



# THE COURT OF APPEAL

## UNAPPROVED. FOR ELECTRONIC DELIVERY

Neutral Citation Number: [2020] IECA 97  
Record Number: 224/15

**The President.  
Edwards J.  
McCarthy J.**

**BETWEEN/**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**- AND -**

**D.C**

**APPELLANT**

**JUDGMENT of the Court delivered by Mr. Justice McCarthy on the 9<sup>th</sup> day of April  
2020.**

### **Introduction**

1. On 18<sup>th</sup> July 2015, following an 18-day trial in the Central Criminal Court, the appellant was convicted of the offence of murder. He was convicted of murder in circumstances where, on arraignment, he had pleaded not guilty to murder, but guilty to manslaughter. The plea to manslaughter was put forward on the basis of the defence, or partial defence, of provocation. He has appealed his conviction for murder. Central to the present appeal is the contention that the judge erred in admitting certain items of evidence, the admissibility of which had been challenged.

2. To put the admissibility issues that arise for consideration in context, it is necessary to say something about the background to the trial that took place.
3. The deceased man, E. O'C, was a maternal uncle of the appellant, his mother, A, was a sister of the late E.O'C. She predeceased him in 2000. The trial Court heard that the appellant, D.C, both before and after his mother's death, had spent much time with the wider O'C family in a Dublin suburb. The Court heard that he was particularly close to P. O'C, brother of the deceased, P. O'C occupying a quasi-paternal role in the appellant's life.
4. In 2011, the appellant's older sister, L.C, made an allegation in the nature of an allegation of historical sex abuse against the deceased. The allegation was vehemently denied by the deceased, but gave rise to deep divisions in the family. The matter was investigated by Gardaí who submitted a file to the DPP who subsequently directed that there would be no prosecution. In the aftermath of this decision, tensions escalated within the C and O'C families and the Court heard references to a number of incidents in the months leading up to the killing of E. O'C on 15<sup>th</sup> December 2013.
5. We have redacted this judgment for the purposes of the avoidance, so far as practicable, of the identification of the appellant's sister in this regard.
6. On the night prior to the fatal shooting of E.O'C the night of Saturday 14<sup>th</sup> December 2013, there was a fight at a licensed premises in a Dublin suburb, 'Licensed Premises A', involving J. C, partner of L.C and D O'C, a son of the deceased. The fight was not a trivial one, it appeared that the ear of D.O'C was bitten by J.C, and that as a result, D.O'C required hospital treatment.
7. In the course of the Sunday afternoon, sometime around 4.16pm, the appellant telephoned the deceased who was at home at his address, with his wife, C, and other members of the family, asking that the deceased, E.O'C, and his son, D, would attend a 'straightener' or fistfight between J.C and D.O'C. The appellant proposed that the

‘straightener’ should take place that afternoon at a stable yard associated with the O’C family at a location outside the Dublin suburb. The deceased and his son agreed to the suggestion.

**8.** The trial Court was told that E and D.O’C, accompanied by other members of the O’C family, arrived at the yard some time before 5pm. They parked their cars on the grass verge on the roadway outside the yard or compound. D. C arrived about ten to twenty minutes after that, in the company of J.C and his sister.

**9.** A fistfight started between J.C and D.O’C which lasted for no more than five minutes. During the fight, the appellant discharged a firearm into the air. The fight broke up very soon after that, and the two combatants were urged to shake hands. Those present then moved to leave the yard. The deceased man, E. O’C Snr., was the first person to leave the yard. There was evidence that the appellant followed him, including some evidence that D. O’C and his uncle, E, had been walking behind the deceased, but were overtaken by the appellant so that the appellant was walking immediately behind the deceased.

**10.** The appellant followed the deceased through the gateway. At trial, the prosecution made the case that E.O’C had initially turned right, in the direction of where he had parked his car, but as the appellant came up behind him, turned away, with a view to getting away from the appellant. The prosecution made the case that the deceased knew that the appellant had a gun and, for that reason, was attempting to get away from him because he was afraid of the appellant. It was at this point that D.C shot the deceased twice and fatally wounded him. That he did so was never in dispute. There was evidence at trial from E. O’C that after the first shot, the deceased had said “he’s out to shoot me, he’s out to shoot me”.

**11.** The appellant was arrested the following day, on 16<sup>th</sup> December 2015. Before being arrested, he had gone into hiding, had destroyed his clothes and disposed of the gun.

Following his arrest, he was interviewed on a number of occasions while detained, and in the course of detention, told Gardaí that he had been provoked by the deceased, whom, he alleged, had made an inflammatory remark about his sister as they exited the yard. He claims that he was so provoked by this remark that he shot the deceased, but had not intended to kill him. The appellant's account to Gardaí was as follows:-

“I was second out. E. Snr. laughed at me and said ‘tell the red pox I was asking for her’, which is my sister. He said that to rile me over the sex allegations that were made against him. I just don't know why I did it or what came over me, but I just fired the gun at him. Well, I do know why I done it. I do know, because of what he said to me about my sister, he riled me up. I have had a small bit of hatred against him since the sex allegations came out.”

**12.** Arising from this account, and against the background of this account given to Gardaí, the central issue at trial was provocation. The defence case was that this remark had been made, nobody other than the appellant stated that they had heard such a remark, and that the effect of the remark was to provoke the appellant, causing an immediate and total loss of control.

**13.** The following five grounds of appeal were advanced in the course of written submissions:-

- (i) That the learned trial judge erred in law in allowing the admission of alleged threats made by the applicant to the deceased through evidence of two witnesses, D. O'C and C. O'C, who were not present at the time of the alleged threat and which was contested by the applicant as being hearsay and inadmissible and not falling under any of the exceptions to the rule against hearsay.

- (ii) That the learned trial judge erred in law in deeming admissible the evidence of P.O'C as to statements allegedly made by the applicant to that witness as an exception to the rule against hearsay.
- (iii) That the trial judge erred in law and in fact in allowing the witness, C.O'C, to give opinion evidence on whether or not she thought the applicant was capable of carrying out the alleged offence.
- (iv) The trial judge erred in law and in fact in failing to recharge the jury on the specific requisitions raised on behalf of the applicant, in particular, in relation to the issue of provocation.
- (v) That the trial judge erred in law and in fact in failing to recharge the jury on the issue of the lies of the accused.

Grounds (iv) and (v) were not ultimately proceeded with. The grounds that remain live are closely linked and can be dealt with together.

**14.** The issues as to admissibility of evidence arose out of the prosecution desire to put before the jury what the deceased had to say in relation to an interaction between the deceased and the appellant on 8<sup>th</sup> December 2013 in Licensed Premises A. The information available to the prosecution came from three sources: D. O'C, son of the deceased victim, C. O'C, wife of the deceased, and P.O'C, brother of the deceased. D.O'C's evidence was that on Sunday 8<sup>th</sup> December, seven days before the shooting, he had received a phone call from his late father requesting him to meet with him in a public house, 'Licensed Premises B'. His father told him that he had gone to Licensed Premises B, having had a 'run in' with the appellant in Licensed Premises A. When he went to Licensed Premises B, his father told him that D.C, the appellant, had said to him "they'd get him done for a grand or less", clarifying that this meant get him killed for a grand or less. He said that his father told him

that he had left Licensed Premises A to go to Licensed Premises B because they were threatening him.

**15.** The evidence of C. O’C, widow of the deceased, was that her husband returned home, having gone out for a drink to Licensed Premises A. He told her that the appellant, D.C, had threatened him there and that his words were “he had a gun and he told me he was going to kill me”. Her husband was described by her as being “very upset and frightened”. When asked how her husband viewed the threat, she said that he took it very seriously. In re-examination, when she was asked how did her husband view the threat, she responded “he was just saying, talking to me as his wife, saying that he thought they were going to do him”, clarifying by “they” she was referring to the appellant D.C. Asked the leading question “so, he took the threat seriously?”, she responded “very seriously”.

**16.** P.O’C, brother of the deceased, gave evidence to the effect that on 8<sup>th</sup> December, the deceased had phoned him from Licensed Premises A and told him that the appellant was “walking around the pub after him with a gun”. P.O’C responded to the deceased by telling him that he should not worry, that he would ring the appellant with whom he was on good terms. He gave evidence that subsequent to telephone contact, the appellant called to his house, and there, told P.O’C that he was going to shoot the deceased, to which the witness responded “you better not”, and the appellant’s response was “I’m only messing”.

**17.** At trial, there were intensive and extensive *voir dire*s about the admissibility of the proposed evidence. In essence, the defence sought to have the evidence excluded as hearsay. This applied with particular force to the evidence of D and C.O’C, but was also advanced to some extent in relation to P O’C. The prosecution position was that the evidence of what the deceased had said to all three witnesses on the 8<sup>th</sup> December was admissible to show his state of mind on that day, and by extension, what his state of mind would have been a week later, on 15<sup>th</sup> December.

18. We will begin our consideration of this issue by reference to P. O’C. Insofar as P.O’C had evidence to give that the appellant had called to his house, and there, threatened to shoot the deceased, we cannot see how it could be suggested that evidence was inadmissible. If it is accepted that there could be no objection to P.O’C giving evidence that he made a phone call, and arising from the phone call that he was visited in his home by the appellant and that a conversation took place there and give evidence of what was said, it is a short step from there to permitting him to give evidence of what his brother said to him so as to cause him to make the phone call and set up the house visit. Indeed, we think that this was the real significance of what he had to say about being contacted by his brother. We do not ignore the fact that he was challenged on his account of events, where it was suggested that his claim of making a phone call was not supported by phone records and in other ways. In relation to events in Licensed Premises A, it is of note that there was CCTV footage available from 8<sup>th</sup> December. That video footage, there was no audio of course, indicated that there had been an engagement or interaction involving the deceased and the appellant, but it was not clear as to what was being said, or the nature of what was being said, in the course of the interaction. It did not, however, provide any support for a suggestion of the appellant following the deceased around the public house with a gun, or, put in more positive terms from a defence perspective, it supported the position that that had not occurred.

### **Events of 8th December 2015**

19. We turn now to the evidence in relation to what was said on the 8<sup>th</sup> of December which we will characterise as the impugned evidence which the appellant says ought not to have been admitted. As indicated above some degree of detail must be given in respect of it and we deal with each of the relevant witnesses – D.O’C, C. O’C and P.O’C– in turn.

We should say at this stage that we think what P.O'C's evidence and the issues arising therefrom are somewhat different to those in respect of the former two.

**D.O'C**

20. D.O'C said that on Sunday the 8th of December (a week before the homicide) he received a phone call from his now deceased father who requested him to meet him in a public house, Licensed Premises B, and told him that he had had a "run in" with the appellant in Licensed Premises A. He had left Licensed Premises A for Licensed Premises B immediately after this conversation which he, the deceased, said had taken place with the appellant. D O'C's evidence in chief on this topic was as follows: -

*"Q. Yes. Now, I'd like to ask you about Sunday the 8th of December, which was the week before?"*

*A. Yes.*

*Q. Yes. Can you remember getting a phone call?"*

*A. Yes. I got a phone call, yes.*

*Q. Can you tell the jury about that, please?"*

*A. I got a phone call off me father, just to --*

*Q. Can you slow, please, just so that the jury --?"*

*A. Yes. I got a phone call off me father to go down and meet him in the – [Licensed Premises B] and went down, was talking to him, and he told me he had a run in in the pub with [D.C].*

*Q. Yes. And did he say what was said to him?"*

*A. He said to him they'd get him done for a grand or less.*

*Q. That he was going to get done for a grand or less?"*

*A. Yes.*

*Q. And did he say how he would get done?"*



A. *Yes, get him killed for a grand or less.*

Q. *Yes. And your dad told you that [ D.C] had said this to him. Is that correct?*

A. *Yes.*

Q. *And what did your dad do after this was said to him in the pub?*

A. *He left the pub and went down to the [Licensed Premises B].*

Q. *What pub had he been in?*

A. *In the [Licensed Premises A] in [Dublin suburb].*

Q. *The [Licensed Premises A].. And when you got the call from your dad and your dad told you that he wasn't in the [Licensed Premises A] anymore he was in the [Licensed Premises B], why was he in the [Licensed Premises B]?*

A. *Because he left the-- and went to the [Licensed Premises B].*

Q. *Did he say why he left the [Licensed Premises A]?*

A. *Yes, because they was threatening him so he left and went to the [Licensed Premises A].*

Q. *Yes?*

A. *Or went to the [Licensed Premises B] sorry.*

Q. *And did you do anything as a result of that phone call?*

A. *No, I just went home then after that. I left him in the [Licensed Premises B]and I went home.*

Q. *Yes. Well, I think you told the jury that you got a phone call, first of all?*

A. *Yes, I got a phone call off me father. That's why I went down to the [Licensed Premises B].*

Q. *You went down to the [Licensed Premises B]?*

A. *Yes.*

Q. *Yes. And how long did you stay in the [Licensed Premises B]?*

A. *I was there I'd say for about five minutes talking to him.*

Q. *Yes. And who was he with?*

A. *I think [E. S] was with him, one of his friends.*

Q. *JUDGE: Sorry?*

A. *One of his friends, [E.S].*

Q. *MS WALLEY: And were they drinking?*

A. *Yes.*

Q. *Now, when your dad told you that [D. C] had said he was going to get him done, was there any mention of how he would be got done?*

A. *He didn't say to me, no. He just said he'd get done for a grand or less, so that would happen."*

Nothing relevant emerged in cross-examination on this topic.

### **C.O'C**

21. The deceased's widow, C.O'C, insofar as her evidence pertained to what had been said on the 8th of December, told the Court that when her husband returned to their home having been to [Licensed Premises A], he told her that the appellant had threatened him there and that his words were "He had a gun and he told me he was going to kill me". He was described by her as being "very upset and frightened" and told her that G.C was also present on that occasion. When asked how her husband viewed the threat she said that he took it very seriously. During examination in chief, on day five of the trial, the matter was dealt with as follows:-

*"Q. Thank you. Now, the week before E was killed, which is Sunday the 8th of December, do you remember him going to the [Licensed Premises A] for a pint?*

A. *I do.*

Q. *Yes. Can you tell the jury about that please?*

A. *He went down to the [Licensed Premises A] for a drink and he came home that night and he just told me that D.C had come into the [Licensed Premises A] and threatened him.*

Q. Yes.

A. His words were, "He had a gun and he told me he was going to kill me".

Q. And

A. And E. left the pub a few minutes after that.

Q. Yes. So, this was a conversation you had on the 8th of December when your husband came home from the pub?

A. Yes.

Q. And he told you that this had happened in the [Licensed Premises A]?

A. In the [Licensed Premises A]..

Q. And how did he seem when he told you about this?

A. Very upset and frightened.

Q. Did he say was D.C with anyone when this incident occurred?

A. He said it was J.C.

Q. That's L.C's partner?

A. Yes."

The following day, the matter was revisited during examination in chief:-

*"Q. Until May 2002, thank you. Now, yesterday you were telling the jury about a conversation that you had with your husband, your late husband, a week before the killing. This was Sunday the 8th of December of 2014, and you had told the jury yesterday that your husband had been drinking in the [Licensed Premises A] and that when he came home he told you that he had been threatened by D.C?"*

A. Yes.

Q. You recall your evidence yesterday afternoon?

A. Yes.

Q. Now, I think you told the jury that when he came home that your husband seemed worried or frightened. Is that correct??

A. Yes.

Q. Yes. And what was his take on the threat? How did he view the threat?

A. *He was just saying -- talking to me as his wife, saying that he thought they were going to do him.*

Q. *He thought they were going to do him?*

A. *Yes.*

Q. *And by "they" who was it?*

A. *D.C..*

Q. *D. C.. So he took the threat seriously?*

A. *Very seriously.*

Q. *Yes. And I think were you also aware that he had moved from the [Licensed Premises A] pub that night to the [Licensed Premises B]?*

A. *He had told me when he come home about the incidents, that he had moved from the [Licensed Premises A] after D.C had been in there, to the [Licensed Premises B].*

Q. *Yes, and then --?*

A. *And when he came home that night he told me about everything that had happened.*

Q. *Yes. And did he say why he moved to the [Licensed Premises B]?*

A. *He was frightened."*

And later, during cross-examination, the following exchange took place:-

*"Q. Yes, okay. Now, just in relation to the 8th of December, I think what you indicated to the jury yesterday was that when your husband came home he had said to you that he'd been in the [Licensed Premises A] and they'd threatened him, "had a gun and said they were going to kill me"?"*

A, *That's correct.*

Q. *That's what you said yesterday?*

A, *Yes.*

- Q. Okay. So, just to make it clear for you, Mrs O'C, D.C wasn't present during that conversation, so we're not in a position to say whether it did or didn't happen. That's not something that we can do. Do you understand that?*
- A. Yes.*
- Q. Okay. In the context of what he said to you directly, okay, in the house, in your home that evening?*
- A. Yes.*
- Q. Okay. And in relation to the statement that you made to the gardaí, and this may be a very small matter, there was slightly different words used when you explained this to the gardaí, when you made your statement on the 16th of December. And the words that you used then was that: "D.C and G.C walked into the pub and went over to E.. They told him they were going to shoot him dead. They told him he was so easy -- it was easy to get him." Would you accept that that's what you said to the gardaí?*
- A. I -- if that's what's in my statement, but it was the day after my husband died. I can't even remember giving the statements.*
- Q. No I -- I completely appreciate that. And the only thing I'm trying to ask you is that would you accept that there are certainly just slight differences in terms of your memory about what was -- what you said back then in December and what you say today?*
- A. What I said today is what my husband told me.*
- Q. Okay. Okay. When he said that to you, you'd indicated that that was on the evening of the 8th of December, is that right?*
- A. When he came home.*
- Q. Okay, what time was that about? Do you recall?*
- A. Probably 2, 3 o'clock in the morning."*

This topic was again touched upon in re-examination *inter alia* in the following terms:-

*"Q. Now, you've told the jury that your husband came home on Sunday night, Monday morning of the 8th of December of 2013, and he told you about what had happened in the [Licensed Premises A]. Now, my friend has put it to you, you know:*

*"Was your husband drinking?" And: "How did he appear to you?" In terms of his coherence, and in terms -- do you understand the word "coherence", he'd been drinking?*

A. *Yes.*

Q. *Did he seem the worse for wear in terms for drink, in terms of what he was telling you had happened in the pub?*

A. *No. It was like he couldn't get drunk, he sobered up with the fright.*

Q. *Yes?*

A. *He wasn't that drunk."*

### **P.O'C**

22. P.O'C, a brother of the deceased, gave evidence to the effect that, also on the 8th of December, the deceased had phoned him from [Licensed Premises A] as a result of which he spoke to and subsequently met the appellant. During examination in chief, the witness's evidence on the topic was as follows: -

*"Q. Yes. So, I'd like to ask you about the week before the shooting, that's Sunday the 8th of December, do you remember anything happening on that day?"*

A. *Yes.*

Q. *Can you tell the jury about that please?*

A. *My brother E rang me from the pub.*

Q. *What pub?*

A. *The [Licensed Premises A]..*

Q. *Yes.*

A. *And he says that D.C was in walking around the pub after him with a gun.*

Q. *I'm sorry, you dropped your voice and I couldn't hear you.*

A. *D.C was walking around after him in the pub with a gun.*

Q. *With a gun. And can you remember when your brother telephoned?*

A. *He rang me shortly after it and he was after telling me that he was walking around the pub with a gun after him.*

Q. *Yes.*

A. *I says, "Don't be worrying, I'll ring him now."*

Q. *JUDGE: Sorry, say that again?*

A. *Pardon?*

Q. *JUDGE: What did you say just now? I said, "Don't worry" what?*

A. *I says, "Don't worry, I'll ring him now," and I says, "I'll get him over to my house."*

Q. *MS WALLEY: This is D. C?*

A. *To see what's going on, yes.*

Q. *Yes.*

*JUDGE: You see when you speak into the microphone it's much better, Mr O'C.*

Q. *MS WALLEY: So, what happened?*

A. *I rang him and I asked him what was he up to. He says he came over to my house and he says he was going to shoot him and I says, "You better not" and then he says to me, "I'm only messing."*

Q. *I'm only messing?*

A. *Yes.*

Q. *Now, when you say that he came over to your house, where was that?*

A. *In [Dublin village].*

Q. *In [Dublin village]. And you say that was on the Sunday evening?*

A. *That was Sunday evening, yes."*

Thereinafter, the following exchange took place in cross-examination: -

*Q. Yes. And you've given evidence to this jury, Mr O'C, that on the 8th of December you were contacted first of all by your brother, E, and he rings you from the pub and says that D. C was walking around after him with a gun?*

*A. That's true.*

*Q. And also you also confirmed that when you were asked to speak up that he was walking around with a gun after him?*

*A. After him, yes.*

*Q. After him. This is in the [Licensed Premises A]?*

*A. In the [Licensed Premises A].*

*Q. Yes. And you've given evidence to this jury under oath that you, having spoken to your brother and having been told of this event that you agreed that you would contact D.C and you telephoned him and he came to your house?*

*A. That's true, yes.*

*Q. Yes. And I take it that you telephoned him on the only number that you had for him at the time, 085[-----]?*

*A. True.*

*Q. Yes. You see, Mr O'C, I have to suggest to you that that is an untruth, I have to suggest to you that we have the telephone records from Mr C's telephone, okay, and what they confirm to us, and we're going to hear from an expert in phone records in a short time, that on the 20th of November 2013 your telephone number 087[-----] did in fact make contact with D.C's telephone number and would you accept that that is true, you could have made contact with him on the 20th of November?*

*A. I couldn't really because I'm not great on dates.*

*Q. No, no, okay. But you have accepted in your evidence in chief that you were communicating with him using your phone number, ringing his phone number in November and December of 2013, yes, and certainly it appears, and again*



*we're going to hear the evidence very soon, that on the that there are nine incoming calls in November and December of 2013 to D.C's phone from you, yes? Yes. And there's also a good number of telephone calls from D.C's phone to your telephone number, yes. You'd accept that that would be accurate, yes. But the one thing that we note from the telephone records with reference to this specific day and this specific communication that you had with your brother is that there is no communication, there is no contact between your mobile number and D.C's number on the 8th of December, none?*

*A. There's none?*

*Q. None.*

*A. Well, he was rang to come to my house.*

*Q. Mm hmm, mm hmm. Well, we're going to hear from the phone expert very soon. But I have to suggest to you, Mr O'C., that bearing in mind what I understand to be the phone evidence, it makes it clear that there was no communication between you and D.C on the 8th of December?*

*A. I don't know because I'm not great with dates.*

*Q. All right. But what you were sure about and what you were sure about in your evidence in chief is that your brother rang you from the pub?*

*A. Yes.*

*Q. And said that D.C was walking around after him with a gun?*

*A. That's true, yes.*

*Q. So, if that is the day that we're talking about, it is the day that your brother is in the [Licensed Premises A]?*

*A. That's when he was in the pub, yes.*

*Q. Because you use those exact words, "E. rang me from the pub"?*

*A. Yes.*

Q. *And in fairness to you, you've not been here for the purposes of much of the evidence, but the evidence is that he was in the pub on the 8th of December?*

A. *Mm.*

Q. *So, if that's the day that you're talking about and if your words are true that E. rang you from the pub it is the 8th of December that we're talking about; isn't that right? Yes. Now, you indicated to the jury under oath, Mr O'C, that your brother said to you that D.C had a gun in the [Licensed Premises A]; isn't that right?*

A. *That's true, yes.*

Q. *Yes. And I think you said that twice?*

A. *Yes.*

Q. *Yes. And are you sure about that recollection and sure about that telephone conversation?*

A. *Well, he wouldn't lie, like.*

Q. *He wouldn't lie, yes. But are you sure that your memory is accurate?*

A. *Yes.*

Q. *Okay. And you're sure that you're not exaggerating in any way?*

A. *No.*

Q. *No, okay. And having heard this information that a young man is walking around a public house in [--] with a gun, you didn't seek to ring the gardaí or anything like that?*

A. *No, cause I talked to him myself.*

Q. *You talked to him yourself, yes, okay. Even though you are aware of the history between E. O'C and L. C?*

A. *Mm."*

The matter was re-visited in re-examination as follows:-

*“Q. Just very briefly, Mr O’C, I just want to ask you a few questions about that. You told the jury that after your brother rang you from the pub that you rang D.C to talk to D. C?”*

*A. That’s true, yes.*

*Q. Can you remember what phone you used to ring him?*

*A. My own phone.*

*Q. Your own phone, the mobile number --*

*A. I’m nearly sure it was my own phone, yes, 087 [-----].*

*Q. Yes. And you told the jury that D.C came over to your house in [---]?*

*A. That’s true, yes.*

*Q. And you have given the jury the address. And can you remember -- you’ve told the jury that he repeated the threat at that stage that he was going to --*

*A. He did, yes.*

*Q. -- shoot him but he then said he was messing. Can you remember, because Ms Biggs has said to you that this is a lie, can you remember what time of the evening that was?*

*A. It would have been in around 6ish.*

*Q. Yes, yes. And where did the conversation take place to your recollection?*

*A. In my sitting room in my house.*

*Q. Yes. And were you there on your own or was there anybody else there?*

*A. I was on my own.*

*Q. You were on your own. Now, Ms Biggs has put it to you that you’re making this up because you felt betrayed?*

*A. No.*

*Q. No. And she’s also put it to you that when you made your statement on the 19th of December, you made a statement to the gardaí on the 19th of December of 2013 which was four days after the killing and you made that statement toll Sergeant Shane McCartan, she said that you said something different to the guards, so she is saying that you’re lying today because you said something different, what do you say to that?*

*A. No, I’m not lying.*

*Q. Well, how do you reconcile what you told the guards -- sorry, by the word reconcile*

*I mean how do you square up that you told the guards on the 19th of December that your brother told you that D.C came in through the [Licensed Premises A] and told him that he was going to shoot him, that it was easy as that to get him and that E had been playing pool at the time, that's what you told the guards on the 19th of December?*

A. *Yes.*

Q. *But you're telling the jury something different and that's what she's putting to you and the jury want to understand why there's a difference?*

A. *Is it not the same thing walking around the pub after him with the pub as it is to shoot him.*

Q. *So, do you regard those as the same?*

A. *Well, I class that as the same, yes.*

Q. *Yes. And how would you explain that to the jury because --*

A. *Well, what would he be walking around the pub, like, after someone with a gun for?*

Q. *Yes.*

A. *Is it just to play?*

Q. *No, I'm not saying that. What I'm saying is that when you spoke to the guards four days after your brother died there's no mention of him having a physical gun, that's really what Ms Biggs is asking you about?*

A. *There was from E, yes, he told me he had a gun.*

Q. *He told you he had a gun. And in relation to the conversation that you had with D. C are you clear that he did threaten to shoot him again?*

A. *He said he did threaten him, yes.*

Q. *He said he did threaten. Thank you very much."*

### **Issue of admissibility raised at trial**

23. Prior to the introduction of the impugned or allegedly inadmissible evidence, prosecuting counsel had sought a ruling from the judge as to its admissibility. There is, in general, no difficulty in a proper case about the receipt in evidence of what has been said by such a third party who is not called ("reported speech") although it is frequently excluded, because even if it is not hearsay, it is irrelevant or its prejudicial effect is

exceeded by its probative value. Ultimately counsel for the appellant could not contend that there is any objection in principle to the receipt of reported speech as such. A great deal of argument in the trial court was about the hearsay rule and the submissions on appeal extensively deal with it.

**24.** The prosecution's contention is that the evidence of what the deceased said on the 8th December to all three witnesses was admissible to show his state of mind on that occasion, and further as a proper inference of secondary fact his state of mind on the subsequent 15th December when the "straightener" was arranged and in the immediate aftermath thereof when he was shot. Further, it is contended that what was said to P.O'C was admissible to show the appellant's intention to kill the deceased.

**25.** In the present case counsel makes the objections that what was said on the 8th December, a week prior to the offence, by the deceased, certainly to D. and C. O'C and, to an extent to P.O'C, did not fall within the general rule permitting such evidence (even though not hearsay) to be received, either on principle or on the present facts. There was also what we might term a subsidiary point in respect of C.O'C pertaining to expert evidence. It was further contended that even if admissible, the evidence ought to have been excluded as having greater prejudicial effect than probative value.

**26.** It is of course trite law that an individual can give evidence on demeanour or the apparent feelings of another. This is not a matter of expertise, hence the contention that what C.O'C said in this regard was inadmissible is rejected. We do so at this stage due to the clarity of the position, and dispose of this aspect of the appeal at this juncture.

**27.** It was further submitted that the evidence of P. O'C to the effect that the appellant told him that he was going to shoot the deceased, with the qualification, when asked about

it by P.O'C, that he was "only messing" should be excluded because of its terms. We think it best that we deal with P.O's evidence separately.

28. Obviously, the state of mind of a deceased person who is alleged by word or deed to have provoked his killer may be of particular probative value or relevance: this was expressly said in the charge without objection. This is not to say that a judge could not exercise his discretion to exclude otherwise relevant and admissible evidence as having a greater prejudicial effect than probative value.

29. On day four of the trial, the judge ruled upon the admissibility of what was said by the deceased and the accused as follows: -

*"Well, as I understand it, the case that was made by Mr - and will be made by the accused is that as he was leaving the yard after what was called the straightener, the deceased made a remark to him relating to the accused's sister, which was so inflammatory that he was provoked, provoked to the extent that he was no longer master of his own mind, in which state he shot the deceased. Now, it is clearly an issue in the case whether or not the deceased said those words. Nobody else heard him say it and the case that the deceased did say it is dependent solely on the account to be given by the accused, so the jury will have to test the reliability of that. Now, relevant to this, according to the prosecution, is the state of mind of the deceased. Would the deceased have said that given the background circumstances, and the prosecution's proposed evidence is to show the deceased's state of mind taking into account at the time of the killing and also a week before in the [Licensed Premises A] when it is alleged the deceased was threatened by the accused on the 8th of December, exactly a week before. The prosecution case is that the accused threatened the deceased at a time when the accused did not have a gun, in contrast to what happened seven days later when the deceased knew or*

*must have known that the accused had a gun, and the prosecution bases that contention on the fact that the accused had just fired a gunshot into the air. Given that according to the prosecution proposed case, and that's all it is, I'm not saying that there's any finding been made that it happened or it didn't happen or anything of that nature, but it is the prosecution case that it is a matter for the jury to take into account of would he have made the inflammatory remarks about: "Give your sister my regard" - what was the word used?*

*MS WALLEY: The red pox.*

*JUDGE: "Give the red pox my regards." Would he have said that knowing that the accused had a gun when seven days before, when threatened, he had said he didn't want any trouble and retired to another licensed premises? That's the case that the prosecution has made to counter that the words were said and that the accused was provoked.*

*Now, first of all it is clearly relevant and the question of whether it's relevant or not, it is clearly relevant. The second case then: is it admissible? Now, the prosecution case is to give evidence that these matters were said to D.O'C, that when the accused threatened the deceased in the [Licensed Premises A] that he telephoned his son, D, who came to the pub, and it will be D's evidence that he related that he'd been threatened by the accused. C.O'C would relate similar type evidence when she says the deceased came home later that evening.*

*Now, to my mind, such statements when made as to revealing a person's state of mind are admissible and the fact that it's made by somebody other than the accused is immaterial. It's not rendered admissible in order to prove the accuracy or the truthfulness of what is said but it is admissible to show the state of mind of the deceased at the material time. We have in addition to that the proposed evidence of*

*P.O'C, who's been called as a witness to the same purpose but, in addition, P.O'C is being called as a witness to say that the accused admitted to him that he had, in fact, made the threat to the deceased but added the qualification that he had said it in jest. Now, I don't think that it's rendered inadmissible because it is argued that that qualification makes it exculpatory. It is essentially inculpatory and is an admission by the accused of what is alleged by P. O'C, by D. O'C and maybe indirectly by C O'C ...*

*And to my mind the proposed evidence of D.O'C, C O'C and P.O'C are admissible and may be adduced before the jury.”*

As can be seen from the ruling, its essence is that the judge considered that the state of mind of the deceased, some one week before, was relevant to whether, at the time of the homicide, he would have spoken the words which allegedly provoked the accused, namely, “Give the red pox my regards”. It seems to us that the state of mind which could properly be inferred from what the deceased had said, namely, a fearfulness of the appellant and a desire to avoid confrontation with him, as evidenced also by the fact that it cannot be disputed that he left the [Licensed Premises A] for [Licensed Premises B] in circumstances where the appellant was in the former establishment, would have militated against the proposition that he used the offending words and hence went to the issue of whether or not they were actually spoken. This of course is coupled with the fact that on any view, the deceased must have had his back to the appellant when he was shot. The deceased knew that the appellant had a handgun which he had already discharged. It seems to us that the lapse of time does not in principle undermine that relevance: it would be a matter for the jury to decide thereafter.

**30.** In the present case the trial judge directed the jury in his charge on the issue of hearsay as follows: -



*“As I tried to explain I think yesterday or recently anyway, hearsay evidence is not admissible because it's unreliable. It gets warped in its transmission from one person to another and it cannot be tested in cross-examination. Therefore, as a general rule, it is not admitted in legal proceedings. Now, there have been a number of matters of what appears to be hearsay evidence was introduced before you but they were part of the evidence. They're not to prove that the words said by hearsay are actually true. They were introduced as evidence just to show that they were said. Now, there's a distinction between having that evidence to prove the truth of what was said rather than just proving that it was said. I think there were three instances of this. D. O'C told us on the fourth day that the deceased, his father, asked him to go to the [Licensed Premises B] licensed premises where his father recounted that the accused had said he would kill him, get him killed for a grand or less. The purpose of that evidence was not to prove that that was true, what the deceased had said, it was to prove that he had said it and his state of mind, that he was in a state of fear as related by his son. Secondly, C. O'C, the widow of the deceased, gave similar type evidence when she said when he came home later that night her husband said that the accused had threatened him: "He said he had a gun and he told me he was going to kill me." The veracity of that is not the issue. The purpose is to show that that's what the deceased believed to have been said to him and C. had given evidence that her husband seemed very upset and frightened. Thirdly, there's the evidence of P. O'C who said that the deceased rang him from the public house and said that D. C was walking around the pub after him with a gun. Again, the purpose of that was not to prove that that was true but rather that that was what the deceased believed and recounted to P. O'C. So*

*that's to explain the relevance and the consideration to be given to that hearsay evidence.*

*There was other evidence given by P. O'C in his account with the accused which is not hearsay evidence and that's when P.O'C said that he had contact with the accused in which the accused admitted that he said he was going to shoot E Senior. That is not hearsay because that was allegedly said by the accused to a witness, though the rider was added that P. O'C said that the accused did add that he admitted saying that but said he was only messing."*

and, in recharging, the judge, after a defence requisition, said the following:-

*"I mentioned the statements, the evidence, of P, D and C about what they heard from the deceased, that this is hearsay evidence but it is admissible not as to the truth of what was said but of the fact that it was said by the deceased. Of course, you have to be satisfied beyond reasonable doubt that the words were said at all. That's a prerequisite before you go on to consider the significance of the words."*

In addition, it is not in dispute that the judge rightly said that the state of mind of both the deceased and the appellant was relevant.

**31.** The matters in debate have been clarified to the extent that they are now more straightforward. In particular, it is not now in debate but that a witness may give evidence as to what has been said by a third party not before the court (including deceased persons) in certain circumstances – Indeed, it might be said that is the general rule, if, but only if, it is relevant. Perhaps the latter qualification, if it be such, is unnecessary since, of course, evidence is never admissible if it is not relevant. On a day to day basis it is often what might be termed the immediate or instinctive reaction of lawyers to conceive that the reported statements of a third party are always hearsay, but of course they are not. Indeed,

there are a number of headings upon which what might have been said by such a third party (in this case the deceased) are admissible; even in the leading authorities the judges have lapsed into the equation of reported speech with hearsay. In the present case, it is sought to prove the state of mind of the deceased at the time he was killed by reference *inter alia* to what he said on the 8th December previous and what might be termed conclusions deriving from it. The statements of the deceased to his brother on that date present slightly greater complexity, and of course must be married to what was said by the accused to him and, in particular, for the purpose of showing that his state of mind was such that his state of mind was relevant to whether or not he said the words which are alleged to have provoked the accused to shoot him twice in the back immediately after the so-called "straightener" had ended and, at least after a fashion, given rise to a reconciliation between the protagonists.

**32.** A number of authorities are relevant. The first to which we refer is the leading Irish case of *Cullen v Clarke* [1962] IR 368 and in particular the judgment of Kingsmill Moore J. who analysed the distinction between evidence of what was said by a third party not before the court and evidence excluded under the hearsay rule but otherwise admissible. It was an appeal to the Supreme Court under the Workman's Compensation Acts. The applicant workman had sought to prove his incapacity to obtain employment by adducing evidence as to what had been said to him by putative employers when he had approached them for work. The judge excluded that evidence as hearsay and the Supreme Court held that he was right. Kingsmill Moore J. stated the general rule as to the admissibility of statements by third parties as follows: -

*"In view of some of the arguments addressed to the court it is necessary to emphasise that there is no general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness.*

*There is a general rule, subject to many exceptions that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert; the reasons being that the truth of the words cannot be tested by cross-examination and has not the sanctity of an oath. This is the rule known as the rule against hearsay ... I may perhaps call attention to some of the cases in which evidence may properly be given of words uttered by persons who are not called as witnesses.”*

In doing so he then went on to say:-

*“First: The utterance of the words may itself be of relevant fact, quite apart from the truth or falsity of anything asserted by the words spoken. To prove, by the evidence of a witness who heard the words, that they were spoken in direct evidence in no way encroaches on the general rule against hearsay ...*

*Second: where a fact or transaction is an issue declarations which accompany or explain the fact or transaction are generally admitted under the somewhat vague principle that they form part of the res geste. If the employer had said, “No, but ask me again in a week’s time,” the statement would be admissible as being really an intrinsic part of the act, showing that the refusal was not absolute and unqualified but might yield to altered circumstances. Again, in so far as the evidence of the words spoken is offered merely to explain or qualify the nature of the act, there is no breach of the hearsay rule.*

*Third: the statements accompanying the act may be offered as showing the mind of the actor at the time of the doing of the act. Here there is a breach of the hearsay rule, in so far as reliance is placed on the truth of the words uttered, a truth which is not sanctified by an oath or capable of being tested by cross-examination. But here resort can be had to another well-established practice, sometimes regarded as falling within the res gestae extension, sometimes as an exception to the hearsay*

rule. *“When the motive or reason of a person for doing an act, or the intention with which he does it, is relevant to the issue, his statement made at the time of the doing of the act is evidence of his motive, reason or intention”* : *Law of Hearsay Evidence*, Tregarthen, at p. 55. *“Whenever the bodily or mental feelings of a person are material to be proved, the usual expression of such feelings made at or about the time in question may be given in evidence. If they were the natural language of the affection, whether or body or mind, they furnish original and satisfactory evidence of its existence, and the question whether they were real or feigned is for the jury to determine”* : Phipson’s *Law of Evidence*, 8th ed., 1942, at p. 71.

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*“As to intention and motive. When the question of intention arises in regard to an act done, it may ... be proved either by declarations made at the time of the act or when the latter is of a continuous nature ... by declarations at any time during its currency.”*: [Phipson, edition cited, P.72]

*Fourth: as to the admissibility of declarations as to states of mind, where such declarations are made prior to or subsequent to an act and unconnected therewith, the authorities are not uniform, but the modern tendency is to admit such declarations. “... wherever it is material to prove the state of a person’s mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were” : Sugden v. St. Leonards (1) per Mellish L.J., at p. 251. “It is well established in English jurisprudence, in accordance with the dictates of common sense, that the words and acts of a person are admissible as evidence if his state of mind. Indeed, they are the only possible evidence on such an issue. It was urged at the Bar that although the acts of the deceased might be put in evidence, his words might not. I fail to understand the distinction. Speaking is as much an act as doing. ‘It must be borne in mind that there is nothing in the admission of such evidence which clashes with the rooted objection in our jurisprudence to the admission of hearsay evidence. The testimony of the witnesses is to the act, i.e., to the deceased speaking these words, and it is the speaking of the words which is the matter put in evidence and which possesses evidential value. The evidence is, therefore, not in any respect open to the objection that it is secondary or hearsay evidence’ : Lloyd v. Powell Duffryn Steam Coal Co., Ltd. (1), per Lord Moulton at p. 757. The remarks of the Lord Justice, in so far as they hold that the admission of evidence of words spoken by a person who is not a witness in order to prove the state of his mind is not a transgression of the general hearsay rule must, I think, be confined to cases where such words are the spontaneous and unrehearsed expression of contemporary feelings, words which reveal rather than declare the condition of the mind. A man’s statement as to what are his motives, intention, or*

*other his state of mind may be rehearsed, and may be false, and to admit such a statement as evidence of the true condition of his mind is contrary to the general hearsay rule and can only be allowed as an exception to that rule. Nevertheless, such statements, if contemporary with a relevant act, have regularly been admitted.”*

**33.** *Sugden v St. Leonards* [1876] 1 PD 154, is usually relied upon as establishing an exception to the hearsay rule and in particular, a rule which allows the contents of a Will to be proved by evidence of what the deceased said its contents may have been. In that case Lord St. Leonards was much given to making Wills or codicils thereto and what was conceived to be his last Will was kept by him (in a box in his house) but at his death it had disappeared. Apart from receiving evidence as to what he had said to his daughter as to its contents, what he had said was also taken to be indicative of his state of mind during his life, that is to say, a belief on his part that the relevant Will remained in existence. Presumably it might be said that the “relevant act” was the making of the Will, and if it was, what occurred was the receipt of such evidence for the purpose of proving his state of mind: what was said was of course not said at the time of the making of the Will (on the facts as reported) [subject to the fact that one might perhaps regard the time between the making of the relevant Will and his death as in some sense a continuum such that the period in question was, so to speak the “act”].

**34.** In *Lloyd*, also a Workman’s Compensation Acts case, the plaintiff was the deceased workman’s posthumous child but the deceased and his mother were not married to each other; there was no difficulty about the principle that a child born to unmarried parents could be a dependent for the purpose of the Workman’s Compensation Acts and in all cases it was a question of fact. It was sought to prove the fact of dependency by what had been said by the deceased to the effect that he accepted that the child was his (we

summarise here), and that he intended to marry the mother (and indeed had become engaged to do so); there is no doubt that the state of mind of the deceased was relevant to his actions and the dependency (the latter being a fact in issue). He had died on the 17th October, 2011. The relevant statements were made the day before and in what was described as the earlier part of that month.

**35.** It seems fair to say that what is now regarded as the leading modern English case is *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, a decision of the Privy Council on appeal from Malaya where, during the so-called Malayan Emergency in the 1950's it was a capital crime to possess ammunition (subject to exceptions which were not relevant) When found in possession, the defence advanced was duress and for that purpose the appellant sought to adduce in evidence threats supposedly uttered to him by unidentified terrorists to prove his state of mind. The evidence had been excluded at his trial as hearsay, but ultimately it was held by the Privy Council took the view that:-

*“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what it contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made...”*

**36.** This decision, clear and cogent as it is, is frequently quoted. In *R. v Willis* where it was applied, it was held that a certain conversation between the appellant and a co-accused, (after the crime had been discovered) in a receiving case, could be given in evidence to show that the appellant did not know of the fact of the theft (it is not necessary



in the present case to go into the facts further, save to say that such state of mind was relevant to what was suggested to be a want of candour when questioned by the police).

There, Lord Parker L.C.J. stated the rule in following terms: -

*“It is true that the Board [in Subramaniam] were there considering the state of mind and conduct of the prisoner at the time of the commission of the offence, but provided the evidence as to his state of mind and conduct is relevant, it matters not whether it was in regard to the conduct at the time of the commission of the offence or, as here, had a subsequent time to explain his answers to the police and his conduct when charged. Accordingly, it seems to this court that that evidence in the present case was wrongly excluded.”*

This statement is obviously not at variance with *Cullen* insofar as it refers to contemporaneity because the “relevant acts” are the events in [Licensed Premises A] on the night of the 8th.

**37.** Further extensive consideration to the rule was given in *R. v. Blastland* [1986] AC 41. Amongst other aspects *Willis* was quoted with approval. There the appellant had been convicted of the murder and buggery of a twelve year old boy between about 6pm on a given date (9th December, 1982) and the next morning when the body was found. The facts do not matter save to this extent: A third party, described as “Mark” in the report had apparently (in more or less clear terms) spoken about the murder at a time when it had not been discovered and, indeed, made admissions to the effect that he had committed it. For reasons which do not appear from the report the admissions were accepted to be untrue. The case against the appellant was described by Lord Bridge of Harwich in his speech as being “an extremely cogent one”. There was no suggestion that “Mark” was unavailable to give evidence but for whatever reason he was not called and it was sought via the evidence of other witnesses to prove what he had said to them. The House of Lords held that such

evidence was rightly excluded by the trial judge on the ground that it was irrelevant but nonetheless the rule of admissibility of statements of third parties not before the court to show states of mind was restated by him and, indeed, as we have said, *Willis* aforesaid was quoted with approval: Lord Bridges' ultimate conclusion was to say that he did not think "... it would be appropriate to go further, by way of generalisation, then to say that the admissibility of a statement tendered in evidence as proof of the maker's knowledge or other state of mind must always depend on the degree of relevance of the state of mind sought to be proved to the issue in relation to which the evidence is tendered".

**38.** The final case to which we refer is *DPP v Alan Murphy* (unreported Court of Criminal Appeal, 8th July, 2013, Hardiman J.), and with which we deal at this stage as it is most recent in point of time opened to us in either here or in England. There, the appellant had been convicted of arson and manslaughter and subsequent to the offence had both been interviewed by the Gardaí and made statements. During his time in garda custody he had spoken to his father; the evidence in that regard was summarised thus by Hardiman J. –

*"... Mr. Murphy said that in answer to a question [by his father] as to how he was, the applicant said 'I am sorry dad. I told them what I did'. The father asked what he did tell them and the applicant said 'I told them I started the fire'. The father then said 'What did you do to start the fire. How did the fire begin Alan'. The applicant said 'I don't remember dad'. The father then asked when (why?) he had told them that he had started the fire to which the applicant replied 'I am sorry dad, I don't remember what I did but something in the back of my mind tells me that I did it'."*

**39.** Hardiman J. pointed out that what was said was inadmissible as hearsay, though it could have been introduced in evidence as a prior consistent statement, admissible to rebut the suggestion of afterthought, had he given evidence and the issue of invention raised.

40. Hardiman J. went on to explain that counsel for the accused had sought to advance the proposition that what was said was admissible on two bases, and in these terms:—

*“The first was that it was relevant to a fact in issue and was therefore original evidence. Alternatively if it was to be regarded as hearsay it should nonetheless have been admitted, not to prove the truth of what was said but merely to prove that it was said. The sense in which the evidence was alleged to have been relevant to a fact in issue was that it was relevant to show his state of mind at the time of the phone call and ‘to infer something about his state of mind at an earlier period, by way of supporting the contention that there was a lack of mens rea or the capacity to form mens rea.’”*

41. Hardiman J. quoted certain relevant passages from *Cullen v Clarke* with reference to the fact that words spoken by a person who is not a witness in order to prove his state of mind was not a transgression of the hearsay rule, but:

*“confined to cases where such words are a spontaneous or unrehearsed expression of contemporary feelings, words which reveal rather than declare a condition of mind”.*

42. Hardiman J. held that the words were irrelevant, saying: -

*“Insofar as they relate to that state of mind as something from which an inference as to his state of mind on an earlier occasion [i.e., the commission of the offence] may be drawn, they fail to meet the test of the exception to the hearsay rule (sic).”*

And added that:-

*“Having regard to the time in which they were spoken they cannot be regarded as the ‘spontaneous and unrehearsed expression of contemporary feelings’, whether in relation to his state of mind at the time of the arson or at the times when he made incriminating statements. The words spoken in the telephone conversation are contemporary with neither of these things. Moreover, from the point of view of any*

*of the exceptions to the hearsay rule, the words have no relevance whatever unless they are to be regarded as true, they are therefore clearly inadmissible unless they can be said to be within the scope as of what is sometimes referred to as the res gestae exception, which it is obvious they are not.”*

**43.** Whilst the clearest of distinctions, to put it no further, was not made, it seems, by counsel or the Court, between hearsay and non-hearsay reported speech it seems right to say that it was excluded on both bases as alternatives, the observations pertaining to conversations receipted in evidence to prove a state of mind being those relevant here.

**44.** In none of the English authorities to which I have referred, including those relied upon by Kingsmill Moore J., nor in the passages from Phipson quoted with approval by him is there any reference to the concept of contemporaneity. We think that is the thrust of what was said by Kingsmill Moore J. permits receipt of the evidence of what was said in or about the time of the relevant acts, as here, on the evening in question when the appellant was in the public house: the evidence was that both the deceased and the appellants were in it over time on the evening in question. There is no reason to suspect that what was said by the deceased was not spontaneous or rehearsed.

**45.** As to P.O’C’s evidence, we can think, frankly, of no circumstances where an expressed intention to kill somebody which, ultimately, was consummated is not highly relevant to whether or not, at the time of killing, the killer had an intention to kill or cause serious injury or, in the present case, he killed because of something said by the deceased immediately before he was shot which caused a complete and total loss of self-control – *i.e.* that the appellant was provoked. An expressed intention to kill in advance is utterly incompatible with the proposition that something was said at the time of the shooting gave rise to the defence of provocation. Of course, since what it is alleged the deceased said to

his brother formed part of their conversation, it is admissible so that the appellant's response can be made sense of.

**46.** As appears from the judge's charge, and this is a subject which does not appear to be in contention, the state of mind of the deceased was relevant to how he behaved and in particular what he said, at the time that he was killed. We think that obviously if he was in fear of the appellant it would bear upon whether or not, when the appellant was armed and had already discharged one shot, he would have said something to him of an insulting kind. We think that what was said was admissible as indicative of his state of mind at the time of the incident at [Licensed Premises A] on the 8th of December. The question is whether because of the lapse of time, the evidence is relevant as to his state of mind on the 15th. We think that it is. The point has been made that because of that lapse of time one cannot draw an inference that that was his state of mind on the 15th and that whether or not he had such a state of mind is speculative. We think that this evidence must be seen in the context of the familial relationship and transactions between the appellant and the Cs after the allegation was made by L.C against the deceased. We think that considerable weight must be given to the view of the trial judge as to its relevance, notwithstanding the lapse of time. We think that it would be reasonable for a jury to draw the inference that his state of mind was the same, and it seems to us that this must be so on any rational approach, especially because of the fact of the appellant's possession of a firearm which had already been discharged. It might well be that if the state of mind of the deceased was one of fear of the appellant, or at least expressed fear of the appellant, say some months before, it would be hard to justify the rational conclusion that the inference could be drawn that he had the same frame of mind on the 15th as he had on the 8th; but there is obviously a radical difference between the former position and that which pertains here.

47. The final aspect of this matter is whether or not, notwithstanding its probative value, the evidence ought to have been excluded because its prejudicial effect outweighed such value. Undoubtedly, there is a coherent proposition to this effect, that by permitting the receipt of the evidence for one purpose, namely, to prove the state of mind of the deceased, and legitimately so, a jury might mistakenly think that they could rely upon what had been said by the deceased as proof that the appellant had actually spoken the words in question. There will not uncommonly be evidence which tends to show an accused person in a bad light, for example, evidence of background and circumstance which is indicative of criminality other than that charged. Whilst from time to time evidence of that class may be excluded, it is always a judgment to be made on a case-by-case basis, on the evidence and having regard to the nature of the issues in the case. We have referred to the judge's charge, primarily because of the difficulty or risk which might arise in this regard; and it seems to us that he clearly told the jury about the limitations of the impugned evidence. There is no reason to suppose that they would have understood it to be relevant only for the purpose of showing the state of mind of the deceased at the time of the event.

48. In the nature of the defence and having regard to the fact that, as we have said, the case to a very great extent hinged on a few words spoken outside the yard on the evening in question immediately before the shooting (if they were spoken) the jury were entitled to have all available evidence notwithstanding the risk that such evidence can, in principle, have a prejudicial effect.

49. We accordingly dismiss this appeal on all grounds.

*Birmingham P: I agree.*

*Edwards J.: I agree.*