



THE COURT OF APPEAL

Appeal No: 214/2020

**Birmingham P.
Edwards J.
Kennedy J.**

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

Respondent

V

PHILIP DUNBAR

Appellant

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 30th of January 2024.

Introduction

1. This judgment is concerned with the appellant's appeal against his conviction by a jury for murder in the Central Criminal Court on the 2nd of November 2020.

The Grounds of Appeal

2. The appellant has filed a Notice of Appeal in which he lists sixteen grounds of appeal. However, counsel for the appellant helpfully grouped these into five topic headings for the purposes of making submissions and for the oral hearing. We intend to structure this judgment by adopting the five topic headings proposed by the appellant and addressing the issues raised under their appropriate headings. The five topic headings were:

- I. The application for the discharge of the jury;
- II. Diminished responsibility;
- III. Refusal to exclude part memos of interview;
- IV. Admissibility of CCTV evidence;
- V. The witness "AB" and associated rulings.

Background to the Matter

3. The evidence adduced before the jury established that the appellant and a Mr. Adam Muldoon (i.e., "the deceased") were socialising with others in the appellant's home area from approximately 10:00pm on the 22nd of June 2018. The appellant had been taking alcohol and drugs. At approximately 11:48pm the appellant and the deceased travelled the short distance

together, and alone, to Butler's Park in Tallaght. While they were in the park the deceased was stabbed repeatedly with a knife. Evidence adduced at trial from the State Pathologist, a Dr Margaret Bolster, was to the effect that 183 stab wounds to the body of the deceased were observed at post-mortem examination. The most serious wounds were those that punctured the lungs and liver and severed the carotid artery and jugular veins, all of which would have been fatal. Further, there were numerous defensive wounds on the hands of the deceased.

4. The prosecution's case was that the stabbing was perpetrated by the appellant, and that it was murder.

5. The appellant was to be seen on CCTV, harvested in the course of the subsequent investigation into the deceased's killing, returning from the park alone at approximately 00:13am on the 23rd of June 2018.

6. Shortly after the killing, the appellant went to the house of a friend, "AB", and informed AB that he had stabbed the deceased a number of times and had killed him. Later, the appellant and AB went to a large pond where the appellant disposed of a knife.

7. Further CCTV footage recorded on the 23rd of June 2018, and harvested in the course of the Garda investigation, showed the appellant interacting with other people outside of his home during the daytime. Later, CCTV showed the appellant and AB travelling and moving consistently with the case made by the prosecution in regard to the disposal of the knife.

8. Later on the same day, the appellant made a witness statement in which he made no admissions and lied about his movements on the previous night.

9. Later that evening, the appellant went to a Garda station and made admissions during a voluntary cautioned statement in the presence of his grandmother, but without a solicitor and without having legal advice. In this statement, he accepted that he brought the deceased to Butler's Park on his own and that he must have stabbed him and killed him. However, he asserted that he did not actually remember stabbing the deceased. He said that he was hearing voices telling him to do things such as killing. He also referred to taking drugs.

10. Having been arrested and detained, he was further interviewed in the presence of his solicitor. He made similar admissions in the course of this interview.

11. There were four main strands on which the prosecution based their case. First, they relied on the admissions of the appellant to gardaí. Secondly, they relied on CCTV evidence which they contended supported the prosecution's case and tended to undermine the defendant's assertion (subsequently advanced) that the defences of diminished responsibility and/or intoxication were engaged. Thirdly, they relied upon admissions said to have been made to the appellant's friend AB in the immediate aftermath of the killing and evidence concerning the disposal of the knife. Fourthly, and finally, they relied upon DNA evidence confirming the presence of the deceased's blood on the appellant's clothes.

Topic No. I - The Application for the Discharge of the Jury.

12. At the commencement of the trial, as is usual, prosecuting counsel made an opening speech to the jury. Following that speech, defence counsel applied to the trial judge for a discharge of the jury on the basis that the speech had referenced two matters which it was contended had the potential to prejudice the jury against the accused.

13. The first matter complained of was the following:

" [...] *the defence may choose to test the evidence offered by the prosecution, by way of cross-examination and also, as Judge McDermott, who is the trial judge, as Judge McDermott has adverted to, there can -- and this happens in every criminal trial -- there can be legal issues in relation to evidential matters which have to be determined by the judge in the absence of the jury. And the defence are perfectly entitled to raise legal challenges over and above testing the evidence by way of cross-examination. So it's not the case that the defence are trying to do something that's slick or, you know, not permissible; it is entirely proper and appropriate for the defence to challenge the evidence offered by the prosecution, not just by cross-examination, but also by legal challenge. And, as Judge McDermott has said, if that happens, you are asked to withdraw to your jury room. There's nothing sinister about that. There's no reason to wonder about that because in the same way, ladies and gentlemen, when you retire to consider your verdict at the end of this trial you do so in private. You don't have the judge presiding over you. You don't have counsel and solicitor there. You do so in private.*"

14. It was submitted to the trial judge by defence counsel that the prosecution had strayed from the normal convention of simply stating to the jury that they would be excluded from court when legal issues were being considered. It was considered objectionable that it had been explicitly conveyed to the jury that on such occasions the defence would be challenging evidence on legal grounds, i.e., seeking to prevent the jury from hearing evidence that the prosecution were seeking to adduce. It was submitted that as the jury might be potentially prejudiced in their view of the accused arising from prosecuting counsel's remarks, the jury should be discharged.

15. Prosecuting counsel responded to this by rejecting the defence criticism and emphasising that she had also told the jury (a) that there was no obligation on the part of the defence to prove anything, and (b) that the defence, if they chose to do so, could stay silent throughout the trial, but that what was equally available to the defence was an ability to challenge material by way of cross examination and also by way of legal challenge. This was, she submitted, a correct statement of the legal position.

16. Having observed that, in his view, the question of legal challenges was one that could have been left alone in the opening statement, the trial judge went on to rule as follows with respect to the request that the jury should be discharged on account of what had been said in that context:

"But, nevertheless, it's a matter that was referred to in respect of legal issues that could be raised, and clearly by the defence in relation to the matter. It seems to me that that of course is as a matter of fact correct, but what effect does it have on the jury. I think the indication, as a matter of law, when questions of admissibility or legal issues of any kind, apart from issues of admissibility, it is open to defence counsel, it is open to prosecution counsel, it is indeed open to the judge to raise issue in relation to the admissibility of evidence in the course of a criminal trial. I do intend to explain that to the jury and to leave it at that, and that's as far as I'm going on it. I'm not going to discharge the jury on that basis.

Insofar as it can be conveyed to a jury that legal issues arise, and insofar as that might be linked to, or said to be linked to categories of evidence that are not going to be opened, I

didn't discern an explicit link between the two issues in the course of the opening. And it seems to me that the phrase "other categories", insofar as it has been explained to me by prosecuting counsel, insofar as what wasn't said, is consistent with the view which I had formed that the reference to "other categories" was open to just a general proposition in relation to what normally one does as a matter of prudence in opening a case for the prosecution is not to give hostages to fortune by outlining statements of fact that might not be actually proven in the course of a criminal trial and/or matters that might be the subject of a legal ruling and it might be unwise to open and/or just choose not to open particular areas of evidence, because there may be a conflict in the evidence and it might not be of very great assistance in the course of an opening to go down that road at that stage. So there are any number of reasons why categories of evidence might not be opened to the jury and an opening to a jury in respect of fact might be very short, if not to say bald, in relation to the extent of the facts to be opened to the jury.

In my view this jury has not been wholly prejudiced against the accused in the manner which would be required to warrant its discharge or give rise to such concerns in relation to the fairness of the criminal trial as to require its discharge and the empanelling of another jury. I simply don't think that the threshold in relation to that has been reached. Insofar as there is any remaining understanding in relation to – insofar as an issue has been raised in relation to the jury's apprehension in relation to legal issues, I'm going to tell the jury after lunch that, insofar as there are legal issues that arise in the course of the case, I will deal with them. They can be raised by either side or indeed I may raise legal issues with either party during the course of the trial in relation to any aspect where I think it appropriate and that may require them to retire for the consideration of those issues."

17. As he had said he would, the trial judge subsequently further addressed the jury with respect to discussion of legal issues in their absence, and said the following to them:

"I just want to say one thing before we go on, just about the process we follow. I said earlier and you've heard about the fact that the jury and you may be asked to retire when a legal issue arises and there's been some mention to that that may arise in relation to a challenge to evidence or something of that nature. Issues arise of that nature for many, many reasons. Usually what's happening is that counsel are seeking the guidance of the Court, me, in relation to a legal issue and how the legal principle is to be applied to the case. That's all that's happening. And that's not your affair, that's my business. So, you're asked to retire while I deal with that and then I deal with that business because that's my affair. I won't be in with you deciding the facts of the case because that's your affair and I'll stay out of that as far as I can.

So, that's the way it's done and the prosecution can raise an issue in relation to how the law should be applied. The defence may raise it. I can raise it in the course of the case if I feel it's necessary with either side and, as I say, that's all my affair and it's a legal issue that I have to resolve and it's nothing to do with you. You don't have to consider any

aspect of it whatsoever. So, they're issues that I -- and they in fact they may be challenging issues in themselves, but that's in relation to the decision I have to make, but that's another day's work."

18. It is contended on this appeal (in ground of appeal no. 7(ii)(a)) that the trial judge erred in not discharging the jury, and that the prejudice apprehended was not capable of being adequately addressed by further instructions to the jury, alternatively the trial judge's further remarks to the jury were not sufficient to cure the mischief which had occurred.

19. The second matter from the opening speech complained of was the following:

"It's also the case that, as I've touched on already, Philip Dunbar was a couple of months short of his 18th birthday when these events are alleged to have occurred, and that's something that you will hear about in terms of his youth, but be under no illusions. We have seen children as young as 13, 14, 15 before these courts who have been charged with murder and found guilty of murder. That is part of the world that we live in. But Judge McDermott will direct you in relation to that in more detail."

20. Counsel for the defence also asked the trial judge to discharge the jury in consequence of these remarks. It was submitted that the effect of the comments referring to other children aged 13, 14 and 15 years as having been convicted of murder was grossly prejudicial in the specific context of a recent horrific case involving children of that age range who were convicted of murder, namely the case involving the murder of Ana Kriégel, which had been surrounded by massive publicity, and which would still have been fresh in the minds of the jury.

21. Counsel for the prosecution responded by stating that her reference to the ages of other persons convicted of murder was to establish to the jury the point that, notwithstanding this accused's minority, children of his age and even younger could be held criminally responsible.

22. The trial judge dealt with the matter as follows:

"In the course of submissions to the jury, in an effort to convey the age of legal responsibility, having regard to the fact that the accused was under age at the time he was charged in relation to the matter and the time of the alleged offence, it was sought to convey that the legal age of responsibility is indeed lower than that of the age of the accused at the time. A reference was made to the case involving two young boys -- well I took it to be a reference to the case involving two young boys in relation to the lengthy trial that occurred in this court before me, in respect of a particularly -- a case which attracted an awful lot of publicity and would have, in that sense, been understood I think by the jury in the context of its nature and what happened in that case and the evidence, such as it was, was widely known arising out of that case. It was a case involving the murder of a young girl by the two boys in circumstances which were extremely disturbing.

Now, having said that, the reference was clearly in the context of trying to emphasise that persons from age 12 upwards are open to criminal liability in respect of a murder charge. That is, as a matter of fact, correct of course, as a matter of law in fact. And, in the circumstances, it seems to me that it was not -- certainly not calculated to inflame the jury against the accused in any sense or prejudice the jury against the accused in any sense and I didn't take it to be such an attempt, and I don't think it was so intended.

So, what is the effect then of the reference which was in somewhat less explicit terms than I have referred to, in fact much less explicit terms? It seems to me that it was a matter to put the issue in context for them. It might perhaps have been better left alone but, insofar as the age of consent was something which it was sought to explain to the jury and bring to their attention, that was done. I have no difficulty in my charge to the jury in indicating that this is a case, as will be emphasised again and again and again that falls four square within its own facts, can only be decided on its own facts, and is not to be decided by reference to any other case outside of the four square walls of the facts of this case. That has been emphasised again and again by me and will be emphasised again in the charge to the jury at the conclusion of the trial. So I am not going to discharge on that basis."

23. In due course in charging the jury on day 24 of the trial, the trial judge comprehensively and properly instructed them that they should decide the case on the evidence and the evidence alone, and not by reference to any other case.

24. It is now complained on behalf of the appellant (in ground of appeal no. 7(ii)(b)) that the trial judge also erred in refusing to discharge the jury because of the inferred reference to the Kriégel murder case. It was submitted that the intent of prosecuting counsel was not the issue. The question was whether there was a real risk that the reference to the Kriégel case was liable to raise in the minds of the jury a direct comparison between the accused in that case and in the appellant's case. It was submitted that the comparison was obvious, and the risk was real. It was further submitted that the purported remedy of charging the jury – several weeks later – did not cure the unintentional mischief.

25. In reply, counsel for the respondent has submitted that the comment in relation to "children as young as 13, 14 or 15" was merely illustrative of the fact that persons much younger than the appellant had been found guilty of murder. Moreover, it was in the way of guidance or assistance to the jury at the outset of the trial to inform them that age of criminal responsibility was not an issue. Furthermore, the jury were repeatedly instructed to confine their deliberations to the evidence presented at trial. The impugned comments had a clear and rational purpose and no prejudice attached thereto. It was submitted that as a matter of law there was no basis on which to discharge the jury and, accordingly, no error in law nor in principle had been demonstrated by the appellant.

Analysis and Decision

26. We are satisfied that the trial judge was correct in both his rulings, and that a discharge of the jury was not merited on the basis of either complaint. Indeed, we regard these grounds of appeal as bordering on the unstateable. The references by prosecution counsel to the controversial matters were perhaps unnecessary, but we are satisfied that in neither case would they have created the prejudices contended for. The trial judge dealt thoroughly and properly with any possible concern arising from prosecuting counsel's remarks concerning matters that would be canvassed in the absence of the jury. Moreover, this was done immediately after the opening

speech, and we are quite satisfied that his remarks were sufficient to ameliorate any potential prejudice to the jury arising from what prosecuting counsel had said on that subject.

27. There was no direct reference to the Kriégel murder case, but we accept that it may be inferred that counsel may have had that case in mind in framing what she said. However, we agree with the submission on behalf of counsel for the respondent that prosecuting counsel at the trial did not, in fact, cross any line, and that her remarks about “*children as young as 13, 14 and 15*” were made manifestly for the purpose of illustrating that children younger than the accused in this case could be held criminally responsible. We agree that the impugned comments had a clear and rational purpose, and we do not consider that they were potentially prejudicial in the way suggested by counsel for the appellant.

28. We therefore dismiss grounds of appeal no. 7(ii)(a) and(b).

Topic No. II – Diminished Responsibility.

The Grounds of Appeal

29. Insofar as the topic of diminished responsibility is concerned, the first complaint which we are required to consider in this appeal is the appellant’s contention that the trial judge erred in fact and in law in refusing to call Dr Brenda Wright as a witness or to allow the defence to cross-examine her on the matter of diminished responsibility. This is ground of appeal no. 13 per the Notice of Appeal dated the 6th of November 2020. For convenience, we will call this “Diminished Responsibility - Issue No. 1”, and we will address it presently.

30. A second complaint has also been raised. This is a complaint that the trial judge erred in law and in fact in refusing to allow the jury to consider the defence of diminished responsibility or whether the appellant suffered from a mental disorder at the time of the offence. This is ground of appeal no. 14 per the Notice of Appeal dated the 6th of November 2020. For convenience, we will call this “Diminished Responsibility - Issue No. 2”, and we will also address it presently.

31. Before doing so, however, it is necessary to set out the relevant statutory provisions and relevant background details in respect of each issue (there is some overlapping) so as to properly contextualise them.

Relevant statutory provisions

32. Section 6 of the Criminal Law (Insanity Act) 2006 (i.e, “the Act of 2006”) provides for a partial defence to murder of diminished responsibility, in these terms:

“6.— (1) Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person—

(a) did the act alleged,

(b) was at the time suffering from a mental disorder, and

(c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act,

the jury or court, as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility.

(2) *Subject to section 5 (4), where a person is tried for the offence specified in subsection (1), it shall be for the defence to establish that the person is, by virtue of this section, not liable to be convicted of that offence.*

(3) [Not relevant]"

33. Section 5(4) of the Act of 2006 provides:

"(4) Where on a trial for murder the accused contends—

(a) that at the time of the alleged offence he or she was suffering from a mental disorder such that he or she ought to be found not guilty by reason of insanity, or

(b) that at that time he or she was suffering from a mental disorder specified in section 6 (1)(c),

the court shall allow the prosecution to adduce evidence tending to prove the other of those contentions, and may give directions as to the stage of the proceedings at which the prosecution may adduce such evidence".

Diminished Responsibility - Issue No 1 : Relevant Background Details

34. Following the killing of the deceased in this case, a post-mortem was conducted by Dr Margot Bolster, forensic pathologist, who duly provided a report and subsequently gave evidence as to her findings and conclusions as to the cause of death before the jury. A Dr Carl Gray, forensic pathologist, was subsequently retained by the defence to review Dr Bolster's report and findings. There was no major disagreement as to either, and in particular as to Dr Bolster's finding of 183 stab wounds symmetrically and evenly spaced across the body. In evidence both on *voir dire* and before the jury, Dr Gray opined, uncontroversially, that *"this number of stab wounds were inflicted each with a separate stabbing action with a bladed weapon such as a knife"*, and that he expected that the knife used had had a narrow blade. He further remarked in evidence, *"[c]learly their infliction will have taken some time and effort"*, and that the overall pathological features suggested to him that *"death was rapid in the assault and that stabbing probably continued after death"*. He opined (reiterating what he had earlier stated at para 7.3 of his report) that:

"The symmetry and spacing of the wounds was remarkable. These were deliberately rather than randomly placed. The excessive number and deliberate placement of wounds and probably continuing beyond the point of death raises the possibility of mental illness or abnormal state of mind in the assailant".

35. Shortly after 1.00am on the 23rd of June 2018 the appellant, accompanied by his grandmother, Ms. Mary Dunbar, arrived at Tallaght Garda Station claiming that he had information in relation to the murder of Adam Muldoon and that he was looking to speak to a detective in that connection. He subsequently participated in a voluntary interview, which was electronically recorded, in which he gave a cautioned statement which he signed. In that statement he claimed responsibility for the stabbing of Mr Muldoon, although he stated he did not have a memory of the actual stabbing. He stated that he had been drinking and taking tablets. He recalled going to a field with the deceased, that there had been what he described as *"a little argument"*, but that he had then blacked out and had no memory of what exactly had happened after that. He stated in the course of that interview that he had been hearing voices. Initially he said he had been hearing voices for weeks, but during the reading back process he corrected this to months. He also offered to show gardaí where he had disposed of the knife.

36. Gardaí subsequently went with the appellant and his grandmother to a pond or lake, which was a water feature in Sean Walsh Park adjacent to the Square in Tallaght, and standing at a certain point he indicated to gardaí that he had thrown the knife into the pond or lake from there. At that point, 2.59am, D/Garda Nuala Burke arrested the appellant on suspicion of murder, and he was taken back to Tallaght Garda Station, arriving there at 3.19am whereupon he was subsequently detained by the member-in-charge at 3.35am for the proper investigation of the offence for which he had been arrested.

37. The first doctor to see the appellant in the aftermath of the killing was a Dr Moloney, a general practitioner, who saw the appellant at Tallaght Garda Station at 3.56am on the 23rd of June 2018, having been asked by gardaí to assess his fitness for custody and his fitness to be interviewed while in detention. Dr Moloney found him to be fit in both respects. He gave evidence before the jury in accordance with his statement in which he had stated:

"Re Philip Dunbar. I am a medical practitioner with the Irish Medical Council and the Specialist Register of Medical Practitioners established under section 42 (1) of the Medical Practitioners Act 2017. At 3.14 am on Sunday the 24th of August 2018 I received a phone call request from An Garda Síochána to attend Tallaght Garda Station in a professional capacity. I arrived in Tallaght Garda Station in or around 3.55 am and shortly afterwards I attended to a 17 year old prisoner named Philip Dunbar who I was informed had been arrested that night. His grandmother, Mary Dunbar, was present during my consultation with Philip Dunbar. They both informed me that he lived with her and that his mother was dead and that he had no contact with his father. Philip Dunbar's two sisters also live with her and her husband and her daughter who uses a wheelchair. Philip Dunbar said that he had asked to see a doctor because 'I am hearing voices in my head. Bad thoughts. Seeing stuff as well.' He told me that this experience had been ongoing for the previous two to three months and that he had not seen any doctor regarding same. He added, 'In the past two to three weeks it's like a real person's voice talking to me to do so'." He gave you the following personal history. He smoked cannabis since he was aged 15 but he did not smoke it daily. He last used cannabis on Saturday the 23rd of June 2018, and you had seen him the following day, on the Sunday, on the 23rd of June 2018 sometime between 11 am and 12.30 pm. He was not prescribed medication and he had no allergy. He had a diagnosis of asthma for which he used Beconase and Ventolin. These are actually prescribed medications although he had said he was not prescribed medication but this is not unusual as some people tend to think of pills only when asked if they are prescribed medication. He had another substance abuse habit, namely benzodiazepines. He said that he used the following varieties of benzodiazepine tablets; D5s, i.e. Diazepam 5 milligrams, D10s, i.e. Diazepam 10 milligrams, and Upjohn 90s, i.e. Alprazolam.

He said that he last took benzodiazepine tablets on Friday the 22nd of June 2018. He said that his habit usually involved taking five to 10 benzodiazepine tablets daily".

38. Dr Moloney stated that the appellant, who he correctly referred to at that point as being "the accused", also stated to him: "Sometimes I can't sleep. I'm up all night. I see the outline of people's bodies and they walk through the closed door of my room". Dr Moloney stated in evidence

that he asked the accused whether he was aware of cannabis being a possible cause of the mental experiences which he had recounted, and the accused told him that he didn't know of such a relationship. He confirmed to the doctor that he was aware that he was arrested and that he had been advised as to his rights. The doctor stated that, given the accused's juvenile status, he recommended to An Garda Síochána that the services of a children's forensic psychiatrist be obtained while he was in custody, as he believed that such a service was available. He made enquires of the psychiatric services in that regard later on that morning. This involved a conversation with the Chief Nursing Officer in the first instance, and later with a duty psychiatrist, at the Central Mental Hospital. The outcome was that he was advised that there was, in fact, no child forensic psychiatric service that could be availed of at that time for the accused, and Dr Moloney so advised the gardaí.

39. Dr Moloney testified that he had a second consultation with the accused at in or around 9.28am on the Sunday morning, the 24th of June 2018. On this occasion the accused said to him, *"I last heard voices last night saying bad stuff, to cut myself, to kill someone, hurt people. It's not me. It's just like someone else is doing it"*. The accused said that his last visual hallucination was a week or two earlier. He showed Dr Moloney a few minor scars on his forearms consistent with having been caused by deliberate self-harm. Dr Moloney asked him if he had ever attempted suicide. He replied, *"I tried hanging last year but I couldn't do it"*.

40. Dr Moloney stated in the course of his evidence that:

"[...] one must remember what Philip Dunbar had said to me was a history suggestive of mental illness but it wasn't diagnostic necessarily of mental illness. He had not ever attended any doctor or psychiatrist about this hallucinations, auditory and visual. So, he did not have a psychiatric history established anywhere and I thought it would be helpful if the service was available to come and determine that. But anyway it wasn't forthcoming and I told Sergeant Farrell that and when Mr Hennessey, his solicitor, arrived in the station myself and Garda Farrell had a conversation with him about what I had been attempting to achieve and Mr Hennessey said well he would like a psychiatric opinion and it was -- at that stage I did not see where it was going to come from but I said look, to please his request, I phoned the psychiatric services in Tallaght and the consultant psychiatrist there who was on call that weekend said that that service is not available. So, we had explored every avenue".

41. He added:

"It didn't affect my decision that he was fit to be detained in custody and fit to be interviewed. It was simply that if a service as such was available it would be remiss of me not to use it. That was all that was involved in that".

42. Later on, the defence legal team arranged for the appellant, as the then accused, to be psychiatrically assessed, with specific reference to his mental state at the time of the alleged offence and then also his mental state during subsequent meetings with civilians and gardaí in the course of which he made certain comments and statements. Dr Aoife Kearney, a consultant forensic psychiatrist, was consulted in the first instance, and the court of trial was informed that she had reported, with regard to s. 6 of the Act of 2006, that she could not find evidence of a mental disorder at the material time. Dr Kearney was not called as a witness at the trial.

43. Dr Kearney having found no evidence of a mental disorder at the material time, the defence sought a second opinion from a Dr Brenda Wright, also a consultant forensic psychiatrist. Unfortunately, from the defence's perspective, Dr Wright agreed with Dr Kearney.

44. Ultimately, Dr Wright was called as a defence witness and gave evidence in the presence of the jury on day 22 of the trial. Before she gave her evidence, however, defence counsel had applied unsuccessfully to the trial judge two days earlier, on day 20, for the trial court to call Dr Wright as a witness so as to facilitate a desire by the defence to cross-examine her, in circumstances where defence counsel submitted that the witness did not properly understand what the defence contended was a subtle distinction between intoxication and adverse mental state caused by prolonged use of drugs. The defence were permitted, in order to lay the foundation for this application, to adduce evidence from Dr Wright in a *voir dire* which was conducted on day 20.

45. In the course of that *voir dire*, there were the following exchanges (*inter alia*) between defence counsel and Dr Wright:

Q. Okay. So, you have prepared a report which makes reference to certain cognitive functioning impairment and also unusual mental experience -- experiences, including pseudo hallucinations; is that correct?

A. Yes, that's correct, yes.

Q. And you have referred to those occurring while the accused was actually under the influence of an intoxicating substance, correct?

A. Yes, that's correct.

Q. But you've also referred to similar type symptoms when he was not under the influence of an intoxicant -- not experiencing the intoxicating effects of a drug, but was instead in withdrawal, that's referred to in your report; isn't that correct?

A. That's correct.

Q. Okay. So, what I'm asking you is did you address the question at all of whether or not the section 6 exclusion of intoxication with regard to a mental disorder, whether that exclusion applies to an effect of a drug during, for example, withdrawal symptoms?

A. So, the -- with regard to the symptoms that Mr Dunbar described experiencing and I've clarified -- or described as pseudo hallucinations in my report, it was my view that these were occurring on the basis of his accounts and both at interviews and in the book of evidence in garda interviews that these were occurring both in states of intoxication and also in states of withdrawal and that would be -- it would be recognised that those type of unusual perceptual disturbances can occur on either being exposed to a substance or in a state of intoxication or withdrawal.

Q. Yes, but what I'm asking you is did you consider the question of whether these symptoms occurring during a withdrawal period as opposed to while a person is actively intoxicated or experiencing the intoxicating effects of a -- of a drug, did you consider whether or not such symptoms occurring during withdrawal did not -- or are not covered by the exclusion under the Act on the basis that they are not an effect of intoxication but they are instead an effect of the effects on the brain, side effects on the brain, due to prolonged use of a drug?

A. So, the report seeks to address ultimately Mr Dunbar's capacity at the time of the alleged offence and at the time it was my view that he was intoxicated and that any symptoms he was experiencing at that time were what was relevant to the question I was being asked.

Q. Okay. But the particular question I'm asking is whether or not you considered because he experiences these phenomena, when he is not actually actively intoxicated, when he's in withdrawal, that that may properly be regarded as a condition which is not a consequence of being under the intoxicating influence of the drug; do you see the distinction?

A. Again, I'm finding it difficult but I would go back to what I said earlier which is that these symptoms can occur both in a state of withdrawal and intoxication. The other issue that would be relevant in my consideration of this, and the question regarding his mental state at the time of the alleged offence, is that these symptoms, in and of themselves, in my view, don't reach the threshold for a mental disorder. So, the fact that he's experiencing them at the time of the alleged index offence, for me the question is do these symptoms meet the threshold for mental disorder and, in my view, they did not.

Q. Well, what are the characteristics of a mental disorder?

A. With regard to the question of somebody's mental state at the time and the presence or absence of a mental disorder, from a psychiatric point of view and what I would be considering is the person's capacity at the time and whether the capacity is impaired at the time and it was my view that Mr Dunbar's capacity at the time of the alleged index offences was not impaired by a mental disorder and the reason I came to that conclusion was because the symptoms which he described, these pseudo hallucinations, again in my view didn't reach the threshold for a mental disorder, they didn't impair his capacity.

Q. Okay. But whether a mental disorder impairs capacity is a separate issue. I just want to ask you what your definition of a mental disorder is. For example, if a person actually hears a person speaking to them, exactly as if the person was standing right next to them and is experiencing it as such, can that be categorised as a cognitive impairment or some kind of a mental disorder?

A. Again, and I described it in the report, I've distinguished the pseudo hallucinations from hallucinations and the difference between those two phenomena as a person would experience them is the level of insight. So, typically, a person who's experiencing pseudo hallucinations will say I'm hearing voices. A person who's experiencing auditory hallucinations will say there are people out there talking about me. So, they don't have that insight and this is what would distinguish between the hallucinations and the pseudo hallucinations and it was for that reason it was my view that Mr Dunbar didn't have a psychotic disorder that, again in my view, would reach the threshold for a mental disorder. He had insight, so he was able to -- in the presence of pseudo hallucinations, his cognitive function was sufficiently intact".

46. Dr Wright, while accepting that the pseudo-hallucinations experienced by the accused were not normal everyday experiences, was emphatic that *"from a clinical point of view, they don't reach the threshold for a clinical disorder"*.

47. Having heard submissions from both sides in regard to the application that the trial court should itself call Dr Wright before the jury, so as to facilitate her cross-examination by defence counsel, the trial judge ruled as follows on day 21:

"This is an application to me as trial judge to call as a witness Dr Brenda Wright, a consultant forensic psychiatrist with the National Mental Health Service. Alternatively, I'm invited to permit the defence, when calling her, to challenge her in respect of her opinion which is adverse to the defence that the accused was not suffering from a mental disorder at the time of the killing.

She prepared a report on the accused dated the 10th of March 2020 following receipt of a letter of instruction dated the 11th of January, in which she was asked to consider the accused's mental state at the time of the alleged offence and during subsequent meetings with civilians and Gardaí. At that time, the trial had been adjourned from the 13th of February until the 16th of March and thereafter was adjourned and given an early date for trial of the 14th September during the special sessions of the court which commenced on the 31st of August following the Covid lock down. The document which were furnished to Dr Wright are set out at paragraph 1.3 of her detailed report. These include two previous reports by Dr Aoife Carney (sic), consultant psychiatrist dated 20th January 2020 and the 31st of January.

As noted by the Court of Criminal Appeal in the People (DPP) v. Tomkins, unreported, Court of Criminal Appeal 16th of October 2012, section 6 of the 2006 Act provides the basis for the defence of diminished responsibility. It must be established that at the relevant time the accused was suffering from a mental disorder such as not to justify a finding of not guilty by reason of insanity. The mental disorder must substantially have diminished the accused's responsibility. The accused must establish that though he understood the nature of the crime he committed his mind was, in the words of Charleton J in the People (DPP) v. Heffernan 2017, 1 Irish Reports 82 at page 88: "disordered through illness, disability, dementia or disease of the mind such that their criminal responsibility is substantially diminished." The disorder must exist at the time the killing occurs.

The importance of engagement by the accused required by the burden and standard of proof placed upon him under section 6 was emphasised by Charleton J at page 95, paragraph 20. It is a fair requirement to bring forward testimony upon which that fact can be found. I do not regard that passage as an encouragement to trial judges to deviate from the normal procedures involved in criminal trials, or the examination or cross examination rules by introducing an inquisitorial system, whereby the expert retained by the accused did not indicate a favourable professional opinion but they may then be

challenged and cross examined with a view to changing their opinion at the judge's medically uninformed direction. It is not the normal function of a trial judge to intervene when the proofs fall short to remedy the shortfall on either side. The judge's duty is primarily to ensure fair trial and, in doing so, may exceptionally call a witness of his own motion.

*In this case, the accused has sought to engage with the issue of diminished responsibility, but as often happens, the professional report obtained is adverse to his case and does not support it. There is a recognised power vested in a trial court to call and examine a witness who's not been called by either of the parties in a case. The power was identified in *Coulson v. [Disborough] 1894, 2 Queen's Bench, 316*, a civil case, and was extended to criminal cases. The Court has the power to call a witness not called by either the prosecution or the defence of its own motion if, in the Court's opinion, that is necessary in the interests of justice which may extend of course to the ascertainment of truth.*

*An example of this was in *R v. Harris, 1927, 20 Criminal Appeal Reports at 86*. This power extends to, in unusual circumstances, to the calling of an expert witness. It was considered in somewhat different circumstances in other jurisdictions in *R v. Kuchenn, 1982, 74 Criminal Appeal Reports, 30*, in which a trial judge declined to call medical evidence on the reports available providing a basis for the defence of diminished responsibility which the client did not wish to pursue. The Court of Appeal doubted the existence of such a power where the accused opposed it, but felt that in that case the power had been properly exercised not to call the medical evidence, see also *R v. Bouchard, 12 CCC, 2nd 554*.*

The exercise of this power should only occur exceptionally and after careful consideration as to the potential effects of the decision to do so or refrain from doing so on the fairness of the trial. In this case, the defence invite the judge to call the witness or, in the alternative, to allow the defence, in calling its own witness, Dr Wright, to cross examine her. The trial process is, of course, adversarial and in that context the burden of proof requires the defence to establish the defence of diminished responsibility on the balance of probabilities. There is a procedure to be followed in the furnishing of medical reports if they are to be relied upon, so that the prosecution may meet the issue. What I am invited to do is to allow the defence to cross examine Dr Wright, having produced and served on the prosecution a report in which she rejects the existence of a mental disorder in Mr Dunbar at the time of the killing. I am to do this in the absence of any further expert report or any expert basis for permitting such a challenge. I am to do so without any access to the detailed instructions given over to the doctor or how or as to why she may be considered to be in error and in the absence of any forensic knowledge on my part or to be advanced by any other witness that there's any basis upon which to mount a challenge to her testimony. If I pose any questions to the witness I have no way of knowing what she will say or whether I may elicit material which might otherwise not have been elicited.

The witness may be given an enhanced standing as an expert because she is called by the Court, which may be perceived as preferring her to the expert who may be called by the prosecution. The issue of diminished responsibility may be thought to have a greater standing because the trial judge calls a witness on the topic and is satisfied to have her challenged when she proves not to support the proposed defence. It is said that this concern might be met by permitting counsel for the accused to call the witness and examine and cross examine as he thinks fit. That divergent from the norm would still have to be explained to the jury, since the prosecution, if they called a professional witness will not have the same latitude. The prosecution would only learn during the cross examination what new evidence, if any, is to emerge when they were entitled to notice of what that expert would say. I do not consider that the exceptional grounds that would be required to allow such a radical departure from the normal rules have been established to enable me to permit that course to be taken".

48. At this point in his ruling the trial judge reviewed the letter of instruction to Dr Wright, noting that she in turn had been provided with the letter of instruction to Dr Kearney, and Dr Kearney's two reports, and that she had been expressly asked (*inter alia*) to include in her consideration the possibility that the diminished responsibility defence might be available.

49. The trial judge reviewed Dr Kearney's reports, and correspondence provided to him arising from same, in some detail, noting that in her first report:

"[...] [i]n respect of section 6, she concluded that she could not find evidence of a mental disorder at the material time and that, by his own admission, the accused was intoxicated, which was, in her opinion, a relevant disinhibiting factor in his case.

He stated to her that he was intoxicated with benzodiazepines and cannabis, of which he was a heavy user at the time. He was not -- he was 'not naïve' in the use of these substances and combinations of same in these amounts".

50. The trial judge noted that the defence's legal team on receipt of that first report had complained to her that she had not considered the observations at paragraph 7.3 of Dr Gray's report and *"the proposition that the diminished responsibility defence might be available, despite the fact that the accused might, at the time of the offence, have been under the influence of drugs and/or alcohol"*. The trial judge noted that Dr Kearney had, in fact, addressed this matter at paragraph 2.2 of her said report, stating that it was not possible to infer special psychiatric opinion regarding the description of the wounds from the information available to her. She had reiterated that she had found no evidence of mental disorder and that disinhibition due to intoxication may be relevant. She had further stated *"acute intoxication is likely to impact on impulsivity and self-control"*. The trial judge recorded that, in any event, on receipt of the defence team's complaints, Dr Kearney addressed all issues raised specifically and re-interviewed the accused. Having done so, she stated that her opinion had not changed and asserted that the phenomena that the accused described *"are not indicative of a mental disorder as a separate entity from that of the effects of his substance misuse and heavy and persistent pattern of drug use"*.

51. At this point in his ruling the trial judge confirmed that he had read and considered Dr Wright's report and considered her evidence. He noted that she had set out a very detailed history under various relevant headings. He went on to state:

"She gave her opinion that the accused "has a primary diagnosis of dependence on cannabis and benzodiazepines, characterised inter alia by a strong desire and compulsion to take the substance and difficulties in controlling this behaviour in terms of its onset, termination or levels of use." He had a physiological withdrawal state when substance use had ceased or been reduced, as evidenced by withdrawal symptoms or use of the substance to avoid or relieve withdrawal symptoms.

At paragraph 15.3, she stated that given the extent of his self reported consumption of substances, it is reasonable to assume that over a period of months prior to the alleged offence he alternated frequently between a state of intoxication or withdrawal, depending on the type of quantity of substance available to him at the time. She noted that he described unusual perceptual experiences when using intoxicants, such as hearing voices telling him to harm himself or others or seeing the outlines of people. They did not reach the threshold of hallucinations, but were to be regarded as pseudo hallucinations, which are recognised by the person as unreal as opposed to a hallucination which is perceived as real by the person.

Mr Dunbar described thoughts that others may harm him or talk or laugh about him. While such thinking is paranoid and regarded as paranoid ideation by Dr Wright it and other matters described 'occur in the context of his use of intoxicants.' His thinking did not amount to psychotic delusions. He displayed insight into these phenomena and -- he displayed insight into these phenomena and recognised that they were not real. The pseudo hallucinations and paranoid thoughts occur as part of a substance induced mental state which she accepted in evidence was normal".

52. The trial judge further noted:

"Dr Wright concluded in relation to his mental state at the time of the offence that he was intoxicated. She defined her understanding of the term, i.e. "Intoxication is defined as a transient condition, following the administration of alcohol and other psychoactive substance relating in disturbances in level of consciousness, cognition perception, effect or behaviour or other psycho physiological functions or responses." She noted that acute intoxication was excluded from the definition of mental disorder under the provisions of the 2006 Act. She concluded that he understood the consequences of his own use of substances and alcohol and because of this had reduced consumption up to February, which indicated an ability to control his use. It was her view that his state of intoxication "would have contributed substantially to his behaviour at the time of the alleged index offence, to the extent that if he was not intoxicated he would not have behaved as he did."

Insofar as he described having a blackout regarding the stabbing, she concluded that this was a partial alcoholic blackout and noted that he had "flashbacks" for some details of the

offence. He had experienced such blacks outs before. He did not suffer from a mental disorder. They were associated with intoxication.

That is an outline, and it's not exhaustive, of the circumstances in which Dr Wright may be called as a witness for the defence".

- 53.** He then added these observations in regard to the application before him:
"She has made a clear finding that the accused does not suffer from a mental disorder which, under section 6, includes mental illness, mental disability, dementia or any disease of the mind but does not include intoxication. Of course, the burden of proof is on the defence to establish diminished responsibility on the balance of probabilities. Dr Wright was called on the issue by the defence, but there's no suggestion in her report or in her evidence that she did not consider all aspects of the symptoms reported and the history recorded by herself and others on Mr Dunbar in determining that he was not suffering from a mental disorder or that she excluded from her assessment his history of drug/alcohol or abuse or withdrawal from same when considering the question whether he was suffering from a mental disorder at the time of the offence and whether such a disorder was a relevant factor in what he did. She stated that her report sought to identify the accused's capacity at the time of the alleged offence. Though the symptoms or phenomena which he described can occur in a state of withdrawal and intoxication, they did not, at the time of the alleged offence, reach the threshold for mental disorder which was the essential question for her from a psychiatric point of view. His capacity was not impaired by a mental disorder at the time. Though they were not normal every day experiences, from a clinical point of view they did not reach the threshold of clinical disorder. There is no clinical or professional evidence to support the proposition that her methodology or professional assessment of Mr Dunbar's mental health or the existence of a mental disorder on the date of the event was in any sense inadequate, other than by counsel's submissions.

It is, in my view, noteworthy that since delivering her report on the 10th of March Dr Wright received no correspondence asking her to elaborate upon or address any matter which was thought to be significant to an assessment for the purposes of section 6, but which was considered not to have been or to have been inadequately addressed by her. This was said to be because it was thought the matter was adequately dealt with in the letter of the 28th of January, which I was told she was sent but clearly was not. It is said that there is such -- that there is such a defect in her report and that in order to ensure that justice is done and that the truth is ascertained in the case, I should call Dr Wright as a witness and permit the defence and prosecution counsel to cross-examine her on the suggested inadequacies of her report. What are these suggested inadequacies and from what do they emanate? In my view, the application derives from a perception that Dr Wright did not take any account of the effects of drug use or withdrawal symptoms on Philip Dunbar and its association with any recognised mental disorder which may be clinically diagnosed was not because she erroneously discounted its relevance to the

section 6 issue because intoxication is excluded from the definition of mental disorder under the Act. It is suggested that Dr Wright failed to take account of drug abuse related symptoms but may be relevant to a mental disorder because of that exclusion. It is said that perhaps the consumption of drugs or alcohol might have caused or contributed to a mental disorder which was operative at the time of the killing.

It is very clear from Dr Wright's report that every facet of Philip Dunbar's history, ranging from suggested pseudo hallucinations to his fears of others and what they might say about him, voices and other phenomena, his suicidal ideation from time to time, his self harming and other matters were considered in all their aspects and in great detail as reported and against a background and in the context of his reported alcohol and substance abuse generally and on the night of the killing. However, Dr Wright concluded that he did not suffer from any mental disorder. As a corollary, it seems to follow that there was, on her opinion, no operative mental disorder at the time of the killing, giving rise substantially or to any extent to the actions of the accused. There is no other expert professional opinion relied upon to the effect that he suffered from a mental disorder or that Dr Wright's methodology or opinion is wrong or seriously in error or in any way inadequate. I do not consider applying the appropriate criteria that I should call Dr Wright and permit her cross-examination by counsel for the defence. I do not consider, on the basis of the evidence and submissions advanced, that it is necessary or in the interests of justice or a fair trial to do so or that this is one of the exceptional occasions which requires such an intervention. I do not consider either that it is appropriate to leave defence counsel at large to cross-examine his own professional witness on her opinion in this case or that such a course is necessary for or conducive to a fair trial on this issue".

Diminished Responsibility - Issue No. 2 : Relevant Background Details

54. In circumstances where the trial judge had refused to call Dr Wright himself, the defence called her, and she gave evidence before the jury on day 22. She outlined her qualifications and expertise, and the circumstances in which she had been engaged to assess the accused. In the course of her testimony she stated that her assessment was assisted by Irish Prison Service medical records relating to the accused; a medical report from Dr Moloney concerning his findings following his examination of the accused while he was detained in the immediate aftermath of his arrest; reports of Professor Harry Kennedy, clinical director of the National Forensic Mental Health Service and the Central Mental Hospital (whom she confirmed under cross-examination had assessed the accused at the request of the prosecution and had reported no abnormality in regard to the accused's mental state); the accused's primary care records, and; interviews with the accused. She told the jury that she had concluded on the basis of her assessment that the accused suffered from pseudo-hallucinations and unusual perceptions. However, in her opinion the accused had insight into these experiences and was aware that they were not real, and; she stated that as of the 20th of December 2018 (the last of a series of interviews she conducted with the accused) her conclusion was "*there was no current evidence of major affective (referring to mood) or psychotic illness or symptoms*". She further opined that:

"Based on Mr Dunbar's own account on his consumption of substances in the hours preceding the alleged index offence, it's my view that at the time of the incident, Mr Dunbar was intoxicated. Intoxication is defined as a transient, so temporary condition, which follows the administration of alcohol or other psychoactive substances, in this case cannabis and benzodiazepines and which results in disturbances of level of consciousness, cognition, perception, mood, behaviour and other other psycho physiological functions and responses. So, that is to say that the -- it's a temporary condition results from the use of intoxicants and associated with it are disturbances in consciousness, thinking, problem solving, one's experience of the external environment, mood and behaviour".

55. With reference to s. 6 of the Act of 2006, Dr Wright stated her understanding to be that acute intoxication is expressly excluded from the definition of mental disorder. She accepted that her opinion had been sought as a second opinion to that of Dr Kearney who had been of the view that the accused's intoxication excluded the possibility of him availing of the defence of diminished responsibility. Dr Wright confirmed that her opinion in that respect did not differ from that of Dr Kearney. She then added:

"Mr Dunbar's intoxication was voluntary in that he understood the consequences of using substances and alcohol and because of this had significantly reduced his substance use up to February, indicating an ability to control his use.

[...] it's my view that Mr Dunbar's state of intoxication would have contributed substantially to his behaviour at the time of the alleged index offence, to the extent that if he was not intoxicated he would not have behaved as he did".

56. Addressing the accused's claimed amnesia for events, Dr Wright observed:

"So, Mr Dunbar has variously reported that he has little recollection of the events surrounding the alleged index offence and he has referred to having a blackout. A blackout relates -- a substance related, that is related to drugs or alcohol, blackout is defined as amnesia for the events of any part of a drinking episode, but without loss of consciousness. It's characterised by a memory impairment during the period of intoxication in the relative absence of other skill deficits. So, that's to say albeit the person may -- subsequently will have no recollection of events, they will still be acting and functioning and walking and talking and to other people observing them there's no evidence that -- there's no objective evidence of this loss of memory because they appear, to all intents and purposes, to be functioning. Sorry, I've just lost my place there. Yes, sorry, a substance related blackout is not to be confused with passing out, which is characterised by loss of consciousness. So again, the person is not unconscious, but they continue to function but their -- they are not forming memories about the particular time during the period of intoxication. In contrast with a loss of consciousness, during a substance related blackout, planning, social interaction, long-term memory and other higher cognitive functions are present. And of note, blackouts are inherently subjective in nature. It's rarely possible to objectively validate a claim of substance related amnesia and this is what I was saying, to the objective observer who sees the person during the

period of intoxication, they can't account or otherwise for the subjective report of a loss of memory".

57. Dr Wright added that *"benzodiazepines certainly can be associated with blackouts"*, and that:

"An alcoholic blackout may be complete, also known as en bloc or partial, also known as fragmentary or a grey out. An en bloc or complete blackout is complete amnesia, so complete loss of memory for significant events which would otherwise be memorable. In a complete blackout the memory loss is permanent and cannot be recalled under any circumstances. However, this contrasts with fragmentary or partial block outs which occur more frequently and in these partial or fragmentary blackouts it is usually possible to recall some information and this can be aided by cueing. So, maybe prompts, maybe accounts from friends of what happened, for example, would assist the person in remembering maybe elements of their actions or events during the period of blackout".

58. Dr Wright further confirmed that the blackouts she was referring to included drug-related blackouts. She stated that the accused appeared to describe a partial alcoholic blackout. He described experiencing what he referred to as flashbacks for some details of the events related to the index offence. She then stated it to be her expert opinion that in the absence of a mental disorder, neither s. 5 nor s. 6 of the Act of 2006 applied in the accused's case.

59. Certain other evidence in the case that was adduced before the jury requires to be alluded to as it was relied upon by the defence in the court below as supporting a contention advanced by them on behalf of the then accused that, notwithstanding Dr Wright's evidence, the issue of whether their client could avail of the partial defence of diminished responsibility under s. 6 of the Act of 2006 should still go to the jury. This other evidence relied upon was evidence from the appellant's grandmother, Ms. Mary Dunbar, and certain matters stated by the appellant in the course of his interviews with gardaí, including his voluntary cautioned statement.

60. Ms. Dunbar told the jury that the appellant had a history of self-harming, that he had attempted suicide in a number of occasions, and that he had had a number of tragedies in his life. She stated that his mother had died of sleep apnoea at just 36 years of age, and that prior to her death she had had mental health problems and very serious drug problems. The appellant's father also had a drug problem and had been violent towards the appellant's mother before leaving the family, following which there had been little or no further contact with him. The appellant's mother had had a second partner who also had a drug problem and health issues, and he was also violent towards both the appellant's mother and the appellant. Ms. Dunbar stated that the appellant's mother had died on a night when it had been expected that the appellant would have stayed with his mother, and she suggested that the appellant had it in his head that if he had been with his mother on the night she died, she would not have died. After his mother died the appellant spent a lot of time at her grave. Ms. Dunbar stated that he used a variety of means including drugs to block everything out. He had overdosed on one occasion on paracetamol and was admitted to hospital. He had spoken to her of having suicidal thoughts and of hearing voices. She expressed the belief that he used drugs to escape what was going on because he had not only lost his mother, he had also lost his home, the house, and that all was gone.

61. In his interviews with gardaí the appellant had spoken of hearing voices in his head and of seeing things. He said that the voices were telling him to do things. He stated that it was like someone was sitting beside him saying “do it, do it, do it, do this, do that”. Describing his recall of the critical incident he stated (*inter alia*):

“And then we walked into the field, sat down, had a fag with him and then that's really all I can remember. We had a little bit of an argument, messing with each other, but that's the only thing, do you know what I mean? And then I was on -- I took 15 Up Johns and I was having a few drinks, so I can't remember, I blacked out. I'm addicted to tablets. Can't, like, every day I need them, I need them, I need them, it's not even because I need them, just to get my mind off things, out straight, like, to get my head off, like, everything. You get me? I don't know, it's just fucked up.

No excuse to what I did, no excuse, no matter what. But I just can't remember really, it was like a blackout. Gone. My head is fucked. All I do was think, think, think, think, think, think and think the worst of everything. Every little thing is just negative, but I did, and I know I killed him.

I can't remember, just like stabbing him, but I can remember walking away and knowing I did it, it was like when I was doing it there was no memory, the memory just went, it was just gone. But when I woke up today, I just knew, I know it was me that did it, but I just can't remember doing it. Always on tablets. My mind is fucked, just fucked up. Hearing things, I'm seeing things. I don't know.

We walked into the field. He was walking into the field and then he couldn't get over the wall. So, I helped him over the wall and then we had a little bit of an argument.” [...] Just a little disagreement. And then we walked into the middle of the field and then that was it. It was all I can remember really. It was just a blackout but it's just coming back, coming back to me there from when I stabbed him, I didn't feel anything. It was just black, blank. And then when I was walking back through the field, all I was hearing was voices in my head: 'Do it, do it, do it'. Hearing stuff, seeing stuff and this has been going on for the past six or seven months. Never told anybody about it or anything. Everybody thinking I'm going to be a fucking schiziatric or psychiatric ward.”

62. The appellant was asked by a Garda interviewer to clarify for how long he was saying he had been hearing things, and he continued:

“For weeks. Something in I want to kill. I don't know. It's fucked up. I want to do bad things all the time and that's: 'Do it, do it, do it'. Don't know and I'm seeing stuff and I'm sitting in my bedroom and seeing stuff flying past me, it's like a little outline of a body walking in and out of the room. [...] I walked out of the field and then I was fucked. I was on tablets and I was drinking so I can't really remember. When you take tablets, like I took like 15 Up Johns and drank a few bottles then that just blacks out. I can't stop. I'm addicted to tablets; I always need them. When I'm going into the house, I'm always out of it and it's not even that, it's just to take the pain away and misery, that's all it is.”

"I know I stabbed him, I know but I can't -- it's like it didn't happen in my mind, did not happen. But I know I did it. I don't know, I know I did it, but I can't remember doing it." [...] "I don't even want to think of it either. Out straight I don't want to think of it. I try not to but it's always there that I killed him. Do you get me? I didn't mean it like, I didn't mean it to happen, just couldn't. I didn't mean it to happen. I just blanked out. I'll show you where I threw the blade."

63. On day 23, after Dr Wright had concluded giving evidence before the jury, defence counsel submitted to the trial judge that the issue of diminished responsibility should be allowed to go to the jury notwithstanding the testimony of Dr Wright. Contrasting the position under s. 6 of the Act of 2006 with that under s. 5 of the same Act, counsel submitted that while the legislation expressly required the evidence of a consultant psychiatrist to establish insanity, there was no corresponding requirement in regard to diminished responsibility. It was submitted that it was a question of fact as to whether the accused was suffering from a mental disorder and that that was something to be decided upon by the jury and not by any expert. Moreover, it was submitted that Dr Wright had conceded that the appellant's experiences were abnormal, and it was further submitted that they were capable of being associated with the chronic effects of drug use and not solely with acute intoxication.

64. While counsel accepted the proposition put to him by the trial judge that the situation before the trial court was not one involving the absence of an expert opinion supporting the existence of a mental disorder, but rather the presence of a negative opinion denying the existence of such a disorder, counsel contended that in the last analysis it was still a matter for the jury.

65. In support of counsel's argument the court was referred to *R v. Byrne* [1960] 2 Q.B. 396. This case had involved an appellant who had been charged with the murder of a young girl whom he had strangled and whose dead body he had mutilated. He had admitted the facts of the killing, and he had pleaded that he was suffering from diminished responsibility, as defined under the English legislation, and that accordingly he was not guilty of murder but guilty of manslaughter. The trial judge had charged the jury to the effect that if the appellant killed the girl under an abnormal sexual impulse which was so strong that he found it difficult or impossible to resist, but that he was otherwise not suffering from an abnormality of the mind, the section providing for diminished responsibility would not apply. Allowing the appeal on the grounds that that was a misdirection, the English Court of Criminal Appeal held, *inter alia*, that whether the accused was suffering from an abnormality of mind, and in turn whether the abnormality was such as substantially impaired his mental responsibility, were matters for the jury on which they were entitled to disagree with the medical evidence, but the aetiology of the abnormality was a matter to be determined by expert evidence; that the direction withdrew from the jury the essential determination of fact which was within their province to decide; the medical evidence and the other evidence plainly pointed to the conclusion that the appellant was on the borderline of insanity, and, properly directed, the jury could not have come to any conclusion but that the defence under the relevant section was made out.

66. Counsel again sought to emphasise to the trial judge the primacy of the jury and that it was for the jury to determine whether the accused was suffering from a mental disorder and not a psychiatrist. The trial judge queried *in arguendo* with defence counsel if that could be so in areas where the jury had no expertise whatsoever, adding:

"This is not them coming in to decide a matter on the basis of their day-to-day understanding of life and their experience of life. This is their coming to an issue which is defined in terms of medical terminology. It is defined in terms of medical expert witnesses who come to court and indeed are expected to come to court in relation to the matter".

67. In response, defence counsel stated that he was willing to hang his hat on the proposition just advanced.

68. In detailed further legal submissions on the question of whether diminished responsibility should be allowed to go to the jury, the trial judge was also referred to the decision of this Court in the *People (DPP) v. Alchimionek* [2019] IECA 49. In that case both the prosecution's expert and the defence's expert were *ad idem* that the accused, who was charged with manslaughter, was suffering from a very serious mental disorder at the time of the killing. In his charge to the jury the trial judge told them that *"in the light of the medical evidence, it would seem to me that you have no option but to accept that on the balance of probabilities, the defence of not guilty by reason of insanity is available to the accused, and in such circumstances, you are obliged to acquit"*. Despite this direction, the jury declined to find the accused had a defence of insanity, and proceeded to convict the accused. The Court of Appeal quashed the conviction on the grounds that it had been perverse and against the weight of the evidence. However, in the course of doing so, the Court had been at pains to emphasise the primacy of the jury in our system of criminal justice. Moreover, the Court of Appeal had quoted from Hardiman J. giving judgement for the former Court of Criminal Appeal in the case of the *People (DPP) v. Abdi* [2004] IECCA 47, where he stated at p. 20 of his judgment:

"We wish to emphasise, however the central role of the jury on the issue of insanity. Many cases where insanity is pleaded do not in fact give rise to a great deal of controversy but, due to the difficulties and uncertainties attending on this particular area of medical science, there will always be those that do. But whether controversial or not, it is essential that every such decision be taken by a properly informed jury in a public forum. Equally it is important that where a person does not suffer a criminal conviction on the ground of insanity, such insanity should be clearly and publicly established to the satisfaction of the general public as represented by the jury. The role of the expert witness is not to supplant the tribunal of fact, be it judge or jury, but to inform that tribunal so that it may come to its own decision".

69. Defence counsel submitted that the correct question was not whether there were medical or psychiatric witnesses who would say that the accused was suffering from mental illness or mental disorder at the material time, but rather whether there was evidence upon which a jury could properly come to such a conclusion. It was the defence legal team's submission that on the totality of the evidence the jury could conclude that the accused had been suffering from a mental disorder at the time, namely being chronic disordered effects on his brain and psychology due to long-term drug use and withdrawal.

70. Reliance was also placed, as it happens by both sides, on the decision of the Supreme Court in the *People (DPP) v. Heffernan* [2017] 1 I.R. 82. Both sides continue to rely on aspects of that authority in support of their respective positions at this appeal.

71. In the *Heffernan* case the appellant was tried for murder and raised the defence of diminished responsibility pursuant to s. 6 of the Act of 2006. The appellant applied to the trial judge that the jury be directed that the burden cast on the defence was only to raise a reasonable doubt as to the question of diminished responsibility. This application was refused, and the jury was directed that the defendant was required to prove the defence on the balance of probabilities. The appellant was convicted of murder. He appealed unsuccessfully to this Court (*People (DPP) v. Heffernan* [2015] IECA 310), where we held that the use of the word “*establish*” in s. 6(2) meant that the appellant bore the burden of persuasion to the same standard as would apply to the defence of insanity, which was proof on the balance of probabilities. He then sought, and was granted, leave to appeal to the Supreme Court as to whether the Court of Appeal was incorrect in interpreting the burden and standard of proof for diminished responsibility under s. 6 of the 2006 Act.

72. The Supreme Court in dismissing Mr. Heffernan’s appeal held (*inter alia*) that in order to avail of the defence provided by s. 6 of the 2006 Act, it was for an accused to establish on the balance of probabilities that at the time of the act alleged he suffered from a mental disorder that was such as to diminish substantially his responsibility. There was no question but that the Oireachtas intended, by the use of the word “*establish*” and by requiring the trial court or jury to make a “*finding*”, to cast a burden of proof on the defence that went beyond the raising of a reasonable doubt.

73. The defence pointed to the fact that it appeared to be implicitly conceded in *Heffernan* that the defence could, at least in principle, be established on the prosecution’s evidence alone and that, notwithstanding that the defence bore a burden of persuasion, it was not necessary for the defendant to call evidence himself in support of his claim of diminished responsibility.

74. By the same token, strong reliance was placed by the prosecution on dicta in the *Heffernan* judgments to the effect that a person putting forward a defence of diminished responsibility is required to engage with setting out his defence on that basis. We were referred with particularity at the hearing of this appeal to para. 18 of the judgment of Charleton J. (as reported in the Irish Reports) where, having noted that the condition for the concession to illness made by the Act of 2006, in particular ss. 5 and 6 thereof, is that the accused carries a persuasive burden and thus the applicability of the defence must be clearly demonstrated. The learned Supreme Court judge went on to observe:

“This carries consequences. Unlike circumstances where the accused must solely meet an evidential burden, it may not be enough for the accused to simply test the prosecution evidence and to probe potential weaknesses, thus leaving the task of persuading the jury that a particular defence is inapplicable to the prosecution. Instead, the accused would be wise to actually participate in the trial and in advocating the case for the applicability of the defence or carry the consequences. That is perhaps demonstrated on the facts of this case, where psychiatric evidence was available to the accused but a decision was made not to call it but to rely exclusively on testing the prosecution testimony.”

- 75.** Charleton J. went on to say at para. 20 of his judgment in *Heffernan*:
 “[...] *the creation by legislation of the defence of diminished responsibility prays in aid a substantial impairment of understanding or control or both by reason of mental illness. Again, it is right that the accused should demonstrate that clearly. [...]*
Therefore, in both these defences of insanity and diminished responsibility, experience has not demonstrated any constitutional or human rights deficit in requiring a real engagement by the accused in setting out the nature of their mental illness and the dynamic of their impairment as it unfolded in the context of homicide. That is not productive of unjust results. That engagement is only fully called on where the accused has a persuasive burden. By setting the standard as requiring the accused to clearly demonstrate that the defence of either insanity or diminished responsibility is applicable, no accused who has brought about the death of another person may do anything other than fully engage with the trial and demonstrate the reality of his or her case”.
- 76.** Finally, in her judgment in the same case, at para. 90 of the report, O’Malley J. stated:
 “[...] *I think that it is worth pointing out that the policy factors that justify the same onus of proof as in the case of insanity are also clear. The same difficulties that the prosecution would face in proving beyond reasonable doubt that an accused is sane would arise in an attempt to prove that the responsibility of the accused was not diminished by reason of mental disorder. If the prosecution bore such a burden it would have to prove this positively – inviting the jury to reject dubious evidence from the defence would not suffice. The problem stems from the intrinsically subjective nature of the defence; from the fact that mental disorders and their effects are not necessarily the subject of ordinary life experience or knowledge and will generally require some level of expert assistance to the jury or court; and from the fact that an accused cannot be compelled to participate in any form of medical examination by the prosecution. For those reasons the defence of insanity has always imposed a burden of proof on the accused. The same considerations arise with diminished responsibility”.*
- 77.** The trial judge in the present case ruled that the issue should not be allowed to go to the jury, stating:
 “*I am satisfied that since there is a clear finding by a consultant psychiatrist that the accused, in her professional opinion, did not suffer from a mental disorder at the time of the killing, there’s no basis upon which the issue of diminished responsibility could be left to the jury. The onus is on the accused to establish the defence on the balance of probabilities. If there’s no expert evidence adduced to support the existence of a mental disorder, but the issue of diminished responsibility is left to the jury, they will be left at large to reject the only expert opinion adduced and make a finding on the basis of the accused’s behaviour on the night and his history as previously outlined to others, and to form an opinion in respect of a matter upon which an expert opinion is, in my view, essential.*
- The remaining evidence to be relied upon concerning his personal and family history, his experiences with alcohol and drugs over his teenage years, his social and educational*

history, the effects of alcohol and drugs on his behaviour, and the effect of his mother's death upon his life and behaviour, do not constitute evidence of the existence of an operative mental disorder at the time of the killing, though all were considered in detail by Dr Wright in her report and in her evidence. The jury would be left to consider the matter without expert forensic professional advice or evidence and would be invited to make a diagnosis that simply on the evidence has not and cannot be made by any psychiatrist, including the witness who assessed the accused.

I am satisfied that it is critical for the defence seeking to establish diminished responsibility to adduce medical evidence supportive of the existence of mental disorder under section 6(1). Its absence undermines the defence and will likely lead a trial judge not to leave the defence to the jury. Dr Wright's opinion and evidence that the accused was not suffering from a mental disorder makes that decision, in my view, coercive, and, more particularly, on the facts of this case in which Dr Wright states that the disinhibiting factor for the accused's actions was intoxication within the definition of the Act. Consequently, I will not allow the issue of diminished responsibility to be considered by the jury."

Diminished Responsibility – Issue No. 1 : Analysis and Decision

78. We are satisfied that the trial judge correctly exercised his discretion not to call Dr Brenda Wright as a witness or to allow the defence to cross-examine her on the issue of whether the appellant had a mental disorder as defined in s. 1 of the Act of 2006.

79. The power of a judge to call a witness of his or her own motion, or at the request of a party, is one to be sparingly exercised and only where it is necessary in the interests of justice. See, in that regard, the cases of *R. v. Wallwork* (1958) 42 Cr. App. 153, *R. v. Roberts* (1984) 80 Cr. App. R 89, and *R. v. Oliva* [1965] 1 W.L.R. 1028; and, more generally, see Mark Lucraft (ed.), *Archbold: Criminal Pleading, Evidence and Practice* (Sweet & Maxwell 2024), paras. 4-410 and 4-411, and *Blackstone's Criminal Practice* (2008 edition, Oxford University Press) para. D.17.10. There was nothing in the circumstances of this case to justify the trial judge in calling Dr Wright. There was no evidence that the interests of justice required it. The defence were at full liberty to call an expert, if they could get one, to say that the appellant was suffering from mental disorder. There was no suggestion that their client was unwilling to cooperate or to make himself available for assessment or examination. The fact that they had been unable to obtain such an expert was not suggestive of the possibility of injustice being done. The onus of proof, or burden of persuasion, in respect of the issue of diminished responsibility rested squarely on the defence. As was stated clearly in *Heffernan*, the defendants were required to engage with setting out on what basis their client was entitled to avail of the partial defence. They were required to prove that their client was suffering from a mental disorder at the material time as a precondition to being able to avail of the partial defence. Although not an express statutory requirement in the case of s. 6, for all practical intents and purposes it was necessary for the defence to adduce expert opinion in support of the contention that the accused had been suffering from a mental disorder at the material time. To offer that view is not to suggest for a moment that expert opinion would usurp the function of the jury, or that any decision on that issue was to be delegated to an expert. However, it was not likely to be within the everyday experience of life of any jury member not

trained in psychiatric medicine to engage in psychiatric diagnosis, and it is to be expected that an ordinary jury member would require the assistance of testimony from an expert or experts in that field before they could make an informed decision on such a question. The primary responsibility for providing them with that assistance rested with the defence in circumstances where their client was contending that he was entitled to the benefit of the partial defence provided for in s. 6 of the Act of 2006. It was not for the Court to relieve them of that responsibility. We are satisfied that the trial judge considered the application made to him carefully, and that in declining to accede to it he got the balance right. It is a fundamental principle of the adversarial legal procedure that, save in exceptional circumstances, a party is not entitled to cross-examine his/her own witness. There was nothing exceptional in the circumstances of this case such as would have justified the trial judge in calling Dr Wright himself; alternatively, in allowing defence counsel to cross-examine Dr Wright, the defence having opted to call her notwithstanding her previously expressed view, in which she was in ostensible agreement with her colleague Dr Kearney (and seemingly also with Professor Kennedy on the prosecution side), that the appellant was not suffering from a mental disorder. We find no error of principle on the part of the trial judge in how he dealt with this application, and we have no hesitation in dismissing this ground of appeal.

Diminished Responsibility – Issue No. 2: Analysis and Decision

80. We are also of the view that the trial judge was correct in not allowing the issue of diminished responsibility to go to the jury. As the *Heffernan* case makes clear, the partial defence of diminished responsibility under s. 6 of the Act of 2006 differs from defences such as self-defence (whether advanced on the basis that what was done was fully justified, or alternatively that it represented excessive self-defence) or provocation, in that the accused must do no more than merely raise a reasonable doubt. In a case in which self-defence (on either such basis) or provocation is advanced, the prosecution must prove beyond reasonable doubt that the accused did not act as suggested in self-defence, or was not provoked to act in the manner alleged. It is sufficient for the defence to raise a doubt in the mind of the jury to get the benefit of the defence. In such cases, the defence is not required to positively prove anything. The defence does not bear a burden of proof or burden of persuasion. At most, the accused may bear an evidential burden and it may be enough for him or her to simply test the prosecution evidence and to probe potential weaknesses, thus leaving the task of persuading the jury that a particular defence is inapplicable to the prosecution.

81. Conversely, in a case such as the present, in which an accused is asserting a claim to be able to benefit from the partial defence of diminished responsibility provided for in s. 6 of the Act of 2006, that accused does bear a burden of proof, or burden of persuasion as it has sometimes been called inasmuch as he/she is required to demonstrate to the required standard, i.e., on the balance of probabilities: (i) that he/she did the act alleged; (ii) that he/she was suffering from a mental disorder at the material time, and; (iii) that the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to have diminished substantially his or her responsibility for the act. We are satisfied that if there is no *prima facie* evidence upon which a jury, properly charged, could find that the defendant's burden has been discharged in any of those three respects, then it would not be proper to allow a jury to consider whether an accused can benefit from the partial defence of diminished responsibility.

82. The trial judge was right, in our assessment, to adjudge that there was an absence of *prima facie* evidence that the appellant in this case was suffering from a mental disorder at the material time. There was a complete absence of cogent evidence tending to suggest the existence of a mental disorder. It seems to us that such evidence as existed was to the effect while the mental symptoms which the appellant claimed to have experienced at the material time were abnormal (in the sense of not being normal everyday experiences), these were unusual perceptual experiences associated with intoxicant use. They did not reach the threshold of hallucinations but rather were to be regarded as pseudo-hallucinations which were recognised by him as being unreal. As such, they were not indicative of a mental disorder separate from the effects of his substance misuse and a heavy and persistent pattern of drug use. Even if the jury were to have completely rejected the evidence of Dr Wright characterising the appellant's unusual perceptual experiences as pseudo-hallucinations which were recognised by him as being unreal, such other evidence as there was in the case could not, we believe, have satisfied them to the standard of the balance of probabilities, that the appellant was suffering from a mental disorder at the material time.

83. However, even if we are wrong about that, we consider that on no view of the evidence is a causal connection made, or capable of being inferred, between any possible mental disorder and a diminishment of the appellant's responsibility for his actions. It is our assessment that, for all practical intents and purposes, the making of that causal connection would, in the circumstances of this case, have required expert psychiatric opinion, which was wholly absent.

84. We are satisfied that the trial judge engaged in a most careful analysis of the evidence, and he gave a ruling which was totally in line with that evidence. We find no error of principle in his conclusion that there was insufficient evidence to demonstrate either that the accused was suffering from a mental disorder; or that, even if he was so suffering, that it was such as to diminish substantially his responsibility for his actions in killing the deceased.

85. Accordingly, we have no hesitation in also dismissing this ground of appeal.

Topic No. III – Refusal to Exclude Part of Memoranda of Interview

86. In ground of appeal no. 12 it is complained that the trial judge erred in fact and in law in refusing to rule as inadmissible certain specified parts of the memoranda of interview of the appellant. It is necessary to place this ground of appeal in context.

87. When the appellant arrived at the Garda station in the company of his grandmother on the 24th of June 2018, and there voluntarily participated in an electronically recorded interview, although not under arrest, he made the following assertions (*inter alia*) in the course of that interview:

"I walked through Glenshane field with Adam. We'd had a little bit of an argument, yeah, but I just blacked out yeah. But I don't remember doing anything. I knew I did it, yeah consciously I knew I did it yeah but I just can't remember. I can't visualise it. I just blacked out. Hearing voices in my head and all".

"He was dead. I can't remember just like stabbing him but I can remember walking away and knowing I did it. It was like when I was doing it, there was no memory. The memory just went – it was gone. But when I woke up today, I just knew. I know it was me that did it, but I just can't remember doing it".

"I can't remember stabbing him but I just knew when I walked away that he was dead".

*" -just a little disagreement and then we walked into the middle of the field. And then that was it. It was all I can remember really. It was just a blackout. But it's just coming back, coming back, to me there. **From when I stabbed him**, I didn't feel anything. It was just black, blank. And then when I was walking back through the field all I was hearing was voices in my head: 'do it, do it, do it'".*

"I know I did the stabbing but I just can't remember doing it".

[Emphasis added by this Court]

88. This interview took place between 00:50am and 02:25am. As can be seen from the foregoing quotations, the appellant's predominant assertion during that interview was that while he knew that he had done the stabbing, he could not remember actually doing it. However, on one occasion he does refer to "*From when I stabbed him*".

89. Following the visit to the water feature in the Sean Walsh Park where the appellant indicated to gardaí the location where he had disposed of the knife, the appellant was arrested on suspicion of murder and brought back to the Garda station where he was detained for the proper investigation of the offence for which he was arrested. He was duly formally interviewed on two occasions while so detained, and understandably much of the focus of the interviewing process related to further questioning of him in relation to what he had said in the course of his voluntary interview.

90. The first formal interview while the appellant was in detention took place on the 24th of June 2018 from 13:35 hours until 17:02 hours. There was a second interview on the same date between 19:29 hours and 22:10 hours, but we are not concerned with that in the context of the ground of appeal now under consideration.

91. In relation to the first formal interview, it was conducted at a point in time when the appellant was in his 18th year, but he was still legally a minor. He was accompanied both by his grandmother, Ms. Mary Dunbar, and by his solicitor, Mr. Michael Hennessy, throughout the interview.

92. The record of the interview shows that just prior to 16:03 hours, when the appellant was afforded a toilet break, the focus of the interview had centred on what the appellant had said to gardaí in his voluntary statement in the early hours of the morning, and there was an attempt to identify, with particularity, the location of certain bushes to which the appellant had referred at that time. This led to the following exchanges:

"Q. Right, now [...] So were all now happy we know where the bushes are and we can move on [...]. 'It was just at the bushes and I just walked on.'

A. And if you read that statement, what does it say? I can't remember.

Q. And I will read it to you and you will know everything that's in there.

A. But you should know yourselves, you don't need to read it.

Q. *Exact words: 'I know I did the stabbing but I just can't remember doing it.' They're your words. I'm not trying to twist them. They're your words not anybody else's. I'm just recapping on them and asking you to explain them to me.*

A. *It's already explained on a sheet of paper.*

Q. *We'll come back two steps. You said 'I stabbed him'? It's all up here, right. Can you tell me exactly what happened with the 'I stabbed him'?*

A. *I can't remember. I said I know I stabbed him.*

Q. *Yea?*

A. *But I never said I stabbed him. I said I know I stabbed him. There's a difference.*

Q. *Will you explain that to me because I wasn't here last night?*

A. *If I say I stabbed you. Yea? I'm after stabbing you. If I say, I know I'm after stabbing you but I can't remember. That's what I said.*

Q. *Explain to me how you are coming up with the two different?*

A. *I said that last night. Did I or did I not? I said I know I stabbed him but I can't remember stabbing him.*

Q. *Right?*

A. *And that's it".*

93. The court of trial heard evidence in the course of a *voir dire* on day 10 of the trial that at this point in the interview there was an interjection by the appellant's solicitor, Mr. Hennessy, to say: *"It's been a really long interview I think. He's a juvenile"*. And then Garda Kieran Kilcoyne, who was one of the interviewers, says, *"One second. I'm just going to check times et cetera and I'll speak with the member-in-charge. How long are we here, Conor?"*, to which the other interviewer, Garda Conor Fleming replies, *"Two hours and 25 minutes"*. And then Garda Kilcoyne says, *"Two hours, 25 minutes. Okay. Right. I personally don't believe it's too excessive. I am going to check with the member-in-charge. I will come down with the member-in-charge and we'll let him lead me on what way we go"*. The evidence was that Garda Kilcoyne then left to get the member-in-charge, and while he was absent Mr. Hennessy is recorded as saying to Garda Conor Fleming, *"It's two hours and 40 minutes"*, to which Garda Fleming responds: *"No, we started at 13.35 High Ter (sic), John and I try again later in the afternoon thanks"*. Mr. Hennessy then states, *"Well, we were here a good few minutes getting ready beforehand. I think he is getting tired"*. Directing the question to the appellant, Mr. Hennessy asks, *"Are you okay?"*, to which the appellant replies, *"Yeah, yeah, yeah"*. Then the member-in-charge, Sergeant Gary Farrell, enters the room and asks, *"Philip, how are you keeping?"* The appellant replies to him, *"All right."* The member-in-charge then asked, *"Are you happy to continue?"* and the appellant replied, *"No, I don't want to. Two and a half hours I'm sat here"*. Sergeant Farrell then says, *"You feel you're not able to continue at the moment; is that correct?"* and the appellant replies, *"Yeah"*. Sergeant Farrell asks him, *"You're looking for a break?"* and Philip Dunbar nods his head in confirmation. And then Sergeant Farrell says, *"Well, if that's the case then we'll wrap it up"*. And Garda Kilcoyne says, *"Okay. That's no problem"*.

94. The evidence was that at this point Sergeant Farrell addressed Ms. Dunbar, asking her, *"Mary, are you okay?"*, and then he again addressed Philip Dunbar by saying, *"We'll just let them finish up. You can't just walk out now. Let the lads finish what they're doing and then we'll wrap"*

it up soon". Then Garda Kilcoyne addresses the member-in-charge and says "Sergeant, can I just – I have one question I want to put to him to finish the topic we're on". And the member-in-charge says, "Yeah, okay". And then Garda Kilcoyne turns to address Mr. Hennessy, but before he can speak Mr. Hennessy says, "Ask the question". Garda Kilcoyne responds, "We have been talking about something here at the moment. I just want to finish that topic and then we can finish up this interview. You want to get this topic finished as well. Is everybody happy that we just finish that topic we're on?" The appellant replies, "No more than five minutes". Garda Conor Fleming then says, "So five minutes then". And Garda Kilcoyne says, "Right". Mr. Hennessy then interjects addressing his client to say, "Just so that you know it's all going to be read back. That's going to take [...]" The appellant then responds, "That will take 25 minutes, can I use the toilet real fast?"

95. At this point the appellant is taken to the toilet by the member-in-charge. In his brief absence there is a discussion between Ms. Dunbar and Garda Kilcoyne about football and housekeeping and then Ms. Dunbar says, *"I'm getting a bit concerned about him now because he's getting a bit [...]"*, and then Mr. Hennessy interjects to say, *"The camera is still on [...]"* and she says, *"Sorry"*. Mr. Hennessy then invites Ms. Dunbar outside. They come back into the room, as do the member-in-charge and the appellant, and Mr. Hennessy says, *"We don't want to disrupt the last, it's fine. We can talk later on"*.

96. At this point the interview resumes at 16:05, as follows:

Q. You said earlier on you stabbed him and I am asking you the question.

A. No. I said I know I stabbed him.

Q. Right. Can you tell me the difference between did you stab him and you know you stabbed him? Tell me what that is to you.

A. The only reason I came in here was because I was getting flashbacks and I said that. That's all.

Q. I just want to try to understand how Philip Dunbar is categorising I know I stabbed him to your words 'I stabbed him, it was just blank'.

A. When I said that. No, that's when I blacked out. I can't remember. I blacked out. I was getting bits of flashbacks. That's when I came in here. It's only reason I came down here. If not, I would have went off and just let you on and do your investigation. I made it 10 times easier for you.

Q. Can you tell me about the blackout?

A. I can't remember.

Q. You were blacking out, right, and somebody else says they blacked out, I don't know what blacked out means to Philip Dunbar. That's why I am asking Philip Dunbar. Philip, what does blacked out mean to you?

A. I can't remember.

Q. Right. That's it. That's your answer. It's always your answer. That's what I'm here for. That's what Conor is here for. We're asking Philip Dunbar questions to get Philip Dunbar's answers, OK?

A. Yeah. So what, you have to read all that out now?

Interviewer answers: Yes.

Q. So what makes you know you stabbed him?

A. *I blacked out, I don't know. I can't remember. I can't remember.*

Q. *Can you tell me about the flashbacks? Just going to finish the subject”.*

97. At this point the appellant’s solicitor Mr. Hennessy interjected again to suggest that Garda Kilcoyne was asking another question. Garda Kilcoyne responded, *“I’m not”*, to which Mr. Hennessy said, *“You said you were going to ask one more question. Now you are opening up a new avenue”*. Garda Kilcoyne replied, *“I have to do an investigation properly and thoroughly”*. Mr. Hennessy then stated, *“No. Appreciate that. I’m responsible for that. As well as the member in charge’s response which was wellbeing. I’m now concerned he’s tired. He still hasn’t eaten that food. It’s very warm in here. I respectfully suggest that the interview be wrapped up”*.

98. Garda Kilcoyne then says,

“At all times, all the times I'm here for your wellbeing and your grandmother's wellbeing and even your -- I say even but – as always the wellbeing of your solicitor. My bottom line is I have questions about the death of Adam Muldoon. I have to ask them. I don't want to be asking them. I want to be sitting out in the sun. I want to go after the dubs. I'd love to watch the Dubs getting bet by 20 points. I'd love it. But I'm here because I'm trying to investigate a crime. Nothing more than that. Okay. So I have to ask the questions”.

99. He then resumes his substantive interview:

“Q. Tell me about the flashbacks?”

A. *The flashbacks are I stabbed him. That's all I remember. After that it's blank, blank. No memory at all. I even said that to your woman last night, didn't I, I said I get flashbacks and I can't remember.*

Q. *And you have explained to me what a flashback is, explain to me what a blank is. Now I understand what Philip Dunbar is telling me. I didn't understand five minutes ago. I can't apologise for asking questions, trying to get an understanding because I have to get to the bottom of it, okay?*

A. *Yeah. No problem.*

Q. *And I can go and get you a Fanta out of the machine if you want because we’re going to read this back now. But I had to get there. Do you want a can of Fanta out of the machine?*

A. *Eh, Yeah*

Q. [Garda Kilcoyne addresses colleague] *Do we even have Fanta out in the machine?*

A. *And then can I go out and have a fag?*

Q. *If the sergeant allows it”.*

100. Thereafter the remainder of the interview record is uncontroversial. It references the provision by gardaí of a McDonalds meal to the appellant. Further, it records that there was a reading back, that the appellant was invited to make any alterations or additions that he might wish to make, that he initialled a number of corrections, and that the notes were witnessed, timed, and dated.

101. Defence counsel had argued before the trial judge that all of the questioning in the first interview concerning what the words used by the appellant in his voluntary interview in the early hours of the morning of the 24th of June 2018 with reference to the stabbing of the deceased had

actually meant, should be excluded on the basis that such questioning was conducted in circumstances which were oppressive and unfair. It was suggested that the answers given by the appellant to the questions asked of him in the first interview conducted while he was in detention were consequently not voluntary.

102. In support of his argument, defence counsel drew the court's attention to s. 55 of the Children Act 2001 (i.e., "the Act of 2001") which states:

"In any investigation relating to the commission or possible commission of an offence by children, members of the Garda Síochána shall act with due respect for the personal rights of the children and their dignity as human persons, for their vulnerability owing to their age and level of maturity and for the special needs of any of them who may be under a physical or mental disability, while complying with the obligation to prevent escapes from custody and continuing to act with diligence and determination in the investigation of crime and the protection and vindication of the personal rights of other persons".

103. Further, the trial judge was reminded of the jurisprudence of the Supreme Court in the *People (Director of Public Prosecutions) v. Shaw* [1982] I.R. 1, where Griffin J. said at pp. 60-61 of the report that:

"the decided cases show that a statement will be excluded as being involuntary if it was wrung from its maker by physical or psychological pressures, by threats or promises made by persons in authority, by the use of drugs, hypnosis, intoxicating drink, by prolonged interrogation or excessive questioning, or by any one of a diversity of methods which have in common the result or the risk that what is tendered as a voluntary statement is not the natural emanation of a rational intellect and a free will".

And that:

"[...] even if a statement is held to have been voluntarily obtained in the sense indicated, it may nevertheless be inadmissible for another reason. Because our system of law is accusatorial and not inquisitorial, and because (as has been stated in a number of decisions of this Court) our Constitution postulates the observance of basic or fundamental fairness of procedures, the judge presiding at a criminal trial should be astute to see that, although a statement may be technically voluntary, it should nevertheless be excluded if, by reason of the manner or of the circumstances in which it was obtained, it falls below the required standards of fairness. The reason for exclusion here is not so much the risk of an erroneous conviction as the recognition that the minimum of essential standards must be observed in the administration of justice. Whether the objection to the statement be on constitutional or other grounds, the crucial test is whether it was obtained in compliance with basic or fundamental fairness, and the trial judge will have a discretion to exclude it 'where it appears to him that public policy, based on a balancing of public interests, requires such exclusion' – per Kingsmill Moore J at p 161 of the report of [People (A.G.) v. O'Brien [1965] I.R. 142]".

104. It was submitted that having regard to all the background circumstances, and the manner in which the questioning had proceeded, the trial court should have excluded the parts objected to by the defence in order to uphold the right to fair treatment in custody. It was suggested that D/Garda Kilcoyne's response to the appellant's solicitor's asserted concern about the length of the

interview, namely that "*I personally don't believe it's too excessive*" was irreconcilable with the objective facts, the decision of the member-in-charge and the interventions of the appellant's solicitor during interview. Counsel asked the trial court to note that the appellant had arrived in the garda station at 1am, was processed until approximately 3am, was awake at least until 5am, was woken at 7am, medically examined at 9:30am, and was a 17-year-old boy who had clearly asserted he was addicted to taking drugs and who was not eating his food. While he had told Dr Moloney that he had not taken drugs since Friday he had told Garda Giltrap, the gaoler, that he had taken drugs two hours before.

105. Reliance was also placed on the fact that the appellant was said in evidence to have been asking repeatedly for a cigarette break. It was submitted that this was of particular significance, in context.

106. It was further contended that this was a crucial period of time, as the appellant had answered a question after he had expressed reluctance to answer any further questions owing to how he was feeling.

107. It was submitted that the actions of Garda Kilcoyne negated what was said in front of the member-in-charge and in the face of objection from his solicitor who had very real concerns for his client's psychiatric and mental wellbeing. The element of voluntariness was absent during this period of time, and the appellant was being compelled into answering questions when he did not want to answer any questions at that point.

108. It was further contended that failure by the gardaí to have a psychiatric evaluation conducted on the appellant as advised by Dr Moloney amounted to a breach of the appellant's rights whilst in custody.

109. Finally, it was urged upon the trial court that the appellant's background was particularly unusual and harrowing. It was said that when the appellant was aged 15 years, his mother had died during a period in which he perceived he was meant to be taking care of her, and during which both he and his mother were simultaneously subjected to violence by her boyfriend. His mother was a drug addict, had mental health problems, and the appellant had felt that it was his fault that she had died.

110. The trial judge refused the application to exclude the parts of the first memorandum of interview to which there was objection. He said that he was not satisfied having considered all of the evidence that the accused was medically unfit for custody or interview. He viewed extensive parts of the interviews, and he stated that it was clear to him that the appellant was able not only to receive and understand advice which was given to him, but that he clearly understood the role of his solicitor and had exercised his right to silence as he was entitled to do, when he thought that was appropriate. He was also well able to engage with the questions posed by the interviewers and deal appropriately with them at the time. He was satisfied that the accused was not suffering from any mental or medical condition, nor was he under the influence of any drug or intoxicant such as to affect the fairness of the process or the voluntariness of his actions or of any words spoken by him. He was satisfied that there was no breach of custody regulations, or of any of the accused's statutory, regulatory, or constitutional rights and entitlements. Having alluded to the interjections made by the appellant's solicitor during the interview and the exchanges that had followed, the trial judge further ruled:

"I am satisfied, having viewed the interview and these exchanges, which are fully set out in the transcript of the note which was furnished to me, that the reality was that the interview was interrupted at a stage when a most important topic was under discussion with the accused. In my view it was appropriate that this topic be concluded and it was concluded well within a period of five minutes of Sergeant Farrell leaving the interview room it would appear to me. I do not consider, having heard all the evidence, that Garda Kilcoyne acted unfairly, oppressively or in any way that undermined the responses of the accused who I am satisfied replied freely and voluntarily and gave answers to the questions posed. It was in my view wholly unrealistic that the interview should conclude on this important question without these relatively short and entirely logical supplemental queries. It would have been wrong and unfair of the interviewer not at that time to seek clarity in respect of the answer given to the final question posed and answered and give the accused an opportunity to explain his response. He very shortly thereafter properly concluded the interview. I do not accept that the interviewer was embarking on a wholly new line of enquiry which is evidenced by the rapid conclusion of the interview shortly thereafter. I am satisfied that this was not to defy the decision of the member-in-charge. In fact the member-in-charge was told that the question to be posed was to conclude the topic they were on. It is in my view somewhat artificial to characterise what happened as unfair and unlawful given the flow and reality of the exchange between the interviewer and the accused which arose directly out of that last question. I am satisfied on the evidence that at all times the interviewing members had due regard for the age of the accused, the fact that special care was required in respect of interviewing a person under 18 and his level of maturity and any relevant vulnerabilities owing to his age and level of maturity. I am satisfied the gardaí fully complied with their obligations in the circumstances of this case under section 55 of the Children Act 2001. There was not any breach of their obligations to him under the act or the provisions and regulations governing his detention and interviewing, the law or the constitution. I am also satisfied therefore that this portion of the interview should be admitted in evidence".

111. In the appeal before this Court counsel for the appellant reiterated the arguments made before the court below and asked us to rule that the trial judge erred in law and in fact in how he dealt with the matter. This application was opposed by counsel for the respondent.

112. We are completely satisfied that the trial judge dealt with the matter appropriately. The decision that he came to was open to him on the evidence. The trial judge's ruling was detailed, cogent and evidence-based and in our view, as such, it is unassailable.

113. We therefore dismiss ground of appeal no. 12.

Topic No. IV – Admissibility of CCTV evidence

114. The next ground of appeal can be characterised as an issue relating to the admissibility of the CCTV footage. During the course of the investigation, members of the gardaí harvested a quantity of CCTV footage. They did so from several households in the Glenshane Estate and Rosfield Estate in Tallaght, Tallaght Shopping Centre, a local chip shop, and Dublin Bus. In addition, footage was gathered from the home of the appellant's grandmother at 10 Glenshane Drive, with her consent. The appellant, it should be noted, resided at this address. Gardaí then

proceeded to analyse the CCTV footage and to distil the content thereof. The footage was then given to Garda Brian McCormack who was responsible for producing a compilation of the footage, and who further provided a narrative to accompany this. It can be noted at this point that no issue arises as to the chain of evidence; rather, the contention raised in relation to the admissibility of the CCTV videos focused on the failure by gardaí to comply with the law which established the procedure that was to be followed.

115. As already indicated, the CCTV footage that was sourced and which was challenged as inadmissible at trial, and before this Court on appeal, is from a wide variety of sources. However, the issue on appeal focuses mainly on CCTV evidence procured from various householders in the Glenshane and Rossfield Estates, with particular emphasis on the CCTV footage obtained from the address of the appellant's grandmother at 10 Glenshane Drive.

The CCTV Issue as it Developed at Trial

The Arguments Raised by the Appellant in *Voir Dire*

116. At this juncture, it is helpful to consider the CCTV footage in issue in two subcategories: CCTV evidence from various households and shops, and; CCTV evidence from the household of the appellant's grandmother.

117. In turning to the first subcategory, counsel for the appellant raised two lines of argument: first, that the gardaí knowingly relied on a resource available as a result of illegal surveillance, and; second, that the gathering of such CCTV evidence infringed the appellant's right to privacy under the Constitution, under the law of the European Union, and under the European Convention on Human Rights.

118. At this stage, it is appropriate to note the legal architecture surrounding the gathering of CCTV footage for investigative purposes. On the 27th of May 2018, the Data Protection Act 2018 (i.e., "the Act of 2018") became law, which legislation imposed various obligations on processors and controllers of CCTV footage and changed the procedure that had applied under the Data Protection Act 1988, as amended (i.e., "the Act of 1988").

119. In the course of a *voir dire*, which took place over four days of the trial, a number of gardaí gave evidence to the effect that they were not aware of the recent change in the law, and as such, that they had not been given any information, training or advice on the changes brought about under the Act of 2018. Evidence was given as to the approach followed by gardaí. It involved going to a local area – in this instance, the Glenshane area – and walking through the streets, making note of whether a household had a camera or not. If there was a camera, gardaí would approach the householder and ask permission to have access to the video for a specified period of time. The relevant period in this case was the 22nd to 23rd June 2018; so generally between a 24-hour and 48-hour period. If a householder refused to give consent, the gardaí would then apply for a warrant seeking the CCTV video.

120. Counsel for the appellant focused on the obligation under s. 16 of the Act of 1988, which required a householder to register the instalment of a CCTV camera. He did so, in spite of such a requirement for registration not arising under the Act of 2018, which came into force in late May 2018, some weeks prior to the murder being investigated. Essentially, his contention was that when s. 16 of the Act of 1988, with its requirement for registration, was operative, there was widespread – indeed it was suggested, universal or near universal – disregard of the obligation to

register, but gardaí, without regard to that failure to register, accessed and harvested CCTV footage. However, the Act of 2018 does impose various obligations on data controllers. Detective Garda Mark Shortt (otherwise "D/Garda Shortt"), among other members of An Garda Síochána, admitted that they had not informed relevant households from whom they were acquiring CCTV footage as to their legal obligations. It was argued that in failing to ensure that householders and businesses alike were complying with their legal obligations, the gardaí, over a prolonged period, were relying on illegally created material, and it was said that, in those circumstances, the evidence should not be admitted. It appears that the focus on the practice following when the Act of 1988 was in force was to establish that the actions of gardaí at the time of the investigation in issue formed part of a consistent and persistent pattern of behaviour that had stretched over many years, and perhaps in doing so, to cut off any argument that might otherwise have been advanced, in that what had occurred in late June 2018 was an aberration due to a failure on the part of gardaí to adjust to a changed legislative environment.

121. In relation to the second strand of the argument raised, it was not put to the trial court that the privacy rights of the appellant are absolute. Rather, it was submitted that, upon balancing the right to privacy with the right of citizens to have crimes investigated, detected, and prosecuted, the Court should declare the CCTV evidence inadmissible. When balancing such rights, the court must consider the following principles:

- (i) whether a legitimate aim was being pursued;
- (ii) whether the aim was being pursued appropriately (meaning in accordance with law), and;
- (iii) whether the means chosen to pursue the aim were necessary and proportionate.

122. The Act of 2018 provides for circumstances in which CCTV evidence can be processed for a purpose other than that for which it was originally sought, and under s. 41(b) of the Act of 2018, this includes "*preventing, detecting, investigating or prosecuting criminal offences*". Counsel for the appellant contended that the adoption of a blanket policy by the gardaí to seek and take CCTV footage for a period of 24 to 48 hours was not in accordance with law as there was no evidence to suggest that the gardaí took time to consider whether such evidence was necessary.

123. Moving on to the second subcategory of evidence, that from 10 Glenshane Drive, the appellant acknowledged that while the 48 hours generally sought may, on one view, not be deemed excessive, there could be no justification provided by gardaí as to why two weeks of footage was necessary, which was what was acquired. In furtherance of this argument, counsel for the appellant pointed to para. 70 of the judgment of McKechnie J. in the High Court in *Digital Rights Ireland Limited v. Minister for Communication* [2010] 3 I.R. 251. That judgment refers to *Klass v. Germany* (1979-80) 2 EHRR 214, a case which challenged the validity of a law allowing State authorities to open and inspect mail and listen to telephone conversations on the grounds that it contained no requirement to notify persons after the surveillance had ceased and it provided no redress before the courts. The European Court of Human Rights held that any interference with the right to privacy is subject the principle of proportionality. Counsel for the appellant herein advanced the argument that accessing two weeks' worth of footage seriously offended the principle that there should be a limitation of such a seizure.

124. Counsel for the appellant has relied heavily on Case C-212/13, *František Ryneš v. Úřad pro ochranu osobních údajů* (11th December 2014). In our view, this case is of limited relevance because what was in issue there was a reference by the Supreme Administrative Court of the Czech Republic to the Court of Justice of the European Union (CJEU), and the question involved whether the operation of a camera system, which was installed on a family home for the purpose of the protection of the property, health and life of the owners of the property, but which also monitored a public space, could be classified as falling under the exception to processing personal data outlined in Article 3(2) of Directive 1995/46/EC of 24th October 1995, namely, “*by a natural person in the course of a purely personal or household activity*”. It expressly stated that the case did not concern State security or the activities of the State in areas of criminal law which come within the other exception laid down in the first indent of Article 3(2) of Directive 1995/46/EC. At para. 41 of his Opinion in Case C-212/13, Advocate General Niilo Jääskinen stated expressly that Mr. Ryneš acted as a private individual and not as an officer of the law.

125. Returning to the present case, the CCTV footage taken from 10 Glenshane Drive can be divided into two further categories. Firstly, footage relevant to the events surrounding the offence and the immediate aftermath, showing the coming and going of the appellant on the night of the death of the deceased, and at one stage showing the appellant in possession of the deceased’s walking aid and then the trip to The Square Shopping Centre, involving the disposal of the knife. In turning to the second category, the Saturday afternoon, the appellant is to be seen in the front yard and there appears to be other children around. Counsel submitted that the evidence harvested from the Saturday afternoon extends beyond the relevant period as it may be used by the prosecution as evidence of the demeanour of the accused at that time, and thus, disadvantaging him in the eyes of jurors.

126. Counsel for the appellant sought to rely on the decision of the Supreme Court in *People (DPP) v. J.C.* [2017] 1 I.R. 417, and he argued it acts as an authority for the proposition that there is an obligation by the gardaí, as the investigating authority, to ensure householders comply with legal obligations. Counsel for the appellant purported to apply the balancing test articulated by Clarke C.J., and he pointed to the automatic exclusion that applies when gardaí have collected evidence in a deliberate and conscious breach of constitutional rights. Counsel for the appellant also noted the exceptions under the *J.C.* test in relation to inadvertence on behalf of the gardaí, and as to the issue of a subsequent legal development. However, it was advanced that the gardaí cannot rely on inadvertence in this case in relation to a new legal regime, as the law was arguably more stringent prior to May 2018, and that, at that stage, they were not in compliance either.

The Director’s Argument in the *Voir Dire*

127. The argument advanced by counsel for the Director in the *voir dire* consisted of one overarching argument that both the constitutional rights argument and the data protection argument did not stand up to scrutiny.

128. In terms of the constitutional rights argument, it was submitted that the appellant had failed to demonstrate any breach of the constitutional right to privacy of any person associated with the CCTV, as counsel for the Director stated:

“This is in circumstances where the CCTV covers public places and exteriors of buildings where the persons depicted, whether definitively or at a distance, can have no reasonable

expectation of privacy and that is the litmus test. Can a person have a reasonable expectation of privacy [...]”.

129. Counsel for the Director then sought to break down the various categories of CCTV footage. Starting with footage taken from the various shops and from Dublin Bus, it was argued that no right to privacy could be said to be infringed as shopkeepers and Dublin Bus alike were entitled to install CCTV, and in both of those scenarios, it served a legitimate purpose, i.e., to prevent people stealing, or prevent fare dodging, respectively. In turning to the next category of CCTV footage, that taken from private homes, it was said the same could be argued as, generally, the cameras showed people on a roadway or in a public place in front of a house on a footpath.

130. Counsel for the Director acknowledged that counsel for the appellant sought to place a particular focus on CCTV footage at a house recording within the front garden, and asserted that the appellant’s privacy rights were engaged, as well as the privacy rights of other children. Counsel for the Director rebutted this argument by stating that the appellant’s grandmother, in having CCTV at her house, was pursuing the legitimate aims of seeking to protect her property, her right to the inviolability of her dwelling, and protecting her and her co-occupants’ (of which the appellant was one) security. If the appellant had any concern about his privacy rights having been infringed, counsel for the Director said that the appellant ought to bring a claim against his grandmother, not the Gardaí. Moreover, it was noted that, in CCTV evidence from the 23rd of June, the appellant spat at the camera and therefore was aware as to its presence. In furthering this argument, counsel for the Director placed reliance on *Idah v. DPP* [2014] IECCA 3 which involved wiretapping by Gardaí. At para. 35 of his judgment MacMenamin J. stated:

“The Commission’s Report takes care to identify context as being a major factor in determining the extent of the right of privacy and giving rise to a ‘reasonable expectation of privacy’”.

131. In relation to the data protection arguments, it was argued that counsel for the appellant was wrong to suggest that the Act of 1988, as amended, or the current Act of 2018, created a strict liability scenario for all homeowners and shopkeepers who set up CCTV footage. Additionally, it was contended that, whether a householder had registered their camera or not, this did not deprive the gardaí of their entitlement to seek out material that they deemed to be relevant to a serious criminal investigation. Counsel for the Director stated that both the Act of 1988, as amended, and the Act of 2018, as well as Directive 1995/46/EC as repealed by Regulation (EU) 2016/679 of the 27th of April 2016 (i.e., “GDPR”), carve out an exception for the detection, investigation, and prosecution of crime.

The Trial Judge’s Ruling

132. The trial judge concluded that it would be difficult to see how the accused or other persons said to be depicted and visiting public areas could be said to have had an expectation of privacy. At this juncture, the trial judge also noted that another witness, who is referred to in the present judgment as “AB”, was rather keen for the CCTV footage to be admissible as the footage showed him going out of his own home at the time when appellant suggested he was involved in killing or at the scene of the crime. The trial judge, crucially, then went on to consider each element of the footage as set out in the compilation and addressed the question of relevance.

133. In relation to the CCTV evidence gleaned from 10 Glenshane Drive, which was perhaps the most controversial or hotly contested aspect of the CCTV footage, the trial judge concluded that the relevance of same lay in the fact that the angle of the camera covered what the locals referred to as “*Butler Park*”, which was a subarea of Jobstown Park, where the murder occurred. This footage became more significant following the appellant’s decision to attend Tallaght Garda Station to make an admission of his involvement in the events at the park. The trial judge said that the change in dates – originally the appellant’s grandmother had consented to a day of footage as opposed to two weeks of footage – was understandable, given that the circumstances had changed. It is of note that, during the *voir dire*, D/Garda Shortt gave evidence that he made the decision to seize the DVR (Digital Video Recorder) outright; due to the relevance of the location of the camera, that a large quantity of footage would be required, and that this would be time consuming. Moreover, the trial judge found it difficult to understand how a grandmother could be said to be invading the appellant’s right to privacy by filming him in his own garden.

134. In considering the necessity of the CCTV evidence, the trial judge stated that the principle of necessity relates to, and is assessed at the time of, the collection of data and not with the benefit of hindsight.

135. The trial judge pointed to the fact that Directive 1995/46/EC made it possible for a national court to take account of legitimate interests pursued by the controller, and that ultimately CCTV footage was permitted to be entered in as evidence in the related criminal proceedings.

136. The trial judge rejected the suggestion that householders who were operating CCTV cameras on their walls were acting illegally and not in compliance with relevant legislation. He held that it is lawful to mount CCTV cameras on your house, and that there is no obligation on the gardaí to ensure that each householder is compliant with the obligations under the legislation before ascertaining CCTV evidence.

The Appeal

The Argument of the Appellant on Appeal

137. Counsel for the appellant contends that the trial judge erred in refusing to rule inadmissible the CCTV evidence relied on by the Director, and in particular, erred in fact and in law by refusing to rule inadmissible the CCTV evidence from outside 10 Glenshane Drive on the afternoon of the 23rd of June 2018. This argument is advanced by counsel for the appellant on a number of grounds, which were largely similar to those put before the trial judge, albeit with some new lines of argument, which will be the focus below.

138. In a nutshell, counsel for the appellant contends that the process through which the gardaí collected the CCTV evidence was illegal, namely that the gardaí failed to ensure the relevant householders had registered their CCTV cameras, as required by the Act of 1988; that they did not caveat the request for CCTV footage with a reference to the right of the householder to refuse such a request made by gardaí, and; that any warrant sought on foot of refusal by a relevant householder was unlawful as it breached the principles of safeguarding the constitutional right to privacy, as set out above. Finally, in relation to the evidence taken from the grandmother’s house, it is argued that the evidence should not have been admitted as the prejudicial impact of such evidence outweighed any probative value, on the basis that it showed another individual laughing

in the appellant's company, the day after the murder which had the effect of tarnishing the appellant's character.

139. In response to queries from the Court, counsel for the appellant contends that the gardaí have a duty to procure evidence that is relevant, but that this is subject to the principle of necessity, which requires the gardaí to operate within the confines of the law, and he argued that collecting and using evidence that is illegal is acting in breach of that duty. In turning to the warrants, counsel for the appellant submits once more that the principles of necessity and proportionality were not complied with as all the warrants sought by the gardaí lacked specificity.

The Argument of the Director on Appeal

140. Counsel for the Director, in her written submissions, points to s. 41 of the Act of 2018, which reads as follows:

“Without prejudice to the processing of personal data for a purpose other than the purpose for which the data has been collected which is lawful under the [GDPR] the processing of personal data and special categories of personal data for a purpose other than the purpose for which the data has been collected shall be lawful to the extent that such processing is necessary and proportionate for the purposes—

[...]

(b) of preventing, detecting, investigating or prosecuting criminal offences”.

141. Counsel for the Director argues that whilst data subjects have various rights in relation to their personal data, s. 41 curtails those rights when a state agency is investigating crime. Additionally, counsel for the Director accepts that data subject rights are restricted by the principles of necessity and proportionality. She points to para. 96 of Joined Cases C-203/15 & C-698/15 *Tele2 Sverige/Watson & Ors*, (21st of December 2016) wherein it is stated:

“Due regard to the principle of proportionality also derives from the Court's settled case-law to the effect that the protection of the fundamental right to respect for private life at EU level requires that derogations from and limitations on the protection of personal data should apply only in so far as is strictly necessary”.

142. In relying on the principle of proportionality, counsel for the Director advances the argument that the footage gathered in this instance covered public areas, was for a limited time frame, and was wholly proportionate and reasonable in the pursuit of the criminal investigation into the murder of a vulnerable young man. Further, she submits that the *J.C.* test does not arise, as the applicable data protection law allows for the processing of personal data in such circumstances. Therefore, counsel for the Director argues that gardaí did not act contrary to the law.

143. On the issue as to the purported illegality of the warrants, counsel for the Director simply asserts that none of the evidence sought by warrant was used, and therefore such an argument is irrelevant; but if the situation was otherwise, and it was necessary to consider the validity of warrants, they would indeed stand scrutiny.

Discussion

144. Unfortunately, we view some of the arguments advanced in the trial court and echoed before this Court as lacking in reality. Our concerns in that regard are heightened by the fact that we have been given to understand, and indeed have ourselves observed, that similar arguments

have been advanced in other cases, sometimes at great length. The legal regime applicable on the 22nd and 23rd of June 2018 was the Act of 2018. Section 41 of that Act is in these terms:

“Without prejudice to the processing of personal data for a purpose other than the purpose for which the data has been collected which is lawful under the Data Protection Regulation, the processing of personal data and special categories of personal data for a purpose other than the purpose for which the data has been collected shall be lawful to the extent that such processing is necessary and proportionate for the purposes—

(a) of preventing a threat to national security, defence or public security,

*(b) **of preventing, detecting, investigating or prosecuting criminal offences**, or I set out in paragraph (a) or (b) of section 47”.*

[emphasis added]

Paragraphs (a) and (b) of s. 47 of the Act of 2018 state:

“(a) is necessary for the purposes of providing or obtaining legal advice or for the purposes of, or in connection with, legal claims, prospective legal claims, legal proceedings or prospective legal proceedings, or

(b) is otherwise necessary for the purposes of establishing, exercising or defending legal rights”.

Notwithstanding that the Act of 2018 had been in force for some four weeks prior to the murder and the investigation to which the murder gave rise, there was much focus at trial, and indeed before this Court, on the previously applicable regime. In those circumstances, attention is drawn to the provisions of s. 60, in particular subsections (1)(a) and (3)(a)(ii) thereof, of the Act of 2018 which are in these terms:

“60. (1) The rights and obligations provided for in Articles 12 to 22 and Article 34, and Article 5 in so far as any of its provisions correspond to the rights and obligations in Articles 12 to 2a) are restricted to the extent specified in subsection (3), and [...]

(3) Subject to subsection (4), the rights and obligations referred to in subsection (1) are restricted to the extent that—

(a) the restrictions are necessary and proportionate—

[...]

(ii) for the prevention, detection, investigation and prosecution of criminal offences and the execution of criminal penalties”

Articles 12 to 22 of the GDPR address the rights of the data subject, but the rights afforded are subject to necessary and proportionate restrictions for the purpose of the investigation and prosecution of a criminal offence. Article 23 of the GDPR provides that a Member State is permitted to enact legislation to restrict the scope of the rights and obligations where this is necessary and proportionate in a democratic society, and specifically, where what is involved is the prevention, investigation, detection or prosecution of criminal offences.

145. In this case, CCTV footage was obtained from a number of private dwellings in the Glenshane and Rosshfield areas of Tallaght, from The Square Shopping Centre in Tallaght, from the local chip shop, and from a bus. The householders who had installed CCTV did so in protection of their dwelling, to deter unauthorised entry onto it, and to assist in the apprehension of anyone

who did enter onto it in an unauthorised fashion. Similar considerations apply in the case of the commercial bodies which had installed CCTV, be that to discourage anti-social and criminal behaviour in the case of the chip shop and the shopping centre, or the additional considerations of discouraging fare evasion in the case of Dublin Bus. Leaving aside the CCTV footage from 10 Glenshane Drive, the CCTV footage adduced in evidence was of activity in public places, footpaths, roads, a public park, a bus, and a shopping centre. It does not seem realistic to us to suggest that someone walking or visiting such an area would have a reasonable expectation of privacy.

146. As this case demonstrates, many business premises and private dwellings are now equipped with CCTV cameras. That this is the situation is universally known. It would be impossible to frequent public areas without becoming aware of it. Over and above that, many vehicles are equipped with dash-cameras, and a high proportion of people are equipped with devices that allow them to take photographs or to record matters of interest. The comment that there can be no general expectation of privacy in a public place is not an unqualified one. While individuals may have no realistic expectation that their presence in a public place will not become public, they may well have an expectation that, in general, private, intimate, or sensitive conversations would not be recorded, certainly absent special circumstances or an appropriate authority.

147. That one's presence in a public place may be recorded works to the advantage and disadvantage of individuals. If the individual recorded as being at a particular location is someone who is or has been or is about to become involved in criminal activity, that may be to the disadvantage of that individual, in one sense. In other cases, it may advantage an individual. In this case, there was a witness, AB, who, as the trial judge pointed out, was pleased that footage existed. The material available included footage showing him going in and out of his own home. On the part of the appellant, there was a suggestion that AB was involved in the killing or was present at the killing, but the availability of CCTV footage provided this witness with valuable cover.

148. In this case, the CCTV footage that was entered in evidence at trial was accessed as a result of requests to householders and businesses by gardaí, but it must be noted that there is nothing to suggest that the appellant was identified by any of the householders who provided the CCTV footage, or that any of those who made footage available might have identified the appellant as a data subject.

149. The CCTV footage obtained from the appellant's home, the dwelling of his grandmother, Ms. Dunbar, requires separate consideration. It is to be distinguished from other footage accessed in a number of ways. That is so, first, by reference to duration. In the case of the other footage, gardaí were seeking access for 24 to 48 hours. While it was formally submitted that gardaí did not justify the need for this level of access, in truth it was all but conceded that access for this duration would not be regarded as unreasonable. We are in no doubt that was a sensible concession, if it was, in fact, a concession. As was correctly pointed out by the trial judge, the necessity for accessing is to be assessed at the time of the collection of the data. As an investigation develops, and particularly with the benefit of hindsight, it may emerge that some data accessed was not in fact relevant and not necessary. However, at an early stage of an investigation, gardaí may well be acting under pressure, including time constraints. A significant margin of appreciation must be afforded to gardaí. In this case, for the generality of footage,

duration of the CCTV sought was limited, but in other cases, longer periods may be required, cases where there may be a suggestion of individuals involved in advance planning, e.g., concerning individuals familiarising themselves with a route or location.

150. Another point which sets apart the 10 Glenshane Drive footage from the other material is that the other material is more directly relevant to the criminal activity. It shows the run-up to the period when the killing must have occurred and the period immediately afterwards. It shows the accused, or certainly the person who the prosecution contended is the accused – that much was not in controversy – and the deceased, going to Butler Park, and the accused returning alone. Other footage is relevant to the disposal of the knife. In the case of the 10 Glenshane Drive footage, while some material falls into that category, there is footage of the appellant returning home in the aftermath of the killing, with a walking aid or Zimmer frame, which was the property of the deceased. There is other footage of the deceased socialising with other young people in the garden of his home on the day after the killing which, on its face, would be quite innocent. The prosecution’s interest in this was to establish the normality of the appellant’s actions and to rebut any suggestion that, at the time, he was not responsible, or not fully responsible, for his actions. One issue about which there could not be any dispute was that the appellant was fully aware of the presence of the cameras. Proof of this was provided, if proof was needed, by the fact that, as we have already referred to, at one stage, the accused chose to spit into the camera. It is worth noting that this particular footage was excluded by the trial judge on the basis of lacking probative value.

151. We do not believe that any rights of the appellant, whether under the Constitution, under the European Convention of Human Rights, or under the EU Charter of Fundamental Rights, have been breached. We understand the submissions of the appellant to be that, since the decision of the Supreme Court in *J.C.*, the focus is no longer on the question of whether an individual’s rights have been breached, or whether the acquisition of the evidence involves conduct that amounts to a breach of constitutional rights. The submissions then go on to say that, in this case, there has indeed been a breach of constitutional rights, and that the breach has involved a conscious and deliberate breach of constitutional rights to the extent that, without resorting to the balancing stage, the evidence is to be excluded. We find that suggestion very surprising, and we have no hesitation in rejecting it out of hand. In the course of ruling on the matter, following the conclusion of the *voir dire*, on 9th October 2020, the trial judge commented that it had been suggested, because gardaí did not have regard to the statutory provisions and did not seem to be fully aware of the statutory provisions applicable, and did not seem to have been tutored in them, that this in some way affected their conduct, undermined their conduct, and brought into focus a failure to observe a lawful requirement in respect of the downloading and treatment of the CCTV material. The trial judge went on to say:

“I reject that proposition. It seems to me that the conduct, the facts of this case indicate that in every respect, the Gardaí had due regard and proper regard for the limitations which apply as a matter of law in the way they went about their business as a matter of fact and I am satisfied of that beyond reasonable doubt”.

152. In our view, the trial judge was fully entitled to so conclude, and indeed any contrary finding would be unthinkable.

Conclusion

153. Overall, we are of the view that the challenge to the admissibility of the CCTV footage was not made out. It is, quite simply, misconceived. There was evidence there capable of being accessed which was highly relevant. In a particular case, it could advance the investigation, identify a suspect, and thereafter, provide relevant evidence at trial. In another case, the evidence might exonerate a suspect; indeed, in the present case, it has assisted a witness in rebutting unfounded allegations made against him. Consider what the situation would be if gardaí did not access evidence which had the potential to advance an investigation and contribute significantly to proving the guilt of a perpetrator, but which also had the capacity to exonerate a suspect who was innocent; how would the actions of the gardaí be regarded; could failure to access the material be regarded as anything other than a grave dereliction of duty?

154. We have no hesitation in dismissing this ground of appeal, and we would hope that in the future valuable court time would not be taken up with such unmeritorious arguments.

Topic No. V – The Witness “AB” and Associated Rulings

THE WITNESS – AB

Background

155. The witness, who was a minor at the time of the commission of the offence, was a long-time friend and associate of the appellant herein and a key prosecution witness. We will refer to him as AB, which are not his actual initials.

156. In the early hours of the 23rd of June 2018, the appellant visited the home of AB twice. On his second visit, AB said that the appellant confessed to the deceased’s murder. The relevant portion of AB’s evidence is as follows:-

“A. He told me he brought him into the field. He told me he lured him into the field. He was telling me for ages, probably about two/three years before that, how he wanted to put him out of his misery. So, I thought nothing of it, do you know. So, next of all when that night happened he told me how he brought him into the field, how he stabbed him and how he cut his throat and how he held on to him begging for his life saying "Please, Philip' I'm not Anto Lakes' I'm not Anto Lakes please.”

Q. Now, again you have covered a lot of ground. You have told the jury that he told you he stabbed him. Did he tell you how many times he stabbed him?

A. Ah yeah, he told me that he kept going. He kept going. He told me that he got so wore out with one hand that he changed the knife into the second hand just to keep going.

Q. Yes. And you mentioned something about his throat, what did he say about that?

A. He told me how he just stood over him and just kept slashing his throat, do you know what I mean.

Q. Yes. And did he tell you whether Adam was dead or not?

A. Yes. He said to me, he said, he goes", "I knew he was dead the second I caught him in the neck" and he just started laughing then about it to be honest and he was waving the knife in my face and he was saying "Look I know how it feels to be a killer now", do you know what I mean.

Q. Yes. So, you are saying that he said he knew he was dead because of what he had

done to his neck?

A. Yes.

Q. *What do you mean by that?*

A. *He told me now with the first stab wound he gave him in the neck he told m", "Cause I just knew he was done, Froggy" he said to me. I was in shock I was just cause he is a shit talker. He always was a shit talker. So I knew he was after doing something but I didn't know to the extent, do you understand what I am saying.*

Q. Yes.

A. *So, I was more like what the fuck was going on, sorry for my language as well but I just really -- I was in shock, yes, and he just told me how he done it and just went into detail and how he just tortured him, yes.*

Q. *Yes. Now, in relation to what he was telling you at this stage, did you notice anything about his clothing or what was he wearing?*

A. *Yes, yes. There was blood on the clothing, yes.*

Q. *Blood on his clothing?*

A. Yes.

Q. *And where was the blood can you remember?*

A. *On his trainers and on his tracksuit bottoms.*

Q. *I see.*

A. Yes.

Q. *And you said something about Anto and I didn't quite get that so can you explain that to the jury please?*

A. *Yes. Because apparently now when he was stabbing Adam he told me he said -- more or less he was saying oh shut up Anto, shut up Anto as he was stabbing him in the throat and he said shut the fuck up, he said shut the fuck up and he just kept stabbing him and stabbing him. He told me, he goes, I just blacked out, he goes, I just pictured that his face was Anto and he goes and that's all, I just murdered him. He just started laughing about it. He was proud of it.*

Q. *So, in terms of this reference to Anto, is this Mr Dunbar telling you that he was speaking to the deceased as if he was Anto; is that it?*

A. *That's correct, yes.*

Q. *Yes. And how did he seem when he was telling you this?*

A. *To be honest I wouldn't say he was angry to be honest now, I wouldn't, like, but I wouldn't say he was distraught either, do you know, he was more thinking saying what am I going to do, what am I going to do and he was more proud about it, boasting about it, do you know.*

Q. *Yes. Now, you have mentioned a knife, that he had a knife, can you tell us about that please?*

A. *Yes. It was like a Swiss army knife apparently now, a Swiss army.*

Q. Yes.

A. *He showed me. He was waving it in my face he was. There was actually still parts of his neck stuck to the knife and he was waving it in my face and he was saying "Ha,*

look, now I know what it feels to be a killer", do you know. I was broken crying I was and I was looking at him and I was saying, I was saying, "Philip, man", I was saying, "Like what the fuck?" I was saying, like, and he goes, "Yeah, I know how it feels to be a killer now, I know how it feels", do you know, he was saying it to me for a while before that".

157. Counsel for the appellant submitted that when interviewed by the gardaí, AB made damning allegations regarding the admissions to him by the appellant. This, it was said, was very much apparent on the DVD of interview. It was said that in his evidence, AB made further allegations regarding the appellant's involvement in the killing, with reference to the appellant's demeanour while making these admissions, contending that the appellant was laughing and boasting about his actions. The defence case was that AB was not a credible witness.

158. The appellant's case was that he could not remember meeting with AB after leaving the scene of the stabbing and could not remember anything that had been said.

159. It was argued by counsel for the appellant that his client did not have a fair trial in that the evidence of AB ought to have been excluded on the following bases:-

- a) Inadequate disclosure by the respondent in respect of AB's previous offending, in particular, an assault with a knife where the defence received witness statements and a memorandum of interview with AB, but not the DVD of interview where he claimed not to have used a knife, conflicting with other evidence. Moreover, it is said that documents relevant to other criminal offending dealt with under the Garda Youth Diversion Programme were not disclosed;
- b) The gardaí did not maintain records of communications with him or about him prior to his interview;
- c) The defence were hampered in cross-examination of AB regarding his criminal conduct which was the subject of the said Diversion Programme. The trial judge permitted this cross-examination but prevented the media from reporting AB's name. This it is argued, meant that the trial was not in accordance with law. Moreover, that the defence was prejudiced as members of the public with information regarding the credibility of the witness or contradictory statements made by him, would not be in a position to come forward.

Grounds of Appeal

160. The following grounds of appeal relate to the witness AB and the rulings associated with him:-

"3. The Learned Trial Judge erred in fact and in law in dealing with certain disclosure applications including in particular in regard to documents relating to previous convictions and incidents recorded on the Garda PULSE system including in regard to [other witness] and [AB]. The Appellant will seek to rely on the transcript of the pretrial hearings and rulings including on the 30th of July, 2020.

4. The Learned Trial Judge erred in fact and in law in ruling that the evidence of [AB] was admissible and in failing to rule that in all the circumstances it was necessary to exclude his evidence in order to ensure a fair trial.

5. *The Learned Trial Judge erred in fact and in law in ruling that [AB] could be cross-examined as to, and if necessary, evidence given in respect of, certain criminal conduct which was the subject of the Garda Youth Diversion Programme having regard to the provisions of s. 48 of the Children Act, 2001 as amended.*

6. *The Learned Trial Judge erred in law in ruling that the media could not use the name of [AB] in any reports of the trial, in particular having regard to the contention by the defence that this would mean that the trial was not in accordance with law, and that in particular the defence would not have the normal advantage of public identification of the witness, so that if members of the public could approach the defence solicitor or prosecution with relevant information as to the credibility of that witness and of the credibility of the particular allegations made by that witness.*

7. *The Learned Trial Judge erred in fact and in law in refusing to allow the defence to show parts of the DVD of the taking of the statement of [AB], in particular to show [AB] demonstrating what he claimed to have been told by the Appellant as to actions carried out by him in killing the deceased, in particular having regard to the fact that in response to such demonstrations, the gardaí found it necessary to check as to whether [AB] was present at the killing.*

8. *The Learned Trial Judge erred in fact and in law in restricting the ability of defence counsel to cross-examine [AB] by reference to the Appellant's instructions".*

Overview

161. At the hearing of the appeal, counsel stated that the argument on the admissibility of AB's evidence was made on two bases. First, that the appellant had been denied documents relevant to AB's offending behaviour. This related to the said inadequacy of the disclosure of PULSE records for AB and, in particular, to a previous assault by AB and other matters which were the subject of the Garda Youth Diversion Programme; and moreover, that the gardaí did not maintain records of communications with AB, or about him, prior to his interview.

162. It was said that it was not possible to properly cross-examine AB in the light of the above, and that while the memoranda of interview of AB were made available to the defence in respect of what we will term the "*knife assault*", the DVD of interview for this offence was not. Due to the said inadequacy of disclosure, it was argued that the defence were impeded in challenging the witness effectively, leading to an unfair trial.

163. The second point was that the defence were not legally entitled to raise evidence or put questions in connection with any matters which had been the subject of the Garda Youth Diversion Programme, on the basis of an explicit statutory provision under s. 48 of the Children Act, 2001 as amended. It was said that the judge's solution of permitting cross-examination but preventing the media from reporting AB's name resulted in a trial which was not in accordance with law. This was premised on the contention that the appellant had suffered prejudice in that if a witness was named in the media, this might have resulted in members of the public coming forward with information pertaining to the credibility of the named witness, or with contradictory statements made by him in regard to his evidence.

164. As a consequence, it was argued that the trial judge erred in failing to exclude AB's evidence and the trial was unfair.

165. The submissions are somewhat unwieldy; however, we will attempt to summarise and group them as best as we can.

Disclosure

Ground No. 3

166. This ground of appeal states:

“The Learned Trial Judge erred in fact and in law in dealing with certain disclosure applications including in particular in regard to documents relating to previous convictions and incidents recorded on the Garda PULSE system including in regard to [other witness] and [AB]. The Appellant will seek to rely on the transcript of the pretrial hearing and rulings including on the 30th of July, 2020”.

167. On appeal, the argument was advanced that the appellant was unable to effectively challenge the reliability of the witness without full disclosure and, in particular, concerning a previous assault matter when he was a juvenile. It seems that the witness had assaulted his father in a Lidl supermarket with a knife, which matter was the subject of the Garda Youth Diversion Programme. While the defence were ultimately furnished with the memorandum of interview relevant to the assault, it was submitted that they required the DVD of the interview to expose purported lies on the part of the witness.

168. Counsel for the appellant said that in the course of this interview, the witness accepted that he had assaulted his father, but he denied the use of a knife. The DVD was sought in order to actually show to the jury that the witness had lied. Counsel contended that the DVD of interview would have been much more effective and could have transformed the case, had it been disclosed.

169. At trial, when outlining the position to the trial judge, it was accepted on behalf of the appellant that the defence were in a position to challenge the credibility and reliability of the witness and the allegations he was making regarding the appellant’s admissions to him and also his own role in regard in the offence. However, counsel outlined that they could not put to the witness positive propositions as to what he did or did not do as the appellant’s instructions were that he did not have memory of those matters.

170. In effect, in our view, if the appellant was hampered in effectively cross-examining the witness (with which proposition, we do not agree), it was not by virtue of the inadequacy of disclosure, but rather by virtue of his own instructions and the stated absence of memory. The most the appellant could suggest to the witness regarding his role was to enquire whether he was present for the killing, but he could not positively assert that he was *actually* present. As properly observed by the trial judge, the intention on the part of counsel was to ask a witness whether he had a role to play in the killing of the deceased without any basis whatsoever.

171. AB’s evidence was to the effect that the appellant had made admissions to him regarding the killing of the deceased. The defence understandably wished to impugn his credibility and so the real issue raised before the trial judge related to the disclosure of material concerning the assault matter and, it seems to a lesser degree, other convictions which were the subject of the Garda Youth Diversion Programme.

172. On the knife assault issue, initially it seems that the defence were furnished with the witness’ statements and were informed that AB had accepted that he had assaulted his father but had denied the use of a knife. However, the trial judge ruled that the memorandum of interview

should be furnished to the defence in relation to that matter. Moreover, it seems that there was a potential prosecution regarding drug offences when he attained his majority in respect of which the judge found the defence had sufficient material arising from the PULSE records.

173. Insofar as disclosure concerned other occasions which were the subject of the Programme, the judge had regard to the protection afforded to juveniles and found that there had been adequate disclosure in respect of those matters. In any event, on appeal, the focus of the said inadequate disclosure appears to rest with the DVD of the interview concerning the assault.

174. In the ordinary course of events, the defence will receive a list of previous convictions of proposed witnesses. Further requests for disclosure may arise therefrom. In the present case, the defence had received the memorandum of interview concerning a previous conviction regarding AB. The memorandum contained a denial on the part of the witness that he had used a knife in the course of an assault.

175. The prosecution are under a duty to provide all relevant disclosure as stated by Carney J. in *DPP v. Special Criminal Court and Ward* [1999] 1 I.R. 60. This includes material which could assist the defence or damage the prosecution's case. The duty to disclose, as can be seen, is confined to relevant material. The relevant disclosure was that of the memorandum of interview, which, in our view, was sufficient to properly cross-examine the witness enabling the defence to seek to impugn his credibility.

176. We are not at all persuaded that the judge erred in his ruling. He properly approached the matter by directing the appellant be furnished with the interview notes and no conceivable unfairness arose.

Pre-Witness Statement Communications

Ground No. 4

177. This ground of appeal states:

"The Learned Trial Judge erred in fact and in law in ruling that the evidence of AB was inadmissible and in failing to rule that in all the circumstances it was necessary to exclude his evidence in order to ensure a fair trial".

178. Defence counsel sought disclosure of all communications between AB and gardaí before his attendance at the Garda Station with a solicitor. It was contended that AB was at risk of being investigated for and prosecuted for being an accessory, and so it was necessary that all communications be disclosed in this respect. An application was made to exclude his evidence on the basis of a failure to maintain notes of communications including notes concerning various witness statements taken from AB. It was submitted that it was not possible to properly cross-examine a potential accomplice without having any substantive information regarding communications between him and the authorities on that subject before he gave his witness statement. Moreover, reference was made to a phone call to the emergency services by AB on the 8th of August 2018, wherein he appears to have said that he had committed a criminal offence and had requested to speak to the gardaí who had interviewed him.

179. It seems that a note was taken of that call, but it was argued at trial that the matter was not fully addressed or properly recorded. The phone call to emergency services was as follows: -

"I need two police to come arrest me now. I have to hand myself in for something' I'm after committing a crime' I'm going to get around four year (sic) and I need to hand myself in for it [...] the person that done that, I am a main witness in that investigation".

180. The trial judge ruled *inter alia* that AB was a witness who was being interviewed by the gardaí in the course of the investigation and had not changed his status. He observed that the solicitor present with the witness at interview was entitled to be there, and he did not accept the suggestion that as the solicitor was present, it should have been apparent to the gardaí that AB may have been involved in the commission of a criminal offence. He found that there was no indication on the evidence of any communication between the solicitor and the gardaí of any substance and that ordinary Garda procedures were followed.

181. On the specific issue of disclosure the trial judge said as follows:-

"It is a matter for the gardai as to the priorities they afford in relation to the – and the basis upon which they address witnesses and it is a matter for the gardai to determine whether they wish to change the status of a witness which happens in many investigations going from a witness to a suspect. That did not happen in this case and I should also say in relation to the investigation and the suggested unfairness in relation to the accused because there are no more detailed notes available and therefore he is at a disadvantage or prejudice, I don't accept that for a moment. There has been extensive disclosure of materials in this case".

182. On the issue of the phone call, the trial judge was satisfied that fair procedures were followed and that nothing of substance arose; and moreover, that there was a report in relation to the phone call by AB to emergency services and that it seemed to relate to some sort of robbery.

183. We have no hesitation in rejecting this ground of appeal. It is clear that the appellant was in a position to cross-examine the witness on the circumstances giving rise to the making of witness statements, his attendance at interview with a solicitor, and other issues of relevance, in order to test his credibility. The defence were in possession of the necessary statements and of the relevant DVD. It is also apparent that the trial judge carefully considered the matter and ruled accordingly.

184. By way of further elaboration, on day 3 of the trial, the concerns regarding the absence of this material were ventilated before the trial judge who was informed that the defence had sought all relevant information as to interactions between the gardaí and AB. The defence had received a statement from a Garda Murray who stated that he took a witness statement from AB which was recorded on DVD and was taken in the presence of his solicitor.

185. Reference was also made to the phone call to the emergency services. It seems that the proposition advanced in the course of this application was that the trial court should direct the respondent to take statements from the gardaí regarding the communications made pre-statement with AB in order to ensure the fair conduct of the *voir dire* as to the communications with the witness. The trial judge properly refused to do so, either in that regard, or concerning the call to the emergency services.

186. On day 4, the *voir dire* took place which concerned the evolution of how AB came to be in the Garda Station. There was extensive cross-examination on the issue, and following

submissions, the judge refused to exclude AB's evidence on the basis that inadequate notes were maintained regarding the process.

187. It is well established that a person is entitled to a fair trial, but not a perfect trial. The absence of this material did not render the trial unfair. We attach considerable weight to the view of the trial judge having heard the evidence. He was in the best position to determine whether the Garda process was just or unjust. There is no question that there was any deficiency of any substance which would have necessitated the exclusion of AB's evidence.

188. This Court cannot determine any unfairness arising from the procedures adopted by the gardaí. The fact that the witness was accompanied by a solicitor did not in and of itself presuppose or indicate any level of guilt or involvement on his part. We are not persuaded that the absence of notes prejudiced or hampered cross-examination. A note of the call to the emergency services was furnished to the defence, who were in a position to utilise it if they so wished.

189. We reject this ground of appeal.

AB's Evidence

190. Ground of appeal nos. 5, 6 and 7 concern the limitations placed on the cross-examination of AB in that he was a person who was the subject of the Garda Youth Diversion Programme.

Overview

191. Defence counsel submitted that s. 48 of the Children Act, 2001, as amended, which prohibited the cross-examination of AB on criminal behaviour for which he was admitted to Garda Youth Diversion Programme, breached the appellant's constitutional right to a fair trial in due course of law. It was submitted that this provision prohibited the defence from cross-examining AB on matters pertinent to his credibility.

192. The prosecution disclosed certain matters concerning criminal behaviours engaged in by AB as a juvenile, and the judge permitted cross-examination on one of those matters relating to an assault.

193. In terms of AB's reliability and credibility, counsel for the defence was particularly concerned with the assault incident. The trial judge directed the disclosure of all documents which related to this incident, bar the DVD recording of an interview. It was contended by the defence that AB had told lies regarding the assault on his father in that he denied the use of a knife. However, the operation of s. 48 prohibited counsel from pursuing these matters in cross-examination with a view to undermining AB's credibility.

194. It was defence counsel's position at trial that the entirety of AB's evidence ought not be admitted since it was not possible to cross-examine on highly relevant material. It was submitted that the exclusion of AB's evidence was the only way to vindicating the accused's right to a fair trial.

195. Prosecution counsel adopted the position that the trial court, in exercising its inherent jurisdiction and to ensure a fair trial for the accused, could permit cross-examination to take place on the assault incident.

196. The trial judge achieved a compromise in that he permitted cross-examination in respect of that incident in order to protect the fairness of the trial under Article 38 of the Constitution but prohibited the publication of AB's name in order to protect the witness from the publicity that would otherwise accompany the material.

Ground No. 5 – Permitting cross-examination of AB on conduct the subject of the Garda Youth Diversion Programme

197. This ground of appeal states:

“The Learned Trial Judge erred in fact and in law in ruling that AB could be cross-examined as to, and if necessary, evidence given in respect of, certain criminal conduct which was the subject of the Garda Youth Diversion Programme having regard to the provisions of s. 48 of the Children Act, 2001 as amended”.

Overview

198. The judge permitted the cross-examination of the witness on the knife assault having determined this was an issue of potential relevance to his credibility.

Submissions of the Appellant

199. It was submitted that the compromise achieved by the trial judge was not in accordance with law and was not satisfactory in dealing with the issue in any case, as defence counsel were denied disclosure of the DVD of the interview in which AB denied the use of a knife in the assault incident.

200. While counsel for the appellant accepted that the defence were given the memorandum of the relevant interview, he submitted that the DVD of the interview would have provided much more graphic detail and information than the memorandum, and therefore it would have been a more useful tool to demonstrate the witness’s unreliability.

201. Counsel for the appellant contended that having regard to the importance of the witness, the circumstances of the case and the type of previous conviction, the defence could legitimately seek the disclosure of all of the relevant material pertaining to the knife assault.

Submissions of the Respondent

202. It was submitted on behalf of the Director that s. 48 of the Act of 2001 was fairly applied and that in allowing the incident in which facts were dispute to be put to AB, the trial judge upheld the constitutional right of the appellant to fair procedures whilst ensuring compliance with the statutory requirements insofar as was possible.

203. Counsel for the respondent pointed out that defence counsel were at large to cross-examine AB in regard to the actual admissions made by the appellant to him. She said that there can be no complaint made because, on account of the compromise reached by the trial judge, there was no stymieing of the defence’s exploration of what were, undoubtedly, collateral matters.

Ground No. 6 – Ruling prohibiting the publication of AB’s name

203. This ground of appeal states:

“The Learned Trial Judge erred in law in ruling that the media could not use the name of AB in any reports of the trial, in particular having regard to the contention by the defence that this would mean that the trial was not in accordance with law, and that in particular the defence would not have the normal advantage of public identification of the witness, so that if members of the public could approach the defence solicitor or prosecution with relevant information as to the credibility of that witness and of the credibility of the particular allegations made by that witness”.

Overview

204. Defence counsel misunderstood the nature of the order made by the trial judge as to publicity. It was believed that the prohibition related only to the facts associated with the Garda Youth Diversion Programme, whereas the trial judge's ruling was that the witness's name was not to be published at all.

205. The trial judge then facilitated an application by defence counsel to vary the order in the terms as had been understood by them. It was submitted that the order was unnecessarily excessive in its breadth, and that the purpose that the trial court had intended to achieve could have been achieved by the more limited prohibition as advocated for by the defence.

206. Moreover, it was submitted that there is a constitutional imperative that justice be administered in public and that the defence would be prejudiced by the anonymity order as same would prevent potential witnesses with relevant experience of him from coming forward as can occur where there are contemporaneous media reports of the events at trial.

207. Prosecution counsel opposed this application by reference to the Children Act 2001. The trial judge ruled that there was a possibility that an order in the terms as advocated for by the defence could be misinterpreted, or that some error could be made by the media, and accordingly he refused to amend the order as originally made in order to give full effect to the spirit and intention of the provisions of the Act of 2001.

Submissions of the Appellant

208. It was submitted that the order suggested by the defence was straightforward and not at risk of misinterpretation, and that the order originally made was made without jurisdiction or justification. It was reiterated that the prohibition on the publication of AB's name could be said to have caused the appellant prejudice, as members of the public who might have had relevant information as to his conduct and credibility would not have been aware of AB's significant role in the case and the claims which he made.

209. Counsel for the appellant said that it is one of the crucial protections of the constitutional requirement of a trial in public that a member of the public can come forward with relevant evidence. He further said that the advantage of a witness coming forward, because of publicity, is their demonstrable independence, because they have not been procured by the defence.

210. Counsel for the appellant emphasised the fact that this was a witness who the court below heard was actually sending threatening messages during the trial to another witness. He said that that is the type of communication with which other persons, had AB's identity been publicly disclosed, might have been in a position to come forward.

211. Counsel for the appellant submitted that the witness made vicious and extreme allegations against the appellant and that should his name have been attached to these allegations in the press, it could have been expected that anybody who personally knew the witness might have applied an immediate degree of scepticism to them.

Submissions of the Respondent

212. It was submitted that the trial judge's order ensuring the anonymity of the witness was entirely consistent with his statutory obligations under the Act of 2001. It was said that that fact is underlined in circumstances where the trial judge had permitted cross-examination of AB in relation to an assault, allegedly committed whilst he was a juvenile, to allow the appellant's legal team to effectively challenge his credibility.

213. Counsel for the respondent said that the suggestion advanced on behalf of the appellant that had the people of Ireland known that AB was giving evidence that they might have volunteered themselves as persons who could contradict him, is speculative in the extreme.

Ground No. 7 – The DVD of interview with AB for this incident

214. This ground of appeal states:

“The Learned Trial Judge erred in fact and in law in refusing to allow the defence to show parts of the DVD of the taking of the statement of AB, in particular to show AB demonstrating what he claimed to have been told by the Appellant as to actions carried out by him in killing the deceased, in particular having regard to the fact that in response to such demonstrations, the gardaí found it necessary to check as to whether AB was present at the killing”.

Overview

215. In the application to the court below, defence counsel contended that the body language, physical actions, and gesticulation of AB in a particular portion of his recorded statement was consistent with someone who was present at the murder. Indeed, it was noted that this was so apparent so as to lead one of the gardaí interviewing him to ask whether he had been there at the time of the stabbing.

216. It was submitted that the showing of this segment of video would allow the defence to cross-examine AB on whether he was at the scene of the murder, and it would further allow the jury to make its own assessment on the matter also. It was said that the trial judge erred in refusing to permit the jury to see a crucial portion of that DVD. It was argued that if AB were present for the killing, this would have completely transformed how his evidence might have been viewed by a jury.

217. Prosecution counsel opposed this application *inter alia* on the ground that showing the jury that portion of the DVD recording which shows AB giving his statement in a Garda interview room, in the company of a solicitor, would have given the impression that he was an accused person himself.

218. The trial judge ruled that as a prior consistent statement is not admissible in evidence, and that this was not a case to which any exceptions to the rule applied, the recorded statement could not be admitted.

Submissions of the Appellant

219. It was submitted that the showing of the portion of the DVD would not have offended the rule as to prior consistent statements, as the purpose of same was to allow the jury to make an assessment of fact as to whether AB had in fact conveyed that he was present at the scene of the murder. Further, it was submitted that the question as to whether AB was present at the murder was so significant that it was necessary, as a matter of fairness, that the jury be shown the best evidence on the issue.

Submissions of the Respondent

220. In reply, it was submitted that the appellant had failed to establish a compelling reason, or any basis in law, which would have allowed the rule against prior consistent statements to be overlooked. Further, it was submitted that the assertion that AB was present at the murder was

not substantiated in any other evidence before the trial court, including the CCTV evidence, and that the basis for the assertion was the mere instruction from the appellant.

221. It was reiterated that the small portion of the DVD, which was sought to be shown to the jury, would have conveyed a powerful and inaccurate display to the jury, insofar as it would have shown AB being interviewed by the gardaí in the presence of his solicitor and would therefore have given the impression that he was an accused person.

Discussion

222. We propose to address the three grounds together. Section 48 of the Act of 2001, as substituted by s. 126 of the Criminal Justice Act 2006, provides:-

"Inadmissibility of certain evidence

(1) Subject to subsection (2), no evidence shall be admissible in any court in respect of –

(a) any acceptance by a child of responsibility for criminal or anti-social behaviour in respect of which the child has been admitted to the Programme,

(b) that behaviour, or

(c) the child's involvement in the Programme.

(2) Where a court is considering the sentence (if any) to be imposed in respect of an offence committed by a child after the child's admission to the Programme, the prosecution may inform it of any of the matters referred to in subsection (1).

Subsection (2) applies, with the necessary modifications, in relation to a child who has attained the age of 18 years".

223. The trial judge, in ruling on day 4 of the trial, prefaced his remarks as follows:-

"This is a ruling in respect of the admissibility of the evidence of AB. It should be noted that in respect of this ruling I am making an order that the name of the witness, the subject of the ruling, is not to be published, nor the details of any references made within or at any stage in the course of this trial to his being subject to part 4 of the Criminal Justice Act (sic) 2001 or the Juvenile Liaison Diversion Programme when under the age of 18 years".

224. The trial judge went on to summarise the objection to the evidence:-

"Counsel on behalf of the accused objects to the admissibility of this evidence, not on the basis of its relevance but because he wishes to be in a position to cross-examine the accused about various events which occurred in his teenage years and which, when explored, is expected will serve to undermine his credibility as a witness, either because he has told lies about significant events in the past and/or is not to be trusted as a reliable witness in respect of the evidence which he proposes to give".

225. Having set out the terms of the relevant statute, the trial judge stated:-

"Section 258 of the act also contains extensive provisions in the nature of a sunset clause for offences after the passage of three years. No evidence is admissible thereafter in any proceedings before a judicial authority to prove that the child has been convicted or charged or prosecuted for any offence, the subject of the finding of guilt. This prohibition extends to ancillary circumstances, including the conduct constituting the offence. These provisions are clearly designed to assist in the rehabilitation of a child who commits an

offence. If it becomes widely known that has a child has been a delinquent as a juvenile or convicted of an offence, that may have a very serious and perhaps disproportionate effect on their future prospects, training and employment and/or socially. The label of criminality may become a lifelong burden and hamper the effect of divergence of a youth from crime which is the purpose of these provisions and part 4. The protections are designed to protect and rehabilitate the child”.

226. He then specifically referred to the five matters where AB was subject to the scheme; which we do not intend to reproduce here, save to say that, having considered the nature of the incidents and the age of the child, we find ourselves in agreement with the trial judge that those matters could not have given rise to issues impacting on the witness’s credibility relevant to the offence with which the appellant was charged.

227. Following further consideration, the trial judge concluded that the only issue of substance regarding credibility was that of the incident concerning a knife and the conflicts of evidence in that regard. The trial judge then carefully considered s. 48 of the Act of 2001, as amended, and found absent “*any other countervailing constitutional requirement, that counsel may not cross-examine on the basis precluded by statute”.*

228. With reference to countervailing constitutional considerations, the judge referred to situations recognised at common law, whereby inadmissible evidence may be permitted in ease of the defence in a criminal trial to ensure a fair trial, and in that regard he referred to *R. v. Greenwood* [2005] 1 Cr. App. R. 99.

229. *Greenwood* concerned a murder trial and really related to issues of disclosure. When considering the admissibility of third-party admissions to an offence, Dr Heffernan in her text on *Evidence in Criminal Trials* (2nd edn, Bloomsbury Professional 2020), at para. 8.73 thereof, refers to *Greenwood* and says:-

“Greenwood does not involve a third-party admission per se; it is more properly categorised as a case addressing the prosecutorial duty to disclose evidence that may possibly exculpate the accused. Nevertheless, the broad principle illuminates the direction that the law may travel on the narrower issue. There is no Irish authority on point although it seems likely that the courts will increasingly invoke Art. 38.1 of the Constitution as a basis for displacing statutory or common law evidentiary rules that imperil the fairness of a criminal trial”.

Conclusion On Permitting Cross-Examination of AB on Conduct the Subject of the Garda Youth Diversion Programme - Ground No. 5

230. The clear purpose of s. 48 is to protect juveniles from the negative impact of criminal conduct and to assist in their rehabilitation. Public dissemination of former misconduct could have a negative impact and so the section is designed for the protection of juveniles and to give a meaningful opportunity to rehabilitate. However, how does this interplay with an accused’s right to a fair trial, which includes the right to cross-examine and challenge the credibility of witnesses?

231. In the first instance, we believe the trial judge was entirely correct to consider that the only relevant matter addressed under the scheme was that of the aforementioned assault. The next step he took was to consider the impact of s. 48 on the right to a fair trial.

232. The wording of s. 48 is absolutely without ambiguity: where a juvenile is subject to the programme, then subject to subsection (2) no evidence shall be admissible in respect of the relevant behaviour or anything to do with the juvenile's involvement in the programme.

233. The wording of the section is mandatory, and the clear intent of the Oireachtas was to ensure that the section would operate to protect the child. However, it simply cannot be the position that the evidence of a witness who has, as a juvenile, been subject to the programme, is to be excluded on that basis alone.

234. The trial judge in the present case properly considered how best to give effect to the appellant's right to a fair trial. Excluding the evidence of AB, in our view, was not the appropriate path to take. Even if counsel on behalf of the appellant was not permitted to cross-examine on any conduct relevant to the Programme, we do not believe that the appellant's right to a fair trial would have been negatively impacted. Four matters under the Programme were clearly of totally insubstantial relevance to the issue of credibility; the only possible matter was the assault issue, and this in and of itself was of little weight, in our view, insofar as challenging the credibility of the witness was concerned.

235. The trial judge resolved the tension between the appellant's right to a fair trial and the terms of s. 48 of the Act of 2001 in a manner which was most favourable to the appellant. He viewed the matter through the lens of Article 38.1 of the Constitution and Article 6 of the ECHR, and we believe he properly did so.

236. There must be compliance with any given statute, and we stress that this judgment is not to be taken as a precedent to circumvent statute. In the circumstances of the present case, we are of the view that the judge protected the appellant's right to a fair trial by permitting limited cross-examination, whilst ensuring that AB and the protection afforded to him by statute was maintained. Having said that, if the trial judge had decided not to permit the cross-examination, equally we would be of the view that Article 38.1 had not been breached.

237. We do not find favour with this ground of appeal.

Ruling Prohibiting the Publication of AB's Name – Ground No. 6

238. Article 34.1 of the Constitution provides that:-

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution and, save in such special and limited cases as may be prescribed by law, shall be administered in public".

239. An accused's right to a fair trial is paramount, and vested in a trial judge is the power to take all steps necessary to ensure that right is vindicated. As stated by Denham J. (as she then was), in *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465 at p. 474:-

"A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute".

240. Justice must be administered in public, however, in certain circumstances, whether by statute or by common law, a court is permitted to depart therefrom. As said by Hamilton C.J. in *The Irish Times Limited v. Ireland* [1998] 1 I.R. 359 at p. 385:-

“While the public nature of the administration of justice and the constitutional right of the wider public to be informed of what is taking place in courts established by the Constitution are matters of public importance these rights must in certain circumstances be subordinated to the interests of justice and the rights of an accused person which are guaranteed by the Constitution.

I am satisfied that the exercise of the rights conferred by Article 34.1 can be limited, not only by Acts of the Oireachtas, but also by the courts where it is necessary in order to protect an accused person's constitutional right to a fair trial”.

The complaint here is that the trial judge stepped into error by prohibiting the naming of the witness intruded on the appellant's right to a fair trial. The argument appears to be that by the imposition of this prohibition, members of the public who might otherwise have been of potential assistance to the defence in attacking the witness's credibility did not know of the witness's name and so did not come forward.

Conclusion On Ruling Prohibiting the Publication of AB's Name – Ground No. 6

241. The cases mentioned above are not directly on point, but nonetheless the principle remains that a trial judge may in certain circumstances limit publication of matters at trial in order to ensure a fair trial. The present case does not involve the resolution of competing constitutional rights *per se*, rather whether there was a real risk of an unfair trial due to the judge imposing the prohibition on naming the witness. The trial judge properly identified the measure he took as being an exceptional one.

242. He permitted the limited cross-examination of the witness in order to ensure a fair trial for the appellant, and, in order to achieve balance and to protect the witness, he ordered that the witness's name not be published, or that any reference be made to the witness being subject to Part 4 of the Act of 2001, as amended.

243. We are not at all persuaded that there was any risk of an unfair trial by imposing such a prohibition. The appellant's right to a fair trial was clearly and unambiguously vindicated. His counsel were in a position to cross-examine on the only aspect of matters which could be said to be of even tangential relevance to the witness's credibility. The notion that some potential witness was impeded in coming forward in the absence of the witness being named by the press is simply speculative.

244. We are not persuaded that there is merit in this ground.

The DVD of Interview with AB for this Incident – Ground No. 7

245. The defence applied to show short excerpts from the DVD of interview primarily in order to confront the witness with his physical actions and gestures during interview. The defence wished to demonstrate that his physical actions were consistent with AB witnessing the events in question, rather than simply describing what had been described to him by the appellant. The respondent objected to this course of action as above. The trial judge gave a detailed ruling on the issue which we set out hereunder:-

“The situation in this case is that the witness present in the witness box, AB, has been the subject of cross-examination to date and will be subject of further cross-examination.

Issues have arisen in relation to what was suggested were prior inconsistencies in relation to his statement which were not. Within the body of that alleged prior inconsistency which

was not there is a demonstration by him in relation to the statement which he actually made. The purpose for introducing the prior statement of the witness was to properly and fairly redress the inappropriate impression made with the jury that he had in fact made an inconsistent statement when he clearly hadn't. A prior consistent statement is not admissible in evidence except in the limited exceptions provided under Lord Denman's Act under sections 3 and 4 and then consistent statements in respect of section 5. It appears to me that this is not a case to which the exceptions might apply in relation to the introduction of a prior consistent statement as a matter of law and in the circumstances it is inappropriate that, for any other purpose, other than the limited purpose for which it was referred to, that it should be introduced. Video of that statement is a manifestation and type of prior statement in modern form which is covered in my view by the sections and the same principles apply. The difficulty in relation to this case is that it is now said by – the difficulty now raised, it is said, by counsel is that in order to demonstrate the gesticulation or the actions and put them squarely to the witness in relation to the matter it's necessary to play that video to him and to invite his comments in relation to that video concerning the challenge made, not on the basis of any more in terms of inconsistency, but on the basis now that the statement has been introduced, which would not ordinarily have been introduced, now to show that that gesticulation is consistent with some theory advanced that he was in fact at the scene of the killing and must have witnessed the killing at the time. That seems to me to be wholly inappropriate in the circumstances, both in which the issue evolved before the jury and has had to be dealt with and also in the context of the law relating to prior consistent statements. It seems to me also that in relation to the introduction of such material on such a selective basis, having regard to the very extensive video coverage of the witness's statement and recording of it, it would be wholly unfair to introduce such a segment, leaving aside the difficulties in terms of editing it down to avoid the introduction of further inadmissible material, it would be wholly unfair to present that as a single specimen of the statement given without, and in terms of the manner in which this young man delivers himself and speaks and made his statement, without regard to the manner in which he gave his statement throughout the period of the making of the statement. So, I am refusing the application. I don't think there's anything unfair about it".

246. The defence wished to question the witness as to whether or not he was present at the scene of the killing (notwithstanding that the appellant was unaware whether he was or was not) and, in this respect, the defence wanted to use the video recording of interview in the expectation that AB's gestures and attitude during interview would demonstrate that he was actually present.

247. It was submitted that the purpose of showing some of the video recording was that it would have enabled the defence to suggest to AB that his gestures were consistent with being present at the scene. It was said in submissions that AB's actions and noises made by him (such as gurgling when describing what had been told to him by the appellant), had the appearance of a reconstruction of the manner in which the deceased was killed and so it was necessary to show parts of the video to properly cross-examine AB. In essence, the defence wished the jury to assess the witness's demeanour when making his statement.

248. The law regarding the general inadmissibility of prior consistent statements is well settled. Prior consistent statements offend the rule against narrative and will not generally be permitted, but, as with many areas of law, it is subject to certain exceptions. We will not rehearse those exceptions here save to say that the present circumstances do not fall within any of those exceptions.

249. Perhaps the most salient issue is that of fairness. As observed by the trial judge, the introduction of a selected excerpt from the recording would have been wholly unfair. The defence have a right to test evidence by cross-examination, it is one of the most valuable tools available to a party to proceedings deriving essentially from an accused's right to trial in due course of law as guaranteed by Article 38.1 of the Constitution and expressly guaranteed by Article 6(3) of the ECHR. However, it is not an unfettered right; cross-examination may be extensive and wide ranging, utilising materials disclosed, cross-examining on evidence not adduced in direct evidence, or putting the case to the witness, but there are limits to cross-examination and those limits may safely be left to a trial judge to determine in the context of a trial.

250. In the present case, the appellant had been furnished with the statement of the witness and had received the video recording of the making of that statement, from which counsel was in the position to conduct cross-examination. If the appellant had been permitted to introduce to the jury an extract from that material, undoubtedly, the respondent would have sought to introduce such excerpts as she thought appropriate. Indeed, as noted in submissions made on behalf of the appellant, part of the Director's response to the application was to indicate that the respondent would seek to show other portions of the video where the appellant was emotional and crying.

Conclusion on the DVD of Interview with AB for this Incident - Ground No. 7

251. It seems to us that the material was inadmissible as being a prior consistent statement, which could not have been adduced in evidence, as it did not fall within any of the recognised exceptions.

252. Secondly, we are not persuaded that the trial judge's ruling had the effect of breaching the appellant's right to a trial in due course of law. The ability to cross-examine was not hampered by the trial judge's ruling. Illustrative of this view is as stated in the appellant's submissions; that when certain matters were put to the witness in cross-examination arising from the video, such as the witness making gurgling noises and tilting his head in a certain way when describing issues, the witness accepted that it was possible he had acted in that way in interview.

253. We are not persuaded of the merits of this ground.

Ground No. 8

254. This ground of appeal states:

"8. The Learned Trial Judge erred in fact and in law in restricting the ability of defence counsel to cross-examine AB by reference to the Appellant's instructions".

255. This ground was not specifically addressed in either written or oral submissions and so we surmise that it is in the nature of a 'catchall' ground which encompasses the preceding arguments. We observe that the cross-examination of this witness took some time, and it was effected over a period of some three days' hearing. Whilst the temporal aspect is not determinative, and whilst we acknowledge that there were legal applications during the cross-examination, the examination was

nonetheless detailed and extensive. We do not accept that the rulings of the trial judge impeded or hampered the ability of counsel to effectively cross-examine the witness.

256. This ground is also rejected.

Conclusion

257. We are satisfied that the appellant's conviction is safe and that his trial was satisfactory. Having rejected all grounds of appeal advanced by the appellant, we must dismiss his appeal against his conviction.