THE COURT OF APPEAL

Ryan J.
Finlay Geoghegan J.
Edwards J.

Record No: 134/2013

Record No. 139/2013

The People at the Suit of the Director of Public Prosecutions

Respondent

v

John Paul Cawley and Wenio Rodrigues Da Silva

Appellants

Judgment of the Court delivered on the 18th of May 2015 by Mr. Justice Edwards

Introduction
1. This is a case in which the appellants, who were tried jointly as co-accused, were each convicted of the murder of Bruno Lemes De Souza between the 16th and 17th February, 2012, both dates inclusive, at Shronowen Bog, Tullamore, Listowel, in the County of Kerry, by unanimous verdicts of a jury on the 22nd May, 2013 following a twelve day trial before the Central Criminal Court sitting in Tralee.

2. The first named appellant had pleaded not guilty to murder but guilty to manslaughter upon arraignment at the commencement of the trial. However this was not acceptable to the respondent. The second named appellant had pleaded not guilty *simpliciter*.

3. Following their convictions, the appellants were each sentenced to the mandatory sentence of imprisonment for life, to date from the 11th March, 2013.

4. Both appellants now appeal against their convictions for murder.

The Evidence before the Jury
5. Sandra Cawley told the jury that she had been living at Number 2 Ardoghter, Ballyduff, Co. Kerry for approximately ten months together with the second-named appellant (Wenio), who is her ex-partner, her two children and, latterly, her two brothers, one of whom was the first named appellant (J.P.), and the other of whom was named Charlie. She had been in a relationship with Wenio, who is a Brazilian national, for about three and a half years. She recalled another Brazilian man, Bruno Da Silva (Bruno), visiting the house on the 16th February, 2012. He had telephoned looking for directions and she had given him Wenio's number. Wenio had earlier told her that "some guy" was coming down to sell a car to him.

6. At about 6 pm or 6.30 pm Wenio arrived home from work and Bruno followed him in. Wenio was driving an Audi and Bruno was driving a silver Opel Astra or a Vectra. Susan Cawley's two brothers and her two children were also present when they arrived. The car for sale was viewed and after about ten or fifteen minutes Wenio and Bruno came into the house. They had coffee and were talking in the kitchen and during this time they spoke in Portuguese. The witness retired to the sitting room. Both of her brothers were also there. Every now and then Wenio would come into the sitting room, have a brief conversation, and then return to the kitchen. On one of these occasions he told Susan Cawley that Bruno had said something about her voice "being sexy" and about her being "hot". She stated that when Wenio relayed this to her, he did not look his normal self. However, the witness stated that everything seemed to be "going grand" until at one point she asked Wenio, "Well, what's going on?" Wenio did not reply and went upstairs.

7. Susan Cawley then left the sitting room and went to the kitchen to get a glass of water and engaged Bruno in conversation. She stated that she had butterflies in her stomach while talking to him and conceded that this was on account of what Bruno had reportedly said to Wenio.

8. After a short time she retired again to the sitting room and there encountered Wenio who had come back downstairs. She asked Wenio, "What's he doing here?", to which Wenio replied "Oh I'm going to beat him up." Susan Cawley responded, "Why would you go beating up a man for that, any guy could say it?" Wenio returned to the kitchen. Shortly after that the witness heard what she characterises as a "thunt" sound, which she said was "a really like kind of heavy noise".

9. Upon hearing this noise Susan Cawley got up and went towards the kitchen. Her brother J.P. was in the kitchen at this point, as was Wenio. They were both in the vicinity of the sink and Wenio was holding a bar or a tool in his hand. As Susan Cawley entered the kitchen, she saw J.P. run into the laundry room. As he did so she saw Bruno lying on the floor of the laundry room "kind of half legs up and stuff and he had his hands over his head".

10. Bruno said "Call the Gardaí", and Wenio then ordered Susan Cawley to "Get out of here." The witness withdrew, and as she did so she heard two more "thunts". She ran upstairs to her children, and having done so was coming back down the stairs again when she met Wenio, her two brothers and Bruno coming up the stairs. Wenio was carrying the bar she had seen earlier and J.P. had a knife in his hand. Bruno's hands were tied up with rope, and Wenio was holding one end of the rope that had been used to bind him. She said Bruno looked terrified, and there was blood coming down his face.

11. The group going upstairs then went up to the attic, and Susan Cawley continued to the bottom of the stairs, and proceeded from there into the kitchen. As she was doing so she could see Wenio, J.P. and Bruno on the landing and the pull down stairs leading to the attic being opened. Sometime after that Wenio and J.P. came back downstairs. Susan Cawley then answered a knock at the front

door and briefly went out to speak to the caller, who was another Brazilian gentleman named Ivan who was calling by prior arrangement concerning travel tickets. When she returned, she found that Wenio had changed his clothes and she observed both he and J.P. washing their hands. Wenio then went outside to speak with Ivan who had been asked to wait for him. Ivan was then invited in and was present in the house for a short period during which nothing untoward occurred and he then left.

12. After Ivan had left, J.P and Wenio went into the sitting room. Wenio then asked Susan Cawley for her phone. Then either Wenio or J.P. went upstairs and took two photographs of Bruno with the phone. The photographs show Bruno with his wrists still tied. Moreover his wrists were further tied to his legs.

13. Susan Cawley then told the jury that she recalled Bruno and her brother Charlie coming down from the stairs subsequently. At this point, Wenio and J.P. were in the hallway. Bruno asked if he could take off his jacket and Wenio let him take off his jacket. Bruno's legs were free but his hands were still tied. Wenio opened the rope on Bruno's wrists to allow him to take off his jacket. Bruno was also barefoot, and Wenio allowed him to put on his shoes. Then Wenio tied up Bruno's wrists again with the same rope.

14. Wenio then went out and drove his car (the Audi) to the front door of the house, and put Bruno into the back of the car. Susan Cawley was then ordered to "Get the kids and put them into the car." She and Charlie roused the children from their beds and placed them in the other car, i.e. the silver Opel Astra or Vectra that Bruno had arrived in. Wenio then got into the driver's seat of the other car (the Audi) and J.P. got into the back of it next to Bruno. The witness and her brother Charlie got into the silver Opel Astra or Vectra. Both cars then drove off. The time was between 11 pm and midnight.

15. After the cars had gone a short distance, the brother Charlie, who was driving the silver Opel Astra or Vectra, flashed the other car because he was unable to drive the car properly. Both cars stopped, J.P. got out of the Audi and took over the driving of the other car. At the same time Charlie transferred to the Audi.

16. The cars then drove through the village of Ballyduff and on to Lisselton. From there they proceeded along a road leading into a bog. The lead car then stopped, and Wenio got out and went back to the car behind and informed the occupants that he had run out of petrol. The witness stated that she and Wenio had passed by this place before some weeks previously. She could not recall why they had passed that way, but stated that Wenio had commented at the time that it was a nice place.

17. Having stated that he had run out of petrol Wenio returned to the Audi. J.P. then got out of the silver Opel Astra or Vectra and approached the Audi. Charlie then got out of the Audi and Wenio returned to the silver Opel Astra or Vectra. At this point Susan Cawley asked him "What's going on?" to which he replied "Don't worry."

18. Bruno was then removed from the Audi by Wenio. He was supported on one side by Wenio and on the other side by J.P. and the three of them proceeded down towards the bog. Bruno's hands were still tied but his legs were free. Bruno was struggling somewhat. The witness could not see anything after that. She remained in the silver car with her children.

19. After some time had passed Wenio and J.P. returned, but there was no sign of Bruno. Susan Cawley asked "Where is Bruno?", and Wenio replied "Don't worry, he's dead." The witness then said "Why did you kill him? It was only a stupid thing. You could have let him get off with it. There’s no point killing someone over stupid stuff, like what he said." According to Susan Cawley, Wenio made no verbal response, but removed his clothing and put it in the boot of the car.

20. The evidence was that Wenio and J.P. then got into the silver car which already contained Susan Cawley, Charlie and the two children. Wenio, who was wearing nothing at all, then drove the vehicle away from the scene. As the car was driving along, J.P. spoke about what had happened in the bog. He said that he had stabbed Bruno once in the heart, following which Bruno and Wenio had fallen into a dyke. According to Susan Cawley, J.P. stated that Wenio was doing "most of the stabbing and stuff like that". She described how at one point they discussed how the knife had fallen out of Wenio's hand, how Bruno had struggled to try to reach it, and how Wenio got to the knife and then exclaimed to J.P. that "He's not dying, he's not dying, what will I do?", to which J.P. had responded "slice his throat", which, it was said, he duly did.

21. The car was driven home through Lisselton and Ballyduff, and items of clothing were discarded by J.P. along the route. At Ballyduff bridge the car stopped and J.P. threw two knives into the river below. When they arrived home in the early hours of Friday the 17th February, Susan Cawley was instructed by Wenio to clean up blood in the laundry room, and she did so with a bucket and mop and some bleach, following which she went to bed.

22. Susan Cawley stated that she got up again at 8 am or 8.30 am on the same date. She, Wenio and J.P. then drove into Ballyduff in the silver Opel Astra or Vectra car where the witness collected her social welfare from the Post Office and, following which, they proceeded on to Lisselton where they called to a petrol station and purchased a can of petrol. They then went on to the bog and refuelled the Audi which had been left there. The Audi was then driven to a scrap yard located between Listowel and Tralee and was sold for scrap for which Wenio received €150.

23. Susan Cawley also described to the jury a third visit to the bog with Wenio and J.P. for the purpose of trying to find Bruno’s body. They returned to the bog after selling the Audi for scrap. When Wenio found the body Susan Cawley walked down and viewed it. It was off the roadway, in a dyke, and she could see his hands still tied with rope floating in the water.

24. Susan Cawley further stated that, later on, after they had finally returned home again, Wenio instructed Charlie to clean up yet more blood which had been deposited on the stairs, on the landing and on the pull down stairs leading to the attic.

25. Susan Cawley told the jury that in the days following the incident Wenio had texted Bruno’s girlfriend using Bruno’s phone and pretending to be Bruno. He had said, while pretending to be Bruno, that he (Bruno) was in Cork, that he owed money to Brazilian men, and to traveller men, for drugs.

26. However, some days later, Bruno’s disappearance having been reported to An Garda Siochana by his girlfriend Patricia da Silva, the Gardai in Gort, where Bruno had resided, telephoned Susan Cawley’s phone. This occurred in circumstances where, subsequent to the incident, Ms da Silva received a number of calls from a male person calling himself William and purportedly looking for Bruno. These calls originated on Sandra Cawley’s phone. The Gardai, in their efforts to locate Bruno after he had been reported missing, had sought, and were granted, access to Patricia da Silva’s phone records, and had identified amongst recent call traffic that the calls from the man calling himself William had been initiated from the phone belonging to Susan Cawley. In the course of further enquiries it had been ascertained that Susan Cawley was in a relationship with, and living with, a Brazilian man named Wenio da Silva. Accordingly, when the Gardai from Gort telephoned Susan Cawley they indicated to her that they wished to call and speak to Wenio, and sought directions to their house at No 2 Ardoghter, Ballyduff.

27. Susan Cawley told the jury that on the day following the said phone call, the Gardai in Gort duly called to No 2 Ardoghter and spoke to Wenio, and that in her hearing Wenio acknowledged meeting Bruno, at night, down from where his boss lives, and that there were three guys in the car with him. The Gardai did not question anybody else on this occasion. After the Gardai had left the house, Wenio instructed the others living there that if the Gardai returned and sought to question them separately "we'll all have to make up, make up a story that has to be the same."

28. The jury heard that in due course Susan Cawley was interviewed by the Gardai. She told the jury that she had lied to them in the first instance, before eventually telling them the truth.

29. The jury also heard evidence from Charlie Cawley consistent with the account given by his sister Susan Cawley. In addition, he stated that he saw Wenio strike Bruno with a wheel brace in the laundry room. He also stated that after Bruno had been brought up to the attic he had been instructed by Wenio to watch him, and that while doing so he observed Bruno, who was tied up, to be bleeding heavily, with blood going to his face. He said that when Wenio had come back up to the attic to collect Bruno and bring him downstairs, Bruno had pleaded with him saying "Wenio, Wenio, Wenio, please Wenio, please".

30. Charlie Cawley confirmed that J.P. had photographed Bruno using a phone. He described the car journeys both to and from the bog and his account substantially mirrored that of his sister Sandra. However, he also stated that after he had changed from the silver Opel Astra or Vectra to the Audi he witnessed a conversation taking place in Portuguese between Wenio and Bruno, although he could not understand what was being said. He then asked Wenio where they were going and Wenio replied "We're going to drop Bruno back to Gort". However, they did not go to Gort and when the car stopped it was at the bog. He was then instructed by Wenio to return to the other car, which he did, handing two knives that were in the back of the Audi to J.P. as he left.

31. Charlie Cawley said that he then saw Wenio, J.P. and Bruno walking down the bog. He remained with the party in the other car until Wenio and J.P. returned. They had returned without Bruno. Wenio was all wet when he returned and he said that this was because as he was holding Bruno, Bruno fell and then both he and Bruno had fallen into a dyke. He confirmed that the Audi was abandoned at the scene as it had no petrol and they drove away in the other car.

32. He was asked about the conversation in the car as they were driving away from the scene and stated:-

> "I remember then, say, Sandra asking him, say, did they do it, did they do it, "Did you do it?", "Did you kill him?", and then I can't remember which one of the boys said, "Yeah." And then I recall Wenio saying that he actually stabbed him ... 50 times after two of them fell into the dyke, and then John Paul said that he stabbed him once somewhere in the chest."

33. He confirmed the discarding of items of clothing and the knives while they were en route home, and also being subsequently instructed by Wenio to clean up blood in the house. He also confirmed that J.P., Wenio and Sandra subsequently left the house again later that day "to collect Sandra's dole money, and the Audi", and that when they returned later without the Audi he had enquired as to where it was and was told by Wenio that he had sold it.

34. In addition, they heard evidence from the deceased's girlfriend, Patricia da Silva, confirming that she last saw her boyfriend at 2pm on the 16th February, 2012 and that although she knew that he was going to sell a car, she did not know exactly where he was going to sell it or to whom he was going to sell it. Her boyfriend dealt in cars so that was not unusual. She said that he had failed to return home, and throughout that evening and on the following day, the 17th February, she kept attempting to contact him. She then received a call at 2.00pm on the 17th February from a private number and the caller, who spoke with an Irish accent, informed her that Bruno was in Cork and was about to be deported. She was very concerned, and enlisted the help of a friend to contact the immigration authorities in Cork. When they did so it transpired that Bruno was not about to be deported. Later that afternoon, Ms da Silva received another call, this time from a regular number. The caller identified himself as William and was asking for Bruno. The person calling himself William indicated that he had met Bruno at 4pm on that day at his house in Limerick and that Bruno had left to go on to Cork, but that he was due to return to William's house in Limerick later that evening so that he, William, could pay him. He indicated that Bruno had given him Ms da Silva's number as his (Bruno's) phone battery was dead.

35. Following this call, Ms da Silva was sufficiently concerned to contact the Gardai in Gort. Over the succeeding days she subsequently received a number of text messages purporting to come from Bruno's phone. In addition, the person calling himself William telephoned her again on a number of further occasions, each time asking to speak with Bruno. On one such occasion she stored the number of the incoming call on her phone as "William, Limerick".

36. Ms da Silva provided her phone to the Gardaí in an effort to assist them in searching for Bruno. The jury later heard that this phone was technically examined and that it was determined that the stored number relating to "William, Limerick" was that assigned to Sandra Cawley's phone.

37. The jury also heard evidence from the man called Ivan, from Wenio's employer, Michael Dalton, and from the residents of neighbouring houses in Ardoghter.

38. They then heard evidence from Weslley De Carvalho Gomes, who was another Brazilian man interested in cars, and who knew both Bruno and Wenio. According to his evidence he had originally arranged to sell the Audi car to Bruno. However, Wenio, while on a visit to Mr Gomes' premises had seen the Audi and was much taken with it. He urged Mr Gomes not to let Bruno buy the Audi but to sell it to him instead, which Mr Gomes refused to do. Wenio then proposed to Mr Gomes that he should contact Bruno and intimate that Wenio was interested in a possible swap arrangement whereby Bruno would exchange the Audi for Wenio's Opel vehicle. This Mr Gomes did, and Bruno agreed to the swap. The Opel vehicle's tax book was in Mr Gomes's possession and after Bruno and Wenio had concluded their deal, Wenio called to Mr Gomes to collect it. This was the 16th February and Bruno was due to meet with Wenio again later that day at Wenio's house to in turn collect the tax book from him. Mr Gomes, whose English was poor, told the jury that when Wenio called to him to collect the tax book he had had a conversation with Wenio in the course of which Wenio had complained that he had a problem with Bruno. Mr Gomes continued:-

> "I say why problem with Bruno? Bruno very quiet. And he said no, Bruno talk for everybody in Gort that time, Bruno live in Gort, bad word with my wife, and I'd say what happen and he told me everything."

39. Under cross-examination by counsel for the first named appellant, Mr Gomes agreed that he had said in his statement to the Gardai that "The first time Wenio rang he told me that Bruno was going to come to his house and that he was going to kill Bruno because Bruno was speaking to everyone in Gort about Sandra and that Bruno was saying that he was going to fuck Sandra," and that Wenio had indeed said that.

40. Mr Gomes further told the jury that at lunchtime on the 16th February he spoke with Bruno on the telephone and urged him not to go to Wenio's house that day. Although he attempted to contact him again later he did not succeed in doing so. Mr Gomes then telephoned Wenio at 5pm or 6pm to see if Bruno was there. He spoke to Wenio who told him that he and Bruno had had a fight inside the house.

41. Mr Gomes said that later on the same date he had been sleeping and woke up frightened. He immediately tried to telephone Bruno, again without success. He then rang Wenio again who answered and appeared to be in a nervous state. Wenio told Mr Gomes that he had given Bruno two clubs to the head in his house. Mr Gomes enquired as to why he had done that and Wenio responded that Bruno went at him in the house. Mr Gomes then told the jury "I said to Wenio don't do that, you can go arrested and Wenio was very nervous and he said to me he was going to release Bruno, leave him at the station and he wasn't dead at the time."

42. Mr Gomes further told the jury that he then offered to go and collect Bruno and take him to a hospital, and that Wenio had said that he was "going to take him near Limerick so I could go and collect him. After that Wenio didn't ring me. I rang him again." Mr Gomes said that he spoke to Wenio maybe three times that night, urging him not to kill Bruno.

43. The following morning Wenio sent a text to Mr Gomes, attached to which were photographs of the injured Bruno with his hands tied. Although his fingers appeared to be purple and swollen Bruno appeared from the picture to be alive. However, Mr Gomes said when he saw the photos he believed Bruno had died. He said that some days later Wenio and Sandra Cawley called to his house in Bruno's car and attempted to sell it to him but he declined to buy it.

44. Mr Gomes told the jury that shortly after the night on which Bruno was killed he and Wenio worked together, in pursuit of their shared interest in car mechanics, for more than a week both at Mr Gomes's garage at his home, and at another garage premises belonging to a friend of the witness in Hackettstown, Co Carlow. During these discussions they had discussed recent events. Describing one such conversation at the Hackettstown garage Mr Gomes told the jury:

> "A. I asked him why did he do this, that he was calmer then and he could talk to me, and he said Bruno charged him and he just wanted to scare him, take him to the bog and he was in front of Bruno pulling him and Bruno charged him with the knife that he had. Wenio had the knife and the two started fighting and they fell in a hole and the knife stab him in his gut. He gave him several stabs, that's what he told me, and then I said why did you do this. He said he was going to get out of there and he was going to talk to the police and he said to me
>
> Q. Sorry, can I stop you there. Who was going to talk to the police?
>
> A. Bruno was going to speak to the police before he was killed.
>
> Q. Yes. And he said that in answer to the question why did you do it; is that right?
>
> A. Yes.
>
> Q. Did he describe anything else as to what happened maybe after the stabbings?
>
> A. Yes, he did.
>
> Q. What did he say?
>
> A. He said that he came back after to see if Bruno was dead and he threw some branches of trees on top of him and nobody was going to find him in that place. After this day he went out to Listowel, court in Listowel on Wednesday and I got the phone to ring the guard. I was scared."

45. Again, under cross-examination by counsel for the first named appellant, the witness stood over an amplified and more detailed account which he had given in a statement to An Garda Siochána, in which he had said *(inter alia):-*

> "Wenio was here all the time working on the cars with me. On the Monday or the Tuesday I was asking Wenio about Bruno again and what happened. Eventually Wenio told me that he had killed Bruno after he had a fight with him. He told me that he took him, Bruno, to a bog and that he was still alive that time and that he killed him with a knife in the bog. Wenio said that he took Bruno to the bog in the Audi A4 I swapped him. He told me that he put Bruno in the backseat of the Audi and put his tied hands over the seat in front of him. Wenio told me that Bruno said to him in the bog that he would give him €10,000 not to kill him. Wenio told me that Bruno was walking in front of him and Bruno came at him for fight. Wenio said he hit Bruno with a knife and they fell into water in the bog. Wenio told me that he hit Bruno 40/45 times with the knife. Wenio showed me with his hands how he did it to Bruno, how he stick him with the knife. I said to Wenio that he was crazy and fucking stupid to do that to Bruno. I said to him that the guards find Bruno when it gets hot but Wenio said no, I put him too far into the bog and it's no good any more, that it's not used any more. Wenio said that he went to a bridge after and threw away the knife into the water but he said that he didn't know where."

46. The jury also heard evidence from Dr Margot Bolster, a State Pathologist, with regard to the post-mortem conducted on the deceased's body, in which 64 stab wounds were identified, and the cause of death was stated to be haemorrhage and shock due to multiple stab wounds with blunt force trauma to the head and body as a contributory factor.

47. In the next part of the trial the jury received evidence concerning the Garda investigation, and the arresting and interviewing of the two appellants.

48. The jury heard first about the interviews with the second named appellant (Wenio). In summary, they heard evidence that he admitted in the course of being interviewed that the deceased had called to his home at Ardoghter which he shared with the Cawleys. He also admitted that he pulled Bruno out of his car and struck him with a wheel brace. He further admitted that he tied the deceased's hands and that he was placed for a period of time in the attic. While he admitted that he and the Cawley brothers took the deceased to a remote bog, he alleged that upon reaching the bog that it was Charlie and J.P. who took the deceased away and returned after twenty minutes. He claimed that in this period he had remained in the car and that it was the Cawley brothers who disposed of the knives on the way home.

49. The jury then heard evidence concerning the interviews with the first named appellant. These also contained admissions which were substantially consistent with the accounts given by Sandra and Charlie Cawley respectively, and with the admissions said to

have been made by Wenio to Mr Gomes. There were six interviews in all, three on the 11th March, 2012 and three on the following day, the 12th March, 2012. It is proposed to quote selectively from these interviews and only to the extent necessary for the purposes of this judgment.

50. In the first interview on the 11th March, 2012, which commenced at 13.42pm, the following exchanges *(inter alia)* took place:-

> Q: I'm guessing that this man was walking down a lane in the dark with his hands tied begging for his life?"
>
> A: "He was talking to Wenio in their language. He was upset."
>
> Q: "What happened then?"
>
> A: He had him standing on the edge of the dyke talking to Wenio in their language. Whatever he was saying to Wenio was making Wenio get very angry."
>
> Q: "Why did you stab him?"
>
> A: "Wenio said to."
>
> Q: "You said he thought he was talking to Bruno. Why did you stab him?"
>
> A: "I don't know."
>
> Q: "What did you think would happen?"
>
> A: "I only stabbed him once."
>
> Q: "What would you expect to happen if you stab a guy in the chest in the middle of nowhere?"
>
> A: "To kill him."
>
> Q: "What did you know you were doing when you stabbed him?"
>
> A: "Probably die."
>
> Q: "You didn't go back to see if he was okay?"
>
> A: "No."
>
> Q: "Did you intend to kill this man?"
>
> A: "No, I was only helping Wenio. I only stabbed him once."
>
> Q: "It can take only one wound?"
>
> A "I only stabbed him once. Wenio went in after him and finished it. You could still hear him moving around after. Wenio struck him in the throat with the knife because he said it to me."
>
> Q: "What was your plan leaving the house?"
>
> A: "Put him in the car and bring him off."
>
> Q: "You talked about that before you left?"
>
> A: "Yes."
>
> Q: "Was Bruno injured in the back of the car?"
>
> A: "No."
>
> Q: "Did ye drag him out in the car?"
>
> A: "No, he walked out to the car."
>
> Q: "Who brought the knives?"
>
> A: "Me."
>
> Q: "Where did you get them?"
>
> A: "The kitchen drawer."
>
> Q: "Why did you bring the knives?"
>
> A: "I don't know."
>
> Q: "Did you bring them to kill Bruno?"
>
> A: "No."
>
> Q: "I can't see of any other reason to bring two knives in the car. They weren't to protect yourself or Wenio?"

A: "I just brought the knives to threaten him so he wouldn't move in the back of the car."

Q: "When you got out of the car why did you bring the knives out with you?"

A: "So he wouldn't go anywhere."

Q "I don't understand. Why would you keep him there if you were letting him out of the car?"

A: "I don't know."

Q: "Why did you bring him to the back road?"

A: "Don't know."

Q: "Whose idea was it?"

A: "Both of us."

Q: "Why did you pick a place out in the middle of nowhere?"

A: "I don't know."

Q: "You had already assaulted him. There was no reason to take him out there unless you intended to assault him further or kill him. Isn't that the case?"

A: "Yes."

Q: "I take you back a step. I don't accept that you left him there and he was alive at the side of the road?"

A: "Ilooked back and he was moving."

Q: "This place where you stabbed him, have you been back there since?"

A: "No."

Q: "If you left him at the side of the road were you wondering what happened him?"

A: "No."

Q: "Did you presume that he was dead?"

A: "No."

Q: "You left a guy with multiple stab wounds in the middle of nowhere. What did you think would happen?"

A: "I don't know."

Q: "You knew he was dead didn't you?"

A: "No."

Q: "Explain to me what you think happened to him so?"

A: "I don't know."

Q: "If you stab a guy a number of times you're going to get covered in blood?" A: "I had no blood on me."

Q: "What did you talk about before you left the house with Bruno?"

A: "We were talking about what we were going to do and where we were going to go."

Q: "What did you say you were going to do?"

A: "Kept hitting him. I didn't know we were going to stab him."

Q: "You brought knives with you?"

A: "Just to threaten him."

Q: "You said you stabbed him first?"

A: "Yes." "You said you brought the two knives. When did you give Wenio the other knife?"

A: "When we got down the lane."

Q: "Was he trying to get away from you, Bruno?"

A: "No."

Q: "Was he fighting with you?"

A: "No."

Q: "Why did you stab him?"

A: "I don't know. That's why I feel bad for doing it."

Q: "Why did you stab him?"

A: "I don't know."

Q: "I don't understand how you brought this man to a remote laneway and without him fighting you you just stabbed him?"

A: "I know."

Q: "At what point did you decide to stab him?"

A: "I don't know."

Q: "You must have talked to him about stabbing him before you left the house?"

A: "Nothing about stabbing."

Q: "About killing him then?"

A: "No. Just about giving him a beating. I didn't know we were going to kill him."

Q: "When did you realise that this man was dead?"

A: "I don't know." "You knew he was dead?"

A: "He was moving but he could have died slow."

Q: "What did yourself and Wenio speak about going back in the car?"

A: "We didn't speak."

Q: "You must have spoken when you decided to throw the knives out the window?"

A: "No. I just said to slow down and I threw the knives out the windows."

Q: "Did you throw anything else out of the car that night?"

A: "No. Just two knives."

Q: "Did it cross your mind as to what happened to this man?"

A: "Sometimes."

Q: "Did you go back to where he was?"

A: "No."

Q: "Did Wenio?"

A: "No."

Q: "Did yourself and Wenio talk about it since then?"

A: "No."

Q: "The following morning you got up and didn't talk about it?"

A: "Nothing. I didn't say one word about it."

Q: "Unless you presumed you killed him?"

A: "We didn't talk about it at all."

Q: "The clothes you were wearing, where are they?"

A: "Gone."

Q: "Where?"

A: "The bin in Ardoughter."

Q: "Why did you get rid of your clothes if you weren't worried about the man?"

A: "No, Iput my clothes into a bag and put them into a bin."

Q: "Are they still in the bin outside?"

A: "No."

Q: "Did Wenio take off his clothes?"

A: "I don't know."

Q: "How did you think the man would live? Did you care?"

A: "It was always going through my head."

Q: "After this thing happened what went through your head?"

A: "If he would survive or die."

Q: "If you were wondering if he lived or died why didn't you drive back out there?"

A: "I don't know."

Q: "You told us some of the truth but you haven't told us the whole lot. Are you afraid of something that you're not telling us?"

A: "No."

Q: "What made you so angry to stab this man?"

A: "I don't know."

Q: "Did you keep stabbing him?"

A: "Yes."

Q: "With your left or right hand?"

A: "Right."

Q: "What kind of knife did you have?"

A: "I don't know. It wasn't that long."

Q: "When you were stabbing him where was Wenio standing?"

A: "Beside me."

Q: "What was he doing?"

A: "Just standing."

Q: "When did he start stabbing him?"

A: "When I stopped?"

Q: "How many times did he stab him?"

A: "I don't know." "He stabbed him a good few times?"

A: "I don't know."

Q: "More than once?"

A: "Yes."

Q: "Was his knife big?"

A: "No, small knife, about one and a half times the size of the Biro."

Q: "Did you stab him when he fell to the ground?"

A: "No."

Q: "Did Wenio?"

A: "No."

Q: "What did you say to each other walking back to the car?"

A: "Nothing. We just walked up."

51. In the second interview with the first named appellant, which commenced at 19.45pm on the 11th March, 2012, the following further exchanges *(inter alia)* took place:-

Q: "When did ye first discuss killing Bruno?"

A: "At the edge of the dyke."

Q: "When did ye first talk about killing him?"

A: "Wenio was on about it inside the house."

Q: "What was said in the house?"

A: "He said he would bring him out some road and kill him."

Q: "Tell us the story?"

A: "That's what he said, we will bring him out some road and kill him."

Q: "Why did you kill him?"

A: "I don't know why."

Q: "When ye discussed it in the house that Wenio said you would take him away and kill him what did you say?"

A: "I said it was up to you."

Q: "You have told us a number of lies so far. Let's cut to the chase and tell us exactly what was said in the house."

A: "He just said he would put him into the car and get a place to put him."

Q: "Spit it out."

A: "We said we would put him into the car and out the road and we would kill him. I was driving the Opel Vectra. I was shaking in the car. I didn't know what to do."

Q: "The reason we are going over this is that we know there is more."

A: "We got out of the car at the top of the lane. He said we will walk down to the end of the lane and we will kill him there."

Q: "You knew going down the lane that he was going to be killed?"

A: "Yes."

Q: "Are you telling us?"

A: "He wanted me to help him and I stabbed him once. In the house he asked me to help him so I said I would."

52. Then, in the fourth interview with the first named appellant, which commenced at 10.24am on the 12th March, 2012, the following further exchanges *(inter alia)* took place:-

Q. "What was said to you?"

A: "Nothing was said but I knew something was going to happen because back at the house Sandra had said he cannot stay here. He cannot go back to where he belongs because he will bring Brazilians to the house or that he will bring guards to the house."

Q: "You knew something was going to happen. Didn't you know he was going to be killed?"

A: "Yes."

Q: "Didn't Bruno know at that stage that he was going to be killed? Isn't that the truth?"

A: "Yes."

Q: "Didn't Bruno beg for his life?"

A: "Yes."

Q: "What did he say?"

A: "He started crying and on the way down to the lane he started talking Brazilian and he told him that he would give him €10,000 if he didn't kill him."

Q: "What else did he say?"

A: "He was mostly crying, even when he fell into the dyke he was begging Wenio not to go near him with the knife. Wenio wouldn't listen. He just kept crying after that."

Q: "Why did you take upon yourself to be the first person to stab him?"

A: "I just wanted to get the first one over and done with. I didn't want to stab him after that."

Q: "Did Wenio say anything to you before you stabbed him?"

A: "He just said we'll kill him."

Q: "Are you sure you only stabbed him once?"

A: "Yes. Only stabbed him once, no more than once."

53. Following closure of the prosecution case it was indicated by counsel for the first named appellant (J.P.) that, although his client would not be giving evidence personally, medical evidence would be called on his behalf in support of a diminished responsibility claim. The jury then heard evidence from two expert witnesses, one called by the first named respondent, a Dr Glanville, and one called by the prosecution, a Dr Wright. It is unnecessary to review their testimony for the purposes of this judgment, save to say that one aspect of the expert evidence adduced on behalf of the first named appellant in support of the claim of diminished responsibility was the suggestion that, because of low intelligence and personality disorder, the first named appellant had little capacity to form an independent intention and that, in doing what he did, he was simply going along with the directions or instructions of his co-accused.

54. In particular, Dr Glanville testified that:-

> "Well, my view, given the results of the assessment, given the information which he gave me and given my reading of his statements to the gardaí, is I don't see any great evidence that he had formed an intent to injure the deceased."

55. No evidence at all was adduced from, or on behalf of, the second named appellant.

Grounds of Appeal against Conviction on behalf of the First Named Appellant
56. The appeal on behalf of the first named appellant is based on a single net point. It is complained that the learned trial judge erred in law in failing to direct the jury adequately or at all on the issue of the onus of proof cast upon the prosecution to establish beyond reasonable doubt that the presumption that the accused had intended the natural and probable consequences of his actions had not been rebutted.

57. The Court has received written and oral submissions from both sides on the point at issue, which were of assistance and for which it is grateful.

Grounds of Appeal against Conviction on behalf of the Second Named Appellant
58. The appeal on behalf of the second named appellant is based upon six complaints in respect of acts or omissions by the trial judge, which it is contended rendered the trial unsatisfactory and the verdict unsafe. The acts or omissions complained of are pleaded in the following terms:

> "1. Failing to requisition the Jury in respect of the matters raised by counsel, and in particular in failing to recharge the Jury in respect of the point that what the defence counsel for the other accused said in closing only related to his own client and his remarks concerning this accused should be completely ignored, and other matters.
>
> 2. Failing to give a separate trial when sought, to this accused, on the basis of the remarks made by counsel for the other accused to the Jury in his closing about this accused's defence.
>
> 3. Failing to acquiesce to counsel for this accused's application to rule out the introduction of text messages without proof of their authorship, or their correctness.
>
> 4. Failing to discharge the Jury when application was made on behalf of this accused in circumstances where the evidence before the jury was now unfair to this accused.
>
> 5. In allowing the memoranda of interview of the co accused to go to the jury where it was of a grossly prejudicial nature to this accused without being of a probative nature in the trial.
>
> 6. In allowing the continued introduction of hearsay evidence and leading questions without advising the jury of the worthless nature of such evidence."

Submissions
59. The Court has received written and oral submissions from the parties in both appeals, which were of assistance and for which it is grateful.

The First Named Appellant's Sole Ground of Appeal.
60. The first named appellant complains that the trial judge, in charging the jury with respect to the ingredients of murder, did not address the onus or burden of proof to be discharged with respect to s. 4(2) of the Criminal Justice Act, 1964 (hereinafter the Act of 1964). This was in circumstances where the prosecution were relying, inter alia, upon s. 4(2) of the Act of 1964. The first named appellant further contends, correctly, that the omission was pointed out to the trial judge at the requisitions stage, but that notwithstanding a specific requisition from counsel for the first named appellant asking the trial judge to charge the jury concerning the burden of proof with respect to s. 4(2) of the Act of 1964, the trial judge did not do so.

61. S.4 of the Act of 1964 is in the following terms:-

> "4.—(1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.
>
> (2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted."

62. The trial judge charged the jury on day eleven of the trial. As is usual and proper the jury were, at an early stage, given the general direction with respect to the onus of proof in a criminal trial when they were told "the burden of proof in a criminal trial rests at all times on the prosecution."

63. Later in his charge the trial judge specifically addressed s.4 of the Act of 1964, and said:-

> "Now, while I don't disagree with the definition of murder that you were given at the beginning of the trial and indeed by I think both by Mr. Peart and Mr. Devally, what I'm simply going to do is to repeat the definition here which is found in the Criminal Justice Act of 1964. And section 4 (1) of that act states as follows: "Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill or cause serious injury to some person whether the person actually killed or not." And section 4 (2) of the act goes on to state: "That an accused person shall be presumed to intend the natural and probable consequences of his conduct but this presumption may be rebutted." So, for example, if I take up a gun and point it at someone, a loaded firearm, and point it at someone and pull the trigger you can take it that it can be presumed that I intend to kill or cause serious injury to that person. And you can again apply that principle if I have a knife in my hand and I plunge it into somebody you can take it that I can be presumed to intend to, at very least, cause serious injury if not to kill that person."

64. In requisitions at the end of the judge's charge, counsel for the first named appellant raised two requisitions. His first, and it is uncontroversial in the context of the present appeal, was that the trial judge should tell the jury that an element of premeditation was not incompatible with the partial defence of diminished responsibility. His second requisition was then made in the following terms:-

> "The second point that I wish to raise with you is that insofar as the prosecution seek to rely on upon the presumption under section 4 (2) of the Criminal Justice Act 1964 the statute that defines the offence of murder that they bear an onus in relation to establishing that the matter has not been rebutted which they seek to rely upon."

65. This second requisition was not opposed as such by counsel for the prosecution, but he appears to have misunderstood it as being a complaint as to the manner in which the judge had charged the jury with respect to the burden and standard of proof in relation to the defence of diminished responsibility. He said:-

> "In relation to the gnomic address on the 1964 acts provision I can only understand it to mean that Mr Sammon is now, contrary to what he has suggested during the trial, possibly indicating that it is now for the prosecution or the jury to assess whether the prosecution has proven beyond a reasonable doubt that the defence of diminished responsibility is not proved on the balance of possibility."

66. Tellingly, he added:-

> "So, it makes no sense to me but unless I misunderstand it I can't understand how to address it, his second point."

67. Counsel for the first named appellant did not reiterate his second requisition or seek to clarify what he had meant. There then ensued some further discussion relating to the first requisition, following which the trial did not expressly rule on the counsel for the first named appellant's two requisitions. Rather, he simply directed that the jury should be brought back.

68. The jury then returned, and an important contextual detail is that at this point the jury apparently communicated a desire to see the statement of a particular witness, namely Michael Dalton, the second named appellant's employer. The trial judge addressed then as follows:-

> "JUDGE: Very well. Mr Foreman, ladies and gentlemen, there's just one matter that I may not have addressed you correctly on with regard to the law and that is that when you're considering the question of a mental disorder and the defence of diminished responsibility the lapse of time and premeditation are not necessarily inconsistent with a finding of diminished responsibility but of course the whole finding in this area is a matter for you having considered all the evidence. You have asked about Mike Dalton's statement. … … "

69. The trial judge then went on to tell the jury that they were not entitled to see Mr Dalton's statement but that he proposed, for their assistance, to review in detail the evidence that had been given in court by the witness Michael Dalton. However, he did not at any point return to address the second requisition raised by counsel for the first named appellant. It is not clear whether this was the result of a conscious decision on his part not to do so, or due to misunderstanding on his part as to the nature of what he was being asked to do, or simply due to oversight in circumstances where he may have been distracted by the jury's request in relation to the statement of Michael Dalton.

70. The charge required in relation to s. 4(2) of the Act of 1964 was considered by the Court of Criminal Appeal in *People (A.G.) v Commane* [1975] 1 Frewen 400. The circumstances in which criticisms were levelled at the judge's charge on s.4(2), which was ultimately found to have been adequate on this issue in the circumstances of the particular case, are apparent from the judgment of Walsh J. where he said (at p.406):-

> "It has been submitted on behalf of the applicant that the learned trial Judge misdirected the jury on the law. In particular, it is submitted that the learned trial Judge misdirected the jury when he said to them that they must consider whether there was anything in the accused's version of the events as contained in his several statements, oral and written, which "displaced the presumption that a man intends the natural and probable consequences of his act." He went on to say that if there was nothing in the statements and nothing in the surrounding circumstances which displaced that presumption then he was guilty of murder. If that were taken by itself then it would be a misdirection but the learned trial Judge did not leave it in that condition. He went on to say that the onus was on the State and there was no onus on the accused to give any explanation. He said "the onus was on the State to say 'Here is the evidence. There is a presumption of law that a man intends the natural and probable consequence of his act. Whoever inflicted these injuries must have intended to cause at least serious injury and there is nothing in the surrounding circumstances which displaces the presumption that the accused intended the natural and probable consequence of his act', and all that the State must do, that onus is on the State." He had earlier told the jury the onus on the State was to satisfy them that there was no view of the case and that there was no evidence in the case which rebutted the presumption that the accused intended the natural and probable consequences of his act."

71. In addition, the first named appellant has referred to the Court a passage from Coonan and Foley on *The Judge's Charge in Criminal Trials* (Round Hall, 2008), at paragraph 8-18, where the authors state:-

> "… in cases where s.4(2) applies the trial judge should instruct the jury:
>
> > (a) that it must decide whether death or serious injury is a natural and probable consequence of the accused's actions;

(b) that if it decides this issue in the affirmative, a presumption arises that the accused intended to kill or cause serious injury;

(c) that the burden of proving that the presumption has not been rebutted rests at all times on the prosecution;

(d) that if it is satisfied beyond a reasonable doubt that the presumption has not been rebutted, it may convict the accused of murder."

72. The Court has noted that the authors of that text have footnoted the case of *D.P.P. v Hull*, (unreported, Court of Criminal Appeal, July 8, 1996) as authority for these propositions. The Court has considered the *Hull* case, in which the judgment of the Court was delivered by Blayney J., and it has to be said that it does not in terms formulate a four point model charge with respect to s.4(2) of the Act of 1964 along the lines presented by Ms Cooney and Dr Folan. That having been said, in the Hull case the Court of Criminal Appeal was required to consider the adequacy of a recharge, or supplementary charge, given to the jury following a question asked by the jury with respect to the presumption arising under s. 4(2) of the Act of 1964.

73. As the judgment of Blayney J. explains, the trial judge in her initial charge to the jury had said to them:-

"So what you have to do is to take the totality of the evidence that you have heard and decide whether Norman Hull is guilty of murder. The first step is to decide what were the natural and probable consequences. Then, if you believe that the natural and probable consequences was death or serious injury, that is the first hurdle, but you have to say have the State proved that he intended to cause death or serious injury. Even though there may be a presumption that he intended the natural and probable consequences of his act, nevertheless the State must show that the presumption has not been rebutted. So, do you accept Norman Hull's explanation that it was probably accidental, and if you do there is no question of the psychosis affecting that and, in which case, you find him not guilty of murder but guilty of manslaughter.

I again remind you - the test is could it be true, might it be true, in all fairness might it be true and in all of those cases, you give him the benefit of the doubt."

74. Having been deliberating for some time the jury came back with a question and the following exchange then took place:-

"Foreman: We are looking for clarification on the natural and probable consequences and should we deal with that question first or continue with the number of instructions you gave?

Judge: Well if you consider that the natural and probable consequence of firing at the door was to cause either death or serious injury then you can move on and consider everything else. If it was not a natural and probable consequence that is the end of

it and you would find him not guilty of murder.

Foreman: Do we follow in the order of instructions that we were given in steps?

Judge: Yes.

Foreman: Thank you."

75. In giving judgment for the Court Blayney J stated:-

"The question put by the jury had really two parts to it: Firstly, it concerned what the foreman referred to as the principle of natural and probable consequence, and secondly, it related to whether they should deal with that question first. In her reply, the learned trial judge dealt with both parts.

It is clear from the learned trial judge's charge that what she was instructing the jury to do was to approach their verdict in two stages: Firstly, to decide whether the natural and probable consequence of the applicant firing at the door was to cause death or serious injury, and secondly, if they decided this in the affirmative, to go on to consider whether the firing had been deliberate or accidental. This appears from the following passage …"

At this point Blayney J. quotes the passage from the trial judge's initial charge quoted earlier at paragraph 72 above. He then continues:-

"The Court considers that this was a reasonable way to put the matter to the jury. If they decided that the natural and probable consequences of firing at the door was to cause death or serious injury, then the presumption arose that this was the applicant's intention, but the question remained as to whether that presumption had been rebutted and this had to be decided by considering whether the firing had been deliberate or accidental. So, in instructing the jury to acquit the applicant if the firing was accidental, the learned trial judge was in effect correctly telling them that, if they took this view, it meant that the presumption that the applicant intended to cause death or serious injury had been rebutted and so he was entitled to be acquitted. For these reasons the Court is satisfied that the learned trial judge dealt adequately with the question posed by the jury."

76. In the circumstances, the *Hull* case is not in fact authority for the proposition that it is mandatory in every case in which s. 4(2) of the Act of 1964 is engaged for the trial judge to specifically tell the jury that the burden of proving that the presumption has not been rebutted rests at all times on the prosecution. It must be acknowledged that such a direction was certainly required on the facts of the *Hull* case, and was in fact given in the initial charge, and in general it should be given as a matter of best practice, but *Hull* does not say that any charge that omits it will necessarily be bad.

77. The appellant's case on this appeal is quite simply this: notwithstanding that he was seeking to secure a verdict of not guilty of murder but guilty of manslaughter by reason of diminished responsibility, he was still facing a charge of murder and, in accordance with the golden thread referred to by Viscount Sankey in *Woolmington v The DPP* [1935] A.C. 462, it was for the prosecution to prove every element of his guilt of that. In circumstances where the prosecution were relying on the presumption created by s. 4(2) of the Act of 1964, as in this case, they were required to prove beyond a reasonable doubt that the presumption had not been rebutted. Moreover, it is contended that evidence capable of rebutting the presumption is to be found in the first named appellant's responses at interview, particular the interview commencing at 13.35pm on the 11th March, 2012 and the interview at 19.45pm on the 11th

March, 2012. It was imperative that the jury, entrusted to try him for the offence of murder, should have been told in terms that the burden of proving that the presumption had not been rebutted rested at all times on the prosecution. The jury were not told that in this case, and in the circumstances the first appellant says that his trial was unsatisfactory and his conviction for murder must be regarded as unsafe.

78. Responding to this, counsel for the respondent does not concede that it was necessary, in the circumstances of this particular case, for the trial judge to tell the jury that the burden of proving that the s. 4(2) presumption had not been rebutted rested at all times on the prosecution. The respondent's case is that there was absolutely no evidence before the jury that could have rebutted the s. 4(2) presumption. While it was true to say that that the appellant initially denied an intent to kill or cause serious harm, it was put to him in later interviews that there had been discussions in advance about killing Bruno, and that as they walked down the lane he knew Bruno was going to be killed, and he appeared to accept that that was so. Moreover, it was contended, it had never been suggested on behalf of the first named appellant that the presumption was capable of being rebutted on foot of any evidence before the jury. Indeed, the defence case had been entirely focussed on the claim of diminished responsibility. The defence case had been opened to the jury on the basis of a tacit acceptance that there was clear evidence against this appellant as to his involvement in the killing of the victim, and supporting an intention to kill or cause serious injury, and that the real issue for the jury would be whether the first named appellant was suffering at the time from a mental disorder that diminished substantially his responsibility for the act. Moreover, counsel for the respondent points out, what was tacitly accepted in counsel's opening speech was overtly accepted in his closing speech when he told the jury that his client:-

> "… has admitted that he participated in this homicide and all of the ingredients, within terms of what makes out a murder, are there in this case against him but for this issue that centres around his level of mental functioning, …"

79. The Court has given very careful consideration to the respondent's contention that there was no evidence before the jury that could have rebutted the s. 4(2) presumption, and is unable to agree that that was so. There are denials of intent in the first named appellant's interviews. It was a matter for the jury as to whether or not that position was subsequently resiled from by the first named appellant as contended by counsel for the respondent. However, any such consideration by the jury would have to have taken account of the evidence of Dr Glanville. It will be recalled that Dr Glanville expressed the view that because of low intelligence and personality disorder the first named appellant had little capacity to form an independent intention, that in doing what he did the second named appellant may have been simply going along with the directions or instructions of his co-accused, and that he (the witness) could see little evidence of the formation of an intention on the part of the first named appellant to harm the deceased.

80. Accordingly, there was some evidence which, if accepted as credible and reliable, was capable of rebutting the s. 4(2) presumption. Equally it was open to the jury to totally reject that evidence and to find beyond reasonable doubt that the presumption had not been rebutted. It was, however, necessary for the jury to at least engage with the issue, and to consider whether the prosecution had proven beyond reasonable doubt that the presumption had not been rebutted. However, they had not been told in terms that the burden of proving that the presumption arising under s. 4(2) of the Act of 1964 has not been rebutted rests at all times on the prosecution. One cannot therefore foreclose on the possibility that the jury might have approached this aspect of their task in the mistaken belief that it was for the accused to discharge a burden of rebutting the s. 4(2) presumption.

81. It is precisely because of the risk just acknowledged that in most cases a failure by the trial judge to tell the jury that the burden of proving that the presumption arising under s. 4(2) of the Act of 1964 has not been rebutted rests at all times on the prosecution will amount to misdirection. However, it may be going too far to suggest that that must invariably be the case. If it were the case that there was absolutely no evidence capable of rebutting the presumption then a failure to do so would not necessarily be a misdirection. However, that is not the situation here.

82. While it is true to say that the jury had been expressly told by the judge in the general directions given by him at the outset of his charge that "the burden of proof in a criminal trial rests at all times on the prosecution," that was not sufficient in the Court's view having regard to the imperative that the jury should clearly appreciate that, in this instance, that requires proof of a negative, a somewhat difficult concept which is counterintuitive.

83. The Court cannot be sure that if the jury had been properly directed it would not have made a difference. Even if the jury were not satisfied to the required standard that a verdict of not guilty of murder but guilty of manslaughter by reason of diminished responsibility was appropriate, they were not necessarily required to convict the accused of murder. It would still have been open to them to bring in the ordinary alternative verdict of manslaughter if they had a reasonable doubt as to the existence of the specific intention required for murder.

84. Accordingly, the deficiency in the charge in this case was more than a mere technical one. It was a substantive deficiency that regrettably rendered the trial unsatisfactory and the conviction of murder unsafe in the circumstances.

85. The appeal on behalf of the first named appellant is therefore allowed.

86. The Court will therefore quash his conviction for murder, set aside the sentence of life imprisonment in his case and order a retrial. However, in circumstances where the first named appellant pleaded guilty to manslaughter on arraignment in the first trial, and throughout that trial indicated an acceptance that he was at least guilty of manslaughter, any retrial must necessarily be with respect to whether the correct verdict in this case is one of guilty of murder, guilty of manslaughter by reason of diminished responsibility, or guilty of manslaughter *simpliciter*.

The Second Named Appellant's First and Second Grounds of Appeal

87. These two grounds of appeal are interconnected and therefore may be considered together.

88. The background to them is that counsel for the second named appellant had unsuccessfully sought a separate trial for his client at the commencement of the trial on the grounds that in the course of being interviewed by the Gardaí the first named appellant had made statements implicating his client. The trial judge had refused to grant separate trials believing that it was not in the interests of justice to do so, and on the basis that the second named appellant could be afforded a fair trial notwithstanding the difficulty posed by his co-accused's implicatory statements by the giving of appropriate warnings and directions to the jury concerning the fact that statements of, or memoranda of interviews with, a particular accused were to be treated as evidence against that accused only.

89. However, in the course of his closing address to the jury, counsel for the first named appellant made a number of remarks concerning the manner in which his co-accused's defence was being conducted, and sought to pour scorn on the manner in which Mr Gomes in particular had been cross-examined by counsel for the second named appellant. Counsel for the second named appellant took strong objection to these remarks and contended that they were highly prejudicial to his client's case. In the circumstances, he

renewed his application for a separate trial and requested that the trial judge discharge the jury from further trying his client, an application which, if it had been acceded to, would have meant that the trial would have continued against the first named appellant only, with the second named appellant being tried at a later date on his own. The trial judge refused the application and the second named appellant contends that he was wrong to do so.

90. It is necessary to set forth the matters ventilated in the closing speech of counsel for the first named appellant in respect of which counsel for the second named appellant took such strong objection. Before doing so, it is important to acknowledge that an important contextual detail is that counsel for the second named appellant made his closing speech to the jury before counsel for the first named appellant made his closing speech. The defence being run by the second named appellant was a cut throat one. He was explicitly making the case that he had not killed Bruno, but that Bruno had in fact been killed by the first named appellant who, in conjunction with his sister, was now seeking to blame Wenio. Counsel for the second named appellant had addressed the jury, inter alia, on the basis that they should be circumspect with respect to the evidence of the admissions supposedly made by the second named defendant to Mr Gomes on the basis that Mr Gomes had changed his evidence as to the location and occasion where these admissions were allegedly made under cross-examination.

91. It will be recalled that Mr Gomes had initially said that the admissions he claims were made to him were made as he and Wenio were removing an engine from a Ford Mondeo in the garage in Hackettstown and that nobody else had been present. However it had been suggested to him in cross-examination that they could not have been alone and that at least two others must have been present because, in the absence of an engine hoist, the only way you could get the engine out of the car was "for four fellas to get around, two on either side, plank across rope and pull up the engine," and he agreed with that. Mr Gomes had then changed his evidence and suggested that the conversation in question must have occurred in the kitchen afterwards. The jury were invited to consider the credibility and reliability of Mr Gomes' said evidence in the light of those changes in his account.

92. When counsel for the first named appellant then came to address the jury, he almost immediately sought to engage with the suggestion that Mr Gomes was neither credible nor reliable. He said to the jury:-

> "In relation to Mr. Peart, I will say this that much of the situation that he addresses within terms of defending his client is to be commented upon in the sense that in many ways the defence of Mr Da Silva is essentially an insult to your intelligence. The problem for Mr. Wenio Da Silva is that this confession that was made to Mr. Gomes is there and it is an important, very important item of evidence and the difficulty that Mr. Peart has in relation to it in defending Mr. Da Silva is that there's no way really of avoiding other than to come up with this colourful suggestion that this couldn't have been said because the activity involved something to do with a Mondeo, no hoist and two planks and the efforts made by Mr Gomes to make it clear that this activity of changing the engine didn't go on for the entirety of the visit of Wenio is just brushed aside while this colourful episode of the Mondeo engine and the men there with the planks is created as a dominant image for you to take on board, oh this couldn't have happened therefore. But you will recall Mr Gomes in the witness box. Your function is to assess human beings. Did he come across to you as a credible man? A fella who was here telling the truth or did he come across as some sort of arch conspirator out to do down Mr Wenio for some reason that escapes us all, something to do with the Brazilian community or something like that, or did he come across as a fella who is coming here to be translated within terms of his evidence and to tell you what he was told by Wenio. And what he did say …"

93. At this point he rehearsed for the jury the main features of the admissions that Mr Gomes claimed Wenio had made to him. Having done so he continued:-

> "So, there you have a full detailed confession from Wenio made to Mr Gomes. Now, despite the best efforts of Mr Peart on behalf of Mr Wenio in terms of the Mondeo and the two planks, that is devastating and crushing evidence within the terms of a full confession to the murder.
>
> Now, you will be directed when I have finished speaking by Mr Justice Sheehan and he will tell you, as has already been told to you by Mr Devally, that what one accused says about another is not evidence against the other. What one accused says he did himself is evidence against that person who is making that statement or answering those questions to the police. So, what you find in terms of Mr Cawley's interviews with the police, whenever he refers to Wenio, that is not evidence against Wenio. But this confession to Mr Gomes is evidence. It's damning evidence and it amounts to a full and crushing confession and there's no way two planks and a Mondeo is going to remove that in terms of your sensibility and I'm sure you're not going to take well to having your intelligence insulted like that."

94. Later on in the said closing speech counsel for the first named appellant also said:-

> "Now, the situation in terms of his confession and his account of his involvement to the extent of bringing Bruno along the pathway with Wenio and then stabbing him once, after which there is a fall into the bog, as I said insofar as he refers to Wenio there that's not evidence against Wenio but it is interesting to look at what Wenio confesses to Mr Gomes which is evidence. It's solid evidence. And in that account given to Mr Gomes by Wenio he talks about his in fact Wenio does not mention John Paul Cawley in that account at all to Mr Gomes and what he does do is he talks about Wenio said he hit Bruno with a knife. They fell into the water in the bog. Wenio told me that he hit Bruno 40/45 times with the knife. It gels very much with the account that John Paul Cawley gives but as I stressed already what John Paul Cawley says, in terms of his interviews to the police, is not evidence against Wenio. But it does so gel."

95. Finally, towards the end of his closing, counsel for the first named appellant also sought to characterise Wenio as an "arch manipulator," and counsel for the second named appellant also complained vehemently about that.

96. Immediately upon the conclusion of counsel for the first named appellant's closing address, counsel for the second named appellant renewed his application for a separate trial and applied for the jury to be discharged as against his client. He complained:-

> "I thought we had made it perfectly clear between us, and all counsel, that this is a difficult trial to run with the Chinese wall between the parties and that I thought it was made perfectly clear yesterday that when the jury were considering my case that they would put aside John Paul Cawley's six memoranda of interview and they would not refer to them. My learned friend in closing has specifically invited them to compare the alleged confession to Wesley Gomes with John Paul Cawley's six memoranda and that is totally and completely contradictory to the correct instruction to them. The instruction to them should be that they do not compare and contrast the John Paul Cawley six memoranda when they are considering Mr Da Silva's case at all and I thought yesterday we had come to the conclusion that the correct way of handling it was a direction to the jury to put aside the six memoranda in respect of John Paul Cawley while considering Mr

> Da Silva's case. Now, my learned friend has specifically invited the jury to compare the alleged confession to Wesley Gomes and to basically find, I suspect, that the same information is in the John Paul Cawley memorandas of interview as is in the Gomes alleged confession."

97. He also complained:-

> "I think it's over I'm sorry to say and I think my presence in this jury is that this is it's now hopelessly compromised. I'm surprised at my learned friend. And that's not the only thing he did. When and this can have no advantage to him whatsoever when dealing with my case and his case they're dealt with separately, they've been run together, and it's of no advantage to his case at all to say that my defence was an insult to the jury's intelligence. It can't be of any advantage to him and they should regard the criticism of Mr Gomes by me and by the way the added joke of the two planks I think it's part of that old joke about two short planks. There wasn't two planks. It was one plank and it was particularly utilized as a because that's how it works. Four men, two on either side well in the middle. But to use the two planks was to create a kind of a joke and it can't have assisted his case one jot because it has nothing to do with his case and he sought to insult me and he sought to belittle the defence of Mr Wenio Da Silva for no advantage to himself. It can't have any help to him whatsoever. It's got nothing to do with his case. He then accused Wenio Da Silva of being an arch manipulator. There is no evidence the words arch manipulator have not been used in this trial till he used them. They can have no advantage. He never made a case that Wenio Da Silva was an arch manipulator and the only purpose it can have because of that is to destroy my case in front of the jury's eyes and in those specifics circumstances, while I'm appalled to be doing it now, appalled in my own way dealing with it now, I feel I have no other case except to apply to discharge the jury in that regard."

98. Counsel for the respondent opposed the application on the basis that counsel for the first named appellant had been within his rights to comment adversely on his co-accused's case, and further that he had not crossed any line in inviting close scrutiny of the record of the six interviews with his client to see if they provided an honest and coherent account, which he was contending they did, and a honest and coherent account that accorded with other evidence in the case, namely Mr Gomes' account of what had been said to him by Wenio.

99. The trial judge refused to discharge the jury, commenting:-

> "I had understood that Mr Sammon was asking inviting the jury to compare the statements made by his client, Mr Cawley, with the account given allegedly by Mr Da Silva to Mr Gomes. It seemed to me that he is entitled to do that. I'm going to refuse the application."

100. The trial judge then proceeded to charge the jury. In the course of his charge he told the jury:-

> "The next thing I want to say to you just of a legal matter, and it should be very obvious at this stage, is that you should consider each case separately. You need to realise then that what is contained in Mr Cawley's interviews with the police is evidence against him only. Equally what is in Mr Da Silva's interviews is evidence against him only. So, I suggest, Mr Foreman, that when you're considering the case against Mr Cawley, you put the interviews with Mr Da Silva to one side, and when you come to consider the case against Mr Da Silva you put the John Paul Cawley interviews to one side and don't pay any attention to them when you're considering Mr Da Silva's case."

101. When it came to reviewing the evidence, including the testimony of Mr Gomes, the trial judge did so comprehensively but without commentary. Then towards the end of his charge the trial judge sought to summarize the prosecution and defence cases respectively. He did so as follows:-

> "Now, that basically brings me to the end of my review of the evidence and to summarise briefly counsel on behalf of Mr Da Silva contends essentially that the prosecution has not established beyond a reasonable doubt that Wenio Da Silva murdered Bruno de Souza. While the defence accept that Wenio Da Silva struck Bruno de Souza with the torque wrench they say that this was done in self defence. The defence say that you cannot rely on the evidence of Sandra Cawley and Charlie Cawley and that in the case and that in this case the Cawleys have conspired with each other to lay the blame on Wenio Da Silva. The defence further say that you should reject the evidence of Wesley Gomes as being unreliable and point to the fact that Wesley Gomes said Wenio Da Silva had killed Bruno de Souza at a time when they were changing the engine of a car and there were two other men present when the engine was being changed. The defence further say that the text and telephone calls, while nasty in themselves, do not of themselves allow you to conclude that Wenio Da Silva is guilty. The prosecution, on the other hand, contend that there is ample evidence in this case in respect of which they suggest there is only one proper conclusion, namely that Mr Da Silva is guilty as charged.
>
> Counsel for Mr Cawley urges you to find his client guilty of manslaughter due to diminished responsibility. You are urged to hold that John Paul Cawley was at the time suffering from mental disorder was such as to substantially diminish his responsibility for his actions. The defence rely on Mr Glanville for this defence largely and, in particular, on his evidence to establish mental disorder and regarding his interview that Mr Cawley's responsibility for his actions was substantially diminished they say that this part of his evidence finds support in those parts of the evidence which show Wenio Da Silva as the man who controlled events, gave directions and who people were terrified of. The prosecution say this is a case of murder, that John Paul Cawley did not suffer from a mental disorder and whatever mental health difficulties he had they were not such as to substantially diminish his responsibility for his actions and in particular they say that the defence has not established, as a matter of probability, that this defence is laid out."

102. Following the trial judge's charge to the jury, counsel for the second named appellant requisitioned the trial judge to reiterate to the jury the exact point that he had been making with respect to the evidence of Mr Gomes, arising out of his cross examination of that witness, in circumstances where "in his closing Mr Sammon had sought to pooh-pooh or to make nonsense of this point" and where he believed his colleague had "misadvised the jury in that in fact there was only one plank and he was telling them there was two planks and I got the impression that there was an element of two short planks involved."

103. Counsel for the second named appellant also requisitioned the trial judge to tell the jury that:

> "...that there are two genuinely different separate trials going on at the one time and that anything that Mr Sammon said in his closing has no effect whatsoever on my client and is only in respect of his own client and that any remarks that he made should be completely ignored by the jury if they reflect on my client or my client's case."

104. The trial judge refused to recharge the jury in the manner suggested, stating that he had considered counsel's requisitions but that it seemed to him that he had already dealt reasonably with the issues being raised. The second named appellant now contends that the trial judge also erred in not acceding to his said requisitions.

105. There are particular potential difficulties where there are co-accused, represented by different counsel, who are running different defences, especially where the defences being run are of a cut-throat nature with one accused blaming the other, or where the defences being run are inconsistent with each other, or conflict with each other, in whole or in part. There is undoubtedly potential for one accused to prejudice the position of another accused. However, that is one of the normal hazards to be coped with in a joint trial.

106. A trial judge has no discretion to prevent a defence counsel commenting adversely on the case of a co-accused where it conflicts with that of the accused that he or she represents. Moreover, it is not improper for defence counsel to do so; indeed his or her duty to the client may require that kind of engagement and confrontation, but it must be conducted within the limits of what is fair. Accordingly, there should be no reference to alleged facts or other matters that have not been the subject of evidence – *Shimmin* (1882) 15 Cox CC 122, nor should evidence that was given in the trial be misrepresented. Defence counsel may advance hypotheses which go beyond his client's version of events, always provided that other evidence has been called which supports such hypotheses – see *Bateson* (1991) The Times, 10th April 1991 cited in Blackstone's Criminal Practice 2000. Moreover, although it doesn't arise in the present case, in a case where a co-accused runs a defence that conflicts with that of the accused he or she represents, counsel is entitled to comment adversely on the failure of the co-accused to give evidence – *Wickham* (1971) 55 Crim App R 199.

107. This Court considers that in a criminal trial defence counsel must be afforded very considerable latitude concerning how he or she presents his client's case in closing. That having been said a trial judge has to ensure that the trial is fair. It is up to the trial judge to intervene if necessary, but we consider that the threshold for judicial intervention must be set at a reasonably high level, and that before a judge would be justified in intervening he should be of the view that what was said was manifestly unfair.

108. Moreover, it would only be in exceptional circumstances that a trial judge would be justified in intervening in the middle of counsel's speech. We agree with the view expressed in Archbold, 2014 ed., at paragraph 4-366, that although it might exceptionally be necessary for a judge to interrupt a speech by counsel in the presence of the jury, it is generally preferable for him not to do so; such interventions might disrupt the speaker's train of thought or inappropriately divert the attention of the jury; ideally, interventions for the purpose of clarifying or correcting something said, either by judge or counsel, should be made in the first instance in the absence of the jury and at a break in the proceedings, see *R. v. Tuegel* [2000] 2 Cr.App.R. 361, CA. In most cases, however, a judge will be content not to interrupt the speech but to attempt to address the balance with respect to any unfairness perceived by him as arising from counsel's remarks in the course of his charge.

109. The Court has little doubt that in the case of a truly egregious unfairness arising from remarks of counsel for a co-accused in a closing speech, a trial judge would have jurisdiction to discharge the jury with respect to the accused that was prejudiced, but considers that a case justifying so extreme a measure would be rare indeed.

110. The Court has considered the allegedly unfair remarks made by counsel for the first named appellant in this case. There were a number of aspects to them. First, counsel for the second named appellant felt that a key point made on behalf of his client was being unfairly rubbished, on the basis of a misrepresentation of what in fact had been the evidence. Secondly, counsel for the second named appellant felt that an inappropriate joke was being made at his expense, which had the potential to rebound to the prejudice of his client. Thirdly, counsel for the second named appellant felt that by inviting the jury to compare what J.P. had said in his statements to the police, with what Mr Gomes had claimed Wenio had said to him, the jury were in effect being invited to regard what J.P. had said in his six statements to the police about Wenio as evidence against Wenio.

111. The trial judge did not consider the impugned remarks to be so unfair as to warrant his intervention. He was not disposed to discharge the jury and this Court considers that he was correct in refusing to do so.

112. Counsel for the first named appellant was entitled to engage robustly with, and dispute or criticise, his co-accused's case to the extent that it conflicted with the case that he was running, and it was considered strategically necessary to do so. While the language used to do so in so far as the aspect of the second named appellant's case that had sought to impugn the credibility and reliability of Mr Gomes's testimony was concerned was strident, and the perceived joke was arguably in bad taste and inappropriate to the context, the remarks were not manifestly unfair. While there was a reference to two planks, whereas in fact only one had been mentioned in evidence, the Court does not consider this inaccuracy to have constituted a material misrepresentation of the evidence. It mattered little whether there was one plank or two in terms of the point that was being made, namely that Mr Gomes had accepted in cross-examination that to remove an engine without a hoist would have required four people and that therefore he could not have been correct in his assertion that he and Wenio had been alone during this operation. Indeed this was why he had then sought to change his evidence to say that the admissions had in fact been made afterwards in the kitchen.

113. Insofar as the contents of the statements made by J.P. were concerned, the Court is satisfied that while his counsel may have gone right up to the line in terms of what was permissible, he did not cross it. Moreover, the trial judge reiterated to the jury in very clear terms that the statements of an accused to the police were only evidence against that accused.

114. Insofar as the refusal of the requisitions was concerned, the trial judge considered, in essence, that his charge, in which he had sought to fairly present the case that each party was making, struck the right note in terms of balance, and that by the end of his charge any lingering effects of the remarks of counsel for the first named appellant would by that stage have dissipated, such that no further intervention was necessary. It seems to us that this was a decision that was legitimately open to him in the proper exercise of his judgment and discretion, and he is not to be criticised for it.

115. In support of his arguments, the second named appellant sought to rely on a decision of the Court of Criminal Appeal in *People (Director of Public Prosecutions) v Vera McGrath* [2013] IECCA 12 (ex tempore, Court of Criminal Appeal, 11th March 2013). The Court is satisfied that the facts of this case were radically different from those of the present case, and that it is wholly distinguishable and of no relevance to the controversies this Court has had to consider in respect of this group of grounds of appeal.

116. In the circumstances the Court is not disposed to uphold the second named appellant's first and second grounds of appeal.

The Second Named Appellant's Third Ground of Appeal.

117. This ground of appeal was not addressed specifically at the hearing of the appeal, counsel for the second named appellant having indicated that he was content to rely upon his written submissions.

118. The complaint is a two part one. The essence of the first part of the complaint is that the trial was unsatisfactory because the trial judge refused to discharge the jury as against his client in circumstances where, the prosecution having advised the defence that it was not their intention to proceed with certain evidence in respect of telephone texts, with the result that certain prosecution witnesses who were subsequently called were not cross-examined by defence counsel about such texts, the prosecution later resiled from their earlier representation and indicated in front of the jury that it was now their intention to call this evidence. Counsel for the second named appellant had complained unsuccessfully to the trial judge that he was prejudiced by this course of action and that it was unfair for the trial to continue in front of that particular jury as he could no longer with any strength recommence to cross examine relevant witnesses.

119. In response to the first part of the complaint, counsel for the respondent has in his written submissions conceded the basic facts as alleged, but contends that it was the result of a misunderstanding between experienced counsel. The suggestion of severe prejudice is rejected. He points out that the prosecution had indicated that relevant witnesses were available to be recalled, and had offered to recall them, but that this offer was not taken up.

120. The essence of the second part of the complaint is that the trial was unsatisfactory because the authorship of certain of the text messages relied upon by the prosecution was not proven, and that accordingly their contents constituted inadmissible hearsay.

121. The trial judge had ruled on day six that the text messages were admissible in evidence, stating that he did not consider the arguments advanced on behalf of the second named appellant to be well founded. Beyond that he does not give reasons for his ruling.

122. While it would have been preferable if the trial judge had stated in terms why it was that he did not consider those arguments to be well founded, the Court is satisfied nonetheless that he was correct in his ruling and that the texts were properly admissible.

123. In relation to the first part of the complaint, this Court considers that the offer to recall relevant witnesses sufficiently addressed the issue, and that the trial judge would not have been justified in the circumstances in discharging the jury as against the second named appellant.

124. In relation to the second part of the complaint, it is clear that the prosecution was relying on the fact that the texts in question had been received by the persons who claimed to have received them, e.g. Patricia da Silva, rather than on the truth of their contents. Indeed, in many instances the prosecution's case was that the contents of the texts were not true, but the fact that they had been received, and what they purported to say (whether it be true or not), and the fact that they purported to come from a particular source, or could be traced to a particular phone, was all evidence in itself. Such evidence being original evidence rather than testimonial evidence would not have offended the hearsay rule and was properly admitted before the jury.

125. Moreover, to the extent that text messages were identified as having originated on a particular phone from telephone records generated without human intervention and kept by the relevant telephone companies, these records were admissible as business records in the normal way.

126. In the circumstances the Court is not disposed to uphold the second named appellant's third ground of appeal.

The Second Named Appellant's Fourth and Fifth Grounds of Appeal.
127. These grounds of appeal arise out of the second named appellant's complaint that unedited memoranda of the interviews with the first named appellant were allowed go to the jury, which memoranda contained material which, although not evidence against the second named appellant, was significantly inculpatory of him.

128. The second named appellant had applied to the trial judge on day eight of the trial to have references to his client by name edited out of the said memoranda before they were allowed go to the jury. The application was made in reliance on *The People (Director of Public Prosecutions) v Laide and Ryan* [2005] 1 I.R. 209, and it was opposed by the prosecution on the basis that the proposal was fraught with difficulty, and that such an exercise had given rise to a successful appeal in the *Laide and Ryan* case. The trial judge refused the application, effectively on the basis that he accepted the prosecution's contention that it was workable in the case before him, and having specifically commented in the course of the arguments that "this is a case where the defence of each party is to blame the other in part."

129. Following the refusal of the trial judge to accede to the editing request, counsel for the second named appellant then applied again for a separate trial, and asked yet again that the jury be discharged against his client so that the trial at hearing would then proceed only against the first named appellant. The trial judge refused that application also.

130. The rules of evidence provide that where an accused has made an out of court inculpatory statement, usually though not invariably to the police, it is only evidence against the person who made it and does not constitute evidence against any other person implicated therein. It has long been recognised that in the situation of a joint trial, where one accused has made an out of court statement implicating another or others, steps have to be taken to protect those co-accused potentially prejudiced. There are a number of ways in which this may be done, and it is a matter for the trial judge to determine the most appropriate approach in the circumstances of the individual case.

131. The traditional means by which the problem may be addressed is by the giving of appropriate directions and warnings to the jury. There is long standing authority supporting this approach as is apparent from textbooks on criminal procedure both here and in the neighbouring jurisdictions in the United Kingdom. In *The People (Director of Public Prosecutions) v. Ferris and Vearer,* (unreported, Court of Criminal Appeal, *ex tempore*, 11th March 1997) O'Flaherty J. alluded to this, stating:-

> "The rule, as we understand it, is that there must be a warning by the trial judge where there is anything in the way of the admission or something that represents an attempt by one accused to implicate the other, in that circumstance, of course, the judge must give a warning to the jury that what one accused says is not to be taken as evidence against the other so as to implicate him in the crime with which he is charged."

132. However, directions and warnings are not the only way by means of which unfair prejudice arising out of the statement of one or more co-accused can be safeguarded against. In some cases editing may be appropriate, whether by way of anonymisation or redaction or both. However, anonymisation may be ineffective, as indeed it was in *Laide and Ryan*, and redaction may not be possible without consent. In particular, redaction may not be possible where the case of the accused who has made the problematic statement is based on attributing blame in whole or in part to his co-accused. He is reasonably entitled to insist that his entire statement goes before the jury without redaction.

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

134. In *Laide and Ryan*, the first accused along with three others were jointly charged with two counts, one of manslaughter and the other of violent disorder contrary to s. 15 of the Criminal Justice (Public Order) Act 1994. The first accused was convicted of manslaughter and violent disorder while the second accused was convicted on the violent disorder charge only. The first accused appealed both convictions on the grounds, *inter alia*, that the trial judge failed to ensure that he received a fair trial having regard to the outcome of the editing of the statements of a co-accused.

135. One of the co-accused made a statement which implicated the first accused. Much of what was contained in the statement went beyond the prosecution case against the first accused. The first accused requested redaction of significant portions of the controversial statement, but consent to that was not forthcoming. In the circumstances, the trial judge ruled that the statements be edited so as to anonymise references to the first accused by substituting "Mr. A" for his name wherever it appeared.

136. As McCracken J. explains in paragraphs thirteen and fifteen respectively of the judgment of the Court of Criminal Appeal, an unanticipated problem then arose in the following circumstances:-

> "13. When the details of the editing were determined by the trial judge, counsel for Andrew Frame raised the question of the possibility of the jury thinking that "Mr. A" was in fact his client and counsel for the second accused expressed similar fears. Both counsel then asked that they be permitted to cross-examine the garda witness who had produced the statements in order to elicit that "Mr. A" was not their respective client. The trial judge ruled that such cross-examination would be permissible. Counsel for the first accused again suggested that certain of the sentences in the statements could be totally excised, but the trial judge refused to do so."
>
> "15. In the course of the cross-examination of the garda witness, it was duly established that Mr. A was not Andrew Frame and was not the second accused. Counsel for the first accused was then placed in a totally invidious position. He could not ask a similar question in relation to his client, because Mr. A was the first accused. On the other hand, by not asking the question, the jury could clearly draw the inference that Mr. A was the first accused. This court is quite satisfied that there was not only a very real risk, but a probability that the jury would and did draw such an inference."

137. In *Laide and Ryan* it was contended that the editing of the statements in order to conceal the identity of the first accused achieved the exact opposite of what was intended, and in fact led to him being identified by the jury. It was further argued that once the first accused had been identified his position would have been better had the statements gone before the jury unedited. The Court of Criminal Appeal agreed with the first accused and allowed his appeal on the ground that the editing of the relevant statements, although directed by the trial judge with the best of intentions and with the objective of ensuring fairness, had in fact led to unfairness in the circumstances of the particular case rendering the trial unsatisfactory.

138. In this Court's view, the decision in *Laide and Ryan* is not authority for the proposition, as counsel for the second named appellant in the present case sought to suggest, that in a joint trial, where a statement to the police made by one accused is prejudicial to another accused, the preferred method of ensuring fairness in the trial must be to edit the statement in question. Editing is but one possible way of addressing the problem, but it is an expedient that can be fraught with potential difficulty, as is graphically illustrated by the *Laide and Ryan* case.

139. In this Court's view, the circumstances of *the Laide and Ryan* case are clearly distinguishable from those of the present case. One reason why the trial judge in the *Laide and Ryan* case felt that warnings and directions would possibly be insufficient as a means of safeguarding the first accused against potentially unfair prejudice was that one of his co-accused not only implicated him, but did so in a manner that went considerably beyond the prosecution case. No such circumstance exists in the present case. While the first named appellant has implicated the second named appellant in his statements, his allegations are consistent with, but do not go beyond, the prosecution's case.

140. Another distinguishing feature of the *Laide and Ryan* case, when compared with the present case, is that that case concerned an incident of violent disorder in which many people, including but not confined to the four persons on trial, were alleged to have been involved. Accordingly, it was reasonable in the first instance for the trial judge to believe that anonymisation might be a viable and practical option, because in theory "Mr A" could have been one of quite a number of persons, not all of whom were before the Court. However, in the present case there were just two accused who, as the trial judge remarked, were each blaming the other in part. No form of anonymisation could have worked in the present case, and there was no consent forthcoming to redaction.

141. It was ultimately a matter for the trial judge to determine how best to protect the second named appellant against unfair potential prejudice. He opted to do so by the traditional means of giving the jury suitable warnings and directions, and in particular gave the warnings and directions quoted earlier at paragraph 100 of this judgment.

142. This Court has considered the entirety of the evidence, the concerns articulated on all sides, the rulings, directions and charge of the trial judge and has concluded that the trial judge dealt with the issue appropriately. The trial judge would not have been justified in discharging the jury in the circumstances of the case.

143. In the circumstances the Court is not disposed to uphold the second named appellant's fourth and fifth grounds of appeal.

The Second Named Appellant's Sixth Ground of Appeal.

144. The substance of this complaint is that the trial was unsatisfactory because the trial judge allegedly allowed "the continued introduction of hearsay evidence and leading questions without advising the jury of the worthless nature of such evidence."

145. The controversy in question arises out of testimony given before the jury on day five of the trial when counsel for the prosecution was seeking to elicit evidence from Detective Sergeant John Heaslip concerning a search of No 2 Ardoghter, Ballyduff, Co Kerry pursuant to a search warrant. In general terms, the witness testified that the warrant was produced to Sandra Cawley who was made aware of specific items that the Gardaí were interested in locating. The witness testified that various items in the house were pointed out to him, but on several occasions did not confine himself to saying that a particular item had been pointed out, but rather added details of words of explanation spoken by Sandra Cawley at the time of pointing out the item.

146. The explanations given by Ms Cawley were objected to by counsel for both appellants as being hearsay.

147. On some occasions the explanation provided by Ms Cawley was unsolicited, on other occasions it was provided in response to questions asked by the witness. A short extract from the transcript will serve to illustrate the type of evidence that is in controversy:-

> "Q. I think if you move forward to photograph No. 8 please, that shows in a closer aspect some of the same items on the same area?
>
> A. That's correct, Judge.
>
> Q. And finally the phone visible in No. 8 is that the phone that we see close-up in No. 9?
>
> A. That's correct.
>
> Q. And was that pointed out to you by anyone in particular?
>
> A. Yes. While I was in the house Sandra Cawley pointed it out to me as the phone belonging to Bruno de Souza.
>
> Q. Did she point out any other particular items within the house?
>
> A. Yes, Judge. She pointed out a rug in the sitting room which was on the floor of the sitting room.
>
> Q. And I think that's 11 and 12 in the photographs; is that right?
>
> A. That's correct, yes, 11 and 12.
>
> Q. I think in 12 it's been turned over in order to picture what's on the bottom?
>
> A. Yes. There was stains on the back of the rug. In response to a question which I asked her of what happened or what was that on the rug she said it was Bruno's blood and she couldn't clean it all off."

148. The transcript records a series of interjections by counsel for the appellants' protesting at the eliciting of alleged hearsay, notwithstanding that much, though not all, of the material complained of had already been mentioned by Ms Cawley when she herself was in the witness box. Although counsel for the prosecution promised to tread carefully and undertook not to elicit hearsay, it is clear that Detective Sergeant Heaslip did not appreciate the basis of the objection because, despite the best efforts of prosecuting counsel, he persisted in offering evidence of what Sandra Cawley had said to him in the course of pointing things out.

149. In so far as the complaint is based on leading questions, it is clear from the transcript that, while there were some leading questions, these were resorted to by counsel for the prosecution in an effort to more tightly corral and control his witness, and they were for the purpose of trying to avoid further repetition of what constituted the main complaint.

150. The trial judge dealt with the objections by a combination of measures. He ruled that much of the controversial evidence was unobjectionable, because it had already been given by Sandra Cawley, and that in respect of evidence that went beyond what she herself had stated in the witness box the problem might be avoided if "Detective Sergeant Heaslip simply says that he accompanied her to certain places." Further, he permitted prosecuting counsel to speak to Detective Sergeant Heaslip over the luncheon break in a further effort to defuse the problem, and that was done.

151. Counsel for the respondent disputes in his submissions that the evidence in controversy was hearsay at all, but contends that even if it was hearsay the matter was very properly dealt with by the learned trial judge. It was submitted that there was no significant piece of evidence adduced by the prosecution in the relevant segment of the trial which might have affected the issues in the case. It was further submitted that the second named appellant's submissions singularly fail to point to any piece of significant evidence in the entire trial that was adduced by a leading question or that was in fact hearsay.

152. The Court agrees with the respondent that the evidence was not in fact hearsay. The statements complained of accompanied, or were related to, the performance of an act in issue or relevant to an issue in the case. The act in each instance was the act of pointing an item out to a Garda who was conducting a search on foot of a warrant. Declarations that explain the performance of an act constitute a component of the recognised exception to the hearsay rule that embraces statements forming part of the *res gestae*. In *Evidence,* 2nd ed, (Round Hall, 2014) Declan McGrath, Barrister-at-Law, explains (at paragraph 5-75):-

> "5-75 The phrase *"res gestae"* means "transaction" and, under the inclusionary doctrine of res gestae, a statement which is so closely associated in time, place and circumstance with some act that is in issue that it can be said to form part of the act rather than a reported statement, is admissible in evidence to prove the truth of its contents. In *Teper v R.*, [1952]AC 480 Lord Normand explained that the application of the doctrine:
>
> "It appears to rest ultimately on two propositions, that human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words, and the dissociation of the words from the action would impede the discovery of the truth."

153. The quotation from *Teper v R* was expressly approved in this jurisdiction by the Court of Criminal Appeal *in People (Attorney General) v Crosbie* [1966] IR 490 at 497.

154. As McGrath also points out (at paras 5-87 & 5.88):-

> "5-87 If an act is in issue, or relevant to an issue, a contemporaneous statement made by the person performing the act, explaining his or her intentions in performing the act, is admissible to prove the truth of its contents. The rationale for admitting such a statement appears to be that it is the best and often the only evidence available to explain the motive for the performance of the act. Further, a limited guarantee of reliability is afforded by the requirement of contemporaneity.
>
> 5-88 The conditions of admissibility are as follows: (i) the act is in issue or relevant to an issue; (ii) the statement explains the performance of the act; (iii) the statement was made contemporaneously with the act performed; and (iv)

the statement was made by the person performing the act."

155. It seems to this Court that each of the four conditions identified were satisfied in respect of evidence concerning explanations given by Sandra Cawley to Detective Sergeant Heaslip at the time of the search, and accordingly evidence of them was admissible as an exception to the hearsay rule.

156. Even if that were not the case, the Court in any event agrees that the trial judge dealt appropriately with the issue. It is clear that the controversial evidence was not being led deliberately, and in cavalier disregard of the rules of evidence. The Court is satisfied that even if the controversial evidence had been technically inadmissible, the fact that it was admitted would have had no implications for the overall fairness of the trial, or the safety of the verdict. In the Court's view, even if the evidence was inadmissible there would have been no necessity to give the jury a warning to disregard it in the particular circumstances of the case.

157. In the circumstances the Court is not disposed to uphold the second named appellant's sixth ground of appeal.

Conclusion

158. In circumstances where this Court has not seen fit to uphold any of the second named appellant's grounds of appeal, his appeal must be dismissed.