THE COURT OF APPEAL

Birmingham J.
Mahon J.
Hedigan J.

[192/2011]

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Peter Kenny

Appellant

JUDGMENT of the Court delivered on the 20th day of February 2018 by Mr. Justice Birmingham

1. The applicant, Peter Kenny, was convicted, following a very lengthy trial, of the offence of murder. He had stood trial along with three others charged with the murder of John Carroll in Grumpy Jack's public house in the Coombe area of Dublin on the evening of 18th February, 2009.

2. The deceased was a customer in the public house when a motorcycle pulled up outside carrying two people. The pillion passenger dismounted the bike, walked into the public house wearing a motorcycle helmet and shot Mr Carroll a number of times. The appellant, Mr Kenny, was one of four men who stood trial for the murder. The prosecution case was that Mr Kenny was the pillion passenger on the motorcycle, that it was he who entered the public house and discharged the shots. The first named accused on the indictment, Damien Johnson, was alleged to have been the driver of the motorcycle and he was acquitted by direction of the trial judge following the close of the prosecution case. The second named accused, Christopher Zambra, was alleged to have been the main organiser of the plot to murder Mr Carroll and to have assigned roles to others. In his case, the jury was unable to agree but he was acquitted following a retrial. Bernard Hempenstall was alleged to have been party to the planning of the murder and was sitting in the company of the deceased when the shooting took place. In his case, the jury returned a verdict of not guilty.

3. While there were a number of aspects of the prosecution case, at its heart was the evidence of Joseph O'Brien. On his own admission Mr O'Brien was party to the plot to murder Mr Carroll. At trial, the defence argued that the trial judge should exclude the evidence of Mr O'Brien on the basis that his evidence was unreliable and inadmissible. Before the case had been opened to the jury there had been a *voir dire*, largely devoted to the issue of Mr O'Brien's evidence lasting some 21 days.

4. Mr O'Brien was arrested on the evening of 20th February, 2009 at Dublin Port by Detective Sergeant Whitelaw on suspicion of involvement in the murder of John Carroll and he was brought to Pearse Street Garda Station. He was arrested in the company of Bernard Hempenstall and another man and when arrested he had approximately €3,000 in his possession.

5. Much of the *voir dire* centred on the circumstances in which Mr O'Brien provided a statement to the Gardaí on the night of 20th February, 2009 and a second statement the following morning. Having been brought to Pearse Street Garda Station, he was brought, after approximately one hour, to the office of Detective Superintendent P.J. Browne. There, a meeting took place involving the Detective Superintendent, Detective Sergeant Whitelaw and Mr O'Brien. It lasted a little over two hours. At one stage Mr O'Brien's girlfriend, Emma Walsh, joined the gathering at his request. No memorandum was kept of this meeting, no notes were taken and it was not recorded on video or audio. At the end of the meeting, Detective Superintendent Browne began taking down a handwritten statement which was dictated to him by Mr O'Brien. The process was interrupted by a Garda arriving to give Ms Walsh the €3,000 which had been seized from Mr O'Brien when he was arrested. The defence case was that what occurred in Pearse Street Garda Station had to be seen against the background of the previous relationship between Mr O'Brien and Gardaí. It seems that for some six years there was a pattern of very regular dealings between Mr O'Brien and Detective Sergeant Whitelaw. There can be no real doubt that Mr O'Brien was providing information over this period though he himself was not prepared to accept that he was an informant and according to him much of the six years was spent by him rebuffing attempts by the Gardaí to have him provide information. At trial, the defence were much exercised by the lack of record keeping in relation to the contacts between Mr O'Brien and Gardaí over the years and the fact, as they contended was the case, that best practice was not followed.

6. In terms of post murder contact, the first event of significance occurred on the evening of 19th February, 2009. On that occasion Gardaí went to the home of Mr O'Brien's sister having received confidential information to the effect that the motorcycle used in the murder might be found there. A motorcycle was indeed discovered there and when Detective Sergeant Whitelaw knocked on the door of the house, it was answered by Mr O'Brien. It seems that he contacted Detective Superintendent Browne to tell him this and that the Superintendent asked for Mr O'Brien to be brought to see him in Kilmainham Garda Station. A meeting did in fact take place in a car outside the garda station. The Defence draw attention to the fact that neither Gardaí referred to this meeting in their in their initial statements whatsoever.

7. In the course of the *voir dire* at trial, and again, on the hearing of this appeal, it was argued on behalf of the appellant that his entitlement to a trial in due course of law required the exclusion of the evidence of Joseph O'Brien having regard to the following matters:

> i. The relationship between Detective Sergeant Whitelaw, Detective Superintendent Browne and Joseph O'Brien going back to the period 2003 – 2005, the existence of which was not disclosed until immediately prior to the trial and the nature of which remained entirely unclear throughout the *voir dire* and the trial owing to the stark contradictions in evidence as between Mr O'Brien and the Gardaí.
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> ii. The fact that that relationship was permitted and encouraged outside of what both members knew clearly to be Garda procedures and best practice and in contravention of the CHIS (Covert Human Intelligence Sources) Guidelines published in April, 2006 which meant there was no record, no book entry, PULSE entry or paper trail of any kind which documented the relationship involving constant contact between Detective Sergeant Whitelaw and Mr O'Brien over many years and that none of the information passed to him was ever passed on to any other member of An Garda Síochána with a possible exception of Detective Sergeant Browne. Mr O'Brien did not accept passing on information.

iii. The fact that prior to the making of a brief statement implicating three of the four accused in the murder of John Carroll, that Detective Superintendent Browne had held a private meeting with Joseph O'Brien, which meeting was not recorded and no notes of any kind were kept. The accounts of what was discussed varied enormously.

iv. The fact that the meeting was attended (for part of it) by Mr O'Brien's girlfriend, Emma Walsh, who it appears participated in a conversation as to whether or not Mr O'Brien was going to provide a statement to the Gardaí;

v. The fact that the taking of the statement which commenced at approximately 23:26 was interrupted in order for Ms Walsh to be given and to have counted out to her a sum of approximately €3,000 which was found in the possession of Mr O'Brien when he was arrested.

8. Much of the focus of the *voir dire* centred on the meeting on the evening of 20th February in the office of Detective Superintendent Browne. In a situation where there was no recording and no contemporaneous notes, the Court was dependent on the accounts and the memories of the participants. Those accounts varied. It is, however, reasonably clear that there was discussion in relation to the issue of the witness protection programme, discussion on the issue of immunity from prosecution, however on Mr O'Brien's account his main concern was for the situation of his sister. The meeting was also the occasion when the sum of €3,000 which had been taken from Mr O'Brien was handed over to his girlfriend after Garda Barmbrick joined the meeting. She counted out and then handed over the money to Ms Walsh.

9. The appellant has drawn parallels with the case of *DPP v. Gilligan* [2006] 1 IR 107. There, the Supreme Court had concluded its judgment as follows:

> "There are no special rules of evidence relating to witnesses in a State witness protection programme. The ordinary rules as to the admissibility of evidence apply. There is no rule excluding such evidence. The facts and circumstances have to be considered in each case. Such evidence is admissible but should be excluded if the circumstances fall below the fundamental standard of fairness."

The appellant contends that what occurred here fell below the fundamental standard of fairness. The appellant says that it is clear from the *Gilligan* case that there is a line which, if crossed, would be fatal to the prosecution's efforts to adduce the impugned evidence. In that case Denham C.J. had said:

> "I would affirm the findings of the trial court and the decision that while aspects of the procedures followed by An Garda Síochána compromised the evidence of Charles Bowden and Russell Warren, they were not such as to compromise the entire criminal process system. These shortcomings were regretted by the trial court and I would endorse that view. Such infirmities (for example, the failure to keep a record by An Garda Síochána and returning monies with no legitimate basis) should not arise and in other circumstances may prove fatal."

On behalf of the appellant it is said that the circumstances in which monies were returned here were quite remarkable in terms of timing and context. The appellant says that it is unimaginable that the counting out of money under the nose of an accomplice, while his statement is on his lips, would not have fallen within the "other circumstances" contemplated by the Supreme Court as potentially fatal.

10. The first challenge to the admissibility of the evidence of Joseph O'Brien was in the context of the *voir dire.* The prosecution categorised this as a pre-emptive strike and one which was not permissible having regard to the decision of the Supreme Court in *DPP v. P'OC* [2006] 3 IR 238. In these circumstances the defence renewed their application at the direction stage. The defence say that that the trial judge at that stage did not really address their fair trial arguments but rather proceeded to ask himself whether there was evidence on which a jury might convict. The defence point out that it is clear from certain remarks made by the judge when he came to charge the jury that he had formed very strong views about the nature of the Garda investigation and that if he had given effect to those strong views at the appropriate time this ought to have resulted in the case being stopped after the *voir dire* or withdrawn from the jury at the direction stage. The judge said:

> "I'm further warning you, ladies and gentlemen, that there are dangers in convicting on his evidence as a member of the witness protection programme in circumstances where there is an awful lot left in, I won't say darkness, ladies and gentlemen, and I won't suggest that we had Machiavelli, the prince of darkness operating in this case, but Mr O'Brien secured two secret meetings, if I might describe them as that, with Superintendent Browne as he then was and Sergeant Whitelaw where the position was to say the very least compromised by the conduct of Superintendent Browne and Sergeant Whitelaw. Where a person is detained in custody and where he or she is to be interviewed, the law requires that that interview be videotaped, that there be an audio video – video recording of that interview. Not once but twice Superintendent Browne and Sergeant Whitelaw disregarded that. There was the meeting on the evening that the – Mr O'Brien was detained, there was a meeting which is unrecorded where there are conflicts and contradictions as between Mr O'Brien and the two garda officers as regards what happened at that meeting. The following morning when a further meeting takes place where again Mr O'Brien and the Garda Síochána are at differences as regards what happened. Had those matters been video recorded, quite clearly one could see where the truth lay but in the present case one cannot see with certainty where the truth lies and because of that we do not know what might have happened, whether or not inducements might have been given, what promises might have been given or what suggestions may have been made as regards the witness protection programme. I will come to all of this when I come to the evidence, ladies and gentlemen, but you might perhaps recall that as regards matters it is Mr O'Brien's assertion that the witness protection programme did not arise until after statements had been made and that it was a matter that was brought up by Garda Síochána, and the garda evidence is to the contrary, that Mr O'Brien was seeking the meeting and that's what he wanted to discuss before he told the Garda Síochána anything.
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> You have in addition to that, ladies and gentlemen, the position in relation to Mr O'Brien and his association with Sergeant Whitelaw and indeed to a lesser extent with Superintendent Browne where superintendent – where both the superintendent but more particularly Sergeant Whitelaw operated outside the rules if I might describe it as that where, effectively, the findings or the recommendations of the Morris Tribunal were set at naught by Sergeant Whitelaw and Superintendent Browne and where one does not know the true relationship between the informant, Mr O'Brien, and the Garda Síochána, his handlers. So for that reason again, ladies and gentlemen, it is dangerous to act on the uncorroborated account or accounts given by Mr O'Brien."

11. Following an overnight break, the trial judge returned to the issue on the following morning. He did so as follows:

"Now, Mr Gageby [senior counsel for the prosecution] has suggested to you in the course of his closing that the conduct of Superintendent Browne and Sergeant Whitelaw was perhaps unfortunate and that it led to a lot of time being spent in this court discussing matters that could quite clearly have been solved had there been a video recording. It's not a question, ladies and gentlemen, of this being unfortunate. This was wrong. It was wrong for the superintendent to engage in the type of conduct that he engaged in. What happened at that first meeting - because there was one the following morning also - but what happened on that meeting, ladies and gentlemen, is not clear. The Garda Síochána contend for the proposition that it was Mr O'Brien who indicated that he knew matters about the killing of Mr Carroll but that he wasn't going to say anything until the issue of the witness protection programme had been explained to him, or what the witness protection programme was had been explained to him, and both Superintendent Browne and Sergeant Whitelaw contend that that is what happened in the first instance. All that happened was that the witness protection programme was explained to him and that it was explained on a number of occasions. In the course of that explanation, Superintendent Browne says that he dealt with issues in relation to what might have happened to other people in the witness protection programme and some people might, notwithstanding they were in the programme, be prosecuted and others weren't but that the issue of prosecution would be a matter not for him but a matter for the Director of Public Prosecutions. It's denied that any question of immunity was discussed but it might strike you, ladies and gentlemen, that that is precisely what was happening at that stage. Superintendent Browne and Sergeant Whitelaw were discussing the question of immunity for Mr O'Brien and they were getting Mr O'Brien to talk to them on the basis that they would recommend the witness protection programme and recommend immunity from prosecution. His partner was brought into that meeting and matters were discussed with her in relation to the witness protection programme. Monies were returned to her that had been found on the accused man, a sum I think it's just short of £3,000 that was there in 50 pound notes and 50 pound note that had been broken and you had the change out of a 50 pound note. No proper enquiry was made in relation to that money. The superintendent says he took it at face value when he was told that the money had been saved or the money had been borrowed, or wherever the money had come from, and that was the true position and there was no question of it being the proceeds of crime. That was wrong, ladies and gentlemen, and it was something that was known to be wrong for a number of years. The Supreme Court considered this matter, ladies and gentlemen, in the case of *John Gilligan* and what was said in the judgment of the Supreme Court in relation to circumstances where monies had been improperly returned and what was said by the Supreme Court in relation to the return of monies and the failure to record matters is as follows: Mrs Justice Denham in delivering the judgment says:

> "I would affirm the findings of the trial court and the decision that while want aspects of the procedures followed by An Garda Síochána compromise the evidence of Charles Bowden and Russell Warren, they were not such as to compromise the entire trial process. These shortcomings were regretted by the trial court and I would endorse that view. Such infirmities, for example the failure to keep a record by An Garda Síochána and returning monies with no legitimate basis, should not arise, something that should not happen."

That's what Mrs Justice Denham, in delivering the unanimous decision of the Supreme Court, had to say in relation to the type of conduct that Superintendent Browne and Sergeant Whitelaw engaged in. They should not have been having discussions off-record, off-tape. They should not have been returning monies that might not be legitimate without making full and proper enquiries in relation to it. And at that stage, ladies and gentlemen, Mr O'Brien commenced a statement. That was perhaps some two hours after the private meeting had started. Mr O'Brien, on his account of matters, has told you that the question of the witness protection programme was not something that he brought up and it wasn't something that was brought up before he started making any statement, but rather, it was only after he had made his statements that the question of the witness protection programme arose and he said it was the Garda Síochána who brought it up. They're in complete contrast in account as regards what happened. Had the matter been video recorded, ladies and gentlemen, everybody would have a permanent record of what happened and you and I could see what in fact happened that night.

Matters continued in that same vein the following morning after Mr O'Brien had had his night's rest. Again, it's a private meeting. Again, there is no tape recording or video recording of what happened and a statement is made by Mr O'Brien. Yes, ladies and gentlemen, the Garda Síochána did read the statements back to Mr O'Brien on videotape at a later stage, but I suggest to you that that is no help to anyone where you have a situation where what went on for the two hours before the first statement isn't recorded in any statement, no recording in relation to it at all, good, bad or indifferent. You may well consider that the Garda Síochána are well-rid of the likes of Superintendent Browne, a man who has flaunted the law and has behaved in the manner in which he behaved and, indeed, you might share a view in relation to Sergeant Whitelaw that he is not the type of Garda Síochána that you would like to see in the force or that you wouldn't like to see that type of conduct from a member of An Garda Síochána.

You heard, ladies and gentlemen, in the course of matters and I will come back to it at a later stage that this wasn't the only breach of requirement on the part of Sergeant Whitelaw and, indeed, Superintendent Browne. You heard about the witness – I shouldn't say the witness, but the CHIS system, which is the manner in which the Garda Síochána are expected to interact with informants. And again, that seems to have been totally ignored by the sergeant and the superintendent where they suggest that Mr O'Brien was just a low grade informant and sure we didn't need to with him, he didn't want to be in the programme and we didn't really need to have him in it. The CHIS programme was put together for a good reason, ladies and gentlemen. Certain recommendations were made by the Morris Tribunal which enquired into Garda misbehaviour in Donegal. Recommendations were made by the Morris Tribunal. They weren't just made for the sake of making them. The recommendations that were made by Morris were made because there was a necessity for the recommendation and yet Sergeant Whitelaw and Superintendent Browne totally ignored those recommendations."

12. Following the *voir dire* the judge had ruled as follows:

> "As regards matters, I have come to the conclusion that the applications in this matter should be refused having regard to the decision in *McKevitt* and the decision in *P.O'C.* As regards matters, I do not – even if those judgments were not there, I consider that, notwithstanding the various illegalities and improprieties on the part of both Superintendent Browne, as he was at the time, and Sergeant Whitelaw, is not such as would render an unfair trial in this matter or would render it an unfair trial. It is a matter that quite clearly will be kept under review in the course of the trial."

The appellant has criticised that ruling as unsatisfactory and surprisingly brief. The prosecution say that the application to exclude the evidence of Mr O'Brien by way of a *voir dire* before the case was even opened to the jury was an impermissible tactic and amounted to a form of prohibition. The prosecution say that there is a very strong presumption that a court is entitled to the evidence of every man. Such deficiencies as there were in relation to the Garda interaction with Joseph O'Brien did not threaten the entire criminal justice system or the fairness of the trial. Such deficiencies as there were in this case were not of the same scale as

were in issue in the *Gilligan* case.

13. In the Court's view, the prior contact between Mr O'Brien and Gardaí between 2003/2005 and the time of the murder could not possibly provide a basis for excluding his evidence. It is true that contact was outside the CHIS system but the fact that someone has acted as a Garda informant, registered or not, does not mean that they can never give evidence.

14. There remains for consideration the circumstances surrounding the meeting in the office of Detective Superintendent Browne. The Garda evidence was that Mr O'Brien had indicated on the way to the station that he wanted to speak to Detective Superintendent Browne and on arrival expressed this desire to the station sergeant. It would undoubtedly have been preferable if that meeting had been video-recorded. In the Court's view such features of the meeting as were unsatisfactory would not see the case halted nor were they matters that could see the issue withdrawn from the jury. The Court agrees with the assessment of the trial judge that the return of £3,000 was wrong, something which has in fact been confirmed as being the proceeds of Mr O'Brien's drugs activity by the evidence given by Mr O'Brien at the retrial of Christopher Zambra. It was a matter about which there could never have been any real doubt.

15. The appellant has brought a motion seeking to adduce this additional evidence regarding the nature of the £3,000 arising from the retrial of Christopher Zambra that took place in 2013. To assess the significance of this it is necessary to recall what Mr O'Brien's evidence was in 2011, which is the subject matter of this appeal.

16. It is clear that the issues in the case were considered with care and on an individual basis by both the trial judge and indeed ultimately by the jury. He gave the jury an exceptionally strong corroboration warning. The jury then acquitted one of the three accused, disagreed in respect of a second and convicted the third. The conviction of Mr Kenny was in circumstances where there was very considerable supporting and corroborative evidence. In the course of the 2011 trial which is the subject matter of this appeal, he had given evidence that he had taken the money from his girlfriend's house. He stated that his girlfriend, Emma, had gotten the money from the credit union. He rejected the suggestion that it was his money, the product of his criminal activities. In the course of the Zambra trial, he was asked as to where the £3,000 approximately had come from, to which Mr O'Brien responded:

> "Proceeds of drugs."

He was asked about his account at the previous trial and why he was telling lies on that occasion, and responded:

"I don't know."

17. No juror at the 2011 trial could have believed that the £3,000 was the property of Emma Walsh and had been taken from her without her knowledge, whether the sum had been borrowed, or whether it represented accumulated savings. Insofar as Mr O'Brien in 2013 eventually acknowledged what must have been obvious to all and sundry, this if anything served to refurbish his credibility. What occurred in 2013 has not called into question the safety of the 2011 conviction and the Court is not prepared to permit additional evidence in that regard to be adduced.

18. Apart from the formal request to adduce additional evidence arising from the *Zambra* retrial, the appellant has also, without objection from the prosecution, raised informally the contents of a newspaper article that appeared in the Sunday World of 12th March, 2017 under the by-line of Nicola Tallant. The article is headlined "When I was offered money to get involved in the murder of John Carroll I just wanted it … I needed the cash." Other headlines over the piece were "Inside the mob: State witness Joey "the lips" says exile is a hell", "How supergrass tried to evade gangland hit as mayhem engulfed his life."

19. The appellant's interest focuses in particular on the opening paragraph, which is as follows:

> "Joey O'Brien sat in Detective Superintendent P.J. Browne's office in Sundrive Road Garda Station and reached for the glass of straight whiskey the cop had poured."

It is said that this paragraph is highly significant in that it indicates one of two things: either no whiskey was poured for Mr O'Brien, in which case it was another example of him being prepared to invent stories and tell lies or, alternatively, he was given whiskey and, if so, this was an example of serious Garda misconduct. The Court does not view the article as having the significance suggested. The act of pouring the whiskey was attributed to Detective Superintendant Browne some three years after his death. Moreover, the credibility of the piece is not enhanced by the reference to Sundrive Road Garda Station. The meeting between Joseph O'Brien and Detective Superintendent Browne took place in Pearse Street Garda Station and that meeting was probed in exhaustive detail during the course of the very lengthy *voir dire* which took place at the start of this trial.

20. The Court will now turn to some subsidiary issues that have been raised during the course of the appeal.

The refusal of an application for a separate trial

21. This arises in circumstances where the evidence of Joseph O'Brien before the jury commenced on Friday, 3rd June, 2011, and on the same day counsel for the then co-accused Damien Johnson began his cross examination. In the course of that cross examination he asked:

> "Q. Listen, you hadn't seen Kenny for years: isn't that right?
>
> A. That's correct, yes.
>
> Q. The last time you saw him, according to yourself, he had a knife in your back?
>
> A. That's correct.
>
> Q. Isn't that right?
>
> A. Yes."

Counsel returned to the matter a little later when he said:

> "Q. Look, the last time you saw Kenny, you had a knife in your back?

A. That's correct.

Q. We have established that?

A. Right."

22. On the following morning, counsel for Mr Kenny applied for a separate trial as a result of this exchange. Counsel for the Director was dismissive of the application, categorising what had emerged as "frankly, small beer". In the Court's view, the trial judge was well within his rights in deciding not to discharge the appellant from the indictment and not to order a separate trial. In the case of *DPP v. Cawley and De Silva* [2015] IECA 100, Edwards J. commented:

> "It can also arise that in some cases, because of their peculiar circumstances, there is no effective means of safeguarding against unfairness other than by the severance of the indictment and the directing of separate trials. However, such cases are relatively rare and recourse to such a measure should represent a last resort, following prior consideration and rejection for good and cogent reasons of all other options, particularly where a joint trial has been underway for some time."

In this case what was emerging was evidence of a physical altercation some years in the past. In the circumstances the Court can well understand why counsel for the prosecution would have taken the view that this was not a matter of great consequence. Obviously, it is possible to imagine other trials where the impact would have been altogether different.

Phone evidence

23. Counsel for the appellant raised an issue to the effect that the subscriber details held by the telecommunications provider Meteor in respect of the mobile telephone number 086 2117935 were obtained illegally and in breach of the Data Protection Acts and were therefore inadmissible in evidence. The prosecution were anxious to adduce evidence that the phone number in question was registered by the appellant through a pre-paid account in his own name. The objection to the admissibility of the evidence was presented on the basis that the testimony of Mr John Walsh who at the time held the role of Investigation and Security Coordinator with Meteor went no further than that he had received a request from the Crime and Security Section of An Garda Síochána and that he provided the information requested, by return. This Court cannot see any great substance in this challenge. Meteor had put in place a system where they responded to requests from a particular unit of An Garda Síochána, the Crime and Security Section. Meteor has no investigation function and no investigative capacity. It could not be expected to carry out an assessment whether the information sought was necessary or of value in the context of a particular investigation. To expect them to do other than to respond to requests from the appropriately designated section lacks reality. In any event, in the context of this particular case there is a further point in that Ms Aisling O'Brien, sister of Joseph O'Brien gave evidence to the jury that she rang a taxi using Peter Kenny's phone, her own being out of credit and Mr Michael White of SCR Cabs gave evidence of receiving a call from phone 086 2117935 seeking a cab as a result of which he dispatched a taxi to 29 Clonard Road.

The trial judge's charge in relation to corroboration

24. This issue arises in circumstances where the trial judge commenced his charge on 13th July, 2011 and concluded it on the following day. It is accepted that in the course of the first day of his charge he misdirected the jury in a significant aspect but he corrected this on the following morning. The situation arose as follows. On 13th July, the judge had commented:

> "While on the subject of corroboration, ladies and gentlemen, corroboration can ground a conviction. If you disbelieve the guts of what was said by Joey O'Brien, or are not satisfied beyond reasonable doubt, more correctly, that you're not satisfied beyond reasonable doubt as to its correctness, you can still convict, you're still entitled to convict if you find corroboration persuasive, independent evidence of the matters, but again, in relation to that I will give you the caveat that where somebody is an accomplice, I told you they can be unreliable and they have been found to be unreliable, but an accomplice can make his lie more credible because he knows the events and he can fit people in and out and slot things in and out to suit his case because he knows the facts and he can put untruths into those facts."

At that stage, the foreman requested a break on behalf of the jury, this occurred at 16.06. A number of matters were discussed in the absence of the jury, which included counsel on behalf of the appellant expressing discomfort with the court's remarks in relation to corroboration. The jury was sent home at 16.30. The jury was sent home without further correction.

25. When the court sat the following morning the trial judge, in exchanges with counsel, referred to his remarks the previous day as "a gaff" and as "definitely wrong". The jury was brought back to court and the trial judge immediately addressed what he had said the previous day and corrected his remarks. He did so in these terms:

> "I want to start this morning by correcting something I said to you yesterday. Towards the conclusion of my readdress to you I told you that if you believe – if you disbelieve the guts of what Joey O'Brien said or more correctly you are not satisfied beyond reasonable doubt you can still convict if you find corroboration, that is a wrong statement of the law. At that stage, I think you might have been aware that I was quite tired and I was confusing circumstantial evidence with corroborative evidence. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which, as evidence, is sufficient and credible. Corroboration arises where the evidence to be corroborated has a degree of credibility. However, it is not a two stage process, it is not a process in which there is firstly determination as to whether the witness is credible and if he is credible then the issue of corroboration is addressed. The evidence of a witness which is suspect, which is subject to a warning, should be considered in light of all the evidence in the case. Accordingly, in determining the credit to be given to Joey O'Brien you must look at the whole of the evidence, you should look at how it fits in with all the evidence in the case. If you are satisfied that the material capable of being corroboration or any of it is, in fact, corroboration, that is, persuasive independent evidence, you may use that to examine the credibility of the evidence tendered by Joey O'Brien or indeed any other suspect witness. If on the whole of the evidence having heeded the warnings and cautions I have given you in respect of the uncorroborated evidence of an accomplice or of a person on the witness protection programme, you are satisfied beyond reasonable doubt of the guilt of any of the accused you may convict that accused. However, if on the whole of the evidence you are not satisfied beyond reasonable doubt in relation to a portion of Mr O'Brien's evidence which implicates any one of the accused you must acquit that accused and if you're not satisfied in the whole of the evidence including that which you deem to be corroboration as to the correctness of the testimony of Mr O'Brien, or indeed Ashling O'Brien, insofar as it implicates that accused you must acquit that accused."

26. The appellant says that the misdirection of 13th July was a very significant one. It was a misdirection that was of particular significance so far as the appellant, Mr Kenny, is concerned because it was the case that there was more evidence against him which

was capable of amounting to corroboration. The appellant says that the timing of the remarks, just before the issue paper was to be handed to the jury, made the misdirection a very significant event. After the impugned remarks the jury remained together for approximately 30 minutes and heard a correction only the following morning. The misdirection was in clear and stark terms while the correction, while legally accurate, was couched in terms which would be familiar to and well-understood by lawyers but might not be as readily understandable by lay jurors. There is no doubt that there was an unfortunate misdirection on 13th July. That was recognised by the trial judge and he set about correcting it as a priority when the court sat again the following morning. Trial judges are human and from time to time errors will be made. These may take the form of legal misdirections or a misstatement of the evidence. When such mistakes occur, the long-established practice is that they are the subject of requisitions and if it is accepted that a mistake has been made that the judge will correct the mistake by readdressing the jury. In this case tiredness after a long day may provide the explanation for the mistake. However the mistake was corrected in clear terms, the jury were provided with an explanation in terms of tiredness and the fact that when tired, the judge had confused circumstantial evidence and corroborative evidence. The fact that what was in issue here was a legal matter, how evidence should be assessed and evaluated, meant that it was an area where the jury could be expected to pay particular attention to what was being said by the judge. For that reason the correction was likely to be particularly effective. In the circumstances this ground of appeal fails. In summary, the Court has not been persuaded that the trial of Mr Kenny was unsatisfactory or that the verdict was unsafe. Accordingly, the Court will dismiss the appeal against conviction.