COURT OF APPEAL

CCAOT0122/2012

CCAOT0123/2012

CCAOT0124/2012

Peart J.
Sheehan J.
Mahon J.

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

JIMMY CONROY, MICHAEL CONROY AND THOMAS SWEENEY

APPLICANTS

JUDGMENT OF THE COURT DELIVERED ON THE 31ST DAY OF JULY 2015

1. On the 1st March 2012 all three applicants were convicted of the certain offences and received sentences of imprisonment following a five day trial at the Circuit Criminal Court in Galway. The offences were:

(a) Violent Disorder contrary to section 15 of the Criminal Justice (Public Order) Act 1994;

(b) Production of an article capable of inflicting serious injury contrary to section 11 of the Firearms and Offensive Weapons Act 1990;

(c) Assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act, 1997

2. All three applicants seek leave to appeal against their convictions and their sentences of imprisonment. However, it has been agreed by all parties that this Court should determine the appeals against conviction first, and at a later stage, hear submissions in relation to severity of sentence, if necessary.

3. The offences for which the applicants were convicted were committed in the house of the Conroy family into which members of the Sweeney family had been invited following a ceremony of marriage in which the first named applicant, Jimmy Conroy, who was then aged 16 years married a member of the Sweeney family.

4. It would appear, at least from the prosecution's version of events, that in the early hours of the morning following the wedding a violent row broke out in the Conroy house, and that significant injuries were sustained by some members of the Sweeney family, allegedly inflicted with the use of a saw, an axe, a knife and a sword, following which the Sweeneys left the house and made their way to an location known as Streamstown Cross about 1.2 km away from the Conroy house, and where they met members of An Garda Siochana.

5. The prosecution case was that the injuries sustained by members of the Sweeney family had been inflicted by the applicants while those members of the Sweeney family were in the Conroy house.

6. While none of the applicants gave evidence, as is their right. However, the thrust of the defence being put up for consideration by the jury could be gleaned from statements made by them during the course of the investigation, and from the nature of questions asked by defence counsel to prosecution witnesses during cross-examination. In brief it can be said that the defence case was that while there had undoubtedly been a row within the house before the Sweeneys left, no injuries were inflicted there, and that the injuries which were evident to Gardai when they met up with the Sweeney group can only have been sustained by them during some row among themselves that must have broken out on the road between the Conroy house and Streamstown Cross.

7. On this appeal each applicant is separately represented by solicitor and counsel. A number of grounds of appeal are relied upon by each, but a common ground urged by all applicants relates to the judge's charge to the jury at the conclusion of the evidence. They say that in the course of the third section of his speech to the jury at the conclusion of the evidence when he came to deal with the prosecution's case, the evidence given by the prosecution witnesses, and the case being put up by the defence and the facts relied upon in that regard, even though they did not give evidence in court, he did so in a way that unfairly focussed upon the case being made by the defence, and in a way that distracted the jury's attention away from the first and most important question, namely whether the prosecution had proved its case beyond a reasonable doubt, and towards focussing upon whether the defence had satisfied the jury that the prosecution case was flawed - in other words, that the burden of proof was effectively reversed, and presumption of innocence undermined, notwithstanding his clear explanation of those principles earlier in his charge to the jury, and about which they make no complaint.

8. It is submitted by all appellants that the judge by expressing himself in the way he did at certain stages during his charge was not impartial in the manner in which he summarised and commented upon the evidence for the prosecution's case, in so far as he did, and the case being put up by the defence for consideration, and that the jury will have been left in little doubt as to the lack of merit in the defence case which the jury was going to consider during its deliberations.

9. It has been submitted by all applicants that the fact that the trial judge from time to time throughout his charge reminded the jury that issues of fact were for them and them alone to decide, and that he warned them that if he strayed into commenting on the evidence or expressed any opinion on it they should disregard that completely, it is nevertheless an insufficient antidote to an otherwise unbalanced and partial charge. In that regard the Court has been referred to a passage from the judgment of O'Donnell J. in *People (DPP) v. Rhattigan* [2013] IECCA 13 where within para. 20 he stated:

" ... counsel for the applicant suggests that it is the current practice of judges charging a jury to make no comment whatsoever on the state of the evidence but to simply and neutrally recite what has been said by either side. However, no authority has been cited by either side for the suggestion that the trial judge is permitted to do no more than to recite the contentions made in closing speeches by the prosecution and the defence. It remains the law, as set out by McGuinness J. in DPP v. DO'S [2004] IECCA 23 that: 'comment is permissible if it is made in the course of a fair and balanced charge'. The judge may comment, it was argued, but his comments must be those appropriate for a judge and should not be 'the stuff of advocacy'. This may be so, but it describes rather than defines the appropriate standard. However, the function of a trial judge is not merely to repeat the evidence given and the submission made by counsel, together with perhaps undigested and indigestible quotations from text books or decisions of this or any other court. The function of the trial judge is to ensure in the first place that by appropriate rulings, only such evidence as is properly admissible is heard by the jury. A jury must then assess that evidence by reference to concepts and reasoning processes which are unfamiliar to them and which they are encountering for the first time in the highly charged context of a criminal trial which will often involve evidence which is disturbing and indeed shocking. The function of the trial judge is to give guidance to the jury not only as to the legal concepts involved, but also to assist them in understanding the task which they are about to perform. It should go without saying that a jury is not chosen as the finder of fact in criminal trials because its members have any training or expertise in criminal investigation, deductive reasoning, or methods of logic; instead a jury makes decisions for which its potential members are admirably suited, namely the application of common-sense and experience to an analysis of the facts within a legal framework provided by the judge. The function of a trial judge in this regard is to attempt to present to the jury the issue which it has to decide in a clear and comprehensible way. In a simple way this may involve no more than identifying what has been said on each side but in more complex cases it will necessarily involve a degree of analysis of the evidence if only to focus on the central issues, and to present what is to be considered by the jury in an ordered, comprehensive and intelligible way ..... what is precluded is conduct which is inappropriate for a judge and which is advocacy as to the outcome, which is partisan, and which therefore departs from the fairness which is expected of a trial judge. Furthermore, if there is such partiality, it cannot be cured by formulaic statements on the role of judge and jury and of the entitlement of a jury to disregard the views of the judge. But analysis of any such complaint necessarily involves an analysis of the overall charge, and indeed may involve consideration of the conduct of the trial as a whole."

10. As to the reference therein to the fact that partiality displayed during a charge cannot be cured simply by the repetition of some formulaic statement from time to time by the trial judge that the jury should disregard any views expressed by the judge, counsel has referred also to the comment by Lloyd L.J. in *R v. Gilbey*, unreported, Court of Appeal, January 26, 1980 where he stated:

"It cannot be said too often or too strongly that a summing up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury".

11. As to the requirement upon a trial judge to fairly put the defence case to the jury for its consideration, counsel has referred to a passage in Coonan & Foley: The Judge's Charge in Criminal Trials, where the authors state the following at para. 3.20:

"Any defence (assuming, if relevant, that the accused satisfies his evidential burden) no matter how unmeritorious, must be put to the jury. This obligation does not, however, involve any requirement to put the defence to the jury in precisely the way counsel may indicate he or she wishes it to be put. At the appellate level the focus will not be on such points but on whether the defence, as a whole, was properly put before the jury. The relationship with summing up is well expressed by Geoghegan J. for the Court of Criminal Appeal in People (DPP) v. Bishop [2005] IECCA. 2:

> *'While it is always important that the trial judge summarises for the jury the defence case as well as the prosecution case he is not obliged to refer to every piece of evidence that the jury heard and still less is he obliged to refer to every argument put forward in speeches to the jury."*

12. In the present case the fact is that none of the accused persons chose to give oral evidence. That was their right and entitlement as accused persons who are at all times *presumed to be innocent until such time as the jury decides that the prosecution has proven its case against them beyond a reasonable doubt.* Indeed, the trial judge in this case made that very clear during the course of his charge when dealing with the burden of proof and the standard of proof. Nevertheless, they had given statements to the Gardai *and these were before the jury, and the jury also had the benefit of hearing questions being put during cross-examination to prosecution witnesses, which,* while not themselves *constituting evidence*, nevertheless *indicate what the defence case* was.

13. How the trial judge charges the jury in relation to the defence case will depend on the particular case at hand, and the length of the trial, and whether the defence went into evidence will be a relevant factor in deciding in particular how detailed a summary of the evidence should be given by the trial judge in his charge. This is put well by Coonan & Fahy in their book already referred to, where at para 3.23 they state:

"A good summation of the law -- reflecting how the extent of the duty to charge on the defence will vary from case to case -- may be found in R v. Curtin [1996] Crim. L.R. 831]:

> *'It is a judge's duty, in summing up to a jury, to give directions about the relevant law, to refer to the salient pieces of evidence, to identify and focus attention upon the issues, and in each of those respects to do so as succinctly as the case permits. It follows that as part of this duty a judge must identify the defence. The way in which he does so will necessarily depend on all the circumstances of the particular case. When the defendant has given evidence it will usually be desirable, though it may not always be necessary, to summarise his evidence ...'."*

14. Before considering the manner in which the trial judge charged the jury, summarised the evidence the prosecution evidence, and dealt with the issues which, as he saw it, the jury would need to address in its deliberations in order to reach a verdict, it is necessary to summarise the matters which counsel for the applicants drew the jury's attention to during their closing speeches and which they submitted must led the jury to conclude that the prosecution had failed to prove its case beyond a reasonable doubt. Counsel pointed to what they saw as being gaps in the prosecution case, inconsistencies in the account of events in the Conroy house as given by the three Sweeney witnesses, and failures by the Gardai to properly investigate the matter. It was submitted that these and other matters were of sufficient significance to leave a reasonable doubt in the minds of the jury, and should lead to an acquittal. Their complaint to this Court is that the trial judge failed in his summary of the prosecution case to deal adequately and fairly with any of these potential deficiencies, and instead concentrated on the case being offered by the defence, namely that these injuries were caused by the Sweeneys upon themselves while they were on the road going to Streamstown Cross, and expressing his own views in an unfair and partial way as to the credibility of that as a possibility.

15. The matters which were urged by counsel for the applicants as giving rise to reasonable doubt can be briefly set out as follows, without going into full detail:

☐ the prosecution had suggested that there was some sort of feud between the Sweeney and the Conroy families, whereas there was no evidence given in that respect, and in fact the contrary seemed probable on the basis that on this night the Sweeneys had been invited into the Conroy house after the wedding;

☐ the conflict of evidence given in relation to the condition of the saw and colour of the handle of the saw alleged to have been used;

☐ the differing accounts of how the row in the house started as given by john Paul Sweeney and Eddie Sweeney;

☐ differing accounts given by the Sweeney witnesses in relation to their departure from the Conroy house;

☐ the fact that Mary Sweeney was noted by the hospital as having injuries, yet in her evidence she did not mention receiving injuries in the Conroy house. This was urged by the defence to suggest that she was injured after she left the house, and that in turn gave support to the defence case that some sort of row among the Sweeneys must have occurred while they were on their way to Streamstown Cross;

☐ the fact that Eddie Sweeney had denied having had a mobile phone, yet Mary Sweeney was able to give Gardai his mobile phone number, and this raised the question as to why neither ambulance nor Gardai were phoned by the Sweeneys;

☐ the fact that no weapons were found at the Conroy house, and in particular the saw, the knife and the sword said by the Sweeneys to have been used by the applicants;

☐ the fact that no search of the bushes at Streamstown cross was carried out by the Gardai when they stopped there;

☐ while an axe head and axe handle were produced in court, one did not fit the other;

☐ the fact that while blood was seen by Gardai on Kathleen Conroy's clothing when they called to the Conroy house, Garda Grady stated that she could not recall if she inquired as to how it got there (but Kathleen Conroy said that she did ask), and no forensic examination was carried out to establish whose blood it was. Similarly there were blood spatters on a door and again no forensic examination was carried out in relation to that;

☐ the fact that neither the Conroy house nor the area at Streamstown Cross was declared a crime scene, and therefore no searches were carried out, it being at least suggested that if a search at Streamstown Cross had been carried out it might have revealed weapons consistent with the injuries having been sustained by the Sweeneys as a result of a row among themselves on the road to Streamstown Cross;

☐ the evidence as to the extent of the injuries sustained by the injured parties and the extent of the bleeding that would have resulted, and yet they were able to walk the distance of 1.2 km from the Conroy house to Streamstown Cross without calling either the Gardai or an ambulance or even calling to one of the houses that were along that road. This was said to also support the defence case that it was after the Sweeneys had left the Conroy house that these injuries were sustained;

☐ the fact that Garda Steede had stated that when he saw the Sweeneys on the road as he passed them he saw no obvious signs of injury, nor saw anybody staggering, and the fact that he did not stop - all suggestive, it was submitted, that the injuries were likely to have been sustained after that and quite soon before the Gardai arrived;

16. As has been noted already, the applicants on this appeal have submitted that when the trial judge came in his charge to deal with the issues which he considered the jury would have to consider, he focussed their attention only on the defence case, and did not address in any fair and impartial way the evidence led by the prosecution and draw attention to any of the potential issues arising in that evidence and which the jury might consider gave rise to a reasonable doubt. In so doing, it is submitted, the jury was effectively left with an impression that it was up to the defence to prove its theory about the injuries being sustained by the Sweeneys during a row among themselves while on the way to Streamstown, rather than that the jury had to be satisfied beyond any reasonable doubt that the prosecution had proven its case against the applicants that they had committed the offences while in the Conroy house and in the manner described by the Sweeney witnesses.

The judge's charge

17. As stated already, the applicants' complaints relate to the third section of the judge's charge. Nevertheless, it must be clearly stated that in the earlier parts, he made it very clear indeed that the members of the jury alone were the judges of the facts in the case or, as he put it, "the real judges in this case", and that it was they and they alone who had to decide what the evidence established had happened. He made it clear also that they could accept or reject any evidence they heard, and that they could consider the way in which questions were answered, the demeanour of the witnesses and bring their common-sense and life experience to bear. He explained clearly that they could draw inferences and explained that concept. Having drawn attention to the fact that all the accused were from a particular background, he emphasised that the jury was not entitled to allow any sympathy or prejudice to affect their assessment of the evidence, and made it clear also that there was one law in the country, and it was the same for everybody. He went on to explain the nature of the offences, and told the jury that it had to consider each offence against each accused person separately.

18. In addition, of course, he dealt with the presumption of innocence, the standard of proof beyond a reasonable doubt, and the fact that the onus was at all times on the prosecution to prove its case beyond a reasonable doubt. Specifically he stated that the defence does not have to prove anything, and can simply sit back and wait for the prosecution to prove its case beyond a reasonable doubt. He specifically referred to the fact that in this case none of the accused persons had chosen to give any evidence, but made it clear that the fact that they had not given any evidence is not something from which they may draw any adverse inference, since to do so would be to wrongly place some onus of proof upon the accused persons.

19. The trial judge clearly explained the nature of the offences alleged against each accused, and the ingredients of those offences which the prosecution had to prove beyond a reasonable doubt before a guilty verdict could be brought in.

20. No complaint is made by counsel for the applicants in relation to the first two parts of the judge's charge, nor could they reasonably do so. Their focus is rather on the third part where he dealt with the evidence, and the issues arising therein. It is important, however, before dealing with his summary of that evidence and some of his comments upon it, to emphasis that at the outset of his charge the trial judge told the jury that if during the course of his summary of the evidence and the issues arising he expressed any opinion on that evidence he would be "trespassing upon [their] jurisdiction", since it was for them only to decide what the evidence established, and he explained that in so far as he might express any opinion upon the evidence they could either accept it or reject as they chose. He explained that he would be highlighting certain questions that the jury might need to ask themselves during their deliberations, and certain issues, but that any decision on those matters was entirely a matter for the jury to decide upon. He assured them that what he would be saying was for their guidance and assistance only and that they could accept or reject anything that he might say, and that it was solely for them to be satisfied about the evidence beyond a reasonable doubt.

21. Having made those very clear statements he proceeded to state that the defendants each deny any assault upon the alleged victims while they were in the Conroy house, and he referred to the fact that none gave evidence but that the case they were making was evident from questions that were put to the prosecution witnesses in cross-examination, and statements made when interviewed by the Gardai. He gave examples of some of those questions and answers given, but stated that he was doing so from his notes, and told them that in the event that his note did not accord with what they heard, then they should rely upon what they had heard and not what he said. He then told the jury that they would need to "carry out a forensic examination of that" (i.e. the case being put up by the defence by way of the questions asked in cross-examination and the statements made at interview), and said that he would proceed to make suggestions as to *"the order of the questions that you might ask yourself in considering that forensic examination".* However, he went on to make clear that he was doing so only for their guidance and that they were perfectly entitled to ignore his suggestions.

22. The first question suggested by the trial judge that the jury must ask themselves was:-

> *"Are you satisfied beyond reasonable doubt that the injuries seen by Gardai - that was at Streamstown Cross - were sustained at the Conroys' house or do you believe that it is reasonably possible that the injuries were, in fact, sustained after the Sweeneys left Conroy's house in good health and unmarked by a bleeding injury?"*

23. Having suggested that question he went on to say that if they considered that that might reasonably be the position (i.e. the injuries were sustained after leaving the Conroy house), then they must acquit *"because then you cannot be convinced if you have a reasonable doubt about that, you can't be convinced beyond a reasonable doubt that the acts of violence took place at the Conroy house".*

24. He proceeded then to say that in considering that issue they might consider it helpful to look at what caused the injuries, and for that purpose to look at the nature of the injuries - i.e. were they in the nature of scratches, scrapes and lacerations which could be caused without the use of an implement, or rather were they injuries which could only have been caused by a sharp implement and with force. He then referred to the medical evidence in the nature of a report from Dr Gaffney and the evidence given by Mr Casey as to what he saw when the Sweeneys came to his house. Having described that evidence of the nature of the injuries he stated that if they concluded that these injuries were not sustained as a result of the forceful application of a sharp instrument, then that would indicate that they did not believe the account of what happened and how the injuries were inflicted as given by the prosecution witnesses (the Sweeneys), and in those circumstances they should waste no more time and simply bring in a not guilty verdict "because the fundamental credibility of the Sweeneys was impugned".

25. If on the other hand they believed that the injuries were sustained by the use of a sharp implement, they should move to the second question he was suggesting, namely "what was the origin of those implements" and went further and said that if they got as far as asking this second question they were no longer talking about implements but rather "weapons". He referred to the evidence given by Mary Sweeney when she asked where these weapons the Sweeneys are supposed to have used upon themselves somewhere along the road to Streamstown Cross *"had come out of".* The judge asked *"did the Sweeneys bring the weapons to the Conroy house"* bearing in mind that they had originally planned to stay at the Ardagh Hotel that night but found they could not do so - hence they had ended up at the Conroy house where they were made welcome.

26. The trial judge then stated:

> *"So - if the Conroys are right that the Sweeneys were alright when they left the Conroy property, it must follow that if the Sweeneys inflicted the injuries on one another and you believe that those injuries were inflicted with a weapon, it must follow that one of the following hypotheses apply:*
>
> > *(a) they had the weapons concealed on their person when they left the Ardagh Hotel, or*
> >
> > *(b) they had the weapons concealed in and about the vicinity of the road outside the Conroys property, having done so in advance of the day, or*
> >
> > *(c) they found the weapons in or around the Conroy house which they brought with them when they left the property and used on one another when they were on the road.*

27. The final hypothesis to which he referred was (d) in respect of which he stated the following:

> *"It was canvassed in the course of one of the speeches to you that they [the Sweeneys] fell out at Streamstown Cross, that they found weapons or implements at that location and they set about one another. Is there any evidence of or was it ever suggested to the paramedic, Mr Mullins, to Dr Casey or any of the Gardai that there was ill-will between the Sweeneys at Streamstown Cross? If what is postulated has any merit would you not have expected there would be some evidence of at least tension between them at the Cross? Instead, it would appear if you accept the summation of the evidence the only upset there appeared to be created [was] by Ellen Sweeney who apparently was somewhat hysterical lest she'd be left on the side of the road ..... . If you believe that the injuries were caused by weapons, was there any evidence of tension that you would - might or might reasonably expect - in some shape or form to be present at the location during the course of the hour, hour and a half that the Gardai were there?"*

28. The trial judge then proceeded to refer to some of the Sweeney evidence such as the use of the saw in the assault upon John Paul Sweeney and Eddie Sweeney both in the hall and outside, the use of a sword in the assault upon John Paul Sweeney, and the use of an axe and a knife also in the assault upon John Paul Sweeney. He paused at that point to refer to the fact that there was no evidence of any injury to Eddie Sweeney caused by the use of the knife by Thomas (Buttons) Sweeney, and the evidence as to the

use of a knife was a tear to Eddie Sweeney's jacket. The judge explained that if the jury was satisfied with that evidence, they could convict Thomas (Buttons) Sweeney on the assault charge only if they were satisfied that he was acting in concert with the others. He stated *"it's a matter for you".*

29. The trial judge then moved on to consider the evidence as to the alleged use by Michael Conroy of a samurai sword in his assault upon John Paul Sweeney. He noted that it was corroborated by Mary Sweeney who said that she saw Frankie Conroy take two such swords out of the boot of Michael Conroy's car, take the cover off one and give the other to Michael Conroy, and that she begged him not to use it. He described this evidence as "curious" because such weapons are not normally found in those parts of Ireland, and also because it is not the sort of weapon that can be easily concealed on one's person, given its size. He referred also to the evidence of Gardai who said that they had found two covers for Samurai swords on the grass not far from the Conroy front door, and that this could amount to corroboration if the evidence of the Gardai was accepted by the jury - which he said again was a matter for the jury. He referred to the fact that there was no direct evidence of the presence of the swords (since they had not been found) but he suggested the jury could ask themselves if the presence of the covers on the grass might amount to an inference that there were swords in the covers and were removed from the covers, and whether Mary Sweeney's evidence in that regard was "reliable, compelling and truthful, and that this is so notwithstanding the absence of any forensic evidence connecting the sword covers to the accused". He went on:

> *"If you come to the conclusion that the swords were in the car and removed from the covers and the covers were found by the Gardai, must you not then inevitably conclude that the swords were not brought to the Conroy property or to any place adjacent to the Conroy property by the Sweeneys? Then if you do, are you not also driven to the conclusion that the swords were within the control and possession of the Conroys or some of them? ... ... You must therefore look at the totality of the evidence produced and in the overall context of that evidence determine whether or not your conclusion about the sword covers and swords permits you to conclude beyond a reasonable doubt that the evidence of John Paul Sweeney and Mary and Eddie Sweeney relating to the use of weapons was the truth. For this purpose, you will have to consider again whether it is or is not reasonable to conclude that those weapons [i.e.] the swords, saw, axe and knife, could have inflicted the injuries described. If you conclude that there were weapons on the Conroy property and the weapons were used on the alleged victims and that the injuries received by the Sweeneys were the result of the use of the weapons on them, then the final question in the series of questions is to decide, if you can .. if you can determine beyond a reasonable doubt that the persons who used the weapons were the three accused. If you reach those conclusions then it would seem to me logical that you are accepting and believing, warts and all, what the Sweeneys say happened as to how and what injuries they received, as to how they received those injuries. Does it not logically follow that you accept their evidence as to who it was as to who did those injuries, who used the weapons and caused those injuries. The question then is did the accused assault the victims in the manner described ... ".*

30. The trial judge went on immediately to state that if they have answered the questions in the way he has suggested they might if they were so satisfied, then it followed that:

> *"by doing so you have also found that you do not believe that the Sweeneys were in perfect health when they left the Conroy property and you believe that the items of weaponry, in particular the swords, were on the Conroy property. In other words you have accepted those parts of the Sweeneys' sworn evidence which are immediately relevant to the questions you ask to be credible and reliable. And more to the point, and of special importance, I suggest to you, you have done so by a forensic examination of the silent evidence in the case, the injuries, how they were caused, the type of implement that might have caused those injuries. You have inquired to see, again, if the weapons allegedly used are compatible with the injuries which were sustained. You have determined the place of the Garda evidence relating to the covers for the Samurai swords. You have considered whether the expressed view of the accused that the alleged victims were in rude good health when leaving their property might reasonably be true. So you have examined the silent evidence and you have found answers in the silent evidence which, if you go that far, supports the contention, the evidence given by the Sweeneys as to what happened and where it happened. In other words, the issue of the credibility of the Sweeneys, Mary, John Paul, and Eddie Sweeney was only part of your overall forensic deliberation on the evidence and you conclude that all the evidence leads to the inevitable conclusion that the evidence given by the Sweeneys in regards to how and with what the injuries were inflicted is true, does that not compel you to believe that the identity of their assailants as given by the three Sweeneys is also true and reliable? If you come to that conclusion, then you will by inference be finding that you believe the Sweeneys, warts and all?"*

31. The trial judge explained what he meant by "warts and all" by saying that the Sweeneys had *"a somewhat unsavoury background .. of violence some time ago",* but went on to say that notwithstanding what views they may have formed of them, the jury will have concluded that they believe what they say happened in the Conroy house that night.

32. It was at this stage towards the end of his charge that the trial judge made reference to some of the matters to which counsel for the applicants had referred in their speeches to the jury for the purpose of suggesting to the jury that it should have a reasonable doubt, and which have been set forth earlier in this judgment. He said that there had been inconsistencies highlighted in relation to the chronology of events as given by the witnesses who gave evidence, and referred also to the fact that a huge amount of drink had been consumed by everybody. He said also that the jury will have considered the fact that the Sweeneys passed various houses along the road to Streamstown Cross, and then stated: *"you've taken on board each and all of the matters that have been canvassed and you still, because of the nature of your forensic trawl through the forensic silent evidence, you have come to the conclusions which are inescapable if that's your view".*

33. The judge then made reference to there being no history of violence between these two families, and the point made by counsel to the jury that if the amount of blood alleged to have flowed from these wounds was correct they could not possibly have got as far as Streamstown Cross. This was a reference to the applicants' contention that for this reason the injuries must have been inflicted after they left the Conroy house. The trial judge stated in this regard: *"Well, with all due respect, Dr Casey was in the witness box and he wasn't asked to make any comment on that question, so it's entirely speculative and not based on the evidence in the case with the greatest of respect"*. He referred to the fact that counsel had made reference to the fact that one of the Sweeney family, David Sweeney, had not been called to give evidence, but said that he could not see the relevance of that fact, but made it clear that it was a matter for the jury to see if it was relevant to them. He concluded his charge by saying:-

> *"You have to make your determination on the evidence that is presented to you. Does the evidence in this case entitle you and cause you to conclude beyond a reasonable doubt that the accused are guilty of each of three offences? Don't speculate as to what might have been produced ...and I think if you consider forensically the questions in the order in which I suggest, I'm only suggesting it to you, that you might find it most useful."*

34. The essential question arising out of the judge's charge on this appeal is whether taking the charge as a whole, the trial judge unfairly focussed the collective mind of the jury on what the applicants were putting up as a defence, and invited the jury to forensically examine the applicants' hypothesis that the injuries were inflicted upon the Sweeney members not at the Conroy house at all but, instead, on the road to Streamstown, rather than inviting them first to forensically examine the evidence led by the prosecution to see if they could be satisfied that the prosecution had proven the case against each accused person beyond a reasonable doubt.

35. This Court is satisfied that despite an impeccable charge to the jury contained in the first two parts of the charge, the manner in which at the very commencement of the third part of his charge immediately focussed his attention on the case being made by the defence by means of the questions put in cross-examination and by reference to statements made to the Gardai when interviewed, and laid put a clear path by means of a series of questions that the jury could ask themselves as shown above, an impression could well have been given to the jury that if, having considered the defence case by means of those questions, and having examined the case being put up to them by the defence they did not accept it as being likely or possible, then they should convict. That of course is to reverse the burden of proof. In other words, if the defence failed to persuade the jury of its case, they could regard the prosecution as having proven its case beyond a reasonable doubt.

36. There is no doubt that in the earlier parts of the charge the trial judge stated clearly that the onus of proof lay at all times with the prosecution and that the prosecution must prove its case beyond a reasonable doubt. It is also clear that before he dealt with the defence case he stated to the jury that if he commented upon any of the evidence in a manner with which they disagreed they should disregard his comments entirely, and form their own view of the evidence.

37. The difficulty in the present case is that despite the perfection of parts one and two of the charge, the trial judge failed to summarise the evidence of the prosecution witnesses, and draw attention to any issues in that evidence which the jury would have to resolve beyond a reasonable doubt before they could convict. The speeches of counsel for the applicants had undoubtedly suggested a number of matters which they contended would or should give rise to a reasonable doubt as to whether the prosecution had proven its case to the required standard, and these have been referred to already. While the jury had heard those speeches, it is what the trial judge says in his charge that will resound the loudest in the ears of the jury when they leave the court to commence their deliberations. For that reason the trial judge ought not to simply refer briefly to the matters to which counsel has referred, but must himself lead the jury through the prosecution case in a balanced and fair way so that the jury's mind is alert to the need to forensically examine all aspects of that case, and the jury's attention should be drawn to specific issues of controversy, so that they can be guided as to matters which may give rise to a reasonable doubt depending on the jury's view of the matter.

38. The case being put up for the jury's consideration by the defence, whether by way of oral evidence, or as in this case, by reference only to statements made or to questions put in cross-examination, must also be summarised by the trial judge in a fair and balanced manner. But the prosecution must have at least on a prima facie basis have proven its case beyond a reasonable doubt before the jury needs to consider the case being made against it by the defence. An unproven prosecution case cannot be improved in any way by a failure by the defence to rebut it.

39. This Court considers that there is a real risk in the present case that the jury was led down a particular path which focussed attention first of all upon the defence case by the way the trial judge suggested how they might approach their consideration of the case by reference to particular questions that they should ask themselves. If one takes the very first of those questions to which reference is made at paragraph 21, namely whether the jury was satisfied beyond a reasonable doubt that the injuries were sustained at the Conroy house, or was it reasonably possible that the injuries were sustained after the Sweeneys left the Conroy house. There is no doubt that he went on to suggest that if the jury was satisfied that the latter was the case, they simply had to acquit the defendants. But the unspoken corollary to that statement could, at least in the minds of the jury, be that unless the jury was satisfied that the injuries could have been sustained after the Sweeneys had left the Conroy house, the prosecution had proven its case beyond a reasonable doubt that the injuries were sustained in the Conroy house. That is the sense in which it is contended on this appeal that the trial judge focussed the attention of the jury on issues in a way which suggested that there was an onus upon the defence to prove its case before the onus upon the prosecution had to be discharged. This is in spite of the fact that in the earlier part of his charge the trial judge had stated that the onus of proof never shifted to the defence. This Court agrees that this created a risk of unfairness, and a risk that the jury approached its task having been wrongly directed in this regard.

40. The Court also notes that at the conclusion of the judge’s charge, during requisitions, Counsel for the appellants made strong requisitions in relation to what they said was the unfairness of the charge overall, but the trial judge chose to not say anything further to the jury to address that concern.

41. The Court will allow the appeal against conviction in respect of each applicant.