day of May 2012, at Parkstown, Horse and Jockey, Thurles, in the County of Tipperary, dishonestly handle stolen property, to wit a Toyota Landcruiser Jeep bearing Registration Letters and Numbers 06 KE 8015, knowing that the property was stolen or was reckless as to whether it was stolen."

207. Patrick Roche was acquitted of this count.

208. Prior to the commencement of the trial, a successful application was made on behalf of Alan Freeman to sever certain counts from the indictments, namely counts concerning an alleged aggravated burglary at the home of a Mr Cruise on the 13th April 2012 and a count of handling stolen property, namely; a Toyota Landcruiser Jeep.

209. Before the accomplice Mr Gammell gave evidence, counsel for Mr Freeman applied for a separate trial as he was concerned evidence would be adduced which would prejudice his client. This was refused and while the application was renewed a number of times following evidence and indeed the discharge of the jury was sought, such applications were also refused.

210. It is contended that during cross-examination, counsel who appeared on behalf of Philip Roche at trial asked questions which, in and of themselves, were prejudicial or the answers to which caused prejudice to the co-accused. It is contended that the trial judge ought to have ordered separate trials as a consequence and in effect discharged the jury in respect of Patrick Roche and Alan Freeman.

Alan Freeman

211. Insofar as Alan Freeman is concerned, on day 12 when William Gammell was cross-examined, he made a number of references to Alan Freeman, which, it is contended, served to implicate him in the Cruise aggravated burglary by referring to the blue BMW, which was used in the Garvey aggravated burglary as being 'robbed' by Alan Freeman. Moreover, that evidence of the appellant's role in the transfer of a stolen Toyota Land Cruiser Jeep was adduced. Mr Freeman was not on trial for the theft of the BMW or of handling the Land Cruiser.

212. Complaint is also made with matters arising during the cross-examination of John Cahill. Firstly, on day 16, counsel for Philip Roche in the trial, asked the witness a number of questions in succession about duress, dealing in drugs, being in fear of others and a debt owed to Alan Freeman and the steps he took to discharge it. Furthermore, Mr Cahill was also cross-examined in a manner which it is contended linked Alan Freeman to a Mitsubishi Lancer, which it was suggested had been used in the course of an aggravated burglary of the Cruise home on the 13th April 2012.

Patrick Roche

213. Counsel for Philip Roche asked John Cahill to confirm that Christopher Stokes had pleaded guilty to the offence of aggravated burglary at Sunville House. He, it will be recalled, was the driver of the vehicle in which Patrick Roche was a passenger when he was arrested by the Gardaí shortly after the Sunville House burglary.

214. Finally, pertinent to both appellants was the question which arose in cross-examination when counsel for Philip Roche asked the witness:

> "And what country do you intend going to having given this evidence?"

Thus implying, it is said, that the appellants were dangerous men from whom it would be necessary to flee. Following this question, counsel for Patrick Roche made an application

for a separate trial, that is separate from the trial of his co-accused Philip Roche, on the basis that his client's interest had been undermined in the presence of the jury. Counsel for Alan Freeman also made an application for a separate trial in the following terms: –

> " I was going to apply for a separate trial on the completion of this cross-examination. It's as well to make it now. The Court is probably sick of me standing up looking for separate trials but it has now come to the stage where I don't believe that this Court has any option but to grant Mr Freeman a separate trial …

When Mr Costelloe had finished his careful examination in chief of the witness I was in the position where I could readily cross-examine this witness --. But, now I have a client who's not only alleged to have committed this aggravated burglary before this jury he's now a drug dealer who is responsible for a 10,000 debt by Mr Cahill. It didn't come out in those crystal clear terms but anybody with half a brain in their head would infer that that is the situation. That Mr Cahill somehow or other -- drugs -- there is a drug debt there. It didn't come out in that fast term but that's what's implied and the jury are no eejits and it's as clear as day that that is what has come out. It's an impossible uphill battle now for Mr Freeman given that Mr Freeman was granted a separate trial in respect of other matters in the case things have emerged during the course of the trial ongoing which have linked him to the BMW stolen from the Cruise's or taken from the Cruise's. Linked him to a Mitsubishi which wasn't clear from the evidence of Mr Gammell. But, that is all gone for him now and I submit that he's in an impossible situation."

215. The trial judge refused and in grounding his decision, the trial judge stated as follows:-

> "I've done my best to try and maintain as level a playing field as possible for all participants where including the people and we've worked hard at achieving that. And a comment I made earlier in relation to a previous application is that I have to look at the body of evidence as a whole, I have to look at matters as a whole. I have to have consideration for the rights of the individuals, each of them. But, also I have to have consideration for the trial process and procedures that are adopted. This is a joint trial. Risks are associated therewith and they have become very apparent…
>
> I don't feel the need to press the nuclear button in respect of ordering a separate trial in relation to his client at this time. I don't think that we've reached a threshold where such prejudice has been shown. There is a lot of work I have to do if we get to the charge, there's a lot of work I will have to do. But, at the present time I'm satisfied that it can be properly dealt with. If difficulties arise with it they can be raised with me. But, as things stand I'm satisfied that, repetitive and boring as it might be for the jury, clarity can be provided to them in relation to many of these matters…. In respect of Mr Heneghan's application I'm repeating myself somewhat. I'm going to be very clear to the jury in indicating to them that they cannot engage in speculation, they cannot engage in conjuncture. In relation to there has been no mention -- there has been no specific mention of the debt being

linked to drugs and I'm going to tell them very clearly that debts can arise in a whole range of situations and that they're not to go jumping the gun or making assumptions in relation to anything and it has no relevance in the context of their decision making process in relation to his client. Of course I will tell them clearly that each charge on the indictment is to be dealt with as an island and that each individual is entitled in respect of each charge to a proper and careful assessment on the basis of the evidence in respect of him and that charge alone. I'm satisfied that when properly instructed the jury can understand their task and apply the evidence that they've heard appropriately."

Submissions of Alan Freeman

216. The appellant submits that the above cross-examinations elicited evidence that the appellant committed, was involved with, or connected to a number of offences which resulted in gross prejudice to the appellant. The appellant submits that this prejudice was incapable of remedy by judicial warning.

217. The appellant refers to the judgment of Hardiman J. in *The People (DPP) v. McGrath* [2013] IECCA 12 and submits that as in McGrath, the effect of the joint trial permitted the co-accused by cross-examination to blacken the character of the appellant. As such, the appellant submits that the trial judge was wrong in law to refuse to order a separate trial for the appellant.

Submissions of Patrick Roche

218. This appellant submits that the nature and content of the cross-examination of John Cahill, in particular the reference to the guilty plea of Christopher Stokes, served to adduce evidence of the bad character of the appellant which would otherwise have been inadmissible. The appellant submits that this evidence interfered with the appellant's right to a fair trial and the presumption of innocence.

Submissions of the respondent

219. The respondent submits that the trial judge dealt with this matter appropriately and in fact acquiesced to the views of counsel for the appellant in not addressing the jury on this issue. The respondent submits that the reality of trials such as the present one is that prejudicial material may arise in the evidence of accomplices, but this should only lead to a discharge when the issue is irredeemable. The respondent says that as in *The People (DPP) v. Kenny* [2018] IECA 38, the trial judge was within his rights not to discharge the jury and rely on the general principle that the jury will assess the evidence in accordance with the directions given to them.

220. In relation to the arguments of Mr Freeman, the respondent submits that *McGrath* was a markedly different case where it was apparent that the co-accused took every opportunity to blacken the character of Ms. McGrath. The respondent submits that that is not the case being advanced here. Furthermore, there was no knowledge before the jury that Mr Freeman knew the origins of the Land Cruiser and therefore there was nothing for the jury to speculate upon. In relation to Patrick Roche, any prejudicial material that may have arisen could have been dealt with in the judge's charge, but no further mention was made by the trial judge by request of counsel for the appellant.

221. Reliance is also placed on the decision in *The People (DPP) v. Cawley and De Silva* [2015] IECA 100, where Edwards J. emphasised the general principle that juries can be relied upon to follow the directions given to them in their assessment of the evidence. At para.133 Edwards J. stated as follows: –

> "It can also arise that in some cases, because of their peculiar circumstances, there is no effective means of safeguarding against unfairness other than by the severance of the indictment and the directing of separate trials. However, such cases are relatively rare and recourse to such a measure should represent a last resort, following prior consideration and rejection for good and cogent reasons of all other options, particularly where a joint trial has been underway for some time."

222. Finally, it is said on behalf of the respondent concerning Mr Freeman's contention that the evidence of Mr Gammell of the Landcruiser was appropriately addressed by the trial judge.

Discussion

223. On day 12 of the trial, William Gammell, the accomplice to the Creed aggravated burglary, gave evidence. Prior to the commencement of his evidence, an admission was made on behalf of each of the appellants pursuant to section 22 of the Criminal Justice Act 1984 in terms of accepting that on 13th April 2012 a light blue BMW vehicle with registration number 00 WW 1000 was taken from a Mr Cruise. It was also accepted that on 11th April 2012 a blue Ford Transit motor van driven by Mr Freeman was rear ended by a vehicle driven by William Gammell.

224. William Gammell was then called and gave evidence. As there are three vehicles in respect of which the alleged prejudicial cross-examination is concerned, we will address the evidence in respect of each of the vehicles in turn, starting with the Mitsubishi Lancer.

The Mitsubishi Lancer

225. In his direct testimony, Mr Gammell was asked whether he had met Mr Freeman prior to 11th April 2012. He said that prior to that he had one or two dealings with Mr Freeman and the following exchange took place: –

> "Q. And specifically was there an occasion where you were asked to do something with a car for Mr Freeman – by Mr Freeman?
>
> A. Yes. We were asked to mind a car, yes.
>
> Q. Okay. When you say we, who is we were asked?
>
> A. Me and John Cahill.
>
> Q. John Cahill, okay. And what kind of a car was it?
>
> A. A white Mitsubishi Lancer.

[…]

[…]

[…]

[…]

Q. And what did you do with it?

A. I parked it behind a house where a family member was staying.

Q. Okay. Do you remember whereabouts that was?

A. In Oola, County Limerick".

There followed an objection concerning the maps and then the questioning continued: –

Q. So, the Mitsubishi Lancer was left behind a house at Oola?

A. Yes. Near the…

Q. Okay. And that was at the request of who? Who asked you to do that?

A. John Cahill.

Q. Right. And on behalf of who?

A. Alan Freeman."

The next reference to the Mitsubishi Lancer with which Mr Freeman takes issue came about in the course of Mr Gammell's cross-examination by counsel on behalf of Philip Roche as follows: –

" Q. And this just happens to be a casual bumping into each other, yourself and John Cahill?

A. Yes.

Q. And low and behold he's got this white Mitsubishi Lancer that's so hot it needs to be parked off side?

A. Yes.

[…]

[…]

[…]

Q. So, when you say in your statement "I'm talking about the white Mitsubishi Lancer" that you parked in your dad's place for €400 for the night, you say, "that's the car to my recollection that was used in the robbery of the BMW in Cappaghmore"?

A. Yes

Q. So, here you're picking up this car from John Cahill--

A. I didn't pick it up. He dropped it off. I just seen the car."

The cross examination continued: –

Q. And would be fair to say that the white Mitsubishi Lancer that you are keening out of sight is the self – same vehicle that is used to invade Mr Cruise's property?

A. Yes, they used that car".

226. On day 16, counsel for Philip Roche cross-examined the accomplice John Cahill who was the accomplice to the Garvey aggravated burglary. Insofar as the Mitsubishi Lancer was concerned the following exchange took place: –

"Q And this Mitsubishi Lancer was that used in the robbery of the Cruise household?

A. I was told on the night of that that the car was being moved on to tell Willie that it was being moved."

Conclusion on this sequence of questioning.

227. The concern expressed on the part of the appellant Alan Freeman is that the above evidence prejudiced him in the eyes of the jury by inferring that he had an involvement with a stolen vehicle. However, on a careful scrutiny of the impugned pieces of evidence, it becomes clear that the accomplice John Cahill was the moving party insofar as requests were made concerning the Mitsubishi Lancer. The height of the evidence was to the effect that Mr Cahill was acting on behalf of Mr Freeman. This was a matter which could be explored in cross-examination of Mr Cahill but did not prejudice Mr Freeman to the degree that it was necessary to direct separate trials. It is the very nature of trials where there is accomplice evidence that the accomplices themselves are of course directly involved in the commission of the offences in respect of which they are now giving evidence. The central feature of accomplices is that they themselves are directly involved in criminal activity and in this instance the impact of this evidence was to link Mr Cahill with the Mitsubishi Lancer, but we are not persuaded that the impact of the evidence was of such a prejudicial quality so as to require separate trials.

228. Moreover, on requisition, the trial judge addressed the jury on this vehicle vis-à-vis Mr Freeman in the terms requested by his counsel

The Toyota Land Cruiser

229. On day 12 of the trial, again in the course of Mr Gammell's evidence he was asked about a silver Toyota Land Cruiser. The following sequence of questions and answers took place in direct testimony: –

> "A. No, it was a silver Toyota land cruiser.
>
> Q. A silver Toyota Land Cruiser, okay. And how did you get that car?
>
> A. They rang me said that it was coming off in Dublin – –
>
> […]
>
> Q. So, my question was how you got that Land Cruiser, what was your answer?
>
> A Alan Freeman and Patrick Roche rang me said it was coming down from Dublin, to collect it in the Horse and Jockey."

230. Count eight on the indictment concerned a count of handling stolen property, namely a Toyota Land Cruiser jeep at Horse and Jockey, Thurles as against Patrick Roche. Count 30 concerned a count of handling stolen property of the same vehicle, but in a different location, namely in Athy, Co Kildare as against Alan Freeman. The latter count was severed from the indictment before the trial commenced. Consequently, it is argued on behalf of Alan Freeman that as he was not being tried for the handling of the Land Cruiser, the above extract from the evidence implicated him in a count which was not before the jury.

Conclusion regarding the Land Cruiser

231. We are not persuaded that the impugned evidence caused any prejudice of the kind requiring separate trials. The prosecution had originally preferred counts in respect of three aggravated burglaries as we have outlined above. The reason why the counts in respect of this particular jeep were preferred on the indictment was that it was the respondent's case that that vehicle was used in the aftermath of the Creed aggravated burglary. The respondent's contention was that there was a link between the alleged offences and the three appellants and that there was a similar modus operandi vis-à-vis the three offences and that there was a number of vehicles connected to the aggravated burglaries. However, the trial judge severed the counts concerning the first aggravated burglary, as the counts related to Mr Freeman only and also severed the count of handling the Land Cruiser vehicle insofar as it related to Mr Freeman.

232. Had this Court been dealing with the application to sever in the first instance, it is unlikely that we would have been persuaded by the argument advanced on behalf of Mr Freeman to sever the indictment. However be that as it may, the indictment was severed but it is very difficult to see that any prejudice arose from the impugned questioning and answers concerning the Land Cruiser, there can be no question of any responsibility being visited on Alan Freeman regarding the provenance of the jeep. Moreover, we note that Patrick Roche was in fact acquitted of this count by the jury. Moreover, in his charge to the jury, the trial judge directed the jury that Patrick Roche telephoned William Gammell regarding

the Toyota Land Cruiser and told him to go to Horse and Jockey to see if he, Mr Gammell, wanted to buy it. He emphasised that that was the only evidence connecting Patrick Roche to the Land Cruiser. No mention was made of Mr Freeman and no requisition followed.

The sky-blue BMW

233. The only count concerning this vehicle related to the appellant Philip Roche, wherein he was charged with possessing stolen property on 16th April 2012, namely a BMW 5 Series vehicle bearing registration letters and numbers 00 WW 1000. He was acquitted of this charge. As we have outlined above, prior to Mr Gammell giving evidence on day 12, admissions were made on behalf of the three appellants pursuant to s.22 of the Criminal Justice Act 1984 that this vehicle was a stolen vehicle.

The significance of the sky-blue BMW

234. This BMW car had been stolen from the Cruise household on the 13th April 2012. The accomplice, Mr Cahill gave evidence that it was used in the Garvey aggravated burglary on the 16th April 2012 and burnt out after some days later.

The sequence of evidence

- On day 12, prior to Mr Gammell giving evidence, counsel for Mr Freeman, made a pre-emptive strike and sought a separate trial as he was concerned that evidence would be elicited which would prejudice his client. This was refused.

- Prior to Mr Gammell's evidence, an admission was made that the sky-blue BMW, registration number 00WW1000, was stolen from Mr Cruise on the 13th April 2012.

- Mr Gammell gave evidence and was cross-examined by counsel for Philip Roche.

- During this cross-examination, with reference to the white Mitsubishi Lancer, counsel referred to Mr Gammell's statement where he said:-

  Q."That's the car to my recollection that was used in the robbery of the BMW in Cappaghmore?"

  A. Yes.

and also asked the question:-

"So if you're that innocent why would you be burning the BMW?"

The latter question was asked with reference to Mr Cahill, the accomplice to the Garvey aggravated burglary, to which the answer was:

"A. The BMW was used in the Garveys. Alan Freeman robbed the BMW and he brought it to the Pole Field in Monard. "

- Up to this point, while it was accepted that the BMW was stolen from Mr Cruise, there was no evidence linking Mr Freeman to this.

- On day 13, following the evidence of Mr Gammell, counsel on behalf of Alan Freeman made an application for the jury to be discharged on the basis of the evidence adduced concerning the Land Cruiser, the Mitsubishi Lancer and the BMW.

- The application was refused.

- On day 16 when Mr Cahill was being cross-examined by counsel on the half of Philip Roche, the following took place:-

> "Q. And then there was a question of Ian Cruise's sky-blue BMW?
> A. Yes
> Q. That was stolen. I think it was on 14 April 2012?
> A. I'm not sure. I don't know what date."

- At the conclusion of the latter portion of cross-examination on day 16, counsel on behalf of the respondent alerted the trial judge to his concern regarding the direction the cross-examination was taking. It is fair to say however that at this point the concern arose from the cross-examination of Mr Cahill on the reason why he (Mr Cahill) became involved in the Garvey aggravated burglary, specifically as to whether it was on a voluntary basis or that he was operating under duress from other parties. A lengthy argument followed between counsel for the respondent and counsel for Mr Philip Roche where Mr Costelloe drew to the trial judge's attention to his concerns regarding the relevance of the line of questioning by counsel for Philip Roche on a number of issues including the relevance of this aspect of the cross-examination.

- The trial judge refused to allow any questions concerning Mr Freeman and the blue BMW.

- Following further cross-examination, applications were made on behalf of Patrick Roche and Alan Freeman for separate trials. The impugned line of cross-examination this time involved a question which it was contended led to the inevitable conclusion that it would be necessary for Mr Cahill to leave the country for his own safety after giving evidence, but counsel for Mr Freeman again expressed his concern regarding the evidence linking Mr Freeman to the stolen BMW and thereby to the Cruise aggravated burglary.

- The application was refused.

Discussion

235. The counts concerning the Cruise aggravated burglary related to Mr Freeman only and as we know those counts were severed from the indictment. It is difficult to see the basis in law for such severance given the considerable nexus between the aggravated burglaries, the use of stolen vehicles, the temporal nature of the burglaries and the modus operandi.

236. The issue concerning prejudicial material arose as a result of the cross-examination conducted by counsel who appeared for Philip Roche at trial. Great care had been taken

to ensure that no link would be made between Mr Freeman and the Cruise aggravated burglary. In order to achieve this, an admission was made that it would be unnecessary for the respondent to prove that the BMW was stolen from Mr Cruise on the 13th April, 2012. There can be no doubt but that where Mr Freeman was charged with the Garvey aggravated burglary, where the evidence was that the BMW was used in that burglary and where it was alleged that he was involved in the stealing of that vehicle was all relevant evidence and thereby admissible evidence. The suggestion that the admissibility of such evidence is dependent on the party who elicits it is not correct.

237. If the evidence had been limited to the simple fact that the BMW had been stolen by Mr Freeman, there would not be, in the context of a concerted course of violent aggravated burglaries and where the vehicle was used in connection with the Garvey burglary, any argument to be advanced on Mr Freeman's behalf.

238. This is not a case with factual similarities to the decision in *The People (DPP) v. McGrath* [2013] IECCA 12 where the Court found that the cross-examination resulted in evidence which tended to blacken Ms. McGrath's character and was thereby prejudicial. We can see that the question asked which elicited the response from Mr Gammell that Mr Freeman robbed the BMW was a relevant one. Counsel was cross-examining the accomplice Mr Gammell regarding the burning of the BMW and as to why he was doing that. He then asked why Mr Cahill had the BMW, from which came the impugned answer implicating Mr Freeman in the stealing of the BMW and thus, it is argued, in the Cruise aggravated burglary.

239. It is this latter aspect which causes concern. The question of the prejudice must be viewed through the prism of the severing of the Cruise counts from the indictment. Evidence is only admissible if it is relevant to issues in the proceedings. It is clear that the line of questioning was relevant to the defence of Philip Roche as counsel was entitled to test the credibility of the witness.

240. Evidence may be considered for many reasons to be prejudicial to an accused. The question is whether it is so prejudicial so as to render a trial unfair and lead to the nuclear option of a separate trial in the latter stages of a long trial. Whether evidence of bad character is so prejudicial will depend on a number of circumstances. Such evidence will not inevitably lead to a jury discharge or separate trials. Issues such as the nature of the evidence in the context of the trial must be taken into account, what is prejudicial regarding an accused on one set of facts may not be prejudicial against a different accused on a different set of facts. An individual charged with a series of serious crimes, for example, and where a minor previous conviction from many years prior emerges, would not suffer the same prejudice as a person charged with a minor offence where evidence of a conviction for a similar recent offence emerges, but we emphasise that each case is entirely fact dependent and well within the province of a trial judge. Other factors such as the circumstances leading to the potentially prejudicial evidence, the manner in which and from whom the evidence emerges and whether the matter can be addressed by appropriate directions from a trial judge are all relevant to the situation.

Conclusion

241. In the present case, where the indictment was severed insofar as Mr Freeman was concerned on the Cruise counts, the evidence that he had stolen the BMW, which had been stolen during the Cruise aggravated burglary, was evidence of bad character. The fact that the jury were aware that the Cruise burglary had occurred three days prior served to compound the prejudice caused to him. The clear implication was that Mr Freeman was involved in the Cruise aggravated burglary. This placed him in the position of not only being an alleged participant in the Garvey aggravated burglary, but also a participant in an aggravated burglary closely connected in time and place to the offences for which he was on trial.

242. While the trial judge made no mention in his charge of Mr Freeman stealing the BMW, and while no requisition was raised regarding the vehicle, nonetheless the prejudice remained. In those circumstances, we conclude that the trial judge erred in failing to order a separate trial regarding Mr Freeman.

The Proviso

243. We have been urged by the respondent to apply what is commonly known as the proviso should we conclude that the trial judge erred. Section 3 of the Criminal Procedure Act,1993 provides for the jurisdiction of the Court of Appeal to affirm a conviction even where an error has been identified if the Court considers that no miscarriage of justice has actually occurred.

244. The relevant portion of section 3 (1) of the 1993 Act provides as follows: –

> "On the hearing of an appeal against conviction of an offence the Court may –
>
> (a) affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred)."

245. The evidence against Mr Freeman at trial concerning the aggravated burglary of the Garvey family was limited in his case to the evidence of the accomplice Mr Cahill. There was no evidence capable of corroborating Mr Cahill's testimony. Nor was there any forensic evidence or any other circumstantial evidence linking Mr Freeman to these offences. Consequently, this is not a case where the evidence aside from the impugned evidence was overwhelmingly against this appellant. In those circumstances, notwithstanding our view that the indictment should not have been severed in the first instance, we are not satisfied to apply the proviso. In those circumstances, Mr Freeman's appeal must be allowed.

246. We do not need therefore to address the argument advanced on behalf of Mr Freeman that evidence adduced in cross-examination by counsel for Philip Roche regarding money owed to Mr Freeman by Mr Cahill and the basis for such a debt was prejudicial evidence which should have given rise to a separate trial. For the sake of completeness, we are not persuaded that this line of cross-examination gave rise to prejudice as asserted on his behalf. On the contrary we consider that the evidence regarding the underlying reasons

for Mr Cahill's involvement in the Garvey aggravated burglary to have been relevant and therefore admissible evidence.

Discussion - Patrick Roche.

247. The prejudice contended for on behalf of this appellant again arose from the cross-examination of Philip Roche and significantly differs from that of Alan Freeman. Two issues arise:-

1) The evidence elicited that Christopher Stokes pleaded guilty and

2) The evidence that it would be incumbent on Mr Cahill to leave the country once he completed his evidence.

248. On the first impugned issue, the argument is advanced on behalf of the appellant that the evidence adduced in relation to Christopher Stokes' guilty plea was highly prejudicial to the appellant in the circumstances. He relies on the fact that he was arrested in the vehicle shortly after the commission of the aggravated burglary at the Garvey house where he was the passenger in the vehicle and Christopher Stokes was the driver of the vehicle. It is argued that such evidence caused irreparable prejudice to the appellant and served no purpose for the defence of Philip Roche.

249. The second issue also arose in the course of cross-examination of Mr Cahill by counsel for Philip Roche. In this instance it is contended that the natural implication of the question was that the appellants were dangerous and/or violent individuals and that Mr Cahill's life was endangered as a result of giving evidence in the trial.

250. Following the impugned question, counsel for Patrick Roche immediately applied for a separate trial on the basis of both issues. Indeed, counsel for the respondent intervened after the latter question was asked and queried the relevance of the line of cross-examination and accepted that the question asked was an improper one. However, Mr Costelloe argued that the trial judge could address the situation and ultimately the trial judge ruled against granting separate trials. He was satisfied that clarity could be brought to the proceedings by virtue of his charge wherein he indicated that the jury should not engage in speculation or conjecture. In order to address the situation which had arisen by virtue of the question asked, it was agreed that Mr Cahill should be asked as to whether he had been promised any benefit by the State or from any other person as a result of giving evidence. This question was asked by the judge in the absence of the jury, to which Mr Cahill replied in the negative. He was then asked whether he intended to leave the country as a result of fear deriving from the giving of evidence, to which he again replied in the negative. Counsel for Patrick Roche and indeed Alan Freeman agreed that the responses were of assistance. Ultimately, when the jury returned Mr Costelloe asked the two questions to which he received answers in the negative from Mr Cahill.

251. Prior to the judge's charge on day 21 of the trial, counsel made certain applications to the trial judge and counsel on behalf of Patrick Roche voiced his concerns that any mention of the fact that Christopher Stokes had pleaded guilty would serve to emphasise and

highlight the material. No specific mention was made of the question posed as to whether Mr Cahill would leave the country. No requisitions were raised on either aspect following the trial judge's charge.

Conclusion

252. Firstly, we are entirely satisfied that the question posed regarding Mr Cahill's intentions following evidence was more than adequately addressed by the trial judge in the course of the trial and wisely, counsel for Patrick Roche clearly took the tactical decision to leave this matter rest. We are satisfied that no prejudice was caused to the appellant Patrick Roche, or indeed to Alan Freeman in this respect.

253. It is certainly difficult to ascertain the rationale behind the question concerning Mr Stokes' pleas of guilty, unless, in asking the question it was sought to place the blame four square on the shoulders of Christopher Stokes. However, that as may be and accepting that the question was improper, inadmissible evidence on occasion comes into a trial either inadvertently or, fortunately less frequently, deliberately, such as in the present case.

254. Even where inadmissible evidence finds its way into a case, discharging the jury or granting a separate trial in respect of one or more appellants should be as a last resort and only in the most extreme circumstances. A trial judge in considering applications of this sort following the admission of inadmissible evidence should carefully analyse the relevant facts and consider whether in the context of the particular facts, prejudice of the kind which cannot be alleviated by appropriate intervention or directions of a trial judge has been caused, thus rendering the trial unfair.

255. In the present case, we are satisfied that the evidence was not of such prejudice so as to warrant the judge proceeding down the route of last resort and particularly so where the impugned evidence came about on day 16 of the trial, thus leaving time for the evidence to fade. Even absent the fade factor, we are not satisfied that the evidence was in any event of the calibre of prejudice which would have warranted the jury to be discharged or the granting of a separate trial. Moreover, the trial judge was asked to refrain from making any reference to the evidence in order to avoid the risk of highlighting it. This approach was, in our view, the appropriate one in the circumstances of the trial.

256. It is in the interests of justice where persons are charged with offences arising from the same incident or with offences arising from a separate incident or incidents, but where the offences are so connected, whether by time or place or other related factors, that persons be tried together. This obviously applies where persons are charged as joint offenders in pursuit of a common design, but it is by no means limited to such situations. We are aware that, on occasion, prejudicial material can emerge during joint trials which in almost all circumstances can be addressed by the appropriate directions of the trial judge. As stated by Mahon J. in *The People (DPP) v. Coughlan Ryan* [2017] IECA 108 at para. 18:-

> "Inadmissible evidence finds its way into many trials, usually accidently and inadvertently. When it does, its prejudicial effect will vary from case to case, obviously very much depending on what has been stated to the jury or how it might be interpreted by the jury. It is well established and long accepted that a jury should only be discharged where the prejudicial effect is significant and it is not possible to counter that prejudicial effect by suitably warning or directing the jury. Juries have proven themselves time and time again to be willing and capable of heeding judicial warnings and instruction and of acting appropriately in response thereto."

257. We are not persuaded that the trial judge erred, and this ground therefore fails.

258. Where co-defendants mount a cutthroat defence or indeed where a defence is pressed which could have the effect of prejudicial impact on another defendant, it is the common and preferred practice that the parties are alerted to this course and, if difficulties are anticipated, that such difficulties are the subject of a ruling by the trial judge. A situation such as arose in the present case is to be avoided at all costs. An approach by a defendant to deliberately prejudice another defendant's right to a fair trial, is to be depreciated. The approach adopted on behalf of Philip Roche was, at times, difficult to comprehend and the questions asked were on occasion, improper. However, due to interventions by the respondent and counsel on behalf of the other appellants, and the rulings of the trial judge, any prejudice was avoided save in the instance of fixing Alan Freeman with stealing the BMW. In the interests of absolute clarity, it must be emphasised that we are of the view, that significant prejudice was caused to him only **in the peculiar circumstances** where the indictment was severed, and he was directly implicated in the charges arising from a very similar aggravated burglary.

Singular grounds

Ground 3 of Patrick Roche- Detention of the appellant

The learned trial judge erred in fact and in law in finding the appellant's detention at Mallow Garda Station and subsequent detention at Henry Street Garda Station pursuant to section 50 of the Criminal Justice Act 2007 on the 17th April 2012 lawful.

Detention at Mallow Garda Station

259. Following the aggravated burglary at Sunville House, (the Garvey home), the appellant was arrested on the 16th April 2012 pursuant to s.15 of the Criminal Justice (Theft and Fraud) Offences Act, 2001, detained in Mallow Garda Station overnight, charged and released on bail. He was immediately arrested on suspicion of committing an offence contrary to s. 73 of the Criminal Justice Act 2006; namely, the commission of an offence for a criminal organisation and was detained at Mallow Garda Station pursuant to section 50 of the Criminal Justice Act 2007. The appellant was later transferred to Henry Street Garda Station where he was further detained, pursuant to section 50 of the Criminal Justice Act 2007.

260. During the course of the trial, counsel for the appellant sought to have the appellant's detention pursuant to s.50 of the 2007 Act declared unlawful. It was contended that the

member in charge of Mallow Garda Station, Garda Hosford, did not have reasonable grounds for believing that Patrick Roche's detention was necessary for the proper investigation of the offence for which he had been arrested.

The Evidence

261. Detective Garda John O'Connell gave evidence concerning the appellant's arrest and arrival at Mallow Garda station. He introduced him to the member in charge, Garda Hosford, and said that he informed Garda Hosford that he had arrested the appellant for an offence under section 73 of the Act on suspicion of the commission of a serious offence for the benefit of, or direction of, or in association with a criminal organisation; namely to commit an aggravated burglary at Sunville House.

262. He requested that Garda Hosford detain Patrick Roche pursuant to the provisions of section 50 of the Criminal Justice Act 2007 for the proper investigation of the offence. He said that he gave Garda Hosford details of the aggravated burglary including that Patrick Roche was arrested following a chase at speed and that upon searching the vehicle in which they were travelling, the Gardaí discovered two balaclavas, handcuffs and US dollars. Detective Garda O'Connell then went on to say as follows: –

> "...Judge I didn't have to say anything to Garda Hosford. In the course of general conversation between two colleagues, it was quite apparent to me that he had knowledge of Patrick Roche himself, and I didn't have to inform him any of other details, other than the outline that I have given you there in relation to the section 50. I didn't actually inform him anything else of him, he was familiar with him. He had been just arrested in the area in relation to a separate matter"

263. Garda Hosford then gave evidence to the Court that he was informed of the offence for which the appellant had been arrested; namely an aggravated burglary at Sunville House on 16th April 2012 contrary to section 73 of the Criminal Justice Act 2006. He then stated that Detective Garda John O'Connell made an application to him to have the appellant detained pursuant to section 15 of the 2007 Act and that he outlined the grounds relating to such application. Garda Hosford then proceeded to set out those grounds and then stated as follows:-

> "There was also the belief that he was part of a criminal organisation carrying out this alleged offence. So after having heard the grounds from Detective Garda John O'Connell, I was satisfied myself that the detention was lawful and necessary for the proper investigation of the offence for which he was arrested for."

264. The substance of the issue before the trial court and before this Court was predicated upon a response by Garda Hosford to a question asked of him by counsel for the appellant in the following terms: –

> "Q. Just to be clear on this. Are you saying that Garda John O'Connell put this factor of a belief, that Mr Roche was a member of criminal organisation before you

as part of his grounds upon which he was seeking to have you make a decision to detain Mr Roche?

A. That belief was garnered from the offence for which he was arrested for under section 73 of the Criminal Justice Act 2006.

Q. That is the source of that belief?

A. Yes."

The Submissions

265. Counsel for the appellant submitted that the detention was unlawful because Garda Hosford based this belief on the nature of the offence for which the appellant was arrested. Mr Delaney SC for the appellant argued that the key feature which triggers the substantially more lengthy periods of detention than would be permitted pursuant to s. 4 of the 1984 Act, is the involvement in the criminal organisation. In those circumstances, he contends that the state of mind of the member in charge of the Garda station must encompass not only his belief that the suspect may have committed a serious offence, (in the present case, aggravated burglary) but also the belief that such involved a criminal organisation. He argued in substance that the member in charge cannot rely on the fact that the arrest was made pursuant to section 73 of the 2006 Act.

266. Mr Delaney relies on the dicta of Hardiman J. in *The People (DPP) v. Birney* [2007] 1 IR 337, where he said: –

> "This Court is of the view that it was clearly the intention of the Oireachtas that the member in charge of a Garda Station in circumstances where he is asked to detain a prisoner for the purpose of investigation of an offence pursuant to s. 4 should not merely be a rubber stamp. The role of the member in a charge involves both a subjective and objective element and subjectively he must believe that the applicant's detention is necessary and objectively must be satisfied that there are reasonable grounds for his belief."

267. Mr Delaney accepted that grounds were furnished to the member in charge but that no information was given to him regarding the development of a criminal organisation.

268. Mr Delaney further submits that in giving his ruling, the trial judge misstated evidence when he referred to Garda Hosford's evidence and that Detective Garda O'Connell informed him of a belief that the appellant was part of a criminal organisation carrying out the alleged offence. He submits that the reply given by Garda Hosford in cross-examination effectively wiped out that evidence, leaving the garnering of the belief from the offence for which the appellant was arrested.

269. In response, it was argued on behalf of the respondent that the height of the appellant's complaint is the contention that there was insufficient evidence to enable the trial judge to conclude that the member in charge had the requisite reasonable belief necessary pursuant to section 50 (2) of the 2007 Act to authorise the appellant's detention.

270. Mr Costelloe argues that not only was the member in charge furnished with the information which gave rise to the appellant's arrest but he was also informed that he was arrested on suspicion of committing a section 73 offence and that having heard all that material, Garda Hosford was in a position to form his own belief that it was appropriate to detain him pursuant to s. 50.

The trial judge's decision on the lawfulness of the detention

271. In ruling the detention of the appellant at Mallow Garda Station lawful, the trial judge held that:-

> "The member in charge must be satisfied of course on the basis for the belief advanced in relation to an offence. So, for example, if somebody was brought in on suspicion of a section 4 assault, one would presume that the member in charge would have to be satisfied in relation to the injuries allegedly suffered by a complainant or a victim, the suspected involvement of the person brought in, and brief details in relation thereto must be furnished. It must be sufficient that this information is explained to a member in charge. But to go further than that would possibly move the member in charge from his role as member in charge into a role of interfering or carrying out an investigation into an offence, and that is not what the statue at section 50 of the 2007 Act envisages. Garda Hosford said in his direct evidence that Detective Garda O'Connell gave grounds for his suspicion and he set out those grounds and they included the moustache for example, descriptions of the incident. I think there was reference to Mallow also or sorry, when I say Mallow, I mean Buttevant. But there were details given in relation to the Pallasgreen Sunville incident. But he also said in his direct evidence that Detective Garda O'Connell included in his grounds for suspicion a belief that Mr Philip Roche was part of a criminal organisation, or words to the effect. So I'm satisfied that, when the interaction was taking place between Garda Hosford and Detective Garda O'Connell, that that was a part of the information which was transferred from one to the other. Whilst I'm critical of Garda Hosford using Detective Garda O'Connell's statement at a much later stage as an aide memoire, I'm satisfied that as he said himself in cross-examination, that he did remember the incident but he didn't remember the fine detail. I'm satisfied with the information that he had at the time, albeit limited. I'm satisfied that that information was capable of giving him reasonable grounds in order to effect a detention. This finding is on the basis of Garda Hosford's evidence, as I said earlier, that Detective Garda O'Connell told him that he believed that Mr Roche was part of a criminal organisation, and I think that it's a reasonable inference open to him, in all of the circumstances where there was a charge under section 73, bearing in mind that it seems, on the basis of the evidence given by Garda Hosford in cross-examination, that he was familiar with the provisions of section 73, and they of course deal with the commission of an offence for a criminal organisation. I'm satisfied in those circumstances that he had reasonable grounds and I'm satisfied that the detention is therefore, or was therefore valid."

Discussion

272. The relevant portion of section 73 of the Criminal Justice Act 2006 provides as follows:-

> "73 – (1) A person who commits a serious offence for the benefit of, at the direction of, or in association with, a criminal organisation is guilty of an offence."

273. Section 50 (2) of the Criminal Justice Act 2007 provides: –

> "(2) Where a member of the Garda Síochána arrests without warrants, whether in a Garda Síochána station or elsewhere, a person (in this section referred to as "the arrested person") he or she, with reasonable cause, suspects of having committed an offence to which this section applies, the arrested person –
>
> (a) if not already in a Garda Síochána station, may be taken to and detained in a Garda Síochána station, or
> (b) if he or she is arrested in a Garda Síochána station, maybe detained in the station,
>
> for such a period or periods authorised by subsection (3) if the member of the Garda Síochána in charge of the station concerned has at the time of the arrested person's arrival at the station or his arrest in the station, as may be appropriate, reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence."

274. Garda Hosford was provided with information which led to the arrest of the appellant. It is not the appellant's case, and nor could it be suggested that Garda Hosford was provided only with the **fact** that the appellant was arrested and the section pursuant to which he was arrested. Mr Delaney accepts that information was given to Garda Hosford concerning the material which led to the appellant's arrest, however he says that there was in effect no evidence of an involvement with the criminal organisation sufficient to ascribe to Garda Hosford reasonable grounds for believing that the detention was necessary for the proper investigation of the offence.

275. It is necessary to carefully examine the wording in section 50(2) (b) which requires the member in charge to have reasonable grounds for believing that the detention is necessary for the proper investigation of the offence. In those terms, section 50 (2) replicates the terms of section 4 of the Criminal Justice Act 1984. In order to validly detain an individual pursuant to section 50 of the 2007 Act, it is necessary for the member in charge of the Garda station to have reasonable grounds for believing that the individual's detention is necessary for the proper investigation of the offence. It is correct to say that the member in charge cannot rubberstamp the request of the arresting member to detain a suspect. This was clearly stated in *The People (DPP) v. Birney* [2007] 1 IR 337. A member in charge must form his belief independently that the detention is necessary; that is, he must come to this conclusion independently in his own mind. This of course does not mean that he cannot base his decision on foot of information which has been furnished to him by the arresting member of An Garda Síochána. Equally, he is not precluded from relying upon information which he may have had prior to the arrest of

the person to be detained. The important aspect is that he independently come to a conclusion as to the necessity to detain a suspect and he must have reasonable grounds for so doing. The member in charge may therefore take into account information which he receives from the arresting member, information which the member in charge may have had in his or her possession and information which comes about in the course of completing the custody record.

Conclusion

276. In the present case, the member in charge was aware of the offence for which the appellant had been arrested, it was not the position that he knew only of the section pursuant to which the appellant had been arrested. He was aware of the precise terms of the offence, the nature of the "serious offence", namely; an aggravated burglary at Sunville House on 16th April 2012. Moreover, in direct evidence, having detailed the grounds as outlined to him by Detective Garda O'Connell, he also stated that there was the belief that the appellant was part of a criminal organisation in carrying out this offence. Significantly, he then stated:-

> "So after having heard the grounds from Detective Garda John O'Connell, I was satisfied **myself** that the detention was lawful and necessary for the proper investigation of the offence for which he was arrested for." (our emphasis).

277. The contention on the part of the appellant that the subsequent cross-examination, and in particular the answer to a question regarding the origin of the belief of involvement in a criminal organisation, obliterated the evidence that there was a belief that the appellant was part of a criminal organisation cannot be correct. The member in charge gave very clear evidence that he was satisfied that the detention was necessary for the proper investigation of the offence for which the appellant had been arrested. He gave that evidence in the full knowledge of the offence for which the appellant had been arrested, the nature of the alleged criminal activity, the circumstances of his arrest and in the knowledge he had been requested to detain the appellant pursuant to section 50 of the 2007 Act.

278. Therefore, we do not find that there was an error in the trial judge's decision that the appellant's detention pursuant to section 50 of the 2007 Act was lawful.

Detention at Henry St Garda Station

279. Whilst no argument was advanced in the oral hearing in respect of the appellant's detention at Henry St. Garda Station, in written submissions it is contended on behalf of the appellant that his continued detention was unlawful as the subsequent members in charge misunderstood the nature of the offence for which the appellant had been detained. This application was predicated on the evidence of Sergeant Keating and Sergeant Hennessy who were members in charge at Henry Street Garda Station at the time. During the course of cross-examination, Sergeant Hennessy, when asked what did he understand the appellant's detention to be, stated:

> "He was detained for section 50 of the Criminal Justice Act 2007, for aggravated burglaries where a firearm was used."

280. Counsel for the appellant submitted that as the members in charge were of the erroneous view that this was an aggravated burglary investigation, they were not therefore in a position to make an appropriate and adequate assessment of the investigation within terms of discharge of their functions as members in charge.

281. The trial judge in ruling that the detention was lawful, held that:-

> "Mr Sammon makes reference to Mr Justice Clarke's views, obiter views on the *DPP v. Roche*. And it seems to me that they seem to require of the member in charge in section 4 detentions under the 1984 Act, a somewhat higher standard of care when assessing whether reasonable grounds exist justifying continued detention. In that they believe in that he believes that negative circumstances may also trigger an event happening, which event would trigger release. And it seems to me, in the context of that comment that he reaches that view in circumstances where nothing much by way of investigation is happening during the period of the prisoner's detention. And it is entirely understandable that view would be reached in circumstances where somebody was just being held and there was nothing being done; that would be most unfair and it would be an abuse of a person's liberty in the grossest way. In this particular case, however - I'm now speaking of the case before this Court - I'm satisfied that there was a significant amount of investigation taking place on an ongoing basis and that - this is the important point I think - the member in charge knew and was aware that there was significant investigation being carried out on an ongoing basis in relation to the alleged commission of the offence. In that respect, what supports my being satisfied in relation to that is the fact that there were 25 interviews that took place over the period of detention. There was an application in respect of photographs being taken of the suspect, swabs, fingerprints being taken. And also, most importantly, there were a number of extension periods which were granted both by senior members of An Garda Síochána and the District Court. So, even if I applied the logic of Mr Justice Clarke in this particular case, I would still find that the detention was lawful."

Submissions of the appellant

282. The appellant submits that due to the misunderstanding of the members in charge in Henry Street Garda Station in respect of the nature of the offence for which the appellant was detained, they were unable to comply with the statutory requirements of s. 50 of the Criminal Justice Act 2007 as they did not have any regard to the element of a connection to a criminal organisation pursuant to s. 73 of the 2006 Act.

283. The appellant submits that the trial judge failed to address the evidence that the members in charge in Henry Street Garda Station had misapprehended the nature of the offence for which the appellant had been detained.

Submissions of the respondent

284. In relation to the actions of the subsequent members in charge, the respondent submits that their powers to release the person in custody are a negative power to be exercised

where there are no longer grounds to detain the person for the offence to which the detention relates.

Discussion and Conclusion

285. Subsequent members of an Garda Síochána who replace the initial member in charge of the Garda station must ensure compliance with the Treatment of Persons in Custody Regulations 1987, as amended. Moreover, if there are no longer reasonable grounds for suspecting the suspect of committing an offence which falls within section 50, he must be released from custody immediately unless his detention is authorised apart from the 2007 Act. In this regard section 50(6) of the 2007 Act provides as follows: –

> "If at any time during the detention of a person pursuant to this section there are no longer reasonable grounds for believing that his detention is necessary for the proper investigation of the offence to which the detention relates, he or she shall, subject to subsection (7), be released from custody with unless he or she is charged or cause to be charged with an offence and is brought before the court as soon as may be in connection with such charge or his detention is authorised apart from this Act."

286. Therefore, if the detention of the suspect is no longer necessary for the proper investigation of the offence, a detainee must be released. However, there was no suggestion on the evidence that the investigation was not ongoing. Furthermore, following the detention of the suspect on foot of reasonable grounds on his or her initial arrival at a Garda station, it requires something more to trigger an action releasing the detainee pursuant to section 50 (6) of the 2007 Act. As stated by Charleton J. in *The People (DPP) v. Roche* [2015] IESC 67 at para. 32:-

> "The trial judge concentrated on one aspect of s.4, as to the absence of evidence, but did not consider the conditional nature of the requirement for release. That condition in the legislation is entirely explicable and it logically flows from the scheme of detention whereby there should be an initial enquiry on 'arrival at the station' and whereby detention should only be authorised on reasonable grounds but, once that is done, it requires the occurrence of a further event, whereby the failure to release renders unlawful the continued detention of a prisoner because of something happening. That could be new information."

287. Thus, once the initial detention was lawful, unless some further event took place, the continued detention was lawful.

Grounds 4, 6, 7 & 17 of Patrick Roche - Inferences

4. The learned trial judge erred in law and in fact in permitting the prosecution to invite the jury to draw inferences from the appellant's failure to answer questions under sections 18 & 19 of the Criminal Justice Act 1984 as amended, in circumstances where the Gardaí had not questioned the appellant in respect of the offence he was arrested for.

6. The learned trial judge erred in law in permitting the prosecution to invite the jury to draw inferences from the appellant's failure to answer questions pursuant to sections 18 & 19 of the Criminal Justice Act 1984, in circumstances where the appellant was not on trial for the offence in respect of which inferences had been put.

7. The learned trial judge erred in law in permitting the prosecution to adduce evidence, pursuant to S.19A of the Criminal Justice Act 1984 as amended, of the appellant's failure to mention during interview facts relied on in his defence, in circumstances where the appellant had not and did not subsequently rely on any such facts.

17. The learned trial judge erred in law in permitting the prosecution to adduce evidence, pursuant to S.18 of the Criminal Justice Act 1984 as amended, of the appellant's failure to answer questions in respect of objects purportedly found in his possession, in circumstances where it was a matter for the jury as to whether those objects were in his possession.

Grounds 4 and 6

288. In the concluding stages of the appellant's detention at Henry Station Garda Station, the provisions contained in ss. 18, 19, and 19A of the Criminal Justice Act 1984, as amended, were invoked.

289. During the course of the trial, counsel for the appellant sought to have the memorandum of interview excluded where the above provisions were invoked on the basis that the appellant had been arrested on suspicion of an offence contrary to section 73 of the Criminal Justice Act 2006 and was charged with and on trial for the offences, *inter alia*, of aggravated burglary and false imprisonment. Consequently, the argument was and is advanced that the respondent could not seek to rely on the provisions of the 1984 Act, as amended, as the appellant was not questioned in respect of the offence for which he was arrested and secondly, was not on trial for the offence for which he had been arrested. Grounds 4 and 6 arise from this argument and can be addressed together.

290. When the matter was canvassed at trial, the trial judge refused to accept this argument and held that:-

> "I am satisfied that in all the circumstances it is perfectly reasonable and proper that Detective Garda O'Connell questioned the accused about the serious offence he believed that the accused had committed, namely, the aggravated burglary, and I do not believe that it need to have gone any further than that. I do not believe that there was a necessity for there to be any references, specific or otherwise, in relation to section 73 arrest. The burglary, the aggravated burglary constitutes, in my view, a serious offence and that is something which is specifically referenced in the provisions of section 73. This also deals, I believe, with a niche point made by Mr Lynam regarding the section 18, subsection 1, requirement under the 2007 Criminal Justice Act, which of course amends the 1984 Act, in relation to the

proceedings against a person for an arrestable offence, where the suggestion was that the inferences asked to be drawn flow from an investigation into an offence of aggravated burglary. As I said, the aggravated burglary constitutes in my view an element of the section 73 offence, which was the arrestable offence, and that constitutes a serious offence under subsection 1 of section 73"

Submissions of the appellant

291. The appellant submits that it is not permissible to adduce evidence arising from an interview with an accused where ss.18 and/or 19 of the 1984 Act, as amended, are invoked where the questions asked related to an offence other than the one for which the person was arrested or is on trial. The adverse inference provisions were invoked when the appellant was questioned about the commission of an offence contrary to s.73 of the Criminal Justice Act, 2006. Therefore, the resulting interview was not admissible in the trial for aggravated burglary.

292. The particular nature of an offence contrary to s. 73 may have influenced the appellant's decision not to answer the questions. It is submitted that the appellant may also have had regard to the fact that he was asked very little about the criminal organisation aspect of the offence. It was not permissible to invoke the inference provisions when the appellant had already offered an explanation of the circumstances whereby he came to be stopped by the Gardaí.

Submissions of the respondent

293. The respondent submits that the arrest under section 73 related to a serious offence i.e. aggravated burglary and the questions asked of the appellant related thereto and the ruling of the trial judge does not fall foul of *The People (DPP) v. Wilson* [2017] IESC 53 as that was a situation where the appellant was questioned for the offence of the unlawful discharge of a firearm and was tried for burglary. There is a direct connection between the offence for which the appellant was arrested and the offence for which he was tried.

294. Critically, unlike *The People (DPP) v. Wilson* [2017] IESC 53, the solicitor for the appellant would have been able to give full legal advice, including the possibility of being charged with aggravated burglary simpliciter particularly when the questions, having been provided in advance, focused heavily, and repeatedly on aggravated burglary with none of the inference questions relating to the criminal organisation aspect.

295. The respondent rejects the contention that ss. 18 and 19 should be strictly interpreted, and the judgment of McKechnie J. in *The People (DPP) v. A. McD* [2016] 3 IR 123 makes clear that an absolute strict interpretation is not required and to do so would void the provisions of their utility. As the questions concerned the aggravated burglary, the safeguard of legal advice was maintained.

The Sections

296. The relevant portions of section 18 of the 1984 Act as amended provide as follows:

"(1) Where in any proceedings against a person for an arrestable offence evidence is given that the accused –

(a) at any time before he or she was charged with the offence, on being questioned by member of the Garda Síochána in relation to the offence…

was requested by the member to account for any object, substance or mark, or any mark on any such object, that was–

(i) on his person,
(ii) in or on his or her clothing or footwear,
(iii) was in his possession, or
(iv) in any case in which he or she was during any specified period,

and which the member reasonably believes that may be attributable to the participation of the accused in the commission of the offence and the member informed the accused that he or she believes, and accused failed or refused to give an account, being an account which in the circumstances at the time clearly called for an explanation from him or her when so questioned, charged or informed, as the case may be, then, the court, in determining whether a charge should be dismissed under Part IA of the Criminal Procedure Act 1967 or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure or refusal is material."

297. The section then goes on to address these safeguards, which includes the right to consult a solicitor and, other than when such right was waived, that the accused had an opportunity to consult with his solicitor.

298. Section 19 concerns adverse inferences which may be drawn from a failure or a refusal to account for one's presence at a particular place in any proceedings against a person for an arrestable offence where at any time before being charged with the offence, on being questioned by a member of Gardaí in relation to the offence, and on being requested to account for his presence at a particular place, fails or refuses to give an account.

299. Section 19A of the 1984 Act, as amended, concerns inferences which may be drawn from a failure to mention any fact subsequently relied upon in his or her defence in proceedings for an arrestable offence.

Discussion

300. When the appellant was arrested on the evening of 16th April 2012 for the offence of possession of articles, he was detained pursuant to section 4 of the Criminal Justice Act 1984, questioned and released on bail. He was then arrested for an offence contrary to section 73 of the Criminal Justice Act 2006, which is laid out above.

301. He was detained pursuant to the provisions of section 50 of the Criminal Justice Act 2007 and interviewed. Two interviews took place during the latter stages of the detention in which the adverse inference provisions were invoked. The first of these interviews commenced at 15.58 on 23rd April 2012, in the usual manner, with the caution being administered at which point the appellant was advised that the Gardaí intended to rely upon the adverse inference provisions. No issue is taken with the manner in which the provisions were invoked. Having read section 18 of the 1984 Act as amended by section 28 of the Criminal Justice Act 2007, the interviewing Garda then said: –

> "I will now explain to you in ordinary language the questions that I wish to ask you. I reasonably believe that your possession of an object(s) that I am going to ask you about is directly related to your involvement in the aggravated burglary at Sunville House, Pallasgreen, Limerick on the 16th April 2012.
>
> I also believe that you failed or refused to give an account, being an account which in the circumstances at the time clearly calls for an explanation from you for your possession of this/these object(s) that I believe is directly related to the aggravated burglary at Sunville House, Pallasgreen Limerick on 16th April 2012.
>
> Q. Do you understand that?
>
> A. No comment.
>
> Q. Is there anything you want to ask?
>
> A. No comment".

302. There followed an explanation and examples given of an inference and the potential consequences for failure or refusal to give an account. Thereafter, the Gardaí set out the objects about which they intended to question the appellant, including; balaclavas, gloves, screwdriver, jacket, handcuffs, US dollars and clothing containing glass fragments from the scene of an aggravated burglary at Sunville House on 16th April 2012.

303. It was then indicated to the appellant that the Gardaí would ask these questions and he was not to answer until he had the opportunity to consult with his solicitor. The specific questions were then read out to the appellant and at the conclusion of the series of questions regarding each of the above objects, reference was made to an aggravated burglary at Sunville House on 16th April 2012. The same procedure was followed concerning section 19 and section 19 (a) of the 1984 Act.

304. The interview concluded with the appellant signing the interview, timed at 16.44 hours. The appellant was then given an opportunity to consult with a solicitor and the next interview commenced on the same date at 18.19 hours. The adverse inference provisions were invoked and to each question the appellant made no comment. That interview was signed and concluded at 18.38 hours.

The argument that the appellant had provided an account

305. On behalf of the appellant it is submitted that not only was the use of the adverse inference provisions impermissible in the circumstances but also that the contents of the interviews were inadmissible in circumstances where the appellant had already provided an account.

306. In general terms, when the appellant was interviewed prior to the adverse inferences being invoked, when asked questions about the objects outlined above, he indicated that he knew nothing about them. The point is made on behalf of the appellant that he did answer questions and gave an account of being with Christopher Stokes but that he did not notice and did not know anything about the items which were found in the car when he was arrested by the Gardaí shortly after the aggravated burglary at Sunville House.

307. It is suggested on behalf of the appellant that in the latter stages of the interviews before the first provisions were invoked that when asked: –

> "Do you accept that the handcuffs found in your car … That you were stopped and were used to tie members of the Garvey family?"

While he made no comment, this was in circumstances where, when these questions had previously been put to him, he replied

> "Oh God, no. Jesus, no, I wouldn't do something like that"

308. Furthermore, in oral submissions, Mr Delaney SC for the appellant pointed out some 17 interviews, at the point when the adverse inference provisions were invoked, that the appellant had provided an explanation regarding the circumstances whereby he came to be stopped in the vehicle on the night in question by members of An Garda Síochána. He submitted that the account provided by the appellant involved him stating to the Gardaí repeatedly:-

> "I took a train from Dublin to Cork that day. I was picked up at Kent Station in my cousin's BMW. That is Christopher Stokes. He was driving the car. We went to a location in Knocknaheeny to do something about the horse and then we started to drive around the country."

309. It seems that the drive around the country concerned searching for female company. Mr Delaney submits that the appellant was repeatedly asked to give an account and he repeatedly provided that account. He submits that therefore it was not permissible to invoke the adverse inference provisions where an explanation had already been given in respect of these suspicious circumstances, the finding of items or an accused presence at a particular place simply on the basis that the Gardaí do not accept the explanation. In this respect he relies on the decision of *The People (DPP) v. A. McD* [2016] 3 IR 123. In fact, in the decision of the Supreme Court in *A.McD*, when considering whether the answers given by the respondent precluded the use of s. 19 of the Act, McKechnie J. stated at p. 161:-

> "More important is the definition of "an account" for the purposes of this section. In *The People (DPP) v. Devlin* [2012] IECCA 70, (Unreported, Court of Criminal Appeal, 6 July 2012), the Court of Criminal Appeal held at p. 30 that while the accused persons explanation for the presence in his jacket of the knife and cheap "may or may not" have been satisfactory, nonetheless it was an answer to the question asked regarding his possession of those items. It thus did not amount to a failure or refusal to account. As above-mentioned, Fennelly J. stated at p. 14 that s. 18 "does not apply where an account of any kind has been given". As ss. 18 and 19 of the 1984 Act are identical in their operation it will be difficult to say that an interpretation of one such provision would not apply to the other. Therefore it might usefully be asked what the court intended by this observation."

310. Having then considered the provisions in s. 2 (4) (b) of the Offences Against the State (Amendment) Act 1998 and s.52 (2) of the Offences Against the State Act 1939, McKechnie J. went on to say in considering s. 19 of the 1984 Act: –

> "Neither in the express language of the section law in the judgement of the Court of Criminal Appeal in *The People (DPP) v. Devlin* [2012] IECCA 70, (Unreported, Court of Criminal Appeal, 6 July 2012) is any reference to an account needing to be coherent or rational, or any suggestion that an account which is demonstrably false and misleading shall be regarded as a non—account. Notwithstanding that, it seems to me that if this statement of the Court of Criminal Appeal is to be taken literally, such that any account would be sufficient to prevent the application of ss. 18 and 19 of the 1984 Act, it could easily become effortless for an accused person to circumvent the operation of those provisions. It surely cannot be the case that a person being investigated in respect of an arrestable offence can nullify the operability of this statutory provision by simply giving any manner of accounts, however plainly unrelated or potentially farcical it may be. To hold otherwise would be to enable such a person apprised of this fact to avoid the provision of its utility. It is equally apparent, however, that the views of the investigating gardaí cannot be determinative of whether an account has or has not been given for the purpose of this section. They cannot seek to invoke its charm simply because they do not like an account is given, or because they do not regard it as satisfactory, or because they do not think it sufficiently explains the person's presence at that location. Furthermore, the issue of credibility is not for them. Therefore the interviewer cannot be arbiter in that provision. However, it must be the case that the minimum level of plausible engagement is required before an account can satisfy the requirements of s. 19 of the 1984 act. While that necessarily will be will involve consideration of the entirety of the circumstances presenting each case."

311. Mr Delaney argues that the trial judge did not engage with the issue of whether or not the account provided met the plausibility threshold. In this respect, when ruling on the admissibility of the interviews where the adverse inference provisions were invoked, the trial judge indicated that it was open to the appellant when repeatedly asked the same question to indicate that he had already replied to that question.

312. The respondent rejects the contention of the appellant that the inference provisions could not arise at all in his case where he had given an "account" and relies on *The People (DPP) v. A. McD* [2016] 3 IR 123, where it was held that not just any answer will suffice, and the determination of whether the answers provided were a failure or refusal to give an account is for the court to decide. The respondent submits that the account given by the appellant in the context of how he came to be arrested and the items found in his possession was lacking in merit as it did not address his possession of the items in question in any real sense. It is submitted that it was well within the trial judge's right to permit the jury to draw their own conclusions from the evidence.

313. On this discrete point, even if the trial judge did not engage with the plausibility threshold, this is not a paramount consideration in this case when one considers the entirety of the presenting circumstances.

Conclusion on issue of whether the appellant had provided an account

314. The central question is whether the answer repeatedly given by the appellant in the interviews leading to the interviews where the adverse inference provisions were invoked was such so as to prevent the use of sections 18 and 19 of the 1984 Act, as amended. The inference provisions only apply where there is a failure or refusal to provide an account which in the prevailing circumstances, clearly called for an explanation at the time of questioning.

315. The appellant was asked to account for items found in the vehicle at the time of his arrest at Buttevant, Co. Cork shortly after the Garvey aggravated burglary. These items included balaclavas, gloves, handcuffs, handcuff keys, US dollars and clothing containing glass. He was also asked to account for his presence at Buttevant on 16th April 2012.

316. Evidently, the appellant's presence in the area of the aggravated burglary on the relevant date shortly after the aggravated burglary and where items were found not only in the vehicle in which he was travelling but also on his person called for an explanation from him when questioned. This critical issue had to be evaluated in the circumstances which existed when the appellant was asked for such an account. At that time, the Gardaí had stopped the appellant in suspicious circumstances, proximate to the Garvey house and proximate in time to the aggravated burglary. Coupled with the items found in the vehicle and on his person, an explanation was called for. The account given repeatedly by the appellant was a most general account which was not, in our view, a plausible one. The account that the appellant was collected at Kent Station by Christopher Stokes and that they went driving around the country seeking female company and/or were out "lamping" is an implausible explanation in the circumstances in which the vehicle was stopped. We are not persuaded there is any merit in this argument.

Correspondence between the offence for which the appellant was arrested and the offence for which he was tried.

317. In the first interview where the adverse inference provisions were invoked, specifically s. 18 of the Act, the interviewing member of An Garda Síochána prior to explaining to the appellant the questions he intended to ask him said:-

> "I will now explain to you in ordinary language the questions that I wish to ask you. My reason would be the possession of an object or objects that I'm now going to ask you about is directly related to an involvement in aggravated burglary at Sunville House, Pallasgreen, Limerick, on the 16th of April 2012."

318. Thus, it is clear that the member of An Garda Síochána intended to question the appellant about objects related to the appellant's alleged involvement in the aggravated burglary at Sunville House. Prior to invoking the provisions of sections 19 and 19A of the Act, the interviewing Garda prefaced the proposed questions in each instance by reference to the aggravated burglary at Sunville House.

319. The circumstances of the present case where the adverse inference provisions were invoked are quite distinct from those in the decision of *The People (DPP) v. Wilson* [2017] IESC 53. In that decision, in the context of invoking section 19 of the Act, the interviewing Garda stated that he was of the reasonable belief that the appellant's presence at the stated location was "to participate in and carry out the unlawful discharge of a firearm at 56 Dromheath Drive, Mulhuddart, Dublin 15." Mr Wilson was ultimately charged with the offence of burglary.

320. The present case can be distinguished from the facts in *Wilson* for a number of reasons. It must be remembered that the appellant was arrested for an offence contrary to section 73 of the 2006 Act and a constituent element of that offence is that of the commission of a serious offence. In the present case, the serious offence was that of the aggravated burglary at Sunville House. When the appellant was arrested for an offence under that section, he was informed that he was being arrested on suspicion of committing the offence of aggravated burglary in association with a criminal organisation.

321. Furthermore, throughout the entirety of his detention pursuant to section 50, and some 17 interviews, he was questioned about this aggravated burglary. It is quite clear therefore that the appellant was fully aware that central to his detention was the aggravated burglary at Sunville House.

322. In *The People (DPP) v. Wilson* [2017] IESC 53, Mr Wilson was arrested on suspicion of the unlawful discharge of a firearm and he was questioned in relation to that offence and the adverse inference provisions were invoked in that respect. Subsequently, Mr Wilson was charged and tried on a count of burglary. In the course of Mr Wilson's detention and interviews, no reference was made to a burglary offence. Whilst the factual background concerning the firearms offence and the burglary offence were the same, in circumstances where he was tried for burglary, an entirely separate offence, the Supreme Court found that the adverse inference provisions could not be invoked in respect of an offence with which the accused person was not ultimately charged. McKechnie J. emphasised the importance of the carefully structured safeguards within the legislation. He observed at p.21: –

> "…the right to consult a lawyer would be utterly hollow: giving advice on an offence which his client was not ultimately on risk of would be useless. More significantly,

being unable to give advice on the charge in the indictment would have the same effect as if the safeguards were not within the statutory provisions at all. That would have very serious implications for the surviving viability of these provisions. In my view, however, there is no concern in this regard when the section is properly understood."

323. In the present case, the appellant was in compliance with the legislation and given an opportunity to consult with his solicitor regarding the questions to be asked in interview. The first interview in respect of which the adverse inference provisions were broached concluded at 16.44 hours and the interview in which the questions were asked commenced at 18.19 hours. In the intervening time, the appellant consulted with his solicitor. Significantly, in the present case, the safeguard in the legislation concerning a reasonable opportunity to consult with his solicitor was met in a meaningful way. There can be no dispute that the appellant had full knowledge that the questions concerned the aggravated burglary. Not only was the offence of aggravated burglary a constituent element of section 73 of the 2006 Act, but the questions related directly to that offence. Moreover, at the conclusion of each series of questions concerning particular items, the question was asked as to whether the appellant had possession of those items for the purpose of carrying out "an aggravated burglary at Sunville House, Pallasgreen, Limerick on 16th April 2012".

324. This is quite different from the factual position in *The People (DPP) v. Wilson* [2017] IESC 53 where the belief expressed by the Gardaí concerned Mr Wilson's presence in various locations was in order to participate in and carry out the unlawful discharge of a firearm. Adverse inferences may only be drawn where the relevant provisions are properly invoked in every respect. The provisions encroach on the right to silence and the privilege against self-incrimination guaranteed by the Constitution. There can be no doubt and there is no issue but that the provisions were properly invoked and, in our view, the appropriate safeguards were provided to the appellant.

Conclusion

325. We are satisfied that the questioning in the interviews where the adverse inference provisions were invoked related to the offence for which the appellant was arrested and not simply to questioning concerning the factual matrix which could give rise to a number of different arrestable offences.

326. While in the present case there is certainly a factual connection between the offence for which the appellant was arrested, and the offence with which he was charged and tried, it is much more than that. Aggravated burglary was the "serious offence" within the terms of the offence for which the appellant was arrested pursuant to section 73 of the 2006 Act. Therefore, the offence of aggravated burglary was a constituent element of that offence and the respondent was entitled to rely upon the interview where the adverse inference provisions were invoked.

327. The questions posed related directly to the offence with which the appellant was charged; that is the offence of aggravated burglary. In those circumstances we are satisfied that the provisions were correctly utilised in the present case.

328. Finally, the safeguards provided for pursuant to sections 18, 19 and 19 A of the 1984 act, as amended, were adhered to in a meaningful way. It is quite clear that a legal adviser considering the proposed questions would have been in no doubt but that the proposed questions related to the specific aggravated burglary with which the appellant was charged and stood trial.

Additional Ground

The learned trial judge erred in law in permitting the prosecution to adduce evidence, pursuant to S.18 of the Criminal Justice Act 1984 as amended, of the appellant's failure to answer questions in respect of objects purportedly found in his possession, in circumstances where it was a matter for the jury as to whether those objects were in his possession.

Appellant's submission

329. The appellant submits that it was impermissible for the Gardaí to ask the appellant in the context of inference questioning about the incriminating items as they were not in the appellant's possession, having been found in a car and not on the appellant's person. During the course of inference questioning, the appellant was asked to account for a number of items in his possession including balaclavas, gloves, handcuffs, $1850, a set of clothing containing glass from the scene of an aggravated burglary at Sunville House and a screwdriver.

330. In seeking to have these questions ruled as inadmissible, counsel for the appellant submitted that these items were found in the car which did not belong to the appellant and not on his person. It was further submitted that the question asking why the appellant possessed a set of clothing containing glass from the scene of an aggravated burglary at Sunville House was in contravention of section 18 as it could not be established beyond a reasonable doubt that the glass in his clothing came from Sunville House. The trial judge ruled on the issue in the following terms: -

> "The final point in relation to this matter, relates to the questions themselves and that was something which I have exercised some thought in relation to and I have read the various sections of the Act and some of the other legislation that deal with inferences and I've also referred to Walsh. And having done all of that, I am satisfied that in the absence of a specific definition within the legislation and it hasn't been opened to me of possession, it is reasonable that Detective Garda O'Connell used the word "possess" or "possession", I think were the words that he used, and it is reasonable that he used them in circumstances where he believed that the various items found in the BMW car in Doneraile, near Buttevant, were items in respect of which the accused exercised some degree of control or dominion. These items of course were not on his person in the car, they were not in his clothing or in his footwear, but they were nonetheless, given the suspicions of Detective Garda O'Connell and given the small physical space within which they

were located, reasonably held in my view to be in his possession. In those circumstances, the question as posed was reasonable or the questions as posed were reasonable and not in breach of the Act"

Respondent's submission

331. In relation to the items in the appellant's possession, it is submitted that there was primary evidence establishing such before the jury, in particular, that glass shards linked to the Sunville patio window were found in the clothing Patrick Roche was wearing on the night in question.

332. Furthermore, it is submitted that section 18 provides for the drawing of inferences from items found "otherwise in his or her possession" and therefore envisages items in one's possession or within one's control, beyond his or her immediate person. It is submitted that there is no requirement for definite, unassailably provable possession on the suspect's person and the existence of s.18(l)(iii) established this.

Discussion

333. This ground concerns s. 18 of the 1984 Act. The relevant portion of the section refers to a request by a member of An Garda Síochána to account for, *inter alia*, an object which was –

"(i) on his person,

(ii) in or on his clothing and footwear,

(iii) otherwise in his possession, or

(iv) in any place in which he or she was during any specified period."

334. This submission seems to be predicated upon a two-stage approach. That is, for the interview where the provision was invoked to be admissible, the respondent must prove to the requisite standard that the object was in the accused' possession. In other words, proof of possession is a prerequisite to admissibility.

335. On behalf of the appellant, it is argued that it was impermissible for the Gardaí to suggest to the appellant in interview where the adverse provision was invoked that he possessed certain items. The submission is made that the items were simply in the vehicle in which he was travelling, rather than on his person, thus the questions asked arose from unproven factual assertions. While it is acknowledged that questions could have been asked about the items being "in any place in which he or she was during any specified period", as some of the items were not on his person, he should not have been questioned about them pursuant to section 18 (1) (i) of the Act.

Conclusion

336. This is a novel suggestion. It is certainly the position that a jury may only draw such inference from a failure or refusal as appears proper, and in this respect, before any inference can be drawn, the fact finder must be satisfied beyond reasonable doubt that the object was in the possession of the accused, before then considering whether the

person failed or refused to give an account, and if the jury conclude that there was such a failure or refusal, then and only then may a jury draw such inference as appears proper. But to say that it is necessary for the purported possession to be proven before the evidence can be left to the jury is not a sustainable argument.

337. Moreover, s.18 (1) (iii) of the Act clearly provides for objects **otherwise** in the possession of the person who is the subject of questioning under the provision. Even if this were not so, s. 18 (1) (iv) makes provision for a request by a member of An Garda Síochána for the person to account for, *inter alia*, any object, **in any place** in which the person was during any specified period.

338. Evidently, the subsections are broadly drafted to take account of a request to account for objects which are found actually on an individual, in or on an individual's clothing or footwear, in any place in which the individual was during any specified period or otherwise in his possession. This clearly encompasses the items found in the vehicle in which the appellant was travelling. We do not find merit in this argument.

Ground 7

7. The learned trial judge erred in law in permitting the prosecution to adduce evidence, pursuant to S.19A of the Criminal Justice Act 1984 as amended, of the appellant's failure to mention during interview facts relied on in his defence, in circumstances where the appellant had not and did not subsequently rely on any such facts.

339. The appellant submits that the reference to section 19A by the prosecution before the jury when it had already been established that such reference should not be made added to the considerable amount of prejudicial evidence heard by the jury in the course of the trial.

340. The respondent submits that the mere fact that the jury heard that section 19A had been invoked is not a matter which caused any prejudice to the appellant and therefore did not support his application to discharge the jury.

Discussion

341. The issue concerning the admissibility of the interviews where the inference provisions were invoked arose on day 10 of the trial. After the trial judge ruled on the issue, Detective Garda John O'Connell was called for the prosecution and he gave evidence of the interviews conducted with the appellant. In so doing, the terms of section 19 (A) of the Criminal Justice Act 1984 were read to the jury. In addition, the following was read to the jury from the first interview: –

> "Under this section, if you have any fact in your possession about the aggravated burglary at Sunville House, Pallasgreen, Limerick, on 16 April 2012, that you intend to use in any proceedings arising out of this matter, you should discuss them now. If you fail or refuse to provide such fact or facts, if charged with an offence which is punishable by a term of imprisonment of more than five years, a judge can take this failure or refusal into account, whether a charge should be dismissed, whether you have a case to answer, and the judge and jury can take into account your

failure or refusal to answer these questions in deciding if you are guilty of the offence. Your failure or refusal can be used to support other evidence be put forward against you, but failure or refusal on its own were not predictive of an offence."

342. There then proceeded the proposed question in the context of section 19A of the Act as follows:-

> "Question: have you any fact in your knowledge that you have not disclosed and which you intend to rely upon at a later date or at a subsequent trial?"

343. In the second interview the above question was asked to which there was no comment.

344. On day 21 of the trial, applications were made to the trial judge prior to his charge. In this regard Mr Lynam on behalf of the appellant referred to the above passages which were read to the jury. Mr Costelloe suggested that the trial judge inform the jury that section 19(a) of the Act was not part of the case and Mr Lynam reserved his position. It does not appear that the point was revisited. However, in the course of his charge of the issue the trial judge said as follows:-

> "I should say to you that there was mention of – and you'll see in the interviews – reference to section 19 (a). Well, if you come across or you find yourself asking each other any questions about it, I'm telling you to ignore it completely. That provision does not apply this case and you are to take no notice of it, and any reference to it in the interviews or references that were made to was during evidence are not relevant to your deliberations."

This does not appear to have been the subject of any requisition.

345. During oral submissions, counsel for the respondent was of the view that the portion of the interview which concerned section 19(a) did not in fact reach the jury as an exhibit. However, Mr Delaney in reply indicated that there was a lack of clarity whether or not the memoranda of interview reached the jury in unredacted form. However, he did indicate, (not being the counsel at trial) that he would be surprised if the interviews were left in unredacted form given the controversy which had arisen.

Conclusion

346. In our view, we are not persuaded that the reading of the section to the jury and the proposed question and response gave rise to prejudice of a kind contended for on behalf of the appellant. The trial judge dealt with the matter adequately in his charge and there is no reason to believe that any jury once directed by a trial judge to ignore evidence, would then proceed to disregard that direction. It is quite clear that the jury were told to ignore that evidence.

Ground 1 of Philip Roche- Rejection of application to move trial

The conviction of the appellant is unsafe having regard to the adverse publicity in advance of his trial and having regard to the refusal of the Court to transfer his trial to Dublin.

347. Before the trial commenced, counsel on behalf of Philip Roche applied to the trial judge to have his trial transferred to Dublin Circuit Criminal Court pursuant to section 32 of the Court and Courts Officers Act 1995, due to adverse publicity.

Submissions of the appellant

348. It is fair to say that this ground was not advanced to any extent in the course of oral arguments. In written submissions the appellant submits that the trial judge ought to have exercised his discretion in favour of the appellant and transferred the trial to Dublin. The appellant refers to *The People (DPP) v. Joel and Costen* [2016] IECA 120 where the Court of Appeal found that there were compelling reasons for transferring the trial, however, Mr Clarke SC for the appellant before this Court properly accepted that the appellant's case was not on a par with that of *Joel and Costen*.

349. This Court did not have the benefit of the transcript of the application before the Circuit Criminal Court and nor did we receive the booklet of publicity which was relied upon before that Court. However, Mr Clarke advised the Court that the publicity with which the appellant was concerned occurred in and around the time of the offences; namely mid-2012.

Submissions of the respondent

350. The respondent submits that the circumstances of this case are substantially different to the unique circumstances in *The People (DPP) v. Joel and Costen* [2016] IECA 120 and argues that Birmingham J. (as he then was) took care to stress in *Joel and Costen* that the views of the trial judge would be afforded a very considerable margin of appreciation. As such, it is submitted that the trial judge was correct to decide that the issue could be dealt with by rulings and directions to the jury.

Conclusion

351. This ground can be dealt with in short order. The publicity complained of took place in 2012, the trial itself took place in June 2017, a period of some five years elapsed between the date of the publicity and the date of trial. A trial judge may only transfer a trial if satisfied that it would be manifestly unjust not to do so in terms of section 32 of the 1995 Act. The judge therefore enjoys a wide discretion and the threshold that must be reached by an accused is a high one. In terms of the factual position as outlined to us, no realistic arguments can be advanced, and indeed were not advanced, that the appellant's right to a fair trial was impugned by virtue of his trial taking place before Limerick Circuit Criminal Court and this Court will not interfere with the decision of the trial judge.

Ground 4 of Philip Roche-The handcuffs

The learned trial judge erred in law in refusing the appellant's application to discharge the jury after it became apparent that a jury member was likely to have seen the appellant being brought into the courtroom in handcuffs.

352. On day 13 of the trial, counsel for Philip Roche made an application to discharge the jury in relation to Philip Roche as he had concerns that a member of the jury had seen Mr Roche being led away from a prison van in handcuffs. CCTV footage was examined, and

the trial judge questioned the relevant juror discretely who stated that he had never seen the appellant outside the courtroom. The trial judge refused the application.

Submissions of the appellant

353. The appellant submits that his presumption of innocence was undermined. He says that the trial judge should have applied an objective bias test and refers to *The People (DPP) v. Mulde*r [2009] IECCA 45 as authority as to the manner in which a court should apply an objective bias test in the context of whether to discharge a jury once a suspicion is formed that a juror might not take an impartial view.

Submissions of the respondent

354. The respondent submits that the juror confirmed that he had never seen the appellant outside the courtroom and the trial judge accepted the juror at his word as he was entitled to do. As such, the respondent submits that there is no substance to the appellant's complaint and the Court should not disturb the finding of fact of the trial judge.

Discussion

355. It is contended on behalf of the appellant that the trial judge ought to have discharged the jury having viewed the CCTV footage, which it is contended, potentially proved that the appellant was exposed to the juror in handcuffs. The trial judge ruled as follows: –

> "Judge: Very good. Now, in relation to your application, Mr O'Caroll, the appearance of Mr Kelly does not automatically mean that you are wrong in your application, but I've taken what Mr Kelly has said in relation to the matter and I have considered that in conjunction with the timeline and the other factors that I notice from the CCTV and it would seem to me that it is not unreasonable at all that I accept Mr Kelly at his word in that respect".

356. It is the position that an accused person's presumption of innocence can be undermined by the public exposure in handcuffs. However, the decision to discharge the jury is one which may only be taken as a last resort and with due regard to the rights of an accused to a fair trial as guaranteed by Article 38 of the Constitution. In assessing whether or not to discharge the jury, a trial judge must always have regard to the robust common sense of juries, which has been borne out time and time again before the courts.

Conclusion

357. It is clear that the trial judge carefully considered the issue before him. The question he posed to the juror was one which was carefully constructed and designed to ensure that no possible prejudice could be occasioned to the appellant. The judge was entitled to accept the evidence given by the juror and this Court does not find fault with the trial judge's approach.

Ground 5 of Philip Roche

The trial judge erred in law and acted contrary to fair procedures in directing that the cross-examination of the witness John Cahill by the appellant's counsel be limited to certain subject matters.

358. Counsel for the appellant sought to cross-examine John Cahill on the basis that his involvement in the aggravated burglary at Sunville House was voluntary. The evidence of the witness was that he became involved in the offences in order to clear a debt owed to Alan Freeman. Before the examination, the witness was informed that he was not to mention, *inter alia,* that the debt he owed to Alan Freeman was drug-related. During the course of cross-examination on behalf of Philip Roche, issue was taken with counsel's line of questioning. The trial judge ruled that the prejudicial effect of such questioning on the other defendants outweighed its probative value and that he had to balance the respective rights of the appellants.

Submissions of the appellant

359. While the submissions filed on behalf of the appellant address this ground, the point was all but abandoned in oral submissions on the basis that the line of cross-examination did not appear to be of any moment.

360. However, we will deal with the issue in short order. The primary submission made by the appellant is that the ruling of the trial judge disproportionately abrogated the appellant's right to cross-examine. The appellant relies on the decision in *The People (DPP) v. Piotrowski* [2014] IECCA 17 where Clarke J. (as he then was) said:-

> "If the issues being pursued by cross-examination are directly relevant to the facts of the case in the sense of the facts which are alleged to constitute the offence charged or the guilt of the accused in respect of that offence, then wide latitude must be allowed. "

361. The appellant submits that in this instance, unlike *Piotrowsk*i, the questioning of the witness was neither unwarranted nor improper given that counsel had identified that he was seeking to establish that the involvement of the witness in the aggravated burglary was on a voluntary basis.

Conclusion

362. The trial judge directed Mr Cahill that he could indicate he was under considerable pressure but to go no further than that. We are absolutely satisfied that the trial judge balanced the rights of the appellant and the interests in the administration of justice in preserving the integrity of the trial itself. Cross-examination was not hampered or constrained so as to cause any injustice in the circumstances to this appellant.

Ground 4 of Alan Freeman

The trial judge erred in law and in fact in failing to accede to an application by counsel on behalf of the above-named appellant for a direction due to the Director of Public Prosecutions failing to tender into evidence any fact identifying the appellant as the Alan Freeman referred to by the accomplice witnesses.

Submissions of the appellant

363. The appellant submits that there was no evidence before the Court from which it could properly be inferred that the appellant was the Alan Freeman implicated in Mr Cahill's evidence

Submissions of the respondent

364. The respondent submits that there was no confusion in the trial as to the Alan Freeman being referred to by the witnesses and there was no defence made out on this basis. The respondent submits that this was not a live issue in the case and as such, it is submitted that this ground is without merit.

Discussion and Conclusion

365. During the trial, the defence put forward by this appellant was that he had no involvement in the Garvey aggravated burglary. At no stage in the trial was any issue raised expressly or inferentially by way of cross-examination or otherwise that the Mr Freeman before the Court was a different person to the Alan Freeman stated in evidence by Mr Cahill. There is no basis on the manner in which this case was conducted for this ground of appeal.

Ground 5 of Alan Freeman

In all of the circumstances, the trial of the accused man was unsatisfactory and the conviction as a consequence thereof unsafe.

366. The Court does not intend to address this ground in the circumstances.

Conclusion

367. Accordingly, the appeals of Patrick Roche and Philip Roche are dismissed, and the appeal of Alan Freeman is allowed.