THE COURT OF APPEAL

107

114/13

The President

Birmingham J.

Edwards J.

No.

The People at the Suit of the Director of Public Prosecutions

Respondent

v

Alan Wilson and David Crowley

Appellants

Judgment of the Court delivered on the 5th day of November 2015 by

Mr. Justice Birmingham

1. The appellants were tried jointly in the Dublin Circuit Criminal Court. The first named appellant, Alan Wilson, was charged with and convicted of a single count of burglary. Subsequently, he received a sentence of seven years imprisonment in respect of this offence. The second named appellant, David Crowley, was also convicted of a burglary offence and further of an offence of possession of a firearm, a shotgun, in such circumstances as to give rise to a reasonable inference that it was not in his possession for a lawful purpose. The trial judge, His Honour Judge Desmond Hogan, imposed a sentence of seven years imprisonment in relation to the burglary offence and a concurrent sentence of eight years imprisonment in respect of the firearms offence.

2. At issue at trial were offences alleged to have occurred at 56 Drumheath Drive, Blanchardstown, on the 3rd June, 2009. A number of statements were furnished to gardaí by the occupant of the house, one Lisa Murray. By reference to these statements, it was the prosecution contention that on the occasion in question, Ms. Murray had seen both appellants walking into the kitchen of her home and had then seen the second named appellant, David Crowley, hit her boyfriend, David O'Brien, on the head with a meat cleaver. A statement referred to the presence of blood on Mr. O'Brien's head after the assault. The statement of Ms. Murray refers to the fact that she left the house and went around to her father's house which was nearby. As she left the house, she heard two shots being discharged.

3. A statement was also provided to the gardaí by Noel Murray, the father of Lisa Murray, who said that he had been at home at 7.30 pm on the relevant occasion, the 3rd June, 2009, had heard two loud bangs and that his daughter had come to the house screaming. According to Mr. Murray's statement, he had gone with his daughter back towards her house and had seen David Crowley along with others leave the house. Mr. Crowley was holding a firearm. It is a noteworthy feature of the case that at no stage was a statement provided by Mr. O'Brien, the alleged injured party, nor did he play any role at trial. Both applicants have appealed against conviction and Mr. Wilson has also appealed against severity of sentence. The sentence severity aspect will be dealt with later, to the extent that it is necessary to do so, but suffice to note at this stage that Mr. Wilson was in custody solely in relation to the current burglary charge between the 6th March, 2012 and the 5th April, 2012. Between the 5th April, 2012 and the date on which he was sentenced on this burglary matter on the 12th April, 2013, Mr. Wilson was in custody in relation to a murder charge in respect of which he was acquitted on the 31st July, 2014.

4. Each appellant has advanced a number of grounds of appeal and while some are specific to one appellant or the other, there is considerable overlap. It is convenient to deal first with those grounds which are common to both. The grounds of appeal which are common to both appellants are as follows:-

> (i) Failing to discharge the jury on the application of both appellants where there had been contact between the second named appellant and some jurors following day two of the trial.
>
> (ii) The admission into evidence of the statement of Lisa Murray and Noel Murray and a failure to impeach Lisa Murray.
>
> (iii) A challenge to the lawfulness of the arrest.
>
> (iv) No evidence that any physical contact that might have occurred/alleged assault was in fact unlawful.
>
> (v) Lack of evidence that the appellants entered the premises at 56 Drumheath Drive as trespassers.
>
> (vi) The adequacy of the judge's charge in relation to trespass and the response to questions from the jury in that regard.
>
> Ground 1: Failure to discharge the jury following contact between the second named appellant and some jurors at the conclusion of day two of the trial

5. While this point appears in both notices of appeal, it is really only being argued with real force by Mr. Crowley. The point arises in

the following circumstances. When the court sat on the 8th February, 2013, which was the third day at trial, the trial judge, in the absence of the jury, informed counsel that the "jury minder" had been told by a juror that on the previous afternoon, following the conclusion of court business as the juror left the court building, that he took out a cigarette at which stage the appellant, David Crowley, approached him and lit his cigarette. The judge indicated to counsel that he felt that the proper course of action to be adopted by him was to bring down the juror and ask certain questions of him. The juror was brought into court and the following exchanges between judge and juror took place.

> "Judge: Can I say this much to you firstly: I am most obliged to you. You did mention to the jury minder who mentioned – who caused it to be mentioned to me that when you were stopping to have a cigarette just outside the court building, I think, that one of the accused came over and lit your cigarette: is that right? Now was that – could you just tell me – just tell me what happened. I just got to hear –
>
> Juror: I was looking for my lighter that's all.
>
> Judge: Yes.
>
> Juror: And the gentleman there just came over and offered me a light. To be honest with you, I didn't recognise him at the start because he had a black jacket on him.
>
> Judge: Yes.
>
> Juror: And then I recognised who it was and just said 'Thanks' and off he went.
>
> Judge: Alright, tell me did you – how did you regard that? Did you feel threatened in any way by it?
>
> Juror: Not at all, no. No my lord.
>
> Judge: And you didn't think that that would be an influencing factor. Or do you –
>
> Juror: Not at all.
>
> Judge: That it could be reaching – you reaching a free and unfettered decision having deliberated.
>
> Juror: It won't impact on me whatsoever.
>
> Judge: Good, bad or indifferent?
>
> Juror: Good, bad or indifferent, your honour.
>
> Judge: Alright. Tell me, did you mention that to any of the other jurors?
>
> Juror: Well four of them go with me and there were two more in front of me so –
>
> Judge: Yes?
>
> Juror: And some of them saw it.
>
> Judge: And?
>
> Juror: And I mentioned it to them this morning.
>
> Judge: And did any of them –
>
> Juror: As I said, I felt obliged to mention it.
>
> Judge: Well I'm – oh I'm greatly obliged that you did, and you are to be commended for that. No doubt about that. Did any of the other jurors make any comment to you about or otherwise?
>
> Juror: No, not – they were just surprised I think. A few jaws dropped. That was about it.
>
> Judge: Yes. Okay. Thank you. I don't mean to embarrass you or anything –
>
> Juror: Oh, not at all.
>
> Judge: By singling you, but I have certain duties.
>
> Juror: I think we felt a bit uncomfortable going all – going out at the same time as the defendant, you know, through the turnstiles and all –
>
> Judge: Yes.
>
> Juror: As a result of that.
>
> Judge: Yes?
>
> Juror: That's the only thing I would say.
>
> Judge: That's all.
>
> Juror: That's all."

6. There followed some discussion between judge and counsel, but counsel for Mr. Crowley indicated that while he would have to take instructions, he would be very concerned at this stage. Counsel referred to the fact that the gentleman had said, notwithstanding that he was not influenced, that he felt uncomfortable. Counsel for Mr. Wilson interjected to say that he would be uncomfortable about phrases such as "jaws dropping" and "feeling uncomfortable".

7. At that stage, the whole jury was brought into court. The judge addressed the jury as follows:-

> "Madam Foreman, ladies and gentlemen, good morning to you. Thank you for your attendance again this morning. A certain matter arose yesterday and a juror very properly brought it to the attention of the jury minder who then caused it to be brought to my attention and that was when he was going to have a smoke outside on leaving the building yesterday at the end of the trial, that one of the accused went over to him and lit his cigarette for him. Now, I think there were other jurors present when that happened and I think other jurors may have seen what happened. And I want to ask you and I will give you some time to consider it if you wish, whether you would consider that to be an influencing factor that would make you perhaps slightly nervous or upset or could have the effect on you that you could not give a fair and considered and reasoned verdict, or would you have been influenced by that in any way? In other words, did you feel harried by it, did you feel frightened by it? Now that is – and therefore could you be influenced by it and of course more particularly could you be influenced by it adversely to the accused? Madam Foreman do you think – would you like some time to discuss that with your members of the jury or do you think it necessary at all?"

8. The foreman responded by saying that he felt that he would rather the matter was discussed than that he would speak for everybody. The jury were then given an opportunity to discuss matters and when they returned to court, the foreman said:-

> "We are happy that it is not going to have any effect on our decision on either of the accused at all. We were just happy that it has been brought up with yourself for the benefit of ourselves, but also for the defendant."

9. After the jury retired once more, both defence counsel pressed for the discharge of the jury, an application which was opposed by the prosecution. Following further debate, the judge ruled as follows:-

> "Well it appears to me that – from my point of view that I have approached this matter very carefully and that I have made inquiry firstly with the juror concerned, whose cigarette was lit for him by one of the accused on the steps of the building as he had just left it, and arising from what he had said and told me, I furthered that inquiry and opened it to the jury as a whole. The reason being was that from what the first juror told me, or told the court, there were other members of the jury present, when that happened and also matters had been mentioned in the jury room this morning. Now, one of the – having asked the jury certain questions, that's the twelve of them, being roughly the same questions as I asked the single juror when I singled him out from the jury, that's the juror whose cigarette was lit for him, as to whether they felt frightened or threatened in any way by this act, and as to whether they would feel that because of this act, they would not be able to give a free and unfettered judgment or verdict. I also asked them that by this act, was the reputation of either or both of the defendants tarnished to the extent that they felt that a fair verdict could not be reached by them after consideration. And the answer to that, and all questions, appears to me that the jury feel very clear in their minds that they can continue, that they can proceed to give a fair verdict and that the reputation or that their view of the accused, and I mean that in the plural sense, is not in any way tainted and that their verdict will be based on a fair way and an unbiased way.
>
> Now, I have a certain discretion in this, and it appears to me I have no small discretion in this, I've got quite a large discretion in fact, ------- application or the actual discharge of the jury, it appears to me would be warranted where the interference would be such as to create a real – I lay emphasis on the word "real" danger of an unsafe verdict or where the interference would form the bias or the bias rather of – for so called objective bias which arises when an objective observer and I am quoting now from the criminal process, where an objective observer aware of the facts might reasonably apprehend that justice had not been done. I don't think that arises in this situation. I have made proper and due inquiry and I am satisfied that what I have been told by the jury to proceed with the trial. I am satisfied as jurors are frequently told to rely on the robustness of the jury. So proceed. I accept that not a lot of evidence has been heard. I accept that, but we have been, what have we, a day to voir dire effectively and – but this is not the reason, let me say very clearly, as to why I would have decided to continue with the trial. The reason that I have continued with the trial is the reason I have already mentioned. I think this jury are well capable of giving an unbiased and fair verdict.

10. In support of this ground, counsel for Mr. Crowley has relied on the cases of The People v. Tobin [2001] 3 I.R. 469 and DPP v Mulder [2007] I.R. 796.

11. In the Court's view neither of these cases are really on point. Tobin was a case where the foreman of the jury had disclosed during deliberation, but prior to conviction for rape and sexual assault, that a juror had disclosed a personal experience of sexual abuse. The foreman told the court that this was not affecting the impartiality of that juror in any way, but that the jury felt that this was a matter that should be brought to the attention of the court. The trial judge granted a certificate for leave to appeal on this ground and the Court of Criminal Appeal simply quashed the conviction. During the judgment of the Court of Criminal Appeal, Fennelly J. commented:-

> "Moreover, even jurors without similar experience of sexual abuse might well be influenced by sympathy for a fellow juror who had suffered, at the hands of another, the type of abuse with which the accused was charged. That is not to say that such consideration would apply to the trial of every type of offence where a juror had undergone a similar ordeal. It is enough to say that assumed abuse is in a special category. Nor does it follow that subsequent discovery that a juror had had an experience of that kind would warrant quashing the conviction. The issue in this case was explicitly raised by the jury which expressed its concern."

12. The facts of Tobin are very far removed indeed from the facts of the current case. In the case of DPP v Mulder, the foreman of the jury informed the court that the deceased's brother was making himself "a small bit familiar with some members of the jury". Addressing the court, the foreman referred to the fact that there had been an outburst at the arraignment stage, apparently involving the deceased's brother. On the following day that individual, the deceased's brother, had borrowed a paper from the juror and read out a report of the outburst on arraignment. The foreman stated that the juror in question felt that the deceased's brother was familiarising himself with him and had, at the end of the day, greeted him with a smile and a nod. The foreman said that the juror felt somewhat intimidated and uncomfortable. The trial judge inquired of the juror if he felt intimidated or uncomfortable. The juror said he did not, but that he felt the familiarity was wrong and went on to add that he was probably able to continue as it stood. The Court of Criminal Appeal quashed the conviction. However, in doing so the court made the following observation:-

"While the courts should be reluctant to discharge a jury because of individual incidents involving communication with a juror, the nature of this intervention and the cumulative effect of the incidents and the conflict to some extent in the reports given to the judge would have led an observer to be concerned that there would be a risk of an unfair trial."

13. In the Court's view, this incident having arisen, the matter was dealt with, as indeed he himself observed, by the trial judge in a very careful manner. He was best placed to assess the impact of what had occurred on the jury and whether it was safe to allow the trial to continue. He correctly addressed his mind to the fact that the issue was whether there was a real risk of unfairness. No reasonable observer would have had any concerns at the approach taken by him. Certainly, the course of action that he chose to follow was one that was open to him and the conclusion that he arrived at is not one that can be interfered with. This ground of appeal fails.

Ground 2: Statements of Lisa Murray

14. This ground of appeal arises in a situation where on the day of the alleged incident, Ms. Murray had made two statements to different members of An Garda Siochána. At trial Ms. Murray resiled from the two statements that she had made to An Garda Siochána. The text of the two statements were as follows:-

"Statement 1

I hereby declare that this statement is true to the best of my knowledge and belief and that I made it knowing that if it is tendered in evidence I would be liable to prosecution if I state in it anything which I know to be false or do not believe to be true. –

My name is Lisa Murray and I live at the above address with my two kids who are two years old and six years old. This evening I was at my house with David O'Brien and Jacko – I don't know his real name. I think he is from Blanch, but I don't know where he is from. He dropped David over in his car. I don't know the type of car, but it is a big red one. David is my boyfriend on and off for the last five years. At about 7.40 pm, this evening I was in the sitting room with the baby and I went to get his soother in the hall. I saw two people walking into my kitchen. I recognised Alan Wilson straightaway. I know him, 'cos, my sister is going out with his cousin and I have seen him around the estate. I think he lives in Wellview now. I didn't see the second fella's face straightaway. After they went into the kitchen I heard a scuffle. I heard the chairs in the kitchen falling around the place and the bin being knocked over. I ran to the door of the kitchen and saw David Crowley hitting my boyfriend David O'Brien. He was hitting him in head with a handle of a knife. It wasn't a knife from my house. It was about 6 to 8 inches long and 4 inches wide. It was a meat cleaver. I grabbed David O'Brien and pulled him out of the kitchen into the hall. David Crowley turned around with the knife in the air towards me. I thought he was going to hit me with the knife. I was so scared I ran out of the house. I ran to Drumheath Grove and got my dad. As I was running around to his house I heard two gunshots. I got my dad, and me, him and my brother ran back to the house. As I got to the house I saw three people getting into a silver car. I saw David Crowley roaring at my dad before he got into the car. The car went off down the road and I came into the house to see if someone was shot. David was in the sitting room. There was blood on his head. At the moment there is trouble with our family and Vera Cahill. She is going out with David Crowley. My brother Martin used to go out with her. That ended about five years ago, then they were on and off for a while and for the last three years they haven't been with each other. They have a child with each other. She lives in Parlickstown Court. I think for the last three years there has been trouble with her. I cannot remember the clothes the two fellas in the house were wearing. I remember Alan Wilson had a pair of black gloves on. I got a good look at Alan Wilson and David Crowley. I was 100% sure it was the two of them that were in my kitchen. I didn't see who the third fella was. I didn't give any of the three of them to come into my house today at 56, Drumheath Grove, or to damage my property. (Italics added)

Statement 2

I hereby declare that this statement is true to the best of my knowledge and belief and that I made it knowing that if it is tendered in evidence I would be liable to prosecution if I state in it anything which I know to be false or do not believe to be true. –

On Wednesday the 3rd June, 2009, I gave permission to members of An Garda Siochána to take possession of my house at 56, Drumheath Drive, Mulhuddart,

D. 15 as a crime scene. I understood fully that this crime scene will be examined by An Garda Siochána and any results of this examination may be given in evidence during any subsequent court proceedings."

15. It is convenient at this stage to refer to a statement provided by Noel Murray which has given rise to similar issues. The text of that statement is as follows:-

"I hereby declare that this statement is true to the best of my knowledge and belief and that I made it knowing that if it is tendered in evidence I will be liable to prosecution if I state in it anything which I know to be false or do not believe to be true. –

I remember Wednesday, 3rd June, 2009 I was at home in my own house. I was out the front sweeping up my driveway. It was still very bright and sunny out. It was around 7.30 pm to 7.45 pm. I know this because my daughter had just dropped my wife to her bingo. I put my tools back in the shed when I was finished and I came back into the sitting room of my house which is at the front of the house and the windows are wide open in the sitting room. I heard two loud bangs, like two loud bangers. They were within a couple of seconds of each other. I lifted a net curtain to see if I could see anything, but I couldn't. Then I heard screams 'Da, Da' I didn't realise who it was at first. I opened the porch door and I saw my daughter Lisa Murray standing at the kerb outside my house. She was hysterical. She said 'Somebody is after shooting at my house'. I immediately thought of the kids. I ran around and my son Martin followed me. When I got around to the house, I saw a silver coloured car parked up around 10 to 15 yards from Lisa's house. It was facing me. It was a silver coloured saloon. There were three lads walking away from the house. I roared at them 'You big hard man, shooting up where there is kids'. I think there was one sitting in the car. The other three were walking towards the car. When I roared at them Davy Crowley turned around. None of them were wearing balaclavas or anything. I know Davy Crowley over ten years, even fifteen years. My daughter Lorraine is living with Davy Crowley's brother Denis. Davy Crowley's

> mother lives in town. Davy is from there. I didn't recognise the others, but it was definitely Davy Crowley. Davy Crowley was holding a shotgun. It was a sawn off shotgun. Somebody roared at him 'Come on get into the car, get into the car'. I am nearly sure Davy got into the passenger side. The car spun around then to head out of the scheme. When the car was turning I away (sic) some of the reg. I am nearly positive that WX was the county on it. I walked into the house, then I saw blood all over the floor. I was trying to calm my daughter down because my two year old grandson Devin was here. I ran out the front again and I seen the blood on David O'Brien's head and hand. I shouted to get an ambulance. I seen a tall lad with tight hair with Davy O'Brien. I think his name was Jacko. I didn't see them leave. I went back in and mopped up blood. My daughter showed me a plastic bag. I lifted it up and looked in. It was some sort of grubby t-shirt. This is all over my son Martin, breaking up with Vera Cahill who is a relation of Davy Crowley. He broke up her after eleven years and she didn't take it too well. I couldn't describe the other three because they kept their back to me. I was angry and frightened when I saw the gun. I feared for my grandchildren's safety."

16. When, on the first day of the trial, Lisa Murray was called to give evidence she responded to what was really an introductory question from prosecution counsel, who asked her whether anything had happened at her house on the 3rd June, 2009 as follows:-

> "I was after being up with my sister and about 6.00 her husband dropped me home and I opened the door and just heard an argument in the kitchen, I just ran out of the house and went around to my Da. I didn't see who was in the house or anything. My ex boyfriend that used to live there, he used to bring people in all the time when I wasn't there, so I didn't know who he had in the house at the time."

17. This gave rise to an application by the prosecution, pursuant to s. 16 of the criminal Justice Act 2006, to admit into evidence the out of court statements made by Ms. Murray. In the course of a voir dire, Ms. Murray said that she had been out of the house for a lot of the day in question, that she had been drinking with her sister and that, when she came home, she heard people in the house who she did not know and initially thought they may have broken in. She said she was drunk on the night and did not recall making any statements to gardaí, though she did identify her personal details and signature on the statement taken from her by Garda Mullaney. Under cross-examination, she said that her ex-partner, Mr. David O'Brien, may have invited people into the house and that she was under particular stress at the time that this incident occurred as her mother had recently been diagnosed with cancer. Following the voir dire, the court ruled that the statement furnished by Ms. Murray to Garda Mullaney should be admitted into evidence, pursuant to s. 16 of the Criminal Justice Act 2006. Both appellants challenged the correctness of the ruling. On behalf of Mr. Wilson it is submitted that there was evidence which, it is contended, was uncontested that the witness, Lisa Murray, was drunk when she made the statement. However, notwithstanding the submission, Garda Mullaney, who took the statement, said that as far as he could tell Ms. Murray was not under the influence of an intoxicant.

18. Again, on behalf of Mr. Wilson, emphasis was placed on the fact that the statement in question was not one that was made on oath nor was it video recorded. However, the DPP responds by saying that the relevant section also provides for the admission of a statement where it contains a statutory declaration as was the case here. Both appellants argued at trial and on appeal that the admission of the statement was unfair.

19. Criticism focused in particular on the phrase "I didn't give any of the three of them to come into my house today at 56 Drumheath Grove". Two points are made. First of all it is said that there is a word missing after "any of the three of them" and supplying the word "permission" is impermissible speculation. Secondly, it is said that the reference to 56 Drumheath Grove is an error, that there is no suggestion that any incident took place there and that all the indications are that Ms. Murray resided at 56 Drumheath Drive.

20. In relation to the two specific criticisms, the omission of a word which is suggested to be "permission" and the reference to 56 Drumheath Grove, the Court is of the view that neither of these points was of sufficient substance, in and of themselves, to justify not admitting the statement in question as evidence. It is practically certain that the word omitted was "permission", but more fundamentally all of the evidence in the case, the evidence of the gardaí who came on the scene, the balance of the challenged statements of Ms. Murray and indeed what she had to say in court, leaves no room for doubt but that the position is that she did not give Mr. Wilson and Mr. Crowley permission to enter on the premises and to be on the premises.

21. On the more general question of whether this was a case where it was appropriate that a statement should be admitted under s. 16, it is clear that the trial judge was very conscious indeed of the statutory framework and had the benefit of detailed submissions from counsel on all sides as to how the statutory scheme operated and was intended to operate. In this case, there was information available to the trial court which enabled it to conclude that statements in issue had been made by Ms. Murray and that her evidence in court was materially inconsistent with them. There was, and could have been, no dispute that direct oral evidence of the facts concerned would have been admissible, the statement was clearly made voluntarily and indeed was volunteered in the immediate aftermath of a serious incident. There was evidence that it was reliable in the sense that it was clearly established that the statement was made and the circumstances in which the statement was made were that it was taken in the immediate aftermath of an incident, in her own home and before there was an opportunity to concoct or fabricate a statement. In addition, while it is true that the statement was not given on oath or affirmation, nor was it video recorded, it did contain a statutory declaration and the court was fully entitled to conclude that when made, that Ms. Murray understood the significance of what she was saying and understood that there was a requirement to tell the truth.

22. There remains for consideration the question of whether there was a risk that the admission of the statement would be unfair to the accused or either of them or that it was in the interest of justice that the statement ought not to be admitted. The appellants, and in particular Mr. Wilson, emphasised that the statement deals with a visual identification. They point to the well recognised dangers of visual identification and say that there is no opportunity to conduct an effective cross-examination in a situation where a witness is not standing over a purported identification. However, it must be appreciated that this was not a fleeting observation of a stranger at a bus stop or anything of that nature. The statement of Ms. Murray was very specific in that she recognised Alan Wilson straight away and that she knew him because her sister was going out with his cousin and she had seen him around the estate. It was a recognition effected in her own kitchen. Furthermore, some support for the statement is to be found in the fact that she commented that Alan Wilson had a pair of black gloves on when this occurred on the 3rd June, and the car in which Mr. Wilson was travelling when stopped was found to contain gloves. Again, support for the general reliability of the statement is provided by the statement of her father Noel Murray. The court is of the view that this was not the usual case of visual identification at all. Those who participated in this incident made no attempt to hide their identity. Instead, one must conclude that they were confident that those who were in the house and those who observed them, would, for whatever reason, be reluctant to give evidence. The fact that Ms. Murray and her father resiled from their statements and that Mr. O'Brien never gave a statement at any stage shows that their confidence was not misplaced.

23. In all the circumstances, the Court is of the view that there was ample material available to the trial judge to allow him to reach the conclusion that this was a case for admitting the statement. The point has been made, and indeed has been the subject of

supplemental written submissions on behalf of the appellant Alan Wilson, that there was a failure to impeach Lisa Murray. In the Court's view, this point is somewhat misconceived. The complaint is really that the procedure provided for in Lord Denman's Act for having a witness declared hostile was not followed. However that complaint misses the point that s. 16 of the Criminal Justice Act 2006 provides a new statutory procedure. The procedure is not made contingent on a successful application to have the witness whose statement it is sought to have admitted declared hostile.

Statement of Noel Murray

24. A statement was also taken from Mr. Noel Murray on the 3rd June, 2009. On this occasion the statement was taken by Detective Garda Tom Cooney. As in the case of his daughter, when Mr. Murray was called to give evidence he did not testify in accordance with his statement. Again, there was an application by the prosecution to admit the statement in accordance with the provisions of s. 16 of the Criminal Justice Act 2006, and again this precipitated a voir dire. In the course of that voir dire, Mr. Murray gave evidence that he did not have any recollection of meeting with Detective Garda Cooney and making the statement referred to. He said that he had been having trouble sleeping at the time and also referred to the fact that his wife was in poor health. He said that he had been drinking on the day in question and had taken a sleeping pill. He went on to say that the first time he became aware of having made a statement was when his daughter told him that she had been visited by the gardaí about the incident. He was not in a position to confirm that the signature at the end of the handwritten statement was in fact his.

25. The arguments advanced to the trial court as to why this statement should not be admitted, and the arguments now advanced on appeal to a very large extent mirror the arguments that were canvassed in the case of Lisa Murray. Once more, the Court is satisfied that all of the statutory preconditions to the admission of the statement were met and that the trial judge was acting within his discretion in deciding to admit the statement. In the circumstances, this ground of appeal fails.

The challenge to the validity of the arrest

26. Both appellants were arrested while travelling in a silver Toyota Corolla vehicle which was stopped by gardaí on the old Navan Road. During the course of a voir dire, the court heard from Garda Niall Phelan and Detective Garda Nigel Petrie. Both gardaí had been on duty in a garda car, driven by Garda Phelan with Detective Garda Petrie acting as observer. At about 7.40 pm on the 3rd June, they received a radio call that an incident had taken place in the Drumheath area. A supplemental call indicated that a silver vehicle with a possible partial registration of "00 WX" was involved. The gardaí saw such a car at a time when it was taking a right turn onto the old Navan Road. The gardaí activated their blue lights and the car was stopped and approached. There were four men in the car which was being driven by Alan Wilson. The garda evidence was that the occupants appeared nervous and agitated. It appears that the gardaí made a decision to search the vehicle and the occupants pursuant to the provisions of s. 23 of the Misuse of Drugs Act. However, that did not happen. The gardaí say it did not happen because the situation on the roadside was an evolving and fluid one. They were monitoring radio transmissions and before they proceeded to carry out a Misuse of Drugs Act search, which the occupants of the vehicle had been informed was the intention, the gardaí took the view that they had sufficient grounds to make an arrest pursuant to s. 30 of the Offences Against the State Act 1939, as amended. In those circumstances Garda Phelan arrested Mr. Wilson, as well as another occupant seated behind Mr. Wilson, and Mr. Crowley, who was occupying the rear passenger side seat, was arrested by Detective Garda Petrie.

27. At issue is the period of approximately fourteen minutes between the time when the vehicle in which the appellants were travelling was brought to a halt by the gardaí driving in front of them and activating their flashing lights and the arrest which took place at approximately 8.00 pm. The appellants say that nothing new emerged during these fourteen minutes to justify the arrest and that they were not free to go about their business during the fourteen minutes and that this represented a deprivation of liberty. It is argued that they were not told why the vehicle was stopped and were not told that they were free to go so that what was in reality a detention situation developed. Counsel for Mr. Crowley submitted that the subsequent arrest and any search under the provisions of s. 30 of the Offences Against the State Act 1939 was also unlawful as was the subsequent detention in a garda station where the gardaí had purported to obtain DNA samples as well as evidence of a forensic nature relating to gunshot residue.

28. On behalf of Mr. Wilson it is argued that the arrest was unlawful and, because the arrest was unlawful, that a memorandum of interview taken, the fourth memorandum of interview taken, ought not to have been admitted. The appellants rely on cases such as DPP (At the suit of Garda John Higgins) v. Farrell [2009] IEHC 368, Oladapo v. Governor of Cloverhill Prison [2009] IESC 42, DPP v. Finn [2003] 1 I.R. 372 and People v. Boylan [1991] 1 I.R. 477, as well as other cases.

29. In the Court's view, none of the cases referred to was on point. So far as Boylan is concerned, the appellant was the driver of a truck which was stopped by gardaí and searched. During the search which lasted for a period of two hours, the appellant was brought to and detained in a nearby shed where, he alleged, he was questioned by a number of gardaí. However in this case there was no question of the appellants being brought to a shed or indeed to any other location and there detained. All that occurred here was that there was a conversation between the gardaí and the occupants of the car which had been stopped in the course of which the occupants were informed of the intention to conduct a drug search. Again, the facts of Oladapo were very different. In that case the appellant had been arrested pursuant to the provisions of s. 13 of the Immigration Act and taken, following the arrest, to a garda station where he was refused "permission to land". Thereafter he was arrested for a second time pursuant to the provisions of s. 5(2) of the Immigration Act 2003. The critical factor is that at the time of the initial arrest, the gardaí had no intention of charging him with the offence for which he was arrested. Rather, the real intention was to take him into custody so that he could be brought to a garda station and there refused permission to land. In Higgins v. Farrell the gardaí stopped a vehicle in the Neilstown area and then proceeded to search it under the Misuse of Drugs Act and found a knife in the course of the search. The garda explained that he had stopped the car because there was a drug problem in that area. However, there was no evidence that he had any particular suspicion in relation to that vehicle or that driver. The case of Finn involved a conscious decision by the gardaí, apparently as a matter of general policy, to detain someone arrested under s. 49 of the Road Traffic Act and keep them under observation for a period before proceeding to a breath test.

30. The circumstances in which an arrest occurs may vary very considerably. On the one hand, one may have a situation where a suspect is fleeing from a crime scene and is rugby tackled to the ground by a pursuing garda. A more extreme example still is where the arrest occurs following a confrontation between armed gardaí and armed subversives as was the situation in the case of People v. Kehoe [1985] IR 444, a case referred to by counsel for the DPP. At the other end of the spectrum the arrest may be by appointment when an individual calls to the garda station to allow a warrant to be executed or something of that nature. The present case involves a situation where members of An Garda Siochána engaged occupants of a car in a relatively brief conversation. It is not suggested that anything of evidential significance arose directly from that conversation. In those circumstances there is no justification for the suggestion that the appellants were detained. That is not to say that had the appellants broken off the conversation and sought to leave the scene, that this would not have provoked action on the part of the gardaí. The case has some similarities with the case of Director of Public Prosecutions v Twesigye [2015] IECA 99, a decision of the Court of Appeal from earlier

this year. There, an appellant, who was present in the sitting room of his house while a drug search was being conducted, contended that he was in de facto detention and that as a result the clock started earlier with the knock-on effect that subsequent extensions were out of time. The court rejected the suggestion that there was a de facto detention such that it started the clock. Critically in this case the contemplated search under the Misuse of Drugs Act did not take place. Had it done so, and items of interest been recovered, or had the search been a prolonged one, different considerations might conceivably arise. However, this Court is satisfied that on the established facts, the point argued is without merit. Accordingly, this ground of appeal fails.

No evidence that the assaults were unlawful and that the appellants were not acting in self defence.

31. The argument is made that the state of the evidence was such that the possibility that Mr. O'Brien had consented to being struck was not excluded or, perhaps more realistically, that the evidence was not such as to exclude the possibility that either or both appellants were acting in self defence. This argument is advanced in a situation where Mr. O'Brien, the victim of the alleged assault never made a statement and took no part in the trial. In the Court's view, the state of the evidence was such as to preclude the suggestion of self defence as a matter of reality. Ms. Murray's statement so far as relevant provides:-

> "At about 7.40 pm this evening I was in the sitting room with the baby and I went to get the soother in the hall. . . . After they went into the kitchen I heard a scuffle. I heard the chairs in the kitchen falling around the place and the bin being knocked over. I ran to the door of the kitchen and saw David Crowley hitting my boyfriend David O'Brien. He was hitting him on head with a handle of a knife. It wasn't a knife from my house. It was about 6 to 8 inches long and 4 inches wide. It was a meat cleaver. I grabbed David O'Brien and pulled him out of the kitchen into the hall."

32. This Court takes the view that the account given by Ms. Murray out rules any question of self defence. Particularly significant is the fact that the meat cleaver type weapon described by Ms. Murray did not come from her house.

33. A further argument is made to the effect that, absent evidence from Mr. O'Brien, there was no evidence that the assault caused harm, yet Ms. Murray refers to the fact that David (O'Brien) was in the sitting room following her return from her father's house and that there was blood on his head. Mr. Murray too refers to seeing blood on Mr. O'Brien's head and hand to the extent that he shouted out that an ambulance should be sought and that he cleaned up blood in the house where the incident had occurred. Moreover, there was evidence from a scene of crimes examiner of obtaining blood samples from the driveway, front door frame and hallway of the house. In the Court's view, there was abundant evidence that Mr. O'Brien suffered harm, as that term is defined in s. 1 of the Non Fatal Offences Against the Person Act 1997, during the course of this incident.

Absence of adequate evidence of entry as trespassers

34. Both appellants argue that there was insufficient evidence that they entered 56 Drumheath Drive as trespassers, which is, of course, an essential proof if the offence of burglary is to be made out. There are a number of sub-issues here. There is, first of all, the point in relation to 56 Drumheath Drive/56 Drumheath Grove. The Court is satisfied that if regard is had to the contents of the statements as a whole, as well as the evidence of gardaí who attended at what was believed to be a crime scene, that there can be no doubt but that Ms. Murray resided at 56 Drumheath Drive and that she was speaking of that dwelling when saying that she did not give permission to Mr. Crowley or Mr. Wilson to come into her house. A second point relates to the possibility that Mr. Crowley and/or Mr. Wilson might have been given permission to enter by Mr. O'Brien and that it was subsequent to this that an altercation developed. This was an issue which concerned the jury who in the course of their deliberation returned to court and asked the following question:-

> "Can trespassing occur after someone has entered the property, and by which I mean if somebody decides they no longer want that person on the property? Is that now – then trespassing."

35. The appellants are critical of the judge's response arguing that it was not made clear to the jury that the way in which the counts on the indictment were formulated meant that their concern was with the status of the appellants at the time of entry. The judge responded in these terms:-

> "Now, the next thing is this that – and that kind of touches on your third question. If somebody is no longer required or no longer wanted on the premises, does that make him a trespasser? Now, of course that is a – to answer your question firstly, of course that could happen 'I don't want you here get out move on'. Well that then if that person insisted on staying, that would make him a trespasser, right. But I must very clearly say to you, I am answering your question simply because you asked it. But in the context of what you are deliberating on, there is no evidence before you to suggest that question. It is a very good question, it is a good thinking question, but in the context of this trial, there is no evidence before you to suggest that question and therefore the question and I am saying this to you now in the nicest way, is irrelevant. It is not a question that you should take up your time answering: it is not relevant to this trial, okay?"

36. The trial judge was correct to instruct the jury that there was no basis on which they could consider the particular question, namely, that the accused were invited in and subsequently told the leave prior to the assault on Mr. O'Brien.

37. In the Court's view, the judge's response to the question focused the attention of the jury on the point of entry. There was evidence from which the jury could legitimately deduce that the entry was as trespassers. There was first of all the timetable suggested by Ms. Murray's statement and again the fact that the weapon used in the assault had been brought to the house was a relevant consideration. This ground also fails.

38. Turning then again to grounds that are specific to one or other appellant.

Admissibility of evidence in relation to the wearing of a bullet proof vest by the first named appellant Alan Wilson

39. The jury was permitted to hear evidence that the appellant Alan Wilson was wearing a bullet proof vest when stopped by the gardaí. The appellant urges upon the Court that this evidence has little, if any, probative value but that its prejudicial effect was enormous. The respondent disagrees and says that the evidence had probative value in the circumstances of the case.

40. It is certainly possible to imagine cases where the wearing of a bullet proof vest was so remote from the specific charge with which the court was concerned that its probative value would be non-existent and where it ought to be excluded accordingly. However, this is a case where the incident involved the discharge of a shotgun. In the view of the Court, evidence that somebody

who on the prosecution case was choosing to put himself at a location where a shotgun was going to be or might be discharged was highly probative indeed. Accordingly, this ground fails.

41. The first named appellant also complains about the judge's charge and he says that while the judge, on a number of occasions, instructed the jury not to draw inferences from the fact that Alan Wilson was wearing a bullet proof vest, the effect of this was simply to draw attention to that evidence. The Court is satisfied that the first named appellant's complaints are unwarranted and that the trial judge's direction with respect to the drawing of inferences were even handed, fair and appropriate in light of the evidence adduced. The Court repeats its view that the evidence in relation to the bullet proof vest was of probative value. The fact that the judge instructed the jury not to draw inferences from the fact that Mr. Wilson was wearing a bullet proof vest was indeed favourable to his position. It was entirely appropriate that the judge should refer to this evidence. He could have taken the view that it had some materiality to the case and invited the jury to consider what legitimate inferences might be drawn, but instead he chose to instruct them not to draw any inferences from this fact. It would have been remiss of the judge not to mention this evidence at all and to leave the jury uninstructed in regard to a piece of evidence that had potential to be considered of material significance.

Failure to disclose the antecedents of the injured party

42. The first named appellant complains that the trial judge ought to have directed the disclosure of the previous convictions of Mr. David O'Brien. The argument advanced does not take sufficient account of the fact that Mr. O'Brien was not a witness in the case and it was never envisaged that he would be as he had not provided a witness statement. Questions of previous convictions, if any, could have no relevance to the question of Mr. O'Brien's credibility as that could never have been an issue. Had a positive case been advanced by the defence that Mr. O'Brien was the aggressor and that accordingly the appellants were acting in defence, this might have required a reconsideration of the issue by the trial judge, but no such case was presented. This ground also fails.

The drawing of adverse inferences pursuant to s. 19 of the Criminal Justice Act 1984

43. Following the arrest of the first named appellant, he was interviewed on a number of occasions and in the course of the fourth such interview, the provisions of s. 19 were invoked. At the start of that interview Garda Phelan explained that the arrest related to the unlawful discharge of a firearm at Drumheath Drive on the 3rd June, 2009. The legislative provisions were explained and the appellant had an opportunity to consult with his solicitor specifically in relation to this issue.

44. The point that is made is that Mr. Wilson was arrested under s. 30 of the Offences Against the State Act 1939 by Garda Phelan who suspected "that they had been involved in an incident whereby a firearm was discharged at Drumheath Drive". Mr. Wilson argues that the section, which he says is a penal section and one which trenches on the traditional right to silence and must therefore be strictly construed, has not been complied with. The section provides for the admission of evidence "in proceeding for an arrestable offence" when "at any time before he or she was charged with the offence, on being questioned by a member of An Garda Siochána in relation to the offence". The point is made with some force that the appellant was not being questioned during the course of the interview in relation to a burglary, but rather a firearms offence and that he has never been charged with a firearms offence. The trial judge ruled on the matter at p. 16 of day 7 of the transcript. He did so in these terms:-

> "Now, it appears to me that when a person . . . is arrested and is lawfully detained that the gardaí can question an accused on matters that are peripheral but relevant to what an accused person has been arrested for and that they can do that prior to an accused person being charged with a particular offence and in short it appears to me that a person having been arrested, properly detained for a particular offence, or allowed latitude in questioning matters, in questioning an accused person as to matters that may be peripheral or relevant to the offence for which he was originally charged."

45. In referring to peripheral matters, the trial judge went further, considerably further, than he needed to. In the context of what happened at Drumheath Drive, the offences of possession of a firearm, involving the discharge of a firearm, and burglary are inextricably linked. There was no question of the prosecution seeking to invoke the statutory provisions by piggy-backing an offence other than the one with which he has been charged. Still less is there any question in the original arrest pursuant to s. 30 of the Offences Against the State Act operating as a colourable device.

46. A similar issue had arisen in the case of DPP v Liam Bolger (No. 1) [2013] IECCA 6 and DPP v Liam Bolger [2014] IECCA 1, at paras. 44 to 59. There the appellant, who had been convicted of murder, sought leave to appeal and when the application for leave to appeal was rejected by the Court of Criminal Appeal, a motion was brought to that court seeking to set aside its judgment. This gave rise to the fact that there are two judgments in the case. In the course of both judgments, the court expressed the clear view that evidence giving rise to the drawing of adverse inferences was admissible, this in a situation where the accused had been arrested for offences of possession of firearms, but charged and convicted with the offence of murder. Accordingly this ground of appeal must also fail.

47. In summary then, all of the grounds advanced by both appellants seeking to have their convictions set aside are rejected. The Court therefore will turn to the question of sentence in the case of the first named appellant, Mr. Alan Wilson.