THE COURT OF APPEAL

UNAPPROVED **Neutral Citation Number: [2020] IECA 300**

[132/17]

[148/17]

The President

Kennedy J

Ni Raifeartaigh J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DYLAN HAYES AND GERARD HOGAN

APPELLANTS

JUDGMENT of the Court delivered on the 9th day of November 2020 by Birmingham P

1. On 17th May 2017, following a three-week trial in the Central Criminal Court, both appellants were convicted of the offence of murder. They had stood trial charged with the murder of one Shane Murphy on 30th April 2015 at an address in Pallasgreen, County Limerick. Both men have now appealed their conviction. There are grounds of appeal that are common to both and there are a number of additional grounds that are raised by the appellant, Gerard Hogan, alone.

2. Before turning to consider the grounds of appeal that have been argued, it is appropriate to say something about the background to the trial. A degree of caution is required in that the background inevitably draws, to some extent, on accounts of eyewitnesses, and it is a key plank of the appeal of Gerard Hogan that those accounts are not

reliable, are not supported by, are inconsistent with, and, indeed, are contradicted by the scientific and forensic evidence in the case. With that caveat, what emerges is that Shane Murphy met his death on the evening of Thursday 30th April 2015 at 1, The Grove, Pallasgreen, County Limerick, which was the home of his girlfriend, Sharon Kelly.

3. In the days leading up to the death, a number of persons had been staying in the house. On 29th April 2015, the day of Gerard Hogan's birthday, the second-named appellant was present at the aforementioned address along with Sharon Kelly, Shane Murphy, Jodie Byrnes and Ailish Flood. During the evening, a now deceased neighbour, Wayne (his surname was not given at trial), arrived over to the house. Jodie Byrnes, a female, who was one of the people staying in the house at the time, was upstairs in one of the bedrooms. She said that she woke to find Wayne in bed next to her. She jumped out of bed. Shane Murphy came up and put Wayne out of the house.

4. On the next day, Thursday 30th April 2015, there was some toing's and froing's from the house that day. In the evening, Sharon Kelly, Shane Murphy, Jodie Byrne, Ailish Flood, and the second-named appellant, Gerard Hogan, were all present in the house. Most present were drinking, though perhaps not all to the same extent as each other. Jodie Byrnes telephoned her ex-boyfriend, Dylan Hayes, the first-named appellant, and told him about the incident with Wayne the previous night. Dylan Hayes arrived over to the house accompanied by another man, Graham Kelly, at around 10.45pm.

5. Subsequent to the arrival of Dylan Hayes and Graham Kelly, an altercation developed. It was the prosecution case that in the course of that altercation, Dylan Hayes and Gerard Hogan attacked Shane Murphy. Eyewitnesses stated that a screwdriver and knife were used by the men. Mr. Murphy sustained a number of stab wounds and other injuries. The Emergency Services were contacted. Attempts were made by Graham Kelly to carry out CPR, but to no avail, and Mr. Murphy died at the scene.

Overview of the Evidence

The Evidence of Sharon Kelly

6. Sharon Kelly, the householder, was sober during the incident. Her position was that she did not want Dylan Hayes or Graham Kelly in the house; indeed, she wanted all the men out of the house, other than Shane Murphy. While she was trying to push them out towards the door, she was head-butted by Dylan Hayes. Gerard Hogan hit Mr. Murphy over the head with an ashtray. Dylan Hayes, Gerard Hogan, and Graham Kelly cornered Mr. Murphy over by a patio door in the sitting room. Mr. Kelly was punching him, but Gerard Hogan and Dylan Hayes were stabbing him. Sharon Kelly thought that Dylan Hayes had a screwdriver and Gerard Hogan, a knife, though she conceded that she may have been mistaken and that it may have been the other way around, but she remembers that they were both stabbing Mr. Murphy.

7. No witnesses suggested that Graham Kelly had a weapon. Graham Kelly started shouting to the others to stop, that Mr. Murphy had had enough. The three men left the sitting room. Mr. Murphy slid onto the floor. Ms. Kelly brought Mr. Murphy over to the couch. She was leaning over him, trying to stem the bleeding, when she says that Mr. Hogan and Mr. Hayes returned again and started stabbing Mr. Murphy once more. At this stage, Mr. Murphy was in a totally defenceless condition and they were stabbing him, mostly on the side and the chest. Ms. Kelly was kicking out and screaming for them to stop, and she herself received injuries trying to protect Mr. Murphy, in particular, a laceration to her hand which was deep and required stitches. According to Ms. Kelly, Dylan Hayes and Gerard Hogan were egging each other on, using words like “get him, get him”. When Dylan would stop staying that, Gerard Hogan would take it up and *vice versa*. Graham Kelly eventually pulled the attackers

off Mr. Murphy. In the process of attempting to break up the fight, Graham Kelly hit Gerard Hogan in the face.

8. Counsel for Dylan Hayes did not really challenge the evidence of Sharon Kelly. Counsel for Gerard Hogan, however, appeared to accept that his client was involved in the incident to some extent, but maintained that his client was involved in punching as opposed to stabbing. He suggested that his client may have picked up the screwdriver at a later stage and that there was only one attack and that his client had come in and gone out. However, on eight occasions, Sharon Kelly asserted that there had been a break between a first and second attack. Counsel for Gerard Hogan suggested that his client had not uttered the words of encouragement attributed by Sharon Kelly. Ms. Kelly disagreed with this.

The Evidence of Graham Kelly

9. Graham Kelly's evidence was of attending the house and becoming aware that a fight had broken out involving Shane Murphy, Gerard Hogan, and Dylan Hayes. He tried to break up this fight by pulling the two appellants off Shane Murphy, punching Dylan Hayes in the process. He describes Gerard Hogan running out of the room when he saw him punching Dylan Hayes, but then running back into the room. Gerard Hogan had something in his hand. The evidence of Graham Kelly was the subject of an application by the prosecution pursuant to section 16 of the Criminal Justice Act 2016. We will return to this issue in due course.

Evidence of Ailish Flood

10. Ailish Flood's evidence also suggested that there were two attacks on Shane Murphy. She said that Dylan Hayes had a knife and Gerard Hogan had a screwdriver. She describes Gerard Hogan jabbing the screwdriver into Shane Murphy and she said that they were saying "give it to him, give it to him, finish him".

Evidence of Jodie Byrnes

11. The evidence of Jodie Byrnes was the subject of a further s. 16 application. This occurred in circumstances where she was unable to provide more than limited details of the events of the night in question at trial but had previously provided Gardaí with a statement which implicated the two accused, with whom she had a friendship going back a number of years.

Forensic Evidence

12. A screwdriver, a knife, and a broken ashtray were recovered at the scene. Gerard Hogan's blood was found on the handle of the screwdriver and at the part where the metal shaft meets the handle. Shane Murphy's blood, as well as the blood of Gerard Hogan, was on the tip of the screwdriver. Shane Murphy's blood was also found on the knife. Blood samples from both Shane Murphy and Gerard Hogan were recovered from portions of the broken ashtray. Shane Murphy's blood was recovered from the clothing of Dylan Hayes and also of Graham Kelly. Gerard Hogan's blood was recovered from his own clothing.

13. The pathologist concluded that the majority of the serious injuries to Shane Murphy were caused by a knife. She accepted that some of the more minor injuries found on the body could have been caused by an object such as a screwdriver. Death was caused by some of the injuries which had been inflicted by the knife.

The Approach of Dylan Hayes in Interviews and at Trial

14. Dylan Hayes gave a number of differing accounts as to what occurred on the night in question. Initially, he put himself upstairs, hearing shouting and roaring downstairs. There was then an account which involved blaming Gerard Hogan for stabbing Shane Murphy

before making admissions, initially off camera, that he had in fact stabbed Shane Murphy, but only on a limited number of occasions. He stated that the deceased was calling him a junkie and a "gear head". So far as stabbing is concerned, his accounts progressed from stabbing Shane Murphy with a biro, before accepting that he had stabbed him a number of times with the knife, but only on the legs and buttocks, to a situation where, by the final interview, his account had progressed to accepting that he had stabbed the deceased in the stomach and chest.

15. At trial, Dylan Hayes did not dispute any of the accounts of him stabbing Shane Murphy. Instead, the case advanced was one of a loss of control. He put the source of the loss of control in the context of having been accused of being a junkie and a gear head.

The Approach of Gerard Hogan in Interview and at Trial

16. In interviews with Gardaí, Gerard Hogan's account did not involve him hitting Shane Murphy. He told Gardaí that he cut his hand trying to take a knife off "someone". At trial, the case put forward on his behalf was that he was involved in an assault on Shane Murphy. He also accepted that he had a screwdriver, but suggested that he never used it and that he did not have it when he assaulted Shane Murphy.

Grounds of Appeal

17. It is convenient to deal, first, with the grounds of appeal that are common to both appellants, these grounds being in relation to provocation and the invocation of s. 16 in respect of the evidence of Graham Kelly. This latter ground is more relevant to the appeal of Gerard Hogan.

Provocation

18. By way of introduction to this topic, it should be explained that at the close of the prosecution case, both appellants indicated that they were seeking to have the defence of provocation go to the jury. It must be said in both cases, that there were aspects of the case which rendered reliance on the partial defence problematic. In the case of Dylan Hayes, the suggested provocation was being called a junkie or a gear head by the deceased. In the course of interview, he had said "I went up to Shane and I said to him, 'were you saying that I was goofing up in the house the last time?' He said he was saying it. He took off his top. He said 'what are you going to do about it?' He hit me and I stabbed him and he hit me again". It is to be noted that at no point during the course of the various Garda interviews did Dylan Hayes make the case that he had experienced a sudden and complete loss of self-control. Rather, counsel for Dylan Hayes pointed to the forensic evidence, the multitude of stab wounds, to invite the drawing of an inference that the attack was frenzied and that the frenzied nature of the attack was indicative of a total loss of self-control. A further difficulty for Mr. Hayes was the evidence of Sharon Kelly and Ailish Flood that there had been two attacks, with an opportunity for passions to cool in between them. This was an issue to be assessed by the jury if permitted to consider the partial defence of provocation.

19. The situation of Gerard Hogan was more problematic still. At one level, the provocation pointed to was being head-butted by Shane Murphy, but the evidence in that regard was very limited. At one point in interview, Gerard Hogan had said that he was head-butted by the person he took a knife from, which, on any version, could not seem to have been Shane Murphy. At trial, his evidence was that while he had been involved in an assault of Shane Murphy, that he had not stabbed him, that he had refrained from such activity. In effect, the case on his behalf was that he had stayed apart from such activity, having kept himself in control.

20. In the circumstances, one can see how the judge might have decided not to let the issue of provocation go to the jury in either or both cases, in particular, he might have decided to do this in the case of Gerard Hogan. In his case, the judge pointed out that the word 'provocation' had not featured in the closing speech of defence counsel, while counsel described his approach as giving the topic a "light rub". Be that as it may, the judge allowed the jury to consider the partial defence, and so, what he had to say to the jury becomes of significance.

21. The judge's approach to the issue of provocation was slightly unconventional. He adverted to the concept of provocation and the fact that it would serve to reduce what would otherwise be murder to manslaughter at an early stage of the charge. He returned to the issue once more close to the end of his charge when telling the jury that, when dealing with the state of mind of an accused, it was with the individual accused, subjectively, that they were to be concerned.

22. On Day 12 of the trial, the judge addressed the jury as follows:

> "[n]ow, the other topic which arises in the immediate context of the law of murder is the question – the question of manslaughter and a question of provocation of which you have already heard. Now, in some circumstances, even where a person kills or…causes serious injury, that person is not guilty of murder but guilty of manslaughter, which is, as you probably know, and you will appreciate, a less serious form of homicide, and a person can never be convicted of murder if he or she does not intend to kill or cause serious injury. If you like, you do not even get to the issue of manslaughter or provocation unless you took the view that a particular accused person, again, I try to speak in principle, was guilty of the killing, whether he or she wielded the knife, for example, or not, and you do not get as far as even having to consider the question of manslaughter unless there is an intention to kill or

cause serious injury. It simply does not arise. The issue, however, even if a person intends to kill or cause serious injury, on the evidence in this case, one of the options which is open to you is to find the accused not guilty of murder, either of them, but guilty of manslaughter because he or either or both of them was or were provoked. I have said a few times, I have used the phrase 'he or they or each or both'. It is important that I say this to you, you are dealing with two separate accused, two separate alleged offences. In fact, you are dealing with two separate trials, in a sense, rolled into one. This is done primarily for administrative convenience because many of the witnesses in this case would be common to the cases being made by the prosecution against both of the accused and there would be a certain absurdity, perhaps, in having two trials, one of each of the accused, separated, and obviously tried by different juries. So, you proceed on the basis that each accused is to be dealt with separately and I raised it at this juncture because I think it is an appropriate time to do so. But in any event, Ladies and Gentlemen, the question arises as to whether or not, rather than a verdict of guilty or not guilty, as the case may be, it is legitimate on the evidence to find one or other or both the accused not guilty of murder, but guilty of manslaughter on the grounds of provocation. Now, provocation is defined in the following way. For it to arise, there must be a sudden, unforeseen onset of passion which, at the time when the accused killed the deceased, totally deprived him of his self-control.

So, at the time when the accused killed the deceased, for provocation to arise, there must be a sudden, unforeseen onset of passion which totally deprives him of self-control. Now, it is not enough that the accused has lost his temper or that he was easily provoked. The loss of control must be total, must have come suddenly and before the passion has time to cool. The reaction cannot be tinged by some form of

calculation, by some form of weighing the various pros and cons, but it must be genuine, in the sense that the accused has not, as it were, set up the situation which now provokes him – it must not be tinged by calculation and it must be genuine, in the sense that the accused did not set up the situation he now says provoked him, and the prosecution must prove beyond a reasonable doubt that the accused was not provoked because the responsibility for proof arises or lies on the prosecution at all times.

So, in the case of the accused, where the jury are satisfied that the accused killed the deceased and that at the time of the killing, he had the intention to kill or cause serious injury, a verdict of manslaughter may be appropriate on the grounds of provocation. I think it might be helpful if I read that again to you. For provocation to arise, there must be a sudden, unforeseen onset of passion which, at the time when the accused killed the deceased, totally deprived him of his self-control, and in those circumstances –

Now, it is not enough that the accused has lost his temper or merely that he is easily provoked. The loss of temper must be total, must come suddenly and before the passion has a time to cool. It cannot be tinged by some form of calculation, by some form of weighing various pros and cons, but it must be genuine, in the sense that the accused has not, as it were, set up the situation which now provokes him. The prosecution must prove beyond a reasonable doubt that the accused was not provoked because the responsibility for proof lies on the prosecution at all times.

Now, potentially, such a verdict or verdicts is or are available in the present cases, and I say cases on the basis of the evidence as a matter of principle, but I do not decide whether or not provocation arises, it is none of my affair. I have simply sought to give you the legal principles which are applicable because it is my job, on

the basis of the evidence I have seen in the case or heard in the case, to give you what the relevant legal principles are. I mean, you can imagine a judge charging a jury dealing with charges of murder where he would say nothing about provocation because there would just be no suggestion of it in the evidence or no rational basis for a jury to even consider it. So, I am not saying it arises, I am saying that in principle, on the evidence, it is capable of arising, in the sense that it would give rise to an acquittal of the accused on a charge of murder, but a conviction of manslaughter, the other verdict, of course, being available in the case of one or both of the accused, being not guilty of murder *simpliciter*, end of story." [The repetition here arises in the original charge by the trial judge]

The judge reverted to the issue of provocation just before concluding his charge and sending the jury away. He did so in these terms:

"Ladies and Gentlemen, I just want to revert to the issue of the state of mind of the accused. I have explained to you that you are dealing with this man in this case, not some notional person, and you are dealing subjectively with this man. Of course, when you are dealing with him, you are dealing, as far as you can, on the evidence, dealing with a man who presents himself to you with all the strengths and all his weaknesses, with his baggage, I do not mean that in a pejorative sense, and as he was on the occasion in question. Of course, when you are looking at a person's state of mind, amongst other things, if there is evidence there, as there is in this case, which you will take into account, which is the consumption of alcohol, or if you conceived it might be the case the question of the use of medication, whether for medical purposes or as a drug of abuse, you try and look at the man as he was on the occasion in question, taking into account all aspects of his personality, or the factual circumstances insofar as you can on the evidence before you."

The Court would simply observe that these remarks, which were the very last thing that the jury heard before being sent away, were clear, straightforward and expressed in plain English.

23. Immediately when the judge concluded his charge, prosecution counsel was clearly of the view that more specific treatment of the subjective nature of the provocation partial defence in the context was required, and requisitioned successfully to that effect. While there was little, if any, disagreement as to how the judge should recharge, the manner in which he actually did so is the subject of severe criticism by the appellants.

24. Prosecution counsel said that he was not sure that it had been made clear in the context of the provocation plea that the subjective test arises throughout and that it also applies in relation to intention. The judge's response was to say that he thought counsel was wrong about that, but it did not mean he was not going to recharge the jury. Counsel said that the other issue that arose was the issue of credibility, that the jury had to look at the credibility of a plea of provocation, referring to the Coonan & Foley textbook on *The Judge's Charge in Criminal Trials* ('Coonan & Foley'), referencing there, a quotation from Barrington J. in the *DPP v. Kelly* [2000] 2 IR 1. The judge enquired of counsel what he wanted him to say, did counsel want him to read out the passage which counsel had read. Counsel confirmed that he was seeking that the passage should be read, to which the judge responded that he might or might not do that.

25. Counsel for Dylan Hayes supported what had been said by counsel for the prosecution. Counsel indicated that when the judge had said, quite correctly, that it was not enough for a person to have lost his temper or that he was easily provoked, that this could introduce, accidentally, an objective test. Counsel for Gerard Hogan adopted everything that had been said by his colleague on behalf of Dylan Hayes in relation to provocation.

26. Having listened to other requisitions, mainly from counsel on behalf of Gerard Hogan, the judge then brought the jury back and recharged them as follows:

"[t]he first thing is this, I have already stressed to you the fact that you're looking at these men in this case subjectively speaking. At any point in the case, where you are considering the state of mind of the accused, whether it's in terms of an alleged intent to kill or cause serious injury or when dealing with the state of mind at the time when the accused might or might not have been provoked obviously you're dealing with them on that subjective basis. So, you're not – you are adopting exactly the same approach on all aspects of the case when you are dealing with the accused's state of mind, either when looking at the issue of whether or not they had an intention, or either of them, to kill or cause serious injury, or whether or not either or one of them had or had not the state of mind which would justify the provocation defence. So, always subjective, no objective test. The objective issue, as I said to you earlier, is only one of the tools which you might use to judge the state of mind of the accused on any topic. I think that is clear, but just in case. Now, the other thing in relation to provocation is this, I am just going to add a little to what I told you about it, I actually think it is wiser if I actually just read out to you what I said already on the topic and then say a little more. What I have already said is this: for provocation to arise, there must be a sudden, unforeseen onset of passion which, at the time when the accused killed the deceased, totally deprived him of his self-control, So, at the time when the accused killed the deceased, for provocation to arise, there must be a sudden, unforeseen onset of passion which totally deprives him of self-control. Now, it is not enough that the accused has lost his temper or that he was easily provoked. The loss of control must be total, must have come suddenly and before the passion has time to cool. The reaction cannot be tinged by some form of calculation, by some form of weighing the various pros and cons, but it must be genuine, in the sense that the accused has not, as it were,

set up the situation which now provokes him, and the prosecution must prove beyond a reasonable doubt that the accused was not provoked because the responsibility for proof always lies with the prosecution.

Now, there is this further piece, which I think might be of some help to you. If the reaction of the accused, in totally losing his self-control, in response to the alleged provocation, appears to you to have been strange, odd or disproportionate, of course that is a matter which you are entitled to take into consideration in deciding whether the evidence on which the plea of provocation is based is credible, to state the obvious, really. Again, I suppose, coming back to the point, you have to start somewhere in terms of assessing credibility, and, as I say, when you are looking at the person's state of mind, that context or otherwise, these men in this case, subjectively speaking, so that is the provocation matter which we wanted to deal with."

27. In the Court's view, no juror or other observer who heard the charge delivered could have been in any doubt at the conclusion of it that the test was anything other than subjective and that the focus of attention was anywhere other than the individuals before the Court. In coming to that view, we are influenced by the clarity of the trial judge's remarks just before sending the jury away, which we have quoted above. Lawyers are, of course, greatly exercised by the distinction between the subjective and objective test language, but laypeople are unlikely to be as taken with issues of language. What was required was that it was made clear to the jury that they had to focus on the individuals on trial. The concern of the jury was with the individuals in Court on trial; the concern was not with how the public, generally, might be expected to react or how the reasonable man might be expected to react. In our view, nothing that the judge said could be seen as putting the jury wrong. As to the recharge, it would have been better had the judge read the entirety of the quotation from Barrington J.

as quoted in *Coonan & Foley*, but we do not believe, in the circumstances of this case, that any real damage was done by his decision to provide only a shorter extract. Overall, the Court has not been persuaded by the arguments on behalf of either appellant in relation to the issue of provocation. Rather, we take the view that the judge's treatment of the issue was, in the circumstances of this case, adequate.

Section 16 of the Criminal Justice Act 2006 – Evidence of Graham Kelly

28. Graham Kelly gave evidence on Days 3 and 4 of the trial. His evidence was that he arrived at the house in Pallasgreen by taxi, along with Dylan Hayes, the appellant. The appellant, Gerard Hogan, Shane Murphy, Jodie Byrnes and Sharon Kelly were already present at the house. At one stage an argument broke out between himself and Shane Murphy, but was resolved. Graham Kelly went back into the house and then heard screaming and went into the sitting room. There, he saw a fight going on between "the three boys", these being Dylan Hayes, Gerard Hogan and Shane Murphy. Graham Kelly went to break up the fight and pulled the boys apart and then saw blood on Shane Murphy. Graham Kelly hit Dylan Hayes in the process. Gerard Hogan ran out of the room and came running back in again with something in his hand and Graham Kelly hit him, as he thought he was going to be hit by Gerard Hogan. Shane Murphy was bleeding from numerous places. He stated that Gerard Hogan, who had received a slap on the head from Shane Murphy a little earlier, was angry after being hit and did not want to let it go. He said he could not hear anything being said by Dylan Hayes or Gerard Hogan in the sitting room, as he was in the kitchen. He explained that he offered assistance to Shane Murphy after he had broken up the fight, and when he did so, that he opened his top and saw that he had been stabbed.

29. The prosecution made an application pursuant to section 16 of the 2006 Act. They did so in a situation where they felt that his evidence in Court did not correspond with his earlier

statement made to Gardaí. In particular, in a statement made to Gardaí, he had said that when he was in the kitchen, Gerard Hogan and Dylan Hayes "took off at a gallop towards Shane Murphy" and he also said that he could hear both Gerard Hogan and Dylan saying "give it to him, give it to him".

30. A *voir dire* was conducted in relation to the issue. Graham Kelly accepted that he had made the statement in contention, but said he could not remember making it. Questioned as to why he could not remember making the statement or give the details in evidence contained in the statement, he stated that he had been addicted to "Upjohns" for the last two years, to drugs as well as alcohol, and that he could not remember that far back.

31. The defence resisted the invocation of section 16. They argued that Graham Kelly appeared to be a witness giving an honest account of events, that he had no recollection of the excerpts from the statement of interest to the prosecution, that Graham Kelly was highly intoxicated with drink/drugs at the time of the events, and this would significantly undermine the reliability of any account he might have given in the following days. It was pointed out that he had given important, probative, and relevant testimony in the course of his evidence in chief. His willingness to give evidence adverse to the defence was consistent with a willingness to give a truthful account, and the fact that he had no recollection of some points of detail which had been noted in his statement did not justify the invocation of section 16. The defence said if he could not genuinely recall matters represented by the excerpts from his statement, which the prosecution were interested in and seeking to adduce, then cross-examination would be rendered meaningless. The defence contended that the failure on the part of the witness to provide the very limited portions of the statement which the prosecution sought, was not a ploy by Graham Kelly to avoid giving evidence, but arose from a position that he honestly held. They contended that in a situation where significant, relevant and

probative evidence had been given, that it could not be said there was any necessity for the additional material for which the prosecution was contending.

32. The defence also drew attention to the fact that on the evening of the incident, after Graham Kelly had left Pallasgreen, that he was in the company of Ailish Flood and others, at which point, further intoxicants were consumed, and, it was said, that it must inevitably be the situation that post-event discussions had taken place. In those circumstances, there had to be a possibility of cross-contamination of narratives.

33. In the course of ruling on the issue, having viewed the DVD of the reading over of the statement, the trial judge concluded:

(a) That the assertion by Graham Kelly that he could not recall certain matters constituted a material inconsistency;

(b) That it had been established that the statement was made by Graham Kelly;

(c) That the evidence sought to be adduced would be admissible in the ordinary course; and

(d) That the statement was made voluntarily.

With regard to reliability, the trial judge noted that there was no reason to doubt Graham Kelly's account when he stated that he had a great deal of drink and drugs taken, and that on the next day, he was arrested on an unrelated matter, when he was found to be intoxicated from drink, and perhaps, drugs. At that stage, he was regarded as unfit for interview. While he was in custody on the other matter, the shoplifting matter, he slept in the Garda station, and accordingly, the trial judge had no difficulty with the proposition that Graham Kelly was a person who had recovered from drink and drugs when he made his statement, such that the Court could exclude intoxication as a factor continuing to bear upon reliability.

34. The judge felt that at the time of making his statement, Graham Kelly understood the need to tell the truth. With regard to the reason offered by Mr. Kelly for failing to give a

section of the statement in evidence, the Court was of the view that the explanation offered was a true explanation. In that regard, the trial judge observed that Graham Kelly appeared to be an honest witness. When addressing the issue of necessity, the trial judge referred to the decision of McKechnie J. in *DPP v. Murphy* [2013] IECCA 1, where the distinction was drawn between evidence which was merely supportive, useful, helpful or even desirable, which was insufficient to meet the requirements of s.16 of the 2016 Act, and evidence which was essential in a material and substantive respect.

35. In moving the application, counsel on behalf of the prosecution pointed to what he said were significant divergences between the evidence given by Graham Kelly in court from what he had said in the statement. Counsel pointed out that in his statement, it was clear that there were two attacks on Shane Murphy; but in his evidence, he suggested there was just one attack. In his evidence, he had said he did not remember the appellant saying anything or one of them being the aggressor. However, in his statement, he had said that Gerard Hogan would not leave it go and he was all talk, saying "come on, I'm not leaving it go". According to his statement, the impression he got from Gerard Hogan was that he wanted someone to help him have a go "off" Shane. Of particular significance, in his statement, he had said there was shouting, he could hear "give it to him, give it to him" and he thought both of the appellants were saying that. However, in his evidence, he said he did not remember the appellant saying anything. In his statement, he said they were in the kitchen, whereas, in his evidence, he said they were not. In his statement, he had said they had made a break for it, out of the kitchen over towards Shane Murphy. In his statement, he said that when he got in, they must have shoved Shane back out towards the couch, whereas, in evidence, he said that Shane was standing up and only fell to the ground after he broke up the fight.

36. Once the judge agreed that the section could be invoked, agreement was reached between the parties as to how the ruling would be implemented. The ruling saw the following statement read to the jury as part of the evidence of Graham Kelly:

> "Ger and Dylan made a break for it, took off in a gallop over towards Shane. Shane was coming against them. Then there was a bit of shouting. I could hear '[g]ive it to him, give it to him'. I think they were both saying it. It was shouting."

It was certainly open to the trial judge to conclude that the inconsistencies between the original statement and his evidence amounted to material inconsistency. The fact that the judge felt that the witness was being honest in the witness box did not serve to bar the invocation of section 16. Again, we feel that the judge's conclusions as to reliability were supported by the evidence. In particular, it seems to us that the judge was entitled to conclude that Graham Kelly, having slept it off in the Garda Station, was a person who had recovered from the effect of drink and drugs. Again, it seems to us on the run of the case, that there was a basis for his conclusion that the evidence contained in the statement was necessary. In a situation where there were a limited number of eyewitnesses, where accounts were likely to diverge, certainly on points of detail, and where witnesses were subject to challenge as unreliable, having regard to the consumption of alcohol, a conclusion that the additional material contended for was necessary is easy to understand.

37. This Court has had an opportunity of reading the transcript of the *voir dire* and the exchanges that took place between counsel and the trial judge. The sense that emerges is of the care and caution displayed by the trial judge. His caution was demonstrated by his desire that the witness would be given and would take an opportunity to review his statement prior to any formal application being made. Only after an opportunity had been given to the witness, and when the material inconsistency was repeated, did the section 16 application proceed. Once more caution, consistency, and deliberation were the order of the day. The

judge requested to view the video of the statement. The judge then gave a detailed ruling, addressing each of the issues raised against the statutory framework. It seems to us that it was open to the judge to find, as he did, that the inconsistencies between the original statement and the evidence amounted to "material" inconsistencies.

38. In these circumstances, we cannot conclude that it was not open to the trial judge to admit this statement pursuant to section 16. Accordingly, this ground of appeal, a ground of appeal common to both appellants, though of greater significance to Gerard Hogan, is rejected.

The Grounds of Appeal Exclusive to Gerard Hogan

39. Before turning to address the specifics of the individual grounds advanced on the appellant, Gerard Hogan, it is necessary to put those grounds in context. The appellant says that while, on reading what eyewitnesses had to say, it might seem that Gerard Hogan participated in the fatal assault, that in reality, the prosecution were running two cases in tandem against Mr. Hogan. Two eyewitnesses, Sharon Kelly and Ailish Flood, reported that Gerard Hogan was a participant in the fatal assault but counsel says that evidence (and it is emphasised that only Sharon Kelly had suggested at any point that Mr. Hogan had a knife, and even she was uncertain in that regard and admitted that she might be wrong) was in the teeth of the scientific and forensic evidence. The appellant draws attention to the evidence of Ms. Sandra McGrath, Forensic Scientist. The clothes that Gerard Hogan was wearing were taken from him, and also taken was a ring described as a terraced ring. So far as the 14 swabs taken from Mr. Hogan was concerned, in 13 of the 14 swabs, the DNA retrieved was that of Gerard Hogan himself, and of the 14 swabs, in no case was DNA of the deceased recovered. The terraced ring would be expected to be an ideal surface for retaining blood with which it had been in contact, but the situation is that no blood was found. The defence place

considerable emphasis on this. Linked to this, it is said, is the evidence of the Pathologist, Dr. Linda Mulligan, who found no injuries that were suggestive of an assault by a screwdriver.

40. The strength, indeed vehemence, of the reliance placed on the contention that there was a major divergence between the eyewitnesses and the scientific/evidence was reflected in the fact that during the course of the oral hearing, which was conducted remotely, members of the Court found it necessary to chide gently counsel for the appellant for addressing them as if they were a jury. It was a matter that was placed front and centre by the defence, and forms the background to the following grounds of appeal.

Separate Trials

41. Gerard Hogan applied on two occasions for separate trials. The application was first made before he was first put in charge of a jury, but when he was, that jury was discharged at an early stage. The case for separate trials was put forward on two bases; that upon arrest, Dylan Hayes had shouted at Gerard Hogan to say "no comment", and that in the course of interviews, Dylan Hayes had, at one point, sought to attribute blame to Gerard Hogan for the stabbing and death of Shane Murphy. In the course of written submissions, the respondent describes the application for separate trials as a prime example of the stock-in-trade of such applications. The prosecution case was that Gerard Hogan and Dylan Hayes had been involved in a concerted and joint attack on Shane Murphy, involving the use of a screwdriver and a knife.

42. In the circumstances of the case, the trial judge was, in the view of the Court, clearly within his rights in directing that the matter should proceed as a joint trial. Indeed, any other course of action would have been surprising in the extreme. In fairness to the appellant, counsel on his behalf did not pursue the point beyond the written submissions. In any event, it is accepted that whatever case there might have been for separate trials at the outset of the

case, it was weakened by the fact that prosecution counsel put his case fairly and squarely on the basis that Dylan Hayes had "plunged" the knife and that as the trial proceeded, there was no dispute that this was so

Section 16 of the Criminal Justice Act 2006 – Evidence of Jodie Byrnes (Otherwise Jodie Kinsella Byrnes)

43. Again, the evidence of Jodie Byrnes was the subject of an application by counsel pursuant to s. 16 of the Criminal Justice Act 2006. This ground of appeal can be dealt with briefly as the issues raised echo those already considered in the context of the section 16 invocation in respect of the evidence of Graham Kelly. Again, the judge's approach was careful and cautious. He ensured that psychiatric reports in relation to the witness were obtained and made available to the defence. The judge made provision for a recording of a 999 call made by the witness on the night of the incident and the video recording of her statement be played back to her in the course of the trial that proceeded, even though she would already have heard these in the course of the earlier aborted trial some days prior. The judge considered the matter overnight and delivered a detailed ruling, ultimately holding that the statement could be read into evidence.

44. The s. 16 application in the case of Jodie Byrnes was more straightforward, it might be seen as more a common or garden application, than that of Graham Kelly, where the judge's view that he was dealing with an honest witness was a somewhat unusual feature. Jodie Byrnes was a close friend of the two accused. She had made a statement, implicating them in detail, and at trial, asserted a lack of memory. The trial judge's approach to the issue was a proper one and this ground of appeal therefore fails.

Requisitions

45. A large number of requisitions were raised by counsel on behalf of the then accused, Gerard Hogan.

Requisition Regarding Ailish Flood

46. Prior to Ms. Flood giving evidence, counsel for the appellant indicated that there was an objection to a portion of Ms. Flood's evidence on the basis that its prejudicial effect exceeded its probative value. This was in relation to an account which Ms. Flood had given of the appellant and deceased standing up and squaring up to each other on the evening before the incident, at a time when the appellant had a black-handled knife sticking out of the waistband of his trousers. In circumstances where whether Mr. Hogan was in possession of a knife or not at any point during the incident was a matter of controversy, the trial judge agreed that the evidence could be led and that it ought not to be excluded. When the witness gave evidence to this effect, it was put to her that her description of events was strange, considering her actions. She had kissed the appellant and was in bed later that night with him. It was put to her that her recollection was poor and was remarkably similar to an incident recounted by Jodie Byrnes in her statement, which had referred to Dylan Hayes having a knife in the waistband of his trousers on Thursday 30th April. While the judge summarised the evidence, he did not refer to the fact that in cross-examination, it was put to Aisling Flood that her description of the actions of the appellant, Gerard Hogan, were remarkably similar to the actions of Dylan Hayes, as described by Jodie Byrnes. It was said that this was evidence of bad character, specifically evidence of a propensity to carry a knife..

47. The respondent says there are limits to what can be expected of a trial judge when it comes to summarising the evidence of a trial that has lasted two weeks. We agree with that observation. A judge's charge is an exercise in communication. Rehearsing the evidence is designed to assist a jury; it is not an exercise in box-ticking. In any trial of any length, a judge

is required to be selective, otherwise the charge will be unduly lengthy, with the rehearsal of the evidence rivalling in length the actual evidence. In selecting what is dealt with in the charge, the trial judge is entitled to, and should, exercise judgment as to what should be dealt with. Provided the selection is not unfair to the accused, such selection is within the discretion of the trial judge. We are quite satisfied that this ground of appeal is not made out as this particular omission was not, in the overall context, unfair to the accused.

The Impact of the Words Spoken

48. The appellant says that it was open to the jury to approach the case on the basis that he had not stabbed the deceased. The pathologist called by the prosecution had confirmed that the injuries were caused by a knife and not a screwdriver. The appellant's co-accused had admitted stabbing, while provoked, the deceased 23 times. In closing to the jury, counsel for the appellant submitted that the prosecution case came down to a proposition that the jury would have to be satisfied beyond reasonable doubt not only that certain words were spoken, but that those words could be attributed to Gerard Hogan, and that the words were associated exclusively with the presence of an intent to kill or cause serious harm.

49. It is said that the judge fell into error in failing to direct the jury to consider what the situation would be in relation to the prosecution case if the stage was reached where it had reduced itself to the contention that the accused man had spoken words of encouragement and/or egged on his co-accused to stab to death the deceased man, and if that was so, then the judge ought to have warned the jury that they had to:

(a) Consider whether the words were in actual fact spoken;

(b) Consider whether the words could be attributed in whole or in part to the appellant; and

(c) Consider that in the event that they were satisfied that the words were spoken and the attribution was correct in association with the accused man, that they had to unequivocally acknowledge that those words had the meaning attached to them by the prosecution i.e. that they were spoken in the context of egging on the co-accused or encouraging him to stab to death the deceased man.

50. Again, it seems to the Court that it is not a question of looking at a particular form of direction that was sought and asking whether the judge could have directed in that fashion, but rather, stepping back and viewing the charge as a whole. When viewed as a whole, the charge does not appear objectionable. It repeatedly emphasised that all matters required to be proved had to be proved beyond a reasonable doubt, obviously this included that the words were spoken by Gerard Hogan with the intention of "egging on" the co-accused and so this ground of appeal fails.

Requisition in Relation to Withdrawal from the Joint Enterprise

51. There were really two aspects to this. Firstly, there was an issue as to whether the judge should draw the jury's attention to the fact that as a matter of law, it was possible to withdraw from a joint enterprise. Secondly, the question as to what should be said in relation to whatever evidence there was in the case that touched on the issue. On behalf of the appellant, it was contended that it was open to the jury to consider Gerard Hogan's position as comparable to that of Graham Kelly as having been involved in the punching, but then having broken off once he realised the seriousness of the situation, and that at that stage, there was an attempt to pull away the knife, an attempt consistent with no longer wanting to be associated with what was taking place (as distinct from pulling the knife from his co-attacker so that he could use it on the victim himself). The position of counsel for the prosecution was that he did not object to the jury being informed of the possibility of withdrawal from a joint

enterprise as a matter of principle, but objected to the Court being asked to search for and find evidence in support of the withdrawal and then address the jury on it, when he contended that there was just no such evidence in the case.

52. The ruling of the trial judge, delivered after putting the matter back overnight for consideration, is instructive. He commented:

> "[i]n relation to Mr. Burns' point [Senior Counsel for the prosecution] about the question of withdrawal from the joint enterprise, I am glad I didn't decide this yesterday and indeed I think I made it clear that I was going to, as it were, that we were going to leave it until this morning so that we could reflect on it, and I'm glad we did, because I agree with Mr. Burns fully. Mr. Burns has used the phrase that we're getting further and further from the facts of this case and we really are entering into the thing on the basis which bears no relation to the reality of this case if we go down that road."

In the Court's view, the judge's concerns about moving further and further from the facts of the case were merited, and indeed, were far from confined to this issue. We agree with the trial judge that there was insufficient, if any, evidence in the case suggesting a withdrawal from a joint enterprise which would have required or justified a charge directed to this issue. The contrast between this case and the case of *DPP v. Andrew Gibney* [2016] IECA 334, a case to which there was reference in the course of the appeal argument, is striking. In *Gibney*, it was not in dispute that the appellant was one of a number of youths who had gone to the home of the deceased. However, there was evidence to suggest that after the majority of the group, including the appellant, left the scene, two youths remained behind, attacking the deceased. In this case, there was no evidence from any witness of anything approaching a withdrawal from a joint enterprise. The requisition requesting a direction on the issue of withdrawal from a joint enterprise was based on a defence theory or conjecture. If the judge

was to deal with the issue, then, ordinarily, he would be expected to identify the evidence in the case relevant to the issue, but the difficulty he would quickly find himself in was that there was no such evidence. Accordingly, the Court is satisfied that the ground of appeal must fail.

A Voice Recognition Warning: Modified O'Casey Warning

53. Counsel for the appellant proposed that a voice identification warning be given to the jury. As one would expect, counsel for the prosecution opposed the suggestion on the basis that this was not a voice identification case. One must immediately observe that the judge's concern about moving further and further from the facts of the case applies with equal, if not greater, force to this suggestion. To state the obvious, voice recognition arises in circumstances where a voice is heard, where the speaker is not observed uttering the words in question, but the person hearing the speech claims to be in a position to identify the voice. Nothing of the sort was in issue here. That is not to say that this was not a case which required care in this respect, care as to the actual words spoken, care as to whether the words were to be attributed to one or two actors, and care as to the meaning to be attributed to the words. It had, however, nothing whatsoever to do with a voice identification warning or a modified *O'Casey* warning.

Requisition in Relation to a Jury Question in Relation to Manslaughter

54. During the course of their deliberations, the jury asked the following question:

> "Do we have the option of convicting either of the accused of manslaughter rather than murder, and if so, can this only be on the basis of provocation?"

It appears that the jury underlined the word 'only'. There followed significant debate between counsel and judge. Ultimately, the judge made clear to the jury that there were two routes to a

manslaughter verdict. One route lay through the partial defence of provocation, but the other route was open if they were not satisfied beyond a reasonable doubt that either accused had the requisite intention for murder *i.e.* to kill or cause serious injury. In a further recharge, the judge clarified that it was not down to a question of choice between murder or manslaughter, and that an acquittal was also an available option. In the Court's view, the trial judge is not to be criticised. He put the options that were available before the jury and clearly explained the routes that would lead to a particular conclusion. Accordingly, this ground of appeal on behalf of Gerard Hogan fails.

55. In summary, then, the position is that the Court has not been persuaded to uphold any ground of appeal advanced by either appellant. The Court has not been persuaded that the trial was unsatisfactory or that either verdict is unsafe. Accordingly, the Court will dismiss both appeals.