



THE COURT OF APPEAL

[2022] IECA 135

Court of Appeal Record No. 237/2018

**Edwards J
McCarthy J
Kennedy J**

BETWEEN/

**THE PEOPLE (AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS)**

RESPONDENT

-AND-

R. K.

APPELLANT

JUDGMENT of the Court delivered by Mr Justice McCarthy on the 16th day of June 2022

1. This is an appeal against the conviction of the appellant at Dublin Circuit Criminal Court on the 20th of July 2018 on two counts of intentionally or recklessly causing serious harm contrary to section 4 of the Non-Fatal Offences Against the Person Act. The serious harm alleged was that the appellant infected S.K. and R.C. with HIV.
2. It is not in real debate but that both complainants and the appellant are infected with some form of the virus. Each complainant gave evidence as did members of An Garda Síochána (pertaining to their dealings with the appellant, including interviews conducted with him) and a number of medical and scientific experts: Dr John Lambert, a consultant physician in infectious diseases with special expertise in HIV (who treated both complainants and saw the appellant for the purpose of treatment although he did not ultimately do so), Dr Cillian De Gascun, a medical virologist specialising in clinical and diagnostic work who is director of the National Virus Reference Laboratory ("NVRL") and two general practitioners, Dr Sarah O'Connell and Dr Kilian McGrogan, both of whom had some professional engagement with the appellant. A scientist, Professor Andrew Leigh Brown, specialised in the field of evolutionary genetics, was called by the appellant. No real issue arose as to whether or not, if infection was transmitted, it occurred recklessly having regard to the previous knowledge (which was really undisputed) of the appellant of the fact that he was HIV positive when he engaged in sexual activity with the complainants.

3. The core of the prosecution case was the evidence of the complainants to the effect that they had unprotected sex with the appellant. The prosecution, primarily on the basis of their evidence, sought to show that they had been infected by him. It will be necessary for us to refer to certain aspects of the evidence in summary form. It might be said at this stage that the complainants were not acquainted with each other. Regrettably it is necessary to enter into the issue of the complainants' sexual activities with third parties having regard to the nature of the prosecution case and the fact that in the ordinary course of diagnosis of HIV and treatment therefor doctors attempt to engage in the process of contact tracing.

S.K.

4. We turn first to S.K. who said in evidence that she first met the appellant in October 2009 and began a relationship with him in January 2010; this extended to engagement in intercourse. She met him at weekends, and she became pregnant by him in late January or early February – their child was born on the 31st of October. On the first occasion on which the appellant and S.K. had intercourse he at first wore a condom but told her afterwards that he had removed it saying that he didn't like wearing them and he did not do so, thereafter. They married before the birth of the child but parted thereafter. S.K. was first diagnosed as HIV positive on the 17th of May 2010 and came under Dr Lambert's care. She said that the appellant was not shocked upon learning that she had HIV and he himself was thereafter seeing the same doctor in relation to a test for HIV.
5. Prior to her relationship with the appellant, she had had boyfriends with whom she had sexual relations. In cross-examination she ultimately accepted that she had two previous casual relationships; she initially rejected that proposition or that she had told the Gardai about them – she said she had no memory of them or indeed of so telling the Gardaí; her acceptance was premised on the fact that if she had told the Gardai that this was so (she had done so). In her evidence in chief, she said that she had only one boyfriend before the appellant – one B.C. However subsequently she agreed in cross-examination that she had had two, explaining that she had forgotten about the second – referred to as E.E; she had told the Gardai about both in her statements. The relationship with B.C. was of approximately six months' duration and extended to some point in 2009. The subsequent relationship with E.E. lasted approximately two months but he emigrated at the end of December 2009.
6. It was also ascertained in cross-examination that she had told the Gardaí that she had had oral sex with such persons – the core proposition put to her in this context was extracted from one of her statements to the Gardai where she had stated: "*I also had casual sexual relations with one or two other males. I didn't also intercourse with these names [sic], but I probably wouldn't had sexual contact with them, that's all sex et cetera. I don't know their names. I would have just met them on nights out at parties*", she explained that this must have been a reference to a so-called "*one-night stand*". On enquiry of her as to what she meant by the use of the term oral sex, she said she meant normal sexual intercourse (as it was put); she rejected at another point the proposition that she had had oral sex with persons whom she had met casually. She did not use protection when she had oral sex.

Accordingly, if she had sexual intercourse casually there was no unequivocal evidence to the effect that prophylactic contraception, e.g. a condom, had been used. At one point she said that these relationships occurred when she was younger – sixteen or seventeen years of age. Again, later, she, referred to such activities as having occurred "*earlier*" in 2009.

7. It was put to her in cross-examination that she had met the appellant and had had sexual intercourse with him in a hotel on the 26th of May 2018 which she initially rejected but, when pressed she accepted that the appellant had maintained records by means of video recordings of his girlfriends. Effectively in explanation for the initial denial she said that (whilst) she had been well for a year prior to the trial, she had been in and out of hospital, had tried to commit suicide and that the appellant had manipulated her. She was asked whether or not she had had sex with him in 2016 or 2017 and said she had not; in particular, she said she had not done so on the dates of the 24th of March 2016 and the 19th of October of 2016 which were in her statement to the Gardaí. When the judge asked her if it was possible that she could not remember, she agreed and further when asked could it in fact be true, she accepted that "*it might be*".

R.C.

8. R.C. met the appellant in 2009 through an acquaintance called P.J. and sexual intimacy extending to intercourse began approximately a week later. She thought that this had been in early 2009 but later in her evidence she accepted that it had, more than likely, been in November of that year. Again, in her case, he wore a condom but then removed it, telling her that he had done so, and she thought in doing that, his conduct was "*very sneaky*" as she put it. He refused to use contraception. Thus, the prosecution evidence was to a similar effect in respect of both relationships in this regard.
9. As a result of medical symptoms, she was found to have chlamydia and subsequent tests revealed that she was HIV positive (the date is not precisely clear, but it was apparently before the 17th of June 2010 and not later than the 22nd of June 2010 when he first saw her as a consequence). She was informed of this fact by Dr Lambert. Her relationship with the appellant was, as she put it, "*on and off*". He blamed her for the fact that she was so infected, his mood changed upon learning that she was being tested for HIV and he kept saying that he still loved her but appeared agitated. R.C. and the appellant had a child on the 31st of August 2012, and she described their relationship, again, as similarly being "*on and off*" thereafter. She asserted in this connection that this was because "*he never leaves me alone... he harasses me, calls my phone non-stop*". They had a second child in 2016.
10. She was herself using contraception before she met the appellant. They lived together at weekends, for what appears to be a relatively brief period, after the second child was born. She accepted that she had some contact with the appellant in 2017 and 2018 but could not remember certain dates to which reference was made to this in evidence. She had had a sexual relationship with a D.D. in 2009 and on one occasion with her acquaintance P.J. She said that such intercourse was "*protected as well*". She accepted also, as she informed the Gardaí, that she had had some casual relationships with others subsequent to her sexual relations with D.D. and P.J.

Arrest and Interviews with Gardaí

11. The appellant had been arrested for the purpose of investigation of the offences on the 5th of December 2015. Memoranda of interviews conducted by the Gardaí were before the jury. To a very significant degree the appellant indicated that he could not remember given matters when asked questions. Suffice it to say that in the first interview when asked whether or not he had had unprotected sex with girlfriends (he having identified the complainants here as persons with whom he had had relationships), he said he had not. In the second of the interviews, he said he did not remember for how long he had been HIV positive and that he had first been told in Ireland by a doctor whose name he did not know. He further claimed that he was tested because asylum seekers are tested – he thought this was in 2008 soon after his arrival here. He became aware, he said, of the fact that he was positive at the end of 2008 and said that having been referred to St. James' Hospital and attended there every three months – he said he didn't know how he had contracted HIV. In the third interview he said he didn't remember for how long he was with S.K. before they began to have sex, didn't remember whether or not it was at the start of the relationship that she became pregnant because the condom burst, he didn't remember on how many occasions the latter had occurred and said that unprotected sex had occurred only since they had had a baby.
12. When it was put to him that S.K. had been told by him that he didn't like wearing condoms and refused to do so, he insisted that he wore them. He told the Gardaí that from "*day one*" he used condoms; when asked whether or not he and S.K. had had anal sex, he said he thought that they had done so a few times and when asked whether or not a condom had been used, he said he did not remember, nor, he said, did he remember whether or not he had told S.K. that he was HIV positive but thought that he did. He did not remember Dr Lambert's diagnosis in 2010, and asserted that Dr Lambert had lied when the latter had said that the appellant told him that he had had a negative test for HIV in Uganda – the appellant asserted that he had not been tested there, or, when asked had he denied his knowledge of his HIV status to Dr Lambert, he said he didn't remember the denial, nor did he recall whether or not he told that doctor of his HIV status.
13. With respect specifically to R.C. he said he didn't remember when he had had a relationship with her but thought it was before that with S.K., he didn't remember in what year he had met her, nor did he remember whether or not he told her he had HIV before having a sexual relationship with her; when asked how often he had had unprotected sex with her he said he didn't really remember very well, except that in the first six months of their relationship they had had unprotected sex when drunk, but he did not remember how many times, ultimately responding to an enquiry as to whether or not it was "*two to three*" with the answer "*maybe*".

Evidence of Dr Lambert

14. Turning then to the medical evidence; we need not deal with that of the general practitioners in any detail. Dr John Lambert said that in the course of treatment of S.K, he ascertained from her that she was in a sexual relationship, whether or not she was using [contraceptive] protection and whether or not she had previously been tested – this is a standard procedure in respect of the evaluation of sexually transmitted infections. His notes

indicated that she informed him that she had been in a relationship with the appellant since October 2009.

15. The appellant had had a blood test on the 17th of May 2010 which showed that he was HIV positive. He was first seen by Dr Lambert on the 27th of May 2010 who said the appellant was extremely concerned about receiving that (2010) confirmed diagnosis of HIV. However, it is clear from the evidence of the general practitioners that he was found to be HIV positive in February 2008 and had been referred for treatment to St. James' Hospital on the 12th of March 2008. The records of their practice indicated that the appellant was "*not surprised*" by the diagnosis when made then.
16. Thereafter, Dr Lambert met the appellant again on the 17th of June 2010 and was informed by the appellant that he had been tested in Uganda but had not been tested here – the tests in Uganda being negative. The appellant had been identified by R.C. as a sexual partner, having been her boyfriend for the previous six months, but when the appellant was asked about this, he initially denied all knowledge of her. In the course of his consultation with the appellant, Dr Lambert referred to the fact that he had (already) been diagnosed as HIV positive some two and a half years before; the conversation had initially been what Dr Lambert described as very congenial, but it then became "*very closed*". Thereafter he had no further interaction with the appellant.
17. Results of testing from the National Virus Research Laboratory ("the NVRL") (of which Dr De Gascun is director and who later gave the relevant evidence) were to the effect that Strain B of the virus (there are a number of strains or subtypes, both terms were used in the evidence, but we shall refer to them as strains here) was that with which the complainants and the appellant were infected; this was described by Dr Lambert as an African virus. Mutation of the elements of the virus takes place apparently on a constant basis; mutations present here were not referred to by Dr Lambert but by Dr De Gascun. The preponderance of viruses in Africa varies from country to country. Combinations of viruses apparently also arise – he said that the predominant virus in Africa was Strain C. He accepted that there are others here or in Europe which a person of African origin might contract here. Transmission rates are based on his understanding of the virus and the sexual history he takes from his patients – he reaches a view as to the likelihood of who infected whom, based on "*putting all these pieces of information together*". His evidence was that he had never seen an African infected with anything other than an African strain. His opinion was that the complainants had been infected by the appellant. If the same strain had not been shared by all three, he would have taken a different view.
18. We will refer below to Professor Leigh Brown's evidence in some degree of detail, but we might say at this point that Professor Leigh Brown questioned the conclusion that the strain was Strain B and what he described as a rather unusual version. Whilst references had been made by Dr De Gascun to the use of a particular computer program in the NVRL in the testing process he said that "*a single method such as this standard method used here, I would not accept on its own, I would look for corroboration from other method [sic]*". Effectively, he was not prepared to concede that all three protagonists had the same strain

still less, we infer, the same mutation (of which more below). He said that since mutations are constantly occurring, the differences in the virus between individuals will grow, but at the time of transmission it will be the same. In Uganda, of which Professor Leigh Brown had great experience, there are two dominant strains; Strains A and Strain D. Strain C is more prevalent in countries which border it; Strain B is virtually unknown in Uganda and Professor Leigh Brown said that it is found largely in South African males who had engaged in homosexual sex and not otherwise amongst Africans, though they may have contracted it elsewhere. He, however, accepted that Strain B is responsible for 12 percent of cases globally and 50 percent of Irish cases.

19. Returning to Dr Lambert's evidence, there was no disagreement amongst the experts that when it was detected in the appellant by Dr Lambert in 2010 the so-called "[viral] load" was 11,931 (say, 12,000). In Dr Lambert's opinion, this indicated that the appellant was not on treatment or taking treatment – he considered that if one's viral load was 12,000 "there is significant [risk of] transmission" (all agreed also that medication or treatment can suppress the viral load to the point where the condition is not transmissible). Nor was his evidence that transmission does not take place as a result of oral sex in real dispute; similarly it was not in contention that if a man who is HIV positive has unprotected sex with a woman it is ten times more likely that she would become infected (because of the vaginal surface area, tears in the vagina and the entry of semen) than infection by her of the man. He referred to "having anal sex or unprotected vaginal sex" as "highly infectious".

Defence Expert Evidence and Admissibility Issue

20. The circumstances in which the evidence of Dr De Gascun and Professor Leigh Brown came to be given were somewhat exceptional. As the Director of Public Prosecutions was about to close her case (having called only Dr Lambert, but not Dr De Gascun) there was served upon her Professor Leigh Brown's report. This was done in purported compliance with the provisions of section 34 of the Criminal Procedure Act 2010. Under section 34(2) an accused person must give notice to the prosecution of an intention to call an expert or present expert evidence at least 10 days in advance of the scheduled date of trial, regardless of whether or not such evidence will be introduced in response to expert evidence presented by the prosecution or otherwise. The notice and the accompanying report were accordingly served out of time. The judge was prepared to admit the evidence notwithstanding the latter fact, subject however, to a ruling as to the admissibility of a portion thereof – a topic dealt with on the *voir dire*. It is not entirely clear to us on what basis the judge exercised his discretion to admit the evidence. Ultimately this gave rise to a decision by the prosecutor to call Dr De Gascun as part of his case. We deal first with the admissibility issue (certain evidence was excluded as appears below), the procedural aspect having been decided in favour of the appellant.

Evidence of Professor Leigh Brown on *Voir Dire*

21. The evidence the exclusion of which was sought, to put the matter shortly, pertained to Professor Leigh Brown's experience of prosecutions in other jurisdictions with special reference to phylogenetic analysis. Dr De Gascun described this type of analysis as a way of comparing how similar each of a number of genetic sequences might be and it is something which can be done in respect of any virus or bacteria/organism. Professor Leigh

Brown described it using the analogy of a family tree – the analysis seeks to ascertain “*how closely related they are or how distantly related*”. He had never been engaged in a prosecution where this had not been done. One might add here that he referred to prosecutions in which he had been an expert witness in Scotland and in Australia – he said nothing explicit about prosecutions in any other jurisdictions or the number thereof. In strictness the judge’s ruling excluding such evidence pertained to what might be given in evidence before the jury; it was in principle possible for the judge to consider it in adjudicating on the issue of whether or not the trial should have been stopped. We will return to this topic below. We turn first to the evidence which he gave on the *voir dire* and return later to the evidence ultimately given before the jury.

22. Professor Leigh Brown expressly stated that “*in a number of other jurisdictions it is considered necessary to have this form of scientific analysis, this phylogenetic analysis, for the prosecutions to go ahead*” and further “*the guidelines [by which it seems he referred to guidelines in such jurisdictions] which specify that the analysis should be included were developed as a result of considerable public discussion of the initial cases in both jurisdictions, in Scotland and in England and Wales, which had then led to the development of the Crown Prosecution Service in England and Wales of the current guidelines in consultation with the interested parties*”. It was also said that the purpose of analysis is “*to establish that the prosecution goes forward on a fair and just basis, that there is a clear link between the individuals as far as all the evidence... provides*”. He also agreed with counsel that as far as he was aware “*scientific and clinical evidence of a forensic nature*” was a prerequisite, generally, in prosecutions but this does not appear to be so, as emerged in cross examination. His evidence under this head amounted to expression of views on legal issues and prosecution policy and practice in other jurisdictions, the benefits or desirability of such analysis and his own experience as an expert witness.
23. In cross-examination counsel referred to certain documentary material produced on behalf of the defence purporting to be guidelines applicable to prosecutions in England and Wales with special reference to scientific or medical evidence (in respect of offences analogous to that before us) and referred him to a passage to this effect: -

“Ideally, both scientific and medical evidence should be relied upon, but depending on the facts of the case there may not always be the need for both to be adduced.”

He responded by saying that he was not a lawyer – though he had already given evidence on the topic – and a further portion was put which referred to the fact that “*each case must be considered on its own facts and on its own merits*”; to the latter he responded that he could not say what the passage meant but that he had not seen a case “*in recent years*” when there had been no phylogenetic evidence. Reference was also made to the medical and scientific considerations in Scotland in a “*document that’s entitled, Prosecution Policy on the Sexual Transmission of Infection*” and he agreed with the proposition there that stated that: -

"In such circumstances at best, the scientific and medical evidence may demonstrate that the strain of the infection in the victim is consistent with the strain in the accused and are compatible with the allegation that the accused infected the victim."

The judge did not elaborate on the reasons for the exclusion of the evidence in question but having regard to its nature, as summarised above, we think that he was right.

Evidence of Dr Killian De Gascun

24. Dr De Gascun is a medical specialist in clinical and diagnostic virology and his expertise extends, in his laboratory, to the analysis of blood from those who may or may not be infected by a virus (including HIV). One seeks to establish what is called sequencing when analysing a blood sample and he had available to him two samples from the appellant, one obtained in 2008 and another in 2010, one from S.K. and two from R.C; that from S.K. dated from 2010 and those from R.C. dated from 2010 and 2012 respectively. The work of the laboratory in sequencing is for the purpose of testing the extent to which there might be resistance to drugs needed for treatment of HIV – in essence, as he put it, *"to see what drugs can be used to treat the virus"*. He also gave evidence as to the nature of the HIV virus, referring, as had been done by other witnesses, to what were described as strains – he said that there were nine of these and within those there were, sub-strains (which might be described as *"sub-sub"* types of HIV) or, to complicate matters further, what were described as *"additional recombinant viruses or circulating recombinant forms"* – that is to say combinations of different strains. Replication of the virus is suppressed by treatment to the point that the virus remains *"fairly constant"* but if a patient is not receiving treatment, then, over time, the virus will replicate and change gradually – mutation, as the doctors call it. Sequencing is effectively a process of analysis of the genetic code of the virus in order to identify changes relevant to treatment with medication.
25. Strain B identified in the appellant's samples is one of the main strains accounting for about 50% of those with the virus in Ireland – something which is similar to the remainder of the western world. Globally, it accounts for 10-12%. Some mutations were identified in the appellant's sample – four in number in the earliest sample but in the later sample, that described as M36V was the only one which was detected. He attributed this to the fact that with the technology available, at least to his laboratory, it was potentially the case that only 80% of the virus was analysed, or as we understood it, capable of being analysed. Strain B was also identified as being that found in the case of S.K. (on the basis of a 2010 sample) together with the variation characterised as M36V (and one other). The conclusions reached on the viruses identified in the case of R.C. was also that Strain B and similarly the mutation M36V was apparent in both her samples.
26. As to whether or not the sequencing can assist in ascertaining whether transmission has occurred from one person to another, he said that it *"didn't tell us a huge amount. It means, say, a transmission event cannot be excluded because they are the same subtype but other than that it doesn't tell us a huge amount else..."*; transmission could not be excluded but was not confirmed. He said that the limitation of sequencing was that of *"directionality"* of infection between two individuals – it cannot be ascertained thereby. One would need *"supporting information from other sort of [sic] say demographic data from the time of*

knowing when somebody was infected essentially and maybe that somebody else was not infected prior to that time or something like that". Phylogenetic analysis is a way of comparing how similar each of a number of genetic sequences might be, it is something which apparently can be done in respect of any virus or bacteria – any organism. Dr De Gascun accepted that it was: -

"useful say, at a population level for identifying sort of transmission clusters and typically, you know, if you hear in the media about outbreaks of food borne diseases associated with, you know, lettuce or meat or something like that, typically there would be a phylogenetic analysis of some shape or form performed in that situation to try and link cases back to a point ... [of] ... exposure."

He further added that phylogenetic analysis is not done routinely in the case of HIV because *"...at the individual level it doesn't give you a huge amount of additional information, but, as I said, in the setting of ... from a population perspective, in the setting of a non-explained outbreak it can be helpful."*

27. Dr De Gascun's laboratory could have conducted phylogenetic analysis, but he said it would not be appropriate for him to do so lest confirmation bias arose – his laboratory would undertake sequencing, ascertain the background [by which we understand is meant the prior history of relevant parties] and then that analysis would be sent to an independent expert such as Professor Leigh Brown – whose laboratory is one of the leading centres, though there are others. Reference was made to the computer platform which was used by Dr De Gascun (apparently some years before the trial) which it was suggested to him meant that the sequencing process was not of, as counsel put it, a *"very high quality"* – that being the opinion of Professor Leigh Brown; it appears that that program generated results which formed the raw data then analysed on what appears to have been a more advanced platform; Dr De Gascun did not on our reading of the transcript concede this point.
28. He described the concept of looking at the evidence epidemiologically as looking at the broader picture – the history of the patient and all relevant risk factors (including sexual encounters which might have been had over time); the veracity of the history, he said (as did Professor Leigh Brown) was of fundamental importance. He was effectively of the one word with Professor Leigh Brown to the effect that whilst a single episode of sexual contact can transmit HIV, that receptive unprotected anal intercourse gives rise to a risk of 1 in 100 and vaginal intercourse 1 in 1,000; late diagnosis of women – up to 50% -occurs only when the stage of AIDS has been reached, and that can be 10 to 15 years after infection. It seems relevant here to point out that the complainants were born on the 24th of June 1988 (S.K.) and the 9th of July 1991 (R.C.)
29. He said that if his laboratory were asked to undertake a phylogenetic analysis it would take a period of months (three to six) depending on the resources one would *"throw at"* the problem. He explained that: -

"... [to do] ... a correct analysis you always need a background population. So the sequenced data that are available in Ireland looking at a single region of the HIV

genome, those that are involved with drug resistance, but in order to do a comprehensive phylogenetic analysis ideally you would look at more than one region of the genome so that those sequenced data are not available at this point in time and if you were to go back and try and generate an accurate background population to perform a correct analysis then you would need to do additional testing, additional sequencing which would take time."

He repeated, however, that such an analysis could not prove that someone had, in fact, infected another.

Professor Leigh Brown (Evidence before the Jury)

30. When giving evidence before the jury, Professor Andrew Leigh Brown said that the course of an infection involves a short period known as acute infection where the virus is at very high levels ("*hundreds of thousands of copies per millilitre of blood*"), something which lasts only a few weeks, followed by a level of infection which is called clinical latency – this can last for several years. He said it could last between four and fifteen or twenty – the median period was described as ten and whilst the raw figures given by them seem to differ somewhat it seems that he and Dr De Gascun were not really in disagreement about this. The so-called viral load of the appellant would have made him infectious but described it as a level which looked "*rather low*". The virus is highly variable and different strains were associated with different continents, but over the years have become mixed. If one individual infected another one would expect the viruses to be very closely related. It may be possible to say that the transmission is consistent between one person and another, one cannot do more than exclude the possibility of transmission between given individuals. The type of testing (and in particular the software program) undertaken in the NVRL was not the type of scientific exercise to which he would have conducted. He considered that the appearance of mutations (as referred to by Dr De Gascun) suggested divergence rather than similarity but emphasised that the data available to him was not on its own adequate to draw any conclusions with respect to the probable direction or connection between the individuals in question – this was the only expert evidence as to the significance of mutations.
31. He stressed also that one cannot simply compare the analysis for HIV conducted in respect of each relevant party's blood (that is to say the appellant and the complainants') – one has to "*include all other possible sources of the infection such as other sexual contacts ... and other likely sources from the background population*". What was described as a truthful and credible history from the principal individuals involved would be necessary and perhaps a database of suitable reference patients, for example, other Africans from the same area residing in Dublin. One of the difficulties about assigning a source of infection is the long period of clinical latency because recent partners may not be relevant. He said that an honest sexual history would still make it difficult to work out who the possible sources might have been without any other information, without the actual analysis and this would involve, it was said, sampling of third and perhaps fourth party contacts. This was referred to in a less detailed way by Dr De Gascun.

32. If the witness was to conduct a phylogenetic analysis it would take a matter of days, but only if he had details of all of the previous partners and contacts and local controls – this would include an accurate history from all concerned, including the appellant. Whilst Dr De Gascun referred to a period of between three and six months, in truth, there is no real difference between their evidence as to time – Dr De Gascun’s estimate included the time which would have been needed to gather all relevant information or conduct necessary research and the figure of two days was the estimate for conducting the analysis with the benefit of that body of work which was simply not available. He said that “*from a point of view of this prosecution [we] were interested more in the contact in terms of finding either possible sources because the ... analysis is infectious ... excluding potential sources. That does not provide direct confirmatory evidence*”. He too said that phylogenetic analysis can never actually establish that one person gave it to another but would be useful to exclude transmission. It is not in dispute, we might add here, that this type of analysis can merely show consistency. Phylogenetic testing was used in every other prosecution in which he was involved.

Grounds of Appeal

33. We will now turn to the grounds of appeal which are as follows: -

- I. *The verdict of the jury convicting the appellant in respect of Counts 1 and 2 on the indictment was wrong in law and in fact and inconsistent with the evidence to the extent that the jury could not find beyond reasonable doubt that the appellant had committed the offences.*
- II. *The learned trial Judge erred in law in failing to grant a direction of no case to answer and in failing to withdraw the matter from the jury in respect of both counts on the indictment where there was insufficient evidence that the appellant had in fact caused the serious harm alleged.*
- III. *The learned trial Judge erred in law in failing to grant a direction of no case to answer and in failing to withdraw the matter from the jury and/ or direct that the trial was otherwise in accordance with law because of the manner in which the investigation and prosecution of the matter had proceeded.*
- IV. *The learned trial Judge erred by not exercising his inherent jurisdiction to stop the trial and withdraw the matter from the jury in circumstances where the manner by which the appellant was being tried failed to accord with recognised standards for the prosecution of offences regarding HIV transmission.*
- V. *The learned trial Judge erred in law and failed to have sufficient regard for the entitlement of the appellant to be tried in the due course of law in permitting the jury consider the prosecution expert evidence which, given its limitations, would only lead to speculation on the part of the jury.*
- VI. *The learned trial Judge erred in the manner which he dealt with the application to stop the trial and withdraw the matter from the jury.*

- VII. *The learned trial Judge erred in fact and/or law by limiting the scope of the expert evidence to be given by Professor Andrew Leigh Brown on behalf of the appellant.*
- VIII. *The learned trial Judge failed to properly explain to the jury how to treat the scientific evidence and that at its highest, the appellant was merely a possible source of the HIV infection.*
- IX. *The learned trial Judge erred in law in failing to charge the jury in accordance with the requisitions made on behalf of the appellant.*
- X. *The learned trial judge erred in law by failing to direct the jury concerning the circumstantial nature of the evidence in his charge [**additional Ground added with leave of the Court**].*

We will not deal with the grounds of appeal *seriatim* in the order of their enumeration.

Ground Seven –

VII. The learned trial Judge erred in fact and/or law by limiting the scope of the expert evidence to be given by Professor Andrew Leigh Brown on behalf of the appellant.

34. We think it appropriate to deal with this ground first as it pertains to the admissibility of evidence. The judge did not articulate in explicit terms his ruling excluding that evidence, but the point at issue and his conclusion was understood by all concerned, viz – that evidence which amounted to expressions of view on legal issues and prosecution practice in other jurisdictions and his own experiences as an expert in those matters be excluded.
35. On first principles the excluded evidence was in our view not relevant to any issue which the jury had to decide and hence not admissible. It is of no relevance to a jury in this jurisdiction as to how proceedings are prosecuted in other jurisdictions or the circumstances in which it might be considered appropriate to do so as a matter of policy. A jury is required to decide the matter on the evidence in accordance with the principles of law in this jurisdiction. Further, he had no expertise in those matters – they are not matters of science. That is all. No restriction was placed on the receipt of evidence about the nature of phylogenetic analysis.
36. Insofar as it may be suggested that the approach taken in other jurisdictions may have a bearing on whether or not, as a fact, there is a real risk of an unfair trial, or a prosecution is perhaps oppressive by virtue of the fact that a phylogenetic analysis has not taken place this is a matter of submission to the judge on the legal issue of whether or not a direction to acquit ought to be given. Proceedings may be prosecuted with or without expert testimony – we are aware of no class of case where, in principle, the existence of scientific evidence is a *sine qua non* of a prosecution. There will, in many cases, be insufficient evidence to make out a prima facie case without, say, medical or scientific testimony – such as here, where evidence as to the fact that all three protagonists are HIV positive was adduced. The approach taken in other jurisdictions depends on the substantive and procedural law (including the law of evidence) applicable in those jurisdictions.

37. It is further contended that the ruling of the judge meant that the appellant was deprived of the opportunity to advance the proposition, having regard to the exclusion, that Professor Leigh Brown "could not rule out transmission by the appellant due to inadequacy of proof/available material". We cannot set out the evidence *in extenso*, but it appears to us that having regard to the evidence on this topic actually before the jury that the potential benefit of, or the fact of the absence of, such analysis was capable of being relied upon. It is also said in the written submissions that when cross-examining Dr De Gascun counsel for the appellant was prevented from establishing that certain unidentified matters (and they were and remain unidentified) were the subject of agreement between him and Professor Leigh Brown – the matters referred to being found in a document or documents. We cannot speculate as to what those matters might be. We think that the judge was right and dismiss this ground of appeal.

Grounds Two, Three, Four, Five and Six –

II. The learned trial Judge erred in law in failing to grant a direction of no case to answer and in failing to withdraw the matter from the jury in respect of both counts on the indictment where there was insufficient evidence that the appellant had in fact caused the serious harm alleged.

III. The learned trial Judge erred in law in failing to grant a direction of no case to answer and in failing to withdraw the matter from the jury and/ or direct that the trial was otherwise in accordance with law because of the manner in which the investigation and prosecution of the matter had proceeded.

IV. The learned trial Judge erred by not exercising his inherent jurisdiction to stop the trial and withdraw the matter from the jury in circumstances where the manner by which the appellant was being tried failed to accord with recognised standards for the prosecution of offences regarding HIV transmission.

V. The learned trial Judge erred in law and failed to have sufficient regard for the entitlement of the appellant to be tried in the due course of law in permitting the jury consider the prosecution expert evidence which, given its limitations, would only lead to speculation on the part of the jury.

VI. The learned trial Judge erred in the manner which he dealt with the application to stop the trial and withdraw the matter from the jury.

Direction

38. At the conclusion of all of the evidence counsel for the appellant made an application to direct the jury to acquit. In opening his application, he relied on the well-established principles elaborated in *The People (DPP) v PO'C* [2006] 3 IR 238 which affords the judge a discretion if not a duty to direct an acquittal in the event that there is a real risk of an unfair trial. When making the application, counsel engaged with the evidence. There was no reference to the proposition that the jury should be directed to acquit, either because there was no evidence to prove a crucial element of the charges or that such was the inherent weakness of the evidence a jury could not properly convict upon them in accordance with the well-known principles elaborated in *R v Galbraith* [1981] 1 W.L.R. 1039 and *DPP v M* [2015] IECA 65. Such applications, if they arise, are ordinarily made at the end of the prosecution case and it is debateable whether or not the governing principles extend to permitting such applications at the close of all of the evidence (where the defence goes into evidence as here). However, the judge took the view that the tenor of counsel's application meant that not merely was it an application for a direction under *PO'C* but also on the basis of the latter authorities and in particular on the basis that the evidence was so

flawed – with particular emphasis on the alleged want of credibility of the complainants – that a jury could not properly convict upon it. We proceed similarly; no issue has been taken in the present case as to the timing and hence there is no need to address that question.

39. We think that it is helpful to set out *in extenso* the ruling of the judge on this application and it is in the following terms: -

"An application has been brought that this matter shouldn't go to the jury on, I suppose, a POC basis, a fairness basis and secondly the evidence adduced by the State is infirm and basically it shouldn't go to the jury because it's not believable or believable to the necessary degree.

Now, the evidence before the Court is made up of the complainants, the witnesses, the medical witnesses and the scientific witnesses. Now, the two complainants gave evidence, they were cross examined and the jury heard them and certainly had capable of forming an impression on both chief witnesses. Both chief witnesses indicated that they had unprotected sex with this defendant. They also indicated in their evidence this was the only party they had unprotected sex with. Now, they were cross examined and it seems [S.K.] omitted to tell the jury that she had subsequent encounters with [the appellant]. Now, obviously a jury can form their impression of what that means. They can decide whether [S.K.] and indeed [R.C.] are believable in the critical parts of their evidence from assessing them both on an overall basis. I accept the submission by Mr McGinn on that, in relation to that matter. That is for the jury to assess witnesses called them before and they can decide whether to believe them in relation to the critical evidence. They can believe them on all their evidence, none of their evidence or some of their evidence. It is for the jury to decide that matter.

Now, in relation to -- so therefore I think the evidence is there in relation to the crimes that [the appellant] has been accused of for the matter to go to the jury. The evidence is there. Now, the question is there a basic unfairness in the case in relation to the absence of the testing as suggested by Mr Greene on behalf of his client, phylogenetic testing? Obviously, the State didn't do this testing. Obviously, this testing is very involved, very intensive, has difficulties but obviously in a perfect world it should have been done.

Now, obviously in a perfect world the State probably should have phylogenetically tested this -- all of the parties involved in this case. Now, so the evidence is it's not there. Obviously, we know the medical evidence, we heard the evidence of Dr Lambert, that he was dealing with three parties who had HIV, who had a similar strain or sub strain and basically, he was aware that both [the appellant] had sexual encounters with both of the complainants and he came to a certain conclusion. Obviously, the jury have heard that evidence and they can decide what they want in relation to the probabilities or the possibilities in relation to the encounters.

Now, in relation to the -- go back to the phylogenetic testing, obviously this trial has been very extended. It seems that a report was served in relation to the matter late in the date and I gave permission for the -- that this report -- that this witness could be -- give evidence in the matter. Obviously, the fairness of the trial was essential in the case. Obviously, time was given to the State to deal with the proposed evidence of Dr Leigh Brown so that is the situation. And obviously Dr Leigh Brown gave evidence in the matter, and he indicated that basically phylogenetic testing would never link the defendant to -- or viruses -- or HIV viruses cannot be linked with certainty, but they can be excluded. The available evidence to it at the present time is that all three had B viruses or similar type viruses and in his last part of his evidence Dr Leigh Brown seems to have had problems with that, calling it B but there's no doubt that the three viruses were similar and they had certain -- one mutation in common. Dr Leigh Brown also indicated that he was of the view that there was contrary indications of similarity in the viruses. But there it is, the question is should I stop this trial on the basis of the absence of phylogenetic testing? If -- can a jury be directed properly in relation to these crimes in the absence of this type of testing? Obviously, the Court must consider fairness to every party before the Court and it seems to me that properly directed this jury can make a decision on the matter, it is simple as that. I am aware of the guidelines, but guidelines are mere guidelines. I'm aware obviously one would like a perfect trial. One would like a perfect prosecution but, in most cases, we don't have perfect prosecutions or perfect defences. We move along and basically this -- the Court's function is to ensure a fair trial to all parties and I can say that from my point of view, and it's only this judge's point of view it's not a perfect prosecution and it's not a perfect defence is in the case but I'm satisfied the jury will have enough evidence to decide the matters properly. They will have enough evidence, if a guilty verdict was brought in relation to these matters, I would think they have sufficient evidence to come to that conclusion, it wouldn't strike me as unfair and the absence of phylogenetic testing doesn't render their -- wouldn't render their verdict unfair. So, therefore it is matter for the jury to make up their minds on the facts and obviously, as is always in judicial performance, prosecutorial performance, and defence performance things can be better but in this case I have no hesitation in allowing the matter go to the jury."

PO'C

40. With respect to the PO'C application, the principal ground on which it was pursued was that a real risk of an unfair trial arose because of the absence of a phylogenetic analysis, a point made even though, by definition, one cannot speculate as to the results thereof. The related submission was also advanced that a prosecution pursued in the absence of such an analysis is oppressive in the sense that it ought never to be commenced without it. This is ultimately based upon the proposition that such a test is capable of excluding an individual although it cannot go further than showing consistency with the proposition that a person was such transmitter. We should note here that from time to time it is contended that given evidence which might be relevant and a potential benefit to an accused is unavailable, say, because of death or a failure by the prosecution to secure all relevant evidence, such as a failure to take possession of CCTV footage. In those cases, one attempts to make a judgement,

without speculation, as to the extent to which the missing evidence bears upon the fairness of the trial and a value judgement must be made on a case-by-case basis. This will, by definition, involve a judgement as to the substance of that evidence or its potential. Such an analysis might well show the consistency of the prosecution's case rather than excluding the appellant.

41. Professor Leigh Brown was not in a position to undertake the test since the availability of information as to sequencing is only one part of what might be required. Information is required to form a database, to obtain an accurate sexual history and, having traced sexual partners, to ascertain whether or not they might have HIV. This is why Dr De Gascun considered that, as he put it, depending on resources, the conduct of such an analysis would take approximately three to six months. A period of two days was referred to by Professor Leigh Brown, but this was on the basis of having all relevant information. Crucially, an accurate sexual history is required from the parties. By definition, the suspect, and in this case the now appellant, cannot be compelled to give information, whether accurate or otherwise, in the course, say, of interview as to his sexual history (including details of previous partners) sexual preferences, lifestyle choices or, say, whether or not he was an intravenous drug user. In short, he cannot be forced to co-operate. If he did not rely on his right to silence, anything he might have said could not, unless he gave evidence, be tested under cross-examination as was the case with the complainants S.K. and R.C.
42. There is, and was, no reasonable possibility of conducting or attempt to conduct it on any meaningful basis in this case if at all. If this is so, an unreasonable standard is being posited to say nothing about the practical fact that one must speculate as to the result even if it were possible to undertake the analysis. The scale of the wider work involved, even if one had detailed information from the appellant, is very significant and one would have to find and secure the co-operation of past sexual partners of those involved.
43. A value judgment must in many cases be made by the prosecution or perhaps the Gardaí as to how far they will go in investigation including the pursuit of scientific evidence; wide ranging and lengthy work would have been necessary here and without purpose. The absence of expert evidence cannot in principle be a basis for excluding prosecution or directing an acquittal but even if we are wrong in this view in the present case on the facts it cannot be so. Cases of this kind cannot be put into a special category where such evidence is a prerequisite to prosecution; all must depend on the totality of the evidence.
44. It seems proper to infer on the evidence of Professor Leigh Brown that there are circumstances in which, without the conduct of such analysis, a given individual can be excluded as a source of infection if the individuals did not have the same strain as the putative infecting party. That cannot be excluded by means of phylogenetic analysis in the present case, but the point is that it would appear that a phylogenetic analysis is not always necessary for the purpose of exclusion.
45. Furthermore, in many instances in the course of a trial evidence which might be capable of being obtained or might have existed but is no longer in existence, may be absent for any number of reasons. This is the case, for example, in many cases prosecuted after the

elapse of many years, say in the case of allegations of child abuse. Equally, however, such a difficulty may arise even in a case which is of recent origin. We reiterate that as a matter of legal principle, even if such a test was not conducted, it is perfectly proper to prosecute a case and indeed on proper evidence to convict.

Galbraith

46. We think that the first point is that issues of credibility of witnesses or their reliability are matters for the jury and it is only in wholly exceptional circumstances that a case should be withdrawn from the jury where the prosecution case at its highest, on the evidence, would permit a jury properly charged to convict. We cannot enter into the detail to a greater extent than heretofore of the evidence of the complainants; we think that arguments can be advanced that they were unreliable to a greater or lesser degree or perhaps, indeed, on occasion untruthful, but these are classically matters for juries to decide. Certainly, the evidence of those witnesses is not such as to render it legitimate to invoke the exceptional jurisdiction in *Galbraith*. Their credibility as to their sexual relations with other persons may or may not be relevant, but that is properly a matter for a jury. The complainants' evidence did not suffer from such infirmities as would render it appropriate to take the matter out of the jury's hands. It is not apparent to us that the evidence was necessarily untruthful at any point and equally discrepancies in evidence or supposed omissions can be explained by reference to forgetfulness or other error. To put the matter in another way, we have on many occasions seen what one might describe as supposed infirmities in evidence of crucial witnesses of the type or to the extent present in this case. In the ordinary course of trials adjudication on such evidence is a matter for juries and this case is no exception. The prosecution case in any event must be taken at its highest. We think the jury could act on the evidence of these complainants. The evidence, however, is not confined to that of the complainants.

Refusal

47. The application for a direction either by virtue of the principles in *PO'C* or those elaborated under either limb of *Galbraith* or as addressed in *DPP v M* [2015] IECA 65 was accordingly rightly refused by the trial judge. The jury were entitled to convict.

Ground Eight and Nine –

VIII. The learned trial Judge failed to properly explain to the jury how to treat the scientific evidence and that at its highest, the appellant was merely a possible source of the HIV infection.

IX. The learned trial Judge erred in law in failing to charge the jury in accordance with the requisitions made on behalf of the appellant.

48. Subsequent to the charge, and as a result of questions asked by the jury, requisitions were made. We are concerned here with the issue of whether or not, as sought by defence counsel, a novel variant of what is commonly known as a *Lucas* warning: (see *R v Lucas* [1981] QB 720) should have, or was, properly given in relation to the evidence witnesses.

49. A *Lucas* warning is a warning to the jury that even where the accused has told lies on a material matter (if they had concluded that such lies were told), whilst it might be relied upon as evidence of guilt, it was not necessarily so since lies might be told for what might shortly be described as innocent reasons. This issue had been raised with the judge before

he commenced his charge and he had agreed in general that such a warning would be given. The matter was discussed on the following terms: -

"MR GREENE: Just one thing, Judge, I wonder is the Court minded to give a warning in connection with how to approach lies in accordance with R v. Lucas.

JUDGE: Yes, I think I'll mention that basically if you're satisfied lies were told it's not the end of the matter.

MR GREENE: That's --

JUDGE: Basically, it's for -- it's for them to bring it into -- bake it into the cake in relation to credibility and such like.

MR GREENE: And exclude all other possible reasons for the lies being told I think is -
-

JUDGE: Well, yes.

MR GREENE: Yes.

JUDGE: I think that goes without saying but I think basically just because any witness or anybody lies in a -- in a statement or in interviews doesn't mean that they're guilty.

MR GREENE: Yes.

JUDGE: Or it doesn't mean that the witness lacks credibility on the major issues. Remind me, yes, remind me if I forget about it.

MR GREENE: May it please the Court.

JUDGE: I probably will. If there was ever a case for a jury this is a case for the jury."

50. In the event, there was no issue about the *Lucas* warning given as aforesaid in relation to the appellant; the judge had charged the jury in respect of alleged lies told by the appellant as follows: -

"And in relation to lies, misleading statements and such like, just because somebody tells a lie in a statement or in -- you'll hear -- you'll see the -- you'll have it before you, when [the appellant] was interviewed by the guards Mr McGinn -- and you may decide he's misled the guards and even told lies. That's not the end of the matter. The lies could be relevant in assessing the credibility of his defence but just because he's told lies doesn't lead inevitably to a guilty verdict. Obviously, you must take into account but before you decide that he's guilty you'll -- the fundamental test is satisfied beyond reasonable doubt of his guilt. Just because he told a lie or misled the guards or wasn't candid with the guards, obviously you can take it into account, that goes without saying. You may come to the view that that he thought he had

infected him but even that he thought he'd infected them is not the central issue. The central issue is can you be satisfied beyond reasonable doubt that he did infect the two of them and that's basically the evidence of sexual activity between the parties as described by both complainants. Both complainants said they had unprotected sex with [the appellant] and this was the only time they had unprotected sex with any party and obviously the inference the prosecution are asking you to draw is clear, the only opportunity to get HIV was from the sex with [the appellant]."

51. In addition, with respect to the witnesses [S.K and R.C], even though he need not have done so in our law (since anything in the nature of, or analogous to, a so-called Lucas warning simply doesn't arise in this jurisdiction as to witnesses' "alleged" lies), the judge further stated that: -

"Now, undoubtedly in relation to the lies, the misleading statements made by the two chief witnesses for the prosecution the same criteria applies. Just because they told lies to you, if you find it so, or they misled you doesn't mean that he should be found not guilty. Obviously if their behaviour and the way they behaved in court and the question they answered questions shakes your confidence to a sufficient degree in the assessment of their evidence in relation to critical matters, then take into account because the evidence of both parties, [S.K.] and [R.C.], is they had unprotected sex with this man and nobody else."

52. It was in respect of the latter that the issue arises. Counsel for the appellant made a requisition as follows: -

"MR GREENE: The -- I'll just make these requisitions, just in connection with the warning about my client's lies, if they're found to be lies, you went on to say -- and you flagged you might say something like this, but you went on to say that -- I'm sorry, I just have to find it but it was effectively that just because the witnesses told lies doesn't mean that my client should be acquitted or words to that

JUDGE: No, I did say that.

MR GREENE: Yes.

JUDGE: I said basically just because they've told lies --

MR GREENE: That's to give them the comfort of a Lucas warning as well I think, and I submit that that's not really what's in play. If they told lies that is something that should be assessed insofar as their credibility and reliability is concerned on the central tenets of the case.

JUDGE: Well, I said that several times, I said you're aware they told lies.

MR GREENE: Well, I'd ask you to say it again but that's my requisition. I mean if the Court isn't minded that's fine.

JUDGE: Yes, thank you. No, I'm happy with that one."

The judge rightly refused that requisition; he need not in Irish law have said anything of this kind but what he did say enured to the benefit of the appellant.

53. The second criticism of the charge is that the judge did not tell the jury that if they did not believe the appellant's defence but that it might reasonably be true, they were obliged to acquit. It is submitted that this was raised in circumstances where the prosecution's burden of proof had already been stated but that there had been a failure to mention that no burden rested on the defence. It is said that this may reasonably have resulted in the jury believing that the defence carried a burden to prove such matters relative to his defence, rather than merely establishing a reasonable doubt. Whatever else we reject the latter proposition – it is an inference which does not arise from the supposed omission. In fact, towards the beginning of the charge, in addressing the burden of proof the judge stated that: -

"The state must prove their case. [The appellant] has been brought to this court by the state and the party who asserts must prove. [The appellant] does not have to take any part in this trial, he can say to the state prove your case."

54. It is suggested that the defence was that HIV was acquired from one of the other possible sources that had been "concealed" by the complainants. The judge went on to say that: -

"Before you can convict [the appellant] of any crime or offence you must be satisfied beyond reasonable doubt of his guilt. I think it's fairly self-explanatory phrase, beyond reasonable doubt."

Thereafter he explained the concept of a reasonable doubt and also said: -

"Obviously to convict [the appellant] you must believe the state's case but if you don't believe the state's case, you say on balance I disbelieve the state's case... or, sorry, on balance I believe the state's case, that's not enough. You must take the further step and believe the state's case beyond reasonable doubt. If you disbelieve the state's case, then acquit. If you believe the state's case but don't believe it beyond reasonable doubt you must acquit as where... to convict you must be satisfied beyond reasonable doubt of the state's case. You must look at all the evidence in the case and decide beyond reasonable doubt [the appellant] is guilty of one or the two... [offences] now, that's a heavy burden. You must look at all the facts carefully and decide can you, to that conclusion."

55. The requisition in question was approached in the terms set out below. We should say that on perusal of the transcript at one point the requisition seems to have been made by Mr McGinn (the prosecutor) but this is an error – the respondent in their submissions state that the requisition was made by defence counsel and this is the norm in the natural flow of a trial where there is an issue about a charge. The exchange was in these terms: -

"MR MCGINN [sic]:... I would prefer if you said this about the burden of proof, it's often said. You said that if they didn't believe the State's case that was the end of it."

If they believed it and they had a reasonable doubt that also was the end of it. You explained what a reasonable doubt was. If they don't believe his case but it might reasonably be true they should also acquit and I think you -- I submit that that should be said as part of the exercise of explaining the concept of reasonable doubt and its interplay with the burden of proof.

JUDGE: Well, I said -- did I not say at the end that basically your basic case on the facts is that they procured this HIV from alternative sources?

MR GREENE: That is effectively where we are, I suppose, but that, I suppose, suggests that I've got something to prove here.

JUDGE: No, no, but that is the -- that is the suggestion being made. You don't have to prove anything. I said -- I think at the end I said if you find that reasonably believable you acquit.

MR GREENE: Well, my submission is that that should be said, that if you don't believe the accused's position but it might reasonably be true, then you're obliged to acquit. Also, you didn't give the usual direction about the two counts being separate trials tried separately.

JUDGE: Well, I'll say that to them [by which, having regard to what the judge said when he called the jury back he mentioned that he would tell them that they must deal with each count separately – although, indeed, this is something he had said earlier].”

56. It is submitted, it appears correctly, that the judge did not rule explicitly on the application to deal with the issue that if the accused's position might reasonably be true that the jury were obliged to acquit and it is to be inferred that he had ruled against the proposition advanced.
57. We emphasise again that a charge must be taken in its entirety. Apart from what we might term the usual elements of the charge pertaining to general matters such as *inter alia* the burden of proof and kindred issues set out above (we cannot set out the charge in full), the judge referred to the appellant's case, and doing so, he referred to reasonable possibilities that the HIV might have derived from an alternative source and that if that was reasonably possible in either or both cases the appellant was entitled to an acquittal. In the context in which it appears it is difficult to see any real difference between the latter statement and a general one to the effect that if it was reasonably possible that the appellant's case was true the jury had an obligation to acquit.
58. Thirdly, with respect to the question by the jury the following exchange took place between the judge and defence counsel: -

"JUDGE: Is there anything that is there any specific question there's confusion about?"

FOREMAN: Yes, it involves the mutation and is a conversation we're having at the moment and a clarification of the All the mutations that were mentioned.

JUDGE: Yes. So, there was mention of a particular mutation, I think it was mentioned by two doctors at least. The last two doctors obviously, Mr Lee Browne [sic] from Scotland mentioned it and our friend from the UCD mentioned, I can't [sic] his name Degaskin, Degaskin [sic]. We certainly can clarify that for you.

FOREMAN: Sorry, just give me two seconds. Then can I just ask then one of the strains, the M36V, was there clarification that all three parties had this mutation?

JUDGE: I don't know, I don't know the particular number but there was there was a mutation with numbers that was common to all three parties. I thought it was M32 but it could be M36. Was it M36?

MR McGINN: It was M36V.

FOREMAN: Yes.

JUDGE: So, M36V.

FOREMAN: So, all three parties have it.

JUDGE: That's what the evidence was and basically all well, Mr Dr Degaskin and Dr Lee Byrne or Lee Browne [sic] indicated those were present in all three parties.

FOREMAN: Okay.

JUDGE: Now, Dr Lee Browne [sic] gave evidence as well as Dr Degaskin [sic]. So, if there's any particular question, we'll help you. We don't give transcripts.

FOREMAN: Yes, that's fine.

JUDGE: Now and if is that the question about the mutation, was that the principal question?

FOREMAN: It was, yes. Sorry, just give me two seconds. Sorry, can I stand up?

JUDGE: Oh, please do, please do.

FOREMAN: We're just wondering how likely would it have been to get that mutation off a fourth party?

JUDGE: That wasn't dealt with.

FOREMAN: It wasn't mentioned.

JUDGE: That wasn't dealt with in the evidence.

FOREMAN: Okay.

JUDGE: The evidence is finished at present.

FOREMAN: Yes.

JUDGE: I gave you instructions how you should approach the evidence. At this point we don't add to the evidence.

FOREMAN: Yes, that's fine.

JUDGE: That's the situation. So, I'll leave it to your good selves at this stage. I think if there's any particular question on the evidence you wanted to be reminded of, we can do that, but we don't we don't give written transcripts for many good reasons, one of them is practical, we don't have them but at this stage but there's other reasons as well. Thank you very much."

59. Counsel for the appellant then asked the judge to deal with what he contended were differences between the viruses suffered by the three individuals in question for which the jury sought clarification as to the strain M36V. Ultimately, however, evidence of Dr De Gascun was played – it is not clear whether some or all. The jury were offered the opportunity of hearing Professor Leigh Brown's evidence but declined. It appears to us that the judge was right when he refused to add anything to the information he had given to the jury in response to their express enquiry. It is not the judge's business to do more, in our view, than answer the question asked by the jury; the matter canvassed by defence counsel went beyond the information which was sought. It is plain that taking the exchanges as a whole the jury were thoroughly conversant with the evidence and were considering all aspects of it. The trust which is to be placed in them was amply justified having regard to what they sought or didn't require.

Ground One –

I. The verdict of the jury convicting the appellant in respect of Counts 1 and 2 on the indictment was wrong in law and in fact and inconsistent with the evidence to the extent that the jury could not find beyond reasonable doubt that the appellant had committed the offences.

60. The issue of supposed perversity of the verdict has also been introduced. In recent times this ground of appeal has become more common, often in tandem with a complaint that the trial judge ought to have directed an acquittal on the state of the evidence. In truth this is intrinsically connected with the application for a direction having regard to the state of the evidence. We think it is appropriate to refer in this respect to *DPP v Alchimionek* (Unreported, Birmingham P, 19th February 2019) – there, the issue of whether or not the appellant was not guilty by reason of insanity in circumstances where the factual circumstances giving rise to the charge of murder were not in dispute. The medical evidence called on behalf of the defence, to put the matter shortly, was that at the time of the offence the appellant was insane within the meaning of the Criminal Law (Insanity) Act 2006. The appellant had been examined also by a consultant psychiatrist on behalf of the prosecutor who took a similar view and the judge rightly told the jury that: "*in the light of the medical*

evidence, it would seem to me that you have no option but to accept that on the balance of probabilities, the defence of not guilty by reason of insanity is available to the accused, and in such circumstances, you are obliged to acquit [by reason of insanity]". The jury however convicted the appellant of murder. Engaging with the issues which arose Birmingham P said the following: -

"As has been made clear in cases such as DPP v Tomkins and DPP v Nadwodny a decision to quash a verdict because it is perverse is a very exceptional one. This reflects the prime issue of the jury in our system of criminal justice. Ordinarily, it is not for appellate courts to substitute their own view of the evidence for that of the jury. A further practical reason why such situations are rare and exceptional is that in any given case where the state of the evidence is such that a conviction would be perverse or would give rise to a miscarriage of justice, one would expect to see an application to the trial judge to withdraw the case from the jury. If, such a case, the issue is in fact considered by the jury, then usually, it will be because a judge, having heard the matter argued, has come to the view that it is a case where a properly charged jury could properly return a verdict of guilty."

In his conclusion Birmingham P said that: -

"Unusual as it is to set aside a verdict of a jury as perverse and against the weight of the evidence, in this case, the court feels compelled to do that. The rejection of the verdict of not guilty by reason of insanity and the return of a verdict of guilty was not supported by any evidence in the case, was against all the evidence in the case, and in those circumstances has to be regarded as perverse."

61. We think that this is a good example of the class of case where a verdict might be regarded as perverse. The matter was addressed also in *DPP v Hearn* [2020] IECA 181. There, the appellant was convicted of the offences of robbery, theft and production of a knife whilst committing the offence of false imprisonment, contrary to section 11 of the Firearms and Offensive Weapons Act 1990. He was charged with a number of other offences on the same indictment one of which was false imprisonment, and it is plain that on the evidence the allegation of production of the knife was of production during the course of that alleged offence. Donnelly J, giving the judgment of the court, characterised the appeal as presenting "*an unusual conundrum*" because of the acquittal of the accused of the very offence in the course of which it had been alleged the knife was produced when, on the evidence, that allegation was at the core of the offence – it was of the essence of the charge. Donnelly J referred to the fact that in these circumstances there was a *prima facie* inconsistency. The position was complicated, or the issue of perversity was perhaps overlaid by undoubted deficiencies in the charge as to how the jury should address that alleged offence. It was held by this court that the verdict was "*logically inconsistent*" and one which "*no reasonable jury, properly charged could properly have reached*". Again, we think that this is an example of the rare circumstances in which an allegation of perversity is truly made out. The allegation of perversity in this case is not due to some irrational inconsistency

or a verdict which is rationally incapable of following from the evidence or the absence thereof, as in *Alchimionek*.

62. It seems to us that the observations of this court in *DPP v M* [2015] IECA 65 are apposite. There, we said (per Edwards J) (para. 54) that: -

"it appears to be the case that the verdict is being characterised as perverse simply because the appellant disagrees with the trial judge's decision to allow the prosecution case to go to the jury. The fact that he disagrees with that decision is neither here nor there. To secure a finding of perversity he would have to be in a position to persuade this court that no jury, properly directed, could have returned a guilty verdict on the evidence in this case..."

63. One might conclude in this regard by reference to the judgment of the former Court of Criminal Appeal in *DPP v Cecil Tomkins* [2012] IECCA 82 (per McMenamin J). There, he quoted with approval from the judgment of McCarthy J in *DPP v Egan* [1990] ILRM 780 and in these terms as follows: -

"... [McCarthy J] ... pointed out that the Court of Criminal Appeal may not substitute its own subjective view of the evidence in place of the jury's verdict. A decision that a verdict was perverse is a very exceptional one as pointed out in the following terms:-

'...the jurisprudence of the Court of Criminal Appeal since 1924 as, from time to time endorsed by this court is clear. Save where a verdict may be identified as perverse, if credible evidence supports the verdict, the Court of Criminal Appeal has no power to interfere with it. The concepts of lurking doubt feel of the case, gut feeling or back of my mind are foreign to the judicial role as I understand it. Juries are regularly enjoined to disregard their personal feelings or other subjective assessments and to concentrate on the evidence as it is sworn to in the witness box. In many instances what may be difficult and ... obscure to a trial judge is crystal clear to a jury; the converse is also very possible. To permit verdicts on criminal trials to be upset upon such subjective consideration would seem to me to be a denial of the validity of trial by jury'.

64. It seems to us that on a consideration of the evidence that this is not a case of perversity; we are not persuaded that no jury, properly directed could have returned guilty verdicts on the evidence adduced before it and accordingly, we reject this ground of appeal.

Ground 10 –

X. The learned trial Judge erred in law by failing to direct the jury concerning the circumstantial nature of the evidence charge.

65. To a degree the concept of circumstantial evidence was touched on at trial by counsel for the appellant in the course of his application for a direction when he said that *"what the court is now dealing with is a case where a jury has to be charged to act on evidence when convinced beyond a reasonable doubt with a set of circumstances redolent of some*

coincidence and in my respectful submission an invitation to convict on what really is ...redolent of an invitation to convict... on probabilities". He went on to say that: -

"[there is] an awful lot of case law dealing with circumstantial evidence [which] will speak of the propriety of allowing that sort of case go to the jury where there is a ... large set of circumstances which point in a particular direction to a point where the jury (sic), to use Mr Justice Hardiman's words, toleration of coincidence is tested to a significant degree that they might well be entitled to convict..."

66. The Court raised the issue of whether or not the prosecution case was one based wholly or mainly on circumstantial evidence and permitted an amendment of the grounds of appeal to allow this issue to be argued. The Director, in support of the verdict, submitted that that this was not a case of circumstantial evidence or, more properly, a case based wholly or mainly on such evidence which would attract the special form of charge appropriate to such cases. We agree. Again, we cannot reprise here, the evidence with which we have dealt in detail earlier in this judgment. We are satisfied that this was not a case based wholly or mainly on circumstantial evidence; counsel for the appellant, in our view, rightly did not pursue at trial the proposition that it is such a case – we are indebted to counsel for arguing the proposition here at our request.
67. We therefore reject all grounds of appeal.