THE COURT OF APPEAL

[203/12]

Birmingham P.

Edwards J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

RESPONDENT

WAYNE KINSELLA

APPELLANT

JUDGMENT of the Court delivered on the 23rd day of October 2018 by Birmingham P.

Introduction

1. On 21st May 2012, the appellant, Wayne Kinsella, was found guilty of the murder of Adil Essalhi on 6th January 2011 in the Tyrrelstown area of Dublin. An important feature of the case is the fact that Wayne Kinsella's nephew, Michael Kinsella, was also charged with the murder, but was tried separately. The appellant now comes before this Court seeking to challenge his conviction. A key aspect of this appeal is the proposition put forward by the appellant that the civilian witnesses engaged in a form of collusion with respect to their evidence for the purposes of shielding Michael Kinsella from responsibility.

Background

2. On the date the murder took place, Wayne Kinsella had been socialising with Adil Essalhi and Martina Deegan. They spent a number of hours in a public house in Dublin city centre during which time alcohol was consumed. At around 4pm, the party travelled to an address at Apartment 14, Tyrrelstown Plaza, Dublin 15 being the residence of Martina Deegan. As the evening progressed, and more alcohol consumed, a number of individuals joined them at the apartment, including the co-accused, Michael Kinsella. Upon arriving at the residence and encountering the deceased, Michael Kinsella formed the impression, misapprehension it may be said, that Adil Essalhi had been involved in the murder of one Lee Kinsella: the appellant's brother.

3. At 8pm, Wayne Kinsella, Michael Kinsella, and Adil Essalhi left the apartment together, apparently on the pretext of attending another party. The deceased was taken to a nearby field, attacked with a knife/machete, killed, and his body burned. The appellant admits to having been present at the time of the murder, but denies taking part during or after the fact.

Evidence

4. Adil Essalhi's body was later found with the assistance of information provided by the appellant. Garda Alan O'Toole and Garda Sheelagh Sheehan gave evidence that on 12th January 2011 they approached Wayne Kinsella whilst on patrol in connection with the disappearance of another person, Jason O'Dea. The appellant directed them to a field behind 'The Thirsty Bull' pub and offered to take them to the location of the body.

5. On 13th January 2011, Wayne Kinsella met with Gardaí and provided them with further information. Detective Garda Peter Collins gave evidence that they had not been aware that Adil Essalhi was missing at the time and that the appellant had indicated that the body in question belonged to Jason O'Dea or someone with a similar sounding name. A staged arrest took place for the purpose of protecting Wayne Kinsella's girlfriend: Natasha Carey, and to disguise the fact that he was assisting Gardaí in their inquiries. While in Garda custody, he led them to the field where the body of Adil Essalhi was and pointed to where a knife, used in the attack, had been buried. The appellant was arrested and charged for the murder of Adil Essalhi on 15th January 2011 at Blanchardstown Garda Station.

6. In a voluntary interview, whilst in Garda custody, Wayne Kinsella stated that he had information as to the whereabouts of the deceased's jumper as well as the murder weapon that he was willing to share. He said to the interviewing members of An Garda Síochana, "I want you to put it on record as well that I did not kill anybody". This assertion was repeated when Gardaí attended a football pitch in Tyrrelstown at the direction and suggestion of the appellant. He stated "I was there but I didn't do anything. I want a separate trial from the other fellow".

7. CCTV footage was central to the prosecution's case and confirmed the general narrative of how the day progressed and the movements of key individuals. Footage taken from near the apartment complex in Tyrrelstown was admitted into evidence which showed individuals said to be the appellant, co-accused, and deceased leaving together and heading in the direction of the field in which the body of Adil Essalhi was discovered. It also captured individuals identified as Wayne Kinsella and Michael Kinsella returning alone without Mr. Essalhi just over an hour later.

8. On Day 6 of the trial, 16th May 2012, Garda Olive Crowe gave evidence that on 10th January 2011, she had received confidential information from a person known to her for some time. This person stated that a murder had taken place in Blanchardstown the previous week. The informant had disclosed that the deceased had met Wayne Kinsella when they had been collecting social welfare and drank together for the day. They further indicated that the appellant and Michael Kinsella had convinced themselves that Adil Essalhai had been involved in the murder of Lee Kinsella and this led to his murder at their hands. This information was provided to Detective Inspector Colm Fox. Garda Crowe emphasised that she believed the provider of this information would be in danger should their identity be revealed.

Grounds of Appeal

9. Wayne Kinsella has advanced a number of Grounds of Appeal which may be summarised and distilled as follows:

> (i) the trial judge erred in failing to adequately charge the jury on corroboration;
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> (ii) the trial judge erred in failing to recharge the jury on the creditworthiness of the civilian witnesses;
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> (iii) the trial judge erred in refusing to reveal the identity of the confidential informant in circumstances where the appellant's innocence was at stake.

Motion to Admit Additional Evidence

10. The procedural history of this appeal is complicated somewhat by a number of changes in Wayne Kinsella's legal team and interlocutory motions to adduce further evidence in the form of extracts from the transcripts of the first and second trials of Michael Kinsella. The initial motion was filed by the appellant's previous legal team on 10th June 2015, and concerned testimony by Martina Deegan at Michael Kinsella's first trial for the murder of Adil Essalhai which the appellant says saw the witness making admissions to colluding with other prosecution witnesses to the detriment of Wayne Kinsella. This motion was subsequently adopted by the current legal team and has been supplemented with a further application dated 5th March 2018. This latest motion seeks the admission of similar extracts from the evidence of Martina Deegan at Michael Kinsella's second trial along with other extracts from the evidence of Natasha Carey at his first trial. It is claimed that this evidence tends to prove the claim that there was an agreement to falsely implicate the appellant so as to protect Michael Kinsella from criminal responsibility.

The Judge's Charge

11. When the Court sat on Day 8 of the trial, 18th May 2012, in order for the judge to deliver his charge, closing speeches having been completed the previous day, Senior Counsel for the defence rose and said that he and prosecution counsel had a discussion and agreed that it would be appropriate that in regard to some witnesses, an accomplice warning would be given. There followed a discussion involving both counsel and the trial judge. The judge asked whether there was an obligation on him to point to areas where the jury could find corroboration and was told by prosecution counsel that he thought that there was. The judge asked "and what areas, then, ought I point to?" Prosecution counsel responded:

> "[s]ome independent pieces of evidence, for instance, in my submission, possibly the statement made by the accused to the Gardaí; the business about if you find the killer, who he named dead, burnt and bleached, it corroborates various elements."

He said it was capable of corroborating, for instance, the statement of motive which the witnesses gave that the deceased was being taken out in the context of being involved in the killing of the brother of the appellant.

12. Prosecution counsel referred also to the use of bleach on the knife. After some further discussion, it was agreed that the commencement of the charge be deferred and that the Court would rise for a few minutes to allow counsel to consider the corroboration issue further.

13. When the Court sat again, a few minutes later, first, prosecution counsel and then defence counsel addressed the Court. Each referred to the cases of DPP v. Gilligan [2006] 1 IR 107 and DPP v. Meehan [2006] 3 IR 468. In the course of submissions, prosecution counsel said:

> "[o]bviously, it's a matter for the jury whether evidence which is potentially corroborative evidence is corroborative evidence, but broadly speaking, anything independent in the case which is, if you were to take these witnesses out of the case which would tend to connect the accused with the crime and which would, so to speak, support evidence given by a witness."

He then instanced the fact that witnesses had spoken of three departing and two returning. He referred to the CCTV footage and to the fact that one of the three on the footage was wearing a white garment and there had been evidence that Wayne Kinsella had put a white top on the deceased. He referred to the fact that there were two sets of wounds involving two weapons; to the evidence in relation to motive and to the use of bleach to clean a knife. In responding, defence counsel pointed out that both the Gilligan and Meehan cases make the point that the nature of the defence being put forward may be critical in determining what is corroborative evidence. Counsel said that he disagreed with prosecution counsel when he had said that the CCTV footage was corroborative. He said it might well be if it had been the case that Wayne Kinsella had put up a defence to say that he had left the apartment at a particular time and had returned at a later time. In those circumstances, he accepted that CCTV footage would be critical, but he said not so in a situation where there was no challenge to the fact that the three of them left together. He said at its very height, it

could not be said to be anything more than confirming, but it lacked that which tended to connect Wayne Kinsella to the commission of the offence.

14. Having heard from counsel, the judge, without further ado, said "very well, thank you, would you ask the jury to come out please?" Defence counsel then said:

> "I understand, Judge, the Court is not going to rule on our application and I am not taking any issue with that."

The judge responded "oh, sorry, I beg your pardon, I will of course give you an accomplice warning" and stated that he would give it in respect of three witnesses: Martina Deegan, Jemma Deegan, and David Kinghorn. Prosecution and defence counsel had been in agreement in relation to Martina and Jemma Deegan. Prosecution counsel had been somewhat equivocal in relation to David Kinghorn, while defence counsel had said that a warning was appropriate.

15. The judge dealt with the issue of corroboration in the course of his charge as follows:

> "[t]he next matter that I want to deal with is the question of corroboration. So, the warning is that it is dangerous to convict on the evidence of an accomplice alone unless you find corroboration. And corroboration is independent testimony or evidence which affects the accused person by connecting or tending to connect him to the crime that is alleged against him, in this case, the murder of Adil Essalhi. It is evidence which implicates him; which confirms in some material particular, not only the evidence that the crime has been committed, but also that the accused committed it. Now, when I mention corroboration, the first thing I must say to you is that whether or not there is corroboration in this case is entirely a matter for you. What I am obliged to do is to point to areas where it might be possible for you, after considering the evidence, to decide, well, there is corroboration there or there isn't, but by giving you this, if you like, added direction, I am not telling you whether or not there is corroboration in the case. But there are some areas where you might find corroboration and the following are the possible sources of corroboration. First of all, the evidence of Wayne Kinsella himself and his account at the very beginning in Granby Row to the Detective Garda, I think, in particular, the evidence was given to you by Detective Garda Sheehan, that if the Gardaí found the person responsible for his brother's death and the body was burnt and there was bleach on it, that they then could go to him and look no further than him [the transcript states "looks into further than him" but this is an obvious error]. It is possible that you may also find corroboration in the CCTV footage which you have seen about people leaving the apartment at a particular time and people returning. Again, it is entirely a matter for you, and it is also possible that you may find corroboration in what – the evidence that Wayne Kinsella himself provided while he was in custody waiting to be charged and you will remember, in particular, that portion of the evidence where the Detective officer said 'where are we going, Wayne?' and Wayne Kinsella said to him 'to the football pitches in Tyrrelstown' and Wayne Kinsella then said 'will this help me? I was there but I didn't do anything. I want separate trial from the other fella. Nikki's only helping me. I'll say to her when I get back to tell everything'."

16. Following the charge, the lengthy requisition by defence counsel and the exchange that followed merit quotation:

> "Mr. O'Higgins (Senior Counsel for the defence at trial): I must respectfully submit on behalf of my client that I have very serious cause for concern on the directions which your Lordship has given them on what evidence is capable of amounting to corroboration. Now, I know you heard submissions in advance from counsel before you commenced your charge and I asked what really the effect of the ruling was and you indicated, well, you were going to give a warning, but the Court was silent on whether or not it favoured the prosecution's submissions or our own as to whether there was actually any evidence of corroboration, and I don't wish to be repetitious, but mindful of the fact, I think, that the Court of Criminal Appeal has now placed a very heavy onus on counsel to speak at the time if you have a problem with something, and if you don't, there can be very – it can be a very unreceptive place to make an argument elsewhere if something isn't voiced at the time. Now, I gave an example, Judge, before lunch about drawing from the line in both Gilligan and Meehan that in assessing what's capable of amounting to corroboration, a critical factor is what is the defence case or what the defence case is. And I should say, by way of background, that the debate as to how or why the corroboration warning has become unduly technical is tied up with the words 'corroborate' and 'confirm' frequently being used interchangeably as if they were the same thing, and indeed had been so interchangeably used in the Special Criminal Court's verdict judgment in the Gilligan case. And the distinction, of course, is that a witness's testimony may be confirmed in a material respect, in the sense that they say something and if you look to some other aspect of the evidence in the case, that testimony is confirmed and the effect of the confirmation may even be such as to increase the credibility of the suspect witness, but it does not actually amount to corroboration unless that which is relied upon as corroboration is, first of all, independent of the witness and tends to implicate the accused in the commission of the offence. Now, in my respectful submission, the CCTV footage falls short of that. Certainly, if the defence case was that Wayne Kinsella had left the flat and was not part of the proceedings, had gone before there was any trouble, the fact that three people got over the wall, even if you could not see who they were, that might be something which would be capable of amounting to corroboration if the jury were satisfied that, looking on the evidence as a whole, that the person getting over the wall was Wayne Kinsella, or if Wayne Kinsella had said 'yes, we left the apartment, Michael and Ali went left, I went right', again, I would concede it could amount to corroboration.
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> Judge: Alright, well, is your first point, then, that the CCTV footage, that a jury could not possibly find in that any bit of corroboration?
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> Counsel: No, it might confirm, tend to confirm the accounts, but not corroborate as that word – Judge, that's what I mean.
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> Judge: That's your first point?
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> Counsel: That's the first point.
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> Judge: Very well.
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> Counsel: And similarly, Judge, you then went on to say that because Wayne Kinsella had put himself there, but denied any involvement in the offence that that could corroborate the testimony of the people in the flat. Now, that seems, in my respectful submission to be –
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> Judge: Sorry, well, maybe I'm completely misunderstanding this and I'm sure you'll point it out to me –

Counsel: It is a bit of a minefield –

Judge: No, no, no. But I thought that corroboration was evidence that might tend to implicate the accused in the crime.

Counsel: Yes,

Judge: That it's not necessarily corroborative of what a witness says except insofar as it goes to the accused's guilt.

Counsel: It implicates him in the commission of the crime.

Judge: Yes.

Counsel: But in circumstances where people are saying – I mean, again My Lord, I suppose if you were to go back to the earlier case that was quoted earlier about the boy who was being sodomised, I mean the corroboration in that case were certain boxes that were in the room. Now, on one level, the boxes didn't touch on the commission of the offence at all, but because it was so highly unusual that the boy would be in that particular room in the house and that there was no other obvious reason to suggest why he would be there, the fact that he was able to give a description of it and the boxes were so proximate to where the offence had been committed, this was deemed, in that case, to amount to corroboration. But in circumstances where the defence case is that the three men were – not even just the defence case, but the evidence is that the three men left the apartment. There is evidence to say it was a party. There is evidence to say it was a fake party. There is evidence to say they went over the wall. There is evidence to say that they went up to the field. There is evidence – by virtue of the fact that my client returned to the field and helped them locate the jumper and the other implements and saying that he wasn't involved in the actual killing himself. I mean his presence at the place where the crime was committed, it was never in issue. It was never challenged. It is not that there is any point of dispute in any of that, but being there does not make him guilty. It is only being there and being involved that makes him guilty.

Judge: Well, are you saying that the defence case is that he was there but wasn't involved?

Counsel: Well, that's the implication of it, but he travelled – I mean I cannot say things that were not in evidence, but the evidence is that he travelled to the field with the guards, we saw the video of it. He pointed in the general direction of where the machete would be found, and it was found, admittedly, now, it had been in the water, but put up on the ditch, but he said 'it's around here'. He then walked further up and showed them where the jumper was buried. He was asked, you know, did he take the jumper off the individual and he said he did not do it. The implication of all of that, in my respectful submission, is that either he was there at the time when the event took place or at some time immediately afterwards or very shortly afterwards, but there has never been a case made that he wasn't there and the point about it is that the fact that the prosecution can put him in the field, in my respectful submission, does not link him to the commission of the offence. What links him to the commission of the offence is evidence from which the jury can be satisfied that he partook in it, because, if Michael Kinsella, on his own initiative, killed this man and my client wasn't party to it, it is not a suspicious feature against my client that he happened to be there, and that is my difficulty. And in my respectful submission, it is not capable, for that reason, of amounting to – capable of being amounted to corroboration. And similarly, My Lord, I would ask about the reference in the car to the bleach that it be pointed out – two things be pointed out to the jury. Number one, that was talking about something in the future, that's the first thing, and the second thing is either, when he told the guards this, it seems to me there can be only one of two states of mind, either he didn't know that the deceased had been burnt and bleached, and if he did not know, it's not a point against him, or, if he did know, it seems very odd that his telling the police that, in the sure knowledge the matter is going to be investigated and they would have to look at it in that context. That's what I have to say on the corroboration, My Lord, and I have other requisitions, but I think I am perfectly satisfied, in terms of the other requisitions, that they are matters that are capable of remedy, if the Court is with me, that is. If it is not with me, it does not arise.

Judge: Let me hear what the other requisitions are then.

Counsel: They are, but could I just say on the corroboration, I have a doubt that if the Court accepts my argument, it may not, of course, that it is a matter that is capable of remedy and nothing short of a very clear direction to the jury that neither the CCTV or the comment 'I was there but I didn't do it', they are not capable of amounting to corroboration, in my respectful submission.

Judge: And, is the statement to the effect where he asked if he can do anything to avoid life imprisonment, is that corroborative?

Counsel: I couldn't see how, My Lord. I mean, you could look at it to say that it's a selfish thing to say, I'll say whatever is required to avoid life, or equally, you could say that somebody who says, well, I'm giving you all the help I can if I'm going to avoid being blamed for murder, but I mean, as to what it means is a matter for the jury."

17. The defence position in relation to corroboration might be summarised as follows. The defence case is not and has never been that Wayne Kinsella was not there when the murder occurred, but that Wayne Kinsella, while present, did not participate. The Director points to the fact that the CCTV footage available showed three people leaving the Tyrrelstown Plaza apartment block via stairs, out the gate leading to the car park at the back at 21.10 hours, and two people returning by the same route from the direction in which the three had left at 21.36 hours. The Director says that the argument advanced on behalf of the appellant is artificial and fallacious because it operates on the basis that evidence that would otherwise have been corroborative ceased to be so because the appellant admitted he was present for the murder, but claimed not to have participated.

18. Denham J. dealt with the issue of corroboration in Gilligan from para. 75 onwards. She commented:

"[i]n *R v. Baskerville* [1916] 2 KB 658, Lord Reading defined corroboration as follows at p. 667:

'We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it'.

A somewhat similar approach was taken in Ireland in *Attorney General v. Levison* [1932] IR 158. In that case, the Court of Criminal Appeal held that even assuming there was no corroboration of BK's evidence, the jury was entitled to act on the uncorroborated evidence of an accomplice as they had been duly warned by the trial judge, and as the evidence was sufficient to support their finding, the verdict could not be set aside and leave to appeal was refused. O'Byrne J. at p. 165 pointed out that:

> 'What constitutes corroboration must depend on the facts and circumstances of each particular case, on the defence set up by the accused, and on the nature of the question to be determined by the jury'.

He went on to define corroboration at p. 165:

> 'Accordingly, as it seems to us, evidence of any material circumstances tending to connect the accused with the crime and to implicate him in it would appear to us to be corroboration in the circumstances of this case'.

Thus, there are three strands to corroborative evidence. First, that it tends to implicate the accused in the commission of the offence. It renders it more probable that the accused committed the crime. Secondly, it should be independent of the evidence which makes corroboration desirable. However, as Lord Reed said in R v. Kilbourne [1973] AC 729 at p. 750:

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

Thus, the nature of corroborative evidence depends on the facts and circumstances of the case and the defence of an accused. Corroborative evidence establishes a link which tends to prove that the accused person committed the offence. Corroboration may be found in a simple fact. For example, in the Attorney General v. O'Sullivan [1930] IR 552, a case of sodomy, corroborative evidence was the evidence of boxes found in a room. Kennedy CJ, delivering the judgment of the Court of Criminal Appeal, said the following at pp. 557 to 558:

> 'The whole story told by the boy from his meeting with the accused up to the point of entering the unoccupied house and as to some of the incidents within the house (e.g. the going upstairs and coming down with a lighted candle), and as to the sending out of the boy, crying, into the street again have been corroborated in a remarkable manner by the evidence and statement of the accused himself. There is, however, one further item of evidence corroborative of the boy's story which goes near to the actual crime. I refer to the boy's story of the boxes of ointment and the corroboration by the boxes found by the Gardaí it the appellant's rooms and afterwards identified by the boy. The state of distress of the boy as he came away from the house, proved by the civic guard and admissible as part of the res gestae, is, (but his complaint is not) further evidence in corroboration. There is, in our opinion, a body of circumstantial evidence of a material character, in addition to the evidence of the accused as to the surrounding circumstances, which supports the whole story of the boy (including the commission of the offence) and directly implicates the accused'.

The evidence of the boxes was a material link in the case. It was independent evidence implicating the accused in the commission of the crime. While it might have been possible for the boy to know of the boxes from a previous innocent visit, taken in the context of all the circumstances of this case, this evidence was corroborative of the case put forward by the prosecution. The nature of the defence may be critical in determining what is corroborative evidence. If, for example, the defence is that a person was not at a premises, then evidence by that person as to the interior of the premises may be corroborative, as, there being no suggestion that the person could have been there for another reason, it tends to link the accused to the crime. Thirdly, it should be credible. It should be supporting evidence which has a degree of credibility. In *R v. Hester* [1973] AC 296 at p. 315, Lord Morris of Borth-y-Gest stated:

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

This is a matter of common sense. Corroboration arises where the evidence to be corroborated has a degree of credibility. However, corroboration is not a two-stage process. It is not a process in which there is, first, a determination as to whether a witness is credible and, if he is credible, then the issue of corroboration is addressed. I would distinguish any two-step approach based on an interpretation of *R v. Hester* [1973] AC 296.

The evidence of a witness, which is the subject of a warning, should be considered in light of all the evidence of the case. It should be considered to see how it fits in with all the evidence of the case. The evidence of a witness, such as an accomplice, does not need to be considered separately and categorised prior to an analysis of corroboration. I would also adopt the approach taken by Lord Bridge of Harwich in *Attorney General of Hong Kong v. Wong Muk Ping* [1987] 1 AC 501 where he stated at p. 512:

> 'Where the prosecution relies on the evidence of an accomplice and where . . . the independent evidence capable of providing corroboration is not by itself sufficient to establish guilt, it will have become obvious to the jury in the course of the trial that the credibility of the accomplice is at the heart of the matter and that they can only convict if they believe him. The accomplice will inevitably have been cross-examined to suggest that his evidence is untrue. The jury will have been duly warned of the danger of relying on his evidence without corroboration. Their lordships can see no sense in the proposition that the jury should be invited, in effect, to reject his evidence without first considering what, if any, support it derives from other evidence capable of providing corroboration.'

The nature of corroborative evidence was described succinctly by Maguire J. *in The People (Attorney General) v. Trayers* [1956] IR 110 at 114:

> 'In this connection, the judge had explained to the jury what is meant by corroboration, namely, 'independent evidence of material circumstances tending to implicate the accused in the commission of the crime with which he was charged' (per O'Sullivan CJ in The People (Attorney General) v. Williams [1940] IR 195 at p. 200)'.

I would adopt and apply this definition.

Circumstantial Evidence

> Circumstantial evidence may be corroborative evidence. Thus, in Attorney General v. O'Sullivan [1930] IR 552, the Court

> was of the opinion, having considered the evidence, that there was a body of circumstantial evidence of a material kind which supported the boy's story, including the commission of the offence and which directly implicated the accused. Thus, corroboration may be obtained in a body of circumstantial evidence, more than one piece of circumstantial evidence, which has a cumulative effect and establishes corroboration. Not every piece of the independent circumstantial evidence may implicate an accused with the offence, but the collection of circumstantial evidence as a whole tends to implicate the accused."

19. In the context of the present case, of significance is the approval and adoption of the definition of corroboration as "independent evidence of material circumstances tending to implicate the accused in the commission of the crime with which he was charged" as articulated by O'Sullivan CJ in The People (Attorney General) v. Williams [1940] IR 195 at page 200. The defence draw attention to it and place particular emphasis on the comment that the nature of the defence may be critical in determining what is corroborative evidence.

20. In the course of his judgment in Meehan, Kearns J. observed at para. 40:

> "[t]here can be no doubt but that the entire purpose of corroboration is to reassure a jury or Court that potentially suspect evidence, such as that of an accomplice, is both credible and reliable. It must be borne in mind that the ultimate goal of judicial endeavour in this area is to ensure that there are appropriate legal principles to indicate how that goal may be achieved. This is more important than arriving for its own sake at any permanently fixed definition of the term 'corroboration'. As pointed out by Lord Pearson in R v. Hester 'the word corroboration in itself has no special legal meaning: it is connected with the Latin word robur and the English word robust and it means strengthen, perhaps the best synonym is support'."

Kearns J. pointed out that what he described as the rigid approach evident *in R v. Baskerville* was softened by two later decisions of the House of Lords; *R v. Hester and R v. Kilbourne.*

21. The Court of Criminal Appeal referred to a number of Irish cases including *Attorney General v. O'Sullivan* [1930] IR 552; *Attorney General v. McGrath* (Unreported, Court of Criminal Appeal, 15th June 1925, and *Attorney General v. Levison*, as supporting a nuanced interpretation of Baskerville. He commented that it followed that each case has to depend partly on established legal principles; partly on the manner in which the case is run; the nature of the facts in issue in respect of which corroboration is desirable or necessary and the nature of the defence. The Court of Criminal Appeal stated that it was of the view that a more flexible approach to the whole issue of corroboration beyond the narrow formulistic definition of Baskerville was entirely open on the decided cases in this jurisdiction and in the particular circumstances adverted to by Denham J. in Gilligan.

22. In the present case, the Director says that the approach contended for by the appellant is a highly artificial one. The Court is in absolutely no doubt that the nature of the defence in a particular case is highly relevant when it comes to determining whether evidence tendered is corroborative or not. In the course of the appeal hearing, members of the Court took the example of the presence of semen on a complainant. If the defence consisted of a denial that any sexual activity took place, then the presence of semen from which a DNA match is obtained will be highly significant. Depending on the circumstances of the case, it might be that the finding of semen traces, even if no matching was possible, might still be very significant. On the other hand, if there is no dispute that there was sexual activity and the issue is whether the activity was consensual or non-consensual, then the semen will probably be of little significance, though there may be cases where the location of the semen might be significant.

23. In general, pieces of evidence are neither inherently corroborative or not, or indeed inherently supportive of evidential value or not. A judgment has to be made on a case-by-case basis in light of all the circumstances that prevail. However, as emerges from a number of the authorities and as the semen example raised in argument shows, and indeed as a matter of common sense, the nature of the defence in issue is very significant. If the defence is reasonable self-defence, or the partial defence of provocation, then evidence to confirm the presence of an accused at a scene is unlikely to be significant. The appellant says that is in effect the situation here. The defence is that the appellant, while present, did not actively participate. The Director says that the approach suggested by the defence is a highly artificial one, devoid of reality, that seeks to strip the CCTV footage which shows three departing and two returning of its obvious evidential significance. The Court sees considerable substance in the Director's arguments. This was not a case of someone present in a public house when a patron produced a handgun and shot another customer, or someone present when a domestic incident escalated and resulted in a fatality, but rather someone present for an incident at a time and place when innocent bystanders would not have been expected.

24. The CCTV footage showed three men leaving Tyrellstown Plaza apartment block via stairs and out the gate leading to a car park at the back at 21.10 hours on a January evening and two people returning by the same route from the direction which the three departed at 21.36 hours. The clear inference is that the late Adil Essahli was murdered in the available narrow time window. Other evidence established that two different types of wounds were inflicted; wounds inflicted by a knife with a sharp point used to slash and stab and chop wounds consistent with the use of a machete.

25. It seems to the Court that the probative value of the CCTV footage was very considerable and that the trial judge was justified in forming the view that it was possible that the jury would find corroboration there. It does not seem to the Court that the footage lost its evidential value because the accused admitted being there, but denied participating. Again, the situation might have been different if a positive defence had been advanced, such as there was an agreement to frighten the deceased or to give him a beating, but that the other person present, Michael Kinsella, went outside the terms of what had been agreed. However, absent something of that nature, there is considerable force in the submissions by the Director of Public Prosecutions to the effect that the position taken by the defence is a highly artificial one. Indeed, absent CCTV footage, which caught the actual murder being committed, it is hard to imagine evidence of greater probative value than footage showing two people, along with the deceased, departing the apartment and two returning minus the deceased. The significance of the evidence is increased by the fact that two weapons, a knife and a machete, were used in the course of the murder. Indeed, it is difficult to overstate the significance of that evidence.

26. In the circumstances of the case, the Court has not been persuaded that the judge's charge in relation to corroboration amounted to a misdirection.

The Applications to Admit Further Evidence

27. The first trial of Michael Kinsella for the murder of Adil Essalhi took place between 6th and 17th February 2014 and resulted in a

disagreement. A second trial commenced on 4th December 2015, and on 9th December 2015, Michael Kinsella was rearraigned and entered a plea of guilty to manslaughter. The effect of the various motions is that the defence are seeking to put before the Court transcripts relating to what occurred when Martina Deegan was called as a witness at the first trial of Michael Kinsella and the evidence given by her at the Michael Kinsella retrial and the evidence given by Natasha Carey, girlfriend of the appellant. The Court is in no doubt that whether these items are considered individually or collectively, they do not cross the threshold of relevance. During the course of the first trial, Ms. Martina Deegan, when called as a witness, refused to be sworn and instead produced a letter claiming that witnesses in the trial of Michael Kinsella had been encouraged to tell lies in order to "get back at Michael Kinsella's mother" because she had previously caused the appellant to be locked up "for murdering an old man in a graveyard years ago". At first blush, it might seem hard to see how this could be thought of as being of assistance to the appellant. Ms. Deegan's performance, when called as a witness, could not by any stretch of the imagination be seen as constituting "new evidence". At the appellant's trial, the defence suggested that witnesses had colluded in order to conceal or to minimise the role played by Michael Kinsella and invited the jury to take the view that this objective was to be achieved by creating false evidence which would implicate the appellant. The evidential basis for this second limb of the proposition was thin to the point of being non-existent.

28. The defence put forth by Michael Kinsella involved a suggestion that the appellant, while in custody, had encouraged his girlfriend, Natasha Carey, to implicate Michael Kinsella in the murder. No new evidence emerges in that regard. The remaining point made by the appellant relates to evidence given in the trial of Michael Kinsella by Natasha Carey. The witness gave evidence which tended to minimise the role of the appellant and had considerably more to say about the role of Michael Kinsella in the events that had occurred. Even a cursory consideration of the transcript leaves no room for doubt that Natasha Carey was an unimpressive, and it must be said, unreliable witness. By that stage, she was claiming that a statement which she had given to Gardaí, which had incriminated the appellant to a significant extent, was part of a plot conceived at the home of Michael Kinsella's mother to introduce incriminating material against Wayne Kinsella with a view to exculpating Michael Kinsella. Again, the question arises, how much of this is new? The appellant's team had her statement available to them at his trial and they were perfectly free to cross-examine Ms. Carey as to why her evidence was diverging from what she had told Gardaí.

29. The Court would add just one observation in relation to the approach by the appellant's various legal teams of seeking to introduce material from the transcripts of subsequent trials. In the course of judgment in the case of DPP v. Brian Meehan, the Court commented as follows:

> "63. There is one further point that the court would wish to address. The appellant has sought to make use of material of interest extracted from the Gilligan transcript. He has operated on the basis that he can trawl through that transcript, make a selection and then proceed to deploy the selected material. However, it is not in fact the case that in general one is entitled to rely on the transcript of another trial. On the contrary, cases where that will be permitted will be exceptional.
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> 64. The circumstances in which evidence given at a later trial might be admissible in the course of an appeal from a case that was decided earlier was considered by the Court of Criminal Appeal in DPP v Paul Ward (Unreported, Court of Criminal Appeal, 22nd March, 2002). There, the court commented:
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> 'It is difficult to see any circumstances in which a finding made in a subsequent case in any court, criminal or civil, as to the character or integrity of any witness or party could be made evidence on the appeal. However, there are extreme cases in which facts established in later cases may so undermine the basis on which an earlier case had been decided that it would be appropriate to have regard to the latter case on an appeal in the former. In that connection, Mr. Peter Charlton, S.C., helpfully referred the Court to a decision in R. v. Williams: R. v. Smith [1995] 1 Cr. App. R. 74, where the Court of Criminal Appeal in England permitted evidence to be given of a trial subsequent to that under appeal as it had emerged in the subsequent case that the police who had carried out the investigation did engage, and had been engaged, in the fabrication of evidence. That case is illustrative of the limited range of matters in which evidence given in a later trial might be admissible on appeal from an earlier one. It was impossible in the present case to identify any comparable far-reaching breach of fair procedures and much of the evidence which it was sought to introduce merely went to the credibility of the State's only material witness. However, to avoid any possible injustice this Court permitted the applicant to extract material from the transcripts in the two subsequent trials relating to certain specified topics which might have had the capacity to undermine the substance of a fair trial. In fact, the evidence adduced was not material to this court in reaching its decision but it might be said that it illustrated further, if that were necessary, the difficulties of ensuring the integrity of the evidence of an accomplice whose evidence is such that he must be admitted to a witness protection programme'.
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> 65. In the Court's view this is certainly not such an exceptional case. Really, this is a case where the appellant is saying that the approach of the Gilligan trial court is to be preferred to the approach of the court that dealt with his case. However, in doing so, he chooses to ignore the remarks made by the Supreme Court in Gilligan on the issue of corroboration. The Court makes this observation, notwithstanding that it has in fact addressed and dismissed the substance of the appellant's contentions."

30. The Court would repeat what it said in Meehan about the fact that it is in general undesirable, and indeed impermissible, to introduce material from subsequent trials. By no stretch of the imagination could this be seen as the sort of exceptional case where it might be permitted.

Creditworthiness of the Civilian Witnesses

31. The appellant raised a number of issues regarding the credibility of the evidence given by several witnesses: Gemma Deegan, Martina Deegan, David Kinghorn, and Natasha Carey, being the individuals present at the apartment upon the return of the co-accused individuals. The chief concern highlighted by the appellant was that the witnesses had colluded in an effort to safeguard Michael Kinsella from prosecution and in doing so, lied about an issue of fundamental importance. Three of the witnesses accepted that they had attempted to take Michael Kinsella's involvement "out of the picture" but denied colluding or planning to do so. They suggested that their failure to mention his involvement was coincidence. On Day 6 of the trial, 16th May 2012, Natasha Carey claimed that this was part of a plan, implicit or other, to keep Michael Kinsella out of it owing to his age.

32. Counsel for Wayne Kinsella also submitted that the evidence of the civilian witnesses was inconsistent with statements they had made to Gardaí. Specific reference was made to accusations made by Gemma and Martina Deegan that the appellant had boasted about cutting the deceased person's neck and showing off a black bag which contained a petrol can, the suggestion being that it was

the one used to burn the deceased's body. These allegations only emerged during the course of the examination. Further, the appellant questioned the motives of the witnesses, stating that their evidence was tainted by the possibility of charges being brought against them as accessories after the fact. It is worth noting that on Day 5 of the trial, 15th May 2012, Gemma Deegan accepted under cross-examination that she was aware of this possibility.

33. It is interesting, given the nature of the evidence, that both sides were agreed that there was a need for the trial judge's charge in this case to address the motivation of the witnesses to lie to the Gardaí. Indeed, both sides requisitioned the trial judge in this regard. Counsel for the appellant went further, submitting that the jury should be made aware of the witness's propensity to lie and that they had, in fact, lied in this case. Having considered those submissions, the trial judge formulated his charge in this way:

> "I should also remind you that each of the accomplices had a propensity to lie and to draw your attention to that and in fact you will remember that on their own evidence each of the accomplices admitted having told lies but that it's also important when you're considering their evidence to consider their motivation or why they may have been telling lies. And the other thing that I should have told you was that of course if, having considered the warning that I have given to you and given it due weight, you are nevertheless satisfied with the evidence of an accomplice and satisfied that you can rely on the evidence of an accomplice then you can convict and you can convict on that evidence alone and convict on it, as I say, alone, that means without corroboration." [Day 8, 18th May 2012, at p.78]

Counsel for the appellant remained unsatisfied, however, and requisitioned the trial judge once more stating that the jury should be charged with respect to the fact that the witnesses had lied and in doing so made false accusations against the accused for the purpose of shielding Michael Kinsella. The trial judge refused to do so and the appellant's further request to discharge the jury on that basis was also refused.

34. The appellant was, of course, entitled to requisition the trial judge in relation to his charge and argue that the jury should be reminded of certain aspects of the evidence. He was not, however, entitled to dictate the form the charge takes. The concern raised by the appellant here and in the court below was that there was a specific danger that the witnesses had lied in the circumstances. There may have been a strong justification for that concern, as shown by the Director's acceptance of the need for the judge's charge to address the issue. This is not a case in which the trial judge outright refused to charge the jury in light of concerns raised by counsel. On the contrary, the trial judge did remind the jury of the dangers of accepting evidence of the witnesses having regarding to their propensity to lie and their admissions to having told lies in this case. He was right to do so. He was also right to inform them that, notwithstanding that danger, they were entitled to accept the evidence of those witnesses and convict on that basis if they found it to be reliable. The question of creditworthiness was adequately addressed in the trial judge's charge.

35. As such, the Court is not convinced that the trial judge erred in law in failing to recharge the jury in this regard.

The Identity of the Confidential Informant

36. On Day 6 of the trial, 16th May 2012, Garda Olive Crowe gave evidence of a disclosure that had been made to her which would appear to confirm the prosecutor's version of events. The informant stated that, following a day of socialising with the deceased person, Wayne and Michael Kinsella had gotten it into their heads that he had been involved in the death of the late Lee Kinsella. They went on to say that the appellant had stabbed and killed Adil Essalhi before dumping and burning his body in a field behind the "Thirsty Bull" pub. In the course of this disclosure, reference was made to the appellant returning to the apartment covered in blood and using bleach to wash it off.

37. The appellant's position was that the disclosures made by the confidential informant were "strikingly similar" to the evidence of the civilian witnesses which had been proven to be inconsistent and involved deliberate falsehoods. In those circumstances, counsel for the appellant petitioned to have the identity of the confidential informant revealed in line with the "innocence at stake" exception so that they might be cross-examined as the narrative they presented excluded Michael Kinsella. The Director maintained that the informer did make reference to the involvement of both co-accused in the crime.

38. Sheehan J. refused to order the disclosure of the confidential informant's identity as the appellant had not shown, on the balance of probabilities, that it was necessary to prove his innocence. It was accepted that the "innocence at stake" exception had long been a feature of Irish law, but according to the jurisprudence following Ward v. The Special Criminal Court [1999] IR 60 a balance had to be struck between the need to safeguard confidential informants from harassment or intimidation and the accused's fair trial rights. The trial judge took into account the fact that the prosecution had not sought to rely on Garda Crowe's evidence, but had tendered her at the defence's request. Further, the defence indicated that the purpose of doing so was purely so as to obtain the name of the informant. Sheehan J. concluded his ruling on the subject that the public interest consideration involved could be used to justify the imperilment of the overall fairness of a trial, however, on the facts of the case he was satisfied that refusal to name the informant did not go beyond what was strictly necessary.

39. The appellant relies on *Director of Consumer Affairs v. Sugar Distributors Lim*ited [1991] 2 IR 225 wherein Costello J. found that in determining whether the exception to the informer privilege may be invoked, the Court should examine the documents being relied on and ascertain whether they tended to show that the accused did not commit the act alleged. In seeking to apply that decision to this case, the appellant submits that the trial judge should have examined the confidential informant so as to properly ascertain if the revelation of their identity would have assisted in proving that the accused had not committed the crime for which he was charged. It was argued that any refusal to reveal the identity of an informant must be justified as being "strictly necessary", as per Fennelly J. in P(DPP) v. Kelly [2006] 3 IR 115, and the prosecution is the only one capable of providing such justification as the objective reasons which may underlie their position are matters peculiarly in their knowledge. In essence, the appellant suggested that Sheehan J. applied the wrong standard in holding that the burden of showing that it was necessary to reveal the identity of the informant was on the accused person, rather than the prosecution. Such an interpretation was said to be in line with the balance between the public interest with respect to informer privilege and the accused person's right to a fair trial as discussed by in *P(DPP) v. Kelly* [2006] 3 IR 115.

40. Even if the trial judge was correct in determining that the burden was on the accused on the balance of probabilities, the appellant submits that the refusal to reveal the name of the confidential informant and allow the prosecution to continue regardless denied them the opportunity to adduce further evidence that there had been an organised effort to present false information to the Gardaí. The presence or absence of collusion was central to the appellant's case theory and went towards establishing the innocence of the appellant as a reasonable inference of same. As such, Sheehan J. should have probed the informant given the similarities in the narratives presented by the civilian witnesses and that of the confidential informant. The appellant submits that if the trial judge had

done so then he would have been satisfied that there was sufficient grounds to suggest that the identity of the confidential informant was central to proving Wayne Kinsella's innocence.

41. The nature of the "innocence at stake" exception to informer privilege and the standards to be applied have been a subject of much debate with different jurisdictions taking different positions. The *locus classicus* in this jurisdiction is the judgment of the late Carney J. in Ward v. The Special Criminal Court wherein he directed the Special Criminal Court to examine whether any of the confidential documents "might help the defence case, help to disparage the prosecution case or give a lead to other evidence". The distinguishing factor in this case is that what is being protected is not documentary information, but the identity of the informant themselves. The more analogous case would, therefore, seem to be P(DPP) v. Kelly [2006] which dealt with the question of belief evidence with respect to membership of an unlawful organisation contrary to section 3(2) of the Offences Against the State (Amendment) Act 1972. It is important to recognise that in Kelly the Supreme Court held that the witness could be cross-examined on the basis for their belief up until the point of revealing the informant's identity and that thereafter the public interest in protecting their identity prevailed. The Supreme Court re-iterated the rejection of the use of "special advocates" to represent the views of the defence. Similarly, the Courts in this jurisdiction have not approved of the procedure in *Doorson v Netherlands* [1996] 22 EHRR 330 wherein judges examine a witness in the privacy of chambers and having received the answer determine whether it should be disclosed.

42. Ordering the disclosure of the name of an informant would be a very radical step indeed. It is to be expected that in most cases where it occurred, it would result in the immediate collapse of the trial. There may well be many cases where that could not be avoided if one has regard to the "innocence at stake" exception and the paramount requirement to ensure that the innocent are not convicted. However, in the Court's view in the present case the factual basis for requiring disclosure has not been made out. It is speculation to suggest that disclosure of the name of Garda Crowe's informant would support the defence's assertion that a number of prosecution witnesses conspired to keep Michael Kinsella out of the picture. First of all, it must be noted that according to Garda Crowe, her informant did not in fact keep Michael Kinsella out of the picture. Rather, she says that she was told that Michael Kinsella and Wayne Kinsella got it into their heads that the deceased was the driver of a vehicle that was involved in the murder of Lee Kinsella, acting as the getaway driver on that occasion. It is true that the balance of what she records relates to Wayne Kinsella but given that she was giving her evidence during the course of the trial of Wayne Kinsella that is scarcely surprising. It is also worth considering how the informant came by his or her information. One possibility is that he or she was among the group in the apartment and if that is so that the account would accord with others from the apartment is scarcely surprising.

43. If the informant was not present in the apartment then the other possibility is that the informant was given an account, either first hand or otherwise, of what happened which emerged from someone who was in the apartment. Again, that there would be a degree of convergence not surprising.

44. The trial judge, having heard argument on the matter, put the matter back overnight for consideration and the following morning ruled that the defence had not shown, on the balance of probabilities, that naming the defendant was necessary to show the innocence of the accused. He said that he had considered whether or not Wayne Kinsella's right to a fair trial in this case could be undermined by refusing the defence's application but that bearing in mind the evidence given in the case to date, he did not consider that the fairness of the trial was jeopardised by preserving the anonymity of the informant. In the Court's view the conclusion arrived at by the trial judge was very definitely one that was open to him. The Court has no hesitation in dismissing this ground of appeal.

Conclusion

45. In summary, the position is that the Court has not been persuaded to uphold any of the grounds of appeal that have been argued and advanced in the written and oral submissions. The overall sense that the Court has was that this was particularly strong case from the prosecution perspective and no doubt has been raised about the fairness of the trial or the safety of the verdict. Accordingly, the Court will dismiss the appeal.