THE COURT OF APPEAL

Birmingham P.
Hedigan J.
Edwards J.

Record No: 205/2013

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

O'REILLY COMMERCIALS LIMITED

Appellant

JUDGMENT of the Court delivered on the 3rd of October 2018 by Mr. Justice Edwards.

Introduction

1. This appeal is against the appellant's conviction on foot of a health and safety prosecution, the tragic background to which lies in a single vehicle road traffic accident which occurred on the 4th of April 2006 near Erry, Clara, Co Offaly. This accident involved a Mercedes school bus which overturned and in which a schoolboy, Michael White, suffered serious injuries from which he died.

2. It is uncontroversial that the direct cause of the accident was a failure of the rear suspension of the vehicle, causing the back axle to detach while the vehicle was being driven with catastrophic consequences. Moreover, the rear suspension which failed was not the vehicle manufacturer's original leaf spring suspension, but a modified air ride suspension fitted by a previous owner of the vehicle and which was not approved by the vehicle's manufacturer.

3. As a commercial vehicle, the school bus in question was required to have, and at the time of the accident did have, a Certificate of Roadworthiness issued by the relevant issuing authority (a city or county council which exercises or performs the functions of a licensing authority under the Finance (Excise Duties) (Vehicles) Act 1952) under Regulation 15 of the European Communities (Vehicle Testing) Regulations 2004, S.I. No 771/2004, ("the 2004 Regulations"). As a prerequisite to obtaining this certificate, the vehicle's owner had to present his vehicle for a Department of the Environment (DOE) Commercial Vehicle Test ("(DOE) CV Test") to be carried out by an authorised tester pursuant to Regulation 12 of the 2004 Regulations, and obtain a statement of vehicle roadworthiness (a "Pass Statement") given by the authorised tester under Regulation 14 of the 2004 Regulations. Once obtained, the Pass Statement was then submitted to the relevant issuing authority in support of the application for the Certificate of Roadworthiness.

4. In this case, the appellant was an authorised tester for the purposes of the 2004 Regulations and the vehicle in question had been presented for, and had undergone, a (DOE) CV Test carried out by the appellant who had issued a Pass Statement in respect of it, on foot of which the Certificate of Roadworthiness in force at the time of the accident had been obtained. There was a conflict on the evidence concerning the exact date on which the actual inspection comprising the (DOE) CV Test was carried out, but it was uncontroversial that the Pass Statement was issued on the 1st of September 2005.

5. Section 7 (1) of The Safety, Health and Welfare at Work Act 1989 ("the Act of 1989"), which was in force up until the 31st of August 2005, provided that:

> *"It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risks to their safety or health."*

6. Section 48 (1)(a) of the Act of 1989 in turn rendered it an offence for a person to fail to discharge the duty to which he is subject by virtue of s.7(1) of the Act of 1989.

7. Following an investigation by the Health and Safety Authority arising out of the bus crash in which young Michael White died, the appellant was prosecuted on a four count indictment before the Dublin Circuit Criminal Court in respect of four separate alleged offences under s.7(1) of the Act of 1989, in respect of the conduct of its undertaking as an authorised tester of commercial vehicles. On the 27th of March 2013, the appellant was convicted by a majority verdict of a jury on count No. 1 on the indictment, but was acquitted on counts nos. 2, 3 and 4.

8. Count no. 1 was pleaded in the following terms:

> *"STATEMENT OF OFFENCE*
>
> *Failing to conduct an undertaking so as to ensure so far as reasonably practicable that persons other than employees are not exposed to risks to safety or health contrary to Section 7(1) and Section 48(1)(a) of the Safety, Health and Welfare at Work Act 1989 as amended.*
>
> *PARTICULARS OF OFFENCE*
>
> *You, O'Reilly Commercials Limited, between 5th and 6th days of August 2005, both days inclusive, at or near Ballinalack, Mullingar, County Westmeath, being a place of work, and you being an employer within the meaning of the Safety Health and Welfare at Work Act, 1989 (as amended) did fail to conduct your undertaking in such a way as to ensure, so far as*

was reasonably practicable, that persons not in your employment who may be affected thereby were not exposed to risks to their safety, or health in that, while conducting a vehicle test in respect of a bus bearing registration number 89 WD 2218 pursuant to the European Communities (Vehicle Testing) Regulations 1981 to 2008, you did fail to note the modified rear suspension in the said vehicle."

9. Accordingly, in terms of count No. 1, the specific conduct that was said to constitute a failure by the appellant to discharge the duty to which it was subject by virtue of s.7(1) of the Act of 1989, was the failure to note the modified rear suspension in the bus in question in the course of the (DOE) CV Test carried out by the appellant, between the dates specified.

10. Following a twenty-four day trial, the appellant was convicted on count No. 1 and acquitted on the other counts on the indictment. The appellant now appeals against his conviction on count No. 1 on seven grounds.

Grounds of Appeal

11. The grounds on foot of which the appeal is advanced are as follows:

1. The trial judge erred in failing to accede to the defence application to quash the indictment before the commencement of the trial;

2. The trial judge erred in ruling that documents relating to vehicle testing produced by the appellant could not be shown to a prosecution witness in the course of evidence;

3. The trial judge erred in allowing the prosecution to adduce the opinion evidence of Tony Wynne which went to the ultimate issue in respect of count no. 1 on the indictment;

4. The trial judge erred in ruling that if counsel for the defence put a proposition to a prosecution witness who interviewed a director for the appellant company that was based on information favourable to the appellant then the prosecution would be allowed refer to other material which was unfavourable to the appellant;

5. The trial judge erred in failing to direct the jury to record verdicts of not guilty in respect of all the counts on the indictment on the basis of the four grounds advanced by counsel for the appellant;

6. The trial judge erred in ruling that the 'Nolan' report was inadmissible on the basis that it was not an expert report in respect of which an opinion had been formed;

7. The verdict of the jury was perverse in recording a conviction on count one on the indictment after recording verdicts of not guilty in respect of counts two, three and four.

Uncontroversial matters

12. At the opening of the oral hearing, counsel for the appellant helpfully outlined for our assistance a number of matters in respect of which it is accepted there is no controversy.

13. We were told that the vehicle in question was a Mercedes bus and that it was originally registered in the United Kingdom. It had been operated there by London Bus as part of its fleet. The bus had been originally manufactured with a standard leaf spring suspension. However, London Bus had modified it by substituting an air ride suspension for the original leaf spring suspension. This was done with the knowledge, and it seems the approval, of the relevant UK authority concerned with the roadworthiness of commercial vehicles.

14. After some time, the bus was disposed of by London Bus and was brought to Ireland by its purchaser and was registered here in 2000. Since arriving in this country, it has had a number of owners. Ultimately, it was acquired by Messrs. Raymond McKeown and Ruairi McKeown, partners in an undertaking known as Clara Cabs, with the intention of using it as a school bus, and the McKeowns were the owners of it at the time of the accident on the 4th of April 2006. The McKeowns had purchased the bus in the latter half of 2005 from the immediate previous owner, a Mr. Gaffey. At the beginning of August 2005, Mr. Gaffey was still the owner of the bus, but was hoping to sell it to the McKeowns, who were looking for such a vehicle to use as a school bus. With this potential sale in mind, Mr. Gaffey approached Mr. David O'Reilly, Managing Director of the appellant, with a view to presenting the vehicle for a (DOE) CV Test. Mr. Gaffey first brought the vehicle to the appellant's premises on the 5th of August 2005. There was a conflict of evidence as to whether the vehicle was in fact presented for testing on that date or was merely presented for a pre-test inspection (described in evidence as a pre-DOE) on that date. Be that as it may, the appellant did not complete an examination of the vehicle on the 5th of August 2005, on whatever basis it was presented. Two reasons were put forward for this. The first was because Mr. Gaffey did not have the vehicle log book with him. (However, the evidence adduced before the jury suggested that while this would have prevented an actual (DOE) CV Test from going ahead, it would not necessarily have prevented a pre-DOE examination from proceeding.) The second was that the vehicle was considered to be too dirty. (This would have inhibited both a pre-DOE examination and an actual (DOE) CV Test from being completed.)

15. Subsequently, the vehicle was re-presented and was tested and ultimately Mr. Gaffey was issued with a Pass Statement. There was controversy as to whether Mr. Gaffey re-presented the vehicle on the 6th of August 2005, or on any subsequent date in August, and if it was represented during August for what purpose it was re-presented (i.e. for a pre-DOE examination or an actual (DOE) CV Test), but it was uncontroversial that a Pass Statement issued on the 1st of September 2005.

16. Counsel for the appellant informed the Court that when a vehicle was presented, and accepted, for testing there were several possible outcomes:

1. the vehicle passes and leaves with a Pass Statement;

2. the vehicle fails but remains on the tester's premises where the failings are rectified following which it is issued with a "rectified" Pass Statement;

3. the vehicle fails, but leaves the tester's premises the owner having been issued with a test report detailing the failings, following which the failings must be rectified and the vehicle presented for a rectified re-test within 21 days. If the vehicle passes the re-test it is then issued with a "rectified re-test" Pass Statement.

17. The McKeowns purchased the bus from Mr. Gaffey with the benefit of the Pass Statement issued by the appellant, which was in turn used to obtain a Certificate of Roadworthiness.

18. It was also uncontroversial that the bus, prior to being presented by Mr. Gaffey for testing on this occasion, had on three previous occasions been tested in this jurisdiction, and had passed, while it was in the possession of previous owners.

19. The principal regulations which governed the testing of commercial vehicles at the relevant time were the 2004 Regulations. Pursuant to these regulations, and earlier regulations which the 2004 Regulations replaced, various circulars were issued to authorised testers concerning what they should do and should not do in the course of testing. These circulars supplemented, and once issued formed part of, a vehicle testers manual provided by the Department of the Environment to each authorised tester.

20. One such circular was VS3-2001 relating to vehicle modifications. The vehicle testing manual current in August/September 2005 incorporated this circular. This version of the manual specified that:

> *"Modifications to vehicles which affect safety should have the approval of the original manufacturer. Where this is not possible, e.g., the manufacturer has gone out of business, the vehicle should be approved by an automotive or mechanical engineer. Consequently for vehicles registered after the 31st of March 2001 which have modifications which could affect the vehicle's safety authorised testers should request sight of the manufacturer's approval or certification from an automotive or mechanical engineer that the vehicle's safety has not been compromised by the modification before proceeding with the roadworthiness test. Modifications that were carried out before a previous test are likely at this stage to have stood the test of time. Nonetheless where authorised testers have serious concerns about issuing a further roadworthiness certificate at this stage, either the manufacturer's approval to the change or the relevant certification by an engineer should be seen before a further roadworthiness certificate is issued."*

Controversial evidence at the trial (relevant to the appeal)

21. The prosecution's case was that, notwithstanding that the Pass Statement issued on the 1st of September 2005, the vehicle was in fact tested on the 6th of August 2005 and failed in certain respects (which did not include having a modified suspension that was neither approved by the manufacturer nor certified by an automotive engineer), following which it was presented for a rectified re-test on the 1st of September 2005, which it passed. In that regard, they relied primarily upon evidence to that effect in a statement made by Mr. David O'Reilly to HSA Inspector Sheeran on the 1st of October 2008, as well as on the contents of certain documents produced by Inspector Sheeran in the course of his evidence, which had been generated by the appellant and which were provided to Inspector Sheeran, pursuant to a statutory request. In addition, they relied on certain evidence given by Mr. Gaffey.

22. The statement of Mr. O'Reilly made to Inspector Sheeran on the 1st of October 2008, was in the following terms:

> *"I hereby declare that this statement is true to the best of my knowledge and believe that I make 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 am an authorised vehicle tester certified by Westmeath County Council in 1993 approximately. I can confirm that the vehicle, 89 WD 2218, owned by James Gaffey was tested for DOE. The test was booked for Friday the 5th of August 2005 but I think the test was carried out on Saturday the 6th of August 2005. I am giving a copy of the page of the DOE test book for this test to Inspector Sheeran. I produce this as exhibit DOR1. The bus failed on a number of items. I am giving a copy of the failure list to Inspector Sheeran. I introduce this as exhibit No. DOR02. The vehicle was booked in for retest and retested on the 1st of September 2005. I'm giving Inspector Sheeran a copy of the page of the DOE test book for this retest. I introduce this as exhibit DOR03. The vehicle passed. I am giving a copy of the documentation of pass results to Inspector Sheeran, six pages in total. I introduce this as exhibit DOR04. I have had this statement read back to me and it is correct. I hereby declare that this statement is true to the best of my knowledge and belief and that I make 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."*

23. It was put to Inspector Sheeran in cross-examination, *inter alia*, that the bus could not have been tested on the 6th of August 2005, and re-tested on the 1st September 2005, as the re-test would have been outside of the 21 day period provided for by the 2004 Regulations. It was also put to him that an actual test could not have taken place prior to the 1st of September 2005, because if one had taken place the relevant authorities would have a record of it, and none such exists. Inspector Sheeran was adamant that he had simply recorded what had been stated to him by Mr. O'Reilly, that he had read the statement over to him after he had taken it, that Mr. O'Reilly, having been afforded the opportunity, *"had a look at it to see if he was happy with it"* and that Mr. O'Reilly had signed it. Mr. O'Reilly later gave evidence that he had not stated what was in the statement. He accepted that his signature was on the document but emphatically denied that it had been read over to him or that he knew what he was signing. However, it was never put to Inspector Sheeran that Mr. O'Reilly would be disputing that the statement had been read over to him or that he was unaware as to what it was that he was signing.

24. Inspector Sheeran also acknowledged under cross-examination that, at the time of the taking of this statement, he would have been aware of the fact that Mr. O'Reilly had earlier given a statement to the Public Service Vehicles (PSV) Inspector, Garda Michael Nolan, which was ostensibly inconsistent with what he was now saying. Inspector Sheeran accepted that he did not question him about the inconsistency.

25. The defence maintained that both the relevant (DOE) CV Test and the issuance of the Pass Statement occurred on the same day, i.e., the 1st of September 2005, and that all that had occurred in August 2005 was an informal pre-test inspection (a pre DOE) to identify issues that required to be addressed before the vehicle would be presented for an actual test. In that regard, the defence sought to rely primarily on evidence to that effect contained in the earlier statement made by Mr. O'Reilly to Garda Michael Nolan on Wednesday the 5th of April 2006, and also on exhibit DOR 02, an undated document referred to in the statement of the 5th of April 2006 as a list of *"recommendations"* said to have been furnished to Mr. Gaffey following the alleged pre-test inspection, notifying him of matters that required rectification before an actual test would be capable of being passed. (Exhibit DOR 02 was also referred to in the later statement made to Inspector Sheeran on the 1st of October 2008, where it was characterised as the *"failure list"*, and it was frequently referred to in evidence given at the trial by Mr O'Reilly as the *"ticked sheet"* in the context of an explanation put forward by him that the fact that the items that were marked or ticked on the sheet were fail items, and that items that would pass the test were not marked or ticked in any way, indicated that it was a record of a pre-test rather than an actual test.)

26. The statement made by Mr. O'Reilly to Garda Nolan was in the following terms:

> *"I am David O'Reilly, owner of O'Reilly Commercials Limited built in 1990. I am the chief tester appointed by the*

Department of Transport Environment in 1993. We are the main dealer for MAN truck and bus in the midlands and northwest since 1995. I am qualified with senior trade cert in the motor trade since 1989. The owner of bus No. 89 WD 2218, James Gaffey, booked in his bus with the office for a pre DOE back about a month before it was tested. James Gaffey told me he intended to sell the bus and wanted to know what his bus needed to make it road worthy before he sold it. This is a normal procedure. James Gaffey took away his bus after my first inspection with a list of my recommendations which I have given the gardaí a copy of. James returned for his DOE test on the 1st of September 2005 to my test centre and a full Department of the Environment test was carried out by myself, David O'Reilly. The bus 89 WD 2218 passed all the necessary criteria to obtain a certificate of roadworthiness and certificate No. H200621524 was issued from this centre. In general I found the condition of this bus to be above average for the year of the bus. During examination I found no defects on the bus or any modifications that caused me concern. The only owner of the bus I know was James Gaffey and I only met him on the first day of the inspection and the second time on the day of the test. I don't know or have any dealings with the current owner".

27. Mr. O'Reilly also gave lengthy evidence for the defence at the trial in which he explained, *inter alia*, the differences between a pre-test and an actual test, and the paperwork and procedures that would be associated with each. Various records generated by the appellant were put to him by his own counsel for commentary and explanation. These recorded both the transaction with Mr. Gaffey, as well as transactions with other clients. In terms of his own dealings with Mr. Gaffey, he stated that on the 5th of August 2005, he was told by his office staff that *"there's a test there"*. He went out to take a preliminary look at the vehicle, and to look for the tax book, which was normal procedure. Usually, the tax book would be left on the seat but there was no tax book there. Mr. Gaffey was not at the vehicle so Mr. O'Reilly returned to the reception area of his premises where he found Mr. Gaffey. He did not know the man and had never met him before. He informed him that he could not carry out a (DOE) CV Test because there was no tax book. Mr. Gaffey informed him that he had forgotten it. His evidence was then that Mr. Gaffey said *"that he had the book [sic] sold and it was needed for the 1st of September for school runs, and would I be able to do a -- tell him what would it take to pass the test."* Mr. O'Reilly then gave the following further testimony:

"Q. Okay, and what did you say or do then?

A. He asked us will we check it for -- see what repairs it would take to put it through a test.

Q. Right?

A. And we told him we couldn't do an official DOE test because he had no tax book.

Q. Right, and did -- was he keen to get your view on what needed to be done?

A. He wanted to know what needed to be done because he had to get parts for it; he says he'd have time to order them.

Q. Right?

A. And he was -- he says it'd be a workshop job at that stage.

Q. Okay, and so what did you do then?

A. We proceeded to check it then for pre-DOE test.

Q. Yes?

A. A smoke test, a break test, and when I went in underneath it then it was dirty and I told him -- I went back out to get him again then, I said it's too dirty to view it.

Q. Okay?

A. And it wanted to be washed.

Q. Well, where was that now? Where was it dirty?

A. Underneath the chassis, the undercarriage of it.

Q. Okay, and did you bring him out just to show him that?

A. I brought him in to the pit to show him what we wanted cleaned on it, yes."

28. Mr. O'Reilly identified an invoice issued to Mr. Gaffey for the appellant's services on the 5th of August 2005. The evidence with regard to this invoice was as follows:

"Q. Okay. Could I ask you look at an invoice?

A. Yes.

Q. There's copies for the Court and the jury here. Is that a copy of the invoice that you issued?

A. That's right, yes.

Q. On the 5th of --?

A. 5th of August, yes.

Q. Okay, and it's -- how is it described there just, by the way?

A. It should be a pre --

Q. Well, just read out what is there?

A. "Carry out PPE test on bus."

Q. Okay, and what does that mean or --

A. A pre-DOE test.

Q. Okay, and why is it described like that?

A. Because it wasn't an official test.

Q. Yes, no but what does PP mean then?

A. It should be a pre -- P-R-E.

Q. All right, could I ask that --

A. Pre-test."

29. Mr. O'Reilly was also asked whether Mr. Gaffey had said anything about when he might come back, leading to the following exchanges:

"A. Not to me, he said he -- he didn't say anything to me in the test station.

Q. Pardon?

A. He didn't say to me on the -- at the test.

Q. Okay, okay. Well, are you aware as to whether in fact he made an appointment on the 5th to come back on any other day?

A. No, there was no appointment in the book any other day.

Q. Okay?

A. Until the appointment in the 1st of September."

30. As alluded to already, Mr. O'Reilly sought to dispute the evidence that had been given by Inspector Sheeran concerning the statement that he had signed on the 1st of October 2008. He was cross-examined about this, giving rise to the following exchanges (*inter alia*):

"Q. Yes, okay. If we then look down through the body of that document please, if you would, Mr O'Reilly. And it says: 'I, David O'Reilly, being a manager whose position is director, make this statement on the 1st of October 2008 to the best of my knowledge and belief, and I make it knowing that if I know it to be false or not to be true, I shall be guilty of an offence.' And is that your signature?

A. That's my signature, yes.

Q. And is the date the 1st of October 2008?

A. That's right.

Q. So do you have a memory of signing this document?

A. No.

Q. You don't?

A. Because I signed documents for him that day, and I took it that he was working with me and we were together on this, that he was going to find out what happened the bus.

Q. Okay?

A. And there was no mention of making a statement on that day, and it was in the foyer of the hotel beside the bar.

Q. So you've no memory of signing this legal document?

A. He says he had to sign documents, he says: 'Will you sign these few documents for me?' when he came back with them in his briefcase.

Q. Okay. So did you sign them blank or did you sign them with the entries in them?

A. I don't know.

Q. You don't know, right. Could I suggest to you, Mr O'Reilly, that that appears to be a little implausible in circumstances where you're meeting a Health and Safety Inspector, you know it's in relation to this very serious incident in April of 2006, and he is asking you to sign a document. At the very least you'd have read it, you would know what you were signing?

A. No, I didn't know what I was signing. I didn't sign because I trusted him, like any other inspector that came about

that bus."

31. Both sides relied to some extent on evidence given by Mr. Gaffey on the issue of his dealings with the appellant, although his testimony was not wholly consistent with the position being maintained by either side. Mr. Gaffey on the one hand seemed to confirm that he had had more than one dealing with the appellant in August 2005, but on the other hand seemed to maintain that his August dealings involved a pre-test only.

32. Mr. Gaffey gave very brief evidence in chief, dealing primarily with the period of his ownership of the bus in question, and his sale of it to Ruari McKeown. In regard to getting the vehicle tested before selling it, he merely stated *"Obviously I got it tested for him"*.

33. In the course of being cross-examined by counsel for the appellant, Mr. Gaffey identified the Pass Statement (described by counsel in his questions as *"the vehicle testing certificate"*) issued to him by Mr. O'Reilly on the 1st of September 2005. Following this there were the following exchanges:

"Q. … . And certainly, that would appear to suggest that your vehicle was tested on the 1st of September 2005?

A. That's correct, yes.

Q. And I think if you go back to page five of six, I don't know whether you've seen this document before but this was printed out relating to the record of the test on the 1st of September 2005. And it gives details in relation to the vehicle there; isn't that right?

A. That's right, yes.

Q. And I think you brought the -- you brought the tax book -- a "tax book" is the common phrase for it, to Mr O'Reilly on the 1st of September?

A. That's right, yes.

Q. Okay. And you hadn't bought it on the first date, the 5th of August?

A. That's correct, I think, yes."

34. Mr Gaffey was then further cross-examined by Mr Greene SC, who was counsel for a then co-accused. Mr Greene's cross-examination was not primarily focussed on the testing of the vehicle, but touched on it in passing. However, in the course of that cross-examination there was the following exchange:

"Q. … you went, as I understand it, to the company represented by Mr McGuinness, to my right, at the start of August; isn't that right?

A. Yes.

Q. Because there was an issue about cleanliness. Was that it, just cleanliness underneath?

A. No. The log book; I forgot it on the day.

Q. Okay, you forgot the log book?

A. Yes.

Q. But because you hadn't the chassis, as I understand it, clean enough; is that right?

A. He wanted it washed, yes.

Q. He wanted it washed and he wanted the log book; is that it?

A. That's correct.

Q. As a result of which it was three and a half weeks before you went back to him to get the cert; isn't that right?

A. It would have been back to him before that to do a pre-test on it.

Q. When was that?

A. I'm not sure now; I haven't any dates for that."

35. Arising from Mr. Greene's cross-examination there was certain re-examination of Mr. Gaffey, in the course of which counsel for the prosecution elicited the following further testimony:

"Q. Briefly, Mr Gaffey. I think you indicated to Mr Greene that while you received the certificate on the 1st of September 2005, there had been a pre-test sometime before that; is that right?

A. That's correct, yes.

Q. And can I take it then that that was sometime in August?

A. Yes.

Q. And have you any idea what tests were carried out or the manner in which they were carried out for the purposes of what you call a pre-test?

A. Well, he just checks and gives you a list of what has to be fixed, and you go and do it and bring it back then for the other test.

Q. Okay. And when you say he does it, or gives you the list --?

A. Yes.

Q. -- for the purposes again of that testing, would it be fair to say that you wouldn't have much knowledge of the manner in which the test is carried out, or matters of that nature?

A. No, no, I wouldn't be near him doing it. He'd do it himself and just give you the list.

Q. Right. And was that subsequent to the date on which you presented without the log book?

A. It was after that, yes, yes.

Q. All right. So we're talking about, again for clarity, three dates. First date, where you present without the log book, you're told to come back?

A. Yes.

Q. Was that in August sometime as well, do you recall?

A. It would have been, yes.

Q. And then after that then, you present for your pre-test, tests are carried out, and you're given a to-do list, as such?

A. Yes.

Q. And then that's also in August at some point?

A. Yes.

Q. And then you return on the 1st of September, and you're, at that point and on that day, you were provided with the certificate; is that right?

A. Yes. They checked it and it passed, so…

Q. Yes. And is it fair to say that that is the only document that you, yourself, received and that was in your possession, as regards your interaction with O'Reilly's Commercials; is that right?

A. Yes.

Q. So in terms of the other documentation presented to you, you had no role in filling in or in any way being involved in the presentation or preparation of that documentation?

A. No."

36. The date of the conduct said to comprise the alleged failure to fulfil the duty under s.7(1) of the Act of 1989, was of significance in the case because s.7(1) of the Act of 1989 ceased to have effect at midnight on the 31st of August 2005, when the Act of 1989 was repealed and replaced by the Safety Health and Welfare at Work Act, 2005 ("the Act of 2005").

37. As regards the alleged failure to note the modified rear suspension in the said vehicle, the prosecution's case was that the fact that it was modified would have been obvious to a conscientious tester on visual inspection due, *inter alia*, to the existence of two redundant spring hangers attached to the rear chassis. The prosecution case, relying on expert testimony from a Mr. Wynne, a Department of the Environment vehicle tester of thirty six years experience, and a member of the team that had compiled the 2004 version of the Vehicle Testing Manual, was that a tester, noting those redundant spring hangers should be alerted *"to immediately inquire as to what type of suspension system was now in use"* and should have concerns if *"[i]ts non-standard from a manufacturer's specification."* Mr. Wynne, who examined the vehicle a considerable time after the accident, expressed the view that the tester should have been asking himself: *"Who fitted this? Where did it come from? What is it? How does it apply to this vehicle? Does it affect the vehicle's specification? Has it got the manufacturers type of approval and how does it affect the integrity of the vehicle?"*

38. Mr. Wynne further expressed the opinion that paragraph 12 of the section of the vehicle testers manual relating to *"rear suspension, rear springs"* would have been relevant in that context of addressing those questions. Paragraph 12 stated *"Any modification to a vehicle which has safety implications shall be approved in writing by the vehicle or the trailer manufacturer. Where this is not possible certification by an automotive or mechanical engineer that the modifications have been assessed and found to be safe shall be provided by the operator."*

39. The jury received evidence that the modification had not been approved by the manufacturer. Moreover, there was no evidence that the appellant had sought from Mr. Gaffey, and/or that he had been provided by Mr. Gaffey with, the certification of an automotive or mechanical engineer, confirming that the modifications had been assessed and found to be safe.

40. Mr. Wynne expressed the opinion that, in light of the fact that the vehicle had an unknown quantity in the form of a modified rear suspension that was non standard from the manufacturer's specification, and in the absence of certification by a competent person that the modifications had been assessed and found to be safe, the vehicle should not have passed a roadworthiness test conducted by the appellant. (Although not strictly relevant to the appeal, Mr. Wynne also felt that the vehicle should not have passed because of the existence of a repaired fracture to the chassis, in the absence of evidence that the repair had been performed in a manner approved by the manufacturer.)

41. In further support of their case, the prosecution were relying on s.50 of the Act of 1989, which provides:

"In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a duty or requirement to do something so far as is practicable or so far as is reasonably practicable, or to use the best practicable means to do something, it shall be for the accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement, or that there was no better practicable means than was in fact used to satisfy the duty or requirement."

42. In the course of his evidence, Mr. O'Reilly contended that he did in fact note the modified rear suspension on the vehicle but was satisfied that it was a *"top class"* job and said *"I could see nothing wrong with it"*. He said that he had personally fitted air ride suspensions in trailers, was very familiar with them and had no safety concerns. He did not regard the redundant spring hangers as being of significance because some manufacturers provided the option to customers of choosing between spring leaf suspensions and air ride suspensions, and in such cases the vehicle chassis would be fitted with spring hangers that might or might not be used, depending on which option was chosen. He was personally an agent for a German mechanical engineering company, Maschinenfabrik Augsburg-Nürnberg, more commonly referred to as MAN. Mr. O' Reilly testified that such a choice was available on certain MAN vehicles which would have redundant spring hangers if the air ride suspension option was chosen. In substance, his evidence on this aspect of the case was to the effect that the presence of redundant spring hangers would not have flagged to him that a vehicle might have been modified by the retrofitting of an unapproved air ride suspension.

Ground of Appeal No 1.

43. In ground of appeal no. 1, the appellant complains that the trial judge erred in failing to accede to a defence application to quash the indictment and discharge the appellant before the commencement of the trial.

44. This application had been based upon a submission that counts nos. 1 to 4 on the indictment as it then stood, constituted offences unknown to the law. The statement of offence in each of the four counts was that the accused had failed…*"to conduct an undertaking so as to ensure, so far as reasonably practicable, that persons other than employees are not exposed to risks to safety or health contrary to section 7 (1) and section 48 (1) (a) of the Safety, Health and Welfare at Work Act 1989 as amended."* The particulars of each of the four counts then varied in that they each referred to a distinct alleged failing in the conduct of a vehicle test pursuant to the European Communities vehicle testing regulations 1981 – 2008.

45. In the case of count no. 1, the alleged failing was that the appellant "did fail to note the modified rear suspension in the said vehicle". In the case of counts nos. 2-4, the particulars differed in that they related respectively to; at count no. 2, a failure to verify as safe the modified rear suspension in the said vehicle, at count no. 3, a failure to note the missing bolt in the right rear suspension spring of the said vehicle, and at count no. 4, a failure to take account of a fracture in the chassis of the said vehicle.

46. It was submitted that it was an integral and indivisible part of each of the four counts that were then on the indictment that the accused had, in the conduct of the test or tests allegedly conducted, breached the regulations under which the test or tests were performed. It was submitted that this constituted a fault in the indictment in that it did not disclose, under any of the counts, an offence known to law. It was submitted that the regulations, while creating a number of offences, did not create any such offence with regard to the nature of the performance of a defective or incomplete test.

47. In support of this submission both this Court, and the court below, were specifically referred to various individual regulations comprising the 2004 Regulations. In particular, this Court was referred to Regulations 7, 16, 18, 20 and 21, respectively.

48. Regulation 7 states:

"7(1) The Minister may from time to time issue directions to issuing authorities and authorised testers in relation to the —

(a) manner in which the tests are to be carried out,

(b) manner in which any or all of the items to be tested as specified in Schedules 2 and 3 are to be carried out.

(c) premises to be used as test centres,

(d) number and layout of test lanes,

(e) equipment to be used to carry out tests,

(f) maintenance and calibration of equipment used in carrying out tests,

(g) qualifications and training requirements for persons carrying out tests,

(h) records and documentation to be maintained, or

(i) data to be provided to the Minister and the format of such data.

(2) Issuing authorities and authorised testers shall comply with any direction given under paragraph (1).

(3) Where an authorised tester fails to comply with a direction under paragraph (1) the issuing authority may suspend or terminate the appointment of the person as an authorised tester where it believes the circumstances of the non-compliance warrants such action."

49. Regulation 16 creates an offence of failing to deliver up a revoked or cancelled Pass Statement on demand of an authorised officer. Regulation 18 is concerned with the powers of inspection by officers of test facilities and records to ensure compliance with the regulations; and creates an offence of obstructing or misleading an inspecting officer. Regulation 19 is concerned with the use of an uncertified or untested vehicle in a public place; and creates offences in this regard. Regulations 20 and 21 address Garda powers to inspect vehicles and to demand the production of certificates. Regulation 22 provides the penalties for offences under the regulations on summary conviction.

50. The regulations are expressed to have been made by the Minister for Transport in exercise of the powers conferred on this office by section 3 of the European Communities Act 1972, for the purpose of giving effect to Council Directive 96/96 RC and Commission

Directive 2003/27 EC. It was submitted that the regulations do not provide that an authorised tester could be guilty of an offence under the regulations in circumstances such as those in this case. Rather, such offences as are created under the regulations are concerned with the user/owner of a vehicle or a party who fails to permit an inspection.

51. It was submitted that the respondent wrongfully framed an indictment alleging a breach of the Act of 1989, which is concerned with the safety of systems of working, and places of work, when in truth the particularised allegations concerned the adequacy and manner of testing under the European Communities (Vehicle Testing) Regulations 1981-2008.

52. It was further submitted that, in so far as the conduct complained of might be said to possibly constitute offences under the 2004 Regulations, or that the offences alleged gained their substance and precision from the regulations, it was submitted that s. 3 (3) of the European Communities Act 1972, prohibits the creation of an indictable offence by regulations made under the Act.

53. The appellant contended before the court below, and still maintains, that in the indictment as laid, the respondent inappropriately and impermissibly resorts to a joinder of alleged breaches of regulations made under or pursuant to the ministerial power provided in s.2 of the European Communities Act 1972 on the one hand, with the offence under ss. 7 (1) and 48 (1) (a) of the Act of 1989, on the other. Thus, the appellant's argument is that the result of this conflation is the creation of offences unknown to the law. The particulars of the offences as pleaded inextricably link the impugned conduct of the test or tests with the standards as set out in the regulations relating to the testing regime; and thus the allegation is grounded in the regulations rather than a failure or shortcoming grounding culpability under s. 7 of the Act of 1989.

54. In the court below, the respondent sought to make the point, re-iterated before us, that the particulars pleaded were necessary to give reasonable information as to the nature of the charge as required by s.4(1) of the Criminal Justice (Administration) Act 1924, but that the essence of each charge was the failure, in the particular respect pleaded, *"to conduct your undertaking in such a way as to ensure, so far as was reasonably practicable, that persons not in your employment who may be affected thereby were not exposed to risks to their safety or health in that while conducting a vehicle test in respect of a bus bearing registration number 89 WD 2218 pursuant to the European Communities (Vehicle Testing) Regulations 1981 – 2008..."*

55. The appellant submitted that it was somewhat to miss the point to describe the reference to the regulations as merely particularising an offence alleged to have been committed under s. 7 of the Act of 1989. It was submitted that there could have been no breach of s.7, where the performance of the test concerning the vehicle could not be said to involve a breach of the Act of 1989. If the vehicle did not pass the test, nor enter upon the public road by virtue of the test concerned, no danger affecting safety, health or welfare at work can have arisen, irrespective of the manner of the test.

56. The respondent adamantly maintains that the indictment as framed clearly and distinctly sets out an offence known to the law, being one contrary to ss. 7(1) and 48(1)(a) of the Act of 1989. The statement of the offence, in respect of each count including the count the subject matter of this appeal, was in the following terms:-

> *"Failing to conduct an undertaking so as to ensure, so far as is reasonably practicable, that persons other than employees are not exposed to risks to safety or health, contrary to section 7 (1) and section 48 (1) (a) of the Safety, Health and Welfare at Work Act 1989 as amended."*

57. It was submitted that the counts as framed on the indictment did not allege an offence on foot of breaches of the Regulations of 1981 – 2008, but rather an offence contrary to the Act of 1989 and, accordingly, were offences known to the law. It was not the case, as submitted by the appellant, that the offences in question gained their *"substance and precision"* from the Regulations but rather, it was submitted, the actions and/or omissions of the appellant which underpinned the prosecution case were simply identified with additional clarity through reference to the said Regulations.

58. The respondent refutes the claim that she had sought to circumvent the prohibition on the creation of an indictable offence by regulations made under or pursuant to the ministerial power provided in s.2 of the European Communities Act 1972; by employing the device of charging an offence under the Act of 1989, as alleged by the appellant. In support of her position, the respondent relies upon *Quinn v Ireland* [2007] 3 I.R. 395, and in particular paragraphs 15 and 16 of the judgment of Denham J in that case, to which we have been referred.

59. In the court below the trial judge refused to quash the indictment, ruling:

> *"I have considered the submissions, the reference books and the case law referred to. I'm satisfied that the first named accused is charged with an offence known to Irish law, that's section 7 of the 1989 Act. The first named accused is not charged with a breach of the regulations and I accept the submissions of Ms Biggs in that regard. I will therefore refuse the application to quash counts number 1 to 4 on the indictment. I will say one further thing and that is I note that Ms Biggs has referred that if I wasn't with her on one point she's referred to the removal of the reference [sic] in relation to the regulations from the indictment, that's a matter for the prosecution."*

We think it likely that the judge's words may have been somewhat indistinct on the recording and that the words *"she's referred to the removal of the reference"* that appear on the transcript should probably read *"she's prepared to remove the reference."*

60. Although the same arguments were advanced in respect of counts nos. 1 to 4, inclusive, we are only concerned at this point with count no. 1. In that regard, we have not been persuaded by the appellant's arguments that it fails to disclose an offence known to the law.

61. In our judgment, count no. 1 on the indictment clearly alleges an offence contrary to s.7(1) and s.48(1)(a) of the Act of 1989 and no other offence. While it is true in general terms that the Act of 1989 is primarily concerned with risks to safety, health and welfare *at work* created by systems of work, places of work or the working environment, it is also clear that certain of its provisions are more broad in their potential application (our emphasis). Section 7(1) of the Act of 1989 is one such provision. Section 7(1), since repealed and replaced by s. 12 of the Act of 2005, which is narrower in its scope, creates a duty on an employer to conduct his undertaking *"in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risks to their safety or health."* The wording is clear and unambiguous and is broad enough to cover, in the case of a service provider such as the appellant, not just the manner and means in which, and location at which, the service is provided but the nature and quality of the service itself.

62. It is equally clear to us that the offence as pleaded in count no. 1 does not allege any breach of regulations. The reference to the European Communities (Vehicle Testing) Regulations of 1981 – 2008 was clearly intended to inform interested parties of the

context within which the alleged offence was committed, namely during the carrying out of a vehicle test on a particular vehicle for the purposes of those regulations, and no more than that. It does not allege that those regulations, or any one of them, were in fact breached, much less that any such breach is itself an offence. There is no reference to the regulations in the statement of offence. Rather, the reference is contained solely within the particulars of the offence. That particularisation was wholly appropriate in our view, and was not in any way misleading or liable to be misconstrued.

63. Moreover, in so far as the particulars of the offence also specifically refer to a failure *"to note the modified rear suspension"*, this alleged failure is not framed or characterised in any way as constituting a breach of the said regulations. Rather, it is the particularisation of how the appellant is said to have failed to conduct his undertaking, so as to ensure so far as reasonably practicable that persons other than his employees were not exposed to risks to their safety or health. In essence, the indictment alleges that the test performed by the appellant on the bus on the occasion in question was, by reason of the appellant not taking, as a matter of reasonable practicability, a step or steps that were open to him, i.e., noting the modified rear suspension, inept or ineffectual to such an extent that it left persons other than his employees exposed to a risk to their health and safety. It was a matter for the prosecution to prove that allegation to the standard of beyond reasonable doubt, but it is perfectly clear to us what it was that was being alleged, and that the alleged offending conduct would, if proven, constitute a recognised offence under the law.

64. In the circumstances, we consider that the trial judge was correct in her ruling and we are not disposed to uphold ground of appeal No. 1.

Ground of Appeal No. 2.
65. This complaint was made primarily in the context of counsel for the appellant's detailed cross-examination of Inspector Sheeran, and also in the context of his later cross-examination of Mr. Wynne.

66. Before unfolding the dispute giving rise to the rulings now complained of, we consider that it is important to record that Inspector Sheeran gave evidence at the trial, not as an expert in vehicle design, construction, safety or roadworthiness, or in relation to commercial vehicle testing, but in his capacity as an authorised inspector for the purposes of the Act of 1989, who had conducted an investigation on behalf of the Health and Safety Authority ("HSA"). . Indeed, before the controversy with which we are now concerned arose, counsel for the appellant had successfully elicited from Inspector Sheeran that his background was in chemical engineering and that he was not claiming any personal expertise in automotive engineering, or in vehicle testing. He acknowledged that the HSA, whom he represented, had consulted with, and had had recourse to, other persons who did have such expertise and who would be giving evidence in due course later in the trial.

67. On day 9 of the trial, at a certain point in his cross-examination of Inspector Sheeran, counsel for the appellant sought to put a number of documents to the witness. These documents had originated within the appellant company. They related to the procedure and system by which the appellant performed vehicle tests and recorded findings, and purported to be examples of how, in particular, it recorded pre-DOE tests, "rectified" tests and failed tests. These documents were not already in evidence and they were concerned with the testing by the appellant of vehicles other than the bus in question. Counsel for the respondent raised an objection to this proposed line of cross-examination on the following basis:

> *"PROSECUTING COUNSEL: … as I understand matters I think Mr McGuinness [defence counsel] might intend to propose to ask this witness to comment on documentation that has been derived from O'Reilly Commercials Ltd, from their computer system. And if that is the case, Judge, again insofar as it may be documentation that this witness has never seen before, in my respectful submission, and rather than have an argument in front of the jury, it may not be appropriate to ask this witness to comment upon documentation that he has never seen before, that he's never inputted, that he has no role in its production or preservation. Particularly in circumstances where this documentation, its authenticity has not been confirmed, has not been proven and I'm not sure as to whether Mr McGuinness seeks to introduce this documentation, to prove the truth of its contents. If that is the case, certain requirements under the 1992 Criminal Evidence Act would have to be complied with."*

68. Prosecuting counsel continued:

> *"But if that is the case, then my objections are a) that documentation is not authenticated, it may well be hearsay and altogether aside from those issues of admissibility, how a witness who has never seen documentation before, who knows nothing of the system can comment upon it is I'm at a loss as to how it could be relevant."*

69. Counsel for the appellant then responded:

> *" … in terms of its origin or authenticity, any document put to a witness doesn't require to be proved before it's put to the witness. It may well be subject to the requirement of it being proved at a later stage of the proceedings. But it can be put to the witness without, as it were, the natural order being turned on its head and requiring, I mean to require the defence to prove every document before they can put it to a witness is an inversion of the statutory order of matters. Any document can be put to a witness, subject of course to the overriding test of relevance. This is relevant, because it relates to the system authorised by the department for the submission of returns. It's the record of a statutory test and more importantly it's an example and as it were, a non controversial example of a test having been conducted and producing a fail result. So it's an example of something that's relevant to the prosecution assertion, they're asserting that Mr O'Reilly tested and failed this vehicle and then retested it and passed it on the 1st of September. And it's essential for me to put examples of fail documents and of the format, the format of documents, because Mr Sheeran there, he's brandishing what he says is a fail form. So it's completely relevant for me to do that and I'll be coming to it in more detail when dealing with all the fails in the period under scrutiny, August to September."*

70. In rejoinder, counsel for respondent further submitted:

> *"…there are experts who are to be called in relation to the testing procedure, namely Mr Coppins, and Mr Wynne. And insofar as there might be any probative value derived from their views as to whether or not this documentation consists of a fail document or not, it should come from people who have direct knowledge of the procedure involved, and not in my respectful submission, from Mr Sheeran. What Mr McGuinness suggests from Mr Sheeran's perspective as presenting as a fail form, that information came directly from Mr O'Reilly, himself a tester. So if documentation is to be put, it's to be put to the people with direct knowledge of the system employed in relation to these testing regulations, Judge."*

71. The trial judge seemed to accept the submission from counsel for the appellant that it was not necessary to authenticate the documentation before it could be put to the witness, but stated that it would have to be authenticated at some point and that *"it's a*

matter for you to decide how to do that". She later added: *"What stage you prove them at is up to you, but they must be proven."* In response to this part of the ruling, there was mention by counsel for the appellant of the possibility of his client executing a late certificate for the purposes of s. 6 of the Criminal Evidence Act 1992, and, a little further on in the transcript, there was also a suggestion, albeit objected to by his opponent, that an alternative means of proceeding would be to stand the witness down, and for the court to then receive evidence from Mr. O'Reilly in the course of a voir dire for the purpose of authenticating the documents. In that regard, counsel for the appellant said:

> *"Well, what I'm quite happy to suggest as an easy and acceptable and proper way then is simply to put Mr O'Reilly in the box on a voir dire on the admissibility of these to deal with them and I can do that in five minutes."*

72. As it transpired neither course was in fact adopted before the cross–examination of Inspector Sheeran resumed, because the judge had indicated sympathy with counsel for the respondent in relation to the second part of her objection, namely that, in circumstances where the documents emanated from the appellant, where the witness had no knowledge of them, and where the witness was not testifying as an expert, it was hard to see how he could comment meaningfully on them; and that it would be more appropriate to ask the relevant expert witnesses due to be called by the prosecution to deal with them. The terms of the trial judge's ruling in that regard were:

> *"The document has derived from [the] O'Reilly computer system, it hasn't originated in the investigation and in circumstances where there are other witnesses, if the document is proved, who have direct knowledge then it's more appropriate that it should be put to the other witnesses, either Mr Coppins or Mr Wynne as opposed to Inspector Sheeran."*

73. Following some further exchanges, counsel for the appellant sought confirmation that the trial judge's ruling was not to be construed as preventing him from putting the documents to the prosecution's expert witnesses. In response to this, the trial judge added:

> *"JUDGE: No, no, I didn't mean it, I didn't unless I didn't make myself clear, what I've said is that the point raised on behalf of the prosecution was that it would be more appropriate to put the documents that are attempting to be introduced to the appropriate expert witnesses and I have said that I think that's the correct thing. It doesn't mean that they can't be put to Mr Sheeran, and he says he doesn't know anything about them or he can't comment, it doesn't mean that either. But it seems to me that it would be more appropriate that the expert witnesses would deal with them. But that's all I've said in relation to that."*

74. At this point the cross-examination of Inspector Sheeran resumed. It continued into day 10 and the issue arose again in circumstances where counsel for the respondent suggested that counsel for the appellant was attempting to go behind the ruling made on the previous day. Counsel for the respondent disputed this, stating:

> *"With respect, Judge, I don't think I am going behind the ruling, because I've laid a foundation in the answers to the questions as to their relevance, and they're obviously relevant in this way: The issue of what result or what test was done or what re-test was done is central in addition to obviously the date of any such matter. The witness has produced from the document first given to him on the 31st of March the one of six, which says "rectified". And indeed also on five of six, "rectified". He has confirmed, even from his own knowledge, that rectified can mean passed on the day that you bring it there with faults that are rectified. He has relied upon and retreated into the worksheet, the tick sheet, whatever one might like to describe it, as a fail, the fail results. And I'm entitled, in my submission, to put what are the data which are required by law to be kept, the result of which is required to be given to the application applicant for a test in the form in which it is recorded.*
>
> *JUDGE: And who is going to prove it?*
>
> *MR McGUINNESS: And it can be it can be it can be*
>
> *JUDGE: So we are back to where we were on Friday.*
>
> *MR McGUINNESS: Well there are two issues.*
>
> *JUDGE: Yes.*
>
> *MR McGUINNESS: One is a form of limited cross-examination on this aspect, reserving it for the experts possibly. And it's simply to establish that he has never seen, or maybe he has, a document recording a fail or a rectification*
>
> *JUDGE: And that's he can answer that.*
>
> *MR McGUINNESS: Pardon?*
>
> *JUDGE: He can answer that. That's a straight yes or no answer. He can answer that.*
>
> *MR McGUINNESS: Well but obviously I want him to answer it by reference to the*
>
> *JUDGE: To documents that you want to get in without proving them?*
>
> *MR McGUINNESS: No, no, no, that's not I mean, I'm quite content that at this stage he would simply look at a fail and look at a rectified and confirm whether he's ever seen any of them before.*
>
> *JUDGE: Right."*

75. Counsel for the appellant went on to address the judge's question as to how he was going to prove the documents in question. He re-iterated the statement that his client was prepared to execute a certificate for the purposes of s.6 of the Criminal Evidence Act 1992, to the extent that that might be required, but went on to contend, in substance, that his understanding of the ruling requiring authentication at some point was that it could only apply to privately generated documents that had originated within the appellant company, but that he had not understood that it could extend to documents which were public documents in respect of which authentication was not required under the rules of evidence. He submitted that the documents that he was attempting to put

to the witness at this point were in fact public documents that did not require to be authenticated, on the following basis.

76. Having directed the trial judge's attention to the 2004 Regulations, he submitted:

> *"… . In relation to paragraph 8 then, regulation 8, it says: "All records and documentations kept by an authorised tester in connection with the carrying out of tests under the regulations, are the property of the issuing authority, which has the power to inspect and recover from the authorised tester any of such records or documentation as it considers appropriate." So just stopping there, Judge, the position simply isn't that these are private business records of a company that have no relevance or have purely private status in this sense. The test centres, on behalf of the council, do the work mandated by the directive and the regulation. But they're not free to record whatever they want or do whatever they want in that regard. They have to abide by the requirements in relation to keeping it and maintaining it, and doing so in accordance with*
>
> *JUDGE: I understand all of that.*
>
> *MR McGUINNESS: Yes.*
>
> *JUDGE: I haven't missed that point."*

77. He subsequently added:

> *"And I say that, as far as this witness is concerned, I'm entitled to simply put it this far at the moment, and I'm only putting it this far at the moment, I want with if the Court give me leave to do this I want to simply ask him has he in fact seen a fail result in the format that of one that I want to put to him, or has he seen a rectified result in the format that I want to put to him. And a more general use with the other experts is of course a matter that I'll be seeking the leave of the Court on.*
>
> *JUDGE: All right."*

78. Having heard counsel for the respondent in reply, whom it is fair to say vehemently opposed the application, the trial judge then stated:

> *"JUDGE: All right. Well, it does seem to me that I have already ruled in this respect. It does seem to me -- I haven't been told exactly that I have a grasp of the documentation before the Court, but as far as I'm concerned I do know what it is. It is documentation that has been input onto O'Reilly Commercials Limited computer system. It has been extracted by somebody from the computer system. They are computer records from O'Reilly Commercial Limited. They do not come within the exception, that is that they are public documents by statute. That's not the case. They have originated, they have been input in to the system by obviously somebody who sat down and input the data, and they have been extracted in a similar way by somebody who has taken them down from the system. There's nothing before me that's any different this morning than what was before me on Friday morning in relation to the point, and I've made my ruling in that regard. And that's that as far as I'm concerned.*
>
> *MR McGUINNESS: Well, Judge, the only issue I need direction on obviously is, I do intend to ask him whether the witness would like to see them.*
>
> *JUDGE: No, I'm not going to allow that either, because that's getting the document in under the cover*
>
> *MR McGUINNESS: Well, it's*
>
> *JUDGE: If you want to ask him if you want to ask him has he seen a failed statement he can say yes. If you want to ask him has he seen a passed statement he can say yes or no. You can ask him does he understand the difference between the two. Does he know you can go wherever you like in that regard, but putting giving the document to him to ask him to comment is really trying to get the document in under the cover, so I'm not going to allow that.*
>
> *MR McGUINNESS: Well, obviously it wouldn't require the jury to see it.*
>
> *JUDGE: No, I know that."*

79. The issue of whether a document could be put to a witness before the authenticity of the document had been demonstrated, in circumstances where it was not already in evidence, arose again on day 13, when counsel for the appellant was cross-examining one of the prosecution's expert witnesses, Mr. Wynne. An attempt by counsel for the appellant to put a document, originating in the appellant's undertaking and not already in evidence, to Mr. Wynne, was objected to, giving rise to the following exchanges:

> *MS BIGGS: Yes. This is the document that Inspector Sheeran indicated he had never seen.*
>
> *MR McGUINNESS: Yes, indeed, but it's a document that this witness can speak to in terms of giving his opinion as to whether the document which he expected to see with the other one, whether this is consistent with it and whether he recognises the format of it. And it's clearly within his expertise in my submission.*
>
> *A. Two of six and three of six are the same.*
>
> *JUDGE: Just hold on a second.*
>
> *MS BIGGS: He can comment in terms of whether or not this is consistent with certain documentation he might have seen in the past, but he cannot comment as to this document's authenticity; he cannot say how and what manner this was produced; the only person who can say that is the person that produced it.*
>
> *JUDGE: We're back to the argument in ...*
>
> *MS BIGGS: Back to the same argument, Judge.*

JUDGE: I've made my ruling in that regard.

MR McGUINNESS: Judge, it's not the same argument, and perhaps --

JUDGE: All right, all right. Ladies and gentlemen, would you leave us for a moment please.

In absence of the jury

JUDGE: Yes, Mr McGuinness?

MR McGUINNESS: Judge, this is a document which is consistent with the type of document that the witness expected to find --

JUDGE: Where did it originate?

MR McGUINNESS: -- with sheet five of six.

JUDGE: Sorry, where did it originate?

MR McGUINNESS: It originates from O'Reilly Commercials Ltd from the system.

JUDGE: So it's a document that was input on to O'Reilly Commercials Ltd system on behalf of O'Reilly Commercials and it was extracted from the system by somebody on behalf of O'Reilly Commercials.

MR McGUINNESS: Indeed, indeed.

JUDGE: And how do you intend to authenticate it?

MR McGUINNESS: Well, I intend to authenticate it in due course if necessary. But the purpose of putting it to the witness is to see whether he can, in fact --

JUDGE: And -- yes.

MR McGUINNESS: And could I suggest this course, Judge --

JUDGE: Yes.

MR McGUINNESS: -- that we ask the witness on a voir dire what he can say about it, and then the Court will know precisely where we stand in relation to it.

JUDGE: Well, that doesn't authenticate the document itself, so it's a document that's input on to O'Reilly Commercials Ltd system and it's extracted from O'Reilly Commercials Ltd system by somebody on behalf of O'Reilly Commercials. It's not authenticated; it's the same argument.

MR McGUINNESS: Judge, it's the same document but with a witness who has --

JUDGE: Except --

MR McGUINNESS: -- responsibility for inspecting --

JUDGE: -- the document --

MR McGUINNESS: Judge, if I might be permitted --

JUDGE: Yes.

MR McGUINNESS: -- to finish the argument on the issue.

JUDGE: Yes. Finish, Mr McGuinness.

MR McGUINNESS: It's my expectation that this witness is in a position to say that this is the format of a document in terms of everything that's on it that is consistent with what he would expect to find in a record of rectification, consistent with documents five of six and four of six. And in my submission it is admissible from the point of view of having this witness who's the expert tester who has given evidence of familiarity with and inspection of the documents maintained there, and in my submission he ought to be allowed to express his view upon whether he recognises this, recognises the format of it and can offer his opinion as to whether it's consistent with the other two documents, and if there's any doubt either in Ms Biggs's mind or in the Court's mind, my submission is that the Court ought to permit the few questions now to establish that before any decision is made on the issue.

MS BIGGS: Mr McGuinness says that it is admissible. And I stand over my earlier objection that this document is not admissible as evidence until somebody can prove its authenticity and that must come from the defence case because Inspector Sheeran was asked about this. He has never seen it. It was put to him that it was shown to him; he has indicated in evidence that it was never seen by him. That is the evidence that is presently before the jury. And until it is authenticated, in my respectful submission, it does not become evidence. Insofar as Mr McGuinness suggests that this witness can comment on perhaps the format of the purported certificate, I have stated earlier that Mr Wynne is the expert in vehicle testing and in principle insofar as he has expertise in that he can comment on the format of the certificate, but to go any further, in my respectful submission, seeks to get this document in by the back door. His answers may be evidence but the document itself is not evidence, Judge, in my respectful submission.

JUDGE: All right. My view is that it is an attempt to get the document in by the back door; I think he can comment on it

in limited circumstances but the document itself is not evidence and won't form part of the evidence."

80. In a supplementary ruling, following some queries raised by counsel, the trial judge later added:

> *"… ; I'm going to confine the documentation at this stage, [to] the documentation that's in evidence. You have said yourself, Mr McGuinness, to me, let me find where -- what you said; you said it needs to be explained to the jury. This witness -- as the jury have these documents -- this witness can deal with these documents; these are the documents they have and that can be explained to the jury.*
>
> *MR McGUINNESS: Well, Judge --*
>
> *JUDGE: I've now made an order; that's the way it's going to be done.*
>
> *MR McGUINNESS: Well, what I want to ask the Court to consider is this proposition in relation to the consequences of the order. I want to establish if I can --*
>
> *JUDGE: If I've made an order I'm not going to back on it, and I've --*
>
> *MR McGUINNESS: No, I'm not --*
>
> *JUDGE: -- made it and I'm asking you to confine the rest of the questioning in relation to the documents that the jury do have, which is Kinahan's test, exhibit five and five of six, or any of the documents that they already have.*
>
> *MR McGUINNESS: Well, I mean, if the Court is preventing me asking Mr Wynne about the system --*
>
> *JUDGE: I'm not preventing you asking him about the system. In fact, I'm not preventing you asking him anything in relation to the documents that the jury already have, and that's what I'm saying. I'm not preventing you doing that; it's in relation to the other documents that I still believe are seeking to be introduced by the back door that I'm not allowing."*

81. Upon being shown the document at issue, Mr. Wynne indicated that he could not accept its authenticity as it was not the original used in the testing of the vehicle to which it related, and in circumstances where the document was not in evidence, counsel was thereby prevented from pursuing the matter further with him.

82. Counsel for the appellant complains that he ought to have been allowed put the documents at issue to the prosecution's witnesses, whether or not they were in evidence, on the basis that they had potential probative value in demonstrating more fully and accurately the ordinary working system of O'Reilly Commercials, in showing the full range of possible outcomes of DOE tests on vehicles and all of the possible permutations through which a vehicle might fail and be retested under the applicable regulations.

83. It was further submitted to us that the witnesses to whom it was sought to show the documents were capable of commenting upon them and comparing them to the prosecution exhibits, being documents from O'Reilly Commercials and relating to the vehicle in question, these witnesses having already dealt with the prosecution's documents.

84. It was submitted that the trial judge erred in disallowing the production of these documents on the basis of them not having been proven. The ordinary course of such matters required that these documents be later proven by defence witnesses unless they are of such nature as to prove themselves. Further, documents produced in accordance with statutory requirements were, in the context of the case, capable of being examined by the witness (whether inside or outside of the witness box) if any real concern as to "authenticity" arose.

85. We were referred to my own judgment, delivered when I was a judge of the High Court, in *The Leopardstown Club Ltd v Templeville Developments Ltd* [2010] IEHC 152, in support of the proposition that where a document which is not already proven is to be used in cross-examination, it must either be proven at that juncture or there ought to be an undertaking to do so at a later stage. It was submitted that Hardiman J had also outlined the law in similar terms in *The People (Director of Public Prosecutions) v Diver* [2005] 3 IR 270.

86. It was further submitted that it would have been open to counsel for the appellant, even if not in a position to authenticate the document, to nonetheless use it on a limited basis in the course of his cross-examination by employing the so called *"Phipson formula"* – see the *Leopardstown Club* case at para 5.52.

87. Finally, it was submitted that the documents at issue should have been allowed to be put, even though not yet proven, where there had been an offer to adduce the necessary proof on a *voir dire*, but that proposal had been rejected.

88. Counsel for the respondent submitted in reply that the trial judge had not erred in ruling that documents relating to vehicle testing produced by the appellant could not be shown to a prosecution witness in the course of evidence, in circumstances where the witness had no knowledge of the documents in question, having not had sight of the documents prior to the trial, had no input into their production or preservation and the documents had neither been authenticated nor proven.

89. It was further submitted that at no point did the trial judge refuse an application to prove the authenticity of the documents in the context of a *voir dire*. It was true that a *voir dire* was suggested *in arguendo* as being a possible means of proving authenticity should that be required, and that, in response, the prosecution had indicated that they would be opposed to any such suggestion on the basis that it would involve interrupting the prosecution's case to hear evidence from witnesses for the defence, but there was no application to actually proceed in that way, and consequently no ruling refusing to hold a *voir dire*.

90. It was also submitted that the Phipson formula could not in reality have been availed of by the appellant, certainly in the case of Mr. Wynne, in circumstances where the witness, having been shown the material at issue, indicated that he was not prepared to accept its authenticity. Moreover, in the case of Inspector Sheeran, in circumstances where he was a complete stranger to the documents it was proposed to proffer to him, he was not going to be in a position to say one way or the other whether the contents of those documents were true, or indeed whether they were even authentic.

91. We have considered the arguments on both sides and have made the following determinations. There were in fact two facets to the objection raised by the prosecution to what counsel for the appellant was proposing to do. The first was based on the

prosecution's entitlement to insist on formal proof of the provenance and authenticity of any document, not already in evidence, that it was proposed to put to the witness under cross-examination. The second was essentially based on the evidential concept of relevance. In essence, it involved the proposition that unless it could be shown that the witness under cross-examination, and to whom it was proposed to show a document not already in evidence, would be in a position to offer some relevant evidence, either by way of commentary on the document itself, or with respect to its contents, then the court should not permit the document to be introduced, at least through that witness, for failure to demonstrate relevance. It is important not to conflate the issues of the appellant's ability and willingness to meet the requirements of adducing necessary proofs, on the one hand; and the concurrent requirement on him to also demonstrate that the witness under cross-examination was in a position to give "relevant" evidence relating to the document that it was proposed to introduce, on the other hand.

92. As to the former, it is clear that the trial judge correctly understood the law and we consider that her ruling that the appellant, if counsel intended to proceed in the manner proposed, would have to authenticate the documents at issue at some point during the trial was correct and is thus unimpeachable. We consider that the trial judge was entirely correct in her view that the documents at issue were not public documents in respect of which authentication was not required under the rules of evidence.

93. The transcript does not suggest that the trial judge was insisting on immediate proof, or that she would prevent the appellant from proceeding on foot of an undertaking. While there was discussion about whether authentication might be provided by means of a late executed s.6 certificate, or in the course of a *voir dire*, or otherwise (e.g. by calling the relevant witness or witnesses in the course of the defence case in the event of the defence going into evidence), there was no offer of a firm undertaking to do it in any particular way or at any particular point. The closest it came to that was when the objection was renewed in the course of Mr. Wynne's cross-examination and counsel for the appellant said *"Well, I intend to authenticate it in due course if necessary"* (our emphasis). It is clear that the trial judge would have been prepared to accept a firm undertaking, but the most she received was a conditional undertaking, with no firm indication as to when and by what means it was proposed to fulfil it.

94. We are prepared to accept that it is implicit from earlier discussions that appear on the transcript, that counsel for the appellant's preferred means of authentication, should it have been necessary for him to provide it, would have been to do it in the course of a *voir dire* if the court was prepared to permit it to be done in that way. It is reasonable to infer that he may have wished at that point to preserve his client's option not to go into evidence before the jury, and having Mr. O'Reilly give evidence in the course of a *voir dire* would achieve that. Although the suggestion that a *voir dire* might be held was vehemently opposed to by counsel for the prosecution, on the basis that it was, in her perception, highly unorthodox that defence evidence would be heard in the middle of the prosecution case, and also that it would disrupt the flow of the prosecution's case, we consider that in principle there would have been no actual legal obstacle to the matter proceeding in that way, providing the court was disposed to allow it. However, no formal application for a *voir dire* was in fact pressed, and the trial judge was never at any point asked to rule on whether or not she would allow a *voir dire*.

95. On both occasions on which the objections were raised, what in fact happened was that, once the trial judge had made it clear that in principle the appellant would have to authenticate the documents at some point, the debate moved on to address the secondary basis on which the objection was being maintained, i.e., relevance, and, specifically, whether the witness under cross-examination could say anything of relevance with respect to the documents at issue.

96. Ultimately, the trial judge's refusal to allow the documents at issue to be introduced in evidence, through the cross-examination of Inspector Sheeran, was on the grounds that Inspector Sheeran could not give any relevant evidence with respect to them. He was a stranger to the documents. He had had no input in creating them. They had not been provided to him in the course of his investigation. He had never seen them before. He had no generic familiarity with such documentation based on relevant experience. He had no expert knowledge of vehicle testing practice and procedure. He had no expert knowledge of what the Department of the Environment, or the Department of Transport or the Road Safety Authority required with respect to record keeping. The documents he was being asked to consider were not documents relating to the vehicle the subject matter of his investigation. He was being asked to comment on records created by the appellant relating to the testing of other vehicles, which records might or might not have been properly created and maintained. He was clearly not in a position to comment on whether the records created by the appellant in respect of those vehicles were properly kept or not, or whether the notations thereon were appropriate or not. At most, he could have been asked to describe the format of them, and notations used, for the jury and to similarly describe those on the records relating to the bus at issue. That was not going to be probative of anything other than perhaps to demonstrate some consistency (or possibly inconsistency) of record keeping, and in the use of notations, by the appellant. As a non-expert the witness would not be entitled to volunteer a personal opinion as to the consistency or otherwise of the appellant's record keeping, although a jury could perhaps draw their own conclusions on that issue from the descriptions given in evidence. As we understand it, the appellant hoped to demonstrate such consistency in the belief that, as a piece of circumstantial evidence, it would possibly be probative to a degree as to what was the true status of the *"ticked sheet"* document that the prosecution were relying upon. However, there were other means by which the appellant could establish the consistency of his client's record keeping, and use of notations, if he wished to do so. It was not immediately, or at all, obvious to the trial judge, or indeed to us, why it was considered appropriate that Inspector Sheeran, as opposed to better qualified and more expert witnesses who were due to testify later in the case, should be asked to receive records created by the appellant, and to which the Inspector was a complete stranger, unless it was solely for the purpose of trying to get them into evidence before the jury at that stage of the trial. However, as regards any possible testimony to be elicited from Inspector Sheeran based on those documents, it has not been demonstrated that he had anything of relevance to say about them.

97. Having given the matter careful consideration, we are satisfied that the trial judge's decision not to permit the documents to be introduced through the cross-examination of Inspector Sheeran was not erroneous. Her view that Inspector Sheeran could offer no sufficiently probative relevant evidence in relation to the documentation in question was one that was open to her on the evidence before her. Moreover, it did not close off any line of defence that might have been open to the appellant. It was open to him to arrive at the destination he was trying to reach by another legitimate route, i.e., by going into evidence in due course and calling Mr. O'Reilly as a defence witness, as in fact he did.

98. In circumstances where the intended line of cross-examination, which would necessitate the introduction into evidence of the documents at issue, was not going to be permitted on the grounds of a failure to demonstrate that it would potentially elicit any evidence relevant to the issues that the jury had to decide, any requirement to demonstrate authenticity became otiose at that point.

99. In relation to the proposed cross-examination of Mr. Wynne on similar lines, the trial judge made a similar ruling. However, the trial judge had earlier acknowledged that potentially relevant questions concerning such documentation, that it might not have been appropriate to put to Inspector Sheeran, who was not an expert in vehicle testing or in relation to the required record keeping, might properly be put to a person possessing expertise in such matters, i.e. Mr. Wynne. That having been said, however, it was still

incumbent on counsel for the appellant to demonstrate potential relevance. Counsel had not been afforded an unrestricted licence to ask any questions at all. If the documents in issue were to be introduced into evidence in the course of cross-examining Mr. Wynne, it could only have been on the basis that some evidence was to be elicited from Mr. Wynne with respect to them that was going to be relevant to an issue or issues that the jury had to decide. Once again, in this particular instance the trial judge was not persuaded that relevant evidence would in fact be elicited in the course of the proposed exercise, and we consider that this was a view that it was open to her to form, based on the evidence she had received, the submissions made to her and having regard to her overview of the case. We do not consider that she was in error in refusing to permit the documents at issue to be introduced in the manner proposed. Her refusal to do so would not have prevented counsel for the appellant from doing what he wanted to by more appropriate means, e.g., calling Mr. O'Reilly to give evidence for the defence in due course (as in fact happened) and introducing the documents at issue as exhibits at that time.

100. In the circumstances, we are not disposed to uphold Ground of Appeal No. 2.

Ground of Appeal No. 3
101. Under this heading it is complained that the trial judge erred in allowing the prosecution to adduce opinion evidence from Mr. Wynne that went to the ultimate issue.

102. The specific opinions that the appellant seeks to impugn in this way are to be found in the following extract from Mr. Wynne's evidence in chief:

> *"Q. MS BIGGS: Yes, Judge. Mr Wynne, just we were bringing you through your assessment of this vehicle, 89WD2218 on the 13th of March 2009 and can you tell us if you formed any opinions as to whether or not this vehicle should have passed a roadworthiness test?*
>
> *A. The vehicle in my opinion should not have passed.*
>
> *Q. Yes?*
>
> *A. Because it had an unknown quantity in the modified rear suspension unknown to the manufacturer and the vehicle and there's a break in the chassis."*

103. The issue for the trial judge was, and now on appeal for us is, whether Mr. Wynne's expert opinion as so expressed represented a subversion of the jury's role as finders of fact.

104. The appellant has referred us to the following extract from McGrath on Evidence, 2nd Ed, 2014 (Round Hall: Dublin) at para 6-32 et seq:

> *"However, the prohibition against experts opining on the ultimate issue still has some vitality in jury trials, particularly criminal trials before a jury. As noted above in People (DPP) v Abdi Hardiman J emphasised that:*
>
> > *'The role of the expert witness is not to supplant the tribunal of fact, be it judge or jury, but to inform that tribunal so that it may come to its own decision. Where there is a conflict of expert evidence it is to be resolved by the jury or by the judge, if sitting without a jury, having regard to the onus of proof and the standard of proof applicable in the particular circumstances. Expert opinion should not be expressed in a form which suggests that the expert is trying to subvert the role of the finder of fact.'*
>
> *It is, thus, impermissible for an expert in a criminal trial to express a view on the guilt or innocence of an accused or to say that he or she is satisfied of a matter the subject of his or her opinion 'beyond a reasonable doubt' because this will be regarded as subverting the role of the jury."*

105. The appellant also places reliance on the following passage from the judgment of Macken J in the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Gormley and White* [2011] IECCA 78 at pp. 9-10:

> *"The helpful extract from DPP v. Abdi, supra, case is in the following terms:*
>
> > *'Expert opinion should not be expressed in a form which suggests that the expert is trying to subvert the role of the finder of fact.'*
>
> *This, in reality, is a statement of the law. As to whether or not that occurs in each and every circumstance where an expert expresses a strong, or very strong, confidence in his opinion, even 'no doubt' in his opinion, depends on the circumstances of the case, the type of evidence being tendered, the manner in which the evidence has been tendered, even perhaps the tenor in which the evidence is tendered, the charge to the jury, and all other relevant factors enabling a court to determine whether or not there has been, in reality, an attempt by an expert to usurp the role of the finder of fact (whether judge or jury), or whether his/her evidence might reasonably be interpreted as being such an attempt, or as having that effect."*

106. In addition, the appellant relies upon Clarke J's summary of the legal position in the Supreme Court appeal in the same case (*The People (Director of Public Prosecutions) v Gormley and White* [2014] 2 I.R. 591 at 649), where he said (at para 142):

> *"The important point to emphasise in this context is that the witness is allowed to express an opinion, as an expert, solely on a matter which falls within his or her area of expertise and not a view on the guilt or otherwise of the accused. It is, in principle, analogous to a witness of fact expressing, with a degree of confidence, a view solely on a matter of fact within his or her own knowledge such as "I am sure it was the accused that I saw at the scene of the assault". In either case, it remains exclusively a matter for the jury to decide what weight, if any, to attach to the evidence and of course to decide the issue of guilt or otherwise of the accused."*

107. The appellant maintains that the opinion expressed by Mr. Wynne went to the ultimate issue, namely whether the appellant had failed to conduct its undertaking in such a way as to ensure, so far as was reasonably practicable, that persons not in its employment who might be affected thereby were not exposed to risk to their safety, in that, while conducting a vehicle test of the bus in question, he had failed to note the modified rear suspension in the said vehicle.

108. The appellant contends that Mr. Wynne was entitled to outline the required testing procedure, and how a tester should approach a modified suspension system should he encounter a vehicle with one, as those were matters within his expertise. However, it is submitted on behalf of the appellant that Mr. Wynne should not have gone further and expressed the opinion that the bus in question was unroadworthy and should not have passed the test for the reasons he stated. These were, it is argued, issues for the jury to determine as matters of fact with the assistance of permissible expert testimony from witnesses such as Mr. Wynne. It is suggested that by going as far as he did, Mr. Wynne usurped the role of the jury. It was submitted that the jury were perfectly capable of forming their own view on the issues of the vehicle's roadworthiness, and whether or not it should have passed, based on the evidence that they had heard.

109. In reply, the respondent says that the issues on which Mr. Wynne gave his opinion in evidence were matters which were clearly outside of the ordinary knowledge and experience of the jury and that, accordingly, expert evidence was both required and admissible in that respect. We were referred to the judgment of Barron J in *McMullen v Farrell* [1993] 1 I.R. 123 at 141, as authority for the proposition that in some instances it may be appropriate for an expert to express an opinion on a question which the court has to decide. Moreover, citing the same quotation relied upon by the appellant from the judgment of Clarke J in *The People (Director of Public Prosecutions) v Gormley and White* [2014] 2 I.R. 591 at 649, the respondent lays stress on the last sentence thereof, where it states: *"In either case, it remains exclusively a matter for the jury to decide what weight, if any, to attach to the evidence and of course to decide the issue of guilt or otherwise of the accused"*. Counsel for the respondent maintains that this extract supports his submission. He contends that the opinion of Mr. Wynne constituted the giving of his view in relation to whether or not the vehicle should have passed. The issue and question of the guilt or innocence of the appellant in terms of the s.7 offence was thereafter properly within the exclusive remit of the jury. In making their determination, the jury was free to attribute whatever weight they deemed appropriate to the evidence of Mr. Wynne.

110. It had been flagged in the Book of Evidence that Mr. Wynne held the opinions that he expressed. Before these opinions were elicited in evidence, the trial judge was asked to rule on whether they offended the ultimate issue rule. Having heard the arguments she ruled as follows:

> *"JUDGE: The issue that has been raised by Mr McGuinness on behalf of the O'Reilly Commercials Limited is the admissibility of the opinion of this witness, Mr Wynne. I've been referred to two sections of McGrath on evidence and I have now had an opportunity to consider both of those. In a case such as this as case that requires a specialised knowledge and expertise and where a jury as tribunal of fact would not be possessed of such specialised knowledge the function of the expert is to furnish the jury with the necessary scientific criteria or specialised criteria to enable them of their own independent judgment to apply that criteria in their deliberations. If that knowledge was within the knowledge of the jury it would not be admissible. In the McFadden and Murdoch cases* [McFadden v Murdock (1867) 1 ICLR 211] *referred to in McGrath on Evidence the ultimate issue rule was illogical for the reasons as set out in the book and I'm not going to go through those reasons and it's further set out there that the rule is invoked sporadically and is generally recognised as being obsolete. So, it is the responsibility of the Court to decide the matter and in considering the matters and in considering the objections as put forward by Mr McGuinness I'm of the view that the value of this expert he having set out his qualifications and his years of experience is similar to the expert in the Murnaghan and O'Maoldhomhnaigh case* [Murnaghan Bros v O'Maoldhomhnaigh *[1991] 1 IR 455] and in those circumstances I'll allow him to deal and give the evidence in relation to his opinion."*

111. Just by way of further elucidation, the case of *Murnaghan Bros v O'Maoldhomhnaigh* referred to by the trial judge was cited by McGrath at para 6-82 of his well regarded work, to which the trial judge had been referred, in the following context:

> *"Greater deference will be shown to the opinions of experts in respect of more traditional categories o evidence. This is evident from* Murnaghan Bros v O'Maoldhomhnaigh *(sic) where Murphy J accepted that the trial judge had been correct in saying that the court must not abdicate to experts the role of the court in determining matters of law and fact but went on to say that the value of expert evidence in relation to accounting matters is well recognised. Therefore, because the accountant had not been shown to have erred as a matter of law in his approach and his evidence had not be challenged on the grounds that it did not represent the practice of the accountancy profession, the learned judge was of the view that there had not been sufficient grounds for the rejection of his evidence."*

112. We are satisfied that the trial judge was correct in her ruling. We do not consider that the opinions expressed went to the ultimate issue, which concerned whether the guilt of the accused in respect of the offence charged had been established beyond reasonable doubt. The offence charged required proof of conduct of the undertaking in such a way as to expose relevant persons to risks to their safety or health. A matter rendering a vehicle unroadworthy might or might not give rise to an actual risk to health or safety, but would not necessarily do so. The circumstance preventing certification as roadworthy might relate solely to non-compliance with a regulatory requirement but not necessarily imply that the vehicle was unsafe. The same can be said with respect to the statement that the vehicle should not have passed the test. While it is true that both of these statements of opinion were expressly linked to the assertion, in respect of which there was abundant evidence, that the vehicle *"had an unknown quantity in the modified rear suspension unknown to the manufacturer"*, that fact, in and of itself, did not automatically imply that the vehicle was unsafe. It might or might not have been unsafe. Whether it was, and whether by reason of it, relevant persons were exposed to risk to their health and safety was a matter for the jury to determine on the evidence. The witness expressed no opinion on whether or not the appellant was guilty, or otherwise, of the charge preferred against him, and a conclusion one way or the other would not automatically follow from the opinions expressed. We are satisfied that the ultimate issue remained with the jury, and that their role was not usurped.

113. In the circumstances, we are not disposed to uphold ground of appeal No. 3.

Ground of Appeal No. 4.

114. This ground of complaint arises in the following circumstances. In the course of counsel for the appellant's cross-examination of the prosecution's witness, Inspector Sheeran, it was put to the witness, and he agreed, that in the course of his investigation he had sought, and had been furnished with, a report from an expert at Daimler Benz. The report was that of a Mr. Roth, and was furnished to Inspector Sheeran via a Mr. Rayhand, who was a solicitor for Daimler Benz (we infer that he may have been an in-house solicitor, although nothing turns on it), in response to an enquiry received from Inspector Sheeran, seeking to establish if a suitably qualified and competent Mercedes Benz or Daimler Benz engineer had inspected the vehicle, and if that engineer would be willing to provide him with a statement. Counsel for the appellant was about to ask the witness concerning what the report had stated in response to questions posed by him to Daimler Benz in earlier correspondence, namely *"[w]ould the modifications to the rear suspension be obvious to a trained mechanic?"* and *"[w]ould that mechanic require training on Mercedes vehicles?"*, when counsel for the respondent objected on the basis that his opponent was seeking to elicit hearsay.

115. The trial judge was informed, in the absence of the jury, that there had been out of court discussions between counsel, aimed at securing agreement that certain admittedly hearsay evidence relating to the history of the bus in question could be elicited on a consent basis. Regrettably, while all sides had understood that an agreement had been reached, it later transpired that counsel were not ad idem as to the exact parameters of what had been agreed, and, in particular, whether it covered the evidence in controversy which was Mr. Roth's response to the aforementioned questions, namely : *"It's unclear whether a mechanic, even a mechanic trained on Mercedes Benz vehicles would have noticed a change to the vehicle, especially given the above described individual body build approval process."* Counsel for the appellant was anxious that the jury should learn of this response, for the obvious reason that it had been favourable from the appellant's perspective. Counsel for the prosecution was not prepared to allow such evidence, which she maintained was hearsay, to be adduced on a concessionary basis unless she could elicit in re-examination that Inspector Sheeran had also received, in the course of his investigations, several other expert reports, namely what were referred to as the *"Tennison"*, *"Nolan"* and *"Roels"* reports, respectively, and that they had been unfavourable to the defence on the specific matter at issue. Counsel for the appellant maintained in response to the objection that the relevant extract from the Roth report was not in fact hearsay because he proposed to introduce it *"not so much to prove the truth of its contents via Daimler, but to prove that the defendant's answer is consistent with information the Inspector had."*

116. The trial judge rose to allow counsel to re-engage and see if they could resolve the impasse on a consent basis, failing which she would rule on the objection. Counsel did re-engage but were unable to resolve the impasse.

117. The trial judge then ruled as follows:

> *"JUDGE: All right. Two issues arise, 1) is it hearsay evidence and then the second issue is, even if it is hearsay evidence, should it be admissible? It's quite clear that Mr McGuinness wants to put to Mr Sheeran information which was in Mr Sheerin's possession before he went to interview Mr O'Reilly. And that in putting that information or that in the course of that information that Mr Sheeran had information that in fact was favourable to Mr O'Reilly's position. Ms Biggs on the other hand says that there are equally three reports, the Tennison report, the Nolan report and the Rolls report, which put forward a position that's not favourable to Mr O'Reilly. Ms Biggs says that the Tennison report and the Nolan report or Mr O'Reilly's report and Mr McGuinness says that the Tennison report is in fact a report that was commissioned by the insurance company. The Rolls report is one that was provided, as I understand it, from the McKeown's. Ms Biggs is saying that it would only be fair that if the content from the Mercedes Benz report and the questions that were answered should be put to Mr Sheeran, that then the contrary should also be allowed. Mr McGuinness is saying in fact that that comparison is not accurate. In my view, I have to say I think that if there's a favourable position for Mr O'Reilly and Mr O'Reilly is the person we're concerned with, O'Reilly's Commercials Ltd, if there's a favourable position put to Mr Sheeran, insofar as he had information that was favourable, I think the contra position has also to be put. So if at this stage, if Mr McGuinness wants to proceed in that vein and if he wants to deal with it, he may deal with it, but that contra of that, I will allow Ms Biggs deal with it in the manner that she has suggested. So it's a matter for Mr McGuinness to decide whether he wants to proceed along that vein or otherwise."*

118. Counsel for the appellant maintains that the trial judge's ruling was erroneous on the following basis. He submits that an attempt to demonstrate that the witness had information from Daimler Benz consistent with the answers Mr. O'Reilly gave to the Inspector should not come with the *"cost"* of allowing the prosecution to adduce other information, (in particular, reports from Tennisons, Mr. Paul Roels and a Mr. Nolan) which might not be consistent with the defence case (pages 36 – 38). The point at issue was not the state of mind of the Inspector. Rather, the purpose of the questioning was to demonstrate that a respectable source had given him a view consistent with the defence explanation. This was particularly relevant in the context of an inquiry made by the Inspector to the manufacturer. It is submitted that it was an error to conclude, as the trial judge did in the context of a criminal trial such as this, that *"if there's a favourable (to the defence) position put to Mr Sheeran, in so far as he had information that was favourable, I think the contra position has also to be put."*

119. We are not disposed to uphold this ground of appeal. We consider that counsel for the appellant was being disingenuous in contending that the principal purpose for which he was seeking to elicit the evidence in controversy was to establish that explanations given by Mr. O'Reilly to Inspector Sheeran were consistent with information the witness already had. It is manifest that he in fact wanted the extract from the report to be given in evidence in the expectation that the jury would treat its contents as being true, and thereby place reliance on it. We are satisfied that it was hearsay evidence, and that in the absence of a concession from the prosecution it could not be adduced. The prosecution had made clear that they would not stand in the way of it being introduced provided that, in the interests of balance, prosecuting counsel could seek to establish in re-examination that the Inspector had also received several other expert reports, namely what were referred to as the *"Tennison"*, *"Nolan"* and *"Roels"* reports, respectively, in the course of his investigations; and that they had been unfavourable to the defence on the specific matter at issue. We see nothing unfair in any of that. The proposed evidence was inadmissible hearsay. If counsel for the appellant wanted it in, the required concession to permit it to be adduced was available but at a price. If he wasn't prepared to pay that price, then the judge would have had no choice but to apply the rule against hearsay and exclude the evidence. We are satisfied that the trial judge dealt with the issue fairly and correctly.

120. Accordingly, we are not disposed to uphold ground of appeal no. 4.

Ground of Appeal No. 5

121. In brief summary, this ground relates to the refusal of the trial judge to grant a direction and withdraw the case from the jury at the close of the prosecution case. At that point in the trial the appellant still faced four counts. However, he has since been acquitted of counts nos. 2, 3 and 4 respectively and so this Court is now only concerned with the direction application in so far as it related to count no. 1.

122. The first point made on the direction application was common to all four counts. It contended that there was evidence pointing overwhelmingly in the direction that the only actual test conducted on the bus in question was on the 1st of September 2005, by which date s. 7(1) the Act of 1989 had been repealed and was no longer in force. We agree that there was evidence suggesting that that was indeed the case. However, there was also evidence suggesting the contrary, and specifically the statement of admission made on behalf of the appellant by Mr. O'Reilly to Inspector Sheeran on the 1st of October 2008; and arguably supported to a degree by one interpretation of certain of the documents produced by Inspector Sheeran in the course of his evidence, in particular the so-called *"failure list"* or *"ticked sheet"* as it was variously referred to; and arguably further supported to a degree by the testimony of Mr. Gaffey. We consider that this conflict as to what it was that the evidence in fact established was classically an issue for a jury, properly charged, to resolve. The fact that there was a conflict in the evidence as to when the bus was tested was not a reason to withdraw the case from the jury as long as there was, viewing the matter from the high water mark of the prosecution case, at least some evidence on which a jury could be satisfied beyond a reasonable doubt that the offence charged was committed within the timeframe alleged by the prosecution i.e., between the 5th and 6th of August 2005, and while s.7(1) of the Act of 1989 remained in

force. We are satisfied that there was evidence to that effect on which the jury, properly charged, could have acted if they were prepared to accept it.

123. A second argument was advanced in support of a direction, based on the second limb of Lord Lane's celebrated statements of principle in *R v Galbraith* (1981) 73 Cr App R 124; [1981] 1 W.L.R. 1039, and in which counsel for the appellant contended that the totality of the evidence as it related to each count separately and together was contradictory and inconsistent to such an extent as to render the evidence so tenuous as to make a conviction upon it unsafe. In consequence, the trial judge ought to have acceded to the application for directions. It was submitted that in relation to the only count now remaining, i.e., count no. 1, that a directed verdict ought to have been granted, as the prosecution evidence taken at its height could not be regarded as establishing a date of testing caught by the 1989 Act; and/ or that the prosecution case had excluded neither the reasonable possibility that a tester in Mr. O'Reilly's position would not have regarded the suspension in question as being anything other than standard, nor the possibility that there was insufficient evidence to alert the tester to a non-standard modification.

124. It has been submitted on behalf of the respondent that there was a large amount of material and evidence constituting the prosecution case that suggested, taking the evidence at its highest, that there was an unsafe system of work and the test, conducted in accordance with the 2004 Regulations, was subject to the provisions of the Act of 1989. To the extent that were inconsistencies or conflicts in the evidence, these were matters for the jury to resolve. It could not be said that the evidence was so tenuous that no jury, properly charged, could convict upon it.

125. We agree with counsel for the respondent's submission. There were certainly conflicts in the evidence, and some inconsistencies in the evidence, but they were not so far reaching as to render it unsafe to leave the matter to the jury. We are satisfied that the trial judge was correct in refusing to grant a direction on count no. 1.

126. Accordingly, we are not disposed to uphold ground of appeal no. 5.

Ground of Appeal No 6.
127. On day 20 of the trial, in the course of the defence case, counsel for the respondent objected to the proposed evidence of a Mr. Edward Nolan, a Consulting Engineer, concerning another bus, based in Wales and which the defence maintained was a vehicle that had been modified in a manner similar to the bus at issue in the case. Mr. O'Reilly had already given evidence at this stage and had told the jury in the course of his evidence that he and Mr. Nolan had travelled to Wales to view what the defence characterised as *"a sister bus"*. The objection was based on the grounds that it was understood that Mr. Nolan would testify in the terms of a report that he had prepared, and which had been disclosed by the defence to the prosecution. However, the report did not describe any meaningful examination of the rear suspension of the sister bus but, rather, simply related a hearsay conversation with that vehicle's owner concerning its maintenance and service history.

128. The contents of the report were summarised by counsel for the respondent as follows:

> *"Says:'We spoke to the Richard brothers and requested of them that we would like to look at a vehicle they had in their fleet, Mercedes Benz 811D converted by Alexander Coach Builders on an air ride suspension. They most helpfully had arranged with their staff to get this vehicle from the bus park, brought it into their depot and they placed it on four posted HGV hoist. The registered number of this vehicle was G117PGT'. Mr Nolan takes photographs. Says: 'Mr Richards informed myself and Mr O'Reilly that the vehicle was being serviced and checked for its annual roadworthiness test. Mr Richards also confirmed to Mr O'Reilly the vehicle had passed its roadworthy test and attached a copy of certificate'". Then it refers to a number of questions put to Mr Richards in relation to the vehicle and states the vehicle Mr Nolan says: 'I have to state the vehicle of 23 years in age. It was in very good condition, serviced and well kept and was a credit to the Richard Brothers Company'. And then it refers to the vehicle test certificate which is exhibited. And then thereafter the body of the report is in essence a question and answer session between Mr Richards and Mr Nolan. He is asked, 'How long have you been a bus operator?' and gives the answer. 'How many vehicles do you have?' '68' 'How long have you owned your Alexander coach mounted on an 811D chassis?' 'It's just over 12 years' which would bring us back to I think the year 2000. 'What is the registration number of the vehicle?' Gives it. 'Do you service your own vehicles?' 'We do service our own vehicles. We do it every four weeks.' 'Is it mandatory practice for your insurance or for VOSA or is it just good practice?' 'No, it's mandatory to do it every six weeks.' 'In relation to Mercedes 811D mounted on an air ride suspension did you make any alterations to this vehicle from the date of your purchase to date?' and he refers to putting in an auto to manual gearbox. 'They're the only alterations you carried out?' 'Yes'. Then he goes on to deal with any mechanical faults, examination by VOSA and whether or not the springs had been replaced. He says, 'Yes, I would say twice both sides. We have done four rear leaf springs'. It refers to the insurance details and then is asked: 'Is it mandatory in the UK, apart from best practice, to keep such records?' 'Yes, it is'. And then is asked: 'Finally, are you satisfied to date with the service you got from this vehicle, both from a mechanical point of view and wear and tear?' The answer is yes, he would be satisfied with the service of this vehicle. And in my respectful submission both this report and any references to it in other reports is wholly objectionable and inadmissible. It does not in any way form a proper expert report. It is not, and there's no reference to this vehicle being properly inspected. There's no reference to any what might be considered research documentation. There's no proper opinion formed … ."*
>
> *…*
>
> *"It simply is not an expert report. It is no more than a record of a conversation with a person who is, I understand, and I'm subject to being corrected, not giving evidence. It is in those circumstances nothing but a hearsay document and, as I said, Judge, there are no opinions formed based on expertise, based on examination, based on inspection."*

129. Counsel for the appellant argued that evidence from Mr Nolan concerning what he saw and did would be admissible. Moreover, the contents of his report was admissible, notwithstanding the admitted hearsay that it contained, on the basis that an expert was entitled to refer to hearsay if it formed material on foot of which the expert's opinion was based. It was suggested that Mr Nolan could give the same evidence as contained in the report in the witness box.

130. Counsel for the respondent referred the trial judge to the following extract from McGrath on Evidence (see 2nd ed, paras 6-49 and 6-50):

> *"In* R v. Turner *[1975] QB 834, it was held that a party calling an expert should ask him or her to state the facts on which his or her opinion is based. Lawton LJ p that:*
>
> > *'Before a court can assess the value of an opinion it must know the facts on which it is based. If the expert has*

been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant facts the opinion is likely to be valueless.'

In doing so it is permissible for an expert to refer to hearsay evidence if that formed part of the material underlying his or her opinion in order to explain the basis of the opinion. However, it is important to point out that it is the opinion of the expert and not the underlying materials used by him or her which constitutes the evidence in the case"

131. This was the principle upon which counsel for the appellant was purporting to rely. However, counsel for the respondent submits, the instant case was readily distinguishable in as much as Mr. Nolan had expressed no opinion concerning the modified rear chassis of the sister bus in reliance on, or based upon, the hearsay he had received. In fact he had expressed no expert opinion at all in his said report.

132. The trial judge ruled as follows:

"JUDGE: All right. There are two or three issues raised. The first issue is in relation to what I'm going to call the Nolan report and Prosecution Counsel has said to me that it's not a proper expert report, that it's no more than a conversation, there's no opinion formed and she said it's a hearsay document. She went on to say that there's no evidence in the report that the bus being referred to is one of the 244 vehicles recalled and there's no evidence in the report as to whether it was modified. So, she said there's a lack of vital detail relevant, lack of vital detail that's absent relevant to the bus in question.

Mr McGuinness then in reply said that the safety of this bus is at the heart of the prosecution and the defence case and he said Mr O'Reilly made an FOI request and he went to Wales and he gave evidence in relation to that. He said it's very important to the regime that is applicable to such a bus on the road. Mr McGuinness conceded that part of the conversation falls into the hearsay category but he submitted it's capable of being material made known to Mr Nolan. In any event he said it's wholly appropriate for Mr Nolan to give evidence of what he did and what he saw.

Ms Biggs had an opportunity to reply and she said she repeated her original submissions. She said that the so called report is only a conversation with another party. She said we don't know if the bus there has exactly the same dynamics and history as the bus, the subject matter of these proceedings and she referred me to a passage on McGrath on Evidence. In the case of R v. Turner *it was held, 'That a party calling an expert should ask him or her to state the facts on which his or her opinion is based' and the quote from the case was: 'Before a court can assess the value of an opinion it must know the facts on which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant facts the opinion is likely to be valueless.' The text continues: 'In doing so it is permissible for an expert to refer to hearsay evidence if that formed part of the material underlying his or her opinion in order to explain the basis of the opinion. However, it is important to point out that it is the opinion of the expert and not the underlying materials used by him or her which constitutes the evidence in the case'.*

As I say I took the opportunity to review the submissions that are made. I took the opportunity to go through the Nolan report again and in this regard I accept the submission as made by the prosecution. This is not a document in which an opinion has been formed. It is based on conversation and we do not know if the dynamics and history of the Welsh bus, and I'm going to call it the Welsh bus, are the same as the bus the subject matter of those proceedings and in that particular case I'm going to rule that that document, the Nolan report, is inadmissible. Following on from that, I don't think it is appropriate for Mr Nolan to give evidence of what he did or saw in relation to the Welsh bus for the same reasons."

133. At the oral hearing of this appeal it was conceded by present counsel for appellant, Mr Gillane SC, that ground of appeal no 6 was *"a difficult ground to advance in circumstances where it could not be gainsaid that the report of Mr Nolan was substantially comprised of hearsay"*. However, he had no instructions to abandon it.

134. It was submitted that the trial judge had erred in apparently overlooking the proposition of counsel for the appellant that Mr. Nolan could give evidence of what he saw, that being a similar bus, quite apart from the element which could be hearsay. And, where the Court concluded that the Nolan report or evidence was not expert evidence within which an opinion had been formed, but was rather simply direct evidence of observations, it was submitted that that evidence was a matter upon which the jury could draw conclusions. In respect of this it would be a matter for the jury to decide upon the weight and importance to place upon the evidence. This was particularly the case if there was a lack of evidence of the direct correlation between the two vehicles.

135. It was also submitted that if the Nolan report was not capable of being regarded as expert evidence by virtue of not featuring an expert opinion or inference, then it remained as non-expert evidence and, in so far as it was not hearsay, ought to have been admitted by the learned trial judge.

136. In reply, the respondent submits that the trial judge was entirely correct in her ruling.

137. We have no hesitation in saying that we also believe that the trial judge was correct in her ruling. Of course, Mr. Nolan would have been entitled to give evidence of what he did and saw while in Wales in the normal way, providing that it was relevant to some issue that the jury had to decide. However, it was not suggested that Mr. Nolan had anything to add to what was already before the jury in that regard. In reality, he was not in a position to say that he did anything or saw anything of relevance. It is clear from the transcript that the intended purpose in calling him was to get the hearsay contained in his report into evidence before the jury. That would only have been permissible if he was going to give some opinion concerning the sister bus and its modified suspension, relevant to the issues in the case, and that opinion had been formed, either in whole or in part, upon the basis of the hearsay that he had received. However, his report contained no such opinion, and counsel for the appellant did not suggest that Mr. Nolan intended to offer such an opinion if he went into the witness box. In the circumstances, the trial judge's ruling was clearly correct and is unassailable. We therefore also reject Ground of Appeal No. 6.

Ground of Appeal No 7

138. This final ground of appeal is advanced on the basis that it was perverse for the jury to have convicted the appellant on count no. 1, but to have acquitted him on counts nos. 2, 3 and 4, respectively.

139. It was submitted by the appellant that that if the jury were not satisfied that the matters alleged in counts nos. 2 to 4 of the indictment were proven beyond a reasonable doubt, then conviction on count no. 1 was inconsistent and illogical to the point that no

reasonable jury could bring in such a verdict. In particular, and with regard to the narrative particulars of the counts in the indictment; if the appellant was not guilty of failing to verify as safe the modified rear suspension as per count no. 2, then it was illogical that it could have been guilty of count no. 1, which involved failure to note the modified rear suspension system. This, it was submitted, constituted a material inconsistency.

140. Further, it was submitted that if the appellant was not guilty of the offence(s) in that they did, (at count no. 2) fail to verify as safe the modified rear suspension in the said vehicle, (at count no. 3) fail to note the missing bolt in the right rear suspension spring of the said vehicle, and (at count no. 4) fail to take account of a fracture in the chassis of the said vehicle, then it was illogical and inconsistent for the jury to have found that the performance of the test in question was so deficient as to convict on count no. 1.

141. In reply, the respondent has referred us to our decision in *The People (Director of Public Prosecutions) v Twesigye* [2015] IECA 99, where we considered the earlier authority of *The People (Director of Public Prosecutions) v Maugham* [1995] 1 IR 304, and said:

> *"79. It is clear from this detailed extract from the judgment in Maughan that counsel for the respondent is correct in his contention that while that case does confirm the existence of the discretionary jurisdiction to quash for inconsistency, it is a jurisdiction only to be exercised where the appellant establishes that no reasonable jury could properly have reached the verdicts that it did."*

142. It was submitted that each count stood independently of the others and, consequently, the evidence and necessary proofs required for a conviction on each required an entirely separate consideration. Moreover, the proposition advanced by the appellant, namely that the verdict on count no. 1 was perverse due to its alleged inconsistency with the verdict on count no. No 2, is premised on the notion that the verdict on count no. 2 was correct. However, the argument that the verdict in respect of count no. 2 was perverse and that that on count no. 1 was correct, is equally sustainable.

143. We have given careful consideration to this issue. We are satisfied that there is not necessarily any inconsistency between the verdicts on count no. 1 and count no. 3, or between those on count no. 1 and count no. 4 respectively, and dismiss *in limine* the claim of perversity to the extent that it is based on a comparison of the outcomes involving those counts.

144. However, we are satisfied that there is a possible inconsistency between the verdict on count no. 1 and that on count no. 2. That having been acknowledged, it does not necessarily follow that the verdict on count no. 1 is the incorrect verdict, and that it was perverse. We approach the matter by applying the test set down in the *Maugham* case. Blayney J, in *Maugham*, approved a line of English case law to the effect that an appellant who seeks to obtain the quashing of a conviction on the ground that the verdict against him was inconsistent with his acquittal on another count has a burden cast upon him to show not merely that the verdicts on the two counts were inconsistent, but that they were so inconsistent as to call for interference by an appellate court. The court should only interfere if it is satisfied that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion that was reached.

145. We are not persuaded that no reasonable jury, who had applied their mind properly to the facts in the case, could have arrived at the conclusion that was reached. It is entirely possible, in our view, that having decided to convict the appellant on count no. 1 that the jury may have regarded count no. 2 as being otiose on the basis that the issue of whether the accused verified or failed to verify the safety of the modified rear suspension on the bus could only arise in circumstances where an accused had noted the existence of a modified rear suspension. If they were satisfied beyond reasonable doubt that he had failed to note the modified rear suspension then, on one view of it, to expect them to go on to consider whether he had verified or failed to verify the safety of a feature of which he was entirely unaware would be nonsensical. In effect, although they were not instructed to do so, they may well have regarded counts nos. 1 and 2 as alternatives, having regard to the manner in which they were particularised. We consider that this is a possibility that cannot be foreclosed upon.

146. In the circumstances we are not persuaded that the appellant has discharged the high burden upon him to enable to succeed in a claim of perversity. We therefore consider that we must also reject ground of appeal no. 7.

Conclusion.

147. In circumstances where we have rejected all of the appellant's complaints, we are satisfied both that the trial was satisfactory and that the verdict is safe. The appeal against conviction is dismissed.