THE COURT OF APPEAL

Record No. 57/2017

Birmingham P.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

K.C.

APPELLANT

JUDGMENT of the Court delivered on the 21st day of June 2018 by Mr. Justice Mahon

1. This is an appeal against the conviction of the appellant at Dublin Circuit Criminal Court on the 22nd October 2015 following an unanimous jury verdict of guilty in respect of fifty six counts of Indecent Assault contrary to Common Law. The appellant was sentenced on the 2nd November 2016 to concurrent terms of nine years imprisonment in respect of each of the counts, with the final four years of the said sentences suspended on certain conditions. It was further ordered that the said sentence commence upon the lawful termination of an earlier sentence of nine years imprisonment imposed in respect of the indecent assault of a sister of the appellant.

2. The offences occurred between 1980 and 1985 when the complainant, a younger brother of the appellant, was aged between nine and fourteen years, and while the appellant was aged between eighteen and twenty three years. The complainant and the appellant, together with their parents and a number of siblings, lived in a small family home in Dublin. The complainant maintained that he was sexually abused by the appellant on a regular basis over the period of approximately five years. The complainant gave evidence that the abuse started approximately two months after an accident which saw another brother tragically killed. The abuse varied between the appellant groping the complainant's private parts, to the complainant being forced to masturbate the appellant, to the complainant being anally penetrated by the appellant. The complainant maintained that he developed chronic nightmares and a stammer as a result of the abuse he suffered. He first reported the abuse to the gardaí in 2014.

3. The grounds of appeal relied upon by the appellant are three in number, and they are:-

> (i) the learned trial judge erred in failing to discharge the jury in circumstances where, after cross examination of the complainant in respect of his absence from the family home on a date when abuse allegedly occurred, additional evidence was disclosed and adduced by the prosecution which contradicted the evidence previously adduced by the prosecution. The said additional evidence undermined the cross examination conducted by the defence, causing severe prejudice to the appellant;
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> (ii) the learned trial judge erred in permitting the indictment to be amended in circumstances where the appellant was unduly prejudiced by such amendments, and
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> (iii) the learned trial judge erred in failing to discharge the jury in circumstances where, during the course of the trial, prejudicial material had been published on the internet in respect of the appellant.

The admission of additional evidence and the amendment of the Indictment

4. The application by the prosecution to add an additional count arose in the following circumstances. The Book of Evidence included a brochure or booklet relating to a scout's jamboree held in Portuma, County Galway between the 29th July 1985 and the 9th August 1985 to which the complainant was said to have attended. The documents stated the following:-

> *"All troops available of the official jamboree travel package will be transported to Portumna on Tuesday the 20th July 1985. The method of transport will be train and / or bus depending on the geographical location of the troop concerned. The first and last jamboree train will arrive at Roscrea railhead and be met by a fleet of buses which will transport the troops to Portumna camp site. All the other trains..will arrive at Ballinasloe railhead and he same shuttle bus will be provided. Troop travel arrangements will be advised one month prior to camp."*

5. None of the counts preferred against the complainant at the commencement of the trial referred to any incident of abuse in the period 29th July to 9th August 1985, the period corresponding with the holding of the scout's jamboree. It transpired however, in the course of the complainant's evidence that the complainant alleged that he was abused on the weekend of the 3rd August 1985 and he provided specific details of that incident. While the complainant recalled attending the scout's jamboree he was uncertain as to whether he spent the entire two weeks at the jamboree, or had been at home for some part of it. He said however he was at home at the time that a horse (called *Cuban Crisis*) won a race at Galway races as he recollected celebrating at home with members of his family who had been handsomely rewarded from a bet placed on that horse. It was established that the date of the race won by *Cuban Crisis* was the 3rd August 1985.

6. The following extracts from the transcript of the complainant's direct evidence are relevant:-

> *"Q. Now, you went away then on the scouting jamboree and so you were away from the home from that - for that period of time; how long were you away for?*
>
> *A. It was only a couple of days because it went on - I'm not quite sure if it went on for two weeks or whatever it was, but because there's so many different scouts that wanted to go to it, you only get a couple of days at a time.*
>
> *Q. So you returned home from Galway then; did you?*
>
> *A. Yes.*
>
> *Q. Back to (address)?*
>
> *A. Back to (address), yes.*
>
> *Q. And did anything else ever happen to you then?*
>
> *A. Well yes, I remember it was the August weekend, I think it was..*
>
> *Q. When you say the August weekend..*
>
> *A. I think it was the August weekend because it was my mother and father's 25th anniversary and they had gone away to Jersey, and there is -*
>
> *Q. You're still talking the same year here, is that right?*
>
> *A. Oh yes, sorry, yes. We're talking '85.*
>
> *Q. Yes. And so the August weekend is the Bank Holiday weekend; am I right, is that what you're referring to?*
>
> *A. Yes, I think - I'm not 100 per cent if it was the August Bank Holiday weekend, or it was in around that time.*
>
> *Q. And so what do you remember of that then, your parents were away, you said, in Jersey for their wedding anniversary; is that right?*
>
> *A. Yes, for their anniversary, yes. And (KC) and I think it was my brother-in-law and six other people had put money on a horse that…*
>
> *Q. And so you were saying people had put money on a horse; is that right?*
>
> *A. They had put money on a horse, yes.*
>
> *Q. Do you remember the name of the horse?*
>
> *A. I don't.*
>
> *Q. And what do you remember then about the horse race and the money or whatever?*
>
> *A. I remember them, they were all watching it and the horse came in and I know that it was big odds on the horse or whatever, it was back then, and they were all celebrating and delighted because they had practically cleared out the bookies.*
>
> *Q. And do you remember who was in the house?*

(The complainant named a number of people who were in the house, including the appellant)

> *Q. Okay, so what was going on in the house, or can you recall?*
>
> *A. Well basically it is that the - they went to the bookies to collect their money and then they all came back to the house and they were buying - they bought a lot of drink and basically was celebrating, having - having a party."*

7. The complainant then went on to describe how having been given some alcohol by the appellant he went to bed between 11p.m. and 12 p.m. He went on to recall how he was subsequently subjected to a penetrative sexual assault by the appellant after he had gone to bed.

8. The events involving the attendants at the scouts' jamboree and the allegation that he had been subjected to a sexual assault within the scheduled or advertised two week period of that jamboree were re-visited in the cross examination of the complainant. The following extract from the transcript is relevant in this respect:-

> *"Q. ..Now, when in terms of going to the jamboree, how long were you there for?*
>
> *A. A couple of days as far as I remember.*
>
> *Q. I see. And do you recollect when those couple of days occurred over what period of time? Was it a weekday, weekend or can you recollect?*
>
> *A. I can't be a 100 percent sure of it.*
>
> *Q. Can you at all cast your mind back?*

A. Well it was the summer holidays, so one day was like another day. So, I couldn't exactly say it was the weekend or during the week.

Q. I see. Because a few things arose in relation to that. Firstly, in your statement to the guards regarding you going to the jamboree, you refer to going over a weekend?

A. Yes.

Q. Does that jog your memory at all?

A. No I went back over that again because I just had an issue, turned around and said it was jamboree and obviously, weekend because when we had gone away with the scouts, it was always on a weekend. But the jamboree was over - I think it was a 10 day period."

And later:

"Q. Yes. So, are you aware that the business of the horse winning and that was the 3rd of August and that's a Saturday and that's the bank holiday weekend and you allege that you're back at home in your parents' house, your parents are away?

A. Yes.

Q. And yet again another penetration incident occurs but yet in your statement to the guards, you say, "I was away for the weekend." Because there's only one weekend between the 29th of July '85 and the 9th of August? The 29th is a Monday?

A. Yes.

Q. The 9th is a Friday. The only weekend that we actually can cater for over those dates when we know the jamboree was on, in fact is the weekend of the 3rd of August?

A. Yes.

Q. When the horse wins and you're at home?

A. Yes.

Q. Did you think maybe you hadn't got your story right?

A. Well the fact that I was at home and then I did go to the jamboree made me think that it had to be at a weekday. So, it couldn't have been the weekend. That's my only thinking on that.

Q. I see, because another issue arises in relation to that. Because, again, we've been provided with information from the prosecution in terms of the jamboree and the information we've been provided by a Ruth Hughes who in fact found documentation in relation to the camp manual for the jamboree in Portumna in 1985, in Galway. And what this information indicates is that all scouts who were attending the jamboree in fact were to attend for the entire period that the jamboree was on for. So, that it wasn't a situation, as you've indicated..

A. Yes.

Q. - that there would be a visit for a couple of days and go home and another team would arrive?

A. Right.

Q. That in fact as scouts were attending, they stayed for the entire two week period?

A. Well, I couldn't have been in two places at one time. So, maybe our scout group troop broke the rules and just brought us up for a couple of days."

9. Following further questioning the defence counsel asked the complainant the following question:-

"Q. I see. There's no possibility you could be incorrect in your recollection in relation to attending the jamboree and that, in fact, you did attend it for two weeks then?"

10. The complainant responded:

"A. No, no because I was in the house on the August weekend."

11. Prior to the completion of the cross examination of the complainant, Ms. Lacey BL, prosecution counsel, made the following application to the learned trial judge:-

"..The situation is that there are, I suppose, two separate matters to bring to the court's attention. The first is, and I flagged this up to my friend this morning, I have an application to amend the indictment to include another separate count in relation to a very short period of time in August of 1985 which would cover a period of time when, on foot now of the injured party's evidence, he maintains that he was in the family home, and it coincides with the date that the horse, Cuban Crisis, won in the Galway races. That, as the court will have been aware from the evidence, is something that is of contention because he was cross examined, and cross examined vigorously in relation to the fact that he was away at a jamboree in Galway and we know that there are dates of a jamboree in Galway spanning 30th July to the 8th August. My submission is in relation to adding a count on the indictment to cover now that period of time when he says "I couldn't have been in two places at the one time and I was both at home and at the jamboree" and that was on the basis of his evidence. So I have flagged that up to Ms. Burns this morning.

I equally flagged up to her the fact that we would be serving additional evidence, and it was my intention to do that and in fact it is in the process of being served and I have shown Ms Burns a copy of the statement of proposed evidence of a witness by the name of Joe Marken of Scouting Ireland and Ms Burns has an issue in relation to that…"

12. The trial court was advised that Mr. Marken, the witness proposed by prosecution counsel, would say (and ultimately did say) that while the scout's jamboree was for a scheduled two week period, and that while the jamboree's documentation suggested that participants would arrive on the first day and remain until the last day of the event, in fact this did not always happen and that some scouts came and went during the period in question. Such evidence would (and did) clearly allow for the possibility that the complainant both attended the scout's jamboree and was at home within that two week window, including over the weekend of the 3rd August 1985.

13. Ms. Burns SC, counsel for the appellant, vehemently objected to the additional count and the proposed additional evidence. She submitted to the trial court, inter alia, the following:-

"…my submission to the Court is that I adduced that if somebody travelled to that jamboree, they were required to be there on either the 29th or the 30th of July and stay for the two weeks. And instead, Judge, this morning I am provided with a document from Mr Joe Marken of Scouting Ireland and this was taken, I am told by Ms Lacey, after the cross-examination was conducted yesterday afternoon, which now provides information to the defence that Mr Marken was at the jamboree and that his recollection of it is that people came and went and that they came after the start date, and they went home before the finish date.

Had I had this disclosure documentation, never mind it having in fact being served as evidence, but had I had this information I clearly would not have followed the cross-examination that I indulged in with the complainant yesterday. And it is completely unfair, Judge, that a defence that I have been putting forward, which is that the complainant is wrong in terms of his recollection of having been at the jamboree and then back at home on the 3rd of August 1985, and that is now being taken from under my feet and that I am now expected to somehow mend that cross-examination when the horse has obviously bolted.

Disclosure is absolutely vital, Judge, in terms of the preparation of a defence case. And, in fact, had I had this information, I still would have had questions to put to the complainant. But I now can't go back on those questions in light of what, in fact, I have already put to him. In reality, Judge, I have put to the complainant that he is being untruthful about this, and the documentation I submit to the Court supports me in relation to that. And instead now, Ms Lacey, after the 11th hour, I have 15 minutes left in a cross-examination that I have moved from the jamboree that I am now somehow expected to go back over what already has been done and faced with this information that I clearly would have prepared a different cross-examination for. It puts me in an absolutely invidious position and an absolute unfair position in respect of the accused, Mr C.…

This isn't new information that the complainant has somehow come to give and the prosecution now seek to mend their hand because his evidence is different in the witness box. It is not different. The prosecution were always on notice of this. And for some reason best known to the prosecution, they omitted any charge on the indictment that related to the 3rd of August 1985. And the only thing that I can say in favour of the prosecution in that regard is that the complainant in his statement of evidence doesn't refer to the 3rd of August 1985, but on foot of the investigation that was conducted and the other statements that were taken from family members, all other persons, who indeed would have been called today, refer to this gathering on the 3rd of August 1985.

Now, the prosecution chose not to prosecute Mr C. for that. If the Court looks at the indictment that is before the Court, count 51 refers to a date between the 1st of July 1985 and the 29th of July 1985.

Count 50, Judge. It refers to a date of an indecent assault allegedly occurring between the 1st of July 1985 and the 29th of July 1985, the 29th of July 1985 being the start of the jamboree. There is then no count that covers the period of the jamboree, which is the 29th of July 1985 to the 9th of August 1985, and then we have count 51, which includes a date from the 9th of August 1985 to the 31st of August 1985.

So, the prosecution obviously operated on the basis that the jamboree documentation was correct in the interpretation which perhaps the Court is not with me on that, that the persons attending were required to be there, the prosecution obviously operated on that assumption and didn't charge Mr C. with a charge for the 3rd of August 1985 despite what is contained in the complainant's statement and then the extra statements that deal with the event in the family home of the 3rd of August 1985.

The prosecution now seek to completely pull the islands of fact which the superior courts have, time and time again, referred to as being of extreme importance in cases such as this, to completely pull that from under me, adding a count of the 3rd of August 1985 when there is no surprise in relation to the complainant's evidence. He refers to it in his statement."

14. The learned trial judge ruled in favour of allowing the additional count and admitting the additional evidence. She stated:-

"..Now, I have carefully considered the matter and I am asked to discharge the jury on prejudice to the defendant because the count now is meant to be added to the indictment. That count was excluded from the indictment. Whether it was excluded in error or whether it was excluded because the prosecution believed that he was outside of (the home) at a jamboree.

It is clear from the statement of the complainant that a matter occurred, an incident occurred after a win on the horses at a party in the house while his parents were away which happened sometime around the 29th of July and he, being on his summer holidays, doesn't remember whether it was a weekend or during the week as every day was the same and he said he was both at the jamboree and at home in (the home address) during that period. I have carefully considered the manual and I can't take an interpretation just because people are asked to be at a jamboree that they are at that jamboree; that would have to be proved, that he was there at a particular time. Just because a manual says that you are required to attend doesn't mean, obviously, that you do attend.

Whether he is prejudiced now by the addition of an extra count to cover the 1st and the 9th of August, it was put to him at interview that there was an allegation following a win on the horses on the 3rd of August 1985 and Cuban Crisis was

the name of the horse running in the third race, a pretty detailed allegation was put to him, which he denied. That was included in a charge which he pleaded not guilty to, and the incident was outlined in a statement. By the addition now of that count to the indictment there is no prejudice to the accused and I refuse your application to discharge the jury."

15. The jurisdiction to amend an indictment is provided by s. 6(1) of the Criminal Justice (Administration) Act 1924. It states:-

> *"6.(1) Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot in the opinion of the court be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit."*

16. Commenting on that provision, Fennelly J. in *DPP v. Walsh* [2010] 4 I.R. 746, stated:-

> *"The court is satisfied that s. 6(1) of the Act of 1924 confers a broad discretionary power on the trial judge to amend the indictment. The purpose of any amendment must be to ensure that the jury will address the true issues when they come to deliberate on their verdict. The counts in the indictment should correspond as closely as is reasonably possible with the real case for the prosecution. The section requires such amendments to be made as "the court thinks necessary to meet the circumstances of the case ". The section sets no time limit to the exercise of this power. It may occur "at any stage of a trial". It may well be that, in a particular case, a late amendment cannot be "made without injustice". A court should not exercise the power in circumstances involving prejudice to the defendant in the defence of the charges against him. This is prejudice in the legal sense. It does not mean that an appropriate amendment should be refused merely because it would lessen the chance of an acquittal."*

17. An important distinction between Walsh and the instant case is that in the former the application to amend the indictment was at the close of the prosecution case whereas in the instant case it was made during the course of the complainant's evidence. An immediate and obvious consequence is that in the instant case the appellant was arguably in a better position to deal with any additional evidence forthcoming than had the application been made at a later stage in the trial.

18. In *Walsh* Fennelly J. also remarked as follows:

> *"It is quite clear that the trial judge carefully framed each of these counts so as to make them correspond as closely as was reasonably possible with the evidence actually given by the complainant. He noted that the allegations made by the complainant had been very specific as to location, surrounding circumstances and as to the activity allegedly perpetrated by the accused on the complainant. He thought them much more specific than in any trials he had presided over. He cited the decisions of the Supreme Court in The People (Director of Public Prosecutions) v. E.F. (Unreported, Supreme Court, 24th February, 1994) and of the High Court in D.O'R. v. DPP [1997] 2 I.R. 273. He thought that there could be no possible injustice to the accused if he kept, as he did, to the outer parameters of time set out in the book of evidence.*
>
> *The accused has not attempted to point to any particular injustice. He merely complains that the amendments should not have been made at the end of the prosecution case.*
>
> *…In any event, it has not been suggested that any of these time variations gave rise to any actual prejudice to the defence in meeting the case. At no point was any argument advanced to the effect that the dates were significant to the defence. No question of an alibi defence arose. It was not suggested to the complainant that he and the accused were not acquainted or that they had not spent a lot of time in each other's company. The sole basis of the defence, as put in cross-examination, was that the accused had not committed any sexual or indecent assault on the complainant."*

19. In his book *Walsh On Criminal Procedure*, Prof. Walsh states:-

> *"Circumstances may arise in which the prosecution may wish to adduce further evidence before it has presented its case. It may happen, for example, that new evidence becomes available at a late stage or that the defence has introduced a matter in evidence which the prosecution wish to rebut. It may even be that the prosecution had inadvertently omitted to introduce some evidence as part of its case. There is not strict legal prohibition on the tendering of further evidence at a later stage. Indeed it would be entirely a matter for the discretion of the trial judge to determine whether evidence can be adduced by the prosecution or the defence after the close of their respective cases."*

20. There are a number of features in the instant case which deserve to be highlighted. Firstly, the proposed additional count related to a period of time well within the five year period between 1980 and 1985 in which the various allegations of abuse relate to. Secondly, the complainant's evidence that he was at home on the evening of the race win and that he had attended the jamboree undoubtedly inferred that he had not attended the jamboree for its entire duration, and thirdly, the complainant's evidence as to the circumstances of the sexual assault on this occasion and his dating same in the context of the race win and his parents being away on holidays was quite specific in its detail.

21. The additional count sought to be introduced in this case was one very much within the general framework of the allegations being made against the appellant. The additional count cannot have come as any great surprise to the appellant in the circumstances and it represented a real issue in the case that required to be addressed by the jury. It was, in the court's view, well within the discretion of the learned trial judge to allow the additional count at what was a relatively early stage in the trial and before the completion of the cross examination of the complainant by defence counsel. It is difficult to identify any particular injustice that was caused by the introduction of the additional count. The fact that the additional count might, to use the words of Fennelly J. in Walsh *"lessen the chance of an acquittal"* is not a relevant consideration.

22. This ground of appeal is dismissed, as is the ground relating to the learned trial judge's leave to allow Mr. Marken give evidence. While the jamboree brochure which had been included in the Book of Evidence may have established that a scouts' jamboree took place within the dates stated it could never of itself have amounted to proof that all who attended the event did so for its entire duration. Evidence from Mr. Marken was therefore relevant and admissible.

Prejudicial comments on the internet

23. An application was made by Ms. Burns to the learned trial judge following the ruling in relation to the aforementioned issues, in the following terms:

> *"..A sister of Mr C's previously had a trial where Mr C. was the accused person, and he was found guilty in relation to that matter and sex allegations were made. That sister will be a witness in relation to this matter. Now, while she is married and her name obviously will be different, nonetheless, she would be completely identifiable if the jury were to add two and two together at all. There was something put up on Facebook last night that relates her previous trial with a trial that she is due to attend this week and it is under the heading of sibling abuse. Now, clearly I have no way of ascertaining whether the jury are a friend of any of these people, and I am not a Facebook user so I am never quite clear as to how this whole thing works, but certainly my solicitor is concerned that it may be, and it is quite possible, that members may well be on the jury who have in some way had access to the posting she has made on Facebook. Now, we have brought it to the prosecution's attention and I am very loath to make the application because it does seem to me that I don't have a huge amount of information in that we do have the message but there is clearly a link which, without any great thought, would establish it between the two cases."*

24. The application made by Ms. Burns was one for a discharge of the jury. It was subsequently clarified that the name used in the postings by the appellant's sister was in her maiden name of C. The postings in question referred to a sentence of nine years imprisonment imposed on the appellant in relation to his abuse of his sister, and the fact that that sentence was under appeal. The postings apparently were dated as recently as the date of the commencement of the trial or shortly before it. There is no suggestion that they had been placed in order to frustrate the trial, and they were apparently taken down immediately the matter was raised in court.

25. The learned trial judge ultimately decided to decline to discharge the jury and to proceed with the trial. She said:-

> *"…a lot of other Circuit Court judges do it as a matter of course. I haven't done it in this case as I always say decide this case on the basis of the evidence, and I take your point that it's an invitation to them to do it, but many people who are younger than me go on the Internet quite a lot, and I've no evidence here that anybody on this jury has done so. I'm going to give them the warning and I'm going to proceed."*

26. The learned trial judge then proceeded to warn the jury in the following terms:-

> *"Mr Foreman, ladies and gentlemen of the jury, a usual warning given by many judges is not to look on the Internet or take any notice of any print media about any case, all right. I have to ask you, has anybody accessed any information outside the evidence that you've heard in this court relating to this case or anything like this? All right. Is that a no from everybody? Yes, no. All right. So -- and the reason for that is, right, there is reports, and I'm not saying there's any reports about this case, right, but anything that you read shouldn't be taken accurately because it's not tested in cross-examination. You decide this case on the basis of the evidence in this court, right, because that's the only way that you can have a fair trial, because people can say things or post things or print things, and it's not tested by cross-examination. You should take no notice of it, all right. And you would actually be in breach of your oath because you took an oath that you'd well and truly try the issue and a true verdict give according to evidence, right, and it's according to the evidence in this case, okay. And this is perhaps something new because of all the - all the Internet and social media and print and papers, okay, so I'm asking you not to do that, and many judges give it as a matter of course, that warning, okay. So, please don't do that because it's not a fair way to approach the case. And I have to ask you and I hate asking anyone to be an informer, but if you think that anybody else on the jury has done that, please tell me because it's your and my function to ensure here that there's a fair trial to everybody, okay. All right. Okay. Is that all right?"*

27. A number of superior court decisions relied upon in support of this ground of appeal. One of the decisions is the case of *DPP v. Mulder* [2007] IECCA 63. The following comments are highlighted:-

> *"…The right of an accused to be tried by a jury free from any suspicion or taint of bias was one of the cornerstones of the criminal justice system but this right had to be read in the context of the maxim that justice should not only be done but be seen to be done. The test was an objective one, as to whether a reasonable person would have a reasonable apprehension that the accused would not in the circumstances, receive a fair and impartial trial. The court also had to have regard to the robust common sense of juries.*
>
> *.. the test must be an objective one:- "Would a reasonable person have a reasonable apprehension that the appellant would not, in the circumstances receive a fair and impartial trial?" This test was taken from the Supreme Court decision as expressed in the judgment of Denham J. in Bula Ltd. v. Tara Mines Ltd. (No. 6) [2000] 4 I.R. 412 . Of course, in applying the test the court must also have regard to "the robust common sense of juries""*

28. For her part, the respondent also relied on a number of superior court decisions in support of the argument that the learned trial judge was correct in refusing to discharge the jury and continuing with the trial. The court was referred to the decision *in Dawson v. Irish Brokers Association* (Unreported, Supreme Court, 6th November 1998) as an authority for the contention that a jury should not be discharged except as a measure of last resort. The court was also referred to the decisions in *DPP v. D* [1994] 2 I.R. 465 and *DPP v. Z* [1994] 2 I.R.. The court was also referred to the Court of Criminal Appeal decision in the case in *DPP v. Cunningham* [2007] IECCA 49. In that case, the trial judge drew the jury's attention to their obligation to try the case without regard to anything they might see on the internet. The jury was asked to confirm whether or not they had seen anything of relevance on the internet and they responded 'No'. Later in the trial the trial judge's attention was again brought to the content of a particular internet site and to the fact that there had been a reference to it in a recent Sunday newspaper. The trial judge decided to continue with the trial. In the course of his judgment in the Court of Criminal Appeal, Finnegan J. (as he then was) remarked as follows:-

> *"Juries are quite capable of accepting a trial judge's ruling that something is irrelevant. If properly directed they can be expected to abide by their oath and find facts on evidence properly before them. The question asked by the learned trial judge of the jury was appropriate and their answer should be accepted and as they had not consulted the website prior to the learned trial judge's warning the court is satisfied that they would not do so thereafter and that there is no real risk of unfairness arising out of the existence of the website. To hold that such a risk exists would require that at least one juror had visited the website and read the relevant blogs, will be prejudiced against the applicant because of the same, will not comply with his/her oath as a juror and will not comply with the charge of the trial judge. The applicant fails on this ground."*

29. Internet postings and references on the internet to trials, and persons on trial and to witnesses, can be problematical for the administration of justice. They are difficult, if not impossible, to control, and in instances where they are brought to the attention of a trial judge their effect can be difficult to assess in the context of the overriding responsibility and necessity to provide an accused

person with a fair trial. This difficulty is likely to arise in ever increasing occasions into the future.

30. In the instance case, the learned trial judge specifically asked the jury if any of them had seen the postings in question. None had apparently done so. There is no reason to believe that any member of the jury would have misled the court on this issue if indeed they had seen such a posting and it is not unreasonable to have taken them at their word. However, and importantly, whether or not any such postings had been seen by any member of the jury they received a very firm and unequivocal direction to the effect that their duty was to decide the case solely on the evidence heard in court. In these circumstances the learned trial judge was correct to refuse the defence application to discharge the jury, so this ground of appeal fails.

Conclusion
31. As all grounds of appeal have been rejected the court will dismiss the appeal.