THE COURT OF APPEAL

Record No: 118/2012

Ryan J.
Sheehan J.
Edwards J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Martin Morgan

Appellant

Judgment of the Court delivered on the 9th day of March, 2015 by Mr. Justice Edwards

Introduction
1. This is a case in which the appellant was convicted on the 15th March, 2012 of the murder of Mr Lucasz Rzeszutko on the 4th October, 2010. The jury convicted the appellant by a 10:2 majority. The trial took place from the 27th February, 2012 until the 15th March, 2012.

2. The appellant was sentenced on the 30th March, 2012 and received the mandatory sentence for murder of life imprisonment, backdated to the 15th March, 2012.

3. The appellant was initially co-accused with two other persons, Stephen Byrne and Edward Byrne, respectively. All three were charged with murder. At the arraignment hearing on the 27th February, 2012, Edward Byrne pleaded not guilty to murder but guilty to manslaughter upon being arraigned, and that was accepted by the respondent. The other two accused, Stephen Byrne and the appellant, pleaded not guilty to murder. The trial then proceeded against Stephen Byrne and the appellant, and opened before the jury on the 28th February, 2012. On day three of the trial before the jury, the 2nd March, 2012, both Stephen Byrne and the appellant were re-arraigned at their request. Stephen Byrne pleaded not guilty to murder but guilty to manslaughter upon being re-arraigned, and that was accepted by the respondent. The appellant also pleaded not guilty to murder but guilty to manslaughter upon being re-arraigned. However, counsel for the respondent indicated that his client was not prepared to accept a plea to manslaughter in the appellant's case, and thereafter the trial proceeded against the appellant alone on the charge of murder.

4. The appellant now appeals against his conviction on a number of grounds.

Evidence before the jury
5. The jury heard evidence that at about 4:20 am on the 2nd October, 2012 Mr. Lukasz Rzeszutko was on his way to work at a fish processing facility in Newtown Industrial Estate in the Coolock area of Dublin. He was walking to work as he usually did, and he was alone.

6. Mr. Rzeszutko was a Polish national, aged 27, and had been living and working in Ireland for approximately 3 years.

7. At the same time, five people were in the vicinity, having been drinking heavily the previous day into the early hours of the next morning. These were Edward Byrne, Stephen Byrne, the appellant Martin Morgan, Angela Whelan and Lauren Mooney.

8. CCTV footage taken from a camera mounted on an adjacent business premises showed the victim approaching a crooked crossroads within the Newtown Industrial Estate and within the sight of this group. It showed Stephen Byrne approaching the man first, followed by the appellant and finally Edward Byrne. The CCTV did not show the assault itself, which occurred just off camera.

9. Lauren Mooney told the jury that Stephen Byrne walked over to ask the man for a cigarette and was joined shortly thereafter by the appellant. She then said that "it happened", that they just started hitting him. Stephen Byrne hit the victim first and then the appellant did. The victim then fell and they kicked him while he was on the ground. She stated that he was being kicked in the stomach and the legs. Lauren Mooney later accepted that when she made a statement to the Gardaí in the early aftermath she had gone further and had said "Marto was really killing him, he was standing and whacking his foot off the man's head. I didn't want to look." Asked to explain why she had not mentioned that in her initial evidence to the jury, she said she just didn't remember. She did not suggest, however, that what she had said in her statement to the Gardaí had been untrue.

10. Lauren Mooney further stated that as the victim was being kicked by Stephen Byrne and by the appellant, Edward Byrne ran over to try to stop it. In the melee he received a blow to the jaw from the victim and he then turned on the victim and also kicked him. Edward Byrne then withdrew, followed by Stephen Byrne, and finally the appellant withdrew.

11. Angela Whelan told the jury that she recalled Stephen Byrne running over and hitting the victim a box or a dig in the side of the face, followed by the appellant hitting him a dig. The man was screaming and trying to run away but could not get away because Stephen Byrne was on one side of him and the appellant was on the other side of him, and both were blocking him. Edward Byrne then ran over to stop it and the man hit him a kick in the lip or burst his lip. She stated that Edward Byrne hit him two digs in the side of the arm and then withdrew. She herself was distressed and was crying at the time. After Edward Byrne withdrew he ran over to her and put his arm around her, and they proceeded across the road and stood at a little wall waiting for the others. They were joined by the others shortly afterwards.

12. The jury then heard the following evidence concerning what occurred as the group stood at the little wall:

Q. Now, when Stephen and Martin caught up with you at the wall, did you notice anything about them?

A. Yes, there was blood on Stephen's jumper, but he said it wasn't the man's blood, it was Adrian's blood. So, I just said all right. I didn't ask anything else more about it and I seen blood on Marto's runners and his clothes and

Q. Okay. And was there any talking then, at that stage, about what had gone on?

A. Yes.

Q. Well, what was being said?

A. Well, I like, I was screaming, like, what happened and all and Stephen was, like, I don't know, we just hit him, and all. Stephen was, like, I think he's dead and all and I was, like, don't say that. And Marto was, like, I don't think we killed him, I don't know what like, I don't really remember.

Q. Okay?

A. Just that bit really.

Q. Well, that's okay, Angela. Just take it slowly for me. When Stephen and Martin were saying this, do you remember Stephen saying anything about what he had done?

A. Yes.

Q. Well, what was that?

A. That he hit him two boots or two digs and one boot.

Q. Okay?

A. And

Q. And what sorry, you were going to add something, I beg your pardon, I'm after doing it again, I interrupted you?

A. And Marto said that he stood on his head and was standing on his head and all and

Q. Okay?

A. And then he just

Q. Martin said this to you; is that right?

A. To all of us.

Q. To all of you, okay. Now, I think you said then that you went to the shopping centre. After the shopping centre, where did you go, Angela?

A. Home.

Q. And then the following day, do you recall meeting up with anybody or doing anything?

A. Yes, I met up with Stephen and Dean Purdue.

Q. Stephen and Dean Purdue, sorry, is that what you said? Yes, okay?

A. Yes.

Q. Excuse me one second, Angela. Just bear with me for one second, please. I'm almost done, Angela. I just I just want to deal with one last thing, when you were talking with Stephen and Martin at the wall, before you went to Tescos and they said what they said and you've told us that, do they explain to you, or do they show you what they meant?

A. Yes, like like, Marto, like, was saying I stood on his head and Stephen was, like, you were jumping up and down on his head."

13. At this point in the evidence, counsel for the appellant asked for the jury to be sent to their room, and then in the absence of the jury applied, unsuccessfully, to have the jury discharged on the basis that the prosecution had elicited inadmissible hearsay that was highly prejudicial to his client.

14. The jury further heard evidence that a colleague of the victim who was leaving work at 4.30am found the victim and an ambulance was called. His wallet, rucksack and mobile phone were all present at the scene and the victim was taken to hospital with numerous fractures to his skull and facial bones. His injuries were described in evidence as not survivable and he died two days later on the 4th October, 2010.

15. The Assistant State Pathologist, Dr Kalid Jabbar, told the jury that in his opinion death was caused by significant and wide ranging craniocerebral and facial injuries, directly caused by blunt force trauma.

16. Other evidence in the case concerned the finding of blood staining on certain clothing and footwear belonging to the appellant, which was identified by DNA analysis to be that of the victim, as well as blood pattern analysis. The opinion of the expert in blood pattern analysis was that the presence of contact type blood staining on the stitching of the appellant's right runner, that matched the victim's DNA profile, was more likely to have been acquired if the appellant kicked and/or stamped on the victim, than if he was present at the scene and did not kick and/or stamp on the victim. The appellant had voluntarily provided samples of his DNA to the

Gardai for comparison purposes.

17. The clothing and footwear of the appellant that were subjected to the forensic analyses just described were found in the course of a search by Gardai of the home of the appellant's mother, at which the appellant also resided. This search was effected on the authority of a warrant issued by a District Judge on the 2nd October, 2010 pursuant to s.10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 (hereinafter the Act of 1997). The warrant in turn was issued on the sworn information of Sergeant Brian Clune.

18. The jury heard evidence of the circumstances of the search, including evidence that, on being admitted to the premises by the appellant's mother, Sergeant Clune explained to her and the other occupants of the house then present, one of whom was the appellant, the reason why the Gardaí wished to search the premises. He further testified that he showed them the warrant and that they all acknowledged that they understood.

19. Finally the jury heard evidence concerning the arrest of the appellant on the 3rd October, 2010 by Sergeant Donal Brazel for the offence of assault causing harm, contrary to the Non Fatal Offences against the Person Act 1997, and his subsequent detention at Raheny Garda Station pursuant to s.4 of the Criminal Justice Act 1984. The appellant was interviewed a number of times while so detained and the jury received evidence concerning what he had said in these interviews. The appellant made limited admissions, *e.g.*, identifying himself on the CCTV footage that was shown to him, but denied that he had anything to do with an assault on the victim.

20. The appellant did not give evidence himself, or call any evidence in his defence.

Grounds of Appeal
21. The appellant contends that his conviction is unsafe and unsatisfactory and seeks to have it set aside on the following grounds:

> 1. The learned trial judge erred in law and in fact in finding that the search warrant, purportedly issued in accordance with s.10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as amended) relating to 22 Tonlegee Road, was lawful and valid.
>
> 2. The learned trial judge erred in law in allowing the witness, Angela Whelan, to give hearsay evidence that was prejudicial to the accused thereby rendering his trial unfair.
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> 3. The learned trial judge erred in law in failing to accede to a Defence application to withdraw the case from the jury after the Prosecution had, in the course of the trial, accepted manslaughter pleas from the second and third named accused and in circumstances where the case had been opened on the basis of a joint enterprise being undertaken by all of the accused to murder, thus giving rise to the risk of confusion in the minds of the jury and their falling into error by presuming that as the appellant was still being prosecuted for murder that a manslaughter verdict was neither appropriate and/or was applicable to him.

22. At the commencement of the appeal hearing, counsel for the appellant opened his case in a manner that indicated an attempt on his part, without having obtained the prior leave of the Court, to argue Ground 1 upon an expanded basis, in effect attempting to introduce two new grounds of appeal on the pretext that they were sub-grounds to the existing Ground 1. This was objected to by counsel for the respondent, who indicated that he had had no notice of any new grounds, but that if he had been so notified he would not in any event have been prepared to consent to them being argued.

23. In circumstances where there was no consent to the appeal being argued on an expanded basis, counsel for the appellant then sought leave from the Court to expand his grounds. This application was opposed by the respondent, both on procedural and substantive grounds.

24. The Court, having heard the parties' respective submissions, retired to consider the application. Having done so, the Court later re-convened and indicated that it was not disposed to accede to the appellant's application to be allowed to expand his grounds, on either basis on which he had wished to do so, and stated that it would give its detailed reasons for its decision in that regard at a later stage. The Court will do so at the end of this judgment. However, before doing that it will first of all proceed to address the substantive grounds of appeal that are legitimately before it.

Ground 1:
25. The appellant bases this ground of appeal on the assertion that evidence obtained during a search was inadmissible by virtue of the fact that the warrant that purported to authorise it, issued pursuant to s. 10 of the Act of 1997, was defective on its face and, as such, was invalid.

26. It is necessary at this point to set out the terms of s.10 of the Act of 1997. S. 10 of the Act of 1997, as substituted by s. 6 of the Criminal Justice Act 2006, provides:

> "(1) If a judge of the District Court is satisfied by information on oath of a member not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an arrestable offence is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place.
>
> (2) A search warrant under this section shall be expressed, and shall operate, to authorise a named member, accompanied by such other members or persons or both as the member thinks necessary—
>
> (a) to enter, at any time or times within one week of the date of issue of the warrant, on production if so requested of the warrant, and if necessary by the use of reasonable force, the place named in the warrant,
>
> (b) to search it and any persons found at that place, and
>
> (c) to seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that that member reasonably believes to be evidence of, or relating to, the commission of an arrestable offence."

27. An "arrestable offence" is defined by s.2(1) of the Criminal Law Act 1997, as amended by s.8 of the Criminal Justice Act 2006, and means an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment or the

common law, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence.

28. The required form of a warrant issued under s. 10 of the Act of 1997 as substituted, is specified by Order 34 Rule 17 of the District Court Rules 1997 (S.I. 93 of 1997), as amended by the District Court (Search Warrant) Rules 2008 (S.I. No 322 of 2008) as being that set out in specimen Form 34.38 annexed to the said rules. It is appropriate to reproduce Form 34.38:

No. 34.38

Criminal Justice (Miscellaneous Provisions) Act 1997, Section 10(1)

(as substituted by Criminal Justice Act 2006, section 6(1)(a))

SEARCH WARRANT

District Court Area of District No.

WHEREAS from the information on oath and in writing under section 10(1) of the above-mentioned Act of 1997 (as substituted by section 6(1)(a) of the Criminal Justice Act 2006) sworn before me on this day, by.....of

a member of the Garda Síochána not below the rank of sergeant

I AM SATISFIED THAT there are reasonable grounds for suspecting that—

evidence of or relating to the commission of an arrestable offence (within the meaning of section 2(1) of the Criminal Law Act 1997 , as amended by section 8 of the Criminal Justice Act 2006) is to be found in a place (within the meaning of section 10(6) of the Criminal Justice (Miscellaneous Provisions) Act 1997), namely ..... in the court (area and) district aforesaid.

THIS IS TO AUTHORISE ,

of ....., a member of the Garda Síochána, accompanied by such other members of the Garda Síochána or persons or both as the said member thinks necessary,

TO ENTER, at any time or times within one week of the date of issue of this warrant, on production if so requested of this warrant, and if necessary by the use of reasonable force, the place namely ..... in the said court (area and) district as aforesaid,

TO SEARCH that place and any persons found at that place, and

TO SEIZE anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that the said member reasonably believes to be evidence of, or relating to, the commission of an arrestable offence.

Dated this ..... day of ..... 20.....

Signed .....

Judge of the District Court

29. The search warrant at issue in the present case was produced to the Court of trial by Sergeant Brian Clune in the course of his evidence on day six. It was substantially but not wholly in the form specified by the District Court Rules. It is appropriate at this point to indicate that one of the bases on which the appellant sought to expand his appeal was to raise an objection as to the form of the warrant. However, no objection as to form had been raised at the trial, or in the grounds of appeal as filed. In circumstances where this Court has not seen fit to allow an expansion of the grounds of appeal, it does not need to concern itself with any irregularity as to form *per se*.

30. However, while the original complaint raised in Ground 1 is a complaint as to the substance of the warrant, the fact that the warrant deviates from the prescribed form is nonetheless a peripherally relevant circumstance. Critically, the curial part of the warrant, which does not follow exactly the *pro-forma* wording specified by the District Court Rules, states:

> "Whereas I am satisfied as a result of hearing evidence on oath of Sergeant Brian Clune, a member of An Garda Síochána, not below the rank of Sergeant, of Santry Garda Station, that there are reasonable grounds for suspecting that evidence of or relating to the commission of an offence referred to in subsection 1 and section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997, as substituted by section 6 of the Criminal Justice Act 2006, to wit blood stained clothing, is to be found in a place, namely [the address of the appellant's mother's home is specified]".

It then goes on to authorise the Sergeant, accompanied by other members of An Garda Siochána, to carry out a search of the property in question, and to seize relevant material found there, within one week from the date thereof.

31. The appellant asserts that the warrant was defective on its face, and therefore invalid, on the basis that the warrant does not specify 'an arrestable offence' for which the warrant was granted. In particular, the appellant submits that, in light of the emphasis on Article 40.5 of the Constitution of Ireland in the recent case of *Damache v. The Director of Public Prosecutions* [2012] 2 I.L.R.M. 153, the provisions of the Act of 1997 pertaining to search warrants should be strictly construed. The appellant claims that the absence of a reference to an arrestable offence on the face of the warrant goes to the root of the validity of the warrant and can be distinguished from a mere technical defect.

32. This particular objection was raised before the court of trial on day six, and the trial judge, having heard submissions from both sides, considered overnight various authorities to which he had been referred, including: *The People (Director of Public Prosecutions)*

v. Quilligan and O'Reilly (No 3) [1993] 2 I.R. 305; *The People (Director of Public Prosecutions) v. O'Leary* (unreported, Court of Criminal Appeal, 29th July, 1998); *Simple Imports Limited v. The Revenue Commissioners* (unreported, Supreme Court, 19th January, 2000); *The People (Director of Public Prosecutions) v. Mallon* [2011] IECCA 29 (unreported, Court of Criminal Appeal, 3rd March, 2011), *and Damache v. The Director of Public Prosecutions* [2012] 2 I.L.R.M. 153.

33. On the morning of day seven of the trial, the trial judge ruled on the issue as follows:-

> "On the face of the warrant, the requirements of the section have been satisfied and, as such, are not in issue before me. The real objection raised by Mr McDermott, senior counsel, on behalf of the accused, is that the warrant should be condemned because it fails to recite the nature of the arrestable offence grounding the application and he draws the analogy with the Supreme Court decision in *The People (Director of Public Prosecutions) v. Quilligan and O'Reilly* [1986] 1 IR 495. Ms Donnelly, on behalf of the Director of Public Prosecutions has argued that the lack of such information on the face of the warrant does not invalidate the warrants and she relies upon the Court of Criminal Appeal decision in the *Director of Public Prosecutions v. Donal O'Leary*, delivered on the 29th of July 1988 and, in particular, she relies upon what is stated by Mr Justice McCarthy, in delivering the judgment of the court at page 6 of the judgment, where he states, in referring to section 29 of the Offences Against the State Act 1939: "This may cover a range of hundreds of offences. The applicant argues that such an unrestricted form of warrant was too broad a sweep, that is a warrant "at large." No authority in support of this proposition was cited to the Court, save to point, by analogy, to the more limited form of warrant that is permitted to be issued under a variety of statutes, such as, for example, the Larceny Act 1916, or the Misuse of Drugs Act 1984. These, however, are what may be termed judicial warrants as compared with the executive warrants permitted under the 1939 Act and, for example, the Firearms Act 1925 and undoubtedly there is a distinction to be drawn between judicial warrants and executive warrants."
>
> Ms Donnelly further relies upon the Court of Criminal Appeal decision in *The Director of Public Prosecutions v. Gareth Mallon,* delivered on the 3rd of March 2011, wherein there is an extensive and helpful review of the law regarding search warrants."

34. At this point in his ruling the trial judge referred in detail to the judgment of O'Donnell J. in the *Mallon case*, and quoted paragraphs 30, 34, and 38 thereof *in extenso*. He then continued:-

> "And by way of reply, Mr McDermott drew my attention to the recent judgment of the Supreme Court in the case *of Damache v. the Director of Public Prosecutions*, a judgment that was delivered as recently as the 23rd of February last, wherein the Court saw fit to condemn section 29 of the Offences Against the State Act 1939 and he has argued that, to use my own expression, in these more enlightened days, one should not follow the earlier decision in the case of O'Leary.
>
> I have given consideration to the omission that exists in the current world. I have considered the testimony that has been given by Sergeant Clune. In the course of that evidence, Sergeant Clune has stated that he explained the reasons why the search was to be conducted and he explained I shouldn't say he explained, but rather he stated that the occupants of the house acknowledged their understanding of the reason for the search. Having regard to the fact that the warrant, on its face, meets the statutory requirement and having regard to the fact that the occupants of the house acknowledge their understanding of the reason for the search, I can find no grounds upon which I can condemn the warrant. It is not as if, in the course of the warrant, or the execution of the warrant, that matters strayed beyond the matters that were referred to in the warrant and, in particular, having regard to the fact that on the face of the warrant, it is made clear that the purpose of the search is to search for blood stained clothing, it seems to me that the position is one where one cannot argue that this warrant is completely at large insofar as anybody reading the warrant would understand that a search for blood stained clothing is not something that is likely to arise out of, perhaps, a drug offence or a simple larceny or robbery or matters of those natures. Accordingly, I determine that the warrant in this case is valid and evidence in relation thereto and the search may be adduced in front of this jury."

35. It is appropriate to digress momentarily at this point to allude to the statement by the learned trial judge at the commencement of his ruling to the effect that the requirements of s.10 of the Act of 1997, as substituted, were *prima facie* satisfied on the evidence before him, and that they were not in issue before him. The correctness of this assessment is reflected by a consideration of the transcript as a whole and is beyond peradventure. Despite this, the second basis upon which the appellant had sought to be allowed to expand his appeal was so that he could argue that the requirements of s.10 of the Act of 1997, as substituted, could not in fact have been satisfied by the information provided to the District Court Judge by Sergeant Clune, and that accordingly the warrant had been issued in excess of jurisdiction. That case was simply never made at the trial. Once again, in circumstances where the Court has not been disposed to allow an expansion of the grounds of appeal, it does not need to concern itself with the jurisdiction to issue the warrant and whether the requirements of s.10 of the Act of 1997, as substituted, were in fact satisfied on the evidence before the District Judge.

36. Returning to the ground of appeal actually before the Court, the appellant challenges the correctness of the trial judge's ruling and says that the warrant was fundamentally bad and not capable of being relied upon in circumstances where it failed to specify on its face the arrestable offence in respect of the commission of which there were said to be reasonable grounds for suspecting that evidence was to be found in the place specified in the warrant. Consequently, he contends that his clothing and footwear were seized in the course of an unlawful search based upon a flawed warrant, and that these fruits of an unlawful search constituted evidence that ought to have been excluded from the jury as having been obtained in deliberate and conscious violation of his right, and that of his mother, under Article 40.5 of the Constitution.

37. In support of his argument, counsel for the appellant referred the Court to *The People (Attorney General) v. O'Brien* [1965] I.R. 142; *The Director of Public Prosecutions v. Dunne* (unreported, High Court, Carney J., 14th October 1994); *Damache v. The Director of Public Prosecutions; Ryan v. O'Calla*ghan (unreported, High Court, Barr J, 22nd July 1987) and *Simple Imports Limited v. The Revenue Commissioners*.

38. Particular reliance was placed upon the following statement from the judgment of Keane J. in *Simple Imports*:

> "Given the necessarily draconian nature of the powers conferred by the statute, a warrant cannot be regarded as valid which carries on its face a statement that it has been issued on the basis which is not authorised by the statute. It follows that the warrants were invalid and must be quashed."

39. In addition, counsel for the appellant contends that the decision in *The People (Director of Public Prosecutions) v. Mallon* and upon which the respondent places much reliance, is materially distinguishable on its facts from the present case.

40. In reply, the respondent acknowledges that there is a great importance in the careful preparation of search warrants in light of the fundamental rights which are being interfered with. However, the respondent submits that the statutory conditions for the warrant have been met and that reference to a specific arrestable offence is not required by s.10 of the Act of 1997, as substituted. In any case, the respondent contends, the absence of such information is not an error going to the jurisdiction of the warrant and as such, is not sufficient to invalidate it.

41. In support of the submission that reference within the warrant to a specific arrestable offence is not required, the respondent relies first upon *The People (Director of Public Prosecutions) v. O'Leary.* In that case the applicant argued that a warrant issued under s. 29 of the Offences Against the State Act 1939 (hereinafter the Act of 1939) was invalid on the basis that it did not specify the actual offence for which the warrant was issued. McCarthy J. upheld the warrant and stated:-

> "The warrant is a printed form which allows for the insertion of the name of the authorising officer, the address of the premises to be searched, the officer authorised to search, the description of the property and the name of the individual to be searched with a provision for signature, rank and dating. The offences envisaged are under the Act of 1939, the Criminal Law Act 1976, the schedules of offences provided for under Part V of the Act of 1939, and the offence of Treason. This may cover a range of hundreds of offences. The Applicant argues that such an unrestricted form of warrant has too broad a sweep, that it is a warrant "at large". No authority in support of this proposition was cited to the Court save to point by analogy to the more limited form of warrant that is permitted to be issued under a variety of statutes as, for example the Larceny Act 1916 or the Misuse of Drugs Act 1984 ... Section 29, as cited, does permit entry under a valid warrant; the section states a variety of circumstances under which the appropriate Garda officer may validly issue a search warrant; there may be circumstances under which offences under all of the several categories are suspected; the warrant accords with the wording of the section and the entry of the dwelling was, thus, in accordance with the law."

42. The respondent has further referred the Court to *The People (Director of Public Prosecutions) v. Glass* (unreported, Court of Criminal Appeal, 23rd November, 1992). That was a case in which it was contended that a Superintendent issuing a warrant under s. 29 of the Act of 1939 should specify the scheduled offence he had in mind. This was likened to the situation where a person being arrested under Section 30 of the Act of 1939 (or indeed, pursuant to any arrest power) must be told the reason for his arrest. The Court of Criminal Appeal, per O'Flaherty J., rejected this submission, saying:

> "The distinction between the two sections, it seems to us, is that it is very old law that a person on arrest must be told for what he is arrested; under Section 29 the Superintendent was issuing a warrant in relation to evidence of the intended commission or related to the intended commission of an offence and, of course, that warrant might be in relation to premises of a person totally innocent. In this case it happens that the premises were those of a man afterwards accused but the criteria governing the two sections are completely different. Clearly, the Superintendent or, indeed, the person or persons supplying the information to him concerning the possible location of evidence may not be certain at all of which of a range of offences might be the one on which evidence will be forthcoming. There might be an item of evidence on premises that would be such in respect of all offences for the time being scheduled. But a person on arrest is entitled to know with some particular clarity with what he is being charged so that he can decide the best course of action he should take in relation to preparing an answer or defence to any possible charge. So this ground of appeal, the Court holds, has not been made out."

43. The respondent submits that notwithstanding that the cases of *O'Leary and Glass*, respectively, concern s. 29 warrants, the *dicta* in relation to specifying the offence for which a warrant is issued are applicable. Accordingly, the respondent submits, there was no requirement to specify the particular offence in the present case and the lack of such information does not invalidate the warrant.

44. Addressing the appellant's reliance on the *Simple Imports* case, the respondent contends that that case is distinguishable on the basis that the deficiency in the warrant in that case, which involved a failure to record the reasonable cause to issue the warrant, went fundamentally to the jurisdiction to issue it, whereas the alleged failure in the present case is not one that goes to jurisdiction.

45. In support of the argument that an error that does not go to jurisdiction is not necessarily fatal, the Court was referred to *The People (Director of Public Prosecutions) v. Balf*e [1998] 4 I.R. 50 and *The People (Director of Public Prosecutions) v. Mallon*. The Court was referred with particularity to the reference in the judgment of O'Donnell J., who gave judgment on behalf of the Court of Criminal Appeal in *Mallon*, to Hardiman J.'s decision in *The People (Director of Public Prosecutions) v. Edgeworth* [2001] 2 I.R. 131. O'Donnell J. stated:-

> "The present warrant features an inappropriate statement on the face of the document whose effect is to associate the document with the District Court whereas in fact it was issued without any application to a judicial personage at all. It is not however a statement calculated to mislead and there was no evidence before the learned trial judge that any person was in fact misled. The status of the person actually issuing the warrant appears clear on its face."

46. O'Donnell J. then noted that, in distinguishing the cases *Dunne* and *Simple Imports*, Hardiman J. had said, that each of those cases had been "a failure to demonstrate that the conditions laid down by the legislature had in fact been met," echoing in this respect the distinction that had been made in *Balfe*. In *Mallon*, O'Donnell J. held that:-

> "[30] By contrast in the present case, all the statutory criteria could be seen at least on a prima facie basis to have been met and the misdescription, which is the most that it could be called, was not a breach of any condition or criterion imposed by the legislature and is simply an error. [Hardiman J.] concluded, at p. 137, "In my view there is no basis in law for the proposition that this error invalidates a document which accords with all specified requirements of the law".
>
> [31] This reasoning is useful in attempting to understand the case law in this area. An error in a warrant does not necessarily invalidate; it may be in the words of the judgment "simply an error" or a "regrettable misdescription". If, however, it appears that a statutory precondition has not been satisfied *(Kenny)* or if the warrant does not so demonstrate on its face *(Simple Imports),* the warrant will be invalid. Importantly, *Dunne* is analysed as a case where a statutory precondition was not met, rather than a case of simple error. It is unfortunate that it does not appear that *Balfe* was referred to in argument in this case. It would have been useful to have had the Supreme Court's analysis of that case, but it seems probable that if considered correct, it could only be seen as a case that fell into the "simple error" category. But the absence of reference to *Balfe* makes at least one thing clear: *Edgeworth* cannot be understood as disapproving of either the decision or the reasoning in that case, as the learned trial judge here seemed to think."

....

> "[38] In the course of the judgment, the Court in *The People (DPP) v. McCarthy* also helpfully identified a number of principles which it considered could be deduced from the earlier case law:
>
> > (a) Documents, such as search warrants, must be carefully prepared having regard to the fact that they entitle Gardaí or other authorised officers to enter the property of a citizen, and in the course of so doing, to use such force as may be necessary, both to gain admission and to carry out the search and seizure authorised by the warrant;
> >
> > (b) This cautionary approach is particularly enjoined when the search warrant is in respect of the dwelling house of a citizen, in light of the recognition granted to such property under the Constitution;
> >
> > (c) Although search warrants should be prepared carefully, not every error in such a warrant will, by virtue of the same, lead automatically to the invalidation of a warrant;
> >
> > (d) In particular where the substance of the warrant, as opposed to its form, is not open to objection, the invalidation of the warrant will not necessarily ensue.
> >
> > (e) The nature of the error, or omission, must be scrutinised by the courts to see whether it is of a fundamental nature, including an error going to jurisdiction. Several factors may be taken into account, including whether the errors are mere mis-description, whether it is likely to mislead, whether it undermines the apparent jurisdiction to issue it, according to the warrant on its face, and such matters, before the courts will find, in an appropriate case, that it should he considered invalid.
> >
> > (f) It is not possible in relation to non-substantive errors, that is to say, errors which do not affect the substance of the legislative requirements found in the body of the warrant itself, to say that they will never lead to the invalidation of a search warrant, due to the wide variety and nature of errors which may occur.'
>
> This is a very helpful synthesis of the case law to date."

47. It was submitted that in the present case the circumstances were such that there was no danger that the warrant would mislead those to whom it was addressed. It was submitted that it was abundantly clear from the face of the warrant that it related to an arrest for assault.

48. The Court was further referred to *The People (Director of Public Prosecutions) v. Tyndall* [2005] IESC 28 (unreported, Supreme Court, 3rd May 2005). In that case the arrest of the applicant was held to be a valid arrest pursuant to s.30 of the Act of 1939 in circumstances where no evidence was led as to the suspicion of An Garda Síochána that the applicant had committed a scheduled offence at the time of the arrest. Denham J. stated:-

> "I agree with the learned trial judge that the omission of direct evidence of the suspicion does not render the arrest unsatisfactory if the suspicion may be inferred from the circumstances… Evidence of the suspicion of the arresting Garda may be inferred from the circumstances, but evidence must exist from which it may be inferred."

49. The respondent acknowledges that in *Tyndall* the circumstances were not such as to enable the Court to infer suspicion and this ground of appeal succeeded. However, the respondent submits, the same principle applies to specifying an arrestable offence on a search warrant under s. 10 of the Act of 1997, as substituted. It is contended that in circumstances where it was made clear on the face of the warrant that the search was for blood stained clothing, it was apparent to the occupants of the house that the search related to an assault in which harm was caused, i.e., blood was shed, and who in turn acknowledged their understanding of the reason for the search.

50. Counsel for the respondent concluded on this issue by submitting that, in all the circumstances of the case, the trial judge was entirely correct in allowing the evidence from the search to be adduced before the jury.

51. The Court accepts the submission of the respondent to the effect that a failure to state expressly, on the face of a warrant issued under s. 10 of the Act of 1997, as substituted, that it relates to *evidence of or relating to an arrestable offence* is not something that goes to the jurisdiction to issue the warrant, such that the absence of that information would automatically render it invalid.

52. However, as the *Mallon* case makes clear, the mere fact that the deficiency complained of in this case does not go to jurisdiction, and is therefore to be regarded as non-substantive, does not *per se* justify a conclusion that the deficiency did not invalidate the warrant. Accordingly, the finding that the deficiency did not go to jurisdiction is not necessarily dispositive of the appellant's complaint.

53. The Court accepts that it ought to be clear from the warrant that the suspected offence is an arrestable one, so that the person(s) to whom it is relevant, and whose constitutional rights it may have the effect of abrogating, may know the basis on which it has been issued. It is certainly desirable that the warrant should expressly refer to an arrestable offence, and indeed that the specific offence in question should be identified. However, the Court is also satisfied on the jurisprudence opened to it that if the arrestable nature, and/or the specifics, of the offence can be inferred from the information on the warrant that will suffice, although for persons whose constitutional right may be affected to have to rely on inferences is a sub-optimal situation.

54. This Court further agrees with the respondent that, in circumstances where the curial part of the warrant at issue in this case refers to "evidence of or relating to the commission of an offence referred to in subsection 1 and section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997, as substituted by section 6 of the Criminal Justice Act 2006, to wit blood stained clothing," there is sufficient basis for inferring that the offence in question was the offence of assault causing harm, contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997, which is an "arrestable offence" within the meaning of that expression as used in s.10 of the Act of 1997. Even if the warrant had reproduced exactly the wording used in the form specified in the District Court Rules the exact nature of the offence would not have been specified. The only substantive difference would have been that that which is specified in the present as being "an offence" within the meaning of s.10 of the Act of 1997, as substituted, would have been expressly identified as being "an arrestable offence" within the meaning of that section. However, as s.10 only applies to arrestable offences this detail hardly advances matters.

55. The Court considers it unnecessary for the purposes of determining this appeal to express any view on whether the omission of express information as to the arrestable nature, and/or the specifics, of the offence would be fatal if there was no basis for inferring its existence, in circumstances where a sufficient basis in fact existed in the present case for inferring both the specific offence in respect of which evidence was suspected to exist, and, from that, the fact that it was an arrestable offence within the meaning of s.10 of the Act of 1997, as substituted. Moreover, the evidence was that the occupants of the house clearly understood the reason for the search, *i.e.*, that it was for blood stained clothing in connection with a suspected assault causing harm.

56. The Court also expresses no view as to the adequacy of the form of warrant specified in the District Court Rules in circumstances where the warrant in the present case did not in any event reproduce it exactly. The issue as to whether the warrant should identify not merely the fact that the offence is an arrestable one, but also specifically identify the offence, was not argued and therefore does not require to be determined.

57. In conclusion, and for the reasons that have been stated, the Court is not disposed to uphold this ground of appeal. The Court is satisfied that there was *prima facie* evidence before the trial court to support the view that the warrant had been validly issued by a District Court Judge in accordance with s.10 of the Act of 1997, as substituted, and that it was duly executed and validly acted upon in accordance with its terms. In the Court's view, the trial judge was correct to allow the fruits of the search to go before the jury as evidence.

Ground 2:
58. Ground 2 is pleaded in terms that "the learned trial judge erred in law in allowing the witness, Angela Whelan, to give hearsay evidence that was prejudicial to the accused thereby rendering his trial unfair." There are several premises underlying that complaint that require examination.

59. The first premise in this ground of appeal is that the trial judged erred in allowing the witness, Angela Whelan, to give hearsay evidence. An examination of the relevant portion of the transcript (reproduced at paragraph twelve above) indicates that he did nothing of the sort even if, for the purposes of the argument, one were to accept that the impugned evidence was inadmissible hearsay. The impugned evidence was not admitted by the trial judge following an application to exclude it in advance of it being given. The trial judge was never asked to exclude it. Counsel for the appellant certainly protested after the evidence was given, and asked the trial judge to discharge the jury, which the trial judge declined to do. However, that is a different matter to the judge allowing the witness to give the evidence in question.

60. The second premise in this ground of appeal is that the impugned evidence was fact hearsay. That contention requires critical examination, particularly in circumstances where the trial judge formed the view that it was not hearsay. However, before doing so it may be useful to set out the objection articulated by defence counsel, and how exactly the trial judge dealt with it. The relevant extract from the transcript records the following exchanges:-

> "MR McDERMOTT: May it please the Court. In relation to this witness's evidence, the introduction of hearsay testimony from a co accused
>
> JUDGE: Doesn't constitute hearsay, Mr McDermott. Anything said by Stephen Byrne regarding the conduct of Martin Morgan, if said in his presence and hearing, does not offend against the hearsay evidence rule.
>
> MR McDERMOTT: Well, in my respectful submission, I'm in a position in this case which is unusual, in that I have a whole series of interviews conducted with my co accused in this case, and in my significance, I'm not in a position to challenge anything Stephen Byrne said in relation to this case with Stephen Byrne. I'm not in that position. He's a co accused.
>
> JUDGE: Your client was present when this was said. Your client does not deny it, but rather he goes on, on the testimony of this witness, to give a demonstration as to what is meant by standing on one's head.
>
> MR McDERMOTT: That is what that is what is proposed to be given in evidence and what I'm submitting to the Court is that I cannot challenge the basis of the Stephen Byrne assertion, because Stephen Byrne is not a witness in this case. I cannot confront him in relation to that. I cannot confront him in any respect in relation to his story concerning this case.
>
> JUDGE: You could have confronted him there and then and said that is nonsense, Stephen.
>
> MR McDERMOTT: If I may conclude in relation to that, he has made given numerous interviews in relation to this matter, all of which are out of the case by reason of the acceptance of the plea in this case to Stephen Byrne, equally in relation to Edward Byrne, it doesn't arise on this application. But in my respectful submission, I'm being prejudiced by the introduction of this kind of material into the case, where I'm not in a position to confront the person who makes the assertion, who's a co accused of mine and has, in my respectful submission, a status in this case that is not the norm and renders it unfair that it should be introduced in this fashion, and that's my submission to the Court. And my application is to discharge the jury on that basis. May it please the Court.
>
> JUDGE: I don't need to hear you. I'm satisfied that it is not a situation for which the jury should be discharged. Anything that might have been said by Stephen Byrne in the presence and hearing of Martin Morgan, regarding the behaviour of Martin Morgan, does not offend against the hearsay evidence rule, as I understand the hearsay evidence rule. Further, I see no prejudice, or no potential prejudice, as regards the suggestion that Stephen Byrne might have said these matters, in circumstances where, as I understand the statement of Angela Whelan, the accused, Martin Morgan, agreed with the suggestion that he had been standing on the head, and I'll use the expression that's used in the book of evidence, standing on the head of the deceased. And not alone does he confirm that he was standing on the head, but he proceeds to give a demonstration of his conduct and, as I understand the statement of the witness, Angela Whelan, she, in fact, gave a demonstration to the Garda Síochána as regards the manner in which the demonstration was given to her and to others by Martin Morgan. So, I do not consider there is any merit in the application and I do not propose to accede to it."

61. In argument before this Court, counsel for the appellant has continued to maintain that the impugned evidence was hearsay. Beyond asserting this, the appellant's submissions do not seek to explain on what basis it must be regarded as hearsay. Rather, they proceed on the basis that the evidence is self evidently hearsay.

62. In response, counsel for the respondent contends that the learned trial judge was correct in his ruling that the evidence did not constitute hearsay.

63. Whether or not an out of court statement is hearsay or non hearsay is a different issue to whether or not a hearsay statement is admissible or inadmissible. However, these two concepts are commonly conflated even amongst the most experienced legal practitioners. In saying this, the Court recognises the reality that when some lawyers say that an out of court statement is not hearsay this is frequently shorthand for saying that the statement in question is not inadmissible hearsay, but rather that it is admissible as an exception to the hearsay rule. It seems to this Court, however, that the trial judge was clear in his understanding of the law and that he was certainly not conflating the two concepts.

64. Whether or not the out of court statement of Stephen Byrne was properly to be regarded as hearsay or non hearsay depended upon the purpose for which it was intended to be used. If, on the one hand, it was adduced, not just to establish that the statement was made, but also for the purpose of relying upon the truth of its contents, then it was hearsay. In other words if was being relied upon as testimonial evidence rather than as original evidence, that rendered it hearsay. If on the other hand it was adduced merely to establish that the statement was made, it was not hearsay.

65. The position in that regard was succinctly stated by Kingsmill Moore J. in *Cullen v. Clarke* [1963] I.R.368 at p.378:-

> "[I]t is necessary to emphasise that there is *no* general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule, subject to many exceptions, that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert; the reasons being that the truth of the words cannot be tested by cross-examination and has not the sanctity of an oath. This is the rule known as the rule against hearsay.

66. Macdonald JA in the Canadian case of *R v. Baltzer* (1974) 27 CCC (2d) 118 put it in these terms at p.143:-

> "Essentially it is not the form of the statement that gives it its hearsay or non-hearsay characteristics but the use to which it is to be put. Whenever a witness testifies that someone said something, immediately one should then ask, 'what is the relevance of the fact that someone said something'. If, therefore, the relevance of the statement lies in the fact that it was made, it is the making of the statement that is evidence – the truth or falsity of the statement is of no consequence: if the relevance lies in the fact that it contains an assertion which is, itself, a relevant fact, then it is the truth or falsity of the statement that is in issue. The former is not hearsay, the latter is."

67. In addition, a statement to similar effect is to be found in *R v. Rattan* [1972] A.C. 378, where Lord Wilberforce said:-

> "The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', i.e. as establishing some fact narrated by the words."

68. It is clear that in the present case that it was open to the prosecution to seek to rely on the impugned evidence either as original evidence, in which case it would not be hearsay, or as testimonial evidence, in which case it would be hearsay. However, the position is that when the impugned evidence was objected to by the defence the prosecution did not make clear the purpose for which they were seeking to adduce it, and so this Court is left in the position of having to infer the purpose for which it was adduced.

69. The Court is prepared to infer that the prosecution adduced the evidence in question as original evidence, rather than testimonial evidence in two circumstances. First, the prosecution did not address the court at all on the issue at the time that the evidence was being objected to. That was understandable in circumstances where the trial judge immediately responded indicating that it was his firm view that the evidence was not hearsay, because "[a]nything said by Stephen Byrne regarding the conduct of Martin Morgan, if said in his presence and hearing, does not offend against the hearsay evidence rule." That was a correct statement of the law providing the prosecution had adduced the out of court statement in question as original evidence only, which the trial judge manifestly believed to be the position. Assuming it had indeed been the prosecution's intention to rely on it simply as original evidence there was no need in the circumstances for counsel for the prosecution to say anything. Secondly, close examination of the closing speech made by counsel for the prosecution reveals that at no point does he invite the jury to treat the impugned evidence as testimonial. Rather, the emphasis is on the admissions made by the appellant himself during the conversation at the low wall, which were of course admissible against him under the exception to the hearsay rule which allows declarations against interest to be admitted.

70. It is clear from a consideration of the trial judge's ruling that he believed that the impugned evidence was being adduced as original evidence in order to demonstrate that the appellant, in addition to making oral admissions during the conversation, had made further admissions by his conduct. The trial judge clearly had in mind the principle that an oral statement by a third party, made in the presence of the accused, which amounts to an accusation that the accused was guilty of wrongdoing, may amount to an admission by that party if he, by his words, conduct, actions or demeanour, can be considered to have accepted or admitted the truth of what was stated. See *Evidence* (2nd ed) by Declan McGrath (Round Hall, 2014) at paragraph 5-112 *et seq*, also see *The People (Director of Public Prosecutions) v. Finnerty* [1999] 4 I.R. 364 where Keane J. at p. 376 explains the circumstances in which evidence of this sort can be relied upon non testimonially, in stating:-

> "Nor is the appeal concerned with the possible admissibility in evidence, of a statement made in the presence of a defendant, accusing him of a crime, upon an occasion which may be expected reasonably to call for some explanation or denial from him. Such a statement, although not evidence against him of the facts stated, may be accepted by him, by word or conduct, action or demeanour and it is then the function of the jury which tries the case, to determine whether it was accepted by him, in whole or in part: (see *Archbold on Criminal Pleading, Evidence & Practice,*1999 ed., 15 - 390)."

71. The impugned statement of Stephen Byrne was clearly capable of being used as original evidence to support an admission on the part of the appellant by his conduct, in that if the appellant had not been jumping up and down on the victim's head, as Stephen Byrne accused him of doing, it was reasonably to be expected that he would have denied doing so. He did not deny doing so, and so his conduct in acquiescing in, and ostensibly accepting the truth of, Stephen Byrne's accusation constituted evidence in itself that was admissible against him.

72. In the circumstances the Court finds that the trial judge was correct in his ruling, and that the second premise to this ground of appeal is consequently flawed.

73. The third premise in this ground of appeal is that the impugned evidence was not only hearsay but inadmissible hearsay. Strictly speaking, it is unnecessary for this Court to engage with this contention in circumstances where it is satisfied that the evidence was

not hearsay at all. However, it is worth remarking that even if the impugned evidence had been relied upon testimonially, it would have been admissible in any event under the exception to the hearsay rule that permits hearsay evidence of declarations explaining the performance of an act forming part of the *res gestae* to be admitted.

74. Developing this somewhat, as the trial judge noted, the witness had already given evidence that the appellant had said that he had stood on the head of the deceased. What the witness was recounting was a conversation that the appellant was a part of. The scene in which this conversation took place was captured by the CCTV which showed the appellant demonstrate how he had kicked the deceased in the head. The witness gave evidence as to what the appellant had actually said (that he stood on the deceased's head) and what was said about him in the conversation. What Stephen Byrne said served to explain the appellant's words and actions during the conversation, in circumstances where what was stated by Stephen Byrne was acquiesced in and was not repudiated in any way by the appellant at the time.

75. Support for this is to be found in the evidence given by Angela Whelan immediately after the jury had returned to court after the application for a discharge of the jury had been refused. The transcript records the following exchange:

> Q. Okay. And you had said that Stephen had said something about what had gone on; isn't that right?
>
> A. Yes.
>
> Q. Okay. And then what did Martin say in reply to that?
>
> A. To what Stephen said?
>
> Q. Yes. When they were talking about
>
> A. He just
>
> Q. When they were talking about what had happened?
>
> A. Marto said that he stood on his head.
>
> Q. Okay, and did he explain that or did he how do you know what he meant by that?
>
> A. Like, because Stephen was showing us, like, that he was standing up and down and
>
> Q. Was it Stephen was doing that?
>
> A. Yes.
>
> Q. Right. And what was he doing? He was showing you what happened, is that right?
>
> A. Yes.
>
> Q. And was Martin there at that point?
>
> A. Yes.
>
> Q. And did Martin say anything at that stage?
>
> A. No, I can't remember. I just remember Martin saying that he jumped on his head and just that, really.
>
> Q. Right. And how did you understand that? What did you take from that when he said that to you?
>
> A. Well, by standing on his head, like, obviously like jumping on his head.

76. In the circumstances the Court considers that the third premise in this ground of appeal is also flawed.

77. The fourth premise underlying this ground of appeal is that the admission of the impugned evidence rendered the appellant's trial unfair. In the appellant's written submissions a detailed case is made as to the alleged unfairness occasioned to him as a result of hearsay evidence that was prejudicial to him having been wrongly adduced. In particular, stress was laid, as indeed it was before the trial judge, on potential difficulties associated with testing the evidence in question such as an inability to confront and cross-examine the maker of the hearsay statement in circumstances where that person was a co-accused. The Court was referred to various commentaries, cases and authorities in support of the alleged unfairness, including passages from *Evidence* (now in its 2nd edition) by Declan McGrath (Round Hall, 2014); *Wigmore on Evidence; In re Berkley* (1841) 4 CAMP 402; *The State (Healy) v. Donoghue* [1975] I.R. 325; *Donnelly v. Ireland* (unreported, Supreme Court, 22nd January 1998); and *Borges v. The Medical Council* (unreported, Supreme Court, 29th January 2004)

78. In response, counsel for the respondent has argued that it was open to counsel for the appellant to seek to cross-examine Ms Whelan, which cross-examination could conceivably have neutralised any prejudice in the impugned evidence or elicited other evidence beneficial to the defence.

79. This Court agrees with the respondent. Considerations such as those raised by the appellant would only be relevant if the impugned evidence had been wrongly admitted in circumstances where it was inadmissible hearsay. Moreover, the appellant was not deprived of an opportunity of testing the evidence. The point that it was open to defence counsel to cross-examine Angela Whelan is well made, and such cross-examination could conceivably have neutralised the prejudice in the impugned evidence or elicited other evidence beneficial to the defence. It could have been suggested to her that the words had not in fact been spoken by Stephen Byrne if indeed that was the case. Alternatively, if it was accepted that the words had been spoken, it was open to counsel to suggest to the witness that they were open to an interpretation other than that contended for by the prosecution, or that they did not in fact serve to explain the appellant's words and actions during the conversation at the low wall.

80. In all of the above circumstances the Court is not disposed to uphold Ground of Appeal 2.

Ground 3
81. This ground of appeal is advanced on the basis that the appellant claims that his trial was fundamentally unfair by reason of the fact that it began as a case based on an allegation of murder by joint enterprise and then became one of murder by one accused only. This is said to arise in circumstances where the prosecution, having opened the case to the jury on the basis of joint enterprise, failed to give any indication to the jury after Stephen Byrne had changed his plea, that the legal concept of joint enterprise which had been explained to them in the opening by the prosecutor was no longer relevant and could not apply to the remaining accused, and where the judge's charge was allegedly insufficient to dispel the risk of confusion in the minds of the jury arising from what had occurred.

82. In support of the suggestion that the jury might have been confused, the Court was referred by the appellant to the case of *The People (Director of Public Prosecutions) v. McGrath* (unreported, Court of Criminal Appeal, 11th of March 2013) in which Hardiman J. stated:-

> "The Court is of the opinion that there is a considerable conceptual difficulty in saying that the case is posited exclusively on joint enterprise but that only one of the defendants is in fact guilty of murder."

and that:-

> "It is also the opinion of the Court that there was an inherent contradiction from the start in conceiving of the case as being one of murder by joint enterprise and at the same time one on which Mr Pinder might be regarded as merely guilty of manslaughter".

83. In reply to this, counsel for the respondent has referred this Court to what the trial judge actually said in the course of his charge concerning joint enterprise. The trial judge told the jury:-

> "So, the issue, ladies and gentlemen, of a joint enterprise is no longer in the frame here but a joint enterprise or the concept of a joint enterprise in law is that where two people or two or more people engage in a particular course of action they are all responsible for the actions of one another if what occurs is within the contemplation of what was planned. If you take the example of an armed robbery on a post office or a bank and you have three armed individuals who go into the bank and a fourth individual who sits outside with the engine of the car running ready to make good the getaway. Although that individual doesn't enter the bank he is as guilty of the bank robbery as the three who go in because it is part and parcel of the joint enterprise that the bank is going to be robbed and he is going to be outside waiting to get them offside as fast as he can.
>
> And you can have tacit agreements. If there's an assault going on and I go and join in on that then I am equally responsible for the other individual or other individuals who were involved in that. If perhaps somebody is robbing a handbag from an individual and another individual steps in to prevent the lady chasing the man who has taken her handbag then he is as guilty of the handbag snatch as the other individual because he has been partaking in the enterprise that was going on. So, that is what is involved in a joint enterprise but the concept no longer arises here. What you're asked to do is decide the guilt of the accused man of murder on the basis of the evidence of his involvement and only on the basis of his involvement in this particular activity."

84. It seems to this Court that the trial's charge concerning the non-application of the principles relating to joint enterprise to the case against the appellant was entirely clear and unambiguous. There is no tenable basis for believing that the jury might have been confused. They received a clear and readily understandable instruction, just before they retired to deliberate, that they had no need to concern themselves with the concept of joint enterprise. To the extent that the trial judge saw fit to explain the principles of joint enterprise to the jury, he did so, in circumstances where they had previously been mentioned to the jury as being potentially relevant, precisely for the purpose of emphasising that those principles were no longer relevant.

85. In this Court's view the judgment in the *McGrath* case is of no relevance to the issue raised, and it is in any case readily distinguishable on its own very peculiar and unusual facts.

86. In all of the above circumstances the Court is not disposed to uphold Ground of Appeal 3.

Conclusion
87. The Court, in circumstances where it has not seen fit to uphold any of the grounds of appeal relied upon by the appellant, dismisses the appeal.

Reasons for the refusal to allow additional grounds to be argued
88. The Court was not disposed to allow the proposed additional grounds to be argued having regard to the decision of the Supreme Court in *The People (Director of Public Prosecutions) v. Cronin* (No 2.) [2006] 4 I.R. 329.

89. This Court considers that no cogent explanation was advanced on behalf of the appellant as to why the matters sought to be relied upon as additional grounds were not raised at the trial.

90. The appellant was represented by experienced senior and junior counsel, and by a solicitor, at the trial. There is no reason to believe that the failure to challenge the warrant on the additional grounds now sought to be raised could not have been strategic.

91. The late raising of additional points, either based on a trawl of the transcript, or otherwise without good and sufficient reason, is to be deprecated. If, indeed, there had been good grounds for seeking to ventilate additional matters upon this appeal, the appropriate procedure in the absence of consent to an amendment to the Notice of Appeal was to bring a motion on notice to the other side seeking leave to amend, which motion should have been grounded upon an affidavit explaining why the points had not been raised at the trial, and why the interests of justice required that they should now be permitted to be argued. That was not done in this case.

92. In the circumstances, the Court considers that the application for leave to amend the Notice of Appeal to include the additional grounds sought to be relied upon was both procedurally and substantively misconceived.