THE COURT OF APPEAL

[Appeal No. 88/14]

Sheehan J.
Mahon J.
Edwards J.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

BRIAN QUINN

APPELLANT

JUDGMENT of the Court delivered by Sheehan J. on the 18th day of December 2015

[1] Introduction
[1.1] On the 21st November 2013, following a twelve-day trial before the Dublin Circuit Court, the appellant was convicted on four of the seven counts on the indictment.

[1.2] On Count 3 the appellant was found guilty by unanimous verdict of causing serious harm to Lee Harte on the 9th October 2011 contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997 and sentenced to eight years imprisonment in respect of that offence. In respect of Count 4, the appellant was found guilty by unanimous verdict of assault causing harm to Curtis Lennon and in respect of Count 5 the appellant was found guilty of assault causing harm to James Toner Jnr by majority verdict and sentenced to four years imprisonment to run concurrent with the sentence on Count 3. The appellant was also convicted on Count 7, namely, the production of an article capable of inflicting serious injury, to wit, a knife, by a majority verdict and sentenced to four years imprisonment concurrent with Count 3.

[1.3] The appellant was acquitted in respect of two counts of assault causing serious harm and also another count of assault causing harm.

[1.4] The appellant has appealed against both conviction and sentence however this judgment is concerned solely with the appellant's appeal against conviction.

[2] Overview
[2.1] In the Notice of Appeal filed by the appellant on the 12th February 2015, nine grounds of appeal against conviction were set out as follows:

> 1. In all the circumstances, the trial was unsatisfactory and the verdicts are unsafe, in particular, having regard to the various applications, submissions and requisitions made on behalf of the appellant and the adverse rulings made by the trial judge in respect of same.
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> 2. The trial judge erred in fact and in law in refusing to adjourn the trial to permit full disclosure to be made, and the trial was unsatisfactory and the verdicts are unsafe having regard to the fact that adequate disclosure was not made to the defence, including in respect of the PULSE records in respect of relevant incidents occurring at or reported from the appellant's home or his neighbour's home.
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> 3. The trial judge erred in fact and in law in making various rulings as to the evidence heard by the jury including:
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> a. By restricting the defence cross-examination of Lee Harte.
>
> b. By permitting the statement of Robert Ryan to be read back to him and subsequently failing to give an adequate direction regarding the weight to be attached to his evidence.
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> c. By refusing to direct the witness, Sharon Joyce, to refrain from describing the appellant's face as "evil".
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> d. By permitting the prosecution to call "rebuttal evidence" arising from the evidence of good character called on behalf of the appellant, that five of the six complainants did not have previous convictions.
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> 4. The trial judge failed to direct the jury adequately as to the law to be applied to the question of whether the force used by the appellant might have been lawful, including, in particular, in circumstances where such force may have been used inside the appellant's dwelling against persons who may have been believed by the appellant to have entered that dwelling unlawfully in order to commit the criminal offence. Further, the question subsequently raised by the jury was not adequately addressed.
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> 5. The trial judge erred in fact and in law in failing to direct the jury adequately as to the burden and standard of proof, including, in particular as to the law applicable to the assessment of:

a. Inferences favourable to the defence or the prosecution.

b. Inconsistencies in the evidence of the prosecution witnesses.

c. The relevance of alcohol consumption by witnesses.

6. The trial judge erred in fact and in law in failing to direct the jury adequately as to the law applicable to the assessment of the evidence of accomplices or otherwise to give appropriate warnings as to the evidence of the prosecution witnesses who might have been charged with criminal offences arising from the conduct and circumstances grounding the prosecution of the appellant.

7. The trial judge erred in fact and in law in failing to direct the jury adequately as to the law applicable to the assessment of the evidence of expert witnesses.

8. The trial judge erred in fact and in law in failing to direct the jury adequately as to the relevant evidence to the extent that the defence case was not adequately put.

9. Having regard to all the circumstances relating to the trial judge's charge to the jury, the trial was unsatisfactory and the verdict is unsafe.

[2.2] In the course of comprehensive written submissions filed on the 6th July 2015, the appellant indicated that he was not pursuing the ground of appeal relating to the failure to adjourn the trial. Towards the end of the oral hearing of this appeal, grounds (2) and (7) were also withdrawn.

[2.3] When this appeal came on for hearing, counsel for the appellant informed the Court that his principal grounds of appeal related to the trial judge's failure to charge the jury adequately on the question of self-defence and the refusal to give an accomplice warning. In considering these grounds of appeal, it is necessary to set out the background to the offences.

[3] Background
[3.1] The prosecution case was that on the evening of the 8th October 2011, going into the early morning of the 9th October 2011, an eighteenth birthday party had been taking place at 6, Deerpark Avenue, Tallaght, Dublin. It was James Toner Jnr.'s birthday and he lived at this address with his father, James Toner Snr., his mother, Deirdre Hawkins and his brother, Daniel. The appellant and his partner and their three children lived at 10, Deerpark Avenue, which was beside the Toner home.

[3.2] Both families were members of the Circle Housing Association which had been notified by James Toner Snr. of their intention to hold a birthday party on the date in question. The appellant and his partner had previously complained about late night noise from the Toner home, but had been informed that a party was to take place on this particular night.

[3.3] The party concluded at about 4.00am and Lee Harte was leaving with his cousin, Robert Ryan. They were both eighteen years of age and were being accompanied on their way out by James Toner Snr. and Deirdre Hawkins. According to Lee Harte, the appellant and his partner were standing outside their home at the adjoining wall with glasses in their hands. The appellant's partner started to verbally abuse the Toner family, saying, among other things, "you are only scumbags, tomorrow morning youse will be all burnt out". This resulted in a verbal altercation which continued until a glass was thrown at the Toners and the verbal altercation that was taking place developed into a physical altercation in which the prosecution stated that the appellant pulled or dragged Lee Harte into his home and stabbed him there causing him serious injury. In the course of a further physical altercation, the prosecution maintained that the appellant stabbed four other people who went to Lee Harte's assistance.

[3.4] The defence case was that the appellant's partner was outside her home on her own having a cigarette and drinking a glass of water when Lee Harte and Robert Ryan were leaving. She said that this group of people, which included James Toner Snr. and Deirdre Hawkins, started to verbally abuse her. She said this abuse was quickly followed by a physical attack on her by Robert Ryan as he pushed her towards her home. She also alleged that Robert Ryan had exposed himself to her in a demeaning and provocative manner. The appellant's partner said that Robert Ryan pushed her towards her home. She said that the appellant, in trying to pull her into her home, was set upon by the complainants who had illegally entered his home. While the appellant could not remember what occurred after this invasion by what appeared to him to be a violent abusive crowd of drunken people intent on attacking himself and his wife, he maintained that any force used by him was to repel the invasion of his home and to repel the attack on himself and his wife, and that in those circumstances, whatever defence he used was lawful in the circumstances, as he perceived them to be. It was part of the defence case that prior to any stabbing the appellant had been hit over the head with a baseball bat.

[4] Legal position & submissions
[4.1] Section 18 of the Non-Fatal Offences against the Person Act 1997 and s. 1(2) of the said Act are the relevant statutory provisions directly in issue in this case. Section 18 provides for the following:

"(1) The use of force by a person for any of the following purposes, if only such as is reasonable in the circumstances as he or she believes them to be, does not constitute an offence—

(a) to protect himself or herself or a member of the family of that person or another from injury, assault or detention caused by a criminal act; or

(b) to protect himself or herself or (with the authority of that other) another from trespass to the person; or

(c) to protect his or her property from appropriation, destruction or damage caused by a criminal act or from trespass or infringement; or

(d) to protect property belonging to another from appropriation, destruction or damage caused by a criminal act or (with the authority of that other) from trespass or infringement; or

(e) to prevent crime or a breach of the peace.

(2) "use of force" in subsection (1) is defined and extended by section 20 .

(3) For the purposes of this section an act is "criminal" notwithstanding that the person doing the act—

(a) if charged with an offence in respect of it, would be acquitted on the ground that—

(i) he or she acted under duress,

(ii) his or her act was involuntary,

(iii) he or she was in a state of intoxication, or

(iv) he or she was insane so as not to be responsible according to law for the act,

or

(b) was a person to whom section 52(1) of the Children Act 2001 applied

(4) The references in subsection (1) to protecting a person and property from anything include protecting the person or property from its continuing; and the reference to preventing crime or a breach of the peace shall be similarly construed.

(5) For the purposes of this section the question whether the act against which force is used is of a kind mentioned in any of the paragraphs (a) to (e) of subsection (1) shall be determined according to the circumstances as the person using the force believes them to be.

(6) Notwithstanding subsection (1), a person who believes circumstances to exist which would justify or excuse the use of force under that subsection has no defence if he or she knows that the force is used against a member of the Garda Síochána acting in the course of the member's duty or a person so assisting such member, unless he or she believes the force to be immediately necessary to prevent harm to himself or herself or another.

(7) The defence provided by this section does not apply to a person who causes conduct or a state of affairs with a view to using force to resist or terminate it:

But the defence may apply although the occasion for the use of force arises only because the person does something he or she may lawfully do, knowing that such an occasion will arise.

(8) Property shall be treated for the purposes of subsection (1) (c) and (d) as belonging to any person—

(a) having the custody or control of it;

(b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); or

(c) having a charge on it;

and where property is subject to a trust, the persons to whom it belongs shall be treated as including any person having a right to enforce the trust.

Property of a corporation sole shall be treated for the purposes of the aforesaid provisions as belonging to the corporation notwithstanding a vacancy in the corporation."

(9) In subsection (3) 'intoxication' means being under the intoxicating influence of any alcoholic drink, drug, solvent or any other substance or combination of substances.be.

Sections 18 requires to be read in light of s.1 (2) which states: - *"For the purposes of sections 17, 18 and 19 it is immaterial whether a belief is justified or not if it is honestly held but the presence or absence of reasonable grounds for the belief is a matter to which the court or the jury is to have regard, in conjunction with any other relevant matters, in considering whether the person honestly held the belief."*

[5] Submissions in respect of Appeal Ground (4): that the trial judge misdirected the jury in relation to the second limb of the test for assessing whether a person acted in self-defence

[5.1] The first ground of appeal relates to the trial judge's direction to the jury concerning the test to be applied by the jury in assessing whether the appellant had acted in self-defence. Counsel for the appellant submitted that there were two limbs to the test in assessing the legal criteria for whether an individual was acting in self-defence. The first limb is concerned with deciding whether the accused honestly believed it was necessary to use force for one of the five purposes specified in s.18(1), and in fact did so. The second limb concerns a determination as to whether such force as was in fact used was reasonable in the circumstances as he honestly believed them to be. In respect of both limbs the test is at all stages a subjective one. It does not matter whether or not the use of force at all, or the use of such force as was in fact used, was justified. An accused can avail of the defence of self defence if he honestly believed that the use of force was necessary, and that the amount of force employed by him was necessary, in the circumstances as he perceived them to be. However, in assessing the honesty of the asserted beliefs, the trier of fact, whether it be a non jury court, or a jury, is required to have regard to the presence or absence of reasonable grounds for those beliefs, in conjunction with any other relevant matters. To that extent, but to that extent only, the assessment as to whether an individual was acting in self-defence contains an objective component.

[5.2] The appellant contends that on several occasions in the course of addressing the jury in this matter, both in her principal charge and in subsequent recharging, the learned trial judge slipped into error by holding that when it came to assessing the force used by the appellant i.e., the second limb of self defence, the test ceased to be a subjective one and it was for the jury to apply an objective test. In essence, the complaint made is that the trial judge failed to convey to the jury, the nuance that the objective component is only relevant to the assessment of the "honesty" of an asserted belief.

[5.3] Counsel for the appellant further submitted that that there was also a failure to address the recognised and accepted position that a person whose dwelling is invaded or who perceives his home is being invaded unlawfully, is entitled to a special level of latitude and protection, having regard to the constitutional right to the inviolability of the dwelling. Counsel relied upon the judgment in *The People (at the suit of the Director of Public Prosecutions) v Barne*s [2007] 3 I.R. 13 in this regard.

[5.4] Counsel for the appellant further submitted that the inconsistent directions to the jury were such that this Court must attach a certain weight to the fact that at trial, the matter was the subject of requisitions however the judge was not disposed to address the matter again save for reading out a direct quotation from the judgement. The foreman of the jury subsequently sought clarification in relation to the matters which had been the subject of requisitions. Counsel for the appellant submitted that he had sought a full recharge in respect of self-defence on the basis that there was a real possibility that there was a misunderstanding by the jury.

[5.5] Counsel for the appellant referred the Court to the law on inconsistent directions to the jury and placed reliance upon the following case law: - *The People (at the suit of the Director of Public Prosecutions) v. O'Reilly* [2004] I.E.C.C.A. 27; *The People (at the suit of the Director of Public Prosecutions) v. Lynch*, Court of Criminal Appeal 29th July 2015; *The People (at the suit of the Director of Public Prosecutions) v. Bambrick* [1999] 2 I.L.R.M. 71; *The People (at the suit of the Director of Public Prosecutions) v. Clark* [1994] 3 I.R. 289; *The People (at the suit of the Director of Public Prosecutions) v. Kelly* [2000] 2 I.R. 1; *The People (at the suit of the Attorney General) v. Berber and Levey* [1944] I.R. 405; and *The People (at the suit of the Director of Public Prosecutions) v. Noonan* [1998] 2 I.R. 439.

[5.6] Counsel for the appellant placed particular reliance upon the recent judgment in The *People (at the suit of the Director of Public Prosecutions) v. Lynch,* Court of Criminal Appeal 29th July 2015 in which O'Donnell J. stated at paras. 38 and 39: -

> "Even taking this at its lowest point, there is an inescapable possibility that the jury were asking about whether they needed both (proof beyond reasonable doubt of intention to kill or cause serious injury, and disproof of provocation) before returning a verdict of guilty on the murder charge. If this was on their minds, then the response made by the judge was unintentionally but clearly incorrect. There is therefore, at a minimum, an inescapable possibility that the jury were and remained confused as to a central feature of this case. While in this appeal the prosecution sought to maintain the interpretation that both the judge and the jury understood each other and were discussing the requirements of a verdict of guilt of manslaughter, we think, with respect, that it is more likely that the judge and jury were at cross purposes. Again, and at a minimum, the possibility cannot be excluded" and continued at para. 43 that "It is also a fundamental point since if the Court is left with a serious doubt that the jury correctly understood the manner in which they were to approach the defences raised in this case, it follows that the Court cannot be confident as to the fairness of the trial, and the safety of the conviction."

[5.7] Counsel for the Director of Public Prosecutions submitted that the trial judge's charge was detailed, purposeful and lengthy and should be considered as a whole. When considered as a whole, it was counsel's submission that the trial judge did not dilute the requisite subjective elements of the test to be applied.

[5.8] Counsel also submitted that the approach taken by the defence to contend that this was an incident involving the invasion of a home was misconceived as the core of the case was that this was an incident that occurred in the early hours of the morning outside the home of the appellant. Counsel sought to distinguish this case from the circumstances that pertained in *The People (at the suit of the Director of Public Prosecutions) v Barnes* [2007] 3 I.R. 13 which involved a burglary.

[5.9] In respect of the trial judge's charge in relation to the second limb of the test to be applied in assessing whether a person acted in self-defence, counsel for the prosecution placed reliance upon the Court of Appeal decision in *The People at the suit of the Director of Public Prosecutions v. Ryan* [2006] I.E.C.C.A. 47 and referred this Court to Coonan & Foley's textbook, *'The Judge's Charge'* (Roundhall, Dublin, 2008), paras. 17-22 at p. 349 which states: - *"As has already been discussed, a subjective test must be applied into the question of whether the accused believed that the force used was necessary. In contrast, an objective test is to be applied to the question of whether the degree of force used was itself reasonable. The trial judge should instruct the jury that the force used must be reasonable and should remind it of all the factors that will affect its determination of that issue."*

[5.10] Counsel further submitted that the provisions of the Non-Fatal Offences Against the Person Act 1997 does not specify whether it applies only to acts carried out in self-defence and that this aspect is a common law construct. It was submitted that the trial judge's charge was not inconsistent with the statutory provisions and the trial judge was entitled to say that the level and degree and extent of the force must be proportionate and reasonable. It was counsel's submission that in the circumstances of this particular case that there was no risk of it being an unfair or unsatisfactory trial in the sense of misdirection when one looks at the judge's charge as a whole.

[6] Submissions in respect of Appeal Ground (6): Failure to give an accomplice warning

[6.1] The second ground of appeal was based upon the refusal of the trial judge to give an accomplice warning in respect of a number of the prosecution witnesses in circumstances where it was clear that they had an incentive to put forward a certain account of events because to do otherwise may result in their being charged and prosecuted for criminal offences. Three of the injured parties who were prosecution witnesses conceded in cross-examination that they might have been liable to a criminal prosecution. The trial judge took the view that a corroboration warning was not necessary as the prosecution witnesses were not accomplices.

[6.2] Counsel for the appellant acknowledged in the course of written submissions that the witnesses in this case were not accomplices in the strict sense of the word, in that it was unlikely that they could have been charged with assaulting each other or with unlawfully producing a knife. However, counsel argued that they could have been charged with violent disorder or burglary, and as some of them admitted in evidence that it was possible that they could have been charged with a criminal offence, and at the very least, these admissions required the trial judge to give a special warning to the jury about their evidence.

[6.3] It was counsel's submission that there was persuasive authority for the proposition that to confine the corroboration warning to circumstances where a person happens to be liable to be charged with a precise offence which is before the Court would result in injustice and fails to recognise the mischief that the rule is meant to address and contended that the rationale behind the rule is to alert the jury of instances in which a witness may have a motive to lie. It was the defendant's case at trial that there was evidence upon which the jury could come to a reasonable conclusion, that the persons who were prosecution witnesses were persons who were involved in entering the appellant's home in violent circumstances and in circumstances where they were liable to be prosecuted for an offence arising from their conduct and therefore these witnesses had an incentive to put forward an exculpatory description of events in respect of themselves and an inculpatory description in respect of the appellant. It was counsel's submission that those witnesses may have a defence or an argument to say that one of them was dragged in and the others were helping however it was the situation these witnesses knew at the time they were making their statements to the guards that they could be charged with an

offence and that is the justification and rationale for the accomplice warning.

[6.4] Counsel referred to the requisitions made to the trial judge in this regard and her ultimate determination that she would not recharge the jury with an accomplice warning. Counsel for the appellant placed reliance upon the following case law: - *The People at the suit of the Director of Public Prosecutions v. Morgan* [2011] IECCA 36, *Davies v. DPP* [1954] AC 378 and *McNee v. Kay* [1953] VLR 520. Counsel also referred this Court to the case of the *AG v. Carney* [1955] IR 324 and *Dental Board v. O'Callaghan* [1969] IR 181.

[6.5] Counsel contended that the warning could be framed in the traditional terms but limited to simply saying it is dangerous to convict on the uncorroborated evidence of an accomplice. In this regard counsel placed reliance upon the judgment of Hardiman J. in the Supreme Court in *Cosgrave v. The Director of Public Prosecutions, Ireland and the Attorney General* [2012] 3 I.R. 666 and cited the following at para. 124: - *"But Irish authority has over a long period of time taken a broader view of who else is included in that category at least for the purpose of attracting a corroboration warning. Thus in Attorney General v. Linehan [1929] I.R. 19 Kennedy C.J. said: - ' We do not think that in the case of a rule of caution concerned with the credit of accomplice witnesses and the weight of their uncorroborated evidence, a narrow or precise definition of 'accomplice' should be, or indeed can be, laid down.'"* The judgment continues at para. 125: - *"This echoed criticism of what was seen as an unduly strict English rule in other jurisdictions, on the basis that it focussed on the liability of the witness to prosecution for the very offence with which the accused is charged. This seems unduly narrow and seeks to apply a concept which evolved to deal with the question of culpability to the very different problem of credibility…"*

[6.6] Counsel for the Director of Public Prosecutions submitted that it was the appellant's contention that if on any view of it the relevant prosecution witnesses were themselves engaged in a criminal act they were accomplices *inter se* and an accomplice warning should have been given in relation to their evidence. Counsel further submitted that the potential offences committed by some of the injured parties who were the witnesses for the prosecution were not connected in any way or of the same nature as the offences committed by the appellant in this matter. In such circumstances, to give such a warning would have been totally superfluous to the issues that the jury had to decide and would have resulted in unnecessary confusion. The jury were directed to consider and decide each of these offences individually and their acquitting the appellant in respect of some of the charges and convicting on others demonstrated that the jury had approached the task in this way.

[7] Remaining grounds of appeal:
[7.1] Neither counsel made oral submissions at the hearing before this Court in relation to the following grounds of appeal but instead elected to rely upon their detailed written submissions in this regard.

Ground 3: the trial judge erred in fact and in law in making various rulings as to the evidence heard by the jury.
[7.2] In respect of (3)(a), that the trial judge should not have restricted the cross-examination of Lee Harte, counsel for the appellant submitted that he was entitled to ask the prosecution witness whether there were objective grounds upon which the appellant could have perceived that his home had been invaded by a large number of people. The trial judge refused to allow that line of questioning on the basis that it was not for the witness to speculate or to place himself into the mind frame of the appellant and what he may or may not have thought. This was a matter for the jury. Counsel for the appellant, in the course of his written submissions, submitted that the ruling of the trial judge was an unjustified curtailment of the appellant's constitutional right to cross-examine his accusers. It was submitted that, as a matter of law, there is no prohibition on asking a witness to comment on how, based on objective matters within their knowledge, a situation may have appeared to an accused person. Counsel placed reliance upon the Supreme Court decision in *Maguire v. Ardagh* [2002] 1 IR 385 in this regard. Counsel argued that the proposed question was of crucial importance to the test which the jury would have to apply regarding self-defence as to the perception of the appellant. Counsel drew an analogy with the permitted line of questioning in rape cases wherein it is possible to ask a complainant in a rape case: "Having regard to what you did and said, do you accept that it is reasonably possible that you appeared to the accused to be consenting"; and in a self defence case: "Having regard to what you and your friends did and said do you accept that it could have appeared to the accused that you were all about to attack him?" Ultimately, it was counsel for the appellant's contention that by closing down this line of cross-examination the trial judge rendered the trial unfair.

[7.3] Counsel for the Director of Public Prosecutions submitted the trial judge's ruling was correct and that counsel for the appellant's reliance upon decision in *Maguire v Ardagh* [2002] 1 IR 385 was irrelevant in this context. Counsel for the Director of Public Prosecutions reiterated the submission which had been made during the trial that the Defence was attempting to enter the realm of asking a witness as to fact how events appeared to some other person. It was submitted that such questioning is inadmissible and irrelevant on two bases, first each person would not have necessarily observed the same events and in the same manner, and secondly how can the witness to some event enter the mind of a stranger to give opinion as to what those events made a stranger think.

[7.4] In respect of (b), that the trial judge had erred in law and in fact by permitting the statement of Robert Ryan to be read back to him and subsequently failing to give an adequate direction regarding the weight to be attached to his evidence.

[7.5] In the course of his examination-in-chief, Robert Ryan was asked to recollect the events on the relevant evening and responded by saying that he could not remember. The witness confirmed that he had read his statement two days previously but that he had forgot to bring it with him that morning and conceded that he had difficulty with reading. Counsel for the Director of Public Prosecutions suggested that the witness might be asked if the statement had been read to him or if he had read the statement and, in the event that neither had happened, that it would be read to him in Court. Counsel for the appellant objected and noted that sworn evidence had been given that the witness did not remember the events and that he had previously read his statement.

[7.6] The trial judge, in acknowledging her discretion to permit a witness to refresh his memory, permitted the witness's statement to be read to him and the witness proceeded to give evidence. In the course of her direction to the jury, the trial judge reminded the jury that the witness had given evidence after he was sworn in that his mind had gone blank and he couldn't recall the events of the evening. There was a break in the proceedings and he was allowed to have the statement read over to him in order to refresh his memory and then he resumed giving his evidence. The trial judge directed that the jury must bear this in mind when they were deciding the weight to be attached to this witness' evidence.

[7.7] Counsel for the appellant submitted that a witness in direct examination should not be allowed to refresh his memory with reference to his statement after being sworn in and having commenced giving evidence unless the statement is a contemporaneous note. There was no evidence to justify a departure from the ordinary practice; and at the time of the ruling, no evidence of the date of the statement(s); there was never any evidence of the timing of the statements or whether the event was fresh in the mind of the witness at the time of making the statement. Counsel for the appellant relied upon an excerpt from Declan McGrath's book on *Evidence* (2nd Ed., Round Hall, Dublin, 2014) which states at p.134 that: - "*The requirement of contemporaneity between the document and the events recorded in it is crucial because it is only where the document was created at a time when the events in*

question are fresh in the memory of the person who created or verified the document that the rationale of permitting a witness to use the document to refresh memory will apply. A document can, therefore, only be used by a witness to refresh memory if it was made 'at the time of the transaction to which it refers, or shortly afterwards when the facts were fresh in his recollection'."

[7.8] Counsel for the appellant submitted that notwithstanding the warning given in the charge it was unsafe to allow the jury to receive this evidence in circumstances where the witness had given sworn evidence that he could not remember the events despite having read his statement two days previously.

[7.9] Counsel for the Director of Public Prosecutions submitted that the ruling of the trial judge in relation to the reading of the statement was correct and a fair exercise of her discretion and resulted in no prejudice or injustice to the appellant. Counsel noted the particular circumstances within which this arose, namely that the witness was permitted to have the statements read over to him due to his learning difficulties, and in particular his difficulty with reading. This was done prior to any cross-examination. Whilst in the course of the first part of his examination-in-chief the witness repeatedly referenced not being able to remember he also on three occasions referred to his mind going blank, and it was clear that the witness became uncomfortable when questioned about his reading ability. Counsel for the Director of Public Prosecutions concluded that the trial judge took the view, as she was entitled to, that it would not be appropriate to interrogate the witness about his reading levels or intellectual ability.

[7.10] Counsel distinguished this matter and noted that it was not a case of the witness refreshing his memory in the traditional sense.

[7.11] It was submitted by counsel for the Director of Public Prosecutions that reliance upon the case law regarding contemporaneous notes was irrelevant in this context. Furthermore, it was argued that the trial judge gave an appropriate warning worded in favour of the appellant in relation to the matter. It was submitted that during the course of cross-examination, counsel for the appellant actually put most of the statements verbatim to the witness. The jury ultimately acquitted the appellant of the offence alleged on Robert Ryan.

[7.12] In respect of (3) (c), that the trial judge erred in fact and in law by refusing to direct the witness Sharon Joyce to refrain from describing the appellant's face as "evil". During the course of the trial counsel for the appellant drew the trial judge's attention to the fact that the witness had said in her statement that, in the immediate aftermath of the incident, the appellant had looked at her "with a big evil look". Counsel for the appellant objected to the proposed use of the phrase "big evil look" on the basis that its prejudicial value outweighed its probative value and that, as subjective opinion type evidence, it was inadmissible. Counsel submitted that the trial judge erred in law by permitting the witness to express her opinion in those terms as the phrase "evil" went beyond being merely descriptive and carried with it an opinion in effect on the ultimate issue. It was counsel for the appellant's contention that the witness could have been invited to give evidence as to what she actually observed rather than the value judgment she attached to her observation. Furthermore, counsel for the appellant argued that in deciding the matter the Court should have applied the test of whether the prejudicial effect of the proposed evidence would outweigh its probative value.

[7.13] Counsel for the Director of Public Prosecutions submitted that there was no error in permitting a witness to give such evidence.

[7.14] In respect of (3) (d), that the trial judge erred in law and in fact in permitting the prosecution to call "rebuttal evidence" arising from the evidence of good character called on behalf of the appellant that five of the six complainants did not have previous convictions. The context within which this application arose at trial was as follows. Prior to the prosecution's closing speech, counsel for the Director of Public Prosecutions applied for leave to call a Garda to give evidence that five of the alleged injured parties did not have previous convictions. The appellant had been granted leave to call two witnesses to attest to his good character and that one prosecution witness, James Toner Senior, had accepted under cross-examination that he had serious previous convictions. Counsel for the appellant objected and stated that no notice had been given of the application: the prosecution had fully objected to character evidence being called on behalf of the defence but had not signalled an intention to seek to "retaliate" with such evidence. During the application, it was submitted that it was incorrect to characterise the proposed evidence as rebuttal evidence because it had not been suggested to any witness except James Toner Senior that they were of bad character.

[7.15] The trial judge allowed the application and a member of An Garda Siochana was called and confirmed that five of the complainants did not have previous convictions.

[7.16] It was submitted that an application of such an unusual nature should have been preceded by some notice to the defence. It was counsel's submission that the Court erred in allowing this evidence in circumstances where the defence had not sought to impugn the character of any of the prosecution witnesses. It was further contended that by hearing evidence that five of the complainants did not have previous convictions, the jury may have been left with the impression that they had been given an exhaustive account of the witnesses.

[7.17] No written or oral submissions were made in relation to grounds 1, 5, 8 and 9 however each of these grounds are more general in nature and require this Court to consider at length nonetheless.

[8] Decision

[8.1] This Court has considered at length the grounds of appeal being pursued by the appellant, the detailed written submissions of counsel for the appellant and the respondent and their detailed oral submissions before this Court. The Court will proceed to consider the first two primary grounds of appeal and thereafter will proceed to consider the remaining grounds of appeal.

[8.2] In relation to the ground of appeal concerning whether the trial judge adequately charged the jury in respect of the two-part test to be applied in assessing whether the appellant acted in self-defence, this Court acknowledges that this is a particularly complex and difficult area of law. This ground of appeal in fact involves two-subsections. The first relates to the trial judge's direction in relation to the second limb of the test to be applied. The second sub-section relates to whether this case gave rise to the necessity to issue a warning to the jury in line with the judgment in *The People (at the suit of the Director of Public Prosecutions) v. Barnes* [2007] 3 I.R. 13. Each of these subsections will be considered sequentially.

[8.3] Section 1 of the 1997 Act clearly provides that: *"For the purposes of sections 17, 18 and 19, it is immaterial whether a belief is justified or not if it is honestly held."* Therefore it was essential that the jury be directed that both limbs of the test were subjective however in determining the honesty of an asserted belief regard could be had to the presence or absence of reasonable grounds for the belief in conjunction with any other relevant matters. This does not change the overall test which is a subjective one into an objective one. The critical question remains "what were the circumstances as the accused honestly believed them to be." However, objective criteria may be used, in conjunction with any other relevant matters, in assessing the honesty of the asserted beliefs.

[8.4] Counsel for the Director of Public Prosecutions did not dispute that the trial judge had at times failed to clarify the subjective element of the second limb however it was his contention that when the trial judge's charge and recharge to the jury on foot of requisitions and questions from the foreman were considered as a whole, no error emerged which amounted to a misdirection. It was also pointed out that at certain parts of her original charge the trial judge had properly described the second limb as being subjective. However, further directions on the point emphasised the objective element to such an extent that this Court is bound to conclude that the jury may have been confused as to the precise test to be applied in considering the defence of self-defence pursuant to the Non-Fatal Offences Against the Person Act 1997.

[8.5] The second aspect of this ground of appeal relates to the question of whether this case gave rise to the necessity to issue a warning to the jury in line with the judgment in *The People (at the suit of the Director of Public Prosecutions) v. Barnes* [2007] 3 I.R. 13. This Court wishes to emphasise from the outset that the factual circumstances in which the judgment in *Barnes* arose were of a particular nature and involved an invasion of a dwelling by way of burglary and a resulting fatality. However, the principal relevance of this judgement to the present case is that it recognises the constitutional protection of the home and the special latitude to be given to those defending their home from attack. In the course of its judgment, the court noted that the special protection of the dwelling house dated back to time immemorial and was also subject to constitutional protection. The court stated at para. 64:

> "There are consequences of the special status of the dwelling house and of its importance to the human dignity of its occupants. Amongst the most relevant of these is that, as has been held by the courts of common law for centuries, a person in his dwelling house can never be under an obligation to leave it, to retreat from it or to abandon it to the burglar or other aggressor".

[8.6] When considering the degree of force permitted in protecting one's home, the court went on to state at paras. 67 to 69:

> "67. We have already held that burglary is an act of aggression by its nature and that a burglar may be met with retaliatory force to drive him off or to immobilise him or detain him and to end the threat which he offers to the personal rights of the householder and his or her family or guests. That is easy to say in general terms, but in individual cases, the question will immediately arise: what degree of force may the householder deploy to those ends?
>
> 68. It is of course impossible to lay down any formula with which the degree of force can be instantly calculated. Nor, in our view, would it be just to lay down a wholly objective standard to be judged by the standards of the hypothetically reasonable person.
>
> 69. The victim of a burglary is not in the position of an ordinary reasonable man or woman contemplating what course of action is best in the particular circumstances. He may be (and Mr. Forrestal actually was) ageing, alone, confronted with numerous and/or much younger assailants (the applicant was almost 50 years younger than his victim). In almost every case, the victim of burglary will be taken by surprise. The victim will therefore be in almost every case shocked and surprised and may easily be terrified out of his wits. To hold a person in this situation to an objective standard would be profoundly unjust."

[8.7] The trial judge ought to have brought these matters to the attention of the jury in a more pronounced manner when addressing the defence case in the course of her charge. Accordingly, we also hold with the appellant in respect of this aspect of this particular ground of appeal.

[8.8] In relation to ground (6) and the appellant's contention that the trial judge erred in not giving an accomplice warning it is abundantly clear to this Court that it was within the trial judge's discretion as to whether an accomplice warning was required in respect of some or all of the prosecution witnesses. However, it is this Court's view that it would have been preferable had the trial judge directed the jury to take particular care when considering the reliability of the evidence of those witnesses who conceded they might have been liable to a criminal prosecution. While this type of warning falls short of an accomplice corroboration warning, it would have been sufficient to meet any potential difficulty with that part of the prosecution case. Indeed it would be difficult to see how an accomplice warning would have benefited the appellant in this case since such a warning would have involved the trial judge pointing out to the jury each area of evidence where corroboration could be found in respect of each complaint. There was a considerable amount of evidence in the case where the jury might have found evidence to be corroborative but a detailed warning in these terms in this case risked placing on jurors' unnecessary burdens when the fundamental issue in the case was the credibility of the witnesses.

[8.9] This Court also notes that it was accepted by counsel for the appellant in the course of his oral submissions, that should either counsel in a criminal trial take the view that there should be an accomplice warning, it should be raised with the trial judge, either before the commencement of the closing speeches and certainly before the trial judge commences his or her charge. Counsel for the appellant had only requested an accomplice warning from the trial judge during requisitions and in the context of a number of other submissions. That said, while we hold that the trial judge properly exercised her discretion in refusing to give an accomplice warning, the trial judge ought to have directed the jury to take particular care in assessing the reliability of those witnesses who conceded in the course of cross-examination that they may have been liable to prosecution for other offences.

The Remaining Grounds of Appeal

[8.10] In respect of ground (3) (a), this Court has considered the trial judge's ruling to the effect that defence counsel was entitled to put to Mr. Harte whatever his client said had happened, but that it was not fair or appropriate to ask him to enter into trying to place himself in the mindset of the appellant and express a view as to how the appellant understood the situation. In effect, what counsel for the appellant was attempting to do at trial was to get Mr. Harte to express an opinion as to a central fact in issue in the case, namely, the state of mind of the appellant at the time the stabbings occurred. In Declan McGrath's book on *'Evidence'* (2nd Ed., Round Hall, Dublin, 2014) he introduces a chapter on opinion evidence with the following quotation from the judgment of Kingsmill Moore J. in *A.G. (Ruddy) v. Kenny* (1960) 94 I.L.T.R. 185:

> "It is a long-standing rule of our law of evidence that, with certain exceptions, a witness may not express an opinion as to a fact in issue. Ideally, in the theory of our law, a witness may testify only to the existence of facts which he has observed with one or more of his own five senses. It is for the tribunal of fact –judge or jury as the case may be – to draw inferences of fact, form opinions and come to conclusions."

[8.11] The Court considers that the trial judge's ruling on this matter was correct and accordingly, this ground of appeal fails.

[8.12] In respect of ground (3) (b), it is worth reiterating that a witness is always entitled to have a copy of his or her witness statement and to read over it prior to giving evidence. This Court is satisfied that the trial judge's decision to allow Robert Ryan's

statement of evidence to be read over to him by the solicitor for the Director of Public Prosecutions in the presence of the appellant's solicitor was an appropriate ruling in circumstances where it had emerged that he had a problem with reading.

[8.13] This Court has considered ground (3) (c) which contended that there was a risk of unfairness in allowing the word 'evil' to be used in the witness's description of the appellant at the time, and ultimately that the prejudicial value in using this word as a description of the appellant outweighed the probative value. The witness was cross examined regarding her description of the appellant and said in response to a question about this "Well I seen what I seen. I don't know. I just…that's what I seen and that's the way I picked it up."

[8.14] This Court is satisfied that the witness was describing the appellant as she saw him and not offering any view as to his character. The jury was entitled to hear her account of events as they appeared to her. Accordingly this ground of appeal fails.

[8.15] In respect of ground (3) (d), this Court is of the view that once the appellant put his own character in issue and called witnesses in support of his own good character, counsel for the prosecution was entitled to then call evidence to the effect that five of the injured parties had no previous convictions, evidence of James Toner Snr's criminal record having already been introduced into the case. It is also noteworthy in this context that, notwithstanding the fact that the appellant had failed to comply with the statutory requirement to put the prosecution on seven days' notice of their intention to call character witnesses, the trial judge had allowed him to do so.

[8.16] In respect of ground 5(a), this Court notes that following a requisition the trial judge stated:- *"if two alternate views of the evidence are available to you, two possible views occur to you and they seem reasonable you should go with the one most favourable to the accused because that's the only way you can give the accused the benefit of the reasonable doubt which he is entitled to."* This, in so far as goes, is a correct statement of the law and this ground of appeal fails.

[8.17] In respect of ground 5 (b) and (c), inconsistencies in the evidence of the prosecution witnesses emerged in the course of the trial judge's summary of the evidence and it was not necessary for her to further highlight these inconsistencies nor was there any obligation on her to require the jury to consider the effect of alcohol when assessing the reliability of witnesses. Jurors were correctly advised what their function was regarding the assessment of the evidence and the trial judge was correct to refuse the appellant's requisition in respect of these two matters. Accordingly, this ground of appeal fails.

[8.18] Finally, the jury can have been in doubt as to what the defence case was. The trial judge summarised the evidence of the defence witnesses and clearly drew the jury's attention to the fact that the appellant relied on self-defence. Apart from the matters we have considered under grounds (4) and (6) above, the appellant can have no complaint that his defence was inadequately put to the jury.

[8.19] In view of the fact that we have held with the appellant in respect of his submissions on self-defence and have partly held with him in respect of the warning to be given regarding those prosecution witnesses who conceded they might be liable to criminal charges, this Court allows the appeal against conviction and accordingly directs a retrial.