THE COURT OF APPEAL

Record Nos: CA 106/2017 (Kelly)

and CA 97/17 (McGrath)

Birmingham P.
Edwards J.
McCarthy J.

Between/

THE PEOPLE (AT THE SUIT OF THE

DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

V

SHARIF KELLY AND EDWARD McGRATH

Appellants

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 31st day of March 2022.

1. On the 9th of March 2017, Messrs. Sharif Kelly and Edward McGrath (i.e. "the appellants") were convicted in the Special Criminal Court of the offence of murder. Mr. McGrath was also convicted of firearms and ammunition offences. The appellants were convicted following a trial which had lasted 35 days, and which related to offences that occurred on the 6th of March 2013 at the carpark of the Huntsman Inn, Gormanstown, County Meath, when a Mr. Peter Butterly (i.e. "the deceased") was fatally shot. This was the second occasion on which Messrs. Kelly and McGrath had stood trial in the Special Criminal Court charged with the murder of Mr. Butterly. An earlier trial in the Special Criminal Court in 2015 had been aborted when the Special Criminal Court discharged itself on the 55th day of the trial when an issue arose in relation to disclosure. The question of disclosure was to the fore in both the 2015 and 2017 trials, and indeed, has been a major issue on this appeal.

2. Initially, four people were charged with murder: the two appellants, and Messrs. Dean Evans and David Cullen. The prosecution case was that each of the four accused had participated in one way or another in the murder. It was said that each accused was in the general vicinity of the murder, and that each accused had an assigned role to play: as shooter; as driver of the vehicle which brought the gunman to the scene; as provider of transport for the gunman and his driver in the aftermath of the murder, and as disposer of the murder weapon. However, in advance of the first trial there was an unusual development, in that the prosecution did not

proceed with the murder charge against Mr. Cullen, who, it transpired, instead entered a plea of guilty to a firearms offence for which he received a sentence of 7 years' imprisonment, 3 and a half years of which was suspended. He then gave evidence as a prosecution witness at both trials against his former co-accused. The combined duration of both the aborted trial and the trial which resulted in a conviction, which might seem remarkable at first sight, is attributable to this very unusual development.

3. Following the discharge of the first trial court, Mr. Evans was on bail, but he absconded, failing to appear at the start of this trial which then proceeded in his absence. This meant that the trial proceeded with two people on trial, rather than four, as was originally envisaged. We have been told that Mr. Evans was returned to this jurisdiction subsequent to the trial whereupon he entered a plea of guilty to murder.

4. We have referred to the very unusual feature of the case, namely that one of the four accused originally charged with the murder became a prosecution witness. There was a second unusual aspect, in that the murder occurred at a time when there was a Garda surveillance operation in place. The result of this was that the prosecution were able to offer unusually detailed evidence about the movement of individuals of interest, and vehicles associated with them, in the days leading up to the murder. It also resulted in gardaí being in close proximity to the murder scene, and so it was that Mr. Evans, the gunman, and Mr. McGrath, who drove him to and from the scene, were detained and arrested at a moment very close in time to the murder and at a location very proximate. Mr. Kelly was arrested and detained in close proximity to Messrs. Evans and McGrath. The prosecution case against Mr. Kelly was that his role was to pick up Messrs. Evans and McGrath and, after the vehicle in which they had been travelling had been burned out, to transport them away from the scene. The circumstances of the detention and arrest of Messrs. McGrath and Kelly are issues in the course of this appeal. To get a full picture, it should be noted that Mr. Cullen was arrested at around the same time, and at or near the entrance to Gormanstown College. The case that the prosecution had originally intended to mount against him was that his role was to take possession of and to dispose of the murder weapon, and indeed, it is the case that he was observed attempting to dispose of what turned out to be the murder weapon by throwing it into a bush. Before setting out the grounds of appeal that have been advanced, and dealing with the individual grounds, it would be helpful to provide an overview of the evidence at trial and to refer in some detail to the ruling of the trial court when convicting the appellants.

5. The written submissions on behalf of both of the appellants and on behalf of the respondent each set out a detailed account of the evidence at trial. The summary offered here draws heavily on those submissions.

6. On the evening of the 31st of December 2012, a Silver Toyota Corolla (registration 06-D-90332 and chassis no. JTDBR22E22200278501) was stolen from a dwelling in Castleknock, Dublin. This vehicle was subsequently fitted with false registration plates 6-KE-7235 and was used in the murder of Mr. Butterly. At trial, it was often referred to as "*the murder car*" or "*the murder vehicle*".

7. Evidence was given that gardaí had been carrying out surveillance in the days prior to the murder. It is to be noted that at trial, members of the National Surveillance Unit were permitted to give evidence without disclosing their full names. It is also to be noted that there were many

references at trial to K.B. as he was then referred to. In fact, the individual referred to as such has since stood trial and has been convicted of the murder. In particular, the evidence was as follows:

8. On the 4th of March 2013, Garda Officer AC observed a Volvo car 07-D-66171 drive into the Charlestown carpark. Kevin Braney (i.e. "KB") was the driver and Edward McGrath was the passenger. They entered the KFC premises and emerged later in the presence of two men, one of whom was Dean Evans.

9. At 7.10pm at Gullivar's Retail Park, Northwood, Ballymun, Garda Officer I observed interaction between a white van (registration 06-D-83075) and a Toyota Corolla (bearing registration 06-KE-7235, referred to earlier at para. 6) (i.e. "the Toyota Corolla"). The vehicles left the car park led by a third vehicle, a Volvo (registration 07-D-66171, hereinafter "the Volvo"). The three vehicles were observed leaving the retail park at 8.05pm by Garda Officer AC.

10. At 8.52pm, Garda Officer AC observed the olvo and the Toyota Corolla at the Blackthorn Apartments, Brackenswood Road, Balbriggan. Also present, was a green Opel Zafira (registration 03-C-5254, hereinafter "the Opel Zafira"). Mr. Kelly was driving this vehicle when he was stopped, detained and arrested in close proximity to the murder scene.

11. At 8.52pm on the 5th of March 2013, Garda Officer H (referred to as "Witness H" in the course of the appellants' trial) observed the Toyota Corolla parked in a car parking space no. 22 at the Brackenwood Apartments. The car was not moved from his sight and was still present there at 7.00am on the following day when Garda Officer H was relieved from duty.

12. At 9.10pm on the 5th of March 2013, Garda Officer W (referred to as "Witness W" in the course of the appellants' trial) observed the Volvo driving out of Balbriggan, north-bound, on the R132 towards the Huntsman Public House. At the Huntsman Inn, the vehicle turned left, down the L1616 past Gormanstown College to a T-junction where it turned right towards the M1 motorway.

13. Garda Officer A (referred to as "Witness A" in the course of the appellants' trial) saw the Toyota Corolla still parked at Brackenwood Apartments at 7.00am on the 6th of March 2013. At 11.50am, he saw the Opel Zafira on the Harry Reynolds Road in Balbriggan, carrying one male. Shortly after this, the same officer saw the Opel Zafira parked at the front of the Brackenwood Apartments.

14. Garda Officer C saw the Opel Zafira on the Harry Reynolds Road at 12.25pm when it turned into Moylaragh Road. He saw it again on the Moylaragh Road at 12.55pm, travelling towards Drogheda Street in Balbriggan. Both of those roads connect the area where the Brackwood Apartments are located with the Drogheda Road.

15. At 1.00pm that day, Garda Officer A saw the Opel Zafira parked at the post office on Balbriggan's Main Street. He saw Mr. Kelly standing in line in the post office at 1.18pm, a male passenger remained in the vehicle at this time.

16. Garda Officer E (referred to as "Witness E" in the course of the appellants' trial), who was on duty alongside Garda Officer F (referred to as "Witness F" in the course of the appellants' trial), observed the Toyota Corolla being driven on the Harry Reynolds Road in Balbriggan at approximately 2.00pm. Only a driver was visible on board.

17. Garda Officer G travelled directly behind the Toyota Corolla after it turned left onto Drogheda Street from Harry Reynolds Road and as it travelled from Balbriggan in the direction of the Huntsman Public House. He saw just one male driver in the car as it passed the pub. Not long after it passed the public house, it moved to the centre of the roadway and indicated right. At this stage, Garda Officer G saw the rear passenger side window was open and he radioed colleagues with this information. After the Toyota Corolla did a U-turn, Garda Officer G kept going in a northerly direction for some minutes before turning around and driving back towards the Huntsman Inn. He drove along the Flemington Road and came across Garda Officer A and Garda Officer D with Mr. Cullen lying on the ground. He remained there for a few minutes and left the scene shortly after the Emergency Response Unit arrived.

18. Garda Officer E, with Garda Officer F, followed the Toyota Corolla as it drove past the Huntsman Inn. It then did a U-turn, at which stage it was observed that the rear passenger window on the driver's side was open.

19. At 2.00pm, Garda Officer A became aware that the Toyota Corolla had left the Brackenwood Apartments and was driving in a northerly direction. Officer A travelled in that direction and next observed the Toyota Corolla waiting to take a right-hand turn, coming from the northern direction onto the Flemington Road. He saw the Toyota Corolla drive into the carpark of the Huntsman Inn and saw a male driving, and at this point, he had "*a bushy head of hair on him*". He observed that the rear window of the car was opened at the driver's side.

20. Garda Officer A, who had exited the carpark, turned left down the Flemington Road and took the first right in the direction of Stamullen. At that point, he received a phone call from Detective Superintendent Johnson requesting that the Toyota Corolla be intercepted, a man having been injured in the carpark of the Huntsman Inn.

21. Garda Officer C observed the Toyota Corolla travelling towards Gormanstown College. At that stage, Garda Officer A gave directions to stop the vehicle. Garda Officer C turned around and followed the Toyota Corolla towards Gormanstown College. He became aware that a male had been shot in the carpark of the Huntsman Inn. Garda Officer C continued to follow the vehicle past the gates of Gormanstown College, and as he passed the gates, he saw a male standing there.

22. At approximately 2.00pm, Garda Officer B was aware that the Toyota Corolla had done a U-turn and was travelling back towards the Huntsman Inn. At that stage, Garda Officer B was driving up the Flemington Road around the junction at Gormanstown College. He was aware from information he was receiving over the radio that the Toyota Corolla had come back south on the Flemington Road and had entered the carpark of the Huntsman Inn. As Garda Officer B approached the Huntsman Inn, he observed the Toyota Corolla exit the carpark to the left and come straight down towards him on the Flemington Road. He was of the view that the vehicle was being driven at speed. He observed that the driver had a very bushy head of hair and was the only person visible in the vehicle. He did notice that the back windows were down. Garda Officer B drove into the carpark of the Huntsman Inn and saw a black Renault Laguna (06-D-84619) with the driver's door opened. He then observed a man lying down on the ground of the carpark with what appeared to be massive gunshot wounds to the head. Other members of the gardaí arrived within minutes.

23. The fatal shooting of Mr. Butterly was witnessed by two students of the local school who were at different bus stops on the Drogheda Road. A Mr. Sean Brennan saw a silver car stopped in the carpark. He saw one man chasing another. He saw the second man raise his arm and shoot the other man. He saw a silver car exit the carpark and go down the Balscadden Road (also known as the Flemington Road). He believed the pursuer was wearing a balaclava or a black mask. A Mr. Francisco Macari heard a noise like a bang, and he noticed a silver car parked in the Huntsman Inn and he thought that someone was getting into the car. It looked like a silver Toyota. He was not sure if there was another person in the car.

24. Garda Officer C continued in the direction of Balscadden on the Flemington Road, and, as he passed Toberstoll Lane, he observed the Open Zafira parked on the right-hand side of the road facing out, with one male in the driver's seat. He described it as being parked on the side of the road, along the green ditch facing out onto the main road.

25. A short distance after Toberstoll Lane, Garda Officer C observed the Toyota Corolla pulling into a laneway on the right-hand side between two houses and carried out what was described as a "*tactical stop*" which, in effect, meant driving his vehicle into the rear of the Toyota Corolla. Garda Officer C got out of his vehicle, drew his firearm, and called on the occupants of the Corolla to exit the vehicle and to lie on the ground. Mr. Evans got out of the right-hand rear door of the vehicle and dropped two lighters on the ground. Mr. McGrath got out of the driver's door and lay on the ground.

26. Soon afterwards, Garda Officer C observed the Open Zafira coming along the road behind his position and slowing down as it approached him. He again drew his firearm and shouted at the driver of the Opel Zafira to stop, which he did. Garda Officer E came across Garda Officer C and the Corolla. Garda Officer E stopped her vehicle to the right of the Opel Zafira which was already stationary, with the driver still in the driver's seat. She went over to the driver's door, identified herself and told the driver to lie on the ground. She stayed with the driver, Mr. Kelly, for a short time until other members of An Garda Síochána arrived.

27. Meanwhile, Garda Officer A had made his way towards the main gate of Gormanstown College, and there saw Mr. Cullen cross the road with a white plastic bag in his hand and kneel down and pick up what seemed to be a dark object from the grass verge. Upon being asked to get down on the ground, Mr. Cullen threw the white plastic bag into the bushes. The plastic bag contained a firearm, a Beretta.

28. Garda Officer D came across Garda Officer A who, at this point, had Mr. Cullen detained on the grass verge opposite the entrance to Gormanstown College. He was joined almost immediately by Garda Officer G, and then when other members of other Garda units arrived at the location, Garda Officer D went to where Garda Officer C was, i.e. where the Toyota Corolla was, at which stage, Messrs. McGrath and Evans were lying on the ground and handcuffed.

29. Garda Officer D looked into the Toyota Corolla and saw firelighters scattered across the black seat, a petrol container in the front passenger foot-well and a black curly wig and black gloves on the passenger seat in the area of the handbrake at the front of the car.

30. A post-mortem examination disclosed that Mr. Butterly had received three perforating gunshot wounds, one to the neck, left anterior lateral side, a second to the neck, left anterior side and the third to the back of the trunk.

31. Detective Garda David O'Leary recovered six cartridges from the carpark of the Huntsman Inn. A seventh discharged cartridge case was recovered from the carpark by Garda Peter Kelly. The gun in the white carrier bag, retrieved in proximity to Mr. Cullen, was a 9mm Para Bellum calibre Baretta semi-automatic pistol. It could hold 12 rounds of ammunition when fully loaded. When examined, it had not been cleaned since last discharged and there was evidence from a ballistics expert that all seven discharged cartridges that were retrieved had been fired from the gun.

32. There were two areas of gunshot damage to the Renault Laguna; the windscreen in front of the driver's side and to the centre bonnet rear windscreen wiper. There was evidence that, as neither trajectory of the bullet strikes intersected, they were both fired from different locations.

33. Sharif Kelly was arrested by Detective Garda Cornish and brought to Swords Garda station. The extension of his detention was authorised by Superintendent Glackin at 2.11pm on 7th March 2013.

34. In relation to the vehicle linked to Mr. Kelly, the Opel Zafira, the following may be noted. There was evidence that there was no fault with the vehicle. This was the subject of some controversy at trial and is now in issue in this appeal. There was a duvet covering the back seat of the vehicle. There was a white plastic bag in the boot of the vehicle which contained a full change of clothes. A major full DNA profile matching the DNA obtained from buccal swabs from Mr. Evans while he was in custody following his arrest was found to be present on items of clothing in the plastic bag, and the fingerprint of Mr. Evans was found to be located on the exterior of the plastic bag.

35. Mr. Kelly accepted in the course of interview that he had had tea with "*David*" the previous evening, the 5th of March 2013, at Brackenwood Apartments. Firearm residue was found to be present on the jumper worn by Mr. Evans, on the gloves found in the Toyota Corolla, on the outer surface of a balaclava found in the Toyota Corolla and on the grey jacket worn by Mr. McGrath. DNA matching that of Mr. Evans was found on the nose/mouth area on the inside of the balaclava and on the inside of the gloves. DNA matching that from Mr. McGrath was found on the inside band of the wig found in the Toyota Corolla. DNA matching that of Mr. Evans was found on the tracksuit bottoms and the tracksuit top located in the boot of the Open Zafira.

36. At interview, Mr. Kelly:

(i) Denied any knowledge of the presence of the white plastic bag with clothing of Mr. Evans that was located in the boot of the Open Zafira.

(ii) Denied having any relationship with Mr. Evans or Mr. McGrath.

(iii) Claimed that the presence of the cream duvet cover found over the rear seat of the Opel Zafira was due to his use of the car to collect hay for his daughter's horse every Wednesday (i.e., that the duvet was in effect a seat cover protector). It should be noted that Mr. Kelly had a horse or pony at his daughter's stables close by, and that he was a regular visitor to the stables.

(iv) Stated that he knew Mr. Cullen from Balbriggan, maintaining that he was just a friend. When asked whether he had driven the Opel Zafira to Brackenwood Avenue, Balbriggan on 5th March 2013, he replied that he did not know where that was. Asked later if he was up there on the night before the murder, he replied that he was up there to meet his friend, Dave, but he did not know his full name. He said that "*MMcD*" was with him in the car at the time. They were there to have a cup of tea with "*Dave*" who lived in Apartment 44, or so he thought.

(v) Denied driving the Opel Zafira at Brackwood Avenue on the day of the murder and further denied parking near the Toyota Corolla. The prosecution contended that this was a lie, as was his answer that he did not know where Brackenwood Avenue was.

(vi) He stated that he was at the post office in Balbriggan around 12.30pm. The evidence of Garda Officer A had seen Mr. Kelly standing in line in the post office at 1.18pm.

(vii) Denied that it was beyond being a coincidence that he was in Brackenwood the night prior to the murder, and that his car and the Toyota Corolla were both there and that both vehicles were together in the area of the murder on the following day.

(viii) Claimed that the engine management light on his car had lit up at Tobersoll Lane. He said that if the car was started, the rev counter shot up and then dropped way back down, but that it conked out on this occasion. He said that he was stopped there for about five minutes and, after fiddling with wires, had managed to start the car again, but that the revs were doing the same thing, going up to about 1,500 and then dropping back down. He said that when he started the car up, he turned right onto the Flemington Road, and as he went up the road for about ten or fifteen seconds, the car conked out on a sharp bend. He said that he was just about to get out when gardaí came upon him.

The Evidence of David Cullen

37. Mr. Cullen was a controversial witness on behalf of the prosecution who gave evidence over the course of three days (he gave evidence in chief during the first of these and he was extensively cross-examined over two subsequent days).

38. Shortly before the commencement of the first trial, in June 2014, Mr. Cullen gave a statement implicating himself and others in the murder of Mr. Butterly. Mr. Cullen's apparent role was to collect a gun which was thrown from the Toyota Corolla following the murder.

39. On the basis of his willingness to make a statement and give evidence for the prosecution, the murder charge was dropped as against him. He was further subsequently admitted to the Witness Protection Programme**.**

40. At the trial the subject matter of this appeal, Mr. Cullen outlined his involvement in the events. The following summary of his testimony, which we are satisfied is a fair one, is taken from the written submissions filed on behalf of Mr. Kelly.

41. He alleged that on the Sunday prior to the murder (3rd of March 2013), at the request of Mr. Kelly, he met with Mr. Kelly and another man, "*MM*", outside Balbriggan post office. During a

meeting that lasted between five and 10 minutes, one of these men asked whether he would be around during the week to collect something. Mr. Cullen said that he would be, and they spoke briefly before going their separate ways. Over the next couple of days he was in telephone contact with both Mr. Kelly and the other man, MM. Mr. Cullen stated that, on the Monday or Tuesday, he became aware that it was a gun that he was going to pick up, which he agreed to do.

42. Mr. Cullen claimed that on the Tuesday evening (5th of March 2013) there was a meeting in his apartment involving Mr. Kelly, Mr. McGrath, KB and MM. He said he knew beforehand that Mr. Kelly and MM were coming, but not Mr. McGrath and KB. He said it was the first time that he had met Mr. McGrath.

43. Mr. Cullen claimed in evidence that KB asked him was he the man that was going to collect the gun; he said yes. He said he was not aware of what was going to happen; what the gun was to be used for, but by listening to them, he had figured that someone was going to be shot on the Wednesday, the following day.

44. He claimed that KB had said to Mr. McGrath, "*Make sure that he gets blocked in and he can't get out and make sure it gets emptied into him*", and that at that point he (i.e. Mr. Cullen) knew someone was going to be shot. He said that there was also a request to leave a car at the apartment overnight; that he agreed that they could leave the car in his parking space outside his apartment; and that he was to pick up a gun and dispose of it the following day at the gates of Gormanston College. He said he did not really know Gormanston College. Mr. Kelly was to drop him to Gormanston College on the Wednesday, and he was to wait at the gate at 2pm and at approximately 5 minutes past 2pm, a car would drive by, beep the horn, a gun would come out the window and then he would pick it up and dispose of it.

45. He said that Mr. Kelly drove him there the day before to show him where to dispose of the gun on the grounds of Gormanston College and that he dug a hole there.

46. He said the people were no more than 30 minutes in his apartment; twenty minutes maybe. He claimed that KB asked Sharif Kelly to go down to the car and take a black bag from the car and bring it up to the apartment. When asked if he examined the black bag, he said he did not.

47. He claimed the plan for the following day was that MM and Mr. Kelly were to bring Messrs. McGrath and Evans to his apartment, and that Messrs. McGrath and Evans were to stay there for a couple of hours between the morning and the afternoon. Mr. Cullen expressed the belief that they came up on the Wednesday between 11am and 12pm. He believed that MM and Mr. Kelly left at different stages leaving him (i.e., Mr. Cullen), Mr. Evans and Mr. McGrath in the apartment. He recalled that Mr. Kelly then came back at maybe 1.45pm and took him to Gormanston College at maybe 5 minutes to 2pm. It was alleged that Mr. Kelly dropped Mr. Cullen at the gates and went off. Thereafter, Mr. Cullen waited at the gates of Gormanston College and at 5 minutes past 2pm, a silver Toyota Corolla came down, beeped the horn, and a gun came out the window. He said that he went over, picked up the gun and then the gardaí arrived and arrested him.

48. Mr. Cullen stated that either on the Tuesday or the Wednesday, he saw wigs, balaclavas and a Beretta handgun in the black bag. He said his understanding was that Mr. Kelly was to pick up Mr. McGrath and Mr. Evans "*from what* [he had] *heard in* [his] *apartment*".

49. The credibility, reliability and motivations of Mr. Cullen were the subject matter of significant cross-examination at the trial.

The Special Criminal Court's Ruling in regard to the case against Mr Kelly.

50. The ruling of the Special Criminal Court was given on 9th March 2017, and was delivered by the senior presiding judge, Hunt J, on behalf of the three member court. At the outset, the court observed that the most unusual and time-consuming feature of an otherwise apparently straightforward case was that a former co-accused, Mr. Cullen, had decided to furnish a witness statement to the prosecution implicating Mr. Kelly and Mr. McGrath. It pointed out that after providing the witness statement, Mr. Cullen had entered a plea of guilty before the Special Criminal Court to a charge of possession of firearms and had received a 7-year sentence with 3 ½ years thereof suspended. The murder charge that had been pending against Mr. Cullen was not proceeded with, and Mr. Cullen had subsequently entered a witness protection programme and was relocated to another country after finishing his prison sentence. The court said that the evidence of Mr. Cullen fell to be considered as emanating from a source who was, by his own admission, an accomplice in the events surrounding the death of Mr. Butterly, and as emanating from a witness who had and would continue to receive benefits from the State in respect of his decision to provide a witness statement and testimony for the prosecution. The court referred to the fact that the acceptance of a plea to a lesser charge resulted in a greatly reduced sentence to that which he would otherwise have faced. It referenced the decision of *People (DPP) v. John Gilligan* [2006] 1 I.R. 107 as providing strong guidance as to how a trial court should approach such a witness. It said that the court would approach the case by first looking at the facts established by the other evidence in the case before assessing what weight, if any, was to be attached to the evidence of the accomplice and protected witness.

51. The trial court then reviewed the evidence that had been given during the trial, very much as has been set out above. When dealing with the observations by Garda Officer W in relation to observing a black Volvo Reg. No. 07 D 66171 at approximately 9.10pm on the 5th of March 2013 driving out of Balbriggan, on the R132 towards the Huntsman Inn, and there, turning left down the L16 past Gormanstown College to a T-junction where it turned right towards the M1 motorway, the court observed that the travel of the vehicle involved routings and locations that were also centrally involved in the events of the following afternoon, adding that the court was satisfied that there was no coincidence about the route taken by the vehicle which travelled from outside the apartment of Mr. Cullen in what appeared to be a dry run for the route taken by the Corolla the next day.

52. Having referred to the finding of the clothes in the boot of the Zafira, from which a DNA profile was obtained which matched that of Mr. Kelly, the court then dealt with a submission on behalf of that appellant that there was a reasonable possibility that the matching DNA on the two separate garments found in the "*cash sales*" bag came about by reason of secondary or tertiary contamination from DNA matching that of Mr. Evans found on the balaclava from the rear of the Corolla. That was being said to have come about by either a Detective Garda RH (not the same person as Garda Officer H referred to at para. 11, above) or a Garda M handling the balaclava without latex gloves and subsequently coming into contact with the clothing from the plastic bag and depositing DNA acquired from the first item onto each of the second items. The court referred

to the evidence that the Opel Zafira was removed to a secure storage facility at Santry on the afternoon of 6th March. The vehicle was examined and photographed by D/Garda RH on 7th March. The Toyota Corolla was also examined by him on the same day at the same secure facility. He gave specific evidence of gloving and re-gloving during his examination. The court concluded that as D/Garda RH had given evidence of gloving and re-gloving when examining the items in the Corolla, the court was satisfied that he could not have been responsible for transferring genetic material between the exhibits. The court was also satisfied that there was no possibility of such transfer between the time of the seizure of the vehicles and its contents and the removal of the bag from the boot by D/Garda RH. The court did not think that there could have been a reasonable possibility that both a finger mark and DNA relating to Mr. Evans would have been obtained and placed in the items in the boot during the time period between seizure and examination. The court observed that no such proposition was put to any prosecution witness and was completely untenable in any event. Dealing with the examination of items of clothing by Dr Sandra McGrath of the Forensic Science Laboratory, the court said it concluded that it did not discern any reasonable possibility of cross-contamination between relevant exhibits. The court said that the final reason why it was not persuaded by the possible contamination argument was that full major matching profiles were found on targeted areas of two items of clothing from the plastic bag. Based on the evidence of Dr McGrath, the quantity and quality of the DNA and the ensuing profiles were in keeping with DNA transfer due to clothes being worn, rather than suggested secondary or tertiary transfer.

53. The trial court then turned to what it described as a difference of opinion between one of the guards, D/Garda RH and Dr McGrath as to whether the clothes in question were freshly laundered. The presiding judge said that the court had examined for itself the two garments and could form no conclusion as to laundering, after the clothes had been nearly four years in storage. The court could observe that they were certainly not new items of clothing; there were areas of wear on them. The presiding judge said that given the expertise of Dr McGrath and the fact that it was her job to examine the clothes minutely and closely for forensic purposes, the court preferred her evidence and observations on the point of whether these clothes were freshly washed. The court had no reasonable doubt that the DNA found was present due to the clothes being worn by Mr. Evans at some previous point, a finding that was supported by the unchallengeable fact that the bag in which they were found was also in contact with the finger of Mr. Evans at some previous point in time. The court was of the view that any other conclusion would amount to speculative conjecture. This issue about whether the clothes were freshly laundered and how the court dealt with that issue is an issue on this appeal.

54. The court then reviewed the evidence in relation to interviews conducted with Mr. Kelly while in Garda custody in the aftermath of the events. The court pointed out that in an interview on 7th March commencing at 21.20 hours, that the Adidas tracksuit top found in the bag in the boot of the Opel Zafira was put to Mr. Kelly and he denied ever seeing it before, saying that he did not know that it was in his car and that it was not his and he did not know who owned it. It was not an item belonging to his wife. He agreed that the whole range of items found in the bag would make up a complete change of clothes, but he denied having the change of clothes as a change for somebody to change into. He denied that anyone put them into his car, specifically denying that

Mr. Evans put them into his car, and also denied that Mr. McGrath could have done that. The court explained that Mr. Kelly was asked to give an account of his movements on 6th March. Mr. Kelly stated that he was with a friend, MMcD, when he went to collect his money from the post office in Balbriggan, and he gave the time of that as 12.30pm to 1.30pm. He explained that his presence at Flemington, Gormanstown, was for the purpose of feeding his horse. He denied having any relationship with Mr. Evans and Mr. McGrath. He explained that the horse he had spoken about belonged to his daughter and was kept in a stable of Marty Cauldwell at Toberstoll Lane. He was there to feed the horse at 1.45pm and was arrested after leaving the horse. He was asked about a cream or white duvet cover found over the rear seat and explained that the cover was used to keep the back seat of the car clean as he collected hay or shavings for the horse. He stated that he got three bales of hay every Wednesday from a Mr. Chris Sweetman. He denied that the purpose of the covering was to protect persons who would be driven from the scene after the murder of Mr. Butterly. He said he did not have a clue who was driving or who was a passenger in the Toyota Corolla. He admitted, however, that he knew Mr. Cullen from Balbriggan, stating that he was just a friend. He denied that Mr. Cullen was in his car on the previous day, or that he had seen him at Gormanston. He denied ever seeing the Toyota Corolla before. He was asked whether he had driven his wife's Opel Zafira to Brackenwood Avenue on 5th March 2013, and Mr. Kelly's reply was that he did not know where that was. The court observed that this was a demonstrable lie. It was put to him that it was an apartment block, and he was asked if he was up there the night before the murder. He then replied that he was up there to meet a friend, Dave, but did not know his name. MMcD was with him in the car at the time. They were there just to have a cup of tea with Dave who lived in No. 44, or so he thought. When he left Brackenwood Avenue, he went to his home address. He denied seeing the Toyota Corolla parked near him when he was at Brackenwood Avenue. He confirmed that Dave did not have a car and that McD drove a light blue Volvo. This light blue Volvo was not at Brackenwood Avenue. He denied driving the Opel Zafira at Brackenwood Avenue on the day of the murder, or parking near the Toyota Corolla. The court observed that in its view, these were also demonstrable lies. The court quoted him as saying that he was at the post office at Balbriggan at midday to collect welfare. The court commented that this was an untrue statement as far as the time of the event was concerned, and that he was there much later than that. The court quoted him as saying, again, that somebody called Dave was the person that he knew living at Brackenwood Avenue. When asked if he left Brackenwood Avenue at 12.55 hours on 6th March and travelled to the post office in Balbriggan, he stated that he was in the post office before that, around 12.25pm. The court observed that, once more, this was a palpable untruth. The court then quoted him as denying knowing that the Toyota Corolla had left the Huntsman Inn following the murder of Mr. Butterly and travelled from Flemington Road; quoted him as denying following the Toyota Corolla down the Flemington Road and denying that it was his job to collect Mr. Evans and Mr. McGrath. He denied at interview that it was beyond coincidence that he was in Brackenwood Avenue the night before, and that his car and the Toyota Corolla were both there and that both were together in the area of the murder on the following day.

55. The trial court then dealt with what was the final interview of relevance, one that took place at 10.07am on 8th March 2013. The Court noted that in this interview Mr. Kelly was asked

further questions about visiting the horse at the location. It quotes him as saying that he was coming from the stables and when driving back towards the Flemington Road, that the engine management lit up and "*near the end of the thing*" the car conked out on him. He described that if the car was started, the rev shot up and dropped way back down, but that it conked out on this occasion. He was stopped there for about five minutes, rooting around to see if he could get it started again. Three people passed him. He got out and was fiddling with all the wires and the pipes under the bonnet. He said that he was waiting for it to cool down because it was a bit too hot. He jumped back in after about five minutes, or after about five minutes of fiddling with and pushing all the wires around, pushing them in tight to see if it would do anything, and that the car started again but the revs were doing the same thing, going up to 1,500 rpm and then dropping back down. He had his hazard lights on and three people passed, two old women and a man in a silver van. They had to divert around his car. He described the van as something like a Volkswagen Caddy. When he started the car up, he turned right onto Flemington Road to go back, as his ex-wife had an appointment in Skerries. As he went up the Flemington Road for about 15 seconds, the car conked out on a sharp bend. He was just about to get out when the gardaí came up to him. He had the car back started because he tried it and it started. Then, a female Garda had a gun pointed at him and told him to get out of the car and he turned the ignition off. He said there were two cars parked across the road at a house in a driveway, when two women gardaí came up to him.

56. The court said that it would proceed to consider the case of each accused separately in light of the evidence recited, taking into account additional pieces of evidence to be considered as significant points in each case. The purpose of approaching matters in that way was to assess what matters the prosecution had proved to the necessary standard without any reliance on the controversial evidence of Mr. Cullen, and also to provide a frame of reference within which to consider the evidence of that highly contentious witness. The court said it would begin the analysis in each case by applying the presumption of innocence to each accused and analysing the body of evidence to assess the extent, if any, to which the prosecution had succeeded in rebutting the presumption of innocence by proof beyond reasonable doubt. Proof to that standard would not be established where the evidence disclosed a reasonable possible interpretation consistent with innocence.

57. The court dealt first with the situation of Mr. Kelly. It said that an application of the presumption involves taking as the starting point that Mr. Kelly had nothing whatsoever to do with the fatal shooting of Mr. Butterly just after 2pm in the carpark of the Huntsman Inn on 6th March 2013. For the purpose of the trial, the court was satisfied beyond reasonable doubt that Mr. Butterly was shot in the carpark by means of a gun fired by Mr. Evans who was driven to and from the scene in the Corolla by Mr. McGrath. The court was satisfied that this was not a casual event and that Mr. Butterly was ambushed by people who expected that he would be present in the carpark at that time on that afternoon. The execution of the ambush required a considerable degree of forethought, both as to the killing of the victim and the covering of tracks in its aftermath. A firearm and ammunition were required; a stolen car was also required. It was clear that the party carrying out the attack was composed of a driver and a gunman. The position of Mr. Cullen nearby showed that early disposal of the murder weapon was both contemplated and

arranged. The court was also satisfied, as a matter of inevitable inference, that the perpetrators contemplated and arranged an equally early disposal of the Corolla by incineration, thereby eliminating a rich source of potential trace evidence. The court was satisfied that an integral part of the plan was that the getaway vehicle and trace evidence would be destroyed sooner rather than later after the killing to minimise the possibility of the occupants being apprehended almost literally with a smoking gun, or with a fertile source of incriminating material that was the Corolla. The court was satisfied that given the semi-rural area to which the killer repaired after the murder, that a ready source of transport would have been required to remove the culprit or culprits from the burning Corolla and that a well-planned operation such as this would also make provision for steps to reduce or eliminate any other trace evidence that might be found on some or all of the direct participants. The prosecution was therefore required to satisfy the court beyond reasonable doubt that the presence of Mr. Kelly on the Flemington Road in the Opel Zafira was due to something other than being the driver of the vehicle that happened to be following the getaway vehicle from the murder at the time and at the place where it came to a halt. The prosecution was therefore required to prove beyond reasonable doubt that Mr. Kelly's presence there was not simply the result of his travelling on that road after performing his normal daily business of feeding his daughter's horse and taking the Opel Zafira back to his ex-wife who required it for certain personal business that she was going to attend to in Skerries that afternoon. The fact that Mr. Kelly happened to be found travelling on the Flemington Road such a short time and distance after the getaway car, must be regarded as an unfortunate coincidence from the point of view of Mr. Kelly. The court said that it was mindful of the fact that such unfortunate coincidences can occur and that this fact would alone, not of itself, come close to incriminating Mr. Kelly in the matter. The court was satisfied that there were a number of significant coincidences involving the intersection between Mr. Kelly, the Opel Zafira, other persons and locations of relevance to the crime which served to rebut the view that Mr. Kelly was the victim of a single unlucky coincidence. Whereas the happening of a single unlucky coincidence is always possible, when an innocent interpretation of events depends on acceptance of the occurrence of multiple unlikely coincidences, it becomes progressively more difficult for such an interpretation to be tenable as a matter of reasonable possibility.

58. The trial court then observed that the first important component of the innocent account of Mr. Kelly's presence in this area on that afternoon was his assertion, first made at the scene and repeated subsequently at interview, that his presence on Flemington Road was due to the recent feeding of a horse in stables at Tobersoll Lane. The court said it was clear that Mr. Kelly does keep a horse or pony for his daughter at the stables of Martin Cauldwell at the bottom of Tobersoll Lane. It was also clear that he visited the premises on a daily basis to feed and exercise the animal. Mr. Cauldwell confirmed renting a stables to Mr. Kelly during the previous winter, and again, for about two months prior to March 2013. On the day in question, Mr. Cauldwell described being at his premises from about 9.30am and that Mr. Curley arrived at about 11.30am. Mr. Cauldwell knew Mr. Kelly through Mr. Curley. Mr. Cauldwell described how Mr. Kelly arrived about 1.30pm or maybe later. Mr. Kelly asked about his horse and Mr. Cauldwell told him that Mr. Curley had taken care of it earlier. The court said that in respect of Mr. Kelly's time of arrival at Mr. Cauldwell's premises, the court was satisfied that it was at 1.30pm or later because the it was also satisfied

that Mr. Kelly left the post office in Balbriggan at 1.18pm and he would have had to drop off MMcD and then travel to Tobersoll Lane. When asked by gardaí about the time of arrival at the stable to tend the horse, Mr. Kelly had answered "*roughly 1.45pm to 1.50pm. There were two there, Marty Cauldwell and Dave Curley*".

59. The court then dealt with two statements that had been provided by Mr. Curley, saying that it was satisfied that the second account given was the more correct and was in line with the balance of the evidence. The court then dealt with Mr. Kelly's account or explanation for the cover on the back seat of the car. The court said it was clear from the evidence of Mr. Cauldwell and Mr. Curley that Mr. Kelly did not, in fact, feed the horse on that day, nor was there any evidence that he transferred hay from his vehicle to the stables during his short time there. The court recalled that Mr. Kelly had told gardaí at interview that he had purchased hay for the horse every Wednesday from a Mr. Christopher Sweetman; 6th March 2013, the day of the murder, was a Wednesday. Mr. Sweetman gave evidence and told the court that he would have sold hay to Mr. Kelly every three or four weeks over a period of between a year and two years, up to 2013. He would have got two, three or maybe four bales at a time. The court said it was satisfied that he did not have an opportunity to visit Mr. Sweetman on the day of the murder to purchase hay, or to move hay in and out of the car at the stables, and that the duvet cover on the back seat had nothing to do with such matters. The court also felt that it was notable that there did not appear to have been the slightest trace found of any hay that might have been in the vehicle had Mr. Kelly purchased a quantity of hay of such size that the back seat of the vehicle needed to be covered. The court said it was also notable that the back seat was still covered after the time when any hay would have been removed from the car. This was seen as another minor, but nonetheless, unhappy coincidence.

60. The court then turned to what it saw as the third component of Mr. Kelly's account; the behaviour of the Zafira when driven by him on 6th March 2013. The court referred to the fact that it heard evidence from a suitably qualified PSV Inspector who inspected, drove and tested the Zafira a number of days later. The court observed that on the face of it, these malfunctions are a further and rather unfortunate coincidence. They were significant, however, because if they were reasonably possible, they would provide an innocent explanation for the Zafira being seen, firstly, stopping in Tobersoll Lane, and secondly, coming to a halt just behind the location where the Corolla had turned right off the Flemington Road into the gateway at the side of the road. The court said it was satisfied that if there was any previous defect in the vehicle, it had been resolved by the time the Opel Zafira was able to move off and travel down the Flemington Road after the Toyota Corolla and after Garda Officer C to the location where it was subsequently stopped a very short time later. The court said that given the emphasis, understandably laid, by Mr. Kelly on the presence of mechanical defects at various points that afternoon, it was necessary to consider whether it was reasonably possible that the vehicle could have behaved in the manner described. It added that it was fair to observe that the late onset of these malfunctions in the Opel Zafira at precisely the time when a murder was being carried out nearby, and again, when the Opel Zafira was approaching the location where the getaway car had pulled in off the roadway, represented yet another unfortunate coincidence from the point of view of Mr. Kelly. The Court recalled that the Opel Zafira had been seen driving normally at a number of locations in the Balbriggan area earlier

on that day without apparent difficulty. It said that without considering expert matters, there were a number of odd aspects to the malfunctions as described by Mr. Kelly. The vehicle had been driven to the stables in an uneventful manner, and on the evidence, would have been at rest for approximately 10 to 15 minutes and so, presumably, would have begun to cool down after the previous journey. Yet, a malfunction that occurred on the laneway shortly after setting off, is said by Mr. Kelly to have caused the car to conk out. The engine management light came on and Mr. Kelly, on his account, stopped and got out for about five minutes. He was wanting to see whether the car would cool down because it was a bit hot. He fiddled and pushed with all the wires, and after this, the car started again, with the rev counter going up to 1,000 rpm and dropping back down. The Court commented that on the face of it, that appeared to be a somewhat random and improbable method of solving a malfunction in a relatively modern car. Then, on Mr. Kelly's account, a further malfunction occurred after he had turned right down the Flemington Road when the car conked out again. He had managed to start the engine again but had not moved off because as he was just about to get out of the vehicle he noticed an officer pointing a gun at him. The court commented that one was left wondering why Mr. Kelly felt it was necessary to get out of the car if he had succeeded in bringing the engine back to life without leaving the car and fiddling with the pipes and wires on this occasion.

61. The court made the observation that the precise account that was given at interview was not the account that was used when cross-examining relevant Garda officers and that it completely contradicted the evidence of Garda Officer C who was the officer who first stopped the vehicle. The court felt that the evidence of PSV Inspector Doyle was helpful in assessing the plausibility and possibility of the account of the alleged intermittent defects. It was pointed out that Inspector Doyle had used appropriate software to interrogate the memory of the ECU, the Engine Control Unit, and found that there was no current active fault on the vehicle at the time of the examination. The court said it had carefully considered the description of events offered by Mr. Kelly at interview in conjunction with the expert evidence of PSV Inspector Garda Doyle. The court observed that even without the expert evidence, there was an air of implausibility and convenience about the malfunction and the timing thereof as described by Mr. Kelly. The court said that having considered the expert evidence, it was satisfied that there was no support or reason in that evidence to justify a finding that there was a defect detectible by the ECU that would suddenly cause the vehicle to fail twice in the manner described by Mr. Kelly. If the alleged defect had truly caused the ECU light to illuminate, the court was satisfied that the ECU would have recorded it and retained a defect capable of reproducing these symptoms that would be discoverable on examination six days later. No active defects were found, and historical defects retained in the system were not compatible with the symptoms described. Accordingly, the court rejected the account given by Mr. Kelly in this respect as both inherently improbable and actually untruthful.

62. The handling by the trial court of what, by way of shorthand, might be described as the vehicle breakdown issue, has been criticised and is an issue on this appeal.

63. The trial court commented that the next unfortunate coincidence, from the point of view of Mr. Kelly, was that the Opel Zafira was found in close proximity to the Toyota Corolla and that this was a coincidence that had also occurred outside the residence of Mr. Cullen on the night before the murder. Mr. Cullen resided alone at Apartment No. 44. By Mr. Kelly's own admissions, Mr.

Cullen was previously known to him from the Balbriggan area. The court recalled that Officer AC had observed the Zafira parked with the Corolla and black Volvo 07 D 66171, which thecourt was also satisfied was connected with the enterprise at the carpark of the apartments. The court reviewed the surveillance evidence already referred to in the course of this judgment, and commented that, as with most pieces of circumstantial evidence, these observations were perhaps not terribly significant in themselves. However, the previous proximity of the Opel Zafira to the Toyota Corolla and the Volvo, and the repeated sightings of the Opel Zafira at or near the residence of an undoubted participant in the joint enterprise on the morning of the murder where the getaway car had been parked from the previous night before moving to the murder scene, begins to give a lie to the assertion that the proximity of the Opel Zafira to the Toyota Corolla on the Flemington Road very shortly after the murder was simply a matter of a single unfortunate coincidence. The court then observes that it was an obvious and further inconvenient coincidence for Mr. Kelly that the participant, Mr. Cullen, also happened to be a man previously known to him. The court was satisfied that the reason for the observed presence of the Zafira outside the apartment block in question was because Mr. Kelly was visiting his acquaintance, Mr. Cullen, on the evening of 5th March. The court was satisfied that there was no reasonable possibility that anybody but Mr. Kelly was in charge of the vehicle when it was observed on these occasions, just as it was he who was in charge when it was stopped shortly after the murder. The court felt that the description given by Mr. Kelly of his visit to the apartment was most curious. The court felt that the account was both partial and untruthful, and that it was designed to obscure as much as possible the fact that he had apparently visited the premises of a man who had collected the gun after the murder was committed the following afternoon, at a location very close to where Mr. Kelly also happened to be at the very same time. The court did not accept that it was reasonably possible that Mr. Kelly and his companion took the trouble to travel to Mr. Cullen's address for the sole purpose of taking tea with a person known to Mr. Kelly only to the extent of a forename. The court said that the final and most inconvenient coincidence for Mr. Kelly was the contents of the boot of his car at the time of his stop, detention and arrest. It contained a bag with a fingerprint of Mr. Evans which, in turn, contained clothing with DNA matching that of Mr. Evans on separate garments within the bag. This was the same Mr. Evans who, if Mr. Kelly was to be believed, was coincidentally present just yards in front of him on the Flemington Road, having just fired and emptied a murder weapon. It was the same Mr. Evans who was in imminent need of both a change of clothing and a lift away from a burning car, preferably in a vehicle arranged so as to limit the transfer of trace evidence. The trial court addressed the location of the Toyota Corolla and said that it was satisfied beyond reasonable doubt that it was a location that had been designated for the destruction of the Toyota Corolla. The court accepted the prosecution case that the destruction was then imminent, given the scattering of firelighters in the interior and the fact that Mr. Evans had two cigarette lighters in his hand when he emerged from the car. The court accepted that the Toyota Corolla had been driven off the road by Mr. McGrath for that very purpose, apparently oblivious to the presence of Officer C on the road behind him. The court was of the view that the rather obvious conclusion from the circumstantial evidence outlined above was that Mr. Kelly was both equipped and located to provide the necessary assistance to Mr. Evans and Mr. McGrath, and was just about to do that, but for the timely intervention of the gardaí. The court could not accept

that separate items containing forensic links to Mr. Evans were in the luggage compartment of the Opel Zafira by coincidence and without the knowledge of Mr. Kelly. That was at least one coincidence too far. The court identified what it felt was a significant number of lies told by Mr. Kelly to gardaí. Lies told by an accused were capable of constituting independent corroboration of and support for a prosecution case, but before treating lies as either corroborating or supporting, the court had to exercise caution and warn itself that human experience demonstrates that people may tell lies for many innocent reasons. In this case, the court did not find an alternative and reasonably possible basis for the telling of such untruths. The court was satisfied that Mr. Kelly told numerous lies to the gardaí, motivated by the sole purpose of covering up his complicity in arrangements to either kill or cause serious injury.

64. Crucially, the trial court said that it did not accept the submission that absent the evidence of Mr. Cullen, the prosecution could not succeed in establishing that Mr. Kelly participated in a joint enterprise that contemplated death or serious injury to Mr. Butterly. The court said that it weighed and evaluated the various strands that it had set out and had concluded that all the strands of the evidence examined by the court point only in the direction of guilt. On the totality of the evidence, it could not discern a reasonable possibility consistent with the proposition that the accused was innocent of all connection with a plot to kill or seriously injure Mr. Butterly, or, as an alternative, that he was connected with a plot with some sort of minor or trivial objective. The court commented:

> "*None of the individual components would perhaps be enough on their own to convict the accused of this offence, but the combination identified above, together with the particular weight of the fingerprint and DNA evidence, is sufficient to convince this Court that it is proper to convict the accused of the single offence on the indictment without recourse to any other evidence led in this trial.*
> *The Court rejects, in particular, the rather lame suggestion that some unspecified person might have accessed the boot of the Zafira without the knowledge of Mr. Kelly on the previous night so as to place the items associated with Mr. Evans that were found on the following day in that location*."

The Special Criminal Court's Ruling in Relation to Mr. McGrath

65. The court began its treatment of the position of Mr. McGrath by saying that it did not accept the proposition that an acquittal was a possible verdict in his case; and that it considered, as a minimum, that Mr. McGrath had to be convicted of an offence contrary to s. 7(2) of the Criminal Law Act 1997, by reason of his knowing act in driving Mr. Evans from the scene in circumstances where he could not have been but aware of the actions of Mr. Evans in the carpark. The court felt that the real issue in the case was whether Mr. McGrath should be convicted of murder on the basis that the prosecution had demonstrated beyond reasonable doubt that his participation in the events of the afternoon of 6th of March 2013 was accompanied by an intention to kill or to cause serious injury to Mr. Butterly at the time of his death; or alternatively, whether he ought to be convicted of manslaughter on the basis that it was reasonably possible that his participation leaves open a reasonable inference that his intention was to participate in an enterprise that had, as its purpose, the causation of something less than death or serious injury to Mr. Butterly on that afternoon. Accordingly, thecourt was obliged to consider carefully the

inferences to be drawn in relation to intention from the facts proved by the evidence, excluding at this stage, anything said by Mr. Cullen in that respect.

66. The court said it was clear that there was an enterprise to kill or cause serious injury to Mr. Butterly involving a number of persons other than Mr. McGrath. It was also clear that Mr. McGrath was a central participant on the afternoon of the killing. The court said that defence counsel had pointed to various factors which, in his submission, should lead the court to the conclusion that the prosecution had not proved the necessary intent to the required standard. The court said that their undisputable inference that Mr. Evans intended to kill or cause serious injury and the question was whether Mr. McGrath's acts indicated that he expressly or tacitly agreed to a plan which included Mr. Evans going as far as he did. The answer depended on whether the circumstances indicated that Mr. McGrath also had the intention to kill or cause serious injury, or whether the evidence left open a reasonably possible inference that he participated in these events with the intention to cause some minor form of harm to Mr. Butterly and without the foresight that in inflicting some form of lesser harm on Mr. Butterly, that Mr. Evans might well have gone further and proceeded to intentionally inflict serious harm or kill. The court reviewed the evidence set out earlier; the surveillance evidence relating to the KFC restaurant; the evidence as to the vehicles leaving Gullivar's Retail Park and the presence of the Toyota Corolla and other relevant vehicles at Blackthorn Apartments. The court said that, as the Toyota Corolla did not drive from the carpark of the apartments until minutes before the murder, it was entitled to infer that Mr. McGrath drove the vehicle from that location, past the Huntsman's Inn, performed a U-turn and drove the vehicle back to the Huntsman's Inn where it stopped in front of the Renault Laguna of Mr. Butterly. The court was satisfied from the evidence that shots were fired from the Toyota Corolla so as to impact on the Laguna. The fatal shots were then fired by Mr. Evans who got out of the Corolla and pursued the deceased while emptying his weapon. The court did not consider it reasonably possible that there was any change of driver in relation to the Toyota Corolla at any time between the departure of the vehicle from the carpark outside the apartment of Mr. Cullen to the final stop in the gateway at the side of Flemington Road a short time later. The court said it was satisfied that there were a number of unusual features relating to the journey in which Mr. Evans was a participant. The first was that Mr. Evans travelled as a passenger out of sight in the rear of the vehicle which was not the usual arrangement when two people are travelling in a private saloon. The Toyota Corolla was a stolen vehicle, and it was being driven by Mr. McGrath. The rear passenger window was opened at some stage. Mr. Evans was out of sight in the back seat prior to arrival at the car park of the Huntsman's Inn. A petrol container was at all times present, visible in the foot well of the vehicle. It must have been obvious to Mr. McGrath that the vehicle contained items of heavy disguise. Mr. McGrath was seen wearing the black bushy wig prior to driving the vehicle into the carpark with Mr. Evans in the back seat. This was a fact which the court considered to be very significant in itself in assessing his state of mind. The court said the question was whether the facts established permitted it to consider as reasonably possible that Mr. McGrath did not share the intention with Mr. Evans of killing or causing serious injury to Mr. Butterly. The court considered that this was not an inference that reasonably arose on the objective facts concerning Mr. McGrath's behaviour from the time he drove the Corolla from the Brackenwood Apartments to the time when Mr. Evans fired the first shots in the carpark. The court found it

impossible to infer that Mr. McGrath could genuinely have thought that such elaborate precautions and planning were required to administer some sort of minor or trivial injury to Mr. Butterly in the carpark of the public house. The court was of the view that the combination of driving a stolen car, with a large container of petrol in the interior of the car, with a passenger crouching in the rear seat, the opening of the rear window, the passing and return to the ultimate scene, and the wearing of an item of heavy disguise prior to the entry into the carpark, were individually and collectively features that clearly signalled that Mr. McGrath knew perfectly well that steps were being taken with a view to inflicting something other than minor injuries on Mr. Butterly. To accept the submissions of defence counsel would involve the court accepting that the organisers of an otherwise well-planned enterprise would permit an ignorant, and therefore potentially weak or unpredictable link, to occupy the important position of driver. The court said it was satisfied that the matter was planned and reconnoitred in advance and that separate roles were assigned to the driver, to the gunman, the collector of the gun and the escape assistance. If the submissions of defence counsel were correct, it therefore followed that the organisers were prepared to run the risk that an ignorant Mr. McGrath might have been so shocked or surprised by the level of violence used by the gunman that he might have been unwilling or unable to perform the important task of bringing the gunman to the point where the getaway car would have been torched and from where the occupants would make good their escape. In the court's view, it was absolutely inconceivable that such a matter would have been left to chance, or that the getaway driver could have been, or would have been, left blissfully unaware that the objective of the escapade was to inflict at least serious injury on the subject. The court said that its conclusions were not affected by the fact that Officer AC had not purported to identify Mr. McGrath outside Brackenwood Apartments on the previous evening, or by the fact that no change of clothing was found prepared for Mr. McGrath in the boot of the Opel Zafira. These points did not dilute the overall conclusion that the setup of the enterprise, as must have been visible to Mr. McGrath in the minutes before the killing, pointed inevitably in the direction of a serious outcome for the target. The court said that the evidence was that Mr. McGrath was not apparently shocked or surprised by the brutality of the actions of his passenger, and that, in fact, his actions suggested the exact opposite; the calm way that Mr. McGrath drove from a scene of extreme violence and then appeared to perform a studied manoeuvre, in slowing down and turning into an otherwise obscure and unremarkable driveway off the Flemington Road, was fully consistent with an inference that what unfolded in front of him in the carpark was wholly in line with his intention and expectation on arrival there and came as absolutely no surprise to him.

67. The trial court said it had once more weighed and evaluated the various strands of evidence and had concluded that all strands of the evidence examined by the court pointed only in the direction of guilt. On the totality of the evidence it reviewed, the court could not discern a reasonable possibility consistent with the proposition that the accused was in blithe ignorance of the purpose of his visit to the carpark, the visit executed by himself and Mr. Evans on that afternoon. None of the individual components would perhaps be enough on their own to convict the accused of the offences, but the combination identified, together with the particular weight of his arrival at the carpark, already in disguise, and his apparently calm conduct of the vehicle at all times, was sufficient to convince the court that it was proper to convict the accused of the offences

laid against him without reliance on any other evidence led at the trial. Defence counsel's ingenious submissions were ultimately unreal in terms of the ignorance that it attributed to the accused in the light of all the surrounding circumstances.

68. The trial court then said that in the light of their conclusions on the circumstantial evidence in the individual cases against each accused, the court did not need to dwell at length on the controversial evidence of Mr. Cullen. However, it said that in deference to the time and effort that was expended on the witness in the course of the trial, and having considered his evidence in the light of all the other evidence, that the court would, for completeness, state its conclusion on this aspect of the matter. The court then said:

> "*Mr. Cullen is a witness who presents with significant difficulties in relation to his general credibility. Firstly, he was clearly an accomplice to a very serious crime. Secondly, as a result of his decision to provide a witness statement and give evidence on behalf of the prosecution in relation to others allegedly involved in the crime, he was obliged, for his own safety, to enter a witness protection programme and continues to be in receipt of State benefit in the form of relocation and a like-for-like financial package. Another relevant aspect of membership of the programme is that to maintain his position within it, he was effectively obliged to provide evidence for the prosecution when required so to do. He obtained the agreement of the prosecution to acceptance of a plea to a lesser charge than that of murder, thereby securing a very much lighter sentence than the mandatory life sentence which was almost certain to follow had the prosecution pressed the murder charge originally proffered against him. Consequently, the Court must be alive to the very significant possibility that Mr. Cullen has tailored his initial witness statement or his subsequent sworn evidence in the light of these inferences. However, it must also be observed that there are considerable downsides to the position adopted by Mr. Cullen existing side by side with the potential benefits, including a serious level of ongoing threat to himself and possibly others associated with him and the difficulties inherent in starting a new life in a different country under a new identity*.
>
> *As well as the dangers springing from accomplice and witness protection programme issues, there are specific individual infirmities which also affect his credibility. Mr. Cullen was, in a sense, honest and forthright about his capacity for dishonesty. He freely admitted that he would lie in order to improve his personal situation. He had convictions for serious offences involving significant and planned dishonesty on his part, committed against members of his extended family and a former employer. If his current evidence is correct, he has a capacity to tell lies on oath, as demonstrated by the contents of an affidavit sworn in support of his bail application. On the other hand, if the evidence in the bail application is true, in the sense that he claimed never to have met his co-accused before, well, that completely undermines his evidence on that point in this case. Either way, there are many reasons to be circumspect about the serious propositions put forward by the witness.*
>
> *Furthermore, there are significant inconsistencies identified within his evidence in this trial, relating, in particular, to assertions about his understanding of the extent to*

which harm was intended to be caused to Mr. Butterly, though in the case of Mr. Cullen, the gap in perception is confined to the difference between believing that the purpose was some injury by the infliction of gunshot wounds as opposed to causing death thereby. Unlike Mr. McGrath, it must be observed that Mr. Cullen never asserted that the purpose of the exercise was the infliction of something less than death or serious injury.

Finally, by the time he offered cooperation to the prosecution, shortly before his own trial – there was no significant detail or aspect of the prosecution case against all co-accused with which Mr. Cullen was not intimately familiar with at the time when he provided his witness statement. On the other hand, on this aspect of the matter, he made a single main witness statement, followed by some clarification shortly afterwards, and the Court accepts the point that Mr. Cullen's testimony has not deviated in any significant way from the initial account as furnished in June 2013, and as clarified in early July of that year.

Because the witness under consideration was clearly an accomplice who subsequently received an accommodation from the prosecution, resulting in a comparatively light sentence, and who might thereby have been caused to give self-serving witness statements, or testimony based on extensive previous knowledge of the case, and because he is also currently in receipt of continuing benefit and under an obligation to testify pursuant to participation in a witness protection programme, on both counts, the Court has warned itself that it is dangerous, and perhaps doubly so in this case, to convict on the evidence of this witness without independent corroboration. Corroboration in this sense is evidence independent of the evidence to be corroborated, which is credible in itself and which tends to implicate the accused in the commission of the offence under consideration. Corroboration is not required to replicate the evidence to be corroborated in every minute detail, or to support it in every material particular. It may be provided by a body of circumstantial evidence with weighty cumulative effect.

Although it is possible for a trier of fact, having warned itself in the foregoing terms, and having given due weight to that warning, to act on such evidence without corroboration if the evidence is so clearly acceptable as to be regarded as proof beyond reasonable doubt, in this case, both the general and specific difficulties with the credibility of Mr. Cullen have led the Court to a conclusion that the Court should not be prepared to act on any piece of evidence from Mr. Cullen which stood by itself, and that the Court would not regard his evidence as acceptable unless there was significant independent corroboration. The Court has set out at length all of the other evidence in the case and its conclusions thereon so as to provide the full backdrop and context against which Mr. Cullen's evidence falls to be assessed".

69. The trial court then proceeded to set out the evidence that Mr. Cullen had given in the case. It did so in these terms:

"*His evidence implicating the two accused in this case is brief and simple. So far as Mr. Kelly is concerned, Mr. Cullen alleges that on the Sunday prior to the murder, at the*

request of Mr. Kelly, he met Mr. Kelly and another man, MM, outside Balbriggan post office. During a meeting that lasted between five and ten minutes, one of those men asked would he be around during the week to pick up something. Mr. Cullen agreed that he would and they spoke briefly before going their separate ways. Over the next couple of days, he was in telephone contact with both Mr. Cullen and the other man, MM. Mr. Cullen states that on the Monday or Tuesday, he became aware that it was a gun that he was going to pick up, which he agreed to do. Mr. Cullen then gave evidence that on the Tuesday evening, there was a meeting in his apartment involving Sharif Kelly, Edward McGrath, KB and MM. He knew beforehand that Sharif Kelly and MM were coming, but not Edward McGrath and KB. It was the first time that he had met Eddie McGrath. Mr. Cullen gave an account of the contents of that meeting. The Court is not particularly concerned with whether or not it accepts every detail of that account in the light of the other evidence, the only relevance of the testimony of Mr. Cullen for the Court in this case, or in these cases, is as to whether it is capable of confirming the Court's view, based on evidence independent of Mr. Cullen that both Mr. McGrath and Mr. Kelly were fully aware of and participated in a plot to inflict death or serious injury on Mr. Butterly on the afternoon of 6th March 2013.

So far as the day of the murder is concerned, Mr. Cullen's evidence is that it was agreed that Mr. McGrath and Mr. Evans would stay in his apartment for a couple of hours between the morning and the afternoon. He agreed to this and he stated that both men did stay in his apartment prior to the murder from between the hours of 11 and 12. MM and Sharif Kelly were also there, but left at some stage. Mr. Cullen then said that Mr. Kelly came back at 1.45pm and took him to Gormanstown College at about 1.55pm. He waited at the gate of Gormanstown College, which he did, however he got there, when, in line with the arrangement that he says was reached on the previous evening, a silver Corolla came down, beeped the horn and a gun came out of the window. He went over, picked up the gun and was then arrested by the Gardaí. Quite clearly, most of the details in Mr. Cullen's account would have been known to him from his involvement in this enterprise, or could have been constructed from his knowledge of the book of evidence and other materials served on him in his former capacity as an accused. However, the Court is satisfied there is evidence independent of Mr. Cullen which corroborates the broad proposition that Mr. McGrath, Mr. Kelly and the other named persons were present at his apartment for a planning meeting on the previous evening, and on the day itself, and, at that planning meeting, there was some discussion of the outline of the events that happened on the next day.

The stolen vehicle driven by Mr. McGrath before, during and after the murder, was parked outside Mr. Cullen's apartment from the previous evening until it departed to the murder scene on the next day. As the Court is satisfied that Mr. McGrath drove the vehicle to and from the scene, this puts Mr. McGrath outside Mr. Cullen's apartment when he got into that car at about 2 o'clock, and therefore supports the contention that he was actually inside the apartment for a number of hours prior to that time.

Mr. McGrath had been seen by an independent witness, together with Dean Evans and KB on the evening of 4th March, and this is capable of providing independent support for Mr. Cullen's assertion that Mr. McGrath and KB met again at his apartment on the night following the initial sighting. Given that Mr. McGrath drove the stolen vehicle away from the carpark outside Mr. Cullen's apartment prior to the murder, in the view of the Court, it is also highly likely that he was responsible for transporting the stolen vehicle to that location on the previous evening and therefore was present, as outlined by Mr. Cullen.

So far as independent corroboration of the presence of Mr. Kelly in the apartment on the night is concerned, this comes from the observation of the Zafira being seen parked together with the stolen Corolla and the black Volvo outside the apartment at a time when Mr. Cullen asserts that Mr. Kelly was present inside. Mr. Kelly's own statements confirm that he was in Apartment No.[4]4 in that block, drinking tea with a man called David. Separately, he confirmed that he knew David Cullen from Balbriggan. There is no reason to doubt that Mr. Kelly was present in the apartment on the evening, as asserted by Mr. Cullen, and that there was some discussion of the outline of the events of next afternoon by those present.

Given the obvious premediated and pre-planned nature of Mr. Cullen's participation in the crime on the next day, the Court has not doubt but that any meeting of a group of males in his apartment on the previous evening was connected with the enterprise that was undoubtedly in planning and ready for execution on the next day. The Court is satisfied that the parking of the getaway car outside Mr. Cullen's apartment on the Tuesday evening was not a coincidence, but corroborates Mr. Cullen's assertion that the apartment was used on that evening for planning purposes. Officer AC noted the presence of three males near these vehicles, but could not identify any of them individually.

In this case, the Court is left in the position that the circumstantial evidence which implicates Mr. Kelly and Mr. McGrath in these matters, is also capable of corroborating the broad proposition put forward by Mr. Cullen that both Mr. Kelly and Mr. McGrath were present at a planning meeting in his apartment on the night before the murder at which the outline of events on the following day were discussed by all present and that they were also both present at his apartment on the morning of the murder. To that extent, at least, and that is all that is required for present purposes, Mr. Cullen's account tallies with the facts as observed by others. However, because the evidence corroborating his assertions in this respect is so strong that it is also capable of independently convicting each of the accused, the Court does not really have to rely on the potentially suspect evidence of Mr. Cullen in any material respect. However, having considered the evidence, the entirety of the other evidence, the Court is satisfied beyond reasonable doubt that Mr. Cullen is correct insofar as his evidence establishes the broad proposition outlined above, if not all of the individual details claimed by him".

The Grounds of Appeal

70. Having set out the evidence at trial before the Special Criminal Court, and having set out the nature of the ruling delivered by the trial court in convicting both appellants, at this stage, it is necessary to refer to the grounds of appeal.

Sharif Kelly

71. The grounds of appeal, in relation to Mr. Kelly, are as follows:

(i) That in all the circumstances, the trial was unsatisfactory and the verdict unsafe, in particular, having regard to the various applications and submissions made on behalf of the appellant and the adverse rulings made by the trial judge in respect of same.

(ii) That the trial judges erred in failing to provide for adequate disclosure of material which could have been of significant assistance to the defence in the conduct of the trial: and having regard to the failure by the respondent to make adequate disclosure, that the appellant's right to a fair trial was not vindicated, the trial was unsatisfactory and/or the verdict unsafe.

(iii) That the trial judges erred in ruling admissible the evidence arising from the stopping, detention and arrest of the appellant.

(iv) That the trial judges erred in refusing to recuse themselves when an application was made for them to do so during a *voir dire* on the admissibility of evidence of David Cullen on the grounds that the presiding judge had repeatedly interrupted cross-examination and submissions by defence counsel and that it would reasonably appear to a well-informed, reasonable observer, *inter alia*, that crucial matters had been predetermined by the judge or judges, and, in all the circumstances, that the appellant's right to a fair trial, in accordance with law in which justice was seen to be done, was not being upheld.

(v) That, having regard to these interventions, including repeated interruptions of cross-examination and submissions by defence counsel by the presiding judge from which it appeared, *inter alia*, that crucial matters had been predetermined by the judge or judges, and, in all the circumstances, the trial was unsatisfactory, the determinations by the trial judges and the verdict unsafe, and the appellant's right to a fair trial, in accordance with law in which justice was seen to be done, was not being upheld.

(vi) That, having regard to the interventions by the presiding judge during the said recusal application, including repeated interruptions by the presiding judge from which it appeared that the determination of the recusal application itself had been predetermined, the appellant's right to a fair trial, in accordance with law in which justice was seen to be done, was not being upheld.

(vii) That the trial judges erred in refusing to rule inadmissible the evidence of Mr. Cullen.

(viii) That the trial judges erred in refusing to rule inadmissible the evidence arising from the taking of DNA and fingerprint samples from Dean Evans.

(ix) That the trial was unsatisfactory and the determination on the issue as to the admissibility of the DNA and fingerprint evidence and verdict are unsafe, having

regard to the manner in which the hearing and determination on the said admissibility issues were conducted, in particular, in that the trial judge appeared to predetermine the issues as to whether the taking of the said samples involved the breach of constitutional rights before hearing submissions on that matter and as to the implications as to admissibility arising from same.

(x) That the trial judges erred in refusing to find that in all the circumstances, the evidence of Mr. Cullen was not worthy of any credit, whether or not that evidence could be regarded as corroborated: and in failing to address adequately the matters relevant to his credibility.

(xi) That the trial judges erred in appearing to find that certain evidence amounted to corroboration of the evidence of Mr. Cullen.

(xii) That the trial judges erred in refusing to find that, or to address the proposition, that the crucial evidence of Mr. Cullen as to the alleged role of the prosecution was contradicted by his own evidence, or by other prosecution evidence.

(xiii) That the trial judges erred in failing to address the evidence in accordance with law, and in particular, the law as to the onus and burden of proof, including, in particular, regarding:

(a) The evidence of the fingerprint and DNA in relation to the bag of clothes alleged to have been in the appellant's vehicle.

(b) The evidence as to whether the appellant's vehicle might have broken down.

(c) The finding that the appellant told particular lies.

(xiv) That the trial judges erred with regard to the law as to joint enterprise and the application of same in the context of the appellant's case.

(xv) That in all the circumstances the appellant was convicted in a trial which was not conducted in accordance with law and in a manner in which justice was seen to be done.

72. Grounds (i) and (xv) represent generic rolled up pleas and are subsumed in the other grounds. They do not require to be addressed separately. This appellant has grouped some of his other grounds for the purposes of submissions, and we will do likewise for the purpose of addressing them. Accordingly, grounds (ii) and (vii) can be dealt with together; grounds (iv), (v) and (vi) can be dealt with together; ground (x) can be dealt with on its own; there are three sub-grounds to ground (xiii), namely (a), (b) and (c) and these can be dealt with together; ground (xiv) can be dealt with on its own; ground (iii) can be dealt with on its own, and grounds (viii) and (ix) can be dealt with together.

Edward McGrath

73. In the case of Mr. McGrath, the grounds of appeal are as follows:

(i) That the trial judges erred in finding that the prosecution had proved beyond a reasonable doubt that the appellant had the requisite *mens rea* for the charges on the indictment.

(ii) That the trial judges erred in ruling admissible the evidence arising from the stopping, detention and arrest of the appellant.

(iii) That the trial judges erred in failing to provide for adequate disclosure of material which could have been of significant assistance to the defence in the conduct of the trial, and having regard to the failure by the respondent to make adequate disclosure, the appellant's right to a fair trial was not vindicated, the trial was unsatisfactory and/or the verdict unsafe.

(iv) That the trial judges erred in refusing to rule inadmissible the evidence arising from the taking of forensic samples from the appellant.

(v) That the trial judges erred in refusing to rule inadmissible the evidence of Mr. Cullen.

(vi) Tha the trial judges erred in refusing to find that in all the circumstances, the evidence of Mr. Cullen was not worthy of any credit, whether or not that evidence could be regarded as having been corroborated, and in failing to address adequately the matters relevant to his credibility.

(vii) That the trial judges erred in appearing to find that certain evidence amounted to corroboration of the evidence of Mr. Cullen.

(viii) That the trial judges erred with regard to the laws to joint enterprise and the application of same in the context of the appellant's case.

(ix) That the trial judges erred in apparently accepting the contention that the night before the killing of Mr. Butterly, the appellant drove the Toyota Corolla, which was said to have been used in the killing, to the apartment of David Cullen.

(x) That the trial judges erred in refusing to recuse themselves when an application was made for them to do so during a *voir dire* on the admissibility of the evidence of David Cullen, on the grounds that the presiding judge had repeatedly interrupted cross-examination and submissions by counsel for the co-accused, and that it would reasonably appear to a well-informed, reasonable observer, *inter alia*, that crucial matters had been predetermined by the judge or judges, and in all the circumstances, that the appellant's right to a fair trial in accordance with law in which justice was seen to have been done was not upheld.

(xi) That, having regard to these interventions, including repeated interruptions of cross-examination and submissions by counsel for the co-accused by the Presiding judge from which it appeared, *inter alia*, that crucial matters had been predetermined by the judge or judges, and in all the circumstances, the trial was unsatisfactory, the determinations by the learned trial judges and the verdict are unsafe and the appellant's right to a fair trial in accordance with law in which justice was seen to have been done was not upheld.

(xii) That, having regard to the interventions by the presiding judge during the said recusal application by counsel for the co-accused, including repeated interruptions by the learned presiding judge from which it appeared that the determination of the recusal application itself had been predetermined, the appellant's right to a fair trial in accordance with law in which justice was seen to have been done was not upheld.

(xiii) That in all the circumstances the appellant was convicted in a trial which was not conducted in accordance with law and in a manner in which justice was seen to be done.

74. In the case of many of Mr. McGrath's grounds of appeal there is some degree of overlap with complaints made by Mr. Kelly. Accordingly, where this arises Mr. McGrath's grounds will be considered in conjunction with those of Mr. Kelly.

Issues Concerning Disclosure and the Admissibility of David Cullen's Evidence (Including Motions to Admit Fresh Evidence)

Sharif Kelly – grounds (ii) and (vii); and Edward McGrath - grounds (iii) and (v)

75. At the outset it should be stated that the Court had before it two Notices of Motion, (i.e., one from each appellant) seeking leave to adduce fresh evidence which is relevant, it was said, to the admissibility of Mr. Cullen's evidence, and to some other issues on the appeal including issues concerning a refusal by the court of trial to recuse, and concerning the credibility of Mr. Cullen.

76. The supposed fresh evidence on which it was sought by the appellants to rely was comprised of transcripts of the evidence given by Mr. Cullen in two other trials heard by the Special Criminal Court, subsequent to the trial in 2017, in which the appellants were convicted and which is the subject matter of this appeal, namely the trials of *Kevin Braney* (on Bill No. 12/2017) in 2018, and of *Laurence Murphy and Ray Kennedy* (on Bill No. 12/2017A). It is claimed that these transcripts demonstrate that Mr. Cullen gave materially different evidence relevant to the degree of involvement of both Mr. Kelly and Mr. McGrath in the killing of Mr. Butterley to that given by him in the 2017 trial. The motion filed on behalf of Mr. Kelly was supported by an affidavit sworn on the 4th of September 2020 by his solicitor, a Mr. Michael Finucane; while the motion filed on behalf of Mr. McGrath was supported by an affidavit sworn on the 7th of September 2020 by his solicitor, a Ms. Ruth Walsh.

77. In the case of Sharif Kelly, Mr. Finucane deposed (*inter alia*) that:

"*10. In summary, the Appellant seeks to adduce evidence from the transcripts of the trials of Braney and Murphy/Kennedy as to the following matters:*

a) Evidence that Mr Cullen said on oath that he was not sure as to his incriminating allegations that he had asserted as certain against the Appellant in this trial;

b) Evidence that important material was not disclosed to the defence in the Appellant's case, including evidence to the effect that Mr Cullen was a member of the IRA despite his denial of same in evidence in the Appellant's trial, and despite the fact that the trial court in the Appellant's case had considered certain relevant files;

c) Evidence of continuing gross inadequacies in the prosecution s failures to comply with its disclosure obligations and to provide satisfactory explanations in respect of same;

d) A finding that Mr Cullen perjured himself in the Braney trial;

e) Evidence of failures to make adequate and timely disclosure in respect of the process relating to the decision not to charge Mr Cullen with perjury or take other action against him;

f) Evidence relevant to the credibility and reliability of Mr Cullen which came into existence after the Appellant's trial".

78. It was further asserted that:

"*the Appellant's appeal will be substantially assisted if the matters of particular significance arising on a consideration of the transcripts and identified on affidavit herein are considered in combination, including the revelations as to the animus which it appears actuated Mr Cullen and his evidence in the subsequent trials to the effect that he was not sure the Appellant was present for the planning, or brought him to Gormanston*".

79. In the case of Mr. McGrath, Ms. Ruth Walsh deposed (*inter alia*) that:

"*11. I say that the Appellant seeks to adduce evidence from the transcripts of the trials of Braney and Murphy/Kennedy as to the following matters:*

a) A finding that Mr Cullen perjured himself in the Braney trial;

b) Evidence relevant to the credibility and reliability of Mr Cullen which came into existence after the Appellant's trial.

c) Evidence that important material was not disclosed to the defence in the Appellant's case, including evidence to the effect that Mr Cullen was a member of the IRA despite his denial of same in evidence in the Appellant's trial, and despite the fact that the trial court in the Appellant's case had considered certain relevant files;

d) Evidence of continuing inadequacies in the prosecution's failures to comply with its disclosure obligations and to provide satisfactory explanations in respect of same;

e) Evidence of failures to make adequate and timely disclosure in respect of the process relating to the decision not to charge Mr Cullen with perjury or take other action against him".

80. It was further asserted (*inter alia*) by Ms. Walsh that it had emerged in the *Braney* trial "*that the prosecution had failed to disclose an important document showing animus on the part of Mr. Cullen towards Mr. Braney*"; that the appellant's (i.e., her client, Mr. McGrath's) original trial was aborted after a document showing animus on the part of Mr. Cullen towards the appellant emerged after closing speeches; and that the fact "*that Mr. Cullen had a particular animus against Mr. Braney* […] *is particularly significant to the appellant when that is taken together with other evidence*".

81. In truth, essentially the same claims with respect to animus and non-disclosure, arising from evidence received in the *Braney* trial, are being advanced by both appellants.

82. At the hearing of the present appeals we were disposed to allow counsel to present their arguments, including those relying upon the material said to constitute properly admissible fresh evidence, on the basis that this Court would receive the arguments *de bene esse* pending a formal ruling on the applications to adduce fresh evidence to be rendered in due course as part of our substantive judgment on the appeal.

83. In terms of the applicable law on applications to adduce fresh evidence, we were referred to the cases of *People (Director of Public Prosecutions) v. O'Regan* [2007] 3 I.R. 805 and *People (Director of Public Prosecutions) v. Meehan* [2016] IECA 124, from which authorities it was

suggested by defence counsel (counsel for Mr. McGrath adopting the arguments advanced on behalf of Mr. Kelly) that ultimately the question for the Court must be: whether, in the context of the case as a whole (and applying the principles set down in *People (DPP) v. Willoughby* [2005] IECCA 4 and approved in O'*Regan*), the admission of the evidence is necessary in order to ensure that justice is done and seen to be done? Counsel for Mr. Kelly volunteered, during his oral submissions, acceptance that the *Meehan* case had, in effect, added the following criterion, specifically in the context of transcripts: would the evidence in question, if it had been available, have had the potential to materially affect the outcome of the trial? In that regard, the key proposition put forward on behalf of Mr. Kelly was that Mr. Cullen gave evidence in subsequent trials, stating that he was not sure if Mr. Kelly attended a meeting the night before the murder at which the murder was discussed; further that he was not sure if Mr. Kelly had brought him, Mr. Cullen, to the location of the killing on the previous day to plan for the concealment of the gun, and; further that he was not sure if Mr. Kelly had brought him to the location of the murder on the day of the murder; all of which were matters which he had asserted definitively as having occurred in the 2017 trial of the appellants. There was nothing of comparable specificity relied upon as relating to Mr. McGrath, and the written submissions filed on his behalf merely refer to the claimed perjury by Mr. Cullen in the later trial, the claimed history of non-disclosure and the emergence of the previously referred to evidence that Mr. Cullen had an animus against both appellants.

84. It was argued on behalf of the respondent in reply to the motions that the courts have rightly deprecated, in cases such as *People (Director of Public Prosecutions) v. Cronin* [2003] 3 I.R. 377 and *People (Director of Public Prosecutions) v Griffin* [2008] IECCA 112, any *ex post facto* trawl of a transcript of a trial for the purpose of discovering new grounds of appeal not advanced at trial. It was submitted that trawls of transcripts of other separate trials in respect of other offences and different accused (albeit involving similar witnesses) should be viewed with even deeper unease. It is not, in fact, the case that in general one is entitled to rely on the transcript of another trial. On the contrary, cases where that will be permitted will be exceptional.

85. It was submitted that given the significant potential impact on the administration of justice, an appellant seeking to exploit divergences in witness accounts between one trial and the next based on such a transcript trawl ought not to be permitted to adduce evidence of such divergences as "*fresh evidence*" unless it would materially affect the verdict.

86. The respondent asserts that the matters relied upon by the appellants in this case could not have materially affected the verdict. All the matters referred to were matters, bar one, stemming from events occurring long after this trial had concluded. The appellants had not made clear what utility or value was to be attributed to the so-called fresh evidence from their perspective. The respondent's assumption is that they desire to put what Mr. Cullen stated on a subsequent occasion to him to undermine his credibility, although this has not been expressly stated. It was submitted that the utility of doing so would be extremely doubtful in circumstances where Mr. Cullen's credit was significantly eroded during the course of the trial and was not key to the conviction recorded.

87. The respondents point out that Mr. Cullen gave direct evidence in the trial, the subject matter of this appeal, on the 8th of February 2017, and he was cross examined on the 9th of

February 2017 and the 10th of February 2017. However, as was noted by the court of trial in its judgment on the 9th of March 2017:-

> "*In the light of our conclusions on the circumstantial evidence in the individual case against each accused, the Court does not need to dwell at length on the controversial evidence of David Cullen*".

88. The court below outlined its view of Mr. Cullen's evidence and characterised him as a "*witness who presented with significant difficulties in relation to his general credibility*". Having reviewed the context and totality of the evidence proffered by Mr. Cullen, the trial court stated as follows: -

> "*In this case the Court is left in the position that the circumstantial evidence which implicates Mr Kelly and Mr McGrath in these matters is also corroborating -- is also capable of corroborating the broad proposition put forward by Mr Cullen that both Mr Kelly and Mr McGrath were present at a planning meeting in his apartment on the night before the murder at which the outlines of events on the following day were discussed by all present and that he was -- and that they were also both present at his apartment on the morning of the murder. To that extent at least, and that is all that is required for present purposes, Mr Cullen's account tallies with the facts as observed by others. However, because the evidence corroborating his assertions in this respect is so strong that it is also capable of independently convicting each of the accused, the Court does not really have to rely on the potentially suspect evidence of Mr Cullen in any material respect*".

89. Counsel for the respondent has referred to the store being placed by Mr. Kelly in the fact that, in a trial where Mr. Kelly was not an accused, Mr. Cullen was not certain that Mr. Kelly was present in the Brackenwood Apartments and that he was only "*almost sure*" that it was Mr. Kelly that drove him to Gormanston College on the day of the murder; and counsel has commented that any putative importance of this is immediately undermined when one recognises the fact that Mr. Kelly's vehicle was seen at the Brackenwood Apartments that evening close to the Toyota Corolla which was used the following day in the murder plot. Its importance is further undermined by the fact that the court below did not repose confidence in the evidence of Mr. Cullen save insofar as it was corroborated by other evidence in the case.

90. It was further submitted that as with medical evidence which offers a differing opinion than that adduced at trial, the end point of the evidence which the appellants now seek to have admitted is equivocal. The fact that Mr. Cullen on a subsequent occasion was perhaps less sure of a detail than he may have been previously does not meet the criterion that it may "*materially*" have affected the outcome. The respondent contends that even if a retrial was directed and Mr. Cullen maintained his uncertainty, it is difficult to envisage a different outcome in the case, bearing in mind the substantial other independent evidence of guilt. *A fortiori* it could not be said with any confidence that it would have "*a material and important influence on the result of the case*". Such ambiguity or uncertainty may creep into the evidence of an honest and trustworthy witness with the lapse of time.

91. As regards the claim that the fresh evidence which the appellants seek to rely upon supports their case that there was material non-disclosure, the respondent makes a number of points.

92. First, the appellants have not been able to point to a single specific document that they say they were entitled to, but which was not disclosed.

93. Second, while it was true that documentation which showed a view on the part of Garda officers that Mr. Cullen was a former member of the IRA was not disclosed in the trial the subject matter of the present appeal, this was not material which the appellants were entitled to by way of disclosure. The respondent's position is that such would have been irrelevant and or privileged in the context of this trial for murder. It does not follow that because one document was relevant to a later trial that it was liable to be disclosed in an earlier trial. That officers may have held the view that Mr. Cullen was a former member of the IRA was something that had featured in the later *Kennedy and Murphy* trial. However, that had been a prosecution for membership in which it had relevance. The same was not true here.

94. Moreover, the respondent says, it was perfectly obvious from the Book of Evidence that Mr. Cullen was trusted enough within the membership of the IRA to be a participant in a murder plot. Whether he was or had been a member of the IRA, or was not and had never been, was immaterial to his involvement on the occasion in question. The point was further made in this context that if either accused had had any interest in pursuing this issue, or had thought it was relevant, they could have done so while cross-examining Garda witnesses and or Mr. Cullen. However, the respondent suggests, it may be inferred from the transcript, and particularly from how counsel for Mr. McGrath had cross-examined a Garda witness, D/Garda William WH, that a strategic decision had been taken by the defence to de-emphasise any suggestion that Mr. Cullen might be, or have been, an IRA member.

95. Insofar as the complaint based on non-disclosure of material suggesting an alleged animus was concerned, there had been specific focus in the affidavits of Mr. Finucane and Ms. Walsh, respectively, on a Garda memo dated the 13th of February 2019, in which it is recorded that Mr. Cullen had expressed delight that Mr. Braney had been convicted and had received a life sentence, while going on to state that although he was not too happy about the conviction of the others, it had been necessary to get the others in order to get Kevin Braney. In regard to that, counsel for the respondent observes that it was trite to state that there could have been a duty to disclose documents which were not in existence at the time of the earlier trial and which related to events which had not then occurred (such as the document of the 13th of February 2019).

96. In summary, the respondent maintains that, put at its highest, the appellants' contention is that the material which they now seek to have admitted as "*fresh evidence*" could have potentially assisted the defence in further undermining the credibility of Mr. Cullen, a protected witness and accomplice. However, this elides the fact that Mr. Cullen was not viewed by the court below as a reliable witness and his evidence was treated with circumspection.

97. It was submitted on behalf of the respondent that the evidence which is sought to be adduced therefore falls far short of the type of evidence which "*might have had a material and important influence on the result of the case*".

Ruling on the motions to admit fresh evidence

98. The law in relation to applications to adduce fresh evidence derives from the combination of s. 33(1) of the Courts of Justice Act 1924 (i.e., "the Act of 1924"), as amended by s. 31 of the

Criminal Procedure Act 2010; and s. 7A(3) of the Courts (Supplemental Provisions) Act 1961 as inserted by s. 8 of the Court of Appeal Act 2014.

99. Section 33(1) of the Act of 1924 as amended, provides as follows:

> "*The appeal shall be heard and determined by the Court of Criminal Appeal (' the court') on—*
>
> *(a) a record of the proceedings at the trial and on a transcript thereof verified by the judge before whom the case was tried, and*
>
> *(b) where the trial judge is of opinion that the record or transcript referred to in paragraph (a) of this subsection does not reflect what took place during the trial, a report by him as to the defects which he considers such record or transcript, as the case may be, contains*
>
> *with power to the court to hear new or additional evidence, and to refer any matter for report by the said judge*".

100. Section 7A(3) of the Courts (Supplemental Provisions) Act 1961, as inserted by s. 8 of the Court of Appeal Act 2014, provides as follows:

> "*Subject to section 78 (1)* of the *Act of 2014* [a transitional provision, not relevant], *there shall be vested in the Court of Appeal all jurisdiction which was, immediately before the establishment day, vested in or capable of being exercised by the Court of Criminal Appeal*".

101. The statutory power to receive fresh evidence was considered by the Supreme Court in *People (Director of Public Prosecutions) v. O'Regan* [2007] 3 I.R. 805. In his judgment in that case, Kearns J. emphasised that there is a "*clear public policy requirement that a defendant bring forward his entire case at trial, and the administration of justice would not be served by any other approach*".

102. The Supreme Court in *O'Regan* referred to and approved of the decision in *People (D PP) v. Willoughby* [2005] IECCA 4, with Kearns J. stating at para. 69 of his judgment in *O'Regan*:

> "***[69]*** *Having reviewed both the Irish authorities cited above and a number of English authorities, the court considered it could formulate principles appropriate to an application to introduce new or fresh evidence in the Court of Criminal Appeal as follows at pp. 21 and 22:-*
>
> *(a) Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.*
>
> *(b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.*
>
> *(c) It must be evidence which is credible and which might have a material and important influence on the result of the case.*
>
> *(d) The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation*".

103. The Supreme Court judge continued at para. 71 of his judgment:

> "*While the requirement for "exceptional circumstances" may be seen as setting the bar at a fairly high level, the policy considerations to which reference has already been made demand no less. The entire criminal justice system would be incapable of functioning if every trial was subject to a re-run on new grounds or new evidence in an appellate court. Thus it is entirely reasonable to insist upon a "due diligence" test in respect of evidence which was known to exist, or which could reasonably have been obtained at the time of trial but was not. Equally, it can only be seen as entirely reasonable and proportionate to incorporate in the principles a requirement that the proposed new evidence is credible and, if admitted, that it might have a material or important, though not necessarily decisive, influence on the result on the case. The court is also satisfied that any consideration of materiality must be conducted by reference to all the other evidence at the trial and not be considered in isolation*".

104. The case of the *People (DPP) v. Meehan* [2016] IECA 124 saw these principles being applied to a case in which, as in the present case, it was sought to introduce the transcripts of two later trials as fresh evidence. In that case Birmingham J. (as he then was), delivering judgment for the Court of Appeal, observed, in dismissing the application, that:

> "*63.* […] *it is not in fact the case that in general one is entitled to rely on the transcript of another trial. On the contrary, cases where that will be permitted will be exceptional.*
>
> *64. The circumstances in which evidence given at a later trial might be admissible in the course of an appeal from a case that was decided earlier was considered by the Court of Criminal Appeal in DPP v Paul Ward (Unreported, Court of Criminal Appeal, 22nd March, 2002). There, the court commented:-*
>
> > *'It is difficult to see any circumstances in which a finding made in a subsequent case in any court, criminal or civil, as to the character or integrity of any witness or party could be made evidence on the appeal. However, there are extreme cases in which facts established in later cases may so undermine the basis on which an earlier case had been decided that it would be appropriate to have regard to the later case on an appeal in the former.' "*.

105. The Court of Appeal concluded that Mr. Meehan's case was not in the category of exceptional cases alluded to in the *Ward* case. In the present case we take a similar view of the appellants' applications to adduce fresh evidence. There has been a complete failure, in our view, to engage meaningfully with the requirement that "*materiality*" must be conducted by reference to all the other evidence at the trial and not be considered in isolation. In that respect there are two inconvenient features of the case from the appellants' perspective. The first is that the Special Criminal Court regarded Mr. Cullen as being "*a witness who presented with significant difficulties in relation to his general credibility*", and it said that "*there are many reasons to be circumspect about the serious propositions put forward by this witness*". Accordingly, the court below was unprepared to act on his evidence, save to the extent that it could be corroborated. Second, the Special Criminal Court was satisfied that the evidence corroborating Mr. Cullen's assertions was so strong that it was also capable of independently convicting each of the accused, such that it did

not have to rely on the potentially suspect evidence of Mr. Cullen in any material respect. All of this begs the question: how, in the light of those two circumstances, might the fresh evidence which the appellant seeks to have admitted have had a material or important influence on the result of the case? We are satisfied that there is nothing in that material that could have made a difference to the outcome.

106. We are further satisfied that there is nothing in the fresh evidence to suggest that there was material non-disclosure in regard to the 2017 trial.

107. In the circumstances the applications to adduce fresh evidence are refused.

The residual non-disclosure complaint

108. It is necessary to address the complaint made by the appellants that they believe that, quite apart from anything that might have been suggested in the later trials of *Braney* and *Kennedy and Murphy*, there was material non-disclosure in the 2017 trial. However, as has been pointed out by the respondent, the appellants have not been able to point to a single specific document that they say they were entitled to, but which was not disclosed. Moreover, we also take the point made by the respondents that the appellants are ostensibly conflating the State's disclosure obligations with the separate requirement on the State, per the *Braddish v. DPP* [2001] 3 I.R. 127 line of jurisprudence, to seek out and gather relevant evidence. That this is so is apparent from the following exchanges on the first day of the appeal hearing before this Court between counsel for Mr. Kelly and a member of our bench:

> "*JUDGE:* [Counsel]*, in that respect I was trying to get it clear in my mind what exactly you are saying. Could you itemise the documents that you say were not disclosed? Now, I know you've a complaint that key communications were not recorded in writing and you say that this was a stratagem to avoid the required transparency that the law requires post-Gilligan and so forth, but in terms of documents that you say have subsequently come to light and which were not before the Court at the critical time, can you itemise them?*
>
> *COUNSEL: Judge, first of all, the only documents that I'm going to be focusing on with regard to non-disclosure are documents which arise in the fresh evidence. As far as the complaint is concerned that I'm asking this Court to focus on and was asking the Court of trial to focus on, the issue is focused on the fact -- on the demonstrated evidence that the gardaí did not put in writing what actually happened during these key meetings. The answer that is put by the prosecution on this question*
>
> *JUDGE: But that's not ...*
>
> *COUNSEL: I'm sorry?*
>
> *JUDGE: I mean, your complaint is there's a failure to record. Disclosure is where a record is exists and it's not made available. They're two different things and you seem to be conflating them.*
>
> *COUNSEL: This is a key issue for determination by this Court, Judge. I know very well that this proposition is well and widely accepted, in general, that when one speaks of disclosure, one speaks of documents.* […]*. But in 2014 the Court took a very unusual step. That was to make an order explicitly directing the gardaí and the prosecution to actually ensure that gardaí actually made statements setting out in full the relevant events, what*

was said in all contexts, relevant to the issue of how David Cullen went from being an accused to having the charge dropped against him and becoming a witness.

[…]

Therefore, we are not just talking about the general understanding that disclosure is about documents […]. *So I respectfully submit that this is a matter of disclosure because in the particular circumstances of this case the Court made an order that disclosure demonstrably could not -- the disclosure obligations demonstrably could not be satisfied and had not been satisfied by the mere provision of documents*".

109. We are satisfied that the appellants have not sustained their complaint that there was any material non-disclosure by the prosecution in the context of the 2017 trial, in the accepted and well established sense of making the defence aware of the existence of documents that might be of some assistance in damaging the prosecution case, that might be of some assistance in opening lines of inquiry to the defence, or that might be otherwise of some assistance to the defence case. In this regard we note that disclosure issues were canvassed at length before the trial court from day 3 to day 8, with the defence unsuccessfully seeking disclosure in eleven categories. No specific complaint is made about that ruling. A renewed application was made in the course of the cross-examination of Mr. Cullen, and it was again refused in a ruling on day 22. Once again, no complaint is made about this ruling.

110. The respondent says that the appellants' complaints about disclosure seek to argue numerous failings in disclosure based on inferences that they invite the Court to draw from supposedly false evidence given to the trial court by members of An Garda Síochána in the 2015 trial. The appellants seek to argue numerous failings in disclosure as though there was no distinction between the two trials. It is axiomatic, says the respondent, that the only court which could come to a conclusion as to any such falsehood for the purposes of the 2017 trial was the court that heard the 2017 trial. The Court examined *de novo* the issues around disclosure and found there were no relevant failures. We think these are points well made.

The failure to rule the evidence of David Cullen inadmissible

111. The grounds of appeal of both appellants which we have grouped for consideration under this heading also include a complaint that the trial court erred in refusing to rule that the evidence of Mr. Cullen was inadmissible.

112. The appellants both contended before the Special Criminal Court, and again before us, that the evidence of Mr. Cullen should have been ruled inadmissible on the basis that the circumstances in which it was procured breached minimum standards as to fair procedures. While the appellants respective written submissions on this aspect of the case are exceedingly detailed and we have had full regard to them, they are each helpfully summarised within those submissions, and we adopt those summaries for the purposes of this judgment.

113. In the case of the written submissions on behalf of Mr. Kelly, what are described as his "*outline arguments*", which are later elaborated upon in great detail, are set out at para 2-1 thereof, in the following terms:

"*2-1. The appellant submits as follows:*

i. A deal was done with DC [David Cullen] *regarding benefits he would receive under the Witness Security Programme;*

ii. *A deal was done with DC regarding prosecutions including dropping the murder charge and other matters including the murder of Eamonn Kelly;*
iii. *The deal process must be open to scrutiny to uphold fair trial rights and the integrity of the process and the criminal justice system generally.*
iv. *There was a deliberate policy not to record in writing what was said in making the deals;*
v. *The Gardaí concealed from the defence what was said in making the deal in particular regarding prosecutions;*
vi. *The Gardaí concealed from the Court in the first trial and misled the Court in both trials as to what was said in making the deal re prosecutions;*
vii. *The disclosure process was grossly defective;*
viii. *It was not possible to subject the deal process and therefore the reliability of DC given the above; and it was not fair to allow the prosecution to call him to give evidence in the trial proper*".

114. In the case of Mr. McGrath, the summary of his case in this regard is to be found at paragraphs 43 to 45 of his written submissions, which state:

"*43. It is respectfully submitted that the anticipated and actual benefits which accrued to Mr Cullen were of such significance that either on their own, or in combination with:*

- *his admitted willingness to lie, including on oath;*
- *the fact that he would, or believed he would, be ejected from the programme if he did not give evidence; and*
- *the fact that he had prior knowledge from the book of evidence of the proposed evidence against both himself and the other accused so as to be able to fill in gaps in the prosecution case;*

his evidence ought properly to have been excluded.

44. It is submitted that the benefits to Mr Cullen were exceptional. The murder charge against him was dropped. He pleaded guilty to a firearms offence and received a 7-year sentence, half of which was suspended.

45. He had sought but was refused payment of €10,000 but was to be maintained on a 'like-for-like' financial basis in the new jurisdiction".

115. The detail of the complaints advanced on behalf of Mr. Kelly covers the subject of benefits received by Mr. Cullen under the Witness Security Program, and the role of his solicitor in the negotiations around all of that. The solicitor had acted as his agent in the negotiations relevant to the protected witness process and relevant to the murder charge being dropped in exchange for Mr. Cullen making statements and becoming a witness. The solicitor's notes of relevant discussions were, it was claimed, insufficient but were nonetheless of very great significance. They had only been disclosed after the court in the 2015 trial had directed that they should be provided to the defence. In the 2017 trial the defence had sought access to the remainder of the file to be able to satisfy themselves that it did not contain any other notes or records of relevance other than those that had been disclosed, notwithstanding assurances given by the solicitor that it contained nothing of that sort. In response to this the solicitor asserted solicitor/client privilege over the

undisclosed contents of his file, although he indicated that he was prepared to allow the trial court to look at it. However, the defence sought to insist that the prosecution should be shown it first with a view to them removing any material prejudicial to the defendants before the file was passed to the trial court. This was not acceptable to Mr. Cullen's solicitor, who in the circumstances maintained an unqualified claim of privilege. The solicitor's claim of privilege was upheld by the trial court, which ultimately did not receive the file. The appellants maintain that as a result they did not know what went on and what was said and done between the prosecution authorities, Mr. Cullen and the solicitor.

116. The submissions on behalf of Mr. Kelly are critical of the accuracy and reliability, and indeed the credibility, of aspects of the evidence given by various Garda witnesses concerning what assurances had been given to Mr. Cullen, and what commitments he had received, in the course of the controversial negotiations; and they contain suggestions of inconsistencies in the evidence received from various gardaí both *inter se*, and with respect to certain evidence given at the trial by a senior official in the DPP's office. It was further claimed that various members of An Garda Síochána who were witnesses and who gave evidence concerning the negotiations were guilty of giving false and or misleading evidence either in the course of the 2017 trial or during the previous trial. The submissions focus very much on the question of what assurances and commitments might have been given to Mr. Cullen, i.e., with respect to whether the charge against Mr. Cullen for the murder of Mr. Butterly would be dropped, with respect to whether he would also not be prosecuted for the murder of one Mr. Eamon Kelly, with respect to what financial incentives were being offered to him, and with respect to whether other material benefits, concealed and undisclosed, had been provided to him. A possibility was also canvassed that off-camera inducements were offered to Mr. Cullen by the members of the gardaí who took his statements to fill in certain gaps in the prosecution narrative.

117. It was also complained that gardaí had not noted what was said and done in crucial situations; that the senior official from the DPP's office apparently had no notes of his meeting with senior gardaí or the consequences of it; that there had been a deliberate policy of not noting relevant matters amounting to an abuse of process; that there was a demonstrated failure to note what was actually occurring with regard to negotiations and benefits, financial or otherwise; that there had been disregard of the legal obligation to make the process transparent and capable of being monitored and subsequently assessed; that the appellants were entitled to ask about what exactly he was looking for in terms of benefits; that there had been a conversation about relevant matters off camera, and; that there was a lacuna in the evidence in that no explanation was provided for what had occurred with respect to the negotiations for 11 days between the 11th of June 2014 and the 23rd of June 2014.

118. There were yet further complaints that Mr. Cullen was inherently unreliable and not credible. In that regard it was asserted that Mr. Cullen had prior knowledge from the Book of Evidence of the proposed evidence against both himself and the other accused persons, and from his access to the exhibits in the case (other than the CCTV items), thereby enabling him to manufacture evidence against his co-accused so as to fill gaps in the prosecution case in the course of making his witness statement. It was further claimed that Mr. Cullen was a fantasist, and

that he had a history of mental illness supporting the possibility that he was capable of inventing such evidence.

Counsel for Mr. McGrath indicated that he was adopting the submissions made on behalf of Mr. Kelly, as well as relying on his own written submissions. The written submissions on behalf of Mr. McGrath seek to illustrate his three core points (i.e., (i) Mr. Cullen's willingness to lie; (ii) Mr. Cullen's fear that he would be ejected from the WPS if he did not give evidence, and; (iii) the fact that Mr. Cullen had prior knowledge from the book of evidence of the proposed evidence against both himself and the other accused so as to be able to fill in gaps in the prosecution case) by reference to quotations from the transcript, and we have considered these.

119. Both the trial court and this Court were referred to various authorities including *D.H. v. Judge Groarke & DPP* [2002] 3 I.R. 522; *Byrne v. DPP (at the suit of Garda Enright)* [2011] 1 I.R. 346; *People (DPP) v. Doyle* [2018] 1 I.R.1; *People (DPP) v. Gilligan* [2006] 1 I.R. 107 and *People (DPP) v. J.C.* [2017] 1 I.R. 417.

120. The trial court ruled on the admissibility issue on day 30 in a lengthy ruling running to thirteen pages of transcript in which it sought to engage with the various issues raised by the appellants and ultimately refused the application to rule the evidence of Mr. Cullen inadmissible. We will refer to this ruling to the extent necessary to address complaints about it which were canvassed on the appeal.

121. The ruling is criticised by the appellants on the following basis, per paragraph 2-69 of the written submissions filed on behalf of Mr. Kelly, but also adopted on behalf of Mr. McGrath. It is complained that:

> "*i. The Court purported to apply the correct legal test under Gilligan: whether the prosecution proved that the process in relation to DC was such that the admission of his evidence would not be in breach of minimal standards of fair procedures;*
>
> *ii. However, the Ruling fails to address the relevant issues in that regard. For example, the court held that Gardaí did not deliberately commit perjury but did not address the various proven instances of Gardaí not telling the truth and failing to disclose crucial information and documents; and failing to put crucial information in writing either by way of contemporaneous note or by adequate statements;*
>
> *iii. The Ruling appears to ignore the history of untruths and disclosure failures before during and after the Appellant's first trial and throughout; ignores the fundamental question as to whether the court could trust or have confidence in the disclosure process; and ignores the fact that the Court in the previous trial found after 55 days that it could not, and it was apparent that the prosecution had not acted properly on foot of that finding;*
>
> *iv. The Ruling fails to address the question as to whether, having regard to proven instances of DC telling untruths he had repeatedly given perjured evidence and was so unreliable that having regard to all the circumstances his evidence could not be relied on at all*".

122. The respondent's submissions seek to address the complaints made in some detail. The point is made that there is no reported case in this jurisdiction in which a court has declined to entertain the evidence of an otherwise admissible witness in circumstances of this kind. Many

cases have been prohibited or dismissed on "*P. O'C*" grounds, but in no case which has otherwise proceeded to hearing has a court's entitlement to hear, evaluate and, if necessary, attach no weight to the evidence of a witness been considered an inadequate safeguard for the rights of an accused person. It was submitted that it is even less tenable to argue for the exclusion of the evidence of Mr. Cullen in a case where the court of trial in giving judgment must explain in detail the approach taken to his evidence and the reasons why it, or any part of it, is accepted or rejected.

123. It was submitted that the evidence of a witness who is an accomplice and in a witness protection programme is admissible evidence and should be excluded only if it falls below the standard of fundamental fairness. The court can treat such evidence with caution and may have to carefully weigh such evidence in the light of other evidence in the case. In *People (DPP) v. Gilligan* (previously cited), the Supreme Court (Denham J., as she then was) stated at para. 150:

> "*Such evidence is admissible but should be excluded if the circumstances fall below the fundamental standard of fairness*".

124. It has been urged upon us that in the instant case counsel for the appellant herein had no difficulty in cross examining Mr. Cullen; there was nothing unfair in the disclosure process and there was nothing inherently in his evidence (when contrasted with other evidence in the case) which revealed that it was all so unreliable that it should be wholly excluded from the trial court's consideration.

125. The respondent contends that the legal principles set out by the trial court at paragraphs (a) to (f) of its ruling of the 24th of February 2017 correctly summarise the effect of the decision of the Supreme Court in *People (DPP) v. Gilligan*. It is suggested that there was ample evidence entitling the trial court to reject the suggestion that there was a deliberate attempt to conceal events relevant to Mr. Cullen's decision to provide a written statement. The trial court was in a position to evaluate the witnesses whose evidence it had considered and to take the view, which it did, that lines of communication were capable of leading to nuances of understanding by one or another party at any particular time. These nuances, it was submitted, had no bearing on any matter of substance relating to the question of whether Mr. Cullen could be heard by the court below, but the trial court was above all entitled to take this view.

126. It was argued that the trial court was wholly entitled to arrive at a conclusion that the representatives of An Garda Síochána and the DPP committed no deliberate perjury and that the evidence was ample to give it a sufficiently objective picture of the process. Contrary to the impression given by the appellant's submission, and consistently with the judgment of the Special Criminal Court, the *Gilligan* judgment centres on the importance of taking a note of the statement of the proposed witness, and it does not impose a test of comprehensive note taking of every encounter at every stage of a process.

127. The respondent submits that notwithstanding this, there was an ample record on the basis of which the trial court was entitled to find that there was no reasonable evidence for the existence of any unrecorded process.

128. It was submitted that there was no evidence whatever to indicate that the expectation of any particular financial reward gave rise to Mr. Cullen's statement. The evidence was said not to be coercive in that there was no, or no significant, financial benefit, and that the witness's

circumstances were in no material way better than they had been prior to his entering the witness protection programme. The respondent says that the trial court was plainly entitled to take this view on the evidence, and it is hard to see how it could have taken any other.

129. It was submitted that the trial court had correctly observed that the fact that Mr. Cullen had given significant evidence in the support of the prosecution case, and in doing so had arguably filled possible gaps therein, was a matter for that court to consider in relation to weight, but it was not one which should go to admissibility.

130. It was submitted that the trial court was correct to take the view that the suggestion that mental illness had influenced or affected the evidence given by Mr. Cullen was fanciful.

131. The appellants object, *inter alia*, to the following observations and findings by the trial court:

> "*As to the evidence of the members of the investigating team and their respective discussions with* [Mr Cullen's solicitor] *and* [the senior officer from the DPP's office]*, in the final analysis, the Court concludes that their understanding or interpretation of these discussions are entirely irrelevant to Mr Cullen's initial decision to become a State witness, to the contents of his witness statement or to any subsequent matters arising in relation to Mr Cullen's participation in the witness protection scheme. As for the officers who conducted the witness protection aspect of the matter, the Court is satisfied that their behaviour was appropriate at all times and in all respects. In particular, the Court was impressed with the accuracy of the evidence from Sergeant Murphy and fully accepts his account of matters, particularly as to the exploratory nature of the initial meeting between the investigating members and the witness protection members on the 26th of June 2014. In the view of the Court, it is essential that such a meeting should take place in such circumstances. The primary consideration for the witness protection team at that particular juncture was whether Mr Cullen was likely to be in custody after sentence on a lesser charge because the witness protection considerations would obviously vary depending on whether Mr Cullen was in prison or at large. It is also proper that they gave some general guidance to the investigating officers as to issues that might compromise any subsequent witness protection process as the investigating officers are not necessarily familiar with the operational details of a witness protection programme. The Court finds no impropriety or concealment in the interactions between the two teams of officers in this case*".

132. The respondent says that the trial court was entitled to take the view that nuanced differences of understanding between members of An Garda Síochána as to the exact state of the discussions concerning Mr. Cullen's possible admission to the witness protection programme, prior to the making of his statement, were irrelevant to Mr. Cullen's initial decision to become a State witness and to the contents of the witness statement and any subsequent matters arising in relation to Mr. Cullen's participation in the witness protection scheme. Its further conclusions in relation to the witness protection programme in this respect were not only founded on the evidence, but a coercive conclusion was founded on it.

133. It was urged upon us that the trial court was fully entitled to find, as indeed must be the case, that the fact that the witness had committed himself to a broad account of his evidence

relating to the trial by the 27th of June 2014 greatly lessened the potential impact of later events on his evidence, even if there had been any such. All the evidence in the case strongly negated the possibility that there was any parallel set of incentives or distortions operating, other than those of which there was evidence and which the trial court could consider in evaluating the reliability of the evidence of Mr. Cullen in its consideration of the evidence as a whole at the trial.

134. It was submitted that there was ample evidence that the issues sought to be canvassed in relation to the *Kelly* matter were inconsequential. It was submitted that it was plain that Mr. Cullen always knew this. While the pertinent consideration was Mr. Cullen's perception of risk, his claim that he felt at no risk in relation to the Kelly murder was buttressed by the evidence of Inspector Scott, the officer in charge of that investigation, who confirmed that Mr. Cullen never came to the interest of the investigation at all. The fact that Mr. Connolly, Mr. Cullen's solicitor, was cautious when the matter was first mentioned is understandable since, for what are now obvious reasons, he knew nothing about any potential connection which his client might have had with it when the matter was first mentioned.

135. The respondent says that all other aspects of the trial judge's ruling were amply founded on the evidence.

136. In summary, the respondent contends that the trial court correctly applied the *Gilligan* principles; that there were no "*proven instances*", as alleged by the appellants of gardaí not telling the truth and failing to disclose crucial information and documents; that even if there were "*proven instances of gardaí not telling the truth*", which the respondent says the trial court was entirely entitled to find there were not, the appellants had not satisfactorily explained how they should operate to necessitate the unprecedented step of causing the trial court not to have regard to his evidence as part of its substantive considerations. There was no evidence that gardaí failed to disclose crucial information or to put it in writing. The respondent was not seeking in any way to deny the general obligation to gather relevant evidence and to make it available. However, the existence of this obligation does not in any sense require the making of statements by potential witnesses if they have nothing to state.

137. It was further submitted that insofar as the appellants have sought to rely upon rulings in the 2015 trial, their attempts to do so are fundamentally misconceived. It was the duty of the trial court in 2017 to assess the evidence which came before it as providing the foundation for its wider decisions and specifically, in the context of the present discussion, for its decision as to whether to admit the evidence of David Cullen or not. To the extent that the rulings of a court at an earlier trial have any relevance, an acquittal had been refused by the court trying the case in 2015 because it considered that the matter should be retried. If, on an application to the Special Criminal Court at the outset of this case, that court had concluded that a fair trial could not be had, it was required to make its own decision and act in consequence of that. It could not be bound by the ruling of another court taking the view that a trial could take place. Conversely, findings by the 2015 trial court were ones which were founded on the evidence given before that court. They could in no circumstances absolve the 2017 trial court from taking its own view on the evidence properly before it.

138. Finally, it was submitted by the respondent that the ruling now being challenged properly expressed no concluded view about the specifics of Mr. Cullen's evidence. While even a conviction

for perjury may reduce the weight to be given to the evidence of a witness to little or nothing, there is no rule that a trial court should not consider it for what it is worth.

Decision on the admissibility issue

139. The issue for the court below, and for us on this appeal, is whether deficiencies in disclosure or otherwise were such as to have impaired the capacity to cross-examine Mr. Cullen for the purposes of the trial in 2017; and whether the circumstances of the taking of his statement and his coming to give evidence were such that the court below could not fairly embark on a consideration of its weight, if any.

140. We have considered the evidence in the case, the arguments that were made on both sides, and the ruling of the trial court. We are satisfied that the trial court's ruling was based upon an appropriately detailed and rigorously analytical assessment of the evidence and of the arguments. In our judgment, the trial court made appropriate findings of fact grounded in the evidence and applied the correct legal principles to those facts, namely those set out by the Supreme Court in *People (DPP) v. Gilligan* [2006] 1 I.R 107.

141. We were not impressed by the submissions on behalf of the appellants. In our judgment, they were in large measure based upon conjecture, suspicion, and speculation; none of which was borne out in the evidence. There was no non-disclosure relevant to the admissibility issue, and there was no failure to seek out relevant evidence. We accept the point made by the respondent that the obligation to seek out relevant evidence does not extend to taking statements from witnesses who have nothing of relevance to contribute.

142. While there was no doubt that Mr. Cullen presented as an unattractive potential witness given his admitted willingness to lie, his role as an accomplice, and the possibility, even likelihood, that his co-operation with the prosecution was selfish and self-serving, none of those things in themselves provided a good enough reason to exclude his testimony as inadmissible. Neither was the fact that he had had sight of the Book of Evidence, and some of the exhibits, and to some extent at least may be presumed to have known the strength of the prosecution case against both himself and his co-accused. If gaps were ostensibly filled, as was suggested, that was a matter going to the weight of his evidence. Indeed, all of the issues relied upon by the appellants were, it seems to us, relevant only to weight.

143. Consistent with that, the evidence of Mr. Cullen was properly admitted in our judgment, following which the approach to it adopted by the trial court is succinctly encapsulated in the following passages from their ultimate judgment delivered on the 9th of March 2017, and seems to us to have been impeccable. They stated at the outset of their judgment:

> "*For the present purpose, in structuring an approach to the evidence in a case involving such a witness, Gilligan holds that the appropriate approach for a Court to take to such evidence includes analysing the credibility of such a witness in the light of all of the evidence in the case. Therefore, the Court will first look at the facts established by the other evidence in the case before it assesses what weight, if any, to attach to the evidence of the accomplice and protected witness in this case*".

Then, later in the judgment, and following a review of the evidence, they further stated:

> "*The Court will now proceed to consider the case of each accused separately in the light of the evidence just recited and taking into account additional pieces of evidence to be*

considered at significant points in each case. The purpose of approaching the matters in this way is to assess what matters the prosecution have proved to the necessary standard without any reliance on the controversial evidence of Mr Cullen, and also to provide a frame of reference within which to consider the evidence of that highly contentious witness. The Court will begin the analysis in each case by applying the presumption of innocence to each accused, and analysing the body of evidence to assess the extent, if any, to which the prosecution have succeeded in rebutting that presumption by proof beyond reasonable doubt. Proof to that standard will not be established where the evidence discloses a reasonably impossible interpretation consistent with innocence".

144. As we have seen the trial court ultimately felt that they could attribute very little weight to the evidence of Mr. Cullen, and they were unprepared to act on it save to the extent that it was corroborated. Moreover, as it transpired, available circumstantial evidence that was capable of corroborating his testimony was, in the trial court's view, sufficient in its own right to establish the guilt of these appellants beyond a reasonable doubt.

Overall conclusion with respect to this group of grounds

145. In the circumstances outlined we are not disposed to uphold any of the grounds of appeal grouped for consideration under this heading.

Issues concerning the Court's Refusal to Recuse

Sharif Kelly – grounds (iv), (v) and (vi); and Edward McGrath - grounds (x), (xi) and (xii)

146. The substance of the complaints grouped for consideration under this heading is that the trial court erred in refusing to recuse itself on the grounds of objective bias in response to an application in that regard made on day 13 of the trial by counsel on behalf of Mr. Kelly, which application was supported by Mr. McGrath's counsel, and that in circumstances where the trial court had refused to recuse itself the appellants' respective rights to a fair trial had been disrespected and breached.

147. The complaints giving rise to the recusal application related principally to admittedly trenchant exchanges between counsel and the bench (principally although not exclusively during the *voir dire* on day 13 of the trial with respect to disclosure issues and whether the evidence of Mr. Cullen should be ruled inadmissible) concerning the manner in which counsel was cross-examining Superintendent Martin by reference to the transcript of the 2015 trial. The appellants assert that the trial court repeatedly interrupted the cross-examination; that it was hostile to and dismissive of the potential relevance of the line of questioning being pursued; and that it indicated possible pre-judgment or premature judgment on the issues in controversy; all to such an extent that a reasonable and fair minded independent observer, who was not unduly sensitive, and in possession of all of the facts, would have apprehended that the appellants were not receiving a fair hearing from an impartial tribunal on the issues. In further support of the application it was also complained that the behaviour of the presider amongst the panel on the bench extended to shielding, protecting and cossetting the witness; that he had made observations and comments which had the appearance of encouraging the witness or of seeking to guide him towards a particular response; and that he had commented inappropriately that a "*major indulgence*" was afforded to counsel by the trial court allowing him to cross-examine the witness on matters that he (the presiding judge) perceived to be of dubious relevance.

Although the law on objective bias was never in dispute, the appellant's written submissions to this Court contain extensive references to caselaw and we have had regard to the authorities cited, most of which we were already familiar with. These included *A.P. v. Judge McDonagh* [2009] IEHC 316; *Kenny v. Trinity College & Dublin City Council* [2008] 2 I.R. 40; *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 419; *Commissioner of An Garda Síochána v. Penfield Enterprises Ltd* [2016] IECA 141; *Locobail (UK) Ltd v. Bayfield Properties Ltd* [2000] 2 W.L.R. 870; *Goode Concrete v. CRH Plc* [2015] 3 I.R. 493; *Gill v. Connellan* [1987] I.R. 541; *Orange Ltd. v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159; *E.P.I. and Others v. Minister for Justice Equality and Law Reform* [2009] 2 I.R. 254; *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4. I.R. 412; *Dublin Wellwoman Centre v. Ireland* [1995] 1 I.L.R.M. 408; *People (DPP) v. McGuinness* [1978] I.R. 189; *State (Hegarty) v. Winters* [1956] I.R. 320; *Dineen v. Delap and the DPP* [1994] 2 I.R. 228; *Farrelly v. Judge Watkin and the Director of Public Prosecutions* [2015] IEHC 117; *People (DPP) v. D.C.* [2019] IECA 367; *O'Callaghan v. Mahon (No. 2*) [2008] 2 I.R. 514; *DPP v. WL* [2016] IECA 284; *Serafin (Respondent) v. Malkiewicz and Others* [2020] UKSC 23; and *Maher v. Kennedy & DPP* [2011] IEHC 207.

148. The application for a recusal was refused, the trial court providing detailed reasons for doing so. Although the ruling is moderately lengthy, we feel it is necessary to quote the greater part of it for the purposes of this judgment. After noting some of the procedural history of the case and determinations already made on issues arising in the trial, the court noted the "*unusual not to say novel*" basis on which counsel were seeking to have the evidence of Mr. Cullen deemed inadmissible, commenting that "*it is certainly unusual if not absolutely unique*". The ruling then continued:

> "*The Court has not been favoured at the outset of this issue with a precise opening statement from* [counsel for Mr. Kelly] *on the issue, nor does it have to be, but the absence of such a statement makes it incumbent on counsel to make the matter clear, either by the manner in which cross-examination is conducted or by subsequent submissions, which is a stage, of course, that we have not reached in relation to this issue. The Court has to note that clarity has not been a feature of the presentation of this case to date. That is not a remark that the Court is making for the first time, or simply in the context of this ruling. A fair look at the transcript will reveal that the unconventional manner in which witnesses have been approached and cross-examined during this case has been a matter of consistent concern for the Court. The Court has made gentle observations and suggestions as to how it would prefer matters to be dealt with but, notwithstanding what* [counsel for Mr. Kelly] *subjectively thinks, those observations or requests have not, to date, been taken up by him and the technique of using the previous transcript entirely out of sequence and entirely out of context, and the quotation of large parts of that transcript to witnesses, has continued apace and that, as I say, is not a recent or novel concern. It has been a consistent concern, and a concern which the court has expressed on a number of occasion* (sic)*. This technique, although the Court has permitted it to continue despite observations, is not particularly helpful, either from the point of view of witnesses or for the Court in getting to grips with the issues presented.*

As the matter has been raised by counsel, it is necessary to say that the ongoing concerns about [counsel for Mr. Kelly's] *consistent approach to this case became acute during the hearing of this issue. The Court actually considered, before the issue arose today, whether or not it should make some direction of* [counsel for Mr. Kelly] *as to the matter in which the Court required this, and perhaps other matters, to be approached in view of the unhelpful results of how the matter had continued up to that point in time. The Court refrained from doing so, because to do so might perhaps be construed as an unjustifiable attempt to confine the matters under discussion, so it took the approach that, notwithstanding the concerns that it had that* [counsel for Mr. Kelly] *should be allowed to continue so far as was reasonable in the previous vein, and this concern arises generally but the concern also arises that there was a certain amount of revisiting, under the guise of this cross-examination, the matters already ruled upon by this Court in relation to disclosure issues. But the Court, in the interests of getting to the end of the matter, let those matters go and decided to let cross-examination continue in the previous manner, so far as was reasonable; perhaps judging on the basis of the lack of success of previous remarks or interventions that it was perhaps better to, in the long run, let matters run their course.*

Nonetheless, as the point has now been raised, the Court feels it necessary to point out that a criminal trial must have a focus, a quality which has sometimes been absent from this case. Cross-examination at a criminal trial, or indeed on an issue therein, is not at large. A point in contention must be put, preferably succinctly, to the relevant witness. Cross-examination must be focused because, if it's not, the case becomes unwieldy and difficult to try. The lack of focus in this case, as has been pointed out, has been a consistent issue for the Court to date. A trial Court is entitled and required to maintain focus so that it is not side-tracked by irrelevant materials or speculations.

The interventions in this case, which have been picked out and complained about by counsel, were designed only to attempt to keep this matter within reasonable bounds. The Court rejects the suggestion that a fair-minded observer of the entire trial would regard the Court's interventions on this matter as indicating pre-judgement of the overall issue under discussion in the issue concerned, or any undue unfairness. The Court will perhaps rather hope that the reasonable observer of the entire trial to date might wonder at the length of time that the matter was actually allowed to proceed for and might perhaps wonder at the latitude that was granted in relation to the cross-examination but whatever view is taken, whether it's the view pressed by defence counsel or the view just expressed by the Court, ultimately others will be the judge of that.

The factual matter under consideration is -- appears to the Court at least, to be confined to the issue as to whether Superintendent, or then Inspector, Martin has been less than candid with the Court, either on this or another occasion. The Court has regularly observed that what he said on another occasion, or what others may have said or done on other

occasions, is only relevant in the context of this particular trial if it has a context which is relevant to this particular trial which, in this case, would be to the discharge by the inspector of his functions concerning with the case -- concerning this particular case.

The Court is satisfied that [counsel for Mr. Kelly] *has had a full and lengthy opportunity to put whatever case he wants to the witness in that respect. That general issue, that broad issue, as to the candour of the officer on this or on other occasions, is fully open and, in the view of the Court, that issue could not have been taken to have been decided by reference to any of the matters referred to by counsel. The Court is entitled to come to a view on minor or obvious matters and the only concluded view in this case is as to the likely approach of an official in the Director of Public Prosecutions' office to how the question of a plea might arise and the circumstances in which that might arise. No view, good, bad or indifferent, bearing on the truthfulness, candour or otherwise of the officer concerned has been expressed or could have been taken by the reasonable observer to have been expressed by this Court.*

Now, the Court wishes to emphasise that what happened, or what has happened, in a previous trial is relevant only if it goes to the credibility of evidence in this trial, or if there is reason to think that a deficiency previously outlined in that trial is ongoing or has not been adequately addressed. If this type of case is to be made to witnesses in the current trial, both the Court and the witnesses concerned are entitled to clear suggestions about the case to be made by the accused in that respect. Now, the Court is satisfied that no reasonable observer would conclude that the issue under discussion has been decided already. The question of whether the witness should be excluded is fully open for discussion, as is the truthfulness, or otherwise, of the inspector and observations about the likely attitude of somebody in the DPP's office is of scant relevance to the decision on that particular issue.

However, as counsel have chosen to raise the matter, the Court wishes to be perfectly clear for the future about the approach to be taken. The Court positively requires that this case be conducted in a conventional way by reference to cross-examination on evidence in this trial in the first instance, by the propositions in issue being put in a clear and focused way to the issue -- or to the witnesses in this trial and by the previous trial only being introduced where evidence in the previous trial is either relevant to the credibility of a witness under consideration in this trial, or otherwise to a disposal of an issue in the current trial. The Court would suggest that simple adherence to this direction will minimise the necessity for any further intervention, but intervention will continue as and when it is deemed necessary, in order to keep this trial focused and on track".

149. Counsel for the respondent, who had opposed the application, has submitted that the trial court's ruling was appropriate and exhibits no error. In doing so, he makes a number of points, including that counsel for the appellant's submission to the court of trial on the recusal application had failed to deal with matters in sequence thereby giving no perspective to what had actually

taken place. Accordingly, the respondent would seek to do so for the benefit of the Court of Appeal.

150. It was submitted that what had given rise to robust exchanges on day 13 of the trial was defence counsel's approach to the cross-examination of Superintendent Martin, who was in the witness box, by reading to him sections of his and other witnesses' testimonies at the previous trial, on occasion omitting some portions of the transcript. The cross-examination included lengthy quotations from witnesses in the earlier trial which was at times confusing in nature and which on occasion included putting to the witness concerned, certain observations and involvements by the presiding member of the bench in that previous trial concerning how the court in that trial considered that the case should proceed. By way of illustration we were referred to the following exchanges at pages 23/24 on Day 13:

> "*PROSECUTING COUNSEL: Judge, there's a large part being left out of the transcript there and I'd emphasise again I can see some logic in his being asked what happened at the meeting, that's fine, and I can see, cumbersome as it may be, a reasonableness in asking this witness what he said at the last trial but asking him about what Superintendent Gilligan said at the last trial in circumstances where I think he was excluded at the time -- PRESIDING JUDGE: Mr O'Higgins, the Court has repeatedly made the point to* [counsel for Mr. Kelly]. *Now,* [counsel for Mr. Kelly] *is doing as he does. I'm reluctant to intervene in case one might be criticised elsewhere, perhaps one intervenes too much as it is, but really, and I'm pretty sure I can speak for my colleagues, this is of no apparent relevance, I simply say that.*
>
> […]
>
> *SENIOR PRESIDING JUDGE: Yes. Well, it appears that as regards Sergeant Archibald, Sergeant Murphy, Superintendent Gilligan, whom we'll no doubt be hearing from in due course whenever that might happen, we're having all this on the double. It's, I'll say it for the fourth time or perhaps the third time this morning, it is of no or minimal value.*
> *COUNSEL FOR MR. KELLY: Well, that places me in a difficult position, Judge, because it is absolutely crucial to the case which I am making to establish that this witness knew very well that not only he but other witnesses at this meeting were not giving the correct truthful description of what occurred and it is of absolutely fundamental importance in my respectful submission. If the Court takes a view at this stage that it doesn't matter, for example, if several gardaí together, in sequence, failed to tell the truth about what happened at the meeting, if that doesn't matter then I'm in a difficult position.*
> *PROSECUTING COUNSEL: Sorry, I'm not saying that, Judge. I'm saying that --*
> *SENIOR PRESIDING JUDGE: I wasn't saying that either. I am saying repeated questioning of a witness about what another witness said or done is of no or little value unless it is placed in the context of the discharge of his responsibilities in which case the Court would be very grateful if there was a clear exposition of what this witness is said to have done wrong*".

151. The respondent considers that the cross-examination was ostensibly directed towards importing into the 2017 trial the views of the trial court in the 2015 trial on the subject of the propriety of Garda behaviour. This was submitted to have been objectionable in principle. The only

way in which the court in the 2017 trial could arrive at a proper conclusion on the issues which it had to resolve was on the basis of primary evidence received by it in that trial. This could, of course, be tested by reference to inconsistencies in earlier evidence. Instead counsel for Mr. Kelly had attempted to conduct a reprise of selected elements from the trial in 2015 and, in effect, to have an argument as to what could be inferred from them. That had resulted in lengthy discussions, not on what happened in relation to disclosure and other matters, but in relation to what may or may not have been said about it by various witnesses in the previous trial. The purpose of the cross-examination was summarised by counsel for the appellant as being to elicit Superintendent Martin's alleged failures to disclose information in the previous trial. Superintendent Martin did not agree that there were such failures.

152. There had followed a detailed set of questions about the progress of the previous trial and quotations were put to the witness as to the conclusions of the court in the previous trial, which included references to counsel's submissions in the previous trial. The cross-examination had also proceeded by putting to the witness findings of the court in the previous trial. The respondent asserts that this was not done with a view to eliciting inconsistencies between the evidence given in this trial and evidence given by the witness on a former occasion, but involved the putting of matters from the transcript, not necessarily verbatim, as though to re-run the last trial, or portions of it, for evaluation rather than addressing the evidence in this one.

153. This approach was criticised by the senior presiding judge on day 13, and not for the first time. A similar approach had been evident on day 11, precipitating an intervention from the bench. In the ensuing discussion the following exchange had taken place:

> "*COUNSEL FOR MR. KELLY: Well, one aspect is the fact that I think that there were occasions while I was cross-examining witnesses that I incurred the displeasure of the Court in terms of how I approached the matter. I tried to respond and to work in a way which --*
>
> *SENIOR PRESIDING JUDGE: The main problem I had was the constant reference to the transcript of the previous trial without eliciting any evidence in this trial. That's the problem I had speaking personally*".

154. At the oral hearing of the appeal, counsel for the respondent isolated a further short exchange as typifying the ongoing difficulty for the trial court:

> "*Q. And what I want to suggest to you is that that is clearly giving the impression that there was clarity at that meeting, the 26th of June, that he was not to be given a yes to any of his demands; is that not so?*
>
> *A. To any of the demands surrounding the witness protection.*
>
> *Q. Well, that's actually not said there because the previous question and answer does relate to witness protection but this is a follow up question asking about any of the demands?*
>
> *SENIOR PRESIDING JUDGE:* [Counsel for Mr. Kelly]*, again I mean if there's a proposition to be put to the witness along these lines why can it not first be put in the context of this trial, see what the answer to it is and then revisit what was said on another occasion. I mean we're having this constant difficulty. This has no context for us, none*".

155. Yet another example was provided by counsel for the respondent, arising shortly thereafter:

> "*COUNSEL FOR MR. KELLY: You see I have to clearly suggest to you that you were giving the impression to the judges on the last occasion that there was no -- that the agreement at this meeting was there was to be no response to Mr Cullen or his solicitor to the effect we're going to run with your command, we're going to accept your demand in dropping the murder charge, that's the impression you were giving the judges; isn't that correct?*
> *SENIOR PRESIDING JUDGE:* [Counsel for Mr. Kelly]*, for the benefit of these judges, what are you suggesting to the witness about this meeting, never mind what impression he was giving on a previous occasion, what impression do you want us to take from it? Can you just put that clearly please?*
> *COUNSEL FOR MR. KELLY: Well, Judges, I have to explain why I've done what I've done because this is absolutely fundamental in the case. A very significant part of the case that I am making to this court is that the last court was not given the truth and that what occurred in the last trial is a matter upon which this court must have very grave concerns.*
> *SENIOR PRESIDING JUDGE: I'm just not clear what concerns it is we ought to have,* [counsel for Mr. Kelly]*. Could you just favour us with the clear suggestion of what it is you're driving at?*
> *COUNSEL FOR MR. KELLY: You were concealing from the Court on the last occasion the fact that there was actually an acceptance of his offer and in that sense that there was a deal offered and there was a decision to accept that deal from him, he makes the statements in relation to the Peter Butterly murder before this court and the murder charge would be dropped, that would be an agreement which was made on your side by the DPP and the guards and you kept that from the Court on the last occasion, that's what I'm suggesting to you?*
> *WITNESS: I don't accept that, Judges, I don't accept that.*
> *SENIOR PRESIDING JUDGE: I mean what was the Court on the last occasion to make of the fact that within a very short period of time he had made himself available under what he was demanding, made a statement and pleaded guilty within four days. Wasn't it as plain as a pikestaff that that bit at least had been agreed?*
> *COUNSEL FOR MR. KELLY: Well, that's what the defence position was but the prosecution position appeared to be --*
> *SENIOR PRESIDING JUDGE: Well, we weren't there on the last occasion,* [counsel for Mr. Kelly]*, so it's very difficult for us to determine what the atmosphere or content of those proceedings was*".

156. As the respondent points out, the cross-examination proceeded with yet further quotations from different days of the first trial. Lengthy quotations were put to the witness. This approach continued, with counsel for the appellant at one point putting to the witness the nature of defence submissions by Mr Hartnett SC in the previous trial which led to certain disagreements between counsel for the appellant and the trial judge.

157. Counsel for the appellant put to the witness the findings in relation to disclosure of the court in the previous trial; presumably, the respondent suggests, for the purpose of influencing the

court in this trial to take a certain view of disclosure. We were asked to note that disagreements then arose between counsel and the trial court as to whether what was being put related to a failure to make disclosure, as counsel contended, or some other failure. Counsel was asked if he now had the material which he was contending showed that there had been a failure to disclose at an earlier stage:

> "*COUNSEL FOR MR. KELLY: I can't answer that definitely, Judge, because -- partly because the position we adopt is that the disclosure process in this case, its credibility has been destroyed.*
>
> *MEMBER OF THE BENCH: Leave aside the credibility, I'm asking you do you have discovery or disclosure of the documents that you have sought, other than the ones that the Court has ruled against?*
>
> *COUNSEL FOR MR. KELLY: Well, I suppose, Judge, we were asking for detailed statements from various witnesses, that they should put in statement form the information that they had, and --*
>
> *SENIOR PRESIDING JUDGE: That's not disclosure,* [counsel for Mr. Kelly]*, that's not a disclosure process at all*".

158. The matter was brought to a head when a member of the bench intervened to try to ascertain the position of the defence asking: "*Well, can you answer my question, yes or no? you're conducting this trial and you're conducting these cross-examinations on the basis of documents which you now have, which you didn't have at the last trial?*" The response received was equivocal, with counsel stating, "*I don't know if the prosecution has other documents that they haven't told us about*".

159. The respondent contends that quite clearly the trial court was concerned that its task was to decide whether or not the evidence of Mr. Cullen could fairly be taken on the basis of disclosure now made. The position of defence counsel, who made no actual allegation of non-disclosure, appeared to be that because there had been, in his contention, an earlier failure to make disclosure the witness should not be allowed to give evidence regardless of whether or not anything remained to be disclosed by the time the 2017 trial was taking place.

160. Notwithstanding his exchanges with the bench, defence counsel had persisted in putting to the witness for his agreement that, on a number of occasions during the previous trial, the defence had been making submissions complaining about disclosure generally and that they had asked the court for an order directing the gardaí to produce narrative statements, which the court had done. This led to the following interjection:

> "*SENIOR PRESIDING JUDGE: We don't have these transcripts,* [counsel for Mr. Kelly] --
>
> *COUNSEL FOR MR. KELLY: Well, I'm referring --*
>
> *SENIOR PRESIDING JUDGE: Just tell us about what happened*".

161. Counsel then summarised the submissions he had made to the court in the 2015 trial, and again mentioned the order that the court had made. He was then asked if he had got anything on foot of that and responded that he had not, leading to the following exchanges:

> "*SENIOR PRESIDING JUDGE: And what is it that you didn't get that you ought to have got; would you make that clear for us?*

COUNSEL FOR MR. KELLY: Well, all of these admissions that this witness has made about giving immunity in respect of Eamon Kelly, about basically doing the deal that the murder charge will be dropped in exchange for the statement.
SENIOR PRESIDING JUDGE: You have all that -- you have all that now.
COUNSEL FOR MR. KELLY: So, it doesn't matter? The Court is just not interested in the fact that this witness concealed that in court --
SENIOR PRESIDING JUDGE: Well, we're interested in doing this trial, [counsel for Mr. Kelly]*, right.*
COUNSEL FOR MR. KELLY: Right, well if the position is that this Court actually doesn't care about the fact that this material was concealed from the defence, not just by this witness but by other witnesses as well, and then after the evidence is given, there's no further statement from the witness, I have to confront him with it in cross-examination.
SENIOR PRESIDING JUDGE: Yes, well, [counsel for Mr. Kelly]*, why don't you do that? If the submission is going to be made to us that we should disbelieve him as an incredible witness who has lied or been economical with the truth on previous occasions, the normal way to do that is to suggest it to the witness and then the Court will understand exactly where you're coming from, I would suggest.*
COUNSEL FOR MR. KELLY: Well, I thought I had made the position very clear, Judge.
SENIOR PRESIDING JUDGE: Well, it's in a very elliptical way, if I may say [counsel for Mr. Kelly].
COUNSEL FOR MR. KELLY: When I have -- when I have gone in that direction I've been shut down and told --
SENIOR PRESIDING JUDGE: You haven't been shut down at all, in fact, you've been allowed to cross-examine on something of that may be of dubious relevance for a whole day so don't go down that road. All right. You've been given very wide latitude.
COUNSEL FOR MR. KELLY: Well, Judge, you did actually indicate that --
SENIOR PRESIDING JUDGE: No, I'm not going to get into these exchanges, [counsel for Mr. Kelly]*, which are provoked, I apprehend, for the purposes of the transcript. If you want to cross-examine him in that vein, do it now before the opportunity passes*".

162. Counsel for the respondent maintains that the approach to cross-examination was fundamentally misconceived and his persistence in it provoked the predictable response to the effect that the court was trying the instant case, and not some other. It was submitted that the cross-examination sought to evade the fact that disclosure had been fully and fairly made, and to substitute an examination of the transcript of the previous trial, for any engagement with the issues which properly arose in this case; to seek to raise an artificial disclosure argument where the matter had been fully examined and ruled on, subject to ongoing obligations, for the unappealing task of having to engage with the evidence against the accused. If the presiding judge was perhaps frustrated by the approach of the defence, this was really a reflection of the nature of the cross-examination which proceeded on the false assumption that the prior transcript established axiomatic dishonesty, by which the court in this trial should be bound, and effectively repeated itself at great length.

163. It was submitted that the reasonable observer of the exchanges between counsel for the appellant and the presiding judge, with a full knowledge of the factors bearing on the exchanges witnessed by him or her, would fully understand the exercise by the court below of some discipline in the conduct of the trial. Observed by someone in this position, the exchanges, while trenchant, were readily explicable. It was submitted that the exchanges in question did not prevent cross-examination, nor did they prompt or tend to alter the evidence of the witness whose answers were clear and unambiguous both before and after the interventions complained of.

164. The respondent maintains that much of what was put was not relevant to the issues the court had to decide or involved oppressive repetition to points clearly answered, for better or for worse.

165. Accordingly, the respondent contends that the exchanges complained of fall far short of anything which might lead a reasonable observer to apprehend an unfair trial.

Decision with respect to the complaints about the failure to recuse

166. We have read the relevant transcripts and have considered the submissions on both sides, as well as the ruling of the trial court. We agree with the submission on behalf of the respondent that the appellant's submission failed to give adequate perspective as to what had taken place. However, we ultimately gained that perspective following a consideration of the relevant transcripts.

167. Having done so, we are satisfied that it would not be appropriate to uphold the complaints that the appellants make with respect to the refusal of the application to recuse. There were trenchant and indeed robust exchanges between senior counsel and the bench; but that was in circumstances where the patience of the bench was being sorely tried by counsel's persistence with his strategy of putting lengthy passages from the transcripts of the 2015 trial to the witness he was cross-examining and engaging only minimally, or not at all, with the evidence in the 2017 trial. We note counsel for the respondent's characterisation of the defence's approach to the cross-examination of Superintendent Martin as being misconceived, and we consider that characterisation to have been apposite.

168. It is important to record that although judicial frustration with the approach being taken was manifest from the exchanges, at no time was the bench discourteous or impolite towards counsel; nor was counsel ultimately prevented from cross-examining in the way that he wished. This was a cross-examination conducted by an experienced senior counsel, who was required to have a broad back, especially when dealing with a collegiate court, and who, it was reasonable to expect, should have been able to read his audience, and accept and respond to clear signals from the bench, and to adjust course during his cross-examination to tack across headwinds and currents emanating from the bench. It is part of the normal cut and thrust of advocacy to have to do so. It is clear that his strategy failed to engage the judges, and that he failed to gain traction for the premise on which his cross-examination was being conducted, rightly characterised as, "*the false assumption that the prior transcript established axiomatic dishonesty, by which the court* […] *should be bound*". The whole approach was untenable, and the trial court would not have been doing its job had it failed to signal that, and to endeavour to persuade counsel to refocus his cross-examination on issues arising from evidence actually before the trial court, or which the trial court would hear.

169. We are completed satisfied that the judicial interventions made were merited; that counsel was not improperly put off his stride, and; that there is not a scintilla of evidence to support the suggestion made by the first named appellant in his written submissions that the witness was being shielded, protected or cossetted by the court, or that he was at any stage guided towards a particular response or responses. We are satisfied there was no unfairness in the judicial interventions made. On the contrary, they were appropriate for the proper conduct of the trial and the efficient management of the scarce resource that is court time. It was not an overstatement, or in any way improper, for the trial court to have remarked to counsel that he had been given considerable latitude and major indulgence. In our view that was true, as considerable patience was in fact shown over the course of a lengthy cross-examination.

170. Moreover, counsel was not ultimately prevented from cross-examining in the way that he wanted. The fact that his approach failed to impress the trial court is neither here nor there. It was the judges' job to decide the case only on the evidence before them. If, after receiving clear flags that the trial court regarded questions about what had happened in an earlier trial as being irrelevant, counsel chose to persist with putting such questions, he can hardly complain that the trial court was not ultimately influenced by matters of that sort elicited during his cross-examination. It would of course be different if the trial court had been wrong in regarding what had occurred in an earlier trial as being irrelevant, but they were not wrong. On the contrary, they were completely right.

171. We find no error in how the trial court dealt with the recusal application, and we find its ruling on the issue to be cogent and compelling.

172. In conclusion on this issue we are not persuaded that a reasonable and fair-minded independent observer, who was not unduly sensitive, and in possession of all of the facts, would have apprehended that the appellants were not receiving a fair hearing from an impartial tribunal on the issues.

Overall conclusion with respect to this group of grounds

173. In the circumstances outlined we are not disposed to uphold any of the grounds of appeal grouped for consideration under this heading.

Issues Concerning the Credibility of David Cullen, Corroboration; Contradictory Evidence

Sharif Kelly – grounds (x) (xi) and (xii); and Edward McGrath – grounds (vi) and (vii)

174. In large measure the arguments advanced by both appellants in support of the complaints under this heading traverse ground already covered by the arguments presented in support of the claim that Mr. Cullen's evidence should have been deemed inadmissible. Once again, the appellants rely on the witness's admitted propensity and willingness to lie; on the fact that he was an accomplice; on the fact that he was a protected witness, and; on the fact that he had made his statement having had access to the Book of Evidence and to certain exhibits, and therefore knew what evidence the prosecution had against him and the other accused.

175. In Mr. Kelly's specific case it is complained that while the trial court in addressing the credibility of Mr. Cullen referred to a number of matters tending to show his unreliability, the trial court did not find that he was so unreliable as to be worthless as a witness and indicated that it could and did rely on his evidence on matters in respect of which there was corroboration - or where his evidence "*tallied*" with independent evidence. Nor did the trial court make a finding that

he had lied on oath either to it or to the 2015 trial court. In substance, it is contended that these conclusions were against the weight of the evidence and represented a significant error.

176. The first named appellant's written and oral submissions to this Court, which were adopted by counsel for the second named appellant, have sought to rehearse a long list of instances in which the appellants claim that the evidence demonstrates a willingness and propensity on the part of Mr. Cullen to lie, and of instances where the appellants claim it could be demonstrated that he had actually lied. Further reliance was placed on what was characterised as the dishonest use by Mr. Cullen at various stages during interviews, statement making and testifying in court of expressions like, "*don't know*", "*don't remember*", "*possibly*", and "*anything is possible*". In substance, the argument made is that the nature of Mr. Cullen's evidence was such that it should not have been regarded as being capable of being relied upon, whether or not it was corroborated.

177. The approach of the trial court was to apply the *Gilligan* jurisprudence and, consistent with that, to treat the evidence of Mr. Cullen with great circumspection. In our judgment, the trial court subjected his testimony to appropriately rigorous scrutiny and analysis, before arriving at the following conclusions (quoted earlier in this judgment but which bear repeating):

> "*In this case the Court is left in the position that the circumstantial evidence which implicates Mr Kelly and Mr McGrath in these matters is also corroborating -- is also capable of corroborating the broad proposition put forward by Mr Cullen that both Mr Kelly and Mr McGrath were present at a planning meeting in his apartment on the night before the murder at which the outlines of events on the following day were discussed by all present and that he was -- and that they were also both present at his apartment on the morning of the murder. To that extent at least, and that is all that is required for present purposes, Mr Cullen's account tallies with the facts as observed by others. However, because the evidence corroborating his assertions in this respect is so strong that it is also capable of independently convicting each of the accused, the Court does not really have to rely on the potentially suspect evidence of Mr Cullen in any material respect. However, having considered the evidence -- the entirety of the other evidence the Court is satisfied beyond reasonable doubt that Mr Cullen is correct insofar as his evidence establishes the broad proposition outlined above, if not all of the individual details claimed by him.*
>
> *In the final analysis, the Court wishes to say this: these cases amount to no more or no less than they appear to be on the surface. Both accused were apprehended by the Gardaí in the immediate aftermath of a callous, brutal and premeditated murder, both performing their assigned roles in an enterprise that had already achieved the desired result. All of the circumstantial evidence in each case points only in this direction. The direct evidence of Mr Cullen only confirms that which is already known or which can be established by logical inference. In the circumstances, the Court's verdict is that each accused is guilty of each count against him in the indictment*".

178. We find no error in the approach of the trial court. It is true that there is no explicit finding that the evidence of Mr. Cullen was worthless. However, we reject the suggestion that the failure to make such a finding, and instead to treat his evidence as capable of being relied upon where it was corroborated, went against the weight of the evidence and was flawed on that basis. The fact

that aspects of his testimony could be independently, and indeed be strongly, corroborated by evidence sufficient in its own right to support a conviction, demonstrates that these parts of his testimony could not be said to be worthless, and that they were capable of being relied upon. However, the critical feature of this case, which the appellants submissions fail to engage with beyond saying that they disagree with it, is the fact that there was sufficient material in the other evidence presented by the prosecution, quite apart from Mr Cullen's testimony, to enable the trial court to be satisfied beyond reasonable doubt as to the guilt of the accused. Accordingly, the testimony of Mr. Cullen, supported as it was by other evidence sufficient in itself to establish guilt, simply provided yet further evidence of their guilt.

179. In the circumstances we find no error on the part of the trial court in their approach to the weight to be attached to the evidence of Mr. Cullen, or as to the manner in which they found it to have been corroborated.

Overall conclusion with respect to this group of grounds

180. In the circumstances outlined we are not disposed to uphold any of the grounds of appeal grouped for consideration under this heading.

Issues Concerning the Onus and Burden of Proof and the Trial Court's Treatment of the Evidence

Sharif Kelly – ground (xiii); and Edward McGrath – ground (i)

181. Ground (xiii) on behalf of Mr. Kelly is pleaded in terms that:

"*The trial judges erred in failing to address the evidence in accordance with law, and in particular, the law as to the onus and burden of proof, including, in particular, regarding:*

(d) The evidence of the fingerprint and DNA in relation to the bag of clothes alleged to have been in the appellant's vehicle.

(e) The evidence as to whether the appellant's vehicle might have broken down.

(f) The finding that the appellant told particular lies".

182. Ground (i) on behalf of Mr. McGrath is pleaded in terms that:

"*The trial judges erred in finding that the prosecution had proved beyond a reasonable doubt that the appellant had the requisite mens rea for the charges on the indictment*".

183. The substantive arguments in support of these grounds were those advanced by counsel for Mr. Kelly, with counsel for Mr. McGrath adopting his colleague's arguments. However, in summary, the case being made on behalf of both appellants under this heading is that the court of trial made findings and drew inferences which it used to support its decision to convict based upon an assessment of the evidence that was less than sufficiently rigorous, and which chose to ignore, or which attached insufficient weight to, aspects of that evidence that were favourable to the defence. It is suggested on behalf of the appellants that the trial court failed to have proper regard to the fundamental principle that the onus and burden of proof lay at all times upon the prosecution to prove the guilt of the accused to the standard of beyond reasonable doubt. It was suggested that a proper assessment and analysis of the evidence would not have permitted a properly charged tribunal of fact to arrive at certain of the conclusions that the trial court did on several key sub-issues, namely (a) their conclusion that Mr. Kelly must have known of the presence of the items in the boot of the Opel Zafira that were later forensically linked to Mr. Dean Evans; (b) the trial court's conclusion that there was no possibility of forensic contamination,

involving secondary or tertiary transfer of trace evidence as postulated by the defence, to explain the presence of Mr. Evan's DNA on the clothing contained within the white plastic bag found in the boot of the Opel Zafira; (c) the trial court's rejection of the defence suggestion, and the evidence in support of it, that Mr. Kelly's vehicle might have broken down; and (d) the finding that the appellant Mr. Kelly had told certain lies. There is also a complaint that the trial court failed to engage with a defence suggestion that the finger-mark lifted from the white plastic bag and attributable to Mr. Evans could possibly have been left on the white plastic bag in the weeks or months prior to the event and be unconnected with the event. We will deal with each of these complaints seriatim.

Knowledge by Mr Kelly of the items in the boot of the Opel Zafira

184. The appellants' complaints are based on the fact that the only direct evidence as to whether or not Mr. Kelly had knowledge of the items that were found in the boot of the Opel Zafira were Mr. Kelly's denials in the course of being interviewed. In response to questioning, he indicated that "*I didn't know it was in my car*". Further, when asked, "*did anyone put that in your car?",* he replied, "*Not that I know*". The appellants' point is that the prosecution had not proved, they say, that other people did not have access to the vehicle and or that nobody else had placed the items in the boot. It was for the prosecution to prove beyond reasonable doubt that the appellant knew that the plastic bag was in his vehicle, and the appellants say the evidence did not establish that.

185. As the Director's submissions on this appeal point out, the trial court analysed the evidence in great depth. The defence cases depended upon acceptance of the existence of a series of possible coincidences. The issue of Mr. Kelly's knowledge of the items in the boot of the Opel Zafira had to be considered in the context of the evidence as a whole, and the trial court's assessment of that evidence having regard to the case being made by the prosecution. The judgment of the court below records:

> "*The Court is satisfied that the combination of the driving of the Corolla and the features of the location just outlined support the inference advanced by the prosecution, and support it beyond reasonable doubt, that this was the location designated for the destruction of the Corolla. The Court accepts the prosecution case that the destruction of the getaway car was then imminent, given the scattering of firelighters in the interior and the fact that Dean Evans had two cigarette lighters in his hands when he emerged from the car. It accepts that the Corolla had been driven off the road by Mr McGrath for this very purpose, apparently oblivious to the presence of Officer C on the road on behind him. There was no evidence that the Corolla was driven in a manner that would suggest that it was attempting to escape the attentions of a pursuer. Instead of accelerating away down the road, it made a turn that would have required deceleration and a relatively slow speed to successfully enter a narrow gate and laneway. The rather obvious conclusion from the circumstantial evidence outlined above is that Mr Kelly was both equipped and located to provide the necessary assistance to Mr Kelly* [Evans?] *and Mr McGrath, and was just about to do so but for the timely intervention of Officer C and his colleagues. Now, the Court cannot accept that separate items containing forensic links to Mr Evans were in this the*

luggage compartment of the Zafira by coincidence and without the knowledge of Mr Kelly. This is quite simply at least one coincidence too many. As the prosecution pointed out, the enterprise clearly called for somebody to fulfil the support role to the getaway car in early course or, as it was put, if Mr Kelly did not exist he would have had to have been invented. It is clear that a second getaway driver had be somewhere in the vicinity of this murder on that afternoon".

[Name query in square brackets by the Court of Appeal]

186. This Court has carefully considered the totality of the evidence in this case and we are absolutely satisfied that the trial court was perfectly entitled to reject the possibility that, unbeknownst to Mr. Kelly, items which could be forensically linked to Mr. Evans, happened to be in the boot of the Opel Zafira when he drove it that day, as being "*one coincidence too many*". It is not to ignore Mr. Kelly's assertion at interview that he had no knowledge of the items. Rather it amounts to an express rejection of that assertion. This was a conclusion that the trial court was entitled to arrive at on the evidence, and it was supported by the evidence. There is nothing to suggest a lack of rigour in the trial court's analysis of the evidence. On the contrary, the trial court's analysis on this sub-issue is cogent and compelling. We find no error of principle with respect to it.

Conclusions on possibility of forensic contamination

187. It was submitted in written submissions that "*crucial findings by the trial court on this issue were not reconcilable with an approach to the evidence which was consistent with legal rules*". This refers to how the court reconciled the evidence given respectively by D/Garda RH and Dr Sandra McGrath respectively, alluded to earlier at paras. 52 and 53 of this judgment, concerning the condition of the clothing in the white plastic bag found in the boot of the Opel Zafira, and in particular as to whether it had been laundered.

188. The prosecution's case was that the incriminating trace evidence found on the clothes in the white plastic bag was on the items before the involvement of the gardaí and not as a result of any contamination. D/Garda RH gave evidence of taking possession of the white plastic bag and its contents and testified, *inter alia*, that the clothing items "*were folded neatly and freshly laundered. Everything was clean*". At the end of his testimony this witness was asked by a member of the three-judge bench, "[…] *why do you say freshly laundered? Is there a reason?*" The witness replied: "*Well, the way they were presented. They were particularly clean and particularly well folded. They didn't look like they had been used* […]".

189. Dr Sandra McGrath later forensically examined the same items. She agreed under cross-examination that if they had been laundered DNA material on them at the time of laundering would have been washed away. In circumstances where DNA material was found on the clothing, it followed that that DNA material had been deposited since the clothes were last laundered. she stated, "*the DNA is deposited since the item was last washed, so if an item is washed or gets wet, you know, the DNA is removed or degraded*". The defence relied on this evidence to contend that, in circumstances where a prosecution witness, namely D/Garda RH, had testified that the clothes appeared at the time of being seized to have been freshly laundered, it could be inferred that the incriminating DNA subsequently found on them had not been deposited by primary contact but rather by secondary or tertiary transfer, or in other words through contamination. The defence

case was that the trial court in its role as the tribunal of fact was obliged, by virtue of the two views rule, to adopt the view on that aspect of the evidence that was favourable to the appellants, in circumstances where the defence maintained the court could not possibly, on the evidence before them, be satisfied that the alternative view was correct.

190. Dr McGrath could not recall if the clothes were folded when she examined them and she accepted that she had no note of how they were, or whether they had been folded or rolled up when she received them. However, Dr McGrath seemingly did not share D/Garda RH's belief that the clothes in question appeared to have been freshly laundered. This emerged when towards the end of her cross-examination there were the following exchanges between defence counsel and Dr McGrath:

> "*Q. Can I just ask you one final thing; I think in this case there was no indication as to the state of the clothes in the sense had they been recently laundered or when they had been laundered; is that fair to say?*
>
> *A. There is no indication. I noted that they appeared to be worn. They weren't -- they didn't appear to be new clothes or freshly laundered clothes*".

191. Following her testimony, Dr McGrath was asked some questions by members of the bench to clarify aspects of her evidence, and indeed during this exercise the members of the trial court took the opportunity to physically examine the clothing items which had been produced as exhibits. The exchanges that ensued included the following:

> "*Q. MEMBER OF THE BENCH: I just have one question to ask you, Doctor. You've told us that if the items were washed the likelihood is that the DNA would not be there, or there would be no DNA on it; is that right?*
>
> *A. Well, we would -- washing would remove most if not all of the DNA. But given the quantity and quality of the DNA that I obtained, and the profiles that I got, it is more in keeping with my expectations that they were worn. So if the items had been washed and there was some DNA even remaining, I wouldn't expect it to be of the result that I got.*
>
> *Q. MEMBER OF THE BENCH: That's the next question I was going to ask you, that between washing and finding they had been worn?*
>
> *A. It would be in line with my expectations, yes, that they had been worn, yes.*
>
> *Q. SENIOR PRESIDING JUDGE: When you say you would have expected something slightly different if they had been washed and not worn, does that mean you expect a profile that's not complete? Or something of that kind? Is that it?*
>
> *A. Possibly, yes. In general terms we would expect, say, a lower amount of DNA, first of all.*
>
> *Q. SENIOR PRESIDING JUDGE: Yes?*
>
> *A. And in -- I would be expecting maybe that there would be, you know, poorer quality, maybe less of a DNA profile, maybe not the full DNA profile. But even if I got a full DNA profile it wouldn't be of the level that I'd be seeing, say, for example, when I saw in this case --*
>
> *Q. SENIOR PRESIDING JUDGE: Yes?*
>
> *A. -- where the quantity and the quality of the DNA was of a high level.*

Q. SENIOR PRESIDING JUDGE: So when one looks at a full profile, which is sort of a strong generation, you have all of the areas that you're looking for, and you have them at the level -- at a high level?

A. Exactly, yes, yes.

Q. SENIOR PRESIDING JUDGE: And that's what you mean when you say a full profile?

A. Yes, sorry, yes".

192. In the course of its judgment the trial considered the possibility raised by the defence that the presence of incriminating DNA found on the clothes that had been in the white plastic bag found within the boot of the Opel Zafira was due to secondary or tertiary transfer, i.e., contamination, rather than primary transfer, but rejected it. They gave the following reasons for doing so:

"*At this point it is convenient to deal with the submission made on behalf of Mr Kelly that there is a reasonable possibility that the matching DNA on the two separate garments found in the "Cash sales" bag came there by reason of secondary or tertiary contamination from DNA matching that of Mr Evans found on the balaclava from the rear of the Corolla. This is said to have come about by either Garda H or Garda Maguire handling the balaclava without latex gloves and subsequently coming into contact with the clothing from the plastic bag and depositing DNA acquired from the first item on each of the second items. The Zafira was removed to the secure storage facility at Santry on the afternoon of the 6th of March. The vehicle was examined and photographed by Garda H on the 7th. The Corolla was also examined by him on the same day at the same facility. He gave specific evidence of gloving and re-gloving during his examinations. He carried out gunshot residue tests on the items recovered from the Corolla. These exhibits were then taken by Garda Maguire. The photographs show the bag and clothes in situ in the boot of the Zafira which was then examined. As Garda H gave evidence of gloving and re-gloving when examining the items in the Corolla the Court is satisfied that he could not have been responsible for transferring genetic material between these exhibits. The Court is also satisfied that there was no possibility of such transfer between the time of the seizure of the vehicle and its contents and the removal of the opening of the bag from the boot by Garda H. The Court does not think that there could have been a reasonable possibility that both a finger mark and DNA relating to Dean Evans would have been obtained and placed on the items in that time period in the boot between seizure and examination. No such proposition was put to any prosecution witness for comment and is completely untenable in any event.*

Garda H placed the various clothing items from the plastic bag in one evidence bag which he gave to the exhibits officer. Garda Maguire took the items from the Corolla and subsequently gave them to Dr O'Shaughnessy. Items of clothing from the Corolla were examined by Sandra McGrath of the Forensic Laboratory for DNA after examination for gunshot residue by Dr O'Shaughnessy. She dated the examination of the balaclava as being the 8th of March. She also examined the clothing from the Zafira for DNA. These were apparently not received by her until the 12th of March. The Court does not, on this

evidence, discern any reasonable possibility of cross-contamination between the relevant exhibits, and particularly when one looks at the evidence of Ms McGrath.

The final reason why the Court is the not persuaded by this possible contamination argument is that full major matching profiles were found on targeted areas of two items of clothing from the plastic bag from the boot. Now, based on the evidence of Sandra McGrath, the quantity and quality of the DNA and ensuing profiles were in keeping with DNA transfer due to the clothes being worn, rather than the suggested secondary or tertiary transfer. There was a difference in opinion between one of the guards and Ms McGrath as to whether the clothes in question were freshly laundered. Now, the Court examined for itself the two garments and could form no conclusion as to laundering after the clothes have been nearly four years in storage. The Court can observe that they are certainly not new items of clothing. They have areas of wear on them. Given the expertise of Ms McGrath, and the fact that it was her job to examine the clothes minutely and closely for forensic purposes, the Court prefers her evidence and observations on the point of whether these clothes were freshly washed. Now, the Court has no reasonable doubt that the DNA found was present due to the clothes being worn by Dean Evans at some previous point, a finding supported by unchallengeable fact that the bag in which they were found was also in contact with the finger of Dean Evans at some previous point in time. In the view of the Court any other conclusion would amount to speculative conjecture".

193. We find that far from there being a failure by the trial court to engage with the evidence, there was on the contrary a meticulous attention to detail and a most detailed analysis in their consideration of the evidence. We are satisfied that the conclusions that were arrived at were conclusions that were open to the trial court on the evidence. The court below was not obliged to adopt the view favourable to the defence if they were satisfied that the other view was correct. It is clear from their reasoning that they were so satisfied, and we are in turn satisfied that there was a basis in the evidence on which the trial court could legitimately take the view which it did. We find no error of principle, and we reject this aspect of the appellants' complaints concerning the trial court's treatment of the evidence, and the conclusions to be drawn from it.

Conclusions as whether the first named appellant's vehicle might have broken down

194. In the course of an interview with gardaí the appellant Mr. Kelly had maintained that having delivered hay to his daughter's pony, he was driving away from the stables in Tobersoll Lane in the direction of Flemington Road in his Opel Zafira when the engine management light lit up and the car cut out. He managed to re-start the car several times but on each occasion the rev counter shot up and then the revs would drop down again to the point where the engine would again cut out. The vehicle had limped the short distance from where the fault first occurred to Flemington Road before cutting out again. It was at this location that gardaí had encountered him and arrested him.

195. In regard to the issue as to whether the Zafira might have broken down as alleged by Mr. Kelly, the trial court had heard from Garda Joe Doyle, a PSV Inspector, who had examined the Opel Zafira that had been driven by the appellant, Mr. Kelly. The examination involved a visual inspection of the vehicle inside and out and then it went from a visual to a detailed mechanical

inspection and a road test. As part of his examination he interrogated the vehicle's onboard diagnostic unit using Tech 2 software. It showed no current active fault on the vehicle. However, it did provide a record of three historic faults. By various means which he described in his evidence, the Inspector satisfied himself that none of these historic faults was ongoing. Ultimately, the witness testified to the following effect:

> "*Q. Could you on dealing with the car detect any fault which would cause it unexpectedly to stop?*
>
> *A. At the time of my inspection, I could not come up with any faults. I could not find any faults within the vehicle that would render it unable to stall -- that would render it to stall or not to be -- be unable to start*".

And:

> "*Q. In short, could you detect any explanation why the car might randomly and suddenly stop?*
>
> *A. No*".

196. Under cross-examination, the witness acknowledged that vehicles breakdown for many reasons and, in effect, that there are occasions when it is not possible to ascertain the reason for the breakdown. However, as it had been suggested that an engine management light had come on, he would have expected a fault to be recorded. He accepted, however, that that was not always true. The evidence in that regard was:

> "*A.* […] *if there's an illumination of the engine management light you will find a fault code on the vehicle.*
>
> *Q. Yes. But the point is that, as I think I put to you on this occasion, in general and for the most part one would expect to find fault codes on subsequent examination of the ECU, however not necessarily and I think you accepted that on the last occasion?*
>
> *A. Yes.*
>
> *Q. Yes. Some faults are sporadic in nature -- some faults that are sporadic in nature are difficult to trace; isn't that correct?*
>
> *A. Yes.*
>
> *Q. And it is difficult and sometimes impossible to reproduce the same conditions in a test as applied in the driving conditions in which the engine failed; isn't that correct?*
>
> *A. Yes*".

197. Garda Doyle accepted that one of the historic faults related to an open relay defect. He testified:

> "*A.* […] *In relation to the main relay, if the main relay is -- you're driving along and the main relay opens, goes open circuit, you're going to know about it because you will feel a reduction in power and it will go into limp home mode and your light will come on and you can pull over and if you knock the engine off and you go to start it again and the relay is still open, you're still going to have limp home mode at reduced power but if, for some reason, the relay does decide to close itself, and it might, that type of fault, because the vehicle has put itself into limp home mode, it will stay there until it's fixed properly. So, some faults -- yes, some faults will let you knock it off and start back up and on you go, others will require more attention.*

Q. So, was the vehicle in limp home mode when you --

A. Got to it.

Q. -- tried to start it?

A. No, when I took control of the vehicle and when I had it the vehicle was as I expected it to be, you know, as you would expect it to be when you'd turn the key in your ignition.

Q. In short, could you detect any explanation why the car might randomly and suddenly stop?

A. No".

198. The appellants make the point that the prosecution adduced no evidence to show that an open relay defect might not have been coincidentally the cause of the engine management light coming on. The witness was pressed to accept that an open relay defect might have stopped the vehicle from starting, and he responded, "*It's quite difficult to accept it. It's difficult to accept*". He accepted that if an unqualified person was told that there was an open relay problem, "*the unqualified person would probably not expect it to start*". The witness volunteered that "*an open fuel pump relay, that will stop the car from starting because you won't get fuel*". Accordingly, whether or not it would start would depend on which relay was stuck open.

199. The appellants maintain that on any fair evaluation of the evidence, the possibility that the Opel Zafira had broken down as maintained by Mr. Kelly simply could not be excluded.

200. In ruling on this issue, the trial court stated *inter alia*:

"*The engine management light did not illuminate at the time of Garda Doyle's inspection, or during his driving of the vehicle, which one might expect if the vehicle had an active defect which had caused the warning light to illuminate when the vehicle was last driven. It would be noted that the defect alleged by Mr Kelly was such as to trigger this warning light and if this defect was covered by the engine control unit system, the ECU, as would be implied by the illumination of a warning light, the Court is also satisfied that this ECU would have recorded a defect which would have been found on subsequent examination and that that defect would therefore be likely to give rise to the symptoms described by Mr Kelly, given that the Court was satisfied that the ECU was not reset in the interim period.*

Garda Doyle used appropriate software to interrogate the memory of the ECU and found there was no current, active fault on the vehicle at the time of his examination. He did find a record of three historical faults stored in the system in relation to the oxygen sensors and a main relay on the engine control unit. These historical warnings were removed from the system and Garda Doyle then checked to see whether such defects were actually present in the vehicle. When he removed the main relay to mimic the defect, the vehicle started but ran only in limp home mode. When the relay was replaced, the car started and ran normally. Repetition of this process produced precisely the same results.

The Court is satisfied that this historical fault reading did not represent a defect that was active at the time when the vehicle was driven by Mr Kelly because the vehicle was described by him as starting twice and conking out twice. Not going into the reduced

power, limp home mode described by Garda Doyle that would have been the consequence of such an active fault in relation to the relay.

[…]

The Court has carefully considered the description of events offered by Mr Kelly at interview in conjunction with the expert evidence of Garda Doyle. Even without the expert evidence, there is an air of implausibility and convenience about the malfunctions and the timing thereof as described by Mr Kelly. Having considered the expert evidence, the Court is satisfied that there is no support or reason in that evidence to justify a finding that there was a defect detectable by the ECU that would suddenly cause the vehicle to fail twice in the manner described by Mr Kelly. If the alleged defect had truly caused the engine control unit light to illuminate, the Court is satisfied that the ECU would have recorded it and retained a defect capable of reproducing those symptoms discoverable on examination six days later. No active defects were found and the historical defects retained on the system are not compatible with the symptoms described. Accordingly, the Court rejects the account given by Mr Kelly in this respect as both inherently improbable and actually untruthful".

201. The trial court was best placed to form an impression of, and decide what assistance was provided to it, by the expert evidence offered by the PSV Inspector. In our assessment the findings of the trial court were findings that were open to them on the evidence. Their reasons for rejecting Mr. Kelly's account as improbable and untruthful were cogent and were based on a full analysis of the evidence before them. We find no failure on their part to engage with the evidence. On the contrary, there was careful and rigorous analysis of the entirety of the relevant evidence. We find no error in either the approach of the trial court to this issue or with respect to its findings.

The finding that the appellant Sharif Kelly had told lies

202. We are satisfied that there is no sustainable legal basis for the complaints that are made under this heading. The appellants disagree with the findings by the trial court that the appellant, Mr. Kelly, had lied to gardaí in relation to numerous matters. These were primary findings of fact by the trial court in its role as a tribunal of fact, and they were based in some instances on inferences drawn from circumstantial evidence and in other instances on the trial court's determinations that it had been demonstrated by other evidence that lies had been told. Primary findings of fact are unassailable on appeal, providing there was at least some evidence to support them.

203. The complaints, such as they are, amount to a contention that there was an insufficient basis in the evidence for the court to have legitimately inferred that lies were told, or for it to have found on the basis of other evidence that Mr. Kelly had demonstrably lied.

204. Having considered the transcript in detail we fundamentally and profoundly disagree with that contention. The trial court was best placed to evaluate the evidence and form an overview of it. Their consideration of the evidence was rigorous, painstaking, and detailed. They engaged in a most careful and cogent analysis as is evident from the detail of their rulings. While this was very much a circumstantial evidence case, it has been reiterated many times in jurisprudence that a circumstantial case can be every bit as strong as a case involving direct evidence. Many strands can make a strong rope capable of bearing a significant load, and there were many strands in this

case. In our view this was a strong circumstantial evidence case, and the evidence bearing on the issue of lies being told by Mr. Kelly was, notwithstanding that it was circumstantial, particularly strong in our assessment. There was, in our view, a solid basis in the evidence for the view taken by the trial court that the appellant, Mr. Kelly, had told numerous material lies, and in some instances demonstrable lies, and that he had done so cynically in an effort to distance himself from what the trial court characterised as "*difficult areas of the narrative*". The trial court was entitled to come to the view on the evidence before it that his account was utterly implausible, and based on lies.

205. In that regard, the ruling of the trial court well explains how they viewed the evidence on the "*lies*" issue, in the following passages:

> "*The Court also considers that Mr Kelly told a significant number of lies to the gardaí in the course of his interviews in addition to those already noted. As outlined above, in the light of the forensic findings in relation to the bag and clothes found in his boot, the Court does not consider that Mr Kelly could have been telling the truth when he denied having any relationship or knowledge with Dean Evans, or when he denied that the clothes were in the boot and were there for Dean Evans. Likewise, the Court considers that Mr Kelly did not give a full account of his movements on the Tuesday evening. He gave a partial account, specifically designed to distance himself from Mr Cullen. Similarly, the Court considers that his account of the vehicle malfunctions is inherently improbable and demonstrated to be actually so by the expert evidence. These untruths were specifically designed to construct an innocent explanation for the presence of Mr Kelly in his car near the junction of Tobersool Lane as the getaway car passed, and for his vehicle apparently slowing to a halt in the area where the Corolla had turned off the roadway a short time later and a short distance away from the first sighting.*
>
> *Lies told by an accused are, of course, capable of constituting independent corroboration of, and support for, a prosecution case. However, before treating lies as either corroboration or support, the Court must exercise caution and warn itself that human experience demonstrates that people may tell lies for many innocent reasons, such as, perhaps, stress, panic, confusion, mistake or a desire to cover up embarrassing or disreputable conduct which falls short of constituting criminal activity. The Court has considered the untruths told, and indeed had an opportunity to see a brief video excerpt of Mr Kelly at interview whilst he was speaking on some of these matters. Mr Kelly presented as very relaxed and articulate as he gave a false account of a vehicle malfunction. The Court does not find an alternative and reasonably possible basis for the telling of such untruths in this case. The Court is satisfied that Mr Kelly told numerous lies to the gardaí, motivated by the sole purpose of covering up his complicity in arrangement to either kill or cause serious injury to Mr Butterly. The Court considers that these lies were told until* [sic] *relation to substantial matters on obvious areas of intersection between Mr Kelly and times, places and persons also complicit in the enterprise. The purpose of telling these lies was obviously to distance Mr Kelly from difficult areas of the narrative and the Court is satisfied that Mr Kelly well knew that these were difficult areas when he told such untruths.*

The Court has considered and excluded a reasonably possible innocent basis for the lies told by Mr Kelly. They were too numerous, too substantial and too implausible for that. In these circumstances, the Court considers that the various lies told at interview, having been demonstrated to be untruthful by other aspects of the evidence, are such as to constitute corroboration of the prosecution case that Mr Kelly was an integral and knowledgeable part of arrangements to kill or seriously injury Mr Butterly. The Court does not accept the submission that, absent the evidence of Mr Cullen, the prosecution cannot succeed in establishing that Mr Kelly participated in a joint enterprise that contemplated the causation of death or serious injury to Mr Butterly. Of course, he is not obliged to make any case at interview or at trial. However, the case that he voluntarily elected to put forward from the very beginning, and subsequently at interview, was that he was simply an innocent abroad who was coincidentally swept up in matters that had nothing to do with him when he was stopped driving behind the getaway car. He denied any relationship with the occupants of Corolla. This case seems to the Court to be totally inconsistent to the alternative suggested at the end of [counsel for Mr. Kelly's] *closing. The making of a false case in itself tends to undermine the contention that the Court should take the view that, rather being an innocent passer-by, Mr Kelly was really involved in a criminal enterprise, but one that had an intention or purpose falling short of the actual outcome in this case. However, it's ultimately for the prosecution to satisfy the Court that the scope of the joint enterprise included the causation of death or serious injury, and that the accused possessed the necessary intention at relevant time, even if he has put forward alternatives that do not sit comfortably together*".

206. In our view, the evidence was not finely balanced, far less insufficient, on the issue of whether lies were told. The inferences drawn, and findings made, by the trial court as to lies told by Mr. Kelly were fully justified on the evidence. We find no error of principle and dismiss without hesitation any suggestion that there was a failure by the trial court to properly engage with the evidence, or a disregard by them of the rules relating to the drawing of reasonable inferences and as to reasonable doubt. Further, the trial court properly gave to itself, and applied, a *Lucas*-type warning.

207. In conclusion we are not prepared to uphold any of the complaints underpinning ground (xiii) on behalf of Mr. Kelly and ground (i) on behalf of Mr. McGrath.

Issues Concerning Joint Enterprise

Sharif Kelly – ground (xiv); and Edward McGrath – grounds (viii) and (ix)

208. It is complained on behalf of Mr. Kelly in ground (xiv) that the trial judges erred with regard to the law on joint enterprise and the application of same in the context of the appellant's case. An identical claim is made by Mr. McGrath in his ground (viii). In addition, Mr. McGrath complains in his ground (ix) that the trial judges erred in apparently accepting the contention that, the night before the killing of Mr. Butterly, this appellant drove the Toyota Corolla which was said to have been used in the killing to the apartment of Mr. David Cullen.

209. The written submissions on behalf of Mr. Kelly in respect of his ground (xiv), and adopted by Mr. McGrath in relation to his ground (viii), include a wide-ranging and comprehensive review of the law relating to joint enterprise, referring to decisions from this jurisdiction including recent

cases such as *People (DPP) v. Dekker* [2017] 2 I.R. 1; *People (DPP) v. Kelly* [2016] IECA 404, and *People (DPP) v. Gibney* [2016] IECA 336, as well as cases from further back such as *People (DPP) v. Doohan* [2002] 4 I.R. 463 and *People (DPP) v. Cumberton* (Unreported, Court of Criminal Appeal, 5th of December 1994); decisions from Northern Ireland such as *R. v. Gamble* [1989] N.I. 268 and *DPP v. Maxwell* [1978] 3 All E.R. 1140; and decisions from England such as *R. v Jogee & Ruddock* [2016] 2 W.L.R 681, *R v. Mendez (Reece) & Anor* [2011] 3 W.L.R. 1, *R v. Rahman (Islamur) & Ors* [2008] 3 W.L.R. 264, *R v. Powell (Anthony Glassford), English (Philip) & Daniels (Antonio Eval)* [1997] 3 W.L.R. 959 and *R v. Anderson & Morris* [1966] 2 W.L.R. 1195.

210. With all due respect to the industry of counsel, it does not seem to us that this was a particularly useful exercise for the simple reason that there was, in truth, no dispute about the law that was applicable; it was accepted on all sides that there could be convictions only if the trial court was satisfied beyond reasonable doubt that an individual defendant was a party to the joint enterprise and had the necessary and requisite intent.

211. When the focus moves from the general survey that was undertaken to the particular case that is now the subject of appeal, the focus turns very quickly to the position of Mr. David Cullen. It cannot be seriously disputed that if the evidence of Mr. Cullen was admitted, and reliance was placed upon it, and that if the court of trial in its role as the tribunal of fact was satisfied beyond reasonable doubt that his evidence was credible and reliable, there would be the necessary evidence in the case to conclude that both appellants were party to a joint enterprise, the object of which was to murder Mr. Butterly. The issue that arises is as to whether, if the evidence of Mr. Cullen was to be excluded from consideration, there would be sufficient evidence to justify the recording of a conviction. Related to this is the question of whether, in fact, the trial court placed reliance on the evidence of Mr. Cullen at all stages, or whether, in fact, the trial court concluded that it could convict without reference to Mr. Cullen and was, in fact, prepared to do so.

212. On this topic, the judgment of the Special Criminal Court is clear and unequivocal. In that regard, the following extracts from the transcript of the trial of 9th of March 2017 require quotation. At p. 38, lines 10 to 20, the following appears:

> "*The Court has weighed and evaluated the various strands set out above and it's concluded that all strands of the evidence examined by the Court point only in the direction of guilt. On the totality of this evidence, it cannot discern a reasonable possibility consistent with the proposition that the accused was innocent of all connection with a plot to kill or seriously injure Mr Butterly, or as an alternative that he was connected with a plot with some sort of minor or trivial objective. None of the individual components would perhaps be enough on their own to convict the accused of this offence, but the combination identified above, together with the particular weight of the fingerprint and DNA evidence,* ***is sufficient to convince this Court that it is proper to convict the accused of the single offence in the indictment without recourse to any other evidence led in this trial***". [Emphasis added]

213. Further, at p. 37, line 12, the Special Criminal Court commented:

> "*The Court does not accept the submission that, absent the evidence of Mr Cullen, the prosecution cannot succeed in establishing that Mr Kelly participated in a joint enterprise that contemplated the causation of death or serious injury to Mr Butterly*".

214. At p. 44, line 16, dealing with the case against Edward McGrath, the Special Criminal Court had this to say:

> "*None of the individual components would perhaps be enough on their own to convict the accused of these offences, but the combination identified above, together with the particular weight of his arrival at the car park already in disguise, and his apparently calm conduct of the vehicle at all times,* ***is sufficient to convince this Court that it is proper to convict the accused of the offences laid against him in this indictment without reliance on any other evidence led in the trial***". (emphasis added)

215. In the pages preceding the extracts quoted, the Special Criminal Court set out and subjected to analysis the various strands of the prosecution case. Many, if not all, of these are dealt with in some detail elsewhere in the course of this judgment, but suffice to say at this stage that the Court is in no doubt that there was ample evidence available to the Special Criminal Court to justify a conclusion that the appellants, Mr. Kelly and Mr. McGrath, were each party to a joint enterprise which had as its objective the murder of Mr. Butterly, or at the very least, causing him serious harm.

216. The trial court is criticised for identifying as the alternative to participation in a plot with an intention to kill or cause serious harm, an enterprise that contemplated a minor or trivial outcome. It is said that in providing this binary choice, the trial court fell into error and failed to consider the possibility of other serious offences other than murder or the infliction of serious bodily harm being in contemplation. However, the Special Criminal Court concluded, and, in the view of this Court, was justified in concluding, that the plot was to kill, or at the very least, cause serious injury to Mr. Butterly.

217. In the circumstances, the trial court will dismiss Mr. Kelly's ground (xiv) and Mr. McGrath's ground (viii).

218. As regards Mr. McGrath's ground (ix) it is complained that whilst the trial judges ruled on the defence submission that intention to kill or cause serious harm had not been proven to the requisite standard, finding that the appellant, Mr. McGrath, must have been aware that the objective was to kill or cause serious injury, it is submitted that an analysis of the judgment of the trial court shows that certain factors identified by counsel for Mr. McGrath as being relevant were not given adequate consideration.

219. In that regard the trial judges ruled that their conclusion in relation to the state of mind of the appellant, Mr. McGrath, was unaffected by the fact that Officer AC did not purport to identify that appellant outside the Brackenwood Apartments on the previous evening, or that there was no change of clothing for him, both of which circumstances had been heavily pressed by counsel for Mr. McGrath as supposedly casting doubt on whether he was properly to be considered as having been a participant in the alleged joint enterprise, and whether it could reasonably be inferred that he had had the necessary intent to kill or cause serious harm.

220. However, with regard to Mr. McGrath's involvement the trial court held *inter alia*:

> "*In the view of this Court, the real issue in this case is as to whether Mr McGrath should be convicted of murder on the basis that the prosecution have demonstrated beyond reasonable doubt that his participation in the events of the afternoon of the 6th of March 2013 was accompanied by an intention to kill or to cause serious injury to Mr Butterly at*

the time of his death, or alternatively whether he ought to be convicted of manslaughter on the basis that it was reasonably possible that his participation leaves open a reasonable inference that his intention was to participate in an enterprise that has as its purpose the causation of something less than death or serious injury to Mr Butterly on that afternoon. Therefore the Court must consider carefully the inferences to be drawn in relation to intention from the facts proved by the evidence in relation to Mr McGrath, excluding at this stage anything said by Mr Cullen in this respect. It must also bear in mind that a person is taken to intend the natural and probably consequences of their actions, but it is for the prosecution to show that any application of this presumption has not been rebutted on the evidence.

It is clear from the evidence that there was an enterprise to kill or cause serious injury to Mr Butterly, involving a number of persons other than Mr McGrath. It is also clear that Mr McGrath was a central participant on the afternoon of the killing, which is also relevant to the nature of the encounter in which he was an observed participant on the evening of the 4th of March 2013 - the Court has already referred to that and to who was involved in it. Mr Greene pointed to various factures which, in his submission, ought to lead the Court to the conclusion that the prosecution had not proved the necessary intent to the required standard against Mr McGrath in order to convict him of murder. The Court will turn to consider these matters, but proposes to analyse the inferences to be drawn in the light of all of the evidence, as well as matters understandably stressed by Mr Greene. In this case, as in almost every other where intention is in issue, the Court has to consider the question of intent by a process of inference from the facts and circumstances proved. Here, there's an undisputable inference, or at least not one that was disputed in this trial, from the actions of Mr Evans that he intended to kill or cause serious injury to Mr Butterly. Now, the question that arises in relation to Mr McGrath is as to whether his acts indicate that he expressly or tacitly agreed to a plan which included Mr Evans going as far as he did and committing the crime of murder if the occasion arose. The answer therefore depends on whether the circumstances indicate that Mr McGrath also had the intention to kill or cause serious injury, or whether the evidence leaves open the reasonable interpretation that he participated in these events with an intention to cause some minor form of harm to Mr Butterly, and without the foresight that, in inflicting some form of lesser harm on Mr Butterly, that Mr Evans might well have gone further and proceeded to intentionally inflict serious harm, or kill, Mr Butterly".

221. Later in the judgment the trial court continued:

"*The first observation of relevance in this case involved Mr McGrath, which was Officer AC's sighting on the 4th of March 2013, when a black Volvo, 07D66171, drove into the car park in Charlestown, driven by KB, with Mr McGrath in the passenger seat. After being in the KFC restaurant, KB and Mr McGrath came back, got into the Volvo and left. Significantly, one of the additional men was Dean Evans, with whom Mr McGrath travelled to and from the murder two days later. The Court is satisfied that there is no reasonable possibility open, other than the conclusion that this gathering was somehow associated with the*

*events of two days later. Mr McGrath was not specifically identified as being involved on the following evening when this black Volvo was seen leaving the Gulliver's Retail Park, followed by the Corolla and the while Transit van. The black Volvo and Corolla travelled in convey from the retail park and were later seen again at the Blackthorn** [Brackenwood?] *Apartments when they were together, and also then in company with the Zafira. The black Volvo and Zafira then left the car park of the apartment complex that night, but the Corolla did not. The black Volvo was subsequently seen driving out of Balbriggan and turning down the Flemington Road, as previously noted herein. Mr McGrath was not actually seen again until he was arrested after the murder. However, as the Corolla did not drive from the car park of the Brackenwood Apartments until minutes before the murder, the Court is entitled to infer that Mr McGrath drove the vehicle from this location, past the Huntsman Pub, performed a U turn and drove the vehicle back to the Huntsman where it stopped in front of Mr Butterly's Laguna. The Court is satisfied from the evidence that shots were fired from the Corolla so as to impact on the Laguna, as previously described. The Court considers that the fatal shots were then fired by Mr Evans who got out of the Corolla and pursued the deceased whilst emptying his weapon. This is why a ***[not] *guilty verdict is not open to Mr McGrath. Even if he was blissfully unaware of the true purpose of this enterprise until the first shots were fired, the Court considers that he must have been aware of the fact that Mr Evans had killed, or at least caused serious injury to Mr Butterly, but nonetheless elected to drive him from the scene, thereby at the very least committing an offence under section 7, subsection 2 of the 1997 Act.*

The Court does not consider it reasonably possible that there was any change of driver in relation to the Corolla at any time between the departure of that vehicle from the car park outside Mr Cullen's apartment to the final stop in the gateway at the side of the Flemington Road a short time later. Accordingly, the Court is entitled to draw inferences as to Mr McGrath's state of mind and intention, based on his being the driver of the vehicle from the apartments to the car park of the Huntsman Inn when the shooting began. It must also be borne in mind that the intention to kill or cause serious injuries does not necessarily have to be present for a protracted period, and that such intention may be formed spontaneously and over a brief period of time. It is only required that the necessary intention be present in the mind of the accused at the time of the acts causing death.

The Court is satisfied that there were a number of unusual features of relating to the journey in which Mr Evans of a participant. The first is that Mr Evans travelled as a passenger out of sight in the rear of the vehicle, which is not the usual arrangement where two persons travel in a private saloon. The second is that the Corolla was obviously a stolen vehicle and was being driven by Mr McGrath and this is a fact that must have been known, inevitably, to Mr McGrath. Thirdly, the rear passenger windows were opened at some stage. Fourthly, Mr Evans was out of sight in the back seat, prior to arrival at the car park of the Huntsman Inn. Fifthly, because Mr Evans was in the back and there was no passenger into the front seat, the Court is satisfied that there is no reasonable possibility,

other than the petrol container was at all times present in visible in the front footwell of the vehicle. Even in the less likely circumstance that it was transferred from the backseat area to the front passenger footwell at some point in the journey, the Court does not consider that this is an item that would have escaped the attention of Mr McGrath as he got into the vehicle. Sixthly, it must have been obvious to Mr McGrath that the vehicle contained items of heavy disguise. This is clear from the fact Mr McGrath was seen wearing the black bushy wig prior to driving the vehicle into the car park with Mr Evans in the backseat, a fact which the Court considers to be very significant in itself in assessing his state of mind.

The Court is satisfied that these are the relevant facts established by the evidence pertaining to Mr McGrath's surroundings in this the minutes prior to the discharge of the first shots by Mr Evans in the direction of the deceased. The question is whether these facts permit the Court to consider it reasonably possible that Mr McGrath did not share the intention with Mr Evans of killing or causing serious injury to Mr Butterly. The Court considers that this is not an inference that reasonably arises on the objective facts concerning Mr McGrath's behaviour from the time he drove the Corolla from the Brackenwood Apartments, to the time when Mr Evan's fired the first shot in the car park. The Court finds it impossible to infer that Mr McGrath could genuinely have thought that such elaborate precautions and planning were required to administer some sort of minor or trivial injury to Mr Butterly in the car park of the public house in this location in the middle of a Wednesday afternoon. The Court is of the view that the combination of the driving of a stolen car, with a large container of petrol in the interior, a passenger crouching in the rear seat, the opening of the rear windows, the passing and returning to the ultimate scene, and the wearing of an item of heavy disguise prior to the entry into the car park, are individually and collectively feature that clearly signal that Mr McGrath knew perfectly well that such steps were taken were being taken with a view to inflicting something other than minor injuries on Mr Butterly. To accept the view propounded by Mr Greene would involve the Court accepting that the organisers of an otherwise well planned enterprise would permit an ignorant, and therefore potentially weak or unpredictable link, to occupy the important position of driver. The Court is satisfied that this matter was planned and reconnoitred in advance, and separate roles were assigned to the driver, the gunman, the collector of the gun and the escape assistant. If the submission put forward by Mr Greene is correct, it therefore follows that the organisers were prepared to run the risk that an ignorant Mr McGrath might have been so shocked or surprised by the level of violence used by the gunman that he might have been unwilling or unable to perform the important task of bringing the gunman to the point where the getaway car would have been torched and from where the occupants would make good their escape. In the opinion of the Court, it is absolutely inconceivable that such a matter would have been left to chance or that the getaway driver could have been or would have been left blissfully unaware that the objective of this escapade was at least to inflict serious injury on the subject.

This conclusion is not affected by the fact that Officer AC did not purport to identify Mr McGrath outside the Brackenwood Apartments on the previous evening, or that no change of clothing was found prepared for Mr McGrath in the boot of the Zafira. In relation to the first point, the officer was not able to identify any of the three persons in the darkness outside the apartments and there was no particular significance in this, one way or the other, save to note that the stolen vehicle, which Mr McGrath undoubtedly drove away from that same location on the next day was parked up there that night. On the second point, this may simply reflect the fact that it was not expected that Mr McGrath would be firing any weapons or that he would be in the vicinity of weapons when discharged. These points do not dilute the overall conclusion that the set-up of the enterprise, as must have been visible to Mr McGrath in the minutes before the killing, pointed inevitably in the direction of a serious outcome for the target.

In addition, the presence or absence of the sports bag or cellular data or other evidence does not affect the inference drawn by the Court from the evidence actually presented. Mr McGrath was not apparently shocked or surprised by the brutality of the actions of his passenger. In fact, his actions suggest the exact opposite. The calm way that Mr McGrath drove away from a scene of extreme violence and appeared to perform a studied manoeuvre in slowing down and turning into an otherwise obscure and unremarkable driveway off the Flemington Road before being apprehended is fully consistent with the inference that what unfolded in front of him in the car park was wholly in line with his intentions and expectations on arrival there and came as absolutely no surprise to him. One must bear in mind, in judging his prior state of mind, how he acted in the manner afterwards -- or the manner in which he acted afterwards because he couldn't have missed Mr Evans firing shots, leaving the Corolla and pursuing the victim across the car park whilst emptying the pistol in his hand.

Once more, the Court has weighed and evaluated the various strands of evidence set out above and has concluded that all strands of the evidence examined by the Court again point only in the direction of guilt. On the totality of this evidence it cannot discern a reasonable possibility consistent with the proposition that the accused was in blithe ignorance of the purpose of his visit to the car park, the visit executed by himself and Mr Evans on that afternoon. None of the individual components would perhaps be enough on their own to convict the accused of these offences, but the combination identified above, together with the particular weight of his arrival at the car park already in disguise, and his apparently calm conduct of the vehicle at all times, is sufficient to convince this Court that it is proper to convict the accused of the offences laid against him in this indictment without reliance on any other evidence led in the trial. Mr Greene's ingenious submission is ultimately unreal in terms of the ignorance it attributes to the accused in the light of the -- all of the surrounding circumstances".

[Name query at *, and word insertion at **, in square brackets by the Court of Appeal]

222. As can be seen from this lengthy, but in our view necessary, quotation from the trial court's ruling the trial judges engaged in a meticulous and painstaking analysis of the evidence they had heard. They were best placed to evaluate the evidence, to determine issues of credibility and reliability, and to determine what weight was to be attributed to pieces of circumstantial evidence viewed individually and cumulatively, and what inferences could properly and legitimately be drawn. We are fully satisfied that there was an adequate basis in the evidence for the trial court's ruling concerning Mr. McGrath's involvement in the joint enterprise and on the specific issue of whether this appellant had driven the Toyota Corolla used in the killing of Mr. Butterly to the apartment of Mr. Cullen on the night before the killing. The trial court was entitled to reject the points made by defence counsel on the basis on which it did so. The arguments put forward by counsel were duly considered, but they were rejected for cogent stated reasons. The trial court was fully entitled to do so in its role as a tribunal of fact.

223. We are satisfied that there was ample evidence capable of supporting their factual determinations on the issue of the level of Mr. McGrath's involvement, and we find no error of principle. Accordingly, Mr. McGrath's ground (ix) is also dismissed.

Issues Concerning Arrest and Detention

Sharif Kelly – ground (iii); and Edward McGrath – ground (ii)

224. It is complained on behalf of Mr. Kelly in ground (iii), and on behalf of Mr. McGrath in his ground (ii), that the trial judges erred in ruling admissible the evidence arising from the stopping, detention and arrest of the appellants.

225. In the case of Mr. Kelly the evidence was that following the shooting Garda C carried out "*a tactical stop*" of a Silver Toyota Corolla on Flemingstown Road. Garda C was the sole occupant in his vehicle. He ordered the two people in this vehicle to exit the vehicle which they did scattering firelighters on the ground. Moments later, at 14.10pm, the Opel Zafira driven by Mr. Kelly approached this location and it came to a halt, with Garda C ordering the vehicle to stop. Garda C's two colleagues, Garda E and Garda F, then came upon the scene, and Garda E ordered Mr. Kelly to get out of the vehicle and to lie on the ground. With firearms drawn the three members of the surveillance unit kept the three men at the location and were joined shortly thereafter by members of the Emergency Response Unit ("ERU") who then effected formal arrests.

226. Garda E gave evidence at the trial that having arrived at the scene, she and her colleague Garda F produced their official firearms and, having identified themselves by shouting "*armed gardaí*", directed the occupant who was Mr. Kelly, to exit the vehicle. Mr. Kelly duly did so and was detained face down on the roadside. Garda E's evidence was that "*In doing this, Judge, I was detaining the driver under s.30 of the Offences Against the State Act. The driver lay on the ground. I told him this was under s.30 of the Offences Against the State Act*". She accepted in cross-examination that at the time of doing so she did not specifically use the words that "*I am detaining you*" or refer to "*detention*". However, her evidence was that "*the pure focus was the secure detention of him*", and that,

> "*Judge, in my statement in the -- previously and now, I described the physical detention of Mr Kelly. I am aware I didn't use the word 'detention'. Given the heightened danger at the time that was not my focus. I described it -- I did say after that as regards in accordance. I know my wording wasn't the most precise as regards saying that I informed him*".

227. Garda E was robustly cross-examined about the statement to which she had referred, in which, consistent with her evidence at trial, she had stated, "*I was doing all this under section 30*", but she accepted when pressed about it that she had not said in terms either that she was arresting Mr. Kelly under s. 30, or that she was detaining him under s. 30.

228. Garda F's recall at the trial was that while Mr. Kelly was on the ground "*Garda E informed him he was going to be detained under s.30 of the Offences Against the State Act*" and that she (Garda F) had then cuffed Mr. Kelly. She accepted under cross-examination that at an earlier trial she had testified that Garda E had informed Mr. Kelly that she was "*stopping him*" under s. 30 of the Offences Against the State Act 1939. Pressed as to the ostensible discrepancy, the witness did not demur from counsel's suggestion that "*during the stopping of this man, that Garda E was, during that point, shouting out, 'This is under section 30 of the Offences Against the State Act'?*", and she merely responded, "*This is all literally five seconds long; this all happens very quickly*".

229. Gardai C, E, and F were all members of the Garda National Surveillance Unit ("NSU"). It was about 10 to 15 minutes after Mr. Kelly's car was stopped that other gardaí arrived, including a D/Garda Cornish, and they took over the custody of the appellant. Subsequently, at 14.40pm, D/Garda Cornish informed Mr. Kelly that he was arresting him pursuant to s. 30 of the Offences Against the State Act 1939. There was evidence that this was done by him because it was NSU practice to leave the process of effecting formal arrests to members of other Garda units with a view to protecting the anonymity and methodology of that specialist unit.

230. D/Garda Cornish gave evidence concerning his arrival at the scene and what he had encountered there. He testified that he had put on latex gloves and proceeded to search the Opel Zafira, as that vehicle had featured in an official briefing that he had earlier received. He described what he found in the course of his search. He testified to having received certain radio communications, and to forming the view that the Opel Zafira had been acting in concert with the other vehicle at the scene, a Silver Toyota Corolla, which had been pursued from the Huntsman Inn pub following a shooting there. He continued:

> "*A. At this point, once I had the vehicle searched, I approached Mr Kelly. I identified myself. I was wearing my garda baseball hat. I produced my garda ID, and I identified myself as a member of An Garda Síochána. I cautioned Mr Kelly. And I believe, yes, I identified him and he -- after I cautioned him Mr Kelly said, "I was up seeing my horse." And I noted that in my notebook at the time.*
>
> *Q. Yes?*
>
> *A. Then I informed Mr Kelly that I was arresting him for possession of a firearm with intent to endanger life at the Huntsman Inn, and membership of an unlawful organisation, namely the Irish Republican Army, otherwise known as the IRA, on the 6th of the 3rd 2013 at Flemington Road.*
>
> *Q. Yes. And did you do anything after that?*
>
> *A. I noted that he made -- I cautioned him again at that point and he made no reply after caution. And after that I recall it was an inclement day, there was -- the road was wet. I believe Mr Kelly was lying down or was some way prone on the road. So I assisted him in sitting him up, so he had less contact with the ground. That was my next involvement with him.*

Q. Yes. Apart from making reference to the membership and the firearms offence, I suppose -- firearms with intent to endanger life, did you say anything else to him?

A. Well, I would have explained in, let's call it layman's terms or ordinary language, what the arrest was for. But I wouldn't have said --

Q. What arrest?

A. That he was being arrested for being a member of the Irish Republican Army, otherwise known as the IRA, and for possession of firearms in relation to that incident.

Q. Yes?

A. I would have explained it to him in layman's terms and I don't believe there's any other conversation after that.

Q. Did you exercise any particular power in order to do that?

A. Well, I arrested him under the power of section 30 of the Offences Against the State Act.

Q. Yes. Now, can you say what happened then?

A. At that point there was radio communications looking for to transport Mr Kelly, since he was under arrest. I was comfortable with the scene and with the vehicle at this point, I was comfortable that the arrest was made, and the next priority for me now was to transport Mr Kelly to a garda station, so I think -- I believe it was Swords Garda Station, two gardaí from Swords Garda Station, I believe, came to transport Mr Kelly to Swords Garda Station.

Q. Now, when you say that you arrested Mr Kelly --?

A. Yes?

Q. -- under section 30 of the Offences Against the State Act, did you say anything to him? What did you say to him?

A. I informed him the reason for his arrest. I cautioned him. I informed him in layman's terms the reason for his arrest. And that more or less was the bones of the conversation.

Q. Yes. So maybe you'd tell the Court what you told him?

A. I told him that I was arresting him for being a member of the Irish Republican Army, otherwise known as the IRA, and possession of firearms with intent to endanger life, I've written down exactly as I said it. He was arrested for possession of firearms, intent to endanger life, and membership of an unlawful organisation, namely the Irish Republican Army, otherwise known as the IRA, on the 6th of the 3rd 2013 at Flemington Road, Gormanston. I cautioned him again and he made no reply to this. That was the conversation.

Q. And did you say anything about the power under which --

[COUNSEL FOR MR. KELLY]*: There shouldn't be any leading at this stage.*

SENIOR PRESIDING JUDGE: No, there shouldn't be, Mr [DEFENCE COUNSEL] . But he hasn't. He's asking him did he say something. That's not leading.

A. I arrested him under the power of section 30 of the Offences Against the State Act".

231. It was complained on behalf of Mr. Kelly that there was delay in arresting him and that he was unlawfully detained from 14.10pm until 14.40pm on foot of what is characterised as "*a non-statutory roadside detention policy*". Further, although the law requires prompt arrest, it was suggested that this requirement was disregarded on the basis of a Garda policy that members of the NSU should not perform formal arrests lest doing so compromises the anonymity of the membership of that unit, or its methodology. It was further complained that the absence of formal notebook entries by NSU members and some ERU members (D/Garda Cornish did take contemporaneous notes and produced them) represented bad practice, tainting the evidence of the witnesses concerned and representing an unfairness in the investigation. In regard to that, a D/Garda WH of the ERU testified that as the ERU's day-to-day role was an operational one and not an investigative one "*we wouldn't use a notebook*". It is further complained that although the evidence was that s. 30 may have been mentioned by Garda E, it was not invoked as such by any of the relevant officers and Mr. Kelly was not given any or any timely reasons for his detention and arrest.

232. As regards the search of the vehicle by D/Garda Cornish it is further complained on behalf of Mr. Kelly that D/Garda Cornish did not identify in his evidence any common law power, or assert any statutory basis, on foot of which he could lawfully have carried out that search. Neither did he speak to Mr. Kelly prior to carrying out his search, and no reason for the search and seizure of his vehicle was communicated to him. It is complained that in consequence of this Mr. Kelly's constitutional rights to the enjoyment of private property and to privacy were breached.

233. The prosecution, however, contended that *de facto* both a common law power and a statutory power (i.e., under s. 7 of the Criminal Justice Act 2006) existed on foot of which the search and subsequent seizure had been lawful.

234. The common law power to search and seize was said to have been available because Mr. Kelly had been apprehended in the vicinity of a vehicle which was considered to be of material interest in connection with his suspected involvement in a serious crime, and there was an entitlement to secure relevant evidence.

235. As to the invocation of the statutory power, Superintendent Alf Martin had testified during the trial that:

> "*A. I met Sergeant Eddie Woulfe who was a Sergeant in Ashbourne at the time, Judges, and I directed him to co-ordinate the movement of all the cars connected to the incident, that is the Laguna, which was still parked obviously in the Huntsman Inn car park, the Zafira, which was parked on the Flemington Road, the Toyota Corolla, which had been rammed, and also the garda car that was involved in the stop, I directed that that would be taken away for a PSV examination and that the others would be retained as evidence under the Criminal Justice Act 2006, section 7 of the Criminal Justice Act 2006.*
>
> *Q. And are you aware that Sergeant Woulfe I think later co-ordinated the removal of these vehicles?*
>
> *A. Yes, I am*".

236. Counsel for Mr. Kelly had also sought to argue that the case could be distinguished from the type of emergency situation or "*continuum*" that had been spoken of in the important case of *People (DPP) v. Kehoe* [1985] I.R. 444.

The Ruling on Mr Kelly's Arrest

237. The trial court ruled as follows on the issue of the lawfulness of Mr. Kelly's arrest:

"*Officer C, who had previously observed a green Zafira 03C5254 at a location in Balbriggan became aware of certain movements of vehicle Toyota Corolla 06 KE 7235 at around 2 pm. He subsequently saw this vehicle travelling towards Gormanston College and was then made aware of the fact of the shooting of Mr Butterly. This car was pursued at speed past Gormanston College, where officer C observed another male. As officer C's car passed at the junction of Tobersool Lane he saw a green Opel vehicle parked up on the right facing out towards the junction with one male in the driver's seat. There is some dispute as to how far up or down Tobersool Lane this vehicle was parked, but there is no dispute that it was Mr Kelly and the vehicle that he had custody of at that time. Officer C continued past this junction for a short distance and then saw the Toyota Corolla 06 KE 7235 pulling into the right. He then carried out what he described as a tactical stop by crashing his vehicle into the back of the Toyota. He exited from the vehicle and drew his firearm. Some events then took place in relation to the occupants of the Corolla which do not directly concern the case against Mr Kelly. Officer C then saw the green Zafira approaching the area in which the Corolla was stopped and stated that he shouted to the vehicle to stop under the provisions of section 30 of the Offences Against the State Act. Whether or not he actually did so is irrelevant, because the vehicle came to a stop, although Mr Kelly claims, through counsel and counsel's questions, that this was a result of a coincidental event, namely that the Zafira happened to stall at that time and place, rather than as a result of any action of any member of the guards. In either event the Court is entirely satisfied that, based on officer C's observations and his state of mind as given in evidence, that he had ample grounds for requiring this vehicle to stop on the basis of a suspicion that it was involved in and connected to the events that had very recently unfolded at the Huntsman Inn. It was a vehicle that had been previously noted in the context of the surveillance operation in progress at the time. At the time that he stopped the vehicle and detained Mr Kelly he was the only officer at that particular scene. In fact, irrespective of any state of mind that this officer had in relation to the particular Zafira in question the Court would go so far as to say and to hold that members of the gardaí at that location would have been justified in stopping and detaining any vehicle travelling close to and in the same direction as the Toyota Corolla within minutes of the public murder that had very recently taken place at the Huntsman Inn. Officer C stated that very shortly afterwards other gardaí arrived at the scene, the first of which were the officers E and F. After a further short period of time he departed from the scene. Officers E and F approached the Zafira from the rear. Officer E observed the vehicle on the road and beyond and on the right the crashed garda car and the Corolla. She also saw officer C. She stopped to the right of the Zafira, saw the driver, shouted "armed garda" and drew her weapon. The door of this car opened and the driver was instructed to get out and lie on the road. In doing this officer C stated that she was acting under the provisions of section 30 of the Offences against the State Act. The Court has absolutely no doubt that she was aware of her powers under this section and that in her own mind she was utilising those powers in dealing with Mr Kelly. Furthermore, the*

Court has no doubt whatsoever, based that on her knowledge and her state of mind at that time, there were reasonable grounds for her exercising a power to detain the driver of the vehicle which was already stopped at the point when she arrived. Mr Kelly complied with all requests made of him, made no requirements or demands of the officer and gave his name in response to a demand. The Court considers it entirely irrelevant as to whether or not officer E made specific mention of section 30 of the Offences against the State Act in these circumstances. There was absolutely no reason to think that equipping Mr Kelly with this particular snippet of legal information was going to make the slightest difference to him or the position in which he found himself, in the sense that he was going to have any choice in the matter or that he would have thereby been enabled to query the officer concerned or somehow leave the scene. This is not analogous to the cases where non-compliance with a statutory requirement could give rise to the commission of an offence thereby necessitating, in some cases, the specific invocation of the legal provision concerned. It would not be reasonable to think that events would have unfolded in any different manner whether or not there was specific mention of section 30 of the Offences against the State Act by the officer concerned".

238. The trial court then considered at length the decision of the Supreme Court in *Mulligan v. DPP (Garda Ryan)* [2009] 1 I.R. 794, to which it had been referred, before continuing:

"*Now, there are a number of important propositions contained in that judgment, which are applicable in the circumstances of both cases under consideration here. The Court relies on those and I'm reading them into the record for the purpose of any subsequent examination.*

I resume to deal with the case of Mr Kelly and continue as follows: Even if Mr Kelly is given the benefit of any reasonable doubt by the Court finding that there was a reasonable possibility that nobody at that point had mentioned section 30 of the Offences Against the State Act, on the basis of the foregoing law the Court finds that the absence of a specific mention of the section in these circumstances in no way affected the legal validity of the detention of the accused Mr Kelly at the location of the stop of his vehicle. The officer was fully entitled to use his powers under the statute, that being the Offences against the State Act, to stop this vehicle and to proceed to secure the vehicle and the occupant. He had these powers in mind in carrying out these actions and there was ample justification for the actual exercise of his powers in this case. The Court finds as a fact that his actions were clearly part of the continuum that had commenced with the murder carried out a short distance and a very short time previously.

Officer F gave evidence that officer E informed Mr Kelly, in her presence, that he was going to be detained under section 30 of the Offences against the State Act. She said that she remembered this because she was going to mention the section if officer E did not. She did not make mention of the actions or statements of officer E in her witness statement, because, as she explained it in evidence, she was confining her witness statement to her own actions. The Court considers that this explanation is reasonable in all of the

circumstances as her very valid observation that this entire transaction lasted a short number of seconds and a short number of seconds in the circumstances which are described as surrounding this transaction. Insofar as it may be relevant the Court is satisfied beyond reasonable doubt that there was in fact a specific mention of section 30 after Mr Kelly was restrained and on the ground.

Perhaps the more substantial complaint made by Mr Kelly is that neither of these officers gave any specific reason for his detention after he exited the vehicle and that his detention was thereby rendered unlawful. The requirement to furnish reasons for a detention or arrest does not necessarily arise at the point at which the confinement of liberty commences".

239. The trial court then referred in some detail to *Christie v. Leachinsky* [1947] A.C. 573 and to *People (DPP) v. Walsh* [1980] I.R. 294 to which it had also been referred, before again continuing:

"*So the requirement to give reasons arises either at the point in time of initial confinement or at a reasonable time thereafter. And a reasonable time of course has to be judged by reference to all of the circumstances that prevail in and around the facts of the individual case. Now, the Court will for the moment act upon the presumption that Mr Kelly himself had no reason of why he was being stopped or detained. But on that basis, any information deficit on his part is in the view of the Court remedied by the clear explanation given to him by Detective Garda Cornish when he was formally arrested by this officer at 14:40. In this respect the Court will again take the defence case at its highest by assuming that Mr Kelly had no reason to have any prior knowledge as to why he was being stopped or detained by the guards on this occasion. It may be that at a subsequent stage the Court will have to scrutinise more closely and critically the number of unfortunate and unlucky coincidences for Mr Kelly in actual acceptance of a reasonable possibility that there was complete ignorance on his part as to the reason why he was engaged in this manner by the police at that time and place. But that's a discussion for the future. We proceed upon the presumption just outlined for current purposes.*

On the assumption that Mr Kelly was initially detained at the scene of his vehicle stop at approximately 14:10, this leaves a period of approximately a half an hour between that initial detention and the time of his formal arrest. For the reasons set out below the Court does not consider that his detention over that period or the subsequent formal arrest by Detective Garda Cornish was vitiated by any failure to give specific reasons either at the commencement of his confinement or during the time between that commencement and the subsequent formal arrest.

In respect of the suggestion that was made in argument that this detention was unlawful because it represented the operation of a non-statutory practice of officers not carrying out a legal arrest and/or was the emanation of an unacceptable period of delay before formal arrest, the Court has to observe that it was the unusual position in this case that the first

three officers at the scene of the stop and detention of Mr Kelly were officers attached to the National Surveillance Unit. It appears to the Court that there is in fact a general practice that such officers do not involve themselves in the arrest of suspects, save as a last resort. Having regard to the policy considerations clearly and carefully outlined by Detective Superintendent Johnston in relation to the nature and method of such operations and the strong public interest in the safe conduct of such operations and the conservation and safe preservation of officers conducting them, the Court considers that the suggested policy is entirely reasonable and practical when it is executed in respect of surveillance officers and the Court therefore considers that it was reasonable for the surveillance officers in this case to secure the scene and to await the arrival of other officers to effect any formal arrests that might have been required, once this process did not involve an undue or unreasonable delay or a break in the continuum that was undoubtedly in place at the time of the stop and continuing thereafter. The effect of securing of this particular scene, in the view of this Court, undoubtedly required the presence of more than three garda officers of whatever hue or description. In respect of the formal arrest, the Court is satisfied beyond reasonable doubt that Garda Cornish acted under the provisions of section 30 of the Offences against the State Act and that he had reasonable grounds for so doing based on his prior knowledge and his considered assessment of the scene after his arrival. The Court is also satisfied that he specifically mentioned section 30 of the time of the arrest but considers that this requirement is entirely unnecessary and refers back to the observations of Charleton J in the Mulligan case.

*The Court is quite satisfied that it was explained in clear times** [terms?] *to Mr Kelly that the formal arrest was being carried out on suspicion of membership of an unlawful organisation on that day and for possession of a firearm with intention to endanger life and that, at that point, Mr Kelly was under no misapprehension about the situation in -- from that time either in respect of his formal arrest or indeed as to the reason why he had been stopped and detained in the first place.*

As to the suggestion that there was an unreasonable delay in effecting a formal arrest, the evidence suggests that a period of approximately 30 minutes elapsed between the arrival of Detective Garda Cornish on the scene and the time of his carrying out a formal arrest of Mr Kelly. Now, the Court is of the view that this officer was quite entitled to carry out an assessment of the scene, consult with fellow officers who may have had additional information of relevance and inspect Mr Kelly's vehicle before committing himself to the step of making a formal arrest.

Now, the Court does not consider that, in the overall circumstances of this case, the period that elapsed between formal arrest and the giving of reasons for the detention and/or arrest was unreasonable and that, of course, is the period that elapsed between the garda's arrival on the scene and his execution of the formal arrest. The prevailing circumstances were hardly capable of being described as routine or foreseeable. To say

that the scene was apparently calm at various stages whilst Detective Garda Cornish was present at the scene is not synonymous with the finding that the situation was stable, free from potential danger or volatility, or that it was likely to remain calm at all times until it became possible to remove all concerned from the area. In fact, the Court is satisfied that the gardaí were confronted on this occasion with a highly unusual, fraught and difficult situation including the continuing possible presence of firearms or other subversive persons in the area who were supporting, or participating in the criminal enterprise that had just occurred.

In the view of this Court, it is of little or no significance in the overall context whether this accused was arrested at 14:40 or ought to have been arrested at some interim time between 14:10 and 14:40. It is quite clear to this Court that there is no reasonable view of the circumstances so described under which this accused might have been permitted to leave this scene, whether he was present under an initial detention for the purposes of securing the scene, or under a subsequent formal arrest. The first and correct imperative of the gardaí arriving at the scene was to secure the scene and those at it and then to assess the developing situation and to take such steps as were required after appropriate consideration and reflection. After such steps, it was necessary for suitable transport to be summoned to, and to arrive at, this scene which was a semi-rural location where traumatic events had occurred suddenly and out of the clear blue sky.

The Court is absolutely satisfied that there was both a right and duty to stop, secure and subdue this accused as part of the continuum that had commenced with this murder and at no time did the circumstances requiring such action abate or change so as to break the continuum thereby established and, as a consequence, render any actions taken by the gardaí unlawful. There was certainly no need for the gardaí to indulge in some colourable process involving some technical release of the accused followed by a further arrest. Even if one took the view that at some point during the 30-minute period between stop and formal arrest that the detention previously effected by the surveillance officers had become unlawful by unreasonable delay, or by reason of unreasonable delay, this had absolutely no effect on the duty, right and entitlement of Detective Garda Cornish to effect the arrest that he undoubtedly made at 14.40 hours".

[Word query at *, in square brackets by the Court of Appeal]

240. The trial court ultimately concluded:

"*The overall result of all the garda actions in this case is that the murder of Mr Butterly occurred at approximately 5 past 2 on that afternoon. The accused, Mr Kelly, was apprehended just past Tubersool Lane at approximately 10 past 2 and, by the combination of processes and events described above, was at Swords Garda Station by a quarter past 3. In all the circumstances of this case, the Court sees nothing unreasonable in either the communitive or the individual time period involved, having regard to the particular circumstances of this case, whether those time periods arose as the result of the*

application of a general garda policy, practice or procedure, or were simply the product of the individual steps and actions taken by individual members in this case".

241. The attempt to distinguish *Kehoe* was also rejected, as follows:

"*There is absolutely no question of there being any break in the continuum that commenced with the murder; which continued through the pursuits, stops and detentions a short time later; which proceeded through the securing of the scene by the officers initially present and by those who subsequently arrived with additional observations and information; continued on throughout the formal arrest and the wait for the arrival of suitable transport; the transport of the accused persons to garda stations; and the continuum that ended when the accused were delivered into the custody of detaining members at a garda station.*

Having analysed the facts and circumstances of this case, the Court is entirely satisfied that there was an unbroken continuum in the sense described in the Kehoe decision from the time of the murder to the time of arrival at the garda station a little over an hour after that murder. Nothing in the case law opened to this Court suggests that there was any impropriety, unconstitutionality or illegality involved in any of the actions of the gardaí in dealing with the violent and unexpected event, or that any policy executed, or any individual decisions taken by individual officers led any of them into legal or constitutional error. Within the constraints imposed by the law or the constitution, the gardaí are entitled to a reasonable margin of appreciation as to how they approach operational matters.

Leisurely discussions in a courtroom such as this sometimes obscure the urgent and perilous circumstances in which such decisions are taken and such processes are carried out. It is necessary, in the view of this Court, to guard against undue retrospection or second guessing in such matters. Just because this drop scene was apparently calm on the surface, this did not imply in any sense that the gardaí present, or who came to be present, were obliged to act in a hasty fashion in dealing with those stopped and detained shortly after this very grave and serious event. They were perfectly entitled to take a cautious and measured approach in a potentially volatile and still unfolding situation. If this resulted in inconvenience or discomfort for the accused, which it undoubtedly did, this was simply the inevitable by-product of a lawful stop and detention process applied to him".

242. The trial court went on to say that even if it was incorrect in its (primary) approach, it was in any case satisfied that it could rely on the decisions of the former Court of Criminal Appeal in *People (DPP) v. Bolger* [2013] IECCA 6 and *People (DPP) v. Breen* [2008] IECCA 136 to find that that even if there was some legal difficulty with all or any of the prior period of detention, the subsequent formal arrest "*was entirely unaffected by any such putative issues*". In the trial court's view:

"*Detective Garda Cornish had the power to arrest. He exercised that power, he had more than sufficient grounds for so doing, he conveyed appropriate reasons to the accused and, insofar as it may be relevant, kept appropriate notes subsequently*".

243. Apropos the complaint concerning notetaking, the trial court held that it was not satisfied that there was a deliberate policy not to take notes. Moreover, while it accepted that there were undoubted defects in "*procedures, in notetaking, in note preservation, in the dating of statements and so on and so forth*", the trial court was nevertheless of the view that "*on the essential issues in this case, the Court considers that they are of absolutely no relevance in terms of the credibility of the officers on the particular points that this Court has to be satisfied of*".

244. In regard to the controversies concerning the search and seizure of Mr. Kelly's vehicle the trial court ruled:

> "*Now, we turn to the question of the search of the vehicle. It was argued in Mr Kelly's case that the basis of the search of his vehicle needed to be communicated to him. In this case, there was a cursory and necessary inspection of the vehicle and its visible contents by the officer who carried out the initial stop. In the view of this Court, this officer had a perfect right and duty, and indeed obligation, under either common law or section 30, to carry out any such steps at the scene of this stop. It strikes the Court as almost inconceivable that the officer who stopped Mr Kelly would not continue to carry out a search, even of a cursory variety, of his vehicle, or that the law would not permit such a non-intrusive step in relation to the vehicle which Mr Kelly had left at that stage*".

245. The trial court distinguished certain caselaw (i.e., *People (DPP) v. McFadden* [2003] 2 I.R. 105) that had been relied upon by the appellant concerned, on the basis that the case relied upon had involved a search of the personal effects, and in particular a wallet, taken from the person of a prisoner in custody. The trial court accepted that the examination of the wallet taken in such circumstances was objectionable as it was covered by a search of the person and "*because a wallet or a purse is generally carried on the person and has contents of an intimate and sometimes sensitive and personal variety*". However, the trial court continued, "*similar considerations do not apply to motor vehicles*". The trial court then ruled:

> "*Even if there was an illegality involved in terms of the examination of Mr Kelly's vehicle. There's no constitutional right engaged in that. The Court doesn't need to consider a JC-type exercise. The height of it would be that some illegality stopping short of the infringement of a personal right might have been involved in relation to Mr Kelly and, if that was the case - which the Court doesn't think it was - it would undoubtedly, balancing all matters, undoubtedly exercise its discretion in favour of the prosecution on this issue*".

246. On the issue of the lawfulness of the seizure of Mr Kelly's car and its contents, the trial court further ruled:

> "*Turning now and lastly in relation to the seizure, removal and search of the vehicle subsequently, the Court again considers that Mr Owens is correct in his arguments in this respect; there were ample powers under section 7 or common law to search, seize, remove the vehicles from this scene. Any fair observer would think that it would be absolutely inconceivable that the guards wouldn't take those elementary steps in this case or any other case. As it happens, the Court accepts the evidence of Sergeant Woulfe and Inspector Martin on these issues. The Court is entirely satisfied that Inspector Martin had the powers to authorise the seizure and removal of these vehicles, that he invoked the powers that he had and that he communicated the invocation of those powers to the*

sergeant who acted lawfully therefore in the removal of these vehicles, these very relevant vehicles, from the scene. So again, if there is any legal deficiency in relation to the seizure and removal and/or subsequent search of Mr Kelly's vehicle, it amounts to an illegality at highest. No constitutional right is engage by this and again any discretion that the Court would exercise would be in favour of the prosecution on this issue".

247. Finally, under this heading, the trial court rejected any suggestion that the case had some parallel with the decision in *The State (Trimbole) v. The Governor of Mountjoy Prison* [1985] I.R. 550 as had been argued at one point. This was a suggestion that was not re-ventilated on appeal.

Decision on the issues arising from Mr. Kelly's stop, detention, arrest and vehicle search

248. We have considered the relevant evidence in detail, and the approach of the trial court to the issues raised. We find no error on the part of the trial court. We find that its approach was sound, and that its findings were solidly supported by the evidence, by the express terms of s. 30 of the Offences Against the State Act, and by the jurisprudence and precedents on which the court below placed reliance. The trial court's analysis was rigorous, and we find the reasons given by it for its decisions on the arrest controversies to have been cogent and compelling, and we fully agree with them. We are satisfied that the stopping, detention and arrest of Mr. Kelly was accordingly lawful, and that the actions of the gardaí did not involve any illegality or unlawful breach of his rights.

249. We are also satisfied that the trial court was correct to regard the search of Mr. Kelly's vehicle as having been lawful in the circumstances of the case. In our view, the evidence clearly justified the search of the vehicle on foot of the common law power of search previously alluded to, given the circumstances in which the vehicle was intercepted; the suspicion held by gardaí, as evidenced by the briefing to which Garda Cornish referred in the course of his evidence, that its driver was acting in concert with the occupants of the Silver Corolla which had also been stopped at the scene of the Zafira's interception at Flemingstown Road a short time previously, and which Silver Corolla had been observed driving away from the scene of the shooting at the Huntsman Inn leading to its pursuit by gardaí. Further, the fact that firearms were understood to have been used by those involved in the killing of Mr. Butterly at the Huntsman Inn would have in itself justified the urgent searching of any vehicle associated with persons suspected to have been involved, as a matter of prudence and safety. The trial court properly at one point characterised the situation that obtained at Flemingstown Road as being "*potentially volatile and still unfolding*". Further, there was also a clear need to preserve and secure possible evidence in the circumstances of the case.

250. We also agree, however, that even if the legal justifications relied upon for Garda Cornish's search of the vehicle were to be regarded as being in some way inadequate, and we reiterate that we do not think that they were inadequate, there was at most a mere illegality involved in the searching of the vehicle. The trial court was correct in its view that there was no breach of constitutional rights involved. It was entitled therefore to say that it would in any event have exercised its discretion to admit the evidence notwithstanding any possible illegality.

251. We also find no error in the trial court's view that the seizure of the vehicle pursuant to s. 7 of the Criminal Justice Act 2006 was lawful. However, we are again of the view that even if the basis for doing so was to be regarded as being in some way infirm, there was at most a mere

illegality involved in the seizure of the vehicle. We again consider that the trial court was correct in its view that there was no breach of constitutional rights involved and that it was entitled to say that it would in any event have exercised its discretion to admit evidence recovered in consequence of that seizure notwithstanding any possible illegality.

The complaints about Mr. McGrath's arrest

252. In the case of Mr. McGrath, the complaints made about the circumstances of his arrest were similar to those made on behalf of Mr. Kelly. The evidence was that Mr. McGrath was one of the two persons (the other was Mr. Dean Evans) who exited the Silver Toyota Corolla following the tactical stopping of that vehicle at 14.05pm by Garda C at Flemingstown Road, just before the subsequent arrival of Mr. Kelly's Opel Zafira. The occupants were again kept on the ground at gunpoint by NSU members pending the arrival of members of the ERU and other gardaí, whereupon they were formally arrested at 14.38 pm. As in the case of Mr. Kelly, it is principally complained that Mr. McGrath was unlawfully detained from the time that he exited his vehicle until he was formally arrested.

253. The trial court ruled on his arrest as follows. It rehearsed in some detail Garda C's pursuit of the Silver Corolla to the point where that vehicle and the pursuing garda vehicle passed the intersection of Flemingstown Road with Tobersool Lane. It continued:

> "*Having passed this intersection and made his observation, he continued after the Corolla when his state of mind was to follow this vehicle and to attempt to stop it if possible based on all of the matters of which he had become aware.*
>
> *A short distance later, he observed this vehicle pulling into a gateway on the right-hand-side of the road. He carried out a tactical stop which consisted of crashing his vehicle into the rear of the Corolla. He exited his own car, drew his official firearm and called upon the occupants of the vehicle under section 30 of the Offences against the State Act to get out of the car and to lie on the ground. Edward McGrath came out of the driver's door and lay on the ground as directed where was beside Dean Evans who had emerged from the right-hand rear door where Mr Evans was seen to drop two cigarette lighters onto the ground. The Court is satisfied beyond reasonable doubt that this officer had the power to stop and detain this vehicle and the occupants under section 30 of the Offences against the State Act and that he did so and invoked his power in relation to the vehicle and its occupants. The Court is satisfied that he communicated this to the occupants of the vehicle and moreover that he had overwhelming grounds for taking these actions. Mr Greene suggested that there was an issue as to whether or not this officer had actually mentioned section 30 when carrying out these actions. For the same reasons expressed in relation to Mr Kelly and the reasons emanating from the decision of Charleton J., the Court considers that this was entirely irrelevant one way or the other.*
>
> *So far as the cross-examination directed towards the issue of an alleged policy to stop suspects without proceeding to formal arrest, the Court repeats the observations that were made about the operational considerations that pertain to surveillance officers and to the particular and unforeseen circumstances that caused the officers to step out of the shadows in this case and to become involved directly with those suspected of serious*

crime. At that point, this officer was the only person on the scene and it was entirely reasonable that his first priority was to secure the scene and to have proper regard to his own safety before taking any further steps. As part of the continuum that commenced with the shooting of Mr Butterly in the pub car park and the departure, pursuit and stop of the Toyota Corolla vehicle which was strongly suspected of having an involvement in this matter, this officer cannot be criticised in any respect for taking the actions that he did in the circumstances, which were the same as previously described in the portion of the ruling relating to Mr Kelly. In consequence, it appears to this Court that Edward McGrath and his companion were lawfully stopped by this officer and thereafter were in lawful detention at the scene of this stop for all purposes from approximately 5 past 2 on that afternoon.

Officer C waited for a short period of time for other gardaí to arrive to the scene and he then communicated what he had seen to the new arrivals and departed. Before he left, Officer C had provided assistance in handcuffing the two males on the ground. A formal arrest procedure subsequently carried out in relation to Mr McGrath -- or was subsequently carried out in relation to Mr McGrath by Detective Garda Hartnett of the Emergency Response Unit. This officer gave evidence that he was on the M1 at just after 2 pm when the call came that the Toyota Corolla in question needed to be stopped. Detective Garda Hartnett left the M1 and travelled in the direction of Balbriggan and he then became aware that a man had been shot dead in the car park of the Huntsman Inn. He was also made aware that the silver Corolla in question had left the car park and had been stopped. He proceeded firstly to the scene of the shooting, remained there for a short time and then travelled to the area where the Corolla and its occupants had been stopped and secured a short time previously. The Court is satisfied that Detective Garda Hartnett would not have arrived at this scene any earlier than 14:10 hours. He there had a conversation with a member of the surveillance unit who informed him that those who had arrived on the scene in the Toyota Corolla in question were now secured on the ground beside that vehicle.

At that point, Detective Garda Broughall was there along with other members of the National Surveillance Unit. Detective Sergeant Kane and Detective Garda Kavanagh were also there and they communicated further information concerning Mr Cullen and the firearm, both of whom were located at the other scene outside the gate of Gormanston College. Detective Garda Hartnett holstered his firearm and described his view that the scene was still dangerous and fluid. The Court fully agrees and endorses this officer's description and assessment of the situation and refers back again to the observations made by the Court on this matter in the ruling in relation to Mr Kelly.

Once Detective Garda Hartnett had satisfied himself that the area of the vehicle was secure and that nobody else was potentially around, he put on latex gloves and performed a cursory search of the car in which he observed a number of objects and articles inside and

outside the Corolla. Having looked in, he observed in the passenger seat a black wig and black gloves and the black gloves were on the front passenger seat. In the front passenger footwell, there was what appeared to be a petrol can. On the dashboard, there was a pair of dark-rimmed glasses without lens and strewn around the car was a quantity of small Zip firelighters. Two white cigarette lighters were observed close to where the two persons were restrained on the ground. Based on his previous knowledge, his assessment of the scene and his observations of the telling items discovered both in and out of the vehicle, Detective Garda Hartnett formed the view that both of the occupants in the car were members of an unlawful organisation and had been in possession of a firearm at the Huntsman Inn on that day. The Court is satisfied beyond reasonable doubt this was an entirely justified suspicion on the part of this officer in all of the circumstances just described.

The officer then approached Mr McGrath, noted that he was handcuffed face down and how he was dressed. He introduced himself, produced his identification, cautioned him and demanded his name and address which was provided without difficulty by Mr McGrath. Having noted these details in his notebook, he carried out a cursory search of Mr McGrath's person and found nothing of relevance. At 2.30 pm, he formally arrested the accused Edward McGrath under the provisions of section 30 of the Offences against the State Act on the basis of the two suspicions outlined above. The Court is satisfied beyond reasonable doubt that in all respects this was an entirely proper and justified arrest carried out in a proper manner including the provision of reasons for this arrest in ordinary language. In any event, the Court is not in any doubt, having regard to the contents of the car and the observations of the movements of this particular car in the minutes previously preceding the stop, that the driver of this car would have been under any misapprehension whatsoever as to why he had been stopped or arrested. The accused remained at the scene after the arrest until suitable transport arrived when he was taken to Ballymun Garda Station when he arrived at 3.45 pm, significantly less than two hours after the shooting of Mr Butterly. Detective Garda Hartnett informed the member in charge of the station that the time of his formal arrest was 2.30 pm".

254. Once again, and for essentially the same reasons as it had given in regard to the similar complaints made by Mr. Kelly, the trial court went on to hold that the complaints about note taking were ultimately of no relevance.

255. Again, as in the case of Mr. Kelly, counsel for Mr. McGrath had sought to argue that the case could be distinguished from the type of emergency situation or "*continuum*" that had been spoken of in the important case of *People (DPP) v. Kehoe* [1985] I.R. 444; but the trial court disagreed, holding:

"*For the reasons already outlined in relation to Mr Kelly, the Court rejects any suggestion of this kind. The Court is satisfied that there was an unbroken continuum that commenced with the shooting of Mr Butterly, proceeded through the pursuit and stop of the Corolla, the securing of the occupants and the scene and the subsequent arrests. The Court finds nothing unreasonable in the lapse of a period of time between either 14:10 and 14:30 or*

14:38 if one takes the defence case at its highest, in the terms of the necessity of securing this scene and assessing the situation prior to the execution of a formal arrest. For the reasons already expressed in relation to Mr Kelly, the Court therefore rejects the suggestion that a period of pre-arrest detention was a colourable device in this case executed for reasons of administration and/or convenience. On the contrary, the Court is satisfied that the potential dangers associated with this particular scene called for careful assessment, calibration and measurement. The Court also rejects the suggestion that there was any confusion or inadequacy pertaining to the evidence of Detective Garda Hartnett on any of the significant issues that this Court has to decide in relation to these matters".

256. The trial judges added:

"*The Court is satisfied that Mr McGrath was in continuous and lawful detention from 14:05 at the very earliest and 14:10 at the latest. The stop, detention, arrest and search of the accused and the search and seizure of the vehicle in which he was travelling and the contents thereof were all in accordance with the law in the particular circumstances disclosed by the evidence. So the product of all of these matters is admissible in evidence*".

257. Once again, for the reasons we have stated in respect of the similar arguments made on behalf of Mr. Kelly, we reject Mr. McGrath's complaints concerning the lawfulness of the stopping of his vehicle, and his detention and arrest, and concerning the ruling that the evidence arising from that stopping, detention and arrest was admissible. We therefore dismiss ground (ii) on behalf of Mr. McGrath.

Issues Concerning Admissibility of DNA Evidence

Sharif Kelly – grounds (viii) and (ix)

258. It is complained on behalf of Mr. Kelly in ground (viii) that the trial judges erred in refusing to rule inadmissible the evidence arising from the taking of DNA and fingerprint samples from Mr. Dean Evans.

259. It is further complained on his behalf in ground (ix) that the trial was unsatisfactory and the determination on the issue as to the admissibility of the DNA and fingerprint evidence and verdict are unsafe, having regard to the manner in which the hearing and determination on the said admissibility issues were conducted, in particular, in that the trial judges appeared to predetermine the issue as to whether the taking of the said samples involved the breach of constitutional rights before hearing submissions on that matter and as to the implications as to admissibility arising from same.

260. It was indicated at the appeal hearing that Mr. McGrath would be adopting the submissions on behalf of Mr. Kelly (although we note that Mr. McGrath himself has no specific grounds of appeal with regard to the admissibility of forensic samples taken from Mr. Dean Evans).

261. At any rate, the first point that jumps off the page from the ground of appeal as formulated is that it relates to the taking of samples from somebody other than the accused, or indeed, the co-accused before the trial court. To put the issue in context, it is necessary to remind ourselves that a plastic bag containing a set of clothes was found in the vehicle which the appellant was driving when he was arrested. When those clothes were examined, they were found

to contain DNA material which matched a sample taken from Mr. Evans after his arrest. Again, it will be recalled that Mr. Evans, while at one time a co-accused, did not appear for the second trial which resulted in the convictions now the subject of appeal. That trial proceeded in his absence. However, in his absence, the appellant mounted a challenge on multiple grounds to the procedures followed when it came to taking forensic samples from Mr. Evans.

262. The evidence established that on the 6th of March 2013, Detective Chief Superintendent Thomas Maguire received a telephone call from Detective Sergeant Flaherty who was seeking authorisation from the Chief Superintendent that he would be permitted to photograph, fingerprint, palm print and take samples pursuant to s. 2 of the Criminal Justice (Forensic Evidence) Act 1990 (i.e., "the Act of 1990"), to include firearms residue swabs from Mr. Evans and Mr. McGrath. Detective Chief Superintendent Maguire considered the request and then informed Detective Sergeant Flaherty that he was authorising the taking of the samples and that the Detective Sergeant could go ahead and make arrangements for the samples to be taken. There was also evidence from Sergeant Tormay of his taking up the duty as Member in Charge of Ballymun Garda station. He went to an interview room where Mr. Evans was and informed him that an authorisation had been issued for the taking of forensic samples and that the grounds for this related to the unlawful possession of a firearm. Sergeant Tormay gave evidence that he made a requirement of Mr. Evans pursuant to the Act of 1990 and that he was present for the taking of the samples. Sergeant Tormay indicated that the basis upon which he was aware of the authorisation to take the samples was due to a note in the custody record. It appears that the custody record entry was made by a Garda Kelly who had been informed by Detective Sergeant Flaherty of the authorisation issued by Detective Chief Superintendent Maguire.

263. The elaborate argument presented by the defence at trial was based on a very particular interpretation of the decision of the Supreme Court in *People (DPP) v. J.C.* [2017] 1 I.R. 417. The building blocks were as follows:

(i) It was said that Detective Chief Superintendent Maguire did not communicate to Detective Sergeant Flaherty the grounds upon which he had decided to issue his oral authorisation in breach of the statutory requirements. This argument ignores the fact that the authorisation was given in response to a request from Detective Sergeant Flaherty.

(ii) While Detective Sergeant Flaherty had communicated the fact of Detective Chief Superintendent Maguire's authorisation to Garda Kelly, who made a relevant entry into the custody record, Sergeant Tormay purported to give the information prescribed to Mr. Evans based on the entry rather than on the basis of any personal direct knowledge.

(iii) It was argued that there was a breach of s. 2(6) of the Act of 1990 because the member taking the sample, or causing the sample to be taken, failed to inform the person from whom the sample was taken of the three matters set out in the subsection.

(iv) If the Sergeant was to be regarded as the member either taking a sample, or causing a sample to be taken, then, it was said, that this was an impermissible and

unlawful action on the part of the Sergeant, in that he was no longer to be regarded as independent of the investigation.

(v) It was said that the authorisation issued by Detective Chief Superintendent Maguire breached the principles established in the decision of the Supreme Court in *Damache v. DPP & Ors* [2012] 2 I.R. 266, in that he was part of and not independent from the investigation into the matters under consideration. It is to be noted that what might be described as "*Damache* arguments" have been advanced and rejected on a number of occasions. In the case of *People (DPP) v. Ryan Glennon* [2018] IECA 211, what was in issue was the extension of a detention. Birmingham P., delivering judgment for the Court, commented as follows at paragraph 5 of that judgment:

> "*The Court begins its consideration of this issue by pointing out that there is no statutory requirement that a Garda officer of appropriate rank performing the duty must be someone independent of the investigation. What is sought therefore is to read into the legislation something that is not there. The Court then calls to mind the well-known observations of Oliver Wendell Holmes that the life of the law has not been logic; it has been experience. The Court is not at all persuaded that there is any analogy to be drawn between the position of a member of an investigation team issuing a warrant to search a dwelling and the position of officers involved in the investigation taking decisions in relation to somebody who, on this scenario, has been lawfully arrested and validly detained. It seems to us that it would be destructive of the efficiencies required and expected of An Garda Síochána to exclude from decision making those who are best equipped to form judgments; those who are most familiar with the investigation. As the case of DPP v. Gary Howard [2016] IECA 219 establishes, where what was essentially the same argument was advanced in the context of s. 50 of the Criminal Justice Act 2007, the argument would find favour only if abstract logic were to be preferred to the experience of the law. The Court does not see this as a point of substance and has no hesitation in rejecting this Ground of Appeal*".

(vi) In the course of its recent judgment in the case of *Kevin Braney v. Ireland and the Attorney General* [2022] 1 I.L.R.M. 141, the Supreme Court appeared to approve the decisions in *People (DPP) v. Howard* [2016] IECA 219 and *People (DPP) v. Glennon* [2018] IECA 211. The Supreme Court concluded its consideration of that specific issue as follows:

> "*59. Substantial differences justify a different approach from Damache. In addition, and more importantly, no evidence or substantial argument emerges to demonstrate that as a matter of fact in this case or as a matter of principle, generally, there has been any departure from the standard of care and reasonableness required in the safeguarding of rights*".

264. On day 28 of the trial, the 22nd of February 2017, the trial court delivered a detailed ruling in relation to this issue which ran to some 26 pages of the transcript. The trial court's ruling precipitated an exchange between counsel, particularly counsel on behalf of Mr. Kelly and the presiding judge. The exchange began with counsel for Mr. Kelly saying that the trial court appeared to have ruled that, in a number of respects, there were breaches of the law connected to the process of the procurement of the sample. To this, the senior presiding judge responded by saying, "*yes, of a limited variety*". Counsel continued:

> "*COUNSEL: Yes, but I had understood that the Court was going to, as it were --*
> *SENIOR PRESIDING JUDGE: There's no constitutional right engaged. That was the finding of the Court. So there's no need to argue it further.*
> *COUNSEL: Well, I understood the position was that the Court was going to rule, first of all, on whether or not there were breaches of the law and the connection with the procurement of the samples?*
> *SENIOR PRESIDING JUDGE: No, no. We would have turned to JC if JC arose,* [counsel]*. We found legal breaches in relation to a third party; that gives rise to discretion. We've exercised out discretion. That's it.*
> *COUNSEL: I appreciate the Court has ruled. I'm just flagging that I understood I was going to have an opportunity to argue what the consequences of any breach of law was?*
> *SENIOR PRESIDING JUDGE: No, that's not a correct understanding. The understanding of the Court is that that arises in relation to JC, which requires a separate, entirely separate exercise,* [counsel]*, and we don't require to argue JC, because there's no invasion of a constitutional right.*
> *COUNSEL: Well, Judge, could I be permitted to just spend two minutes --*
> *SENIOR PRESIDING JUDGE: Yes.*
> *COUNSEL: -- summarising the position which I had intended to put before the Court, and if the Court is unmoved by that --*
> *SENIOR PRESIDING JUDGE: Oh, absolutely, yes, I've no problem with that.*
> *COUNSEL: Essentially, Judges, it was going to be my submission that under JC there's been a fundamental shift, in that instead of exclusionary rule directed at vindicating the rights of the person whose rights were infringed, the Court has shifted policy, as it were, to guarding against inappropriate conduct by gardaí invading constitutional rights.*
> *SENIOR PRESIDING JUDGE: There's no invasion of a constitutional right. That's the whole point,* [counsel]*.*
> *COUNSEL: Well, with regards to that I was going to argue that under Boyce, the Supreme Court has established that DNA samples involve taking -- invading privacy rights and bodily integrity rights.*
> *SENIOR PRESIDING JUDGE: No --*
> *COUNSEL: They are constitutional rights.*
> *SENIOR PRESIDING JUDGE: No right of bodily privacy or integrity of Mr Kelly has been identified in this case.*
> *COUNSEL: No, I --*
> *SENIOR PRESIDING JUDGE: Boyce doesn't arise either.*

COUNSEL: Well, well, in the first instance there is -- if the Court takes these illegalities, there is an invasion of the constitutional rights of a person.
SENIOR PRESIDING JUDGE: Yes, which he is not entitled to raise. That's the ruling of the Court. And we're not going behind it.
COUNSEL: No, Judge, you've given me the two minutes, as it were, to articulate what I was going to articulate. I do have the relevant parts of JC in a summary document, and I have Boyce to hand in to the Court.
SENIOR PRESIDING JUDGE: All right, [counsel]*, all right, all right.*
COUNSEL: If the Court wishes to receive it. But it does appear that the Court has considered and determined the matter, so I don't want to --
SENIOR PRESIDING JUDGE: There's no constitutional rights engaged. And at least my understanding, but I may be wrong, is that JC talks about the position that arises consequent upon a finding of the invasion of a constitutional right. Matters of legality and discretion are still governed by O'Brien and other cases.
COUNSEL: Well, the point is, Judge, that the position appears to be that if a DNA sample is taken otherwise than in accordance with law then it is an unlawful invasion of a person's constitutional rights.
SENIOR PRESIDING JUDGE: [counsel]*, let's not go round in a circle: no samples were taken from Mr Kelly in breach of his constitutional rights --*
COUNSEL: Yes.
SENIOR PRESIDING JUDGE: -- and he has got no right, the Court has ruled, he has no right to set himself up as a bystander of an officious kind in relation to other people. That's the ruling of the Court".

265. In the course of the very lengthy submissions that were filed on behalf of Mr. Kelly, at p. 147 thereof, the ruling of the trial court is helpfully summarised. We are happy to adopt that summary and we set it out here:

(i) "*The Court is satisfied that the explanation given to Dean Evans adequately conveyed the first ground relied on by the Detective Chief Superintendent, namely; that the Detective Chief Superintendent suspected Mr Evans of having been involved in the firearms offence for which he had been arrested. Furthermore, Sgt Tormay also properly conveyed the information required to Dean Evans. This was because the Detective Chief Superintendent had issued the authorisation on the basis that he suspected that Mr Evans had been involved in the offences for which he had been arrested which included the firearms offence, and he was therefore very much aware that the samples in question would tend to prove or could confirm or disprove his involvement in these offences*".

(ii) "*There was a breach of s.2 in circumstances where the sergeant did not communicate to Mr Evans the second ground upon which the Detective Chief Superintendent had issued the authorisation, namely; that the taking of the samples to be authorised could tend to confirm or disprove involvement of the suspect in the offence for which he was arrested*".

(iii) "*With respect to the involvement of Sgt Tormay in the investigation, the Trial Court ruled that there was no tenable objection to the mere presence of the member-in-charge at the taking of a forensic sample. The member-in-charge may be required to introduce those actually taking the sample to the accused for the first time, as happened in this case. In broad terms, the taking of a sample or the causing of the taking of a sample must generally be categorised as an investigative step and due observance of the distinction between the investigation and those members of the Gardaí responsible for the treatment and welfare of the detainee, generally requires that members in the latter category do not become involved in investigative matters, unless the exigencies of the particular situation require such intervention as a matter of last resort. No such considerations arise in this case*".

(iv) "*There is a further breach of the provisions of s.2(6), in that applying a strict or narrow construction of the words of the section in question, the information stipulated by the section was not given by a member who either took the samples or caused the samples to be taken from Mr Evans. Having taken this view of the facts — which was based on a strict construction of the statutory provision in question — it was not necessary under this heading to consider whether Sgt Tormay exceeded the proper bounds of his position as member-in-charge because the Court has concluded that he did not in fact involve himself in the actual taking of the samples, over and above providing the statutory information or attempting to provide the statutory information required to be given to Mr Evans*".

(v) "*The Damache argument concerning the involvement of the Detective Chief Superintendent in the investigation was without merit. The Supreme Court decision does not have any application beyond circumstances pertaining to the issue of search warrants in relation to dwellings. The interaction between a presumptively constitutional regime for the taking of forensic samples and the bodily integrity of the individual is not addressed by the Supreme Court decision — and even if it were — it is difficult to see how this could avail the appellant herein*".

(vi) "*There was no breach of s.2(7) of the 1990 Act. The section does not prescribe any particular method or form by which this process of confirmation is to be executed. In this case, the Detective Chief Superintendent made an immediate note in his journal confirming the issue of the oral authorisation, which included the main terms thereof*".

(vii) "*The 1990 Act is a penal statute but it involves no question of the enforcement of any penalty against the appellant under these provisions of the Act. The second point to note is that neither the Act nor the regulations contain any provision relating to the admissibility or non-admissibility of evidence garnered by means of the various procedures provided for in the Act. Therefore, the nature of the statute is irrelevant because the admissibility or non-admissibility of evidence is*

not the enforcement of a statutory penalty nor is the process governed by any statutory provision which requires interpretation or construction".

(viii) "*The Trial Court noted that it is very difficult to see how any defect in the procedures relating to Mr Evans impinge in any way on either the constitutional or legal rights of the Appellant. The manner in which samples were taken from Mr Evans does not infringe any right to privacy or bodily integrity of the appellant. Therefore, the only conceivable right protected by the Constitution that might be affected by the admission of such evidence is his right to a fair trial. In that regard every law abiding citizen would like to see that all laws are complied with by everybody in every respect. Regrettably, that is not a standard which is achievable in human affairs and it is not the position that every piece of evidence placed before a trial court must be rejected*".

(ix) "*The right to a fair trial does not include the right to become an officious bystander in respect of breaches of third party rights, unless in extreme situations where those breached are so egregious so as to taint the administration of justice. Alternatively, there must be specific unfairness accruing to the accused emanating from the third party breach. Neither position has been established by the appellant*".

(x) "*Therefore, it remains to be considered whether there are legal rather than constitutional grounds for excluding the evidence*".

(xi) "*In that regard, it is necessary to consider whether there are legal grounds for excluding the evidence emanating from forensic samples taken from Mr Evans at the trial of the appellant*".

(xii) "*The reference (by analogy) to exclusion of evidence in relation drink driving cases where a breach of a statutory procedure had occurred was not well founded. The Road Traffic Acts provide a self-contained code for the investigation and prosecution of such offences. The forensic samples legislation and regulations made thereunder are quite different in nature and content. The most that can be done is to examine the matter from the perspective that the samples were tainted by the breaches identified, thereby giving rise to the exercise of discretion*".

(xiii) "*The correct approach is that expressed by Kingsmill Moore J. in People (Attorney General) v O'Brien [1965] I.R. 142, namely; the Court must take into account a broad range of circumstances before determining whether, on balance, the evidence should be admitted or excluded:*

(a) The requirement to give information prior to the taking of a sample under s.2(6) of the 1990 Act is directed solely towards the intended recipient and not any third party. Consequently there is no disadvantage whatsoever to the appellant;

(b) Secondly, it is necessary to consider the nature and extent of the breaches. In assessing the nature and extent of the breach of s.2(6) the Court is entitled to take into account the fact that there was a genuine but misguided

attempt by Sgt Tormay to see that the provisions of the subsection were complied with. Albeit that that effort was not in itself sufficient to meet the full requirements of that subsection. Consequently, it cannot be said that the Gardaí engaged in blatant disregard of the statutory requirements in question, nor can it be said that there was any settled or deliberate policy to avoid compliance with the provisions in question. As a result of the steps in question and of the information previously imparted to Mr Evans, the Trial Court is fully satisfied that prior to the taking of the samples in question, Mr Evans was well aware of the nature of the offence in which it was suspected that he had been involved and that he knew that an authorisation had been given under s.2(4)(a) of the 1990 Act and the results of any tests on the sample might be given in evidence;

(c) Thirdly, Mr Evans had the opportunity to receive legal advice prior to the taking of the swab. The taking of a fingerprint, a palm print, a firearm swab from the skin or a buccal swab do not, in themselves, constitute an unlawful or impermissible infringement of the right to bodily integrity. The Oireachtas has already determined, in the context of the 2006 legislation, that a taking of such samples without consent is lawful and has struck a balance between the public interest in having access to the objective and immutable evidence provided by such samples and the minimally evasive means of obtaining such samples in the context of the issue of bodily integrity. That legislative choice is presumed to be constitutional and proportionate until declared otherwise by the superior courts".

(xiv) "*In relation to the failure to append the form specified in appendix D to the Criminal Justice (Forensic Evidence) Act, 1990 Regulations 1992 to the custody record of Mr Evans and the possible alternative view that there was, in fact, a breach of s.2(7) by the failure of the Superintendent to confirm the oral authorisation in writing as soon as was practicable, the Court applied the same discretionary criteria. Those lapses do not appear to be intentional or systematic and there is no effect on the fairness of the appellant's trial*".

(xv) "*Trial Court noted that in case it was incorrect in taking a view that Sgt Tormay did not involve himself in the taking of the samples thereby breaching the 1984 Act and/or the Custody Regulations, a statutory discretion arises. For the same reasons as outlined above, the nature and extent of these breaches could not lead to the exercise of discretion in favour of excluding potentially relevant evidence against the appellant*".

(xvi) "*The Trial Court also considered submissions made on behalf of Mr McGrath (the co-appellant herein) although they do not concern the within submissions and the issues pertaining to the admissibility of the evidence as against the appellant*".

266. The appellant's approach before this Court has been to seek to bank the rulings of the trial court which found that there had been breaches and to reinstate and repeat all of the arguments that were rejected. For our part, we think that the trial court might well have concluded that there

were no breaches. We think it is arguable that the nature and circumstances of the arrest, together with the information specifically provided, meant that, in truth, Mr. Evans was in fact informed of all the matters contemplated by the statute. Neither are we convinced that there is any valid criticism to be made of Sergeant Tormay. If one takes the view, as the trial court did, that he was not an active participant in the taking of the sample, then it seems to us that he did not exceed his proper role in providing information to a prisoner as to what was occurring and why it was occurring. If one takes the view that he did, in fact, become actively involved in taking the samples, it does not seem to us to follow from that that he had impermissibly involved himself in the investigation. What was significant from the investigation perspective was that there should be authorisation for the taking of samples and that samples should be taken. We do not ignore the point made on behalf of the appellant, which we recognise as of some substance, that it does not always follow that because an authorisation has been given, that a sample will actually be taken. Be that as it may, if one proceeds on the same basis as the trial court – that there were certain breaches – those were not breaches of consequence, they did not impinge on the constitutional rights of Mr. Evans, and most emphatically, they did not impinge on the constitutional or other rights of Mr. Kelly or Mr. McGrath. We are certainly not persuaded that there were any breaches going beyond those found by the trial court. We have already indicated our views in relation to what we have been describing as the *Damache* point. We do not believe it was ever a point of any merit and, post the decision of the Supreme Court in *Braney*, it has even less substance.

267. Likewise, we are not prepared to expand the criticisms of Sergeant Tormay and we agree with the trial court that whatever view is taken of his actions, it did not involve serious wrongdoing from any angle, nor did it involve prejudicing the position of Mr. Evans, and still less, prejudicing the position of Mr. Kelly or Mr. McGrath.

268. The appellant further contends that the trial was rendered unsatisfactory when, having established certain breaches of procedures, he was denied the opportunity to follow up on this by arguing that by reference to the *J.C.* decision of the Supreme Court, that evidence in the case against him should have been excluded.

269. We have already referred to exchanges that took place between counsel on behalf of Mr. Kelly and the presiding judge after the trial court's ruling on the challenge to the procedures followed had been delivered. While we are prepared to accept that there may have been some misunderstanding as to what procedure was envisaged, we do not believe that the trial court fell into any error when it concluded that its ruling disposed comprehensively of all the issues before the court.

270. In summary, we have not been persuaded that the issue in relation to the DNA samples, and the related issue relating to fingerprints, has given rise to any issue of substance. Certainly, we have not been persuaded that it is, under any circumstances, a ground of appeal that could be sustained.

271. We therefore dismiss these grounds of appeal.

Generic Issues

Sharif Kelly – grounds (i) and (xv); and Edward McGrath – ground (xiii)

272. Having considered the run of the trial, and all of the specific issues raised by the appellants, we are satisfied to reject these generic grounds of appeal also as not having been

made out. Accordingly, we reject any suggestion that the trial was unsatisfactory and the verdict unsafe. We further reject any suggestion that the appellants were convicted in a trial which was neither conducted in accordance with law nor in a manner in which justice was seen to be done.

Conclusion

273. The appeals against conviction in both cases must be dismissed.