THE COURT OF APPEAL

Court of Appeal Record No. [294/2018]
Neutral Citation: [2021] IECA 196

Birmingham P.

McCarthy J.

Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANT/RESPONDENT

-AND-

REGINA KEOGH

APPLICANT/APPELLANT

JUDGMENT of the Court delivered by Mr Justice McCarthy on the 15th day of July 2021

1. This is an appeal by Regina Keogh against her conviction by the Special Criminal Court on the 2nd November, 2018 of the murder of Gareth Hutch at an apartment complex known as Avondale House, North Cumberland Street, Dublin 1 on the 24th May, 2016. She was tried with Thomas Fox and Jonathan Keogh (her brother) both of whom were convicted also of the offence. The judgment of the trial court, delivered over two days because of its thorough nature, reprised and comprehensively engaged with all relevant evidence and legal issues and reached reasoned conclusions in the ordinary way. The trial commenced on the 5th day of June 2018 and the hearing of evidence and speeches

concluded on the 30th day of July 2018. We cannot, obviously, set out here the substantive evidence or the full judgment.

2. Jonathan Keogh, a brother of the appellant (who lived in Flat 6A, Avondale House) and another person ("AB") who was not rendered amenable to justice, shot Mr. Hutch (who lived in flat 13 A) having emerged from 18 A - the apartment of one Mary McDonnell - from which there was a clear view of Mr. Hutch's flat and from which his flat had been "staked out" from approximately 6.45 that morning until the shooting at 9:54. The appellant's flat is in the same block as that of Mary McDonnell and she and the appellant were intimately friendly over many years visiting each other daily if not several times a day; it is of some relevance that Mary McDonnell had few outside interests and was heavily dependent upon Regina Keogh from the time when Mary McDonnell had moved into the block some 17 years or thereabouts prior to the murder. It is material also to refer to the fact that she had extensive difficulties, including mental health difficulties, which gave rise to attempts to take her own life and she received a great deal of assistance from Regina Keogh in that regard. It was contended on behalf of the prosecution that the vantage point from which Mr. Hutch was shot was procured by Regina Keogh from her friend Mary McDonnell with full knowledge of the fact that it was to be used for the purpose of shooting the deceased.

3. Extensive CCTV footage is available of relevant events in and around the complex and the conclusions as to the movements of the protagonists are not in real dispute.

4. Ms. McDonnell said that Mr. Fox and Mr. Keogh arrived at her flat with firearms the night before – it was apparent from CCTV footage that this was at approximately 10.40 p.m., cleaned them with wipes provided by her and left them (in the immediate

vicinity) outside the flat overnight thereafter. She was in bed on the morning of the 24th when Mr. Keogh and the second assailant arrived. She stated that effectively she was under a degree of restraint, being required to sit in a chair and that she had no opportunity, for example, to make tea or otherwise move about, although one of her daughters, Jessica, who resided there, gave evidence to the effect that she had offered the individuals tea having put the kettle on. Whilst there was a dispute at trial about the identification of Mr Keogh Mary McDonnell knew him for many years and the trial court rightly rejected any reasonable possibility that she was wrong in her identification; there was ample evidence, largely extrinsic to anything she might have said, allowing the Court, as it did, to convict both Mr Keogh (as an assailant) and Mr Fox of murder (the latter as principal in the second degree primarily due to role as the driver of a getaway vehicle -his defence to the effect that he had withdrawn from the criminal enterprise in question before the murder had occurred having been rejected by the Court).

5. The next day Ms. McDonnell's flat was searched under warrant and she was arrested and detained for the investigation of the offence of murder. She made a statement then, under caution, from which her own engagement was manifest, if not that of the accused. She was detained for a period of six days (18:45 on the 25th of May 2016 - 18.20 on the 30th May 2016) and interviewed repeatedly by the Gardaí. All of those interviews were recorded in the usual way. She appears at all times to have been in receipt of the fullest legal advice: on the 28th of May her solicitor told the Gardaí in writing that she was prepared to give evidence. She was charged with withholding relevant information pursuant to s.9 of the Offences Against the State (Amendment) Act, 1998, brought to court and remanded in custody to the Dóchas Centre but was subsequently granted bail. The charge against her was withdrawn on the 15th of

February 2017. A letter of immunity was issued by the Director of Public Prosecutions on the 8th of May 2018 on the basis that she would give evidence in accordance with statements made by her implicating amongst others the appellant. There is no doubt but that the case against Regina Keogh is primarily based upon Ms. McDonnell's evidence and absent it there would not have been sufficient evidence to convict.

6. An angry confrontation had taken place the day before the shooting between Jonathan Keogh and the deceased; it was seen on CCTV, and even if one ignores what Ms McDonnell says (referred to below) she overheard, the nature of the event is unambiguous; it was apparently brought to a conclusion, however, by a handshake, obviously giving rise to an inference that the two were parting on good terms. After it had occurred, Messrs. Fox and Keogh and the appellant visited her apartment;such visits overlapped to the extent that for certain periods from the late afternoon to the early evening one or more of those individuals were present in the apartment (a sister of the appellant was also present for a time). She recalled that during the confrontation Mr. Keogh had said to the deceased that "*if anything happens to her. (pointing to the appellant's flat) … or any of my family I'm coming after you".* She said in evidence also that Mr. Keogh pursued Mr. Hutch about the courtyard or car park forming part of the complex of flats with a knife that she was wrong about that since this is not what occurred at as could be objectively established by reference to CCTV footage, evidence going to her credibility. Thereafter the appellant arrived at her flat and sought a "relaxer" (Valium) and seemed very upset, having seen the event. In response to the appellant Ms. McDonnell said "*it's over, like, they're shaking hands*" to which the appellant responded "*no, that's only the beginning*". At a given stage the appellant was called over to Gareth Hutch's apartment by him and on her return she gave a phone number (given to her by the deceased) to her brother – it was apparently that of

someone described as "*Mega*" or "*Maga*" (described as an uncle of the deceased). Mr Keogh rang him; the conversation included the assertion by Mr. Keogh that "*I'm going to get him [the deceased] before he gets me"* and he was in a highly agitated state.

7. Some days before (a Saturday – the shooting occurred on a Tuesday) the appellant had said to Ms. McDonnell that "*Johnny wants you to do something for him*" to which she responded "*what*" and the appellant then said "*can he sit in your flat for a while*"; when Mary McDonnell asked her the purpose the appellant said nothing.

8. On the evening of the 23rd at a point when the appellant and her brother were both in her flat Jonathan Keogh told his sister to "*give Mary €1,000 out of that money that you have belonging to me and I'll give her the €4,000 when I come back*" – she thought this was a joke. She understood that such payment was in consideration of her affording Jonathan Keogh access to her apartment. She in turn told the appellant that she would not and that she couldn't because "*James [her husband] wouldn't like it and the twins won't like it*". She further gave evidence to the fact that *"they*" (by which it appears she meant both Mr. Keogh and the appellant) "*kept saying*" words to the effect of *"like, that's the only way it's going to happen, that's the only way it's going to happen. If not then Johnny is going to be shot."* The exchanges ended when the appellant said that she had to return to her own flat to feed her children. The others had left before the appellant.

9. Thereafter, she visited the appellant's flat (she thought it was eight or half past on the evening in question) staying until half past eleven or twelve, as she recalled it (although the CCTV footage indicated that it was earlier). During the period she was there Jonathan Keogh and Thomas Fox arrived and before she left she was told by the appellant *"they'll be up to you*". Within minutes Jonathan Keogh and Thomas Fox

arrived with the firearms – the CCTV footage indicates that, to use the words of the judgment, she was followed to her flat "*almost immediately*"; they apparently spent some five minutes in Ms. McDonnell's flat and the Court took the view, again by reference to the footage, that they must have been in the appellant's flat when she went up to that of Ms. McDonnell with gloves, as referred to below.

10. Ms. McDonnell rang the appellant and said that she had (already) told her that she didn't want *"anything up in my house*". The appellant arrived at her flat and gave her what she characterises as a handful of (surgical) gloves, telling her to "*give them to Johnny"* for *"tomorrow"*. She refused, responding "*it's not happening here it's not because James won't let it happen here or nothing like it, and neither will the twins"*. She described the appellant as having an excuse to come up, as she put it, to the witness's flat to get some teabags which were given to her by the witness – the trial court took the view that the CCTV footage of the appellant as she returned to her home showed that she was carrying items consistent with the appearance of teabags. Mr. Keogh and Mr. Fox left Ms. Keogh's at approximately 11.14 p.m. It was conceded that Ms. Keogh was wearing clothing with pockets when visiting Ms.McDonnell which would have permitted her to place the gloves in her pocket .Ms. McDonnell placed the gloves on the counter and the next day she gave them to Jonathan Keogh when, on his arrival, he had enquired for the gloves that "*Gina gave you*", which the Court properly inferred he wore and she placed the unselected or unused gloves into the pocket of a housecoat ultimately found as aforesaid by the Gardaí, hanging on a bedroom door.

11. Shortly after the shooting she heard the appellant screaming and when she ran downstairs to her she saw her returning to the block, at a run; she said to Ms. McDonnell "*I'll be up to you Mary in a minute. Make us a cup of tea (or coffee)"*.

When she asked her what had happened she responded by saying "*Gar [the deceased] is after getting shot"*.

12. After the Gardaí arrived in the witness' flat on the 24th and declared it a crime scene, she stayed in that of the appellant – and during the hours of the afternoon when she was there it seems legitimate to summarise by saying that the appellant was on the telephone most of the time, indeed to the point where she had little conversation with her. The fact of significant telephone use by the appellant is clear from evidence adduced about telephones.

13. The trial court rightly took the view that Mary McDonnell was an accomplice and that accordingly it would be dangerous to convict the appellant without corroboration. There were other factors (including her attitude towards the appellant) to which the Court also had regard when assessing the extent of the danger of such a conviction without corroboration. It is quite plain from the judgment that this understanding of danger informed the entire of the Court's analysis of her evidence – the Court was scrupulous in that regard; that approach was similarly taken with respect to the evidence against the appellant's co-accused.

14. The judgment must of course be taken as a whole and it is manifest that a great deal of what was said by the Court, especially with reference to the danger of convicting on the uncorroborated evidence of Ms. McDonnell and what does or does not constitute corroboration as a matter of principle, was applicable to, or common to, her brother. Even at the risk of repetition, however, the trial court when dealing with her repeated much of what it had earlier said in findings pertaining to her brother which was applicable to, and was actually applied to, both. So far as her brother is concerned the need for corroboration was dealt with as follows:-

"Approach to the testimony of Ms McDonnell. The Court has approached the evidence of this witness on the basis that it has borne itself that it would be dangerous to act upon her testimony in the absence of corroboration. We've adopted this approach for three particular reasons. Firstly, the facts suggest that such a warning is mandatory in the case of this witness because she was chargeable in relation to this matter as either a principle or an accessory, and having secured immunity from prosecution, for that purpose may have been tempted to exaggerate or fabricate evidence as to the guilt of the accused in order to escape the consequences of potential complicity in a very serious offence.

Secondly, apart from obtaining a broad immunity from prosecution in relation to this matter, the witness has also received a level of financial recompense through the gardaí although she declined to participate in a formal witness protection programme. That being said, the reality or perception of great financial benefit, or future additional benefits, are not very significant factors in this case. Quite apart from the fact that is, that as in most such instances, the financial benefits received from the State are accompanied by and balanced against a great deal of personal inconvenience and disruption to her previous life and the very real possibility of suffering serious harm as a result of her offering testimony. However, the significant benefit of non-prosecution remains a particularly weighty factor and the Court has therefore operated on the basis that this represents an additional and serious source of danger in relation to the testimony of Ms McDonnell.

Thirdly, having regard to the fact that Ms McDonnell was willing to make a serious presumption against Mr Keogh relating to the possession of a knife during the dispute in the car park on the day prior to the murder, where the CCTV evidence does not provide any basis for her making such a presumption. It is necessary to approach with

particular caution any other testimony from her that alleges further or other serious misconduct against Mr Keogh.

There are further specific reasons relating to Ms McDonnell's testimony which would make her reliance on it dangerous in the absence of corroboration. We are satisfied that Ms McDonnell has continued to minimise her role in this matter in the course of her evidence in this trial. We find that whatever she may have thought about Mr Keogh intentions prior to the evening of the 23rd of May, she could have been under no illusions about the gravity of the situation once Mr Keogh and Mr Fox appeared in her flat with two guns on that evening. In addition, she has downplayed the extent to which he accommodated the two men who came to her flat on the next morning. She may not, in reality, have had any real choice in the matter but we accept her daughter's evidence that Ms McDonnell in fact offered tea to the men who were in her flat. In addition, we do not accept her assertion that the gardaí had made up aspects of her interview in detention about the issue of gloves, a stance that she continued to maintain in evidence in spite of the specific evidence to the contrary. [The latter refers to the fact that she blankly denied to the Gardaí that the gloves which loom large in the case were hers].

15. When addressing Ms. McDonnell's case separately (and we think it necessary to set out the relevant passage at length having regard to its significance) the Court had this to say:-

*"**The case against Ms Keogh depends very substantially on the evidence of Ms McDonnell as set out above and we don't propose to engage in repetition** and because of Ms McDonnell's position as a person in receipt of financial benefit pursuant to an unofficial witness protection scenario and, perhaps more importantly, her receipt of a blanket immunity from prosecution in relation to her role in this matter, it is therefore necessary to approach her evidence with particular caution and to bear in*

mind the desirability of corroboration in the sense also defined above before her evidence accepted and acted upon, bearing in mind the multiple factors necessitating the self administration of a corroboration warning in this case.

There are further and particular reasons relating to the danger associated with acting on Ms McDonnell's evidence in the absence of corroboration. As we have already noted in connection with other verdicts, Ms McDonnell has not always been truthful in her evidence to this court and in certain aspects understated her role in this matter. For example, in terms of denying what must have been an obvious understanding of the seriousness of the matter once firearms were produced in her flat on the previous evening and also in terms of her approach to the two men who entered the flat on the morning of the murder, in terms of offering tea and such like. In addition, she was not truthful in respect of her account of certain interactions with the gardaí in the course of her interviews.

A further specific reason for caution arises from her particular personal relationship with Ms Keogh and whatever else we may say about Ms Keogh in due course, she was a good friend to Ms McDonnell over the years. We are satisfied that over those many years Ms McDonnell came to depend on Ms Keogh for assistance in relation to many aspects of her daily life and, in fairness to Ms Keogh, that assistance was forthcoming and she was, on the evidence, undoubtedly a good and dependable friend to Ms McDonnell over that long period. Tragically, it was this good relationship that Mr Keogh took advantage of in order to inveigle himself and his co-conspirators into Ms McDonnell's flat for the purpose of their nefarious activities. However, some aspects of Ms McDonnell's testimony suggest that she had become over dependent on Ms Keogh by the time of these events and any failure or perceived failure by Ms Keogh

to immediately respond to her needs resulted in expressions of resentment and frustration by Ms McDonnell. This was apparent at various points during her garda interviews and was also a feature of her evidence at trial, perhaps remarkably over two years after the events when Ms McDonnell still appeared to be upset about her perception that Ms Keogh had ignored her needs and requirements when she was shut out of her flat on the night of the murder." [Our emphasis].

16. The Court ultimately took the view that the testimony of Ms. McDonnell *inter alia* as to matters bearing on the present appellant's involvement was, on all crucial points, true. Having regard to the desirability of corroboration, the Court identified three aspects of the evidence which constituted it, namely, (and to put the points in summary form) the fact that gloves were brought to Ms. McDonnell's home on the night before the murder by the appellant for use by the gunman, the fact of certain telephone communications between the protagonists and the fact that the appellant caused funds to be sent to her brother in Belfast, the availability of which was relevant to an offer of payment to Ms. McDonnell.

Grounds of Appeal

17. The grounds of appeal relied upon are as follows: -

i. *The court of trial erred in law and in fact in determining that DNA matching Jonathan Keogh, found on gloves retrieved after the murder in Mary McDonnell's flat, was capable of constituting corroboration, or did so corroborate Mary McDonnell's evidence of their delivery to the latter's flat and thus, inculpate the accused in the crime charged.*

ii. *In determining the issue identified in paragraph 1, and in reaching its conclusion, the decision of the court was unsafe and unsatisfactory because it failed to identify all the relevant evidence thereon and thus exclude any other rational basis for the presence of the DNA on the remaining gloves. In*

the premises, and for the want of same, the decision was, in the alternative, flawed.

iii. *Insofar as the court reached a factual determination that the accused, Regina Keogh, received the gloves from Jonathan Keogh, immediately prior to their delivery to Ms. McDonnell's flat, same was insufficiently evidentially based.*

iv. *The entire ruling and judgment of the court in relation to the gloves was unsatisfactory, as the court failed to nominate and identify all the relevant evidence on the issue, so that the want of reference to pertinent evidence, and appropriate findings thereon indicates that the court has failed to take into account relevant evidence, both as judge and/or jury.*

v. *The above preceding paragraphs, without prejudice to the generalities, are particularly relevant because;*

   a. *Mary McDonnell had previously, in a very credible manner, claimed ownership of the relevant gloves.*

   b. *Mary McDonnell had been deliberately told by Gardaí that similar gloves to those mentioned above had been found in Jonathan Keogh's flat.*

   c. *No evidence was adduced by the prosecution of any such scientifically established similarity.*

   d. *The absence of any DNA material of Regina Keogh on the relevant gloves.*

   e. *According to the narrative of Ms. McDonnell, as soon as Mr. Keogh arrived in the flat, he handled the gloves.*

vi. *The rulings adverted to in grounds i-iv are in strong contra-distinction to the lengthy judgment and ruling in the case of the second named accused, Jonathan Keogh and the first named accused, Thomas Fox. If Mr. Keogh and Mr. Fox were entitled to, and did get a highly factual determination, so too was Regina Keogh when, absent Mary McDonnell's accounts of their interplay, no sustainable case existed. In failing to rule with clarity on relevant issues, inter alia, Ms Keogh's unusual route to the BMW, the*

allegation that the accused had dispersed her children the night prior to the murder and for these and other reasons and facts, the court failed to follow through with the inevitable scepticism that ought to have flowed from such evidence. Similar arguments exist for other categories of evidence.

vii. *The court erred in identifying call data records as being capable of, or constituting corroboration of the accused's participation in the crime.*

viii. *Notwithstanding significant reasons to doubt Ms. McDonnell's veracity, or credibility, the court failed to identify all of the suspect evidence and, in doing so, misdirected itself and failed to render a verdict on all of the evidence and/or give full reasons.*

ix. *The court erred in identifying how the furnishing of money to Denise King, after the murder was capable or did constitute corroboration that she was a party to the murder plot, as opposed to assisting an offender, contrary to law.*

Preliminary Observations on the Grounds of Appeal

18. Before addressing the grounds, we stress that on appeal an appellate court must show deference to the findings of credibility made by trial judges who have had the benefit of hearing a particular witness when giving evidence. It is submitted, and we think rightly, by the respondent that this general rule applies with special significance when the evidence in question is that of an accomplice. This is relevant here because of the extent to which, in substance, the appeal seeks to challenge findings of fact based on the analysis of the evidence and the conclusion reached thereon (and not merely that of the accomplice Ms. McDonnell) rather than confining the appeal to free-standing, identified errors in law. We think that the decision of the Supreme Court in *DPP v McKevitt* [2009] 1 IR 525, on this topic aptly states the position where Geoghegan J. put the matter as follows (with reference to the relevant witness there):-

"I now turn to I now turn to the second of the three issues on appeal identified in the judgment of the Court of Criminal Appeal, that is to say, that the Special Criminal Court should not have found that David Rupert was a credible witness whose evidence could be safely relied upon. In my view, this ground of appeal must fail on the simple basis that the Special Criminal Court believed Mr. Rupert. ***That finding cannot be interfered with by an appellate court unless it was not open rationally to have had that belief or at least not to have had a reasonable doubt. If it had been a traditional jury verdict the question would have been was it a perverse verdict?*** *I think it is impossible to conclude that the verdict was, in any sense, perverse or that it was not open to the Special Criminal Court to accept the evidence of Mr. Rupert. The fact that Mr. Rupert may or may not have had a shady background, depending on your point of view, and the fact that as a paid agent he might be suspect as a witness at any rate are neither here nor there, as far as an appellate court is concerned. Numerous criminal trials over the years have been conducted in circumstances where a key witness such as an accomplice, for example, has a background which might make his evidence suspect. If it was a jury trial, a jury would always be warned of the danger in relation to such evidence but it was never the law that in the last analysis the jury was not entitled to accept the evidence. In this instance, there is abundant evidence that the Special Criminal Court was fully mindful of the potential unreliability of Mr. Rupert's evidence but nevertheless believed him. I do not see how that finding of belief can be overturned."* [**Our emphasis**].

19. We of course do not doubt the fact , as submitted by the appellant, that our function, to quote Murphy J. speaking for the Court of Criminal Appeal in *The People (DPP) v. Ward* (Unreported) (Court of Criminal Appeal, 22nd of March 2002) is to:-

"[consider] whether, in relation to the several grounds of appeal, the evidence accepted by the Special Criminal Court, on its assessment of the credibility of the witnesses, fairly and properly supports the findings of that court, and whether the inferences drawn as disclosed on the transcript were fairly and properly drawn, having regard to the onus of proof which lies on the prosecution".

and in which it was pointed out that:-

"a decision based on an error of law or logic, or a demonstrable misapprehension of known fact, must be susceptible of correction."

20. The case is made, in effect, that the court fell into error in the manner in which it dealt with the accomplice's evidence; in the submissions under the heading "Mary McDonnell" it is stated that: "*the court did not approach her evidence with the high degree of skepticism which was clearly required given her obvious and acknowledged untruths under oath and otherwise"* This proposition is simply wrong as can be seen from the judgment, with particular reference to the quotations above. The complaint really seems to be that the Court was prepared to proceed on the basis of her evidence in crucial matters in a way unfavourable to the appellant, as the Court on the evidence was entitled to do.

21. We have found a certain difficulty in addressing the grounds severally because they overlap. It will be seen that ground one focuses in an explicit way on the conclusion of the court that DNA matching that of Mr. Keogh found on gloves retrieved from Ms McDonnell's flat was capable of constituting corroboration or did so corroborate her evidence against the appellant; the thrust of the appeal is heavily weighted towards that topic. However, in grounds two and three it is submitted that the conclusion was "*unsafe and unsatisfactory*" because it did not identify all relevant

evidence thereon or exclude any other rational basis for the presence of the DNA; furthermore, it is said at ground three that the Court's conclusion that Ms. Keogh had received the gloves from her brother immediately prior to their delivery to Ms. McDonnell's flat was not sufficiently evidentially based; further, that the Court "*failed to nominate and identify all the relevant evidence on the issue"* (at ground four); grounds five and six go on to further engage primarily with the evidence pertaining to the gloves (or any DNA obtained from them). Ground seven at least pertains to the freestanding issue of call data records but ground eight must be regarded as overlapping to a greater or lesser degree with grounds one to six as it expressly refers to failures to identify "*all of the suspect evidence*" giving rise to reasons to doubt Ms. McDonnell's veracity or credibility. Ground nine, again, is specific to the issue of the provision of money to Denise King [by the appellant] and asserting that this does not constitute corroboration of the murder but rather of a different offence, that of assisting an offender. We think that we must deal with all issues together with the exception of grounds seven and nine which will be dealt with separately.

Grounds one to six and eight

22. It was submitted that the Court failed to have sufficient regard to what we consider a minor aspect of the evidence of the witness's daughter Jessica about the events of the morning of the shooting; it is suggested that her evidence was "*in stark contrast to her mother's account of events*" with special reference to the fact that Jessica stated her mother offered the gunmen tea – in circumstances where Ms. McDonnell had asserted that she was effectively under a form of restraint; the Court preferred her daughter's evidence, as it was entitled to do, and it is suggested that the Court "*lost sight*

of its import in reaching its determination on the guilt of the appellant"; this is nothing more than a protest at the fact that the court in its close engagement with the evidence of the questioned witness (Ms. McDonnell) rejected her evidence in part on a minor matter when assessing reliability or credibility and did not, as the appellant appears to submit, take the view that in some sense this, whether alone or with other elements, fatally undermined her evidence. It is furthermore suggested that Ms. McDonnell's evidence as to her daily routine, in particular the fact that she ordinarily, apparently, at a certain juncture had the habit of opening her front door but had not done so on the day in question similarly undermined her; these are trifling points in the over the small scheme of things and the Court was perfectly entitled to take the view that it did in it's conclusion .

23. Reference is also made to the fact that Ms. McDonnell said that the appellant had "*gotten her kids offside"* the night before the murder because of her knowledge and anticipation thereof (at least by implication) and, that this was something which was proved to be "*utterly false*". It was certainly incorrect- falsity is a different thing. Again, it was a factor which went into the mix, so to speak, and was properly considered by the trial court in reaching its ultimate view about the witness and her evidence.

24. Furthermore, the appellant refers also to the fact that a claim to ownership of the relevant gloves made by Ms. McDonnell in interview was made in a "*very credible manner*" (something she denied she had said to the Gardaí), that she was told that surgical gloves had been found in Mr. Keogh's father's flat (where he then lived), that, in fact, there was no evidence of similarity of the gloves so found in Mr. Keogh's flat with those in question here, that the appellant's DNA been not found upon the latter and that the description given in the course of the evidence of the movements of the

appellant towards, from or in connection with a BMW getaway car supposedly relevant to her engagement; it is contended in effect that these were aspects of the evidence with which there was no or no sufficient engagement and that these facts undermined the Court's conclusions. We see no basis for these contentions.They are potentially relevant certainly to the ultimate conclusions but neither severally or otherwise do they serve to undermine them.

25. The appellant submits that the court of trial made "*one factual error of substance and high import"* in that in the course of the judgement it was stated that the DNA matching that of Mr. Keogh was found on the inside of the gloves whereas in fact there was no evidence to that effect. In the course of that part of its judgment which explicitly dealt with Mr. Keogh, the Court pointed out, with respect to the gloves, that the evidence was as follows:-

"On the 27th of May 2016, Garda Damien Murphy attended a Ms McDonnell's flat with a number of other Gardaí on foot of a search warrant that had been obtained by Sergeant O'Sullivan in respect of that premises. Garda Murphy gave evidence on day 4, commencing at page 21. In the course of his search, he seized a dressing gown from behind the main bedroom door. The dressing gown is illustrated by photograph No. 3 of trial exhibit 2i. We are satisfied that this garment belongs to Mary McDonnell and was found in her bedroom. And the dressing gown is trial exhibit 15. Garda Murphy found a number of surgical gloves inside the pocket of the dressing gown. The gloves and pocket are illustrated by photographs 4 and 5 of the same exhibit. The surgical gloves were also seized and became trial exhibit 16. These gloves were also submitted to Dr Connolly [of the Forensic Science Laboratory] for examination. He described that the exhibit consisted of a total of eight latex gloves which appear to be unworn. He

sampled the outside of the gloves to recover any DNA present. The DNA profile obtained from the gloves…which a database search showed to match that of Jonathan Keogh."

26. Later, however, addressing the evidential value of the gloves so far as the guilt of Mr. Keogh was concerned the court had this to say:-

"Subsequent examination of Ms McDonnell's flat revealed gloves in the pocket of her dressing gown which transpired to have on their insides DNA matching that of Mr Keogh. Mr Guerin suggested this was not a matter of significance because Mr Keogh regularly attended his sister's flat for dinner. Once more, we do not think that this suggestion stands up to any scrutiny. It is difficult to see how dinner engagements would involve contact with the inside of rubber gloves ***and even if this were so, and such contact happened in Ms Keogh's flat*** *as to how these gloves came to be innocently in Ms McDonnell's flat, a place that Mr Keogh only seemed to have had recourse to in the context of events leading up to the death of Mr Hutch."*[**Our emphasi**s].

27. There is no reference in that portion of the judgement dealing directly with the appellant's guilt as to the position on the gloves of Mr. Keogh's DNA. The height of the apparent error by the Court, accordingly, is that when engaging with the issue of gloves so far as Mr Keogh was concerned there was a misstatement by the Court - it went beyond that which the evidence justified and in particular it referred to the insides when there was no evidence to that effect. We cannot see how this could impinge upon the conclusion reached where the present appellant is concerned: the Court stated correctly what the evidence was at a given stage in its judgement, apparently misstated it when dealing directly with the guilt of Mr. Keogh and made no error when dealing

directly with this appellant. As emphasised above, it is clear that the Court reached its conclusion on the basis that even if the DNA became adhered to the gloves at the appellant's flat the crucial point in Mr. Keogh's case is the fact of their presence in Ms. McDonnell's flat. Any error does not pertain to this case.

28. The real issue pertaining to the gloves is whether or not the fact that the gloves were found in Ms. McDonnell's flat (in a housecoat) with DNA on them matching only that of the appellant's brother was capable of constituting corroboration, or the trial court was justified in reaching the view that it was corroborative. We think it appropriate in the first instance to refer briefly to the law of corroboration.

29. The purpose of corroboration was stated by Kearns J. speaking for the Court of Criminal Appeal in *The People (DPP) v Meehan* [2006] 3 IR 468 to be to:-

"*reassure a jury or court that potentially suspect evidence…is both credible and reliable*"

The traditional statement of what constitutes corroboration is that to be found in *R. v Baskerville* (1916) 2 K.B 658 in the following terms:-

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."

The matter was the subject of debate in *The People (DPP) v Gilligan* [2006] 1 IR 107 as well as *Meehan*. These decisions contemplated a broader definition of corroboration but ultimately it was held by the Court of Criminal Appeal in *Meehan* that:-

"The review of cases demonstrates that the application of Baskerville in Ireland has over the years been of a flexible and nuanced nature. The Court believes in any event that the formula of words adopted in Baskerville to define corroboration, including as it does the words "tending to connect him with the crime", leaves a considerable margin of discretion with any court dealing with issues of corroboration to decide what may or may not constitute corroboration."

30. The ruling of the trial court herein is in these terms:-

"... the DNA evidence is important in terms of corroborating Ms McDonnell's account in relation to the important matter of how gloves came to be in Ms McDonnell's flat prior to this murder."

and the trial court went on to say that:-

"Ms McDonnell's account that Ms Keogh brought gloves to her flat in a brief visit late on the evening of the 23rd is corroborated by the independent finding of DNA matching that of Mr Keogh on the rubber gloves subsequently found in Ms McDonnell's dressing gown hanging on the back of her bedroom door. On this basis and on this basis alone, because if that DNA evidence wasn't there such a conclusion might very well not be possible, we are satisfied beyond reasonable doubt that Mr Keogh had given these gloves to Ms Keogh and that Ms McDonnell's evidence that Mr(sic) Keogh brought these gloves to her flat when she visited for the purpose of some future use by Mr Keogh is correct and is corroborated by the finding of Mr Keogh's DNA on gloves retained by her for whatever reason after this event."

31. In this context the appellant refers to the conflicting narratives pertaining to the gloves when being interviewed by the Gardaí with special reference to the fact that she accepted in her third interview that the gloves were "*probably*" hers and rejected the

proposition that those who had brought the firearms to her flat had used gloves for cleaning them. Subsequently, at trial, she rejected the proposition that she had ever told the gardai that at all. It is submitted that this was what was characterised as "*further evidence*" of her "*abject unreliability*". Again, this was evidence which the trial court took into account when deciding on credibility and notwithstanding apparent untruthfulness, reached the impugned ultimate conclusion accepting the substance of her evidence on core issues, as they were entitled to do.

32. It is further submitted that the height of the DNA finding is that the gloves could be forensically linked to Mr. Keogh and that this could not amount to independent support for the testimony in question- thus it was thereby suggested corroboration simply did not exist. It is suggested that since the Court erroneously concluded that the evidence in question was capable of being corroborative a legal error was thereby committed. It is submitted that the evidence in question is merely that Mr. Keogh touched the gloves and no more and that it is accordingly corroboration merely of Ms. McDonnell's evidence to the effect that he handled the gloves on the day of the murder. In this regard it is suggested that it is of "*critical importance*" that the appellant's DNA was not found on the gloves.

33. We think that the evidence about the gloves, taken in context with other immediately relevant evidence (for example, the fact that the gunmen were in the appellant's flat whilst the appellant visited Ms. McDonnell's flat purportedly for the purpose of obtaining tea bags, Ms. McDonnell having been visited immediately thereafter by the gunman with the guns and the fact that gloves were used for handling the firearms on the day of the shooting conclusions which was not impugned) undoubtedly was capable of constituting corroboration in principle on the authorities

and the trial court was entitled to find that it constituted such as a fact. It is plain that it did this by the application of the ordinary principles which must be applied by triers of fact in criminal cases. The appellant would have wished for a different conclusion but obviously that is not the point. We feel that the issue in relation to gloves should not be over-complicated. Ms. McDonnell's evidence was that gloves were brought to her flat by the appellant. CCTV footage shows the appellant making her way to the flat at the relevant time and returning with a white object visible in her hands, consistent with the suggestion that she brought tea bags back from the appellant's flat, thus providing a reason or an explanation for the visit. Gloves matching those that had been referred to by Ms. McDonnell were found in her flat. They were located in the pocket of a housecoat where Ms. McDonnell had indicated that she had put the surplus gloves. The gloves, on Ms. McDonnell's account, had been brought to the flat for a particular purpose, so that Jonathan Keogh could have access to them there and the gloves retrieved bore DNA matching that of Jonathan Keogh, thus increasing the significance of the find.

34. None of the conclusions of fact impugned as aforesaid can properly be interfered with; it was "*open rationally*" to the Court to take the view that Ms. McDonnell was a credible witness and *not to entertain a reasonable doubt* as enunciated in *McKevitt*. They were *not perverse*. [Our emphasis].

35. We have also addressed our minds, in light of *DPP v Ward,* as to whether or not:-

"The evidence accepted…[by the court]. On its assessment of the credibility of the witnesses, fairly and ***properly supports*** *the findings of that court, and whether the inferences drawn as disclosed on the transcript were* ***fairly and properly drawn****, having regard to the onus of proof which lies on the prosecution."* [Our emphasis].

or whether or not:-

"[The] decision [is] based on an error of law or logic, or a demonstrable misapprehension of known fact" [Our emphasis].

..calling for intervention, and we take the view that there is no such error.

Ground vii.

The court erred in identifying call data records as being capable of, constitution, corroboration of the accused's participation in the crime.

36. The Special Criminal Court addressed in the greatest detail the call records of contacts between the three accused and A.B, the evidence pertaining to the acquisition of the burner phones and purchase of credit by one or more of the protagonists. In that part of the judgment dealing with the present appellant the Court had this to say:-

*"by way of further corroboration, not really a matter addressed by Mr Gageby's submission, she had engaged in persistent communications with the burner phone, the 455 number [**that of Mr Keogh**], as opposed to Mr Keogh's ordinary phone number. There were 15 contacts between the 455 burner number and her 911 number between 12.20 and 18.59 on the day before the murder. The calls amounted to five minutes duration in total and there were also a number of texts. On the same day, Mr AB's 693 phone contacted her 911 number at 10.07, 10.38, 11.18 and 11.44 at a time when he and Mr Keogh were engaged in moving or were sitting in the BMW **[a getaway car]** or just after visiting McNally's shop. The 10.38 call was made through the Five Lamps site, cell site 10936 when Mr AB was in the BMW in the car park of Avondale House. The 11.44 call was made through the same cell site and this was at the precise time when Mr AB moved the BMW within the car park at Avondale House. We have not*

been offered any suggestion as to how these communications might be explained on a reasonable basis that is reasonably possible, nor can we off our own bat discern any such explanation from the evidence."

and thereafter

"she engaged in prolonged and intense telephone contact with Mr AB from shortly after the murder right up until the next day, the 25th of May. This contact commenced at 14.31 with a long text message to her from Mr AB's number, followed by a 13 second returned call from her 911 number at 14.23, 14.33 and 26. Almost immediately afterwards, her number switched to frequent contact with the 249 number purchased earlier by Mr AB at the Omni Park in Santry. Part 3 of trial exhibit 110 I shows the intensity of the contact between those two numbers that afternoon, that evening and into the next day. There are 47 separate contacts between Mr AB and Ms Keogh from 14.34 on the 24th of May to 23.38 on the 25th of May. We do not think that these are coincidental contacts."

37. The Court had available to it the clearest evidence upon which a conclusion could be drawn that the phone number ending with the numbers 455 was that of Mr. Keogh's burner phone and similarly with respect to numbers associated with A.B (also burner phones). The burner phone number attributed to Mr. Keogh was not (effectively) used after the murder but of course on the evidence it was also used the previous day on a number of occasions for contact between brother and sister; furthermore, that phone was the phone used for communication between the gunman (whilst they were in Ms. McDonnell's flat "staking out" Mr. Hutch's flat) and Mr Fox.

38. The appellant has sought to impugn the conclusion in relation to the phones by suggesting that the court did not give any or any proper consideration to "*the fact that these were phone numbers with which Ms Keogh would be in regular, lawful and innocent contact"* and, further, that "*it should be borne in mind that Mr AB was a very close friend of her brothers and known by her to be so. In particular, her telecommunication contact with her brother at this time can be innocently explained by virtue of her knowledge that there had been a recent dispute between her brother and the deceased."* We think and that these hypotheses are entirely speculative and to say that they can be rationally based upon the evidence is in our view untenable. At best these are submissions which in no sense can be said to impugn the findings and obviously we do not think that there was any obligation upon the trial court to expressly deal with them. In any event, they were not submissions which were advanced at the trial court which was careful to refer to the submissions made by counsel for the appellant and engage with them. On the evidence, the Court was entitled to take the view that the telephone contacts with A.B after the murder was evidence of her continuing complicity in the matter and constituted further corroboration. There was no history of "*close and established frequent communication"* on these phones in any ordinary sense.

Ground 9

The court erred in identifying how the furnishing of money to Denise King, after the murder was capable or did constitute corroboration that she was a party to the murder plot, as opposed to assisting an offender, contrary to law.

39. With respect to the question of the provision of funds we do not think that there can be any question but that subsequent to the murder the appellant took decisive steps to cause substantial funds to be sent to Belfast for Mr. Keogh's benefit, he having fled the jurisdiction. It is submitted that this was not capable of, nor did it, constitute corroboration of the fact that the appellant was a party to the murder plot as found by the trial court. Apart from the question of whether or not the actions after the murder showed continuing complicity in the murder itself the fact that the appellant had available to her substantial funds sent to her brother in Belfast via the agency of Ms. King in circumstances where her brother had, in the presence of Ms. McDonnell, asked the appellant to give money to her from the funds he had provided to his sister, the balance to be payable on return is unambiguously evidence which corroborated, as found Ms. McDonnell's evidence. In that regard, the Court said:-

"The fact that she sent a large cash sum to her brother in Belfast after the murder also is independent corroboration of Ms McDonnell's account that some form of payment was suggested for her services and possibly available a few days previously. In the aftermath of the murder, Ms Keogh acted promptly to see that this man was transferred to Belfast for the benefit of her brother. Ms Keogh was not really challenged on these specific matters in cross-examination."

40. It is submitted that there was no nexus between Ms. McDonnell's assertion that she would be given money for her cooperation and the fact that this money was in the hands of, and sent to, Belfast for Mr. Keogh with the assistance of Ms. King: we think that the nexus was clear.

41. We might also add that that there is no rule of law which *per se* excludes from a consideration as to whether in proof of guilt evidence of what occurred after a crime is

consummated. Evidence as to the engagement of a party at that stage might well amount to no more than evidence proving that a party is an accessory after the fact. Here, it is submitted that the evidence points to that more limited engagement, at most; here the Court was entitled to take the view that in fact it was evidence of participation in the murder. Obviously it corroborated the accomplice's evidence.

Concluding Observations

42. We have already addressed the impossibility of setting out the judgment in full even though were we to do so it would show the comprehensive engagement of the Court with all evidence and submissions and the basis upon which it reached its conclusions, as well as the principles of law which it applied. We conclude by saying that if and insofar as it may be relied upon as a separate ground that there was an insufficiency [of explanation] in the rulings of the trial court or some supposed failure of the trial court to "*nominate and identify*" all relevant evidence or fail to take it into account there is no basis for saying so. We think it right to emphasise in this context, in any event, the fact that in *The People (DPP) v McKevitt* it was pointed out by Geoghegan J. in the Supreme Court that the:-

*"**main thrust** of the attack on the credibility findings by the Special Criminal Court is the **alleged inadequacy of reasons** given for the belief and **the omission expressly** to deal **with each** of the credibility points against [the impugned or doubtful witness there] raised by the appellant at the trial."* [Our emphasis].

43. Geoghegan J. went on to say there that:-

"..I find this criticism equally unjustified. It has never been the law that a trial court must trawl through every credibility point raised against a key witness and explain why

it has rejected it in its judgment. Under the jurisprudence of the European Court of Human Rights, there would be a requirement for a judge who has listened to two opposing points of view in the same area to explain his reasons in a general way as to why he favoured one rather than the other. This could be especially so in a field of specialist expertise. But that is a long way from saying that every credibility point against a key witness must be expressly touched on and commented upon and dealt with in a judgment."

44. It said that the portion of the judgement dealing with the present appellant was in some sense deficient by reference to the fact that it was shorter than the portions dealing with the co- accused. This is a superficial point. It is perfectly obvious that a great deal of the evidence common to all had been comprehensively reprised when dealing with the co-accused when the Court set out its conclusions in respect of the present appellant; a good example of this is that she was dealt with last and the trial court rightly did not engage in unnecessary and detailed repetition. In fact, this was expressly stated at the commencement of the judgment dealing with the conclusions about her; this portion of the judgment is that emphasised in the quotation at paragraph 15 hereof. Furthermore, the Court, in addressing the events leading up to the murder and the event itself had this to say, later in its judgment about her:-

"The case against Ms Keogh commences with events some days prior to the dispute in the car park and the shooting on the next day. We have already set out the evidence in relation to these matters above and do not propose to engage in repetition."

45. There was accordingly no deficiency in giving reasons, consideration of all relevant evidence and engagement therewith.

46. We reject all grounds of appeal.

47. The appeal against conviction is accordingly dismissed.