THE COURT OF APPEAL

[55/2017]

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

AND

GAVIN SHEEHAN

APPELLANT

JUDGMENT of the Court delivered on the 25th day of May 2020 by Mr. Justice McCarthy

Preliminary

1. This is an appeal against conviction. On the 28th November 2016, the appellant was convicted on four counts, *viz*- possession of a firearm contrary to s. 27A of the Firearms Act, 1964, possession of ammunition contrary to the same provision, unlawful discharge of a firearm contrary to s.8 of the Firearms and Offensive Weapons Act, 1990, and assault causing serious harm contrary to s.4 of the Non-Fatal Offences against the Person Act, 1997. In addition, and prior to his trial, he pleaded guilty to two counts of criminal damage contrary to s.2 of the Criminal Damage Act, 1992.

2. The appellant was subsequently sentenced on February 14th 2017 to a term of fourteen years' imprisonment with the final three years suspended in respect of each of the possession counts, seven years' imprisonment in respect of the unlawful discharge count, and to twelve years' imprisonment with the final two years suspended in respect of the count of section 4 assault, to run concurrently.

Background

3. These offences concern incidents which occurred on the night of the 14th/15th of May 2016 in the Laurel Ridge and Hollywood Estate area of Shanakiel, Cork: these are two housing estates situate immediately adjacent to each other and between Blarney Road and Harbour View Road. Prior to the shooting on the evening of Saturday the 14th of May 2016 at approximately 7p.m, one Dylan Cunningham was in a fast food restaurant known as 'Dinos' in Blackpool with his girlfriend Ciara Sheehan, who was later shot. The appellant entered the premises and punched Dylan Cunningham in an unprovoked assault. Later that evening, Dylan Cunningham's home at No. 37 Hollywood Estate was subject to criminal damage, in that at 12.15 a.m. the front patio door was smashed. A short time later, the home of the appellant at No. 7 Laurel Ridge was also subject to

criminal damage, at approximately 12.30 a.m. when windows were broken. At approximately 1.00 a.m. or a few minutes thereafter (there was much debate at the trial as to times) on Sunday the 15th of May 2016, Ciara Sheehan was standing in the front room of No. 37 Hollywood Estate when she heard what she describes as a loud bang like a firework and then she heard buzzing in her ear. She had been shot in the neck. Ms. Sheehan was taken to Cork University Hospital where she received medical attention and on examination, the medical team identified a penetrating wound to her right neck from which a bullet was removed.

4. While dealing with the call to the Gardaí occasioned by the damage to No. 37 Hollywood Estate, Gardaí were notified that the property of one Michael Condon at No. 57 Harbour View Road was damaged by two male youths. Inspector Ronan Kenneally, on his way to the shooting incident at Hollywood Estate, observed the appellant, being one of them, committing criminal damage to the house and a car; charges arising therefrom gave rise to pleas of guilty. The appellant left in a Nissan Almera with a 02 C registration; this vehicle come to a stop on Harbour View Road at the entrance to Laurel Ridge and the appellant alighted from the front the passenger seat and ran into Laurel Ridge. He was followed by a Garda, and after a chase, he was arrested for the possession of a firearm at No. 37 Hollywood Estate with intent to endanger life.

5. The car from which the appellant alighted was found to have a golf club, a hurley and a mobile phone in the footwell of the front passenger side. As part of the investigation, the appellant's home at No. 7 Laurel Ridge was searched pursuant to s.29 of the Offences Against the State Act,1939 as amended. No firearm was recovered; however during this search, a CCTV system was recovered which proved to be probative. This showed the appellant at 12.05 (in fact 12.51 a.m. as the system was 46 minutes behind time) in the morning in question with a gun in his right hand, and some two minutes later, getting a glove from the car in the drive and putting it on his right hand. At 1.08 am (corrected time) he could be seen leaving his own home and climbing over a wall into Hollywood Estate. Four minutes and five seconds later, he was seen to return to the front of his house from the opposite direction with no firearm in his hand.

6. During the afternoon of Sunday, the 15th of May 2016, a Garda Dave Barry recovered a Smith and Wesson pistol, a firearm as defined under the Firearms Acts, at the base of a one-metre-high dividing wall at Hollywood Estate and Laurel Ridge. A discharged shell was found on the 10th of June 2016 at the rear of No 37 Hollywood Estate. The bullet recovered from Ms. Sheehan's neck had class characteristics comparable to those of the Smith and Wesson semi-automatic pistol recovered. This ammunition was ammunition as defined under the Firearms Act.

7. The mobile phone recovered in the Nissan Almera showed a "dialogue stream" from Facebook and we shall refer again to that below. During his detention, Gavin Sheehan was interviewed.

8. During interview, he acknowledged that the Nissan Almera car was his and he accepted that the golf club and hurley found in that car were also his. He said he may have gone to

Hollywood Estate on the night in question; the reason he gave was; "to talk to a girlfriend or to get picked up, I don't know". He acknowledged that he was in dispute with the Cunningham's. He failed to cooperate in any way in relation to the shooting incident or to assist in the recovery of the firearm while in custody.

Grounds of Appeal

9. The appellant submits that the trial judge erred:-

   i. in fact and in law in failing to accede to a motion brought on behalf of the appellant to have the trial transferred to the Dublin Circuit, pursuant to s. 32 of the Courts and Court Officers Act, 1995;

   ii. in refusing an application to allow the appellant's legal team to come off record;

   iii. in refusing to discharge the jury;

   iv. in admitting evidence purportedly from a mobile phone, in circumstances in which the provenance and integrity of the relevant data had not been proven;

   v. in misdirecting himself as to the law relating to adverse inferences arising from the utilizing of s. 18 and 19 of the Criminal Justice Act 1984 as amended;

   vi. in law and fact in his charge to the jury;

   vii. in admitting CCTV footage which was of such poor quality that it required a narrative as to what was visible in it;

   viii. in failing to accede to the application to withdraw the case from the jury at the end of the prosecution case;

   and;

   ix. that the verdicts were perverse and against the weight of the evidence.

Ground i

The trial judge erred in fact and law in failing to accede to a motion brought on behalf of the appellant to have the trial transferred to the Dublin Circuit, pursuant to section 32 of the Courts and Court Officers Act, 1995.

10. The case had been first listed some days before the trial date for the purpose of fixing a date for it; this listing occurred at the sittings to which the appellant Mr. Sheehan was returned some three weeks before (as is the practice in the Cork, and indeed other circuits outside Dublin). On that occasion an adjournment was sought solely due to allegedly outstanding disclosure but refused. No other issue was raised and the trial date was fixed for the 16th of November.

11. Two days before the date which had been fixed for trial (on the 14th November) pursuant to a Notice of Motion an application was made for the trial's transfer to the Dublin Circuit pursuant to section 32 of the Courts and Court Officer's Act, 1995 because there had been what was characterised on behalf of the appellant as "a very large amount" of

"prejudicial" publicity giving rise to what was described as a "real risk of unfairness". The relevant statutory provision is as follows: -

> "Where a person (in this section referred to as 'the accused') has been sent forward for trial to the Circuit Court, sitting other than within the Dublin circuit, the judge of the Circuit Court before whom the accused is triable may, on the application of the prosecutor or the accused, if satisfied that it would be manifestly unjust not to do so, transfer the trial to the Circuit Court sitting within the Dublin circuit…"

12. No such application was made when the matter was first listed, and counsel told the judge that it was only subsequent to the first unsuccessful adjournment application that Mr. Sheehan gave instructions to apply for such transfer. It might briefly be stated that on the application reference was made to an article in the Irish Examiner shortly after the incident (something which is of course in itself unsurprising) but it was contended that two passages were of particular significance, viz: –

> "Detectives are also anxious to establish if the recovered gun is linked to other criminal activity including a drive by shooting in the Knocknaheeny area in July 2014"

and;

> "The man injured in that attack knew his attacker, but no complaint was ever made to gardaí"

and, furthermore, that it contained a quotation from a local councillor to the effect that –

> "Sunday's shooting is the most serious in a string of increasingly violent attacks, all linked to one individual, on people across the northside."

Reliance was also placed upon certain radio reporting, the fact of publication of photographs of the appellant and certain Facebook material. The judge indicated that he would warn the jury against viewing the Facebook material.

13. An adjournment application to allow the operation of the so-called "fade factor" was unsuccessful. The lapse of time between events giving rise to the charges and the trial was approximately six months. All the allegedly adverse publicity was dated from May. Facebook material had not been viewed from that time.

14. After refusal of the application garda evidence was called to address the provision of CCTV evidence and, on the face of it, all CCTV material obtained by the gardaí had been furnished or made available for viewing.

15. Reliance has been placed upon DPP v. Joel & Anor. [2016] 2 IR 363 by the appellant. There, the appellants were charged with the manslaughter of the first appellant's mother to put the matter shortly, by gross neglect of her care in circumstances where she suffered from serious ill-health. An application to transfer a retrial from Wexford Circuit

Court to the Dublin Circuit was refused and that refusal was relied upon as a ground of appeal after the appellants' convictions. The report refers to the fact that: -

> "The first trial received significant coverage in the national media. However, the coverage of the trial in the Wexford media can properly be described as blanket coverage. The trial was a lengthy one, taking place over a seven week period and throughout the trial each of the Wexford newspapers provided massive coverage. It is undoubtedly the situation that people pay more attention to media stories that are local to them or in some other ways personal to them. The likelihood is that all of the members of the jury panel would have been exposed to the coverage from the time of the original trial. … The extent of the coverage and the fact that that coverage related to events that had occurred in their own area, in their own home county, meant that the scope for the fade factor to operate in respect of Wexford jurors was limited."

Birmingham P., as he now is, referred to the fact that –

> "This was a case where the facts in issue were very unusual, were particularly sensitive and particularly emotional. As a matter of common sense those who heard about such matters over a prolonged period in an intensive manner were very unlikely to forget."

Most importantly, however, he went on to point out that:-

> "Courts ought to trust jurors to be true to their oath and to decide cases on the evidence they hear in court."

16. One cannot, emphasise the latter factor to strongly and, obviously, this was the view also of Birmingham P. because it is plain from the judgment of the court that the totality of the circumstances were wholly exceptional. Indeed, the gravamen of his decision might be regarded as fairly summed up by this observation of his:-

> "In this case, the issues at stake were so emotional and so sensitive and the coverage had been so massive and so intense that the case for a transfer was a truly compelling one."

17. It was suggested that a direction to the jury would not be observed and that, in effect, they would breach their oaths, despite that there was no reason to suppose that the latter could possibly arise. It is now common for judges to advise jurors to forbear from internet searches. Any consideration of whether or not it was possible to obtain twelve impartial jurors in a given venue must have regard to the size of the pool from which they might be drawn, and in the case of Cork, the electoral register comprises in excess of 400,000 people in five constituencies. In recent years, the Central Criminal Court has sat outside Dublin and dealt with cases without objection or any suggestion of a difficulty in obtaining an unbiased jury, even in cases involving a far higher "profile" (including what might be described, on occasion, as a national "profile") without any concern. Clearly,

every case must not only depend on the venue but the extent of the publicity and the nature of the case.

18. The facts and circumstances in Joel are utterly remote from those pertaining here, even if one were to ignore the vastly larger jury panel. It is long established in our jurisprudence that courts, having given appropriate directions and warnings to potential jurors to self-disqualify or at least bring any concerns to the attention of the trial judge before being sworn, will be sufficient, in general, to ensure that only impartial jurors are ultimately chosen and serve. The judge exercised care to deal with the risk, such as it was, of bias whether actual or objective. In particular, he told the panel about the names of witnesses, lay and garda, the location of the alleged offences and the nature of them with warnings not to serve if they were acquainted with such persons). He invited counsel to give information in open court for the benefit of the panel in that regard, apart from what he said himself. While we need not set out his observations in extenso, he said: -

> "So, Laurel Ridge, off the Blarney Road in the city in or about May 2016. If you know Mr. Sheehan, who you've seen here plead not guilty, or if you know anyone connected with this case, if you know anything about the case, if you know anything about the circumstances of the case, tell me and I will excuse you from jury service. The essential part of a juror's duty is to be objective, not to have anything to do with the case, or opinions about the case, or the people involved in it. In other words, you must be independent of the case. So if you know any of the witnesses or anything about the case, tell me, and I will excuse you from the jury service…"

Shortly thereafter, (counsel having at that juncture referred to a number of witnesses) he referred to the named civilian witnesses and certain garda witnesses, with further reference to other relevant locations. No application was made to him about the efficacy or sufficiency of what he said to the jury panel. No doubt the judge was also influenced by the fact that the population of the city and county of Cork is in excess of 400,000 with a commensurate number of prospective jurors.

19. Significantly, before the jury were sent to lunch, the judge said: -

> "… You know nothing about the case. You were listening to Mr. O'Sullivan [counsel's opening speech was then in progress] but this is the start. Remember, in all cases information unfolds bit by bit and a jury is not to make up its mind until all the facts are in. So you keep an open mind and wait. And also in this and in all cases, it's very important that the jury do not discuss the case, the people in the case, the circumstances of the case, or anything to do with it with anybody who is not on the jury. You can't be sharing information and getting influenced by the outside. It could happen very easily in that, you know, you say I am on a jury, what's it about? And you know it's something about a shooting, and then people start talking to you and once they start talking it's very hard to stop them, and the best way to protect yourself is to say, look, I am on a jury, I cannot talk to you about the case, I cannot have any discussion and stop it there and then don't have any discussion.

I am telling you that now, as it were, at the start when you know nothing about the case and I'll remind you about it as the case goes on at the appropriate time…"

20. An adjournment application was not subsequently pursued on the date of trial, though further unspecified disclosure took place the day before. Experienced counsel had no difficulty defending the case in those circumstances. Reference was further made by the judge to the fact that he would tell the jury (subject to such form of words as might be agreed at the trial itself) to avoid the Facebook page of the radio station in question. In the event he did not do so - counsel for the appellant did not so raise the issue . We see no basis for speculation that those of our fellow citizens who served on the jury and were oath bound in doing so would not have listened carefully to what the judge and the prosecutor said and acted accordingly.

21. We therefore reject this ground of appeal.

Ground ii

The trial judge erred in refusing an application to allow the appellant's legal team to come off record.

22. On the first day of the trial and prior to any evidence having been given, Senior Counsel for the defence made application for permission for himself, junior counsel and their instructing solicitor to come off record. The Learned Trial Judge was informed that the appellant had "lost confidence" in his legal team and no longer wished to be represented by them. The trial judge refused the application and stated that its "timing is doubtful". Upon enquiring of counsel for the defence, the following exchange took place:-

"Judge: What do you say about I directing you and your solicitor to stay in the case and advise him? Otherwise I'll have to go ahead with him being [un]represented?

Mr. Heneghan: I think, Judge, that were – the Court has the power to do, but obviously has the power to do it, but we are of the view that the client having lost confidence in us, it mightn't be the best way to proceed.

Judge: It may not be the best, but it would certainly be better than requiring the man to defend himself, which is the other alternative.

Mr. Heneghan: Well, that's a matter that Mr. Sheehan may wish to address you himself on, that I can't assist the Court in that.

Judge: Very Good. What do you say about --- Mr. Sheehan about defending yourself?

Accused: Your honour, I just – I only got all the evidence, most of the – some of the evidence last night. I'm still only reviewing it. I didn't even have a defence prepared. I'm only in the Circuit Court three weeks.

Judge: Very good.

Accused: I didn't even have a defence prepared and my solicitor – this is the only the second time I saw him, like. They didn't even come down to me this morning or nothing. I wanted to talk to them before the jury was sworn in.

Judge: Very Well

Accused: That's what I'm angry with."

The judge refused the application stating that he did not think it appropriate to relieve the appellants legal team of their responsibilities so late in the case, when a jury had been sworn, and on grounds which were "patently unstateable". He said:-

> "I am not at all convinced as to the appropriateness of relieving you [the solicitor and counsel] of responsibility at this stage, so late in the case, when the jury has been sworn and for the grounds which have been given, they are patently unstateable."

23. The judge decided that the matter should proceed to the extent that in what appears to have been a short period before lunch the prosecutor should open the case, taking the view that Mr. Heneghan SC and his colleagues would have an opportunity to consult with their client over the luncheon adjournment.

24. The matter was revisited after the afternoon adjournment. Defence Counsel informed the Court that the position remained the same and that the appellant had been fully advised of the circumstance but was nevertheless not satisfied to be represented by his then legal team. The trial judge ultimately ruled on the application in these terms:-

> "And the only thing I can read from what you told me this morning is, in effect, a form of bullying by your client. He didn't want the case to go on today, and if he – the case was to go on, he was going to sack you and that's in other words, that's my translation of the lack of confidence. In my view to as is were give into that would be a complete denial of justice and would be wrong for a trial judge".

The appellant submits that it was improper and inappropriate for the judge to effectively coerce the appellant (as he contends occurred) to continue to be represented by a legal team in whom he had stated that he had lost confidence. The appellant had a right to dispense with his legal team and appear in person should he so wished. It is submitted there was clearly no question in this case of the trial judge adjourning the trial so that alternative representation might be obtained. The appellant was aware that if his lawyers were allowed to come off record, he would be required to proceed in person. He nevertheless maintained his wish to dispense with his legal team. There were no compelling reasons to force him to continue to be represented when he did not wish to be and the reasons given by the trial judge for taking such a course were neither legitimate nor based on anything that had arisen during the course of the application. The appellant says that the trial judge took "a particular view" of the appellant and his approach in refusing the application for his legal team to come off record.

25. The respondent submits that at no stage during the application to transfer the trial to the Dublin Circuit was any suggestion made that the appellant had no confidence in his legal team. It is quite clear that instructions had been given by him to bring the application, and that those instructions had been given by him subsequent to the 14th November 2016 when his application had failed: the trial judge, when the application to transfer was refused, requested of counsel on behalf of the appellant, as to whether there was anything else arising, bearing in mind that the matter was listed for trial two days later, and no issue arose.

26. After the jury had been sworn and prior to the application to come off record (an event which we think is material to this aspect of the appeal) Mr. Heneghan SC, counsel for the appellant in the trial court, made an application, having been afforded time within which to consult his client, to the judge to recuse himself, initially at least, apparently, by virtue of the judge's refusal of the application to transfer the trial to the Dublin Circuit. Counsel's submission was made in these terms: –

> "…There was, perhaps, objective bias against the lawyers in the case and indeed against Mr. Sheehan, that's the application. There is another reason given to me, and I am far more reluctant to make this application, but, again, it's on the instructions of my client in terms of perceived bias in that names of individuals who were due to come in the currency of this case may be known to a family member of yourself, judge, arising out of martial arts. That's all I'll say on that matter…"

The judge informed counsel that he knew nothing about the latter topic "Nothing about martial arts, nor anything to do with it".

27. An exchange had indeed taken place between the judge and counsel at the time of the original application pertaining to the size of the jury panel, when in the judge's view that was relevant to the application in question, and about the size of which counsel did not know. He indicated again that he would have thought that the size of the panel would be relevant to any such application and he inferred that it was because of his exchange with counsel (which, on perusal of the transcript seems to be a perfectly normal one about a point legitimately raised by the judge) (the prosecutor was in a position to give certain figures to the judge in that regard) and the judge, in our view rightly, rejected the application. That ground of appeal has now been withdrawn.

28. It was only when the appellant was unsuccessful in his several applications over three days that the application for permission to come off record was made; it bears repetition that when the matter was first listed on the at the sittings in question of the Circuit Court an application was made for an adjournment on a ground pertaining to disclosure, thereafter to transfer to the Dublin Circuit , then and in tandem with the latter a further application for an adjournment to allow the so-called "fade factor" and then the application to the judge to recuse himself; there was some debate as to the opportunity which had been afforded to counsel to speak to his client and issues of disclosure or service of additional evidence. Significantly, this did not give rise to an application for an adjournment by experienced counsel, something which would no doubt have been if

counsel was concerned that late disclosures or service hampered him in the defence, but counsel sought time within which to consult with his client, which was afforded to him. After affording such opportunity Mr. Heneghan's application to "come off record" was then made.

29. When the court sat again in the afternoon, Mr. Heneghan told the judge that he was:-

> "... professionally sound to continue, there's no difficulty continuing. There is no difficulty continuing with me, judge."

And;

> "JUDGE: Professionally, there is no difficulty in you continuing?
>
> MR. HENEGHAN: Yes, I checked with the Bar Council there is no difficulty with them."

Thereafter, Mr. Heneghan indicated that he would continue in the case but stated in respect of the issue of a lack of confidence by the appellant in him that:-

> "And that position seems to be maintained by my client and he is still of a mind that he does not want me, my solicitor or my junior counsel to represent him."

Mr. Heneghan went on to say:-

> "Well, he has worries, as I said earlier on, judge, about disclosure issues. They were genuine worries he has, but they are worries he has. But there was also a fact that he is not at all happy with our representation, for whatever reason, and I am not in the man's mind, that's within him and is for him to say. So that's the position."

Though invited to do so, the judge did not speak directly to the appellant to ascertain his position. The judge then ruled in the terms of aforesaid.

It appears that the appellant's solicitor had been retained when he was first brought before the District Court. One can understand that the judge was somewhat frustrated by the turn of events because, as he said, and all experienced trial judges know that this is the fact, that: -

> "… People wanting to change their minds at the last minute is not unknown…"

Effectively, the trial proceeded in circumstances where the appellant did not wish to be represented by his then lawyers, even though they were prepared to act for him, and indeed on perusal of the transcript did so with competence. No suggestion has been made in this Court that the appellant was dissatisfied with them in the conduct of the defence.

30. The appellant relies upon Burke v O'Halloran [2009] 3 IR 809. There, the applicant (for judicial review) had been represented by a solicitor assigned to him under the Legal Aid

Scheme, but during the course of the trial in the District Court he repeatedly interrupted his solicitor to the point where it seems clear that the latter was finding it impossible to conduct his defence, and effectively, a degree of disruption was introduced into the proceedings by Mr. Burke. As held by Clarke J. (as he then was), however, it became manifest that the applicant wished to dispense with his solicitor and to defend the case in person, something which the learned District Court judge refused to permit in circumstances where the solicitor was at least content, if not desirous of being relieved from responsibility. The decision of the District Court (whereby Mr. Burke was convicted of certain offences) was quashed on the grounds that legal representation, as Clarke J. put it could not be "imposed on parties who do not wish to have it" in circumstances were the corollary of a right to legal representation, he had held, is an entitlement to conduct one's own defence; Clarke J. envisaged circumstances, however, that might be described as compelling reasons might give rise to a legitimate refusal to an accused person's application to dispense with the service of his lawyers and to conduct his defence in person.

31. In Stephens v Connellan [2002] 4 IR 321, though certain convictions were quashed when the applicant for judicial review had been required to proceed at trial without legal representatives – he had apparently retained four different solicitors over a period of approximately a year, the last of whom had withdrawn shortly before the day of trial in the District Court. For the present purpose the salient part of the judgment of McKechnie J. is as follows: -

> "In my view, by refusing the request for an adjournment and by proceeding with this hearing, the resultant trial was not one held in due course of law and consequently the first respondent [the District Court Judge] by firstly embarking upon and thereafter by continuing with the trial acted without jurisdiction. The convictions which followed must in these circumstances be quashed. In so concluding I am not under any circumstances implying that an accused person reluctant to face trial, could by self-induced means over a period of time, achieve repeated deferments of his case. If it occurred, that would be a personal abuse by him of his right to representation, which in turn would be a highly influencing factor in any court's decision to favour the State's rights to press on with the prosecution. Nothing remotely akin to that situation exists here. Each case evidentially must therefore be looked at in the light of its own facts."

32. In the present case the position is somewhat more equivocal than in Burke. Mr. Heneghan SC and his colleagues continued in the case, having sought advice from the Bar Council, so as to ascertain the appropriate course ethically. The court was not told on what basis they were able to continue, though their client did not wish to continue their retainer and we can only surmise that they conceived that it was appropriate for them to do so, the trial judge having decided to refuse their application to come off record. Mr. Heneghan was desirous that the judge should hear his client's position but at that stage the judge appears to have decided how he would proceed and inferred that what was occurring would have been obvious to the appellant. In the submissions before us the

proposition is advanced that the consequence of relieving the appellant's lawyers of their responsibilities would not have been, say, an adjournment but would merely have been that he would have proceeded to defend the case in person – indeed in those submissions they have effectively disclaimed the proposition that the matter might have been adjourned but explicitly stated that it would have been obvious to the appellant that the case would have been proceeding and that he would have to deal with the matter himself should he dispense with his lawyers.

33. In truth, every experienced criminal lawyer or judge would not have been surprised in the least if, the then lawyers having withdrawn or been dismissed, the appellant would have then sought an adjournment to retain new lawyers. The suspicion in those circumstances is of course that the dispensation with lawyers who have been acting for a party for some time is a tactic to procure an adjournment, earlier steps to postpone the trial having failed. When applications are made at the last moment, as here, trial courts, and, indeed this Court, must be astute to avoid a situation where the dismissal of lawyers, whether accompanied by a desire or intention to retain new lawyers or not, is used as a tactic to seek an adjournment – this is merely the reality which pertains in the criminal courts. Trial judges are in a particularly strong position on applications of this kind to judge the run of the case or to form conclusions based on the sequence of events, as here.

34. Accordingly, trial judges may find themselves in considerable difficulty. They will be legitimately anxious for trials to proceed and will find it hard to envisage why experienced and competent lawyers who have acted for an accused person for some time (during which period, of course, if the accused person became dissatisfied he would have an opportunity to change lawyers) might no longer be acceptable at the eleventh hour . There will of course be circumstances where lawyers will find it necessary to withdraw from the defence or may find that it is inappropriate professionally to continue to act, but those factors do not arise here.

35. We feel that the trial judge may well have been correct in taking the view that having regard to what had passed before the application by Mr. Heneghan to withdraw from the case, and drawing on his very great experience, the appellant's desire was a tactic to procure an adjournment of the trial – on his assumption that he would not have to proceed with the case if he was unrepresented, even of his own motion. We do not think that it was one of those rare situations, however, where the judge could refuse to permit the appellant to discharge his solicitor and counsel as he has an undoubted right (though not absolute) to act in person. We think that in cases of this kind where a judge has permitted counsel and solicitor to withdraw on being dismissed by their client it will in general be permissible for the judge to proceed with the trial all else being equal. We think that he should inform the accused that dismissal of his lawyers will not in itself be a reason for an adjournment and that even if he dispenses with his lawyers the case will proceed, thus allowing him to make a decision as to whether or not he will persist in his desire to do so. It seems to us that the obligations on the State to provide legal aid to indigent persons as long established or, indeed, to afford them their entitlement to representation, whether by virtue of the State's Legal Aid Scheme or otherwise in criminal

matters, is not an open ended one. Persons may choose their own lawyers. If they wish to change their lawyers they may in general do so but if a party dispenses with his or her lawyers whether with a view to seeking new ones or otherwise at a stage which would, say, prevent a trial from proceeding a judge would in general have no obligation to adjourn the matter but would be entitled to proceed with the trial. It is all the more so where competent lawyers have been acting for an individual for a lengthy period (in the present case some six months); if a party were to take the view that the lawyers were not competent or if personal relations broke down he would have ample opportunity over such a period to make an informed judgment but there would come a point where it would simply be too late for him, if he decided to dispense with them, to obtain new ones who could properly act. This is due to the obligation of the State to provide representation and the duty of a court, conducting a trial in due course of law, on occasion, to proceed with the matter even where the accused is unrepresented.

36. We think it might be helpful to summarise the approach which would regard as best practice (subject by definition to the facts of each case):-

(1) If an application of the present kind is made the judge should make a direct enquiry of the accused to confirm that he wishes to dismiss his lawyers and defend himself in person.

(2) He should be explicitly told that the fact that he dismisses his lawyers will not, of itself, entitle him to an adjournment but that he will not, of course, be prevented from making an application for an adjournment on the same basis as one might be sought by his lawyers, if he had them.

(3) He should then be afforded an opportunity to consider his position as we know that in many cases having done so an accused person will be quite content that his existing lawyers act for him.

37. We wish to make clear, and reiterate, then each case is fact specific and that what we have said are merely general guidelines. No particular form of words need be used by the judge to convey the substance.

38. Even though we think that the judge fell into error in failing to permit the appellant to appear in person we do not believe it to be an error of substance in the circumstances. This ground of appeal is a good example of where the proviso under s.3 of the Criminal Procedure Act, 1993 can properly be applied absent any other error (and there is none). It states:-

"3.—(1) On the hearing of an appeal against conviction of an offence the Court may—

(a) affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred),"

No suggestion has been made that the defence was not conducted with competence, that there was any failure to follow the appellant's instructions or that any breakdown of communications occurred. The appellant makes no criticism as such of the lawyers who acted for him beyond the limited one on the day when the application to come off record was made, being no more than an expression of annoyance that they had failed to visit him on the morning of the trial. We need hardly say that having regard to the experience of counsel and solicitor, the fact that they did not seek an adjournment because of a difficulty in defending the case on the merits, due, for example, to some late disclosure there can be no question or any suggestion that the defence was prejudiced by the manner in which the trial proceeded from the date of the return.

There was accordingly no impact on the trial per se arising from the refusal of the application. The issues raised on this appeal as to the merits have no connection with the judge's decision.

Ground iii

The trial judge erred in refusing to discharge the jury.

39. The appellant submits that the case should have been withdrawn (sic) from the jury in light of three issues which arose during the trial which both individually and cumulatively, rendered it unfair:

I. There was reference made during the opening speech of the prosecution to something in the nature of an ongoing feud between the appellant and the Cunningham family. There was however no evidence of any such feud or dispute given by any witness at trial.

II. On the third day of the trial, the wall by the entrance to the courthouse where the jury entered, was prominently "grafittied" (sic) with a message disparaging of and allegedly highly prejudicial to the appellant.

III. Later on that day, an intruder entered the court room and made a loud interjection which was highly disparaging of and prejudicial to the appellant.

We will deal with Grounds I and II together but first we make a number of general observations.

40. Geoghegan J. addressed the general rule on applications to discharge juries. in the case of DPP v Mulder [2007] 4 IR 796, where he said:-

> "The court is of the opinion that the issue must be decided in the light of the right to a fair trial guaranteed by Article 38 of the Constitution. The right of an accused person to be tried by a jury free from any suspicion or taint of bias is one of the cornerstones of the criminal justice system."

We will refer to that authority below in greater detail.

41. The appellant submits that it is clear from the foregoing, that the criteria to be applied are objective and require a consideration of whether a reasonable man possessed of all the material facts might have a reasonable apprehension that the appellant would have been able to receive a fair trial. It is submitted that in the circumstances of this case any such reasonable observer could not but have been left with such a reasonable apprehension of unfairness. The jury had, through a combination of the three factors complained of, been exposed to numerous suggestions to the effect that the appellant was somebody embedded in crime, perhaps of an on-going and organised nature and had become the subject of a campaign, which was clearly designed to make them aware of that fact.

42. The respondent submits that the factual scenario of the present case cannot be compared with that in DPP v Mulder, whereby it was complained that a brother of the deceased in a murder trial was intimidating members of the jury. It is submitted that the graffiti and the intervention of what appeared to be a drunken man would not support a purported concern that jurors may have been "intimidated" and unable to fulfil their oath to try the case fairly on foot of the evidence; no reasonable person would consider that these facts would in any way have the result that a jury could not properly and fairly try the case.

I. Criticism of opening speech

43. In the first instance under this head the appellant makes reference to prosecution counsel's opening speech whereby he said: -

> "… Now, whatever way one wants to describe it, there was a dispute going on between – and this is what the prosecution will say to you – there was a dispute going on between Gavin Sheehan and members of the Cunningham family, [as appears to be the fact] and in the evening of the Saturday the 14th of May an event occurred at Dino's Chipper in Blackpool… About seven o'clock in the evening and an event took place whereby Gavin Sheehan came across Dylan Cunningham who would be a son of – in the Cunningham family … and a punch was thrown. Now, later during the course of that night a sequence of events occurred. Those events involved that at about, it appears, sometime just after midnight, a sliding door at the front of … the Cunningham family home, a windowpane smashed, by persons unknown. Not long afterwards, maybe 20 minutes later, windows were smashed in the home of Sheehan family …" (our emphasis).

44. Clearly, anything said in counsel's opening is not evidence and it is necessary to insofar as reference may be made to portions thereof to ensure that they are taken in context. Having elaborated on relevant principles of law and the manner in which a trial proceeds and the role of the various parties thereto, the prosecutor turned to the evidence but before entering upon any detail he had this to say:-

> "Now, at this point in time, I have to give you a little summary of the case, so to speak. Now what I am about to tell you is not evidence and it's not evidence for a very simple reason that I wasn't there. I personally didn't see any of these things. I can't tell you what happened. I didn't see it, I don't know. But to give you some

idea of what we are going into in terms of the trial, I'll give you a brief outline of what the evidence – the State expects will be adduced over the course of the next few days, so you have some idea of what exactly we're talking about."

and;

"… You deal with any case on the evidence you hear in court and nothing else. The evidence in court will be witnesses who will go into that witness box there, they will give their evidence to you, they'll be asked questions by both sides and you hear what they have to say…"

45. Insofar as any criticism is made, accordingly, of counsel's speech in opening the case because of a reference in it to anything of which evidence was not adduced, the jury was aware that what counsel said was not evidence, that insofar as he referred to the evidence it was clear he was referring to the evidence which he expected to adduce. This is the time honoured form in which counsel refers to evidence when opening a case.

46. There was evidence of an assault by the appellant on Dylan Cunningham in the presence of Ciara Sheehan at Dino's Chipper (from her – and it matters not that Mr. Cunningham said nothing about it himself in evidence contrary to what the appellant submits) so there could be no complaint on behalf of the appellant that counsel in opening the case said something in this regard of which evidence was not adduced. The height of the appellant's complaint, accordingly, must be that counsel referred to a "dispute" between the Cunningham and Sheehan families, extending to a reference to the fact that on the night in question each of them respectively were the victims of criminal damage to their homes. Evidence of these facts was given, however if and insofar as it might be contended that the prosecutor may have overstepped the mark, so to speak, it was to state that there was "a dispute going on between Gavin Sheehan and members of the Cunningham family"; in any event, we do not think he did so, as a fact. There does not appear to be any primary evidence of this fact but it appears that an inference is capable of being drawn to this effect. No one could doubt the admissibility of the evidence as to the criminal damage as part of the background and circumstances of the shooting which lies at the core of the case. We cannot accept that having regard to the context counsel's speech in which the supposedly offending form of words was used could properly be the subject of a discharge, even if the criticism is justified. Associated with this aspect is the evidence of what occurred earlier (on the evening before).

47. Needless to say, there could be no basis for a discharge by the subsequent receipt of admissible evidence in accordance with what was originally opened to the jury and, in particular, evidence as to the assault earlier in "Dino's". No objection was taken to the receipt of that evidence given by Ciara Sheehan, an eye witness to the event on the evening in question (the shooting taking place after midnight) – rightly so since there was no basis for doing so. We think that the judge was right when he held that such evidence was admissible in accordance with the principles elaborated in DPP v McNeill [2011] 2 IR 669 and we think it of assistance if we refer to one of the salient passages in the judgment of Denham J. (as she then was) as follows: -

"[49] Background evidence may be admitted to give a jury a relevant picture of the parties in the time prior to the offences charged. Background evidence may be admitted because if it were not admitted it would create an unreal situation. It arises in situations where if no background evidence was admitted, the evidence before the jury would be incomplete or incomprehensible. Background evidence is evidence which is so closely and inextricably linked to the alleged offences and/or the relations between the relevant persons so as to form part of the body of evidence to render it coherent and comprehensible. Whether or not background evidence is to be admitted is a matter to be determined by the trial judge in all the circumstances of the case. The fact that the evidence tends to show the commission of other crimes does not render it inadmissible. The test to be applied is that of relevancy and necessity.

[50] In considering whether background evidence may be admitted, relevant considerations may include:-

(i) consideration of whether the background evidence is relevant to the offence charged;
(ii) consideration of whether background evidence is necessary to make the evidence before the jury complete, comprehensible, or coherent. Whether without such background evidence the evidence may be incomplete, incomprehensible or incoherent;
(iii) consideration of evidence of the commission of an offence with which the accused is not charged, but that is not of itself a ground for excluding the evidence;
(iv) consideration of whether the background evidence may be necessary to show the real relationship between relevant persons.

The test to be applied by the court is whether the background evidence is relevant and necessary. The test is not that it would merely be helpful to the prosecution to admit the evidence."

48. The following day it was sought to rely upon the fact that such evidence was inadmissible inasmuch as there was no charge of assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act [by implication, pertaining to the assault in question]. It was at that stage entirely too late to object to the evidence or seek the discharge of the jury either because it was referred to in the opening speech or given in evidence without objection, apart altogether from the fact that there was no basis for doing so on the merits.

49. We think that the evidence as to the assault was an essential part of the background and circumstances so to render the entirety of the events of the evening in question explicable to the jury so that they might have what one might describe as a full picture of the relationship between the protagonists and the background and circumstances to the shooting at the core of the case. We think that the judge was right in his approach.

(ii) and (iii) graffiti and interruption in court

50. The appellant submits that the case should have been withdrawn from the jury in light of two other issues which arose, which both individually and cumulatively, with the first, which rendered the appellant's trial unfair. On the third day of the trial, the wall by the entrance to the courthouse where the jury entered was "prominently" graffitied with a message disparaging of and highly prejudicial to the appellant, and, later on the third day of the trial, an intruder entered the court room and made a loud interjection which was highly disparaging of and prejudicial to the appellant. The appellant submits that the prejudicial effect of these statements and interferences meant that the case ought to have been "withdrawn" from the jury, (by which we assume he means that the jury ought to have been discharged) such reasonable observer could not but have been left with such a reasonable apprehension of unfairness. The jury had been exposed to numerous suggestions to the effect that the appellant was a person embedded in crime, perhaps of an on-going and organised nature and had become the subject of a campaign, which was clearly designed to make them aware of that fact.

51. The incident involving the graffiti in itself gave rise to an application to discharge the jury and when later on the same day the word "Rat" was shouted in court was the basis for a third application for such discharge to be made. It has also been submitted on behalf of the appellant that the three events grounding the several applications should be taken cumulatively, and that so taken, the judge erred in refusing the (last) application. It is further submitted that in dealing with the application to have the jury discharged, the trial judge adopted a flippant and capricious attitude by expressing the view that the Counsel's application was bordering on the "pathetic", despite the fact that the comment was clearly audible and had in fact caused him to immediately tell the jury to retire. It is submitted in the circumstances that the judge had prejudged the issue and had set his mind against discharge from the outset. It is submitted that he did not apply an objective test to the situation as required by the authorities above cited and that if he had done so his decision could only have been different. It was submitted that they were suggestive of involvement by the appellant in "longstanding criminality of a subversive or perhaps 'gangland' variety" which could not but have created a "real risk" of prejudice. Furthermore, it was submitted that the latter events "created around the trial" an intimidating and sinister atmosphere giving rise to a situation where the jury may have felt either individually or collectively nervous or uneasy to the point of being unable to impartially carry out their functions. One might add at this stage that the judge was not asked to say anything to the jury about what we have described as the latter events when charging them or at the time that they had occurred, as one might have expected would have been appropriate. The appellant relies upon Mulder, but it is vital to remember that each case where it is sought to discharge a jury, or there is criticism of a trial judge's refusal to discharge, must be based on the facts of the case.

52. No one doubts the general principle that an objective test must be applied by the judge as to whether or not a reasonable person would have a reasonable apprehension that the accused would not in the circumstances receive a fair and impartial trial. One must of course proceed upon the basis that such a person is well informed as to the trust

reliability of jurors, including their capacity to exclude from their minds prejudicial material. In Mulder the factual situation was utterly different from that in the present case. It was helpfully summarised by Kearns J. (as he then was) in DPP v Lonergan [2009] 4 IR 175, so far as the facts were concerned, in the following terms: -

"(a) at the arraignment in front of the jury panel the deceased's brother shouted from the public gallery;

(b) at that stage the judge questioned the deceased's brother in relation to the shouting and he stated that it was just his reaction at seeing his sister's husband who had allegedly strangled her;

(c) on the third day of the trial, prosecution counsel applied for an order excluding the deceased's brother and his wife from court while the evidence continued, due to concerns by the gardaí as to the behaviour of the deceased's brother and his wife in court;

(d) the note from the foreman of the jury stated that the deceased's brother was making himself "familiar" with some members of the jury;

(e) after the trial judge's request to the foreman to ascertain the correct facts, the foreman addressed the court and referred to the outburst at the arraignment by the deceased's brother, and stated that while the jury were waiting in the corridor outside the court, the deceased's brother borrowed one of the juror's newspaper and read out an article referring to the outburst indicating that this was him;

(f) the foreman stated that the juror felt that the deceased's brother was familiarising himself with him and at the end of that day he greeted the juror with a smile and a nod;

(g) he further stated that the juror in question felt somewhat intimidated and uncomfortable;

(h) when the juror was questioned by the judge there was a conflict in his answers from that which the foreman had reported."

53. Reliance is also placed on a number of English authorities which we consider to be of little assistance. In DPP v Lawson [2007] 1 Cr. App. there, in the course of his summing up, the judge inadvertently made reference to evidence which he had earlier in the trial held inadmissible and which, in a case involving conspiracy to import controlled drug or the reference to the fact that one of the persons allegedly involved had pleaded guilty. The judge, when refusing the application rejected "any possibility" of prejudice and in any event took the view that if there was such a possibility it could be cured by an appropriate direction to the jury: it was submitted that the judge was wrong in both respects and in particular it was contended that the rule was that: -

> "Where a matter is capable of more than one reasonable interpretation, the judge should approach the matter on the basis of 'the most prejudicial' interpretation the jury might put upon it."

On appeal, the latter proposition was rejected and it was held that the appropriate formulation of the rule as to whether or not a jury should be discharged having heard inadmissible prejudicial evidence was:-

> "… Whether a fair minded and informed observer would conclude that there was a real possibility or a real danger, that the jury would be prejudiced against the defendant by wrongly admitted prejudicial information."

54. We think that in any event, Lawson involved reference by the judge to evidence previously held inadmissible by him, a far more significant thing than vulgar abuse of an accused. The circumstances in which the latter might give rise to a discharge must be rare indeed having regard the trust which can be placed in juries in circumstances where the constitution mandates a jury trial. Since there is no implication that it may have occurred here we pass over the fact that it has been known before now for individuals to attempt to procure mis-trials by discharges of juries by themselves causing supposedly prejudicial incidents and one need hardly add that care must be taken to avoid any suggestion that such a thing would be tolerated.

55. We might briefly refer also to R v Boyes [1991] T.L.R, in which, during the charge, in a trial for offences of rape and indecent assault the complainant's mother shouted from the public gallery: -

> "When it's going to come out about the five other girls he has attacked."

The Court of Appeal in England took the view that –

> "… One could hardly think of any more damaging and prejudicial evidence being taken to the jury room."

Again, this, on the facts, bears no similarity to the present case.

56. We accordingly reject this ground of appeal.

Ground iv

The trial judge erred in admitting evidence purportedly from a mobile phone in circumstances in which the provenance and integrity of the relevant data had not been proven.

57. It is submitted that the trial judge erred in ruling admissible evidence supposedly downloaded from a mobile phone, attributed to the appellant, in circumstances in which the prosecution plainly accepted that they were unable to prove from where the data originated, or the manner in which it was generated. The data in this case purported to be communications sent via "Facebook messenger", an internet messaging application. On the fifth day of the appellants trial, the prosecution sought leave to introduce into evidence two documents apparently depicting messages from the above mentioned "app",

which were purportedly recovered from a phone, located in the car in which the appellant had allegedly been a passenger on the night of his arrest – though one only was ultimately introduced. The messages referred to "fighting" between the appellant and the Cunninghams and included a message in the terms "I'm packing well". The prosecution wished to attribute the latter in particular to the appellant. Counsel for the defence objected to the introduction of this evidence and the prosecution called Detective Garda Aidan Forrest to explain, in the absence of the jury, how he had downloaded the data in question. In the course of the voir dire he stated that he had used a so-called "XRY" facility to download material (the pages were photographs of what could be seen on the phone). Under cross examination he was asked how he could verify the time at which the messages were sent. He stated that the indication of the time appearing with the messages actually admitted, "Saturday 10.36pm", was inputted by the Facebook messenger app. He accepted that he could not prove or put evidence before the court of how that app operates and agreed that he had not sought to contact Facebook with a view to advancing the situation. He accepted also that he could not prove in any way who had sent the messages to the phone analysed nor who had sent the replies. He simply stated that the replies had been sent from the phone, though he did not expand on how he knew this to be so. It was submitted on behalf of the defence that the in light of the fact that there was no proof as to how the messages were generated nor from where or from whom they emanated, that they should accordingly be excluded. It was pointed out that there were means of providing better and more robust evidence of such matters (which may or may not be correct) and that such procedures were not carried out. The trial judge refused the application in the following terms:-

> "All right, very good. There are certain discrepancies in the absolute proof in this case, there's no doubt about that, and I accept what Mr Heneghan says, that it would be possible to be more definitive in relation to the time, had one accessed Google or one of the other providers. However, there is evidence that this phone was found in the car on the side from which the accused emerged from the car, even though there were others in the car at that time. There is evidence that the phone was looked at. The guard can be examined on that, but because of the specific references to "Gav" and the responses from on those queries and given the fact that there is evidence that he was the only Gav in the car, I will allow those two pages."

58. The appellant submits that the ruling was incorrect, in circumstances where it was accepted by the prosecution that there was no proof, or even evidence, of how the messages came into existence, what time they were sent, or who was communicating in them. Such evidence was unproven and clearly inadmissible. Furthermore, by placing such evidence before the jury in such a manner, the prosecution was inviting them to speculate which, it was submitted, was not permissible.

59. During the voir dire as to the admissibility of the material in question there was some debate about the fact that a day and time appeared on each of the items which at that time the prosecutor effectively sought to put in evidence. The proposition seems to have

been that since such day and time emanated from Facebook by some unknown means (but one which was, or at least assumed to be, computerised) at least the time, if not the whole of the contents could not be given in evidence in the absence of "authoritative evidence to describe the function and operation of the computer". The appellant relied upon DPP v. A. McD [2016] 3 IR 123 in support thereof. Here it was held that computer generated information where there was no human intervention could be given in evidence provided that there was authoritative evidence to describe the function and operation of the computer.

60. In A. McD, one of the issues in debate was the admissibility of certain CCTV footage. It was contended that effectively CCTV footage was inadmissible as real evidence without "authoritative evidence to describe the function and operation" of the equipment by analogy with the necessity for such evidence where it was the product of a computer (such as a printout) which was sought to be put in evidence. Obviously, in the case of a computer, what is produced could ultimately be the product of the human mind and hence hearsay.

61. DPP v Murphy [2005] 2 IR 125 is a classic example of the rule. There, it was sought to put into evidence telephone records which purported to establish that communication had taken place between certain mobile phones and the locations thereof, by reference to the places where what might be described as communication masts for the transmission of mobile phone communications. This information was the product of a computer and human intervention did not arise. "Authoritative evidence to describe the function and operation of the computer" was accordingly required. It is sought to draw an analogy between the telephone evidence and, that dealt with in, inter alia, in A. McD.

62. No one could doubt but that the phone itself is a piece of real evidence. The appellant's proposition, accordingly, must be that the contents thereof (whether visible to the naked eye without the use of XRY equipment or otherwise) cannot be given in evidence; no suggestion appears to have been made that the user of such XRY equipment raises any issue of principle and in any event we think that there is no distinction between what one might call reading the contents of a phone which can be seen with the naked eye or with the use of such equipment to download the contents and view it with the naked eye thereafter.

63. The position here, however, as can be seen is quite different. Whether the contents of the phone is downloaded with the assistance of such XRY equipment or otherwise (with the possible exception of a time or day – depending on the source of that information) in the present case the text was simply just and ultimately, of course, was analogous to typed material on a word processor or, indeed, to handwriting. Mere examination of the physical exhibit disclosed the text. The law pertaining to proof of the product or output of a computer without human intervention has no relevance. As it happens, the only time which appears on the material put before the jury was a time which was inserted by the operator of the mobile phone and as described as being incorrect: it was plainly of no significance one way or the other.

64. It is difficult to see how there could be any circumstances in which the prejudicial effect of the contents of the phone could outweigh its probative value. We reject this contention.

65. We therefore think that the learned trial judge was right to admit the evidence. We accordingly reject this ground of appeal.

Ground v

The trial judge erred in misdirecting himself as to the law relating to adverse inferences arising from the utilising of s. 18 and 19 of the Criminal Justice Act, 1984 as amended.

66. The Prosecution sought to put into evidence the contents of a number of interviews conducted with the appellant whilst he was in Garda custody. In the last of these interviews the provisions of ss 18, 19 and 19A of the Criminal Justice Act, 1984 had been invoked. Objection was taken by the defence to the admission of that interview into evidence, in circumstances in which the prosecution intended to invite the jury to draw inferences adverse to the appellant therefrom. The trial judge acceded to the application to exclude certain questions pursuant to s. 19 of the Act. However, as regards certain questions and answers which were asked of the appellant utilising s. 18, he refused the application and permitted that evidence to be adduced. This provision is as follows:-

> "(1) Where—
>
> (a) a person is arrested without warrant by a member of the Garda Síochána, and there is—
>
> (i) on his person, or
> (ii) in or on his clothing or footwear, or
> (iii) otherwise in his possession, or
> (iv) in any place in which he is at the time of his arrest
>
> any object, substance or mark, or there is any mark on any such object, and the member reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of the offence in respect of which he was arrested, and
>
> (b) the member informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark, and
>
> (c) the person fails or refuses to do so,
>
> then if, in any proceedings against the person for the offence, evidence of the said matters is given, the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he could lawfully be convicted on that charge) may draw such inferences from the failure or refusal as appear proper; and the failure or refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any other evidence in relation to which the failure or refusal is material, but a person shall not be convicted of an offence solely on an inference drawn from such failure or refusal.

(2) References in subsection (1) to evidence shall, in relation to the preliminary examination of a charge, be taken to include a statement of the evidence to be given by a witness at the trial.

(3) Subsection (1) shall apply to the condition of clothing or footwear as it applies to a substance or mark thereon.

(4) Subsection (1) shall not have effect unless the accused was told in ordinary language by the member of the Garda Síochána when making the request mentioned in subsection (1) (b) what the effect of the failure or refusal might be.

(5) Nothing in this section shall be taken to preclude the drawing of any inference from a failure or refusal to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.

(6) This section shall not apply in relation to a failure or refusal if the failure or refusal occurred before the commencement of this section."

67. While the appellant was being interviewed, members of an Garda Síochána questioned him about the CCTV footage from his home and the telephone found in his car. These provisions have been considered in a number of instances and the leading authority in respect of the provisions of s.19 is DPP v A. McD., as referred to above in another context. This is of assistance here because s.18 is in precisely the same terms as s.19 save that the former pertains, as appears therefrom to objects, substances or marks, whereas the latter pertains to presence at a particular place; though is not in theory direct authority on the present issue the reasoning may properly be applied. In fact, in A McD the then leading authority on the provisions of s. 18 which was DPP v. MacCarthaigh [2015] IECA 234 was approved and relied upon when the court was dealing with s.19; that decision of the Supreme Court post-dated the trial. We think that the principles relevant when one is to decide the lawfulness of the invocation of the present provision, and the receipt in evidence accordingly of the answers or reactions (including the absence of an answer) was summarised in A. McD by McKechnie J. in the following terms (para. 85):-

> "There are several conditions set out in the full section which must be satisfied before its provisions can be invoked. The section also lays down a number of other safeguards, such as that one cannot be convicted of an offence solely or mainly on the inferences so drawn (section 19(2)). Section 19(3) provides that subsection (1) shall have no effect unless the accused was told in ordinary language what the effect of the failure or refusal to account might be, and was informed before such failure or refusal that he had the right to consult a solicitor and that he was afforded an opportunity to so consult before the failure or refusal occurred. Moreover, section 19 can have no application unless the interview process is being electronically recorded, as it was in this case. None of these points or factors, however, are in dispute on this appeal, with the single issue being whether or not

the answers given in the third interview on the 19th/20th August, 2011, were such that the section could not be lawfully invoked against the accused in the last of the interviews conducted during his re-arrest and detention in November of that year. In other words, in light of such answers, could it be said that the accused had, within the meaning of the section, failed or refused to account for his presence as was demanded. Accordingly, this issue would seem to require some evaluation of what is an appropriate level of engagement so as to prevent the section from operating against an accused person."

68. The core proposition of the appellant herein is that inasmuch as the appellant had been questioned about the position of the firearm in the second interview he had in fact given "an account, being an account which in the circumstances at the time clearly called for an explanation from him or her when so questioned…" and having been shown the CCTV footage from his home on the evening and in or about the time alleged to be relevant. It was submitted that the answers actually given subsequent to the invocation of the provision, to quote the appellant's submissions, "clearly recall the account given in his previous interview when he identified the item apparently visible in his hand on the CCTV shown to him, as a knife or an imitation firearm". It was submitted that inasmuch as the provision is applicable only where a suspect fails or refuses to give an account that it could not be relied upon nor, consequently, could any part of what was said in response. Questions extended to an enquiry about the fact that he was seen on such CCTV footage apparently searching in a wheelie bin - the tenor of the earlier interview so far as that was concerned being to the effect that the appellant was searching for a firearm.

69. The facts bear a resemblance to A.McD. That case was a prosecution effectively relating to the arson of a motor car in the car park of an apartment complex. Following his arrest and detention for the investigation of the offence the accused was interviewed by the gardaí on three occasions. He exercised his right to silence during the first and second interviews. Subsequently he was re- arrested, pursuant to a warrant issued by the District Court, for the further investigation of the offence in circumstances where additional evidence was available to the gardaí and in particular certain CCTV footage of the event and the result of a forensic test. For these reasons he was questioned in what McKechnie J. described as a "much more specific" manner than during the first period of detention. When the gardaí interviewed him for the third time (in that second period in custody) they invoked the provisions of s. 19.

70. In the present case, the invocation of the provisions of s.18 in relation to the firearm and the telephone are somewhat different. In relation to the first it is contended that questions had been asked of the appellant concerning it, objectively speaking, was because the gardaí did not like "an account as given, or because they do not regard it as satisfactory, or because they do not think it sufficiently explains the person's presence at that location…". We think that the law pertaining to s.18 is stated by McKechnie J. in the following terms:-

"Neither in the express language of the section nor in the judgment of the CCA in Devlin is there any reference to an account needing to be coherent or rational, or any suggestion that an account which is demonstrably false and misleading shall be regarded as a non-account. Notwithstanding that, it seems to me that if this statement of the CCA is to be taken literally, such that any account would be sufficient to prevent the application of sections 18 and 19 of the 1984 Act, it could easily become effortless for an accused person to circumvent the operation of those provisions. It surely cannot be the case that a person being investigated in respect of an arrestable offence can nullify the operability of this statutory provision by simply giving any manner of account, however plainly unrelated or potentially farcical it may be. To hold otherwise would be to enable such a person apprised of this fact to void the provision of its utility. It is equally apparent, however, that the views of the investigating gardaí cannot be determinative of whether an account has or has not been given for the purpose of the section. They cannot seek to invoke its terms simply because they do not like an account as given, or because they do not regard it as satisfactory, or because they do not think it sufficiently explains the person's presence at that location. Furthermore, the issue of credibility is not for them. Therefore the interviewer cannot be arbiter in that provision. However, it must be the case that a minimum level of plausible engagement is required before an account can satisfy the requirements of section 19 of the 1984 Act. What that necessarily will be will involve a consideration of the entirety of the circumstances presenting in each case."

In the second interview conducted with the appellant herein, (being that relevant in the present, immediate, context), the following exchanges took place:-

"Q: At 00.16 on your CCTV system you can see you in the driveway of your house standing next to the blue Almera car, gates closed behind you and you have a silver handgun in your hand, Is that correct?

A: No

Q: What did I get wrong?

A: It's probably a knife, I don't know what it is.

Q: In the shape of a gun?

A: You must be wrong

…

Q: What was it?

A: A knife or an imitation gun

Q: Why did you wrap it up in a hood and place it in the wheelie bin?

A: I didn't wrap anything up

Q: Why did you put the gun in the wheelie bin?

A: I had no gun. All I had last night was drink

Q: At any stage did you open the wheelie bin?

A: I did I had vodka in it.

…

Q: So you then went looking for your firearm/handgun, but you couldn't find it.

What happened then? Lost the plot; turned your bin upside down. Is that right?

A: I was looking for a bottle of vodka

…

Q: What did Seanie think when you were showing him the gun in the window?

A: I was showing him a hook knife

Q: You know were not making this up

A: I shot no one

Q: Do you want to tell us where you left the handgun? A child could pick it up and could cause serious injury to itself or another person.

A: I had no chrome gun. I'm no flighty Thompson."

71. The following are the relevant portions of the seventh interview, in the course of which questions were asked after the invocation of section 18:-

Q: In relation to section 18 of the Criminal Justice Act 1984, as amended by section 28 of the Criminal Justice Act 2007, I am now asking you, can you account for the possession of a firearm by you at 7 Laurel Ridge, Shanakiel, Cork, at approximately 00.16 hours on the 15th May 2016, which I believe is linked to your involvement in the unlawful possession of a firearm at 37 Hollywood Estate, Cork on the 15th of May 2016.

A: I had no firearm at my address, you see what you want to see

Q: In relation to section 18 of the Criminal Justice Act 1984, as amended by section 28 of the Criminal Justice Act 2007, I am now asking you, can you account for the possession of a firearm by you at 7 Laurel Ridge, Shanakiel, Cork, at approximately 01.00 hours on the 15th May 2016, which I believe is linked to your involvement in

the unlawful possession of a firearm at 37 Hollywood Estate, Cork on the 15th of May 2016.

A: I have no reply

Q: In relation to section 18 of the Criminal Justice Act 1984, as amended by section 28 of the Criminal Justice Act 2007 and I'm now asking you to account for why you left 7 Laurel Ridge with this Firearm in your possession at approximately 1.07 am on the 15th of May 2016.

A: I had no firearm

Q: You have been shown an exhibit consisting of conversation streams which were downloaded from a mobile phone seized as part of this investigation. I, Detective Garda Pat Condon, wish to inform you that it is my reasonable belief that this phone and the conversations contained therein are conversations of a dialogue that you had with a third party on the night of the 14th May 2016 and that these conversations are consistent with and attributable to your participation in the commission of the offence for which you are arrested and detained. It is the intention of the gardaí to formally invoke section 18 of the Criminal Justice Act 1984, as amended by section 28 of the Criminal Justice Act 2007. What is meant by the phrase "Im packing well"?

A: No comment

Q: I suggest to you that the term refers to and is a colloquial street term for the possession of a firearm

A: No

Q: If it doesn't refer to possession of a firearm as asserted could you please explain to me what your interpretation of its meaning is?

A: No comment

Q: I wish to ask you if reference to 'Gav' dialogue stream [sic] a reference to you?

A: No comment."

72. What is or is not an account or a failure or refusal to give one must be a question of fact judged against the principles aforesaid. It is a matter for the judge to decide whether or not the legal criteria for admissibility of such evidence have been fulfilled and if fulfilled it is thereafter a matter for the jury to draw such inferences as they may see fit as set out in the section. The learned trial judge ruled on the matter as follows: -

"Very good. In the circumstances, I think the guards were entitled to invoke section 18 and I am going to allow the – in view of Sheehan J's finding in the MacCartaigh case that the answers suggest a deliberate attempt to evade the implications of

section 18 and are either a refusal to answer or… they are a refusal to engage in any meaningful way with the question, and that the answer is trite. I am going to allow those queries."

It seems to us on consideration of the contents of the relevant interviews the trial judge was entitled to conclude, as he did "… in a circumstantial and temporal context" constituted a failure or refusal in that there was not a "… minimal level of plausible engagement…". We think that the trial judge was entitled to take the view that what was said on the relevant topic in the second interview was "… demonstrably incapable of belief or so incredible as to merit only being disregarded as untrue…". It did not, in short, amount to an account.

73. In the context of the admissibility of what we might call the fruits of the s.18 interview the learned trial judge was also called upon to decide whether or not what was called a "dialogue stream"(on the mobile phone to which reference has already been made), that is to say what was what was to be read or seen on the phone did not fall into the category of an "… object substance or mark or any mark on any such object" both because the phone was not "in his or her possession" and its contents (the dialogue stream) did not constitute an "object substance or mark or any mark on any such object"; effectively, the proposition advanced on behalf of the appellant has to be that it might or might not be lawful to ask a person to account for, say, a mobile phone. The section does not contemplate an enquiry as to its contents. We reject this proposition. As elaborated above, the mobile phone was a piece of real evidence. The evidence was sufficient to permit the judge to decide for the purposes of deciding on whether or not the section had been lawfully invoked, that it was in the appellant's possession and it seems to us that an account as to an object extends or can extend to all aspects of it, including whatever might be seen, either with the naked eye or otherwise on it. The material was rightly admitted and we accordingly reject this ground.

Ground vi

The trial judge erred in law and fact in his charge to the jury.

74. The appellant submits that the trial judge erred his charge to the jury. In particular, in that he erred by referring to a specific firearm in such a way as to suggest that there could only have been one firearm in the locale, on the night in question and by outlining questions asked of various witness without reference to their corresponding answers. Throughout his charge the judge made reference to "the" firearm. The appellant submits that this clearly suggested to them that there was only one firearm present in the vicinity on the night in question. This was a matter of some significance as pointed out by Counsel for the defence when raising a requisition on the matter because even if the jury were satisfied beyond reasonable doubt that the item apparently visible in the appellant's hand on the CCTV footage was a gun, in order to convict him of the other offences, they would also have had to be so satisfied that it was the same gun which fired the shot at 37 Hollywood Estate. The onus was at all time on the prosecution to establish this fact. In responding to Counsel's submissions on this point, the trial judge appeared to express disquiet at the fact that such a proposition was never specifically raised by the defence.

This was despite the fact the defence case had been run on the basis, firstly that the appellant had never been in possession of any gun, and secondly, that he appeared on CCTV with an item apparently visible in his hand at a time which, on the evidence, made it impossible for him to have carried out the shooting at the Cunningham's address. In any event, whether such an issue had been raised or not, the prosecution case had been opened on the basis that the firearm apparently visible in the appellant's hand on CCTV taken from his home, was the same gun which had been used in the shooting. This point was accepted by Counsel for the prosecution when asked to respond to the requisition raised. The trial judge re-charged on the point in these terms:-

> "Now, the next thing is, what this man is charged with possession of a firearm. I keep on referring to it as "the" firearm, which is not correct. It's "a" firearm and, for example – and this is very important in the context of the case and it's very important in the context of the defence – supposing you were satisfied that at the particular time on the video outside his house, she is in possession of the Smith and Wesson there and then stop and if you were to take on board Mr Heneghan's point that, given the time confusion given the time, that this is the time when the shooting occurs above the road. So, it is possible to distinguish, in other words, in being in possession in one place, is that necessarily the case that he is the person? Are the circumstances so overwhelming that it is proved to your satisfaction beyond a reasonable doubt that you must be satisfied not only if he had it in one place, that he had in there but also that he travelled the distance and fire the shot? So, if you're satisfied, that even if you are satisfied that it is him with the gun at his house at the time of the video, you still have to be satisfied beyond reasonable doubt that it was he travelled up to Hollywood estate and fired a shot."

A further requisition was raised regarding the adequacy of the recharge but was refused.

75. The criticisms of the judge as to the manner in which he reminded the jury of certain aspects of the evidence by the use of the questions, which was merely a form of words or rhetorical device, is in our view unfounded when one takes the charge in its entirety, as one must. It is apparent that the questions were for the purpose of reminding the jury of the evidence on the topics the subject thereof. They were mere figures of speech. This is an utterly superficial criticism. It did not serve to confuse them or emphasise any aspect of the case whether favourable or unfavourable nor give rise to a deficiency in the summary of the evidence which it was his obligation to give. Reference to questions which might have been asked is not uncommon way of addressing particular topics and drawing them to the attention of another, which is no more than what was done here.

76. With respect to the reference to "the firearm" it seems to us that from the context the judge must have been understood to be referring to the firearm of which evidence was given in the case and as he pointed out the theory that there was a second firearm had never been canvassed explicitly although it might appear that on one view of the evidence it must inferentially have existed if the shooting occurred whilst the appellant could be seen on CCTV footage outside his own house. Each of the parties explicit case was clear,

namely, the prosecution contended that the appellant shot Ms Sheehan with the firearm of which he was seen to be in possession for some brief period on CCTV and the defence case was that what had been so seen on CCTV was not firearm nor, by definition, had such been used by the appellant. This must have been clear to the jury. We think accordingly it was unobjectionable in the circumstances for the judge to use the form of words as he did because a judge is required to charge the jury on the basis of the case which is made before him and not about some notional case. We therefore reject this ground of appeal also.

Ground vii

The trial judge erred in admitting CCTV footage of such poor quality as to require a narrative as to what was visible in it.

77. The appellant submits that the trial judge erred in admitting CCTV footage which was of such poor quality that it required a narrative by a Garda witness as to what was visible in it. The appellant submits that the judge jumped to conclusions and failed to engage with and view what was on the CCTV footage. Much of the footage in question was not objected to. However, the defence assert that there are difficulties with respect to two items of footage. The first of these pieces of footage purported to show a laneway area which was in the vicinity the Cunninghams' house. The prosecution contended that a person could be seen running on the footage in question. The second item of footage purported to be footage from an "Applegreen" petrol station. It apparently depicted a view across Harbour View Road, of a wall dividing Hollywood estate from Laurel Ridge estate. The prosecution contended that a person could be seen at one point in the footage climbing that wall. A laser pointer was required to direct the court's attention to what was apparently visible on the footage. Obviously, if the quality of given footage is so poor as to make it impossible to see or understand what is taking place it should be excluded on the ground of relevance. It has been established for many years at this stage that it is lawful to receive the evidence of an expert ad hoc who has viewed footage put in evidence with a view to assisting the jury as to what can be seen or understood from it. We cannot see how in the circumstances of this case the user of such an expert (who did not purport to make an identification, as such, from the footage) could be open to objection.

78. The prosecution's contention was that the evidence before the jury would allow it, on reviewing relevant portions of the footage, to infer that an unidentified person shown upon it was the appellant ; in their contention there was sufficient evidence before the jury which would allow them to view the CCTV footage and then taken in conjunction with all the other evidence in the case, including other CCTV footage which was not in issue, being in particular the footage from the appellant's own home and the time line set out by the State with regard to the former as well as the time of the 999 call about the shooting. In our view this is correct.

79. Accordingly, the submissions in this appeal on behalf of the appellant in relation to the receipt of the footage are entirely misconceived insofar as they rely upon the authorities pertaining to identification of persons on footage by viewing it. The position would be quite different if, for example, the victim of a crime might be asked to view given footage

for the purpose of saying whether or not he could identify his assailant with the potential infirmities which such an identification might entail. The position differs again from circumstances where a garda might be called as an expert ad hoc to identify a suspect in circumstances where the quality of footage was so poor as to render it difficult for a trier of fact to make an identification, and differs again from a case where jurors might be asked to look at given footage and compare any person seen thereon with the accused who might be sitting in court or perhaps with photographs of the accused. The prosecution had sought to adduce evidence of direct identification by Garda Forrest of the appellant on a portion of footage but this had been rejected.

80. For the sake of completeness we might refer briefly to the authorities to which reference has been made on behalf of the appellant. DPP v Cooney [1995] 3 IR 205 pertains to a dock identification, DPP v Maguire [1995] 2 IR 286 and DPP v Sychulec & Gruchacz [2018] IECA 19 referred to direct identifications from CCTV footage. None of these are accordingly relevant. We might add that we have not been asked to view the footage in question and cannot judge as to whether or not its quality was so bad as to render it inadmissible because it was irrelevant: we can envisage circumstances where footage might not be received on the ground of irrelevance because if its quality but there is no suggestion in the present case that the basis upon which it was received and used was undermined by complaints about its quality. The real issue in the debate was otherwise as already addressed. We think that the judge was right to receive this evidence and hence reject this ground of appeal also.

Ground viii

The trial judge erred in failing to accede to the application to withdraw the case from the jury at the end of the prosecution case.

81. The application was made pursuant to the principles originally elaborated in R. v. Galbraith [1981] 2 All ER 1060 since approved many times in this jurisdiction. For the sake of clarity it may be of assistance to set out that portion of the judgment of Lord Lane C.J. which summarises the principles applicable:-

> "How then should the judge approaches submission of no case? (One) if there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The judge will of course stop the case. (Two) the difficulty arises where there is some evidence but it is of a tenuous character, for example because of inhuman weakness or vagueness or because it is inconsistent with other evidence. (A) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon submission being made, to stop the case. (B) wherever the prosecution evidence is such that its strength or weakness depends on the view to be taken of the witnesses reliability, or other matters which are generally speaking within the province of the jury and we are no on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury"

82. The most recent Irish authority upon the application of these principles is DPP v M [2015] IECA 65. There, Edwards J. (for the Court) pointed out that:-

> "…The emphasis in Galbraith is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in Galbraith was that even if the prosecution's evidence contained inherent weaknesses, or is vague, or contains significant inconsistencies, is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what Galbraith is in fact concerned with is fairness."

83. The application in the present case was based on the quality of the evidence against the accused. Counsel argued that the case was based on circumstantial evidence, that there was a contradictory version of events from the Gardaí which gave rise to a fundamental conflict with other prosecution evidence and there was an absence of any real explanation for what was submitted to conflicting timeline provided as to the events when such timeline was of prime importance. Reliance was also placed on a lack of forensic evidence. It was accepted that depending on the view the jury took of the CCTV footage from no. 7 Laurel Ridge, there may have been evidence sufficient to leave the count relating to the possession of a firearm at that address to them: however it is submitted that evidence in respect of the remainder of the charges, taken at its highest, was not sufficient to support convictions on those counts and they should accordingly have been withdrawn from the jury. Apart from the foregoing, the appellant pointed to the entirely circumstantial nature of the case as well as the supposed general dearth of evidence presented as regards his alleged role in the shooting offences issues pertaining to the bullet and its casing and the supposedly flawed nature of aspects of the investigation.

84. Counsel for the DPP argued that this is a case of circumstantial evidence. He said that there are many threads of evidence that make up the prosecution case against the appellant. He referred to the CCTV footage which shows the appellant leaving his house at 1.02 a.m. and that a 999 phone call was received at 1.08 a.m. There is, he contended, independent, verifiable evidence of video footage and phone records. Any conflict which has arisen is a jury point, to be considered by it. Counsel accepted that the prosecution could not say that the bullet removed from Ms. Sheehan's neck came from the gun in question alone, but that it came from that type of pistol. This was a strand of circumstantial evidence, which added to others was for the jury to decide on. It did not entitle the appellant to an acquittal. Counsel accepted that it would have been preferable for the trial judge to have viewed the CCTV footage, but nonetheless the judge engaged with the footage. Despite its poor quality, in any event, the footage showed consistent events with the prosecution's case. We agree with these submissions.

85. Applying then the principles elaborated above the learned trial judge rejected the application in the following terms:-

> "Very well. In my view, whatever confusion there is about times, arrival times, whether the guards arrived before the man (sic) was shot or afterwards, they are

matters entirely within the province of the jury to give to the detail, to the timings, to the arrivals, such weight as they think appropriate. If they find that the timings are so confusing that they cannot or will not make a decision one way or another, that's a matter for them, but there is overall evidence taking this case at its high point with which this case merits going to the jury on all counts."

We think that the trial judge was right in refusing the application, applying the relevant principles, and we accordingly reject this ground of appeal.

Ground ix

The verdicts were perverse and against the weight of the evidence.

86. As to the allegedly perverse verdicts, there is much overlap here with the grounds relied upon on the direction application we do not propose to reprise here the evidence in the case or repeat what was said in connection with the application to withdraw the charges from the jury. What the appellant in our view is seeking to do here, in truth, is to impugn the verdict of the jury upon the same basis as the application under the principles elaborated in Galbraith. In principle, a verdict is arguably perverse even where a matter had been properly left to the jury. A not uncommon example might be where there were a multiplicity of counts based on the same evidence but an acquittal on one and not on others where, rationally speaking, there could be no basis for such an event. There is no room here for any contention that there was, for example, an irrationality between the convictions for assault causing serious harm and those pertaining to the firearm and ammunition inasmuch as the prosecution case was that the offence of causing serious harm was committed with a firearm and by definition with ammunition.

87. DPP v. Tompkins (Unreported, Court of Criminal Appeal, 16 October 2012) has been relied upon under this head. The appellant, quoting therefrom, concedes that:-

> "… This court will be very slow to intervene where it is satisfied that a judge has placed all relevant matters before the jury, and is fully and properly instructed them as the burden and standard of proof. However an appeal court may intervene if the judge's direction to the jury is inadequate in the concerning witness credibility or some matter of law. This is entirely distinct from finding fault with the verdict of the jury… This court will only quash a decision has been perverse, where there are very serious doubts about the credibility of evidence which was central to the charge, where a guilty verdict, even by a properly instructed jury was against the weight of the evidence… In assessing this point the court will look at all of the evidence which was before the jury, not selected portions of that evidence."

88. Here, on the evidence the appellant advances the bald proposition that this case falls within that category where intervention is warranted. The respondent submits that there was ample evidence to the jury to allow them to safely return verdicts of guilty with regard to all counts before them. The respondent further submits that there is a very high threshold to be met in arguing that the verdict of a jury was perverse. It is also submitted that this Court would have to decide that the case should not have gone to the jury, which cannot be said in this case. The respondent submits that there was ample

evidence to the jury to allow them to safely return verdicts of guilty with regard to all counts before them. We think that there is no basis for suggesting that the verdict was either perverse or against the weight of the evidence. For the sake of completeness, it was also submitted that the conviction was asserted to be unsafe and unsound. There is no basis for this proposition. Again, we do not accept that this is the case, even if this concept can be distinguished from a verdict which is perverse or against the weight of the evidence. We therefore reject these grounds of appeal also.

89. We accordingly apply the provisions of S3(1)(a) of the 1993 Act as referred to above (commonly known as "the proviso"), and notwithstanding the error in relation to the refusal of the judge to permit the appellant's lawyers to come off record, and all other grounds having been rejected, we are of the view that no miscarriage of justice has actually occurred. We affirm the conviction and accordingly the appeal against conviction is dismissed.