Neutral Citation: [2014] IEHC 483

THE HIGH COURT

[2013 2232 SS]

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA DAMIEN KELLY)

PROSECUTOR

AND

KARL BURKE AND MARK BURKE

ACCUSED

JUDGMENT of Ms. Justice Baker delivered on 17th day of October, 2014

1. Judge Murphy, then a judge of the District Court, by a case stated of 10th December, 2013, stated three questions for determination by this Court pursuant to s. 32 of the Courts (Supplemental Provisions) Act 1961. The questions arose in the context of a hearing, on diverse dates between 23rd April, 2013 and 4th September, 2013, of charges against the two accused persons relating to an alleged assault, attempt to assault, and production of a hammer with intent to intimidate or assault another person. The prosecution case is that the second accused, Mark Burke, confronted three identified persons over an alleged attempted theft the previous week of a motorcar. It is alleged that the first accused, Karl Burke, during the course of this confrontation assaulted one of these persons, and that the second accused retrieved a hammer from his van with which he threatened another one of those persons.

2. The first accused asserts he was not present at the locus of the alleged assault, and offered an alibi witness. The second accused admits that he was at the scene and confronted one of the three about an attempted theft, but that once the verbal confrontation occurred the persons immediately ran away. The second accused denies that he produced a hammer or even owned one of the descriptions given.

3. Evidence was given from two of the complainants and from nine other witnesses for the prosecution. At the end of the prosecution case, counsel for the accused sought a dismissal on the basis that there was insufficient evidence and this application was refused.

4. Both accused then went into evidence and called between them seven witnesses, the two accused and five other witnesses.

5. This consultative case stated arises from the evidence given by one of the witnesses called on behalf of the prosecution, Tara Burke, the wife of the second named accused and the sister in law of the other, who had given statements to the gardaí exculpatory of both accused persons which were tendered in evidence during the course of the trial by the prosecution. The prosecution did not directly put to Mrs. Burke a contradictory version of the evidence that she gave, nor was she discredited personally by the prosecution in the course of the trial. It was asserted by counsel for the accused that in the absence of an attempt to discredit Ms. Tara Burke personally, or to put to her a contradictory version of the substance of her evidence, that the trial judge could not as a matter of law be satisfied beyond a reasonable doubt of the guilt of each of the accused.

6. The trial judge has submitted certain questions to this Court by way of consultative case stated on the basis as she put it that she was "*not certain in law that she was entitled to prefer the evidence of Mr. Grec and Messrs. Cassandro over that of Mrs. Tara Burke*".

7. The questions raised in the case stated are as follows:-

> *"(i) Am I entitled to prefer the evidence of the prosecution witnesses whose evidence was challenged by the accused, over the evidence of the prosecution witness whose evidence was uncontradicted by any party to the proceedings and whose evidence discloses an exculpatory alternative version of events.*
>
> *(ii) Am I entitled to prefer the evidence of the prosecution witnesses whose evidence was challenged by the accused, over the evidence of the prosecution witness whose evidence was uncontradicted by any party to the proceedings and whose evidence discloses an exculpatory, alternative version of events in circumstances where that witness (a)was/ is the spouse of one of the co-accused, (b) was called by the prosecution solely for the purposes of establishing that she had made a 999 call, (c) who was not examined on any other issue by the prosecution, (d) who had already furnished to the gardaí statements which were exculpatory of both of the two co-accused (copies of which were furnished to the court in evidence and which were included in the appendices hereto), and (e) who corroborated the contents of those statements under cross examination by counsel for each of the two co-accused, so that, although no application was made by the prosecution to treat the witness as a hostile witness, she was, in effect in the view of the court, a hostile witness.*
>
> *(iii) If so, am I entitled to convict on the basis that I prefer the evidence of Mr. Grec and Messrs. Cassandro notwithstanding that the uncontradicted prosecution evidence of Mrs. Burke discloses an exculpatory alternative version of events."*

The Rule in Browne v. Dunn

8. At the hearing before me much of the argument of counsel for the two accused centred around the House of Lords judgment in the case of *Browne v. Dunn* [1893] 6 R 67. That case has been identified as the source of a principle, the precise status of which is a

matter of some controversy and difficulty, as to the conduct of a trial and what must be put to a witness in cross-examination. It has variously been described as a rule of law, a rule of evidence, or possibly a rule of fairness such that a witness must not be discredited without having a chance to comment upon the dissenting evidence or answer the challenge in some way.

9. Counsel for the two accused characterised the question first posed by the District Judge in the case stated as whether the rule in *Browne v. Dunn* is part of Irish law and specifically part of Irish criminal law. *Browne v. Dunn* itself was a civil action but has been referred to and followed in criminal trials, although the case law would suggest that some degree of flexibility has been noted in its application. The consequence of failure to cross-examine is the central question, and accordingly the first question of the case stated is whether there is a rule of law that if a witness has not been cross-examined, the evidence of that witness must be accepted. It is also argued by counsel that the presumption of innocence and the requirement that a criminal case must be satisfied beyond reasonable doubt means that the exculpatory statement of Mrs. Burke which was not challenged must raise a reasonable doubt such that a conviction would be unsafe.

10. Counsel for the DPP suggests that the rule, if it be such, in Browne v. Dunn is directed at the situation where a party intends to contradict evidence in chief by a witness for the other side. He suggests that there are two purposes to the rule as follows:-

> (a) In the absence of any challenge, the court may infer that the evidence of the other witnesses is accepted;
>
> (b) It is also regarded as unfair to hide your case under the table and only reveal for the first time when the other side's witnesses have already given their testimony. A witness should be given a chance to explain an apparent contradiction in their evidence. .

The Ratio in Browne v. Dunn

11. *Browne v. Dunn* itself was a defamation case reported in an obscure report. The headnote suggests the following ratio:-

> *"If in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination showing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it be otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story or (per Lord Morris), the story is of an incredible and romancing character."*

12. The judgment of the House of Lords was given in an action brought by a person against a solicitor for libel arising from the drawing up by the solicitor of a document which was signed by a number of persons for the purpose of obtaining their authority to take proceedings against Mr. Browne arising from an alleged public order breach. At the hearing of the action, one of the persons who signed the document gave evidence for the plaintiff, and the other signatories, except one who did not appear at the trial and another who was deceased, gave evidence for the defendant. The case made on behalf of the plaintiff was that the entire thing was a sham, that the solicitor did not draw up the document and that it was an entirely gratuitous affair carried out without any honest or legitimate object save for the purpose of annoying Mr. Browne. The persons who gave evidence for the defence said that they genuinely had employed the defendant as solicitor. The jury found for the plaintiff and the defendant appealed. The Court of Appeal set aside the decision of the trial court, and the plaintiff appealed to the House of Lords whose Judgment centred on the question of whether the documentation was privileged.

13. But the judgment has become the *locus classicus* of rules relating to the conduct of a case. A judgment was given by Lord Herschell on the question of how the court was to treat evidence of witnesses who had not been cross-examined and he expressed the view it was not open to counsel to ask the jury to disbelieve the stories of the witnesses who had not been cross-examined. He expressed the following opinion which has been much quoted:

> *"Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."*

14. Lord Halsbury agreed, and said the following with regard to the conduct of a case:-

> *"My Lords, with regards to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."*

15. Lord Morris also agreed. But his judgment took a somewhat different approach to the question of cross-examination which he dealt with as follows:-

> *"My Lords, there is another point upon which I would wish to guard myself, namely, with respect to laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. In this case, I am clearly of opinion that the witnesses, having given their testimony, and not having been cross-examined, having deposed to a state of facts which is quite reconcilable with the rest of the case, and with the fact of the retainer having been given, it was impossible for the plaintiff to ask the jury at the trial, and it is impossible for him to ask any legal tribunal, to say that these witnesses are not to be credited. But I can quite understand a case in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box. I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a witness's credit, that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit."*

16. There is only one Irish case where *Browne v. Dunn* has been expressly referred to, and that is the decision of Ronan J. in *Flanagan v. Fahy* [1918] 2 I.R. 361. In a suit to establish a will, one of the witnesses for the defendant stated that the will was written immediately after the death of the deceased, that he had been invited on behalf of the plaintiff to put his name to it as a witness and that he had been given or offered a bribe to secure his silence. Cross-examination of this witness was directed to prove hostility between him and the plaintiff's family and on re-examination he was asked whether he had not told his employer the same story the day after he had been approached in reference to the signing of the will. The employer was called and gave evidence that the impeached witness had told him substantially the same story a few days after the death of the deceased. A question arose as to the admissibility of the evidence of the statement made to the employer of the relevant witness. Ronan J. outlined the question at p. 388 as follows:-

> *"The entire evidence of Ryan was impeached as being an absolute fabrication and invention. If there was no cross-examination he would have had no opportunity of explaining and showing that it was not. The practice here on the part of skilful counsel has been not to ask any questions which would give the witness an opportunity of explaining, or of stating facts or giving reasons in support of his evidence, unless counsel supposed he could obtain an answer favourable to his case."*

17. Ronan J. made a general observation that *"[i]t does not do of course to let the witness go down without cross-examination",* but suggested there was no rule as such that cross-examination had to be carried out, i.e. no duty to cross-examine the evidence of a witness for the other party. He asked first the hypothetical question as to what would occur had there been no cross-examination at all, and said albeit obiter that in that context the whole of the evidence of the employer would be inadmissible. He went on to make the following comment:-

> *"But in England this would not have been the only result. The settled law and practice there is that, if you do not cross-examine a witness, so as to give him an opportunity of explaining and justifying his evidence or any part thereof, you are taken to have accepted the evidence in respect of which you have not so cross-examined….It is stated in the leading textbooks, and was dealt with in the House of Lords in the case of Browne v. Dunn. This difference of practice must be considered in applying the English cases. It says nothing as to how far Browne v. Dunn governs the Irish Courts."*

The Position in English Law

18. The rule has been followed in England and Wales in a number of cases, not always expressly by reference to *Browne v. Dunn* itself. A recent judgment of the Court of Appeal in *R. v Fenlon* [1980] 71 Cr. App. R. 307 involved three co-accused who were charged with rape. The appellant gave evidence and after his evidence, the trial judge informed the co-defendants that it was their duty to cross-examine the appellant in respect of matters where their evidence might diverge from his. This was one ground of appeal to the Court of Appeal where Lane J. in addressing the question whether the prosecution had to put its case to an appellant said the following:-

> *"Mr. Goldberg submits that that is a rule which applies to counsel prosecuting on behalf of the Crown. It is his clear duty, he concedes, to put to witnesses the version of events for which he contends, so that they can answer it. But he further submits that it is not the duty of one defendant to put to another defendant his version of events where it differs from the version given by the other defendant.*
>
> *We can see no distinction in principle between the one situation and the other. The basis of the rule, as Lord Herschell pointed out, is to give a witness of whom it is going to be said or suggested that he was not telling the truth an opportunity of explaining and if necessary of advancing further facts in confirmation of the evidence which he has given. There seems to be no reason why there should be any different rule relating to defendants between themselves from that applying to the prosecution vis-à-vis the defendant or the defence vis-à-vis the prosecution. It is the duty of counsel who intends to suggest that a witness is not telling the truth to make it clear to the witness in cross examination that he challenges his veracity and to give the witness an opportunity of replying. It need not be done in minute detail, but it is the duty of counsel to make it plain to the witness, albeit he may be a co-defendant, that his evidence is not accepted and in what respects it is not accepted."*

19. The rule has been enshrined in statute in Canada and to some extent in Australia. It is not found as a rule in American jurisprudence. In New South Wales and New Zealand it has been held to apply in criminal cases.

20. Counsel for the first defendant has also identified the rule in the International Criminal Court established in respect of former Yugoslavia and the territory of Rwanda which included the following:-

> *"In the cross examination of a witness who is able to give evidence relevant to the case for the cross examining party counsel shall put to that witness the nature of the case that the party for whom that counsel appears which is in contradiction of the evidence given by the witness."*

21. It seems clear, however that the rule must applied with some care and that is a rule of fairness, or perhaps more properly a rule which is identified as a rule for the purposes of giving concrete reflection to the requirement of fairness.

Does Browne v. Dunn represent a rule?

22. I have heard arguments from counsel for both defendants and counsel for the DPP and these arguments ask me to address the question of whether *Browne v. Dunn* represents the law in Ireland. The rule, if it be a rule, is obscure and the courts have struggled to characterise it, but for ease I will use the word "rule" in my judgment. In particular, it is unclear whether the judgment of the House of Lords merely reflects what is good practice, or whether the *ratio* of that case represents a rule of law, or perhaps a rule of evidence. A degree of difficulty is apparent from academic commentaries with regard to the question of whether the rule applies to criminal cases as well as in civil. It must be recalled in that context that *Browne v. Dunn* was a civil case and the criminal trial is of a nature which is wholly different from the civil trial having regard to the burden and standard of proof and the presumption of innocence.

23. I note, however, that the principles expressed in the case have been formulated in a number of ways, some of which are not relevant to the questions I am asked here. The case law and the academic commentary identify two aspects of the rule: the first concerns the status of evidence not put to a witness for the other party, and whether and how such evidence is admissible. A particular question with which practitioners will be familiar is whether the trial judge can, or should, remedy any frailty arising from the fact that evidence was not properly put, by having a witness recalled or making other orders or directions with regard to the weight to be attached to evidence not properly put at a time or in a manner sufficient to allow a relevant witness to comment. No such

difficulty arose in the trial before the District Court and the trial judge asks me how to treat the evidence of Mrs. Burke, not how to treat evidence form a witness whose testimony was not put to Mrs. Burke. This raises the second aspect of the *Browne v. Dunn* judgment as it has evolved, namely how a court is to treat evidence which has not been challenged in cross-examination.

24. In simple, and perhaps uncontroversial, terms the judgment of the House of Lords is authority for the proposition that the means by which testimony may be challenged is by cross-examination. The proposition so stated must be uncontroversial if one recalls that one cornerstone of our legal system is that evidence is for the most part, save for clearly identified exceptions provided by statute, admissible if it is given or proven under oath, and that the person giving the testimony must be available for cross-examination as to the truth and accuracy of the evidence tendered.

25. In more general terms the principle is that there is a right inherent in the nature of evidence given in the trial process, which flows from the principle of fairness and the rule of law, that a party may test by cross-examination the evidence of a witness for the other party. Whether this right to cross-examine imports a duty to do so is a different matter entirely and lies at the root of the first question in this case stated.

26. McGrath in his text *Evidence* (Dublin, 2004) at p. 91 suggests, correctly in my view, that if a party intends to impeach the credibility of a witness, fairness requires that the matter impugned should be put to that witness. This is a correct statement of the requirement of fairness in the conduct of the case. *Browne v. Dunn* is to some extent authority on the requirement of fairness in the conduct of a trial, and Lord Halsbury made it clear in that case that it is unfair to the witnesses that their credibility be impugned when they do not get an opportunity to respond.

27. One could also say that a well run trial would involve the cross-examination of witnesses, as without cross-examination the court is unlikely to know if there is an alternative explanation or alternative versions of events which ought to be taken into account in assessing the evidence. Again this is not a rule of evidence but a rule of good practice.

28. In the English case of *R. v. Harte* [1932] 23 Cr App R 202, Hershell C.J. stated at p. 207:-

> *"In our opinion, if, on a crucial part of the case, the prosecution intended to ask the jury to disbelieve the evidence of a witness, it is right and proper that the witness should be challenged in the witness box or, at any rate that it should be made plain, while the witness is in the box that his evidence is not accepted."*

29. The court held the conviction in that case to be unsafe, and it did so on the basis that the prosecution could not ask the jury to disbelieve a witness without itself having challenged that witness at a time when that witness had an opportunity to rebut the challenge. This case is not authority for the proposition that the evidence of a witness is inadmissible but rather for the proposition that the credibility of untested evidence cannot be impugned without complying with the requirement that the challenged person be given an opportunity to respond.

30. The prosecution is not entitled to challenge the credibility of Mrs. Burke's evidence as the prosecution did not cross-examine or contest the evidence in the course of trial. However, the trial judge is entitled not to believe the evidence or to give a varying degree of weight to the evidence, but such entitlement arises from the fact that the trial judge is the trier of fact and not from any rule of law that requires or directs the trial judge to believe or not believe that witness.

Browne v. Dunn in the criminal trail

31. In her recent text on evidence, Heffernan, *Evidence in Criminal Trials* (Dublin, 2014), the author pointed to the fact that the rule, which she identifies at p. 46 as a requirement that a party must "*contradict a witness's evidence in-chief by calling a rebuttal witness, the party must first lay a foundation in cross-examination*" as being one which is "beset with uncertainties". I have been directed to a useful and compelling article by Hugh Kennedy, "Putting the case against the rule in *Browne v. Dunn*" (2006) 11(2) Bar Review 39, who suggests that considerable doubt must exist as to whether there is a duty in a criminal trial to cross-examine opposing witnesses. The author criticised any "slavish adherence to the rule", and the challenge of reconciling the rule with the absence of any general duty of disclosure on the defence and the entailment of the accused to remain silent at trial. He asked the following question:-

> *"How else can the operation of the Rule in a criminal trial context be characterised, but is requiring disclosure, whatever may be the required amount of detail to be put by the cross examiner, the effect of the Rule if enforced by the court is an obligation to give advance notice of defence evidence and intended submissions on behalf of the accused."*

32. I accept his argument that in a criminal context to impose a duty on an accused person to cross-examine the witnesses for the prosecution could impact on the right to silence at trial, and could displace the burden of proof in practice, and prevent an advocate from making tactical choices in the conduct of defence. It seems to me that this must be the case having regard especially to the unique and singular combination in a criminal trial of the higher standard of proof, and the fact that the burden lies on the prosecution, which together give concrete effect to the presumption of innocence.

33. I accept this general proposition and it seems to me that there is no rule of law that requires a party to enter upon cross-examination of a witness. If the evidence is not cross-examined, it seems to me the person choosing not to test the evidence is faced with an inevitable consequence, namely that the evidence is before the court in an untested form. The untested evidence may in due course be given more weight merely on account of the fact that it was untested. However, the evidence remains admissible even if it is not cross-examined, albeit a court might, and probably, will take the view that the weight of evidence lies with the uncontroverted evidence which was not tested.

34. Of course an accused can sit back too long as was explained by the Court in *McPherson v Copeland*, [1961] S.L.T 373,where the court explained the difficulty as follows:

> *But criminal proceedings differ vitally from civil. In criminal proceedings nothing is taken for granted; the burden of proof is on the Crown throughout and that burden is to establish their case against the accused beyond reasonable doubt. Ordinarily there is no burden on the accused and he is entitled to sit back and leave the /crown to it. Of course, if he sits back too and far too long, he may come to grief but that is his own affair. He can leave the Crown evidence severely alone in the hope that it does not reach the standard of reasonable certainty or he can intervene at points where he is hopeful of raising a reasonable doubt. It follows that the procurator for the accused can be as selective as he chooses in the cross examination*

I adopt this statement of the difficulty of applying a duty to cross-examine in a criminal trial, and for the reasons stated I conclude

that there is no rule of evidence or law in a criminal trial which requires a party to cross-examine the evidence of the other party.

The status of unchallenged evidence
35. This brings me to the question of how to characterise unchallenged evidence. Evidence which is not tested by cross-examination is untested or unchallenged evidence and the party not testing evidence raises the risk that the unchallenged evidence will be determinative of an issue, and unchallenged or untested evidence carries a particular weight. This is so as a matter of good sense: evidence which is not tested by the means available under our law may not be ignored, or challenged by a collateral or indirect attack.

36. In *Chesapeake & Ry Company* 283 US 209, the US Supreme Court reversed a jury verdict based on the jury's rejection of a witness statement where:-

> *"A reading of [the testimony] discloses no lack of candor on [the witness's] s part. It was not shaken by cross-examination… Its accuracy was not controverted by proof or circumstances, directly or inferentially, and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached, and there is nothing in the record which reflects unfavourably upon his credibility."*

37. Counsel for the two accused argue that a party is deemed to accept evidence not challenged by him. I do not accept this statement as correct. In my view the proposition is more narrow: a party not testing evidence by cross-examination leaves it open to the trier of fact to treat the evidence as determinative, and uncontroverted evidence carries a particular weight which may tip the balance of the case. Cross-examination is a central plank in a trial and that is primarily because the trial judge, or the jury, must be given every assistance in the task they perform in assessing the veracity and import of the evidence they hear. But this does not mean that there is a duty on an advocate to cross-examine or that a well run trial will necessarily mean that all evidence adduced will have been fully tested by the other party

The role of this court in a consultative case stated
38. The consultative case stated raises a number of questions which relate to how the court is to treat the evidence of different parties. It is not my function to advise the trial judge as to which evidence she is to prefer, nor is it my function to review the evidence and assist the trial judge in coming to a conclusion as to the strength of the evidence given. Questions of strength and the credibility of witnesses and whether a reasonable doubt exists are questions for the trial judge and not for me on a case stated.

39. The real question before me is whether there is a rule of evidence or law which will guide the trial judge in her deliberations. What counsel for the two accused argue is that there exists such a rule in *Browne v. Dunn*, and that once they can point to the fact that a witness who gave exculpatory statements was not challenged on any part of her evidence which excuses the accused, that this fact alone, and without any requirement for the trial judge to weigh the evidence, must lead to an acquittal. I do not accept this contention and it has to be borne in mind that Mrs. Burke was one of eighteen witnesses in the case and the trial judge must consider all of the evidence before her and take her own judgment as to which version of events she believes, and whether there is a reasonable doubt in her mind.

40. I accept the argument by counsel for the DPP that the evidence of Mrs. Burke arose in the context of a lengthy trial where it was perfectly clear what case was being put by the prosecution, and several witnesses were called as to the incident, and the production of the hammer

41. The reason Mrs. Burke was called by the prosecution in this case is that her evidence was required to establish that she was the person who made the 999 call of which real evidence in the form of a recording was available and heard at trial. The State might have opted not to call Mrs. Burke at all but had they done this the 999 call could not have been adduced in evidence.

The weight of evidence
42. The trial judge asks this Court whether "*she was entitled to prefer the evidence*" of the prosecution witnesses over that of Mrs. Burke who was technically a witness for the prosecution but who gave exculpatory evidence of both accused. The question arises because the evidence of Mrs. Burke was not cross-examined or challenged while she was giving that evidence. My view is that the question is one to the weight to be given to the two contradictory descriptions of the events giving rise to the prosecution, one of which was not tested. The question so characterised is how the court is to treat the evidence of a witness whose evidence has not been challenged in cross-examination.

43. A party may not seek to ask the judge or jury to disbelieve a piece of testimony if the person giving that testimony has not had an opportunity to comment or deal with the challenge. So stated it is a rule not so much to the conduct of a case but to the conduct of argument or submissions at the close of a case and arises from one of the cornerstones of the law of evidence, namely that testimony be given on oath and that a witness be made available for cross-examination on evidence tendered in examination-in-chief. However, there is no rule which precludes a trial judge, or in the case of a jury trial, the jury, from hearing or accepting the evidence, but rather a rule which prevents a party conducting a case for making an argument that the evidence should be disbelieved as a matter of law. The commentary in the Criminal Law Review to the case of *O'Connell v. Adams* (1973) Crim LR 113 suggests the following rational:-

> *"The rule bars the party who has omitted to cross-examine from asking the jury to disbelieve the witness. Clearly it cannot bar the jury from disbelieving him; and presumably it would be wrong for the judge to tell the jury that they must believe the witness; though he could of course point out that the witness's evidence was unchallenged. Though the magistrates largely fulfil the role of the judge as well as the jury, it seems that they similarly should be untrammelled by rules as to what they must or must not believe. On the other hand, it is obviously desirable that it should be brought to the notice of any witness, before he leaves the witness box, that his evidence is doubted in some respect, since it is possible that he may be able to resolve the doubt."*

44. It cannot be controverted that a judge or jury should not be trammelled by rules as to what they must or must not believe. If the two accused are correct in the argument they make before me, a District judge, or in the case of trial by jury, a jury would be constrained by a rule of law to accept the evidence of a witness merely because that witness is not challenged. It seems to me that the proper approach to unchallenged evidence is to consider the appropriate weight which should be given to such evidence. I have regard to the dicta of Hardiman J. in *Boliden Tara Mines Limited v. Frank Cosgrove & Ors [*2010] IESC 62, at page 8, where the judge noted that certain witnesses who gave evidence in that case were not cross-examined in their evidence. That case involved the rectification of the deed of trust which, it had been asserted, did not properly express the intention of the settlor. Evidence was given by certain witnesses whom the court held to be clear, free of ambiguity, and consistent with their actions. The court noted that those witnesses were not cross-examined and made the following comment, *"I think it to be a salient feature going to the*

weight of the evidence." Hardiman J. was clear that the fact that evidence was not cross-examined did not mean in that case that it had to be accepted without demur, but the fact it was not cross-examined gave it stronger weight. Earlier in the judgment, Hardiman J. made reference to the force or weight of evidence "*deposed to by a witness who is not challenged, contradicted or cross-examined*".

45. Accordingly, it seems to me that in part the answer to the first question raised in the case stated as to whether the trial judge was entitled to prefer the tested evidence over the untested evidence has to be answered as follows: evidence which is not tested is admissible and the fact that it is not tested gives it greater weight. Whether that evidence is to be preferred is a matter for the trial judge and it is not for me to direct the trial judge how to consider the evidence. The judge may accept the evidence albeit that it was not challenged and there is no rule that directs the trial judge to reject that evidence. The evidence is before the court and must be weighed by the court in the light of the entire case and in deciding whether there is a reasonable doubt, but the evidence of Mrs. Burke is not determinative.

46. It is not a matter for me to direct what weight is to be given to any witness or any piece of evidence from such witness. The question before me is confined to the question of the treatment that must be given to evidence of Mrs. Burke. The trial judge is entitled to prefer whichever evidence she in her discretion and in the exercise of her judgement believes to be correct bearing in mind the burden of proof, the criminal standard of proof and the fact that the presumption of innocence means that the accused must be acquitted if he or she raises a reasonable doubt. The evidence of Mrs. Burke is uncontroverted, but this of itself may not be determinative of the innocence of the accused. It is important evidence and cannot be ignored but I have no role in directing the trial judge to treat this evidence as conclusive or determinative of the facts before her.

47. Counsel for the accused and particularly the first accused suggests that the trial judge is not entitled to convict where an exculpatory version of events remains unchallenged. This, it seems to me, is not a true proposition of law. The trial judge is entitled to convict even when an exculpatory version of events is before the court but only if the court holds that such exculpatory version of events does not raise a reasonable doubt. Whether a particular piece of evidence, bearing in mind the relevant weight that it must be given, raises a reasonable doubt is a matter for the trial judge.

The Application of Browne v. Dunn to the first question
48. *Browne v. Dunn* at its height is argued by the accused to be authority for a proposition that uncontroverted evidence must be accepted by the court. I do not accept that this is a correct statement of the *ratio* and a much narrower *ratio* is to be preferred namely that the credibility of a witness cannot be challenged in argument or submission but only by cross-examination. Untested evidence is part of the mix of evidence and is for the trial judge to determine the weight that will be given to the evidence. The credibility of the witnesses and the evidence that they have tendered is a matter to be weighed by that trier of fact. *Browne v. Dunne* does not support the argument that the existence of uncontroverted evidence leads to or directs the court to a particular conclusion on a matter of fact.

49. Counsel for the first defendant submits that the trial judge cannot "simply disregard" the evidence of Mrs. Burke on the speculative basis as argued by the Director of Public Prosecutions that her evidence is tainted by her relationship with the second defendant. I accept that this is a correct proposition, and that the trial judge may not disregard or discount the evidence of Mrs. Burke entirely. The trial judge may disbelieve the evidence or prefer the evidence of other witnesses, but she may not disregard it, and she must ask herself whether that evidence does raise a reasonable doubt. In so doing, she must treat this evidence as uncontested but she must consider all of the evidence and test the evidence in the light of the standard and burden of proof.

The duty of the trier of fact
50. The trier of fact, be it a judge or a jury, must assess the evidence and to do this involves assessing the credibility of evidence, weighing evidence, asking whether evidence given raises a reasonable doubt, and asking whether the evidence satisfies the standard of proof. As stated by Smyth J. in *EPI Environmental Technologies Ink & Anor v. Symphony Plastic Technologies Plc* [2005] 1 W.L.R. 3456 at 3471:-

> *"I regard it as essential that witnesses are challenged with the other side's case. This involves putting the case positively. This is important for a judge to enable him to assess that witness's response to the other case orally, by reference to his or her demeanour, and in the overall context of the litigation. A failure to put a point should usually disentitle the point to be taken against a witness in a closing speech."*

51. I adopt this clear statement of the purpose of cross-examination, or the challenging of a witness's evidence, namely that the purpose is partially at least to enable the finder of fact to have before him or her, or in the case of a jury before them, the sufficient evidence, and sufficient responses to that evidence, to properly weigh the matters before it and to determine the question of fact. This suggests to me that the rule or rules are directed to the ultimate fact finding exercise to be performed at a trial and are rules of evidence at best and not a rule of law.

Conclusion on the first question
52. The following seems to me to be the case:-

> (a) In closing submissions or argument a party may not impeach the credibility of a witness if that witness's evidence has not been tested in cross-examination;
>
> (b) *Ipso facto* a person who does not cross-examine evidence is faced with the prospect that the evidence is heard by the trial judge or the jury and is untested.
>
> (c) There is no requirement that evidence be cross-examined, but by not cross-examining evidence the evidence goes to the fact finder as untested and uncontradicted evidence.
>
> (d) Untested and uncontradicted evidence carries greater weight than tested contradictory evidence.
>
> (e) It is not the function of any rule of law to direct the court to accept evidence merely on account of the fact that it has not been tested. The court must hear all of the evidence before it and is entitled to weigh the evidence, including unchallenged evidence, against the evidence as a whole adduced at the trial.
>
> (f) A trial judge or a jury is not compelled as a matter of law to accept evidence because it is not challenged. Unchallenged evidence is part of the evidence at trial and the fact that it is unchallenged gives it somewhat greater weight, but does not direct a particular result.

The Second Question: was Mrs. Burke to be treated as a hostile witness?
53. At common law, a party may not cross-examine or attack the credibility of his own witness. This is subject to the rule in *Attorney General v. Taylor [*1974] I.R. 97 which sets out the basis on which such cross-examination may be allowed. A party wishing to cross-examine a witness called by him must apply to the trial judge to have that witness declared or treated as a hostile witness. Walsh J. explained the procedure as follows:-

> *"The proper procedure, if it is desired to have a witness treated as hostile, is to make the application to the judge and put before him the material upon which it is sought to have the witness declared to be a hostile witness. This, of course, should be done in the absence of the jury and, if the judge rules that the witness may be treated as hostile, then the witness may be cross-examined."*

54. It is not doubted that formal leave was neither sought nor obtained from the trial judge to have Mrs. Burke treated as a hostile witness. She was called and her statement proved by the prosecution and then tendered in evidence to the defence counsel, both of whom cross-examined her. Birmingham J. in *Power v. Doyle* [2008] 2 I.R. 69, made it clear that the concept of a hostile witness in the law of evidence is a term of art applicable to a situation where a witness called by a party gives evidence which is inconsistent with a statement previously furnished and expressly referred to the law governing the treatment of witnesses as hostile as outlined in the *Attorney General v. Taylor*.

55. A witness does not become a hostile witness merely by giving evidence which is different from evidence given previously or statements made previously by that witness, or by giving evidence contrary to the position proffered by the party calling that witness. The mere fact that Mrs. Burke was the spouse of the second accused does not make her a hostile witness as such. No application was made to the trial judge to have Mrs. Burke treated as a hostile witness and accordingly she was not a hostile witness in the sense in which this term is properly used in the law of evidence. Indeed Mrs. Burke was not in any sense hostile in the sense in which that term is properly used, and she in fact gave evidence which was consistent with her previous statements.

56. Any application to make Mrs. Burke or have her treated as a hostile witness would have been bound to fail and Counsel for the DPP acknowledges that no formal application was made to make Mrs. Burke a hostile witness and he accepts that as she did not make any statement which contradicted a previous statement, the prosecution could not have succeeded in such an application.

57. The trial judge asks this Court whether the court was entitled to *in effect* treat Mrs. Burke as a hostile witness, notwithstanding that no application was made to treat her as a hostile witness. In the light of the clear statement in recent judgment of Birmingham J. in *Power v. Doyle*, I can answer the second question in the negative, there being in law no possible characterisation of a witness as *in effect* hostile and as to call a person a hostile witness is to use a term of art. As the law does not recognise an informal means by which a witness may be treated as hostile, the trial judge is not entitled to prefer the evidence of some of the witnesses over other evidence if in doing so she is in effect treating Mrs. Burke as a hostile witness.

58. There are several other elements in the second question which I will attempt to answer. It is not competent for the court to treat Mrs. Burke as *in effect* a hostile witness. Mrs. Burke was not a hostile witness. The second question may be answered to some extent by the answer to the first but if the second question asks this Court whether the trial judge is obliged to prefer the tested evidence against the untested, the answer is no. As to whether the trial judge is entitled to prefer one piece of evidence against another it seems to me that the trial judge is entitled in her absolute function as finder of fact to prefer one piece of evidence against another, bearing in mind at all times the burden of proof and in particular that the standard of proof is on the criminal scale

59. The court is entitled to take into account that Mrs. Burke was the spouse of one of the co-accused, and the purpose for which she was called namely to prove the 999 call. The fact remains that the prosecution called this witness and is bound by her evidence unless it was tested by them. The court is entitled to take into account that the evidence of Mrs. Burke was not "*examined on any other issue by the prosecution*", but it seems to me that this part of the question is the same as question one. The court is also entitled to take into account that there was in evidence exculpatory statements furnished by Mrs. Burke to the gardaí which were adduced in evidence. The court is also entitled to take into account that Mrs. Burke corroborated the contents of those statements in the course of evidence taken under cross-examination by counsel of each of the co-accused.

The Third Question
60. The trial judge asks whether she is entitled to convict on the basis that she prefers the evidence of one party over the uncontroverted exculpatory evidence of another party. To a large extent, I believe this question is not a proper question for a case stated in that it asks me to direct the trial judge in her deliberations. I cannot consider whether a conviction is correct, or whether a conviction would be correct. Insofar as guidance is sought, it seems to me that if the trial judge is asking me whether her preference over one piece of evidence over another is safe, then the answer has to be yes as the question of the weight of evidence is a matter for her alone. If the question is on the other hand whether the court is entitled to disregard the evidence of Mrs. Burke, the answer is no. The evidence of Mrs. Burke is before the court. It is untested and must be given due weight as untested evidence.

Summary
61. I answer the questions raised by the District Court as follows:

(a) Yes. This is not to say that the evidence of Ms Burke may be ignored

(b) No. Ms Burke was not a hostile witness. The other matters raised go to the weight of evidence.

(c) Does not arise