THE COURT OF APPEAL

149/14

Birmingham J.
Mahon J.
Edwards J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Dermot Griffin

Appellant

JUDGMENT of the Court delivered on the 23rd day of March 2018 by

Mr. Justice Birmingham

1. At approximately 5 am on 1st September, 2001 a fire started in a make-shift den between 2 and 4 Rossfield Avenue in Tallaght, Dublin 24, resulting in the death of Stephen Hughes. The den had been built by a group of children during August, 2001. On the night in question, Stephen Hughes, aged 12, and Daryl Hall, aged 14, had slept in the den. When it caught fire Daryl managed to escape but sadly Stephen did not.

2. On 20th May, 2014, following a trial that lasted some 13 days, the appellant was convicted of manslaughter. He has now appealed that conviction.

3. At trial, the jury viewed CCTV footage from the house of a neighbour, Ian Reilly, which showed an unidentified man approaching the make-shift den at around 5 am, and the den catching fire immediately thereafter. The man appeared to have a dog with him. Jason Lambe, a Rossfield Ave. resident, who lived in No. 18, told the jury that the appellant and his then partner, Ms Tracey Deegan, alerted him to the fire on the night in question. Mr Lambe said that he and some of his friends were drinking together in his living room when the appellant and Miss Deegan knocked on his window. He was told by the appellant and Miss Deegan that that there was a fire and a child was in it. Mr Lambe and his friend Mr Delahunty then went to the fire with the appellant and Miss Deegan. Another witness, Philip Morris gave evidence of hearing screaming at the time of the fire. He lived directly opposite the den and was first onto the scene. He was followed shortly afterwards by the others.

4. The appellant was interviewed in 2001, and at that stage stated that he had stayed indoors on the night in question at No. 16, Rossfield Drive, along with Miss Deegan. He said that he only left the house after he heard screaming. His story was supported at the time by Miss Deegan, his then partner, and she confirmed this again in 2006 when the case was re-examined. This reassessment followed on from another witness, Linda Prentice, in 2006 informing the Gardaí that she had seen the appellant set fire to the den, whereas, back in 2001, Ms Prentice had told Gardaí that she had not seen anything. Also in 2006, James Farrelly came forward to say that he too had seen the appellant that night. His evidence was that the appellant had been in the middle of a road and had threatened him, telling him that he would kill him if he opened his mouth and told anyone that he had seen him.

5. In 2012, Tracey Deegan admitted lying to the Gardaí in earlier investigations. She made a statement that the appellant left the house twice on the night of the fire. He told her he was going to burn down the hut. The first time he came back from the hut, he had told her that he had visited the hut and felt a foot there. He told her when he returned on the second occasion that night that he had burnt the hut down. Ms Deegan, Ms Prentice and Mr Farrelly were significant prosecution witnesses at trial.

6. A large number of grounds of appeal have been formulated. It is striking how many of these involve a complaint that the judge erred in failing to accede to a request for the discharge of the jury. There is also an application to adduce fresh evidence. The Court will deal with that application first and will then deal with the other issues raised. The Court will deal with the issues in the same order as they were raised in the appellant's written submissions.

The application to adduce fresh evidence

7. The appellant has sought leave to argue an additional ground that "the conviction was unsafe and unsatisfactory in circumstances where a third party, who was present at the *locus* of the commission of the alleged offence in or about the relevant time of the offence has admitted committing the offence." The background to the application to argue the additional ground arises from the fact that on 8th February, 2016 the solicitors for the appellant received correspondence enclosing a statement from Garda Stephen Gillespie dated 27th January, 2016, a memorandum of interview with one Shane Butterly conducted by Garda Gillespie dated 19th January, 2016, a statement of Sergeant Keith Halley, undated, a statement of Detective Garda Colin Rochford dated 4th February, 2016, and notes from an interview with Shane Butterly dated 1st February, 2016 conducted by Detective Garda Rochford and Detective Garda Camon Ryan, a statement of Shane Butterly dated 13th September, 2001 and a statement of Eugene Buttlerly dated 10th December, 2001.

8. As appears from the documentation furnished to the solicitors for the defence, it appears that on 19th January, 2016, at approximately 2.50 am Mr Shane Butterly came to Tallaght Garda Station where Garda Stephen Gillespie was on duty in the public office. According to Garda Gillespie Mr Butterly looked dishevelled and confused and at first Garda Gilliespie thought that he was intoxicated. Mr Butterly told him he wanted to confess to a murder, the murder of Stephen. Garda Gillespie asked Mr Butterly was he drinking and Mr Butterly said that he had had four cans and a joint. In his statement Garda Gillespie says that Mr Butterly seemed to be nervous or paranoid and had then said that Stephen was haunting him and that the devil was inside him. Garda Gillepie records Mr Butterly as saying that he heard voices. Garda Gillespie then cautioned Mr Butterly and then asked him when did this happen and he replied "years ago". Garda Gillespie asked Mr Butterly what age he was when it happened and he replied "19". Mr Butterly said that he was now 34. Garda Gillespie spoke to the sergeant in charge, Sergeant Keith Halley, and informed him of what Mr Butterly had said. Sergeant Halley then went to the public office where again Mr Butterly said that he had killed Stephen. Garda Gillespie brought Mr Butterly to a side room off the public office and then asked him whether he understood the caution which he had been given and explained to him that he was not under arrest and could leave at any stage. Mr Butterly said that he understood this. Garda Gillespie then asked Mr Butterly questions and recorded his response in his notebook. While Garda Gillespie was doing this Mr Butterly asked

that he be put into a cell and that a doctor should be got for him. Garda Gillespie said he stopped and asked Mr Butterly if he required medical attention and that Mr Butterly again said that he wanted to see a doctor. Garda Gillespie stopped the questioning, read over the notes that he had taken, asked if the notes taken were correct or whether Mr Butterly wished to make any changes or alterations, which Mr Butterly did not want to do. Mr Butterly signed the notebook and Garda Gillespie witnessed the signature. Garda Gillespie then brought Mr Butterly to Tallaght Hospital in order to see a doctor and stayed with him until he saw a nurse. There after Detective Garda Colin Rochford was directed to locate Shane Butterly and see if he was willing to speak to him further. Detective Garda Rochford called in late January on the father of Shane Butterly who was not able to provide him with details of his son's whereabouts other than to say that he was staying in a hostel somewhere in Cabra. Mr Butterly Senior went on to say that his son Shane had only been released from Dundrum Central Mental Hospital. On 1st February, 2016 Detective Garda Rochford and Detective Garda Camon Ryan called to a location where Shane Butterly was. Mr Shane Butterly confirmed that he had previously called to Tallaght Garda Station. Mr Shane Butterly was asked if he would take part in an interview regarding this and he said he would. Mr Butterly asked for a lift to the garda station as he had no money. On route to Tallaght Garda Station, Gardaí contacted Mr John O'Leary, Solicitor, who said that he would attend at Tallaght Garda Station and did so within a matter of minutes. At 1.05 pm on that date Mr Butterly was brought to an interview room in the company of his solicitor. An interview was then conducted which was video recorded. In that interview Mr Shane Butterly said he had not played any role in the fatal fire in Rossfield, that when he called to the garda station on the previous occasion he was sick, not having got his medication. The appellant says that the confession by Mr Butterly, notwithstanding its subsequent retraction, raises issues about the safety of the conviction. He says that if the evidence was admitted that it might have had an important influence on the outcome of the case. The Director says that the information that has emerged does not meet the threshold of materiality, what was involved here was someone who was mentally ill, recently discharged from the Dundrum Central Mental Hospital making a statement and then shortly afterwards retracting it. The Director says that it cannot be that because an individual comes forward after a trial with an alternative version of events, regardless of credibility deficits or even the admissibility of their evidence, that that should have the effect of overturning a conviction. She urges that the application be refused.

9. The position now is that Mr Butterly is not admitting any involvement in the fatality. The Court cannot see any basis on which what Mr Butterly had to say in the early hours of 19th January, 2016 could be admitted in evidence. No admissible evidence has emerged post conviction and in those circumstances the Court has to refuse the application to argue the additional ground and adduce fresh evidence.

Ground 1: Broadcasting of Exhibits During Trial

10. It is submitted that the trial Judge erred in refusing to discharge the jury, when a video exhibit was broadcast on RTÉ television during the currency of the trial. The footage had initially been made available to RTÉ in 2001 for broadcasting on the Crimecall programme. On the first day of the trial, RTÉ broadcast the exhibit during the course of the six o'clock news and the nine o'clock news. The footage showed an unidentifiable man approaching and leaving the den as the fire started, accompanied by commentary that an individual had left as the fire started. An application was made to discharge the jury on the basis that an exhibit should not be broadcast during the currency of the trial. The judge declined to do that but instead, at that early stage of the trial, cautioned the jury in relation to deciding the case on the basis of the evidence in court.

11. The Court does not believe that this ground presents any serious basis for suggesting that the jury ought to have been discharged. The defence case was not that the fire had not been started by the person as shown on TV, but that the appellant was not that person who started the fire. The footage shown was of an unidentifiable individual. The accompanying commentary that an individual left as the fire started was not of major significance in the context of the case.

Ground 2: Jury Bias

12. The appellant contends that the trial Judge erred in law and in fact, in failing to discharge a jury member who made known to the Court that two of his family members were members of An Garda Síochána. When the trial Judge was informed that he had two relatives serving in An Garda Síochána, one in north Dublin and one in Harcourt Square, the trial Judge spoke to the juror in question and then reported what she had learned which was that two members of the juror's family were members of An Garda Síochána, one stationed on the north side of the city and one in Harcourt Square. One of the relatives was aware that the juror had been called for jury service and enquired whether he had been picked to serve on a jury, and when he said that he had, advised the juror that he should inform the court registrar that two members of the family were members of An Garda Síochána. The juror told the registrar who informed the trial judge, who brought the matter to the attention of the parties. The Juries Act 1976 lists categories of people who are ineligible to serve as jurors, including members of An Garda Síochána. The Act makes no reference to the ineligibility of relatives of members of An Garda Síochána. It was indicated to the court in the context of the application to exclude the juror that it was likely that there would be vigorous cross-examination of members of An Garda Síochána in relation to the nature of the investigation, and that evidence of bad character would feature as part of the case, affecting the juror's ability to bring an impartial mind to bear on the determination of the appellant's guilt. This did not in fact transpire. Rather, the case turned on the credibility of a number of civilian witnesses. The juror, having very responsibly raised the issue, the matter was then properly dealt with by the trial judge. In the circumstances, the Court does not see any real substance in this complaint.

Ground 3: The evidence of Daryl Hall

13. It is contended that the trial Judge erred in refusing to direct the exclusion of a portion of the evidence of Daryl Hall, regarding the alleged demeanour of the accused on the day of the offence. It is also submitted that the Judge erred in failing to discharge the jury, in response to a request to do so, on the basis that Mr Hall gave evidence that was not on notice to the defence and that the evidence elicited from this witness was materially different to that contained in his statement.

14. This ground arises in the following circumstances. The prosecution proposed to adduce evidence by reference to a statement taken from Mr Hall dated 18th October, 2015 in which he had said:

> "I remember D. Griffin coming over to me when I was on the wall and asking me who was in that and what happened. He asked me who was in that and what happened. He looked angry when he was saying this, and I told him, 'My friend Stee,' and he put his hands on his head something, I didn't recall what it was.'

The admissibility of this proposed evidence was challenged because Mr Hall's comments regarding demeanour could not amount to probative evidence because the evidence was entirely speculative. The Judge refused to exclude this portion of the evidence and Mr Hall subsequently gave his evidence before the jury.

15. In the Court's view the Judge was right to take the view that evidence of demeanour and reaction was admissible. However, the complicating factor here is that the evidence was not given in quite the form expected. Counsel asked:

> "Q. Just before you leave that, do you remember anything about his demeanour, how did he appear to you?

A. To me, yes, he looked, like, he had a facial expression on him when I thought about it after, because it wasn't on that because I made an additional statement afterwards.

Q. Alright, and what was that facial expression?

A. He looked worried."

At that stage there was an application to discharge the jury on the basis that the defence was not on notice of the witness saying that the appellant looked worried.

This Court would deprecate over-frequent applications for a discharge. In this jurisdiction, unlike some others, prosecutors do not discuss with witnesses the details of their proposed evidence. Because counsel are generally constrained from leading their witnesses, it is inevitable that witnesses will sometimes depart from their earlier witness statements, or use different language at trial. However, it would very rarely be the situation that this would provoke a need to consider discharging the jury. In *People (DPP) v. Kenneth Cunningham* [2007] IECCA 49, Finnegan J. referred to the Supreme Court case of *Dawson v. Irish Brokers Association* [1998] IESC 39 (unreported, Supreme Court, 6th November, 1998), where O'Flaherty J. commented as follows:

"Once again, it is necessary to reiterate, as this Court is doing with increasing frequency, that the question of having a jury discharged because something is said in opening a case or some inadmissible evidence gets in should be a remedy of the very last resort and only to be accomplished in the most extreme circumstances. Juries are much more robust and conscientious than is often thought. They are quite capable of accepting a trial judge's ruling that something is irrelevant, or should not have been given before them, as well as in the face of adverse pre-trial publicity."

16. In the present case, once the witness used the word "worried", steps were taken to erase the significance of that. A statement was taken from the witness which conveyed that other witnesses at the material time (Mr Delahunty and Mr Lambe) also seemed to be worried. He subsequently gave evidence that Mr Lambe "looked as if panicking". In relation to Mr Delahunty there was the following exchange:

"Q. Well, would it be fair to say that he too was worried about what was going on?

A. Of course, yes he was. Yes, of course, he would have would have been like his two sons grew up with myself and Stephen and we were all pals together.

Q. So as soon as there was an awareness that there was somebody there, obviously it was a matter of concern?"

The fact that the appellant looked worried was admissible evidence. However, notwithstanding that, steps were taken to erase the significance of what was said. This ground of appeal is not made out.

Ground 4: Issues Relating to the Evidence of Kayleigh Deegan and James Shields

17. It is contended that the trial Judge erred in law in refusing to discharge the jury when Daryl Hall introduced evidence which the defence had not been on notice of, in regard to James Shields and Kayleigh Deegan. In opening the case, counsel for the Director had referred to the fact that a number of significant witnesses suffered from heroin addiction at the time of, and subsequent to the offence. In the statement that he gave to Gardaí, Mr Hall had made reference to Mr Shields having a drug problem, commenting:

"I remember James Shields. James was on the drugs and he seemed to me to be homeless."

In the course of the direct examination of Mr Hall, counsel asked:

"Q. I think he has some problems, Mr Shields, that you are aware of. Can you just tell the ladies and gentlemen about that?

A. I know this as a true fact, he was like, he was molested as a kid and he also had a heroin problem."

This gave rise to two challenges. First, it was said that the appellant wasn't on notice of this evidence, and secondly, it was argued that the allegation that Mr Shields had been molested as a kid was an irrelevant hearsay incapable of being proved or disproved. It was said that this was an attempt to garner sympathy for Mr Shields prior to him giving evidence and that this disadvantaged the defence because the jury were ultimately asked to assess the credibility of Mr Shields. The Court will confine itself to saying that the reference to prior molestation could not possibly provide a basis for discharging a jury on the third day of a trial. Again, the fact that the witness volunteered unexpected information is to be explained by the fact that counsel had not discussed the details of Mr Hall's proposed evidence with him, and the fact that counsel was not asking leading questions.

18. There is a second leg to this ground, relating to Kayleigh Deegan. In a witness statement taken in 2001, Mr Hall had said:

"I told Kayleigh to get out of the garden, not to be hanging around the hut because she was a young kid and it wasn't right for her to be there. She wasn't upset or anything and she just left."

This evidence to the jury was expressed somewhat differently. In Court, he was asked what he said to Kayleigh Deegan a few days prior to the fire:

"Q. Did you say anything to the two girls?

A. Yes, I told her – they were hanging around the base. Do you want to – we were all in the base at the time and then when we came out, I told them – they were all – there was a couple, about three or four girls but I just remember Kayleigh and Margaret. Margaret is the other girl's name, Margaret Hogan.

Q. Was she of a similar age to Kayleigh?

A. Yes. I told them to fuck off out of the garden. Sorry for my language, but that's what was said.

Q. What was their reaction to that?

A. I don't know. They just kind of turned around, they just got out. I don't know whether they kept screaming but that's what I said to them."

19. It was suggested that there was a discrepancy in what was said in relation to Ms Deegan which somehow rendered the trial unfair. The judge ruled on this as follows:

> "As regards Kayleigh Deegan, a child between four and seven is asked to get out of the garden and they left and they didn't seem to have any problem with it. The particular words that he used [Mr Hall] to ask her to get her [Miss Deegan] out of the garden is of no consequence."

Again, the Court will confine itself to saying that this could never have been a basis for discharging the jury.

Grounds 5 and 6: Issues relating to evidence of a knock on the window

20. It is submitted that the Judge erred in refusing to exclude a portion of the statement of the witness Jason Lambe regarding the allegation that the appellant had knocked on his window to raise the alarm. It is further submitted that having failed to exclude a portion of the statement of Mr Lambe, the Judge erred in refusing to discharge the jury following evidence given by Mr Lambe to the effect that the appellant had sought to prevail upon him not to speak to the Gardaí, not to give any statements and to say that the appellant had not been there that night, when the appellant was not on notice of such evidence. This arises in a situation where, in the course of a witness statement given on 21st October, 2001, Mr Lambe had said:

> "I saw Dermot Griffin standing in his garden again. I got talking to him and he said to me not to mention his name to the police and not to tell them that he had knocked on my window earlier."

Before Mr Lambe gave evidence, there was an application to exclude this portion of his proposed evidence. It was submitted that this was an equivocal hearsay statement. The Judge refused the application ruling "first of all, there is no unfair prejudice to Mr Griffin in relation to that. It is classically a jury matter as to whether or not that constitutes an admission on Mr Griffin's part and it couldn't have any bearing in relation to speculation about misconduct in circumstances where there is no evidence in relation to Mr Griffin asking people to say he wasn't there generally, but this is very specific in relation to him asking the witness not to say that it was he, Griffin, who had knocked on the window." Mr Lambe went on to give the following evidence:

> "Q. Alright, well now the group of you as you have described were drinking – where were you in the house?
>
> A. Sitting room.
>
> Q. And where is that in the layout of the house?
>
> A. The front area.
>
> Q. The front area?
>
> A. The front of the house.
>
> Q. I see. And did something interrupt you?
>
> A. Yes, we got a bang on the window.
>
> Q. All right. And do you have any idea what time that was at?
>
> A. Between five and half five.
>
> Q. And is this in the morning?
>
> A. Yes.
>
> Q. I see. And what did you do when – first of all, what state were –?
>
> A. We were –
>
> Q. Can I just ask you, sorry, you got a knock on the window; tell me about the curtains?
>
> A. They were drawn, obviously.
>
> Q. Okay. And so what did you do when you heard the knock?
>
> A. Well, we went to the door and we answered the door.
>
> Q. And when you say "we" who are you referring to?
>
> A. Myself and T-Del [the nickname of the witness Mr Delahunty]."

21. Counsel on behalf of the appellant submitted that Mr Lambe had dealt with the knock on the window in the course of five statements, but had said different things on each occasion, and he had stated something different again when giving evidence. It was submitted that none of the accounts were even minimally reliable and were therefore unsuitable to go to the jury. Insofar as Mr Lambe was alleging that the appellant had asked him not to tell the Gardaí that he had knocked on the window, the judge was asked to exclude that on the basis that it was a hearsay statement that did not amount to an admission and was therefore not a statement subject to an exception to the rule against hearsay. The Judge refused that application stating:

> "The inconsistencies in his statements can be put to the jury but it's a matter for the jury; it's a matter for the jury to draw inferences and form conclusions on the basis of the evidence but not engage in suspicion or conjecture."

22. Evidence of a suspect fleeing or hiding or concealing himself after a crime has been committed can be significant evidence from the perspective of the prosecution. In this case, what the appellant was alleged to have said was relevant and was clearly a so-called "disserving statement". In the Court's view the Judge was correct in refusing to exclude the evidence.

Ground 7: The failure of a witness to comply with directions of trial judge
23. It is submitted on behalf of the appellant that the Judge erred in refusing to discharge the jury when a witness, Mr Lambe, refused to comply with the Judge's direction to answer questions asked of him, and counsel for the appellant submits that the witness instead engaged in efforts to manipulate the jury emotionally. It is clear from the transcript that Mr Jason Lambe did not find giving evidence easy. However, it was hardly surprising that Mr Lambe would be emotional given the circumstances of the case. He was one of those who had tried unsuccessfully to pull a 12 year-old child from a burning hut. It is true that he on occasions went beyond answering the questions put to him by counsel in cross-examination and was anxious to make statements in support of his position. However, the real issue here is whether his attitude to the case meant that he was in effect, unable to be cross-examined. The Court is clear that that was far from the case. It is true that he was prepared to challenge counsel, but some of the questions he was asked were framed in terms which provided an explanation for this tendency. For example, at one point counsel for the appellant asked:

> "You might be doing your best or you might not be doing your best. Either way, how reliable is your memory of the night?"

The witness was the subject of a vigorous cross-examination and was also the subject of robust comment in the course of the closing defence speech. Once again, the Court has to observe that the nature of the evidence given by Mr Lambe did not provide a basis for discharging the jury.

Ground 8: Issues arising from the evidence of Ms Tracey Deegan
24. On behalf of the appellant it is submitted that the Judge erred in refusing to discharge the jury where evidence was given by Ms Deegan that the appellant had an intention to burn the hut down, and an issue arose regarding the possible coaching of the same witness. The issue arises in circumstances where Ms Deegan gave evidence that the appellant, her then partner, left her home on the night of the offence and she then gave evidence of his return as follows:

> "Q. In any event, you said he left – Mr Griffin left and he had the dog with him.
>
> A. Yes.
>
> Q. And he was gone for a few minutes?
>
> Q. And he was gone for a few minutes?
>
> A. Yes.
>
> Q. When he came back, did he come back into the kitchen?
>
> A. He did, yes.
>
> Q. And did he say anything to you?
>
> A. He did, yes. He told me that he checked the hut and he felt a foot.
>
> Q. I see?
>
> A. And that he was going back up then to burn it.
>
> Q. And did he say why he was going to burn it?
>
> A. He was burning it because he didn't want joyriders in the area. **He didn't want the guards coming up into the area and he felt that the hut would have attracted the guards up into the area.**
>
> Q. I see. So, you said he left a second time?
>
> A. Yes.
>
> Q. Did he take anything with him or did you notice anything about the second time?
>
> A. He did, yes. He brought paper with him."
>
> [Defence's emphasis]

25. Counsel for the prosecution was permitted to re-examine. In answering a question in the course of re-examination, Ms Deegan referred to being coached. Counsel asked:

> "Q. Alright, in relation to the interviews you gave, Mr Condon [senior counsel for the defence] has read out in some detail, I think you were arrested and interviewed on numerous occasions, if I may, I think it's easiest to summarise. You said yourself you were covering for Dermot Griffin at the time but that some of what -- ?
>
> A. I was yes. I was coached."

The appellant complains that he wasn't on notice of the allegation that he had set fire to the hut because he didn't want Gardaí coming into the area, and wasn't on notice of the allegation that the witness was coached. It is said that the motivation for not wanting the Gardaí to come to the area disadvantaged the appellant because it invited the jury to speculate about the character of the appellant, if he didn't want the Gardaí about. Again, it is said that the reference to coaching was never made prior to the re-examination and that the appellant was denied an opportunity to adequately prepare his defence because he wasn't on notice of either of these allegations.

26. As was to be expected, the issue of previous inconsistent statements featured prominently in the cross-examination. In those circumstances it was always likely that the issue of why inconsistent statements had been made at an earlier stage would feature in re-examination. It is true that the word "coached" had not been used up to that point, but Ms Deegan was explaining why she had lied in her previous statements, in that she was covering up for her then partner. As a matter of logic, any effective cover up would have involved some co-ordinating of positions between Ms Deegan and her partner the appellant. In those circumstances, the introduction of the word "coached" is of limited significance. Again, the Court will confine itself to saying that this could not have provided a basis for discharging the jury on what was then the fifth day of the trial. Again, there is a certain air of unreality in the suggestion that the jury should have been discharged because they might be prejudiced against the appellant by reason of the fact that he did not want Guards around the area. Throughout the trial, the court heard that there were many drug addicts in the area, and heard that a number of the witnesses and friends of witnesses were the subject of outstanding warrants. The appellant was sharing a house with a self-professed heroin addict so again the Court confines itself to saying that this was not a matter that could ever have been expected to lead to the discharge of the jury.

Ground 13: previous convictions of James Farrelly
27. It is submitted that the judge erred in law in refusing an application on behalf of the appellant, that he be permitted to introduce the previous convictions of a proposed prosecution witness James Farrelly without dropping his shield as provided for by s. 1 (f)(ii) of the Criminal Justice (Evidence) Act 1924 as amended by s. 33(a) of the Criminal Procedure Act 2010. The DPP's position was this could be done to a limited extent in relation to his addiction and criminality generally, but not by going through his 90 or so previous convictions. In fact, this Court finds that the defence was given was given very considerable latitude on this. In cross-examination, it was put to Mr Farrelly that he had a longstanding addiction, that he had committed crimes of dishonesty, that he was serving a sentence for robbery. It was put to him that he had previous convictions for offences of criminal damage, possessions of articles with theft, getting into a vehicle without consent, hijacking, possession of drugs for sale or supply, and interfering with vehicles. He agreed with the suggestion that he sold drugs to feed his habit and his long history of addiction was explored.

28. Ordinarily a prosecution witness cannot be cross-examined as to their bad character without the accused 'dropping the shield', allowing for the introduction of bad character evidence of the accused. Section 1(f) of the Criminal Justice (Evidence) Act 1924 (as amended by s. 33 of the Criminal Procedure Act 2010) provides as follows:

> *"(f) a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless— […] (ii) he has personally or by his advocate asked questions of any witness with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the person in respect of whom the offence was alleged to have been committed or the witnesses for the prosecution…"*

29. The Court of Criminal Appeal has held the exception did not apply in circumstances where the imputation of the prosecution witness's character was necessary for the conduct of the defence. In People (DPP) v McGrail [1990] 2 I.R. 38, Hederman J. observed as follows:

"Every criminal trial involves an imputation as to the character of somebody. The mere fact that an accused is accused of a criminal offence and that evidence is offered to support that view is in effect an imputation against the character of the accused. If the accused, either by giving evidence or through his counsel's cross-examination of the witnesses for the prosecution, suggests to them that they are not to be believed, that is also an imputation as to their character in as much as it is suggested that they are telling an untruth, if that is the way the matter is put to them. The defence may even require, in its efforts to rebut the prosecution case, to suggest to the witness and to the court that in fact the real author of the crime, if it has been proved to have been committed, is not the accused but one or other, perhaps, of the witnesses for the prosecution. Such a course of conduct is inevitable if an accused person is not to be seriously hampered in the conduct of his defence. Any ruling otherwise would have the effect of inhibiting the conduct of the defence in that an accused person, who may have a criminal record, may be intimidated into abandoning an effort to put in issue the truth of the evidence of a prosecution witness lest his own character outside the facts of the trial be put in issue."

30. In this case, evidence was put to the jury that the witness was a habitual drug user and a car thief. He was cross-examined at length. Details of his 90 or so previous convictions were irrelevant to the suggestion of counsel for the appellant that he was fabricating his evidence, in circumstances where his history of criminality generally had been established through cross-examination. The trial Judge struck the correct balance between allowing the accused to cross-examine as to establish the witness' propensity to commit dishonest and criminal acts, going to that witness's credibility, and the accused's inability to question the witness at length on his 90 or so previous convictions, which would have resulted in the accused losing his shield.

Ground 11 and 14: re-examination of witnesses
Miss Linda Prentice

31. It is submitted that the judge erred in law and in fact in permitting the prosecution to re-examine Ms Linda Prentice regarding her prior statement made in September, 2001. The relevance of this was that Ms Prentice had given evidence that when she was going out to meet her boyfriend on the night in question, she saw the appellant ignite "a white thing" and throw it into the den causing a fire. Ms Prentice in her evidence-in-chief told the Court she had a heroin problem around the time of the offence. Ms Prentice was cross-examined by counsel at length. The cross examination took some four days. Part of the cross-examination included probing in great detail into the history of her drug habit and her attempts at rehabilitation. In re-examination, prosecution counsel asked the following:

> *"I just want to confirm that in your original statement on 27th September, 2001 you told the Gardaí 'I am presently on a methadone course in CARP in Killinarden Centre in Tallaght'*
>
> *A. Yes."*

32. It was understandable that counsel for the prosecution would wish to re-examine on the issue of the witness' attempt at rehabilitation. The issue was raised by the defence in attempt to undermine her credibility, and her cross-examination omitted questioning her about attending a methadone course in CARP at the time of her making her statement in 2001. The re-examination was designed to provide a more complete picture. There was nothing improper in what occurred and, accordingly, this ground fails.

Mr James Farrelly [otherwise known as James Shields]

33. The evidence of Mr Farrelly was to the effect that he met the appellant on the night of the fire. He was cross-examined in

relation to his drug habit, and of having committed crimes of dishonesty. The suggestion was introduced in cross examination that he may have mistaken the encounter with the appellant on the night of the fire with another night. The following was stated on re-examination:

> *"Q. MS GEARTY: Now, Mr Farrelly, just the last few questions you were asked by Mr Condon, he concluded by asking you was it even the same night, and bearing in mind the alcohol and drink, you said it was possible, but unlikely. Now, why do you say it's unlikely that you're confused about the night?*
>
> *A. Oh yes. I know deep down in my heart, I know for a fact that on that night he approached me and told me if I opened my mouth, he'd kill me. I know for a fact deep down, regardless of what he says. He wasn't there, so he doesn't know. I know for a fact that he grabbed me that night and said that to me. I know deep down.*
>
> *Q. And just in terms of the night it was?*
>
> *A. Yes.*
>
> *Q. I see?*
>
> *A. Yes, definitely."*

34. Counsel for the DPP cites the parameters of re-examination as set out by McGrath, *Evidence* (Thompson Round Hall, 2005), p. 92, para. 3-77. as follows:

> *"A witness who has been cross-examined may be re-examined by the party who called him or her with a view to eliciting further evidence which is favourable to that party and to rehabilitate the credibility and the veracity, reliability and accuracy of the evidence given by him or her if this has been impugned on cross-examination. The principal rule governing re-examination is that it must be confined to matters that were dealt with on cross-examination and a witness may only be questioned in relation to new matters with the leave [of] the trial judge."*

In the Court's view the re-examination was a proper one, nothing improper occurred and this ground of appeal fails.

Ground 9: Refusal to accede to Galbraith direction application

35. The appellant applied to the trial Judge to direct a not guilty verdict on the basis of the inconsistencies in the evidence of the prosecution witnesses. The application for a direction was based upon the second leg of R v. Galbraith [1981] 1 W.L.R. 1039, wherein Lord Lane had stated:

> *"(2) The difficulty arises where there is some evidence but it is of tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence*
>
> *(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.*
>
> *(b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."*

The appellants submitted that the evidence was so weak that no jury properly directed could convict upon it. It was submitted that the unreliability and inconsistencies in the evidence given by Ms Prentice, Mr Farrelly and Ms Deegan were of such a magnitude that no jury could properly convict. The judge acknowledged that there were inconsistencies and that these were witnesses with difficulties. She felt that the issues that arose could be dealt with by the jury. The appellant criticised the trial judge's approach to the application. She ruled on it in the following terms:

> "The first application by the defence is for a direction on the second limb of the Galbraith judgment and that, "Where however the prosecution's evidence is such that it's strength or weaknesses depends on the view to be taken of a witness's reliability and other matters which are generally speaking within the province of the jury and where on one possible view of the facts, there is evidence upon which the jury could properly come to the conclusion the defendant is guilty, then the judge should allow the matter to be tried by a jury." It's accepted that the first limb of Galbraith does not apply. The Court was also referred to the DPP v. Leacy and it says in that case,
>
> > "That if there is some evidence which taken at face value establishes each essential element, then the case should normally be left to the jury. The judge however has a residual duty to consider whether the evidence is inherently weak or tenuous. If it is so weak that no reasonable jury properly directed can convict upon it, then a submission of no case to answer should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence, or from it being a type which the accumulated experience of the courts has shown to be of doubtful value, especially on identification questions, in a case where the question is whether a witness is lying, it is nearly always one for the jury but there may be an exceptional case such as Shippey where the inconsistencies, whether in the witness's evidence as viewed itself or between him and other prosecution witnesses, are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful. In such a case, in the absence of other evidence capable of founding a case, the judge shall withdraw the case from the jury."
>
> Now, the Court has carefully considered the evidence in this case, in particular the main prosecution witnesses, Ms Deegan, Ms Prentice and Mr Farrelly. And, as regards Mr Farrelly's evidence, because his evidence to go as the defence opened the case, he said that it is possible but unlikely that he had mistaken the night, that can be explained to the jury. He maintained that it was the night and he could remember exactly the night in question and he gave reasons for giving different answers when asked previously about the night in question. It was also put to him that in cross-examination he said that he met Mr Griffin, who was screaming like a madman in the centre of the road, and that was never put in direct examination. The inconsistencies in his evidence and the inconsistencies between his evidence and Ms Prentice's evidence can be outlined to the jury.

> As regards Ms Prentice, she alleges that she saw Mr Griffin on the night in question and that she recognised him; we go further on, she said that she recognised his voice. And the Court then is directed to what she said in 2001, 23rd March, 2006, 29th March, 2006, and the changes in the description of what Mr Deegan she says was wearing, and the discrepancies between the times that she said that saw these events occurring, and the inconsistencies between what she said; she went directly to her house after hearing these, that she was in her house all night etc. can be outlined to the jury. And she said that following seeing him go into the hut area with something white in his hand, that she saw him kicking a wall, she then resiled from that, and she said that she heard him talking to himself as he went up the road. And there's no evidence from Ms Prentice as to any alleged meeting between Mr Farrelly and Mr Griffin, or Mr Farrelly doesn't agree with the fact that at that stage he was being sneaked into the Prentice house, that happened a week before that, but Mrs Prentice was now happy to have him stay there, although she didn't like his reputation. She also said that she saw Mr Farrelly walk down past number 5, but that's not supported by the video or by Mr Farrelly's evidence, so those inconsistencies in her evidence can be outlined to the jury, but it's a matter for the jury to assess her evidence, given what she said and as regards seeing the incident and seeing Mr Deegan go in and come out from the hut area.
>
> As regards Tracey Deegan's evidence, in which she gives three different sequences of interview, and in interview 13 and 14 are her evidence, now her evidence in chief. And on 30th January was the first mention of a foot being felt when he went up to the hut on the first occasion. And today or when she gave evidence in this court was the first time that she said that he had been talking about burning down the hut all afternoon. And finally, when she was being cross-examined, she was asked about what she did that morning and she mistook whether it was the Friday or Saturday morning and gave evidence of what she usually does on a Friday morning, so her reply in cross examination to that, and no more than Ms Prentice's reply to what she did on the morning as regards giving her child Weetabix, clearing up the living room with cans, and giving a detailed description of what she did 13 years later, can be outlined to the jury. Ms Deegan has described Ms Prentice as a pathological liar and she hasn't resiled from that. And Ms Deegan has identified her dog, Capone, on it although Ms Prentice has said that it wasn't either of Ms Deegan's dogs. She has given an explanation that what she said now and in 2012 is the correct version and she gave an explanation why she didn't give that version before; she said she was coached, but that was the first time that that was mentioned.
>
> So the Court, in assessing whether a direction should be given to this case, whether the jury should be directed to acquit, will refuse the application under the second limb of *Galbraith*, under *Barnwell*, *Shippey* and *Leacy*, and the Court determines that this is a proper matter that should go before the jury to assess the evidence of the witnesses. Obviously the inconsistencies of the witnesses themselves, the inconsistencies of the witnesses' evidence, the prosecution witnesses between themselves, it's a matter for a Casey warning. I've never actually given a Casey warning before as regards a dog, but I think it is appropriate, right."

Undoubtedly, there were difficulties with the prosecution evidence and specifically with the three prosecution witnesses identified. The Court however agrees with the trial judge that the state of the evidence at the close of the prosecution case was such that it was proper to leave the case to be considered by the jury. The fact that a number of witnesses had been heroin users was something that was made known to the jury. It was a factor to be evaluated by them. It cannot be doubted that the prosecution case was such that a properly directed jury might, not necessarily would convict, it is therefore the case that the judge was correct in deciding to leave matters to the jury.

36. Inconsistencies in evidence go to the credibility and reliability of a witness, normally they are matters that fall foursquare within the fact-finding function of the jury. Inconsistent versions of events do not require that the function of the jury be usurped, by ending a trial by direction. As Denham J observed in *People (DPP) v M* (unreported Court of Criminal Appeal, February 15, 2001):

> *"The inconsistencies in the case go to issues of credibility and reliability. These are matters, relating to issues of fact, which are the duty of the jury to determine."*

37. The fact that three of the witnesses had been heroin addicts was well known to the jury and jurors were capable of considering the weight of the evidence, and any inconsistencies in that evidence, in that light.

Ground 10: Disclosure of DPP directions

38. An application was made by the appellant for the disclosure of a copy of a direction issued by the DPP in 2006. Counsel for the appellant argued that he was entitled to know why the Director chose not to prosecute in 2006 when both Linda Prentice and James Farrelly had come forward and made statements to the Gardaí implicating the appellant in the incident. In the view of the Court there was no basis for requiring the disclosure of the direction. A direction whether to prosecute or not to prosecute will involve an assessment of the available evidence by a professional officer and an assessment of how likely it is that a prosecution could be brought successfully.

39. A direction to prosecute and the underlying decision and the reasons for it are not properly the subject of disclosure. This ground of appeal therefore is rejected.

Ground 15: Refusal to accede to PO'C direction application

40. This ground overlaps with the application for a direction on *Galbraith* grounds. The appellant says that there are a number of factors present which individually and collectively meant that this was not a matter that could be safely left to a jury. It is said that the DPP chose not to prosecute in 2006 even though the statements of Ms Prentice and Mr Farrelly were available at that stage. It is submitted that the only reasonable explanation for this is that the DPP did not believe the truthfulness of those witnesses. This Court does not accept that assertion. As already stated, the decision of the Director to prosecute or not to prosecute involves an assessment of the likely outcome of a trial if one took place. There may be many cases where the Director believes the evidence that is available but feels that the evidence is not strong enough to give rise to a realistic prospect of a conviction. The appellant also points to the significant delay in the respondent's decision to prosecute the case. The situation is that in 2001 there was essentially no evidence available to the prosecution by reference to which they could hope to secure a conviction. The situation changed in 2006 but the situation changed again in 2012 when Ms Deegan provided new information which involved withdrawing the alibi that she had previously provided for Mr Griffin, her former partner. In a case as serious as this it is entirely understandable and entirely proper that the case would be subject to review as new evidence emerged.

41. The appellant advances as a further ground for stopping the trial that the evidence of Ms Deegan would have provided a basis for a murder conviction. The Court is not convinced that is so. The fact that Mr Griffin felt a foot on his first visit to the den did not mean that the den was necessarily occupied on the occasion of the second visit. Even if it was realised that the hut was occupied, it does not follow that there was an intention to kill or cause serious harm. Setting fire to the hut could be explained by recklessness as distinct from intention. However, even if on one view of the evidence it would have supported a verdict of murder, that does not

provide any basis for halting a prosecution for manslaughter.

42. Again, it is said that the effect of the extent of heroin use on the memory of witnesses was not established. The Court does not see that as a basis for stopping the trial. The jury was aware that a number of witnesses in the trial were heroin users and that was a matter to be considered by them when it came to evaluating the evidence. It was not, though, a reason for stopping the trial. This ground of appeal, therefore is also rejected.

Ground 16: Video footage

43. The appellant complains that the judge erred in law and in fact in failing to direct the jury as to the manner in which they were to consider the video footage evidence. It is said that the judge touched on the topic of video footage briefly on two occasions but did not provide substantive guidance. The complaint is made that the judge did not instruct the jury to disregard the RTÉ broadcast and the associated commentary and to have regard only to the CCTV footage as exhibited in the case. It is of some note that there was no criticism of the judge's handling of this issue when she concluded her charge. As regards the RTÉ broadcast on the second day of the trial, after the Crimecall material had been broadcast on the previous evening's news, the judge gave a strong direction to the jury that the case had to be decided on the basis of evidence in court and not by reference to media material whether in the press or on radio or television. There was no criticism of the trial judge's charge at trial and the Court does not see the point raised now as one of substance. This ground of appeal therefore fails.

Supplemental Ground: Unfairness in trial rendered the verdict unsafe

44. The appellant says that the cumulative effect of the matters about which he raises complaints rendered the trial unsatisfactory and the verdict unsafe. The Court is prepared to accept in principle that there may be cases where individual issues are identified which would not on an isolated basis result in a conviction being quashed but the cumulative effect of the matters identified as unsatisfactory would necessitate such a course. However, the Court is quite satisfied that this is not such a case. The complaints advanced by the appellant do not, either individually or collectively, establish that the trial was unsatisfactory or the verdict unsafe. The Court therefore dismisses this appeal.