THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

6/14

The People at the Suit of the Director of Public Prosecutions

Respondent

v

Criostóir MacCarthaigh

Appellant

Judgment of the Court delivered on the 3rd day of November 2015 by Mr. Justice Sheehan

1. On the 19th December, 2013, following a ten day trial in the Central Criminal Court, the appellant was convicted of the murder of David White and was sentenced to life imprisonment.

2. The appellant now challenges his conviction on the following grounds:

1. The learned trial judge erred in law and in fact in ruling that it was open to the jury to draw inferences arising from the content of statutory interviews with the accused.

2. The learned trial judge erred in law and in fact in admitting into evidence the content of interviews with the accused which had been obtained following upon statutory warnings as to the consequences of failing to give answers to certain questions.

3. The learned trial judge erred in law and in fact in directing the jury as to the manner in which they should consider the contents of interviews obtained following statutory warnings.

4. The learned trial judge erred in law and in fact in allowing evidence from Mr Ivan Ennis that the appellant had a knife on his person on the evening of the alleged offence when no notice had been given of that proposed evidence.

5. The learned trial judge erred in law and in fact in permitting the prosecution to adduce evidence of the opinion of Mr Ivan Ennis regarding the accused's disposition and demeanour at a time prior to the alleged offence.

6. The learned trial judge erred in law and in fact in permitting the prosecution to adduce evidence of the appellant's previous criminal convictions.

7. The learned trial judge erred in law and in fact in failing to charge the jury correctly, or at all, in relation to the significance of the evidence of the appellant's prior convictions and the manner in which they should address that evidence.

8. The learned trial judge erred in law and in fact in refusing to discharge the jury subsequent to the giving of evidence by Mr Gary Walsh regarding a purported admission of guilt by the appellant which evidence the appellant was not on notice of.

9. The learned trial judge erred in law and in fact in permitting the prosecution to adduce the evidence of Mr Gary Walsh.

10. The learned trial judge erred in fact and in law in admitting into evidence the fact of the taking of forensic samples from the Appellant and in admitting evidence dependent on the aforesaid samples.

3. In order to consider these grounds of appeal it is first necessary to set out the background to the offence.

Background
4. On the night in question, the deceased was said to have been walking home alone from a pub in Phibsboro when he encountered the appellant. There, the appellant is said to have stabbed him before bringing him across the city in his van to a wasteland area in Mill Lane, Palmerstown, whereupon he stabbed him again repeatedly, causing his death.

5. It was alleged that the appellant and the deceased had met prior to this incident in a pub some weeks earlier. It was also alleged that throughout the incident, the appellant was accompanied by one Simon Griffin. Indeed, Mr Griffin and the appellant had been socialising earlier at the appellant's apartment before the said incident occurred while they were on their way into town.

6. It was the appellant's defence at trial that it was in fact Mr Griffin who had killed the deceased and that he had fabricated an account implicating the appellant.

7. Mr. Griffin gave evidence at trial which was central to the prosecution case. The prosecution also relied on the evidence of Gary Walsh and Ivan Ennis, who were both acquaintances of the appellant and Mr Griffin.

Submissions
8. In broad terms, the submissions in this appeal can be grouped as follows: Grounds 1, 2 and 3 are related and can be dealt with together as can Grounds 4 and 5, Grounds 6 and 7, Grounds 8 and 9, and finally Ground 10 must be dealt with on its own.

Grounds 1, 2 and 3

9. The prosecution at trial made an application to admit inferences from interviews with the appellant under s.18 (accounting for marks on one's person), s.19 (accounting for presence at a particular place) and s.19A (matters which call for comment) of the Criminal Justice Act 1984 (as substituted by the Criminal Justice Act 2007). The application was refused in respect of s.19A but was permitted in respect of the other two sections. The appellant thus submits that the learned trial judge erred in allowing for inferences on the facts and also in the manner in which he directed the jury as to the use of this evidence.

10. In this regard, it is first submitted by the appellant that, in the case of any positive responses which were elicited after the statutory caution, these responses lack the essential precondition of voluntariness for any purported admission. The appellant submits that these responses were given under the compulsion of the provision and in order to diffuse the threat that adverse inferences would otherwise be drawn. The appellant relies on the Supreme Court decision of *Re National Irish Bank* [1999] 3 I.R. 145 in submitting that, as the section itself is silent as to how positive responses are to be received in evidence, if at all, this point must be determined by reference to common law principles, which outline that answers which are coerced are not to be admissible as against the accused. The appellant further notes that in this context it may also be relevant that he had been given the usual general caution at the beginning of the interview i.e. he had been told that he enjoyed a legal entitlement to refrain from incriminating himself, and this caution was never suspended or revoked. It is thus the appellant's submission that the only evidence which is admissible following the administering of the inferences warning is evidence of silence.

11. Secondly, the appellant notes the admission criteria contained in the formula used in both s. 18 and 19: that the accused must fail or refuse to give an account in his or her response. The appellant submits that the answers given in the interview had substantial content and addressed the matters raised in the questions. The appellant notes in his submissions that it is well established that a nonsensical response can give rise to an invocation of the provisions allowing inferences, and that mere utterances are not sufficient to avoid this consequence. However, the appellant submits that the reply that was given was a meaningful answer and directions regarding inferences should not have been given in respect of it. The appellant submits that the learned trial judge incorrectly approached the issue and ruled on a completely different test: whether the responses were satisfactory or sincere.

12. In relation to the response to the s.18 caution, it is arguable, according to the appellant, that it was reasonable for him to give a reply to the effect that one could not know whether a conclusion was sound, as the related question was phrased in terms of a scientific conclusion. The appellant submits that of course the answer was not weighty and was superficial in how it dealt with the major implication of the DNA and the jury could have taken cognisance of this as they saw fit. But it is an entirely different matter to formally direct a jury to the effect that the accused may be considered to have been evasive and to take from that what they will. The appellant maintains that the responses may have been considered by the judge to be unsatisfactory or untruthful but the weighing of the evidence and drawing conclusions from said evidence are the sole preserve of the jury. To direct inferences because of an unsatisfactory or untruthful response, as opposed to a non-existent or futile one, seems to be, as submitted by the appellant, an impermissible extension of the inference provisions and would undermine the constitutional imperative of having one's guilt determined by a jury by reference to the evidence which is before them.

13. It is submitted by the appellant that some latitude should be afforded to the interviewee in interpreting such responses and whether they constitute mere evasions or empty phrases, as such an interviewee is in a situation where he or she must process three newly received statutory directions and digest their import in less than optimal circumstances and without any legal training. The appellant submits that an interviewee in this situation is likely to believe that once they give an answer, they will not be penalised by the imposition of inferences and so the refusal should be unequivocal before there is a departure from the constitutional position as set out in *DPP v. Finnerty* [1999] 4 I.R. 364. The appellant relies on the case of *DPP v. Samuel Devlin* [2012] IECCA 70 in this regard, which he submits adopted the above suggested approach.

14. The appellant further submits that, given the allegation as to who committed the acts of murder was balanced between both the appellant and Mr. Griffin, advising the jury that they may draw inferences from the appellant's failure to reply would be a weighty direction as this evidence could be seen as independent of their conflict and would allow the jury to accept the evidence of Mr. Griffin and reject the evidence of the appellant. The learned trial judge further gave no direction that the inferences could not provide the sole or main basis for a conviction, which is a clear requirement of the law and a safeguard included within the inferences section.

15. The respondent, on the other hand, submits that s.18 has a wider reaching import than simply calling for a verbalised answer, it envisages the person being interviewed to engage with the question as specifically framed and to provide an explanation thereto. The respondent submits that the appellant's answers in this regard did not have substantial content and did not address the matters in issue. The respondent further submits that the appellant submitted a deliberate and tactical evasion when he was given a request to account for the fact that his DNA was being linked to the clothing found on the body of the deceased at a particular place and that it was patently clear that he was not being asked for a scientific response in this regard. Thus, the trial judge was not in error in permitting the matter to go to the jury for them to draw such inferences as appeared proper in the circumstances.

16. In relation to the request made to the appellant to account for his presence at Mill Lane in the early hours of the 25th September, 2008, while the appellant argues that the learned trial judge applied the incorrect test (whether the responses were satisfactory or sincere), the respondent conversely submits that no such test was applied by the trial judge and that the trial judge was entitled to consider the full nature and complexion of the purported response in order to determine whether or not same was capable of constituting a refusal or failure to account in response to the question.

17. While the appellant submits that the refusal or failure must be one that is "stark and unequivocal," the respondent submits that the statutory provisions refer to a failure or a refusal simpliciter. The legislation refers to a refusal or failure to give "an account" which in the circumstances at the time clearly called for "an explanation" from the appellant. Accordingly, it is a perfectly reasonable exercise for the trial judge to consider in context the response, if any, that was given.

18. In relation to the appellant's citing of *DPP v. Samuel Devlin*, the respondent submits that this case bears no relevance to the case at hand given that in the Devlin case, the accused had given unequivocal answers earlier in his interview to which he then later made specific reference.

19. In relation to the appellant's submission that the inference evidence could be seen as independent of the conflict between the appellant and Mr. Griffin, the respondent notes that it is specifically provided for in the legislation that adverse inferences, if so found by a jury, could be capable of amounting to corroboration, and, further, on no reading of the transcript could it be said that the learned trial judge did not engage fully with the submissions made in legal argument by the appellant's counsel. The respondent submits that the learned trial judge conducted a comprehensive analysis of all the relevant matters which can be seen by the fact that he permitted some of the matters to go to the jury by way of potential adverse inference but not others.

20. Where the appellant submits that the positive response lacks voluntariness and ought to be excluded, the respondent submits that the relevant sections (ss. 18 & 19) are silent as to how a court ought to deal with positive responses as these provisions are not intended to interfere with the normal admissibility rules pertaining to the interview process. The person being interviewed has a choice either to provide an account or to decline to do so. Again, while the appellant relies on the *Re National Irish Bank* case, the respondent submits that this case bears no relevant to the case at hand as there was no compunction on the appellant herein to answer the question and his response was a voluntary one.

21. Ultimately the respondent submits that there is no negation of the right to silence here, merely a reasonable provision that a failure to account may permit a jury to draw inferences from such failure as may be proper in limited circumstances. Further, it would be illogical and absurd, it is submitted by the respondent, to interpret the section in a manner which would result in an interviewee providing an account in circumstances which clearly called for an explanation and then this account being excluded from evidence.

22. In considering whether or not the trial judge was correct in holding that the answers given constituted a refusal or failure to account, the court must first of all consider the answers that were given by the appellant. The summary of the memorandum of evidence relevant to the s. 18 inference is as follows:-

> "Q. Your DNA was located on David White's jeans which he was wearing when his body was recovered on the 26th September, 2008, at the Old Cemetery, off Mill Lane, Palmerstown and we believe that you were at this location between 12.30 am and 2.00 am on the 25th September, 2008. I am now requiring you to account for the presence of your DNA on the jeans worn by David White on the 25th September, 2008 and which were located on his body when recovered on the 26th September, 2008?
>
> A. As I said already at the start, I am not a doctor or scientist so I just don't know.
>
> Q. Did you understand?
>
> A. I did understand.
>
> Q. We must warn you that if you fail or refuse to account for the presence of your DNA on David White's jeans an inference or conclusion can be drawn by a judge or a judge and jury at subsequent court proceedings and this inference can be treated as being capable of amounting to corroboration or supporting evidence of any other evidence offered in respect of that offence, do you understand?
>
> A. I understand.
>
> Q. Is there anything that you do not understand or would like further explained?
>
> A. At this moment no.
>
> Q. Will you now give me an account for the presence of your DNA on David White's jeans which he had been wearing on the early hours of the 25th September, 2008 and which were worn by him when his body was recovered at the Old Cemetery, off Mill Lane, Palmerstown?
>
> A. As I have said already and it is all I can say, I am not a doctor or a scientist."

23. This answer was given by the appellant following a consultation with his solicitor and an acknowledgment by him that he understood the import of s. 18 of the Criminal Justice Act 1984, as amended by the Criminal Justice Act 2007, which provides:-

> "18(1) Where in any proceedings against a person for an arrestable offence evidence is given that the accused –
>
> (a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or
>
> (b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it, was requested by the member to account for any object, substance or mark, or any mark on any such object, that was–
>
> (i) on his or her person,
>
> (ii) in or on his or her clothing or footwear,
>
> (iii) otherwise in his or her possession, or
>
> (iv) in any place in which he or she was during any specified period,
>
> and which the member reasonably believes may be attributable to the participation of the accused in the commission of the offence and the member informed the accused that he or she so believes, and the accused failed or refused to give an account, being an account which in the circumstances at the time clearly called for an explanation from him or her when so questioned, charged or informed, as the case may be, then, the court, in determining whether a charge should be dismissed under Part IA of the Criminal Procedure Act 1967 or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure or refusal is material."

24. It is clear from this section that the arrested person is obliged to engage in a meaningful way with the question. The appellant concedes that a nonsensical or trite answer may amount to a failure or refusal to answer, but contends that the appellant's answer in this case was a positive response and that the trial judge erred in holding that it amounted to a failure to respond.

25. This Court is satisfied that the appellant's answer was as the respondent suggests a deliberate attempt to evade the implications of s. 18 and therefore amounted to a refusal to answer. In coming to this conclusion the court bears in mind in particular that shortly

before that answer was given, the appellant had had a consultation with his solicitor and as can be seen from the above answers stated that he understood the questions that he was being asked.

26. The relevant portion of the s. 19 interview reads as follows:-

> "Q. I am now requiring you to account for your presence at Mill Lane in Palmerstown between 12.30 am and 2.00 am on the morning of the 25th September, 2008. Simon Griffin has stated that you drove your Renault van registered number 00 D 2696 to Mill Lane from Ulster Street. He states that David White was in the back of the van and that he assisted you in getting David White out of the van and into the old graveyard in Mill Lane where you murdered David White. I am now requiring you to account for your presence at Mill Lane in the early hours of the 25th September, 2008.
>
> A. Can't remember if I was there or not, its a few months ago, I walk my dog in that area when I am in my mother's.
>
> Q. I must warn you that failure or refusal by you to account for your presence at Mill Lane on the 25th September, 2008, may result in inference or conclusion being drawn by a jury or judge and jury at subsequent court proceedings and this inference can be treated as being capable for amounting to corroboration or supporting evidence of any other evidence offered in respect of that offence. Do you understand?
>
> A. I understand."

27. Section 19 of the Criminal Justice 1984, as amended by the Criminal Justice Act 2007, provides:-

> "19(1) Where in any proceedings against a person for an arrestable offence evidence is given that the accused –
>
> (a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or
>
> (b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,
>
> was requested by the member to account for his or her presence at a particular place at or about the time the offence is alleged to have been committed, and the member reasonably believes that the presence of the accused at that place and at that time may be attributable to his or her participation in the commission of the offence and the member informed the accused that he or she so believes, and the accused failed or refused to give an account, being an account which in the circumstances at the time clearly called for an explanation from him or her when so questioned, charged or informed, as the case may be, then, the court, in determining whether a charge should be dismissed under Part IA of the Criminal Procedure Act 1967 or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure or refusal is material.
>
> (2) A person shall not be convicted of an offence solely or mainly on an inference drawn from a failure or refusal to account for his or her presence at a particular place under subsection (1).
>
> (3) ubsection (1) shall not have effect unless –
>
> (a) the accused was told in ordinary language when being questioned, charged or informed, as the case may be, what the effect of the failure or refusal to account for his or her presence at a particular place might be, and
>
> (b) the accused was afforded a reasonable opportunity to consult a solicitor before such failure or refusal occurred.
>
> (4) Nothing in this section shall, in any proceedings –
>
> (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged in so far as evidence thereof would be admissible apart from this section,
>
> (b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could properly be drawn apart from this section, or
>
> (c) be taken to preclude the drawing of any inference from the failure or refusal of a person to account for his or her presence which could properly be drawn apart from this section.
>
> (5) The court (or, subject to the judge's directions, the jury) shall, for the purposes of drawing an inference under this section, have regard to whenever, if appropriate, the account of his or her presence at a particular place concerned was first given by the accused.
>
> (6) This section shall not apply in relation to the questioning of a person by a member of the Garda Síochána unless it is recorded by electronic or similar means or the person consents in writing to it not being so recorded.
>
> (7) References in subsection (1) to evidence shall, in relation to the hearing of an application under Part IA of the Criminal Procedure Act 1967 for the dismissal of a charge, be taken to include a statement of the evidence to be given by a witness at the trial.
>
> (8) In this section 'arrestable offence' has the meaning it has in section 2 (as amended by section 8 of the Criminal

Justice Act 2006) of the Criminal Law Act 1997."

> (2) This section shall not apply to a failure or refusal of a person to account for his or her presence if the failure or refusal occurred before the commencement of this section.
>
> (3) Subsection (1) shall not affect the application of section 19 of the Act of 1984 to a failure or refusal of a person to account for his or her presence if the failure or refusal occurred before the commencement of this section, and that section shall apply to such a failure or refusal as if subsection (1) had not been enacted."

28. As can be seen from the s. 19 interview, the response of the appellant was to the effect that he could not remember if he was there or not as it was a few months ago. He then went on to state that he walked his dog in that area while he was at his mother's. In the course of his ruling on this matter the trial judge stated:-

> "It is perfectly obvious that when one says that one can't remember that constitutes a failure or refusal."

29. Again this Court reminds itself that the replies given by the appellant follow a legal consultation and were given in circumstances where the appellant stated he understood the question. Accordingly the trial judge was correct in rejecting the submissions made by counsel for the appellant and holding that the reply given constituted a failure to reply.

30. Counsel for the appellant also contended that the replies given by the appellant ought to have been excluded because they were not voluntary and in support of this submission relied on the judgment of the Supreme Court in Re: National Irish Bank [1999] 3 I.R. 145.

31. The *National Irish Bank* case related to the question as to whether or not a witness was entitled in the course of an investigation pursuant to Part II of the Companies Act 1990, to claim privilege on the grounds his answer might incriminate him in circumstances where the Inspectors carrying out the investigation had power to compel answers and to compel the production of documents.

32. The essential difference between that case and the present one insofar as voluntariness is concerned is that a suspect being asked question pursuant to ss. 18 and 19 of the Criminal Justice Act 1984, as amended, is not obliged to answer and unlike the Companies Act inquiry under the Companies Act is not liable to any sanction if he fails to so answer. The appellant in this case was not compelled to answer the question put to him (the caution that he was not obliged to answer any questions if he did not wish to do so was still in place) and accordingly answers given by a suspect when the inference provisions are invoked are voluntary absent any other matter that might impinge on this issue.

33. The appellant also challenges the adequacy of the trial judge's charge when addressing the jury on the inference provisions and states at para. 17 of his submissions (following a recitation of a portion of the judge's charge):-

> "It is notable that the direction does not include any indication of how the jury are to make their determination (as to whether the answers given amounted to an account) nor does it give any assistance as to the standard of proof required nor does the judge direct what the jury are to do with this evidence in the event that they are not satisfied that the answers are evasive."

34. It is clear from an examination of the judge's charge in this case that the standard of proof on this matter was explained to the jury when the trial judge stated at p. 51, line 17 on day 8:-

> "So you are entitled to draw inferences from . . . but there is one thing you can't do and that is to speculate. You can appreciate that there is a world of difference between drawing a rational inference as a matter of common sense from a particular act and speculating. Speculation is forbidden territory because speculation by definition is not based on evidence and you can only act upon the evidence. So there is a difference between a speculation about what might be the case and a proper inference of fact as secondary fact progressing inevitably from the primary fact and of course when you are addressing the issue of whether or not you should draw an inference of secondary fact, the same principles to which I have applied as to prove beyond reasonable doubt of the view favourable to the prosecution apply and the choice that arises between two views which are reasonable must be made in favour of the accused."

35. Again at para. 18 of the submissions filed on behalf of the appellant it was contended on his behalf that it had not been explained to the jury that inferences could not provide the sole or main basis for a conviction.

36. The trial judge in fact stated on day 9, p. 7 referring to the interviews where the inference sections had been invoked:-

> "Now just to be clear about this as I have said to you, it is capable of being of corroboration but not more than that. The law is very explicit to the effect that nobody could be convicted on the basis of, if you like, invocation of these provisions or the answers or non answers call them what you will which might be given Ok? I suppose that's to state the obvious. The most it could ever be as a matter of principle in this case is corroborative."

37. Furthermore it was equally clear from the charge that the trial judge was careful to leave matters on these issues to the jury stating as he did:-

> "Now it is a matter for you ladies and gentlemen of the jury whether you think that the answers given to those questions given by Mr. McCarthaigh were an account. Did he given an account when asked to account for his presence at Mill Lane at the relevant time whether 'I can't remember if I was there or not it is a few months ago. I walk my dog in that area when I am in my mother's' whether that is accounting for his presence there or not. If you conclude that he did not account as required or requested well then it is open to you to draw an inference from that if you feel it proper to do so. So if you find that his answers were a failure to account then the law allows you to draw such inferences as appear to you to be proper then the law specifically provides that such inferences as you may draw may be capable of amounting to corroboration or supporting evidence."

38. It is clear from this that if the answers were not deemed by the jury to be a failure to account, then the drawing of inferences did not apply. The learned trial judge summarised the evidence in detail and the jury can have been little doubt as to their duty in respect of the evidence introduced pursuant to ss. 18 and 19 of the Criminal Justice Act 1984, as amended.

39. The court is satisfied that the trial judge's charge on these matters was satisfactory. This Court is satisfied that answers given to the questions constituted a failure or refusal to answer and were given voluntarily. The trial judge was correct in ruling that it was open to the jury to draw inferences and his charge on these matters was satisfactory.

40. Accordingly the court dismisses the first three grounds of appeal.

Grounds 4 and 5

41. The appellant submits that the evidence of Ivan Ennis at trial should not have been admitted. This evidence relates to an incident said to have occurred some time before the fatal incident and was as follows:

> A. The defendant had a disagreement with my girlfriend and I asked him--
>
> Q. When you say the defendant, you mean --
>
> A. I do, yes.
>
> Q. - Criostóir MacCarthaigh?
>
> A. Yes.
>
> Q. Yes?
>
> A. I just asked him to step out into the hall to discuss it because there was music in the room basically.
>
> Q. Yes. And what happened when you stepped outside?
>
> A. Well, in the when we stepped out into the hallway I got the impression he may have had something in his hand, you know, he had his hand by his side.
>
> Q. Mm hmm?
>
> A. And he gave me the impression that he had a knife.
>
> Q. JUDGE: And?
>
> A. And, well, he made some reference, he said I think he might have said I'll cut I or something like that, I just put my hands up, you know, got him to calm down, he did calm down and basically we went back inside and everything was fine then afterwards.

42. The appellant submits that this evidence would unavoidably have given rise to the suggestion that the appellant had a disposition towards violence in so far as this evidence clearly implies an earlier threat to harm or maim with a knife. The appellant further submits in this regard that this evidence should not have been admitted on the basis that it imports a critical piece of evidence into the case: a potential murder weapon, without any evidence of its existence. Thus, in effect, the appellant submits, this witness was permitted to give opinion evidence as to this important element of the case. The appellant submits that this evidence fell squarely within the category of evidence of prior misconduct of the kind which should not be admitted. The appellant relies on the case of *DPP v. McNeill* [2011] 2 I.R. 669, where Denham C.J. noted the case of *The People (Attorney-General) v. Kirwan* [1943] I.R. 279 at p.303 where O'Byrne J. held:-

> "That evidence that an accused had committed offences, other than that charged in the indictment preferred against him, was never admissible for the purpose of leading the jury to hold that an accused was likely, by reason of his criminal conduct or character, to have committed the crime in respect of which he was being tried."

43. The respondent submits that this evidence was both probative and admissible. The respondent submits that it was highly relevant in the context of the prosecution case that the appellant had armed himself some hours before the incident and that there was a witness whose testimony was to the effect that he had been threatened and that the manner in which that threat had been made had led the witness to believe that he would be harmed.

44. The evidence of Ivan Ennis was part of the surrounding facts of the case and the judgment in *McNeill* can be distinguished on that ground.

45. The relevance of this evidence was abundantly clear. It indicated that on the night in question the appellant was indicating he had a knife and was threatening to use it within hours of when he was alleged to have met and stabbed the deceased. In the course of his evidence Mr. Ennis laid the foundation for his belief that the appellant was in possession of a knife and was duly cross examined by counsel for the appellant. It is not correct therefore to describe this evidence as mere opinion evidence or speculative evidence. The evidence was relevant to the issue as to whether or not the appellant had in his possession a knife on the night of the killing of the deceased by stabbing. The trial judge correctly applied the relevant test when considering this evidence and was correct in admitting it. It was a matter for the jury to assess its credibility and decide whether or not it was corroborative.

Grounds 6 and 7

46. By way of explanation of this ground, the appellant had served a notice in writing of intention to impugn the character of the prosecution witnesses, in particular that of Simon Griffin, the main prosecution witness and accomplice. Counsel for the appellant extensively questioned Mr. Griffin and put to him his previous convictions for a number of different offences. In response to that, the prosecution sought to adduce evidence of the appellant's previous convictions, in particular a conviction in 2006 in the Special Criminal Court for an offence involving the possession of explosives.

47. The appellant argues that the manner in which the evidence was adduced was not in conformity with the procedures set out in the Criminal Evidence Act 1924. It is the submission of the appellant that the correct reading of subparagraph (b) of s. 1A, as inserted by s. 33(b) of the Criminal Procedure Act 2010 is that the requirements therein are conjunctive, as indicated by the word 'and', and so the rebuttal contemplated by the section is only possible if and when the accused gives evidence and it is only subsequent to this that other witnesses may be called and the relevant questions asked.

48. The appellant thus submits that evidence of bad character should only be admissible in the event that the accused gives evidence. The appellant notes that an example of a good reason for this is that, as was a consequence of the procedure adopted by the learned trial judge in this case, the accused may not necessarily have any opportunity to comment on the previous convictions and this contemporaneous reaction is surely vital to how the jury weigh the evidence with regard to credibility.

49. The appellant refers to the decision of Hederman J. in *The People (DPP) v. McGrail* [1990] 1 I.R. 38 in support of his further submission that he was permitted to advance matters in cross examination which in effect amounted to a negation of the allegation and were not gratuitous or with the intention of undermining the witness in the eyes of the jury.

50. The appellant notes that, in the event that this Court decides that the questions asked did indeed amount to a *prima facie* imputation of the witness' character, which fell outside the permissible parameters as was described in *McGrail*, then the appellant would submit that this evidence should in any event be excluded pursuant to the judge's discretion given that it's prejudicial effect far outweighed its probative value as a piece of character evidence. The appellant argues in that context that, other than establishing a previous propensity to disobey the law, it is difficult to see how this evidence could go to the credibility of the witness in any substantial way and that, given its dramatic nature, there was a real risk that the jury would be overly affected by it.

51. It is further submitted in this regard by the appellant that the judge did not provide the jury with adequate direction as to how the evidence was to be used by them, or with an adequate direction to the effect that the evidence of a previous conviction for explosives could not be taken as probative of the murder allegation, and that therefore the jury would have considered this evidence as evidence of a propensity to violence or a disregard for human life.

52. The respondent submits, in relation to McGrail, that what is permissible on foot of the *McGrail* judgment was far exceeded in the case at hand as, not only was it put to Mr. Griffin that he was being untruthful and that he was the person who murdered the deceased, but the questioning went further, his previous convictions for offences under the Misuse of Drugs Act, for possession of pipe bombs, domestic violence and criminal damage were all put to him, the purpose of which was to blacken him rather than to raise doubts about his credibility. The questioning was independent of the facts of the case and offended the established *McGrail* principles.

53. The respondent submits that it was appropriate to inform the jury of these previous convictions on the basis that the provisions of s.1A had come into play. The respondent notes McGrath's explanation in *Evidence*, 2nd Ed., (Dublin, 2014) that an issue which arises in relation to the application of s. 1(f) is the requirement that the accused be called as a witness. The respondent submits however that no such limitation is contained within s.1A as inserted by s. 33(b) of the 2010 Act. Indeed, McGrath notes at p.637:-

> "1A(b) of the 1924 Act provides that the prosecution can cross examine the accused or ask any other witness questions that (i) would show that the accused has been convicted of any offence other than the one wherewith he or she is then charged, or is of bad character, or (ii) would show that the person in respect of whom the offence was alleged to have been committed is of good character."

This, the respondent notes, is repeated at p.639 when dealing with s. 1(f)(iiia) and that at no point is there a suggestion that the entitlement of the prosecution to introduce this evidence is predicated upon the accused himself giving evidence.

54. The respondent submits that s.1 and s.1A of the 1924 Act are designed to meet two different situations: where the accused gives evidence in his own defence and where imputations are cast either by the accused himself in the witness box or by his advocate in cross examination. In the latter scenario, s.1A specifically provides that whatever protections may have cloaked the accused as a result of s. 1(f), they no longer apply. It further specifically permits the questioning of "any other witness" from whom evidence can be elicited as to the bad character of the accused.

55. While the appellant submits that the use of the word "and" limits the prosecution to asking such questions of other witnesses only if the accused has gone into the witness box and only if he has not accepted what has been put to him, the respondent submits that such a construction is neither called for by the plain words and meaning of the Act nor is it founded in logic. In this regard, the respondent submits that s.1A applies despite s. 1(f), it relates specifically to character evidence and is a separate section to that of s.1 which deals with competency of the accused and protections under the shield. Further, the appellant argues implicitly for an insertion of words into the section which, the respondent submits, are simply not there. He implies the words "refuses" or "fails to accept" must be read into the statute as pre-requisites to the prosecution having the power to ask questions about his character or that of other witnesses. Ultimately the respondent submits that the appellant fell short of what were the permissible parameters and the learned trial judge correctly permitted the introduction of evidence as to his previous conviction.

56. Mr. Griffin was the principal prosecution witness. He had pleaded guilty to an offence relating to the removal of the deceased's body in respect of which he had received a prison sentence.

57. Counsel for the appellant cross examined him about his convictions for domestic violence, criminal damage, the possession of pipe bombs, and his convictions under the Misuse of Drugs Act. This questioning went way beyond the kind of robust questioning that engages with the factual matrix of a case and which is envisaged as permissible by the *McGrail* decision. The questioning was clearly designed to blacken the character of Mr. Griffin. Accordingly the trial judge was correct in holding that the questioning was of such a nature that it resulted in the appellant losing his shield. Counsel for the appellant also submits that a proper reading of s. 1(a) of the Criminal Justice Evidence Act 1924, as inserted by s. 3(b) of the Criminal Procedure Act 2010, only applies in circumstances where an accused person gives evidence. Section 33 of the Criminal Procedure Act 2010, provides as follows:-

> "33. The Criminal Justice (Evidence) Act 1924 is amended –
>
> (a) in section (1)(f) –
> (i) in subparagraph (ii)
>
> (I) by the substitution of "questions of any witness" for "questions for the witnesses for the prosecution", and
>
> (II) by the substitution of "person in respect of whom the offence was alleged to have been committed" for "prosecutor",
>
> And
>
> (ii) by the insertion of the following subparagraph after subparagraph (iii): "(iiia) the person has

personally or by the person's advocate asked questions of any witness for the purpose of making, or the conduct of the defence is such as to involve, imputations on the character of a person in respect of whom the offence was alleged to have been committed and who is deceased or is so incapacitated as to be unable to give evidence; or",

And

(b) by the insertion of the following section after section 1:

Evidence of character.

1A. - Where a person charged with an offence intends to adduce evidence, personally or by the person's advocate, of a witness, including the person, that would involve imputations on the character of a prosecution witness or a person in respect of whom the offence is alleged to have been committed and who is either deceased or so incapacitated as to be unable to give evidence, or evidence of the good character of the person— -

(a) the person may do so only if he or she –

(i) has given, either personally or by his or her advocate, at least 7 days' notice to the prosecution of that intention, or

(ii) has applied to the court, citing the reasons why it is not possible to give the notice, and been granted leave to do so,

and

(b) notwithstanding section 1(f), the person may be called as a witness and be asked, and the prosecution may ask any other witness, questions that –

(i) would show that the person has been convicted of any offence other than the one wherewith he or she is then charged, or is of bad character, or

(ii) would show that the person in respect of whom the offence was alleged to have been committed is of good character."

58. The appellant suggests that the correct reading of subpara. (b) is that the requirements therein are conjunctive as indicated by the word "and" so the rebuttal contemplated by the section is only possible if and when the accused gives evidence.

59. This Court holds that the construction called for by counsel for the appellant does not reflect the plain words of the statute nor the meaning of the Act nor is this proposition founded in logic. Indeed if the court were to hold with the appellant on this matter then such a reading would permit an accused person to launch all kinds of attack on the character of prosecution witnesses including a deceased victim and remain unassailable by exercising his right not to give evidence. Such an interpretation would defeat the purpose of the Act. This cannot be correct. Accordingly this Court agrees with the interpretation arrived at by the trial judge and rejects this ground of appeal.

60. The final complaint under this ground of appeal relates to the appellant's assertion that the trial judge did not provide the jury with adequate direction as to how the evidence of the appellant's conviction was to be used by them.

61. It is difficult to understand this complaint. The judge in the course of dealing with this matter in his charge stated:-

"In other words the fact that someone is convicted of a criminal offence does not mean he is to be regarded as having some disposition towards crime. It might mean that a person is not of good character, but that in itself could never be a basis for directly or indirectly making any inference against a person still less a conclusion of guilt. . . . It is not one of those things which should be allowed to influence you in that regard, but it would be relevant obviously to decided on the extent to which, if at all the previous convictions of any of the prosecution witnesses there upon their credibility and if they do to what extent. So that is the position there or I put it to you this way as a matter of principle it is capable of being regarded by you as bearing on that topic, but it is, that is the height of it and you therefore deal with it in accordance with common sense on that legal basis ok.

62. In the course of a subsequent later requisition concerning the date of the offence which the trial judge had incorrectly stated in the course of his charge, the only concern of defence counsel at the time was that this conviction was being repeated to the jury:

"Mr. Hartnett: It was one of the last things you said to the jury. I'd just be worried they might take undue or be unduly influenced by any repetition of this kind which the court has already recognised has limited value, evidential effect."

63. This Court is satisfied that the trial judge properly directed the jury on this issue concluding his direction by saying that a previous conviction could have a bearing on a witnesses credibility.

Grounds 8 and 9

64. During the course of the trial, the defence made an unsuccessful application to have the jury discharged on the basis of what, the appellant submits, is a crucial piece of evidence which had not been disclosed in advance of the trial. This evidence was that of Gary Walsh which described a conversation which he had purportedly had with the appellant after the date of the murder:

Q. Mm hmm. And so what other dealings were there or what other interaction was there between yourself and Criostóir MacCarthaigh?

A. Well, I don't I can't remember how many days after it was but he did say to me one day that, like, I know that you know what we did and I denied it for a while and then I said okay, I've a feeling what yous did and he warned me to keep my mouth shut.

Q. You say he warned you to keep your mouth shut. Can you remember what he said to you?

A. I can't remember the exact words. […]

65. The appellant argues that advance disclosure is of crucial importance. The implementation of this is through the formalities set out in Section 4E of the Criminal Procedure Act 1967 and by the large body of case law in relation to extra-statutory disclosure. The notice of this allegation came too late in the proceedings and thus proper instructions could not be taken in relation to it.

66. The respondent argues that this ground of appeal is ultimately not made out. As a starting point, the respondent outlines that the appellant's submission that there was insufficient time to permit proper instruction to be taken on the said evidence is made for the first time before this Honourable Court and in that regard the respondent relies on the principles set out in *DPP v Cronin (2)* [2006] 4 I.R. 329.

67. The respondent argues that the appellant was not able to put forward any justification when pressed by the trial judge to indicate the manner in which it was alleged that the defence was prejudiced. Rather, he merely submitted that the evidence was not contained in the Book of Evidence and should therefore not be admitted by default. The respondent outlines that quite frequently a witness will say something that is not in the written statement and that the real issue is whether or not the defence was prejudiced by the evidence. The respondent notes the words of the trial judge at Day 3, p.17, line 12 in this regard:

> "I will discharge a jury if a party cannot cope with a major piece of evidence during a trial if they're taken by surprise. With respect, you haven't yet told me why you can't cope with it."

68. This part of Gary Walsh's evidence was highly prejudicial to the appellant and emerged in circumstances where it did not form part of his original statement of evidence. Counsel for the appellant complained that he was disadvantaged and prejudiced by this evidence of which he was not on notice, but when invited by the trial judge to elaborate on this did not do so. The trial judge's remark that he would discharge the jury if a party was unable to cope as a result of being surprised by evidence was an invitation that counsel for the appellant did not take up.

69. With regard to the point now being made that the appellant did not have enough time to take proper instructions on this matter, that point was not made at trial and the court holds that the respondent is entitled to rely on *DPP v. Cronin (2)* [2006] 4 I.R. 329. While the court so holds it was also open to counsel for the appellant to have sought a short adjournment at the time to take further instructions, but no such application was made.

70. The learned trial judge was correct in his decision in refusing to discharge the jury and accordingly this evidence of Gary Walsh was properly admitted.

Ground 10

71. By way of explanation, a significant piece of prosecution corroborative evidence was the forensic evidence, in the form of transfer DNA which was found inside the trouser pocket of the deceased, which connected the appellant with the deceased. After the appellant was detained at the Garda Station, forensic samples from buccal swabs were taken from him pursuant to the provisions of s.2 of the Criminal Justice (Forensic Evidence) Act 1990 and this is what led to the said connection. Thus, the appellant's final ground of appeal relates to the fact that he was the subject of arrest pursuant to the provisions of s.42 of the Criminal Justice Act 1999 when these samples were taken from him.

72. The appellant submits that the detention in question was affected by virtue of the procedure which is described in s.42 of the Criminal Justice Act 1999, as amended by s.11 of the Criminal Justice Act 2006, as the appellant was incarcerated at the time the Gardai wanted to process him.

73. The appellant submits that s.2 may only be utilised in the following contexts: where a person is detained pursuant to s.4 of the Criminal Justice Act 1984, s.30 of the Offences Against the State Act 1939, s.2 of the Criminal Justice (Drug Trafficking) Act 1996 or s.50 of the Criminal Justice Act 2007. In this case, the appellant submits that it was agreed that he was arrested and detained under s.42 of the Criminal Justice Act 1999, despite the relevant written record of the authorisation given by the Superintendent under s.2 incorrectly recited that he was a person detained pursuant to s.4 of the Criminal Justice Act 1984. Further, the appellant submits that this was indisputable given the fact of the court application for such a warrant and the subsequent prison arrest. Thus there was no power to invoke s.2 or to obtain samples based on this provision.

74. Section 42 stipulates that the prisoner shall be 'dealt with' as though he or she had been detained under that section. The trial judge ruled that this effectively brought the detention within the scope of s.2. However, the appellant contends that this adoption of the provisions of s.4 merely concerns the detainee's treatment and the mechanics of the detention. The appellant argues that this is not the same as saying the person is detained under s.4, and this is highlighted by the terms of s.9 of the Forensic Evidence Act 2014, which is not yet commenced.

75. The appellant further notes that, while there was a suggestions that the appellant had consented to the samples being taken, this was after he had been directed to provide the samples pursuant to the authorisation given by the Superintendent under s.2 and it is submitted that this amounted to no more than lawful obedience. Thus, the appellant argues that if this Court holds with his argument regarding the construction of s.42 then the taking of the forensic samples would still have no basis in law. Section 2 is to be interpreted strictly and confined to those who are detained under s.4.

76. While the appellant notes that the written authorisation provided by the Superintendent for the taking of the swabs incorrectly recited the fact that it had been authorised in the context of a person who had been detained under s.4, the respondent submits that the written record is not the basis for the right to make the demand and that the learned trial judge was rightly mindful of the fact that the written authorisation had been given by the same member who had applied for the s.42 warrant to arrest the appellant in prison in the first place. Therefore it could be assumed that the Superintendent inadvertently recorded the reference to a person detained under s.4.

77. The respondent submits that ultimately s.42(3) of the Criminal Justice Act 1999 outlines that the person who has been arrested under the provision of this Act is to be treated *de facto* as a person detained pursuant to the provisions of s.4 of the 1984 Act. Therefore, all of the rights that a person detained under s.4 are afforded to him and likewise, the powers which An Garda Síochána can exercise in relation to such a person are equally available to them, including the power to seek authorisation from the appropriate member for the purpose of taking samples, photographing or fingerprinting.

78. The respondent submits that powers to take samples as they pertain to a s. 4 detainee were not excluded by the Legislature in accommodating the s.4 application to a s. 42 arrested person. This is, it is submitted, entirely in line with the construction of s. 42(3)

(b) to the effect that the phrase "dealt with as though" means something in the nature of being on a par with, or being in the same position as, a s.4 detained person. The respondent submits that the words are precise and unambiguous and should be given their ordinary and natural meaning.

79. The fact that a sample could have been taken in prison is irrelevant to the resolution of this statutory interpretation point, according to the appellant, and whilst a sample might well have been obtained in that fashion, the Gardaí were desirous of detaining the appellant for the purposes of the proper investigation of the offence to include interviewing him for a portion of the periods available to him. Further, in relation to the appellant's reference to the new Forensic Evidence Act 2014, the respondent argues that the only legislation of concern to this Court is that which existed at the time of the taking of the sample and such authorisation was statutorily permissible.

80. The respondent thus submits that the learned trial judge correctly ruled as admissible the authorisation for the taking of the buccal swabs, the samples themselves and the evidence resulting from same.

81. The appellant in this case was arrested pursuant to the provisions of s. 42 of the Criminal Justice Act 1999 and in accordance with that Act was taken to a garda station to be detained in accordance with the provisions of s. 4 of the 1984 Act.

82. Section 42(3) of the Criminal Justice Act 1999 (as amended by s. 11 of the Criminal Justice Act 2006) provides:-

> "42(3) A person arrested under this section –
>
> (a) shall be taken forthwith to a Garda Station and may, subject to subsection (5), be detained there for such period as is authorised under section 4 of the Act of 1984, and
>
> (b) shall, subject to this section, be dealt with as though he or she had been detained under that section."

83. When the appellant was at the garda station relevant forensic samples were taken from him under s. 2 of the Criminal Justice forensic act 1990.

84. It is clear that the purpose of s. 42(3) of the Criminal Justice Act 1999, is to ensure that a person so detained has the same rights and is subject to the same obligations as a person detained under s. 4 of the Criminal Justice Act 1984. One of these obligations is to provide forensic samples when requested.

85. This Court accepts the respondent's submission that powers to take samples as they pertain to a s. 4 detainee were not excluded by the legislature in accommodating the s. 4 application to a s. 42 arrested person. The court holds that the trial judge was correct in his rulings effectively holding that the phrase "dealt with as though" means being in the same position as a s. 4 detained person. The court therefore dismisses this ground of appeal.

86. Accordingly the appeal against conviction is dismissed.