THE SUPREME COURT

[Supreme Court Appeal No.:114/2020]

MacMenamin J.

Dunne J.

Charleton J.

O'Malley J.

Woulfe J.

BETWEEN:

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

PROSECUTOR/RESPONDENT

-AND-

GAVIN SHEEHAN

ACCUSED/APPELLANT

Judgment of Ms. Justice Iseult O'Malley delivered the 29th July 2021

Introduction

1. The appellant was convicted in the Circuit Court on one charge of assault causing serious harm and three charges involving firearms offences. The four charges arose from events that took place on the night of Saturday/Sunday the 14th/15th May 2016,

culminating in a shooting that caused serious injury to a Ms. Ciara Sheehan. The convictions were upheld by the Court of Appeal (see *People (DPP) v. Gavin Sheehan* [2020] IECA 142).

2. In summary, the appellant contends, firstly, that the trial judge wrongly refused to allow him to discharge his legal representatives at the start of the trial ("the representation issue"); secondly, that the Court of Appeal, having found in his favour on that issue, subsequently erred in applying the "proviso" of s.3(1)(a) of the Criminal Procedure Act 1993 to its decision ("the proviso issue"); and, thirdly, that provisions of the Criminal Justice Act 1984 (as amended by the Criminal Justice Act 2007) permitting inferences to be drawn from his responses to garda questioning were wrongly applied in the trial ("the inferences issue").

The evidence in the case

3. Since this was a case that depended entirely on circumstantial evidence, and since the Court of Appeal considered it appropriate to apply the proviso in respect of that evidence, it will be necessary to set it out in somewhat greater detail than usual.

4. The appellant lived in an estate called Laurel Ridge in Cork. This is directly adjacent to Hollywood Estate, where a family called Cunningham lived. There is a low wall running between the two estates. According to the evidence in the trial, the appellant's home was very close to the wall and the Cunninghams' house was a slightly longer distance away on the other side.

5. At about 7 pm on the evening of Saturday the 14th May 2016 the appellant and Mr. Dylan Cunningham had some form of physical altercation in a fast food restaurant. Mr. Cunningham and his girlfriend, Ms. Ciara Sheehan, went back to Mr. Cunningham's family home in Hollywood Estate a few hours later. At 12.15 am on the morning of the 15th May the window of the front door of the Cunninghams' house was broken. About fifteen minutes later, some windows of the appellant's house were broken. Gardaí were called to the Sheehans' house as a result of the latter incident.

6. A short time later, Ms. Sheehan was standing in the front room of the Cunninghams' house when a shot was fired through the window, hitting her in the neck. The exact time of this event was the subject of much debate in the trial. Several Gardaí gave evidence that they heard about the shooting in a radio call that was circulated at around 1 am, and that they were at the scene shortly afterwards. The garda recording system indicated that a 999 call was received at 1.08 am. The defence argued that this meant that the shooting must have been some time before 1.08 am, and that in fact the call might have been made earlier also (since it was routed to the ambulance service before being transferred to the Gardaí, and no evidence was called as to the time the ambulance service received it). Mr. Cunningham had taken Ms. Sheehan to hospital in his car before the Gardaí or ambulance arrived.

7. A short time later some Gardaí observed the appellant in the act of committing criminal damage to the property of another person. He left that scene in a car, was seen to exit from the front passenger side at the entrance to Laurel Ridge, and was arrested by the pursuing Gardaí under s.30 of the Offences Against the State Act 1939, on suspicion of possession of a firearm with intent to endanger life at Hollywood Estate.

8. The appellant subsequently admitted that the car was his. A mobile phone was found in the footwell of the passenger seat in which he had travelled. His home was searched and the domestic CCTV system was examined. Other footage, obtained from neighbours of the Cunninghams and from a nearby petrol station, was also examined. Allowing for necessary adjustments to the times shown on the various systems, the footage showed the following:

    (i) At 12.16 am the appellant took an object from a bin at his house, showed it to people in a car and then put it back in the bin. The prosecution contended that the object was a handgun.
    (ii) At 12.29 am the appellant left in a car.
    (iii) At about 12.30 am two men came to the Sheehans' house and broke some windows. Two Gardaí attended shortly after and were at the house until very shortly after 1.00 am.
    (iv) The appellant returned to the house before the Gardaí left. After they had gone he searched through the bin. His father was present. In

interview the appellant said that he had been looking in the bin for a bottle of vodka.

(v) After the Gardaí left, the appellant remained present in the company of his father until 1.07 am.

(vi) At 1.07 am the appellant left through the front gate of his property with an object in his right hand, and went in the direction of the boundary wall with Hollywood Estate. A few seconds later he climbed over the wall into Hollywood Estate.

(vii) At 1.08 am a man was seen running near the terrace where the Cunninghams lived. The prosecution contended that this man was wearing the same clothes and had the same build as the appellant.

(viii) At 1.09 am a shape which the prosecution contended was a person, climbed over the boundary wall into Laurel Ridge.

(ix) At 1.11 am a man, identified by the prosecution as the appellant, came to the outside of the appellant's house and got into a car which then drove off. The man did not have anything in his hands.

9. A pistol was found beside the estate wall later that day, while a bullet casing was recovered from a resident's garden. A garda ballistics expert gave evidence to the effect that the bullet casing had been discharged by the pistol. He could not say whether the bullet recovered from Ms. Sheehan's neck came from this pistol, but it did bear characteristics comparable with the firearm.

10. The mobile phone that had been found in the car was examined and the prosecution adduced evidence of certain messages discovered on the Facebook Messenger app. These were attributed by the prosecution to the appellant, although not admitted by him, on the basis of his proximity to the phone in the car and because some messages referred to "Gavin" or "Gav". The prosecution relied upon photographs (not screen shots) of the following messages in particular:

- "Yeah, thanks. While the uncles are out, Aaron told my dad for me, let you know where you are coming up to Cia's with the boys 'til later instead of driving. Gavin, serious"

- “I will, yeah. Ha ha ha.”
- “Why –”
- “Why not like”
- “Wait ‘til later. Go looking then. You better have a few heads with you. It’s grand you fight Cunna, but if there are there – and if there are three and loads of them, there’ll be murders.”
- “I’m packing well.”
- “Gav, in all fairness, things are going to get out of hand.”

11. The admissibility of this material was challenged, but it was admitted by the trial judge on the basis that the phone was found in the car on the side from which the appellant had emerged, and he had been the only “Gav”, or “Gavin” in the car.

12. In interviews conducted under the normal caution, the appellant denied having had a firearm or having fired the shot. He agreed that it would take a few seconds to get from his house to the wall between the estates, and that the Cunninghams lived about 50m away on the other side. He went that way “20/30 times a day”. He admitted that he had “probably” gone into Hollywood Estate during the night, perhaps to talk to a girlfriend or to get picked up. He said that he could not remember where he had gone after that, because he had been drunk. He thought he just walked home. The Gardaí put it to him that the CCTV footage from his home showed him with a silver handgun in his hand at 12.16 am – he denied this and said that it was “probably” a knife or an imitation gun. When asked why he had wrapped up the gun and put it into the wheelie bin, he said that he did not wrap anything up, had no gun, and put nothing in the bin. He had opened the bin at a later stage because he had vodka in it. He was asked about the footage of him showing the object to people in the car, and he said it was a hook knife.

13. The pistol that was found by the Gardaí was shown to the appellant. He denied firing the shot. It was put to him that the footage showed him coming over the wall from Hollywood Estate at an earlier time in the night with a golf club. He denied having broken the door at the Cunningham’s house, agreed that he had no reasonable

explanation for having the club but said that he did not know if it was him in the footage.

14. In the course of the final interview, the Gardai invoked s.18 of the Criminal Justice Act 1984, as amended, in asking the appellant to account for his possession of the handgun believed to be visible in the CCTV footage of his home in Laurel Ridge. They told him that they believed that his possession of the firearm at that location was linked to his unlawful possession of a firearm at the house in Hollywood Estate. He responded by, variously, denying having a gun or saying that he had nothing to say. It was further put to him that the messages on the phone were conversations that he had had with a third party on the night, and that they were consistent with and attributable to his participation in the offence for which he had been arrested and detained. He was asked whether there was any explanation for the phrase "I'm packing well" other than that he was saying that he was in possession of a gun. He denied that that was the meaning of the phrase, but otherwise did not respond.

15. This aspect is dealt with in greater detail below.

16. The prosecution case, as presented in the trial, was that the appellant left his home at 1.07 am and went into Hollywood Estate, went past the Cunningham house, firing a shot through the window as he did, and returned to his own home at 1.11 am using a different (slightly longer) route. It was contended that this timeline was completely consistent with the distances involved, with the CCTV footage and with the messages on the phone.

17. The defence naturally emphasised the apparent discrepancies in the evidence about times, contending that the footage, combined with the evidence of the Gardaí as to their time of arrival at Hollywood Estate, showed that the appellant could not have been at the Cunningham house at the time of the shooting. It was argued that some time would have been needed to dispose of the gun and the bullet casing in the locations where they were found, that examination of the gun had not disclosed any evidence of DNA or fingerprints, and that there was no evidence of firearms residue on the appellant. It was also pointed out that the jury had no evidence as to when the messages on the phone were sent, or where the phone was at the relevant times.

The legal representation issue

The trial

18. The facts giving rise to this issue commence with the fact that the appellant, having been sent forward in custody from the District Court, first appeared before Cork Circuit Court on the 24th October 2016. An application by defence counsel for an adjournment was refused, and the trial was fixed for the 16th November 2016. There followed a motion seeking to have the trial transferred to the Dublin Circuit. This motion was heard on the 14th November and was refused. The trial judge was advised on that date that some outstanding disclosure was still awaited by the defence.

19. On the morning of the 16th November 2016 the appellant was arraigned on the six counts on the indictment. He pleaded guilty to two offences of criminal damage arising from the incident where he had been seen by Gardaí while carrying it out, and a jury was empanelled for a trial on the remaining four counts. In summary, those charges were: 1) possession of a firearm in circumstances giving rise to a reasonable inference that he did not have it for a lawful purpose at Laurel Ridge; 2) possession of ammunition at Hollywood Estate on the same date; 3) reckless discharge of a firearm at Hollywood Estate; and 4) assault causing serious harm to Ciara Sheehan.

20. After the arraignment the matter was let stand until 12 o'clock. At that time, senior counsel for the appellant applied to the trial judge to recuse himself. This was refused. There was some further discussion between counsel and the judge during which counsel mentioned that because there had been a delay in bringing persons in custody before the court that morning he had not been able to speak to his client before the arraignment. Counsel stated that the appellant was not satisfied with the manner in which the prosecution was going ahead "*…and indeed perhaps not satisfied with his own legal team because, in fairness to him, this case is hopping along at a very fast rate in terms of preparation…*" Additional evidence had been served as late as the previous evening, and counsel had not been able to view the CCTV footage until the previous night. All of this was difficult for the client, who had "something to say to the Court".

21. The trial judge inquired whether the client was "running the show" rather than counsel. He stated that he expected counsel to explain matters of this sort to the client. Counsel responded that he had attempted to do so, but had to inform the court that his client was not satisfied and there might be a difficulty there. There was some CCTV footage still outstanding. The trial judge did not agree that the case was being rushed, and considered that in any event it would probably not progress beyond the prosecution opening that day. He let the matter stand until 12.30 pm.

22. At 12.30 pm senior counsel moved an application on behalf of the defence legal team to come off record. The trial judge was informed that the appellant had "lost confidence" in them and no longer wished to be represented by them. The trial judge refused the application, expressing a view that its timing was " a bit doubtful". The following exchange then 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 we're – 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.

Judge: What I will do for now is, for the moment, I will direct that the case will continue and I will direct the solicitor and the counsel to stay in the case and to advise Mr Sheehan. I'm not at all convinced as to the appropriateness of relieving you 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. Counsel for the defence then asked for some time to consult with the Professional Practices Committee of the Bar Council. The judge said that the jury should not be delayed any further. The prosecution should open the case, and the defence would have the lunch break to take any instructions. When the court reconvened in the afternoon, senior counsel for the defence informed the trial judge that he had consulted the Bar Council about his position and was reassured that remaining in the case did not pose a professional difficulty. He had advised his client as to his options, and it was a matter for the client if he wanted to say something.

24. The trial judge did not, on this occasion, speak directly to the appellant but responded in the following terms:-

> *"No, no, because you see, my view, I, as a trial judge, people wanting to change their minds at the last minute is not unknown, but normally it happens before the jury is sworn and there's a flustered application to, you know, make an application in other words, that's not what happened here. There were applications in this previously, all of which were dealt with. The nature of the problem in relation to the disclosure was fully dealt with, and the jury this morning was sworn in, there was no difficulty, and the difficulty didn't arise until afterwards, and the difficulty was expressed by you as being your client lost confidence. Now, I have never heard such an expression before in my life, and the timing of it worried me. You see, there's obviously, given the number of applications, or the applications that were made, he was represented at the listing date, he was represented at the motion which was brought on his instructions, so there can't have been a lack of engagement by his legal counsel up to now. 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 it were, give into that would be a complete denial of justice and would be wrong for a trial judge."*

25. In a further exchange with counsel, the trial judge clarified that he meant that the appellant was trying to bully the court, or the "system". Counsel said that his client's position remained the same – "*he does not want me, my solicitor or my junior counsel to represent him*". The judge expressed the view that this arose solely from the fact that the case was going on that day, when the appellant felt that it should not. Counsel responded that he could not really answer that. The judge said that it was clear to him. Counsel said that the client had genuine worries, but it was also a fact that he was not happy with his representation "*for whatever reason, and I am not in the man's mind, that's within him and it's for him to say*." He also made it clear that the appellant felt that his case was being rushed on. The trial judge made it equally clear that he felt that the case should go on.

26. Finally, counsel suggested that the judge should address the appellant "*just to make sure*". The judge responded that if he (the appellant) was not deaf, he had heard what had been said. He (the judge) did not propose to take it any further.

27. The trial accordingly proceeded. On the morning of the second day, senior counsel informed the court that he had instructions from the appellant and was ready to proceed.

The inferences issue

28. Section 18 of the Criminal Justice Act 1984, as substituted by s.28 of the Criminal Justice Act 2007, reads in relevant part as follows:-

> "18.— (1) Where in any proceedings against a person for an arrestable offence evidence is given that the accused—
>
> (*a*) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or
>
> (*b*) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,
>
> was requested by the member to account for any object, substance or mark, or any mark on any such object, that was—
>
> (i) on his or her person,
>
> (ii) in or on his or her clothing or footwear,
>
> (iii) otherwise in his or her possession, or
>
> (iv) in any place in which he or she was during any specified period,
>
> and which the member reasonably believes may be attributable to the participation of the accused in the commission of the offence and the member informed the accused that he or she so believes, and the accused failed or refused to give an account, being an account which in the circumstances at the time clearly called for an explanation from him or her when so questioned, charged or informed, as the case may be, then, the court, in determining … 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 or she 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 evidence in relation to which the failure or refusal is material.

(2) A person shall not be convicted of an offence solely or mainly on an inference drawn from a failure or refusal to account for a matter to which subsection (1) applies.

(3) Subsection (1) shall not have effect unless—

(*a*) the accused was told in ordinary language when being questioned, charged or informed, as the case may be, what the effect of the failure or refusal to account for a matter to which that subsection applies might be, and

(*b*) the accused was afforded a reasonable opportunity to consult a solicitor before such failure or refusal occurred.

(4) Nothing in this section shall, in any proceedings—

(*a*) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged in so far as evidence thereof would be admissible apart from this section,

(*b*) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could properly be drawn apart from this section, or

(*c*) 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 for the condition of clothing or footwear which could properly be drawn apart from this section.

(5) The court (or, subject to the judge's directions, the jury) shall, for the purposes of drawing an inference under this section, have regard to whenever, if appropriate, the account of the matter concerned was first given by the accused.

(6) This section shall not apply in relation to the questioning of a person by a member of the Garda Síochána unless it is recorded by electronic or similar means or the person consents in writing to it not being so recorded.

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

(8) …

(9) In this section 'arrestable offence' has the meaning it has in section 2 (as amended by section 8 of the Criminal Justice Act 2006) of the Criminal Law Act 1997 .".

(2) …

(3) …”

29. Section 19 of the same Act makes provision in respect of questions about the presence of the accused in a particular location or locations. As will be seen, evidence sought to be adduced in reliance on this particular section was ultimately not admitted by the trial judge. However, since it will be referred to in relation to some of the authorities, it is necessary to bear in mind that it is in almost identical terms.

30. While in Garda custody the appellant was interviewed several times. The resulting memoranda were largely uncontroversial and were presented to the jury on the basis of redactions agreed between prosecution and defence counsel or, in one case, directed by the trial judge. However, the question of permitting inferences to be drawn from the final interview was the subject of a *voir dire*. There was no issue as to either the adequacy of the explanation of the legislation provided to the appellant, the opportunity to take legal advice, or the accuracy of the record of the interview, and the debate focussed on the appropriateness of applying the provisions to specific questions.

31. In the interview in question the appellant was asked a number of questions about possession of a firearm at his address in Laurel Ridge. The defence objection to the drawing of inferences in respect of these questions was based on the fact that the appellant had already denied possession of the firearm in the earlier interviews, and continued to deny it in this interview. It was argued that he had, therefore, given an “account” within the meaning of the Act. Counsel relied upon the judgment of the Court of Criminal Appeal in *People (DPP) v. Devlin* [2012] IECCA 70 (“*Devlin”)*, in which it had been stated that the provision did not apply where an account “of any kind” had been given. Counsel for the prosecution relied upon *People (DPP) v. MacCarthaigh* [2015] IECA 234, where it was held that the inferences could be drawn if the answers given by the accused did not engage with the question in a meaningful way and amounted to a deliberate attempt to evade the implications of the section.

32. The Gardaí had also asked questions about the conversation stream on the phone, including questions as to whether the appellant was the “Gav” or “Gavin” referred to, and what the phrase “I’m packing well” meant. In the trial, counsel for the defence accepted that no “account” had been given by the appellant in respect of these matters and that the decision in *Devlin* did not assist him in relation to them. He made a general objection based on relevance, since the conversation had occurred before the shooting. Counsel also accepted that he could not object to the question asking what was meant by the phrase “packing well”, and that the jury could draw an inference from the failure to respond.

33. The prosecution, for its part, accepted that certain questions set out in the memorandum of interview should be omitted as, for example, referring in a prejudicial way to a “feud” between the appellant and the Cunninghams or as simply expressing the opinion of the questioner.

34. As noted above, s.19 of the Act was also invoked, and the appellant was asked to account for his presence in Hollywood Estate “between 1.00 am and 1.10 am”. He was also asked about his presence in Laurel Ridge at “about 1.15 am”, in close proximity to where the gun was subsequently found. The trial judge ruled that this portion of the interview was inadmissible, as it could have introduced confusion about the relevant times. The question of the application of s.19 therefore does not arise in this appeal.

35. The memorandum of the interview, as ultimately exhibited in the trial and excluding the questions and answers ruled out by the trial judge, is here set out in full.

> *“I am now invoking Section 18 Criminal Justice Act 1984 as amended by Section 28 of Criminal Justice Act 2007.*
>
> *I D/Garda Pat Condon wish to inform you that it is my reasonable belief that you were in possession of a firearm, to wit a Smith and Wesson 9mm automatic pistol silver in colour with a black handle at 7 Laurel Ridge Shanakiel, Cork in the early hours of Sunday morning the 15th May 2016 and*

that your possession of that firearm is attributable to your participation in the commission of the offence for which you are arrested and detained.

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 0016hrs 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 15th May 2016 Cork.

A. I had no firearm at my address, you see what you wanna 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 at 7 Laurel Ridge, Shanakiel at approximately 0100hrs 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 15th 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 I am now asking you to account for why you left 7 Laurel Ridge with this firearm in your possession at approximately 1.07am on 15th May 2016

A. I have 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 D/Garda Pat Condon wish to inform you that it is my reasonable belief that this phone and the conversations contained therein are conversations or 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 Gardai to formally invoke Section 18 Criminal Justice Act 1984 as amended by Section 28 Criminal Justice Act 2007.

Q. What is meant by the phrase "I'm packn well"

A. No reply

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

A. No.

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

A. No reply

Q. I wish to ask you if reference to "Gav" dialogue stream a reference to you Gavin Sheehan

A. No reply."

36. In ruling that the above material was admissible for the purposes of the section, the trial judge found that the answers given by the appellant in response to questions about the firearm suggested a deliberate attempt to evade the implications of that provision and were either a refusal to answer or a refusal to engage in any meaningful way with the question, with the answer given being "trite". With reference to the downloaded conversation, he found that the questions asked were all "extremely relevant" and that the appellant had not engaged in any meaningful way with them.

37. When charging the jury in relation to this evidence, the trial judge first of all instructed them that the statute had brought about a change, a diminution in the constitutional right to silence. This was something that they should be aware of, and they should be very careful when dealing with it. They did not have to draw inferences from the appellant's refusals to answer if, for example, they thought, looking at the statements, that the appellant's answers were adequate or reasonable. The judge noted here that the language of the section was lengthy and cumbersome.

The jury had to be satisfied that it had been explained in ordinary terms and that the person being questioned had been given an opportunity to take legal advice.

38. It would then be necessary for the jury to look at what the person was being asked to do. He was being asked to account for what the guards said was his possession of the firearm that they believed was used by him in the attack. The jury should ask themselves whether it was clear on the evidence that there was a strong or a weak case, and whether they felt that it was one that the appellant should have answered.

39. If the jury felt that a response was not a response or was "merely time-wasting, time-serving or trite" then they were entitled to look further and to ask themselves whether the failure to answer was, in effect, attributable to his having no answer. They should only draw an inference if they decided that the failure to account for something was attributable to the Gardaí having a strong case and his having no answer, or no answer that would stand up to scrutiny.

40. The trial judge also directed the jury that any inference drawn should be limited, and that they should take into account the fact that there might be reasons why a person would not reply to questions. Any inference drawn had to be fair to the accused and reasonable in the circumstances, using their common sense. They could not convict on an inference, but had to be satisfied that there was other strong evidence capable of convicting him. If so, they could use an inference to corroborate that other evidence. It was explained that corroboration meant independent evidence implicating the accused, by some material particular, in the crime.

41. In this context the judge drew the jury's attention in particular to the statement by the appellant "I had no firearm, you can see what you want to see", his denial of having a firearm in the context of a question as to why he left Laurel Ridge, and his lack of response in relation to questions about the text message "I'm packing well".

42. Finally, it should be noted that the trial judge gave a *Lucas* warning, instructing the jury to keep in mind the fact that people may tell lies for reasons other than guilt.

The Court of Appeal

43. The appellant was represented by a different legal team on appeal. Nine grounds of appeal were lodged, one of which concerned the refusal of the application to come off record. However, as the Court pointed out in its judgment, there was no suggestion that the appellant was dissatisfied with the manner in which his then legal representatives had actually conducted the trial. Instead, the appeal was argued on the basis that the appellant had been wrongfully deprived of his constitutional entitlement to represent himself and not to have representation imposed upon him. It was submitted that an adjournment would not have been an inevitable consequence of allowing the application, since it would have been obvious to the appellant that the case was going to proceed and that he would have to defend himself.

44. The Court of Appeal commented that it would not, in truth, have been surprising to any experienced lawyer or judge if the appellant had sought an adjournment in the event of the application being allowed. The suspicion in such circumstances would be that dispensing with legal representatives who had been acting for some time was a tactic to procure an adjournment, and the trial judge might well have been correct in having such a suspicion. However, the Court did not think that this particular case was one where the judge could properly refuse to permit the appellant to discharge his solicitor and counsel. If he had permitted them to withdraw, it could nonetheless have been permissible to proceed with the trial. The appellant should have been informed that dismissal of his lawyers would not in itself be a ground for an adjournment and that even if he dispensed with them the case would proceed.

45. At paragraph 36 of the judgment the Court summarised the approach that would be regarded as best practice (subject, by definition, to the facts of each case) in the following terms:-

> *"(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."*

46. It was noted that there was no suggestion in the appeal that the defence was not conducted with competence, or that there had been any failure to follow instructions, or that any breakdown in communications had occurred. No criticism had been made of the lawyers by the appellant, beyond the expression of annoyance that they had not seen him on the morning of the trial. There was, accordingly, no impact on the trial *per se* arising from the refusal of the application to come off record. None of the other issues raised in the appeal had any connection with the judge's decision on this aspect.

47. In dealing with the issue as to the s.18 inferences, it was again submitted on behalf of the appellant that he had, in his earlier interviews, given an "account" in that he had identified the object in the CCTV footage as a knife or imitation firearm and that his replies after the invocation of the Act recalled that account. The argument was that the section could only apply where there had been a failure or refusal to answer, and not simply because the interviewing Gardai did not consider the answer given to be satisfactory.

48. The Court of Appeal cited the reasoning of this Court in *People (DPP) v A. McD.* [2016] 3 I.R. 123 ("*A. McD*") (a decision that post-dated the trial in this case). The judgment then continued with the observation that the question whether or not there had been an account, rather than a failure or refusal, was a question of fact to be decided in accordance with the principles set out in that judgment. It was for the trial judge to decide whether or not the legal criteria for the admissibility of the evidence had been fulfilled, and thereafter it was a matter for the jury to draw such inferences as they saw fit. In this case, the trial judge had been entitled to conclude that there had

been a failure or refusal, insofar as there had not been a minimum level of plausible engagement with the questions about the firearm. The trial judge had also been entitled to take the view that what had been said by the appellant in the second interview (i.e. that the object in his hand was a knife, and that he had been looking in the bin for vodka) was "demonstrably incapable of belief or so incredible as to merit only being disregarded as untrue". In the circumstances, it did not amount to an account.

49. It had been submitted by the appellant that the section was not properly invoked in respect of the phone and the messages for two reasons – firstly, it was not in the appellant's possession, and secondly, the section did not contemplate an enquiry into its contents since those contents were not a "substance" or "mark" on it. The Court of Appeal disagreed, holding, firstly, that the phone was a piece of real evidence. It was for the trial judge to decide whether or not it had been in the appellant's possession. Secondly, the concept of an account of an object could extend to all aspects of that object, including whatever might be seen on it whether with the naked eye or otherwise.

50. In the final paragraph of its judgment, having rejected all grounds of appeal except in relation to the refusal to permit the legal representatives to withdraw, the Court returned to that finding and stated that in the circumstances no miscarriage of justice had occurred as a result of that error. Accordingly, it applied the provisions of s.3(1)(a) of the Act of 1993 and dismissed the appeal.

Submissions in the appeal

The representation issue

51. The parties are largely in agreement as to the applicable principles, although they disagree in their analysis of what actually occurred in the case.

52. Both sides acknowledge that the proposition that representation by way of legal aid is a constitutional right, as was recognised in *State (Healy) v. Donoghue* [1976] I.R. 325

(“*Healy v. Donoghue”)* and in *Burke v. Judge O’Halloran* [2009] 3 I.R. 809 (“*Burke v. Judge O’Halloran*”), the corollary is that an accused person cannot be compelled to accept legal aid and is therefore entitled to represent himself in a trial. Further, they are in broad agreement that the right is a due process right, rooted in the same constitutional provisions as fair trial rights, although in the course of the hearing the possibility was canvassed, and to some extent accepted by the appellant, that it may instead be an aspect of personal autonomy, described as a right “to organise one’s own affairs”, and as protected by Article 40.3.

53. It is also agreed that the right is not absolute, and that it may be curtailed or denied in the interests of, *inter alia*, the administration of justice or of the victims in a particular case. The appellant argues, however, that, since it is constitutional in origin, a trial conducted in unjustified breach of the right cannot be considered to be “a trial in due course of law” as guaranteed by Article 38.1.

54. It is submitted on behalf of the appellant that while in this case the trial judge may have suspected that the appellant was simply trying to get the case adjourned, he was not entitled to reach that conclusion without at least following a proper process such as that suggested by the Court of Appeal. In this case it was plain that the case was going to proceed whether or not the legal representatives remained in it. That being so, the only choice that could have been left to the appellant was to be represented by them or to represent himself. In those circumstances, the fact that he maintained his desire to discharge them was an attempt to exercise his right to represent himself, but he was refused the opportunity to do so.

55. Both parties agree with the wisdom of the approach to such situations set out in the judgment of the Court of Appeal. The appellant submits that although, strictly speaking, it was not the approach adopted by the trial judge, the situation had in fact been made clear to the appellant. The suspicion that he was attempting to delay his trial was not, therefore, a legitimate reason for the refusal of the application, and nor was any apprehension that the trial would become more difficult to preside over in the absence of legal representation. It is submitted that the statement by senior counsel on the second day (that he now had instructions to proceed) cannot be determinative of the question whether the trial judge erred on the first day, and should not be taken as

indicating that the appellant had not intended on that day to represent himself. By the second day, he had no choice but to instruct the lawyers if he was to have any participation in the trial. The change of mind on the second day of the trial should not, therefore, be seen as relevant.

56. The respondent emphasises the proposition that the right to represent oneself is not absolute and cannot be exercised in such a way as to subvert the trial process. With reference to the decision in *Stephens v. Connellan* [2002] 4 I.R. 321, it is submitted that, for example, an accused person may not abuse the right to legal representation in order to gain repeated adjournments, and that the same consideration arises in relation to the right to represent oneself. Here, the words used by the appellant on the first day, when he was addressed by the trial judge, made it clear that he did not think that he was in a position to defend himself. He wanted an adjournment, because he felt that he did not have a defence prepared. The fact that he did not wish to represent himself was confirmed when he gave instructions to his lawyers on the second day.

57. As to the possibility of waiver of the right to legal representation, the respondent says that the appellant could be taken as having waived his right to be represented by the particular lawyers acting for him at the time, but that there was no explicit waiver of the right to representation.

58. In agreeing with the approach proposed by the Court of Appeal, the respondent adds that a trial judge is entitled to take into account the conduct of the proceedings up to the point at which the application to discharge is made. If he or she forms a preliminary view that the purpose of the application is to secure an adjournment, the accused person should be spoken to directly and given an opportunity to address the issue.

The proviso issue

59. The Court of Appeal concluded, in effect, that the proviso should be applied because the error of the trial judge on the representation issue did not affect any of the other grounds of appeal and there was, therefore, no miscarriage of justice. The appellant

submits that this conclusion was incorrect and stemmed from an inappropriate interpretation of s.3(1)(a) of the Criminal Procedure Act 1993.

60. It is argued that the error in question here was fundamentally different to the type of error that is normally under consideration when the proviso is applied. In most cases, where the appellate court rules that, for example, particular evidence should not have been admitted, or that a direction by the trial judge was incorrect, the issue that must be determined will be the effect that the error had on the outcome of the trial. The appellate court will ask, therefore, whether the accused would nonetheless have been convicted if the error had not occurred. If there is no causal connection between the error and the conviction, then the proviso can be applied.

61. In the instant case, however, the error identified is said to have been one that breached a constitutional right at the heart of the trial process. It is argued that in such circumstances the question of a causal connection is irrelevant. On this argument, a finding that a trial was conducted in breach of a constitutional right would mean that it could not be said to have been a trial in due course of law. That, in turn, would mean that it could not be said that no miscarriage of justice had occurred. The appellant relies in this regard on the decision of the High Court of Australia in *Wilde v. R.* (1988) 164 CLR 365 (*"Wilde")*, a case in which the Court of Criminal Appeal of New South Wales had applied a more or less identical proviso. On appeal, the High Court agreed with a defence submission that in some cases it was not appropriate to ask whether the appellant would have been convicted if the error had not occurred. In the course of his judgment Brennan J. said:-

> *"It is one thing to apply the proviso to prevent the administration of the criminal law from being 'plunged into outworn technicality' (the phrase of Barwick C.J., in Driscoll v. The Queen, at p. 527); it is another to uphold a conviction after a proceeding which is fundamentally flawed, merely because the appeal court is of the opinion that on a proper trial the appellant would inevitably have been convicted. The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred,*

then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice."

62. The appellant notes that there have been relatively few cases in which the Irish courts have considered the principles according to which the Irish proviso should be applied, or, indeed, the meaning of the term "miscarriage of justice". He refers to *People (DPP) v. Wall* [2005] IECCA 140 where it was said that a miscarriage of justice could arise "*where there has been such a departure from the rules which permeate all judicial procedures as to make that which happened altogether irreconcilable with judicial or constitutional procedure*", and submits that this is consistent with the analysis in *Wilde*. The section must, therefore, be interpreted in a manner that respects and protects the fundamental rights of accused persons.

63. It is contended that in this case the appellant was prevented from exercising his right to appear in person "*and was coerced against his will and express wishes to continue to be represented by a legal team which he did not want*". This was a fundamental error and it was not appropriate, therefore, to consider the effect on the verdict.

64. It is argued that fundamental errors of this nature have led to convicted persons being released under Article 40.4 of the Constitution, or to the convictions being quashed in judicial review proceedings (as in *Burke v. Judge O'Halloran*, where the High Court found that the applicant had been wrongly deprived of his right to appear in person). The appellant submits that the proper outcome to the appeal would have been a similar finding that the trial had been a nullity.

65. The respondent submits that such case law as there is indicates that the application of the proviso is fact specific and therefore varies from case to case. It is noted that in his judgment in *Wilde*, cited above, Brennan J. had stated that no mechanical approach could be adopted, and that each case must be determined upon its own merits. Reference is made to another judgment of the High Court of Australia, in the case of *McInnis v. R.* (1979) 143 CLR 575, where the trial judge had refused to adjourn to allow the accused to get legal representation. The majority in the High Court considered that the proper approach was to ask whether the refusal had brought about

a miscarriage of justice. For that purpose, it was necessary to ask whether the accused had in reality lost a chance of acquittal. On the facts of the case, the majority view was that an acquittal would have been very unlikely, even with full representation. Conversely, in *Deitrich v. R.* (1992) 177 CLR 292, the court concluded that since the jury had acquitted on one count it could not be said that he would have had no prospect of acquittal on others if properly represented.

66. The respondent also points to the observations of the majority of the High Court of Australia in the more recent case of *Kalbasi v. Western Australia* [2018] HCA 7 to the effect that it is not possible to identify classes of cases to which the proviso does not apply. Similarly, in other recent cases, the position of the Australian courts has been that the focus in each case must be on the effect of the error in order to determine whether a substantial miscarriage of justice had actually occurred. However, the question is not always whether or not a conviction was inevitable.

67. The respondent does accept that, in terms of the Constitution, an error in the trial may have been of such a fundamental nature that the trial cannot be said to have been held in due course of law. In *People (DPP) v. Fitzpatrick & McConnell* ("*Fitzpatrick & McConnell*") [2013] 3 I.R. 656, it was stated in the judgment of the Court of Criminal Appeal that if there had been a fundamental error and a lost chance of acquittal, the appellate court could not apply the proviso simply because it was of the opinion that in a proper trial the appellant would have been convicted. In *DPP v. E.C.* [2007] 1 I.R. 749 a jury misdirection on a matter going to "a central and critical aspect" was such that the proviso could not be applied.

68. It is submitted that the fact that the error under consideration affects a constitutional right is not, of itself, determinative of the question of the availability of the proviso. The issue must be looked at in the context of the facts, which in this case include the history of the conduct of the proceedings, the conduct of the trial, the absence of any subsequent complaint about the representation provided, and the strength of the evidence.

The inferences issue

69. The appellant starts from the proposition that s.18 of the Criminal Justice Act 1984 (as amended) represents a legislative inroad into the constitutionally protected right to silence and must therefore be strictly interpreted. Inferences may be drawn only where the accused failed or refused to give an account. It is accepted that *A. McD.* is the leading authority, and has resolved any apparent difference in emphasis as between the earlier authorities.

70. As far as the questions about the firearm are concerned, it is submitted that the appellant had, in the interviews that took place before the one in which the section was invoked, provided an "account" to the Gardaí, in that he had said that the object seen in the footage could be an imitation gun or a knife. That answer must be taken into account in considering the later "You see what you want to see" response. In accordance with the principles established in *A. McD.*, the section could not be deployed simply because the account given did not satisfy the Gardaí – it would have to be such as could be described as plainly unconnected or farcical. The answer given by the appellant was not so demonstrably incapable of belief or so incredible as to merit only being disregarded as untrue.

71. It is submitted that it was apparent that no answer to the questions about the gun, short of an admission to possession would have satisfied the interviewers, but that would have required an admission of guilt. To interpret the section as permitting this situation would reduce the right to silence and the privilege against self-incrimination to a nullity. The appellant also complains that the ruling of the trial judge was made without viewing the footage said to show the appellant holding the gun, and that therefore he was not in a position to assess whether or not there had been some minimal level of engagement with the questions on the part of the appellant.

72. The respondent relies upon the judgment of McKechnie J. in *A. McD.* and argues that there was no plausible engagement by the appellant with the questions he was asked. It is said that it was plainly obvious from the CCTV footage, which was shown to the jury, that the object in question was a handgun, and the trial judge was entitled to take the view that to say it was a knife was a deliberate attempt at evasion.

73. Moving on to the dialogue streams on the phone, the appellant submits that they did not fall into the statutory categories of "object, substance, or mark, or mark on any object". The Court of Appeal is said to have taken too broad an approach to the interpretation of this part of the section. It is argued that the provisions are directed towards an enquiry regarding the physical presence of an object in the possession of the accused, or a substance or mark on his clothing or footwear or in a place where he was. When such enquiry is made, it is the *fact* of possession, or the *presence* of the mark or substance, that is to be explained. In effect, the Court of Appeal permitted the expansion of the section to cover the transmission of communications at a time earlier than the offence, and also to cover the meaning of those communications.

74. The appellant accepts, as he must, that many of the responses given by the appellant in interview were fully admissible in any event, and that a jury is always entitled to draw such inferences as are proper from evidence presented to it. However, the fact that the legislation confers the additional status of corroboration puts the evidence to which the section applies into a different category.

75. The respondent objects to consideration of the issue relating to the dialogue streams, on the basis that it was not argued in the trial, although it was argued in the Court of Appeal. However, counsel has engaged with the argument and submits that the phone is an "object", and thus an item of real evidence. All of the material found in it formed part of the same object. The respondent draws a comparison with a bag containing controlled drugs or a box containing stolen property. The general principle is that a person who has possession of the container also has possession of the things in it. On this basis it is argued that the dialogue streams were part of the phone. To account for the phone is, on this view, to account for what was contained in or on it.

Inferences – additional issues

76. Although it was not expressly argued in the trial or appeal, the parties were requested to address the meaning of the statutory phrase "attributable to the participation of the accused in the commission of the offence". This request was made on the basis that in considering whether or not the section was properly deployed, the Court may be required to construe the provision as a whole. However, the submissions on this

aspect are received without prejudice to the entitlement of the Court to find that the issue does not properly arise in circumstances where it was not previously argued.

77. The appellant submits that use of the words "attributable to" rather than, for example, "connected to", means that the object, mark or substance must be directly involved or implicated in the commission of the offence. This submission takes account of the possibility that criminal behaviour may take place over a period of time, and that the evidential value of the object, mark etc. may relate to some part of that behaviour.

78. In this case, the physical object was the phone. The appellant argues that the phone could not be regarded as an object, possession of which was attributable to the appellant's commission of the offence. There was nothing to suggest that it was used in the commission of the offence. Further, the messages on it, even if considered to come within the statutory category, could be of tangential relevance only. They were sent before the shooting, and at most might be seen as evidence of a state of mind at the time they were sent. However, they could not be considered to have been "attributable" to the offence.

79. The appellant has raised a further argument, based on the decision of this Court in *People (DPP) v. Wilson [2019] 2 I.R. 158 ("Wilson")* in that the inference provisions can only be applied where the offence in respect of which they are invoked is the same as the one with which the accused is charged. In this case, the appellant was arrested on suspicion of unlawful possession of a firearm at Hollywood Estate. The correct interpretation of the section was reflected in the caution that he was given when it was being explained to him. He was informed that answers to any question in relation to that offence could not be used in relation to any other offence charged against him. However, ultimately, he was not charged with that offence – rather, he was charged with unlawful possession of the firearm at Laurel Ridge and unlawful possession of ammunition at Hollywood Estate.

80. The respondent makes the general point that neither of these issues were previously argued and thus, it is said, they fall outside the terms of the grant of leave to appeal.

81. In relation to the meaning of the words "attributable to participation", the respondent submits that there is no requirement that the object, substance or mark should be believed to have been directly involved or implicated in the accused's participation in the commission of the offence. The only question was whether it was reasonable for a garda to consider that the object, substance or mark suggested that the accused had something to do with the commission of the offence. Reliance is placed on the judgment of the Court of Criminal Appeal in *People (DPP) v. Bolger [2013] IECCA 6 ("Bolger").*

82. The point is then made that while the appellant was arrested for unlawful possession of the firearm at Hollywood Estate, it was at all times made clear to him that he was being detained because the gun had been fired and a woman had been injured. Three of the offences charged (possession of a round of ammunition, reckless discharge of a firearm, and s.4 assault causing serious harm) related to that shooting, and all the charges clearly referred to the same firearm as that for possession of which he had been arrested.

83. The respondent contends that use of the phrase "the same offence" in the two judgments in *Wilson* must be seen in the context of the facts of the case. It is submitted that on a close reading of the judgments, what was meant was an offence similar to, or related to, the one in respect of which the inference provision was invoked. A completely literal interpretation of the section is not appropriate.

84. The respondent submits that this is a case in which the invocation of the proviso would be appropriate if the Court were to find that the inference provisions had been deployed when they should not have been. The appellant contends for the approach adopted by the Court of Criminal Appeal in *People (DPP) v. McCowan* [2003] 4 I.R. 349 ("*McCowan*"), approved by this Court in *People (DPP) v. K.M.* [2018] 1 I.R 810 ("*K.M*") , arguing that there has been a breach of the right to silence and that it is not open for the Court to find that nothing turned upon it.

Discussion

The representation issue

85. The appellant and respondent are of course agreed that the long-established right to legal representation in a criminal trial is constitutionally rooted. That is the basis upon which the right to legal aid arises. Equally, they agree on the existence of the right of an accused person to represent himself or herself. However, it is necessary to explore that concept, and how exactly the right can be exercised in the trial context, in a greater degree of detail.

86. The right to be legally represented in court proceedings, whether criminal or civil, is something that, obviously, cannot be exercised in isolation from the existence of such proceedings. In my view, it is a right that follows from the constitutional guarantees associated with the administration of justice (under Article 34) and, in criminal cases, the right to a trial in due course of law (under Article 38). As O'Higgins C.J. stressed in *Healy v. Donoghue*, this concept of justice imports not only fairness, and fair procedures, but also regard to the dignity of the individual. In the same case, Henchy J. referred in addition to the obligations of the State pursuant to Article 40.3.1º and Article 40.3.2º, in finding a guarantee that an accused person will not be deprived of his liberty as a result of a trial conducted in a manner, or in circumstances, calculated to shut him out from a reasonable opportunity of establishing his innocence. It is therefore mandatory that every criminal trial is conducted in accordance with the concept of justice, that the procedures applied are fair, and that the accused person is afforded every opportunity to defend himself.

87. The right to a fair trial in due course of law is, in my view, an absolute right in that while there may be dispute about the detailed content of the requirements in a given context, or a dispute about whether a particular trial was in fact conducted in due course of law, I am not aware of any authority for the proposition that the Constitution can tolerate an unfair trial.

88. To meet the standard of a trial in due course of law, it will in very many cases be essential to ensure that the accused has access to legal representation. The purpose of affording this right is to ensure that the accused person's defence will be properly

conducted and his or her interests protected in the course of the trial. In broad terms, the role of the legal representative is to protect the accused from any unlawful process and to make sure that any evidence or argument of assistance to the defence is put before the decision maker.

89. The entitlement to conduct one's own defence, on the other hand, does not appear to me to have either the same constitutional purpose or, in all circumstances, the same level of protection. It seems to me that it is, rather, an aspect of personal autonomy and the dignity of the individual – a right to speak for oneself, rather than to be spoken for by another. It is afforded, not in the interest of ensuring a fair trial, or a trial in which the defence is put in the best possible fashion before the decision-maker (for it will rarely bring about this result), but out of respect for personal choice. However, personal choice in this regard will not be permitted to subvert the administration of justice, and for that reason a decision on the part of the accused to discharge his or her legal representatives may in some circumstances be overridden by the trial judge. It is not necessary here, and it would probably be unhelpful, to attempt to list the circumstances in which this may properly occur. However there will be at least some cases where the real objective of the accused is to procure an adjournment, where an adjournment would not be in the interests of the administration of justice, rather than to conduct the trial himself. Another, quite different, situation might arise in a case where the purpose of the accused in representing himself is to conduct an improper cross-examination of a vulnerable witness.

90. In this case, the appellant applied for legal aid. No one could doubt that the case met the criteria for free legal aid, or indeed the criteria for the grant of a certificate for solicitor and two counsel. Not only were the charges extremely serious, but the evidential and legal issues obviously required the attention of experienced practitioners. Apart from the pre-trial applications and issues about disclosure, it was always likely that there would be disputes about the admissibility of background evidence, about the admissibility of the evidence taken from the mobile phone, about the manner in which a significant amount of CCTV footage was to be presented to the jury and about how that footage was to be interpreted (involving the necessity to grasp the full significance of the differing evidence as to the timing of events). There was also the complex and serious issue about the applicability of the inference provisions.

Not all of those issues would necessarily have been obvious at the District Court stage, but it was nonetheless inevitable that once the application for legal aid was made it would be granted.

91. That grant of legal aid entailed a judicial decision, made on foot of the appellant's application, that it was "essential in the interests of justice" (the terminology of s.2 of the Criminal Justice (Legal Aid) Act 1962) that he should have legal aid. That decision ensured that the State's obligations in respect of the appellant's constitutional right to representation were fulfilled.

92. As O'Higgins C.J. said in *Healy v Donoghue*, no one can be compelled to accept legal aid and a person is entitled to waive his right in this respect and to choose to conduct his or her own defence. Although that was not the course originally taken by the appellant, it was of course open to him to change his mind and to seek to defend himself. However, the first observation I would make is that such a choice must be seen for what it is – not just a decision to exercise one constitutional right, but the waiver of another right that is of huge significance in the trial context. In this case, that very significant right been clearly invoked by the accused individual at an earlier stage and had been the subject of a judicial determination that was unquestionably correct.

93. In that context, it seems to me that the principles relating to a waiver of a constitutional right must be relevant. The issue was considered by this Court, in relation to the right to silence, in *K.M.* . O'Malley J. stated that while the waiver of a constitutional right is of course possible, it is not to be lightly assumed that it has taken place. It was observed that in the context of confession evidence, the courts had always held that it must be clear from either an express statement or by necessary implication that the suspect had spoken freely and voluntarily, in the knowledge that he or she was not obliged to do so. The burden of proof that this is what occurred is, of course, on the party asserting that a right has been waived.

94. It seems to me that similar considerations arise in respect of the right to be professionally represented in a trial. Where that right has been vindicated by the grant of legal aid, its waiver must in my view be established to have occurred in a clear

exercise of a voluntary and informed choice. This view, incidentally, is consistent with the views of the majority of the United States Supreme Court in *Faretta v. California* (422 U.S. 806, 95 S. Ct. 2525), one of the authorities relied upon by the appellant, where it was held that an accused had a constitutional right to proceed without the assistance of counsel if he "voluntarily and intelligently" elected to do so. (However, self-representation in the US may be terminated, due to the conduct of the accused, in certain circumstances.)

95. In the context of the instant case, the first issue to be determined is the factual question whether the appellant had made a voluntary and informed decision to waive his right to legal representation, and represent himself in the trial. Having regard to what transpired in the court, as set out above, I cannot find that any such choice was clearly made. When asked directly by the trial judge if he wanted to defend himself in the trial, he did not say that he did. Quite on the contrary, he stated that he was still reviewing the evidence and did not yet have a defence prepared. His irritation with his lawyers arose from the fact that he had not seen them that morning, and that they had permitted him to be arraigned and a jury empanelled in circumstances where he manifestly felt that the trial had come on too fast and that he was not ready for it. There is absolutely nothing to indicate that he wished to take over the conduct of his own defence and proceed with the trial.

96. The facts in this respect could not be further than those in *Burke v. Judge O'Halloran* [2009] 3 IR 809. In that case, it seems to have been clear from a very early stage in the hearing that the applicant and his solicitor were not getting on together, with the former frequently interrupting and distracting the latter. At a certain point the applicant asked if he could represent himself. The District Judge told him he could not. The applicant continued to say, at intervals, that he wished to dispense with his solicitor and to cross-examine a prosecution witness, while the solicitor asked for permission to leave the court. The applicant did not suggest that he would need an adjournment, and it is clear that he believed, quite simply, that he could do the case better than his solicitor. In those circumstances, it was obvious that he had indeed made a choice, and had communicated it expressly to the judge.

97. It is argued by the representatives who took over this appeal that, in this case, the choice must be seen to have been made by necessary implication from the fact that the appellant had been told that the case would not adjourn, and yet maintained his wish to dispense with his lawyers. I do not consider that this follows. There was never any express statement to this effect from the appellant, who continued to permit his lawyers to explain his position, without intervening, even while seeking to dispense with them. At no stage during these exchanges did counsel (who was handling a difficult situation very carefully) even suggest that the client wanted to run the case himself. Even at the appellate stage, counsel have not said that his instructions are that he had wanted to do so, as opposed to perhaps maintaining a forlorn hope that the case would adjourn if the lawyers were dismissed.

98. One might usefully consider here what might have happened if the trial judge had indeed permitted the lawyers to depart and proceeded with the trial. If the appellant had then appealed on the basis that he had not wanted to conduct the case himself, and had been forced on without representation when all he wanted was a change of representation and an adjournment, could an appellate court be confident in saying that this was not what had happened?

99. I consider that the fact that by the following morning the appellant was content to let the matter proceed on the basis that he was instructing his representatives is indeed relevant. If his primary concern was, as it appears very strongly to have been, a fear that because he had not fully assimilated the evidence and prepared his defence, then neither would his lawyers be prepared, it must be assumed that this fear had been allayed. As became clear during the trial, the defence counsel were in fact fully capable of dealing with all of the evidence and the issues that arose therefrom.

100. In the circumstances, it seems to me that the Court of Appeal erred in finding that the appellant had in fact exercised his right to conduct his own defence and that his right had been breached. I am however in full agreement with the proposed procedure (set out in paragraph 45 above) in cases where an application to that effect is made, or seems to be made.

The inferences issue

101. A number of different questions require to be addressed under this heading. The starting proposition is that where the issue is contested, the trial judge must determine whether, on the facts as presented to the court, the statutory criteria have been met for permitting the jury to be given evidence of a failure or refusal to answer questions, and to draw inferences therefrom. In so doing, the judge must bear in mind the constitutional context, in which, absent specific provisions of this nature, no adverse inference can be drawn against a person who chooses to exercise the right to silence.

102. In *A. McD.* McKechnie J. (with whom the other members of this Court agreed), emphasised that the right to silence is impaired by statutory provisions of this nature. It is this fact that obliges a court considering the application of the section to take a rigorous approach, in order to ensure that the right is not impaired beyond the extent permitted by the statute. (We are not concerned here with the principle that penal statutes are to be construed strictly – s.18 does not create a criminal liability, and is therefore not to be considered a penal provision.) It is therefore necessary for trial judges to take a rigorous approach where the prosecution seeks to rely on the provisions.

103. In that context, the first question arising in this appeal is the extent to which the judge was obliged to assess the evidence about the firearm that was in the possession of the Gardaí at the time the section was invoked, before determining whether or not the appellant's engagement with the questions was inadequate. The next question is whether the appellant had given an "account" within the meaning of s.18, in relation to the firearm, such that the Gardaí were not entitled to invoke the provisions in respect of that matter and the trial court should not have applied them. There is, then, a separate question whether the provisions had any application to the content of messages found on the phone.

104. The appellant has, at a very late stage, raised a further issue that, while it might well be ruled out of consideration on *Cronin* grounds, can be relatively easily determined as a preliminary issue – whether the questions asked related to the offences with

which the appellant was charged, within the meaning of the section. He relies here on the judgment in *Wilson*, and on the fact that while he was arrested on suspicion of unlawful possession of a firearm at Hollywood Estate, and s.18 was invoked in respect of that offences, but was ultimately charged with possession of the firearm at Laurel Ridge and with possession of ammunition and the unlawful discharge of the firearm at Hollywood.

105. In *Wilson*, the appellant had been arrested on suspicion of involvement in the unlawful discharge of a firearm at a particular residential address. A prosecution witness had given an account of two men arriving at her home and assaulting a person there with a meat cleaver. She fled the house, and heard shots fired after she left.

106. During the questioning of the appellant, Gardaí invoked s.19 of the Act of 1984, as amended, in respect of questions about his presence at the address. In so doing, they specifically informed him that they believed that the purpose of his presence was to participate in the unlawful discharge of a firearm. He was requested to account for his presence at a place when a firearm was discharged. Ultimately, he was charged only with a count of burglary, in that it was alleged that he entered the building as a trespasser and committed an assault causing harm, with no reference to the use of a firearm. A co-accused was charged with burglary in similar terms, but also with possession of a firearm in suspicious circumstances. The trial judge permitted the inference provisions to be utilised in respect of the appellant's interviews. The Court of Appeal considered, with reference to *Bolger* (considered below), that this was correct, on the basis that the facts of the two offences were "inextricably linked".

107. On appeal, this Court took a different view, and did not consider *Bolger* to be relevant. The difference between the two cases were pointed out with particular clarity in the separate judgment of McKechnie J. In *Bolger*, the appellant had been arrested in respect of possession of a firearm at a location and time at which a man was shot dead. He was ultimately charged with the murder, on the basis that while he was not the gunman, he had driven the gunman from the scene. The questioning was about the movements of the appellant and his van on the day in question, and the invocation of the section (and, presumably, the resulting legal advice) therefore related to the offence with which he was ultimately charged. It may be noted here

that, in any event, it is clear from the judgment of the Court of Criminal Appeal in *Bolger* that the primary issue in relation to the inference provisions was about the admissibility of the interview memoranda having regard to the statutory requirements and safeguards relating to the conduct of interviews.

108. By contrast, in *Wilson*, the offence in respect of which the appellant had been questioned, and concerning which he had received legal advice as to the operation of the section, was the discharge of the firearm. He was never cautioned or given an opportunity to seek legal advice in respect of the offence of burglary, and was not asked questions about it. There was no evidence that the firearm was produced or discharged in the course of the assault. The judgment of Denham C.J. (with whom the majority of the Court agreed) concluded that s.19 could not be utilised in a trial for an offence other that the offence in respect of which the inference caution was expressly invoked.

109. The key point on this aspect, therefore, is that the trial judge can permit evidence to be given of failure or refusal to answer questions, and can instruct the jury that they may draw inferences from that failure or refusal, if the section was invoked for that purpose (and the attendant safeguards duly observed) in questioning the accused about the offence with which he or she is standing trial. That offence may or may not be the same, or the only, offence in respect of which the accused was arrested, since there are circumstances in which a suspect may lawfully be questioned about other offences, or in which the relevant evidence may disclose the commission of more than one offence.

110. In the instant case, I do not see any difficulty arising in respect of these principles. The appellant was arrested on suspicion of possession of a firearm with intent to endanger life at Hollywood Estate. He was charged with reckless discharge of a firearm, and possession of ammunition, at that location. He was also charged with possession of a firearm at Laurel Ridge. In reality, given the facts of the case, evidence of possession at Laurel Ridge was also highly relevant evidence relating to the discharge of the weapon a short time later in Hollywood Estate, and *vice versa*. A person who has a loaded gun, and fires it, must also be considered to be in possession of the ammunition in the gun. It is not just that the facts grounding the charges are

extremely closely linked – it is that the evidence in support of any individual charge also supported the others and was admissible in respect of each charge. It was made entirely clear in the interviews what the investigation was focussed on, and there can be no question in the circumstances of the appellant not having been put in a position to obtain relevant legal advice.

111. On the first of the issues outlined above, the appellant has contended that the trial judge should not have ruled on the applicability of s.18 without having seen the CCTV footage. However, the role of the judge does not, in my view, necessarily require him or her to be satisfied that the facts asserted by the prosecution are correct. What must be established by the prosecution is that in the circumstances as they pertained at the time of questioning (including, but not necessarily limited to, the evidence available to the Gardaí), there was evidence relating to an object, a mark, or a substance as set out in s.18; that the Gardaí believed that it was attributable to the participation of the accused in the commission of the offence; and that the evidence clearly called for an explanation. That may in some cases involve an assessment by the judge of the quality of the evidence put to the accused, in order to determine whether it meets the standard of "clearly calling for an explanation", but whether such an assessment is necessary will in many cases depend on the facts and, to some extent, on the attitude of the defence.

112. In this case, the factual assertion was that the CCTV footage showed the appellant holding a silver-coloured handgun. The appellant had, it is true, denied that he had a gun but had at various times said that the object in the footage could have been an imitation gun, a knife or a hook knife. It can, I think, be safely assumed that if the footage was of such ambiguous quality that the object might have been a knife rather than a gun, that issue might have been raised by the defence. If that had been the case made, the trial judge might well have had to consider it for himself and would have been entitled, in appropriate circumstances, to decide that the matter was not sufficiently clear to permit the application of the section.

113. However, the trial judge was not asked to view the footage, with the defence argument concentrating on the words "an account of any kind" as used in the *Devlin* judgment. (I note in passing that in closing the case for the defence, counsel again

avoided any argument that the object was not a gun. Rather, he emphasised the absence of any forensic evidence linking the appellant to the gun found in the estate, and requisitioned the trial judge on the basis that a different gun might have been used in the shooting.) As presented to the trial judge, therefore, the issue was that while the prosecution relied upon the footage as showing a gun, the defence submission was about the adequacy of the "account". It was not, in those circumstances, necessary for the judge to personally examine the CCTV and satisfy himself that it showed a gun. He was entitled to act on the basis that the footage did show a gun, and to determine that an explanation was clearly called for.

114. The next question then is whether a sufficient account had been given, such that the section did not come into play. The criteria by which this issue should be determined was fully considered by McKechnie J., in *A. McD.* In that case, a car had been set on fire in an underground carpark. Mr. McD. had been arrested shortly afterwards, and had said that he had been present in the carpark because he saw others go in and followed them. He denied having anything to do with the fire. Subsequently, the Gardaí had obtained CCTV footage of the incident which showed Mr. McD's role in a very different light. He was rearrested, and, as described in the judgment, questioned in a manner much more specific than on the first occasion. In particular, the footage and the results of forensic tests were put to him. His responses were uninformative. The Gardaí then invoked s.19 of the Act and requested him to account for his presence in the carpark. He said that he was there but could not remember what he had done. Asked if there was any defence or reason for his actions, he said that there might have been, but he could not remember. He went on to state that he "couldn't give a rat's ass".

115. As it happens, the inference provisions were not relied upon in the trial as the prosecution took the view that certain of the answers given after the section was invoked amounted to admissions. However, the defence argued for the exclusion of the evidence on the basis that the interview had been unlawfully conducted, in that s.19 had not been properly invoked in circumstances where the accused had previously given an account.

116. McKechnie J. gave careful consideration to the judgment of the Court of Criminal Appeal in *Devlin*. He took the view that the statement in that judgment to the effect that the section did not apply "where an account of any kind has been given" could not be taken literally, since otherwise it could easily become effortless for an accused person to circumvent the operation of the provisions, and void them of utility, "by simply giving any manner of account, however plainly unrelated or potentially farcical it may be". Equally, the views of the investigating Gardaí could not be determinative, and the section could not be invoked simply because they did not like the account given, or did not regard it as satisfactory, or did not think it a sufficient explanation. Furthermore, the issue of credibility was not for them. However, McKechnie J. did consider that it must be the case that a "minimum level of plausible engagement" was required before an account could satisfy the requirements of the section. That necessarily involved a consideration of the entirety of the circumstances before the court. By these criteria, the answers given by Mr. McD. during his first arrest were not "demonstrably incapable of belief or so incredible as to merit only being disregarded as untrue". Accordingly, he had given an "account" on that occasion.

117. However, McKechnie J. pointed out that the account given had to be seen in the context of the questions that were being put to the accused at that time. The obligation to give an account, when the section is invoked, depends on whether the circumstances "at the time" call for an explanation. The circumstances had changed significantly before the second arrest, when the new evidence was put to Mr. McD. and the section was deployed. It was with regard to those changed circumstances that McKechnie J. found that, by any yardstick or threshold by which compliance with the section must be judged, the "uninformative" answers given during the second arrest could only be regarded as an outright refusal on the part of Mr. McD. to engage with the new evidence put before him. Accordingly, the Gardaí were justified in invoking the section.

118. It seems to me that the same result must follow in the instant case in relation to the firearm questions, for similar reasons. In interviews conducted under the normal caution the appellant (who, it must be remembered, had been arrested very soon after the shooting incident) was shown footage which, the Gardaí asserted, showed him

taking a gun out of a bin and holding it out for others to see. Given that the appellant was seen departing a short time later with something in his hand, that a person was shot some minutes later, in the nearby home of a man with whom the appellant had had a fight earlier that evening, and just after an attack on his own family home, that was a matter that clearly called for an explanation. Moreover, as required by the Act, it called for an explanation *from him*, since only he could explain exactly what it was in his hand.

119. Before the s.18 interview, the appellant's response at varying times was that he had not had a gun, that the object "*might have been*" an imitation gun, that it was a knife, and that he was looking for vodka in the bin. It seems to me that this demonstrated a manifest lack of engagement with the CCTV evidence. It is inherently implausible that he could not say whether the object taken by him out of a somewhat unusual location, such a short period of time before he was arrested and questioned, was an imitation gun, a knife or a bottle. If the object had been, for example, an imitation gun one might expect some explanation of where it was to be found. What was said could not be considered as amounting to an account. I would therefore consider that the Gardaí were entitled to invoke s.18 in respect of the questions about the firearm.

120. The issue in relation to the messages on the phone raises entirely separate problems. It will be recalled that in the memo in the form put before the jury, three of the questions asked were about the meaning of the words "packing well". The appellant denied that this referred to possession of a gun, but did not respond to two questions asking what other meaning they could have. The final question was whether the use of the name "Gav" was a reference to him, and again he did not respond.

121. Before discussing the applicability of s.18 in this context, it may be necessary to emphasise that the messages were admissible before the jury in any event. The absence of proper evidence as to date on which they were sent was undoubtedly a weakness, but the jury would in the circumstances have been entitled to conclude that they related to the events of the evening in question. (It would of course have been otherwise if, for example, subsequent contents of the messaging app indicated that they must have originated on an earlier date.) The content was manifestly relevant as showing the state of mind of the appellant shortly before the shooting. The jury,

having received that evidence, would in the ordinary course have been entitled to draw such inferences as were proper in accordance with the general instructions given by the trial judge.

122. The issue for the Court is whether the prosecution could seek the additional benefit to be obtained from treating a failure to answer questions about the messages as corroborative evidence. That depends on whether the terms of s. 18 were properly interpreted.

123. For present purposes, the section applied if :-

- There was evidence that an object was in the possession of the appellant, and
- The member questioning him reasonably believed that the object, or any mark or substance on it might be attributable to the participation of the appellant in the commission of the offence with which he was ultimately charged, and
- The appellant was asked to account for the object, substance or mark on the object, and
- The circumstances at the time clearly called for an explanation from him of that object, or substance or mark on it.

124. The actual invocation of the section was in the following terms:-

> *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 D/Garda Pat Condon wish to inform you that it is my reasonable belief that this phone and the conversations contained therein are conversations or 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.*

125. The Court of Appeal held that the text of the message was something visible on examination of the phone, that the phone was an object, and that to account for, or give an account of, an object could include accounting for anything that could be seen on it. I respectfully disagree with that analysis in this context.

126. To begin with, it must again be emphasised that the provisions of ss.18 and 19 encroach upon the constitutionally protected right to silence, and that, accordingly, such encroachment must not be permitted to go beyond the statutory parameters. The sections, unlike the exceptional provisions set out in s.2 of the Offences Against the State (Amendment) Act 1998, as amended, do not encompass all questions that are material to an investigation but apply only in limited circumstances. Accordingly, they should not be read as applying simply on the basis of relevance, or materiality, or, to use the word used in interview by the garda, "consistency". For the possession of an object (or presence of a mark etc) to be "attributable" to suspected participation in the commission of the offence, it must be directly connected with that offence such that possession of it is explicable by the fact of participation.

127. It seems to me that an object in this context must mean a thing that has a physical existence, since it must be possible to physically mark it or leave a substance adhering to it. Clearly, a text message displayed on the screen of a phone is not itself an "object". It is an electronic communication, converted digitally into a readable display on a screen. The message itself cannot be picked up, looked at from the other side or handled in any physical way. It is no more an "object" than the sounds captured on a recording device, although such a device itself is an object. The phone, similarly, is undoubtedly a material object. However, its function in this context is to provide access to electronic information stored electronically on it, by means of apps such as a messaging app. Such information can be stored or deleted, but the phone does not "contain" it the way a bag contains objects that can be taken out or put back in. Objects in a bag are just that – objects. Nor do I think that a message can be considered to be a "mark" on the phone within the meaning of the section. A "mark", again, is something that has a physical existence on some surface of an object. The digital display is not written or scratched on any surface of the phone, whether exterior or interior.

128. I repeat here that relevant evidence of material found on a phone that was in the possession of the accused will be admissible, subject to any applicable rule of evidence that excludes it. However, if the analysis of the Court of Appeal is correct, the investigating Gardaí can not only examine the phone and glean evidence from it, but can also benefit from the inference provisions in seeking an explanation of the *meaning* of *any information* accessed through such examination. That, in principle, would of course extend beyond text messages and could include call histories, event calendars, photographs, emails, bank information, and health information, to name just some of the commonly used features.

129. Personal communications devices in the modern era contain a wealth of information which may well be material to the investigation of a crime – that is not the issue in this appeal. Such information may well be admissible in a trial. However, it seems to me to be clear that none of this was within the contemplation of the Oireachtas in 1984. While developments in technology, and the general use of personal mobile phones, had advanced greatly by 2007, when the section was substituted, the wording was not altered in any relevant way that might indicate that it was intended to cover questions about such material. It is a very long way from questions about why a murder victim's blood is on the clothing of a suspect, or why he has in his possession property belonging to a burglary victim, to an obligation to explain the meaning of electronically stored information or suffer the consequences of adverse inferences. Such a far-reaching inroad into the right to remain silent would in my view require very clear statutory wording, and cannot be read into a provision that speaks of an "object", or a "mark" or "substance" on such object.

130. My primary conclusion on this aspect, therefore, is that the text messages could not be within the category of matters in respect of which s.18 can be invoked. I consider, however, that there is a further issue on the facts of this particular case. It will be recalled that a passage of three questions on this aspect went to the jury, and for convenience I will reproduce them here:-

> *Q. What is meant by the phrase "I'm packn well"*
>
> *A. No reply.*

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 the possession of a firearm as asserted could you please explain to me what your interpretation of its meaning is,

B. No reply.

Q. I wish to ask you if reference to "Gav" dialogue a reference to you Gavin Sheehan

A. No reply.

131. To repeat, the jury would have been entitled to draw inferences from the phone dialogue in any event. However, I cannot see that any of these questions "clearly called for an explanation" from the appellant. This has nothing to do with relevance – they were clearly relevant. The point is that the dialogue appears to me to be self-explanatory. Starting with the last question, the jury were aware that the appellant had told Gardaí that he had lost his phone, but would have been fully entitled on the evidence to conclude that the phone found in the car belonged to him without needing to draw that inference from his refusal to confirm that the messages were addressed to him.

132. The meaning of the word "packing", in the context of a dialogue about a potential fight, is not particularly esoteric and is not even a local idiom. Its use to connote the carrying of a gun has been well-established internationally, for a very long time – the Shorter Oxford English Dictionary cites the work of Raymond Chandler to support its definition. Again, I do not see that an explanation was called for *from the appellant*, or that the circumstances were such as would either require or justify the drawing of additional inferences from his refusal to answer questions about the meaning. To use the section in these circumstances simply has the effect of boosting obvious inferences that are already there to be drawn.

The proviso issue

133. On the foregoing analysis, the question of the application of the proviso does not arise in respect of the representation issue but does arise in respect of those findings on the inferences issue dealing with the text messages.

134. Section 3(1) of the Criminal Procedure Act 1993 sets out the jurisdiction of the Court in this regard. The Court may affirm the conviction, notwithstanding that it is of the 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. In the circumstances of this case, as I see them, I do not consider that the question whether there is a category of legal error so fundamental as to render the trial a nullity, regardless of its impact on the likelihood of acquittal, truly arises.

135. The proviso was considered in *Fitzpatrick & McConnell*, which, as it happens, was concerned with s.18 inferences. The Court of Criminal Appeal found that the procedure adopted by investigating Gardaí who invoked s.18 in that case fell short of what was required, in that the appellant had not been given an appropriate opportunity to consult his solicitor. The Court then considered whether or not it should apply the proviso. At paragraph 46 of the judgment of O'Donnell J., the following observations are made:-

> *"The proviso has been part of Irish law since the creation of the Court of Criminal Appeal. It does not, however, invite a court of appeal to make its own value judgment as to the guilt or innocence of [the] appellant. If there has been a fundamental error in the conduct of the trial and there has been a lost chance of acquittal, then the court cannot apply the proviso simply because it is of the opinion that under the proper trial [the] appellant would have been convicted. If a departure from the essential requirement of the law has occurred that goes to the root of the proceedings, then the appeal must be allowed."*

136. This, in my view, is the correct approach for an appellate court where the issue is the wrongful admission of evidence in the trial or an incorrect instruction to the jury. An

example of such an approach can be found in the recent decision of this Court in *People (DPP) v. Forsey* [2018] IESC 55, where the appellant had been convicted of corruption charges. The Court unanimously found that, through an error on the part of all of the counsel involved as well as the trial judge, the jury had been given incorrect instructions in relation to the burden of proof on a key aspect of the case. One member of the Court considered that the strength of the evidence was such that no real injustice could be said to have occurred. However, the majority took the view that, *inter alia*, it would only be in the clearest of cases that it would be appropriate for an appellate court to dismiss an appeal on this basis, after a trial in which the jury were given fundamentally wrong instructions about their duty in relation to the presumption of innocence. On the facts in that case, the Court could not assume that a properly instructed jury might not have found a reasonable doubt.

137. In *Fitzpatrick & McConnell*, the charge was possession of explosive substances. The Court of Criminal Appeal considered the role of s.18 inferences as corroboration before reaching its conclusion that it would be appropriate to apply the proviso. It was noted by O'Donnell J. at paragraph 46 that the significance of any inference to be drawn might depend on the particular facts of an individual case:-

> *"Most often, as the section itself recognises, its main effect will be to provide corroboration where that is required either by a rule of law, or by the general practice of the courts in respect of particular offences. Here, however, there was no question of the evidence against the accused requiring corroboration either as a matter of law or practice. It was direct and compelling evidence of involvement in the preparation of bombs…The court quite properly rejected the patently threadbare and contrived account offered by the appellant. The provisions of s.18 had no part to play in that assessment."*

138. As an aside, I would agree with the observation here that the section is capable of being applied regardless of whether the case is one where corroboration would normally be required. Where there is no evidence that requires corroboration, it is probably best to explain the inferences issue to the jury in terms of support, rather than to risk having to embark upon an unnecessary explanation of corroboration. However, that question does not arise in this appeal.

139. The judgment in *Fitzpatrick & McConnell* does note that it was dealing with the detailed reasoning of a written ruling in the Special Criminal Court, rather than with a jury verdict. However, it is plain that the s.3 proviso is capable of being operated in respect of jury trials and that it and its predecessor provision have been so operated for over a century.

140. In this case, it seems to me that, on the facts of the case, the views I have expressed in favour of the appellant on one limited matter could not amount to grounds for quashing any of the convictions. Those views relate only to the questions about the messages on the phone. I have been at some pains to point out that these messages were admissible in evidence, and that inferences could be drawn from them, in any event.

141. It seems to me that this case can readily be distinguished from *McCowan* and *K.M.* In each of those cases, evidence was wrongly admitted of interviews where the appellant had exercised his right to silence in an ordinary interview. The inference provisions had not been invoked, and the evidence of the appellants' silence was therefore inadmissible under the principles discussed in *People (DPP) v. Finnerty* [1999] 4 I.R. 364. No guidance was given to the jury in either case as to how it should treat that evidence. In each case, therefore, the jury had been presented with evidence that it should not have heard, with the risk being that the jury could have drawn a general inference of guilt from silence. In *McCowan*, this factor was considered in combination with two other matters of concern, including the failure to properly record denials by the appellant, and it was held that the cumulative effect was to render the trial unsatisfactory. In *K.M.*, the prosecution put into evidence, without any warning to the defence, a memorandum of interview in which the appellant had repeatedly refused to answer questions, stating that he was relying on his prepared statement. The decision of this court was primarily concerned with an argument as to whether or not this approach constituted a waiver of the right to silence. However, it was also a case where the appellant had given evidence in the trial, putting his credibility as opposed to that of the complainant very much in issue.

142. In the instant case the text of the messages was admissible. The question then is whether the appellant might have had a chance of acquittal if the jury had not heard the specific three questions about the messages, and had not been permitted to draw inferences from the response or lack of response thereto. It must be borne in mind, in considering this question, that this, like *Fitzpatrick & McConnell*, is not a case where there was any evidence that *required* corroboration, and so any inferences drawn did not play a legally necessary role in the decision of the jury.

143. The jury had before it CCTV footage of the appellant holding an object. It was not seriously contested, either in the trial or on appeal, that it was sufficiently clear for the jury to be satisfied beyond reasonable doubt that the object was a gun. They were entitled to take the failure to give any form of plausible explanation of the footage into account, to draw the inference that no other innocent explanation was available and to use that inference to support their belief as to what was to be seen in the footage.

144. The jury were also entitled to infer from the evidence before them that the phone belonged to the appellant, and that in the text messages he was telling a friend that he was intending or anticipating a fight with the Cunninghams and that he was in possession of a gun. Did the application of s. 18 in relation to the phone messages, in circumstances where the jury already had evidence of possession of the gun from both the CCTV footage and the text of the messages, add anything extra to the case? It entitled the jury to draw inferences from the failure to explain the messages, but it is hard to see what inference could have been drawn to any effect other than to confirm that the messages conveyed what they clearly were meant to convey – that the appellant had a gun and intended or anticipated some form of confrontation with the Cunninghams. In my view, there is no real possibility in the case that the appellant has lost a chance of acquittal. I do not, therefore, consider that there has been a miscarriage of justice resulting from the application of the section.

145. I stress that I am not to be taken as suggesting that a wrongful application of the inference provisions can generally be overlooked. In another, perhaps more finely

balanced case, where inferences might truly be said to have played a more important role, it could well be a decisive matter in an appeal.

Summary and conclusions

146. The two substantive arguments made on behalf of the appellant in this appeal were, firstly, that the appellant was wrongly deprived of his right to represent himself in the trial and, secondly, that the trial judge erred in permitting evidence to be given and inferences to be drawn in relation to his failure to answer certain questions when interviewed by the Gardaí.

147. On the first issue, I agree that an accused person has in principle an entitlement, as a matter of personal choice, to refuse to accept legal representation. However, where a person has already been granted legal aid, the exercise of this right involves the waiver of the very significant right to be legally represented in a case where there has been a judicial determination that representation is essential in the interests of justice. Such a waiver must be the result of a knowing and freely made choice, and it should not be lightly inferred to have occurred. In this case, the appellant certainly wished to dismiss his representatives on the first day of the trial but there is nothing to support the proposition that he wanted to conduct his own trial.

148. On the second issue, I have concluded that the interviewing Gardaí were entitled to invoke the provisions of s.18 of the Criminal Justice Act 1984, as amended, in respect of the CCTV footage showing the appellant to be holding what appeared to be a gun. The appellant had not previously given an "account" in relation to this matter, having instead made various different and implausible suggestions that the object "might" have been an imitation gun or a knife.

149. I have reached a different conclusion in respect of garda questions about text messages found on a phone associated with the appellant. My primary finding on this aspect is that such messages (which in this case were in any event admissible in their own right) do not come within the ambit of s.18, since they are not "objects" or marks on an object. I have disagreed with the view of the Court of Appeal to the effect that a requirement to account for a phone can include a requirement to explain

information stored electronically on the phone. I have also expressed the view that the messages did not "call for an explanation" from the appellant since the meaning conveyed was clear.

150. I do not consider that my conclusions in relation to the invocation of the inference provisions in respect of the text messages should lead to the quashing of the convictions. Taking the case as a whole, I am satisfied that the admission of this evidence did not deprive the appellant of a chance of an acquittal. A relatively short time before the messages were sent, the appellant was in a physical altercation with Dylan Cunningham. The messages conveyed that he anticipated further confrontation with members of the Cunningham family and that he had a gun. CCTV footage outside his home showed him holding an object that appeared to be a gun. The appellant did not give any adequate alternative explanation for this footage. Shortly after the time of the footage a shot was fired into the Cunningham's house, a very short distance away, and Ms. Ciara Sheehan was seriously injured.

151. I am therefore satisfied that there has been no miscarriage of justice and that it is appropriate to apply s.3 of the Criminal Procedure Act 1993. I would dismiss the appeal.