THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

303/15

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Sabrina Cummins

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 23rd day of March 2017 by Mr. Justice Birmingham

1. In October/November, 2015 the appellant stood trial alongside her brother Kenneth Cummins, charged with the murder of Thomas Horan. Following a conviction for murder she has now appealed. The trial was concerned with events that occurred at Cambridge Court, Ringsend in Dublin. The deceased, a gentleman of mature years, lived alone in a form of sheltered accommodation, living in a modest one-bedroom apartment. On 6th January, 2014 persons entered his apartment and at trial it was not seriously in issue, but that those who entered were the co-accused. Multiple serious injuries were inflicted on the deceased which proved fatal. Following her conviction the appellant has brought this appeal. Some 13 grounds of appeal were set out in the formal written notice of appeal though not all of those have been elaborated upon either in written or oral submissions.

2. The original grounds of appeal were as follows:

> **Ground 1**: The judge erred in law or in fact or in a mixed question of law and fact in refusing an application that the appellant should be tried separately from her co-accused. This ground of appeal was not initially pressed when the appeal was opened this morning but was referred to at the reply stage.
>
> **Ground 2**: The judge erred in law or in fact or in a mixed question of law and fact in failing to direct the jury that the plea of guilty entered by her co-accused to the charge of murder was positively supportive of her case being that it was her co-accused and not the appellant who had caused the death of the deceased, Thomas Horan, and that the said plea of guilty vindicated the admissions made by her co-accused in the course of his Garda interviews. This ground of appeal formed a significant part of today's proceedings.
>
> **Ground 3**: The judge failed properly to charge the jury in relation to the fact that the allegations made by her co-accused against the deceased, Thomas Horan, were not any part of her case and that she in fact specifically disavowed any such allegation. This ground is linked to the severance separate trial issue.
>
> **Ground 4**: The trial judge wrongly coerced the appellant to continue giving evidence during the trial including doing so by means of "threats" in relation to the consequences for the appellant of her failing to continue with her evidence. This, alongside Ground 2 which related to the entry of the plea of guilty, formed the core of the appeal this morning.

3. Then, on the original notice of appeal there were what, in the light of what has transpired subsequently, might be described as subsidiary grounds as follows:—

> Ground 5: The trial judge misdirected the jury in relation to the issue of corroboration in that he:—
>
> I. Failed properly to charge the jury in respect of the absence of corroboration of the appellant's guilt and in particular in relation to the significant absence of forensics and/or DNA evidence linking the appellant to the death of the deceased, Thomas Horan.
>
> II. Directed the jury that CCTV footage was capable of constituting corroboration of the prosecution case against the appellant in circumstances where the footage merely placed the appellant at the scene of the death of the deceased, which she had not denied, and further in circumstances where the footage was said to be potentially corroborative of a particular prosecution theory in relation to the facts which was contradicted by other evidence in the case.
>
> III. Directed the jury that they could treat as being corroborative of the prosecution case the fact that the deceased, Thomas Horan, was a man who did not consume alcohol and that there was evidence of alcohol having been consumed at his home on the basis that this belied the appellant's account that she had gone to the home of the deceased with an innocent intention. This was not capable of constituting corroboration of the prosecution case as the appellant had stated in a Garda interview that the deceased, Thomas Horan, did not consume alcohol and she stated that she had gone to his home with alcohol and that she had consumed same. This was not inconsistent with her explanation of a visit with an innocent intention.
>
> IV. Placed excessive emphasis on the fact of alcohol having been consumed in the home of the deceased, Thomas Horan, on the night of his death.
>
> V. Failed adequately, or at all, to deal in his charge with the unchallenged evidence that the appellant and the deceased, Thomas Horan, had a long-standing friendship and of the presence of certain personal effects of the appellant in Mr. Horan's apartment, all of which was consistent with a social history between the appellant and Mr. Horan which accorded with the defence case.
>
> VI. Failed adequately, or at all, to deal in his charge with evidence which was "uncorroborative" of the prosecution

case and to charge the jury in relation to the effects of same. This included evidence which undermined the prosecution theory of the appellant participating in a murder to "cover up" a robbery of the deceased, Thomas Horan, to wit evidence of (i) money being found in Mr. Horan's apartment after his death (ii) the fact that the appellant's co-accused did not refer to money as in the "prison phone call" put in evidence in the trial and (iii) the fact that the appellant was due to meet a friend to give her money on the date of her arrest.

Ground 6: The judge erred in law or in fact or in a mixed question of law and fact in failing to charge the jury in relation to the unreliability of admissions made by the appellant in her Garda interviews and in her evidence, particularly having regard to admissions made by her which were demonstrably false. This error was exacerbated by the fact that the trial judge not having dealt with the evidence of the appellant at all in his charge, did not recharge the jury after they requested that the appellant's evidence be read to them following the conclusion of the charge.

Ground 7: The judge erred in law or in fact or in a mixed question of law and fact in failing to direct the jury – particularly after reading, at their request, the appellant's evidence – that they ought to acquit the appellant if they found that (a) the appellant did not participate in a joint enterprise with her brother the co-accused and that (b) the appellant's actions did not contribute to the death of the deceased.

Ground 8: The judge erred in law or in fact or in a mixed question of law and fact in charging the jury in a manner which was imbalanced in favour of the prosecution and which failed fairly to put the defence case to the jury and which omitted matters crucial to the defence case, including with reference to evidence from prosecution witnesses which was supportive of the defence case and which was not treated of by the trial judge in his summary of the evidence.

Ground 9: The judge erred in law and in fact in failing to inform the jury in respect of the content of the appellant's statements in answers to questions put by the Gardaí:—

I. That those answers amounted to evidence in the case not only against the appellant but also in favour of the appellant insofar as such statements were exculpatory;

II. That the jury was obliged to acquit the appellant if the jury found that the exculpatory statements could reasonably be true;

III. That the jury was entitled to reject part of the appellant's statements as being incapable of being truthful while accepting other parts as being truthful or reasonably possibly truthful.

Ground 10: The judge failed to direct the jury in the course of his charge that no adverse inferences were to be drawn against the appellant by reason of her voluntary absence from court at various stages during the trial.

Ground 11: That the judge erred in law or in fact or in a mixed question of law and fact in that having directed the jury that they could rely on circumstantial evidence, failed to direct the jury as to what particular evidence in the case would constitute circumstantial evidence.

Ground 12: The judge erred in law or in fact or in a mixed question of law and fact in misdirecting the jury in his charge in relation to the facts including by:

I. Inviting the jury to speculate in relation to the presence and use of white spirits in the home of the deceased, Thomas Horan, including on the night of his death, using emotive phrases such as "highly suspicious and concerning".

II. Inviting the jury to speculate in relation to the reasons for the timing of a 999 call made by the appellant.

III. Failing to direct the jury in relation to the medical evidence called in relation to the state of mind of the appellant's co-accused.

IV. Failing to direct the jury in relation to the appellant's condition at the time of her Garda interviews, including with reference to panic attacks.

V. Misdirecting the jury in relation to the facts, including by stating that the deceased, Thomas Horan, was in bed when the appellant arrived at his home, in circumstances where there was no evidence to support this.

Ground 13: The judge failed to take any proper steps to deal with adverse prejudicial publicity during the continuance of the trial.

Ground 14: The judge failed properly to direct the jury in his charge as to the manner in which they should properly deal with adverse prejudicial publicity during the trial.

4. Those then were the grounds of appeal set out in the notice of appeal insofar as they related to the conviction. Unusually, in the course of an appeal following a murder conviction, there was also a ground relating to sentence arising from the fact that the appellant takes issue with certain remarks made by the trial judge at the sentencing stage. There were, therefore, multiple grounds of appeal but the written submissions are more focused while the oral presentation today is significantly more focused still. While only a small number of grounds such as those dealing with adverse publicity were formally abandoned, counsel for the appellant agrees that the Court should take the written submissions as the appellant's agenda and that the matters argued in the course of the oral presentation are those on which emphasis is placed.

5. The topics that are adverted to in the course of the written submission were those of separate trials, the significance of the co-accused's late plea of guilty, the allegation by the co-accused against the deceased (that is linked to the question of separate trials), the fact that the appellant was compelled to give evidence or more precisely was compelled to continue to give evidence, and there is an issue re corroboration/DNA/forensic evidence. There is an issue as to corroboration and the relevance to corroboration of the telling of lies. While the written submissions had indicated that there was a failure to give a *Lucas* direction, today it was accepted that there was in fact a proper *Lucas* direction. Then there was an issue in relation to how the judge dealt with the

admissions made by the appellant to Gardaí. There were criticisms also of other aspects of the judge's charge, including what he had to say in relation to joint enterprise, criticism of the overall balance struck by the charge, criticism of how the judge dealt with the relevance of statements made to Gardaí, how he dealt with the voluntary absence from the Court of the appellant, what the judge had to say in relation to circumstantial evidence. Then, the judge was criticised for inviting the jury to speculate and it said that linked with that invitation that there were misdirections in respect of factual issues.

6. The oral argument has centred on the fact that the appellant was compelled to continue giving evidence and on how the plea entered at a late stage by the co-accused was dealt with by the trial judge. The issue of separate trial was also addressed at the reply stage. Before addressing any of the individual grounds it is proper to note that the respondent, the Director of Public Prosecutions, takes as her starting position that this is a case where it is necessary to have an overview of what occurred at trial and that it is very important and necessary to do that before focusing on individual grounds that are raised in the notice of appeal. The Director says that the appellant gave evidence at trial and during the course of her cross examination gave sworn testimony that was tantamount to an admission that she had in fact committed the murder along with her brother. The DPP says that confessions and admissions made by the appellant while giving evidence and in particular while under cross examination were devastating for the defence. Attention is brought to a portion of the transcript of 6th November, 2015, pp. 14 and 15. The section is as follows:-

> "Q. Yes, okay, so you joined in at that point, is that the case?
>
> A. Yes.
>
> Q. I see. And you told the jury that you saw in Thomas Horan's face, or he seemed to you to become the face of Mr. McDonald, the man who murdered your sister, is that right?
>
> A. That's correct.
>
> Q. Yes. I take it that's somebody who you can truly say you hate, would that be fair?
>
> A. Yes.
>
> Q. Yes. Would it then follow, Mrs. Cummins, that when you kicked and [punched] that you did so with a hatred?
>
> A. Yes.
>
> Q. And an intention to hurt, is that correct?
>
> A. Yes, but I didn't mean it.
>
> Q. Yes. But you had an intention to cause serious harm, isn't that right?
>
> A. Yes.
>
> Q. An intention to kill because this was Mr. McDonald you were seeing, is that right?
>
> A. Yes.
>
> Q. Yes. You were in a rage, isn't that right, Ms. Cummins?
>
> A. I wouldn't say a rage but angry, yes.
>
> Q. Angry but not in a rage?
>
> A. No.
>
> Q. You're imagining the person in the world you hate most and you're kicking and punching?
>
> A. Correct.
>
> Q. So when you kicked and punched Thomas Horan, you knew Kenneth was trying to kill him, isn't that right?
>
> A. Correct.
>
> Q. Yes. Because he had been strangling him, isn't that right?
>
> A. Yes.
>
> Q. And you joined in trying to kill him, isn't that exactly what happened?
>
> A. Yes."

Separate Trials

7. The Court will turn first to the question of separate trials. While this was the first issue referred to in the notice of appeal and the first issue dealt with in the course of written submissions it was not initially relied on to any great extent but did feature in the course of the reply today.

8. The background to this issue is that the appellant applied on 9th October, 2015 to be tried separately from her co-accused, her brother. The basis for this was that her co-accused, Kenneth, alleged that she had made an allegation to him to the effect that the deceased had sexually abused her and also abused her sister. The co-accused claimed that he was motivated in the actions that he took against the deceased by this allegation. The appellant however says that she had never made any such allegation to the co-accused and, not only had she never made any such allegation, that moreover that there had never been any instance of sexual

abuse or any other sexual impropriety on the part of the deceased. The appellant contended that the position taken by the co-accused, namely that the appellant had alleged sexual impropriety to him on the part of the deceased was highly prejudicial to her.

9. The Director, for her part, says that this was a case where there were three individuals in the room when the offence occurred. One was the victim, the late Mr. Thomas Horan and the other two were the appellant and her brother, her co-accused. In those circumstances, she says, common sense required a joint trial to be conducted if at all possible. The Director says that a feature of this case, and a relatively unusual feature, was that the prosecution evidence included material which rebutted the purportedly prejudicial material which it was anticipated might emanate from the co-accused. The DPP refers to the case of *Attorney General v. Joyce & Walsh* [1929] I.R. 526, a case also referred to by counsel for the appellant in the course of his submission, and in particular the DPP refers to the statement at p. 537 of the judgment where it is suggested that the court intervenes and directs a retrial only:-

> "**if** we are satisfied that a refusal to direct separate trials **has** resulted in a **miscarriage of justice**." [emphasis that of the Director]

The Director poses the question, how can it be credibly contended that there has been a miscarriage of justice in a case where the appellant eventually confessed to murder from the witness box while under cross examination?

10. The judge ruled on the matter as follows:—

> "It seems to me that the matters referred to by Mr. Ó Lideadha [senior counsel for Kenneth Cummins] and Mr. O'Carroll [senior counsel for Sabrina Cummins] are precisely the kind of items that are capable of being covered and dealt with by the ordinary direction which is given to juries in such cases, that the statement made by A. is capable of being evidence against A. only and not against B. and that is a well established jury direction, so that's one thing to be borne in mind. So, it is quite clear that the law contemplates that and expects that juries are capable of absorbing such a direction and it provides it is the direction to be given in a case such as this. There is to be added to that of course the presumption that juries are capable and will indeed follow legal directions that are given to them by a trial judge."

11. At a later stage in his ruling, the judge dealt with the allegations of sexual abuse. He did so as follows:—

> "The one specific area of discussion that did arise in this case is some form of sexual allegation against the deceased, involving Sabrina Cummins or possibly another. That's as recounted Kenneth Cummins and retold by him in his – in answers to questions put to him. That's not evidence in the case against Sabrina Cummins because it doesn't arise in the case of Sabrina Cummins. She apparently doesn't make any such case. She says nothing at all about it and the scenario may be addressed, I am told, in aspects by direct evidence. It is, however, capable of being evidence in the case in relation to Mr. Cummins, and indeed is not evidence against him but, as I understand Mr. Ó Lideadha's submissions will form part of a defence scenario that may emerge if these submissions are admitted. But that is of course open to challenge by the prosecution and Mr. Farrell [senior counsel for the prosecution] says he will do, but for the present purpose that's not a reason to separate Sabrina Cummins' trial from that Kenneth Cummins or vice versa, because even on a separate trial, and if it was only evidence relevant to the case against Kenneth Cummins, well then – either for or against, I should say, it will be a feature of the evidence in that case because he apparently wishes to rely on it. So, separation is not required for the purpose of doing justice to Kenneth Cummins.
>
> And as regards Sabrina Cummins, it is a very discrete point and it is a point upon which the jury can be directed that insofar as the case against her is concerned it is of absolutely no relevance, it doesn't involve her and the case against her must be judged on its own merits, and indeed so far as she had any input into the case by way of what she said, and she apparently says nothing at all about any such things. But that is perhaps the most important factual feature of this case, when looked at in that way, certainly couldn't form the basis for the separation of trial."

12. The Court is in absolutely no doubt that the trial judge was entirely correct in refusing the application. This was quintessentially a case for a joint trial. The fact that the prosecution case was one of joint enterprise, that both accused were present at the same time, strongly militated in favour of a joint trial. The Court does not see that the fact that the co-accused, Kenneth Cummins, was falsely introducing the question of sexual abuse was prejudicial to the appellant. The jury could have been in no doubt that the allegation was false. Insofar as the appellant's case was that her brother was entirely responsible, the fact that her brother was linked to an entirely false allegation did not disadvantage her. The Court therefore rejects this ground of appeal.

Compelled to give evidence

13. Turning then to the ground that the accused was compelled to give evidence. This ground arises from events that occurred while Ms. Cummins was giving evidence and in particular, events that occurred while she was under cross examination by senior counsel for the DPP. Ms. Cummins began her evidence on 4th November, 2015 and her cross examination began on the same day but it did not conclude then. Her cross examination was due to resume on 5th November but she said that she was too unwell. The appellant was examined by a doctor who gave evidence that the appellant would be well enough to resume her evidence the following morning. That day, 6th November, the appellant declined to return to court to resume her evidence. The explanation offered by her counsel when one was sought by the trial judge was "she talks about being ashamed" and "the whole world is against her".

14. In a situation where at that point she had given evidence that was very damaging to Kenneth Cummins and his counsel had had no opportunity to cross examine her that immediately called into question whether the trial of Kenneth Cummins could proceed. His counsel, at once, flagged the possibility of an application for a discharge. Counsel for the DPP indicated that he saw major difficulties with the case proceeding against Kenneth Cummins if his counsel was not in a position to cross examine a witness whose evidence had been very damaging to his client.

15. The trial judge made certain remarks initially at a time when the appellant was absent from the jury and the substance of those remarks was repeated later in the presence of the appellant. Initially he said as follows:—

> "I just want to make three things perfectly clear. And I am going to give her, while the application is going on, a last chance to consider this if she hasn't already. Firstly, if she's acquitted by any chance, because this trial is continuing in relation to her, she won't – very unlikely to be going anywhere for a while. It's flagrant, direct contempt of court and I intend to deal with it as such. Secondly, if she's convicted of manslaughter that gives rise to obviously a range of possible sentences. This will be a hefty aggravating factor in any sentence to be imposed, make you no mistake about that. Thirdly, if she's convicted of murder, she's going to get a life sentence. That's fine. But the sentencing transcript is something that will undoubtedly arise at some later time and it will contain remarks that may not be helpful to her."

16. Then, at a later stage, the trial judge addressed the appellant, who was at that point present in court, directly. He did so as follows:—

> "Right, Ms. Cummins, I gather you don't wish to continue your evidence. That has very serious consequences in this trial. I'm not going to speculate as to the reasons for this change of mind. Your trial is continuing. Let me assure you about that. You're in contempt of court – that is the position – by refusing to continue the evidence that you, yourself, voluntarily commenced. That has, as I've pointed out, serious and [extensive] consequences. I want you to meditate for the next eight minutes on the following three propositions. And give you – I'm giving you a last chance to continue with your evidence. If you're acquitted by some chance in this case in view of your contempt of court it's highly unlikely that you'd be going anywhere for a lengthy period of time because I'm going to deal with that in the event that you're acquitted. In the event that you're convicted of manslaughter, I have a discretion in terms of the sentence that might follow. Aggravating factors and mitigating factors determine what the ultimate sentence will be. This conduct - and I'm satisfied it's voluntary misconduct. It's in no way conditioned by illness, such illnesses was on display or reflected in evidence yesterday was of an entirely trivial variety. This will be regarded as a hefty aggravating factor and will weigh very heavily in the sentence that will be likely to be imposed if you persist in this misconduct. If you're convicted of murder, well, it's a life sentence anyway. But, of course, the custodial part of a life sentence is subject to the discretion of the Executive, the Minister for Justice. And he or she or they, or whatever committee deals with these matters, they have a discretion in relation to when you might ultimately be released. And there will be remarks on the transcript arising out of this conduct which will be unlikely to be helpful to you in that event. So I want you to take all of those consequences into account in deciding whether or not you're going to persist with this misconduct. I want you to complete your evidence. It's going to be a very short time. Mr. Farrell is nearly finished. Mr. Ó Lideadha says he'll be short. You've started so you should finish. But let me assure you this is not a consequence free decision. So, we'll be back at twenty past eleven and we'll see what the position is then."

And the position is that the appellant did subsequently continue her evidence.

17. In presenting the arguments for this ground of appeal, counsel has referred to the Criminal Justice (Evidence) Act, 1924, pointing out that by virtue of that statute while an accused was competent in his or her own defence he or she could not be compelled to give evidence an accused retained the right to remain silent. It said that Sabrina Cummins was compelled to give evidence. Counsel has also drawn the attention of the Court to the case of *R. v. John Joseph O'Boyle* [1991] Crim. L.R. 67 a decision of the Court of Appeal in England & Wales and says that that case provides support for the position he takes which is that the judge acted wrongly in forcing the appellant to complete her evidence.

18. The Court is quite satisfied that the 1924 Act has no application whatsoever. Ms. Cummins was free to decide not to give evidence. That was an option exercised by her co-accused but once she chose to give evidence she was required to make herself amenable to cross examination. It is absolutely fundamental to an adversarial trial system that a witness giving evidence must be available for cross examination by the party against whom she has given evidence.

19. Again, the *O'Boyle* case is readily distinguishable as is apparent from the headnote. The headnote recites that the appellant, Mr. O'Boyle, was charged with separate conspiracies on Counts 1 and 2 of an indictment and that there was a co-defendant, R., charged on Count 2 only. At the trial, statements said to be a confession made by the appellant in the USA to Drugs Enforcement Agency officers was ruled inadmissible against him whereupon R. sought to cross examine the appellant on that statement. The appellant submitted that such a cross examination of him was irrelevant and thus should not be allowed. Alternatively, that if it was relevant, a separate trial should be ordered. The trial judge overruled both submissions. In consequence, the appellant wished to give no further evidence on the ground that he was to be questioned on a confession that had been ruled inadmissible and he refused to re-enter the witness box. The trial judge ordered him to do so stating that a refusal would result in leave being given to R.'s counsel to cross examine him from the dock and that if he tried to leave the dock or to remain below then he would be compelled forcibly to return. The appellant re-entered the witness box against his will, was cross examined by R.'s counsel about the DEA confession, he did not admit it, and then officers from the DEA were recalled pursuant to s. 4 of the Criminal Procedure Act, 1865 and they gave evidence at length about it. The judge directed the jury to disregard the statement in relation to the appellant but to consider in relation to R. The appellant was convicted and appealed and it was held that although it was necessary to retain intact as far as possible the discretion of the trial judge that instant case was wholly exceptional if not unique. The judge had given insufficient weight to the fact that separate trials would do little if any harm to a co-defendant or prosecution whereas a joint trial would almost guarantee the appellant's conviction whatever direction was given to the jury. Thus, the judge had:

> (i) wrongly exercised his discretion; and
>
> (ii) that the judge could not threaten to have the appellant brought forcibly into court as he did.

He could have taken steps to punish him for contempt. He could have continued the trial in his absence. The threat of force was improper. Although force might sometimes be necessary to restrain violence or to prevent, apprehend a danger. In the circumstances of the present case, the threat had the effect of compelling the appellant to return to the witness box and eventually to bring into operation the provisions of s. 4 of the Criminal Procedure Act, 1865. Thus, the irregularity could not be described as other than material and accordingly the case was not one for the application of the *proviso*.

20. That case, as already commented, is readily distinguishable. This was a case where the trial judge eschewed any suggestion of force being used. More fundamentally in this case, the appellant had no justification whatsoever for declining to continue with her evidence.

21. Insofar as the judge is criticised for what he had to say on this topic it is necessary to consider in a little more detail just what he had to say and essentially what the judge did was he contemplated three scenarios. First, he said that it was possible that there would be an acquittal and he said that if that was the case there was the prospect of addressing the issue by way of contempt of court. The *O'Boyle* case indicates that that was an entirely proper course of action. Secondly, the judge contemplated the possibility of a conviction for manslaughter. It is the case that if the actions of the appellant had caused the trial of Kenneth Cummins to be aborted that would have needlessly and very significantly increased the distress and suffering of the loved ones of the deceased, Thomas Horan. Such a course of action would certainly result in a loss of mitigation and insofar as it would have involved the accused engaging in an entirely impermissible tactic with the effect of increasing the suffering of the family of the deceased, a judge might well be entitled to regard this as an aggravating factor. In those circumstances the judge's remarks in that regard are unobjectionable.

22. In relation to the possibility that there would be a murder conviction recorded, if that happened the judge would have been

entitled to comment on the fact that the tactics deployed compounded the suffering of Horan family members because it meant that they would have had to endure not one but two long trials. There could have been nothing objectionable with such a remark. Whether such a remark would have influenced the Parole Board and, if so, to what extent, is unclear.

23. The thrust of the argument made on behalf of the appellant is that she was put under improper pressure but the fact is that it was the actions of the appellant that were wrongful and improper. She was embarking on a course of action which would damage the administration of justice. Faced with such a situation the judge was entitled, indeed it might be thought obliged, to seek to have her desist from the course of conduct on which she had engaged.

24. The situation may be contrasted with the position of a detainee in Garda custody. There, the issuing of threats or the application of improper pressure may cause someone to act to their detriment, to speak when they had the right to remain silent. Here, there was no right on the part of the appellant to remain silent having begun her evidence. Hence the focus should properly be not so much on what the judge said but on the propriety of what he sought to achieve. His remarks, while undoubtedly blunt, were designed to impact on Ms. Cummins' conduct, were designed to protect the integrity of the trial and they resulted in Ms. Cummins resuming her evidence, something which she was always obliged to do. In those circumstances, the Court dismisses this ground of appeal.

The plea of guilty by her co-accused, her brother Kenneth Cummins

25. The Court turns, then, to the plea of guilty ground. This arises in circumstances where a plea of guilty was entered by the co-accused, Kenneth Cummins, while the judge was in the process of charging the jury.

26. The appellant says that in a situation where the defence was that the murder of Mr. Horan had been committed by the co-accused, that the plea of guilty supported her position. The DPP, for her part, disagrees and says that insofar as the prosecution case was never that it was a situation that one or other of the accused had killed but rather that both accused were involved, that it could, at least in theory, be argued that the development in fact supported the prosecution position. However, while adverting to the possibility that such arguments might notionally be advanced the Director accepted that the cases were separate and distinct and that the judge was correct to invite the jury to focus on the case of Sabrina Cummins. The judge dealt with the issue on 12th November, 2015. He did so in these terms:—

> "I just want to ask you to put the case against Kenneth Cummins completely to one side now. As I said, there are areas of evidence that overlap but you are trying only Sabrina Cummins. You needn't concern yourself any longer with any questions involving the liability of Kenneth Cummins in these matters so the fact of his plea is now known to you, but it has absolutely no bearing on your decision in relation to Sabrina Cummins. It is in no way adverse to her. It's not as if there were joint defences being run here and that she's been prejudiced in any way by it. On the contrary there were completely different defences and, in fact, as Mr. O'Carroll put it to you very succinctly in closing the case, her position is that this was entirely the work of Mr. Cummins, so his plea of guilty is in no way inconsistent with or prejudicial to her position in this case. So you try her on the evidence, putting aside the fact of the plea in the other case. I hope that is clear to you."

27. The Court is conscious, its attention having been specifically drawn to it by counsel for the appellant, that the judge while charging the jury before the change of plea gave jurors what was in effect an accomplice warning in relation to how the evidence of Sabrina Cummins as evidence in the trial of Kenneth Cummins should be considered. Quite obviously it is unusual that there would be a plea of guilty at such a late stage of a trial and after such a warning had been given. However, that said, changes of plea are not all that unusual. In this case the judge correctly identified that this was not a case of defendants mounting a joint defence so that the withdrawal of one from the joint position served to fatally undermine the other. In these circumstances, it was entirely appropriate for the judge to invite the jury to focus on the remaining accused, Ms. Cummins. That did not preclude other parties formulating and advancing such arguments as they wished or drawing such comfort as they wished but it was not for the judge to endorse any such conclusions. This ground of appeal is therefore rejected.

28. The Court has therefore rejected all the substantial grounds of appeal that have been argued during the course of the appeal hearing.

29. So far as the subsidiary grounds to which reference has been made are concerned the Court has had regard to what has been said in the course of the written submissions and in the response thereto from the DPP. The Court agrees with the general position of the DPP that the purpose of requisitions is to identify errors, misstatements of law, misstatements of evidence and it is not to invite the Court to make points to the jury supportive of one side or another. The Court has considered the various points that are mentioned and is of the view that none of those points, whether individually or collectively, serve to undermine the safety of the verdict. Accordingly, the Court dismisses the appeal against conviction.

30. The Court has already referred to the fact that unusually in this case there is an issue raised in relation to an appeal on the sentence side. Ground 14 of the notice of appeal is in these terms:

> "The comments of the learned trial judge at the sentence hearing which, without prejudice to the foregoing grounds, those being those related to conviction, may impact on the appellant in the event of any Parole Board consideration of her case were disproportionate."

In the course of written submissions, this Court was invited if the stage was reached, in other words if the appeal against conviction was rejected, to substitute its own sentencing remarks for the remarks that were made by the trial judge. The situation is a very unusual one indeed in that the challenge is not to the sentence that was actually imposed, nor could it be, because that sentence was mandatory but to the remarks that were made which it is suggested might have an impact at a later stage. This Court is very conscious that the remarks were made by a judge who had at that stage presided over a lengthy trial and therefore that the judge had significant advantages which this Court does not enjoy, dependent as it is on the transcript. The Court notes that the appellant is particularly concerned about the categorisation of her in the course of those remarks as a hard-nosed, barefaced liar. Counsel for the DPP says that there were exchanges in the course of cross examination by him of the appellant which provide a clear basis for the remarks. Be that as it may, this Court is very doubtful that it would be proper for it to embark on a critique of remarks when the sentence is immune from challenge.

31. In any event, the Court is not convinced that the remarks, if seen in context, are as damaging as apprehended. While being described as a liar, more particularly as a hard-nosed barefaced liar, cannot be pleasant, it is necessary to put the matter in perspective. The remarks were made in respect of someone who had been convicted of murder and in that context the remarks recede in significance. In any event, the Court would simply observe and it ventures to suggest that when the question of the release of the appellant comes to be considered by the authorities that the focus at that stage is likely to be on how the appellant has

conducted herself while in custody and the extent to which there is evidence that she is somebody who has sought to rehabilitate herself.

32. In that context the Court would draw attention to the fact that during the course of the appeal hearing counsel on her behalf read a detailed report from the Governor of the Dóchas Centre. That report is entirely positive in tone and is very much to the credit of Ms. Cummins. No doubt when the matter comes in due course to be considered by the Parole Board and by other relevant authorities there will be up to date reports available at that stage from the Governor of the Dóchas Centre, or of wherever centre she will happen to be detained in at that stage. But insofar as the authorities might be anxious to know whether it was the case that from her early time in custody the appellant had sought to rehabilitate and sought to conduct herself in a responsible and proper manner the report that was furnished for the purpose of today's proceedings by the Governor could leave no-one in any doubt on that score.

33. In summary, the Court dismisses the appeal against conviction.