THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

Record No: CCA 42/12

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Imran Ramzan

Appellant

Judgment of the Court delivered on the 11th day of May, 2016, by

Mr. Justice Edwards

Introduction
1. This judgment is concerned with an appeal by the appellant against his conviction by a jury on the 20th of January, 2012, on a count of possession of a controlled drug, to wit, cocaine, on the 14th of September, 2006, at Station Road, Lusk, Co. Dublin for the purpose of selling or otherwise supplying it to another, contrary to s. 15 of the Misuse of Drugs Act 1977 (as amended).

2. The facts giving rise to the offence charged are uncontroversial and may be briefly summarized.

3. On the 14th of September, 2006, gardaí from the Garda National Drugs Unit were, based upon intelligence they had received, conducting surveillance on a number of persons, properties and vehicles in the Lusk area of County Dublin. In the course of that surveillance, a number of those gardaí, while travelling in an unmarked car, were following a Nissan Almera motorcar, at a discrete distance back from it, which was travelling from Lusk in the direction of Skerries. The Nissan Almera contained two persons of interest to the gardaí. At a certain point on the road between Lusk and Skerries, an English registered lorry, travelling in the opposite direction, was observed to flash its lights at the Nissan Almera. Once the Nissan Almera had passed the lorry, the lorry then pulled in to the left side of the road. The Nissan Almera then did a U-turn and headed back in the direction from which it had come. As soon as it had passed by the stationery lorry, the lorry immediately moved off again, pulling back out on to the road and taking up a position behind the Nissan Almera. Both vehicles then travelled in convoy for some distance until they reached a roundabout on the outskirts of Lusk.

4. At that point, both vehicles took the same exit from the roundabout and then proceeded along a bypass around Lusk village. After proceeding through a further roundabout, they then exited on to Station Road and headed in the direction of Rush, Co. Dublin. When they reached a furniture factory on the road in question, both vehicles pulled in to the factory car park and stopped. A third man, whom gardaí had observed being dropped off at that location earlier in the day, was observed to be sitting on a nearby wall at this time. The man in the passenger seat of the Nissan Almera got out of his vehicle, and he was noted to have a navy coloured backpack on his shoulders. The Nissan Almera then drove off, and the passenger who had alighted from it walked towards the English registered lorry. Gardaí observed that the lorry had two occupants, i.e., a driver and a passenger. It was later established that the driver of the lorry was the appellant. The passenger door of the lorry then opened, and the man from the Nissan Almera was observed taking a white coloured item from his navy backpack and handing it up to the person in the passenger seat of the lorry. Both the lorry driver and the passenger were then observed to reach behind their seats and to pull a large plastic bag containing white coloured objects into the front of the lorry. They appeared to gardaí to be tearing at the plastic bag as if trying to tear it open. While this was happening, the previously mentioned third man was observed getting down from the wall on which he had been seated, and he also approached the passenger door of the lorry. This man was observed to be carrying a blue sports bag at this time. When he reached the lorry, he was also seen handing an item from his open bag to a person in the lorry through the open passenger door. At this point the Garda surveillance team, suspecting that the men in question were in possession of controlled drugs, intervened. They intercepted the four men and the two vehicles in the factory car park, and they proceeded to search them pursuant to s. 23 of the Misuse of Drugs Act 1977. A large quantity of cocaine, packed in brown taped packages and wrapped in white quilts, was found within the lorry, as was some €85,000 in cash. The quantity of cocaine involved was 8.355 kilograms, worth an estimated €485,000.

5. All five men suspected of being involved, being the two men in the Nissan Almera (the driver of which was separately apprehended), the man who had been seated on the factory wall and the two men in the lorry (one of whom was the appellant), were arrested on suspicion of having committed a drug trafficking offence and were detained. The appellant was interviewed on a number of occasions while so detained and made a number of admissions, including that he knew there were drugs in the lorry and that he was to receive £400/500 from his passenger for his driving of the lorry.

6. All five men suspected of being involved were later charged with various drugs offences. All except the appellant pleaded guilty. The appellant, who was initially charged with three offences, contested his trial. He successfully obtained a direction on Count No. 1 and Count No. 3 on the indictment preferred against him, but was found guilty by a jury on Count No. 2. It is against that conviction that he appeals to this Court.

Grounds of Appeal
7. The Notice of Appeal filed by the appellant lists ten grounds of appeal against conviction designated (a) to (j) respectively. However, these grounds appear to the Court to be capable of distillation into two main and net complaints:

- that the trial judge erred in ruling at various stages of the proceedings that, in the circumstances of the case, the appellant ought not to be permitted to adduce expert testimony in the course of the trial concerning the appellant's

cognitive functioning and mental state at various times following his involvement in a road traffic accident on the 29th of October, 2005, either from a Dr. Niall Pender, a Consultant Neuropsychologist practicing in Ireland, or from various English medical specialists who had treated him for the injuries that he had sustained in the said accident;

• that the trial judge erred in ruling that the detention of the appellant purportedly in accordance with s. 4 of the Criminal Justice Act 1984 was lawful in circumstances where the member in charge of the garda station at which the appellant was detained, who had testified orally that he had been designated to act as member in charge of the said garda station by the superintendent in charge of the relevant garda district, was unable to produce the written record of the superintendent's direction so designating him.

8. The issue as to whether or not the appellant would be allowed to adduce the expert medical testimony in controversy was raised more than once in the proceedings. It was raised in the first instance pursuant to s. 34 of the Criminal Procedure Act 2010 (the Act of 2010) at a pre-trial hearing on the 28th of June, 2011. It was then raised again at the trial itself. In relation to the complaints concerning the disallowing of medical evidence, it is appropriate to separately consider these various applications.

Complaints Regarding the Disallowing of Medical Evidence

(1) The pre-trial s. 34 application

(a) The circumstances in which the application was made
9. The appellant's case had been listed for trial before the Circuit Court on numerous dates prior to the substantive hearing commencing on the 16th January, 2012. Those dates were 10th November, 2008; 6th July, 2009; 12th April, 2010; 1st February, 2011; 28th November, 2011; and 11th January, 2012. On those dates, the trial had either not been in a position to proceed or was the subject of a successful late application for an adjournment by one or other side.

10. On the morning of the trial date of 1st February, 2011, the defence served on the prosecution, pursuant to s. 34 of the the Act of 2010, a Notice of Intention to adduce Expert Medical Testimony from a Dr. Niall Pender, who is a Principal Clinical Neuropsychologist at Beaumont Hospital, Dublin; a Dr. P.N. Cooper, who is a Consultant Neurologist attached to a number of English hospitals; a Dr. Nicholas Priestley, who is a Consultant Clinical Neuropsychologist based in Manchester; a Mr. P.A. Vinod Kumar, who is a Consultant Plastic Surgeon attached to a number of English hospitals; and a Dr. Theodore Soutzos, a Consultant Psychiatrist based at the Priory Hospital in Roehampton in London.

11. Also, on that date, the accused's legal team formally notified the prosecution and the court of the accused's intention to seek to rely on a defence of insanity as provided for in s. 5 of the Criminal Law (Insanity) Act 2006 (the Act of 2006). This was in circumstances where the accused's legal team had in fact informally put the prosecution on notice of this matter on the evening before.

12. The prosecution indicated to the court that it was not in a position to consent to the s. 34 application. In the circumstances the court adjourned the substantive trial to a later date, and it directed that, in the interim, there should be a pre-trial hearing of the contested application for leave to adduce the proposed expert medical testimony under s. 34 of the Act of 2010. That hearing took place on the 28th of June, 2011.

(b) The arguments presented
13. It may be convenient at this point to set out the terms of s. 34 of the Act of 2010 (to the extent that they are relevant to this appeal):-

> *"34.— (1) An accused shall not call an expert witness or adduce expert evidence unless leave to do so has been granted under this section.*
>
> *(2) Where the defence intends to call an expert witness or adduce expert evidence, whether or not in response to such evidence presented by the prosecution, notice of the intention shall be given to the prosecution at least 10 days prior to the scheduled date of the start of the trial.*
>
> *(3) A notice under subsection (2) shall be in writing and shall include—*
>
> > *(a) the name and address of the expert witness, and*
> >
> > *(b) any report prepared by the expert witness concerning a matter relevant to the case, including details of any analysis carried out by or on behalf of, or relied upon by, the expert witness, or a summary of the findings of the expert witness.*
>
> *(4) [not relevant]*
>
> *(5) The court shall grant leave under this section to call an expert witness or adduce expert evidence, on application by the defence, if it is satisfied that the expert evidence to be adduced satisfies the requirements of any enactment or rule of law relating to evidence and that—*
>
> > *(a) subsections (2) and (3) have been complied with,*
> >
> > *(b) where notice was not given at least 10 days prior to the scheduled date of the start of the trial, it would not, in all the circumstances of the case, have been reasonably possible for the defence to have done so, or*
> >
> > *(c) [not relevant].*
>
> *(6) [not relevant].*

(7) [not relevant].

(8) [not relevant].

(9) [not relevant].”

14. At the commencement of the s. 34 hearing, the court was told that it was accepted that all time limits had been complied with and that all required notices had been furnished. Moreover, as required by the section, the court had been furnished with a booklet of reports from the proposed expert medical witnesses. The court was informed by defence counsel that the reason for seeking to adduce the evidence in question was two-fold: firstly, it was intended to support the proposed defence of insanity; and, secondly, it would be relevant to the issue as to whether the jury could be satisfied beyond reasonable doubt that the accused man had had the required *mens rea* in order to be guilty of the offences with which he was charged. It was suggested that at that pre-trial hearing the court should only deal with the application to adduce the evidence for the first purpose, i.e., to support an insanity defence, and that the application to adduce the evidence for the second purpose, i.e., to negative *mens rea*, should be left over to be revisited in the course of the trial itself

15. The prosecution responded that it was objecting to the proposed expert medical testimony being adduced in support of a defence of insanity on the grounds that the proposed expert evidence did not satisfy the requirements of any enactment, particularly the Act of 2006 and specifically s. 5 thereof, which was the relevant enactment that was being relied upon. It was also the prosecution’s position that they intended to object to the proposed expert evidence being adduced for the suggested other purpose, on the grounds that it was not going to be relevant to any issue required to be determined by the jury and, further, on the grounds that (some of) it would in any case offend against the ultimate issue rule. However, the prosecution was agreeable to the suggestion that the court should, in the first instance, only proceed to determine the application to adduce the evidence to support an insanity defence, and that it should leave over to the trial the further application for the defence to be allowed to adduce the evidence to negative *mens rea*.

16. The specifics of the objection to the proposed reliance by the defence on the expert medical witnesses that they were seeking to call to support their client’s proposed insanity defence were based on s. 5(1) of the Act of 2006, which, counsel for the prosecution submitted, required that evidence to support such a defence should be adduced from a consultant psychiatrist. It was contended that the expression “*consultant psychiatrist*” as used in s. 5 of the Act of 2006 was a term of art referable to a specific restricted definition of “consultant psychiatrist” contained in s. 2 of the Mental Health Act 2001. In that regard, counsel for the prosecution expressly submitted “*it is stated in the 2006 Act that a consultant psychiatrist is as defined in the 2001 Act*”, and further contended that none of the proposed medical experts came within that restricted definition.

17. It may be useful at this point to set out, to the extent relevant, the terms of s. 5 of the Act of 2006 (as amended by the Criminal Law (Insanity) Act 2010):-

“5.— (1) Where an accused person is tried for an offence and, in the case of the District Court or Special Criminal Court, the court or, in any other case, the jury finds that the accused person committed the act alleged against him or her and, having heard evidence relating to the mental condition of the accused given by a consultant psychiatrist, finds that —

(a) the accused person was suffering at the time from a mental disorder, and

(b) the mental disorder was such that the accused person ought not to be held responsible for the act alleged by reason of the fact that he or she—

(i) did not know the nature and quality of the act, or

(ii) did not know that what he or she was doing was wrong, or

(iii) was unable to refrain from committing the act,

the court or the jury, as the case may be, shall return a special verdict to the effect that the accused person is not guilty by reason of insanity.

(2) If the court, having considered any report submitted to it in accordance with subsection (3) and such other evidence as may be adduced before it, is satisfied that an accused person found not guilty by reason of insanity pursuant to subsection (1) is suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, the court shall commit that person to a specified designated centre until an order is made under section 13 or 13A.

(3) (a) For the purposes of subsection (2), if the court considers that an accused person found not guilty by reason of insanity pursuant to subsection (1) is suffering from a mental disorder (within the meaning of the Act of 2001) and may be in need of in-patient care or treatment in a designated centre, the court may commit that person to a specified designated centre for a period of not more than 14 days and direct that during such period he or she be examined by an approved medical officer at that centre.

(b) The court may, on application to it in that behalf by any party and, if it considers it appropriate to do so, after consultation with an approved medical officer, extend the period of committal under this subsection, but the period or the aggregate of the periods for which an accused person may be committed under this subsection shall not exceed 6 months.

(c) Within the period of committal authorised by the court under this subsection the approved medical officer concerned shall report to the court on whether in his or her opinion the accused person committed under paragraph (a) is suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre.

(4) [not relevant]”

18. The restricted definition of consultant psychiatrist contained in s. 2 of the Mental Health Act 2001 is as follows:-

> " *'consultant psychiatrist' means a consultant psychiatrist who is employed by a health board or by an approved centre or a person whose name is entered on the division of psychiatry or the division of child and adolescent psychiatry of the Register of Medical Specialists maintained by the Medical Council in Ireland"*

19. The prosecution's point was that neither Dr. Pender, nor Dr. Cooper, nor Dr. Priestley, nor Mr. Kumar were consultant psychiatrists, much less "*consultant psychiatrists*" as defined by s. 2 of the Act of 2001. Moreover, while it was not disputed that Dr. Soutzos was a consultant psychiatrist in the generally understood meaning of that term, he was not a consultant psychiatrist within the restricted definition of that term created by s. 2 of the Act of 2001.

20. Curiously, the transcript of the hearing on the 28th of June, 2001, reveals that there was no direct engagement by defence counsel with the suggestion that only a consultant psychiatrist as defined by s. 2 of the Act of 2001 could be called to give the evidence which s. 5 of the Act of 2006 says shall be given by a consultant psychiatrist. There appears to have been a tacit acceptance by him that that proposition was correct. The actual extent of defence counsel's engagement with the prosecution's objection was a suggestion that, having regard to the terms of Article 6 of the European Convention on Human Rights, a defendant who is seeking to set up a defence of insanity should not be limited to calling only the evidence of the consultant psychiatrist referred to in the section. It was suggested that an accused should be entitled to call all relevant and appropriate evidence. It was implicit from this submission that the defence were contending that, whether or not they came within the restricted definition, Dr. Pender, Dr. Cooper, Dr. Priestley, Mr. Kumar and Dr. Soutzos, respectively, all had relevant and appropriate evidence to give, and that the accused should be allowed to adduce that evidence. Defence counsel also sought to place reliance on the reference in s. 5(2) of the Act of 2006 to "such other evidence as may be adduced" as supporting his contention that other expert evidence in addition to the evidence of a consultant psychiatrist could be received in support of an insanity defence.

(c) The trial judge's ruling

21. Having heard both sides the trial judge ruled as follows:-

> *"JUDGE: Well, the matter is before the Court today by way of preliminary supervision, so to speak, and application pursuant to section 34 of the Act. It's agreed that this trial should proceed in the new term and that I should be the trial judge. The purpose of all of that is simply to enable pre-trial matters to be identified and dealt with in an expeditious way, so as to accommodate, ultimately, a fair and proper trial. A fair trial is clearly one that is the pursuit of any Court, but it must be fair to all parties involved and be subject to the law as it stands. Section 5 of the Criminal Law (Insanity) Act of 2006 is specific in what it says. It requires for the issue of not guilty by reason of insanity to be established at a trial, it must be based upon the evidence of a consultant psychiatrist. That is the explicit provision of section 5 of the Act in the first place. The reference that Mr. O'Hanlon has opened to the Court of subsection 2 is in regard to evidence that may be considered by a Court after a finding has been made under subsection 1 that an accused person is not guilty by reason of insanity, and there, yes, he's correct in suggesting that there is reference to other evidence as may be adduced in pursuit of the onward orders that may be made by Court consequent upon a finding of not guilty by reason of insanity. The same wording does not appear in subsection 1, which would seem to suggest that the issue of insanity, or not guilty by reason of insanity, can and is only permitted to be raised in evidence, at trial, based upon the exclusive evidence of a consultant psychiatrist. The application today, insofar as it's made, that the reports of the other professionals that are referred to in the booklet of documents refer to professionals who simply do not come within the restricted definition of a consultant psychiatrist under the legislation and Mr. O'Hanlon and the accused and his defence team recognise this and advise the Court that they are taking such necessary steps as to retain and involve a professional who comes within that very clear definition. For the purposes of this application, then, it would seem that I ought not to give, and cannot give, permission under subsection 34 of the Act to the calling of the evidence purported to be based upon the testimony of the witnesses referred to in the booklet of documents submitted by the Court. That would seem to arise from the provisions of subsection 5 of the Act, of the section 34 of the Criminal Procedure Act 2010, because it says there: "The Court shall grant leave under the section to call an expert witness, or adduce expert evidence, on application by the defence, if it is satisfied that the expert evidence to be adduced satisfies the requirements of any enactment or rule of law relating to evidence" and, as I say, at this juncture, the purported extract of evidence, based on the reports of these persons, would be simply coming from people who do not fit within the definition of evidence allowed to be called on the issue of insanity or not at trial. So, for these reasons, I don't propose to grant permission as sought in respect of the witnesses referred to.*
>
> *I accept the proposition that is advanced both by Mr. O'Hanlon and Ms Duffy that the issue of the calling of expert evidence at the trial in relation to the question of mens rea is one that would properly be left over to the hearing of the evidence at trial.*
>
> *…*
>
> *Finally then, that, as the defence have indicated that they propose to seek and rely upon the evidence of a consultant psychiatrist within the definition of the Act, I would invite them to consider and reapply to the Court, under section 34, when they're in a position to do so"*

(d) Discussion and analysis

22. Under s. 34 of the Act of 2010, an accused may not call an expert witness or adduce expert evidence unless leave to do so has been granted under the section. However, as Kearns P. has pointed out in *Markey v The Minister for Justice and Ors* [2012] 1 I.R. 62, the discretion conferred on the court is a very limited one. An accused is in effect presumptively entitled to such leave and, subject to there having been compliance with the notice requirements of the section, a court which is in receipt of an application for such leave must grant it if it is satisfied that the expert evidence to be adduced satisfies the requirements of any enactment or rule of law relating to evidence.

23. The circumstances of the present case require particular focus on what is meant by the phrase "*the requirements of any enactment or rule of law relating to evidence*" in section 34. There is no comma or other form of punctuation after the word "*enactment*" such as might suggest that the subsequent qualifier, i.e., "*relating to evidence*", should not apply equally both to enactments and rules of law. Rather, the plain and ordinary meaning of the phrase is that it refers to "*any enactment … relating to evidence*" or any "*rule of (the common) law relating to evidence*" as alternatives. It is clearly concerned with ensuring that the proposed expert evidence will, quite apart from any other considerations, be legally admissible evidence.

24. We are reinforced in our view by commentary in two of the leading textbooks on the law of evidence in Ireland.

25. Mr. Declan McGrath, Barrister at Law, in his work entitled "*Evidence*" (2nd ed., 2014, Round Hall) comments at para. 6-65 that:-

> *"With regard to the first test for the grant of leave, it is apparent that the court must be satisfied that the evidence proposed to be adduced constitutes 'expert evidence'* ***and is otherwise admissible****."*
>
> [This Court's emphasis]

The author continues:-

> *"Thus, a court could refuse to grant leave if it is not satisfied that the proposed witness has the appropriate qualifications or experience about the matter to which the witness's evidence relates so that he or she fails to satisfy the definition of expert witness in sub.(9). A court might also refuse leave if it formed the view that the expert evidence sought to be adduced was not relevant to the issues in the case or if it is inadmissible because it relates to a matter that is within the knowledge and experience of the tribunal of fact as was the case with regard to the psychiatric evidence in People (DPP) v Kehoe" [1992] I.L.R.M. 481.*

26. Similarly, in their recent work entitled "*Evidence in Criminal Trials*" (1st ed., 2014, Bloomsbury Professional), Dr. Liz Heffernan and Ms. Úna Ní Raifeartaigh, S.C., remark at para. 6.39 that:-

> *"The expert evidence which the defence intends to adduce* ***must be otherwise admissible in law.****"*
>
> [Again, this Court's emphasis]

27. While s. 5(1) of the Act of 2006 does specify that, before the relevant tribunal of fact can return the special verdict of not guilty by reason of insanity, it should have "*heard evidence relating to the mental condition of the accused given by a consultant psychiatrist*", it begs the question as to whether it is correct, solely on that account, to characterise that subsection as being an enactment relating to evidence.

28. If, on the one hand, the effect of that sub-clause is to confine the capacity to give evidence relating to the mental condition of the accused to consultant psychiatrists alone (ignoring for the moment any issue as to whether such consultant psychiatrists must also come within the suggested restricted definition), then it certainly creates a rule of evidence relating to capacity.

29. If, on the other hand, the effect of it is to provide that, if an insanity defence is being contended for, then at least one witness called in support of that contention must be a consultant psychiatrist (again, ignoring for the moment any issue as to whether such consultant psychiatrist must also come within the suggested restricted definition), then it does not create a rule of evidence but rather merely sets a pre-condition which requires to be satisfied before the tribunal of fact can act on any evidence that it has heard by bringing in the special verdict.

30. The provision in question, while not a penal provision in the narrow sense of being a provision that creates a penalty, does undoubtedly operate to place on a statutory basis the existing common law defence of insanity, and to modify that defence in a number of respects. See this Court's judgment in *The People (Director of Public Prosecutions) v Heffernan* [2015] IECA 310. In terms of the specific modifications effected by the sub-clause at issue, to the extent that two interpretations of it may be legitimately open, we consider that it ought in the circumstances to be construed in the manner most favourable to any party seeking to raise the defence.

31. We therefore consider that the correct interpretation of the sub-clause at issue is that it does not create a rule of evidence as to capacity. Rather, s. 5(1) of the Act of 2006, viewed as a whole, and further viewed within its context within the Act of 2006, can be said to be primarily concerned with specifying the substantive findings which a tribunal of fact must make before it may return the special verdict of not guilty by reason of insanity. The sub-clause previously mentioned is to be found embedded within that sub-section, and we are satisfied that it operates solely to set a pre-condition which must be satisfied before the special verdict can be returned, namely that the tribunal of fact should have heard evidence relating to the mental condition of the accused from a consultant psychiatrist. In other words, at least one of the witnesses called in support of a defence of insanity must be a consultant psychiatrist. However, there is nothing to stop the party seeking to establish an insanity defence from calling other witnesses, providing they have relevant evidence to give pertaining to an issue or issues of fact of which that party must satisfy the tribunal of fact to the required standard (the balance of probabilities –see, again, this Court's decision in the *Heffernan* case), before it may bring in the special verdict.

32. It is not difficult to envisage how, in a great many cases, the relevant person's general practitioner might have relevant evidence to give, in addition to that of the consultant psychiatrist, particularly in circumstances where an overview of the person's general physical and mental health might provide important contextual information relevant to an assessment of that person's mental condition at any particular time. It might also be the case that some non-consultant hospital doctor practicing in the field of psychiatric medicine, e.g., a senior registrar at a major psychiatric hospital who had been involved in treating the individual in the past, at the time of, or since the incident, could have relevant evidence to give. Equally, in a case where the subject person has a long-standing and known history of mental ill-health, a psychiatric nurse or a psychiatric social worker familiar with his case, or indeed members of the accused's family familiar which his condition and its symptomatology (who may, for example, have observed how the person was during previous acute episodes), or for that matter any other person who had observed odd or bizarre behaviour by the subject person at a time proximate to the index offence, such as in the lead up to it, or shortly after it had been committed, or indeed during the actual commission the offence, might be able to provide important contextual information.

33. In other cases, there might be an underlying and related physical or mental condition, details of which might again constitute important contextual information of relevance. Could it seriously be contended that an accused suffering from psychotic symptoms by reason of having a brain tumour could not call his or her oncologist to describe the nature and extent of his or her tumour? To take another example, the definition of mental disorder in s. 2 of the Act of 2006 includes dementia. That being so, could it seriously be contended that an elderly accused suffering from dementia, with perhaps periods of lucidity, could not call his or her treating geriatrician to describe to the tribunal of fact the progress of his or her illness and response to treatment, if any? In yet other cases there might have been a head injury giving rise to subsequent cognitive deficits, or personality changes, or even psychosis secondary to traumatic brain injury. Again, it can be readily anticipated that medical professionals, other than psychiatrists, who have been involved in the treatment of such a head injury might be in a position to give relevant evidence concerning the mental condition of the accused.

34. In this case, the appellant had suffered a serious head injury in a road traffic accident prior to the index offence which, he was

contending, had left him with relevant ongoing neurological and psychological sequelae. The appellant's counsel, while seemingly accepting the suggestion that his client bore an onus to adduce, at a minimum, evidence from a consultant psychiatrist (and ostensibly also not demurring from the prosecution suggestion that any such consultant psychiatrist should be one that came within the aforementioned restricted definition) as to his client's mental condition, contended that his proposed medical witnesses were all in a position to provide important contextual information which he should be allowed to adduce. However, it bears commenting upon that none of the proposed medical witnesses had been involved in the actual treatment of the appellant's head injury. They had all assessed him solely for medico-legal purposes long after the fact of the accident in which the head injury was sustained and also long after the fact of the incident giving rise to the charges on the indictment.

35. To the extent that the trial judge treated s. 5 of the Act of 2006 as being, in effect, an enactment relating to evidence, he was incorrect. However, that is not to say that he was entitled to have no regard at all to the terms of s. 5 of the Act of 2006. That could not be so because the terms of s. 5 had direct implications for how the common law rule of evidence relating to relevance might apply in the circumstances of this case. As Hardiman J. emphasised in *The People (Director of Public Prosecutions) v O'Callaghan* [2001] 1 I.R. 584 and again in *The People (Director of Public Prosecutions) v Shortt (No. 1)* [2002] 2 I.R. 686, relevance is a precondition to admissibility. In the O'Callaghan case the late learned Supreme Court judge stated "*relevance is the first and most basic requirement of admissibility*". In the *Shortt* case, he stated at p. 693:-

> "*All evidence must be relevant to a matter in issue as the first condition of admissibility. There are exceptions to the admissibility of relevant evidence, but irrelevant evidence is never admissible …*"

36. We consider that providing the appellant could satisfy the court that he intended to call at least one consultant psychiatrist as specified by s. 5(1) of the Act of 2006 to give the relevant primary evidence, and providing he was further in a position to demonstrate the potential relevance of the other witnesses he proposed calling, he would have been entitled to be granted the leave that he was seeking in his s. 34 application.

37. It is necessary at this point to engage with the suggestion that a consultant psychiatrist as specified by s. 5(1) of the Act of 2006 requires to be a consultant psychiatrist conforming to the restricted definition provided for in s. 2 of the Mental Health Act 2001. Although counsel for the prosecution submitted at the trial, and was not challenged with respect to it, that "*it is stated in the 2006 Act that a consultant psychiatrist is as defined in the 2001 Act*", a close examination of the Act reveals that that is not in fact the case, certainly in so far as the expression "*consultant psychiatrist*" which appears in s. 5 is concerned. The erroneous impression that it was so appears to have been formed because s. 2 of the Act of 2006 defines an "*approved medical officer*" for the purposes of the Act of 2006 as meaning "*a consultant psychiatrist (within the meaning of the Mental Health Act 2001)".* However, s. 5(1) of the Act of 2006 does not require the tribunal of fact to hear evidence from "*an approved medical officer*", merely from "*a consultant psychiatrist*".

38. The concept of "*an approved medical officer*" only has relevance to applications in respect of fitness to be tried arising under s. 4 of the Act of 2006 or, alternatively, applications concerning what is to happen to an accused after a special verdict of not guilty by reason of insanity has been returned under s. 5(1) of the Act of 2006.

39. In the case of a fitness to be tried application under s. 4 of the Act of 2006, the court has power to commit the person concerned to a designated centre for a period of not more than 14 days and to direct that the accused person be examined at that designated centre by an approved medical officer, whose function it is to report to the court on the mental condition of the accused in accordance with the requirements of the section.

40. Similarly, after a special verdict has been returned, a court has power under s. 5(2) and s. 5(3) of the Act of 2006 to commit the person concerned to a designated centre for a period of not more than 14 days (which can be extended subject to a maximum aggregate period of 6 months) and to direct that the person be examined at that designated centre by an approved medical officer, whose function it is to report to the court on the mental condition of the person concerned, and his treatment needs, in accordance with the requirements of the Act.

41. An approved medical officer is not, however, required to give evidence in support of a claim of entitlement to the special verdict of not guilty by reason of insanity under s. 5(1). The only evidence expressly required is evidence "*relating to the mental condition of the accused given by a consultant psychiatrist*". The expression consultant psychiatrist is to be given its normal and colloquial meaning of any medical doctor specialising in psychiatry and holding a consultancy post at a hospital or clinic.

42. In fairness to all concerned, it requires to be acknowledged that prosecuting counsel's erroneous impression, which everybody in the case seemingly accepted as being correct, that s. 5(1) requires evidence from a consultant psychiatrist coming within the restricted definition, was one initially shared by this Court, as is apparent from a brief reference to there being such a requirement, made *obiter dictum*, in our earlier judgment in the *Heffernan* case, and which brief reference, it must now be accepted, was *per incuriam*.

43. It is clear that the proposed witness, Dr. Soutzos, albeit not coming within the restricted definition contained in s. 2 of the Act of 2001, would, in principle, have been a suitable main witness to give evidence as to the appellant's mental condition for the purposes of s. 5(1), providing it could be established that his proposed evidence was relevant to the substantive requirements of the subsection. The difficulty from the appellant's perspective is that the contents of the report of Dr. Soutzos, dated the 11th of April, 2007, indicated that the appellant could never be in a position to satisfy the substantive requirements of s. 5(1) of the Act of 2006. The "summary" at the end of his said report states:-

> "*This is a twenty nine year old man who is charged with criminal offences he is alleged to have committed one day after discharging himself from the Priory and one year after a severe head injury where he was in a coma for two weeks and did not recover memory for two months.*
>
> *His personality has changed. He can no longer function effectively in his father's business as he is easily led and unable to stand up for himself.* ***He says he knew what he was doing and what he was doing was wrong but went along with it as he was afraid.*** *Neuropsychiatric testing shows severe frontal lobe damage which will effect his judgment and planning ability. He also worryingly reports brief periods of lost time and disorientation to time and place suggestive of temporal lobe epilepsy.*
>
> *There is no doubt his head injury has severely reduced his responsibility for his actions*
>
> *Plan:*

1. Urgent Neurological referral

2. Do not drive until he has had epilepsy ruled out, and I have advised notifying the DVLA if he has epilepsy

3. Neuropsychological testing

4. Brain injury rehabilitation

5. I need copies of his medical notes at the Priory in High Bank Bury, Lancashire."

(The Court's underlining for emphasis)

44. Even if it were to be presumed that Dr. Soutzos's evidence would be sufficient to establish that the appellant was suffering from a mental disorder at the time of the offence, there is nothing in his report to suggest that that gave rise to any of the consequences specified in s. 5(1) that require to be demonstrated as having existed before he could be entitled to avail of the special verdict. The subsection requires that at least one of the following three consequences be demonstrated:-

"… that he or she—

(i) did not know the nature and quality of the act, or

(ii) did not know that what he or she was doing was wrong, or

(iii) was unable to refrain from committing the act."

45. The report of Dr. Soutzos states expressly that the appellant reported that he did know the nature and quality of his act, and further that he knew that what he was doing was wrong. The final potential qualifying consequence, i.e., being unable to refrain from committing the act, relates to volitional insanity, otherwise sometimes referred to as "*irresistible impulse*" and which was recognised in *Doyle v Wicklow County Council* [1974] I.R. 55 as a third possible basis for securing an insanity verdict beyond the traditional two recognised by the M'Naghten Rules, which according to their traditional interpretation in the English common law only covered insane delusions. However, there is nothing in the report of Dr. Soutzos to suggest irresistible impulse or anything like it. On the contrary, the appellant told Dr. Soutzos that he had been motivated by fear. It is not necessary for the purposes of the present discussion to give any consideration as to whether the appellant might have been able to run a defence of duress. It is sufficient to state that, certainly on the basis of Dr. Soutzos's report, he was not going to be able to give evidence in direct support of a defence of insanity.

46. That being the case, even if the appellant were to have managed to secure another psychiatrist to give the necessary primary evidence (and he later evinced a desire to call an Irish Consultant Psychiatrist, a Dr. Daly, and obtained leave to do so, but ultimately did not call him for reasons to be discussed later in this judgment), the high water mark of any relevant evidence that Dr. Soutzos might theoretically have given would have been contextual. However, as he had only seen the appellant for the purposes of a medico-legal assessment a considerable time after the offence, and had not actually been personally involved in the appellant's treatment at the Priory Hospital, it is very doubtful if he would even have been in a position to offer relevant contextual evidence. Moreover, if he had been allowed to give evidence for that purpose, it is reasonable to assume the prosecution would in any event have sought to cross-examine him to elicit the matters that he had stated in his report.

47. To return then to the trial judge's ruling on the s. 34 application. The trial judge was in error in believing that only an expert witness coming within the restricted definition of consultant psychiatrist was capable of testifying in support of an insanity defence under s. 5(1) of the Act of 2006. In principle, any consultant psychiatrist was capable of giving the relevant primary evidence. In addition, other medical experts were theoretically capable of giving relevant contextual evidence in support of the claimed entitlement to the special verdict. To the extent that the trial judge foreclosed on both of these things, he was incorrect and in error.

48. However, even if he had not so foreclosed, such issues were not going to be dispositive of the s. 34 issue in any event. Even if he had recognised Dr. Soutzos as being in principle a capable primary witness, and the other proposed witnesses as being in principle capable of giving supporting contextual evidence, the judge was not obliged to grant the appellant leave to call all, or indeed any, of those witnesses unless he was satisfied that they were in a position to give **relevant** evidence. As demonstrated earlier, Dr. Soutzos's report which was before the court at the s. 34 hearing indicates that, if called as a witness, he was not going to be in a position to give the primary evidence which is required to be given by a consultant psychiatrist in support of a claimed entitlement to the special verdict of not guilty by reason of insanity. In truth, he had no relevant evidence to give. Moreover, in the absence of an identified consultant psychiatrist who was in a position to give the necessary primary evidence, there was no defence case of insanity for the other proposed experts to contextualise or otherwise support. The trial judge would have been obliged in any event to refuse the application being made at that point in time for leave to call the witnesses in question at the trial, on the grounds of a failure by the appellant to demonstrate potential relevance.

49. The trial judge's ruling on the s. 34 issue was therefore correct in terms of the result, albeit that the correct result was arrived at for the wrong reasons. In circumstances where the ruling on the s. 34 application was correct and the appellant has not been prejudiced, this Court considers that there are no implications for the safety of the verdict arising from the ruling on the s. 34 application.

(2) The renewed s. 34 application on Day 3 of the trial.

(a) The circumstances in which the renewed application was made

50. During the trial itself, which commenced on the 16th day of January, 2012, the court was addressed by counsel for the defence at the close of the prosecution case on Day 3 and in advance of the defence opening its case . Counsel reiterated his client's intention to seek to raise a defence of insanity and claim entitlement to the special verdict. The court was further informed that the accused was no longer persisting with the second aspect of his previously raised s. 34 application, namely his application for leave to call certain proposed medical experts for the purpose of seeking to negative *mens rea*.

51. In relation to the accused's intention to seek to raise a defence of insanity and claim entitlement to the special verdict, it was indicated to the court by his counsel that the primary expert to be called on behalf of the accused on that issue would be a Dr. Daly, an Irish Consultant Psychiatrist (who was a person who came within the restricted definition), for whom he already had been granted leave to call as a witness. However, counsel stated, he wished to renew his application to be allowed to also call Dr. Pender on the issue.

(b) The arguments presented
52. In renewing the application for the accused to be allowed to call Dr. Pender, counsel for the defence conceded, in response to questioning from the trial judge, that Dr. Pender had not been part of his client's treatment team. Rather, as counsel informed the court, he had reviewed the relevant medical records and had conducted an assessment of the appellant within the scope of his discipline as a clinical neuropsychologist. This gave rise to the following exchanges between the bench and counsel:-

> *"JUDGE: But what relevance do you say he could have then?*
>
> *MR O'HANLON: As a neuropsychologist, he sets out the context in which the defendant, as a result of his accident --*
>
> *JUDGE: So, on the --*
>
> *MR O'HANLON: As a result of the road traffic accident, he was unconscious for a number of weeks and he had suffered a head injury which required surgery as far as I -- a craniotomy which as I understand it is -- he had suffered a fractured skull.*
>
> *…*
>
> *[That] … is part of the context in which the psychiatric evidence has to be considered, having regard to the fact that it's -- they're not unrelated, the physical injury and the psychiatric injury, and while the psychiatric evidence is the evidence which the jury have to consider from the -- for the purpose of whether the defence is established or not or whether it's been rebutted beyond a reasonable doubt or not, if they're satisfied it arises, it's done -- in my opinion, they're entitled to the context in which the defendant will be giving that evidence."*

53. In responding to that application, counsel for the prosecution challenged the relevance of the proposed evidence. She expressed concern that Dr. Pender had not been one of the treating doctors. She also drew the court's attention to a number of passages in Dr. Pender's two reports, which - as previously stated - had been furnished to the court as potentially offending against the ultimate issue rule, as articulated in this jurisdiction by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Kehoe* [1992] 1 I.L.R.M. 481.

54. Amongst the passages in Dr. Pender's first report, which is dated 7th of May, 2009, and which prosecuting counsel was objecting to as overstepping the mark, were the following:-

> *"I suspect it would be very difficult for Mr Ramzan to resist any significant pressure and to problem-solve his way out of a complex situation."*
>
> *"In my opinion, despite the fact that he understood the gravity of the situation, he would have had great difficulty inhibiting his behaviours and putting into place an alternative course of action. In my opinion, his serious brain injury compromised his ability to make reasoned decisions and act appropriately, especially in difficult or challenging circumstances."*

55. Counsel for the prosecution concluded her submission by stating:-

> *"My concern is that -- not that the defence not be in a position to contextualise the fact that there had been a brain injury, but that it is, I think, the psychiatrist who should be in a position to contextualise that, rather than seeking to put in a different expert who is seeking to claim different things and is seeking himself to make findings in relation to what he himself accepts is a difficult thing for him to do because of the efflux of time and because of the fact that he is making assumptions and reaching conclusions which he accepts he is not fully in a position to do, so that would be the concerns I'd have in relation to Dr. Pender. As I say, I don't wish at the same time to put the accused in a position where he isn't able to fully contextualise matters, but I wonder whether this would be something that could be put to the psychiatrist as to what the background had been, rather than to seek to adduce an additional expert … ."*

(c) The trial judge's ruling
56. The case was adjourned overnight to enable the trial judge to consider the submissions that had been made. On the following morning he ruled, stating (*inter alia*):-

> *"The defence propose to rely primarily in pursuit of this issue on the testimony of -- or opinion of Dr. Daly, Dr. Robert C Daly, a consultant psychiatrist, and one of the first issues that emerged is that evidence in pursuit of this issue must under the legislation as has been previously ruled by the Court be given by a clinical or consultant psychiatrist registered for those purposes within the jurisdiction of this country, within the Republic, laid down in the Mental Health Act as referred to in the year 2001. For these reasons, in the pre-trial process arrangements were made for the accused man to be seen by Dr. Daly and then in turn the prosecution, on put on adequate notice have retained the services of Dr. Kennedy.*
>
> *The proposition for the defence is that Dr. Pender, a neuropsychologist retained again by the defence over the last number of years is someone who can give evidence of the medical history and medical context that would assist and support ultimately the testimony both of the accused himself, his father, his wife and that of Dr. Daly. The first point that has to be made is that -- and I do this with the greatest of respect -- Dr. Pender is not a medical doctor, his grounding is in psychology, his fundamental originating degree is that of a Bachelor of Arts in psychology at UCD and thereafter he has built what is undoubtedly an illustrious career in that area of expertise and is employed, as he says, currently at Beaumont Hospital. Nonetheless, his area of expertise does not come within the realm of the issues that can or should be dealt with by way of professional evidence under section 5 of the Act of 2006. All of the evidence and all of the issues that he supports his opinion on are factual records related to him by secondary evidence, documents, reports the history of the accused and his own history as related to Dr. Pender.*
>
> *Based on all of that that then he purports to express opinion and that opinion is in fact an opinion that ought not to be admissible on behalf of the accused from that source. It seems to me to be fully covered and dealt with in the opinion and view of Dr. Daly who is a recognised properly defined expert in this area as permitted under the legislation and as contemplated by the section. For that reason therefore I don't propose to permit the calling of the testimony of Dr. Pender. I should also say that in this context I'm mindful of the judgment of Kehoe which Ms Duffy has provided for me*

and the onus upon me as judge of trial to ensure that the jury are advised that ultimately this issue is something to be decided by them on their view of the evidence and all of it and that it is not a matter to be determined simply by expert. That is the, as I understand it, the gravamen of the decision in Keogh (sic). For all of these reasons as I say therefore I do not propose to permit the calling of the evidence of Dr. Pender."

(d) The appellant's complaints about the trial judge's ruling

57. Both in his grounds of appeal and in the written submissions filed in support of those grounds, the appellant complains that the trial judge's said ruling not to allow Dr. Pender to give contextual evidence was wrong and constituted an error in principle. This point is made notwithstanding that the appellant ultimately withdrew his defence of insanity after he had given evidence himself, and did not call Dr. Daly. That occurred in the following circumstances.

58. Immediately after the trial judge's said ruling, defence counsel opened the defence case to the jury. In the course of that opening, counsel informed the jury that his client was seeking to rely upon the defence of insanity and that they, the jury, would have to consider evidence relevant to that issue. Immediately after the opening of the defence case, the appellant was called as a witness. He gave evidence in chief in which he described his accident in October 2005, including the injuries that he sustained, the treatment he had received and the sequelae to those injuries, and in which he also described his recollection of the events of 14th of September, 2006, and claimed that because of ongoing sequelae arising from his head injury, he had not fully understood what was going on. He was then cross-examined by counsel for the prosecution.

59. In the course of that cross-examination, it was put to the appellant that he had not been admitted to the Priory Hospital at the instigation of his treating doctors, but rather had been so admitted at the instigation of a solicitor acting for him in connection with a civil action he was bringing arising out of his October, 2005 accident. This information came from the medical reports that had been furnished by the defence to the prosecution in connection with the appellant's earlier unsuccessful applications pursuant to s. 34 of the Act of 2010.

60. Further, and later in the course of prosecuting counsel's cross-examination of the appellant, the following exchanges occurred:-

"Q. Well, Mr Ramzan, are you saying to this Court that you didn't understand what was happening that day?

A. Basically, yes.

Q. Well, why are you saying that, are you saying you didn't understand because your brain wouldn't allow you to understand or are you saying you didn't understand because you were misled by the person you were with? I think you're saying to this Court that you were misled; is that right?

A. I was -- probably, yes, misled.

Q. So, I think what you're saying to this Court and what you're asking to this jury to believe is that you were in fact innocent up until the point that you were coming in towards Lusk and the lights were flashed, is that the version of events that you wish the jury to accept today?

A. Yes.

Q. And I think what you're saying to the Court is that you understood what was going on but that your understanding of what was going on was based on somebody telling you a lie; is that right?

A. Yes.

Q. And I think what you're saying to the Court is had you fully understood what was going on that your approach would have been very different; is that right?

A. Yes.

Q. And is that because you understand the nature of right and wrong, Mr Ramzan?

A. Yes.

Q. And you understood it then; isn't that right?

A. No.

Q. You're saying you didn't understand the nature of right and wrong then?

A. Then, no, coming out of a head injury.

Q. Well, Mr Ramzan, I think you have already indicated that at the time if you had known what was going on that you should have gone to the gardaí and that you would have known that then; isn't that right?

A. Probably misled. I was probably --

Q. Pardon?

A. I was misled probably.

Q. You were misled. Well, I have to say to you that the reason that you're now putting the version of events you are, is that you don't want to answer the charges that are here and that the version that you gave to the police is what actually happened, that you knew what you were doing driving to Dublin and that you certainly did understand what it was that was going on and I have to suggest that the jury can find that with confidence. Thank you, I've no further questions?"

61. Following the conclusion of the appellant's evidence, the court adjourned until the following day, and in the absence of the jury the trial judge invited the defence counsel to reflect overnight upon the implications of the evidence that his client had given. When the trial resumed on the following day, the defence counsel informed the court that his client would no longer be seeking to rely upon a defence of insanity, and that he would not be calling Dr. Daly after all.

62. Counsel for the defence then renewed, yet again, his application to be allowed to call Dr. Pender. On this occasion, the rationale offered for doing so was that he merely wished him to testify *"on the basic issue as to the injuries and the effect on the defendant"*. The application was opposed on the basis that the jury already had the evidence of the accused himself concerning his injuries and that if Dr. Pender was to testify within the scope of his expertise, namely that of a neuropsychologist, *"he would be trespassing into the territory of the jury's function."*

63. The trial judge again refused the application for leave to call Dr. Pender, ruling on this occasion that:-

> *"I appreciate … that to some degree the trial has taken a very, very different course now by reason of the very clear evidence given by the accused of his account of what occurred. I've also had the opportunity again to consider yesterday, because it was an issue then and it is now being revisited by Mr O'Hanlon and he's quite correct to do so, of the purported evidence of Dr. Pender. I have to say, in view of the very clear directions of the Court of Criminal Appeal in Keogh's (sic) case, it would seem to me that it would not be relevant or permissible for me to allow Dr. Pender to be called at this remove and in this context where he would seek to comment upon the mind of the accused man and what was within or potentially within his mind. Looking at the headnote of Keogh (sic): "The question of whether the accused had the intention to kill …" in that case, a case of murder "… and was telling the truth were matters four square within the jury's function and a witness, no more than the trial judge or anybody else, is not entitled to trespass on the jury's function." Mr Ramzan has given very clear evidence of events as [they] occurred and what was in his mind at the time as he understands it, and it would seem to me that the only purpose would be to call Dr. Pender to perhaps on the one hand support that. It's already there in evidence, directly given by the accused without any ambiguity, or seek[ing] to qualify it, and that would be only could only be done upon a post event analysis interview and a hypothetical or opinionated basis. In those circumstances, I don't believe it is relevant or permissible within the law and I won't permit it."*

64. What happened next was that counsel for the defence then applied for a discharge of the jury on the basis that a fundamental unfairness had occurred in the trial, by virtue of the fact that the prosecution had been able to cross-examine the accused using the contents of a report or reports furnished by a witness or witnesses whom the defence had not been allowed to call. Counsel for the defence asserted that the matter put in cross-examination concerning the circumstances in which he had been admitted to the Priory Hospital should not have been put in circumstances where both sides had also been in possession of another medical report from a Consultant Neurologist, a Dr. David Neary, who had expressed the view that the accused had required formal neuro-rehabilitation (which the Priory Hospital was in a position to provide). It was submitted that the accused had been obliged to mitigate his losses in connection with his civil claim and that the seeking of neuro-rehabilitation at the Priory Hospital was in fact based on medical advice. Counsel for the defence had not sought leave to call Dr. Neary, believing that the first s. 34 ruling in the trial would have prevented him from doing so.

65. The trial judge refused to discharge the jury, ruling that there was no unfairness in what had occurred. He said, *inter alia*:-

> *"[T]o my mind the legislation of 2010 would seem, if anything, to be doing the opposite to what Mr O'Hanlon complains of, namely striking a balance of what existed before the legislation requiring of the defence to do no more than the prosecution is and always has been obliged to do, namely to give notice of purported evidence of a certain nature."*

66. The judge added moments later:-

> *"[Y]es, there has been comment made on the basis upon which Mr Ramzan ended up in The Priory and that I have to say is a matter of the cut and thrust of the criminal trial. I accept the observation made that Ms Duffy was somewhat sharp to rely upon it. Not sharp in the dishonest way but cutting well close to the bone."*
>
> *…*
>
> *"That's the cut and thrust of it. There's no suggestion that the solicitors in England made a clinical assessment of their client and to the extent that it's suggested that perhaps what they were doing was seeking to embellish a man's position or claim, I doubt it, frankly. Now, I can say as much as that to the jury if Mr O'Hanlon wishes me to but I'd say he's well able to say it himself."*

67. In this appeal the appellant complains that the trial judge was in error in not acceding to his third application to be allowed to call Dr. Pender, and also that the trial judge was in error in failing to discharge the jury when requested to do so.

(e) Discussion and analysis

68. There is no doubt that the trial judge was in error in his ruling on the second s. 34 application with respect to Dr. Pender, to the extent that he reiterated his belief that only a psychiatrist coming within the restricted definition could give relevant evidence in support of an insanity issue, and in his assertion that as Dr. Pender was not medically qualified he could have no relevant evidence to give. However, his further rulings that, in circumstances where Dr. Pender was relying on second hand information as to the actual injuries, and where the opinions expressed by Dr. Pender in his reports potentially offended the ultimate issue rule as expressed in *The People (Director of Public Prosecutions) v Kehoe* [1992] I.L.R.M. 481, it had not been demonstrated that he in fact had relevant evidence to give, were ostensibly correct.

69. Be all of that as it may, in circumstances where the appellant did not ultimately persist with his insanity defence, and opted not to call Dr. Daly, there was in any event nothing for Dr. Pender to have offered a context for. We are satisfied that in the circumstances there are no implications for the safety of the verdict arising from the ruling on the second s. 34 application with respect to Dr. Pender.

70. Next, it is necessary to consider whether the trial judge was correct in his ruling on the third application with respect to Dr. Pender. Even though the appellant was no longer relying on an insanity defence, and therefore it was no longer sought to call Dr. Pender to provide contextual information in support of such a defence, it remained incumbent on counsel for the appellant to demonstrate how his proposed evidence could be potentially relevant if the appellant proposed to call him to support some other aspect of the defence case.

71. The trial judge engaged directly with the issue of potential relevance and was not persuaded that Dr. Pender had in fact any relevant evidence to give, in circumstances where the appellant had described his own injuries, treatment and sequelae, in circumstances where Dr. Pender had not been involved in the appellant's treatment, and in circumstances where the opinions he was prepared to offer purportedly within the scope of his expertise as a neuro-psychologist potentially offended the ultimate issue rule and were liable, if stated before the jury, to trespass on the jury's function. We find no error in the trial judge's approach in that regard, and we uphold his ruling on this occasion as having been correct.

72. Finally, we fully concur with the trial judge's view that a discharge of the jury would not have been appropriate. We are satisfied that no fundamental unfairness occurred and that the issue raised was appropriately dealt with by the trial judge. We are also satisfied that there is no inherent unfairness in the s. 34 procedure. The prosecution were entitled to use the reports in question in cross-examination of the appellant, in the same way as the defence are entitled to use material furnished by the prosecution in the course of disclosure in cross-examining prosecution witnesses. The judge was correct in characterising the questions prompted by the material in controversy as being part of the cut and thrust of the trial.

The Lawfulness of the Appellant's s. 4 Detention

73. The final point in this appeal that requires to be addressed is the appellant's claim that admissions made by him while he was detained, purportedly pursuant to s. 4 of the Criminal Justice Act 1984 (the Act of 1984), were wrongly admitted. He says they were wrongly admitted because his said detention was in fact unlawful. The basis on which the appellant contends that he was in unlawful detention is as follows.

74. The power to detain pursuant to s. 4 of the Act of 1984 may only be exercised by the member in charge of the Garda Síochána station to which the arrested person is taken following his or her arrest. Further, subs. (1) of s. 7 of the Act of 1984 provides for the making of regulations providing for the treatment of persons in custody in Garda Síochána stations, and subs. (2) of the said s. 7 further provides that the regulations shall include provision for the assignment to the member of the Garda Síochána in charge of a Garda Síochána station, or to some other member, of responsibility for overseeing the application of the regulations at that station, without prejudice to the responsibilities and duties of any other member of the Garda Síochána.

75. Regulations were duly made under s. 7 of the Act of 1984, and these were The Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochána Stations) Regulations, 1987, S.I. 119/1987, (the 1987 Regulations).

76. Regulation 4 of the 1987 Regulations deals with the member in charge. It provides:-

> *"4. (1) In these Regulations "member in charge" means the member who is in charge of a station at a time when the member in charge of a station is required to do anything or cause anything to be done pursuant to these Regulations.*
>
> *(2) The superintendent in charge of a district shall issue instructions in writing from time to time, either generally or by reference to particular members or members of particular ranks or to particular circumstances, as to who is to be the member in charge of each station in the district.*
>
> *(3) As far as practicable, the member in charge shall not be a member who was involved in the arrest of a person for the offence in respect of which he is in custody in the station or in the investigation of that offence.*
>
> *(4) The superintendent in charge of a district shall ensure that a written record is maintained in each station in his district containing the name and rank of the member in charge at any given time."*

77. The appellant's case is that, having made no concession before or during the trial as to the lawfulness of his s. 4 detention, it was incumbent on the prosecution to prove beyond reasonable doubt that he was in fact lawfully detained. It was argued that such proof required evidence that the member of An Garda Siochána who purported to detain him upon his arrival at Balbriggan Garda Station on the 14th of September, 2006, who was a Garda Thomas Hartigan, was properly authorised to act as member in charge in accordance with instructions issued in writing by the superintendent in charge of the Garda district within which Balbriggan Garda Station is located.

78. The court of trial conducted a *voir dire* on Day 2 concerning this issue and heard evidence from Garda Hartigan. He testified that he had been attached to Balbriggan Garda Station for over 20 years and that, during that time, the standing instruction from the various superintendents who had been responsible for his district was that in Balbriggan the public officer was to act as member in charge. On the day in question, he was detailed to act as public officer. He was asked:-

> *"Q. MS DUFFY: So can you indicate what you understood authorised you to take up duty as member in charge?*
>
> *A. As I was saying, the superintendent issued a written instruction and he normally --*
>
> *Q. Did you see that written instruction?*
>
> *A. I have seen written instructions. I would have seen that one because it was -- it was a one-page instruction that was attached to -- I believe it was attached to the station diary at the time, but it was something that was attached to one of the books in the station, and if you went to the front of it, you saw it there and you read it. And I've seen them been issued by various different superintendents throughout my time in Balbriggan, and I was in Balbriggan for over 20 years. So, they were issued by various different superintendents at that time."*

79. The prosecution were unable to produce the actual written instructions from the superintendent in charge of the relevant Garda District that would have been current at the time of the appellant's arrest. However, they produced a similar document that had issued subsequently in 2008, and this was shown Garda Hartigan who was invited to comment upon it. He said:-

> *"A. It is a similar document. It would be -- the public officer at that time was set out in what we call the duty detail as opposed to a station allocation book which was -- which was a duty detail that was relevant in the Dublin Metropolitan District. We were part of Louth/Meath and what was known as a country system. But it was every day there was a single page which detailed each member as to what their duties were on that date, and, so, the public officer was detailed, generally speaking, two weeks in advance of arriving in the station. But he was detailed in this. And what the document then similarly as set out in the duty detail but that public officer, he was public officer and member in charge. And when I commenced duty, the public officer took up duty as public officer and member in charge of the station and that was -- you took up in that position if you were public officer and you recorded that in the station diary. You also*

put on other members, you recorded other members as coming on or off duty in that station diary at that time and what their duties were. But it was the member in charge who put that into the diary.

Q. So, I think you've indicated that back in September of 2006 it was a station diary rather than perhaps a station allocation book as described in 2008; is that correct?

A. Yes.

Q. It was called a station diary?

A. A station diary, yes. You took up duty in the station diary as public officer and member in charge.

Q. And do I understand it correctly then, is the evidence that you're giving that your memory of how it would have been in 2006 is that a document similar to this would have been adhered to the front of that station diary?

A. That's correct.

Q. And when you took up duty as member in charge, where was your understanding of where your authority came so to do, or as public officer and member in charge?

A. It came from a general instruction from the superintendent who made a notice similar to this document here. and that was -- he generally made that notice on a yearly basis at the start of the year, and it was attached to the front of the diary."

80. The appellant sought to make the case that in circumstances where the actual written instruction from the superintendent that was in force at the time, designating who should act as member in charge, had not been produced, the prosecution had failed to prove beyond reasonable doubt that Garda Hartigan was properly authorised to act as member in charge so as to have validly detained the appellant under s. 4 of the Act of 1984.

81. The trial judge ruled as follows:-

"I respectfully disagree with Mr O'Hanlon when he says there is absolutely no evidence before the Court to support the proposition that Sergeant (sic) Hartigan was the member in charge on the day. The question is: is there sufficient evidence to enable me draw the firm conclusion beyond any reasonable doubt that that is so? Mr O'Hanlon's submission, as I understand it, is that the failure of the prosecution to identify and to call the superintendent of the day and to support his testimony, direct testimony if given, or indeed that of Sergeant Hartigan as indirect testimony of the events and direct to the extent that it affects him, the failure to support that testimony, potential or otherwise, by documentary evidence is fatal to the proofs necessary.

I have direct evidence from Sergeant Hartigan that he was a member of An Garda Síochána on the day. He was a sergeant, he was on duty, he was the duty officer assigned and that he was of the understanding that the general practice and directive as issued on an annual basis, and in keeping with the specimen directive that has been produced to the Court, the member in charge under the directive of the superintendent of the day. That is direct evidence available to the Court. Am I placed in doubt because the record as kept and as, which Sergeant Hartigan said, did exist; the document was appended to the front of the diary and he would have written in, as is practice, the record of his doing so occurred.

The issue, it would seem to me then, is one of whether or not the Court would come to the conclusion that that testimony of Sergeant Hartigan amounts to nothing simply because the records are not available. I don't believe that that is so. I'm satisfied that there is adequate evidence before the Court on his testimony to satisfy me that he was the member in charge and was properly appointed. I don't believe that the submission made by Mr O'Hanlon that a Court cannot prove its own jurisdiction is appropriate to the argument or to his attack upon the evidence adduced by the prosecution. For that reason, I'm satisfied that there is ample evidence before me from the direct testimony of Sergeant Hartigan that he was the member in charge properly appointed on the day."

82. The appellant has argued before this Court that the trial judge was wrong in his said ruling. We are not persuaded that that is the case. However, be that as it may, the trial judge in fact went on to say that even if he was wrong in his view that the evidence of compliance with the 1987 Regulations was sufficient, he would have been disposed in any event to admit the admissions in controversy having regard to s. 7(3) of the Act of 1984, which provides:-

"A failure on the part of any member of the Garda Síochána to observe any provision of the regulations shall not of itself render that person liable to any criminal or civil proceedings or of itself affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him."

83. We agree with the trial judge that he would have had discretion to admit the admissions in controversy under s. 7(3) of the Act of 1984 had he needed to do so, but we are firmly of the view that he did not in fact need to do so as his ruling had been correct.

84. We therefore dismiss this ground of appeal also.

Conclusion

85. In circumstances where this Court has not been disposed to uphold any of the appellant's complaints, we must dismiss the appeal against his conviction.