THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Record No: 155 and 156 2015

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

DAMIEN FITZGERALD & BILL O'DRISCOLL

Appellant

JUDGMENT of the Court delivered 28th of July 2017 by Mr. Justice Edwards.

Introduction
1. On the 1st of May 2015, the appellants were both convicted by a jury of causing serious harm to Karol O'Keeffe on the 25th of November 2013 contrary to s. 4 of the Non-Fatal Offences against the Person Act, 1997, as well as robbery of the victim's mobile phone, worth €50, on the same occasion contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

2. A third accused, Mark O'Driscoll (who was not related to the second named appellant Bill O'Driscoll), had earlier pleaded guilty to identical charges of causing serious harm, and robbery, of the same victim on the same occasion.

3. The appellants were sentenced on the 1st of May 2015 to eight years imprisonment on both counts, to run concurrently and to date from the 22nd of February 2015.

4. The appellants now appeal against both their conviction and sentence. However, this judgment is concerned solely with the appeals against conviction.

The Grounds of Appeal
5. Both appellants have filed a number of what are essentially similar grounds of appeal against their respective convictions: In summary, these are:

> i. That the trial judge erred in failing to grant applications for a direction of no case to answer by reason of lack of evidence made on behalf of each of the appellants, respectively, at the close of the prosecution case;
>
> ii. That the trial judge erred in failing to give any or any adequate reasons for the refusal to grant the applications for a direction of no case to answer made on behalf of each of the appellants, respectively;
>
> iii. That the trial judge erred in failing to discharge the jury after the jury had heard that Damien Fitzgerald was "signing on" at the time of the incident;
>
> iv. That the trial judge erred in reminding the jury during the course of his charge of the fact that Damien Fitzgerald was signing on at the time of the incident;
>
> v. That the trial judge erred in refusing to charge the jury in respect of an alternative verdict of handling or possessing the property contrary to section 17 or section 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

6. In addition the second named appellant further complains:

> vi. That the trial judge erred in failing to charge the jury in respect of a possible innocent explanation for the blood of the injured party being found on the clothes of Bill O'Driscoll and, having being requisitioned on same, in failing to address the possibility that the blood was on the clothes through innocent contact;
>
> vii. That the decision of the jury was perverse and against the weight of the evidence.

7. In order to give proper consideration to these grounds of appeal it will be necessary to review the evidence that was adduced at the trial.

The Evidence Adduced at Trial
8. Both the Old Youghal Road and the Ballyhooly Road in the suburbs of Cork City are on a hillside north of the river Lee in Cork City, with the Old Youghal Road being at a higher level on the hillside than the Ballyhooly Road. A flight of steps known as "the Quarry Steps" provide a pedestrian connection from the Old Youghal Road to the Ballyhooly Road terminating at their lower end in a laneway that comprises a crescent of houses just off Ballyhooly Road and known as Windsor Cottages. A pedestrian descending the Quarry Steps must pass through a set of gates near their lower end in order to emerge at Windsor Cottages. There are also entrance gates from the laneway to a number of properties on Windsor Crescent close to the bottom of the quarry steps.

9. In the early hours of the 25th of November 2013, Karol O'Keeffe was walking home from a nearby pub when he was violently assaulted on the Quarry Steps. His mobile phone, worth €50 approximately, was also stolen in this incident. Mr O'Keeffe remembered leaving the pub and his next memory was of waking up in hospital. He had no recollection of the assault or concerning the circumstances in which his mobile phone was stolen from him.

10. He described his condition on waking up in hospital, stating that his ear was *"nearly severed off"*, that his face was

"unrecognisable", that he had no strength in his arm, that there were marks on his head, that his memory was impaired and that he was very confused. He spent two weeks receiving acute care in hospital, following which he was transferred to the National Rehabilitation Hospital in Dún Laoghaire. He told the jury at the appellants' trial that he had ongoing sequellae in that he remained very prone to fatigue, had no sense of taste or smell, continued to have impaired memory and to suffer from confusion, and had no self confidence since the incident.

11. It was acknowledged at the trial by counsel on behalf of the appellants that there was no dispute but that Mr O'Keeffe was assaulted, and indeed that he had suffered serious harm.

12. Ms Edyta Balicka was living with her husband Wojcieck at an address in Windsor Cottages. She told the jury that at 12.30 a.m. on the 25th of November 2013 she was at home and in bed upstairs with her husband when she heard a number of people engaged in an argument outside in the laneway. There were raised voices and there was shouting. There appeared to be three or four voices, and one of them was that of a female. They were Irish. She formed the impression they were drunk. The word "fuck" was being repeated many times. It went on for 10-15 minutes. She thought she might have drifted off to sleep briefly during this but, if so, woke again in circumstances of becoming conscious of a voice or voices coming from the direction of their gate. He husband looked out through the window, and following something he said to her she also looked outside. She saw the back of a man *"who was actually trying to walk towards Ballyhooly Road but he was unsteady on his feet and he couldn't –couldn't walk."* He was covered in blood. She identified the location where she had seen the man on a set of photographs produced to the jury. She said she had clear light from a street light. She discussed calling the Gardaí briefly with her husband and when she looked out of the window again the man was lying on the street. She then called the Gardaí. The time was 1.01 am.

13. Wojcieck Balicki in turn told the jury that he was asleep at about one in the morning on the 25th of November 2013 when he was awoken by noise outside. He heard three or four voices, including that of a woman. Although he has limited English he recognised swear words. A few moments later he looked out the window to see a man leaning against his gate. He was covered in blood and sitting down every few moments. He told his wife to call the Gardaí. When he next looked out the man had moved on to the laneway and was sitting.

14. Garda Caroline Keogh, together with two other Gardaí, responded to the call and proceeded to Ballyhooly Road. She found Karol O'Keeffe at Windsor Cottages just off Ballyhooly Road at the bottom of the Quarry Steps. He was attempting to get to his feet. He was very badly assaulted and covered in blood. She said he couldn't stand and kept falling. She described him as being *"really badly beaten"* so she and her colleague, Garda Maher, put him in the recovery position and called an ambulance, which in due course arrived and took the injured man to hospital.

15. Mr Michael Tidings told the jury that at 12.15 a.m. on the relevant date he had seen four persons, being three males and a female, drinking by the Quarry Steps. He described one of the males as wearing a red jacket and this male was standing in front of a green gate. The other two males were wearing dark clothes and white runners and were sitting. They looked drunk. He was suspicious of them as *"I thought that they were breaking in there because it looked like they were going at the gate".* He was subsequently shown some CCTV footage of a group of four persons captured on camera outside a premises known as "Pathways" on Ballyhooly Road and he confirmed that this was the same group as he had seen on the Quarry Steps.

16. Blood stains, keys, a wallet, a ripped necklace and items of clothing belonging to Mr O'Keeffe were found in the vicinity of the Quarry Steps. Also found at the scene was a blood stained temporary social welfare card belonging to the second named appellant Bill O'Driscoll. Mr O'Keeffe identified for the jury the necklace found at the scene of the assault as being his.

17. In the course of the Garda investigation an area of interest was identified and CCTV evidence captured by cameras located on a number of premises within that area of interest was recovered. The area of interest extended from the Ballyhooly Road, through to St Luke's Cross and down to Summerhill North and the Lower Glanmire Road in Cork City. The appellants were identified walking from Ballyhooly Road in the company of Mark O'Driscoll and one Julieanne O'Farrell at 1.09 a.m. on the 25th of November 2013. At 1.20 a.m. Mark O'Driscoll and Bill O'Driscoll were recorded fighting in the middle of the road on Summerhill North, while Mr Fitzgerald attempted to intervene. The appellants were recorded walking back up Summerhill North in another piece of footage at 2.37 a.m., seemingly without Mark O'Driscoll or Julianne O'Farrell. At 2.58 a.m. the appellants were identified from a Garda camera descending a flight of steps from Summerhill North to the Lower Glanmire road, opposite Kent Railway Station. The first named appellant was to be seen bending forward into a blocked up doorway on the first landing. Later footage, from just before 3.00 a.m., showed the appellants walking along the Lower Glanmire Road outbound towards Kent Station, returning briefly to the steps before moving towards Kent Station again.

18. At 3.05 a.m., on the 25th of November 2013, Garda Paul Colgan and a colleague, neither of whom knew anything about the incident at the Quarry Steps, were driving on the Lower Glanmire Road when they happened to spot the appellants. They searched them. Mr Fitzgerald was found to be in possession of two mobile phones, one of which he said was his mother's. Garda Colgan noticed that Bill O'Driscoll had blood on his hands and on his clothing, and asked him why. Mr O'Driscoll responded that he had fallen on the steps leading from Clifton Terrace and had cut his hands. Garda Colgan, in exercise of his powers under the Criminal Justice (Public Order) Act 1994, as amended, directed them to leave the area.

19. During the Garda investigation into the assault on Karol O'Keeffe a number of locations of interest were subjected to forensic examination. As Ballyhooly Road continues from Windsor Cottages in the direction of Cork City Centre it becomes Summerhill North. Clifton Terrace is just off Summerhill North. Clifton Terrace itself connects via a pedestrian path and some steps (referred to in the first named's appellant's interviews as "the railway steps") with Lower Glanmire Road which runs parallel to, and is downhill from, Summerhill North. These steps are directly opposite Kent Railway Station and are in view of a manoeuvrable Garda security camera on Lower Glanmire Road. The jury heard that during one such forensic examination conducted at Clifton Terrace, and specifically on the first landing of the aforementioned steps, Gardaí found a mobile phone wrapped in paper and tucked into a niche beside a steel door which leads to the railway tracks by Kent Railway Station. Mr O'Keeffe identified this mobile phone for the jury as belonging to him.

20. Dr Hillary Clarke of the Forensic Science Laboratory at the Department of Justice was also called to give evidence. Dr Clarke examined a pair of jeans, a hooded sweatshirt and a jacket belonging to Bill O'Driscoll. She also examined a pair of runners, a pair of tracksuit bottoms and a jacket belonging to Damien Fitzgerald and a pair of shoes belonging to Mark O'Driscoll. In the course of her evidence, Dr Clarke explained that there were two ways in which wet blood could transfer to an item. The first was contact, which is where an item comes into direct contact with a wet source of blood, for example if one individual fell on another individual who happened to be covered in blood. The second was spatter, which occurs when force is applied to wet blood, causing small droplets to fly through the air.

21. Blood staining was found on all items examined belonging to Mr Fitzgerald, including spattered blood staining on the lower part of the right and left legs of his tracksuit bottoms, and light, diluted-looking blood staining on the uppers of both runners. The DNA profile

from the spattered blood on the left leg of Mr Fitzgerald's tracksuit bottoms, the blood staining on the heel of his right runner and the blood staining on the left sleeve of his jacket all matched Mr O'Keeffe's DNA profile. A small portion of blood on the right sleeve of Mr Fitzgerald's jacket matched Bill O'Driscoll's DNA profile. Dr Clarke suggested that the dilution of the blood on the runners could have been as a result of the wearer walking through wet grass.

22. Contact blood staining was also found on Bill O'Driscoll's clothing. There was such staining on the right leg of his jeans, also heavy such staining the length of the right sleeve of his hooded sweatshirt and lighter such staining on both sleeves of his jacket. The DNA profile obtained from the area of contact blood staining along the right leg of Mr O'Driscoll's jeans, the right cuff and right sleeve of his hooded sweatshirt matched the profile of Karol O'Keeffe. No blood staining was found on Mr O'Driscoll's runners.

23. Dr Clarke received only one item belonging to Mark O'Driscoll, namely his runners. Heavy contact blood staining was found on the inner aspect of the right runner. There was also spatter blood staining on the right runner. Blood had been pushed up into the grooves of the sole on the right runner. Lighter blood staining was found on the left runner. DNA profiles taken from both the contact and spatter blood staining on the right runner matched with the DNA profile of Karol O'Keeffe. DNA from the sole of the right runner could not be profiled.

24. The jury heard that in the course of the Garda investigation the appellants were identified as suspects in connection with the assault and robbery of Karol O'Keeffe, leading to their respective arrests in that regard later on the 25th of November 2013, and their subsequent detention for questioning at Mayfield Garda Station.

25. During the prosecution case it was elicited by the first named appellant's counsel in the course of cross-examining a Garda witness that Mark O'Driscoll had also been arrested as a suspect, and that Mark O'Driscoll had in fact pleaded guilty to a charge of causing of serious harm to Mr O'Keeffe, and a charge of robbery of Mr O'Keeffe's mobile phone.

26. Both appellants were interviewed on a number of occasions while in Garda custody and evidence concerning these interviews was placed before the jury. Although these interviews were exculpatory in content in as much as both appellants denied involvement in any assault or robbery throughout, they also contained some admissions as to matters of fact on which the prosecution place some reliance.

Interviews with the First Named Appellant While in Custody

27. In the first of these interviews, which commenced at 16:04 on the 25th of November 2013 the first named appellant, when asked if he had information concerning a serious assault committed earlier that day at the quarry steps off Ballyhooly Road stated *"I didn't assault no one."* It was put to him repeatedly that the victim's blood was found on his runner's and that he needed to account for this. His responses included *"It won't be that man's blood"*; *"Send them away to the lab, it won't be me"*; and *"We'll see then. It will be back in a week and you can apologise to me then".* It was put to him *"You were up there and there's blood on your shoes. If it's not the man's blood on your shoes, why wouldn't you tell us whose blood it is?"* He replied: *"Because I don't want to."*

28. The first named appellant was asked about his movements on the previous evening, and in to the early hours of that date. He said that, after consuming eight or nine cans at his mother's place in Inniscarra Road, he and the second named appellant went into town. His interview then continued with the following exchanges:

Q: "What did you do in town?"

A: "Went drinking down by the steps at the railway station."

Q: "Is that Clifton Terrace?"

A: "I don't know it. You can look over at the railway station. If you go up towards St Luke's you can turn down to it. The railway steps I call it."

Q: "How long were you drinking there for?"

A: "A few hours."

Q: "Who was with you?"

A: "Just me and Bill."

Q: "Where did you go to then?"

A: "I think we ended up in The Glen."

Q: "How come The Glen?"

A: "We were going up seeing women."

Q: "Do you know what way you walked up to the Glen?"

A: "To tell you the truth I was a bit steamed, I don't know what way we walked up there."

Q: "Did you meet the women?"

A: "No."

Q: "So what did ye do then?"

A: "We headed back in and we ended back by the steps actually."

Q: "Still just you and Bill?"

A: "As far as I can remember, just me and Bill."

Q: "What did you do then?"

A: "Went up to Killala Gardens, Bill's uncle, but they were all asleep."

Q: "Did you walk up there?"

A: "No, got a taxi just in -- we got pulled by the guards down by the train station."

Q: "When you got to Killala Gardens, no one left ye, what did ye do then?"

A: "Walked down to my mother's house."

Q: "What time did you go into town at from your mother's?"

A: "Around 7 am."

29. He was asked what he did in town that morning, giving rise to the following further exchanges:

A: "Walking around. I had to go into the Meteor shop in town."

Q: "How come you had to go in there?"

A: "I bought a phone Friday. I lost my SIM card so I had to go in to buy a new one."

Q: "Where did you buy the phone on Friday?"

A: "The Meteor shop."

Q: "What type of phone is it?"

A: "A Nokia Lumia."

30. At a later point in the interview he was asked *"Did you meet anybody from the railway steps to the Glen?"*, and replied *"There were people drinking on the steps but I don't know who they were."* He clarified that the steps he was now referring to were not the railway steps but steps where if one were walking up Ballyhooly Road one would *"turn up left before the grotto, up them steps"* (i.e., the Quarry Steps). This gave rise to the following further exchanges (*inter alia*):

Q: "How many people were drinking there?"

A: "Think there was about three or four."

Q: "Did ye join them for a drink?"

A: "We were just having our own few. We were waiting for the girls to come but they never came."

Q: "So did ye wait on the steps?"

A: "Yeah."

Q: "For how long?"

A: "About an hour."

…

Q: "Do you know the people you were drinking with on the steps?"

A: "No."

Q: "Can you describe them to me?"

A: "I think they were three boys and two girls, young enough, 18 to 19, that kind of way."

Q: "Were they from Cork and what were ye talking about?"

A: "We weren't really sitting down having a conversation then, myself and Bill together."

Q: "Right. Damien, these are the steps the injured party was found, do you understand this?"

A: "Yeah, I understand that's what you're saying."

Q: "It was approximately 01:15 hours, give or take a few minutes, when the assault occurred. That was the time you were there, is that correct?"

A: "Well, I didn't see anyone. There was other people there as well."

Q: "You said ye stayed on the steps for an hour, is that correct?"

A: "Yeah."

Q: "Was Bill with you all the time you were on the steps?"

A: "Yeah, he was."

Q: "I find it very hard to believe, Damien, that ye were on these steps for an hour and didn't see any assault around the time you were there?"

A: "I didn't see no assault."

Q: "A woman was asleep in bed and rang in when she heard commotion. Surely you heard or saw something?"

A: "I saw no assault."

Q: "Who was with ye?"

A: "I don't know who they were. There were two girls and two boys."

…

Q: "Were Mark Mox O'Driscoll and Julianne O'Farrell drinking with you?"

A: "I wouldn't really know them."

Q: "By 'I wouldn't really know them', I take it you do know them?"

A: "I do know them to see."

Q: "Were they up there with you?"

A: "I can't really remember them being up there."

Q: "So they could have been there?"

A: "It's a possibility but personally I can't remember them there."

Q: "Were they there when the assault occurred?"

A: "I wasn't there for any assault."

31. Mr Fitzgerald was asked to explain why Bill's clothes were covered in blood and he responded *"I didn't see his clothes covered in blood".*

32. Finally in this interview he was asked about mobile phones:

Q: "How many mobile phones do you own?"

A: "One, but I had a loan of my mother's phone but I gave it back to her yesterday because Noreen was ringing me but I got a new one."

Q: "When yesterday did you give back her phone?"

A: "I think it was last night if not the night before."

Q: "You had two phones on you when the gardaí stopped you in the early hours of this morning. You own these phones?"

A: "My mother and myself."

Q: "What's the number of your mother's phone?"

A: "0872603798."

Q: "Was it a phone taken off the man that was assaulted?"

A: "It wasn't belonging to him. It was my mother's phone it was."

33. The first named appellant was interviewed for a second time commencing at 22.35 on the 25th of November 2013. In the course of this interview he was shown a number of video stills, giving rise to the following exchanges (inter alia):

Q: "Damien, I'm now showing you a CCTV still which was captured at 11.29 pm last night only a few hundred yards from the quarry steps. I put it to you that that is you, that is Julianne O'Farrell, that is Bill O'Driscoll and that is Mark O'Driscoll. Is that you?"

A: "It is."

Q: "Is that the other people I mentioned?"

A: "I can't say it is."

Q: "Now showing you CCTV footage 1.08 am on this morning's date coming down the Ballyhooly Road. That's Mark O'Driscoll, that's Julianne O'Farrell, that's Bill O'Driscoll and that's you smoking a fag or something. Is that you?"

A: "Looks like me, yeah."

Q: "Do you accept that is you in the footage, Damien?"

A: "Looks like me, yeah."

Q: "Damien, what happened up there, did you kick his head in?"

A: "I didn't assault nobody."

…

Q: "Did you kick him in the head when he was lying on the ground?"

A: "I didn't kick no-one."

Q: "Were you involved in the assault?"

A: "No."

Q: "Were you there when the assault happened?"

A: "I know nothing about an assault."

Q: "Did you throw the first punch to start all this?"

A: "I threw nothing. I don't know nothing about anyone throwing anything."

Q: "The ear was nearly kicked off him, is that's why there's blood on your shoes?"

A: "That blood is not his. When it comes back from the lab we'll see then, simple as that."

Q: "What were you thinking when you walked away and left him lying on the ground in a pool of blood?"

A: "I walked away and left no-one on no ground. There was no one there on the ground."

Q: "Ye were on the steps but you said you saw or heard nothing, yet there was a woman over the wall who heard it?"

A: "Maybe it must have been when I went on."

Q: "It wasn't because he was assaulted at 12:30 and ye didn't leave until 01:10?"

A: "It doesn't add up, so it doesn't."

…

Q: "You told us earlier it was just yourself and Bill who walked up Ballyhooly Road, yet it can be clearly seen from footage that you were in the company of two other persons. Do you now accept that you were in the company of others walking up to the scene at the quarry steps?"

A: "It looks like it, yeah."

Q: "Why did you tell us earlier it was just yourself and Bill?"

A: "Because we only bumped into them I think."

Q: "Where did ye bump into them?"

A: "I can't remember, town I think."

Q: "Were they up at the railway steps with ye?"

A: "I didn't think so."

Q: "You were seen on McCurtain Street in the company of Julianne O'Farrell, Bill O'Driscoll and Mark O'Driscoll, is that correct?"

A: "I think so, yeah."

Q: "And the four of you went up to the railway steps, isn't that correct?"

A: "We went for a drink."

Q: "And the four of you then proceeded up the Ballyhooly Road and on to the quarry steps, is that correct?"

A: "Yeah."

Q: "At what point did ye decide to assault this man on the quarry step?"

A: "I attacked no-one and anybody with me didn't attack anyone. Maybe he fell and hit his head."

Q: "If you saw the state of him you wouldn't say that. His ear is almost hanging off. You don't realise how serious this is, do you?"

A: "From what I'm hearing, I hear it's pretty serious, yeah."

Q: "We know you were there, Damien, you put yourself there. Just tell us what happened up there?"

A: "I don't know what happened."

34. The first named appellant was interviewed for a third time in an interview commencing on the 26th of November 2013 at 9.59 hours. In this interview it was put to him: *"Damien, gardaí believe that you had no phone over the weekend and this was motive to assault and beat the man on the steps and steal his mobile phone. What do you say to that?"* He replied: *"I had my own phone."* He was then questioned further about his claim in an earlier interview of having purchased a new mobile phone a short time previously:

Q: "What phone shop did you go to on Patrick Street?"

A: "Meteor shop."

Q: "What did you buy in the phone shop on Monday morning?"

A: "A SIM."

Q: "When did you buy the phone?"

A: "Friday."

Q: "What did you pay?"

A: "€99."

Q: "If you bought a phone on Friday, why did you need a new SIM?"

A: "Because my phone went dead and I took out the SIM card and lost it. I just went in and got a replacement."

Q: "Where did you swap SIM cards?"

A: "Coming down Gurran."

Q: "You had your mother's phone as well?"

A: "Yeah, it's an 087 phone. Noreen was ringing me."

Q: "What type of phone is your mother's?"

A: "A black Nokia."

Q: "Anything unusual?"

A: "No."

Q: "Any keys cracked or anything?"

A: "No."

Q: "Why didn't you give Noreen your new number?"

A: "I couldn't contact her."

Q: "Did you take out your SIM card to try it in the stolen phone?"

A: "I told you I don't know nothing about a stolen phone."

Q: "So you were drinking on the step at the same time of the assault. The phone was found near where the gardaí spoke to you?"

A: "It means nothing."

35. The first named appellant was interviewed for a fourth time commencing at 13:31 on the 26th of November 2013. On this occasion the full video footage recorded by the camera at Pathways was shown to him. He had already been shown selected stills from this footage in an earlier interview. He accepted that it showed him in the company of the second named appellant, Mark O'Driscoll and Julieanne O'Farrell at 1.09 a.m. on the 25th of November 2013, and also that he was to be seen wearing the same clothing and footwear as were taken from him by members of An Garda Siochána following his arrest.

36. The first named appellant was then shown further CCTV footage harvested from the Garda security camera system on Lower Glanmire Road:

Q: "Now showing you footage from the garda camera on Lower Glanmire Road which shows you stashing the injured party's mobile phone which was robbed from him. Bill O'Driscoll was with you. I put it to you that where you stashed the phone is where the gardaí found it?"

A: "I stashed no phone"

Q: "I put it to you that that's you and Bill O'Driscoll in the footage and it clearly shows you bending down on top of the steps and concealing the mobile phone. What do you have to say to that?"

A: "I hid no phone."

Q: "Gardaí met you just minutes after you stashed the phone and you already agreed that you did meet the gardaí there. What do you have to say to that?"

A: "Yeah, I did meet gardaí there, I told you that already."

Q: "Do you accept that that's you and Bill O'Driscoll in that footage?"

A: "Yeah, it do look like the two of us, yeah."

Q: "Will you tell us what you were doing on top of the steps bending down?"

A: "I couldn't see myself bending down."

…

Q: "Do you accept that gardaí located these items at the top of the steps?"

A: "Could have."

Q: "And that's where you were drinking, Damien?"

A: "Might be, yeah."

Q: "[A]re you still saying you had no part to play in this assault robbery?"

A: "Yes."

Q: "How did you come into possession of the injured party's mobile phone?"

A: "I didn't."

Q: "I put it to you that you're clearly seen on footage on the steps hiding it?"

A: "I put it to you I had no phone."

Q: "So what you say about CCTV from 02:59 hours that we showed you on them steps?"

A: "I'm saying nothing about it."

37. Further, in the course of this interview the first named appellant was shown a photograph of the blood staining at the scene of the crime and he was asked:

Q: "Gardaí believe it's the injured party's blood after being viciously beaten. Will traces of this blood be found on your footwear?"

A: "No."

Q: "If this blood is found on your footwear, can you give us any explanation of how it got there?"

A: "Could be if I passed down and stood in it maybe."

Q: "So did you see blood up there that night?"

A: "To tell you the truth I didn't."

Q: "Did you see a man lying on the ground with serious injuries to his head?"

A: "No."

38. The first named appellant was also shown photographs of a number of other physical exhibits and was asked to comment:

Q: "Showing you a photo of a temporary dole card in the name of Bill O'Driscoll which was found at the scene. Can you see it?"

A: "I can see a temporary dole card."

Q: "This necklace which has been identified as the injured party was found in close proximity to Bill O'Driscoll's temporary dole card. Can you explain how they were found so close to each other?"

A: "You've to talk to him about that."

Q: "Sure you were there so we have to talk to you?"

A: "Talk to me then."

Q: "Now showing you discarded cans of Royal Dutch. Were you drinking there on the night?"

A: "Think I was, yeah." "Is it a possibility that your fingerprints or DNA will be on the cans?"

A: "Could do, yeah."

Q: "I'm showing you a significant amount of blood which contains part of the injured party's necklace and a lot of glass. Does this look familiar?"

A: "No."

Q: "These photos suggest the injured party was glassed also during the robbery, do you know anything about that?"

A: "No."

Q: "Now showing you photos of a Nokia mobile phone which was found concealed, wrapped in paper near the top of the steps at Clifton Terrace. This is the injured party's phone which was taken from him on the night. Are your fingerprints or DNA going to be on the phone or the paper it was wrapped in?"

A: "No."

Q: "I put it to you that you're on CCTV placing this phone where the gardaí located it. What do you have to say to that?"

A: "Never seen it before."

Interviews with the Second Named Appellant While in Custody

39. The jury heard that the second named appellant was interviewed for the first time while in custody at Mayfield Garda Station in an interview commencing at 21:37 on the 25th of November 2013. He was shown some CCTV footage from St Luke's Post Office at St Lukes Cross (where Ballyhooly Road becomes Summerhill North) commencing at 1.08 a.m. on the 25th of November 2013. Having viewed this footage he acknowledged that it showed himself and Damien Fitzgerald together and in the company of Julianne Farrell and Mark O'Driscoll, and that the group was walking along Ballyhooly Road in the direction of St Luke's Cross. In response to a question as to where he was coming from, he stated that they were probably coming from Dillon's Cross and that *"we walked from there to town, to Damo's mother's place."* When asked where he had been for the hour from to 1.00 a.m. he stated *"We were just walking around."* It was put to him that CCTV footage from Dillon's Cross did not show them there and he was asked *"so where between St Luke's and Dillon's Cross could you have been?"* and he responded *"[b]y the Grotto"* Further questioning established that the area he called *"the Grotto"* was another place where there were "steps leading up to the Old Youghal Road" from Ballyhooly Road.

40. He was asked about the group of four meeting a Garda on McCurtain St at 10.40 p.m. on the 24th of November, and asked to comment on the fact that there was no blood to be seen on his clothes at that stage. He replied *"because my lip was all right then and my nose was all right at the time too."* When asked what had happened to his nose and lip he stated *"I got a slap and my nose was pouring blood on my lip."*

41. He said the group *"went up by O'Donovan's off-licence"* when going from McCurtain St to Ballyhooly Rd, and that this had happened *"coming down O'Donovan's"* and that it had happened because *"[m]e and Mark had a few words".*

42. This interview then continued with the following exchanges:

Q: "Where did you buy the drink?"

A: "In a small off-licence in Gurranabraher next to the garda station."

Q: "Were you drinking this drink between St Luke's and Dillon's Cross or the Ballyhooly Road?"

A: "No comment."

43. The second named appellant was then asked if he was on the dole, and he said he was, and confirmed that he collected his dole using a temporary dole card. He initially stated his belief that the card was at home. Later in the interview when shown a scene of crime photo of a dole card covered in blood he accepted that it was his dole card that had been found on the Quarry Steps:

Q: "This man was assaulted at approximately 12.30 am, the 25th of November 2013. You've accepted you were drinking there at the time. We must put it to you that you had something to do with this assault?"

A: "I had nothing to do with this assault."

Q: "How can you explain your temporary dole card being found at the scene of the serious assault with blood on is and beside a necklace that was ripped off the injured party?"

A: "It must have fallen out of my pocket before I left the time I was drinking there."

Q: "You accept that the photo I am showing you is your current temporary dole card?"

A: "Yes."

Q: "Will you please tell us what your dole card covered in blood was doing at the scene?"

A: "It must have fallen out of my pocket."

Q: "Were you involved in the scuffle?"

A: "No."

Q: "Whose blood is on it?"

A: "I don't know."

Q: "The necklace that was near the dole card is ripped and belongs to the injured party.

A: "It must have been coincidence."

Q: "What were you drinking last night?"

A: "Carling".

Q: "We must put it to you that from the evidence and CCTV footage you were in the area at the time when this serious assault occurred?"

A: "I wasn't there at the time. I wasn't a part of it."

Q: "I must put it to you that you were part of it and that you and other persons attacked this man for no reason, what have you to say to that?"

A: "You're wrong. I attacked no man."

Q: "Do you accept that you were in the area of the quarry steps between 11.30 pm and 1.09 am this morning?"

A: "We were only in there 20 minutes."

Q: "I must put it to you that you were there longer?"

A: "Yes, I was probably there longer."

44. The second named appellant was interviewed again at 6 p.m. on the 26th of November 2013 at Mayfield Garda Station. This interview included the following exchanges:

Q: "Did you take anything out of this man's pockets?"

A: "I didn't take anything, I didn't see this man."

Q: "Did this man touch you?"

A: "I didn't see this man for him to touch me."

Q: "You were telling us you had nothing to do with this robbery or assault?"

A: "I had nothing to do with that."

Q: "I must put it to you that you were involved in a serious assault and robbery at 12.30 am on today's date, the 25th of November 2013 at the quarry steps, Windsor Cottages at the Ballyhooly Road. What have you to say to this?"

A: "I have no involvement in any assault or anything."

Q: "Do you accept that you were in this area of Cork city at the time when this assault occurred?"

A: "I doubt it."

Q: "I must put it to you that you were in this area at the time when this assault occurred, do you accept this?"

A: "I was around the area."

Q: "So it's a coincidence that you were around the area and that your dole card was found in the area?"

A: "Yes, it must have been a coincidence."

Q: "I must put it to you that you were on the quarry steps at some point during the early hours of the 25th of November 2013?"

A: "Yes."

The Refusal of a Direction

45. At the end of the prosecution case counsel for both accused applied for directions, discussed in greater detail later in this judgment, on the grounds of insufficiency of evidence.

46. These applications were refused by the trial judge, who ruled:

"JUDGE: Very well. There's an application then made at the close of the prosecution case by both Ms O'Connell on behalf of Mr Fitzgerald and Mr Creed on behalf of Mr O'Driscoll and clearly the authorities cited relates in the first instance to the iconic case of Galbraith which was adopted in this jurisdiction under Lacey, and I've considered the matter, particularly the manner in which the arguments have been made by reference to the evidence or the absence of evidence and the difficulty in charging the jury in respect of certain matters and the possibility of the jury falling into error by way of speculation, and having considered the matter and also the reply of Mr Sheehan I am satisfied that the

application should be refused and accordingly I am not going to allow the application to proceed on that basis."

Defence Evidence

47. Subsequent to the closure of the prosecution case, and following refusals by the trial judge of applications for directions on behalf of each of the appellants respectively, the first named appellant opted to go into evidence. In the first instance he called Mark O'Driscoll as a witness in his defence, and he then gave evidence himself.

48. The second named appellant did not go into evidence.

49. Mark O'Driscoll told the jury (inter alia) that he and his partner Julianne were in the company of the appellants at the Quarry Steps at the time of the incident, having met and joined up with them earlier on McCurtain St. There was another *"young fella"* there whom he had asked for a *"fag".* This person had replied as *"What would you give me for a fag"* and gave him the finger. He said *"[a]nd I seen the finger and I just snapped".* He went over and hit him with a pint glass, and also *"hit him a good few punches and a few kicks."* He said *"I done all the damage. I did the damage myself".* He said the first named appellant tried to separate them i.e., he was *"trying to pull me off him".* He said *"the two boys had nothing got to do with it",* and that the incident had ended when his partner and the two boys just walked on.

50. Under cross-examination by counsel for the prosecution he contended that he had not set out to rob the victim of a mobile phone, but conceded that he had in fact done so. It was put to him that the victim's leather jacket had been removed during the incident and was later found thrown in adjacent bushes, and it was suggested that he had thrown it there having first searched the victim's pockets. Mr O'Driscoll denied this, but later admitted throwing the victim's scarf in to the bushes. He agreed that he had initially denied to the Gardaí that he had assaulted and robbed Karol O'Keeffe and that he told them the blood on his clothing was from rabbits he had killed while "lamping" rabbits.

51. When asked under cross-examination to describe again the dynamics of the assault, there was the following exchange:

A. I hit him with the pint glass.

Q. Yes?

A. Then he fell and I started kicking him then and punching him.

Q. Did you kick him and punch him when he was on the ground, is that what you're saying?

A. Yes, on the ground, yes.

Q. He is now lying on the ground?

A. On the ground.

Q. And did you stand back from him

A. No.

Q. to look at him on the ground or were you standing over him at that stage?

A. Standing over him.

Q. And where was Damien Fitzgerald at that moment when you had hit him? Karol O'Keeffe is now on the ground, where was Damien Fitzgerald standing? Was he standing next to you looking at Karol O'Keeffe?

A. No, he wasn't.

Q. Where was he?

A. He wasn't standing next to me.

Q. He was?

A. He wasn't around me.

Q. He wasn't around you, where was he?

A. Sure I told you, the two boys and my partner walked off."

…

Q: … You didn't give any warning to Bill O'Driscoll and Damien Fitzgerald, "Stand back lads I'm just about to hit this man with the pint glass"?

A. I said nothing to the boys.

Q. No. So they had no opportunity then to pull you off?

A. They pulled me off, yes.

Q. When did they pull you off Karol O'Keeffe then?

A. With the first one.

Q. With the first what?

A. With the first punch and kick.

Q. The first punch and kick. Was that with the glass?

A. No, sure I hit him first with the glass and then the glass cracked.

Q. Yes. But you understand now from your account that you've given to the ladies and gentlemen of the jury, you hit Karol O'Keeffe with the glass, are you all right?

A. I am grand.

Q. Would you like me to stop?

A. No, I'm grand.

Q. Okay. You've hit Karol O'Keeffe with the glass. You've told us that Damien Fitzgerald and Bill O'Driscoll have left

A. They have left, yes.

Q. with your girlfriend, so they are not there to pull you off?

A. Yes, I know that.

Q. So how did they pull you off then if they're gone?

A. No, but after when I ran down the road after them.

Q. I must put it to you that you are telling lies?

A. Sure I put it to you that I'm not telling lies.

Q. And you are telling lies because you are taking the blame for your friends?

A. I'm not taking the blame for it. I done the damage, I pleaded guilty already for it."

52. Under cross-examination by counsel for the second named appellant, Mark O'Driscoll acknowledged that he had been diagnosed with schizophrenia for which he was on medication. He accepted he was not supposed to combine his medication with alcoholic drink. If he combines the two it affects his memory. He stated the reason he and Bill O'Driscoll had been fighting on the night was because Bill had been giving out to him for attacking Karol O'Keeffe.

53. The first named appellant then gave evidence himself in which he stated (inter alia):

A. What happened, we were all chatting away. The three of us, we would have been sitting down on the steps. Julianne O'Farrell would have been sitting down on Mark's lap at times, but she stood up. A man now known to me as Karol O'Keeffe came down along, came down along the steps.

Q. Yes?

A. He seemed to be merry himself, in jolly humour, whatever. Julianne O'Farrell asked the man, "Is there any chance you wouldn't have a spare fag there please until I go down the road to the pub and get a box of my own" because she ran out of them.

Q. Go on?

A. At this stage then he was kind of messing with her saying, "What would you give me for a fag?" And all that. It was more playful humour than anything. He kind of put his hand out. It wasn't in any kind of getting onto her but it was playful humour than anything and Mark just completely snapped at this, like. From what I can put it down to, it was a jealous rage, that he must have been thinking that Mr O'Keeffe was getting onto his woman, which in fact he wasn't at all.

Q. So what happened?

A. He came over. He started, he hit him a few digs. He fell down on the ground. He started stamping on him."

…

"A. He punched, kicked and stamping on Mr O'Keeffe. I intervened. I ran over and caught him and pulled him off him. I was finding it very hard to get him off Karol O'Keeffe. Bill was assisting me from the other side to get him off him as well. We eventually did get him off him.

Q. What happened then?

A. What happened, me and Bill were trying to calm him down.

Q. Calm who down?

A. Calm him down. He was roaring and shouting. To be honest I don't know what he was roaring and shouting about.

Q. Mark, you're talking about?

A. Yes, Mark O'Driscoll. I do not have a clue what he was roaring about. Julianne now was in a very shocked state by what she did see as well, like, because for me, like, I've known Mark a number of years. I drank with him a few times and I've never known him for violence."

…

"A. What happened then, me and Bill put the man up on these steps there. Picked the man up, put him there after calming Mark down, Julianne and Mark were arguing."

…

"Q. And?

A. That was I thought everything was calm. I looked at Karol, I didn't see any blood or anything. He looked okay to me. I said, "Are you okay?" He said, "I'm grand, boy, what happened me?" I said, "You're just after getting a few digs and a few slaps there but" I said "you're all right". And he said, "I'm grand". Then Mark, I was talking to Mark again. Out of the blue I was drinking a can I said, "Mark, there was no need for what you are after doing there man". Out of the blue again, this is in the space of a minute, he ran over to Karol O'Keeffe and started kicking and punching him. I heard a glass shatter. Now, the glass shatter he was drinking out of a pint glass that night and I could nearly be certain that it was that time when he hit him with the pint glass was the second time and he was down on top of him. Me and Bill ran in again and pulled him away from him. This is the second time. Me and Bill pulled him away.

Q. Yes. And go on?

A. The man was like a lunatic and that's the God's honest truth. He really was. He put him there. I was so stressed by what was going on. Julianne was crying. Bill was in a fairly agitated state as well. Because we came out for a quiet drink, I didn't want this. I said, "Julianne, I'm going on the way home. You are more than happy to come with me and Bill if you want. I am going up to my mother's house but I'm not staying around here" I said. "I'm going on home", I said. And we proceeded. Mark was going up and down these steps here roaring and shouting like a madman, going up and down the steps. And me and Bill walked on. Julianne just came on. She was crying at the time as well. She came on with us. We ended up kept coming down the end of the lane way, …"

…

"Q. Yes?

A. Turned right. Mark ended up running down, it would have been about a minute or two after that roaring and shouting, "What the eff are ye doing leaving me here on my own?" Now I turned around to him and said, "What do you expect us to do, stay here and you carrying on like a madman?" Then he ended up arguing with Julianne again. "What are you doing?" Julianne said, "I'm going home" and Mark said "I'm going home with you". We proceeded down along by Pathways it would have been a youth hostel, it's down right when you go down a bit farther there, down and Mark handed me a black Nokia phone. I threw it into my pocket, I just leave it."

…

"Q. So you've described coming down the Ballyhooly Road, you are coming down there and Mark hands you a black Nokia?

A. He said, "There's your phone", he said.

Q. Why would he have had the phone in his possession?

A. Because he was playing music on my Nokia Lumia. He was looking at that. He must have thought because earlier on in the night he knew I had two phones, that's why he must have given me the phone. Now it was later, afterwards I realised that I had three phones in my possession. And I was trying to figure out how did I have three phones in my possession because when Mark gave me the phone I had thrown the black phone into my pocket here. I had the Nokia Lumia in another pocket here, but in my Timberland jacket I had a pocket there and a pocket there. I realised I had a black Nokia in this pocket here which was my mother's phone I later found out. So I had this other phone, this other black Nokia that looked identical to my mother's phone and to be straight out with you, I put two and two together, why did Mark hand me this phone? I said. Now, when he handed me, like, after he fighting with Bill and all that, Bill arguing with him over the assault and all that, I said, is he trying to put something on me, pin something on me? I got paranoid to be straight out with you over the phone because I didn't know where the phone came from. There was only I had two phones on the night. Julianne O'Farrell had a phone on the night. Bill had a phone on the night but Mark O'Driscoll never had a phone on the night himself. So I was very suspicious of why he gave me that phone. It was by accident I came into possession of this phone.

Q. What did you do with the phone?

A. To be straight with you, straight out with you, after Bill and all that, I panicked with the phone. I realised after Bill and Mark fighting, I realised about these three phones, I just put the phone in a piece of plastic. I was going to throw it over the railway steps bridge, but I knew it must have been someone's property. I put two and two together that he must have in that one or two minutes that he was left up there, taken this from Karol O'Keeffe and I didn't want the phone around me. So I just threw the phone, I just threw it in a gateway coming down the railway terrace"

…

Before Mark left did anything happen?

A. Yes it did, yes.

Q. What happened?

A. Bill O'Driscoll and Mark O'Driscoll ended up fighting. I wouldn't call it a fight. I would call it more of assault towards Bill O'Driscoll than anything. Bill put to Mark O'Driscoll, "Do you think you're good kicking and stamping on a drunken man over a dirty fag," he said. Mark O'Driscoll turned around and said, "What the eff has it got to do with you".

Q. And what happened then?

A. I was trying to stop it. Julianne it couldn't be done, Mark just hit Bill and Bill just, he knocked Bill out. He hit him straight on the nose and busted his lip and his nose. That's exactly what happened.

Q. And what state was Bill in immediately after it?

A. He was very dazed, very confused. He had a good bit of drink taken as well, but I think like, he fell back and hit his head as well. He was a bit dazed. I was looking after him. I got him up and I brought him back up along the hill. He started coming around then himself again, like.

Q. Now what, in terms of his injuries he got from Mark, you described his nose?

A. A bursted nose and his lip.

Q. Did anything was there any consequences of those injures?

A. How do you mean any consequences?

Q. Did anything come out of his nose or lip?

A. Blood, yes."

Grounds of Appeal Nos. (i) and (ii) – re. the Refusal of a Direction.

54. At the end of the prosecution case it was submitted on behalf of both appellants that the jury ought to be directed to find each accused not guilty on all counts. In making this application counsel for the appellants both relied upon the first limb of Lord Lane's celebrated judgment in *R v. Galbraith* (1981) 73 Cr App R 124; [1981] 1 W.L.R. 1039, namely insufficiency of evidence.

55. The applications were premised in each instance on the proposition that the high water mark of the evidence adduced by the prosecution was that the appellants were present at the scene and at the time of the assault. However, there was no direct evidence that either of them participated in the assault, or that either of them robbed Mr O'Keeffe of his mobile phone. While blood with the same DNA profile as that of the victim had been found on the clothing and/or footwear of both appellants this, it was contended, merely established that they were in contact with the victim's blood and, in the case of Damien Fitzgerald, who had not just contact type blood staining on his apparel but also had spatter type blood staining on it, that he was in close proximity to the victim at the time that he was being assaulted. While it was known for certain that Mark O'Driscoll had been involved in the assault because he had pleaded guilty both to causing serious harm to Karol O'Keeffe, and to robbing his mobile phone, the forensic and other evidence did not establish that either of the appellants was involved in the actual assault or in a robbery of the mobile phone.

56. Moreover, the prosecution had not specifically made the case that the appellants had been acting in concert either with Mark O'Driscoll or even inter se. It was emphasised that there was a lack of clarity as to the exact case being made by the prosecution and that the prosecution had failed to nail its colours to the mast.

57. In that regard counsel for the first named appellant had observed at the time of the application for a direction:

"Now, the section 4, addressing that first of all, there are a number of ways in which Damien Fitzgerald could be convicted but it's not clear yet which is being proposed by the State. That may emerge but at the moment it's unclear are they being charged with having planned this as a joint enterprise, or are they being charged on the basis that they participated in the assault itself by physically attacking Karol O'Keeffe, the injured party, themselves, or is it being asserted or put to the jury that they aided and abetted in this attack primarily by Mark O'Driscoll?"

58. She was joined in this by counsel for the second named appellant who stated:

"The prosecution, as I understand it, are bringing this case on the basis that Mr O'Driscoll perpetrated the assault and that Mr O'Driscoll robbed Mr O'Keeffe such that he stole property from him and at the time used violence against him with a view to stealing the property. The case hasn't been opened to the jury on the basis that they were in a joint enterprise with Mr O'Driscoll. The case hasn't been opened to the jury on the basis that they were aiding and abetting, counselling or encouraging but that they but that Mr O'Driscoll committed these offences. So, the question is then what evidence is there that a jury properly charged and I think that's important could reasonably conclude that Mr O'Driscoll is guilty of these two offences."

59. It was contended that the prosecution evidence did not provide either direct and/or circumstantial evidence sufficient to justify an inference either of a direct attack on Mr O'Keeffe by the appellants (or one or other of them) or of their participation in a joint enterprise of any sort.

60. In addition, it was submitted in support of the direction application, that in so far as the robbery counts were concerned, while Damien Fitzgerald was captured on CCTV hiding the stolen mobile phone, this did not prove that he had robbed it. It might have fallen from the victim's person when he was being assaulted and Damien Fitzgerald could then have picked it up after the fact of the assault and taken it away . If the victim had dropped the phone in the course of being assaulted by someone other than Damien Fitzgerald, and Damien Fitzgerald had then picked it up and taken it away, then in circumstances where he had not been involved in any assault on the victim Damien Fitzgerald would, in that event, be guilty of theft only but not guilty of robbery. Further, in circumstances where Mark O'Driscoll had admitted to both assaulting the victim and robbing the phone, the fact that Damien Fitzgerald had somehow come into possession of it after the fact would, in the absence of evidence of involvement on his part in the assault with intent to rob, raise as a reasonable possibility that he was at most guilty of handling or of being in possession of stolen property. However, he would not be guilty of robbery in those circumstances. The first named appellant was not charged either with theft or with handling or possession of stolen property. Moreover, there was no evidence whatever that Bill O'Driscoll had anything to do with the stolen

phone, other than being present when Damien Fitzgerald secreted it in the niche next to the gate on the first landing of the railway steps.

61. These arguments were reiterated before this Court. In addition counsel for the appellants opened several authorities in support of the proposition, which the prosecution did not in fairness dispute, that mere presence during the commission of a crime by another or others is insufficient in itself to imply participation in a joint enterprise or otherwise to impute criminal liability to the bystander. The authorities to which we were referred included *The People (Director of Public Prosecutions) v. Jordan* [2006] IECCA 71, *The People (Director of Public Prosecutions) v. Rose* [2002] 2 JIC 2101; *The People (Director of Public Prosecutions) v Choung Vu* [2015] IECA 257 and *The People (Director of Public Prosecutions) v Hourigan & O'Donovan* [2004] IECCA 7.

62. In response, counsel for the respondent submitted, and has again submitted to us, that this was a circumstantial evidence case; that it was necessary to view the prosecution's evidence at its height; and that cumulatively the evidence adduced was sufficient to enable a jury, properly charged, to be satisfied beyond reasonable doubt that they could infer guilt on the part of both accused in respect of the offences charged, and thus convict each of the appellants both of causing serious harm and of robbery.

63. Counsel for the respondent did not dispute the propositions that mere presence when a crime was being committed was not enough, absent more, to attach criminal liability to an individual; and that it was not a crime to be a callous bystander or to fail to intervene to assist a person being attacked. However, he disputed that the authorities cited had any relevance to the present case beyond restating these long established propositions which were not in fact in controversy, and he contended that they were each readily distinguishable on their facts from the present case.

64. Counsel for the respondent submitted that in the present case there was in fact much more than mere presence. It was pointed out *in arguendo* on this appeal that there was considerable circumstantial evidence suggestive of their involvement in assaulting and robbing the victim that called for explanation, and it was submitted that no, or certainly no sufficient, explanation had in fact been provided by the appellants when confronted with that evidence by the Gardaí in the course of being interviewed. The absence of explanation was a further very important circumstance in this circumstantial case. Moreover, the appellants had demonstrably lied to the Gardaí in those interviews in respect of several matters including their assertions that they had not seen or encountered the victim on the night. This was a further potentially important circumstance in this case.

65. It was submitted that cumulatively the circumstantial evidence of guilt would have been sufficient to allow a jury, properly charged, to draw inferences adverse to the appellants and to be satisfied beyond a reasonable doubt as to their guilt. The said circumstantial evidence comprised: evidence tending to establish the presence of both appellants at the scene of the crime, and during commission of the assault, in highly suspicious circumstances; further evidence tending to establish the subsequent possession, and secreting, of the injured party's mobile phone by Damien Fitzgerald, who was at all material times in the company of Bill O'Driscoll; the failure of both appellants to provide explanations when afforded the opportunity to do so; and manifest lies told in respect of material matters.

66. We agree with the respondent that there was sufficient to allow the matter to go to the jury. In particular, the evidence of the appellant's respective replies in the course of being interviewed was potentially very significant when taken in conjunction with the forensic and CCTV evidence and their admitted movements and associations. The presence of the victim's blood on their apparel, particularly extensive contact staining on Bill O'Driscoll's clothing and spatter type blood staining on Damien Fitzgerald's clothes, and the fact that they were together afterwards when Damien Fitzgerald was captured on CCTV hiding the victim's mobile phone, called for explanation. They were provided with an opportunity to provide an explanation but they failed to do so.

67. An accused person does not have to prove his innocence at trial. He is presumed innocent and the prosecution at all times bears the burden of proving the guilt of an accused. Moreover, an accused person has the right not to incriminate him/herself, and is not obliged to answer questions put to them by the police. In addition, no inference adverse to an accused can be drawn from a refusal to answer police questions (save in limited circumstances provided for by statute which do not apply here).

68. However, if an accused does not opt to avail of his or her right to silence and in fact proffers actual answers to questions which invite explanations, but the answers are potentially capable of being construed either as dissembling, evasion or avoidance of the issue, or as lies or the promotion of disinformation, then this material forms part of the body of evidence in the case, and a jury is entitled to consider it.

69. In this instance Damien Fitzgerald was asked (inter alia) to explain the presence of blood spatter staining on his apparel and he claimed *"I don't know what happened",* that *"there was no one there on the ground"*, that *"I wasn't there for any assault"*, and that *"I didn't see no assault "*. When he was further asked to respond to a suggestion that *"gardaí believe that you had no phone over the weekend and this was motive to assault and beat the man on the steps and steal his mobile phone. What do you say to that?"* He replied*: "I had my own phone."* In a response to a follow up question he later added *"I told you I don't know nothing about a stolen phone."* When he was asked to explain how the phone had been located near where he and Bill O'Driscoll had been spoken to by Gardaí (the encounter with Garda Colgan and his colleague on Glanmire Road), he responded *"It means nothing".* This was all evidence the jury were entitled to consider.

70. In the case of Bill O'Driscoll it was put to him: *"that from the evidence and CCTV footage you were in the area at the time when this serious assault occurred?"* He replied: *"I wasn't there at the time. I wasn't a part of it."* In a subsequent interview he was asked the following questions and gave the following responses:

> *Q: "Did you take anything out of this man's pockets?"*
>
> *A: "I didn't take anything, I didn't see this man."*
>
> *Q: "Did this man touch you?"*
>
> *A: "I didn't see this man for him to touch me."*

In circumstances where Bill O'Driscoll had extensive contact blood staining on his clothing, which was forensically established to be the victim's blood, and was captured on CCTV as being present with Damien Fitzgerald as the latter his the victim's mobile phone, Bill O'Driscoll's explanations provided at interview that he wasn't there at the time, wasn't part of it, and that he never saw the injured party were very potentially significant matters of evidence even at the direction stage.

71. As it subsequently transpired the first named appellant went into evidence and also called Mark O'Driscoll as a witness in his

defence. The testimony of both Damien Fitzgerald and Mark O'Driscoll, although evidence led on behalf of Damien Fitzgerald, formed part of the overall body of evidence in the case, and in considering the case against both accused the jury were entitled to weigh and consider that evidence in conjunction with all the other evidence in the case including the answers and purported explanations given by each appellant when being interviewed by the Gardai. Although it does not bear at all on the direction issue, it is clear the jury subsequently rejected both the evidence of Damien Fitzgerald and Mark O'Driscoll as to the non-involvement of both appellants in the assault and in the robbery, and also rejected the appellants' respective assertions to the gardaí concerning their non-involvement.

72. We do not consider that the case was opened on a basis that in any way excluded joint enterprise, although counsel for the appellants are correct in saying that neither that expression, nor similar expressions such as "acting in concert" or "acting in common design" were actually used by prosecution counsel in his opening address to the jury. However, in addressing them he did refer to *"the allegation which is made by the Director of Public Prosecutions that Damien O'Driscoll Bill O'Driscoll and Damien Fitzgerald were both involved in an assault on Karol O'Keeffe at Windsor Cottages which involved serious harm."* Further, he went on to tell the jury that:

> *"They intentionally or recklessly assaulted Karol O'Keeffe causing him serious harm and secondly that they in at Windsor Cottages at the time they robbed Karol O'Keeffe of a mobile phone. You will hear evidence from members of An Garda Síochána in relation to Damien Fitzgerald and Bill O'Driscoll being in the vicinity of a place called Clifton Terrace, which is another location which is between Summerhill North and the Lower Glanmire Road, and you will hear evidence that the phone which is Karol O'Keeffe's phone was found secreted, hidden, at Clifton Terrace on the following day by members of An Garda Síochána. They found his phone there and you will hear that or you will see CCTV footage which the prosecution will say will link Damien Fitzgerald with placing that phone in that position and that Bill O'Driscoll was present at the same time, and the allegation that the prosecution makes is that the phone, Karol O'Keeffe's phone, was stolen at the time of the assault and was taken by these two gentlemen and placed in the position it was found in Clifton Terrace and it was found the following day by members of An Garda Síochána … ."*

73. Although, as outlined at paragraphs 56 to 58 above, both defence counsel complained in the course of the application for a direction about lack of clarity from the prosecution as to whether joint enterprise was in fact being relied upon, this aspect of their complaints was never directly responded to by counsel for the prosecution in his replying submissions, nor was it alluded to by the trial judge in the course of his ruling (which we consider in more detail below). Rather the matter was allowed to go to jury on the basis that the judge had considered the parties respective submissions and was satisfied that the application should be refused.

74. We are satisfied that the trial judge in allowing the prosecution case to go to the jury did not, at that point, purport to limit in any way or to suggest that the jury would only be allowed to consider it on a particular basis. On the contrary, we consider that it is clear that he was satisfied that viewing the prosecution's evidence at its height from any or all perspectives open to them, a jury properly charged could potentially be satisfied to the standard of beyond reasonable doubt as to the guilt of the accused. As counsel for the first named appellant had conceded in her submission the evidence at that point might see (either or both of) the accused convicted in *"a number of ways".*

75. We are satisfied that the trial judge was correct in his ruling that the matter could go to the jury in an unqualified way.

76. Be that as it may, for reasons which are not at all clear the case did not ultimately go to the jury on a joint enterprise basis. The transcript does reveal some discussion between the bench and counsel, after the close of the defence evidence, confined to the robbery count, and at the end of which prosecuting counsel appears to concede that the jury should not be permitted to consider the robbery count against Bill O'Driscoll as having been committed on a joint enterprise basis with Damien Fitzgerald. However, the transcript reveals no discussion in advance of the judge's charge as to whether the jury could consider the attribution of criminal liability on a joint enterprise basis in the context of the counts of causing serious harm. The trial judge's charge is completely silent on the issue. However, notwithstanding the absence of any express reference to joint enterprise, or to common design, or to acting in concert in the trial judge's remarks, matters appear to have been left to the jury on the basis that they were, in effect, being asked to attribute criminal liability in respect of all counts on the basis of individual actions.

77. There was no requisition in respect of the judge's failure to mention joint enterprise to the jury, nor indeed any other relevant complaint, either as to content or omission, concerning the judge's charge on attribution of criminal liability and participation. Moreover, notwithstanding the further evidence that had been adduced by and on behalf of one of the defendants, there was no renewal on behalf of either defendant of an application for a direction.

78. None of these developments, which post dated the only application for a direction in this case (namely the application at the end of the prosecution case), has any implications for the correctness of the trial judge's decision to allow the prosecution's case, as it then stood, to go to the jury.

79. We are satisfied that based on the state of the evidence at the close of the prosecution's case there was indeed a case to answer and that a jury, properly charged, could have convicted the accused either on the basis of joint enterprise and/or on the basis of individual actions. In both instances the prosecution's case against each of the accused respectively was based on circumstantial evidence. However, as has often been said, many threads, none of which individually may be sufficiently strong to support a conviction, may together provide a rope of sufficient strength to support that load. We are satisfied that, taking the prosecution evidence at the high water mark, a jury could have been satisfied as to the guilt of each of the appellants in respect of both counts to the standard of beyond reasonable doubt.

80. Complaint is also made concerning the sufficiency of the trial judge's reasons for rejecting the direction applications. His ruling was admittedly terse and economical. However, it followed immediately upon detailed legal submissions and extensive interaction and discussion of the issues in controversy between the bar and the bench. It was not therefore necessary for the trial judge to rehearse the arguments that he had just heard, and the debate participated in, in his ruling. It was sufficient for him to make a determination and to communicate his decision.

81. A somewhat similar complaint, concerning the adequacy of a ruling on the merits by the Special Criminal Court, was made in *The People (Director of Public Prosecutions) v. Murphy* [2017] IECA 6. In rejecting that complaint, in the circumstances of that case, Ryan P remarked:

> *"205. This Court accepts the submissions of the Director as to the adequacy of the reasons contained in the judgment of the Special Criminal Court. The judgment reflects the fundamental simplicity of the issue before the court in regard to the counts in the indictment, the strength of the prosecution case and the essentially hypothetical nature of the*

defence. While it is no doubt the case that other judges and courts would have expiated on the defence case in more elaborate detail, regard must be had to the nature of the issues that presented themselves to the trial court. There is not a general obligation that can be invoked in every case. The length of the judgment and the matters covered therein depend on the case to be decided. That must be said to begin with. Secondly, there are differences in the approaches that courts and judges adopt in expressing their conclusions. Brevity and clarity are cited as desirable qualities in judicial writing. There is much criticism of prolix judgments that have long quotations from the evidence, from legal authorities and from statutory provisions. It might be argued that the trial court ought to have engaged more fully with the arguments when explaining its reasons for the verdict."… "The court did fulfil its function of declaring why it found the accused guilty and it can indeed be inferred from the judgment why the defence evidence and submissions did not create a reasonable doubt. In the particular circumstances of this case, the court finds that the nature of the judgment of the trial court does not furnish or support a ground of appeal.

206. This Court is also of the view that if deficiencies of the judgment of the Special Criminal Court could have furnished a ground of appeal it would be appropriate to consider exercising the jurisdiction under section 3 to disallow the appeal on the ground that no miscarriage of justice was involved and there was no basis for setting aside the verdict."

82. We consider those remarks to be apposite in large measure to the ruling that is criticised in the present case.

83. Moreover, counsel for both appellants in their written submissions have placed reliance on remarks of Murphy J in *O'Mahony v. Ballagh* [2002] 2 I.R. 410 at 416 where he said:

"…it does seem, and in my view this case illustrates, that every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing."

We are satisfied that in the present case the trial judge indicated clearly that he was accepting the prosecution's arguments. Moreover in doing so he stated that he had considered what had been said on both sides *"by reference to the evidence or the absence of evidence and the difficulty in charging the jury in respect of certain matters and the possibility of the jury falling into error by way of speculation".* His reasons for doing so were implicit. The issue was a net one. The application was based solely on alleged insufficiency of evidence. In rejecting it, the trial judge was implicitly stating that he was satisfied that there was sufficient evidence, taking the prosecution's evidence at its height, to enable a jury properly charged to convict. It is not a requirement that a trial judge should itemise each and every item of evidence capable of being relied upon to support such a conclusion.

84. In the circumstances we are not disposed to uphold Grounds of Appeal Nos. (i) and (ii).

Grounds of Appeal Nos. (iii) & (iv) – the "signing on" Issue.

85. In the course of a memo of interview with Bill O'Driscoll being read to the jury, it was inadvertently mentioned that *"Damien signed on in Gurran".* This occurred towards the end of day two of the trial. There had been prior agreement that this matter, which was mentioned twice in the memorandum of interview in question, would be orally redacted when the document was being read to the jury. Prosecuting counsel duly redacted the first such mention but overlooked doing so on the second occasion.

86. The exact context was:

Q: "Where -- did Damien and you met up with Julianne and Mark?"

A: "Damien signed on in Gurran, then Julianne rang me on the phone and we went for a few drinks. At the end of the night we went our way and we went -- or their own way".

87. The mention of *"signing on"* before the jury prompted counsel for the first named appellant to apply to have the jury discharged on the basis that the jury would understand the reference as indicating that her client was on bail as a suspect in another matter and that he was signing on at Gurranabraher Garda Station in fulfilment of a condition of his bail. She submitted there was now a real risk of an unfair trial and that no warnings or instructions by the trial judge could suffice to undo the harm that had been done. The application was opposed by the prosecution.

88. The trial judge, having reflected on the matter overnight, refused to discharge the jury, stating (inter alia):

"The question then is would in all the circumstances having regard to the submission made by Ms O'Connell a suitable warning, not highlighted in any degree but a warning contained in such a way as to indicate to the jury what is to be considered and what is not to be considered in terms of evidence is sufficient. In my view it would, and accordingly, I propose at the point where I am dealing with circumstantial evidence to mention this in such a way as to say that this is not a matter of circumstantial evidence and it is not to be taken into consideration, so accordingly I refuse your application."

89. Counsel for the first named appellant then urged upon the judge that if he was not disposed to discharge the jury, he should draw attention to the matter at all in his charge to the jury lest to do so would, metaphorically, shine a light upon it. She said:

"MS O'CONNELL: May it please the Court. Do I understand you to say, Judge, that you will warn them not to take any extraneous matters into account but you won't refer to that again, which is what I would --

JUDGE: I understand what you're saying. I believe it is appropriate to give the warning, I do believe that. It would not be appropriate to simply now let it there, because it is out and it needs to be averted to in a way which gives a clear indication it is not to be taken into consideration, in fact it is to be disregarded. Moreover the text which was read out is to be suitably amended to exclude that.

MS O'CONNELL: Yes. Well, first of all, my application will be that the Court perhaps doesn't refer to it in the off chance that the jury might not have picked up that it was a Sunday and there might be still a remaining chance that he was signing on for some other reason.

JUDGE: In the circumstances, if you expressly request me in that regard, I will accede to your request.

MS O'CONNELL: And I would ask your lordship to address, when it comes to the jury on that point, we can discuss it

again at that point, but just to warn in the clearest terms, which I know you will do anyway, about deciding on evidence and not any prejudice as to character more broadly and you can as it were --

JUDGE: Ms O'Connell, you can take it I will be doing so. Insofar as you have a specific application and you request me not to make mention of it and I'm directing that that be expunged from the document which will now be handed in, let that be done.

MS O'CONNELL: Yes.

JUDGE: Very well.

90. In his charge to the jury, the trial judge dealt with the matter in this way:

> *"Now in passing, I must also say that there may have a brief mention of Damien Fitzgerald signing on at Gurran. That is not evidence of any sort to be taken into consideration by you in your considerations. If you were to do so, you would clearly be not affording -- you would not be affording, I should say, to the accused, Mr Fitzgerald, the presumption of innocence, which he is entitled to, as indeed is Mr Bill O'Driscoll."*

91. No requisition was raised on behalf of the first named appellant concerning the manner in which the trial judge had charged the jury on this issue.

92. In this appeal counsel for the first named appellant makes, in essence, two complaints about this aspect of the trial. First, he says that the trial judge failed to properly evaluate the significant prejudicial effect of the reference to Damien Fitzgerald *"signing on"* in the context of the trial as a whole. Secondly, he says that the trial judge ought not to have mentioned *"signing on"* in his charge as he had indicated that he would not do so, and that his doing so only served to focus the jury's attention on the inadmissible matter that had slipped in.

93. In relation to the first of these complaints, we note that the written submissions filed on behalf of the first named appellant acknowledge, while attempting to distinguish them on their facts, that there are many authorities that suggest that the discharging of a jury should be a matter of last resort. These submissions refer us to *The People (Director of Public Prosecutions) v. Martin Reilly* [2015] IECA 53, *The People (Director of Public Prosecutions) v. Cleary* [2009] IECCA 142 and *The People (Director of Public Prosecutions) v. Byrne* [2003] 2 JIC 2406; (Court of Criminal Appeal, *ex tempore*, Keane C.J., 24th February 2003).

94. Counsel for the respondent relies in particular on the Cleary decision in which the Court of Criminal Appeal cited, and relied upon, the earlier remarks of O'Flaherty J in the Supreme Court in *Dawson & Another v Irish Brokers Association* [1998] 11 JIC 0602 where he said:

> *"Once again, it is necessary to reiterate, as this court is doing with increasing frequency, that the question of having a jury discharged because something is said in opening a case or some inadmissible evidence gets in should be a remedy of the last resort and only to be accomplished in the most extreme circumstances. Juries are much more robust and conscientious than is often thought. They are quite capable of accepting a trial judge's ruling that something is irrelevant or should not have been given before them as well as in the face of adverse pre-trial publicity. See D. v Director of Public Prosecutions [1994] 2 I.R. 465, Z. v Director of Public Prosecutions."*

95. Counsel for the respondent has submitted that there was no substantial risk of an unfair trial in this case. The comment by a co-accused in the course of interview was so peripheral as to have no effect on the trial or the deliberations of the jury. The fact that the trial judge opted to tell the jury to ignore the comment was a matter within his legitimate discretion.

Discussion and Analysis

96. It seems to us that the first named appellant's contention that there is a real risk that he received an unfair trial by virtue of the jury having heard that he had signed on does not stand up to critical analysis. The trial judge was best placed to determine what remedial action was required. The transcript reveals that the trial judge had an advance awareness that the memorandum at issue contained the impugned statement, and that he had in fact been looking out for it to make sure it was redacted. This indicates that the trial judge fully appreciated that the impugned detail, if admitted, was prejudicial. However he had not appreciated at the time that the memorandum at issue mentioned the matter twice, and in fact he failed to notice when the second instance was read out before the jury. The damage having been done in the sense that prejudicial material had accidentally been laid before the jury, it was then for the trial judge to assess if a discharge was required, or if some lesser measure would suffice. The trial judge had a complete overview of the case, and was placed to assess the impact of what had occurred. Though he fully appreciated the potentially prejudicial nature of the impugned sentence he concluded that a discharge was not required, and that an appropriate warning to the jury would suffice. It is clear that defence counsel was herself prepared to concede that prejudice was not certain to be caused given the oblique nature of the reference.

97. In the circumstances we agree with counsel for the respondent that the trial judge dealt with the issue in a manner that was within the scope of his legitimate discretion, and we find no error of principle in the manner in which he did so.

98. It was unfortunate that having ostensibly agreed not to mention the matter in terms before the jury, that the trial judge in fact did so when it came to charging the jury. However, on a close reading of the transcript it seems to us that counsel and the trial judge might perhaps have been at cross purposes in the discussion concerning what the trial judge should say to the jury. The trial judge had made clear that *"I believe it is appropriate to give the warning, I do believe that. It would not be appropriate to simply now let it there, because it is out and it needs to be adverted to in a way which gives a clear indication it is not to be taken into consideration, in fact it is to be disregarded. Moreover the text which was read out is to be suitably amended to exclude that."* We consider it to be a possibility that cannot be foreclosed upon that, having thus stated his position, the trial judge interpreted counsel's subsequent plea to him *"that the Court perhaps doesn't refer to it"* as being a request that he should not read out to the jury the ipsissima verba of the relevant question and the impugned answer. The transcript reveals that the trial judge indicated ready agreement with at least what he thought was being requested of him.

99. An alternative, and possibly more likely, explanation, is that the judge, having initially agreed to counsel's suggestion, fully appreciating what was being asked of him, simply changed his mind later on. If that was the case, however, it is remarkable that he did not inform counsel in advance of delivering his judge's charge that he had in fact changed his mind.

100. Whether or which, it is clear to us from how he ultimately dealt with it, that the trial judge continued to harbour a perceived

need to advert to the inadmissible material in a way *"which gives a clear indication it is not to be taken into consideration"*, and that he felt that he could not do this other than by referring in terms in the course of his charge to the fact that the jury had heard *"a brief mention of Damien Fitzgerald signing on at Gurran."*

101. While the first named appellant might be justified in feeling aggrieved at a perceived "U turn" by the trial judge concerning how he proposed to charge the jury in relation to the potentially prejudicial material that they had heard, we consider that in the last analysis the only really relevant question is whether the trial judge addressed the potential prejudice in a sufficient and adequate way. We are satisfied that he did so and that the reference in the charge to *"a brief mention of Damien Fitzgerald signing on at Gurran"*, was appropriate in the context of instructing and emphasising to the jury that this was a matter they were not to treat as evidence, the jury having previously been warned that they should decide the case on evidence and on evidence alone. We do not consider, having regard to the overall run of the case, and the relatively peripheral context in which the impugned remark had been made, that the manner in which it was addressed by the trial judge would have caused the jury to focus unduly on the matter so as to defeat the objective that the trial judge was trying to achieve.

102. In the circumstances we are not disposed to uphold Grounds of Appeal Nos. (iii) and (iv).

Ground of Appeal No. (v) – Alternative Verdicts.
103. Counsel for the first named appellant applied unsuccessfully to the trial judge to instruct the jury that it was open to them in her client's case to return an alternative verdict of handling stolen property under s. 17 of the Act of 2001, or of possession of stolen property under s. 18 of the Act of 2001 (as appropriate to the circumstances as found by them) in substitution for the robbery count on the indictment.

104. The transcript reveals that counsel for the second named appellant did not seek to make a similar application or to adopt his colleague's argument. Despite this, both appellants now complain in the context of this appeal that the trial judge was wrong in ruling that it was not open to him to charge the jury as to the possibility of bringing in alternative verdicts under s. 55 of the Criminal Law (Theft and Fraud Offences) Act 2001 (the Act of 2001) of the possession of, or of the handling of, stolen property.

105. Section 55 of the Act of 2001 provides:

> —(1) If, on the trial of a person for theft or for unlawfully obtaining property otherwise, it is proved that the person handled or possessed the property in such circumstances as to constitute an offence under section 17 or 18, he or she may be convicted of that offence.
>
> (2) If, on the trial of a person for an offence under section 17 or 18 of handling or possessing stolen or otherwise unlawfully obtained property, it is proved that the person stole or otherwise unlawfully obtained the property, he or she may be convicted of the theft of the property or of the offence consisting of unlawfully obtaining the property.

106. Neither appellant was charged at any material time with an offence under either section 17 of the Act of 2001 (which relates to handling stolen property) or section 18 of the Act of 2001 (which relates to possession of stolen property). Both were, however, charged with robbery, an offence which has as one of its ingredients theft.

107. The appellants contend that that the trial judge should have, in the circumstances of this case, have instructed the jury that it was open to them in either or both cases to return an alternative verdict of handling stolen property under s. 17 of the Act of 2001, or of possession of stolen property under s. 18 of the Act of 2001 (as appropriate to the circumstances as found by them) in substitution for the robbery counts on the indictment. In that regard they rely on Kearns J's statement in *The People (Director of Public Prosecutions) v. Cronin* [2006] 4 I.R. 329 at 351 where he stated that *"a judge, on being requested so to do can and should leave alternative defences to the jury … providing there is an adequate evidential basis for doing so."* They also rely on *R v. Coutts* [2006] 1 WLR 2154 where the House of Lords held that the failure to leave an obvious alternative verdict to the jury for their consideration rendered a conviction on the offence charged unsafe.

108. In so deciding the House of Lords in *R v. Coutts* identified that there was an important public interest in accused persons being convicted of offences which they had committed, bur equally in them being acquitted of offences which they had not committed. Lord Bingham stated that:

> *"The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support. I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency."*

109. In the present case the trial judge refused to allow the jury to consider the suggested alternative verdicts to the robbery counts on the basis:

> *"JUDGE: Now, I've considered the application by Ms McGillicuddy on behalf of Mr Fitzgerald and the reply by Mr Sheehan, and I am satisfied that section 55 of the Act of 2001 insofar as there is an application that the jury be told that they could bring in an alternative verdict in respect of handling or possession, is not open to the Court in the circumstances and I'll refuse the application."*

110. The trial judge's belief that it was inappropriate appears to have been based on counsel for the prosecution's submission to the court that it is only in circumstances where the trial judge had directed the jury to find the accused not guilty of robbery that an alternative verdict under s.55 would be available. In support of this submission prosecuting counsel had opened to the trial a sentence from Cathal McGreal's well regarded commentary on the Act of 2001 in the Irish Current Law Statutes Annotated (later re-published on a stand alone basis, though with some changes and amendments to the commentary, as part of the Round Hall Annotated Legislation series (Round Hall: 2003), which stated:

> *"In an alternative verdict, the trial judge must first direct an acquittal on the principal charge and then leave the*

alternative verdict to the jury".

111. It is clear to this Court that both prosecuting counsel in his submission to the court of trial, and the trial judge in his acceptance of prosecuting counsel's said submission, were proceeding on a misunderstanding as to the law. The offences arising under ss. 17 and 18 of the Act of 2001 can be legitimate alternative verdicts to a charge of theft or robbery. However, as the statutory definitions of these offences make clear, they must be committed *"otherwise than in the course of stealing".* As Thomas O'Malley points out in The Criminal Process (2009: Round Hall Thomson Reuters) at para 14.150:

> *"In those circumstances, a jury should be directed that the handling or receiving charge is an alternative to the theft or robbery charge, as the case may be, and the judge should not ordinarily take a verdict on the former charge until the jury have reached a verdict on the latter. This is because the charges are, in effect, mutually exclusive."*

112. It is elementary and logical that a person facing possible alternative verdicts that are mutually exclusive (as opposed to one being capable of being subsumed by the other) should not be convicted on both. Moreover, where one verdict would be an alternative to a verdict on a more serious charge (as would arise here) the correct approach is that commended by O'Malley who suggests (op cit, at para 14.150) that:

> *"the jury should be instructed to deal with the more serious charge first and to announce their verdict on that charge, before proceeding to consider the lesser. If they convict on the more serious offence, they need not deliver a verdict on the lesser."*

113. There is no question however that the possibility of an alternative verdict can only arise for consideration in a situation where a direction on the more serious count has previously been granted. In so far as this was ostensibly believed to be the case both by prosecuting counsel, and by the trial judge who was persuaded by prosecuting counsel, they were incorrect. Accordingly in ruling that it was not open to the court to instruct the jury with respect to the possibility of bringing in alternative verdicts on the robbery charges, the trial judge erred in law.

114. The appeal must therefore be allowed on this ground, in so far as the robbery count only is concerned, in the case of the first named appellant. We have given consideration to whether the second named appellant can similarly benefit in circumstances where his counsel did not seek to make a similar application or to adopt his colleague's argument, having regard to the principles set out in *The People (Director of Public Prosecutions) v Cronin* [2003] 3 I.R. 377 and *The People (Director of Public Prosecutions) v Cronin [No 2.]* [2006] 4 I.R. 329. While the Cronin principles tend to be strictly applied in this Court they are subject in all cases to the overriding requirement that there should be no fundamental injustice in the individual case arising from their application. We consider that in the particular circumstances of this case not to allow both appellants to benefit equally from our decision on this ground of appeal, notwithstanding that the point was only relied on by one of them in the court below, could result in a fundamental injustice. We will therefore also allow the appeal on this ground, in so far as the robbery count only is concerned, in the case of the second named appellant.

Ground of Appeal No. (vi) – Inadequate Charge re Possible Innocent Explanations

115. The second named appellant only complains that the trial judge erred in failing to charge the jury in respect of a possible innocent explanation for the blood of the injured party being found on the clothes of Bill O'Driscoll and, having being requisitioned on same, in failing to address the possibility that the blood was on the clothes through innocent contact.

116. In the course of his charge the trial judge fairly and accurately summarized the evidence. That was accepted by counsel for the second named appellant. However, he maintained in a requisition that the trial judge, while he had gone to summarized the prosecution's case accurately, had not done so in so far as the defence case on behalf of Bill O'Driscoll was concerned. In particular, he had not told them that the defence case was that the presence of the injured party's blood on Mr O'Driscoll's clothes was equally consistent with innocent contact, as the defence maintained, as with the prosecution's account of contact in the course of participation in the assault.

117. Counsel submitted, inter alia:

> *MR CREED: In fairness, you did sum up the prosecution's case and you did recite the prosecution evidence, you did recite the defence evidence, I accept all that, Judge, and I'm not going pick holes that you left this little bit out or that little bit out because you don't have to put in every little bit, but in fairness --*
>
> *JUDGE: Yes.*
>
> *MR CREED: -- as you did summarise the prosecution case, I think it is right that you would summarise the defence.*
>
> *JUDGE: Okay.*
>
> *MR SHEEHAN: Certainly I wouldn't want you to say that it is equally consistent because that would be usurping the function of the jury, Judge, but I've no difficulty with the defence case being put in respect of Mr O'Driscoll.*
>
> *MR CREED: Well, sorry, it is, as a matter of science, equally consistent, this is what the scientist has said, but it's a matter for the jury --*
>
> *JUDGE: Of course.*
>
> *MR CREED: -- to determine which one they prefer beyond reasonable doubt.*
>
> *JUDGE: Okay, well we'll have the jury out again then.*

118. The trial judge then re-charged the jury as follows in response to the said requisition:

> *"[I]n my summation to you, I had pointed out certain matters in relation to the prosecution, and maybe I did not give sufficient expansion on what is the defence case or the defence cases here. Essentially, it is that there was an intervention by Mr Fitzgerald; that there was an intervention by Mr O'Driscoll, to intervene, to stop the actions of Mark O'Driscoll, that Mark O'Driscoll has plainly pleaded guilty to the charges and has been found guilty in respect of them, and that he accepts the responsibility solely; and that the evidence as called before you and as recited by me this morning*

when I read it out to you as best I could, that it can equally point to the explanation given by Mr Fitzgerald and by -- as put forward on behalf of Mr O'Driscoll. And that, in that regard, you should be careful in weighing the evidence that if it is pointing either way, to use the phrase yesterday of Mr Creed, the accused is entitled -- or either of them is entitled to the benefit of the doubt.

With regard to the forensic science scientist, Dr Clarke, she indicated how blood might transfer by contact or by spatter, and that's the explanation given by the scientist, but it's a matter for you having regard to the explanation given that these were interventions to conclude or not to conclude that the blood transferred to the clothing in the manner described. That's a matter for you and I don't want to trespass upon your area when you may or may not draw an inference on that."

119. We are satisfied that even if there was merit in the requisition advanced having regard to the charge up to that point, and it is unnecessary to express any view on that, the re-charge clearly addressed the concern raised in adequate terms. We have emphasised time and again that it is not the function of the trial judge in charging the jury to act as another counsel for the defence and to give a second speech for the defence. The trial judge's function at this stage of the trial, apart from instructing the jury as to the law, is to fairly summarize the evidence and both the prosecution and defence cases respectively. If, and as we have said we express no view on it, the defence case on the assault charge had not been adequately put up to the point of requisition, the jury could have been in no doubt as to its essence following the re-charge. It was of course a summary, but that was exactly what the trial judge was required to give. Further, having reminded them of the evidence of Dr Clarke, he quite correctly emphasised that it was a matter for the jury, bearing in mind the explanations offered, to resolve any conflict in the respective contentions by the prosecution and the defence concerning how the blood transfer had occurred. The jury had previously been properly instructed in the main charge concerning both the burden and standard of proof and concerning the "two views" rule.

120. In circumstances where we are satisfied that the defence case was fairly and accurately summarised for the jury, we must therefore dismiss this ground of appeal.

Ground of Appeal No. (vii) – Alleged Perversity in the Verdict.
121. The second named appellant further alleges that the decisions of the jury in his case were perverse and against the weight of the evidence.

122. As we recently pointed out in our judgment in *The People (Director of Public Prosecutions) v. B.F.* [2017] IECA 219, a perverse verdict of conviction is one in which there was no, or no sufficient, evidence capable of supporting the verdict returned.

123. In circumstances where we have decided to quash the robbery convictions in each case having upheld Ground of Appeal No. (v), it is unnecessary to consider the perversity argument in so far as it concerns the conviction of the second named appellant for robbery.

124. In so far as it concerns the conviction of the second named appellant for causing serious harm we are satisfied, for substantially the same reasons advanced in respect of our rejection of Ground of Appeal No. (i) relating to the trial judge's refusal to grant a direction, that there was indeed evidence capable of supporting a conviction. The threshold that requires to be crossed before an appeal court in this jurisdiction would be justified in setting aside a jury's verdict of conviction on the grounds of perversity is a high one. We do not believe that the second named appellant has succeeded in crossing that threshold.

125. We therefore also reject Ground of Appeal No. (vii).

Conclusions
126. We are satisfied that the convictions of both appellants for causing serious harm are safe and satisfactory and we dismiss their appeals against those convictions.

127. We will allow the appeals against the convictions of both appellants on the robbery counts, on Ground of Appeal No. (v) only. The convictions for robbery only will be quashed in the circumstances.

128. We will hear submissions as to whether this Court should direct re-trials on the robbery counts.