THE COURT OF APPEAL

Appeal No. 32/12

Birmingham J.
Sheehan J.
Mahon J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Martin Kelly

Appellant

Judgment of the Court delivered on the 21st day of December 2016 by Mr. Justice Birmingham

1. On the 1st December, 2011, the appellant was convicted in the Special Criminal Court of the murder of Andrew Burns at Doneyloop, Castlefin, on the 12th February, 2008. He now appeals against that conviction.

2. The background to the trial and now to this appeal is that the deceased man, Mr. Andrew Burns, and the appellant both lived in Strabane, Co. Tyrone, Northern Ireland. They were known to each other. The case against the accused was that he was part of a plot to lure Mr. Burns to a church car park in the village of Doneyloop, which is just across the border in Co. Donegal, on the pretext that he was required to go on an IRA mission in which it was intended to murder a PSNI officer who had been dating a Catholic girl in Donegal.

3. The accused drove Mr. Burns to the location where three associates were waiting. There, in the car park of the Church one of them shot Mr. Burns twice in the back, causing his death. There can be no doubt that this was a deliberate assassination. After the killing, Mr. Kelly and the three people who had been lying in wait got into his car and drove off across the border. There, the gunmen handed Mr. Kelly a revolver which was in a black plastic bin liner bag and asked him to dispose of the gun inside the ditch. Mr. Kelly got out of the car, put the gun into the hedge and then drove off. Approximately two weeks after the murder as a result of a phone call, he met again with the three individuals who had been waiting for his arrival in Doneyloop. One of them put the murder gun underneath the passenger seat of the car he was driving, the same car as used on the occasion of the murder. Two of the three, including the person who had fired the fatal shots, took the revolver gun with them at a location outside Strabane. The gun was wrapped in an old oily rag.

4. A little over two years later, on the 24th February, 2010, Mr. Kelly was arrested near Letterkenny under s. 30 of the Offences Against the State Act 1939, as amended, for the unlawful possession of a firearm on the 12th February, 2008, and membership of an unlawful organisation on the same date. Having been arrested by Detective Sergeant Michael Donoghue, Mr. Kelly was brought to Letterkenny garda station where he was detained for a period of 48 hours. That detention was then extended for a further 24 hours following an application in that regard to Judge Seamus Hughes to which he acceded. During his detention at Letterkenny garda station, he was interviewed on eight occasions. During the course of the first six interviews no admissions were made, but in the course of interviews seven and eight, which were video recorded, admissions were made of involvement in the "shooting incident".

5. When the appellant's detention in Letterkenny garda station ended, he was released and it seems, returned to Northern Ireland.

6. On the 11th March, 2010, by prior arrangement, he met with Detective Superintendent Diarmuid O'Sullivan and Detective Inspector Kevin English in a hotel in Ballymena, Co Antrim. A major issue at the trial related to the three interviews, two in Letterkenny garda station and one in the hotel in which admissions were made. Those interviews and the admissions made are now central to this appeal.

7. In summary, the grounds of appeal contend that the stopping of the appellant's vehicle and his arrest were unlawful, that accordingly, his detention in Letterkenny garda station was unlawful and the admissions made by him should have been ruled inadmissible.

8. There is a further challenge to the admissions on the basis that they were not voluntary or were procured in circumstances where minimum standards of fairness had not been observed.

9. A further ground of appeal contends that a not guilty verdict should have been returned on the murder count because the act of shooting deliberately to kill which took place in Doneyloop car park was fundamentally different from the acts which were contemplated and in which the appellant had agreed to participate. To put that ground in context, it is necessary to explain that the admissions made by the appellant were to being the driver, who brought Mr. Burns to where the appellant's associates were waiting with the intention that he would be knee-capped there. In fact the gunman shot to kill and did in fact kill Mr. Burns. Fourthly there is a ground about the inadequacy of reasons provided by the trial court for its decision.

There was a failure to prove that stopping the vehicle driven by the appellant and his arrest under s. 30 of the Offences Against the State Act were lawful.

10. This issue arises in circumstances where Detective Sergeant Michael Carroll, Detective Sergeant Michael Donoghue and Detective Inspector Kevin English stopped the vehicle being driven by the appellant and arrested him. While they were close to Letterkenny, a Ford Galaxy car came from the Ramelton direction headed towards Derry. Detective Sergeant Carroll was driving the patrol car and he activated the blue lights in order to cause the Galaxy to stop. Detective Sergeant Carroll approached the driver, produced his garda identification card and spoke with the driver. He asked him for his driving licence and Detective Sergeant Carroll informed him that he was stopping him under the provisions of s. 30 of the Offences Against the State Act 1939, as amended. Detective Sergeant Donoghue looked at the driving licence which was produced and saw the name Martin Kelly on the driving licence. Detective Sergeant Donoghue also produced his identification card to Martin Kelly, identified himself to him and asked him if he was known as Martin William Kelly. The appellant said he was and Detective Sergeant Donoghue also asked him if he was known as "Mogo" and he said he was. Then, at 12.35 a.m. on the 24th February, 2010, Detective Sergeant Donoghue put his hand on Mr. Kelly's shoulder and told him that he was arresting him under the provisions of s. 30 of the Offences Against the State Act 1939 to 1998 on suspicion of the

unlawful possession of a firearm at Doneyloop, Castlefin, on the 12th February, 2008 and also on suspicion of being a member of an unlawful organisation on the same date. When asked by prosecution counsel during the course of the *voir dire* what was the basis for his suspicion, Detective Sergeant Donoghue replied "I based it on confidential information in my possession and which I was satisfied to be accurate... I would also have known of Mr. Kelly and I was involved in the investigation into the murder of Andrew Burns from the outset". In the course of the cross examination of Detective Sergeant O'Donoghue, it emerged that the three occupants of the garda car had been responding to an alleged armed incident in Convoy when they became aware of information in relation to Mr. Kelly's whereabouts, that it was believed that he had gone to Milford garda station in order to collect another individual. At that point, an operation was put in place to apprehend Mr. Kelly. The garda who was driving the patrol vehicle and who stopped the vehicle driven by Mr. Kelly did not give evidence as to his state of mind.

11. At trial and again on appeal the defence submits that there was no direct evidence or evidence from which the Court could infer that either of the gardaí involved had a reasonable suspicion. It is said that so far as the arrest is concerned, telling the appellant that he was arrested "on suspicion" was insufficient, stating that the suspicion was based on information which the gardaí were satisfied was accurate said nothing of the quality of the information: there was no claim that the suspicion was reasonable and no information from which the Court could find that the suspicion was reasonable.

12. The appellant places particular significance on the case of *DPP v Tyndall* [2005] 1 I.R. 593, a decision of the Supreme Court where the judgment, with which the other members of the Court agreed, was delivered by Denham J. In that case, the accused had been arrested pursuant to s. 30 of the Offences Against the State Act 1939. At trial the arresting sergeant had not given evidence that he had a suspicion prior to arresting the accused, but the trial judge was prepared to infer from the evidence that the arresting garda had a reasonable suspicion and that the mere failure to recite "because I had a reasonable suspicion or a suspicion of his unlawful possession" did not render the arrest incomplete or unsatisfactory. The Supreme Court in allowing the appeal, which came before it on foot of a certificate granted pursuant to s. 29 of the Courts of Justice Act 1924, ruled that it was an essential condition precedent to an arrest that the arresting member of An Garda Síochána had a suspicion as set out in section 30. Proof of the fact of the suspicion might be by direct evidence or the existence of the suspicion might be inferred from the circumstances of the case. The mere fact of the arresting member being an investigating officer was insufficient. The prosecution could not rely on the arrest to prove the existence of the requisite suspicion in circumstances where an arrest could only be performed by a member if he already had the suspicion required. Denham J. commented that if the fact of an arrest by a Detective Sergeant who is an investigating officer was sufficient from which to infer the required suspicion, and the arrest is only valid if the member has the necessary suspicion, it would be to apply reasoning which is circular and flawed.

13. The prosecution contended that the evidence of Detective Inspector Kevin English was also relevant. His evidence had been that he was, as part of his overall responsibilities involved in targeting the activities of dissident republicans in the border area, present in the garda vehicle when "we stopped the vehicle". He said "we believed" that the appellant was driving a car for the purpose of picking up a person who had been detained in Letterkenny garda station. The prosecution submitted that it was obvious that the three gardaí were "jointly and collectively on an operation and had information that caused them to stop the car in order to arrest the appellant on suspicion of involvement in the killing". The defence contended that Detective Inspector English's evidence was irrelevant since the concept of a collective arrest is alien to the constitutional regime and was incompatible with the Supreme Court decision in *Tyndall* and the decision of the Court of Criminal Appeal in *DPP v. Nalty* (Unreported, Court of Criminal Appeal, 16th June, 2005), where a comment by a garda that he had been at a case conference arising from which Peter Nalty was nominated as a suspect was insufficient.

14. The Court ruled on the matter in these terms:-

> "On the evidence of Detective Inspector English and Detective Sergeant Michael Donoghue it was Detective Sergeant Carroll who got out of the patrol car and stopped the vehicle which it transpired was being driven by the accused. Although Detective Sergeant Carroll was called to give evidence, there was no direct evidence, or evidence on cross examination from him on the actual stopping of the patrol car and to that extent the Court is satisfied that the prosecution has not adduced any evidence as to the suspicion held by Detective Sergeant Carroll in stopping the car. Evidence of the arrest was given by Detective Sergeant Michael Donoghue who said *inter alia* . . . [when] asked about the basis of his suspicion, Detective Sergeant Donoghue said that he based it on confidential information in his possession and of which he was satisfied to be accurate. He said he would also have known of Mr. Kelly and he, (the witness), was involved in the investigation into the murder of Andrew Burns from the outset. . .
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> The power to stop and to arrest are separate and distinct powers. As to the arrest, Detective Sergeant Donoghue gave evidence of arrest and of the fact that he was arresting the accused under that section on suspicion of unlawful possession of a firearm and on suspicion of being a member of an unlawful organisation. Having regard to the foregoing, we are satisfied that the arrest of the accused by Detective Sergeant Donoghue was lawful as was his subsequent detention.

15. For the arrest to have been valid there must have been a suspicion that was *bona fide* held and not unreasonable. The law in this area is clear, but its application to the facts can give rise to difficulties. In this case, the position is three senior members of An Garda Síochána, two detective sergeants and a detective inspector, were on duty together. Detective Inspector English had given evidence to the Court about his overall responsibilities in combating the activities of dissident republicans. It is beyond question that all three members were present in the garda vehicle when the decision to pull over the motor vehicle driven by Mr. Kelly was taken. Contrary to what is submitted by the appellant, it is abundantly clear that all three who were in the vehicle were party to the decision to pull over the vehicle. Once the vehicle was stopped and there was a request for sight of a driving licence, the driver was informed about the powers under which the vehicle was being stopped. In circumstances where three members acted in concert as these three undoubtedly did, the only reasonable inference is that in stopping the car Detective Sergeant Carroll was acting in furtherance of his duties. In fact, the court of trial took the view that there was no direct evidence from Detective Sergeant Carroll as to his state of mind. While the trial court could approach matters on that basis, this Court is of the view that Detective Sergeant Carroll's state of mind could have been inferred from the fact that he was acting in concert with Detective Sergeant Donoghue and Detective Inspector English.

16. The actions of the three gardaí in the patrol car also have to be seen in the context of the fact that once it was learned that Mr. Kelly was in the jurisdiction, an operation was mounted designed to lead to his apprehension. The Court has no difficulty in concluding that it was open to the court at trial to conclude that the arrest was a valid one, the car having been lawfully stopped and that the subsequent detention was therefore lawful. Accordingly the grounds of appeal relating to the validity of the arrest fail.

Admissibility of admissions.

That the trial court erred in failing to exclude admissions made by the applicant while in custody in Letterkenny garda station and subsequent admissions made in a hotel in Ballymena

17. In order to put the arguments that are advanced in relation to these grounds in context, it is necessary to say a little more about the sequence of events that led to the appellant standing trial.

18. As we have seen, the appellant was arrested by gardaí on the 24th February, 2010, a little over two years after the murder occurred. Of some note is the fact that the appellant had been arrested and interviewed in relation to these matters by the PSNI sometime prior to his arrest by gardaí. The relevance of this is that when the appellant was questioned about his involvement in the incident, he initially denied involvement and maintained that position throughout a number of interviews. The appellant says that there were numerous references to the fact of his arrest by the PSNI and that there were threats to his life, mainly because of suspicion that he had given information or as a result of reprisals on the part of associates of the murder victim.

19. All interviews conducted at Letterkenny garda station as well as the subsequent interview in Ballymena were video recorded. The Special Criminal Court viewed the tapes of the three interviews at which admissions were made and the trial court was satisfied that the appellant was at all times treated in a professional manner and that there were no threats made to him.

20. There was also some off camera contact between the appellant and investigating gardaí. The Special Criminal Court when ruling on the admissibility of the admissions referred to this issue. The Court drew attention to observations made by the Special Criminal Court on the question of off camera conversations in the case of *DPP v John O'Reilly* (Unreported, Special Criminal Court, 20th October, 2010) where the Court had indicated that in accordance with the spirit of the regulations that provide for audio video recording of interviews that there should be as little off camera verbal contact as possible. The court of trial commented that in *O'Reilly* it had not found and this Court did not find that such a contact should automatically render the contents of interviews inadmissible, but that the Court must look particularly carefully at matters that are alleged to have been said in the course of such contacts. This, the Court said, was particularly important where it is alleged that admissions were made after a series of interviews in which there had been no admissions. The Court concluded its remarks by saying that it had of course to be satisfied beyond a reasonable doubt that admissions were made and were made voluntarily, but that the Court was of the belief that even an extra element of caution must be exercised in accepting such admissions.

21. In this case, what occurred off camera and in particular what occurred in the yard of the garda station was the source of controversy. The appellant's evidence was that on one occasion when he was in the yard for exercise, either on the morning or evening of the first day of his detention, he was in the company of Detective Inspector English and there was a man there from Garda Headquarters. This man from HQ offered him €250,000 if he made a statement in relation to the killing of Andrew Burns. But Mr. Kelly's evidence was that his response to what was said by the man from Garda HQ was to tell him to "Fuck off".

22. Mr. Kelly's evidence was that he was brought to the yard on a second occasion, there were two detectives with him and the same person from Garda HQ appeared. This individual said that he had been talking to his bosses and went on to make references to the witness protection programme, made reference to the money mentioned earlier, said that if a statement was made that the witness protection programme would take him on, that he would get a new job, new identification, a house or an apartment somewhere in a foreign country and a number of countries were mentioned. It was also said that the witness would have to do a jail term, but that at that stage the gardaí were not sure how long a term. The appellant's evidence was that in response to this he just laughed and asked to go back to his cell. Mr. Kelly also gave evidence that between interview six and interview seven, after he had a consultation with his solicitor that he was brought to the side door of the garda station. On this occasion threats were shouted at him that if he did not make a statement that the gardaí would put it out that Mr. Kelly was an informer and he would end up like Mr. Burns, shot dead at the side of the road. According to Mr. Kelly, his response was to say that they could not do that and that the gardaí responded "We are the Donegal guards, we can do what we like" and reference was made to the McBrearty case. During the course of a *voir dire* it was vigorously denied by gardaí that there was any such untoward interaction.

23. During the course of interview seven which took place between 19.23 and 22.03 the 25 February, 2010, and again during the course of interview eight which took place between 11.29 and 14.11 on the 26 February, 2010, Mr. Kelly made certain admissions. He admitted luring Mr. Burns across the border and bringing him to the church car park, but claimed that he did not know that it was intended that Mr. Burns would be shot dead, rather he thought that he would be knee-capped. However, the gunman who opened fire deliberately shot the victim dead. The extent to which this is of significance will be discussed when considering later grounds of appeal. Between interview seven and interview eight, the appellant's detention was extended following a hearing in the District Court. At this hearing the appellant was represented by a solicitor. Mr. Kelly's evidence was that he did not tell his solicitor that he had made a statement as he was too scared to do so. Mr. Kelly claims that there was further contact in the yard of the garda station before the eighth interview and that Detective Inspector English said to him that he would have to put X's on maps and also told him not to tell his solicitor about the statement that had been made the night before, but Mr. Kelly said that he was not going to tell his solicitor anyway.

24. After the interviews the appellant was released from custody. Mr. Kelly says that this was a surprise to him as he had been expecting to be charged. Following his release, he returned to Northern Ireland and was out of the jurisdiction for some period.

25. The appellant's evidence was that sometime, a week or thereabouts, before a meeting which took place in Ballymena on the 11th March, 2010, that he got a call from Superintendent Steele of the PSNI. According to Mr. Kelly and his was the only evidence on the topic, Superintendent Steele told him that there were two senior detectives from Garda Headquarters who were keen to speak to him in relation to an incident in Letterkenny. According to Mr. Kelly, Superintendent Steele said there is a deal to be had or to be made. Mr. Kelly agreed to a meeting and a meeting took place in a hotel in Ballymena. The evidence was that the gardaí would have wished that the meeting would be held in a police station, but that was not acceptable to Mr. Kelly. According to Mr. Kelly, at the hotel, he first met with Superintendent Steele who told him that the gardaí would be along shortly and soon thereafter Detective Inspector English and Detective Superintendent O'Sullivan arrived. Detective Inspector English introduced Detective Superintendant O'Sullivan who then introduced himself as the head of the Special Detective Unit. Mr. Kelly claims that Detective Superintendent O'Sullivan said off camera that the witness protection programme would be available to him, but that he would have to name the people involved. He says that Detective Inspector English and Detective Superintendent O'Sullivan mentioned a number of names that they believed were involved. He was told that the gardaí were not interested in him, but that they wanted to see these individuals off the streets. Mr. Kelly further claims that he was told that if he made a statement naming people that he would probably be charged at a later stage with being an accessory after the fact and would receive a ten year jail sentence, though with a portion of that suspended. He would have to give evidence against those that he was naming, whether they were charged north or south of the border.

26. The gardaí and in particular Detective Superintendent O'Sullivan vehemently denied that any such conversation took place.

27. On camera the appellant repeated his admissions, but on this occasion provided the names of the others involved. During the

course of this interview, it was made clear to Mr. Kelly that the gardaí would be recommending to the DPP that the appellant should be charge with murder.

28. The appellant was arrested on the 16th March, 2010, in Dublin, having travelled from Northern Ireland by train and was brought before the Special Criminal Court charged with a firearms offence. Subsequently on the 30th June, 2010, he was charged with murder.

29. On the 16th October, 2010, Mr. Kelly met with Detective Inspector English and Detective Superintendent O'Sullivan in the Governor's office in Cloverhill. Mr. Kelly's evidence was that the senior gardaí present brought up the witness protection programme and talked to him about his new ID, new job and money. Mr. Kelly's evidence was that the gardaí were indicating that the preferred option at that stage was a charge of being an accessory after the fact. Mr. Kelly's evidence was that at this stage he was seriously considering what was being suggested to him by gardaí because he knew that his life was in danger, and could not see any way out. He thought that was the only option open to him.

30. Mr. Kelly said that there was still further contact with Detective Inspector English and Detective Superintendent O'Sullivan on the 12th September, 2011, in Cloverhill prison. Mr. Kelly said that again there was reference to them arranging for him to be charged with being an accessory after the fact or with the firearms offences. He says that on this occasion there was also reference to his father, who was unwell, and the possibility of compassionate bail to facilitate a visit. Again, there was a conflict between what Mr. Kelly had to say about what had occurred and what the gardaí had to say. The gardaí were adamant that they never initiated any discussion about witness protection programmes, pleas to lesser offences or the like, but that on occasions Mr. Kelly sought to raise these topics, but was prevented from doing so. The gardaí were also adamant that what was being said about the witness protection programme and the availability of €250,000 was nonsense and the witness protection programme operated on a like for like basis. In other words if Mr. Kelly was on social welfare in Strabane, he would be on social welfare when relocated. The gardaí says that any discussions that took place were in the context of addressing security issues in relation to Mr. Kelly.

31. The appellant both at trial and on appeal has submitted that there was a reasonable possibility arising on the evidence that the admissions were not voluntary. Alternatively the admissions should be excluded on the basis that it had not been established beyond reasonable doubt that they were not procured in unfair circumstances. In support of this submission reliance was placed on what the appellant claimed occurred off camera at Letterkenny garda station, in Ballymena and following his charging before the Special Criminal Court. Reliance was also placed on aspects of the on camera interviews and the tactics there pursued by gardaí, in particular their focus on the question as to whether Mr. Kelly was or had reason to be afraid for his own safety.

32. In evidence and by way of submission, the prosecution rejected any suggestion of seeking to engender fear in the accused man. Specifically it was rejected that there was any inappropriate approach or any suggestion of the payment of a sum of money up to and including €250,000 or any improper inducement or introduction of the witness protection programme.

The ruling of the Court.
33. The court at trial took time to consider the matter. The *voir dire* concluded on the 3rd November, 2011 and a ruling was given two weeks later on the 17th November.

34. Having dealt with the stopping of the vehicle/arrest point, the court of trial turned to the questions of the admissibility of the admissions. The Court commented as follows:-

> "As we have outlined above, the accused was interviewed eight times during his detention at Letterkenny garda station. He made no admissions in the first six interviews, but in the course of the seventh and eighth interviews, it is alleged that he did make admissions relating to his involvement in the shooting incident. It is further alleged that he made admissions when he was met in Northern Ireland by Detective Superintendent Diarmuid O'Sullivan and Detective Inspector Kevin English on the 11th March, 2010. It is alleged that these admissions were as a result of inducements and threats.
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> The first allegation raised by the accused in giving his evidence was that a meeting took place in the yard of the garda station with Detective Inspector English and a man from Garda Headquarters. He said that the man offered him €250,000 if he made a statement in relation to the killing of Andrew Burns. To use the accused's words he said 'I told him to fuck off'. He asked could he return to his cell. He then went on in his evidence to give an affirmative answer to the question: 'during the course of the various interviews that were conducted with you, you have hard evidence of references being made by the gardaí to you being in fear'. He was asked what effect that had on him. He said he did not sleep well for two nights and that they kept raising the issue of fear. Asked was there another occasion when he was in the yard, he said that he was brought out to the yard on a second occasion. He was brought out by two detectives. He said that, and we quote, 'When we got out of the yard, that guy I met earlier from Headquarters appeared. The two detectives that were there stayed back and he said he was talking to his bosses'. He went on to give evidence to the effect that this unidentified garda made reference to the witness protection programme and to the money that had earlier been mentioned.
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> Mr. Kelly went on to give evidence of an incident which he said occurred when he was brought to the side door of the garda station by Detective Moore and that Detective Garda Keown came up to them. He was shouting threats and said, and we quote the accused, 'If I didn't make a statement they would put it out that I was an informer and I would end up like Mr. Burns, shot dead at the side of the road'. He said that he told them that he could not do that and that the reply was along the lines 'We are Donegal guards, we can do what we like'. It was immediately after that alleged threat that he went into the interview room. He said that he was panicked and that in answer to Detective Keown said that he was prepared to make a statement. Later on he explained his panicking by saying he was in fear.
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> The third alleged incident of threat or inducement was immediately before the last interview, the one that took place in Northern Ireland, when he alleges that before the cameras were switched on, the witness protection programme was again mentioned.
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> On the overall evidence of the accused, he was induced to make the three statements primarily as a result of the threats made and fear for his life. The witnesses for the prosecution gave evidence in relation to the alleged mention of the witness protection programme by completely denying the mention thereof. Detective Superintendent O'Sullivan gave very strident evidence to the effect that he would never raise such a matter. All prosecution witnesses denied the threats to the accused. We have watched the video evidence in relation to the three relevant interviews with the accused. There was nothing unusual in the behaviour of the accused during these interviews. No threats or inducements were made and, in particular, in the last interview it was made clear to the accused that it was the intention of the garda authorities to recommend to the Director of Public Prosecutions that he be charged with murder. Further, there was no evidence of any

complaints to or by the accused's solicitor, to whom he had access at all material times."

35. Having referred to the evidence of a psychologist called on behalf of the defence and a psychiatrist called on behalf of the prosecution, which is not relevant at this stage, and made the observations quoted above about the undesirability of off camera contact with investigators, the Court concluded its ruling as follows:-

> "By reason of what we have outlined above, the Court is satisfied beyond doubt that neither the threats alleged nor the inducements alleged were made or given and we therefore find the statements to be admissible under this heading.
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> The final matter raised by the defence in seeking to have the evidence of interviews aforesaid excluded was under the general heading that we must separately be satisfied that the statements were voluntary having regard to what the defence described as the threat to which the accused was subject, in that danger to him was repeatedly raised with him in interviews, the implicit suggestion being, that the only way out for him was to make a statement. We have had the benefit of watching the recordings of the material interviews and observing the accused give his evidence before us and we are satisfied that he was, at all times, treated in a professional manner and that there were no such threats made to him as described under this heading. Accordingly we hold that the evidence of the three interviews is admissible."

36. In detailed written and oral submissions to this Court, the appellant has sought to overturn the approach of the trial court. Extensive extracts from the transcripts have been identified, helpfully gathered together in a booklet of extracts and it is said that the evidence before the trial court was such that it could not have been satisfied beyond reasonable doubt that the statements were voluntary, were not the subject of threats or inducements nor could the Court be satisfied that the circumstances in which the admissions were made did not breach minimum standards of fairness. While the industry applied to the task is commendable, the Court is nonetheless of the view that the exercise is misconceived. The exercise on which the court of trial embarked was one of fact finding. Was the Court satisfied beyond reasonable doubt that there had been no threats or inducements as alleged or otherwise? Was the Court satisfied, despite the allegations being made, that the procedures followed had not fallen below minimum standards of fairness? Was the Court satisfied that the admissions were voluntary? Did the evidence of Mr. Kelly on any or all of these issues raise a doubt? Was it possible that there had been threats or inducements, was there a doubt as to whether the admissions were voluntary, was there a doubt as to whether the procedures followed accorded with standards of fairness to be expected? All of these were questions of fact for the trial court; in respect of these issues the court of trial reached a clear and firm conclusion. Insofar as these were all quintessentially matters of keenly disputed fact, the appellant is in a difficult position in trying to persuade this Court that the court of trial, which was in so much better a position to deal with this issue, erred. See in that regard cases such as *S.S. Gaerloch* [1899] 2 I.R. 1; *Hay v. O'Grady* [1992] I.R. 210 and *People v. Madden* [1977] I.R. 336. See also the restatements by this Court of the continuing relevance of that line of jurisprudence in *People v. Doyle* [2015] IECA 109; *People v. Campion* [2015] IECA 190 and *People v. Campion (No. 2)* [2015] IECA 274. This is a case where the findings of fact and the conclusions by the trial court were supported by credible evidence. It is true that there was evidence that went the other way. However, in a situation where there was, beyond question, credible evidence to support the findings of fact of the trial court, this Court is bound by those findings. For this reason, the grounds of appeal relating to the admissibility of the admissions fail.

The appellant should not have been convicted of murder in a situation where the act of shooting deliberately to kill was fundamentally different to what he had contemplated: a punishment shooting or knee-capping.

37. Central to this ground of appeal is the contention on behalf of the appellant that:

> (i) The only evidence as to his participation in a joint enterprise came from the admissions made by him which were to the effect that he agreed to a punishment shooting causing serious injury to the knee with a specific agreement that the shooting would be directed in such a manner as to avoid causing death.
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> (ii) The fatal injuries were caused by a deliberate act designed to cause immediate death.
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> (iii) The deliberate act of shooting to kill was fundamentally different from the act that was contemplated and agreed to by the appellant.

38. In advancing the arguments that he does, the appellant is quick to acknowledge that if the appellant had been shot in the knee and died, because of the extent of trauma or as a result of bleeding to death, (and there have been such cases that have been dealt with by the Special Criminal Court), that he would have been guilty of murder. The appellant argues with considerable force that if the position, which is contended for by the prosecution, is correct, then it would follow that an accused who agrees to a victim's finger being cut off would be liable for murder if the co-accused beheaded the victim.

39. The classic definition of common design or joint enterprise is to be found in the case *of R. v. Anderson and Morris* [1966] 2 All ER 644, a decision which has been referred to with approval in a number of Irish cases. The head note there states:

> "Where two persons embark on a joint enterprise, each is liable criminally for acts done in pursuance of the joint enterprise, including unusual consequences arising from the execution of the joint enterprise: but if one of them goes beyond what has been tacitly agreed as part of the joint enterprise, the other is not liable for the consequences of the unauthorised act."

40. Comparable issues to those that arise in the present case have been considered on a number of occasions by the Irish courts and by the courts of neighbouring jurisdictions. In *People v. Cumberton* (Unreported, Court of Criminal Appeal, 5 December, 1994), what was in issue was that the appellant had accepted that on the night before an assault he had been asked to keep the victim "around the flats". The person who asked him to do this said "He wanted to sort Young (the victim) out". The applicant in his statement to gardaí said that he thought that Young was going to get a hiding that he did not know that he was going to be shot and also said that he thought he was going to get a bashing. Mr. Young was in fact shot with a sawn off shotgun and severely wounded. The Court of Criminal Appeal in refusing an application for a direction observed that it was for the jury to decide whether what occurred was within the contemplation of the common design or not. However, the Court of Criminal Appeal also felt that the trial judge had not dealt adequately with the question of joint enterprise in his charge to the jury. He had told them that if two or more people make an agreed plan to carry out an unlawful act, each of those persons is as liable as the other for what eventually takes place that is within the reasonable contemplation of that plan, but had not gone on to add that if one of the persons goes beyond what is contemplated, the other is not liable for the consequences of the unauthorised act.

41. The case of *People v. Doohan* [2002] 4 I.R. 463 was another case of death by shooting where the appellant's case was that he had agreed to, indeed commissioned, a punishment beating. The trial court was of the view that it was irrelevant that the method used or the weapon actually used had not been explicitly agreed to in circumstances where the appellant had given unfettered

discretion to his co-accused. The Court of Criminal Appeal took the view that while on the evidence the discharge of the gun was not expressly agreed to, that it was open to a jury properly directed to find that its use was not beyond what had been tactically agreed.

42. The issue of how joint enterprise operates in murder cases was considered most recently by the Supreme Court in the case of *DPP v. R.D.* (Unreported, Supreme Court, 16th June, 2015). On that occasion the matter came before the Court by way of a s. 23 Criminal Procedure Act 2010 application that is "a with prejudice appeal against acquittal". The background to the case was that Mr. D along with a co-accused, TN, had been charged with the murder of a young person in the care of the HSE. Essentially each accused blamed the other. On learning that the co-accused was placing the blame on him, Mr. D responded by making admissions of a limited nature. When ruling on a direction application, the trial judge felt that there was no evidence that Mr. D knew that death or serious injury was to be inflicted on the victim. The judge pointed out that the evidence against Mr. D was his own statement and that at its height was to the effect that the injured party was to receive a few digs.

43. In the course of her judgment, Dunne J., with whom the other members of the Court agreed, very carefully reviewed the law in respect of accessorial liability as it developed over the years. She concluded her judgment as follows:-

> "Insofar as the question of the extent of the application of the decision in *R. v. Rhamen* is concerned, I am satisfied that it clarified the law in relation to the mental element required to establish the liability of an accessory involved in a joint enterprise in relation to murder. Accordingly, if an accessory assists the principal knowing that the principal is proposing to carry out an assault and that the principal is armed with a lethal weapon, then, the accessory ordinarily will be understood to have known or foreseen that the principle intended to seriously injure or kill the victim of the assault. However, I am not of the view that *R. v. Rhamen* is authority for the proposition that the *mens rea* required for an accessory to murder is something less than that required of a principal offender under section 4. The *mens rea* of the accessory and principal may not be identical, but provided each has the requisite intention required under s. 4, then in each case, they would be liable for murder."

While it can be said that the context of the present case and the *R.D* case are different in that in *R.D* what is alleged to have occurred was a willingness to facilitate one form of assault – "a few digs" – when what occurred went further involving a stabbing with a shears, here it is said that one form of outrage – a kneecapping was contemplated, but what happened was an outrage of a fundamentally different character, deliberate murder. It is nonetheless the case that if the remarks of Dunne J. just quoted are applied to the present case, this would result in a conviction for murder.

44. Since this appeal has been at hearing, the question of joint enterprise in murder cases and more specifically the sub question of what has come to be known as parasitic accessory liability has been considered by the UK Supreme Court and by the Privy Council in the cases of *R. v. Jogee and Ruddock* [2016] 2 W.L.R. 681. Parasitic accessory liability is a term used to describe a doctrine laid down by the Privy Council in *Chan Wing-Siu v. The Queen* [1985] AC 168 and developed in later cases which held that if two people set out to commit an offence (Crime A) and in the course of that joint enterprise one of them commits another offence (Crime B), the second person is guilty as an accessory to crime B if he had foreseen the possibility that the other might act as he did.

45. In *Jogee & Ruddock,* the Court was invited to take the view that the common law had taken a wrong turn with the decision in *Chan Wing-Sui* and that was compounded by later cases such as the House of Lords decisions in *R. v. Powell, Daniels and English* [1997] 4 All ER 545. The Court concluded that the very extensive analysis that it had undertaken led them to conclude that the developments under consideration were based on an incomplete and in some respects erroneous reading of previous case law, coupled with generalised and questionable policy arguments. Essentially it has concluded that the error that had developed was in equating foresight with an intent to assist, when as a matter of law, the correct approach is to treat this as a matter of evidence.

46. It should be explained that having heard argument in the usual way that the present case was listed for judgment by the Court, but at that stage, the appellant requested that the giving of judgment be deferred to allow further argument be presented arising from *Jogee*. The Court agreed, notwithstanding that the point of central significance in Jogee, does not have any direct relevance to Irish law. In *Jogee*, the UK Supreme Court and the Privy Council were being asked to correct a "wrong turning" which had started with Chan Wing Siu and which had then fed into many other decisions over the past 30 years. However, it is important to realise that Irish law never took that "wrong turning". Rather, the focus of Irish law, no doubt influence and indeed directed by s. 4 of the Criminal Justice Act 1964, has remained on intention rather than forseeability.

47. In the case of *R. v. Gamble* [1989] NI 268, the Northern Ireland courts dealt with a case, the facts of which were very similar to the facts of the present case. So similar indeed that if the approach of the courts in *R. v. Gamble* represents the law in this jurisdiction, then Mr. Kelly is entitled to be acquitted of the offence of murder. In *Gamble* Carswell J. was dealing with four accused who were members of the Ulster Volunteer Force and who had a grievance against an individual named Patton. The four accused entered upon a joint venture to inflict punishment upon him. Two of them, Douglas and McKee contemplated that Mr. Patton would be subjected to either a severe beating or knee-capping. However, in the course of the attack upon Mr. Patton he was deliberately murdered by the other two accused. His throat was cut with a knife and he was shot with four bullets and two of the shots would have been fatal even if his throat had not been cut. Carswell J. found that it had not been established beyond a reasonable doubt that Douglas and McKee contemplated that there was an intention to kill. He concluded that where a person acted with another in pursuance of a common purpose, the accessory was liable only to the extent that the principle acted within the ambit of the type of offence contemplated by him. In this case he felt that the killing was a crime of a different kind from the beating or knee-capping contemplated and authorised. The House of Lords in *R. v. Powell, Daniels and English* referred to this case. There Lord Hutton, with whose opinion the other members of the House of Lords, agreed commented:-

> "In my opinion this decision (the *Gamble* decision) was correct in that a secondary party who foresees grievous bodily harm caused by kneecapping with a gun should not be guilty of murder where, in an action unforeseen by the secondary party, another party to the criminal enterprise kills the victim by cutting his throat with a knife."

He continued:

> "The issue (which is one of fact after the tribunal of fact has directed itself, or has been directed, in accordance with the statement of Lord Parker in *Reg. v. Anderson and Morris* [1966] 2 All ER 644 at 648) whether a secondary party who foresees the use of a gun to kneecap, and death is then caused by the deliberate firing of the gun into the head or body of the victim, is guilty of murder is more debatable although, with respect, I agree with the decision of Carswell J. on the facts of that case."

48. Unfortunately for Mr. Kelly that was not the last word on the subject from the House of Lords. In the case of *R v Rahman* [2009] 1 A.C. 129, the accused were part of a group which chased the victim and his friends with weapons including baseball bats, metal

bars and knives. The victim died from two deep knife wounds to his back. There was no evidence that the accused inflicted the fatal injuries and indeed the individual who did had probably escaped arrest. In the course of his speech, Lord Brown quoted the remarks of Lord Hutton that in a situation where a secondary party foresees the use of a gun to kneecap and death is then caused by the deliberate firing of the gun into the head or body of the victim whether that party is guilty of murder is more debatable. He then continued:-

> "But why, I wonder, is that merely 'debatable'? Why is the secondary party in those circumstances not plainly guilty of murder, just as the appellants in Powell?"

Lord Brown reformulated the traditional test thus:

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B."

49. It must be added that while all the members of the House of Lords in *Rahman* were agreed in dismissing the appeal, there are significant divergences in their approaches and indeed differences in what they had to say in relation to *Gamble*. We have seen what Lord Browne had to say, but Lord Bingham referred to the judgment in *Gamble* with apparent approval at paras. 13 and 14. In contrast Lord Scott at para. 31 said he shared Lord Browne's difficulties with the *Gamble* decision. Lord Neuberger, too was clearly uncomfortable with *Gamble* commenting at para. 93, that while Lord Hutton had expressly said that *Gamble* was rightly decided, that he was very doubtful about the point, but that it may just be that the difference in weapon could justify the acquittals, because of the very limited and specific nature of the use of the gun that was foreseen by the appellants Douglas and McGee.

50. In its ruling of the 1st December, 2011, the Special Criminal Court at trial commented that it was satisfied that the decision of Carswell J. in *R. v. Gamble* was at variance with the law as established in this jurisdiction and that this Court was bound by our jurisprudence where there is such divergence. The Court went on to say:

> "The Court is satisfied beyond doubt that the accused was part of a joint enterprise, the object of which was to cause serious injury to the late Mr. Burns and that he is thereby guilty of murder and we so convict him."

51. It appears to this Court that the precise issue that confronted the court of trial namely, a common intention to cause really serious injury through the use of a dangerous, indeed lethal weapon, a firearm, but where the gunman then intentionally kills the intended victim using that firearm has not previously arisen. The issues raised by this ground of appeal are not only novel, but clearly important.

52. The appellant argues that where what happened was fundamentally different than what had been agreed to, constitutional principles require that Mr. Kelly could be convicted only of matters to which he had agreed or which he had left open as an option. It is said such an approach is supported by cases such *People v. Murray* [1977] I.R. 360 and *C.C. v. Ireland* [2006] 4 I.R. 1.

53. If the arguments on behalf of the appellant, formulated as raising issues of principle are correct, then it is hard to see how someone who causes death, but had not intended to kill should be guilty of murder, but such a person unquestionably is if the intention was to cause serious harm. Likewise, it would be hard to see that co-accused should all be responsible for the consequences flowing from the actions of all, including unforeseen consequences, but again that is the law.

54. In *People v. Doohan* Denham J. commented:-

> "There was evidence upon which the trial could determine that the applicant intended to cause serious harm to the victim. He was in a joint enterprise to cause serious harm to the victim, and consequently there was the necessary intent, the mental element, for murder."

The concluding remarks of Dunne J. in *People v. R.D.*, quoted earlier are also on point. She concluded the judgment by saying that while the *mens rea* of the accessory and the principle may not be identical, but provided each has the requisite intention required under s. 4 in each case, then in each case they would be liable for murder.

55. The development of the law of murder over the years has involved elements of public policy. The fact that an intention to cause serious injury is sufficient to make out a *mens rea* of murder is a recognition of the fact that in many cases, even where it was highly probable that there was in fact an intention to kill, that it would not be possible to prove that was the intent.

56. In the Court's view, the approach at the court of trial was the correct one. The court of trial took as its starting point that it has long been the position in Ireland that a murder conviction is recorded if there was an intention to cause at least serious harm and death results. In this case, Mr. Kelly brought Mr. Burns to the church car park with the intention that he would there suffer serious injury: that he would be shot. In fact he was shot and even if it cannot be proved that a shooting with intention to kill had been contemplated by Mr. Kelly, he is nonetheless guilty of murder. The policy adopted is a pragmatic one. It is one that is deeply rooted and long established and one that can be supported. There can be no doubt that Mr. Kelly rendered assistance to those who carried out the murder and did so both before and after the fatal shooting. The firearm, which according to Mr. Kelly was intended to be discharged so as to cause serious harm to the victim by kneecapping him, was discharged with fatal results. While undoubtedly there is a distinction between what Mr. Kelly says was agreed and what occurred the court does not accept that this was so fundamental a departure as to absolve Mr. Kelly from responsibility for the murder. Accordingly this ground of appeal fails.

Adequacy of reasons

57. The appellant is critical of the adequacy of the reasons given by the court of trial for its decision, submitting that the decision is defective in several respects. In this case the court delivered a considered ruling following on the *voir dire* having taken time to consider the matter and then delivered a considered judgment at the end of the trial which referred back to the earlier ruling. The appellant says the decision leaves unclear whether the stopping of the vehicle, as distinct from the arrest of the driver was deemed lawful and if so why. In relation to the arrest, the appellant says that the court at trial did not address the question of whether it was necessary for the prosecution to establish that the arresting garda had a reasonable suspicion, and if that was so, how the Court concluded that suspicion had been established. In relation to the admissions, the appellant says that apart from rejecting the appellant's claims in relation to threats and inducements it is not clear how the Court came to conclude that there was not a doubt

as to the voluntariness of the admissions. Again, the appellant says that there was a failure to address the issues that had been raised in relation to unfairness and issues touching on public policy. In addition, the appellant says that the Court did not address the arguments that had been advanced that an accused is not liable for actions fundamentally different to the action or range of actions contemplated and as a result the Court did not go on to consider whether shooting into the knee, and so causing serious harm is in fact fundamentally different to shooting into the chest or head with a clear intention to kill.

58. While it is the case that not every argument canvassed has been addressed by the Court in the course of its rulings, no one who had been a participant in the case or had observed the trial could have been left in any doubt whatever, about the basis on which the court of trial approached the case and the view that the Court formed in relation to the various issues that had been raised. This ground of appeal therefore fails.

Conclusion
59. In summary then the position is that the Court rejects all the grounds of appeal and so will uphold the conviction and dismiss the appeal.