THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

Record No 257/14

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

ANDREW SHANNON

Appellant

Judgment of the Court delivered 29th of July 2016 by Mr. Justice Edwards.

Introduction.
1. In this case the appellant was tried before a jury in the Circuit Criminal Court on foot of an indictment containing three counts of causing criminal damage to property, contrary to s. 2(1) of the Criminal Damage Act 1991. At the end of the prosecution case the trial judge granted a direction in respect of counts no's 2 and 3, respectively, on the indictment; but allowed count no 1 to go to the jury. On the 4th of December 2014 the jury convicted the appellant of the offence charged in count no 1. The appellant was subsequently sentenced to six years imprisonment with the last fifteen months thereof suspended.

2. The appellant has appealed against both his conviction and sentence.

3. This judgment deals only with his appeal against conviction

The Grounds of Appeal
4. The appellant appeals against his conviction on two grounds:

> i. The trial judge erred in law and in fact in refusing an application for a separate trial in respect of counts no's 2 and 3 on the indictment;
>
> ii. The trial judge erred in law and in fact in refusing an application on behalf of the appellant to discharge the jury in respect of count no 1 on the indictment upon acceding to his application for a direction in respect of counts no's 2 and 3 on the same indictment.

Relevant Background
5. The three counts that were initially preferred covered two separate incidents which may be conveniently referred to as "the National Gallery incident" and "the Shelbourne Hotel incident," respectively. Count No 1, in respect of which the appellant was convicted, related to the National Gallery incident. Count No's 2 and 3, in respect of which the appellant was acquitted by direction of the trial judge, related to the Shelbourne Hotel incident.

6. The National Gallery incident concerned the damaging on the 29th of June 2012 of an impressionist painting by Claude Monet, with the descriptive title "Argenteuil Basin with a single boat", painted in 1874 and having an indicative value of circa €10,000,000. The appellant had entered the gallery shortly after 10am on the date in question and had viewed a number of paintings. He approached the Monet painting in question and was observed standing in front of it. There were 2 witnesses present. He was captured on CCTV moving forward in the direction of the painting with his arm raised and striking the painting, thereby causing a substantial tear to it. The State's case was that the damage was premeditated and caused deliberately. However, the appellant contended at all material times that he had suffered a coronary episode, that he had accidentally fallen in the direction of the painting as a result of feeling faint, and that in order to save himself as he felt himself falling he had instinctively raised an arm and hand which had impacted the painting.

7. The Shelbourne Hotel incident was alleged to have occurred on the 8th of January 2014. The appellant, along with his nephew, were observed on the hotel CCTV system as being present in the hotel on the same day. There had been a function taking place upstairs in the "Deirdre and Adam suite" of the hotel, in which two large paintings by the artist Felim Egan were hanging. When the function was over and the participants had left, two members of hotel's staff remained and were engaged in clearing up. Having completed their task they then left the Deirdre and Adam suite. The paintings were undamaged at this time. The appellant and his nephew were later recorded on the hotel's CCTV system as being in the vicinity of the Deirdre and Adam suite. The appellant was observed later again leaving the building at around 7pm. Some time after this the staff members returned to the Deirdre and Adam suite and observed that the two Felim Egan paintings had been damaged. They appeared to have been torn or possibly slashed. The matter was subsequently reported to An Garda Siochána. The appellant and his nephew were identified as suspects from the CCTV footage. They were later arrested by Gardaí, following which they were detained and interviewed while in detention. The appellant made no admissions save for the fact of an acknowledgment that he had indeed been in the Shelbourne hotel on the date in question. However, he contended that he had merely been visiting the hotel's spa facility. Both men were initially charged with causing criminal damage to the paintings; however the charges against the appellant's nephew were subsequently dropped and the prosecution arising out of this incident proceeded against the appellant only.

8. Count No 1 on the current indictment, relating to 'the National Gallery incident', was originally the subject of bill of indictment number 827 of 2012 and a trial took place in December 2013 before Dublin Circuit Criminal Court. The jury in that matter were unable to reach a verdict and a date for a retrial was fixed.

9. The offences which ultimately became Counts No's 2 and 3 on the current indictment, relating to 'the Shelbourne incident', involving as they did offending conduct which was alleged to have occurred on the 8th of January 2014, were originally charged and returned for trial on a separate bill of indictment number 439 of 2014. In the meantime, a new trial date in bill number 827 of 2012 had been fixed. The appellant was therefore now subject to two separate returns for trial to the Circuit Criminal Court.

10. Later an amended bill of indictment was presented by the respondent, bill number 827A of 2012, containing 3 counts relating to both the 'National Gallery incident' and the 'Shelbourne incident', and on foot of which the respondent proposed that both cases should be tried together.

11. A trial date was fixed for the 24th of November 2014. On that day a jury was empanelled and legal argument in the absence of the jury took place in relation to whether the amended indictment was properly laid. The trial judge ruled in favour of the prosecution and held that it was. Following on from this, counsel representing the appellant then applied for a separate trial in respect of the offences charged in counts 2 and 3 on the amended indictment.

The Application for a Separate Trial

12. Counsel for the appellant sought a separate trial in respect of Count No 1 (the National Gallery incident) and Counts No's 2 and 3 (the Shelbourne Hotel incident) on the basis that it would be fundamentally unfair for the appellant to be tried in respect of both incidents together. It was contended that Irish law prohibits reliance on evidence of propensity, or similar fact evidence, on the basis that merely because a person may have offended in a particular way on one occasion, that will not of itself justify an inference that that person has again offended in a similar way on a subsequent occasion or occasions.

13. It was contended that there was no justification for seeking to try both matters together, and that in attempting to do so the prosecution were in effect seeking to rely on similar fact evidence.

14. In support of his argument counsel for the appellant opened to the trial judge the decision of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v K.(B.)* [2000] 2 I.R. 199 and the decision of the Supreme Court in *The People (Director of Public Prosecutions) v D.O'S*. [2006] 3 I.R. 57. Counsel contended that although acts of misconduct on occasions other than those charged can sometimes be admissible in criminal proceedings such evidence could only be admitted where the party seeking to adduce such evidence could demonstrate that it was sufficiently relevant to an issue in the proceedings to justify its admission, and that the probative value of such evidence outweighed its prejudicial effect. It was submitted that the proposed evidence with respect to the National Gallery incident had not been demonstrated to be relevant to the any issue in the proceedings in so far as they concerned the Shelbourne Hotel incident, and vice versa. In particular, it was submitted, there was no relevant evidence of any "system" in the alleged offending behaviour, the probative value of which could conceivably outweigh the prejudicial effect of the jury being made aware, in respect of the charges relating to either incident, that the appellant stood accused of having been involved in more than one incident of causing criminal damage to works of art.

15. The case made to the trial judge on behalf of the appellant is well illustrated in the following short exchange between the trial judge and defence counsel:

> *"JUDGE: Well, surely the only purpose of adding the second [incident] is to negative or try to negative the defence in the first; that he fell into the painting?*
>
> *MR BOWMAN: One would have thought -- one would have thought that could logically follow.*
>
> *JUDGE: It would be a very unlucky man who would fall into two paintings.*
>
> *MR BOWMAN: But that's if the Court presumes that Mr Shannon had a hand out on the part of the second painting.*
>
> *JUDGE: I presume that's what the State are going to try to show."*

16. In reply, counsel for the respondent stated that his client was not seeking in respect of either case to adduce the controversial evidence merely for the purpose of establishing propensity. On the contrary, the prosecution wished to adduce it for several reasons that were directly relevant to matters at issue in the cases being tried.

17. In seeking to address the need for such evidence in the case involving the National Gallery incident, he said:

> *"It is first of all to rebut the defence of accident in respect of the first incident; that is the defence that he explicitly raised and that was explicitly raised in closing on the last occasion in the case and, to adopt the language of BK, we say that the evidence would offend common sense if the jury were not to be told that this is a man who has an issue with paintings. And that is the second significant issue that we seek to admit the evidence to establish, which is intent or motive.*
>
> *Now, rebutting accident and establishing motive are both acknowledged matters that the prosecution can seek to lead system evidence in relation to and I don't want to get into a linguistic debate. It's all over the jurisprudence in this area. I'm happy to call it system evidence. But if the Court turns to page 210 of BK, at the very end of that there is a summary of the principles that emerge from the different cases and the Court analysed Makin and Boardman and all the other cases that led to that point. The last paragraph there, they're numbered 1, 2, 3 and 4, and it says: "A number of principles emerge from these cases: 1. The rules of evidence should not be allowed to offend common sense. 2. So, where the probative value of the evidence outweighs its prejudicial effect, it may be admitted. 3. The category of cases in which the evidence can be so admitted is not closed. 4. Such evidence is admitted in two main types of cases: (a) to establish that the same person committed each offence because of the particular feature common to each ..."*
>
> *Now, that is central to the reason why we seek to admit the evidence.*

18. Then, in seeking to address the need for such evidence in the case involving the Shelbourne Hotel incident, counsel for the respondent had the following exchanges (*inter alia*) with the trial judge:

"JUDGE: And what do you say about the particular aspects of the evidence as it seems in relation to the second count, the Shelbourne count; that basically what you have is circumstantial evidence that only two people could have committed it? Is that what it is?

MR NAIDOO: That is correct.

JUDGE: And one of them was his nephew?

MR NAIDOO: […] That is correct, and we seek -- I'm not hiding behind the tree on this. We seek to admit the system evidence to attribute intent to one of those people and seek to persuade the jury that that is therefore the person who you know did the damage. We have two people in a room. One of them we know has a problem with paintings; seeks to damage them. The other doesn't. Now, the jury might not accept that beyond a reasonable doubt but this isn't a weight argument we're having now. This is an admissibility argument and I'm allowed to admit evidence of intent or motive where that will allow me to distinguish between two potential offenders. It is unlikely that Jamie Shannon was there innocently, but we don't have the additional evidence to say exactly what he did. We do have additional evidence in respect of Mr Shannon and the evidence is his state of mind and state of mind, motive, intent, whatever you want to call it, is critical in all cases."

"… motive is explicitly one of the grounds -- one of the issues that the prosecution are allowed to introduce similar fact evidence or system evidence in respect of and that's what BK decided: "Such evidence is admitted in two main types of cases: (a) to establish that the same person committed each offence because of the particular feature common to each; or (b) where the charges are against one person only, to establish that offences were committed. In the latter case the evidence is admissible because: (a) there is the inherent improbability of several persons making up exactly similar stories ..."

That's not exactly the same here but there is the inherent improbability of Mr Shannon accidentally damaging a painting in the National Gallery and then finding himself innocently in the presence of another painting -- two paintings that are damaged. And then it shows a practice which would rebut accident, innocent explanation or denial and could I say Mr Shannon was interviewed by the gardaí, acknowledged that he was there but said that he was only there to visit the spa. Now, the evidence will be that, although it's theoretically possible to get to the spa from the part of the hotel that he was in, the main entrance to the spa is from outside of the building and he went to the spa after this incident and asked for a tour of the spa, which involved a tour of the pool, and he went in from the main entrance on the main street.

So Mr Shannon, in my respectful submission, knew why he was going to the Shelbourne, because he couldn't go back to another gallery; went there with an established purpose, intent or state of mind; and, as he did in the National Gallery, immediately sought to set up an excuse for being present, namely that he only wanted to visit the spa. And I'm entitled to lead evidence to rebut his denial and to establish his state of mind. Thereafter, it's a matter for the jury to decide what they're actually going to do in the case but that is a matter for the jury, in my respectful submission. I say that there is sufficient evidence that it cannot be an innocent coincidence."

19. There followed some further submissions from both sides, in the course of which the trial judge was referred, *inter alia*, to McGrath on Evidence at paragraph 9.54, and Black J's judgment in The People (Attorney General) v Kirwan [1943] IR 279 concerning the need for evidence of misconduct on another occasion to be "necessary".

20. The trial judge then ruled as follows:

"JUDGE: In this case it seems the State are trying to run two trials together in relation to two different offences. They're seeking to run them together. It seems one is to prove that the defence put forward by Mr Shannon in relation to the first incident of accident -- there's evidence if he was involved in the second offence that a jury could take this into account in assessing the explanation of defence of accident. I think that's pretty reasonable in the circumstances, but am very curious to know and it'll be very much of interest to know what evidence they have against Mr Shannon in relation to the second incident. I'll allow the cases to go forward together but, remember, I can always withdraw the matters from the jury at any time if I find that the State -- the way the State has presented the case in any way prejudices the rights of Mr Shannon.

At this point in time I'm happy to let it go -- both cases to be tried together, but I'll be vigilant as to how this case evolves and if I find at any stage that basically Mr Shannon's rights are being interfered with or that the evidence against Mr Shannon in relation to particularly the second event doesn't amount to what it seems at this stage then I might reverse my situation and actually stop the trial."

Submissions to this Court on behalf of the appellant – ground no 1.

21. In his written submissions to this Court counsel for the appellant has again referred extensively to passages from the judgment of the Court of Criminal Appeal, delivered by Barron J, in *The People (Director of Public Prosecutions) v K.(B.)* [2000] 2 I.R. 199.

22. It was submitted on behalf of the appellant that taking into consideration the principles enunciated in *K.(B.)* and the facts in this case there was no sufficient nexus between the incidents to allow for a joint trial.

23. It was further submitted on behalf of the appellant that the prejudicial effect of the evidence in relation to the 'Shelbourne incident' far outweighed any probative effect.

24. Budd J in *C.B v DPP* (unreported, High Court, 9th October 1995) observed:

> "the mere existence of multiple accusations of similar offences does not mean that the evidence will be admissible as it is still essential that there should be a sufficient degree of probative force to overcome the prejudicial effect of such evidence."

25. It was submitted to this Court that the trial judge erred in law and in fact in weighing up the probative force of counts 2 and 3 against their prejudicial effect on the trial in respect of count 1.

Submissions to this Court on behalf of the respondent – ground no 1.
26. The rational advanced by the prosecution for having the National Gallery incident and Shelbourne Hotel incident cases run together before the same jury was that there was evidence of system and/or similar fact evidence which would have assisted the jury in forming a view as to the state of mind of the accused so as to rebut accident, innocent explanation or denial. Central to the prosecution argument is that Mr Shannon variously relied upon accident, innocent explanation and denial to explain the damage done to the painting in the National Gallery and his proximity to the damaged paintings in the Shelbourne Hotel.

27. The factors that the prosecution say justified admitting the Shelbourne Hotel evidence to support the National Gallery evidence, and vice versa, are:

> (i) Both cases involved artwork on public display being damaged.
>
> (ii) In both cases the kind of damage done of very similar. All three paintings were subjected to tears/slashes which penetrated the canvas.
>
> (iii) In both cases the damage was done without any purpose of gain, the damage was (on the prosecution case) simply malicious.
>
> (iv) In both cases the accused had a ready-made explanation for his involvement and/or presence at or near the scene. In the National Gallery he immediately said he had had a heart attack and in the Shelbourne Hotel he said he was in the hotel to visit the Spa and he did visit the Spa after the damage was done.
>
> (v) In both cases he was not only aware that there were CCTV cameras in operation, when being interviewed he invited the Gardai to view the footage to confirm his explanations.
>
> (vi) In both cases CCTV footage showed the accused touring the locations before deciding which paintings to damage. In the National Gallery he walked around the gallery, looking at different paintings before selecting the Monet to damage; while in the Shelbourne Hotel case there was evidence that he had stopped and looked into a number of different rooms, all of which had paintings hanging on the wall, before going into the Adam and Deirdre suite where the paintings were damaged. In the Shelbourne Hotel case he was accompanied by his younger nephew but the prosecution case was that it was the older man who had led the younger man when carrying out the scouting exercise, before settling on the two paintings in the Adam and Deirdre suite.

28. It was submitted that, taken together, these factors provided a very sound foundation for the evidence of both cases to be put before a jury at the same time on the basis that the evidence revealed that all three paintings were damaged in a very similar way by someone with a particular, irrational, state of mind. In particular, it was submitted, the many references by the accused to CCTV footage of his activities in the course of being interviewed in respect of both matters strongly points to him wanting it to be known that he had done the damage, but in circumstances where he believed he could not be held responsible for it. The case therefore involved elements that were both 'strikingly similar' and indicative of a 'system' or modus operandi in common.

29. Counsel for the respondent has submitted that the development of the legal principles governing cases in which what was originally called similar fact evidence, but is now more usually referred to as system evidence, reveals, broadly speaking, two different types of cases. The first category are those cases in which the facts of two or more crimes exhibit what has sometimes been referred to as a 'striking similarity' such that it is inherently unlikely that the offences were committed by different people. In those cases the striking similarity was considered to justify the courts in departing from the normal rule that evidence that an accused had committed one offence ought not to be admitted against him in a trial for a different offence.

30. The second category of such cases are those in which there may not be been any striking similarity, but in which there is evidence that the offences were linked by a methodology or 'system' on the part of the offender which, taken together, made it very unlikely that the offences were committed by different people. Counsel has submitted that although much of the recent case law has focused on 'system' cases, the older striking similarity principles may still justify departing from the normal rule in an appropriate case and that the true governing principles are concerned with whether the similar fact evidence in controversy is sought to be admitted simply to establish propensity or, instead, to advance or rebut a matter in issue in the trial such that it would be an affront to common sense for the evidence on the relevant issue to be kept from the jury.

31. Counsel for the respondent has referred this Court to *Makin v Attorney General for New South Wales* [1894] A.C. 57 in which the Lord Chancellor of the day, Lord Herschell, framed the exclusionary principle in the following way:

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

32. This constitutes "forbidden reasoning" or evidence of propensity, i.e. the accused has done this sort of thing before, hence is the type of person that would commit this offence; therefore he is guilty of the offence before the court. However, for particular purposes, evidence including that of previous misconduct could be used:

> "On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question **whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."** (emphasis added).

33. The Makin principles were approved in this jurisdiction as far back as 1943 in *The People (Attorney General) v Kirwan* [1943] IR 279.

34. It was submitted that the instant case is not one in which the controversial evidence was sought to be admitted to establish propensity, it was sought to be put before the jury for exactly the reasons identified in Makin as being a proper basis for departing from the normal rule that such evidence not be admitted, namely, to exclude accident and rebut the explanations offered by the accused.

35. This Court was also referred to *DPP v Boardman* [1975] AC 421 in which a majority of the Law Lords applied the *Makin* principles

but in which two of their number, Wilberforce LJ and Cross LJ favoured a balancing approach as between the probative strength of the evidence on the one hand, and its prejudicial effect on the other hand. It was submitted that the new less rigid approach advocated by Wilberforce LJ and Cross LJ was adopted in this jurisdiction by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v K.(B.)* [2000] 2 I.R. 199.

36. The Court was asked to note that, as in the earlier English authorities, in K.(B.) Barron J. drew a distinction between cases where previous misconduct evidence was sought to be admitted to show a general propensity on the part of an accused, on the one hand; and "system" evidence, on the other hand, which:

> *"is admissible because the manner in which a particular act has been done on one occasion suggests that it was also done on another occasion by the same person and with the same intent." ([2000] 2 IR 199 at 203)*

37. It was submitted that *K(B)* did not exclude 'striking similarity' cases as falling under the 'system' evidence rubric, rather Barron J. sought to make it clear that system evidence was admissible to advance or rebut an identifiable issue relevant to the question of guilt or innocence. Counsel for the respondent submitted that the instant case has elements of the earlier striking similarity cases: the unusual and specific object of the damage, as well as elements of system, including: the fact that the accused committed the offences in circumstances suggesting he wanted it to be known he was responsible.

38. It was submitted that the prosecution were therefore entitled on the authorities to adduce evidence that the unusual nature of the offences and the manner in which they were carried out revealed a particular state of mind on the part of the appellant, which tended to rebut the explanations offered by him. Not to have put both incidents before the jury would potentially have left them with a materially incomplete view of the relevant evidence.

Discussion and Analysis

39. While it is true that the balancing test advocated by Wilberforce LJ and Cross LJ in *DPP v Boardman* was ostensibly adopted in this jurisdiction by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v K.(B.)* [2000] 2 I.R. 199, this Court does not agree with counsel for the respondent that *K.(B.)* can still be relied upon as representing the current state of the law in that regard in this jurisdiction. Rather, following the decision of the Supreme Court in *The People (DPP) v McNeill* [2011] 2 I.R. 669 there is now considerable doubt as to whether a balancing test is the appropriate one. In that regard, in Evidence (2nd Edition, 2014, Round Hall), Declan McGrath, Barrister at Law, comments at paragraphs 9-67 and 9-68:

> "9-67 While the test of balancing probative value and prejudicial effect was not expressly disavowed in McNeill, it did not receive any support and O'Donnell J in the course of his judgment expressed "doubts about a balancing test where it is not very clear in advance what weight is being ascribed to factors which are not themselves measured in the same register".
>
> 9-68 A notable feature of the judgments was the unanimity as to applicability of the law as to admissibility propounded by Lord Herschell in *Makin* as adopted into Irish law in *Kirwan*. It appears clear, therefore, that the Irish law in this area has reverted to the *pre-Boardman* position. Accordingly, it is suggested that the admissibility of misconduct evidence now falls to be determined in accordance with the following principles:
>
> (a) Misconduct evidence is not admissible for the purpose of inviting the jury to infer from it that the accused is a person who, by reason of his disposition or bad character, is likely to have committed the offences charged.
>
> (b) Misconduct evidence can be admitted in evidence if (i) it is relevant to and sufficiently probative of an issue in the proceedings, (ii) its admission is necessary, and (iii) there is sufficient proof of the commission of the acts of misconduct.
>
> (c) A trial judge has a discretion to exclude misconduct evidence which would otherwise be admissible if is probative force is outweighed by its prejudicial effect.
>
> (d) In any case where misconduct evidence is admitted and there is a risk that the jury may draw the inference that the accused is likely, by reason of his other criminal conduct or character, to have committed the offences upon which he or she is charged, the trial judge should instruct the jury as to the limited purpose for which the evidence has been admitted and warn them not to draw such an inference."

40. Be that as it may, this Court is satisfied that the trial judge correctly exercised his discretion not to sever the indictment and to allow proposed evidence of the Shelbourne Hotel incident to be relied upon in the case involving the National Gallery incident, and vice versa, because in each instance the proposed evidence in controversy, which was properly to be characterised as "system" evidence, was potentially relevant to an issue or issues in the proceedings, and it was sufficiently probative.

41. In arriving at this view we have borne in mind that this ruling has to be viewed in its context, namely that it was a ruling in principle on an objection that was raised at the commencement of the trial, and before any actual evidence had been heard in respect of either case.

42. We have been greatly influenced by the fact that the trial judge obviously approached the issue with considerable care. He seemingly had little doubt concerning the propriety of the proposal to rely on the Shelbourne incident as evidence of "system" in the National Gallery case, having regard to the asserted claim that it was relevant to, and potentially rebutted, the appellant's claim of accident. However he was much more circumspect with respect to the converse proposal, which was to seek to rely on the National gallery incident as evidence of "system" in the Shelbourne Hotel case, because unlike in the National Gallery case, the fact of the appellant having damaged any paintings at all in the Shelbourne Hotel was in issue. While the prosecution had argued that the overall circumstances of both cases were sufficiently similar (strikingly similar, perhaps) to also justify the admission of evidence of system in the Shelbourne Hotel case, the judge clearly regarded the issue as being much more finely balanced in that case than in the National Gallery case. That this was so is clearly to be inferred from his remarks that:

> At this point in time I'm happy to let it go -- both cases to be tried together, but I'll be vigilant as to how this case evolves and if I find at any stage that basically Mr Shannon's rights are being interfered with or that the evidence against Mr Shannon in relation to particularly the second event doesn't amount to what it seems at this stage then I might reverse my situation and actually stop the trial."

43. At this point we are not primarily concerned with whether the trial judge was right to have ruled in principle that system evidence was capable of being admitted in support of the Shelbourne Hotel case, because that aspect of his ruling was overtaken by events when he later granted directions on Counts No's 2 and 3. However, we reiterate that we are satisfied that in so far as his ruling concerned the National Gallery case, it was one that was legitimately open to him to make. The discretion was properly exercised because, as counsel for the prosecution pointed out, the evidence was relevant in terms of potentially rebutting the defence of accident. There were also some striking similarities between the two incidents rendering it inherently probable that the accused had committed the offence charged. It was therefore also relevant and probative on that account.

44. The Court is not therefore disposed to uphold this ground of appeal.

Refusal to Discharge Jury after Direction on Counts No's 2 and 3.
45. Of course, if both cases had proceeded to the jury in circumstances where evidence of system had been admitted, and was being relied upon, the trial judge would arguably have been required, in dealing with each case respectively, to instruct the jury as to the limited purpose for which such evidence had been admitted and warn them not to draw the inference that the accused was likely, by reason of his involvement in the other matter, to have committed the offence at issue.

46. However, and as previously stated, the originally anticipated likely progress of the trial was overtaken by events. Any need for such a direction evaporated once the Court granted a direction on Counts No's 2. and 3.

47. Arising from the granting of the direction counsel on behalf of the appellant submitted to the trial judge that the appellant could no longer receive a fair trial in relation to Count 1 on the indictment and that the jury should be discharged. That application was refused on the basis that Count No 1 could properly go to the jury in circumstances where they would be instructed to disregard all evidence that they had heard concerning the Shelbourne Hotel incident.

48. Just before closing speeches were embarked upon the trial judge told the jury:

> *"… on Tuesday evening there was legal applications made to the Court. As a result of those legal applications, I have directed basically that Mr Shannon should be found not guilty in relation to Shelbourne matters. Now you needn't concern yourself in relation to why that occurred but for the purpose of the remaining count, that is the gallery count, The National Gallery count, you have to ignore all evidence that was given in relation to the Shelbourne Hotel count. Do you understand that?*
>
> *So basically speaking, you know the separation between both of them and you're to take into account the evidence in relation to the gallery count, The National Gallery count - that's the Monet - and ignore all the rest of the evidence. Both Mr Naidoo on behalf of the State and Mr Bowman will also reiterate that to you and you must follow that; that's your duty. Now, and I'll say it to you again at the end just in case you haven't got the point"*

49. Later, after counsels' respective speeches in the course of which the point was again made, the trial judge proceeded to charge the jury. He began by saying:

> *"Thanks, Mr Bowman. It's 5 to 1. I'll start off my speech. I'm going to be very, very short because you've had the benefit of two excellent speeches from both counsel expressing their points of views. Now the first thing I should to say to you is that Mr Shannon is entitled to an impartial jury, he's entitled to a fair jury and he's entitled to think that you will give it good deliberation and you use all diligence in that deliberation. He's also entitled to believe that all the evidence in relation to the Shelbourne will be discarded, and you must do that, that is your duty. There was various legal rulings given by me and the effect of those legal rulings is that the Shelbourne counts, he's been a directed acquittal, and you must obey that, and you must discount from your mind totally the Shelbourne evidence."*

50. Then towards the end of his charge, the trial judge sent the jury to a late lunch, and once the jury had gone out addressed counsel as follows:

> *"I am not closed yet but I will ask counsel about it. Is there anything else you wanted me to tell them?"*

51. At this point counsel on both sides engaged in a brief discussion with the judge concerning a point of evidence that has no relevance to the issues on this appeal. However, neither counsel raised any issue concerning the trial judge's earlier instructions to the jury that they should disregard the evidence in relation to the Shelbourne Hotel incident.

52. After the jury had retired, the trial judge again invited requisitions in relation to his charge. Once again no relevant requisitions were raised.

53. Counsel for the appellant has, however, sought to make the point on this appeal that no requisitions were made precisely because he believed that it was pointless to do so, as no instructions or directions by the trial judge were capable of ameliorating or adequately addressing the unfairness that had crept into the trial. He had been of the view that the only remedy that was going to be effective was to discharge the jury. He had applied for a discharge, and had been refused. It is the failure to discharge the jury that is the focus of ground of appeal no 2.

54. It was submitted to this Court that the trial court's earlier ruling that the incidents could be heard together on the basis of counsel on behalf of the prosecution's submissions, was undermined once a direction had been given because there was no longer evidence of any similar misconduct. The justification for a joint trial had therefore dissipated on foot of the Court's direction to acquit on Counts 2 and 3.

55. In applying for a discharge of the jury counsel on behalf of the appellant had referred the trial judge back to an exchange between counsel and the bench on the 24th of November 2014 in the context of submissions on the consequences of the judge's decision not to hold separate trials:

> *"MR BOWMAN: May it please the Court. The only thing that occurs to me is in the event that, for example -- I don't think it's widely beyond the realms of speculation that we make an application for direction, because I don't believe the evidence is ever going to go beyond that which myself and Mr Naidoo effectively agree in relation to the second matter, and the Court accedes to that application. Well, then we have a very considerable difficulty.*
>
> *JUDGE: I would say you don't but the State does.*

MR BOWMAN: But on the first incident as well.

JUDGE: Yes. I would say that if I accede to a direction in relation to the second incident you'll have a -- I think you'll have a huge difficulty in relation to the first incident.

MR NAIDOO: Well, perhaps we'll cross that bridge if we get to it.

JUDGE: Yes. But I'm telling you now, Mr Naidoo, that if I accede to an application for a direction in relation to the second incident then I can't envisage a situation where the first matter will go to a jury."

56. Counsel on behalf of the appellant further submitted that the appellant was further prejudiced on account of the fact his lengthy imprisonment prior to the 'Shelbourne incident' had been made known to the jury as a result of trying both matters together.

57. In refusing the application to discharge the jury in respect of the 'National Gallery incident' the trial judge stated:

"JUDGE: … I know what you're going to say, Mr Bowman, that you're prejudiced by the jury hearing about Shelbourne.

MR BOWMAN: That, in addition to other matters, such as the fact that they've been in custody for the length of time that they have been, this was deemed irrelevant and objected to strenuously, and upheld by the last trial judge, and that has gone in as a matter of natural consequence in relation to the Shelbourne.

JUDGE: Yes, I understand.

MR BOWMAN: But I'm bound by the Court, obviously, yes.

JUDGE: I understand. All I can say is that there's plenty of trials I've been in, and you've been in, where applications for directions have been acceded to and evidence that wouldn't have gone in, other than that those charges were there, had been given before the jury. And I'm very confident that a jury will accept what I say and accept what Mr Naidoo says and what you tell them, and I'm happy that no injustice will be done to your client.

MR BOWMAN: May it please the Court.

JUDGE: And I understand the objection and you adopting this course that you think that your client has been prejudiced by the fact that the evidence in relation to Shelbourne has been led, and the fact that, basically, the jury now know that your client has been in custody, and I take those submissions and I reject them."

58. It was submitted to this Court that the respondent's case against the appellant in 'the National Gallery incident' lent heavily on the evidence of 'the Shelbourne incident' and that without it a conviction could not be secured, as evidenced in the first trial where the jury were unable to reach a verdict.

59. It was further submitted that this view of the respondent's approach to the case is supported by the decision to drop the charges against the appellant's nephew in relation to 'the Shelbourne incident', in circumstances where the only distinguising feature between the two men was the 'National Gallery incident'.

60. It was submitted that it was clear the respondent proposed to depend on the evidence of each incident to support the other in front of the jury.

61. Counsel for the respondent drew attention to the fact that the trial judge himself had stated "*if I accede to an application for a direction in relation to the second incident then I can't envisage a situation where the first matter will go to a jury*". However when the matter presented in those terms the trial judge refused the application and the matter proceeded albeit with warnings from the trial judge.

62. It was submitted that in all of the circumstances the trial ought not have proceeded further once the court had directed the jury to find the appellant "not guilty" of the counts relating to the "Shelbourne" incident and that the jury ought to have been discharged.

63. In response, counsel for the respondent observes that that the direction on counts 2 and 3 was not in any way a reversal of the trial judge's earlier decision to allow the trial to proceed on the basis of system evidence. Nothing the court said in its ruling suggested that the prosecution decision to lead system evidence was revealed to have been wrong in principle. The decision to grant a direction turned on the fact that the prosecution had not called statistical evidence to establish the rareness of criminal damage to paintings, not on the basis that the system evidence was misconceived in principle:

"JUDGE: Thank you. First of all, I accept Mr Naidoo's submission that similar-fact evidence can be used in the appropriate criminal trial. Obviously, similar-fact evidence, or system evidence, or whatever you want to call it, has to be based on actual evidence. I've no doubt also, looking at it in a general way, what happened to these paintings are reasonably similar, it could be said. There is an argument to say that on both occasions there was an attack on the paintings. Now, that, in my experience, is very unusual and obviously as a person who probably watches the newspapers in relation to crime and criminal behaviour, I don't think I have read a report about a previous attack on a painting in such a way.

Now, I agree, there's two constituent parts to the similar-fact evidence being put forward on behalf of the state (1) these attacks on the paintings were unique and (2) the way, it seems, from the state's point of view at least, Mr Shannon attacked these paintings, was pretty unique as well. In the National Gallery, he did it in the full glare of people and in the full glare of cameras, it seems. And in the Shelbourne, it seems to me a jury could infer that Mr Shannon must have known that he would have been tracked through the hotel by reason of CCTV cameras. And, therefore, it seems that Mr Shannon didn't mind it being put that he be suspected of the crimes, and it seems he had an explanation for what he did. That, it could be argued, is part of his modus operandi.".

64. The respondent makes the further point, in relation to the remarks of the trial judge on which the appellant places reliance, that when the whole of the exchange between counsel and the bench is considered it is clear that the trial judge gave no commitment as to how he might deal with matters should the contingency under discussion arise.

65. After the trial judge had commented: *"But I'm telling you now, Mr Naidoo, that if I accede to an application for a direction in relation to the second incident then I can't envisage a situation where the first matter will go to a jury"*, the exchange had in fact continued:

> *"MR NAIDOO: Except for this important factual distinction between -- just seeing as we're discussing this now --*
>
> *JUDGE: Yes.*
>
> *MR NAIDOO: -- and I appreciate the Court isn't making any kind of ruling at this stage. The whole point about the second incident is that there are two men, as I say, one of who we say we can attribute a motive to. The Court could well say that the prosecution -- could. I'm not saying the Court will or has decided the point one way or the other: "The prosecution can't get to the point of satisfying the jury beyond reasonable doubt on that case, that Mr Shannon is definitely the one who damaged the painting." But the Court could be of the view that the evidence is sufficient to establish that his presence wasn't innocent and that his attitude to the paintings is something that could be relevant to the first case in any event or the Court could decide that it has the ability to direct the jury properly in respect of the remaining charge, having directed the other charges.*
>
> *JUDGE: Yes, I can see that.*
>
> *MR NAIDOO: It would depend on the evidence and how things unfold. It is commonly the case that one charge is directed and the other charges remain before the jury with appropriate directions from the Court.*
>
> *JUDGE:* ***Yes, I can see that as well.*** *Yes. So what -- who did the case initially? Judge Hogan, was it?*
>
> *MR BOWMAN: Yes, Judge.*
>
> *JUDGE: Yes."*
>
> (emphasis added)

66. Counsel for the respondent contends that the alleged interdependency between the two cases was nothing more than mere assertion. There was ample evidence for a properly charged jury to convict in the National Gallery case quite apart from any evidence relating to the Shelbourne Hotel case. There were several strands to that case, some of which were sufficient to ground a conviction on their own and certainly without the system evidence from the Shelbourne Hotel case.

67. These included:

> (a) Direct witness evidence from two witnesses who were in close proximity to the accused when the Monet was damaged, both of whom gave evidence that the accused punched the painting;
>
> (b) Evidence from a witness who had overseen the restoration of the painting to the effect that:
>
> > (i) The point of impact was sufficiently high up on the painting that, the prosecution argued, the accused would have had to reach up to make contact there;
> >
> > (ii) That the strands of the canvass had been snapped by the impact, as opposed to streaching and breaking which, in the expert opinion of the witness, was suggestive of significant force applied rapidly, a finding that the prosecution said was inconsistent with the force being applied by a person who had collapsed into the painting because of a loss of power in his body such that he was unable to keep himself up right.
>
> (c) There was evidence from a different witness that the force of the impact was such that it not only set off the alarm on the wall on which the Monet was hanging, it also set off the alarm on the opposite side of the same wall.
>
> (d) Medical evidence from the ambulance staff who attended him at the scene that the Respondent's vital signs were essentially normal when they examined him, which the prosecution said was inconsistent with his assertion that the impact with the painting was due to a cardiac event;
>
> (e) CCTV footage which, *inter alia*, showed the Respondent carry a can of paint stripper around the gallery in a bag that he never dropped when he apparently collapsed against the painting and also showed him immediately stand up under his own power following the impact, despite claiming that he was caused to fall by a cardiac event.

68. Furthermore, it was submitted, the prosecution ought not to be criticized for seeking to adduce all relevant evidence before the jury.

69. Responding to the complaint that that the jury had been told that the appellant was on bail for the National Gallery case at the time the Shelbourne Hotel incident occurred, counsel for the respondent explained that the reason this evidence was adduced was because it was relevant to establish that one of the terms of his bail was that he not enter any art galleries. It was relevant and admissible evidence, which, counsel submitted, caused no identified prejudice to the appellant. Furthermore, the only possible conclusion to be drawn from the fact that the appellant was on bail was that he had been charged with a criminal offence, a fact that was already known to the jury.

70. It was suggested that the real issue surrounding the decision by the trial judge to allow the National Gallery case go to the jury must be whether or not he was correct in concluding that the jury could be trusted to follow his directions. It was submitted that no grounds have been advanced by the appellant in his submissions to undermine the trial judge's conclusion and no part of his charge to the jury is said to have been unclear or otherwise inadequate.

Decision

71. Having considered the submissions on both sides we are satisfied that the trial judge was correct not to discharge the jury. The discharge of a jury should always be a measure of last resort. Experience has shown that juries take their oath and function seriously,

and that they can be trusted to follow judicial directions and instructions.

72. In this case, following upon the granting of the direction in respect of Counts No's 2 and 3, the jury were given explicit and crystal clear instructions that they were to disregard all evidence in relation to the Shelbourne Hotel incident. The circumstances of the two incidents were such that it required no great mental dexterity to do so, because they were separated in time and place and there was no overlap of witnesses.

73. It was made clear to the jury from the outset by the prosecution that evidence relating to the two incidents was to be considered separately from one another. Moreover, both the prosecution and the defence closed the case by telling the jury in clear terms that they were trusted to follow the directions of the trial judge and not to take evidence relating to the Shelbourne Hotel incident into account for the purposes of the National Gallery matter.

74. While noting what counsel for the appellant contends concerning the alleged futility of raising requisitions, requisitions could certainly have been raised "without prejudice" to the primary case being made in that regard. While the accused was not precluded from persisting in maintaining that the jury should have been discharged, the failure to raise requisitions means that in circumstances where the Court considers that he is wrong in this, and that the trial judge was right not to have discharged the jury, then that is the end of the matter. He must be taken as accepting that the judge's charge was a proper one that correctly and adequately instructed the jury in terms of the need for them to disregard the evidence that they had heard in relation to the Shelbourne Hotel.

75. In the circumstances, we are not disposed to uphold ground of appeal no 2.

Conclusion
76. We are satisfied in all the circumstances of the case that the trial was satisfactory and the conviction on Count No 1 is safe.

77. We therefore dismiss the appeal against conviction.