



THE COURT OF APPEAL

[123/17]

The President
Edwards J.
Ní Raifeartaigh J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

RICHARD DEKKER

APPELLANT

JUDGMENT of the Court delivered on the 27th day of July 2022 by Birmingham P.

1. On 7th March 2017, following a trial which started on 22nd February 2017, the appellant was convicted of the murder of Daniel McAnaspie on 26th February 2010 at Tolka Valley Park, Blanchardstown, Dublin. He has now appealed against the conviction.

Background

2. The trial in question was a somewhat unusual one in that the appellant had previously stood trial in 2013, charged with the murder of Mr. McAnaspie, but was acquitted by direction of the trial judge. However, the prosecution appealed successfully to the Supreme Court, the acquittal was quashed, and a retrial was ordered (*DPP v. Dekker* [2015] IESC 107).

3. The circumstances surrounding the murder of Mr. McAnaspie are not seriously in dispute. The deceased was last seen alive at approximately 4.00am on 26th February 2010 in

the Whitestown Avenue area of Blanchardstown. At that time, he was in the company of the appellant and another person, one Trevor Noone. On 13th May 2013, Mr. McAnaspie's remains were found in the Rathfeigh area of County Meath. It was clear that he had suffered death by stabbing. A murder investigation was launched and the appellant and Mr. Noone were identified as suspects. The case mounted against the appellant was that Mr. Noone had killed the deceased, stabbing him with a garden shears, and that the appellant was guilty of murder in circumstances where he had been a party to the luring of the deceased to a secluded location for the purpose of having him assaulted by Mr. Noone. It was the prosecution case that the appellant believed that Mr. Noone intended to assault the deceased by hitting him, while knowing that Mr. Noone was a violent person, prone to stabbing people, and that he had a garden shears with him.

4. On 24th May 2010, the appellant was arrested at his home. He was brought to Cabra Garda Station where he was detained. During his detention, he was interviewed on seven occasions. Throughout the earlier interviews, the appellant – for the most part – exercised his right to silence, occasionally offering denials. The prosecution case at trial was heavily dependent on what the accused had to say during the final interview, which commenced on 25th May at 5.50am and ended at 7.23am. At 7.56am, the accused was released from detention under s. 4 of the Criminal Justice Act 1984. It should be noted that his initial detention had been extended for a further period of six hours at 2.00pm on the day of his arrest, 24th May 2010, and extended further at 7.55pm. The fact that the appellant's detention was extended could not have come as a surprise to anyone, particularly his solicitor. In any event, the solicitor for the appellant was in contact with the Garda station on a number of occasions after the detention had been further extended. The solicitor had a conversation with the then detainee between 11.25pm and 11.37pm on 24th May 2010 by telephone.

5. It is also clear that the appellant's solicitor was very alive to the possibility that the inference provisions would be invoked. That much is clear from what the detainee had to say when the provisions were actually invoked: it cannot be in controversy that the issue had been the subject of discussion between solicitor and client, and advices had been given, albeit on a contingent basis. What is also clear is that the normal caution was administered, not once, but twice, at the start of the interview. Thereafter, it must be said that the explanations given in relation to the invocation of the inference provisions and the circumstances in which inferences could be drawn were, by any standards, less than satisfactory. Indeed, we found it telling that the State accepted that this was not a case where the prosecution could ever have hoped to have seen inferences drawn had Mr. Dekker chosen to remain silent. In our view, it is of significance that even after the inference legislation was invoked, the accused maintained his previous position of refusing to comment. However, as had been the position in earlier interviews, that approach was not an absolute one. When it was put to him that after an interview ended around lunchtime on 24th May, he had engaged in conversation which involved making admissions of a general inculpatory nature while denying primary responsibility, he denied in emphatic terms that any such conversation had happened, asking, rhetorically, "[h]ave you got it video evidence, yeah?"

6. There is an issue as to whether the appellant was afforded a reasonable opportunity to consult with his solicitor prior to the commencement of the crucial final interview. At the start of the final interview, the appellant was told by the interviewers that the prosecution would be seeking at trial to rely on inferences that could be drawn from any failure on his part to respond to questions that were about to be put to him pursuant to s. 19A of the Criminal Justice Act 1984, as amended. It is not in dispute that at earlier stages of the detention, there was access to a solicitor which would be regarded as reasonable access, but it is said that he was not offered a reasonable opportunity to consult with his solicitor in

advance of or during the critical final interview. Before looking at that final interview, and indeed at events that occurred at other stages during the detention which are relevant to what transpired there, it is appropriate to say a little of what occurred at the immediately preceding interview.

7. This interview, conducted by Gardaí Paul Ryan and Maureen Munnely, commenced at 2.04am on 25th May (the appellant had declined the suspension of questioning). During the interview, the following exchange took place between Gardaí and the appellant, as gleaned from the trial transcript:

“Q. Would you kill someone for Trevor Noone?

A. No, I wouldn’t.

Q. Would you kill for anybody?

A. No, I wouldn’t, I wouldn’t kill anybody.

Q. We need you to tell us what happened, this is on your shoulders, Richie.

A. What’s that statement you have there?”

It is accepted that Gardaí had with them a memo of interview that had been taken from Mr. Noone a short time earlier. Gardaí responded to the appellant by saying, “[i]t will be shown to you later” and he replied, “[w]hy can’t I hear it now?”

8. So far as the final interview is concerned, it should be noted that the prosecution did not at any stage seek to rely on the appellant’s silence, but rather, on responses provided by him during that interview. The distinction between relying on silence and relying on responses is the subject of acute controversy between the parties. However, before examining in greater detail what occurred during the final interview, it will be helpful to draw attention to the interactions between the solicitor and the appellant during the chronology of the detention as a whole:

- At 8.56am, the appellant was detained pursuant to s. 4 of the Criminal Justice Act 1984.
- Between 9.00am and 9.04am, he had a telephone conversation with his solicitor.
- At 9.20am, the solicitor with whom he had been in contact and had been nominated by him telephoned the Garda station to indicate that she would arrive in approximately half an hour's time.
- At 9.55am, the solicitor arrived and proceeded to have a consultation with the appellant.
- Between 10.15am and 10.20am, the solicitor discussed matters with the investigating team.
- Between 10.20am and 10.25am, the consultation between the appellant and the solicitor resumed.
- Between 2.55pm and 2.58pm, the solicitor telephoned the Garda station and spoke with the appellant.
- Between 6.30pm and 6.40pm, there was a further telephone consultation between the solicitor and the appellant.
- At 7.55pm, the detention of the appellant was further extended. One ground for the extension was an intention by Gardaí to invoke the statutory inference provisions.
- At 8.25pm, the solicitor telephoned the Garda station enquiring whether detention had been extended and indicating that she was available for a call with the client if he so wished.
- At 9.51pm, the solicitor telephoned the Garda station and was told that the appellant was in an interview.

- At 11.01pm, the solicitor phoned again and asked if the appellant wished to speak to her. The member-in-charge entered the interview room and established that the appellant did wish to speak with the solicitor.
- Between 11.25pm and 11.37pm, there was a telephone conversation between the appellant and his solicitor.
- At 4.45am, Gardaí attempted to contact the solicitor, leaving a message for her to contact the Garda station because investigators were now proposing to invoke the statutory inferences provisions.
- At 6.00am, 6.25am, and 7.06am, Gardaí telephoned the solicitor, the appellant having requested legal advice, and left messages.
- At 7.20am, the solicitor called and requested the interviewing Gardaí return her call.
- At 7.41am until 7.52am, the telephone call was returned to the solicitor and a consultation was had.

The Final Interview

9. A transcript of the final interview was prepared by a Detective Garda. The section containing the appellant's statements relied upon by the prosecution featured during this interview which, because of its relevance to the arguments as to admissibility, it is appropriate to quote it in full. The transcript as it appeared in the book of evidence is in this form:

“Transcript of Interview #7 with Richard Dekker on 25/05/10 from 5.50am – 7.23am at Cabra Garda Station. Interview conducted by D/Garda Pat McDonagh and Garda Paul Ryan.

Interview transcribed by D/Garda Rebecca Doolan.

Garda: 5.50

RD: So I'm gonna go down for someone telling lies

Garda: Hmm

RD: I'm gonna go down for someone telling lies

Garda: You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence. Do you understand that caution?

RD: Yeah

Garda: As you are aware this interview is being taped and the tape may be used in evidence. Do you understand that?

RD: Yeah

Garda: This interview is being recorded on videotape and is being conducted in an interview room at Cabra Garda Station. The time is 05.50am and the date is 25/05/10, Tuesday, Pat Mc Donagh is my name, and Paul Ryan [is present]. Earlier on you've been given a notice pursuant to Article 5(2) of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations, 1997. What's your full name.

RD: Richard William Dekker

Garda: Your address

RD: 211 Whitestown Avenue, Blanchardstown

Garda: And your date of birth

RD: 07/06/86

Garda: Cautioning you again Richard that [y]ou are not obliged to say anything unless you wish to do so, but anything you do say will be taken down in writing and

may be given in evidence. Do you understand that? Do you want to sign for the caution?

Garda: Richard do you understand that you are still being detained here at Cabra Garda Station pursuant to Section 4 of the Criminal Justice [A]ct 1984 for the murder of Daniel McAnespie.

RD: Yeah. I still wasn't given a phonecall to me father yeah. What's the story with that? What's the story with that?

Garda: But sure he was in the station if he wanted to speak to you he would have wanted to.

RD: In the station?

Garda: He called to the station and dropped down cigarettes down for you.

RD: You'd hardly have let him into the station.

Garda: If he had wanted to speak to you he would have been allowed yeah, he didn't want to speak to you obviously, don't think he's happy with ya for being arrested.

RD: My solicitor told me that they wouldn't let family in, only let solicitors in.

Garda: I have rang your solicitor Kelly Breen on 087-9645777 at approximately 4.45 a.m. to notify her that we would be putting inferences to you in relation to failure of you the accused to mention particular facts. She has not contacted me back yet so we are going to go ahead with our questioning ok.

RD: I want her here. I wanna talk to a solicitor before anything.

Garda: yeah we're after ringing her and she hasn't answered her phone so we can't wave a magic wand and produce her here.

RD: There has to be some solicitor in John Quinns office that'll answer their phone.

Garda: We've rang the out of service number ok.

RD: You rang the night number.

Garda: We rang at 4.45 in the morning, it's now coming up to just after 5 to six in the morning. It's not like it's half two in the afternoon Richard.

RD: Why cant you's wait?

Garda: Why cant we what

RD: Why cant you's wait?

Garda: Because you're detention is up at ten past eight that's why. You can't have it everyway, unfortunately in this life you know. If she rings or when she rings you can get to chat to her then alright.

Garda: I am gonna read you out the legislation of Section 30 of the Criminal Justice Act 2007 and this explains inferences from failure of accused to mention particular facts. Alright?

RD: How'd ya mean?

Garda: We'll explain it to you. If you failed to mention particular facts when they're being put to you, like the fact that . . .

RD: So I'm gonna be section 30'd now?

Garda: No no, this is section 30 of the Criminal Justice Act 2007. You're detained under section 4 of the criminal justice act 1984. This is a piece of legislation that I've to read out to you, that I'm obliged to read this out to you.

RD: Yeah well my solicitor told me that if you read that out to me that I'm not to even open me mouth till she comes to see me

Garda: I'm still gonna read it out, we tried to contact her Richard. Alright, The act of 1984,

Garda: I'll ring the office there now, I'll do it again alright, that alright with ya.

(D/Gda. McDonagh leaves interview room @ 06:00 to ring solicitor for Richard Dekker.)

RD: If I fail to answer particular questions what happens?

Garda: I'll explain it to ya.

RD: Just tell me out straight

Garda: An inference can be drawn by a judge or jury alright, but you cannot be convicted on an inference alone, there has to be other evidence. If you don't fail to mention to particular facts, facts that we've put to you and you failed to answer those facts that we put to you an inference can be drawn. And by failing to answer, you're 'no comment' answers, that's failing to answer. Its new legislation that's been brought out, to counteract people sitting here saying 'no comment' all the time, your solicitor will explain it to you. But no one can be convicted on an inference alone, there has to be evidence and an inference. It can't just be an inference.

RD: Do I have the right to have my solicitor here to tell me the facts of the case and what yis have there

Garda: Sure we're not gonna tell your solicitor what we have

(D/Garda McDonagh returns at 06:02a.m.)

Garda: Message left at his answering machine and also message left with his urgent calls at 24hours.

Garda: I'm gonna read this out alright. The act of 1984 is amended by . . . by reading this now we're invoking this inference under section 30 of the criminal justice act 2007, once I've read this over to you it's been invoked alright. The act of 1984 is amended by the insertion of the following section after section 19, 19A(1) where in any proceedings against a person for an arrestable offence, evidence is given that the accused, alright so arrestable offence is an offence for what you've been arrested for

now. At any time before he/she was charged with the offence or being questioned by a member of the Garda Síochána in relation to the offence, so that's self explanatory, you're here and you're being questioned by members of the Gardai in relation to the offence that you've been arrested for. Or when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it, that doesn't count for the moment yet, we'll just stick to the first one right. That he or she did fail to mention any fact relied on in his or her defence.

(D/Garda McDonagh leaves @ 06:04a.m.)

Garda: Have you always used John Quinn yeah, find them alright yeah?

RD: Alright yeah

Garda: Alright ill keep reading this over to you alright, that you failed to mention any fact relied on in his or her defence in those proceedings being a fact which in the circumstances existing at the time clearly called for an explanation from him or her when so question charged or informed, as the case may be, then, the court in determining whether a charge should be dismissed under part 1(A) of the Criminal Procedure Act 1967 or whether there is a case to answer the court, or subject to the Judges directions, the jury in determining whether the accused is guilty of the offence charged, or of any other offence of which he or she could lawfully be convicted on that charge, may draw such inferences from the failure as appear proper and the failure may on the basis of such inferences be treated as or as capable of amounting to corroboration of any evidence in relation to which the failure is material. Ok. That's basically that, a fact that exists and at the time that that fact is put to you, that it clearly calls for an explanation from you ok when you're being questioned about it, and you've failed to give an explanation. Do you understand?

(D/Garda McDonagh re-enters @ 06.07 a.m.)

Garda: ok so you've failed to give an explanation

RD: I take it you weren't talking to her then no.

Garda: sorry?

RD: Were you talking to her? Solicitor?

Garda: No. If she rings you'll get to speak to her.

RD: I need to speak to her.

Garda: I know that. Subsection 2 Richard reads, a person shall not be convicted of an offence solely or mainly on an inference drawn from a failure to mention a fact to which subsection 1 applies. So that's what I explained alright. You can't be convicted alone of an inference, there has to be other evidence, whether it be a statement from someone else, a witness and the fact that you're failing to account for these facts or mention particular facts, an inference can be drawn from that. Subsection 1 shall not have effect unless the accused was told in ordinary language when being questioned, charged or informed as the case may be what the effect of the failure to mention a fact to which that subsection applies might be. And that's what I'm doing, I explaining it to you, I'm reading the actual legislation as its written here and explaining it to you in ordinary language so you understand. Alright so it's not this legal jargon that's in front of you. The accused was offered a reasonable opportunity to consult his solicitor before such failure occurred and we've done all avenues of that and you have spoken to your solicitor already.

RD: Yeah hours ago

Garda: pardon

RD: Hours ago. I was told by my solicitor if you were to bringing this before me...

Garda: What am I after doing Ritchie I'm after ringing your solicitor twice or three times in the meantime, just because you wanted to stay up all night doesn't mean

everybody's gonna stay up for you do you understand that, that your solicitor might be gone to bed and asleep, it's six o'clock In the morning

RD: It's not just her, there's loads of solicitors

Garda: I'm after leaving a message with John Quinn solicitors on his phone and his pager, so wave your magic wand there Ritchie all you want (inaudible) We're still gonna do this and we're fully entitled so whatever your solicitor told you fair enough, but we're still entitled to do this. Alright. Nothing in this section shall in any proceedings prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged insofar as evidence thereof would be admissible apart from this section. So, it's not prejudice towards you if you sit there and say nothing basically is what that means.

Be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could probably be drawn apart from this section, similar to subsection 4A there. You can sit there and say nothing. The court or subject to the Judges directions the jury shall for the purposes of drawing an inference under this section have regard to when the fact concerned was first mentioned by the accused. Ok, if you mention a particular fact, ok, and then later on when you're giving your evidence in the trial and you suddenly come out with something else, when you first mention that first fact will have consideration towards when the jury or judge is taking their decision on the matter. Do you understand that?

RD: No I don't

Garda: if you're sticking to something all the time, all the long, right, and then all of a sudden, when you're up in the box in front of the judge and jury and next minute

you come out with something totally different, whereas all along, when you first mentioned this fact to us and then all of a sudden

RD: Can stick in me no comment

Garda: Hmm?

RD: I can stick in me no comment

Garda: You can yeah.

This section shall not apply in relation to the questioning of a person by a member of the Gardai unless it is recorded by electronic or similar means or the person consents in writing to it not being so recorded. It's being recorded on that thing up there so.

RD: So I can say no comment if I want and nothing can happen over that?

Garda: exactly.

RD: Right

Garda: You can sit there and say no comment. But that's what an inference is. An inference can be drawn because the fact you've sat there and said no comment.

RD: An inference is what?

Garda: An inference can, it can alter someone's judgement. If there's three or four witnesses said that they've seen you do something and you're not owning up to it yet the witnesses are adamant it was you, they know who you are, it was definitely you there's nothing about it and you're sitting there no comment, that would alter my judgement as to the credibility of you and the credibility of those witnesses saying it was you cos your credibility will go down. Do you understand?

RD: I don't understand, I'm gonna go no comment in any way

Garda: Hmm

RD: I'm saying no comment in any way

Garda: Subject to section 7 of the Criminal Justice Drug Trafficking Act 1996 and Section 5 of the Offences Against the State Amendment Act 1998, this section shall not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section. That doesn't apply to you because you're not detained under those Acts, ok, you're detained under Section 4 of the Criminal Justice Act 1984 and this is relating to the drug trafficking Act and Offences Against the State Act.

References in Subsection 1 to evidence shall, in relation to the hearing of an application in Part 1A of the Criminal Procedure Act 1967, for the dismissal of a charge be taken to include the statement of the evidence being given by a witness at the trial. In this section arrestable offence has the meaning it has in Section 2 as amended by Section 8 of the Criminal Justice Act 2006 of the Criminal Law Act 1997. An arrestable offence is an offence that carries a prison sentence of five years or more, ok. So its burglary, robbery, murder, they're all arrestable offences, they all carry a prison sentence of at least five years or more. That's what that means. Alright and that's

RD: Murder carries a prison sentence of..

Garda: that's life, murder is life

RD: yeah exactly

Garda: Its an arrestable offence cos it carries more than five years. That's the Act I read over to ya alright, now I've read over that Act, that its been invoked

RD: It's just hard for me to understand, didn't spend that long in school years ago (inaudible) . . . big words

Garda: That's no problem, no problem. That's alright. It's hard for us to understand as well cos it's all legal jargon.

Garda: What's your reply in relation to that Ritchie?

RD: What do ya want me to say?

Garda: Have you anything to say to what we're after reading out to you?

RD: No

Garda: It'll make more sense when we put the questions to you, about inferences from failure of the accused, which is you, to mention particular facts.ok.

RD: I still don't get ya

Garda: When I put a question to you and if you say no comment ill explain what it means

Garda: Okay I'm now going to read over to you from my notebook and I will ask you to sign my notebook. It relates to a conversation that we had yesterday the fourth of the twelfth, the fourth of the twelfth, the fourth of the fifth zero ten at Cabra Garda Station alright. *Monday the twenty fourth of the fifth zero ten, 13.08 Cabra Garda Station. Conversation with Richard Dekker 211 Whitestown Avenue after an interview finished. Why are you crying Ritchie? I just want to get this shit of me chest, its nothing to do with me, he was a harmless young fella. The fucker Noone is always getting me into trouble. I told him to stop stabbing him. I need to do a deal with you. This is wrecking my head. If you leave me out I'll need to talk to a few people and then I will come back to you and tell you all that happened. I swear on my life I didn't do anything to him. Who put the body out in Rathfeigh? Look I will tell you all if you let me out. Ritchie Dekker was crying. Ritchie I will have to talk to my boss about this and see what can be done. I can't promise you anything. Ok. Prisonergiven cigarette and placed back in cell at 13.12. I signed it, do you wanna sign that notebook.*

RD: No cos it's Bullshit. Didn't happen, the conversation didn't happen

Garda: See that makes you a liar.

RD: How's that make me a liar, have you got video evidence yeah

Garda: So it doesn't matter, it didn't happen if it's not on video is it? So who's lying here?

Garda: Sorry Pat, 6.17 Marcus De Long ok, member in charge, you alright Ritchie?

RD: Huh, yeah

Garda: So you're saying if it's not on tape then it's a lie. Is that a fact?

RD: It is a lie yeah.

Garda: It's a lie is it, you're telling me to my face that's lie, what I wrote there is a lie?

RD: Yeah.

Garda: Alright Inferences from failure of accused to mention particular facts. You mentioned certain facts to that Detective there right and they were recorded in his official notebook and now you're being questioned about it and asked to sign his notebook and now stating that you've changed your story now, that didn't happen, it's lies.

RD: Didn't happen.

Garda: Well an inference can be drawn from that ok, but you cannot be convicted solely on an inference, there must be. A person, you cannot be convicted of an offence solely or mainly on an inference drawn from a failure to mention a fact alright. Just to remind you about that, that at one stage you mentioned something and then later on when you're questioned about it your evidence has changed. All right.

RD: Didn't mention anything

Garda: Also what you said to Detective Inspector Fox and I at the cell in Cabra Garda Station. Is that a lie as well. That never happened.

RD: Never happened.

Garda: Never happened.

Garda: On the 26th of the 2nd 2010 were you in Tolka Valley Park Blanchardstown after 3 a.m.?

RD: No.

Garda: Were you at a footbridge in that park with Trevor Noone and Daniel McAnaspie.?

RD: No.

Garda: Where were you after 3 a.m. with Trevor Noone and Daniel McAnaspie on the 26th of the 2nd 2010?

RD: Don't know I cant remember, long time ago. I can't remember.

Garda: Again an inference can be drawn from that alright, because we have statement from someone that puts you there ok and you're failing to account for that particular fact. Ok and im gonna say it to you again that you cannot be convicted for an offence solely on an inference ok, but an inference can still be drawn from that. Do u understand that? I think you do.

RD: No. I dont

Garda: What did you have with you in Tolka Valley Park on the 26th of the 2nd 2010?

RD: I wasn't in Tolka Valley Park.

Garda: Did you have a knife with you that night?

RD: No.

Garda: Again an inference can be drawn on that because we have a statement from someone saying that you had a knife with you that night.

RD: It's obviously lies isn't it.

Garda: Did Trevor have a knife that night though.

RD: Did Trevor have a knife that night. No comment.

Garda: Have you ever stabbed someone before.

RD: No I havent no.

Garda: So what you're saying now is anything that doesn't suit you is a lie, is that right? Anything that doesn't suit you at all is a lie, the fact that I spoke with you.

RD: I've nothing more to say to ya's, yis are at me all fuckin night.

Garda: Are we, god love ya yeah that's terrible.

RD: It is terrible, its nothing got to do with me. All right.

Garda: We're not trying to sting you for it.

RD: I don't give a fuck who ya sting for it.

Garda: you 're showing yourself now, what ya really are aren't ya

RD: Yeah you're showing yourself, you're sweet earlier on and now you're bad attitude towards me.

Garda: Have I a bad attitude have I? look at yourself, look at the tape, look what you're at.

RD: Been up all night.

Garda: Have ye? Who's idea was that, we you given a chance to go asleep last night at twelve o'clock, and then again at one

RD: Yeah but I wanted to get this out of the way

Garda: So its our fault again is it, poor you yeah, all everyone's fault but your own isn't it, everyone's fault, blame everyone, blame the drugs. Nice little sweet ride in here all day, all day yesterday so ya had cos it suited you, then telling me that I'm a liar, that you didn't have a conversation with me when you did and then expect me to be nice to you is that it?

RD: Never had conversation with you.

Garda: Did you not? Amazing.

RD: Why have you got proof of it?

Garda: Oh if it's not on video it doesn't matter is it?

RD: Didn't happen.

Garda: Did it not?

RD: No. if it did happen it should be on the video.

Garda: Why is that?

RD: You know exactly why that is, cos that's the law.

Garda: You're wrong Richard, you're very wrong, you're making yourself out to be an awful eejit ok. You really are showing your intelligence levels now because you don't have much, it's not the law. Do you know what the law is, it's against the law to fucking stab someone to death.

RD: Yeah I know it is yeah, it's fucking sick

Garda: its also against the law to get that body and dump it up in a ditch, that's against the law.

Garda: Have u stabbed someone before?

RD: No I haven't no

Garda: Why was Daniel killed that night?

RD: No comment. Nothing to say.

Garda: Why was he killed Did you lose the plot or what was going on?

RD: Nothing got to do with me. I told ye I dont know the young fella. Don't fucking know him.

Garda: Why won't you admit that you were up at that bridge on Tolka Valley Park in Blanchardstown?

RD: Because I wasn't.

Garda: Well where were you then?

RD: Probably in me house.

Garda: Can you read?

RD: Yeah I can read yeah.

Garda: Right, I'm going to give you a copy of a memo of interview taken by Detective Garda Patrick Traynor and Garda Brendan O'Hora of Blanchardstown Garda Station. Please read it carefully. It's an interview taken at Finglas Garda Station on the 24th of the 5th 2010 at 11:37 p.m., that's last night at twenty to twelve, and its an interview with Trevor Noone, ok."

10. At that stage, it is recorded that Mr. Dekker started reading the memo and that after he read the memo, he gave the following response:

“RD: Fuck him. I'm gonna tell yis everything I am, he's a fucking lying bastard, a scumbag lying bastard, he did everything. And ill tell youse out straight now, ill give yis a fucking statement now.”

11. The transcript continues:

“Garda: Thank you.

RD: Right, I thought you's were fucking trying to have me on.

Garda: No we're not having you on, I went down and told you ages ago.

RD: Yeah I know from the first fucking two pages, that fucking, that it is him.

Garda: That is a black and white

RD: Right, he's a fucking scumbag, a scumbag, dirt bird.

Garda: I'm gonna have to read it out, eh, Richard for the tape alright. Ok”

12. The Garda then duly read the memoranda of interview with Mr. Noone. The transcript continues:

RD: Everything he's after saying in that, that's everything he did.

Garda: Ok, ok

RD: He's after turning that on me. Everything he did. He's turned that on me, he's a fucking scumbag. A scumbag.

Garda: Why would he have done that now?

RD: Why would he have done it?

Garda: Yeah why would Trevor have done that?

RD: He done it for fucking nothing, for nothing. He wasn't going to Corduff either. He wanted to give your man a hiding over fighting with his cousins and he asked me 'are we walking down the Tolka, I just wanna give him a hiding' and then we were on the footbridge Daniel was walking ahead, Trevor had the shears in his hand and stuck it straight in his back and Daniel fell back towards the river, like that and he said 'please, please lads I'm dying' and I begged Trevor, I was fucking crying, I begged him, I said Trevor leave him, he's fucking dying, leave him, leave him, leave him. I just begged him. And he looked at me and he had the yoke at me and I thought he was gonna kill fucking me. and he says no he has to go, he's dying, he's dying, he has to go.

Garda: So if I stand up then, which way did he stab first then, if I'm walking over the bridge, was it happened over the bridge?

RD: Trevors behind him and he just went 'Bang' straight into his back, and the young fella fell then towards the river. I think he tried to escape but he couldn't get across the river. His phone is in river.

Garda: His phone is in the river is it?

RD: Yeah when Trevor killed him he took his phone out of his pocket and fucked it in the river. And the weapon that he used is down the fuckin Tolka I'll show ye exactly where he fuckin threw it. The fuckin scumbag.

Garda: Did he bring the shears with him when he left, say when Daniel said I'm heading off home?

RD: He brought the shears with him, he got the shears out of my front garden. Right. I was fighting with people at the time. Right. I had a shears in my front garden right.

Garda: Okay alright Richard just sit down, I just have to write all this down alright. Paul asked you why did Noone do that and you said he did it for nothing, we went down to Tolka for a straightner is it, is that what you said or?

RD: Yeah and he wanted to bring Daniel down to the Tolka, just to, he told me he was just gonna give him a hiding over fighting with his cousin or his uncle or whatever it was. He had the shears with him. I didn't think Trevor was gonna do this. And you actually said to me earlier on, no-one would do that to a dog – Trevor has a fucking dog buried out his back garden he stabbed to death.

Garda: oh for fuck sake.

RD: Ill fucking show you that.

Garda: Hold on, hold on, he did it for nothing. He wanted to bring Daniel down to the Tolka because he wanted a straightner.

RD: Daniel didn't know anything about this. He didn't know that Trevor was going to give it to him, know what I mean. He could have been paranoid in his own head but."

13. It is then recorded that at 6.49am, the member-in-charge called in to see if the detainee was alright. It is recorded that Mr. Dekker was provided with a coke. The questioning then continued:

Garda: So you go down to the Tolka, just as you were coming down to the bridge is it? Cos I don't know it. You're coming to a bridge at the Tolka, like what side.

RD: yeah you walk through the front gates.

Garda: We walked down through the front gates.

RD: We walked down to the first gate at the Tolka and as you walk down a bit there's a bridge and steps going down to the bridge, that's where it all happened.

Garda: What part of Blanchardstown did you enter the Tolka?

RD: From what part of Blanchardstown? Like which gate do you mean?

Garda: Yeah is there a gate at Whitestown where you went into or?

RD: No, there's a gate down passed, know the, you walk out of Whitestown there at the new gaffs then there's a bridge going down and the motorway is down underneath it, and then there's a gate just there as you're going towards Corduff and we went through that gate.

Garda: The bridge goes towards Corduff?

RD: Yeah

Garda: Can you remember what time of night it was.

RD: Time of night it was?

Garda: Hold on there, [*'We walked down through the front gates of the Tolka and down to the bridge. It's a gate down by the new gaffs in Whitestown. The bridge goes towards Corduff.'*] Is that right?

[Prosecution counsel at trial commented that the Garda seemed to be taking a note of what Mr. Dekker was saying and was reading it back to him.]

14. The transcript of interview continues:

RD: Say that again, I just wanna make sure I get this right.

Garda: We walked down the front gates of the Tolka and down to the bridge. It's a gate down by the new gaffs at Whitestown. The bridge goes towards Corduff.

RD: Yeah, the gate, the gate is as you walk into the Tolka.

Garda: What was going on at this stage?

RD: You walk by the new gaffs to get to the Tolka...there's Whitestown, that's my house yeah. The new gaffs are behind it. You walk straight down the main road, there's a bridge there and you keep going up towards Corduff. And at the corner there there's a set of gates and you go through, that's where we went through, through them gates. And then there's steps going down to that bridge.

Garda: There's 211 Whitestown, right, that's your house, now draw a map of where you're going from there.

RD: This is the cul de sac, right.

Garda: Yeah.

RD: Up here, right, green fence is there, through the green fence, all the way down passed the new gaffs, all the new gaffs are here yeah, right, at the back of my cul de sac, and then right, here's your bridge right, you walk across the bridge, soon as you get across the bridge there's a roundabout just there, right, and then the corner then, over in the far corner, that's the gates."

15. At trial, prosecution counsel pointed out that at this stage of the interview, the detainee began to draw a small map. The transcript continues:

"Garda: that's where you walked in, those gates?

RD: That's the gates we walked in yeah."

16. At 6.53, the member-in-charge entered the interview room. The taking of the evidence on this issue at trial was interrupted and the matter resumed the following day, 28th February.

The transcript continues at 6.53am:

Garda: 6.53, some coke there, alright Ritch, you ok?

RD: I'm not really okay to be honest with you

Garda: you're ok to remain in interview for the moment?

RD: Yeah

Garda: What was going on at this stage when you were walking in those gates there, was there somebody said, was there a row going on or was it just?

RD: I knew, like Trevor was always saying to me right we'll bring him down the Tolka and Trevor was gonna give him a hiding over fighting with his family, even though he already knocked him out."

17. There were then a few inaudible words on the part of the appellant. The transcript continues:

Garda: Were the three of ye walking together when you went in through that gate or was Daniel ahead of ye?

RD: Yeah the three of us were together.

Garda: The three of ye were together.

RD: Yeah, But as we were walking down the steps towards the bridge Daniel was in front of us, that's when Trevor fucking stuck him in the back.

Garda: Trevor was already saying to me that he was going to go down to knock the shite out of him for fighting with his cousins. Trevor was holding, did Daniel know he was holding something?

Garda: Did he have it hidden?

RD: He did yeah, he knew he had it.

Garda: Trevor was holding a shears, a garden shears?

RD: Yeah.

Garda: And you're saying that he got them front your front garden because you had them there because you were fighting with people?

RD: Already said...yeah.

Garda: Can you describe them? A colour? What colour were they?

RD: The shears? It was just one half of a shears.

Garda: It wasn't

RD: It wasn't a full shears. It was just one dagger yeah.

Garda: What kind of handle was it?

RD: Brown

Garda: Wooden one?

RD: Yeah wooden.

Garda: Daniel knew he had the shears?..

RD: Yeah.

Garda: Just as we were coming, through the, just as we were through the gates, Trevor walked up behind him and stuck the shears into Daniels back, is that right?

RD: Not just when we got through the gates, when we went down the steps and on to the bridge.

Garda: Ok, just as we were through the gates we went down the steps towards the river. Is that right?

RD: Yeah

Garda: this bridge, it's a foot bridge is it?

RD: It's a footbridge. As you go in there's steps and The steps go down very steep, ya know I mean. You go towards Corduff way and it's the wooden bridge, know I mean, and at the side of the wooden bridge there's a patch of grass, right, and a bit of river.

Garda: Just beside, just beside the steps there's a patch of grass.

RD: No, no after the steps down on the bridge, beside the bridge there's a patch of grass

Garda: After the steps?

RD: After the steps yeah

Garda: and next to that patch of grass is the river, is that right?

RD: A little stream yeah, a little stream going up.

Garda: Just there it happened is it?

RD: Yeah.

Garda: So first of all Trevor from behind straight into the back?

RD: From behind yeah, straight into the back. See the way you's are saying 13 stab wounds, I didn't see him stab him 13 times. Unless me head was just all over the gaff but I know the last time, the last time, the last stab wound that killed him was vicious. It was like, like I was begging him. I was standing up on the bridge and he was on the grass. I was pleading and begging him not to do it and he stuck the whole shears straight into him and twisted and made sure he was dead.

Garda: Into his front or his back?

RD: His back. Could have came out the front.

Garda: So, you're saying maybe that Daniel would have fallen on to his chest then?

RD: yeah. He was on the ground, lying straight on the ground, he was dying.

Garda: So when he hit first into the back Daniel stumbled

RD: Yeah he stumbled back into the river, he was trying to get across the river and he couldn't and he said 'lads lads I'm dying I'm dying just leave it'. That's when I start pleading with Trevor 'Please Trevor, Trevor don't don't' and Trevor looked at me and he had the yoke and I thought he was gonna go for me, know I mean, and he had that glare in his eye, he had that evil in his eyes. I said all this to him, that time I met him

up in that park up at Hartstown, I said all that to him, that's why he's saying all this about me now.

Garda: So Daniel was saying stop stop I'm dying. I roared at Trevor to stop. Daniel was stumbling and fell on his stomach, on his face down. Then Trevor stuck the shears into his back again?

RD: Yeah

Garda: And you're saying he twisted the shears?

RD: Like he viciously viciously viciously stuck that into his back like. Like he stuck in like 'mmm' and he went 'mmm'.

Garda: He made a noise?

RD: He made a noise and was just twisting it and saying he has to go, he has to go, he's dying, he's dying like, y'know I mean.

Garda: OK

RD: You believe me don't you?

Garda: I do believe you.

Garda: He has to go he is dying he is dying. Trevor was saying he is dying as he was driving the fucking shears. And you mentioned something what did you say about Trevor, the way he was looking?

RD: I just said evil looking. Like I always used to be able to kick the bollox out of Trevor, yeah, right, but that night he just looked vicious, evil, I wouldn't even go there, cos I was in fear of me life. I was afraid. Cos he was pointing the thing towards me and it was like he was just 'if you don't go along with me I'm gonna' like that's what I was reading off him yeah, like of you don't go along with me I'm going to stick it straight through you cos I don't trust you. D'you know what I mean.

Garda: Did Daniel then die in front of you. Did he die. Did you know he was dead?

RD: Yeah. I knew he was dead. Lying there dead. There was blood coming out of his back through his clothes like. Trevor went over and start emptying his pockets. Took his phone out of his pocket, fucked it into the river, got the weapon and went and fucked it over. I noticed it, I know exactly where he fucked it, it might be hard to find, it could have went into the river or it could have landed in the bush but I think it landed in the bush somewhere.

Garda: Ok. You've a fair idea where he threw it, you've a good idea where it is?

RD: Where he threw the weapon, yeah

Garda: What happened then?

RD: What happened next. He got Daniels body and fucked it over in a bush just where it happened. He fucked it over in a bush.

Garda: What kind of a bush?

RD: Just a normal bush, just a normal enough bush, small enough bush, he dragged him over and threw him into that bush.

Garda: Ok. Did he cover the body.

RD: No, he didn't cover the body no.

Garda: Did you help him drag the body over.

RD: No I didnt.

Garda: Was the body dragged far from where the body lay, where he was murdered?

RD: No five feet probably.

Garda: What time was this do you think?

RD: Late in the morning.

[Garda]: Between 4 and 6? 5?

RD: (unintelligible)

Garda: What did you do then?

RD: What did we do then. The two of us just walked off home.

Garda: So you thought like Daniels body was covered in this bush then so you couldn't see him. Anyone walking by using the bridge wouldn't be able to see him?

RD: Yeah. Trevor wasn't laughing while he was killing him either, he was just viciously like you know just being vicious about it, he wasn't laughing.

Garda: Would you say that when he was going down it wasn't to give him a straightner, it was to go down to kill him?

RD: I didnt know that. I thought he was just going to give him a couple of digs. That was it, ya know I men. I know he had a shears and all but he'd carry anything around, ya know, locked drunk he'd carry anything around.

Garda: So what was the row about that led to the death of Daniel McAnaspie. What was it really all about? Was it because McAnaspie was fighting with Trevor's cousins?

RD: It was either his cousin or his uncle.

Garda: And the two lads already had an altercation that night. You're saying that Trevor already gave Daniel a straightner that night?

RD: It wasn't even a straightner, Daniel didn't fight back, Trevor hit him. I was standing there and Daniel was saying I'm fighting with this person and that person and he mentioned one name that was related to Trevor and Trevor just went bang and just floored him and knocked him on to the deck. That's when I ran around to me house. Daniel was after telling that Tommy Donoghue is his cousin, I know Tommy, he's no eejit. I went down to me gaff, I stood up on the shed to look around to make sure they weren't still fighting. I wasn't gonna go back around. If he was still kicking the bollox out of him I wasn't getting involved. Me ma seen me up on the shed and all.

Garda: So Daniels body was left in this bush, how long was the body left there for?

RD: I dont know. I don't know what Trevor did with that body, he wouldn't tell me.

Garda: And that's being straight up?

RD: That's being straight up with you. And to be honest, see when my house got smashed up the other night, I think, for the past few weeks, its all adding up to Trevor and his family. I think he thinks I was gonna break yeah and rat him out. I don't even think its Finglas heads, I think it might have been his uncle Wayne, that killed the granda that time, he's living up in Tyrrelstown now. He's out now. I think his family are trying to get me to save him. You know, I'm a kind hearted person, I am, I'm genuinely a kind hearted person.

Garda: On the way home that night did you discuss anything after when you left the body?

RD: On the way home, not that I can remember.

Garda: There was nothing said like that, Jesus what the hell was that all about? Or that was a bit fucking crazy?

RD: That was all said, I already said all that when he was down there, don't please don't, please don't, begging him, begging him not to do it to the young fella, didn't fucking deserve it, only a fucking kid man, didn't deserve it one bit.

Garda: Can you show us where the shears and phone are thrown.

RD: Yeah.

Garda: Are you sorry you didn't contact anybody in relation to this? I mean, have you remorse for what happened even though you didn't do anything but you're still feeling sorry for what happened because you saw what happened?

RD: Of course I am I am crying everyday of the week man.

Garda: you're sorry for what happened, nothing to do with you?

Garda: And you never heard how Daniels body ended up out in Rathfeigh. That was nothing to do with you was it? you didn't give any helping hand?

RD: No.

Garda: and it was never mentioned to you by anybody else in Whitestown?

RD: No. Got to do with him. Its obviously got to do with him, probably his uncle or something, know I mean. His uncle killed that fucking granddad up in the graveyard that time ya know what I mean, sure he probably would have went to him, you know what I mean, he's no problem helping him out. He has that evil streak in him. I know I've done wrong in the past, but most of the time id only be backing myself up, ya know what I mean. I done stupid things when I was younger as well but that's when I was a kid.

Garda: Could Trevor have gone back and moved the weapon?

RD: I dont think so. I don't think so. Genuinely don't think so. He doesn't care. He just doesn't really care, know what I mean. He has no remorse that young fella, I know he hasn't. He has no remorse at all. He's a scumbag. I know that weapon's still down there. I know it is. I just know. Cos I know Trevor years, he'd just throw it and that be it, know I mean. Emptying his pockets and all, sickening.

Garda: We're gonna finish, I'm gonna read this over.

RD: Is there anything else I can help yis with?

Garda: We just have to leave it for the minute anyway, we'll come back to it if need be, we're running out of time.

RD: What's gonna happen with me now?

Garda: I'll have to find out now from the Fox, the man I was talking to earlier on there."

18. At that stage, it seems that the memo was read over to Mr. Dekker and the member-in-charge entered at 7.20 am. The interview continued:

“Garda: Is that a correct account of our conversation Richard?

RD: Yeah.

Garda: Sign that there, will ya. I want you to initial the bottom of every page, just your initials RD. perfect. Sign the seal as well there will you.

RD: What do you thinks gonna happen?

Garda: We’re gonna find that out now.

RD: What do you think like, what’s your opinion?

Garda: Now, do you wish to clarify anything you’ve said or do you wish to add anything? We’re going to turn off the tape.

RD: What usually happens in a situation like this?

Garda: its an unusual one, that’s why we have to sort it out.”

19. The appellant and the Gardaí signed the transcript. The custody records record that at 7.56am, Mr. Dekker was released from custody; his s. 4 detention had been due to end at 8.10am. It is recorded that immediately following his release from custody, Mr. Dekker volunteered to accompany two Gardaí to the scene of the murder in Blanchardstown in an unmarked patrol car. *At 8.15am, the Gardaí in question parked the patrol car on Blanchardstown Road North and followed the appellant through a gate and down into Tolka Valley Park. From there, the appellant led them down a number of steps to a nearby footbridge. The appellant proceeded to point the Gardaí to where Mr. Noone had stabbed Mr. McAnaspie, and to where Mr. Noone had discarded his phone and the garden shears afterwards. Mr. Dekker explained how Mr. Noone had dragged the body of Mr. McAnaspie to an area about 10 feet or so away, but he couldn’t be sure about the exact location. Gardaí compiled a memo shortly thereafter which was signed by Mr. Dekker.*

Submissions on Appeal

20. The appellant contends – and this is not really in dispute – that he could not have been convicted if what he had to say in the final interview had not been admitted in evidence. The appellant’s case is that the trial court erred in admitting into evidence what was said during that interview. It is accepted that, at an earlier stage of his detention, the appellant was given an opportunity to consult with his solicitor. However, it is said that the crucial final interview proceeded despite requests by him to consult with his solicitor, requests that were presented as soon as the question of the drawing of inferences pursuant to statute was raised. It is said that so far as the final interview is concerned, the appellant was not given a reasonable opportunity to consult with his solicitor and that the failure to provide access in the context of that interview meant that he did not have an effective right to legal advice while in detention, and that as a result, his rights pursuant to both the Constitution and the European Convention on Human Rights were breached.

21. The appellant says that the manner in which the Gardaí sought to invoke the statutory provisions for the drawing of inferences from silence was manifestly defective. Indeed, it is said that it is accepted – as much is acknowledged on behalf of the prosecution – that so deficient were the attempts at invoking the inference provisions, that no inferences could have been drawn from silence. Insofar as the prosecution draws a distinction between what the situation would have been if the detainee had remained silent and what happened when he spoke, it is said that that was a distinction without a difference.

22. It is pointed out that neither the accused nor his solicitor was told that the statutory inference provisions would be invoked. Insofar as it can be deduced from what the detainee had to say during the final interview, that it was an issue about which there had been some

discussion between himself and his solicitor at an earlier stage of the detention, any such discussion was at the level of what was anticipatory or hypothetical.

23. The appellant draws attention to and relies on the decision in *DPP v. Fitzpatrick* [2010] IECCA 31 as establishing that reasonable access to a solicitor in the context of the invocation of the inference provisions is not satisfied by a general access at a point in time prior to the invocation of the legislation and at a point in time before the accused and solicitor had been advised of what was intended.

24. The appellant is emphatic in rejecting any suggestion that he carries any responsibility for the fact that he did not have access to a solicitor at the time when the statutory provisions were being invoked. It is pointed out that the default position is that time continues to run when a detainee is in custody between midnight and 8.00am, and that the provision providing that the time between midnight and 8.00am should be excluded only applies when the member-in-charge has formed an opinion that questioning should be suspended in order to afford the detainee a reasonable time to rest and where the detainee has consented to such suspension. If the time between midnight and 8.00am was not to be excluded, then the period of detention was going to expire at 8.56am. From an early stage in the detention, it was the prosecution intention to invoke the statutory inferences regime. The fact that this was the intention formed part of the basis on which the appellant's detention was extended at 7.55pm on 24th May 2010. The invocation of the statutory inference provisions fundamentally changed the appellant's position. It was a matter in respect of which he was entitled to have timely advice and advice specifically directed to that issue.

25. For her part, the Director says there is no question of the appellant having said what he said by reason of a misunderstanding of what he had been told about the inference provisions; rather, the Director says that the appellant is operating on a fundamentally incorrect basis when addressing the arguments for the admissibility of what was said in

interview. It is said that the prosecution sought to have admitted what was said by way of positive and elaborate response to interviewing Gardaí in the context of choosing to respond to an account given by a co-accused. There was no question of what the appellant had to say being brought about as a result of being under compulsion and no question of it having been brought about as a response to the invocation of the statutory inference provisions. The accused was given an opportunity to read what his co-accused had said, and freely, willingly, and without equivocation, chose to respond. It is said that the trial judge was quite correct in his analysis that what was said did not arise as a result of any lack of clarity on the part of the accused as to his entitlement to maintain silence, but rather arose against a background where he was fully alive to the original caution which was still operative, but freely, willingly, spontaneously and without equivocation made a choice to respond to the account that had been provided by the co-accused.

26. The Director points out that it is not the case that the purported invocation of the statutory inference provisions produced a change of heart on the part of the appellant. On the contrary, his attitude remained one of denial. The Director points to his response when a previous conversation that he had had with Gardaí at the station was raised with him. The Director says it is absolutely clear that the fundamental change in the appellant's position came about after he was given the memorandum taken from the co-accused to read.

The Judge's Ruling

27. Having taken time to consider the matter overnight, the trial judge ruled on the matter as follows on 1st March 2017:

“Well, this matter [...] is before me at this juncture so that I may rule on an issue as to the admissibility of evidence and the matter in issue pertains to certain statements made or admissions as the prosecution would contend they are, made by the accused

whilst he was in garda custody in what was the final interview conducted in the small hours of the morning, or early in the morning of the 25th of March and the accused having been arrested the previous day and his period of detention having been extended. It's not in doubt that that was lawfully done.

The accused had the benefit of consultations with his solicitor on a number of occasions, both orally and in person. He also had no difficulty, it seems, throughout the interviews at earlier stages choosing to speak and answer questions or not and to exercise his rights by forbearing to answer any question as he saw fit and there can be no doubt but that he, accordingly, was a person who was able to exercise judgment and had a full understanding of his rights as a person in custody.

The position, however, [senior counsel for the defence] says has -- became more complicated however, to the point where some otherwise unexceptional, shall we say, course of events was distorted, if I could put it that way. An issue arose in the last interview as to the invocation of what have -- can I think for the present purpose be shortly described as the inference provisions of the 2007 Act. We know that in some circumstances failures to afford information, answer questions and so on can give rise to adverse evidential inferences against a party.

Now, an essential part obviously of that statutory regime is that a person should have a full understanding of the circumstances in which he is, for example, called upon to answer a question as to where he might or might not have been at a given place or to explain his presence at a particular place and the legislation makes explicit reference to the question of legal advice and [Senior Counsel for the defence] has made

a number of submissions as to what he would contend were deficiencies in the manner in which the question was of the appropriateness of the advice which he might or might not have had available to him or the provision of advice. He has raised a number of issues about how that matter was dealt with and [Senior Counsel for the prosecution] has made the point, and I think rightly made the point, that if one were dealing with a question of inferences much of the criticism of the circumstances in which that aspect was dealt with might give rise to issues about access to lawyers, an inadequacy of expert -- of access to lawyers.

It seems to me it's a case where were an attempt made by the prosecution to rely upon the inference provisions the prosecution could not be allowed to do so because the accused himself indicates on the -- at various points in the interview a lack of understanding of the nature of the inference provisions which were then sought to be invoked and expressed his desire to see his solicitor. Mind you, he had already received advice prospectively as to what he should do in the event that such a topic was raised from his solicitor at an earlier stage.

But that is not what we are dealing with here. [Senior Counsel for the defence] effectively seeks to conflate what we might describe as a -- an inadequate approach to the question of legal advice where inferences were concerned, with the difficulties which arise about the exercise of one's rights to silence. Effectively he says, yes, the accused was cautioned at the beginning of the interview, that a change, as it were, was brought about by the reliance upon the inference provisions, that attempted explanations were given as to the meaning and effect of such provisions, that they included, for example, an indication that a party would be prejudiced if someone put

that party at a given place in a statement and that such -- and if one were to fail to answer or explain one's presence at such a place. I attenuate the matter, but I hope not unduly so.

And it seems to me that the fundamental question remains, when he chose not to continue to exercise his right to silence and to speak and no one doubts speaking so voluntarily, whether or not in fact the position, the previously given caution, the original caution, had been spent in some way, undermined in some way, that the waters had been muddied in some way, that he had some difficulty in knowing or that he had any -- could have had any difficulty in appreciating that, in fact, he was still entitled to rely upon his right to remain silent and it seems to me, taking the matter in the round, there is no doubt that he had a full understanding of the fact that he was entitled to exercise his right to silence.

Much has been said about resuscitation of a caution, that's a term which has been used in this and other cases, one has a situation where what would well describe as the traditional caution is given, one then has a situation where in interviews forms of words are used to explain the provisions of the 2007 Act and then it is suggested that, as it were, there can be a reversion to what one might describe as the ordinary course of interviewing without reference to that special statutory regime and that if that is the case it is perhaps necessary to say that the position is now, as it are were, changed and perhaps necessary to reiterate the original caution.

It seems to me that that does not necessarily follow, I should say, as a matter of principle in the first instance. A person always has a right to silence, full stop. To that

extent the original caution, so to speak, the traditional one is never watered down.

What happens is in some circumstances if one exercises that right there may be consequences of an adverse kind for one. The question is accordingly whether or not on the facts of this case the accused could have been in any doubt as to his rights to say nothing and whether or not, in fact, he freely with the benefit of his -- of the knowledge of his rights decided, in fact, to make admissions to the [G]ardaí and it seems to me that there is no -- that it is clear that he did know what his rights were and in full knowledge of those rights proceeded to speak to the [G]ardaí in a manner which the prosecution says amounts to a confession.

Now, there is the question then, so I'm of the view first of all I should add as well that I'm not at all -- I'm not satisfied at all, indeed I'll put it another way, I don't believe there's any evidence which would justify the proposition or a conclusion of anybody or even raise the reasonable possibility, I should say, that the accused person in some way was induced, so to speak, or -- induced is the wrong word, that the accused in some way spoke as he did because of some supposed confusion on his part. It seems to me that there is certainly no evidential basis for that proposition. It would be quite different if he had said, in fact, he spoke as he did because he did not realise the true state of affairs. That doesn't import of any burden of proof on the defence, I merely take it -- I'm merely saying there is no evidence upon which one could properly reach the view that he exercised his -- he decided to speak, so to speak, because of his -- because he didn't understand that he was entitled to remain silent. So, I don't think the original caution was undermined in any way. I think that the substance of the position is that he fully understood his position.

And the question then arises as to the provision of the Judges' Rules, rule 8. Now, we know this refers to persons who have been charged. The rules in some respects, are forms of words -- have perhaps been superseded by events. I think it would now be accepted that that rule is to be interpreted as meaning that one should -- a person should be cautioned when handed the statement of another person, a co-accused for want of a better term, a fellow suspect, so to speak, and asked to read it or invited to read it and asked whether or not he would wish to make some comment upon it. There's no doubt but that that was not done in this instance. If I, for a moment, had a fear that the accused didn't realise that he was not entitled to remain silent I wouldn't hesitate to exercise my discretion and exclude what he said. The rules are -- the Judges' Rules are fundamentally important to ensuring fairness in interviewing procedures, but it seems to me that in as much as the accused had more than ample advice as to his rights and fully understood his -- and in the absence of any reason to suppose that he didn't fully understand -- that he didn't have those rights I can't see that it's a proper case for the exercise of my discretion by virtue of a breach of the Judges' Rules. So, I'm admitting the material."

Discussion

28. We begin our consideration of this issue by observing that the manner in which the inference provisions of the Criminal Justice Act 2007 were invoked left much to be desired. The interview, which we have set out in detail in the body of this judgment, shows a degree of confusion on the part of the appellant as to what his position would be if he continued to exercise his right to silence, even after the statutory provisions had been invoked. He was not alone in that confusion. There was certainly a degree of uncertainty on the part of Gardaí about how the provisions would work in practice. However, it is important to emphasise that

there was and is no question in this case about drawing inferences from the appellant's silence; instead, what is in issue is what he said when he chose to speak, i.e., speech not silence. It was, as already noted, conceded by the respondent that had Mr. Dekker chosen to remain silent, it was not a case the prosecution could ever have hoped to have seen inferences drawn from silence.

29. It is the case that the invocation of the inference provisions would not have come as a bolt from the blue, and it is clear that the matter must have been the subject of such discussion, presumably on a contingent basis, between the accused and his solicitor. As it happens, the question of drawing of inferences from silence does not arise for consideration. Therefore, it is not necessary, among other things, to deal with the question of reasonable access to a solicitor with regard to the 'inference' interview, an issue raised by the appellant in the context of the decision in *DPP v. Fitzpatrick* [2012] IECCA 74. Further, it is not necessary to consider in significant detail the fact that the appellant had waived the rest period and the Gardai had sought to contact his solicitor in the early hours of the morning in circumstances where his period of detention was soon to come to an end and the solicitor had not responded after the lapse of an hour. However, none of this arises in a context where the prosecution did not seek to rely on silence in the course of an "adverse inference" interview.

30. The issue that falls to be decided relates to what the appellant said (and not his silence) and whether this was voluntary. This falls to be considered in light of the particular facts of the case. In considering the impact of the invocation of the statutory provisions, it seems to us important to have regard to the attitude of the appellant throughout the final interview as a whole. It is significant that on some occasions, the accused exercised his right to silence, and on other occasions, denied matters, such as his lunchtime conversation with Gardaí, where he regarded a denial as possible and advantageous. It is also manifest from an overall reading of the interview that the event which caused a dramatic change of stance on

the part of the appellant (from denials of any relevant knowledge to a detailed and, it must be said, self-serving description of events) was the appellant's reading of the statement of his co-accused.

31. We agree with the trial judge that the question is as to whether the accused could have been in any doubt as to his rights to say nothing and whether or not, in fact, with the benefit of the knowledge of those rights, he freely decided to speak. We agree with the trial judge that there is no indication whatsoever that the accused's decision to speak in the manner that he did was prompted by confusion or the Gardai's invocation of the inference provisions, and we have no doubt that what he said was said on a voluntary basis. It seems clear to us that the change of heart was prompted by the appellant becoming aware of the fact that his co-suspect had given a version, a false version it may be said, which effectively placed the entire blame on him. It seems his decision was prompted by a desire to put his version out there. In assessing and seeking to determine the reality of what occurred, it seems to us highly relevant that what he had to say did not amount to a full and unqualified admission. While what he said would subsequently be relied upon by the prosecution, and indeed would ultimately see him convicted of murder, from his perspective at the time, he was coming clean about what had occurred and placing the blame fairly and squarely on the co-suspect.

32. In the circumstances, we have not been persuaded that the trial judge was in error in admitting the evidence, and accordingly, we reject the grounds of appeal related to its admission.