



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

**O'Donnell J
Dunne J
Charleton J
O'Malley J
Baker J**

**Supreme Court appeal number: S:AP:IE:2019:000196
[2020] IESC 000
Court of Appeal record number 2016/100
[2018] IECA 372
Central Criminal Court bill number: CCCDP0081/2014**

BETWEEN

THE PEOPLE (DPP)

PROSECUTOR/RESPONDENT

- AND -

ZOLTAN ALMASI

ACCUSED/APPELLANT

Judgment of Mr Justice Peter Charleton delivered on Friday 26 June 2020

1. As in the appeal of *The People (DPP) v McNamara* [2020] IESC, at issue on this appeal has been the role of the trial judge in declining to leave an asserted defence of provocation to the consideration of the jury and the proper analysis of the elements of that partial defence to a charge of murder. But, in this case, since much of the evidence before the jury was derived from statements edited against the express wish of the accused, the proper approach to editing interview material must be considered. Finally, the relevance, and therefore the admissibility, of the actions and the demeanour of the deceased prior to the fatal attack on him by the accused requires analysis.
2. By determination of this Court of 18 February 2020, leave was granted to argue the following points based on the refusal of the Court of Appeal of 26 July 2018 to grant the accused leave to appeal; [2018] IECA 372:
 1. Whether the Court of Appeal was correct in upholding the trial Judge's ruling that the partial defence of provocation should not be put before the Jury.
 2. Whether the Court of Appeal was correct in upholding the decision of the trial judge to permit the Prosecution to edit memoranda of interview with

the applicant in such a way as to omit statements made, and the terms of the questions asked, by the investigating Gardaí.

3. Whether the Court of Appeal was correct in upholding the ruling of the trial judge that evidence of the deceased's demeanour and conduct prior to the event leading to his death was inadmissible.

Background

3. Such facts as are now set out can be indicative only, since finding facts in a criminal trial is a matter for the jury and what follows is merely derived from the transcript. Zoltan Almasi, the accused, lived at an address at Harbour View in Naas, county Kildare. On the evening of 16 May 2014, he heard a commotion on the roadway outside his home. This noise was made by the deceased Joseph Dunne banging on his van. The deceased was a young man of 20 years of age. According to the accused, his van had been damaged by interference on a prior occasion, but not by the deceased. The accused, having arrived home from work, was about to have a shower. Hearing the noise and seeing some of what happened from a window, he quickly dressed and went out, taking a baseball bat which was near his front door with him. An argument ensued. The details are unclear since CCTV shows part only of the altercation, because the accused and the deceased are out of view when the fatal blow is struck. What is clear on the verdict of the jury is that the accused hit the deceased on the head with the baseball bat and killed him. The accused was convicted on 10 March 2016, of murder and sentenced in accordance with law by the trial judge to life imprisonment. That conviction was appealed to the Court of Appeal on five grounds and by judgment delivered on 16 July 2018 the order of the Central Criminal Court was upheld.
4. On the day of the homicide, the deceased had been drinking near to the canal in Naas. This is quite close to the home of the accused. Late in the evening, accompanied by four others, the deceased made his way along the canal and towards Nass town. The deceased was drunk and in poor humour, confronting a passer-by for no reason. His companions persuaded him to desist. The group of five came to the accused's home where his van was parked outside. The victim hit the van, how many times is uncertain but what is clear is that enough noise was generated to attract the attention of the accused. The van was used by him either for work or to transport dogs to shows. He took a baseball bat from near the doorway of his house and pursued those he believed had been involved. On becoming aware of the accused, the group scattered. CCTV shows the deceased running while being chased by the accused who is carrying the baseball bat. The victim ran past a restaurant and some people emerged from there. One lady

testified to seeing a young fellow in a blue and white tracksuit top, a girl in a white hoodie top and another girl and hearing a shout of "what are you doing with the baseball bat?" and a reply coming "you broke my car". Another patron of the restaurant had gone onto the roadway for a cigarette and testified that he "could see some people on the opposite side of the road, opposite the patio where we were sitting, one either side of a vehicle ... arguing." Both were agitated and one was carrying a baseball bat. Among remarks he heard was one about not messing with a car. Someone urged that the weapon be dropped and that the deceased should "come over here." The two men he could see arguing were "agitated" and "aggressive towards each other" and the man with the baseball bat was cross about his car. There was a reference made by the accused that this had "happened before" and he is remembered as having said "I've had enough". This man intervened and said to both of them: "look, stop this, there's no need for this." His attempt to calm the situation was ignored and the men continued shouting at each other. The fatal blow was struck where CCTV did not capture the incident. The witness went back into the restaurant but, on leaving a short time later, he described the following:

The guy with the baseball bat had gone to the left, down towards the canal, to the harbour. And we looked up towards the right and there was a guy lying just right at the corner of the adjacent building, lying on the ground. So we went over to him and he was alive when we went there, because I grabbed his hand and we called 999, because we could see he was bleeding.

5. There were two other people apart from the accused and the deceased who saw the fatal blow being struck. The forensic pathology evidence, of Dr Michael Curtis, was that the deceased's injuries were consistent with the interpretation that he had been struck once in a descending motion with the tip of the baseball bat, while he was standing and that this caused him to fall down. Such other injuries as might have been present on the deceased's body could be the subject of interpretation but were much less serious. The blow with the baseball bat caused a comminuted and depressed skull fracture with haemorrhage into the brain stem. This undermined heart and lung functioning and caused rapid death. Dr Curtis also stated that a toxicology report indicated that the deceased had a blood alcohol level of 231mg, a urine alcohol level of 362mg, all per 100ml, and that no drugs were detected. The forensic pathologist's view was that the main injury was infinitely more likely to have been caused by a blow with a baseball bat than a fall. A single blow of a smooth weapon like a baseball bat does not usually leave blood or DNA traces on it and none were found.

6. Garda officers at the scene spoke to the accused after caution. His initial statement was noted thus:

Coming home, I parked my car behind garage. I went into house for sugar. This was after work; I finished at 21:30 in TNT Dublin. I heard bang, bang, bang. Four guys, one girl were outside my house and they were damaging my car. I came out with baseball bat and they started running. I ran towards restaurant after one guy and two had been quick and ran. I ran past restaurant. I followed him. He fell to the floor and I turned for the others in the car.

7. On interview, the accused was shown CCTV footage, which does not show the actual killing. The accused claimed that he did not know the baseball bat had hit the deceased and claimed that what had happened to the accused was an accident. While denying being in a rage, he claimed that he had been following the group to talk to them and was armed for self-defence: "I wasn't angry, the point of shouting and running was to scare them", and "My only option was to chase them away. I couldn't do anything else and I had to act aggressively to that male behind me because I saw he wasn't afraid of me or the bat in my hand." While the accused does not mention a total loss of self-control whereby he was unable to prevent himself from intentionally killing the deceased, the argument is that the defence of provocation is to be found from the circumstances and that only some eleven minutes passed from the initial commotion to the blow which the accused struck.

Editing

8. In some of the interviews of the accused while in custody, highly sympathetic, perhaps unrealistic and untutored, expressions of apparent sympathy were made by the Garda officers towards the accused. These expressed views such as that maybe what had happened had been an accident and that perhaps the accused's actions, if apparently not an accident, might have been understandable. At trial the prosecution argued for removing these comments by the gardaí, but leaving in place the answers of the accused. The trial judge allowed very extensive editing of many of the interviews resulting in a truncated account being left to the jury. In the written submissions of the accused on this appeal a highlighted chart of the result of that is given. Here, it is enough to give a sample. Here is the original of one interview:

Q: We know you are not telling the truth. A young man is dead. I'm not saying it to be bad. Everything happened so fast. It could happen to any of us. I feel sorry for the position you're in. What happened happened so fast, it

could happen to anyone. I feel sorry for you for the position you're in. We want you to tell us the truth. I know you're not a bad man. You have to think. You need for you to tell us the truth. This happened so fast. You didn't mean to kill that man. If you don't tell us the truth all it shows is that you have a bad heart towards what happened. It will look better. Tell us what happened. We know why you are lying. We understand that. I think you are lying because your life got crazy. For your future (sic) this is a bad situation. This goes to Dublin, in Dublin they read it and go: he lied all the way. Do you understand what a callous heart is? The person who reads this will never meet you and they will read it and think this man does not care, he has no compassion. This is your opportunity to tell the person reading it how you feel about what happened last night, I can see you want to tell us.

A: A young person is a death, is a tragedy but I didn't kill him.

Q: We understand you are scared – you should show you care. You meant to scare him, you swung, you didn't mean to hit but you did. Think. You ran after him and hit him. Think of that man's family.

A: I'm continuously thinking about it.

Q: Truth will help this family. Please think, truth is important, it shows the person in Dublin everything went wrong and you didn't mean what happened.

Q: I'm sorry about everything that happened but I didn't hit him.

Q: "People will understand what happened. It's a tragic accident. Last night's like a car crash. I understand you didn't run out to hit that man. It won't go away, there is a man dead. If it goes to court how is it going to look that you said no all the time. Tell the truth. Are you aware of where the cameras are at the Harbour?"

A: You will not see me hit him.

Q: Did you swing at him?

A: I wouldn't swing the bat either.

9. The editing of this particular interview left out all expressions by the interviewing officers of apparent excuse or sympathy or that what happened was an accident. Instead, the accused's replies were put up to the jury entirely out of context. The accused opposed that editing. On whether the accused was entitled to have the

full version of such interviews put before the jury, the trial judge agreed with a novel prosecution submission that editing had to be done to make the evidence "fair to the prosecution" and left the jury with essentially only the answers of the accused. Her reasoning essentially followed the prosecution submissions which were repeated on appeal to the Court of Appeal and to this Court. She ruled thus:

What's in issue really are the matters contained in interviews three and in interviews five and what I'm told is that the memo is the ordinary type and then the matters that are in bold have been added and it's only some of those matters that are in dispute between the prosecution and the defence. And it does seem to me, without having to go through them individually, that any place in those documents three and five where comments are made that they should not be allowed to go to the jury, that's comments by gardaí, then they should not be allowed go to the jury. Now, I hope it's not necessary for me to go through them and excise all of that and I hope that can be agreed but I'm ruling that where there are comments by gardaí as to what they think or what they don't think or indeed the man in Dublin that those matters should not be allowed go to the jury because I think the rules of evidence do have to be strictly observed.

10. The Court of Appeal upheld this ruling at the invitation of the prosecution, Edwards J giving judgment thus:

28. We are satisfied that the trial judge's ruling was correct. One of the trial judge's functions is to ensure a trial in due course of law, i.e., a trial that is fair to both sides. It is long established that interviews may be redacted in the interests of ensuring fairness to an accused person. Accordingly, it is well established that where the memorandum of an interview refers to previous misconduct by, or previous convictions on the part of the, accused, those memoranda should be suitably redacted to remove the unfair and/or inadmissible material, before being allowed to go to the jury. We see no reason why, equally, redaction of material that might unfairly prejudice the prosecution's case should not also be permitted, provided that that can be done without significant impingement upon the ability of the accused to defend the charge by all legitimate means open to him/her.

29. We have carefully considered all of the redactions made in this case in response to the trial judge's ruling. Counsel for the appellant has not identified any specific redaction that has unfairly prejudiced the defence. Though much was made of claims that the jury were denied relevant

context, it has not been demonstrated to us that any of the appellant's answers to questions that were ultimately redacted were capable of misinterpretation, or of being misunderstood, because the jury were denied the full context in which those answers had been elicited so as to be thereby deprived of relevant admissible evidence. It would not have been open to the defence, for example, to have put it to an interviewer that he/she believed that the accused had not intended to kill the deceased, or that he/she had concluded that the killing had been an accident, as these opinions, if acknowledged, would breach the ultimate issue rule.

30. As will be seen from the illustrations quoted, the impugned questions were typically highly compound ones. The expedient was adopted of redacting numerous objectionable clauses while still leaving an unobjectionable core query. We are satisfied that in the circumstances of the case this form of redaction, and other simpler redactions that were performed, were effective in removing any unfairness to the prosecution without impacting on the meaning of the answers given, or otherwise distorting the appellant's responses. We recognise that in another case it might well be shown that a denial of full context could be of critical importance. However, we are fully satisfied that that was not the case here.³¹ We make no comment whatever on the specific interviewing techniques that were employed in this case. Police interviewers are entitled to conduct interviews with suspects in a robust fashion, providing certain lines are not crossed, and they are not bound to adhere to any rules of evidence, of etiquette, of decorum, of good manners, of protocol, of good taste, or of political correctness, in how they question such suspects. It is, after all, the interrogation of a police suspect. What is absolutely impermissible, however, is that the manner of interviewing should be oppressive, or coercive of the will of the interviewee by subjecting him/her to fear of prejudice, or by offering him/her the hope of advantage. In this case no complaint was raised either at trial, or before us, alleging oppression or coercion through fear of prejudice or inducement. The only complaint was of alleged unfairness in terms of the ability of the appellant to mount his defence, by reason of the admission of certain of his answers at interview where the jury were denied full contextual information in terms of receiving the fully formulated questions which elicited those answers. We are satisfied that the allegation of unfairness was not made out.
11. In submissions to this court, it has been emphasised on behalf of the accused that his refusal to follow a line of questioning indicating accident could be

interpreted by a jury as indicative of a confused state of mind, perhaps consistent with a complete loss of self-control. Further, it has been claimed that the editing confuses and de-contextualises the interviews. Lastly, it is asserted that the accused was gifted a potential defence by the interviewers, that of accident perhaps when swinging the baseball bat or of the victim falling over, which he did not take up and that this could be interpreted by a jury as a genuine attitude. These points are made on behalf of the accused thus:

The harm done here was the distortion of the flavour of the interview by omitting questions, some of which included comment on what had occurred but leaving in the replies the comments elicited. It must be presumed that experienced interviewing Gardaí intend that anything said, whether in the form of a question or comment, will elicit a response. It is important therefore that any jury hearing a response should do so in circumstances that accurately reflect the context in which that response is given. The omitted passages from this interview can be said to fall into two broad categories, those in which the Gardaí suggested that there was no intention to cause serious harm and that the death was accidental (Appellant's submissions, Tab 9, paragraph 21, 1-4;8-10;13;14 &16) and those which challenged the accused's insistence that he did not strike the deceased at all (5-7). In only hearing the replies, the jury is deprived of knowing that the interviewing Gardaí offered the accused an option of confessing to a much lesser crime, which he declined to take. It is submitted that these experienced Gardaí knew exactly what they were doing when they repeatedly made these comments, the purpose of which was designed to induce the accused to accept that he knew he had struck the deceased, but in a more benign scenario. Despite these offers, he steadfastly maintained that he did not in fact strike the victim. It was for the jury to assess whether or not this was a genuine belief on his part or a fabrication to avoid any culpability. The jury may have taken the view that a guilty man would have taken this escape route and concluded that he genuinely did not remember or believe he had struck the deceased. This is relevant in determining the specific intent the prosecution is required to prove in murder and may also have been relevant in determining whether the accused had 'lost control' in the event of provocation being considered. It is submitted that these deletions were not only wrong in principle and without legal foundation, but they caused tangible prejudice to the accused. ... However, we respectfully submit that no confusion between the ability to listen and agreement should arise in this case as the accused responded to all questions and comments. The mischief here is caused by the reality that

the jury is led to believe that the responses given were to questions that were never asked. To quote another sean fhocal: "An áit a bhfuil lúb ar lár is gearr go mbí poll". ("Where there is a dropped stitch there will shortly be a hole.")

12. To this defence contention, the prosecution make a plea that fairness applies at all stages during a criminal trial and that somehow this vague concept, that is argued outside of any actual rules, somehow overrule the laws of evidence. Thus, on this argument, there is some kind of counterweight to the rule that highly prejudicial evidence of limited probative value should not be admitted against the accused. That counterbalancing rule, for which there is no authority, is that questions put in interview should be excluded where the prosecution case is prejudiced. How that prejudice is to arise is not stated since the source of undermining the prosecution's own case comes from that self-same source. The prosecution contends:

that the principles which ought apply are that the trial Judge should ensure that the rules of evidence are fairly and properly applied and that there is fairness as between the parties – this approach will ensure a fair trial. If editing results in real potential unfairness to an accused that is a matter which must be balanced by the trial Judge in her determination as to whether to permit such editing as might be sought or the degree to which same might be permitted. However, it is the position of the Respondent that it is hard to conceive of a set of circumstances where the appropriate application of the ordinary rules of evidence would cause any real and genuine unfairness to arise.

13. What is perhaps not appreciated in the instructions given to the prosecution is that the law of evidence is a set of rules that apply to both sides in a criminal trial. There is an absence of any logical argument based on authority for substituting vague notions of fairness in place of the law. Certainly, issues can come up where despite the ostensible relevance of an answer given by the accused, the existing rules of evidence can require a statement to be edited. But, there has to be a rule of law to enable relevant evidence to be excluded. That relevance here is the requirement that where evidence does not substantially advance any side's version of a fact in issue but causes marked prejudice against the accused, that evidence should not be admitted. This is a balancing exercise since relevant evidence is always admissible unless there is a countervailing rule which requires the exclusion of that evidence. Hence, the prejudicial effect must overwhelm the limited probative value of the evidence. Where the evidence, though prejudicial, is highly probative to the prosecution

case it must be admitted. A classic example is *The People (AG) v Kirwan* [1943] IR 279 where on a charge of murder and where pathology evidence was that the body of the deceased had been dismembered with professional skill, the fact that the accused had learned butchery as a trade while previously serving a prison sentence was admitted because that fact was closely relevant and any prejudice might be slight and could be counteracted with an appropriate comment from the trial judge. Evidence of bad character is also within that principle. In *R v Boardman* [1975] AC 421 Lord Hailsham suggested that the reason why evidence concerning the accused's bad character is usually excluded is because, firstly, it is irrelevant to the logical proof of any fact and, secondly, that its prejudicial value outweighs its probative value. In some jurisdictions, the prejudicial effect rule that enables the exclusion of probative evidence of only a minor character is given expression in a code. For instance, in the United States of America, rule 403 of the Federal Rules of Evidence provides:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

14. What is to be sought in this context is a rule justifying the exclusion of evidence because it does not suit the prosecution case. There is no such rule. Examples of prejudice to the accused which might enable the trial judge to edit out either a question put to the accused or an answer may readily be found. For instance, an interviewing officer puts to the accused that he, arrested for burglary, is a complete liar, not just as a provocative question but for the stated reasons that he is a liar as two of his nieces have accused him of rape. That is to be excluded because an accusation of rape does not advance any aspect of a burglary charge. Again, for example, where an accused arrested for murder is asked about a violent sexual assault conviction against him, the relevance of such evidence will fall to be assessed in terms of how the proof of the commission of any such offence, likely to evoke prejudice, could logically advance the elements of the building blocks of the prosecution's contention that the accused committed the homicide charged. Normally, it would not but the analysis of any exception is outside the scope of this appeal.
15. What is presented by the prosecution as some aspect of constitutional fairness may find expression in the necessity to either edit evidence or to impose a reporting restriction on evidence because of prejudice, not to the prosecution, but to some forthcoming case where the accused or other persons are involved. For instance, a question may be put in interview as to the involvement of

another individual in a crime. Where the answer of the accused is relevant, a name or other identifying circumstance need not be given unless it is otherwise relevant. Where it is, the judge is justified in imposing a reporting restriction. Another example might be the naming of a victim of sexual violence from a previous or forthcoming trial. Again, editing or the use of a reporting restriction may readily solve the problem.

16. Here, an unusual situation presented itself. While an interview is generally to be presented warts and all, since there is no rule of law enabling editing save for what has been already mentioned, sensible cooperation between the defence and the prosecution sides can overcome any possible issue. That was apparently not possible, for some reason. Any edited interview in videoed or written format should be formatted to exclude the chance of a jury being given mistaken versions or a text outside what may have been sensibly agreed.
17. It is illogical for the prosecution to argue that evidence may be excluded because it runs counter to the case proposed on behalf of The People. The prosecution's duty is to present such evidence as is relevant to the trial of an accused. That may be helpful to the contention that the accused committed the crime charged or ambiguous or even unhelpful. What matters is that the evidence is relevant and that no rule of law excludes its admission. Again, it is the rules of evidence that come into play and not any concept of fairness that would reduce the rules of evidence to what has been argued for here to be some kind of ill-defined subsidiary role. What is correct on the prosecution submission is that the mere expression of an opinion, which is not the view of an expert on an arcane discipline outside the common experience of a jury, is not admissible in evidence. While an exception is made as to the opinion of an expert, this is less of an opinion as it might seem. An expert has education and experience in spheres of knowledge closed to those untrained in his or her discipline. In putting forward an opinion, an expert's view is rarely merely that a fact is as he or she states it. Rather, the basis for viewing a fact as such is what is given and the elements of the discipline relevant are expressed. This case provides its own example. The expert trained in forensic pathology was able to put a cause of death on the deceased's injuries through the scrutiny of internal and external signs and the application of medical science in a specialised discipline. Such of that discipline as was relevant to that view of the facts was also given in evidence and could be challenged by cross-examination on the part of the accused.
18. A question put by counsel to a witness, expert or not, is not evidence unless, on a matter of fact, the witness agrees with the proposition put. Nor is any

argument advanced by counsel in a speech or submission to a jury evidence. In any criminal trial, examples of contradicted questions, assents to factual propositions and the presentation of argument on the facts proven, or as to why some facts should be found to be proven, or rejected as having not been proven beyond reasonable doubt, are common. A trial judge may usefully point to the difference and might usefully tell the jury that only testimony and real evidence, meaning what the state of documents or clothes or weapons or roads state of themselves, are what the jury is to base a verdict on. Here, the prosecution contend that the interviewing officers were expressing opinions and so that should be excluded. The correct approach, whether the opinions are for or against the accused's case, is not to edit out questions. Rather it is for the trial judge to simply tell the jury that what the gardaí believe about a case, insofar as a belief may be expressed, is neither here nor there and that a jury acts exclusively on the basis of evidence.

19. Under the ordinary rule in *R v Christie* [1914] AC 545, it has generally been held that statements made in the presence of an accused are admissible in evidence; see *Ulster Bank Ireland Ltd v O'Brien & Others* [2015] 2 IR 656. It would be facile to translate the French expression "Qui ne dit mot consent" into a rule that failure to deny an accusation amounts to an admission. The law does not so hold in all circumstances. An ancestral adage comes closer: "Is ionann toil 's éisteacht", silence can be, not must be, acquiescence in a statement. Silence in the face of accusations of fact that would reasonably require an answer may be held against a person. It is not persuasive, however, that simply because an accused gave a laconic answer to the expression of a view that he or she might be innocent, or remained silent, that that dialogue is not admissible under the ordinary rule that what is said in the accused's hearing is evidence. Simply because it does not suit the prosecution case does not alter the general duty to produce the evidence. Here, matters went further. Without fully analysing the underlying rules, which are not in contention here, it may be generally be stated that if the prosecution does not accept a witness's evidence, the duty of disclosure is fulfilled in passing the evidence to the accused to call that person if their proposed testimony is adjudged to be of help. Here, however, the accused was effectively shut out of calling admissible evidence, or of asking the interviewing officers did they accept that the truncated version presented had a different basis because of questions asked by them, on a basis unknown to the law. The proper approach was that there was no reason to edit these statements based either on the prejudice to the accused and their limited probative value, or prejudice to the right to a fair trial of other parties, or a statutory exclusion of the name of a victim of sexual violence or other exception. Rather, a simple

statement by the trial judge would have cured any difficulty. That would have been to the effect that anything said by the gardaí, any view they might appear to have held during the interviews or during the trial, meant nothing and that the case was to be judged solely on evidence.

Exclusion of deceased's conduct

20. This issue involves what the deceased was doing in or around the canal in Naas about 75 minutes before he struck the accused's van outside his home. What was involved there was that there was a witness whose statement recalled boisterous if not aggressive conduct by the deceased. The interpretation of that is a matter for the jury. He is said to have smashed a beer bottle and to have put a shard of its glass into his pocket; the idea being that this showed a frame of mind which could, not necessarily did, manifest itself later in aggression. To be clear, the deceased did not on any account given by any witness threaten the accused with a shard of glass and nor did he scrape his van with it. That evidence about smashing the bottle and keeping part of it was, however, completely excluded by the trial judge. At the application of the prosecution, even though it was part of the proposed prosecution evidence, it was ruled inadmissible by the trial judge and furthermore the accused was forbidden to ask any question about the incident.

21. What is involved here is a question of relevance. But this has been turned into a complex argument as to the accused throwing away his shield under section 1A of the Criminal Justice (Evidence) Act 1924 as inserted by section 33(b) of the Criminal Procedure Act 2010 and which also imposes a notice requirement on any party seeming to adduce such evidence. This did not alter Section 1(f)(ii) of the Act, however, which is not in any sense prohibitive of an accused, through his advocate, impugning the character of a prosecution witness or the person in respect of whom the offence was committed, here the deceased. While the Act creates the consequence of the accused throwing away the shield, thus being capable of being asked questions as to prior convictions or bad character, it is claimed that it is for the accused to make this choice in the conduct of his defence; which this accused was prohibited from so doing. Here, it is proposed by the prosecution to claim that in some way restrictions on attacking the character of the deceased may be imposed by the trial judge. The accused proposes that descriptions, potentially of the deceased earlier being in a state or of him being destructive of property, are potentially relevant to how the accused's actions might be seen from the point of view of the defence of provocation. Has relevance anything to do with an accused attacking the credit

of a witness, or of the victim, and so throwing away his shield in cross-examination?

22. This is an issue where the submissions show considerable confusion. Perhaps the best way of laying the groundwork for the appeal is to quote the approach of the Court of Appeal to the issue:

58. Section 1A(a) of the Act of 1924, as inserted, provides: "Where a person charged with an offence intends to adduce evidence, personally or by the person's advocate, of a witness, including the person, that would involve imputations on the character of a prosecution witness or a person in respect of whom the offence is alleged to have been committed and who is either deceased or so incapacitated as to be unable to give evidence, or evidence of the good character of the person—(a) the person may do so only if he or she—(i) has given, either personally or by his or her advocate, at least 7 days' notice to the prosecution of that intention, or(ii) has applied to the court, citing the reasons why it is not possible to give the notice, and been granted leave to do so,"

59. In the course of the *voir dire* the prosecution particularised the portions of Ms Walkers's statement in the Book of Evidence that they wished not to lead. The objectionable part her statement, from the prosecution's perspective, was her claim that at one stage she saw the deceased "smash a glass bottle of Bud or Bulmers, a brown bottle anyway off the wall. I saw him put the broken top piece into his hoody pocket, he was smiling and laughing when he put it into his pocket." The prosecution contended that it added nothing of relevance to any issue that the jury would have to consider, and that the defence wanted it in solely for the purpose of blackening the character of the deceased. Moreover, no notice of an intention to seek to elicit and to rely upon such evidence had been served by the defence within the seven day period specified by the statute, nor had any application been made to the trial judge for permission to do so on the basis that it had not been possible to serve the required notice, and explaining why that was so.

60. Counsel for the appellant submitted to the trial judge that it was not for the prosecution to pick and choose the evidence that they wished to lead. In response, counsel for the respondent submitted that it was indeed the prosecution's entitlement to choose what evidence they intended to lead, and what evidence they did not intend to lead. Counsel for the respondent adopted the position that he was not disposed to lead the evidence in

controversy in chief as it was inadmissible, and further he was entitled to object on the same basis to any attempt by the defence to cross-examine it into the case.

61. The trial judge ruled that it seemed to her that these particular facts were not relevant but could only serve to blacken the character of the deceased, and she ruled that they should be omitted from the witness's proposed evidence on that basis. The appellant now seeks to have the matter re-visited on appeal, and submits that the trial judge's ruling was erroneous. The case is made that the evidence was relevant in that it was part of the overall context in which the killing of the deceased had taken place, and that it tended to corroborate or support the defence's contention that the deceased had been out to cause trouble and that this disposition had culminated in his involvement in a confrontation with the appellant which he had provoked by interfering with the appellant's vehicle.
 62. In reply, the respondent maintains that, in circumstances where the broken beer bottle had not been produced to the appellant, and the appellant was unaware of it, and it formed no part of, or played no role in, the actual confrontation which resulted in the death of the deceased, it was irrelevant and of no probative value.
 63. We agree with the submission made on behalf of the respondent and consider that the proposed evidence was correctly ruled to be inadmissible.
 64. In the circumstances we are not disposed to uphold ground of appeal no (v).
23. Clearly, there may be circumstances in which the conduct of someone who later apparently provokes another may be so remote as to be irrelevant. Equally, in attacking the character of a witness or of someone relevant to events, here the deceased, there are limits but these are based on the same criteria of relevance. The first matter to be decided is as to whether what was involved was a matter of relevance or merely a matter of credit. The difference can be seen by this example. A witness is asked about leaving a brothel in a particular location at a particular time which has nothing to do with the crime being tried. That a witness had resort to prostitution may lessen his character in the eyes of the jury. They may think that a man who breaks the law by paying for sexual favours or a person of less than righteous sexual morals is less worthy of belief generally. That is credit. If the time and the location enable the witness to depose to a fact in issue, that nearby was a street lamp and that in its light he saw that accused robbing a woman at knifepoint, that same evidence has

nothing to do with any rule as to credit but is relevant because it gives the witness the opportunity to prove a fact in issue, namely the identification of the accused. Cross-examination as to credit may be controlled even apart from any statutory intervention. This is a matter of judicial discretion related to keeping the trial focused and not allowing credit attacks which are unrelated to the circumstances of the disputed core facts in any trial, civil or criminal, and of keeping reasonable decorum in the trial process while not excluding potentially serious issues as to credit. All answers as to credit are final. While endless repetition of the same undisputed evidence through different witnesses is not a feature of criminal trials in Ireland, unnecessary repetition may be checked by the trial judge in the interests of keeping a trial moving at a reasonable pace. But, that apart, where evidence is relevant, it should be admitted unless its exclusion is required by the rules of evidence.

24. Evidence is admissible where relevant and it is admissible because it is relevant. Unless evidence which is relevant is required by the laws of evidence to be excluded, it is part of the function of a trial in due course of law under Article 38.1 and 38.5 of the Constitution for the jury to consider it. In common with many other systems, our court system uses compulsion to ensure that all relevant evidence is to be adduced before the tribunal of fact at a criminal trial. Walsh J in *The People (DPP) v JT* (1988) 3 Frewen 141 stated that: "the administration of justice itself requires that the public has a right to every man's evidence except for those persons who are privileged in that respect by the provisions of the Constitution itself "or other established and recognised privilege."" It is defining what is relevant that may cause difficulties, as here. Evidence is relevant if that evidence renders more probable or more improbable any fact in issue in the trial. That requires a trial judge to have regard to what the building blocks of the prosecution and defence cases are. It is in this context that relevance may be assessed. That is assessed on the basis of ordinary sense and experience. Hence, where the accused is charged with murdering the victim, it is relevant that the accused had expressed hatred of the victim and a desire to see him or her dead. It is similarly relevant on a burglary charge that the accused was seen near the scene of the crime at the time it was committed. Facts are relevant because of their relationship with facts in issue and assume importance in terms of weight as the jury assesses the facts. Central to any issue of relevance is to ask what case is being made and whether ordinary sense and reason renders a fact disputed as to relevancy more likely in consequence of being considered as part of the overall body of evidence. Such an analysis can also result in a fact being considered more unlikely if it is part of the building blocks of the prosecution case or the defence case to disprove a disputed fact.

For instance, a box containing cannabis resin weighs much more than a box containing cigarettes. A box containing poitín feels different to a box containing drugs or guns. It is on the elements of what is in contest that relevance is to be decided as a matter of ordinary logic. These examples are from cases where, in the first, the accused claimed to have been transporting cigarettes on which customs duties to the Revenue had not been paid, not drugs; and in the second where the defence proposed that a shipment of cannabis resin might be illegal alcohol. Cole, *Irish Cases on Evidence* (2nd edn, Dublin 1982) puts the matter succinctly at pages 1-2 thus:

It must be borne in mind that in its ordinary meaning "relevance" denotes something which is variable and elastic: variable because a particular fact may be relevant in one context and irrelevant in another, elastic because the relevance of any relevant fact may vary in degree from being only minimally of interest to being highly or compulsively persuasive. Facts which are only minimally relevant may be excluded on that ground alone

25. Weight of evidence is another concept that can be similarly elusive. A small fact, presence near the lamppost by the witness, to return to our prior example of credit and issue evidence, may render the assessment of that person's evidence important in the balance because it adds an ability to see clearly. Alternatively, a jury may, for instance, regard a confession statement as less than completely convincing because of lack of detail or because of suggestive questions put by interviewing officers. This is a matter for shrewd and common sense assessment once evidence is admitted for the consideration of a jury but relevance to a fact in issue is the basic test for putting that evidence in.
26. Here, the defence advanced was provocation. What had the deceased actually done? How had the accused in turn reacted? If the accused is to claim an aggressive attitude by the deceased, and that may or may not be in the case here, had the deceased been intoxicated and how had the accused been behaving over the course of that evening? These were potentially relevant questions whereby the trial judge might rule on the admissibility of the evidence. Once admitted, weight was a matter for the jury's assessment.
27. Instead the prosecution analysis has confused evidence as to credit and the consequence of the proposed or potential deployment of credit through questions by an accused with relevance of a fact to in issue in the trial. On behalf of the prosecution is deployed the amendment introduced as section 1A of the Criminal Justice (Evidence) Act 1924 by insertion through section 33 of the Criminal

Procedure Act 2010. This now provides for notice of an attack on someone's character to be given by the accused.

Where a person charged with an offence intends to adduce evidence, personally or by the person's advocate, of a witness, including the person, that would involve imputations on the character of a prosecution witness or a person in respect of whom the offence is alleged to have been committed and who is either deceased or so incapacitated as to be unable to give evidence, or evidence of the good character of the person—

- (a) the person may do so only if he or she—
 - (i) has given, either personally or by his or her advocate, at least 7 days' notice to the prosecution of that intention, or
 - (ii) has applied to the court, citing the reasons why it is not possible to give the notice, and been granted leave to do so,and
- (b) notwithstanding section 1(f), the person may be called as a witness and be asked, and the prosecution may ask any other witness, questions that—
 - (i) would show that the person has been convicted of any offence other than the one wherewith he or she is then charged, or is of bad character, or
 - (ii) would show that the person in respect of whom the offence was alleged to have been committed is of good character.

28. Section 1A must be seen in context. Further, the section and the 1924 Act maintains a sharp distinction in asking questions as to character and calling evidence as to character, on the one hand, and on the other leaving the admissibility of relevant evidence untouched. Section 1 of the 1924 Act, as amended, provides that the accused may only be called by the defence and not by the prosecution. That the accused or his or her spouse does not give evidence cannot "be made the subject of any comment by the prosecution". Where an accused gives evidence, questions may be put that have a tendency "to criminate him [or her] as to the offence charged". An accused giving evidence cannot be asked about the commission of, or convictions for, any other offences "than that wherewith he [or she] is then charged, or [as to whether he or she] is of bad character". But exceptions are listed. These are where the prior conviction or commission of an offence is admissible, as in *Kirwan*, or because of similar fact type analysis or of simple relevancy and where the possible prejudice is not

outweighed by that prejudice; where questions are asked of any witness to establish the accused's good character, or evidence is so called; or where "imputations on the character of the person in respect of whom the offence was alleged to have been committed or the witnesses for the prosecution"; or he or she has given evidence against "any other person charged with the same offence"; or where the person in respect of whom the offence is alleged to have been committed is similarly attacked but is dead or incapacitated.

29. Not surprisingly, the 1924 Act or the 2010 amendments do not provide for the exclusion of relevant evidence. How, after all, would that be possible? The legislation controls questions as to character, evidence as to character, attacks on the character of a deceased or incapacitated person and the consequence which may flow from that whereby the accused may leave himself or herself open to evidence that on a prior occasion he or she committed or was convicted of offences outside the indictment in that particular criminal trial. The legislation therefore has nothing to do with whether the conduct of the deceased could be relevant to how he could have behaved when confronted by the accused. That evidence fell to be assessed as to relevance in the overall context of the criminal trial. The submissions of the prosecution to the trial judge and on appeal were wrong. Had it been that the evidence as to smashing the bottle and keeping the top shard was merely to discredit the deceased, the 1924 Act would have relevance. But this happened the same day and in a context where the deceased's conduct could have been illuminated by his state of mind as expressed in his actions and in his approach to matters.

Provocation

30. The accused had not claimed during his laconic interviews with the gardaí to have killed the victim while in a state where his mind was overwhelmed consequent upon provocation by the deceased. The ordinary definition of provocation requires a sudden and temporary loss of self-control to the degree that the accused cannot prevent himself or herself from intentionally killing the victim consequent upon provocation by that victim. Such a defence should only be left to the jury where there is evidence either on the prosecution case or in consequence of testimony from the accused. No defence of provocation should be left for the consideration of a jury where the evidence does not comprise the legally defined elements or is so slight that no reasonable jury could conclude that the accused might reasonably have acted under provocation. Unless there is some evidence to support a defence, it should not be put forward for the consideration of the jury; see in that regard the judgment of Walsh J in *The People (AG) v Quinn* [1965] IR 366 at 382, *The People (DPP) v Clarke* [1994] 3

IR 289 and *The People (DPP) v Gleeson* [2018] IESC 53 at paragraphs 19 and 20. At pages 382 to 383 of *Quinn*, Walsh J, speaking in the context of the lawful use of force, but enunciating a general principle, explained that before a "possible defence can be left to the jury as an issue there must be some evidence from which the jury would be entitled to find that issue in favour of the appellant." That means that if "the evidence for the prosecution does not disclose this possible defence then the necessary evidence will fall to be given by the defence." Where that is so, for instance where there is no evidence of provocation on the prosecution case, then "it falls to the defence to give the necessary evidence". That does not mean that the defence, in such a case, has a burden of proof as "there is a distinction, fine though it may appear, between adducing the evidence and the burden of proof and that there is no onus whatever upon the accused to establish any degree of doubt in their mind."

31. On the face of it, the ruling of the trial judge was an assessment of the weight of the evidence as opposed to a legal ruling as to whether a reasonable jury, properly instructed, would be perverse to find the defence of provocation on the evidence:

On balance I think that this is not a case where the strength of the evidence would support the defence of provocation going to the jury. I think on balance, taking all matters into consideration, the evidence points certainly to a rage but taking into account the whole of the evidence and the actions of the accused man before and after the event it seems to me that it's not a case where it has been established that there was a total loss of self-control and in those circumstances I have to say I don't think there is sufficient evidence to allow sufficient evidence in this particular case to allow the defence of provocation to go to the jury

32. That ruling was upheld in the Court of Appeal judgment. Edwards J stating:

41. To be fair to the trial judge, she spoke repeatedly about "the strength of the evidence" and the "sufficiency of the evidence", suggesting an appreciation on her part that there was a threshold. The issue in this case is whether the trial judge applied too rigorous a standard, and in effect regarded the threshold as being higher than that which is in fact required to be met, by requiring the available evidence to be such that it "established" that there had been a total loss of self-control.

42. We consider that evidence suggestive, but not going so far as to establish it, that the appellant had totally lost his self-control due to provocation would have been sufficient to meet the threshold. It was not for the trial

judge to determine, even on a preliminary basis, whether the appellant had in fact totally lost his self-control due to provocation; merely whether some cogent evidence existed tending to suggest that that might have been the case. Nothing, beyond the existence of a threshold level of evidence of reasonable cogency, i.e., a credible narrative of events suggesting the presence of the various elements of the defence, was required to be "established".

43. However, when the totality of the trial judge's remarks are considered, it is clear that what she had intended to convey was that such evidence as existed did not, in her view, go so far as to suggest a total loss of self-control. Rather, her assessment, which would have been a finely balanced call, was that it only went so far as to suggest the existence of a rage short of a total loss of self-control, and that would not meet the threshold, low though it might be.
 44. In the circumstances we are satisfied that the trial judge did not apply too rigorous a standard in assessing whether the defence of provocation should have been allowed to go to the jury. There is no basis for concluding that she was guilty of any error of principle in the exercise of her discretion.
33. On behalf of the accused, it is accepted that since the trial judge has control over what set of circumstances could amount to a situation where a jury could rationally accept provocation, that there must be some objective element inbuilt into the definitional elements of the defence. The submissions from the accused state:

Although it has been said that the law on the test for provocation can be distinguished in Ireland from that in other common law jurisdictions as one which is 'wholly subjective', this should not be understood to mean that any conduct by a deceased will justify any reaction by an accused. The subjective element of the test allows the Court to take account of the specific circumstances of the accused and the nature and degree of provocation, but this must be applied with some degree of objectivity as to normal behavioural boundaries. The question of 'suddenness' should be determined by the degree of opportunity to cool off, which may vary in the circumstances. The question of whether the nature of the provocative conduct is sufficient to be considered is more difficult but must also be gauged to a degree by the subjective circumstances of the accused. It would be wrong to attempt to prescribe a range of acceptable or unacceptable conduct as the same provocative act done to one person may

not seem so serious but could be viewed very differently by another, for very good reason. Words, in certain circumstances can be every bit as provocative as acts. The same applies to the proportionality of the reaction by the accused to the perceived degree of insult or injury caused by the behaviour of the deceased. It is submitted that a measured approach would be to look at the circumstances of each person, then the acts of each person and then ask whether a normal individual in those circumstances might have been expected to react in such a way.

34. On behalf of the prosecution, the role of the trial judge is emphasised in terms of a lineage of cases which require cases which do not realistically meet the elements of the defence to be removed from the jury's consideration:

The Superior Courts have determined that a trial Judge has a duty to ensure that a defence may only be left to a Jury where there is some evidence from which the Jury would be entitled to find in favour of the accused (*People v Quinn* [1965] IR 366) and specifically in relation to provocation the Superior Courts have again required a trial Judge ensure that there is evidence suggesting the presence of all the elements of provocation before permitting the defence be left to the Jury (*People v McEoin* [1978] IR 27 and *People v Davis* [2001] 1 IR 146). The trial Judge is not required to decide facts but to analyse all the evidence and determine what defence may arise on that evidence or as McAuley and McCutcheon put it in Criminal Liability 2000 (as quoted in *Davis*): 'a burden rests with the accused who must be able to show that provocation is a live issue'. Hardiman J in *Davis* went on: 'While the burden is not a heavy one, it necessarily involves being able to point to evidence of some sort suggesting the presence of all the elements of provocation'. The trial Judge must determine that that has been done. In this case she was not so satisfied.

35. It is clear that a trial judge is entitled to remove a defence from a jury, and in provocation there are many such instances where a trial judge was held on appeal to have rightly excluded the defence from the consideration of the tribunal of fact. Mystifyingly, there are multiple references in the prosecution submissions to this being somehow a matter of judicial discretion. Where does this come from? It is not. It is a question of legal assessment as to whether a jury could justifiably in the circumstances of any individual case find that there had been a killing under provocation. In *The People (DPP) v Curran* [2011] 3 IR 785, a jury refused to find provocation in circumstances where the accused responded to a minor scuffle by tracking down one of those involved and

stabbing him and a friend with a screwdriver, killing them. O'Donnell J emphasised for the Court of Criminal Appeal the importance of distinguishing provocation from rage or revenge. This principle is of long standing and was emphasised earlier in *The People (DPP) v Davis* [2001] 1 IR 146, 159-160. It is for the judge to say whether the elements of the defence are present on such evidence as the jury might rationally accept as raising a reasonable doubt and which could if accepted embrace all of the elements of the test.

36. In no jurisdiction is a person to be judged on the basis of his or her state of mind as fuelled by drink, as in *The People v McEoin* [1978] IR 27 or as in *The People (DPP) v Kelly* [2000] 2 IR 1 or as in Curran, where both amphetamines and drink were lethally involved. The subjective test cannot be so extended that the limited nature of the defence of intoxication is extended to allow any drunken or drugged notion to partially excuse a complete lack of self-restraint; *The People (DPP) v Eadon* [2019] IESC 98 where the elements of the defence of intoxication require a complete loss as a matter of fact of the specific intent to kill or cause serious injury before a homicide charge can be classified as manslaughter. Here, however, the accused was sober but enraged.
37. For the reasons set out in the separate judgment in *The People (DPP) v McNamara* [2020] IESC **, it is clear that the requirement for the defence of provocation contain an objective element. The circumstances of the entire event can be taken into account, as can any relevant background, but the accused is required to act as an ordinary person having his or her relevant and fixed characteristics and not on the basis of a wholly subjective response, whether one fuelled by intoxicants or alcohol.

This case

38. Here, there was a provocative event; the attack on the van. Events unfolded in a deeply regrettable way from there but there was no break in how they progressed. As to whether any aspect of the subsequent altercation between the accused, armed as he was with a baseball bat, and the deceased, exacerbated or generated further provocation is uncertain. There may or may not have been such a loss of self-control by the accused that he could not prevent himself from intentionally hitting the deceased in such a lethal strike to his head with the baseball bat. Some elements of the evidence, from the point of view of the accused, are unclear as to what may have been said or as to how the altercation progressed or as to why pleas to calm and to desist were not acted upon. Any plea of provocation must be genuine and actually require the accused to have so completely lost self-control as to respond to the provocation offered in the lethal manner proven by the prosecution.

39. In this case, it was the action of the deceased which drew the accused out of his home. Within about eleven minutes of that first banging on the van, the unfortunate deceased was dead. In the interim, some kind of a not so well described row continued as between the deceased and the accused. While the statements of the accused to the gardaí at interview do not detail in any way a state of mind beyond confusion, there was some air of reality about the defence. The assessment of that was a matter for the jury. The jury would not at all be bound to accept provocation and the circumstances are such that the original verdict of murder might be repeated on a retrial. But, once the elements of the defence could be gleaned from the entirety of the case in such a way as a reasonable jury, when properly instructed on the defence, might reasonably accept provocation, the trial of that issue was for them.
40. In consequence of the errors of the trial judge detailed in this judgment, the correct result is to overturn the conviction and order a retrial.