THE COURT OF APPEAL

Record Number: 63/19
Neutral Citation: [2021] IECA 199

Edwards J.
McCarthy J.
Kennedy J.

UNAPPROVED

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

ROSS OUTRAM

APPELLANT

JUDGMENT of the Court delivered on the 16th day of July 2021 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 8th March 2019 the appellant was found guilty of the murder of Patrick Lyons.

Background

2. At the time of his death Patrick Lyons was a 90-year-old man who lived alone. On the night of the 24th February 2017 the appellant went to the home of Patrick Lyons. An argument ensued between the men. An altercation followed. Ross Outram beat the deceased with a stick and left the house. The body of the deceased was discovered the following afternoon and a garda investigation commenced.

3. This led to the appellant being interviewed. He initially denied knowing anything about Mr Lyons or his killing but he subsequently admitted that in fact he had been in Mr Lyons' house on the night of the 24th and he had asked Mr Lyons for money. Mr Lyons refused to give him money. He said that Mr Lyons attacked him with some kind of stick and he acted in self-defence. The appellant stated that he struck Mr Lyons repeatedly but that when he left Mr Lyons was still alive.

4. The State Pathologist, Dr Margaret Bolster, stated that the cause of death was a combination of several factors as follows: blunt-force trauma to the body, with traumatic brain injury, with haemorrhage and shock due to comminuted fracture of the hip joint, with the fracture of ribs and mandible and ischemic cardiomyopathy due to coronary atherosclerosis, emphysema and osteoporosis. It seems that the deceased suffered the head injury and subsequently the comminuted hip fracture.

5. The trial of the appellant commenced on the 18th February 2019 and on the 8th March 2019 the appellant was found guilty of murder.

Grounds of appeal

6. Although the appellant initially put forward nine grounds of appeal, he is seeking to rely on the following seven grounds only:-

(1) Ground 1: the learned trial judge erred in law and in fact in refusing the application for a directed verdict of not guilty on a stated basis.

(2) Ground 3: the learned trial judge erred in law and in fact in directing the jury that they are entitled to consider whether the age and health of the deceased person contributed to his fall.

(3) Ground 4: the learned trial judge erred in law and in fact in inviting the jury to speculate on matters that contributed to the fall of the deceased person.

(4) Ground 5: the learned trial judge erred in law and in fact in relation to directing the jury on the evidence in relation to the drug use and withdrawal symptoms.

(5) Ground 7: the learned trial judge erred in principle and in law in failing to direct that an exhibit be forensically examined when the application was made on behalf of the appellant.

(6) Ground 8: the learned trial judge erred in principle and in law in failing to direct the jury that there could have been blood on an exhibit even if it is not, or is no longer, visible to the jurors on their examination of it.

(7) Ground 9: the learned trial judge erred in law in failing to discharge the jury when requested to do so.

Ground One

7. At the close of the prosecution case the defence sought a directed acquittal on the basis that the evidence established that there were two reasonably possible explanations as to how the deceased's hip fracture occurred but there was nothing in the evidence that could favour one version over the other. The defence contended that since the cause of death was a combination of the brain injury and the hip fracture, and, in circumstances where the defence contended that the hip fracture occurred after the appellant had left the house, this led to a break in causation; a *novus actus interveniens*. It is said that there was no evidence a jury could rely upon that would allow it to safely conclude beyond reasonable doubt that the deceased fell during the assault or that he experienced a fall as a side effect of head trauma, rather than by tripping. On appeal the photographs of the scene were relied upon to demonstrate *inter alia*, blood staining and the condition of the house, with objects on the floor.

8. In refusing the application the trial judge applied the test relating to causation and *novus actus interveniens* as stated in *The People (DPP) v. Davis* [2001] 1 IR 146 and

approved by O'Malley J. in *Dunne v. DPP* [2017] 3 IR 1. Taking the prosecution case at its highest, the trial judge summarised the evidence of Dr Bolster as follows:-

> "Dr Bolster did not accept that the fracture to the right hip was the sole cause of death. Her evidence was to the effect that death was the cumulative effect of both natural and unnatural causes. Specifically she stated that the fracture to the hip was part of the cause of death and a significant link in the chain of causation. In addition to haemorrhage and shock due to a comminuted fracture of the hip joint, the cause of death given by Dr Bolster included blunt force to the body with traumatic brain injury, but also haemorrhage and shock due to fracture of the ribs and the mandible. She explicitly rejected the suggestion put to her that all of the injuries to the deceased's right side could have been caused by one single fall. It was not suggested to her that the fracture to the left ribs were caused by a fall or at least the same fall that resulted in a fracture to the right hip. Her evidence was that bilateral fractures to the ribs would have resulted in considerable compromise of respiratory function. This is the context in which Dr Bolster did say that traumatic brain injury was not of itself sufficient to cause death, albeit that the deceased probably would have died had he not received prompt medical attention for his lacerations.
>
> What is clear from the foregoing is that Dr Bolster did not resile from her opinion that the blunt force to the body, together with traumatic brain injury, together with shock and haemorrhage due to the fracture to the ribs and the mandible, were part of the cause of death. Although she accepted that the fracture to the right hip was a significant cause of death, she never accepted that it was so significant a cause as to overwhelm the other contributing factors. Dr Bolster characterised the degree of injury to the brain as being mild to moderate. Her evidence was that the brain injury was caused by traumatic localised subarachnoid haemorrhages, that is, bleeding into the

membrane over the brain, with linear traumatic axonal injury, that is, damage to the nerve fibres in the brain caused by the multiplicity of blows causing the brain to swing around the skull, thereby shearing or tearing the nerve fibres and the underlying white matter. She said that these injuries, together with the lacerations, afforded evidence of the transmission of force to the brain itself. Her opinion was that such was the degree of trauma and associated loss of blood in the deceased, who was an elderly man, that there would have been some alteration or effect on brain function. She could not say what the symptoms of the resulting alteration or effect would have been, but she did note that there was no evidence that the deceased had attempted to clear the blood on his mouth, eyes, and face, when she said she would have expected him to have done this if he was healthy. Although she accepted that it was not possible -- my apologies. Although she accepted that it was possible that the injuries could have resulted in no alteration or effect on the brain, she did not characterise this possibility as a reasonable possibility and rejected Professor Crane's view to the contrary, noting that Professor Crane was not at the scene or at the autopsy."

9. In reply to the defence's submission that there was no evidence to negative the possibility that the hip fracture occurred after the appellant had left the home of the deceased the trial judge stated as follows:-

" I'm satisfied, however, that it is quintessentially a matter for the jury to decide whether it is a reasonable possibility that a 90-year-old man who is in poor health and who is -- who has been summonsed from his bed by an uninvited visitor to his home would have survived the shock and trauma of being repeatedly beaten to the head and body with a blunt weapon without collapsing or falling to the ground. In deciding this issue, the jury will have the medical evidence as to the nature and severity of the blunt force injuries he sustained, the blood spatter evidence to indicate the locations in or

about which the deceased was allegedly assaulted, and the evidence of Dr Lordan and the deceased's home help to the effect that the deceased had very limited use and function in his right arm."

10. On the defence's second submission that the jury could not possibly quantify the effect the blunt force injuries would have had on the brain of the deceased and therefore could not properly assess whether the fall was a wholly independent act the trial judge stated as follows:-

> "I am satisfied, however, that this -- that there is sufficient evidence available upon which the jury can decide whether the fall, even if it was a trip in the dark, was the natural and foreseeable consequence of the alleged assaults upon him. There is the evidence of the deceased's advanced years, his previous health, the repeated beatings to his head with a blunt weapon, the lacerations, the profuse bleeding, the unclear blood from his eyes and mouth, the fact that he had been in bed before the accused arrived on the accused's account, the shocking nature of what occurred, the fact that he was left alone in the dark, and his clear need for assistance.
>
> Even if I'm incorrect in my assessment of Dr Bolster's evidence, it seems to me to be self-evident to the point of not requiring medical evidence that an elderly man who is savagely beaten about the head and left in the dark bleeding profusely will be significantly compromised in his ability to mobilise in safety until such time as he received assistance and is given proper medical attention. These are all matters that the jury are entitled to consider."

<u>Submissions</u>

The appellant

11. The appellant refers to *The People (DPP) v. Cagney and McGrath* [2008] 2 IR 111 where it is stated that it is sufficient from the defence perspective if the view upon which the

defendant relies is reasonably possible, because the existence of a (reasonably) possible view consistent with innocence necessarily and coercively indicates the ground for reasonable doubt as to guilt.

12. The appellant submits that the evidence in the case established that an assault which occurred caused injuries which would appear were either not life threatening in and of themselves or were not life threatening to the requisite standard of proof enabling a jury to conclude that those injuries were a cause of death. To achieve a cause of death for which the appellant is criminally liable, it is said that the respondent must prove that he caused the injury to the hip. The most that the prosecution had established, it is contended, was that the injuries caused by the assault may have had an impact on the deceased's brain so as to cause him to fall over. But, it is said that there was no evidence to demonstrate that this was what had *actually* occurred. In addition, the injury to the hip was a significant cause of death and it is contended therefore that it was reasonably possible on the evidence that the comminuted fracture to the hip was so overwhelming as to be considered independent of the acts of the accused.

13. In oral submissions Mr O'Higgins SC directed this Court's attention to the photographs adduced at trial with particular reference to several blood marks on various locations within the house. The purpose of this exercise was to show that the deceased had moved about after the assault.

14. Reference was made to MK13, being a hat found by Mr John Hoade – transcript day 4. This hat, it is said achieved significance only during the jury's deliberations, when the jury raised a question as to whether there was blood on the hat. The hat was an item which was worn habitually by the deceased and the relevance to the defence being that the appellant said in interview that Mr Lyons had placed the hat on his head prior to the appellant leaving the house. Grounds 5 and 6 concern this issue.

15. Mr O'Higgins took issue with the respondent's contention that the notion of a fall was simply a hypothesis floated by the defence. However, he contends the 'fall' was not introduced by the defence, it was introduced by Dr. Bolster for the State with whom the defence expert, Dr Crane agreed on this aspect of her evidence. It is said that the State failed to negative this reasonable possibility.

16. Mr O'Higgins argues that there was one significant difference between the evidence of Dr Bolster and Dr Crane. Dr Bolster gave evidence that the injuries sustained would have affected Mr Lyons' brain. Initially, it is said that Dr Bolster said the deceased had suffered a concussion but she accepted that in order to properly diagnose this, one would need a clinical history. However, she nonetheless remained adamant in her opinion that there was an alteration in brain function as a result of the head injuries.

'The Fall'

17. In this regard, Mr O'Higgins poses the question as to what the prosecution proved about the fall? He asserts that the evidence suggested Mr Lyons was mobile after the assault. The appellant's account is supported, it is said, by an analysis of the technical examination at the scene.

18. It is accepted on behalf of the appellant that if the hip was not fractured independently of the injuries sustained then the deceased may have been dizzy or nauseous and thus the injury would be connected to the beating. However, it is emphasised that there was another possibility that the deceased had tripped or fallen, independent of the attack, which therefore amounted to an accident for which the appellant cannot be held criminally liable.

19. Quite properly, Mr O'Higgins accepted as a general proposition that where there is a conflict on the evidence this is then a classic jury decision.

20. The appellant argues that where there are two primary views open on the evidence, then in general terms the jury can resolve the conflict, but the difficulty, it is argued, is that while expert testimony may be called and rejected by a jury in any given case, in this case where testimony was very specific; and when the jury elects a particular view, then the choice must be rational, which it is said was not the case here.

21. In elaborating his point further, Mr O'Higgins says that Dr Bolster's opinion was that the injuries caused by the assault would have an effect on the brain, however, he reiterated that she could not say what that effect would be. Therefore the jury had no evidence as to whether the deceased was concussed, dizzy or any other possible effects as a result of a serious beating. He again emphasised that there was evidence of mobility which post-dated the fall, and that the deceased could not have been mobile if he suffered a comminuted hip fracture during the assault.

The respondent

22. The respondent submits that there was ample evidence upon which a jury could conclude beyond a reasonable doubt that there was indeed a causative link between the blows to Mr Lyons' head, inflicted during the assault, and the comminuted hip fracture, both of which, along with other factors, caused his death.

23. Although Dr Bolster acknowledged that the deceased could have survived the brain injury, she qualified this by stating that the deceased would have died of the brain injuries had they not been treated. Dr Bolster rejected the contention that a significant amount of time may have elapsed between the injuries. She also stated that in her opinion the injuries to the brain would have resulted in some alteration in Mr Lyons' consciousness and that there would have been some effect on brain function. She supported this conclusion by referencing her pathological findings. Although she accepted that nothing is absolute, she

rejected the suggestion that it was reasonably possible that no effect on brain function was occasioned.

24. The respondent submits that even if the prosecution evidence taken at its highest was such that the appellant was responsible for the head injuries only, the trial judge was still justified in his decision to refuse the application. As set out in *The People (DPP) v. Davis* [2001] 1 IR 146, the test for causation is if the actions of the accused were related to the death of the deceased in a more than minimal way. The respondent submits that the cause of death was agreed by both experts to be from a combination of injuries, without any suggestion that one particular injury overwhelmed the others in terms of contributing to death. Therefore, even *if* the evidence only established, to the requisite standard of proof, that the head trauma was inflicted by the appellant, the test set out in *Davis* and approved in *Dunne v. DPP* [2017] 3 IR 1 would have been satisfied nonetheless.

25. The respondent submits that the matters of conflict identified by the appellant were factual matters to be decided by the jury.

26. As regards the appellant's contention that the deceased's alleged fall represents a *novus actus interveniens,* it is submitted that this submission is not evidence-based and the "fall" is not a *novus actus interveniens*. There is no evidence that the deceased fractured his hip due to a fall rather than a blow and there is no evidence that the deceased fell several hours after the lacerations to his head.

27. In oral submissions, Mr O'Kelly SC relies on the dicta of Hardiman J. in *The People (DPP) v. Davis* [2001] 1 IR 146 and the evidence of Dr. Bolster. He stresses that the head lacerations, the brain injury, the rib fractures and the hip fracture were all put forward as the cause of death. Mr O'Kelly argues that there is no evidence that there was a significant time lapse between the head and hip injuries.

28. It is said that even if the deceased was still mobile after the assault, this does not mean that the death was unconnected to the assault. He says there was no evidence to suggest that the hip injury was entirely unconnected.

Discussion

29. In reality, the defence suggestion amounts to this: that coincidentally after attack on Mr Lyons concluded, the elderly man slipped and shattered his hip, which injury was totally unconnected to the assault, thus amounting to a *novus actus interveniens* relieving the appellant of criminal liability and as a consequence the trial judge ought to have directed an acquittal.

30. Murder is distinguished from manslaughter by virtue of the mental element, but of course the prosecution must prove that the appellant caused the death. In *Dunne v. DPP* [2017] 3 IR 1, O'Malley J. stated that the test for causation was settled and as stated in *The People (DPP) v. Davis* [2001] 1 IR 146. She also quoted form the first edition of *Criminal Law and Evidence* by Charleton, McDermott and Bolger and said as follows:-

> "The issue of causation in murder is addressed in the following terms in Charleton, McDermott and Bolger, Criminal Law (Butterworths, 1999) at p. 503 under the heading 'General statement':-
>
> > '[7.23] The accused will legally have caused the death of the victim if his act, or acts, substantially contributed to the subsequent death, taking into account the time at which, and the manner in which the death occurred. It is a function of the judge to decide whether there is any evidence reasonably capable of supporting the conclusion that the accused's act was still a substantially contributing factor at the time when the victim died, having regard to the manner of his death.'
>
> In their discussion of the issue the authors refer to *R. v. Wong Tat Chuen* [1997] H.K.L.R.D. 433 and to *Smithers v. The Queen* [1978] 1 S.C.R. 506. The former was

a decision of the Hong Kong Court of Appeal in which it was held that a jury should be told that it was sufficient if the accused's act contributed "significantly" to the death and that it need not be the sole or principal cause. In *Smithers v. The Queen* the Supreme Court of Canada had ruled, at p. 519, that the accused should be held liable for the death where his or her act or acts were "a contributing cause … outside the *de minimis range*".

31. This Court referred to the same extract in the recent decision of *The People (DPP) v. O'Loughlin* [2021] IECA 107, where the issue of causation was raised, but where the appeal ultimately rested with the requisite mental element of murder. In any event, it is clear that the test to be applied is as in *The People (DPP) v. Davis* [2001] 1 IR 146 at p. 149 and that is:-

> "…it is sufficient if the injuries caused by the applicant were related to the death in more than a minimal way."

32. It is said on the part of the appellant that as the evidence was that the head injuries were not fatal, Mr Lyons' death cannot be fixed to the earlier assault, therefore, unless the State could prove to the requisite standard that the appellant caused the comminuted fracture to the hip, he cannot be held liable.

33. In assessing the arguments advanced on the part of the appellant assistance is to be found in the recent edition of Charleton & McDermott's *Criminal Law and Evidence* at page 450, where the learned authors set out propositions concerning causation which include:-

- " the accused's actions must be such that but for what he or she did the victim would not have died;
- [ ]
- by his or her own fault the accused must bring about the death of the victim and that fault is required to be the operative cause and not merely incidental

for, where the law to be otherwise, driving a car carefully on the motorway without a licence for the victim to run into it and be killed might suffice;

- the accused's actions must be a substantial, or not minimal, and operating cause of the death of the victim;"

34. In the present case it is expressly stated that the cause of death was multifactorial; the deceased died as a consequence of a combination of factors. We cannot agree with Mr O'Higgins' suggestion that it is not only necessary for the prosecution to prove that the appellant violently assaulted the deceased, but that the State must also prove that the appellant caused the deceased to fall, thus shattering his hip. This argument is somewhat artificial in the circumstances of the present case. Mr Lyons had lived in his home for many years, it would certainly be quite remarkable if on the very night he was assaulted he spontaneously and independently of the attack suddenly fell over obstacles in a familiar environment. It is certainly clear on the evidence that the deceased suffered serious injuries and bled as a result of the attack, the possibility that he was able to move in the aftermath does not relieve the appellant of criminal responsibility.

35. We can see there may be merit to the argument in other situations, such as where there are two utterly unconnected events, the latter of which leads to the death of the victim. However, that simply is not the evidence in the present case. The clear evidence of Dr Bolster was that the victim died as a result of a number of causes. To suggest that an elderly man who had sustained a serious beating resulting in a brain injury, and then independently and unconnected to that assault, sustained another injury, stretches credulity beyond rational limits. Dr Bolster emphasised that the hip fracture was not the *sole* cause of death. She did not accept that it was so significant a cause as to overwhelm the other contributing factors. When asked as to the cause of death she said:-

"In conclusion then, as outlined above, there's evidence of significant blunt-force trauma to the body. There are multiple separate injuries, including bruises, abrasions or grazes and lacerations to the body in keeping with multiple blows with a blunt weapon, in addition to possibly a heavy fall onto the right side of the body with a comminuted fracture of the hip joint, that's the shattering of the hip joint. The fracture of the hip joint would have led to a significant blood-loss. Mobility following the fracture of the hip would have been extremely limited, remember the hip joint was shattered. Hip fractures are associated with a large drop in haemoglobin, so you can bleed extensively from a hip fracture; that's a reference from injury 2011 given. There are fractured ribs in both the right and left sides in the vertebral axillary line, due to blunt-force trauma, in keeping with fall or blows. Fractured ribs, especially when bilateral in this case, would result in considerable compromise of respiratory function, so it would affect your ability to breathe. The brain was submitted for a detailed neuropathological examination by Niamh Birmingham, neuropathologist. The full report is attached and her conclusions were as follows.

A traumatic localised subarachnoid haemorrhage, which is bleeding into the membrane over the brain, with linear traumatic axonal injury; this is damage to the nerve fibres themselves, and that's caused by the brain swinging around inside in the skull, shearing or tearing the nerve fibres and the underlying white matter. The findings are consistent with the autopsy findings of multiple separate areas of bruising to the scalp with fracture of the mandible due to blunt-force trauma of the head consistent with multiple blows plus possibly a fall. Significant natural disease is noted with an ischemic cardiomyopathy with extensive ventricular fibrosis or scarring with coronary artery disease. The heart disease would have accelerated death. Chronic lung disease is noted with emphysemas changes and noted in both lungs. Osteoporosis or

thinning of the bones is noted, which would increase vulnerability of fractures following trauma. Mild chronic kidney disease is noted. The cause of the death then is due to a traumatic brain injury with haemorrhage and shock with a fracture of the hip joint with fractures of ribs and mandible. Injuries sustained due to blunt-force trauma, as outlined above, are due to multiple blows with a blunt weapon and possibly a heavy fall**. So, the cause of death is blunt-force trauma to the body with a traumatic brain injury with haemorrhage and shock due to comminuted fracture of the hip joint with fracture of the ribs and mandible, or lower jawbone. The other significant factors being ischemic cardiomyopathy due to coronary atherosclerosis, the damage to the heart, emphysema and osteoporosis." (our emphasis)**

36. As can be seen from the above, Mr Lyons died from a combination of factors, not simply the sole factor of the shattered hip joint, although that was certainly a contributory factor. It is irrelevant to causation whether the victim was a young, healthy individual or a vulnerable, frail, elderly person. The assailant in both cases is equally responsible. What of a situation where an elderly victim who suffers a variety of ailments, including perhaps heart difficulties and is tied to a chair, unable to call for help and dies from a combination of factors including dehydration and shock, should the perpetrator be fixed with criminal responsibility? We believe the answer to that question is yes, and this view is entirely consistent with the test regarding causation, that is to satisfy the causation test, the perpetrator's actions must be not minimal and constitute an operating cause of death.

Conclusion on ground 1

37. In assessing the evidence there was prima facie evidence that the appellant's actions were the operative cause of Mr Lyons' death and not merely incidental to his death. It was

open to the jury to consider that the appellant set in train a very tightly knit temporal chain of events which led to the victim's death. The appellant accepted he beat Mr Lyons and given the nature of the injuries sustained by this vulnerable and frail, very elderly man, it is quite clear that the assault was of a severe order. We do not accept that it was necessary for Dr Bolster to give evidence of the impact the brain injury would have had on the deceased. Indeed how could she have done so, when such necessitated a history to be taken from the victim.

38. The deceased died from a combination of injuries, and not from a single injury. He died as a result of natural and unnatural causes. Whilst the evidence adduced indicated that the traumatic brain injury would not have led to death, Dr Bolster also gave her opinion in cross-examination that the victim would probably have died without prompt medical attention because of the lacerations he received.

39. In that regard it is worth commenting that the lacerations inflicted on the deceased were undoubtedly severe, amounting to several full thickness lacerations. He also sustained bruising to the scalp, a fracture of the mandible due to blunt force trauma and bilateral fractured ribs due to blunt force trauma. It is significant that Dr Bolster opined that the latter injuries would have compromised his respiratory function.

40. Therefore, on any assessment of the cause of death, it is apparent that the victim did not die as a result of a single factor; specifically the shattered hip. He died as a result of a combination of factors, many of which were directly related to the assault. It can be said in those circumstances that there was prima facie evidence that the injuries caused by the appellant 'were related to the death in more than a minimal way' (*The People (DPP) v. Davis* [2001] 1 IR 146) and that the appellant caused the death of the victim.

41. We cannot find fault with the trial judge's impeccable approach to the application to withdraw the case from the jury. It is well established that the withdrawal of a case from a

jury is an exceptional measure 'to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction'. (Edwards J. – *The People (DPP) v. M* [2015] IECA 65.). The trial judge was satisfied that the issue of 'a fall' and the absence of evidence regarding the impact of the blunt force injuries on the victim were quintessentially issues for the jury's consideration.

42. We find ourselves in agreement with the judge's analyses and ultimate decision to refuse the application on the conclusion of the respondent's case.

43. Accordingly, this ground fails.

Grounds 3 and 4

44. In his charge to the jury, the trial judge referred to the reasonable possibility of the deceased's brain function being compromised by earlier blows:-

> "However, if you accept that it is reasonably possible that the deceased did not fall and sustain the hip injury in the course of the delivery of the blows and that it is reasonably possible that the fall occurred after the accused had left the house, you must then consider whether it is reasonably possible that the deceased fell by tripping in the dark and that he so lost his footing in circumstances in which it is reasonably possible that his brain function and general ability to protect himself was not materially compromised by the earlier multiple blows. If you are so satisfied causation is not made out, then you must acquit the accused of murder.
>
> So, there are two circumstances there. First of all is that you must if the prosecution have failed to negative the possibility that the fall occurred after the accused had left the house and when the deceased was on his own and if the prosecution have failed to negative the possibility that the accused lost his footing by tripping in the dark and if the prosecution have failed to negative the possibility that at

the time of so falling the deceased was not materially compromised in his brain function or ability to protect himself as a consequence of the earlier blows to his head and body, in those circumstances causation is not made out and you must acquit. However, in those circumstances you must accept that all of those things are a reasonable possibility.

Now, in deciding this issue you must, of course, have regard to the relevant evidence and the following pieces of evidence appear not to be in dispute. First, that the deceased must have been mobile and upright in the vicinity of the front door after at least one of the alleged blows were delivered to his person. Secondly, that whenever the fall that broke his hip occurred, such was the nature of the fracture that the deceased was incapable of weight bearing on his right hip joint thereafter. Thirdly, that the presence of ash on the deceased's knees is consistent with his having fallen at some time or otherwise having been in contact with ash in or about the fireplace. And fourthly, that had the deceased collapsed or fallen after the alleged assaults upon him, the pathologists agree that he might have been capable of crawling into the armchair where he was eventually found.

Now, in resolving these issues, you are also entitled to have regard to the medical evidence offered on this issue both by Dr Bolster and Professor Crane and that is as to whether the scalp lacerations and the brain injury had some effect on the deceased. But you are also entitled to consider all of the other evidence of the case and specifically you're entitled to consider the age of the deceased, the fact that he was 90 years old, his poor health, the nature and multiplicity of the blows that were delivered to his person, where those blows were delivered to his head and body, the blood loss that he suffered from his scalp lacerations, the blood splatter evidence which would indicate where the blows roughly speaking, where the blows were delivered and the

shock and trauma that the deceased must have suffered during the course of the beatings. These are all matters that you have to consider."

45. Counsel for the defence requisitioned the trial judge on the aspect of his charge addressing the medical evidence surrounding the deceased's fall. The defence argued that the judge's charge contradicted the evidence and there was a gap in the evidence and the judge was inviting the jury to speculate in trying to fill that gap.

46. In refusing to recharge the jury the trial judge stated that he made clear to the jury that they were to have regard to the totality of the evidence in the case and these were matters they were entitled to consider in having regard to the total evidence in the case.

Submissions

The appellant

47. The appellant submits that the trial judge did not single out any one piece of evidence upon which a jury could be invited to conclude was the basis upon which the fall occurred. It is submitted that there is no such evidence that could be relied upon to make that case. Instead there is vague juxtaposition of 'relevant factors' with the result – the fall – and the jury are effectively told that they can rely on these factors, not just as potentially having caused the fall, but upon which they would be entitled to conclude beyond doubt actually caused the fall. The judge was in essence directing the jury to consider matters which were not based on the evidence.

The respondent

48. The respondent submits that the trial judge did not err in the manner in which he directed the jury on the matters they were entitled to consider during their deliberations. The judge told the jury about causation and explained that in order to convict the appellant of murder, they would have to be satisfied beyond a reasonable doubt that the fall and consequent fracture of the hip Mr Lyons sustained was either directly caused by the multiple

blows to Mr. Lyons' head or, alternatively, that it was at least the reasonably foreseeable natural consequence of those blows. He then went on to explain that if the prosecution had not been able to negative the possibility that the hip injury occurred after the appellant left the house; had not been able to negative the possibility that after the appellant left the deceased lost his footing and tripped; and, had not been able to negative the possibility that at the time of so falling, the deceased was not materially compromised in his brain function, then they would have to acquit. The respondent submits that in fact, the trial judge was unduly favourable to the appellant in charging the jury that they would have to acquit if the above was not established.

49. The respondent submits that the trial judge did not err in advising the jury that in considering the live issues in the trial, and in particular matters going to causation, they were entitled to consider the evidence elicited during the trial in its totality. The matters referenced, the deceased's age, his poor health, the nature and multiplicity of the blows, were all matters which arose during the trial.

Discussion

50. On scrutinising the trial judge's charge, it is undeniably so that he instructed the jury in the clearest of terms. Having advised the jury of the legal principles applicable in every criminal trial, he proceeded to explain the elements required for murder. In this regard, he explained the issue of causation as follows\;-

> "Now I want to turn to the issue of causation. As a matter of law, causation in a murder case is established if the prosecution satisfy you beyond reasonable doubt that the act or acts of the accused were related to the death of the deceased in more than a minimal way. Accordingly, the accused's acts need not be the sole or even the main cause of death for his acts to be held to have caused the death of the deceased."

The judge then directed the jury's attention to the expert evidence and then said:-

"Accordingly, if you are satisfied beyond reasonable doubt that it is not reasonably possible that the deceased would have survived the shock and trauma of being beaten repeatedly with a blunt object without collapsing, tripping or otherwise falling to the ground in the course of such an attack, you may find that causation has been established. In other words, if in the course of the repeated beatings the late Paddy Lyons was caused to fall to the ground because of the blows or collapsed in consequence of the blows or tripped trying to escape the blows as they were being delivered, in those circumstances if you have no reasonable doubt that the fall occurred in those circumstances during the currency of the time that the blows were actually being delivered, you can find that causation has been established.

However, if you accept that it is reasonably possible that the deceased did not fall and sustain the hip injury in the course of the delivery of the blows and that it is reasonably possible that the fall occurred after the accused had left the house, you must then consider whether it is reasonably possible that the deceased fell by tripping in the dark and that he so lost his footing in circumstances in which it is reasonably possible that his brain function and general ability to protect himself was not materially compromised by the earlier multiple blows. If you are so satisfied causation is not made out, then you must acquit the accused of murder.

So, there are two circumstances there. First of all is that you must -- if the prosecution have failed to negative the possibility that the fall occurred after the accused had left the house and when the deceased was on his own and if the prosecution have failed to negative the possibility that the accused lost his footing by tripping in the dark and if the prosecution have failed to negative the possibility that at the time of so falling the deceased was not materially compromised in his brain function or ability to protect himself as a consequence of the earlier blows to his head

and body, in those circumstances causation is not made out and you must acquit. However, in those circumstances you must accept that all of those things are a reasonable possibility."

51. The appellant complains that the judge erred in directing the jury that they were entitled to consider whether the victim's age and health partly contributed to his fall and say that the judge invited the jury to speculate on matters which contributed to the fall.

52. The judge highlighted the factors which appeared to him to be undisputed. His succinct statement of these factors was a model of clarity and bears repetition as follows:-

"First, that the deceased must have been mobile and upright in the vicinity of the front door after at least one of the alleged blows were delivered to his person. Secondly, that whenever the fall that broke his hip occurred, such was the nature of the fracture that the deceased was incapable of weight bearing on his right hip joint thereafter. Thirdly, that the presence of ash on the deceased's knees is consistent with his having fallen at some time or otherwise having been in contact with ash in or about the fireplace. And fourthly, that had the deceased collapsed or fallen after the alleged assaults upon him, the pathologists agree that he might have been capable of crawling into the armchair where he was eventually found."

53. The judge then directed the jury to consider the medical evidence and also and quite properly advised the jury to consider all evidence in the case. He, at this point referenced the age and health of the deceased.

Conclusion on ground 3 and 4

54. During the trial, the jury were made aware of the victim's age and health issues, indeed the latter were adduced in the testimony of Dr Bolster as the natural causes contributing to his death. To fail to mention those issues, simply flies in the face of common sense.

55. There is no doubt that the judge was fully entitled and arguably mandated to reference those factors, and even if he did not do so, in advising the jury to exercise their common sense, one would expect a jury to consider those factors in any event. We do not agree with the appellant's submission that the judge invited the jury to speculate. In fact, on the contrary the judge's charge was not only a model of clarity and good sense, but in fact on occasion was most favourable to the defence as can be seen from the above extracts.

56. Accordingly, we find no merit in these grounds.

Ground five

57. This ground is concerned with the aspect of the trial judge's charge which addressed the evidence of withdrawal symptoms in the context of whether or not the appellant was under the influence of Xanax during the incident. The trial judge charged the jury as follows:-

> "The first issue you must consider is whether the late Paddy Lyons who, as I say, was a man of very advanced years and in poor health, ever posed an imminent or any threat of serious or any injury to the accused.
>
> That is a matter that you have to examine in the context of all of the evidence in the case, but you must also have regard to all of the other evidence which may support his assertion that at the time he was under the influence of Xanax in circumstances where he claims to have taken 100 tablets. You have the expert evidence, albeit qualified, to the effect that if he did take that amount it could have a paradoxical effect whereby he would become more susceptible to provocation and would be aggressive. But as I say, that is a qualified opinion expressed by the expert because he also says that there was no evidence that he suffered any withdrawal symptoms in circumstances where he would expect such symptoms to have exhibited themselves if he was taking Xanax with the regularity that he said he'd been taking it and in the quantities that he

was taking it. He also expressed a scepticism based on the fact that no tablets or any drug paraphernalia consistent with the use of Xanax was found in his home or in his estate despite a comprehensive search at Ferryland.

But you also have in addition to the issue of whether he took Xanax, the actual evidence of persons who saw him on the Friday. I'll read back their evidence to you in due course, but it is for you to decide whether they noticed anything about him that was consistent with the taking of Xanax or taking it in the amounts claimed. But you also have CCTV footage of the accused carrying out various tasks in relatively close proximity to the actual journey he made to the late Paddy Lyons and it is for you to decide whether in the movements that you observed him making, be it power hosing his car, power hosing the heater or whatever it was he took out from the back seat of the car, photographing that in executing the manoeuvre whereby he reversed and then drove off, he exhibited any signs of being under the influence of 100 tablets of Xanax. They're all matters for you to decide. Although the expert said that he could not find any evidence of withdrawal symptoms whilst the accused was in custody, you must also bear in mind that on the Monday evening he did complain of nausea and he did request to see a doctor and was seen by a doctor and was prescribed, apparently, medication for his stomach. So that's the evidence that you obviously must look at when considering the issue of self-defence."

58. A requisition was raised on the appellant's behalf on this aspect of the charge. It was submitted that the jury had been charged that the expert stated there was no evidence that the accused suffered any withdrawal symptoms in circumstances where he would expect such symptoms to have exhibited themselves but there was a bigger picture in relation to drug use. It was submitted by the defence that the jury should be reminded that the expert accepted that withdrawal symptoms would be compromised by the use of other drugs and

that taken together, with these drugs being street drugs, would make a very confusing picture for which there is no real research upon which to rely. The trial judge refused to recharge the jury, stating as follows:-

> "However, I'm against you in relation to the third matter because the agreed evidence of the experts, as I understand it, was to the effect that they would have expected withdrawal symptoms to have manifested themselves on the Monday, and they did not."

Submissions

The appellant

59. The appellant submits that the charge to the jury in relation to withdrawal symptoms was unbalanced and could reasonably have improperly resulted in the jury deciding that the appellant did not consume drugs on the relevant day. This could have undermined the credibility of the appellant in the eyes of the jury and it had an important bearing on their assessment of the appellant's account given in interview and his subjective honest belief for self-defence and whether he had the intent that is necessary to sustain the crime of murder.

The respondent

60. The respondent submits that the trial judge fairly synopsised the relevant evidence on the issue of drug use and self-defence. The jury's attention was specifically drawn to the appellant's complaint of nausea during interview and to the fact that he was seen by a doctor and prescribed medication for his stomach. During the portion of the charge in which the various witnesses' evidence was summarised, the trial judge did indeed refer to the witness's comment that taking cannabis and cocaine "was going to distort the picture from a pharmacological point of view." It is clear that the trial judge drew the jury's attention in equal measure to the salient evidence supporting the contention that the appellant had consumed drugs and the evidence suggesting the contrary.

Conclusion

61. We are not at all persuaded that the judge erred in his charge when he invited the jury to consider the relevant evidence on the issue of self-defence. He repeatedly advised the jury that the issue was one for their determination. The real issue is whether the charge was fair and balanced and it is readily apparent on reading the totality of the charge and with specific regard to the portion relevant to this issue, the trial judge's charge was one of impeccable fairness.

62. Accordingly, we have no hesitation in rejecting this ground.

The Motion

63. By notice of motion and grounding affidavit dated the 7th April 2021 the appellant seeks leave to adduce new evidence at the hearing of his appeal. It is urged that the admission of this new evidence is necessary to enable this Court to consider grounds 7,8 and 9.

64. The new evidence which the appellant seeks to rely upon is a report of Mr John Hoade, forensic scientist of FSI, concerning his examination of the deceased's hat [exhibit MK13] subsequent to the appellant's trial. This examination resulted in a report which confirms the presence of blood staining on the hat with insufficient DNA from which to generate a profile. The evidence at trial from Mr Hoade was that the blood at the scene matched that of the deceased.

65. It is said that the evidence at trial revealed that the hat was located in the area in front of the fireplace and that ash was found on the knees of the deceased. Therefore, the argument is advanced that the finding of the hat in this location is consistent with the defence case that the deceased was mobile when the appellant left his house, thus supporting the contention that he may have fallen in the aftermath of the attack by the appellant.

66. Mr Hoade's findings in his report are as follows:-

"**Findings**

There was no obvious visible bloodstaining on the hat. A chemical test indicated the presence of light bloodstaining, predominately on the outside. There was insufficient DNA present in samples of this bloodstaining to generate an interpretable DNA profile."

67. Mr O'Higgins argues that the relevance of the presence or absence of blood on the hat could not reasonably have been known prior to the question asked by the jury. The law is well established regarding the receipt of new evidence on appeal; *Willoughby v. DPP* [2005] IECCA 4 as approved in *The People (DPP) v. O'Regan* [2007] 3 IR 805. For ease of reference the principles are set out hereunder:-

"(a) Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case **of expert testimony**, having regard to the availability generally of expertise from multiple sources.

(b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.

(c) It must be evidence which is credible and which might have a material and important influence on the result of the case.

(d) The assessment of credibility or materiality must be conducted be reference to the other evidence at the trial and not in isolation."(our emphasis)

68. Mr O'Higgins contends that the test for admitting fresh evidence on appeal in an application under section 2 of the Criminal Procedure Act 1993, is less onerous than that which arises in an appeal against conviction. He says this gives rise to an anomaly in that, on an 'ordinary' appeal a higher standard seems to apply than that set down in the legislation

for review of a conviction on the conclusion of an appeal on the basis of a new or newly discovered fact.

69. The relevant provision provides as follows:-

"2.— (1) A person—

(*a*) who has been convicted of an offence either—

(i) on indictment, or

(ii) after signing a plea of guilty and being sent forward for sentence under section 13(2)(b) of the Criminal Procedure Act, 1967, and

who, after appeal to the Court including an application for leave to appeal, and any subsequent re-trial, stands convicted of an offence to which this paragraph applies, and

(*b*) who alleges that a new or newly discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive,

may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence.

(2) An application under *subsection (1)* shall be treated for all purposes as an appeal to the Court against the conviction or sentence.

(3) In *subsection (1) (b)* the reference to a new fact is to a fact known to the convicted person at the time of the trial or appeal proceedings the significance of which was appreciated by him, where he alleges that there is a reasonable explanation for his failure to adduce evidence of that fact.

(4) The reference in *subsection (1) (b)* to a newly-discovered fact is to a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact the significance of which

was not appreciated by the convicted person or his advisers during the trial or appeal proceedings.

(5) Where—

(*a*) after an application by a convicted person under *subsection (1)* and any subsequent re-trial the person stands convicted of an offence, and

(*b*) the person alleges that a fact discovered by him or coming to his notice after the hearing of the application and any subsequent re-trial or a fact the significance of which was not appreciated by him or his advisers during the hearing of the application and any subsequent re-trial shows that there has been a miscarriage of justice in relation to the conviction, or that the sentence was excessive,

he may apply to the Court for an order quashing the conviction or reviewing the sentence and his application shall be treated as if it were an application under that subsection."

70. It is argued that the appellant immediately engaged with the issue of the possibility of blood on the hat once the issue was raised by the jury and sought a forensic examination. Therefore, the appellant says he is in a better position than a person applying under section 2 of the 1993 Act. Yet, the appellant, it is said must overcome a higher threshold than an individual making an application under the 1993 Act.

71. Since the hearing of this appeal, the Supreme Court in *The People (DPP) v. Anthony Buck* [2020] IESC 16 considered the *Willoughby* test and the test pursuant to s.2, specifically s.2(3), (4) and (5) of the Criminal Procedure Act 1993. Additional submissions were received on the invitation of this Court in light of that decision.

72. The appellant says that this decision renders more flexible the test in *Willoughby*. Moreover, that the Supreme Court has effectively signalled that the *Willoughby* test should be more in keeping with the statutory test under s.2.

73. In response, the respondent contends that while the Supreme Court suggests that the test for admitting new evidence on appeal and the test under s.2 of the 1993 Act should align so as to prevent a situation arising whereby evidence is admissible in a s.2 appeal but inadmissible in an appeal against conviction, the *Willoughby* principles were not expressly curtailed.

Conclusion

74. Firstly, in the recent decision of *The People (DPP) v. Anthony Buck* [2020] IESC 16, Charleton J. considered the test for a s.2 application and the test for the admission of new evidence on appeal. One of the specific questions to be resolved by the Supreme Court was whether the *Willoughby* test, as approved in *O'Regan* applies to s.2 applications. The Court was satisfied from a consideration of the terms of the definition of 'new fact' pursuant to the Act, that the legislation has its own test. With reference to s. 2, Charleton J. referred to the necessity of showing "a reasonable explanation" for failing to call the evidence at trial and was of the opinion that while the statutory bases for the admission of new evidence on appeal or pursuant to s. 2 of the 1993 Act, differ, the evidence must be credible and material. Charleton J. concluded that the test in *Willoughby* has application, but that 'some flexibility and common sense in its application may be sufficient to avoid the possible anomaly of evidence being inadmissible for the appeal but also admissible for a s.2 application. At para. 21 he says as follows:-

> "As can readily be seen, the test under the 1993 Act can be either, in a first application, as to deliberate holding back and, in all applications, as to knowing a fact but not appreciating why it is of significance in the context of the issues in the trial, while the test for the admission of fresh evidence on appeal to the Court of Appeal focuses on a complete absence of awareness of a fact. The statutory bases are different What the tests surely have in common is the necessity for whatever the new fact is to

have a basis in credibility and for such fact to be material in the context of the building blocks of the case. Similarly, in common must be the focus on the fact that is put forward as opposed to a reiteration of an entire appeal that has already been determined. Both tests, as to the admission of fresh evidence on appeal to the Court of Appeal, and as to the nature of a fact which may establish a miscarriage of justice on an application following conviction and appeal, may in logic require alignment. Since the test in *Willoughby* is a test of the common law, some flexibility and common sense in its application may be sufficient to avoid the possible anomaly of evidence being inadmissible for the appeal but also admissible s 2 application."

75. Therefore, the concerns expressed on behalf of the appellant of a possible anomaly in the tests for the admission of evidence on appeal and pursuant to s. 2 of the 1993 Act, may be resolved by an element of flexibility and common sense in the application of the *Willoughby* test. We are not satisfied that the decision is authority for the proposition asserted by the appellant, that the test in *Willoughby* should now be more in terms of the test applicable in s.2.

76. The application of the principles must be considered in light of the desirability of calling all relevant evidence at trial. As stated in *The People (DPP) v. John Paul Buck* [2010] IECA 88, where O'Donnell J. described the test for the admission of new evidence on appeal as follows :-

"That normally involves a three stage test: first that the evidence itself be credible; second, that it was not available at the time of the trial; and third, that it would materially effect [sic] the decision or possibly or probably have an important influence on the result. These principles are to be applied in an overall context where there is a strong policy identified in the *Willoughby* judgment in favour of all relevant evidence

being adduced at the trial and all issues being resolved there and that it is only in exceptional circumstances that a court of appeal would allow fresh evidence."

77. The situation in the present case may be said to be somewhat unusual in that the attention of the appellant's legal team was not drawn to the issue of blood on the exhibit until the jury referred expressly to it. In those circumstances, it can be seen that the appellant was aware of the issue at trial and sought to have the hat forensically examined. Thus it can be said that the appellant's legal team made efforts at trial to obtain and adduce the evidence. However, the matter does not rest there and it is worthwhile recalling the policy considerations which underpin the principles enunciated in *Willoughby* and endorsed in *O'Regan*; and that is the necessity for an accused to set out his entire case at trial, otherwise the criminal justice system would be overwhelmed with a re-run of trials at the appellate stage and thus the threshold for the admission of new evidence on appeal is a high one.

78. While the appellant made efforts to adduce forensic evidence, it must be recalled that such efforts were made after the jury had commenced its deliberations, this has a bearing on the application of the test in a flexible manner and with regard to common sense.

79. Firstly, the evidence we are concerned with in the present case is that of expert testimony, where the bar is particularly high. Otherwise, in any given case an opinion could be sought after the conclusion of a trial, which would then be said to be new evidence. It is not new evidence, unless there has been an advance in scientific research which alters the nature of a fact; *The People (DPP) v. Kelly* [2008] 3 IR 697 at 710.The *Kelly* case concerned an application pursuant to s.2 and the comments of Kearns J. are apposite:-

"Secondly, it would have the effect of rendering virtually every conviction, even one upheld by this Court following an appeal, open to later challenge if a further or new expert could be found to offer an opinion which went further than a defence expert had done at trial, or which tended to contradict or undermine experts called on behalf

of the prosecution at trial. It would open the door to the introduction of additional evidence in circumstances which were plainly contra-indicated by this Court in *The People (Director of Public Prosecution) v Willoughby [2005] IECCA 4."*

80. Secondly, it must be said that the existence of the hat was known to the appellant prior to trial. He had made reference to it in his interview and was aware that it had been located by the Gardaí. At that point, a request could have been made for the examination of the exhibit by the State or indeed the exhibit could have been examined by an expert engaged by the appellant.

81. Therefore, the evidence could certainly have reasonably been known or acquired and so the application fails the due diligence test, which is compounded by the high threshold for expert testimony. The fact that the defence formed the view that the exhibit had significance only when the jury raised the question during deliberation does not alter this fact.

82. Insofar as the credibility of the evidence is concerned, that is beyond dispute, being the analysis by a well-known expert in FSI. However, whether the new evidence might have a material and important bearing on the result of the trial is another issue and one which must be considered in the context of the entire evidence and not viewed in isolation.

83. It is well established that in order to admitted new evidence on appeal, the evidence must be material in the manner expressed in *Willoughby*. The evidence must be of *real materiality* in the context of the case.

84. It is important to consider the findings of Mr Hoade upon his examination of the exhibit. That examination revealed that there was light blood staining which was predominantly on the outside of the hat. This is hardly surprising when one considers the location where the hat was found. There was substantial blood with different patterns found from the scene; blood spattering, blood drops, and directional blood. The fact that light blood

staining was found outside the hat would not have, in our view, advanced the appellant's case. It is not evidence which is of real materiality in the context of the balance of the evidence.

85. The general principle is that an appeal must be conducted on the basis of the evidence which is presented at trial and it is only in exceptional circumstances that the public interest in finality can be overridden by the admission of new evidence on appeal. We are not satisfied that the new evidence satisfies the requirements for the admission of such evidence and we refuse the application.

Grounds 7, 8 and 9

86. These grounds are interlinked in that they each arise from a request by the jury to see the deceased's hat and questioned whether there was blood found on the hat. The judge informed the jury that no blood was found on the hat and their request to see the hat was facilitated. The significance of the hat, from the appellant's perspective arose from his assertion in interview that the deceased was wearing his hat when the appellant left the house. It is said that evidence emerged that the deceased could have died following a fall in the area of the fireplace and thus the wearing of the hat would support the appellant's contention that the deceased was mobile when he left the house.

87. On the day following the question asked by the jury, counsel for the defence submitted to the trial judge that the evidence in relation to the hat needed to be clarified for the jury because the evidence in the trial was that the hat had not been examined and upon visual inspection there were parts of the hat that looked dark in colour and could potentially look like blood.

88. The trial judge addressed the jury on the hat as follows:-

> "There is in fact no evidence that the hat was examined for blood; and therefore, there is no evidence that there was no blood on the hat. That is in fact the true position arising from the evidence that you've heard. You will, of course, be able to look at the hat itself. If your examination of the hat raises a reasonable possibility that there is blood on the hat, no inference should be drawn against the accused arising from the omission of the State to examine the hat."

89. Following this, counsel for the defence made an application that the Court allow the hat to be forensically examined for blood in the interests of justice. The trial judge refused this application and stated as follows:-

> "It seems very clear to me that there is no power vested in the Court, whereby I can reopen the evidential part of the case, so that the jury received new or fresh evidence, in circumstances where they have already commenced on their deliberations, so therefore I refuse that part of the application"

90. And as a result of the refusal, a further application to discharge the jury was made which was refused.

91. While these grounds are interconnected we will now consider each ground.

Ground 7

92. This ground is concerned with a refusal by the trial judge to agree to the request made by defence counsel at trial to direct that the hat belonging to the deceased be forensically examined.

Submissions

The appellant

93. The appellant submits that the trial judge erred in finding that there was no power vested in the Court to allow the jury to receive new evidence once they had commenced their deliberations. It is submitted that in finding that the Court had no power, the trial judge failed

to exercise the judicial discretion which was necessary for the proper administration of justice.

94. The appellant refers to *AG v. O'Brien* [1963] IR 65 where the Supreme Court held that a trial judge had a discretion to allow the recalling of witnesses at any stage of a case, even after the jury had retired to consider their verdict

95. It is submitted that the appellant's constitutional rights to a fair trial included a requirement to suspend the deliberations to afford the accused the opportunity to address the concerns regarding the exhibit in this case**.**

The respondent

96. In reply to the appellant's reliance on *O'Brien* the respondent submits that *O'Brien* can be readily distinguished from the current case as the Supreme Court seemed to confine the discretion of the trial judge to allow new evidence to go before the jury after they have retired to consider their verdict to the recalling of witnesses. The respondent argues that the request in the current case, to conduct an examination of an exhibit, in order to explore its evidential value, simply cannot be equated with a request to recall a witness who has already given evidence during the currency the trial.

97. The respondent submits that even if the trial judge did retain a discretion to allow the examination in the present case he was correct to refuse the request. The trial judge presided over the trial for 13 days. He heard the evidence in its entirety, observed the witnesses and was intimately familiar with the *"course of the trial".* His decision, therefore, must be viewed in the context of his role in proceedings and of him being best placed to make the decision he did.

98. Further, there was no injustice suffered as a result of the trial judge's decision. The existence of the exhibit was apparent, and therefore on notice to the defence, from the earliest of stages. The respondent submits that it was at all times open to the defence, in advance of

the trial, to request access to the hat or to request that the hat be subjected to forensic examination and the time to make such enquiries had passed by the time the jury had commenced their deliberations.

99. The respondent submits that in the event that blood had been found on the hat it would not be evidentially significant as there was evidence of substantial bloodstaining, blood spatter and blood pooling all around the locus.

Discussion

100. On Day 12, in the course of their deliberations, the jury asked certain questions and the following exchange took place:-

> "JUDGE: You also want to see the deceased's hat. That also can be provided, I take it.
>
> MR O'KELLY: That can be provided, yes.
>
> JUDGE: And you inquire as to whether it had blood on it; is that correct?
>
> FOREMAN: Yes.
>
> JUDGE: The answer is no. No blood was found on the hat. You also want to see a picture of the blood on the door; is that right?"

101. The jury requested the trial judge to read portions of the expert testimony, which the Court did, following which the jury retired for the day.

102. The following morning, (Day 13), Mr O'Higgins SC expressed his concerns arising from the question asked by the jury concerning the deceased's hat. In short, he raised three issues; that the judge inform the jury that the hat had not been examined; the consequences of non-examination, that is; that any doubt arising as a result of the failure to examine should favour the defence and, raised the possibility that the jury's deliberations be suspended to enable the defence to examine the hat. The relevant exchanges are:-

> "MR O'HIGGINS: But that was the -- and the answer was, "No." But the way the

question was asked and answered intimated the hat had been examined. Now, all the evidence in the case is that it hasn't been examined.

JUDGE: Yes.

MR O'HIGGINS: That's the first thing.

JUDGE: Yes.

MR O'HIGGINS: And we have been facilitated with a visual inspection on it and there are parts of it that look dark in colour but they're not obviously blood, to put it like that. But they're not so obvious that you would say they're not blood either. Now, that's my own subjective assessment.

JUDGE: Yes.

MR O'HIGGINS: I'm obviously not putting that on anybody else. But it's very problematic, Judge, because at a minimum in my respectful submission, the jury need to be told that --

JUDGE: That it hasn't been examined.

MR O'HIGGINS: That it hasn't been examined, that's No. 1.

JUDGE: Yes.

MR O'HIGGINS: And then No. 2 is, I think the jury have to be charged on what the effect of that is in their deliberations. And the norm would be that if the prosecution would have done something and didn't do it, it's not something that can be visited on the defence and if it creates any doubt, the doubt has to apply on behalf of the defence, would be my respectful submission. But, I am sort of slightly troubled at this stage that it has become an issue and the manner it has become an issue and I will need to take instructions from my client. I would be hesitant obviously to ask that their deliberations be postponed to have the hat examined, that would be very unusual but I suspect probably not without precedent, I don't know. But it's, as I say, we're hitting

the ground running on it to some extent and I'm making that observation/submission, first of all that they need to be told the hat wasn't examined. And secondly, I think a view has to be formed as to what the consequences of non-examination are and then we have a matter which we have to consider a little bit further.

JUDGE: So, in regard to the third matter, what are you asking me to do in practical terms?

MR O'HIGGINS: Well, I need to -- discuss it with my client and advise my client as to whether or not we should bring an application on his behalf to have the hat examined even at this late point. I don't know what way the Court would receive that, I don't know what the prosecution's view on it would be. It would be extremely unusual, but as I say, I suspect not without precedent. I'm just flagging that up because that's something we have to have a concern about and have to deal with. But there's no issue in my respectful submission, the jury need to be told it wasn't examined. And I would also respectfully submit that if the omission to examine it creates any doubt in the case, it's one that should apply in favour of the accused."

103. A discussion then ensued and ultimately, it appears that common ground was reached which we will address presently.

104. Insofar as the evidence relating to the hat was concerned at trial, the position is clear. Mr Hoade examined certain items from the scene. He was not asked if he examined the hat, therefore there was no evidence whether or not the hat was examined and, consequently, there was no evidence whether or not there was blood on the hat. The hat simply did not achieve significance until the jury raised their question.

105. Ultimately, the consensus reached was that the judge advise the jury that the hat was not examined. Moreover, that the judge advise the jury that there was no evidence that there was *no* blood on the hat.

106. Mr O'Higgins pressed his submission that the jury be instructed that any inference to be drawn from the above should be drawn in favour of the appellant.

107. The judge then addressed the jury in the following terms:-

> "There's just one matter I want to address you on and it is in relation to the issue of blood on the hat/cap, or however you described the head apparel. There is in fact no evidence that the hat was examined for blood; and therefore, there is no evidence that there was no blood on the hat. That is in fact the true position arising from the evidence that you've heard. You will, of course, be able to look at the hat itself. If your examination of the hat raises a reasonable possibility that there is blood on the hat, no inference should be drawn against the accused arising from the omission of the State to examine the hat."

108. Following the judge's instruction to the jury, no issue was taken with the terms of the instruction. However, Mr O'Higgins then asked the judge to depart from the general rule that the jury do not receive any further evidence once deliberating and, asked the judge to permit the forensic examination of the hat, which evidence would then be adduced before the jury. The judge refused the application.

109. The appellant relies on the decision in *AG v. O'Brien* [1963] IR 65 and asserts that the dicta in that case provides support for the proposition that a trial judge enjoys a discretion during a jury's deliberations to permit evidence to be adduced. The respondent suggests that *O'Brien* may be distinguished from this case in that *O'Brien* is authority for the proposition that a witness may be recalled but is not authority for the contention that entirely new evidence may be adduced at this stage of the trial process. In *O'Brien* the following is stated:-

> " In this country the proper rule is, in our view, that a trial judge has power in the exercise of his discretion to allow a witness to be recalled and to give evidence at any stage of the case before the jury agrees on a verdict. That discretion must, of

course, be judicially exercised. The propriety of recalling a witness and of the questions addressed to him must to a great extent depend upon the course of the trial, the facts of the case, and other matters which can be fully and properly appreciated only by the trial judge himself. His discretion should therefore not be interfered with unless an injustice has resulted from its exercise."

110. The trial judge was not satisfied that he had the power to permit the receipt of evidence where the jury had retired. It must be noted that *O'Brien* was not opened to the trial judge.

111. In *O'Brien,* the jury indicated that they wished to ask a witness a further question. The witness was recalled to give evidence despite defence objection. Davitt P. considered several authorities from this and the neighbouring jurisdiction and having done so said at p. 74:-

> "In each of these cases there was a departure from the usual procedure or normal course of taking evidence; but in no case was there any reception of evidence after the trial judge's summing up, or after the jury had retured (sic) to consider their verdict."

The learned judge then proceeded to consider Wigmore on Evidence (2nd ed.; vol. IV, para.1880) where the author stated:-

> "It is clear that the reception of evidence after the jury has retired to consider a verdict reaches the extreme of irregularity. The normal time for finally closing all evidence is the time when the tribunal proceeds to deliberate upon its effect. Nevertheless, here too it may occur that evidence excusably omitted at an earlier stage may be honestly offered and justifiable received without undue advantage to the opponent… Accordingly it is generally agreed that the trial Court in its discretion determining the exigency may exceptionally admit evidence that this stage"

112. The Court in *O'Brien* decided that the rule in *R v. Owen* [1952] 2 QB 362 was too restrictive; the rule being that once the judge's charge has concluded, no further evidence

ought to be given. In analysing the jurisprudence, with particular reference to *R v. Sullivan* [1923] 1 K.B. 47, Davitt P. concluded that the power of the judge to recall a witness was akin to the power to permit evidence in rebuttal. He said:-

> "[T]hat the judge has a discretionary power with which a Court of Appeal cannot interfere unless it should appear that a real injustice has resulted."

113. It seems therefore, that while the evidence in *O'Brien* was requested by the jury, Davitt P. identified a broader power to recall a witness after the jury retired, which power was not limited to a situation where the jury requested the evidence. Therefore a trial judge has a discretion to permit a witness to be recalled after the jury retire to consider their verdict.

Conclusion

114. Insofar as the present circumstances are concerned, *O'Brien* is authority merely for the proposition that the *judge* has a discretionary power to recall a witness at any stage of the trial and to put questions to the witness, as the judge considers appropriate, to ensure that justice is met. This Court will be very reluctant to interfere with the exercise of the judge's discretion unless a real injustice has occurred. .

115. In the present case, the proposition advanced was, in our view extremely unusual, if not unprecedented. That is, that the jury suspend their deliberations to enable the defence to seek out fresh evidence and **then** have the witness recalled. In our view there must be some order to the trial process, and we do not believe this is discordant with the dicta in *O'Brien*. There is no basis for the re-opening of the evidence after retirement except in the very limited circumstances envisaged by *O'Brien*.

116. What was proposed in the present case was the effective suspension of the jury's deliberations so that a forensic test could be conducted. Following which, Mr Hoade could be recalled to give that evidence. We do not believe that there is any basis for the suspension of deliberations for the purpose of attempting to garner additional evidence once the jury

have commenced their deliberations. That is not within the power of the trial judge, and is not envisaged in *O'Brien*. In our view it is not open to the parties because of some question asked or some issue apparently raised by the jury, effectively retrospectively, to visit or revisit some topic, by having a witness recalled unless the jury request that such witness be recalled to clarify an issue *and* the judge in his or her discretion finds that exceptional circumstances merit the recall of the witness. Thus ensuring that the trial process is preserved.

117. In truth, what was sought in the present case was something not envisaged in *O'Brien* at all. What was sought was not just a variant of the rule in *Owen*, (as modified in *O'Brien*) but went even further than *O'Brien* and, was not consonant with that decision.

118. The trial judge enjoys a discretion as to whether to recall a witness. However, the calling of a witness at the stage of deliberation, at the request of the jury, quite obviously, is something which should arise only in the most exceptional of circumstances. The trial judge's discretion is not an unfettered one and, must again obviously, be judicially exercised. A trial should be conducted with order and we do not believe that a jury has an unlimited right to seek a witness to be recalled, or that the prosecution or the defence have an unrestrained right to question the witness once recalled. Indeed *O'Brien* appears to suggest that it is the judge who should pose the questions. (end page 72 of *O'Brien*). Trials cannot be permitted to descend into disorder, with witnesses recalled and re-examined at will. All depends on the circumstances of the case and the discretion of the trial judge to permit such a scenario, which (as already stated) must be judicially exercised with a witness only permitted to be recalled in the most exceptional of circumstances. The rule expounded in *Owen* is one of procedure to ensure the proper and orderly administration of justice, however, exceptional situations may arise which require the judge to exercise his or her discretion at the request of the jury and recall a witness.

119. This does not extend to enabling either party to seek out and garner evidence after a jury has retired.

120. The trial judge was of the opinion that he did not have the power to permit the evidence to be re-opened and new or fresh evidence adduced at that stage of the proceedings and refused the application. The application was to suspend the jury's deliberations to enable the defence to garner evidence. We do not believe that *O'Brien* envisaged that type of situation. *O'Brien* is confined to the recalling of a witness at the jury's request, which does not include either party seeking fresh evidence after deliberation has commenced. That in effect, is the end of the matter.

121. While not necessary for the purpose of determining this ground of appeal, we observe that the defence were aware of the hat from an early stage and aware of the content of their client's interviews. While we accept that the issue did not become a salient one in the minds of the defence legal team until the jury asked a question concerning the hat, it was always open to the defence to have it forensically examined prior to trial. However, we wonder as to the value of such examination given the presence of extensive blood patterns at the scene. Therefore, whether the deceased's blood was found to be on the hat would not, in our view have been of great moment in the context of the evidence at trial.

Ground 8 .

122. This ground is concerned with the refusal by the trial judge to recharge the jury where the defence submitted that if the Court was not minded to permit the forensic examination of the hat, it would then be necessary to recharge the jury in terms that they could not draw an inference from a visual inspection as to the presence or absence of blood on the hat because blood may be present but not visible.

123. Moreover, the defence submitted that the Court could take judicial notice of the fact that blood can be on an item but not visible and in those circumstances, the jury should draw

no adverse inference either way. The trial judge declined to do so on the basis that there was no evidence that there could be blood on the hat that is not visible and he had already charged them in relation to inferences that can be drawn from their inspection of the hat.

The appellant

124. The appellant submits that the trial judge erred in failing to direct the jury that there could be blood on the hat even if it was not visible to them on their inspection. It is submitted that the absence of evidence as to whether or not there could be blood on the hat, even though it may not be visible to the naked eye, should have resulted in the jury being entitled to consider that there could be blood on the hat which, it is submitted, may have led to a favourable inference being drawn for the appellant.

125. Moreover, Mr O'Higgins argues that should the jury conclude on visual inspection that there was no blood on the hat, this could create a problem for the appellant, however, he says the matter doesn't rest there. The visual examination by a jury raised the spectre of a jury carrying out an impermissible forensic examination in the absence of forensic evidence. In those circumstance, he says this underscores the error of the trial judge in refusing to allow the forensic examination, the subject of ground 7.

The respondent

126. The respondent argues that although the trial judge did not accede to the defence request to tell the jury that there may be blood on the exhibit, even if it is not, or no longer visible in those specific terms, he did tell the jury that if their examination of the hat raised a possibility of there being blood, no inference should be drawn from such a conclusion against the appellant. By couching his direction in such terms, by avoiding a reference to a visual inspection and by employing instead the more general term 'examination', the trial judge was effectively leaving open the possibility that the jury might feel there was blood present, whether visible or otherwise. It is submitted that the formula of words chosen by

the trial judge was in fact preferable to the course suggested by defence counsel in circumstances where there was no evidence at all of either the presence of blood on the hat, or the absence of blood on the hat.

Discussion

127. For ease of reference, we repeat the trial judge's direction to the jury on this issue:-

> "There is in fact no evidence that the hat was examined for blood; and therefore, there is no evidence that there was no blood on the hat. That is in fact the true position arising from the evidence that you've heard. You will, of course, be able to look at the hat itself. If your examination of the hat raises a reasonable possibility that there is blood on the hat, no inference should be drawn against the accused arising from the omission of the State to examine the hat."

128. The trial judge was responsible for ensuring that the jury were provided with a summary of the evidence, as he thought fit having presided over the trial and being aware of all the subtleties and nuances within the trial process. The judge was obliged to address the jury in terms of the *actual* evidence adduced in the course of the trial. He quite properly pointed to the fact that the appellant sought to rely on the hat and of course did so in the knowledge that the hat had not been examined. This occurred in circumstances where, as stated by counsel for the appellant, the issue of the presence or absence of blood was not something that could have reasonably been anticipated by the defence when the hat was relied upon. As we have stated, the issue only arose during the jury's deliberations.

129. We are quite satisfied that the judge's direction to the jury was a proper one in the circumstances and in terms of the evidence adduced at trial. The jury were aware the hat had not been examined, that there was no evidence that there was *no* blood on the hat and upon their own visual inspection of the hat, they were directed not to draw an inference adverse to the appellant should they find blood on the hat.

130. Mr O'Higgins argues that this placed the appellant in an invidious position, in that the jury could conclude on their own visual inspection that there was no blood on the hat which would result in an adverse inference to the appellant.

131. However, the fact that the jury were directed to find no inference adverse to the appellant should blood be visible on the hat, permitted of the finding that a favourable inference could be drawn should blood be found on the hat. Insofar as the argument is made that the jury were carrying out their own forensic examination, we are not persuaded that this was so. The jury in any given case are entitled to examine an exhibit, whether it be a knife, clothing or some such. The hat was an exhibit in the case, which was exhibited by the defence without knowledge of the presence or absence of blood. In any event, we are satisfied that given the condition of the scene and the amount of blood there, the issue was simply not of such centrality as contended for by the appellant.

132. According, this ground fails.

Ground 9

133. This ground is concerned with the trial judge's refusal to discharge the jury.

The appellant

134. It is submitted that in the circumstances of this case it must be considered that the issue of whether or not there was blood on the hat was an important matter in the jury deliberations. When it was decided that jury were not entitled to find out whether there was actually blood on the hat and not entitled to find that there could have been blood on the hat even though it was not, or no longer, visible to them, there was a serious risk that the appellant's right to fair trial was impaired. In those circumstances, it is submitted that the trial judge erred in law in failing to discharge the jury when requested to do so.

The respondent

135. The respondent submits that the trial judge was extremely fair in his direction to the jury about the hat and the issue of the possible presence of blood. He warned the jury that if their examination of same led them to conclude that there was blood on the hat, they could not draw any adverse inference of any such finding against the appellant. It is submitted that by charging the jury in this manner and by directing that the jury's consideration of the hat could not adversely impact the accused, the trial judge ensured that the appellant's right to a fair trial was protected.

Discussion

136. This Court has repeatedly stated that a jury should only be discharged as a last resort, it is an exceptional measure and sometimes is referred to as the nuclear option. In the present case, the trial judge's charge was a model of fairness and clarity. When the issue arose regarding the hat and the absence of evidence concerning the presence or absence of blood on it, the judge dealt with the matter in a fair and balanced way. His choice of words served to address the situation where the jury had asked a specific question on which there was no evidence, yet ensuring that the matter was addressed in such a way so as to favour the appellant.

137. We are not persuaded there is merit in this ground.

Decision

138. Accordingly, we dismiss the appeal.