THE COURT OF APPEAL

Ryan P.
Birmingham J.
Edwards J.

272/11

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Michael Taylor

Appellant

JUDGMENT of the Court delivered on the 16th day March of 2018 by

Mr. Justice Birmingham

1. On 14th November, 2011, the appellant was convicted by a majority jury verdict of the offence of murder. Details of the offence were that he, on 6th April, 2007 murdered Paul Kelly at Wintonville apartments, Charlemont Road, Clontarf, Dublin 3. Some 12 grounds of appeal have been formulated but at the heart of the present appeal is a contention that this was a case where the judge should have directed the jury to return a verdict of not guilty at the close of the prosecution case. Another issue that was argued related to the admissibility of DNA evidence in circumstances where there was a challenge to the procedure followed in relation to the taking of a buccal swab from the appellant at a time when he was in custody.

2. It is appropriate to say something about the evidence that was adduced at trial. At approximately 23.45 on 6th April, 2007 gun shots were heard in the Charlemont Road area of Clontarf. Paul Kelly had been shot and his body was found inside the door of his apartment building, Wintonville Apartments on Charlemont Road, Clontarf. He had suffered multiple wounds to his head, torso, right arm and leg/groin giving rise to catastrophic injuries to multiple organs which were instantaneously fatal. He had suffered two shotgun wounds and multiple handgun wounds. Two men were seen running from the apartment block up Victoria Villas, onto Charlemont Road and then onto Cecil Avenue. Both men were wearing balaclavas and gloves and were carrying what looked like a gun and a shotgun. There were a number of witnesses who described the men running from the scene but none purported to identify the men. Gardaí were on the scene almost immediately and the scene was preserved. In the course of the subsequent examination a glove was found on the corner of Charlemont Road and Cecil Avenue. The glove is a very significant part of the case. The glove was examined. The DNA of two individuals was present. One of the two profiles matched the DNA profile of the appellant. A DNA match was possible because the appellant while in custody had provided a buccal swab which allowed a DNA profile be generated. At trial there was an issue as to whether there was consent to the taking of the sample. Somewhat refined arguments have been advanced on this appeal in relation to the procedure followed in taking the sample, these will be addressed later in the course of this judgment.

3. A number of phones were seized in the aftermath of the murder. It was not suggested that any of the phones seized belonged to the appellant. However, when the contact lists on the phones were examined in a number of cases, a particular number, 086 245 2769 was listed. The prosecution case at trial was that they had succeeded in linking the appellant to that phone number. The phone in question was very active around the time of the murder. Calls were hitting off a mast at Clontarf Garda Station which is in very close proximity to the crime scene. Before and after the murder the phone hit off masts between the crime scene and the home of the appellant's girlfriend at Prospect Hill, Finglas, Dublin. The Court also had evidence of a feud which involved the appellant's family and the deceased.

4. The case mounted by the prosecution was based on circumstantial evidence and there were in effect three limbs to the prosecution case:

> (i) DNA: the presence of DNA matching that of the appellant on the glove which was found 80 m from where the deceased had been shot on the route which was taken by the murderers fleeing the scene.
>
> (ii) Phone activity: the prosecution was able to adduce evidence of activity involving phone number 086 245 2769 at the time of the murder. The prosecution case was that they had established that was the appellant's phone; and
>
> (iii) The evidence that there was a feud involving the deceased and the family of the appellant.

The prosecution would have hoped that there would have been a fourth leg to their case in that a single firearm particle was retrieved from the glove but following a voir dire this evidence was ruled to be inadmissible by the trial judge. The defence make two points. They say that the evidence in relation to each of the three limbs contained frailties but they also say that even taking the evidence in relation to each limb at face value, the evidence was insufficient to allow the case go to the jury. A combination of the phone evidence and the glove/DNA evidence against the background of the feud might raise suspicion, it was accepted, but the defence said very firmly that the evidence in the case never amounted to anything more than suspicion.

5. It is appropriate to say a little more about each of the three strands of evidence.

The glove and DNA evidence

6. Later on the night of the murder at the junction of Cecil Ave and Charlemont Road, Garda Pauraic McNerney found a glove. The area where the glove was located was on the path along which two men were seen to run after the murder. It was approximately 80 metres from the murder scene. The householder there, Mr Colm Frize, confirmed that he lived in the house in question and that it was his habit to smoke cigarettes either out the front of his house or out the back up to 9 pm each evening. It is said that he had been out the front door smoking two to four times between four o'clock that day, and the latest time would have been 9 pm. He subsequently became aware of Gardaí outside his house and in particular, he noticed a Garda standing over a glove on the footpath outside his house. He confirmed that when he had been out in the front area of his house earlier that evening that he hadn't observed any item on the ground. On 28th November, 2007 the appellant was arrested pursuant to the provisions of s. 42 of the Criminal Justice Act 1999 and detained. During his detention a buccal swab was taken from the appellant. A controversy relating to the taking

of the swab will be dealt with when considering another ground of appeal. Dr Ramsbottom subsequently carried out a DNA analysis. DNA was extracted from a mini tape lift from the inside of the glove. The DNA extracted indicated that there was a mixture of DNA from more than one person. The DNA profile contained a mixture which consisted of a major male component and a minor component. The major part of the profile matched the DNA profile of the appellant in all respects. Dr Ramsbottom gave evidence that she estimated the chances of an unrelated person chosen in the Irish population having the same profile was less than one in one hundred million. The minor part of the profile originated from an unknown source and due to the incomplete nature of the minor profile the witness could not determine whether the source was male or female. In cross examination, the witness stated that her findings were consistent with the appellant having worn the glove but she also said that the fact that the major profile was that of the appellant was not indicative of the fact that the appellant was in fact the last person to wear the glove.

The phone evidence

7. As part of the Garda investigation into the murder a number of mobile phones were seized. One such, mobile phone number 086 842 9332 was seized from Michael Taylor Senior, father of the appellant. An examination of its contacts list included the following information:

> "M Taylor:
>
> • 086 245 2769 ("the 2769 number")
>
> • 086 370 4496 ("the 4496 number")
>
> • 086 245 2758 ("the 2758 number")"

Mobile phone records showed that the 2769 number used a particular mobile phone handset. A handset has a unique identifier, an IMEI number which is recorded when a mobile phone call is made or text sent, regardless of what SIM card is inserted into the phone at the time. The handset used by the 2769 number had a unique IMEI number ending in 5630 ("the 5630 IMEI number/5630 handset"). Mobile phone records were obtained for all phone contacts made using the 5630 handset. Analysis showed that the 5630 handset had previously been used in connection with two other mobile numbers – the 4496 number and the 2758 number. Between 1st February, 2007 and 8th March, 2007, the 5630 handset was exclusively used by the 4496 number. Between 8th March, 2007 and 28th March, 2007, the 5630 handset was exclusively used by the 2758 number.

8. A mobile phone was seized from Jamie Taylor, daughter of Michael Taylor Senior and sister of the appellant. Her contact list included the following details:

> "Dad 086 862 9332
>
> Donna 086 243 3100
>
> Michael T 086 370 4496
>
> Mt 086 245 2758
>
> Michael T new 086245 2769"
>
> A phone was seized from Donna Molyneux, sister of the appellant. Included in the contacts list was the following information:
>
> "Derek's dad 086 842 9332
>
> MI 086 245 2769
>
> Joanne Flood 086 875 2041"

A phone was seized from Thomas Fox, a son of the partner of the father of the appellant. Included in its contacts list was the following information:

> "Michel [sic] 086 245 2769
>
> M.TA 086 245 2758
>
> Michel TA 086 270 4496"

9. There was evidence that the phone of Michael Taylor Senior had tried to ring the 2758 number on four occasions on the evening of 6th April, 2007 and on each occasion immediately dialled and connected to the 2769 number. Furthermore, there was evidence of 29 contacts between the 2769 number and the phone of Michael Taylor Senior on 6th and 7th April, 2007.

10. At trial, there was an objection to the admissibility of the contents of the contacts lists on the basis that it amounted to inadmissible hearsay in circumstances where Jamie Taylor, Donna Molyneux and Thomas Fox were not called to give evidence. Mr Taylor Senior was dead at the time of the trial, he had died some six months previously but no statement had ever been taken from him. The judge at trial agreed that the entries on the phones were in fact hearsay, if it was intended to rely upon them as speaking for themselves as to the truth of their contents. However, he was prepared to admit the entries on the phones as real evidence. In those circumstances the contents of the entries would not speak for themselves as to the truth of their contents. The jury would simply be entitled to have regard to the circumstance that the phones in question contained entries which happened to say such and such, which might or might not be true. They could however consider that particular circumstance in conjunction with other circumstances established in evidence, and determine what inferences the cumulative circumstantial evidence might justify. In the Court's view, he was correct in so ruling. The fact that a number of people who might be expected to have reason to contact the appellant, Michael Taylor Junior, had the same numbers for him listed in their phones was of evidential significance. There was other evidence at trial linking the appellant to the numbers linked to the 2769 handset.

11. On 3rd February, 2007, the 4496 number, using the 5630 handset, rang Crumlin Garda Station on four occasions between 19:00 and 20:45. On 28th February, 2007, the 4496 number, using the 5630 handset rang a Smart Telecom customer service line on four

occasions between 13:36 and 14:10. On 12th March, 2007 the 2758 number rang Smart Telecom at 15:59 pm. Garda Diarmaid Kelly of Crumlin Garda Station gave evidence that he received a call and took a message from a male identifying himself as Michael Taylor. He made a note as follows:

> "David Finnerty, can you please contact Michael Taylor on 086 875941?"

The defence accepted that the evidence showed contact between the appellant and Gardaí. Sergeant David Finnerty gave evidence that he had asked the appellant to contact him in a conversation on 27th January, 2007 and that, on seeing Garda Kelly's note on 7th February, 2007 he had contacted the appellant on the number given. There was evidence that Joanne Flood, girlfriend of the appellant resided at apartment 57, Dargle, Block 7, Prospect Hill, Finglas, and that the appellant stayed there at relevant times. David Murphy, a property letting agent, confirmed that he had let the premises to Joanne Flood and that a man by the name of Michael Taylor resided there with her. He confirmed that the apartments faced onto Tolka Valley Road and that there had been a flood in the building in December, 2006. Sandra Murray of McCabe Builders confirmed that a cheque for compensation for damaged property arising from the flood had been made payable to Michael Taylor. Connor Healy of Smart Telecom put in evidence business records of Smart Telecom showing that Joanne Flood had an account with Smart Telecom in respect of the apartment at Prospect Hill. On 28th February, 2007, the day the 4496 number rang Smart Telecom, a fault log was opened on Smart Telecom's customer service computer in respect of Joanne Flood's account. On 12th March, 2007, the day the 2758 number rang Smart Telecom, the 2758 number was added to the account as a customer number.

12. The location of the murder at Winstonville apartments, Charlemont Road, is covered by the mobile phone mast located at Clontarf Garda Station. There was evidence at trial that the crime scene was within an area of "excellent coverage" from the mast. Phone records showed that the 2769 number was in contact with the Clontarf Garda Station mast on four occasions between 23:15 and 23:49 on the night of 6th April, 2007 showing that the phone was within the area of coverage of the mast during that period. Evidence was led from Brendan McKenna of Villicom Engineering, confirming the location of various mobile phone telephone masts used in the O2 network. These included the location of and the area of coverage of the mobile phone mast located at Clontarf Garda Station. He confirmed by reference to the O2 phone data that the 2769 number had connected to the mast on four occasions between 23:15 and 23:49. He also dealt with the areas covered by various masts with which the 2769 number had been in contact at relevant times, and the relevant strength of the coverage within those areas. In particular, the witness gave evidence of the fact that 2769 connected on numerous occasions to masts covering the area in which the apartment at Prospect Hill, Finglas, was located.

Evidence relating to feud

13. The prosecution contended that a feud between the Taylor – Fox family and Paulie Kelly and the Kelly family provided a motive for the killing. Evidence was given by Sergeant O'Flaherty that on 26th April, 2007 he asked the appellant about the feud between the Taylor – Foxes and the Paulie Kelly and Kelly family and that the appellant stated that the feud was all over and said words to the effect that the families had met and negotiated a peace deal. Again, there was a challenge to the admissibility of this evidence on the basis that the conversation took place six weeks or thereabouts after the murder of Mr Kelly and that there was nothing in the evidence which indicated when the feud had commenced and whether it had been ongoing as of the 6th April, 2007. Again, it is said that even if the feud was ongoing at the time of the murder, there was no evidence that the appellant was a party to the feud.

14. On day 12, 4th November, 2011, senior counsel for the then accused sought a directed verdict of not guilty. The application was made on the following grounds:

> (a) That the prosecution case was purely a circumstantial case – there was no direct evidence whatsoever to connect the appellant directly with the murder.
>
> (b) That there was an obligation on the prosecution to prove the primary facts on which they relied before they could invite the jury to draw inferences therefrom.
>
> (c) That the inferences most favourable to the appellant had to be the ones that were drawn, unless the prosecution had proved beyond reasonable doubt that it was appropriate to draw the inference unfavourable to the appellant.

Counsel then addressed each of the three limbs of the prosecution case. So far as the glove was concerned it was contended that no witness had given evidence of actually seeing it being dropped and that the prosecution had not proved beyond reasonable doubt that the glove had not been present earlier in the evening before the murder. It was suggested that the evidence of Mr Frize was all but worthless, having been effectively undermined as a result of concessions made in cross examination. They pointed to the evidence of another local resident, Ms Gavaghan, who had given evidence that she had seen some object around tea time, but was unable to say what it was. The possibility that it was a glove that she had seen therefore could not be excluded. Further, the value of the DNA evidence was disputed. It was pointed out that the evidence was of no assistance in providing a timeframe in which the appellant had contact with the glove. The fact that there was a partial profile from some other individual on the glove meant that it could not be said either that he was the only person who had worn the glove or indeed that he was the last person to wear the glove. So far as the feud is concerned, the point was made that there was no evidence that the feud was active as of the 6th / 7th April, 2007 and no evidence that the appellant was involved. Even if it was accepted that the feud was ongoing as of 6th / 7th April, 2007, it is possible that some other member of the wider Taylor family had access to the appellant's property and might have taken the glove. That possibility had not been excluded. The prosecution, in replying, reviewed the evidence in the case and contended that the combination of circumstances present meant that it was more than just an accident or a coincidence and that all of the connections to the accused Michael Taylor Junior meant that there was a very substantial case of strong circumstantial evidence. The prosecution submitted that it was a case where a jury properly charged if they accepted the evidence would be entitled to convict. The judge took time to consider the evidence and ruled on the matter when the court next sat on 9th November. He commented that counsel moving the application had not referred to authorities on how a court should deal with an application for a direction based upon circumstantial evidence and pointed out that authorities in that regard were to be found in *Blackstone* and *Archbold*. He quotes from *Blackstone* under the heading "cases based upon inferences drawn from circumstantial evidence" where it is said:

> "On the proper test in *Galbraith*, the prosecution are not required to show that the jury could not reasonably reach any alternative inference contended for. The question is whether it is properly open to the jury to reach the inferences contended for by the prosecution."

The Court would refer to the very well known passage from the judgment of Lord Lane C.J. in *R. v. Galbraith* [1981] 1 W.L.R. 1039:

> "How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has

> been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

15. The Court does accept that the case was quite a finely balanced one. However, the presence of a glove on a footpath on an April evening is an unusual occurrence in itself. This evidence of the glove becomes very significant when the glove is located at a place very close to where a murder by shooting has occurred, at a time very proximate to the shooting and on the route taken by the gunmen who were wearing gloves. The presence of DNA matching that of the appellant on the glove, who was in the general vicinity of where the shooting took place, at the time of the shooting, established by virtue of the evidence in relation to the phone activity is a matter of greater significance still. Further, the fact that the appellant is linked to the feud, which it was suggested provided the background motive for the killing, is also considered by this Court to be of significance. The Court does not ignore the points that are made about the limitation of each of the elements of the prosecution case but nonetheless we are of the view that while finely balanced, this case might, to use the language of Lord Lane C.J. be described as a borderline case, where the trial judge was entitled in his discretion to leave the case to the jury. Accordingly, the Court rejects the ground of appeal relating to the refusal to grant a direction.

16. The Court will turn, then, to the other ground which was argued relating to the taking of the buccal swab, an issue that was argued with economy and very ably by Mr Seoirse Ó Dúlaing, junior counsel for the appellant. At trial, there had been evidence that saliva samples had been taken from the appellant by way of buccal swabs. The prosecution had contended that this was done with the consent of the appellant and the defence argued the opposite. A *voir dire* was held and the judge admitted the evidence having viewed the video of the taking of the sample. On appeal, the issue was expressly confined to one point which was that while the detainee was told of the fact of an authorisation, he was not told what the grounds were, on which the authorisation was issued. Section 2(6) of the Criminal Justice (Forensic Evidence) Act 1990 provides as follows:

> "(6) Before a member of the Garda Síochána takes, or causes to be taken, a sample under subsection (1) of this section, or seeks the consent of the person from whom the sample is required to the taking of such a sample, the member shall inform the person—
>
> (a) of the nature of the offence in which it is suspected that that person has been involved,
>
> (b) that an authorisation has been given under subsection (4) (a) of this section and of the grounds on which it has been given, and
>
> (c) that the results of any tests on the sample may be given in evidence in any proceedings."

The point is made that while the appellant was informed of the nature of the offence that he was suspected to have been involved in, was informed that an authorisation had been given and was informed that the results of any tests on the sample might be given in evidence in any proceedings, he was not told what the grounds were on which the authorisation issued.

17. At trial, there was explicit evidence from Garda Moloney which was referred to by the trial judge in the course of his ruling, that when Michael Taylor was being taken from the cell it was explained to him exactly what was going to happen. He was informed again of the reason for his arrest, that an authorisation had been given by Superintendent Nicholas Conneely for the taking of a buccal swab, fingerprints, palm prints and photographs and that the results of any tests carried out could be used in evidence. There was evidence that he was told explicitly the nature of the offence of which he was suspected, that an authorisation had been given and that the results of the testing of the sample could be used in evidence. It is true that there was no evidence of him being explicitly told what the grounds for the authorisation were, but it seems to the Court that he was in fact so informed. The information that he was given in effect informed him that because a serious crime had been committed and because he was suspected of having committed a crime, that it was the desire of the Gardaí to carry out certain tests and that the results of the tests would be given in evidence. In substance, he was being informed that he was suspected of a particular crime, and the tests due to be carried out would advance the investigation into that crime, and for that reason the carrying out of those tests on him as a suspect had been authorised. The Court will therefore reject this ground of appeal.

18. The Court will now deal briefly with a number of other grounds of appeal which while not abandoned have not been elaborated upon during the course of the oral appeal.

Arrest and detention, 29th November, 2007

19. The defence challenged the lawfulness of the arrest of the appellant pursuant to an arrest warrant issued in accordance with the provisions of s. 42 of the Criminal Justice Act 1999 as amended, on the basis that insufficient evidence was put before the judge of the District Court in order for him to form a reasonable suspicion that the appellant was connected with the offence. The relevant evidence on this issue came from Superintendent Conneely on day 3 of the trial, who gave evidence that he had sworn an information. That information set out the nature of the offence, the extent of the Garda investigation and the Garda belief on foot of that investigation that the appellant was implicated in the murder. The witness also confirmed that he had provided sworn oral information to the judge. The judge ruled on the matter as follows:

> "I do not find the grounds set out in the sworn information of Superintendent Conneely to be so inadequate as not to justify the issuing of a warrant herein. Undoubtedly, it might be argued that further or better detail could have been given to the District Court but I do not find the detail given to the District Court to be less than sufficient. Notwithstanding the lack of recall by Superintendent Conneely as to the oral evidence given to the District Court, it is clear to me from the absence of a relevant deletion in the sworn information, and the appropriate deletion having been made to the warrant itself, that the judge of the District Court carried out his obligations under the statute in a diligent manner."

In *DPP v. Balfe* [1998] 4 IR 50, a similar case to this one, in that it relates to the same statutory provision regarding warrants, the Court of Criminal Appeal stated that it is to be presumed that the District judge issuing a warrant would act in accordance with the

requirements of the relevant legislation, and the onus of proof establishing that he or she failed to do so rested on the person challenging the validity of the warrant. In the Court's view the trial judge's approach to this issue was the correct one. The warrant was presumed to be valid and the judge was entitled to take the view that the judge in the District Court had approached his task in a careful and conscientious manner and had properly issued the warrant. The Court also draws attention to the fact that what was in issue here was an arrest under s. 42, i.e. the arrest of someone who was already a prisoner and the taking of that person from one place of detention, a prison, to another, a garda station. This ground of appeal is rejected.

Failing to discharge the jury in the light of the prosecution's closing speech
20. In the course of his closing speech, counsel for the prosecution commented:

> "All of that is a very longwinded and roundabout way of trying to satisfy you that the 2769 number was the accused's number on 6th April,"

and also commented,

> "Mr Taylor's phone was in contact over that period of half an hour with the Clontarf Garda Station mast."

The defence say that the prosecution's speech was a direct invitation to the jury to conclude that the contents of the various contacts lists was true and was therefore in the teeth of the judge's ruling.

21. The judge had ruled on the issue in relation to the admissibility of the information from the contacts lists as follows:

> "The prosecution do not propose to call the owners of the four handsets to give evidence in relation to these entries and in these circumstances the defence have objected to the prosecution producing any evidence regarding these entries on the grounds that such evidence would offend against the hearsay evidence rule. Undoubtedly if the prosecution were to seek to introduce the evidence of these entries as proof of the truth of the entry - namely, that the three numbers were those of the accused – then this would offend against the hearsay evidence rule. However, the prosecution have advised me that such is not their intent or purpose but rather that they contend that these entries when considered in conjunction with other evidence, including but not confined to the use of the number 086 3704496 to contact Crumlin Garda Station, the use of 086 2452758 to contact Smart Telecom, and the addition of that number to the contact details given to Smart Telecom and the use of all three numbers by the same handset as established through its IMEI number, could amount to evidence of circumstances that would entitle a jury to conclude that they were the numbers of the accused. That being the position, I consider the prosecution are entitled to introduce the evidence for the purposes of inviting the jury to draw the conclusion that it is circumstantial evidence, and only circumstantial evidence. I should however observe that careful direction to the jury on the issue will be required if the matter is to go to the jury."

This Court does not feel that the prosecution, in closing, offended the judge's ruling. It was clearly always the prosecution case that they could link the 2769 number to the accused and they were entitled to make that case when closing. This ground of appeal is therefore rejected.

Phone charts
22. The prosecution sought to introduce into evidence two documents that had been prepared by Detective Garda Clancy. The prosecution submitted that it was its "intention to lead a pictorial representation" of the contacts that were found on the phones belonging to Jamie Taylor, Thomas Fox, Michael Taylor Senior and Donna Molyneux. In addition, they sought to exhibit a chart which was described as a "time line" depicting the masts off which 086 245 2769 connected on 6th and 7th April. The defence submit that this second document was being given to the jury so that they could infer that it was a map of the route over which the phone travelled. The defence say that the evidence of the prosecution expert, Brendan McKenna of Villacom Engineering Limited did not establish that the records were a reliable way of tracing the route of a phone. However the prosecution say that defence counsel misinterprets the significance of the evidence of Mr McKenna. The prosecution say that the evidence established that the phone was in contact with different cell sites at different times and therefore establishes that the phone was, at the relevant time, within the area of coverage of that cell site. The prosecution stress that they never sought to prove that the phone was at the precise location of a cell site mast. The prosecution say that the appellant both at trial and on appeal in the written submissions has conflated the concept of the cell site mast location and the area covered by the cell site.

23. In this Court's view, the fact that the phone in question, the 2769 phone, was in contact with particular mast sites, was of importance to the prosecution and illustrating that in documentary or diagram form was proper and legitimate in a matter of some complexity was proper and legitimate. In the Court's view the judge's ruling was correct and this ground of appeal is rejected.

The judge erred in law in failing to direct the prosecution to disclose two statements made by persons unknown on 2nd August, 2011 and 30th September, 2011
24. On day 10 and 11 of the trial it emerged that a member of the Kelly family had stated they had heard that a particular individual had an involvement with the shooting, in that he had collected two individuals on the night of the murder. The trial judge heard evidence from members of the Gardaí involved in taking the statements and then took the statements away, read them and ruled as follows:

> "An issue as regards privilege arises in relation to two statements that were obtained by the Garda Síochána, the first one being a statement that was obtained on 2nd August 2011 and the second one being a statement or, more particularly, a question and answer session that took place on 13th September with an individual who had been named in the first statement, namely that of 2nd August 2011. I have considered the statements in detail, I have had regard to what has been said in relation to a life or lives being at risk, and I am satisfied that there is a real risk to the life of the individual that I described earlier as Mr A, if he were to be named. It was manifestly clear from the material in front of me that Mr A denies the suggestions that are made in the statement of 2nd August 2011 which is in the form of hearsay evidence. In the statement of 2nd August, it is suggested that an unnamed source had advised a member of the Kelly family that Mr A had collected two persons who are named in the statement of the member of the Kelly family immediately following the shooting of Mr Kelly. One of the individuals named is the accused and a second individual is named. The statement or interview notes that took place with Mr A, as I say, make out quite clear that the assertions that are being made against him are untrue. I cannot find anything in either statement that would be of assistance to the defence herein. I do not find anything in the statements that are contrary to the prosecution case that is being made herein and whereas undoubtedly the statement of the member of the Kelly family is prejudicial to the accused man insofar as it names him as being one of the two persons who were collected immediately after the shooting of Mr Kelly, that is the extent to which it goes and it is evidence that in the normal course of events would not be admissible having regard to the fact that it offends against

> the hearsay evidence rule, so I do not consider that this material should be disclosed and I consider that the plea of privilege based on risk to life is one that should be sustained."

25. The Court is quite satisfied that this matter was dealt with correctly by the trial judge. His actions in reading the documents and then ruling as he did was entirely appropriate. The members of this Court have read the statements in issue and we endorse the ruling of the trial judge.

Failing to accede to requests to recharge the jury and failing to discharge the jury after requisitions

26. The defence complain that the judge failed to recharge the jury despite being requisitioned in respect of four matters, namely:

> (i) how to deal with the contacts entries;
>
> (ii) that the jury should consider the complete chart of all contact information and not simply the chart produced by the prosecution;
>
> (iii) the effect of the absence of records in respect of 2758; and
>
> (iv) consent to the taking of the buccal swab.

27. While there were extensive requisitions from the defence, it must be said that they were in quite restrained terms. Counsel indicated that he expected that the Court would be against him on his first requisition but in the light of *DPP v. Cronin* [2006] 4 IR 329 and how it was applied by the Court of Criminal Appeal, he felt that he had to make the point. He then took up the contacts entries issue, though prefacing his remarks by accepting that he had counted three or four occasions minimum when the judge had told the jury that they were not to take the contact entries as speaking to the truth. Earlier in the course of this judgment the Court expressed the view that the trial judge dealt correctly with the issue in relation to contacts entries. The correct approach was to take the view that this was circumstantial evidence, that the combination of the coincidence of similar entries taken in conjunction with the calls to Smart Telecom and Crumlin Garda Station could lead the jury to conclude that phone 2769 was linked to the accused. It follows that we do not believe that judge's charge was objectionable. Indeed, by repeating a number of times that the contacts entries did not speak to the truth of what was contained there, the charge in this regard was in fact very favourable to the defence with regard to the telephone charts. Both sides have put in evidence a pictorial representation of contacts between relevant phones. In the course of his charge, the trial judge referred to only one document which was the prosecution chart, showing the 2769 number connecting to various masts at different times. In fact his reference was in the context of summarising the defence case and highlighting the defence suggestion that the evidence of Mr McKenna did not establish that the records were a reliable way of tracing the route of a phone. Therefore the complaint that the judge afforded an elevated status to the prosecution documentation seems somewhat misplaced. In any event, in the course of recharging, the judge commented that while the accused man had not himself given evidence, certain material had been handed into court by the defence for its consideration. He commented that he had already referred to JC1 and JC2 which were the charts that had been prepared by the prosecution. The defence, he reminded the jury, had also handed in charts in relation to phone traffic and obviously the jury considered those in the same manner as they considered the ones that were handed in by the prosecution.

28. So far as the issue about records in relation to phone 2758 are concerned, the position is that complete records from that phone were not obtained. The records of calls made on the 5630 handset were available to the jury. The judge pointed out that there had been two calls made from the 2758 number to the phone of Michael Taylor Senior some days before the murder and reminded the jury that the defence were suggesting that if the full records had been available, a different picture might have emerged. The Court is quite satisfied that the judge dealt adequately with this issue. The defence also had a requisition in relation to the taking of the buccal swab. Having contended in the course of a voir dire that the samples were not taken voluntarily and that the detainee did not consent to the taking of samples when the evidence was admitted, the defence reversed course and addressed the jury on the basis that a guilty man would not have consented to providing samples. The defence were fully entitled to make that argument to the jury, but there was no obligation on the trial judge to repeat it when he came to charge. He made clear that he was merely synopsising the arguments of the prosecution and defence and would not be repeating all the arguments that each had made. The Court rejects the criticism of the trial judge's charge, which viewed in the round it sees as fair and balanced. Accordingly, this ground of appeal is rejected.

Photographs

29. On 19th October, 2011, which was day 3 of the trial, a photo of the appellant appeared in the Star and Sun newspapers alongside court reports. It was accepted that the articles which formed the reports were not objectionable but it was said that the photograph, the same photograph in both papers, which showed the appellant wearing a hoodie and a partial face covering was prejudicial. This led to an application to discharge the jury. The judge ruled on the application as follows:

> "I do not propose to accede to the application to discharge this jury. The accused of his own free will to appear in public attired in the manner shown in the photographs. In these circumstances, I consider the accused to be the author of his own misfortune if the photographs portray him in less than an ideal light."

30. While the photographs provoked an application to discharge at trial, the issue was not raised in the original grounds of appeal but was the subject of a motion to add a ground. In the Court's view it is of some significance that this was not a case where the Gardaí or any other State institution had created a photo opportunity, either intentionally or intentionally, as by producing an individual in handcuffs outside a courthouse. The appellant had, it seems, appeared in public on some other occasion in the way in which he was photographed. The photograph was in possession of the newspapers and they made a decision to publish it. In the Court's view the publication of a single photograph in the two newspapers does not provide a basis for the discharge of the jury. Accordingly this ground, too, is rejected.

31. In summary, the Court has not been persuaded that the trial was unfair or unsatisfactory or that the verdict was unsafe. Accordingly, the Court will dismiss the appeal.