THE COURT OF APPEAL

Birmingham P.
Mahon J.
Edwards J.

Record No: 218/2012

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent/ Respondent

V

GERARD HAYES

Appellant/Applicant

JUDGMENT of the Court delivered the 26th of June 2018 by Mr. Justice Edwards.

Introduction
1. Mr Hayes is the appellant in the context of an appeal brought before this Court against his conviction for murder by a jury in the Central Criminal Court on the 18th of March 2003. The appeal is based upon seven grounds of appeal contained in a document "Grounds of Appeal" dated the 8th of July 2013. It is further based on two further grounds of appeal which he was permitted to add by leave of this Court granted on the 23rd of June 2017.

2. Mr Hayes is also the applicant in the context of a motion in the appeal proceedings in which he seeks leave to add an additional (10th) ground of appeal.

3. Both the appeal and the motion in this matter were heard together on the 25th of January 2018, and Mr Hayes was allowed to argue his proposed additional ground of appeal *de bene esse*, and without prejudice to how the Court might rule upon the motion. Following the hearing judgment was reserved on both the appeal and the motion.

4. The Court now delivers its judgment on both the appeal and the motion. Although Mr Hayes is both an appellant and an applicant it is proposed for convenience to hereinafter refer to him simply as "the appellant"

The background to the appeal
5. The appellant was born on the 21st of February 1965. At the time of the incident in question, the appellant was living with his mother as he had been barred from his own house. The deceased, John Robinson, whom the appellant described in his statement to the Gardaí, as *"a good friend"*, occasionally stayed in the appellant's mother's house, sleeping in a sleeping bag on the appellant's bedroom floor.

6. On the evening of the 22nd of January 2000, the appellant and the deceased had been drinking together in a location behind the appellant's mothers house. At some point between approximately 9.00pm and 10.00 pm that evening, the appellant and the deceased headed back to the appellant's mother's house. Both men finished off whatever drink they had left whilst in the appellant's bedroom and listening to the radio. According to the appellant's account as given by him in evidence, at some stage during the night, the deceased threw an empty glass bottle towards the appellant on a couple of occasions, which prompted the appellant to say to him *"give over the messing"*, and to point out that it was likely that if he persisted he would wake up the appellant's mother, who was 77 at the time and sleeping in her room downstairs. The appellant then threw the bottle back over towards the deceased. A couple of minutes later, the deceased flung the bottle at the appellant and it hit him on the head, giving him a cut above his left eyebrow.

7. A statement from the appellant's mother was read out to the jury during the trial, pursuant to s. 21 of the Criminal Justice Act 1984. In it she stated, *inter alia*, *that "I went up to bed around 11 o clock. I could hear John and Gerard arguing about a row that [they] had yesterday. I went into them and told them to be quiet. I went back to bed but they kept arguing. A short while later Gerard came downstairs to me. He had blood running down the side of his head. I told him I was going down for Mrs. Robinson. As I got there I met Mr. Robinson at the gate. I told him Gerard & John were arguing and would he come up. Mr. Robinson came up to the house & he went upstairs to the bedroom. I met Mr. Robinson at my front door. He told me John was bleeding and he went to ring for an ambulance. Then I went upstairs to see. I saw John was bleeding from the head. I put my hands on him and asked him if he was all right. He made a sound, but he was conscious. I came downstairs and rang the ambulance." She added later in her statement that after the ambulance had left "I then went to ring the guards but they arrived before I got to do it."*

8. Dr. Marie Cassidy, the State Pathologist who carried out the post-mortem on the deceased on the 23rd of January 2000, was called to give evidence by the prosecution. She gave evidence that the deceased died as a result of *"36 stab wounds and 27 incised wounds to the head, neck chest and limbs".*

9. Garda Vincent Donnellan, Garda Catriona Dwyer and Sergeant John Scanlon were on patrol on the night in question. Having been alerted by radio concerning the incident, they arrived at the appellant's mother's house at approximately 1:46 am. After being let into the house by the appellant's mother, they went into the front room in the house where they encountered the appellant. The evidence given by Garda Donnellan was that the appellant had *"a cut to his forehead and there was blood on his hands."* Garda Donnellan and Garda Dwyer then proceeded to have a look around the house, and in the appellant's bedroom they found *"a large pool of blood...and an empty bottle of whiskey beside it".* Garda Dwyer then found *"a blood-stained knife in the wheelie bin."* Sergeant Scanlon then informed the appellant that he was being arrested for a serious assault on the deceased and he was given the usual caution.

10. Upon being presented at Roxboro Garda Station, the member in charge, Sergeant Con Horan, detained the appellant under s. 4 of the Criminal Justice Act 1984. The appellant was then taken to Limerick Regional Hospital where he received five staples inserted for a gash to his head. The next day, the 23rd of January 2000, the appellant was interviewed under caution by Gardai at Roxboro Garda Station. There was an initial interview during the morning which took the form of a question and answer session, in which both questions and answers were taken down in writing, and in the course of which the appellant admitted to stabbing the deceased and

disposing of the knife in a wheelie bin. The notes were duly read back over to the appellant, he was invited to make any alterations or additions he might wish to make, but made none, and he then signed the notes, and his signature was witnessed by the interviewing Gardaí.

11. Later that afternoon, he agreed to make a narrative statement after caution. In the course of this statement he said, *inter alia*:

> *"I didn't throw the bottle after I got hit in the head. I hadn't a knife, it was John Robinson's knife. The knife was down beside him, I went over and picked it up. ThenI stabbed him with it a few times."*

12. The said statement was taken down in writing, it was read back over to the appellant, he was invited to make any alterations or additions he might wish to make, but made none, and he then signed it and his signature was witnessed by the interviewing Gardaí.

13. Subsequently, at 6:58 pm that evening, the appellant was charged with the murder of the deceased. He was conveyed to Limerick District Court where Judge O' Donnell remanded him in custody pending trial.

14. As mentioned already, the defence went into evidence at the appellant's trial and the appellant testified in his own defence. Having described being hit on the side of the head by the bottle thrown at him by the deceased, he told the jury *inter alia*:

> *"A. …. I looked over and I put up my hand, the blood was coming done the side of my face, and I could see the knife, and I just went up, I seen his hands moving around on the ground, I don't know whether he was trying to get up or whether he was trying to go for the knife. I made a go for the knife, and I cannot remember stabbing him.*
>
> *Q. Now, do you remember getting the knife?*
>
> *A. I can remember jumping up to go for the knife.*
>
> *Q. Are you saying that you have no memory after that?*
>
> *A. I have no memory after that.*
>
> *Q. Do you accept that you did stab him?*
>
> *A. I do.*

15. At the close of the defence case, his counsel raised an issue with the Court *"as to whether there is sufficient evidence of provocation arising in the evidence before the jury so as to permit the partial defence of provocation to go before the jury as an issue in the case"*. The trial judge acceded to this application.

16. Although the available transcript is incomplete, and there is no transcript available covering the latter part of the trial, namely the speeches of counsel, the trial judge's charge and requisitions in relation to the charge, and this is an issue that will dealt with in some detail later in this judgment, it is understood to be uncontroversial that the jury were addressed by defence counsel, and also by the trial judge, on the basis that in considering the evidence they were required to consider the issue of provocation. There is a contention on behalf of the appellant in this appeal that the trial judge's charge on provocation was deficient in certain respects, but it appears to be accepted that the charge addressed the issue at least to some extent.

17. Be that as it may, the jury appear to have rejected the partial defence of provocation, and they found the appellant guilty of the murder of the deceased.

Chronology of events since the appellant's conviction giving rise to the grounds forming the present appeal

18. It should be noted at the outset that the circumstances giving rise to this present appeal are rather unusual. Fifteen years have elapsed between the appellant being convicted and sentenced in the Central Criminal Court and his appeal being heard by this Court. In an affidavit sworn on the 12th of December 2016, for the purposes of adding two further grounds of appeal to the original appeal (to be outlined later in this judgment), the appellant endeavours to explain the lengthy delay in bringing his appeal before this Court.

19. At the time of his conviction the appellant was represented by the Limerick based firm of solicitors, Ted McCarthy & Co, and by both senior and junior counsel. In his said affidavit, the appellant avers that on the date that he was sentenced to life imprisonment, he had a consultation with *"the lady from Ted McCarthy's Solicitor's Office and Junior Counsel"*. He goes onto state that *"I have no doubt but I instructed them on that day that I wished to appeal the conviction."* An undated note of this consultation is exhibited to the affidavit (GH1) in which the attending solicitor noted that *"In cells –said he would appeal + asked how long this would take to come up - MB B.L. 12 mths explained about review in 7 yrs consultation ended".*

20. The appellant further avers that he *"fully believed during the course of the remainder of 2003 that an appeal had been commenced on my behalf"* by Ted McCarthy & Co, Solicitors.

21. At the time of the appellant's conviction there was no automatic entitlement to appeal a conviction in the Central Criminal Court. As a precondition to doing so, the intended appellant required "leave to appeal". The required legal procedure to be gone through in order to enable a person convicted in the Central Criminal Court to appeal their conviction was that the convicted person had to seek such leave to appeal from the trial judge in the first instance within a time specified in the rules of court. If such leave was granted then an appeal could be filed with the Court of Criminal Appeal, but again this had to be done within a time specified by the rules of court. However, if such leave was refused (as it regularly was), an intended appellant was then required to appeal to the Court of Criminal Appeal against the trial judge's refusal of leave to appeal against the conviction. However, a long standing practice had developed whereby the Court of Criminal Appeal was, almost invariably, prepared to treat the hearing of an appeal against the refusal of leave as the hearing of the substantive appeal.

22. In the appellant's case, however, it appears that no leave to appeal was sought from the trial judge in the immediate aftermath of his conviction, and the appeal process was therefore not immediately commenced. The reasons for this are unexplained, although the appellant maintains that he gave an instruction to his then solicitors to commence an appeal on his behalf, and the solicitor's note (GH1) exhibited by him appears to support him in that contention.

23. The appellant also exhibits a letter (GH2) that he personally wrote to the trial judge on the 12th of March 2003, outlining the reasons why he hadn't been afforded a fair trial, referencing in that regard *"the guards telling lies"*, that *"as you know I was in front*

of you last October 11th, that the guards wanted to withdraw statements that was made against me and there you left them up to commit perjury".

24. The appellant goes on to aver that he received no further communications from anybody in Ted McCarthy, Solicitor's, office whilst he was in Limerick prison *"during 2003 and early 2004 and I am certain that this is the case".* The affidavit goes onto aver that the appellant was *"frustrated that I was not hearing anything from Mr. McCarthy's Office in relation to my appeal".* Subsequently, in early 2004 the appellant was transferred to Wheatfield prison, and while there made contact with James McGuill, of McGuill & Co Solicitors. The appellant was visited by a solicitor from McGuill & Co's office on a couple of occasions, and on at least one occasion, i.e., the 5th of February 2004, in respect of which there is a very detailed attendance note, the solicitor was accompanied by Junior Counsel. On that occasion the appellant was certainly informed that he would be required to seek an extension of time to commence his appeal.

25. Seemingly, on the 11th of February the appellant was supplied by McGuill & Co with a draft Notice of Motion, and a draft affidavit to be sworn by him, for the purpose of seeking an extension of time within which he could seek leave to appeal. It is to be inferred from averments in the appellant's affidavit, sworn on the 12th of December 2016, and matters contained in correspondence exhibited with that affidavit, and with a later affidavit sworn on his behalf by Ms Siúna Bartels, Solicitor, that the appellant was not happy with the draft supplied to him. The appellant has deposed that he subsequently telephoned Mr McGuill and told him *"that I wanted a number of matters raised in relation to my trial and in particular certain matters that Mr Justice Carney had said before the jury that had prejudiced my trial".*

26. Notwithstanding this averment, it is noteworthy that the letter written directly to Mr Justice Carney on the 12th of March 2003 makes no complaint about the trial judge having made comments before the jury that had prejudiced the trial.

27. Be that as it may, on the 18th of February 2004, McGuill & Co wrote to the appellant, advising him once again of the need to seek an extension of time in which to seek leave to appeal, and stating *"my firm advice is that the affidavit as drafted is appropriate and should not be amended at this stage. Any criticisms of Judge Carney would be better off being aired in the Court of Criminal Appeal if he (Judge Carney) makes the order extending time. My advice is to proceed with the Notice of Motion and Affidavit, as is".*

28. On the 24th of March 2004, the appellant received a letter (GH3) from McGuill & Co's office, stating that *"this office is no longer prepared to act for you for the following reasons – 1) your refusal since the 11th February 2004 to swear the necessary supporting documentation to progress your appeal 2) your rejection of a consultation with Michael Hennessy, Solicitor in Wheatfield Prison on the 16th March 2004."* In a later letter from McGuill & Co to the appellant, the former stated that *"Ultimately you instructed us not to deal with the appeal"*. The appellant disputes these various assertions. Rather, he avers that *"on the day on which he* [Mr. Hennessy of McGuill & Co] *did visit, I was still having my dinner in the prison. I was told by the prison officer that I had a legal visit but when I tried to go down to the visiting area, I was not allowed".* In any event, the state of play by the end of March 2004 was that none of the documentation necessary to progress the appellant's intended appeal had been completed and filed.

29. The appellant avers that he was transferred back to Limerick prison on the 18th of April 2004, and that following this transfer he wrote to a solicitor in Clonmel, a Mr Eamon Hayes, seeking to instruct him, but received no reply.

30. Then in September 2004 he was transferred to Cork Prison, and was advised by someone there to contact the prominent Cork based solicitor, Frank Buttimer, which he duly did. He avers that he was visited by Mr. Buttimer, and his assistant Mr Emmet Boyle, and that they took instructions from him *"as to why my appeal had not been lodged"*. They advised him of the legal difficulties that that state of affairs presented, and that it would be necessary for him to swear an affidavit and it is claimed that they said that they would be back to him in that regard "within a week or so". The appellant says that he was given to understand that the purpose of the intended affidavit was so that a transcript of the trial could be obtained which in turn would enable grounds of appeal to be drafted. He states that he subsequently received a second visit from Mr Buttimer, but that thereafter a number of weeks passed in which he heard nothing further. He avers that he telephoned Mr Buttimer's office on a number of occasions after that and received assurances that somebody would be up to see him soon. However, he says, this did not occur and that *"even having phoned the office a number of times, I did not receive any further visit"* from Mr. Buttimer's office. A letter exhibited to the affidavit of the appellant's current solicitor, Ms. Siúna Bartels, does indeed confirm that Mr. Buttimer was instructed to act for the appellant. The letter, dated the 30th of October 2014, from Mr. Buttimer's office to Mr. Hennessy in Mr. McGuill's office, *notes "I have been asked to act for* [the appellant] *in relation to an appeal arising from his murder conviction dated 28/03/03".*

31. The appellant avers that, being frustrated with the situation, he then tried to make contact with his original solicitor, Ted McCarthy, but was apparently unsuccessful in doing so. He says that he then contacted his sister *"to see if she would contact John Devane, Solicitor, in Limerick to see if he could try to assist in initiating an appeal on my behalf".* Mr Devane did arrange a consultation with the appellant in prison, at which time the appellant avers that *"Mr Devane led me to believe that he would be able to bring an application to have the transcript released and that this would allow me to progress my appeal"*

32. However, in a letter dated the 26th of January 2007, Mr. Devane notified the appellant that he would not be able to act on his behalf in circumstances where he had become aware of a conflict of interest – he had been in the army with the father of the deceased. In this letter, Mr. Devane recommended that the appellant contact Mr. Robert Eager at Garrett Sheehan & Partners Solicitors. The appellant did so and he and Mr Eager exchanged correspondence between February and May 2007, culminating in a letter from Mr Eager to the appellant, dated the 24th of May 2007, in which Mr Eager noted that *"the first hurdle you must get over is to establish (the onus being on you) as to why you did not appeal within the time allowed by an appeal. It seems to me at this remove that it will be impossible for you to do so. You have taken advice from Frank Buttimer and I do not think that we can be of any further assistance of you in relation to this matter."*

33. According to the appellant, over the next five years or so, he also made contact with numerous other solicitors with a view to progressing his appeal, but to no avail. These included, he says, another Limerick based solicitor, Ms Sarah Ryan and Mr Paul McCann of Madden and Finucane, Solicitors, in Belfast.

34. He further states that at one point he sought the assistance of the Law Society for the purpose of trying to get some solicitor to take on his intended appeal, and he has exhibited a letter from the Law Society to the Clerk of the Visiting Committee at Limerick Prison, dated the 10th of December 2007 (GH8), which perhaps provides some degree of support for that. Although it does not refer specifically to his intended appeal, and refers instead to *"difficulties which Mr Hayes is experiencing in obtaining a legal aid solicitor",* the Law Society's letter advised that, if he had *"an imminent court date or other matter",* he should raise the issue with the court in good time to enable the judge to appoint someone to represent him. Following this advice, the appellant wrote in person to Judge Thomas O'Donnell, at Limerick District Court on the 21st of January 2008. This appears to have been in the context of a then pending Police Property Act application involving the appellant. However, the appellant did say in his letter to Judge O'Donnell that *"I was told*

by the prison staff here that I have to write to Roxboro Gards (sic) and I did on 1-6-06 as I have problem getting representation to come and see me as I am appealing my case and I need a legal aid solicitor to represent me." The appellant enclosed a copy of the Law Society's letter dated 10th December 2007 with his letter to Judge O'Donnell.

35. The appellant asserts that from early 2009 he believed that Madden & Finucane, Solicitors were working on his appeal. However, the appellant says that in April 2011, in circumstances where he had become disillusioned about the commitment of that firm, or any other solicitor or solicitors, to pursue the matter on his behalf, he decided to attempt in person to make the necessary application for an extension of time within which to seek leave to appeal. He wrote to the Registrar of the Central Criminal Court in that respect, and after an exchange of correspondence with the Registrar was facilitated in presenting an application in person to the late Mr Justice Carney seeking late leave to appeal against his conviction.

36. Accordingly, on the 14th of May 2012, the appellant was produced before the Central Criminal Court and made his application in person to the late Mr Justice Carney. On that occasion, the following exchanges took place between the court and the appellant:

> *"REGISTRAR: Director of Public Prosecutions v. Gerard Hayes.*
>
> *JUDGE: Yes. What do you want to say to me?*
>
> *[APPLICANT] I'm looking for a certificate for leave to appeal, your honour.*
>
> *JUDGE: Now, when was your conviction?*
>
> *[APPLICANT] 2003.*
>
> *JUDGE: 2003. Was it before me?*
>
> *[APPLICANT] Yes.*
>
> *JUDGE: Well, why are you looking for a certificate nearly a decade later?*
>
> *[APPLICANT] Because I had a -- I thought my -- I appealed my case straightaway after I had been sentenced and I was sure that there was appeal lodged, and, after that, I had -- I found out that there was no appeal lodged. Then I had difficulties then with other solicitors, trying to get the appeal up and running for me.*
>
> *JUDGE: Who was your solicitor at the time?*
>
> *[APPLICANT] Ted McCarthy from Limerick.*
>
> *JUDGE: Yes. So you're saying no appeal was ever lodged by Mr McCarthy but you thought one was.*
>
> *[APPLICANT] That's right.*
>
> *JUDGE: Now, what are your grounds of appeal?*
>
> *[APPLICANT] I haven't even got my transcripts of the trial.*
>
> *JUDGE: So you intend to pore through the transcript and see what you can find to criticise.*
>
> *[APPLICANT] Yes.*
>
> *JUDGE: Well, I'll refuse your leave to appeal, and that will enable you to appeal against that refusal. Now, you'll get the transcripts then.*
>
> *[APPLICANT] Thanks very much.*
>
> *JUDGE: Very good. Thanks."*

37. According to the appellant's evidence, he subsequently managed in August 2012 to make contact with a Mr A Derek Eckersley Burke, Solicitor, who stated that he was willing to take carriage of his appeal. He met with Mr Burke on a number of occasions and an appeal against the refusal of leave to appeal by Mr Justice Carney was duly filed with the Court of Criminal Appeal. On the 8th of July 2013, a notice detailing seven intended grounds of appeal against the appellant's conviction was filed with the Court of Criminal Appeal on behalf of the appellant (to be outlined later in this judgment).

38. Sometime in 2015, the appellant and Mr Burke had a falling out as a result of which Mr Burke brought a motion before the Court of Criminal Appeal to come off record. This application was acceded to by the Court.

39. At or about this time an issue came to light which was ultimately to become a central issue in this appeal. It appears that by the time proceedings were actually commenced before the Court of Criminal Appeal the stenographic record of the trial in the Central Criminal Court, including relevant audio tapes, had been destroyed and there was no longer any means of producing a certified transcript of that trial. Enquiries had established that an unofficial overnight transcript of the evidence in the case, which had been prepared as the trial progressed for the purpose of assisting the trial judge in preparing a summary of the evidence for inclusion in his charge, had been located on the Central Criminal Court file and was available, but that this only covered the evidence. There was no extant stenographic record, and no transcript whatever, of counsel's speeches, of the judge's charge, of any requisitions raised, or of the delivery of the verdict, all of which occurred on the final day of the trial.

40. On the 2nd of February 2017, the appellant's current solicitor, Ms. Siúna Bartels, swore an affidavit for the purposes of adding two further grounds of appeal on behalf of the appellant. In this affidavit, Ms. Bartels avers that, upon coming on record on behalf of the appellant, her office was furnished with the various documents related to the appeal, including the grounds of appeal dated the 8th of July 2013. It is also averred to by Ms. Bartels that she received *"copies of those parts of the learned trial judge's overnight transcript that were available. I say that I was aware from the outset that parts of this transcript of the trial were missing and could not be found despite every effort being made to do so."*

41. Later in her affidavit, Ms. Bartels elaborates on how *"every effort"* was made to retrieve a complete transcript of the trial. At para 15, she avers that: *"I say and believe that following the lodging of the grounds of appeal by Mr. Burke Solicitor, a copy of the transcript of the Applicant's trial was requested by the Office of the then Court of Criminal Appeal. The transcript was sought from Gwen Malone Stenographers who were the company responsible for creating trial transcripts at the time of the Applicant's trial. However, it transpired that Gwen Malone & Co. was not in a position to create a trial transcript……I say and believe that the transcript was never certified by the late Mr. Justice Carney as the transcript was never requested within the prescribed time following the trial. I say and believe that due to the passage of time, the audio tapes utilized to provide a transcript have been destroyed and it is therefore not now possible to provide an original official transcript of the trial. I say and believe that the original transcript was kept on tape following the trial and the tapes were eventually destroyed".*

42. In her affidavit, Ms. Bartels asserts that, despite the best efforts of everybody concerned, the uncertified overnight transcript that had been located was incomplete and that, in particular, the closing speeches and the judge's charge to the jury were missing. Consequently, a motion was brought on the 2nd of February 2017 to add two further grounds of appeal based on the fact that portions of the transcript were missing.

43. Subsequently, on the 21st of June 2017 and prior to the hearing of that motion, the Chief Prosecution Solicitor's office informed the appellant and his solicitor, Ms Bartels, that it had found some notes that were believed to be contemporaneous notes covering the missing period, made by an unidentified prosecution solicitor who had attended at the trial. These notes are exhibited to an affidavit sworn by Mr. Mark Donnelly, on the 20th of June 2017. Mr Donnelly is a solicitor in the Chief Prosecution Solicitor's Office and his said affidavit was sworn in opposition to the motion brought by the appellant to add two further grounds of appeal with respect to the missing transcripts. Mr. Donnelly was not the solicitor who had attended at the trial and who had made the notes. This Court enquired as to whether or not the author of the notes had been successfully identified at that point, and it was uncertain whether it would be possible at this remove to ascertain the identity of the author of the notes. Counsel indicated that enquiries would continue to be made and that the Court would be updated if the position changed. On the 23rd of June 2017, this Court (Mahon, Edwards and Hedigan JJ) acceded to the application to add the two further grounds of appeal relating to the issue of the missing transcript. Since that date the Chief Prosecution's Office has confirmed that the identity of the author of the note cannot be established.

44. Following sight by his legal team of the prosecution solicitor's contemporaneous notes from the trial in respect of the missing transcripts , the appellant brought a further motion on the 3rd of July 2017 seeking to add yet a further ground of appeal, details of which are set out in the next section of this judgment.

45. This motion has not yet been ruled on by this Court and will be dealt later in this judgment.

Grounds of Appeal

46. The original seven grounds of appeal were as follows:

> (i) Failing to emphasise in his charge the real circumstances of the subjective view that might be held by a wrongdoer that he had been provoked into action beyond his capacity to resist by the actions of the deceased.
>
> (ii) Failing to instruct the jury adequately that the injury to the accused's head (which required six surgical staples to close it), and which was caused by the deceased throwing a heavy pint bottle at him, could be construed as an act of serious provocation taking into account the accused's physical condition. This physical condition was an inebriated condition known to the deceased and who was partially responsible for same
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> (iii) Refusing the application of the State at a pretrial hearing on the 10th March 2003 to withdraw two State witnesses on the grounds that their evidence was unreliable and thereafter enabling that evidence to be adduced before the jury
>
> (iv) Stating to the accused in open court and in the presence of the jury, and just before the accused gave evidence, that he could not correct evidence already given but could only give his version of events otherwise he would be put downstairs in a holding cell.
>
> (v) Failing to appreciate and enable a fair trial in failing to consider the issue of a mixed defence of self-defence and provocation. This was present in the case. This was where the deceased was in a drunken condition and had a seriously dangerous knife in his possession in the bedroom where the incident occurred and that the accused perceived a likelihood that he might be attacked with this knife.
>
> (vi) In conjunction with the above the defendant/appellant says that an unfair or unsatisfactory trial prevailed where the State failed in justice and in their duty to put relevant evidence before the Court to adduce evidence that at the time of the incident the deceased was on bail having been charged two days earlier with having stabbed his brother which matter was known to the accused and where in circumstances he had with him at all times a seriously dangerous knife and which information was also known to the accused.
>
> (vii) Such other matters as become clear on perusing the transcript, but excluding any issue which might arise in respect of trawling the evidence in the transcript. The Counsel now dealing with this matter was not counsel involved in defending the accused in the hearing of the case, and in drafting these grounds relies only on the instructions of the accused.

47. The two additional grounds of appeal permitted with the leave of this Court granted on the 23rd of June 2017, were as follows:

> (viii) The appellant has been denied the right to fairly appeal his conviction from the Central Criminal Court to the Court of Appeal in circumstances where critical parts of the transcript of his trial are not now available
>
> (ix) The appellant cannot advance his appeal or any of his grounds of appeal or challenge the safety of his conviction in circumstances where critical parts of the transcript of his trial are not now available.

48. Finally, as mentioned above, the appellant now seeks leave to rely upon one further ground of appeal, namely:

> (x) The trial judge erred in law and in fact in directing the jury during the course of his charge on the relevant law that a verdict of not guilty was not open to them in this case.

Submissions

49. The Court has received extensive written submissions from both sides, for which it is grateful. Whilst the appellant seeks to rely on a total of ten grounds of appeal against his conviction for murder, it is grounds no. (viii), (ix) and (x) if permitted, which form the kernel of the present appeal. The oral hearing concentrated on grounds no. (viii), (ix) and (x) *de bene esse*. However, the appellant has not abandoned his original seven grounds of appeal and relies upon the written submissions in regard to them.

Summary of the Appellant's Submissions

50. As outlined above, a considerable period of time elapsed between the conviction and sentence of the appellant and the time at which grounds of appeal were filed on his behalf. Consequently, counsel for the appellant submits that this Court is now unable to carry out a proper and precise evaluation of the fairness of the appellant's trial or in evaluating whether the jury were fully and correctly charged in relation to the relevant law touching upon a conviction for murder. In this regard, it is also argued on his behalf that the appellant himself is clearly hampered in the preparation of and the conduct of his appeal. Counsel for the appellant submits that the fact that key parts of the transcript are now missing – particularly the trial judge's charge – means that the appellant has to all intents and purposes lost his constitutionally protected right of appeal. The appellant has been placed in a different situation than other convicted persons who wish to exercise their right of access to the appellate courts as he cannot properly evaluate crucial aspects of the potential unfairness of his trial. In this regard, counsel for the appellant drew this Court's attention to Article 38.1 of Bunreacht na hÉireann, Article 6 of the European Convention on Human Rights ("ECHR") and Article 2 of Protocol 7 of the ECHR, as well as ECHR case-law which states that the right to a fair trial extends to the appeal part of the criminal process - *Belzuik v Poland* (25th of March 1998) and *Ekbatani v Sweden* (26th of May 1988).

51. Counsel for the appellant also submits that no fault ought to be apportioned to the appellant for the present situation. He submits that the appellant at all times since his conviction instructed his various legal teams that he wished to appeal his conviction. It has been further argued that, in any event, this issue should not be approached from a blameworthiness perspective. Rather, the appellant suggests, this Court ought to ask the question as to whether there is a real risk that the appellant cannot have a proper appeal having regard to all of the circumstances that have arisen.

52. Counsel for the appellant submits that an analogy can be drawn between the appellant's current legal situation and cases involving delay and lost evidence. It was submitted that analogous legal principles apply in all of these cases. Counsel for the appellant submits that the absence of a full certified transcript of the trial creates a serious real or presumptive risk of an unfair appeal.

53. In both his written and oral arguments, counsel for the appellant seeks to make the criticism that there appear to be no rules or guidelines in relation to the preservation of papers in criminal cases. In terms of the appellant's case, it is submitted that what he alleges was the premature destruction of the stenographic and/or audio records (notwithstanding that no appeal was in being, and years had elapsed since the trial, at the time) causes a grave injustice to the appellant. It appears from a letter dated the 22nd of February 2016 written on behalf of the independent company who provided the stenographic service, that it has a policy of destroying files and audio recordings in all cases after a period of 7 years. The appellant suggests that *"it appears that no examination is made as to whether the persons the subject matter of the files and recordings remain in custody, have an appeal pending or possibly that they might be considering proceedings under S.2 of the Criminal Procedure Act 1993".* It bears commenting upon, however, that there is no affidavit or correspondence from anybody with the stenographic service concerned speaking to the issue of whether checks or enquiries are conducted prior to the destruction of records, and so what counsel has suggested must be treated as mere assertion unsupported by evidence.

54. Counsel for the appellant also points to the situation in England, where there have apparently been calls that no recordings of criminal court proceedings should be destroyed until at least seven years after the end of a convicted person's prison term and any post-release licence period imposed. There have also, according to counsel for the appellant, been calls for the indefinite preservation of a record of the trial judge's charge and summing up.

55. It was submitted that the unavailability of a complete recording of the trial in any case should in itself constitute a ground of appeal. In circumstances where the safety of the conviction can only be tested by reference to the recording of the trial, then the loss of such material per se should, it was submitted, constitute an independent ground of appeal.

56. In summary, counsel for the appellant has submitted that this Court cannot properly adjudicate upon the fairness of the appellant's conviction for murder in the absence of the complete official certified transcript. Moreover, it has been argued that this Court should not second guess the content of the full judge's charge which *"touched upon issues of great complexity"* regarding the appellant's defence to the allegation of murder. It is said that this Court is irremediably hampered due to the premature destruction of the official record of the trial and that therefore it cannot now be satisfied that the verdict of the jury was not tainted by matters that occurred during the course of the trial but which cannot now be examined or scrutinised by reason of what has occurred.

57. It was further submitted that should this Court decide that the appeal can be dealt with by some other means in the absence of the complete certified transcript, the Court should give directions as to how it proposes to deal with the appeal to allow the appellant properly prepare his appeal in such circumstances.

58. It is suggested on behalf of the appellant that the fundamental question that faces this Court is whether the appellant can now have a full, proper and fair appeal. The appellant submits that the answer to that question is "No". The appellant has been convicted of murder and he disputes that conviction. He is serving a life sentence. He has a right to appeal, which right has been diluted to such a degree that, in all reality, he is being deprived of his right to appeal. It was submitted that this Court should use its inherent jurisdiction and its jurisdiction under the Criminal Procedure Act 1993 to quash the conviction and if appropriate to order a re-trial or make whatever other order that the Court might deem fit.

59. The appellant further relies on his counsel's written submissions in respect of the original seven grounds of appeal.

60. In relation to ground of appeal no (i), it was submitted that the trial judge did not adequately emphasise the real circumstances of the subjective view that the appellant held at the time that provoked him into killing the deceased, particularly having regard to the appellant's state of mind. Counsel for the appellant submits that, if the judge's charge did not emphasise properly all of the relevant legal principles on provocation, then this Court should quash the conviction. However, in the absence of the certified copy of the transcript of the trial judge's charge, counsel for the appellant submits that it is not possible for this Court to decide upon this issue, and that the only safe thing to do in the circumstances is to quash the conviction.

61. In relation to ground of appeal no (ii), it is submitted that the jury in this case were not adequately instructed on the full circumstances of the situation that led the appellant to act in the way that he did. Again, counsel for the appellant argues that if the jury were not adequately instructed in this regard, this Court should quash the conviction. However, in the absence of the certified

copy of the transcript of the trial judge's charge, they submit that it is not possible for this Court to decide upon the issue. It is suggested that in the circumstances his conviction for murder should be quashed.

62. Ground of appeal no (iii) relates to a refusal by the trial judge to accede to a pre-trial application on the 10th of March 2003 to withdraw two state witnesses on grounds of unreliability. It is submitted that the appellant's case was undermined by reason of the decision made by the trial judge on this application. Again, counsel for the appellant submits that as the certified transcript of this application is not available it is therefore not possible for this Court to decide whether this adversely effected the fairness of the appellant's trial. It is suggested that in the circumstances his conviction for murder should be quashed.

63. Ground of appeal no (iv) relates to an interaction between the trial judge and the appellant prior to him giving evidence. In the uncertified partial transcript that is available, it can be gleaned that the following exchanges took place just after the appellant had taken the oath:

> COUNSEL: Q. Mr. Hayes, would you sit down and make yourself as comfortable as you can in that chair. Do you see the black object on a stalk sticking out in front of you? That is the microphone that will be picking your voice up. Do you see it? Coming out from the woodwork there. That is flexible. Can you ensure that it is near to your mouth so that it picks up your voice properly? Thank you.
>
> A. My Lord, there is two members of the family gave evidence during the week …(INTERJECTION)
>
> JUDGE: No, you are here to answer questions put to you by your Counsel and following that to answer questions put to you in cross-examination by Mr. Clarke. You are not here to go off on your own.

64. The appellant contends that the full interaction between himself and the trial judge is not contained in the uncertified overnight transcript. Counsel for the appellant, who did not represent him at the trial, has instructions from the appellant in this appeal that he sought to raise issues in relation to the evidence tendered by two witnesses. He believed an unfairness had been perpetrated upon him during the course of the evidence heard at the trial. Counsel for the appellant submits that the appellant believes that the reaction of the trial judge was unfair. In particular, the appellant claims that the trial judge threatened to put him in the holding cells in open court before the jury. This the appellant believes was prejudicial to his case and also prejudicial to how the jury may have viewed the appellant himself and his evidence. Although it is conceded that it appears that no application was made to have the jury discharged on foot of this alleged interaction, counsel for the appellant submits that it is impossible to know what exactly was said or whether such an application might have been made and might have been successful. Counsel for the appellant thus submits that this interaction may therefore have led to an unfair trial, something we cannot know for certain in the absence of the certified transcript.

65. Ground of appeal no (v) relates to the allegation that the trial judge failed to allow a mixed defence of provocation and self-defence go to the jury. Counsel for the appellant submits that the defence of self-defence should also have been allowed go to the jury in circumstances where prior to his trial, the appellant instructed his legal team that at the time when the bottle was thrown at him, he knew that the deceased had a knife in his possession. He also knew that the deceased had previously stabbed his brother some days prior to the date of the incident.

66. In advancing this argument, counsel for the appellant points to various segments of evidence proffered at the trial. On Day two of the trial, the appellant's memorandum of interview was read out to the jury. The following extract in particular is highlighted in the appellant's written submissions as being of significance:

> *"He had the knife when we came in. By that I mean when we came in after drinking outside and came into the room. He had it down the back of his pants. He took the knife from his pants and left it on the floor when he sat down. I could see the knife shining on the ground. I tell you now to be quite honest with you I made for the knife because I thought he was going to go for the knife. That's why I jumped out of bed and got the knife. …"*

67. The appellant himself gave evidence and during his evidence in chief before the jury there was the following exchange :-

> *"Q: Sorry, I cut across you there. Did you want to say anything else about bottles?*
>
> *A: So, then when I was lying down I had my eyes closed and it must have been two to three minutes afterwards, he threw the bottle, the bottle hit the side of my head. I liked over and I put my hand, the blood was coming down my face, and I could see the knife, and I just went up, I seen his hands moving around on the ground, I don't know whether he was trying to get up or whether he was trying to get up or whether he was trying to go for the knife. I made a go for the knife, and I cannot remember stabbing him."*

68. During the cross-examination of the appellant by prosecution counsel, the following further exchanges occurred:-

"Q: Then suddenly you looked up, is it?

A: I put my hand up to my head and I looked over and he was moving his hands on the ground. I don't whether he was going to trying to get up or not, and I saw, all I can remember is going for the knife and I cannot remember stabbing him."

69. Prior to charging the jury, the following interaction occurred between the trial judge and defence counsel:-

> *"COUNSEL: ….. …… "Thereafter, My Lord, the case within terms of the evidence that the accused brings to bear is a situation of amnesia, arising, but in terms of what the Prosecution bring to the case there is the evidence of Dr …., the State Pathologist, and what Dr. Cassidy found is very gruesome in terms of its, the sheer weight of her evidence as to the number of injuries inflicted, and to some extent, my Lord, I seek to rely on that on an inferential basis, that it is capable of interpretation in various ways, but within terms of the low threshold that is referred to in the Davis Judgment, I would submit that it is capable of being interpreted as evidencing a phonetic and….. (INTERJECTION)*
>
> *JUDGE: All right, Mr. Sammon, ever since the Judgement of the Court of Criminal Appeal in the case of Milan, [?? we would speculate that this might be a reference to The People (DPP) v Mullane, unreported, Court of Criminal Appeal, 11th March 1997] I require a very low threshold. Now, I take it self-defence does not arise in this case?*
>
> *COUNSEL: No, my Lord, there is a suggestion in the accused's evidence that he saw the deceased make a movement and pre-emptively he moved to get the knife, but … (INTERJECTION)*

JUDGE: Well, you are not contending …

COUNSEL: I am not contending for it."

(Commentary in square brackets by this Court).

70. Counsel for the appellant submits that the interjection of the trial judge twice in the above exchange suggests that a portion of the interaction between the trial judge and counsel, as well as certain submissions of counsel, may not be included in the transcript. It is submitted on his behalf that there may have been more discussions in relation to a possible avenue of self-defence but it may well be that these parts of the transcript are not now available, and that, in the absence of the certified transcript, it is not possible to properly scrutinise the application made by counsel for the appellant to the trial judge in relation to a possible defence of self-defence.

71. In advancing the proposition that counsel for the appellant at trial may have pushed the defence of self-defence, this Court's attention was drawn to the evidence of the appellant, both at trial and to the Gardaí – that the appellant saw that the deceased had a knife and he was aware that the deceased was capable of using a knife on him. In the absence of the certified transcript, counsel for the appellant in this appeal submits that it is not now possible to know how or whether the trial judge dealt with any of these issues in his charge to the jury. These are, it is suggested, critical parts of the trial, going to the heart of the appellant's defence and a possible defence of self-defence.

72. Ground of appeal no (vi) is related to an assertion made by the appellant that he received an unfair trial in circumstances where the prosecution failed to put all relevant evidence before the Court – namely the fact that the deceased was apparently out on bail at the time of the incident, having been charged two days earlier with stabbing his brother. Despite the fact that this was denied by both of the deceased's parents in cross-examination, counsel for the appellant submits that the deceased had in fact stabbed his brother some weeks prior to the incident and the Gardaí Síochána were aware of this. It was argued on the appellant's behalf that it was unfair that the jury were not fully aware of this fact and that they were allowed to consider their verdict without this fact being properly imparted to them, in circumstances where it was possibly a very relevant factor for the jury in the trial.

73. Ground of appeal no (vii) relates to any other matters that may arise regarding the potential unfairness of the appellant's trial upon perusing the transcript of the trial. It does not appear that any such matters arise, save in respect of the proposed ground of appeal no (x) that the appellant now seeks leave to argue. This is not based on a perusal of the partial transcript, but rather on a perusal of the contemporaneous note of the judge's charge taken by the unidentified solicitor from the Chief Prosecution Solicitor's office.

74. Counsel for the appellant conceded that it has been the practice of this Court and its predecessor to deprecate the practice of a new legal team poring over the transcripts (or, it follows, any other record) of a trial with a view to formulating grounds of appeal based on points that were not raised at the trial. However, he also points to various authorities where appellate courts have been willing to permit an appellant to raise grounds of appeal which were not specifically raised at the trial, or in an original notice of appeal - *People (Director of Public Prosecutions) v Moloney* (Unrep, Court of Criminal Appeal, 2nd March 1992); *People (Director of Public Prosecutions) v Sweetman* (Unrep, Court of Criminal Appeal, 23 October 2000). Further, this Court's attention was drawn to the decision of *People (Director of Public Prosecutions) v Noonan* (1998) 2 I.R. 439, where the court allowed the accused to argue that the trial judge had erred in his direction to the jury on the defence of provocation, even though his legal team had not raised the matter with the trial judge by way of requisition.

75. It is appropriate to refer in more detail at this point to the proposed ground of appeal no (x) that the appellant wishes to advance. The portion of the solicitor's notes relevant to this is as follows:

"- majority verdicts – out of mind – must be unanimous

- 1 guilty of murder 1 n g of murder but guilty of manslaughter

- must be unanimous for murder or manslaughter.

- verdict of not guilty is not open to you – there is an admission of unlawful killing –can not??(difficult to decipher) be less than manslaughter."

76. Counsel for the appellant submits that it is clear from the above excerpt that the trial judge, in his charge to the jury, directed the jury that a verdict of not guilty was not open to them. This Court's attention was drawn to the decisions *in The People (Director of Public Prosecutions) v Mark Davis* [1993] 2 I.R 1 and *The People (Director of Public Prosecutions) v Padraig Nally* [2007] 4 I.R 145 as authorities for the proposition that, whilst it is open to a trial judge to express an opinion that a verdict of guilty is the only one which would be reasonable and proper on the evidence, he or she could not direct the jury to return such a verdict. Counsel for the appellant thus submits that the solicitor's notes of the judge's charge indicate that the trial judge erred in law, and that the interests of justice require that his client should be allowed rely on proposed ground of appeal no (x).

Summary of the Respondent's Submissions

77. In response to the issues arising from the absence of a certified transcript of the trial, namely grounds of appeal (viii) and (ix), counsel for the respondent submits that the overnight transcripts together with the solicitor's notes provide a sufficient record to enable the Court to determine the appeal fairly. The overnight transcripts include all of the evidence which was given at the trial before the jury, and all rulings up to the close of evidence in the case, as well as the submissions made by counsel in advance of the judge's charge in relation to provocation, and the trial judge's ruling that he would allow provocation go to the jury. The respondent points out that the only omissions from the transcript are the closing speeches and the trial judge's charge to the jury. Whilst conceding that Article 38 of the Constitution guarantees the right of a defendant to a fair trial, and that this guarantee extends to any appeal, counsel for the respondent points out that the appellant has no authority for the proposition that an appeal should automatically be allowed in circumstances where there are transcripts missing.

78. In that regard s.33 of the Courts of Justice Act 1924, as substituted by s.7 of the Criminal Justice (Miscellaneous Provisions) Act 1997, provides in subsection (1) thereof that any application for leave to appeal, or the appeal itself, shall be *heard "on a record of the proceedings at the trial and on a transcript thereof verified by the trial judge before whom the case was tried."* However, subsection (2) of s.33 goes on to provide *"Where the court is of opinion that either the record or the transcript thereof is defective in any material particular, it may determine the appeal in such manner as it considers, in all the circumstances, appropriate".*

79. Counsel for the respondent draws an analogy between the current situation in the present case and situations where there is a failure by Gardaí to seek out and preserve evidence. In citing the case of *Savage v DPP* [2009] 1 IR 185, where Denham J (at. pp. 203-204) distilled all of the relevant principles, the respondent argues that the appellant has failed to point to any particular prejudice resulting from the absence of a complete transcript which renders the current appeal process unfair. There are overnight transcripts of the evidence and there is a note of the charge. There is nothing to suggest that either is inaccurate.

80. Counsel for the respondent also highlights the fact that it was some nine years before the appellant took any actual procedural step to commence the current appeal proceedings. Although convicted in 2003, he did not apply to Mr Justice Carney for leave to appeal until a date in 2012.

81. In relation to grounds 1 and 2 and the purported failure of the trial judge to emphasise the subjective nature of the test for provocation under Irish criminal law, counsel for the respondent submits that the solicitor's notes on the judge's charge clearly indicate that the trial judge emphasised the subjective nature of the test. The relevant excerpt from the solicitors notes reads as follows:

> *"-Defence raised the issue of provocation.*
>
> *- Provocation you could find manslaughter-*
>
> *-where words or conduct of dec'd have caused acc'd…loss of self-control that he is not the master of his actions.*
>
> *- …feature is that …matter not for reasonable man but from what acc'd would do*
>
> *-don't look @ how reasonable man would behave*
>
> *- look @ how acc'd would behave…*
>
> *'total loss of control'*
>
> *'burden of proof rests on the prosecution'".*

82. Counsel for the respondent highlights that the solicitor's notes goes on to make reference to a decision of Barrington J, and suggests that this appears to be a reference to the case of *The People (Director of Public Prosecutions) v Kelly* [2000] 2 IR 1.

83. Counsel for the respondent also points out that there does not appear to have been any requisition by counsel for the appellant.

84. The point is also made that these (late) complaints of the appellant must all be seen in the context of the appellant's own testimony to the jury at trial that he could not say whether or not he had lost his temper. During his cross-examination, the following exchanges took place:

> *"Q. Well, your expressed instructions to your Counsel were that you did not say to any of the Garda that you lost your temper, isn't that right?*
>
> *A. That is right.*
>
> *Q. So, do we take it from that that you are not – you didn't lose your temper?*
>
> *A. I don't know.*
>
> *Q. You don't know?*
>
> *A. I don't know.*
>
> *Q. You are not in a position to say one way or the other*
>
> *whether you lost your temper or not?*
>
> *A. I don't know.*
>
> *Q. You cannot say one way or the other?*
>
> *A. I cannot say."*

85. Counsel for the respondent, while accepting that provocation was allowed to go to the jury in circumstances where the threshold for doing so was low, maintains that the evidence in support of possible provocation was thin at best; as indeed, he contends, the extract just quoted illustrates; and he submits that it is entirely unsurprising in the circumstances that the jury in fact rejected the partial defence of provocation.

86. In relation to ground no. (iii), counsel for the respondent argues that it is unclear how the prosecution's failure to succeed in a pre-trial motion to permit them not to call witnesses in the book of evidence could render a subsequent guilty verdict unsafe. Had the appellant not wished the witnesses to be called then no motion would have been required. It follows from the fact that the application proceeded that it must have been in the teeth of an objection by the appellant. It was submitted that in circumstances where the appellant was successful in resisting the prosecution's application, it is untenable to suggest that the outcome of the pre-trial motion could have adversely impacted on the fairness of his trial.

87. In relation to ground no. (iv),and the comment made by the trial judge at the outset of appellant's evidence, the respondent submits that this issue was not raised by the appellant when he wrote directly to the trial judge on the 12th of March 2003. Further, these comments did not precipitate an application from the defence to discharge the jury. Moreover, and in any event, they would not have justified a discharge of the jury.

88. In relation to ground no (v), it was reiterated that provocation was allowed to go to the jury, notwithstanding that the evidence

in support of it was thin, at best. Moreover, in relation to the suggestion that the trial judge would not allow self-defence, or a mixed defence of self-defence and provocation, to go to the jury, counsel for the respondent points to the exchange quoted earlier at paragraph 69 of this judgment, in which Senior Counsel for the defence, when asked by the trial judge whether the defence were seeking to rely on self-defence, replied *"I am not contending for it".*

89. Moreover, counsel for the respondent submits, there was in any event no evidential support for a defence of self-defence, as the appellant had initially told gardaí that *"I got a belt of a bottle in the head from him and I threw the bottle back at him"*, only to later tell the Gardaí that *"I didn't throw the bottle after I got hit in the head. I hadn't a knife. It was John Robinson's knife. The knife was down beside him. I went over and picked it up. Then I stabbed him with it a few times."*

90. In relation to ground of appeal no (vi), namely that the prosecution failed to lead evidence that the deceased was on bail having been charged two days earlier with stabbing his brother and that he had had with him at all times a seriously dangerous knife, counsel for the respondent submits that these assertions were put before the jury by the appellant in the course of his own evidence, and that the defence was free to call any witness of fact they wished in an effort to prove those assertions, providing that they could establish its relevance. Counsel for the respondent also drew this Court's attention to the well-known English Court of Appeal decision of *R. v. Olivia* [1965] 1 W.L.R. 1028, [1965] 49 Cr. App. R. 298 (which was cited with approval by the Supreme Court in *O'Regan v DPP* [2000] 2 I.L.R.M. 68) as authority for the proposition that there was no obligation on the prosecution to call evidence in relation to the previous stabbing. Counsel for the respondent submits that there was no complaint at trial that the prosecution did not call a witness in relation to this. Accordingly, counsel for the respondent submits, this ground of appeal should be rejected.

91. Counsel for the respondent makes no submission concerning ground of appeal no (vii).

92. The respondent's submissions in respect of grounds of appeal no's (viii) and (ix) have already been outlined above.

93. Finally, in respect of proposed ground of appeal no (x), counsel for the respondent correctly submits that the motion seeking leave to argue this has not yet been determined and that the appellant's submissions in support of his motion seek to argue the substantive point rather than addressing the issue as to why the appellant should be allowed to rely on this ground at this remove.

94. In terms of the motion, counsel for the respondent places emphasis on the fact that no complaint in the terms of proposed ground of appeal no (x) was made at the time of trial by way of requisition. Further, it was not mentioned at the time of the post-conviction consultation. It was also not mentioned in the appellant's personal letter to Mr Justice Carney, nor was any complaint made about it when the initial grounds of appeal were lodged on the 8th of July 2013. This issue was only raised for the first time in June 2017 when the notes of unidentified solicitor in relation to the trial judge's charge were exhibited to Mr. Donnelly's affidavit. Counsel for the respondent submits that the application to add this additional ground is the result of a trawl by a new legal team through such records as exist in respect of the appellant's trial in a manner deprecated time and again by appellate courts. In that regard the respondent relies upon the decisions in *The People (Director of Public Prosecutions) v. Cronin (No.2)* [2006] 4 I.R. 329 at 346, and in *The People (Director of Public Prosecutions) v. Foley* [2007] 2 I.R. 486 at 491.

95. In the Cronin (No 2) case, Kearns J, in the course of giving judgment in the Supreme Court, stated (at 346):

> *"46 It seems to me that some error or oversight of substance, sufficient to ground an apprehension that a real injustice has occurred, must be demonstrated before the court should allow a point not taken at trial to be argued on appeal. There must in addition be some sort of explanation tendered to explain why the particular point was not taken. Furthermore, as noted above, the Court of Criminal Appeal is concerned only with a review of the trial and the rulings made therein, and not with other suggested errors or oversights which may pre-date the trial or have been amenable to remedy in some other manner.*
>
> *47 Without some such limitations, cases will continue to occur where a trawl of a judge's charge years after the event will be made to see if a point can be found which might have been argued or been the subject matter of a requisition at the end of the judge's charge at the original trial, even though competent lawyers at the trial itself did not see fit to do so. It is an entirely artificial approach to a review of a trial and one totally disconnected from the reality of the trial itself. For these reasons and for the reasons offered by Hardiman J. when this case was in the Court of Criminal Appeal, this court should abhor the practice and strongly discourage it."*

96. In the *Foley* case, McCracken J, giving judgment for the Court of Criminal Appeal, which was also faced with a motion seeking leave to add a late ground of appeal, stated (at 491):

> *"9. The accused has also brought a motion to adduce additional grounds of appeal relating to the trial judge's charge to the jury in relation to the problems with identification evidence. No requisition was raised at the end of the charge in relation to these matters, nor were they referred to in the original notice of appeal. The notice of motion seeking to add these grounds is dated the 25th April, 2006, less than two weeks before the hearing of this appeal. The court fully accepts that failure to raise a requisition does not automatically prevent the court from considering a ground of appeal, but when this failure is combined with a failure to include the point in the original notice of appeal, the court must look with disfavour on the application to amend the grounds of appeal. If the court considers that the refusal of an amendment would result in a miscarriage of justice, then of course the amendment must be allowed. In the present case if the trial judge had given no warning whatever to the jury in relation to identification evidence, then clearly this court would have to consider the matter. However, the trial judge told the jury he was making an issue of identification and in the view of the court gave the jury a perfectly adequate general warning as to the dangers of relying on identification evidence.*
>
> *10. The court feels that no injustice will be done to the applicant if leave to amend the grounds of appeal is refused, and, in the light of the failure to requisition and the lateness of the application to amend the court refuses leave to amend the grounds of appeal."*

97. Further, and without prejudice to these arguments, counsel for the respondent submits that were this ground of appeal to be allowed it would be likely to fail on its merits in any event. In advancing this claim, counsel for the respondent contends that the present case can be readily distinguished from the Davis and Nally cases on which the appellant places reliance.

98. In *Davis*, the appellant was convicted by a jury of murder. He had been arraigned at the commencement of the trial and had pleaded not guilty to murder but guilty to manslaughter. The case was defended, *inter alia*, on the basis that there was inadequate evidence to establish an intention to kill or cause serious injury in circumstances where the accused had been seriously intoxicated

with alcohol at the material time, and it was urged upon the jury that they should have a doubt in that regard. In his charge to the jury, the trial judge directed them that the prosecution had established beyond a reasonable doubt that alcohol had not prevented the accused from forming the intention to cause serious injury, and that they must therefore return a verdict of murder. The trial judge concluded his charge by asking the foreman to sign the issue paper there and then, but following intervention from counsel, the jury were permitted to retire. The jury returned to ask if the verdict had to be unanimous, and the trial judge told them that they must all agree to follow his direction to find the accused guilty of murder. The jury then returned that verdict. The guilty verdict was subsequently quashed by the Supreme Court who held that the trial judge could not so trespass on the jury's function.

99. It was submitted that unlike in *Davis* the trial judge in the present case did not direct the jury to bring in any particular verdict. He merely outlined verdicts that were potentially open to them having regard to the run of the case.

100. In the *Nally* case, also relied upon by the appellant, the defence were relying on self-defence in both its forms, namely justified self-defence which if accepted by the jury would have entitled the accused to an acquittal, and in the alternative excessive self-defence which would have the effect of entitling the accused to be found not-guilty of murder but guilty of manslaughter. Unlike the limited defence of provocation, which can only be advanced with the leave of the trial judge, a defence of self-defence, in either or both of its forms, does not require any leave from the trial judge to be advanced. Notwithstanding that this was long understood to be so, counsel for the prosecution invited the trial judge to rule and direct that the defence of self-defence should only be allowed to go to the jury in a truncated form in the circumstances of that case, shorn of any possibility that the jury might acquit altogether, on the basis that the amount of force used by the applicant was so excessive as to destroy any notion that it was objectively reasonable. In such circumstances it would only be open to the jury to convict of either murder or manslaughter. The trial judge acceded to this invitation and directed the jury to consider only excessive self-defence. The jury returned a verdict of manslaughter. The conviction was subsequently quashed on the basis, *inter alia*, that the constitutional right to trial by a jury had, as a fundamental and absolutely essential characteristic, the right of the jury to deliver a verdict. Further, while there was a right and duty vested in a trial judge at any stage of a criminal case to withdraw the case from the jury and direct them to enter a verdict of not guilty, there was no corresponding right or duty on the part of a trial judge to direct a jury to enter a verdict of guilty.

101. The respondent again contends that the *Nally* case is readily distinguishable from the present case. He has submitted that in the present case the trial judge did not prevent the jury from considering a defence that it was legitimately open to them to consider, nor did he limit their choice of verdicts so as to effectively do so. Self-defence was not being contended for in the present case. Counsel for the appellant had expressly said so. The case was being defended solely on the basis that the appellant was provoked. No other line of defence was being run. The fact that the appellant had committed an unlawful killing was not disputed. He had stated in evidence that although he could not remember stabbing the deceased he accepted that he had done so. It was not being contended that the prosecution had failed to prove beyond reasonable doubt that the accused, in stabbing the deceased, had intended to kill or cause serious injury or that the presumption that he had intended the natural and probable consequences of his actions had not been rebutted. The jury were, however, being asked to consider whether the appellant had acted on foot of provocation and, if so satisfied, whether he had been so provoked as to totally lose his self-control, in which case they would be entitled to bring in a verdict of manslaughter rather than one of murder. Therefore, on the run of the case there were only two verdicts potentially open to the jury, namely guilty of murder or not-guilty of murder but guilty of manslaughter. The trial judge had done nothing more than merely outline the verdicts that were potentially open to them having regard to the run of the case.

Discussion and Decision

The Motion

102. It is convenient to deal in the first instance with the motion seeking to add the proposed ground of appeal no (x). We are satisfied that there is every reason to believe that the attempt to add this ground of appeal, which was not raised at trial notwithstanding that the appellant was represented by a highly experienced legal team, all of whom were criminal law specialists, is the result of the type of transcript, or trial record, trawling process that the appellate courts in this jurisdiction have repeatedly deprecated, in *The People (Director of Public Prosecutions) v. Cronin (No.2)* and numerous subsequent cases, and most recently by this Court in T*he People (Director of Public Prosecutions) v. Seamus Murphy* (neutral citation not yet assigned, unreported, Court of Appeal, Birmingham P, 20th June 2018) where we said:

> *"The Court would draw attention to Grounds 1B and 5, which, while not pressed, do not seem to have ever been grounded in the reality of the trial, but would seem to have been formulated by people coming to the transcript late in the day engaging in a trawl. This is not a practice that is to be encouraged."*

103. However, if the interests of justice required it, this Court could, and indeed would, permit a ground not argued at the trial to be advanced notwithstanding that it was not previously argued.

104. We do not wish to be taken as expressing any definitive view on the argument that the trial judge in this case was in error in charging the jury that a verdict of not-guilty was not open to them. It is not necessary for us to do so in circumstances where we are satisfied that we ought not to permit reliance on the proposed additional ground of appeal no (x). However, with reference to the question as to where the interests of justice lie, we do wish to say this. Even if it would have been technically still possible for the jury to return a verdict of not-guilty *simpliciter* in circumstances where, notwithstanding that the appellant had admitted to stabbing the deceased in his own evidence before the jury, he had not actually pleaded guilty to manslaughter at any stage, either upon initial arraignment, or upon a re-arraignment (if any), it would be fanciful and divorced from reality to suggest that a verdict of not guilty, if such were to be returned, would not be perverse having regard to the evidence that was before this jury.

105. A verdict of non-guilty might arguably have been theoretically open, but it was not a realistic, viable or remotely likely outcome in this case. While the Nally case does establish that the constitutional right to trial by jury embraces the right to have the jury deliver its verdict, we do not believe that in the circumstances of this case the trial judge's ruling would have enured to the prejudice of the appellant's constitutional right to trial by jury in any realistic or meaningful way. We are completely satisfied that even if the trial judge's instruction was found to have been technically incorrect, it was an instruction that would not have given rise to any injustice in the circumstances of this case. Accordingly, the justice of the case does not seem to us to require that the proposed ground should be permitted to be argued.

106. We therefore refuse leave to add the proposed ground of appeal no (x).

Grounds of Appeal No's (viii) and (ix)

107. Moving then to grounds of appeal no's (viii) and (ix), which have been described as the kernel or core of this appeal. It is

regrettable that through a combination of circumstances a full transcript is not available of the appellant's trial. While this may not be something for which the appellant is directly responsible, he does bear a degree of indirect responsibility for it. He was grossly late in commencing his appeal proceedings. It is appreciated that he is inclined to attribute this to multiple factors, including alleged failures to progress matters expeditiously, or in some cases at all, on the part of a whole succession of solicitors who acted for him. However, the Court is conscious that, for the most part, it only has one side of the story (or the various stories) in that regard. The fact remains, however, that even if it is accepted, and we think we must accept it having regard to the note of the post sentencing consultation between the appellant and his then legal team, that the appellant formed the intention to appeal at an early stage, and that he has persistently asserted a continuing intention in that regard, he could in our view have done more to ensure that the matter was progressed, including if necessary taking action himself as he ultimately did but much too late in the day.

108. The appellant was aware, certainly from early 2004, that he was out of time to seek leave to appeal, and that if he wanted to appeal it was necessary to apply to the trial judge for an extension of time within which to seek leave to appeal, and (assuming such extension was granted, as was likely) to then seek actual leave to appeal, if only to obtain a refusal in that regard which would then permit an appeal against the refusal to be made to the Court of Criminal Appeal. The appellant was sent the necessary draft paperwork to approve but for his own reasons he did not approve it. The point, however, is that he knew at that juncture what needed to be done. He knew that this was a precondition to being able to appeal that had to be satisfied. Despite this, he did not ensure that this step at least was taken, whatever about obtaining transcripts, and formulating formal grounds of appeal all of which could be done later on. However, without satisfying the necessary preconditions for an appeal the matter could not be progressed in any way. Regardless of whether or not the appellant was well served by the various solicitor's firms that acted for him over the nine-year period with which we are concerned, and we express no view on that, we are satisfied that the appellant knew what was required to be done from an early stage, and was himself dilatory and at least contributed to the delay.

109. We consider that it may well be desirable, as counsel for the appellant suggests, that the responsible authorities should put a protocol in place for the future with respect to preservation of transcripts, or primary recordings from which transcripts may be produced. However, the fact of the matter is that up until now there has been no such protocol in this jurisdiction, and the absence thereof has in practice rarely given rise to insurmountable problems.

110. Nowadays all criminal trials on indictment are digitally audio recorded, and courtrooms in which trials are heard have both a primary digital audio recording system and a back-up ambient digital audio recording system. This system is owned and operated by The Courts' Service. Should a transcript of all or part of the trial record be required subsequently, it can be transcribed from either the primary or backup audio recording for so long as those are preserved. This Court assumes, although it does not know it for certain, that in circumstances where such recordings are now digital they can be maintained indefinitely with relative ease.

111. However, prior to the advent of digital audio recording, the proceedings in criminal trials on indictment were recorded by stenographers, who were independent contractors employed in earlier years by the Department of Justice, and in later years by The Courts' Service, who attended each trial and made a contemporary record of the proceedings, either by means of a shorthand note taken manually by the stenographer, or with the use of a "stenotype" machine which produced either a printed or punched paper record consisting of a series of phonetic symbols that were capable of being later deciphered into text. In addition, stenographers frequently set up their own audio tape recording equipment for the purpose of audio recording the proceedings so that such a recording would be available to them as an aid to deciphering the primary shorthand note, or stenotype machine printout, should that be required e.g., for unusual or unfamiliar place-names, during later transcription. Accordingly, under this old system there were physical records consisting of the stenographer's shorthand notebooks or stenotype printouts, and sometimes accompanying audio tapes, that required to be preserved.

112. The pre-digital audio recording system was the one that was in operation at the time of this appellant's trial.

113. It has never been the case that a certified copy of the transcript of a criminal trial is automatically produced. In some courts (principally the Central Criminal Court and the Special Criminal Court) an informal and uncertified overnight transcript of the evidence is made available to the trial judge, to assist in the preparation of his/her/their summary of the evidence for inclusion in the charge, but in many courts (e.g., the Circuit Court where the majority of trials take place) there is none. In general, the preparation of a certified transcript has to be requested in connection with an intended appeal, and the triggering event that allows it to be done was/is the filing of an appeal (either against a refusal to grant leave to appeal (under the old system), or an actual appeal under both the old and new systems).

114. In this case the triggering event to give rise to the requesting of a transcript did not take place until more than nine years after the trial had concluded, a lapse of time which is almost unheard of in the case of an initial appeal against a conviction on indictment. The company providing the independent stenographic service that attended, and made a record of the proceedings, at the appellant's trial seemingly preserved their records for seven years after they were created. Not having received any request for a transcript within that time, and in the absence of any reason to believe that they might be required in the future, they reasonably destroyed their records. It seems to this Court that they are not to be criticised for having done so. If an appeal had been filed by or on behalf of the appellant within seven years of the trial, which it seems to us was a more than reasonable time within which to expect that that would be done, the records would almost certainly still be extant. An appeal was not, however, filed within that period.

115. The upshot of all of this is that this Court now has an incomplete and somewhat imperfect record of the proceedings at the appellant's trial. However, the Oireachtas has catered for such a situation in s.33(2) of the Courts of Justice Act 1924, as substituted by s.7 of the Criminal Justice (Miscellaneous Provisions) Act 1997. It provides that:

> *"Where the court is of opinion that either the record or the transcript thereof is defective in any material particular, it may determine the appeal in such manner as it considers, in all the circumstances, appropriate"*

116. Clearly, if there was no record at all, and the intended appeal depended upon their being at least some record, the Court would have to allow the appeal. However, where, as in this case, there is some record of the proceedings, the issue for the Court is whether such record as is available is adequate to enable it to fairly determine the issues that have been raised.

117. It seems to this Court that the record of the actual trial from the point where prosecuting counsel had concluded his opening speech to the jury up to the point where the closing speeches of counsel were about to be embarked upon, is more than adequate. There is what appears to be a full transcript up to that point, being the overnight transcript prepared for the trial judge, albeit that it is uncertified and now incapable of being certified due to the fact that the trial judge is now deceased. However, there is no cogent reason to believe it is either inaccurate or incomplete. All grounds of appeal relating to what occurred in this substantial tranche of the trial can readily be dealt with.

118. The record of the next phase of the trial which included counsel's speeches, the judge's charge, such requisitions as were raised and the responses thereto, and the actual verdict, is much less impressive. There is no transcript. All that is available is the contemporaneous note from the unidentified prosecution solicitor. However, it does represent some record of what occurred, and this Court has engaged with the various grounds of appeal touching on what occurred during this phase of the trial, and in particular during the charging of the jury, to see if it is sufficient to enable us to fairly adjudicate on the issues raised. We have concluded that it is indeed adequate to enable us to do so, for reasons we will now elaborate upon.

119. In relation to grounds of appeal (i) and (ii), we agree with the respondent that the solicitor's note provides evidence that the trial judge's charge did deal with provocation, and that it did instruct the jury that the test was a subjective one. The recorded reference to the judgment of Barrington J, which we agree almost certainly is a reference to *The People (Director of Public Prosecutions) v Kelly* [2000] 2 IR 1 is further reassuring in that regard. While the note does not contain the trial judge's *ipsissima verba*, it is a sufficient confirmation in our view that the issue was addressed and correctly addressed. It has to be borne in mind that the trial judge in this case was, at the time, the most experienced criminal law judge on the bench. Moreover, the appellant was represented by a legal team comprising both senior and junior counsel who were also very experienced and who were criminal law specialists, and that they were instructed by a solicitor's firm specialising in criminal law. It is inherently unlikely in the circumstances that a misdirection, if one had occurred, would not have been reacted to. However, there is nothing in the solicitor's note, or otherwise in the evidence as to what occurred subsequent to the conviction, to suggest that anybody listening to the charge had an issue with the instructions that were given to the jury on provocation. The solicitor's note makes no reference to any requisition having been raised. Moreover, the note of the post sentencing consultation, in which the appellant first stated that he wished to appeal makes no complaint about the charge on provocation. Moreover, when the appellant wrote directly to the trial judge to complain that he had been unfairly convicted, the focus of his complaint was his belief that certain Gardaí had given false evidence, not that the trial judge had misdirected the jury. Nothing in the available evidence points to a misdirection on provocation and we therefore dismiss the appeal in respect of grounds of appeal (i) and (ii).

120. The complaint made in ground of appeal no (v), namely that the trial judge erred in not allowing a mixed defence of self-defence and provocation to go to the jury, is misconceived, in our view, in circumstances where defence counsel expressly stated to the trial judge that the defence was not seeking to rely on self-defence. The overnight transcript records this concession, and there has been no suggestion that it was subsequently withdrawn. Provocation was allowed to go to the jury. In the circumstances we dismiss ground of appeal no (v) *in limine.*

121. We have already dealt with grounds of appeal no's (viii) and (ix), and ground of appeal no (vii) is pro-forma but in any event has in effect been disposed of by our refusal to permit the proposed ground of appeal no (x) to be argued. What remains are two grounds of appeal that do not involve issues relating to the judge's charge, namely ground of appeal no (iii) and ground of appeal no (iv).

122. Ground of appeal no (iii) relates to a pre-trial motion in which the prosecution had unsuccessfully applied to be allowed not to call certain witnesses on the Book of Evidence. Although there is no transcript or record of any sort in relation to the hearing of that motion, we consider that none is in fact required to enable us to deal with the specific complaint that is being made. We are satisfied to dismiss this ground *in limine* in circumstances where we wholly agree with the submission made by counsel for the respondent, which we have summarised at paragraph 86 above.

123. In relation to ground of appeal no (iv), which relates to the allegedly prejudicial nature of the trial judge's comments at the commencement of the appellant's testimony before the jury, we are not disposed to uphold this ground. The trial judge's intervention was justified, and his ruling was legally correct. Moreover, while it is accepted that the trial judge's comments were brusque, they could not possibly have justified a discharge of the jury. Moreover, the overnight transcript does not record any complaint about them having been made at the time, or any application having been made in regard to them.

Conclusion

124. We find no reason to believe that the appellant's trial was unsatisfactory or that his conviction was unsafe. In circumstances where we have not seen fit to uphold any of his grounds of appeal, we dismiss his appeal against his conviction.