THE COURT OF APPEAL

The President
Birmingham J.
Sheehan J.

CCA256/07

The People at the Suit of the Director of Public Prosecutions

V

Gary Campion

Appellant

Judgment of the Court delivered on the 31st day of July 2015, by Mr. Justice Birmingham

1. On the 15th October, 2007, the appellant, Mr. Gary Campion, along with three co-accused, Mr. Desmond Dundon, Mr. John Dundon and Mr. John Kelly, stood trial in the Central Criminal Court charged with the murder of Brian Fitzgerald on the 29th November, 2002. On the 15th November, 2007, which was day nineteen of the trial, a unanimous jury returned a guilty verdict in respect of Mr. Campion and the mandatory life sentence was imposed. The jury returned not guilty verdicts in the case of Desmond Dundon and Anthony Kelly while Mr. John Dundon had been found not guilty at an earlier stage by direction of the trial judge.

2. At trial the principal prosecution witness was one James Martin Cahill who at an earlier stage had pleaded guilty to the murder and had received the mandatory sentence. The prosecution case had been that different roles had been played by the four accused and by Mr. Cahill. The prosecution contention was that James Martin Cahill was the gunman who had fired the shots that killed Mr. Fitzgerald. The case made against Desmond Dundon was that he had accompanied Mr. Cahill to the nightclub where Mr. Fitzgerald was employed as head of security and had pointed out Mr. Fitzgerald to Mr. Cahill so that Mr. Cahill would recognise him when it came to carrying out the murder. The case against Mr. John Dundon was that in the course of a reconnaissance trip which was carried out on the day before the murder that he had pointed out an area to Mr. Cahill where he should lie in wait for Mr. Fitzgerald before launching his attack. The case against Mr. Anthony Kelly was the he had provided the handgun used in the murder and showed Mr. Cahill how to use it.

3. The case against Mr. Campion was that he was an accomplice who was present along with Mr. Cahill during the murder and assisted him in committing the crime. At trial there was evidence from a number of witnesses including Alice Fitzgerald, widow of the deceased, who gave evidence of hearing shots and observing the involvement of two men in the incident. Her evidence was that she was at home in Corbally on the morning of the murder, waiting for her husband to return from his work in Limerick City centre nightclub when she heard the jeep driven by her husband coming into the driveway of the house at 3.50 am. She heard four shots and the sound of glass breaking. She looked out of the sitting room window. She described seeing two men, one thinly built and the other fat and stocky. She describes the thin man as having "very shiny, shiny eyes, that his eyebrows met and were jet black". It is not entirely without significance that Mr. Campion has very striking eyebrows. The prosecution case was that Mr. Campion provided and drove a motor cycle that was used in the murder and then destroyed it by burning it.

4. Having pleaded guilty to the murder and having been sentenced, Mr. James Martin Cahill was a witness for the prosecution at the trial. Indeed, as already indicated, it is fair to say that he was a central, indeed the central, figure at trial and many of the grounds of appeal that had been argued on this hearing related to the role played by him.

5. At this stage it may be noted that there was no corroboration of the evidence that Mr. Cahill gave implicating Desmond Dundon and Anthony Kelly, and the jury, having been warned of the dangers of convicting on the uncorroborated evidence of an accomplice, acquitted them. In the case of John Dundon, while Mr. Cahill originally assigned a role in relation to the reconnaissance trip to him, in the course of the trial itself, the witness stated that he was no longer sure that Mr. John Dundon had actually been on the trip. In these circumstances, the trial judge directed a verdict of not guilty.

6. There is no doubt that James Martin Cahill was an unusual witness, indeed a highly unusual witness in a number of ways. Whereas, in many cases involving accomplice evidence, a witness will be contending that the role played by them was less than the role played by others, a fact sometimes reflected in a plea of guilty to a lesser charge, in this case Mr. Cahill was accepting that he had been the actual killer/gunman and his evidence was assigning subsidiary, though still significant, roles to others. There were other unusual features in his testimony, as will emerge, to the extent that at trial a great deal of time was devoted by the defence teams to attacking his reliability and indeed his competence to give evidence at trial. When the jury came to consider their verdict, it was common case that there was no corroboration of the evidence that Mr. Cahill had given against Desmond Dundon and Anthony Kelly and the jury having been warned in strong terms about the dangers of acting on uncorroborated evidence duly acquitted both men. In contrast, in the case of Mr. Campion, the judge outlined to the jury various aspects of the evidence which in his view were capable of amounting to corroboration, pointing out that whether the evidence that he was drawing attention to did in fact amount to corroboration was of course a matter for the jury.

7. There was significant supporting/corroborative evidence including the fact that there was CCTV footage which appeared to show Mr. Campion close to his home at 102 Pineview Gardens, Moyross, at 1.17 am with a motor cycle. Perhaps more significantly, there was evidence from a taxi driver, Christopher Kelly, of picking up a fare from a location near Dillons Garage to which he was directed by his base controller at a time when the motorbike which was used in the killing was burning there having been set alight. The taxi driver gave evidence that his passenger engaged in conversation with him and gave his destination as Pineview Gardens, Moyross. The passenger referred to the fact that he had a relative who was seriously ill in St. John's Hospital in Limerick and indeed at one stage considered diverting to the hospital but proceeded to Pineview Gardens. There was evidence from the hospital administrator that Mr. Campion's grandfather was a patient there at that time and there was also CCTV footage from the hospital which, it was contended, showed Mr. Campion on a corridor there at 17.55 pm.

8. Ten grounds of appeal were set forth in written submissions of which nine were argued. These being:

> 1. The learned trial judge erred in failing to rule upon whether or not James Martin Cahill was fit to give evidence.
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> 2. The learned trial judge erred in allowing the trial to continue in circumstances where James Martin Cahill had not submitted to a psychiatric assessment.
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> 3. The learned trial judge erred in failing to reconsider his decision as to the continuation of the trial without psychiatric assessment of James Martin Cahill after he started to give evidence and his grave psychiatric problems became manifestly obvious.
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> 4. The learned trial judge erred in allowing the continuation of the trial, without a proper transcription of the psychology notes pertaining to James Martin Cahill made by Dr. O'Higgins when the notes were utterly illegible and of no value in the absence of same.
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> 5. The learned trial judge erred in failing to accede to a defence submission of no case to answer upon such application being made on the grounds of the inconsistencies within the evidence and patent unreliability of the key prosecution witness, James Martin Cahill, in respect of whose evidence the jury could not be properly directed.
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> The inconsistency and unreliability referred to comprising inter alia the following:
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> > (i) Mr. Cahill's repeated resiling from his witness statement.
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> > (ii) Mr. Cahill's exculpation in the witness box of Larry McCarthy as the person who ordered the murder despite making him the central figure in his statement.
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> > (iii) Mr. Cahill's admission to having lied previously under oath.
> >
> > (iv) Mr. Cahill's admission that he is a habitual liar.
> >
> > (v) Mr. Cahill's admission that there was no gun found in the deceased's vehicle, contrary to his statement, and provision of a completely unintelligible answer when cross examined on the point.
> >
> > (vi) Mr. Cahill's incessant reliance upon voices, screaming in his head and instructions from his television as excuses for inconsistencies between his statement and his oral evidence.
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> 6. The learned trial judge erred in allowing the trial to continue in circumstances where the evidence of James Martin Cahill represented such a radical and significant departure from the case opened by the prosecution.
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> 7. The learned trial judge erred in directing that obscure CCTV footage was capable of being corroborative the prosecution case against the appellant when the footage was of such poor quality that identification of the appellant and by virtue of same, corroboration of the prosecution case, was in the circumstances impossible.
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> 8. The learned trial judge erred in his directions to the jury as to the approach to and consideration of evidence capable of being corroboration, in that he directed that the jury first consider the strength and reliability of the said evidence before consideration of the value or weight (if any) of the evidence offered by James Martin Cahill. Such direction did not, or may not, have allowed for a proper independent consideration of the primary evidence of James Martin Cahill.
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> 9. The learned trial judge erred in law in failing to recuse himself from the trial of this matter, after it was represented to the court by the prosecution that the court and by implication the learned trial judge was to be the subject of an attack with explosives by elements connected with the defendants.
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> *This ground was not argued.*

10. The verdict of the jury was perverse and against the weight of the evidence.

9. Even by reference to the grounds of appeal, it will be immediately obvious that Mr. Cahill was a highly significant figure in the trial and is now absolutely central to this appeal. The point can have no significance for the present appeal.

10. In addition, the appellant brought a notice of motion, seeking leave to argue a further ground arising from the decision of the Supreme Court in *Damache v. DPP* [2012] IESC 11. However, the argument was really advanced in the context of case Record No. 209/09, a related appeal arising from the conviction of the appellant for the murder of one Frank Ryan on the 17th September, 2006. In a situation where there was an acceptance by counsel for Mr. Campion that the propriety of the arrest was not an issue, the point can have only limited significance for the present appeal. The defence argues that even if there was no challenge at trial to the validity of the s. 29 Offences Against the State Act procedure as such, that failure is not fatal and in that regard reliance is placed on cases such as *DPP v Cunningham* [2012] IECCA 64. In response the respondent refers to the case of *DPP v. Liam Bolger* [2013] IECCA 6 and says that the effect of that decision is that not having raised the s. 29 warrant point at trial or by any other route, that the appellant cannot raise the matter for the first time now. One of the difficulties about the fact that the issue is being raised effectively for the first time on appeal is that neither this Court nor more relevantly, the trial court has heard evidence addressed to this topic. It appears quite possible that if the issue had been raised that there would have been evidence that the gardaí involved in the arrest had the requisite suspicion and intention that would have permitted an arrest and reliance on the s. 29 warrant might not have been strictly necessary. The fact that the trial court was precluded from investigating this aspect because the issue was not raised before it militates strongly against permitting the issue to be raised now for the first time. In any event, the decision in *Bolger* serves to preclude Mr. Campion relying on the point at this stage.

11. There is a further point, in that the issue has to a very large extent been overtaken as a result of the Supreme Court decision in *DPP v. J.C.* where judgment was delivered on the 15th April, of this year. This was a ground of appeal that was always likely to fail, but the outcome has been copper fastened as a result of the Supreme Court decision.

12. The issue of Mr. Cahill's competence/reliability as a witness and more specifically the argument that there was a need for a medical examination and a report following on from such an examination in relation to Mr. Cahill, arose for the first time on the 22nd October, 2007 (day four of the trial). The court was told that an initial assessment of medical notes and records that had been made available by the prosecution suggested to the defence that Mr. Cahill had psychopathic features, including attention seeking behaviour, compulsivity, volatility and aggression. A psychiatrist consulted by the defence, Dr. Ian Bownes, was of the view that a psychiatric examination and report should be sought regarding Mr. Cahill's fitness to provide evidence. The issue was raised in a situation where the medical records that were available referred to the fact that Mr. Cahill had spoken of hearing voices on different occasions and there was a question as to whether he had developed a psychosis. Thereafter, at trial, much attention was focused, particularly by the trial judge, on the question as to whether he, as judge, had the power to order Mr. Cahill to undergo an assessment. The trial judge was of the view that he had no such power and, it must be said that at this stage, the appellant and everybody else seems to accept that he was correct in that regard. That acceptance comes despite criticism of the trial judge's ruling on this issue for the fact that he referred to a case of *R. v. MacKenney* [1983] Cr. App. R. (76) 271, an English case dealing with the admissibility of expert medical evidence to assist the jury in determining what weight, if any, should be given to the evidence of a particular witness, but not to the decision in *R. v. Pinfold and MacKenney* [2004] 2 Cr. App. R. 5, when the matter came back again before the Appeal Court on foot of a reference from the Criminal Cases Review Commission. The issue of an assessment being ordered by the court was brought centre stage by Mr. Cahill who took the approach that he would only agree to undergoing an assessment if ordered to do so by the court.

13. However, the defence argued that even if it was the case that there was no power to order an assessment that this was far from the end of the matter and they now repeat this argument before this Court with some force. The defence are suspicious, and perhaps understandably so, of the approach to the suggested examination that was adopted by Mr. Cahill and say that that was not the response that one would expect from someone who was uninfluenced by figures in authority, and that it is indicative of somebody who was receiving advises or directions from somebody that was well versed in the law. The defence say that in those circumstances, it was incumbent on the trial judge to determine and then make clear to Mr. Cahill and indeed clear to all concerned, that a failure on his part to undergo an assessment would have major consequences for the continuance of the trial.

14. On behalf of the defence the case is made that the first issue to be addressed before any question of the assessment of reliability of a witness's evidence by a jury is reached, is a determination by the trial judge as to whether the witness is competent to give evidence. Sufficient doubt had been raised on the papers in this case as to Mr. Cahill's well being and accordingly as to his capacity to give evidence which would then be capable of being relied on, that the trial judge should either have prohibited Mr. Cahill from giving evidence on the basis that a very real doubt as to his capacity had been raised which had not been dispelled or, at the very least, sufficient information had emerged to mandate a forensic inquiry, and if such an inquiry was rendered impossible by Mr. Cahill's non cooperation, then that he could play no further part in the trial.

15. In addition the defence say that while there was a very powerful case, indeed compelling case for a psychological/psychiatric assessment before Mr. Cahill would be permitted to give evidence, that the case for such an assessment became absolutely compelling once he actually gave evidence. The defence say that Mr. Cahill's evidence and more particularly what he had to say during cross examination was littered with statements that are indicative of extreme paranoia. A recurring theme throughout the evidence was that Mr. Cahill was getting "screaming" into his head and that at other times he was hearing voices. Other issues were that at times he was talking to the TV and the TV was talking back to him. The defence placed particular emphasis on the fact that the voices the witness was hearing and the instructions that were being given to him were not confined to the past or still less to the distant past, but according to Mr. Cahill continued to exercise influence over him.

16. Attention is drawn by the defence to the fact that not only is Mr. Cahill indicating that the voices played a part in influencing his role on the murder and how he carried out his role, voices had told Mr. Cahill to shoot Mr. Fitzgerald in the head, but critically the witness was saying that the voices continued to be influential right up to and including the trial itself.

17. By way of example, attention was drawn to an exchange at Vol. 10 of the transcript as follows:

> Mr. Cahill: Will I explain something? I am getting like the voices back again and I am not sure of some of the people in the case where they was and stuff. So I don't want to convict somebody in the wrong I am going to say it.
>
> Counsel: Well what I heard you say there, and I will be the first one to admit that my hearing is not perfect, and I don't know whether the gentlemen of the jury can hear you. They can't. What I heard you say was you are getting the voices back?
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> Mr. Cahill: Yes.
>
> Counsel: And that is causing you to get people what, mixed up?
>
> Mr. Cahill: Yes.

18. The defence argued that the court was provided with a third opportunity to address the bizarre and extraordinary nature of Mr. Cahill's evidence at the conclusion of the prosecution case in the context of an application for a direction. By that stage it was established that Mr. Cahill was acknowledging that he had told untruths to the gardaí during the course of the investigation. Moreover, there had been occasions when the defence had sought to probe this and had been met with responses that they regarded as utterly incomprehensible. An example pointed to is that Mr. Cahill had at one stage said that there was a gun in the jeep that Mr. Fitzgerald was driving at the time he was murdered. His response to questions in relation to this was: "yeah and I thought the telly was speaking back to me, and the guard through the telly?? – I was asking him did he want his own protection, and the voice was saying, yeah and I writ down about a gun in the jeep and everything, and it is not true". Counsel asked: "You were asking the television what?" which drew the response: "Do the gardaí want his own – want their own protection?"

19. When counsel interjected: "you will have to speak a little more slowly, it may be my fault, but I am not picking up every word that you are saying", Mr. Cahill responded: "I was speaking to the telly and I was saying, did he want his own protection".

20. By the time the various cross examinations concluded Mr. Cahill had admitted to various acts of widely differing sexual depravity, to giggling about the murder and to telling a psychologist he did not know the difference between right and wrong, that was relied on by the prosecution as being significant appeared to show Mr Campion unaccompanied by Mr. Cahill close to his home in Moyross with a motorcycle at 1.17 am, some hours before the murder occurred.

21. The defence says that the enormous risks in the context, in particular of the application for a direction, the point is made that

over and above the general issues that arise in relation to the capability and reliability of Mr. Cahill as a witness, that there is the fact that aspects of his evidence appear to be contradicted by or to be inconsistent with other objective evidence relied on by the prosecution. Mr. Cahill's evidence appeared to suggest that the appellant had been with him from the time of the reconnaissance mission up to a point in time after the killings, but CCTV footage, that was relied on by the prosecution as being significant, appeared to show the witness unaccompanied close to his home with a motorcycle at 1.17 am hours before the murder occurred.

22. The enormous risks in placing any reliance whatsoever on Mr. Cahill is illustrated by looking at what he had to say about one Larry McCarthy. In his statement of the gardaí, Mr. Cahill had indicated that it was Mr. McCarthy who first requested him to participate in the killings, and indeed the prosecution had opened the case to the jury on this basis. However at trial, Mr. Cahill resiled from this position which gave rise to the following extraordinary exchange between the witness and counsel:

> Counsel: Larry McCarthy, never asked you to do a murder?
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> Witness: No.
>
> Counsel: But that is what you told the police?
>
> Witness: Yes
>
> Counsel: And if Larry McCarthy were in the dock he would be facing conviction for murder on the basis of what you said, is that right?
>
> Witness: Yes.
>
> Counsel: But in fact he didn't ask you to do it?
>
> Witness: No.
>
> Counsel: You just made that up?
>
> Witness: I just said it.
>
> Counsel: For what reason?
>
> Witness: No. Well I was getting screaming and I was getting confused as well.

A little further on in the transcript:

> Counsel: The voices didn't say this?
>
> Witness: No.
>
> Counsel: Sorry, where did this come from?
>
> Witness: I just said it out to the police.
>
> Counsel: So it came out of your own head?
>
> Witness: Yes.

23. The defence say that just how truly unsatisfactory Mr. Cahill is as a witness, and indeed just how dangerous he is, becomes apparent when one considers the ease with which he inserts individuals into the narrative or withdraws them.

24. In contrast, the respondent says that so far as the core evidence against Mr. Campion is concerned, that Mr. Cahill's evidence has been consistent throughout, and that there is a considerable amount of other evidence entirely independent of Mr. Cahill to support or corroborate what he is saying.

25. The respondent says that there was no basis whatsoever for requiring an independent psychiatric examination of Mr. Cahill. While there were certainly indications that Mr. Cahill had suffered from depression and anxiety in the past, there was nothing in the extensive medical records that were available and which were disclosed to indicate that Mr. Cahill might be suffering from the sort of major psychiatric evidence such as to render him unfit to give evidence. Insofar as he was in a very fragile mental state, this was explicable by reference to the fact that he had played a central role in a crime of particular brutality and callousness and by his conviction, on good grounds it might be thought, that those against whom he was giving evidence or associates of theirs were determined to kill him.

26. The prosecution point to the limitations of the rulings made by the trial judge in relation to the admissibility of psychiatric evidence. While not willing to order a psychiatric assessment, something which it is accepted by all now, that he had no power to do, the judge made clear that there was no restriction on the defence pursuing the topic of Mr. Cahill's mental state by way of cross examination. Nor was the judge prohibiting the defence from calling any of Mr. Cahill's treating doctors, nor indeed did he exclude the defence calling evidence based on expert opinions formed on the basis of the contents of the medical records and/or observations made of Mr. Cahill's performance in court.

27. The prosecution point out that the judge was clearly very conscious of the fact that there was no intention on the part of the prosecution to call any expert evidence to comment on or to offer support in relation to Mr. Cahill's capacity or potential reliability, and indeed indicated that if the prosecution did seek to go down that road, that that would require a revisiting of the rulings that had been made.

28. On behalf of the Director it is said that the decision of the trial judge to leave issues of reliability and credibility firmly within the remit of the jury, and not to countenance a situation where either side, and in all likelihood both sides, would seek to usurp the jury role by inviting experts to offer opinion evidence on issues that were quintessentially jury matters was an entirely appropriate one. The prosecution say that the failure on the part of the defence to respect the paramount role of the jury, in determining the facts of

the case and then returning a true verdict on whether the accused be guilty or not guilty is apparent from the suggestion that the trial should have been stopped after Mr. Cahill concluded his evidence. Assertions by the defence that the cross examination revealed Mr. Cahill to be profoundly disturbed, an incorrigible liar, one who was devoid of morality, a pervert and so on, did not provide any basis for aborting the trial. Even if the trial judge's assessment at that stage concurred with what was being submitted by the defence that did not provide a basis for stopping the trial, before the prosecution had called all the evidence that it wished to. It was the prerogative of the jury to assess Mr. Cahill's reliability and credibility and to assess all the other evidence in the case.

29. The DPP points to the decision in *DPP v. Gillane,* unreported, Court of Criminal Appeal, 14th December 1998, as one where similar issues arose. There, one of two men who, on the evidence, had been solicited to murder the appellant's wife, an individual described as a "down and out" believed that there was a microchip implanted in his head. The Court of Criminal Appeal commented in these terms:-

> "As regards the reliability of the evidence of Mr. Bolger the fact that he had very strange ideas about what was done to him when he had an operation on his head some twenty years before in the Mater Hospital does not mean that he was incapable of giving evidence. It may well be that many people have little or no knowledge of precisely what was done to them in surgical operations and some people may positively wish not to know. Certainly the ideas that Mr. Bolger expressed as to what was done to him are inaccurate and impossible but on the other hand he emerges from the transcripts of evidence as a positive, clear and forceful witness of the events which he describes. For an example of his positiveness and forcefulness it will be seen that at Q. 642 of transcript 2. he says 'I am telling the truth, the whole truth and nothing but the truth. I don't swear on the bible for nothing'. The jury were, of course, in a better position to assess Mr. Bolger and the reliability or otherwise of his evidence than this Court is from a reading of the transcripts.
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> The jury were, of course, in a better position to asses Mr. Bolger and the reliability or otherwise of his evidence than this Court is, reading from the transcripts. Mr. Bolger's evidence about his operation and what was done to him is totally peripheral and irrelevant to the issues in this case. It is not grounds for withdrawing the case from the jury's consideration. Moreover, in this State all citizens are equal before the law. There are no class divisions or distinctions. Mr. Bolger and Mr. Doyle may be and indeed were down and outs, but their sworn testimony must be given the same attention and respect as the testimony of the better dressed and the more comfortably circumstanced".

30. However, the appellant says that the *Gillane* case and the present case are very clearly distinguishable. While accepting that Mr. Bolger, the witness in the Gillane case, did have very strange ideas about certain topics, the critical difference is that the strange ideas that Mr. Cahill has, hearing voices, talking to and being talked to by the TV and so on, directly impacted on and, indeed on his own account, influenced the evidence he was giving at trial. In these circumstances they argue that it could not be said that the issues are peripheral or irrelevant to the issues in the case.

31. In the nature of things it is unlikely that those who come forward to admit involvement in a crime as serious as premeditated and pre-planned murder will be pillars of society. Those who would decide to become involved in such an enterprise are very likely to have a chequered past. Most normal people would never contemplate becoming involved in such an incident. Those who do become centrally involved are, in a sense, abnormal, ie. in the sense of apart from the norm. In part it is in recognition of that fact that has seen the law traditionally require that juries should be warned, and others charged with deciding the facts should warn themselves, about the dangers involved in acting on such evidence.

32. However, under our system of justice which involves a trial by judge and jury, where it is for the jury to decide the facts, it is for a jury properly and carefully directed to assess the evidence of such a witness and to decide whether to place reliance on such a witness. The scope for expert professional evidence on whether a witness is reliable or indeed capable of telling the truth will be very limited. The decision making process will normally not be enhanced by the prospect of professional witnesses intervening and offering conflicting and competing opinions on a matter that is so quintessentially one for a jury. The situation may well be different in cases involving disputed confessions where appropriate professionals may be able to offer assistance on issues such as whether an individual is particularly prone to succumb to psychological pressure, is unusually compliant or particularly suggestible, or more dramatically still, on issues such as whether an individual suffers from a syndrome involving a compulsion to make false confessions.

33. A judge who has observed a witness such as Mr. Cahill give his direct evidence, and then be subjected to several lengthy cross examinations is particularly well positioned to decide whether the evidence is so unreliable that the case should be withdrawn from the jury or whether the evidence of the witness, together with all the other evidence in the case should be left to the jury for consideration. Certainly, a judge who has observed the witness and in particular an unusual witness as Mr. Cahill undoubtedly was, is better positioned than is an Appeal Court dependent on the arid pages of a transcript.

34. The defence say that the court had an opportunity to prevent Mr. Cahill, as an inherently unsatisfactory and unreliable witness, from giving evidence. They say there was a further opportunity to stop the trial at the conclusion of Mr. Cahill's testimony and they say that there was a further opportunity at the close of the prosecution case, when there was an application for a directed verdict of not guilty on behalf of all the accused men. This Court is of the view that all the arguments advanced in relation to Mr. Cahill are encompassed in consideration of the question of whether this was a case where a directed verdict of not guilty ought to have been granted. The principles to be applied on an application for a direction by a trial judge are set out in cases such as *R. v. Galbraith* [1981] 1 WLR 1039 and *R. v. Shippey* [1988] Crim. L.R. 767 are well known and do not require to be rehearsed at any length. The issue is whether this was a case, where although there was some evidence, it was of an unsatisfactory nature, was inherently weak, was inconsistent with other evidence? Is it the case that the state of the evidence at the close of the prosecution case was such that no jury properly directed could convict? Was it the case that to focus on the fact that Mr. Cahill had not resiled in any way from the allegations that he was making against Mr. Campion was a case of picking the plums and leaving the duff?

35. The arguments advanced on behalf of the defence invite this Court to substitute its views for those of the trial judge on matters of primary fact. The established jurisprudence of appellate courts in Ireland indicate that primary facts are for the courts of first instance which have seen and heard the evidence given and seen the evidence tested in cross examination. See *People v. Madden* [1977] I.R. 336, approving the approach set out by Holmes L.J. in *The S.S. Gairloch* [1899] 2 I.R. 1.

36. There is no doubt that Mr. Cahill was a witness that presented difficulties for the trial judge and when the matter was left for the consideration of the jurors as judges of fact for them. The voices and delusions must have made it difficult to assess how much reliance could be placed on the evidence of Mr. Cahill. This Court has already commented more than once that the trial judge who had observed Mr. Campion in the witness box over many days was well positioned to make that assessment when considering the application for a direction.

37. In refusing the application for a direction, the trial judge commented that he was much influenced by the fact that at any time

that it seemed there was anything that Mr. Cahill thought was incorrect about the case, that he took trouble to explain it, and to bring himself back to a point where he felt that his evidence was the truth, and nothing but the truth. Then specifically, he referred to an exchange. He explained in particular, he referred to an exchange during the cross examination by Mr. McDonald, S.C. for John Dundon, which ultimately led to the directed acquittal of John Dundon. In the course of that exchange, Mr. Cahill commented:-

> "Will I explain something? I am getting voices back and stuff, so I don't want to convict somebody in the wrong. I am not sure was John Dundon around by the nightclub or around by the Brian Fitzgerald's place. I don't want to get anyone wrongly. Also I am not sure I can remember there were three people in the car around by the nightclub, I remember Dessie Dundon, I don't remember Gary Campion, I was not sure, sorry I am not sure, I don't want to any wrongly, that is it."

38. These observations by the trial judge are remarks which only somebody who has sat through the trial is really ever going to be in a position to make. At the application for a direction stage, the decision was his, whether or not to let the case go to the jury.

Some additional issues
39. The defence protest about the failure to stop the trial when handwritten notes that had been made by Psychologist Dr. O'Higgins were illegible. The position is that the respondent provided copies of handwritten notes made by Dr. O'Higgins. It appears that these were contemporaneous notes made by Dr. O'Higgins during sessions with Mr. Cahill. Later formal reports were prepared and these were furnished to the defence. The response of the prosecution was to say that they were handing over exactly what they were in possession of. In the view of the trial judge, and it is also the view of this Court, this was quite sufficient. This Court has noted a tendency for demands for ever more elaborate and all embracing disclosure to feature in trials. The suspicion has to be that very frequently the demands are not prompted by a belief that the prosecution are in possession of, or in a position to access, material that would assist the defence in mounting a case or would damage the prosecution case. Rather it seems that the object is to set the bar for disclosure at such a height that the prosecution will have difficulty crossing it, thereby giving rise to the hope that the prosecution will have to abandon the case. A fall back position is that the obligation is set in such exacting terms that there may be scope for argument later at an appeal stage that the obligations imposed were not fully complied with. Such strategies are to be firmly discouraged. The focus at trial should be on the question of guilt or innocence and not on the extent of the disclosure made.

Obscure CCTV footage not capable of amounting to corroboration
40. The footage in question was footage which the prosecution claimed showed the appellant close to his home with a motor bike in the early hours of the morning. Sergeant Darragh O'Sullivan gave evidence of what he could see happening on the video and was cross examined at length by counsel for the appellant. The footage was played a number of times for the jury and at their request, they returned to court during the course of their deliberations to view the footage once more. Notwithstanding, the terms in which this ground of appeal is formulated, it appears that the judge seems to have taken the view that this evidence if accepted was merely supportive as distinct from corroborative. There was no requisition on this topic arising from the trial judge's charge and in the view of this Court that is not at all surprising. The trial judge was perfectly correct in identifying the footage as capable of amounting to supporting evidence, whether it did in fact support or corroborate was of course a matter for the jury.

The sequence in which elements of the evidence are to be considered
41. In the course of the portion of his charge that dealt with the question of corroboration, the trial judge commented:-

> "It is only if you find it as a fact, if you find these facts first, if you find these facts that you turn to the evidence of James Martin Cahill in relation to Gary Campion."

42. The trial judge would seem to have in mind the decision in *Attorney General of Hong Kong v. Wong Muk Ping* [1987] 1 App. Cas., a decision approved by the Supreme Court in *DPP v. Gilligan* [2006] I.R. 107, which firmly rejected the proposition that the jury should be told to consider the evidence first of the accomplice and if necessary reject it without considering the corroborative evidence. If the trial judge's remarks are to be criticised it is because they are unduly favourable to the defence. In the context of the present case, the jury was in effect being told that unless they accepted the evidence of taxi driver Christopher Kelly about bringing a young man from close to the scene where a motor bike was burning in the aftermath of the murder, and the evidence that he gave about the remarks made by the passenger about having a relative/grandfather in hospital and the associated evidence of the hospital administrator and the CCTV footage from the hospital, that they should not go on to consider the evidence of James Martin Cahill. Whereas the correct position was that the jury were required to heed the warning that they had been given about the dangers involved in acting on the uncorroborated evidence of an accomplice, but they were nevertheless entitled to so act if they wished to do so.

Overview
43. This was a case where the prosecution depended on the evidence of James Martin Cahill. By any standards Mr. Cahill had to be regarded as a most unusual witness. The jury were carefully and strongly warned by the judge about the dangers of acting on Mr. Cahill's evidence in the absence of corroboration. The jury was clearly conscious of that warning and indeed heeded that warning as is evident from the fact that they returned not guilty verdicts in the case of Desmond Dundon and Anthony Kelly where there was no corroboration. However, in the case of Mr. Campion, the position was very different. Here there was significant evidence that was capable of amounting to corroboration and other evidence which, if not meeting all the criteria for corroboration, was certainly supportive of the State case. In these circumstances, it was for the jury to decide whether the evidence as a whole was sufficient to satisfy them beyond reasonable doubt that Mr. Campion was guilty of murder. They concluded that it was. In part, because Mr Cahill was such an unusual witness. The jurors who sat through the trial were much better positioned than this Court is, which is confined to the reading of the transcripts, to make that assessment. They concluded unanimously that all of the evidence that had been put before them was such as to satisfy them beyond reasonable doubt of Mr. Campion's guilt. That was a conclusion that they were fully entitled to reach and one with which this Court cannot interfere. The court will therefore dismiss the appeal.