THE COURT OF APPEAL
CRIMINAL

Neutral Citation Number: [2021] IECA 32

Court of Appeal No.: 302/18 & 303/18

Birmingham P.
McCarthy J.
Murray J.

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

- AND -

DK AND MK

RESPONDENTS

JUDGMENT of the Court delivered on 9th day of February, 2021 by Mr. Justice Murray

1. On 13 November 2018 and following a trial lasting six days at the Circuit Criminal Court in Limerick, DK and MK were found not guilty by direction of the trial Judge of (in the case of DK) two counts of false imprisonment, and (in the case MK) a single count of false imprisonment, these offences being contrary to s.15 of the Non-Fatal Offences Against the Person Act. The alleged victim of the alleged false imprisonment was one DC. The case had originally commenced in November 2016 when, for procedural reasons, it was aborted after DC gave evidence but before he was cross examined.

2. The prosecution case was that on 14 September 2015 A (M K's son) together with DK lured DC (who was eighteen years of age at the time) from his home to a location known as '*Caledonian Park'* or '*Cal's Field'* from where he was taken to MK's house. DC was, the prosecution said, detained at both locations. It was the prosecution case that A and DK were the persons who detained him at Cal's Field where, it was alleged, DC was assaulted by A with a claw hammer and accused by him of being involved in stealing cocaine from him. It was alleged that while in the house there were a number of persons present including MK and DK and that both had participated in his detention there.

3. DK made four statements to the Gardai in advance of the trial. The first two were made on 15 September 2015, the third on 16 September and the final statement on 18 October. All were made in the course of DC's voluntary attendance at Roxboro Road Garda Station. He gave evidence of having signed three of these statements: in relation to the fourth his evidence was that some of the signatures on the document were his.

4. The first statement described arriving at a rock near the tracks at Cals Field whereupon, DC said, A told him to get out *'a few coins of coke'*. He said that when he did this A came behind him and hit him with the hammer down across the leg. He said that he continued that attack, screaming that DC and two others had stolen his cocaine. DC said in this statement that DK was *'just standing there smiling'* and that he did not try to interfere or stop A. He said that A left for a short period, returning with a handgun which he pointed at DC, pulling the trigger. The firearm was not loaded. DC alleged that A said that he wanted his cocaine back and forced DC to telephone a third party and ask for an ounce of cocaine. DC then said that A forced him over a wall and into the back of his family home. He said that when he went there, there were a number of people including A, DK and MK. He said that eventually, A then

pulled out a knife and told DC and another to get out of the house. He said that it was about 7.45pm when they left the house.

5. In the main body of this first statement DC said that after A left (and before he returned with the firearm) '*I was thinking of running then but I couldn't because of my leg*'. In the concluding paragraph of that statement (to which the trial Judge referred as an '*add on*'), after having stated that it was 7.45pm when he left the house, he said the following:

> '*I want to add that when I was at the rock in Cal's Field and [A] went away for the gun I felt I couldn't leave because I thought that the coke that was missing must have been owned by both [A] and [DK] I knew that if I got up to leave that [DK] would have stopped me. From the minute [A] attacked me with the hammer I wasn't able to leave, I knew neither [A] or [DK] wouldn't allow me to. [A] kept a hold of me through Cals field by my arm and [DK] was walking behind. Inside in the house when we were in the sitting room, [A]'s mother [M] locked the door and took my phone off me and put it up on the table so I couldn't ring anyone. [DK] was sitting directly opposite me in the sitting room*'.

6. In his three later statements DC identified the relevant location at '*Cal's Field*', relevant clothing and certain CCTV footage.

7. In the course of the trial the jury were shown CCTV evidence which corroborated aspects of what DC had said in these statements. In particular, there was evidence showing the course of the journey which A took with DC in the former's car to two houses (from one of which DK joined them), the vehicle then being shown heading in the direction of a soccer club where the car was parked. The CCTV footage also showed the three walking along a path near the soccer club towards Caledonian Field. That evidence was adduced before the jury, together with

evidence from a mapper and a photographer. Sergeant Mick Dunne gave evidence of meeting DC at Roxboro Road Garda Station on 15 September 2015 and going with him and Detective Garda Keane to *Cal's Field* where, he said, DC pointed to an area where, according to DC, he had been falsely imprisoned the previous evening. He also identified photographs of injuries said to have been sustained to DC's left leg.

8. On the second day of the trial, the Judge heard, and rejected, an objection to DC giving evidence in respect of a conversation he alleged in his statement he had during the car journey, whereupon DC was called to give evidence. Having confirmed his name and date and place of birth, he then said to the trial Judge that he was '*in fear of my life to give evidence here today*'. Counsel for the accused applied to discharge the jury which, following legal argument, the trial Judge declined to do. The Judge explained his reasoning as follows :

> '*[s]ection 16 of the 2006 Act is brought in to deal with an issue like this. It would seem to be ... absurdity if somebody could say "I have no recollection of the evidence, its very vague" or gave evidence entirely inconsistent with their statement, thus invoking section 16, but that if they were to say simply that they were in feat of giving evidence, they were terrified, they were scared, they were terribly nervous, whatever, that that would bring them ouside of section 16 and therefore the only, ultimately, application that ... would have to be acceded towould be to discharge the jury. That would seem to me to be an absurdity*'

9. When DC was recalled and asked what happened on the 14 September 2015 he repeated this concern and said '*I don't want to answer them questions*'. He was then taken by prosecuting counsel to various photographs showing injuries on his body, which he confirmed before repeating (when asked what injuries he had sustained on the 14 September) that he did

not '*want to answer no questions like*'. Having then confirmed that he had injuries on his legs, he refused to answer any more questions when asked how he came to get those injuries and persisted in that position on further questioning. Prosecuting counsel then applied to the Court to treat DC as a hostile witness, and to have the statements taken from DC and recorded on video tape admitted in evidence pursuant to s. 16 of the Criminal Justice Act 2006.

10. In the course of the ensuing *voir dire*, evidence was given by the Gardai who took the statements in question from DC and part of the video recording of that process was played to the Court. Detective Garda Paul Crowley testified that DC had given evidence in accordance with his statements at an earlier trial of the accused on the same charge, that trial being aborted before he was cross-examined. DC gave evidence confirming his signature on three of the statements, but questioning whether all of the signatures on the fourth were, in fact, his.

11. The effect of s. 16 of the Criminal Justice Act 2006 is to enable by leave of the court the admission into evidence of a statement relevant to the proceedings made by a witness. The circumstances in which that power may be exercised are described in s.16(1) as follows :

> '*Where a person has been sent forward for trial for an arrestable offence, a statement relevant to the proceedings made by a witness ... may, with leave of the court, be admitted in accordance with this section as evidence of any fact mentioned in* ***it if the witness, although available for cross-examination*** *:*
>
> *(a)* ***refuses to give evidence,***
>
> *(b) denies making the statement, or*
>
> *(c) gives evidence which is materially inconsistent with it'*
>
> (Emphasis added).

12. If so admitted, the statement is evidence of any fact mentioned therein. The power to admit such a statement may be exercised if the court is satisfied that direct oral evidence of the fact concerned would be admissible in the proceedings, that the statement was made voluntarily and that it is reliable. If the statement was not given on oath or affirmation or does not contain a statutory declaration by the witness to the effect that the statement is true to the best of his or her knowledge or belief, the Court must be satisfied that when the statement was made the witness understood the requirement to tell the truth. In determining whether the statement is '*reliable*', the Court is enjoined to have regard to whether it was given on oath or affirmation or was video recorded, or (if not) whether by reason of the circumstances in which it was made or otherwise, there is other sufficient evidence in support of its reliability. The Court is required in determining whether to admit the statement to have regard to any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement, or where the witness denies making the statement, any evidence given in relation to the denial.

13. Section 16(4) directs that a statement shall not be admitted in evidence under the section if the court is of the opinion, having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or that its admission is unnecessary, having regard to other evidence given in the proceedings. Subsection (5) provides:

> *'In estimating the weight, if any, to be attached to the statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.'*

14. In his ruling of 6 November, the trial Judge acceded to both prosecution applications. In respect of the application under s. 16, the Judge's findings were as follows:

(i) The application fell within s. 16(1)(a) because DC had refused to give evidence, the reason for that refusal not preventing the Court from applying the ordinary meaning of the provision;

(ii) The evidence established that DC had made each of the four statements;

(iii) Direct oral evidence of the facts contained in the statements would be admissible, and the statement was made voluntarily;

(iv) The statements complied with s. 16(2)(c)(i) insofar as they contained statutory declarations and were dated and explained in ordinary language to DC;

(v) The statements were found to be reliable having regard to the video recordings of the reading over of them to DC and to the fact that the reason for his not wishing to give evidence in accordance with the statements was the fear he had expressed as regards giving evidence, not to any inaccuracy in the statements themselves

15. The trial Judge concluded his ruling on the s. 16 application, as follows:

'And then we have the catch all one which, notwithstanding all of those boxes being ticked and all the reliability and voluntariness and admissibility, that nonetheless the Courts still have a residual discretion to exclude the evidence on constitutional grounds, on unfairness grounds, on normal principles that attach to any hearing in front of a jury if it would be unfair and it obviously has been stated -- urged upon me by the defence that it is unfair but I've dealt with those quickly enough. In my view, all of them may give rise to questions. Ultimately, all are matters for the jury. It's the classic example of when the jury have to determine facts and credibility and inconsistency. I'm mindful of my

position that should it be the case that the jury have to deal with this matter at the end of this particular hearing, warnings have to be given to them and of course there must be warnings given to any jury in respect of conviction on exclusively, predominantly or even partly, as in this case, given the other nature of the other evidence that is corroborative or supporting or potentially, obviously I haven't heard all the evidence yet, but it seems to me that I think this is -- the matters urged upon me by the defence for a reason for not acceding to section 16 are really matters that go to the quality or weight of the evidence and in that regard subsection 5 kicks in, notwithstanding what's been urged upon me by the defence it seems to me I accept what Mr. O'Sullivan says in my own view that subsection 5, in estimating the weight, if any, to be attached to the statement, regard should be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise and therefore those issues that have been raised to me seem to be classically for the jury, coupled with no doubt counsel's defence speeches, my own charge to the jury and they will be given a warning about that but ultimately subsection 5 relates to the weight a jury, the determiner of fact, should place on the evidence adduced in this somewhat unusual manner but, as I say, quite clearly established manner at this stage, some 12 years post the enactment of this legislation.'

16. DC was then recalled in the presence of the jury. He consistently refused to answer any questions put to him by the prosecutor or to look at documents presented to him in evidence. He was stood down, the defendants' counsel having been afforded the opportunity of cross-examining him. Later in the trial he was briefly recalled at the request of the trial Judge, who warned him of the consequences of his failure to answer questions when asked. He maintained the position he had adopted earlier in the hearing. At one point when counsel for the prosecution asked him if his consistent response to questions '*I'm not answering questions*' was '*a line*

you've prepared', his response was that it was. He adopted the same position when cross examined by both counsel for the accused.

17. While DC refused to answer any questions put to him, both counsel had an unfettered opportunity to put their clients' cases to DC. The cross-examination conducted by counsel for DK was brief; he put it to DC that his client was recorded in one of the statements as asking A why they were going through the field, that A had gone '*berserk*' with DC because of a drug debt and then asked if he had come from jail.

18. Counsel for MK specifically put it to DC that he was '*settling old scores*', that he '*ran with*' MK's son, and that he had the latter's number as a contact in his own phone, and that he was seeking to punish A by putting his mother in trouble. He put it that the CCTV showed the time period he had recorded as having spent in MK's house was an invention by him. He put it to him that he had not spent half an hour in that house, and that MK was trying to get him out of the house because she '*wanted trouble out of the house*'. He pointed to the height of the wall DC said he had climbed over to get to MK's house and noted the claim that he was hardly able to walk with his leg.

19. Thereafter three Garda witnesses – Detective Garda John Keane, Sergeant Mick Dunn, and Garda Fiona O'Connell - gave evidence of the taking from DC of his statements, of his signing the statements and of the fact that these were recorded on video tape. The statements of DC were read to the jury by the Detective Garda Keane, who also gave evidence of being taken by DC to the location of the alleged false imprisonment and assault. Detective Garda Keane confirmed that certain items of clothing were provided to him by DC on 16 September 2015, and that these included a pair of jeans containing a hole which, the witness said, DC told

him had been made by the claw hammer wielded by A. Detective Garda Keane was cross examined at some length by counsel for DK.

20. Sergeant Dunne also gave evidence of the taking of the statement and the visit to *'Cal's Field'* and Garda O'Connell of the taking of the third statement on 16 September. Neither were cross-examined, but a third Garda witness – Sergeant O'Connor – was tendered for cross examination in respect of the final statement taken on 18 October.

21. DC's mother then gave evidence. She referred to DC returning home on the evening of 14 September and being *'in an awful state'*. She said he could not walk properly on his leg, that he told her that A had come to the front door, that he owed a drugs debt and to come and clear his name and that he had then been brought down to *Cal's Field* where he was hit with a hammer and a gun put to his head. She was followed in evidence by Detective Garda Paul Crowley, who confirmed that during the first trial DC had identified the accused DK and MK as being the persons so named in his statements and by two further Garda witnesses who testified to the chain of custody of certain evidence. Medical evidence was read to the jury confirming that DC had sustained an injury to his thigh caused by a blunt object resulting in bruising and bleeding.

22. The following day evidence was given by Detective Garda Shane Ryan of his analysis of mobile telephone records which, the prosecution said, established contact between DK and A at relevant times on 14 September 2015. Detective Garda Niall Fitzgerald gave evidence of the seizure on 16 September 2015 of a claw hammer from MK's house on foot of a search warrant and Sergeant David Burke of taking fibre lifts from a silver Toyota. A forensic scientist, Bridget Fleming, gave evidence confirming matches between these fibres and items of clothing of DC.

23. Counsel for each accused then made an application for a direction. Counsel for DK emphasised three features of the case – that while the statement of DC referred to his being locked in a room in MK's home, this was not mentioned at the earlier trial, that DC was never meaningfully cross-examined and that because of his refusal to answer questions it was not possible so to do, and that the evidence from DC's mother disclosed that DC made no complaint to her of DK when he arrived home on 14 September.

24. Counsel for MK began his submissions by stating that he was moving under '*the usual authorities*' for a direction, referring to the prospect that the chain of proof or the evidence being so tenuous that it would be perverse or unsafe to let the matter go to a jury. He referred to the admission of the statement of DC under s. 16, and contended that where a witness refused to answer any questions there was no engagement such that the jury could engage in the process of weighing the evidence, stating that the response of DC to questions meant that counsel could not cross-examine '*with any meaning and to expose those areas which would be beneficial*' to his client. He contended from there that, in relation to s. 16, the question was when that provision referred to a witness being '*available for cross-examination*' whether it referred to what he termed '*a physical availability or is it a real availability*'. Citing McGrath '*Evidence*' (2nd Ed. 2014) at paras. 3-88 and 5-272-278, he quoted from *State (Healy) v. Donoghue* [1976] IR 325, at p. 335 (Gannon J.), *Donnelly v. Ireland* [1998] 1 IR 321, at p. 350 (Hamilton CJ), and *The Criminal Law (Jurisdiction) Bill 1975* [1977] IR 129, at p. 154 (O'Higgins CJ), *Re Haughey* [1971] IR 217, at p. 264 (O'Dalaigh CJ), *People (DPP) v. O'Brien* [2010] IECCA 103, [2011] 1 IR 273 and *R v. Conway* (1997) 36 OR (3d.) 579, 121 CCC (3d.) 397.

25. From there he submitted that even if a witness who was present and refused to answer questions under cross-examination was held to be '*available*' for the purposes of s. 16, it is necessary to assess whether the admission of the previous statement was in the interests of

justice. Thus, he contended, that where the witness was not available for cross-examination *'in the real sense, not the physical, but the actual engagement sense'* the Court has to assess whether the admission of the statement and continuation of the case would be in the interests of justice which, he said, it was not.

26. Counsel for the prosecution submitted that the statements admitted under s. 16 together with the other evidence comprised *'evidence upon which the jury could convict'* and that, while this was *'limited'* the Court would have to give warnings. The contradictions alleged by the accused were, he said, classic jury points. He attached particular significance to the fact that the statements were made very shortly after the event, and that in the second, third and fourth statements DC identified the weapon used on him, and his clothing, and that he took the Gardaí to and identified the location and that he did so voluntarily. He also stressed that the video evidence was consistent with DC's account of the journey leading up to the soccer club and going in on the pathway to the opening in the railway line.

27. Counsel then emphasised that s. 16 envisages the very situation with which the Court was then concerned where witnesses have refused to answer questions, with the weight to be attached to the statements being a matter for the jury. He said that there was sufficient weight and detail in, and substance to, the statements at that stage.

28. In the course of the submissions of counsel for the prosecution, the Judge asked if he could, effectively, revisit the s. 16 order for the purposes of an application at that stage. Counsel's response was that while the Court did indeed enjoy a jurisdiction to withdraw a case from the jury based upon an unfairness but that in this case the unfairness contended for by the accused was that the witness refused to give evidence and this did not of itself provide a basis for withdrawing the case.

29. The trial Judge began his ruling by referring to the decision in *R. v. Galbraith* [1981] 1 WLR 1039, and the frequently cited test articulated by Lane CJ in that case (at p. 1042). The trial Judge was clear that this was not a case in which it could be said that there was no evidence the crime has been committed by the defendant. The difficulty, he said, arises where there is some evidence, but it is of a tenuous character, a vagueness or an inconsistency of inherent weakness. He said that where any Judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that the jury, properly directed, could not properly convict upon it, it would be the duty of the Judge to stop the case. However, he continued, if the strength or weakness depends on the view to be taken of a witness's reliability or other matters which are classically within the provenance of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the Court should allow the matter to be tried by the jury.

30. It is of importance that in this case the Judge did *not* grant a direction on the basis of this test. He was emphatic in this regard. At one point in his ruling he said this:

> *'So, there are infirmities in this case ... but not to the extent ... that the jury should not be the ones who decide on those infirmities and ultimately make a conclusion'.*

31. He said the following at the conclusion of his ruling:

> *'once there is evidence upon which a jury could safely convict if properly charged, and that is a low enough threshold for the prosecution. I think they have passed that. So it's not on the Galbraith principles necessarily, but on the other aspects, it seems to me, overall makes it unsafe to send this matter for determination by a jury.'*

32. The '*other aspects*' to which the Judge referred here appear as follows. First, the Court stressed that there was no real, direct oral evidence in relation to the matters before it. There was, the Judge observed, evidence of call logs, fibres and video evidence relied upon by the prosecution together with the four statements admitted under s. 16. However, that evidence – the trial Judge said – was consistent with the prosecution case but was not itself real evidence of the crime itself and was equally consistent with no crime having been committed at all. He further said that the evidence of injury was not of probative value to the offence as charged.

33. Second, the Judge noted a series of possible inconsistencies in the evidence. This led him to conclude that *'the jury would have a difficult job in concluding and determining facts from the evidence'*. In his statements DC had given inconsistent explanations for being restricted in the field, the trial Judge noting that while he had initially said he could not leave the field because of his injuries, then in what the Judge referred to as an '*add on*' to his statement he said that it was due to the manner in which he felt that DK was watching him and the common possession of drugs that he felt that he had no option but to stay where he was. Further, he noted that the accused in the complaint he made to his mother very shortly after the incident did not accuse either DK or MK. He also observed that while DC had said in his statement that he could not leave the field because of the injuries to his leg, he was nonetheless able to get over the wall to MK's house, that wall being many feet high. The Judge noted some inconsistency in the period the CCTV suggested he had spent in MK's home (14 minutes) and that stated by DC in his evidence (half an hour or so). He also recorded that while in the statement he referred to being locked in a room in MK's house, he had not said this in the first trial.

34. Third, the Judge stressed what he noted from the video evidence as '*a certain, manifestly, lack of interest*' by DC in the statements when they were read out to him by the Gardai. He

said that '*he wasn't engaged in the process at that time and seemed to be somewhat careless or disinterested, uninterested in confirming the truth of that*'.

35. Fourth, the Judge noted that there was a suggestion that phone calls were occurring and involving DC at the time of possible confinement in MK's home.

36. Fifth, and most importantly, the Judge felt that it would be '*dangerous to simply allow this case to proceed to a jury*'. He explained this as follows:

> *'I am not convinced that the right to cross-examination has been vindicated, in light of the overall circumstances of this hearing. There is a danger of this jury acting on a statement alone in the circumstances I've outlined, even if severe warnings or very clear and grave warnings were given to them, as indeed there would have to be, there is the fear aspect mentioned and there is a possibility of almost a type of self-corroboration in that regard. Of course, they can be warned, as I say, the O'Brien case was different, it's the absence of other real evidence in this matter, and I reiterate the identification of the items at the location, the phone logs, the video evidence are certainly consistent with the case being made by the prosecution, but they're equally consistent with no offence whatsoever having occurred. And, of course, I'd be warning the jury that they must prefer the inference, if they are to make inferences, most favourable to the accused. If there are two meanings to be gathered from evidence, they must take that which is favourable to the accused ...*
>
> *.... if a guilty verdict was brought in by the jury, I'm not satisfied that I will be satisfied that that would have been a safe verdict. Were I to let this go to the jury with the warnings and directing them to prefer the evidence most favourable to the accused, there's an argument it would almost result in a charge that ultimately gave them no discretion, if*

properly charged. Now, that's a slightly different way of looking at it, the danger of them bringing in a conviction, but there's also an argument, certainly in respect of the first count, the real evidence is to contradict his statements by the same person who will not allow himself to be cross-examined, and this is where I refer to Mr Justice Hardiman's decision, namely where there has been a previous inconsistency, it seems to me where there are two options open to the jury and the victim who has given those two versions of what happened to him, refuses to cross-examine and the prosecution wish to rely upon that statement of itself of that nature, containing two contradictory assertions, or reasons, to allow that to the jury if properly charged the result would have to be inevitable.

So, in my view, this is an exceptional case ...'

37. It is clear from this passage – and indeed from earlier passages in his ruling in which the trial Judged cited authority addressing the importance of cross-examination - that the fact that DC had refused to engage with the cross examination attempted by counsel for the accused was the decisive factor underlying the view of the Court that to allow the case to proceed to the jury would be '*dangerous*'. However, and at the same time, the Judge accepted that it did not follow that simply because a witness refuses to answer questions and his statement is admitted under s. 16, a direction was inevitable. He said:

'*it cannot be the case that the Section 16 which I have allowed in, should not be utilised or a direction of this nature must follow if a witness simply refuses to answer questions in a blanket manner, which of course has the effect of inhibiting cross-examination or rendering same almost counter-productive and then almost enforcing itself to the jury*'

38. Later in his ruling he repeated this:

'Of itself failure by a witness to reply in cross-examination ... is not sufficient to have the case withdrawn from the jury, because it is envisaged by Section 16 ultimately, as total, absolute blanket refusal to answer questions in examination in chief or cross-examination'.

39. So, in summary, the critical consideration was the combination of the fact that the witness provided the only real evidence of the offence, that there were inconsistencies between his statements and the other evidence, that he was not available for meaningful cross examination, that he had expressed within earshot of the jury fear in the event that he gave evidence, and that there was thus a risk of self-corroboration. Thus, even though there was sufficient evidence to go to the jury, a conviction would be inherently unreliable.

40. These are the circumstances in which the Director brings this appeal pursuant to the provisions of s. 23 of the Criminal Procedure Act 2010. The facility for with prejudice prosecution appeals introduced by that section comes with three preconditions relevant to this case.

41. First, the appeal only lies if the trial court has either made a ruling which erroneously excluded compelling evidence as defined in the Act, or a direction was given in the course of the trial directing the jury to find the person not guilty where that direction was wrong in law. Clearly, it is with the latter circumstance that this appeal is concerned.

42. Second, in that situation this Court must be satisfied that even if the direction was wrong in law, that the evidence adduced in the proceedings was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offences concerned.

43. Third, the Court upon determining to quash the acquittal may order a retrial of the accused for the offence concerned if (where the ground for the decision was that a direction acquitting the person was wrong in law) the evidence adduced in the proceedings was evidence upon which a jury might reasonably be satisfied beyond reasonable doubt of the person's guilt in respect of the offences concerned *and* that it was in all the circumstances in the interests of justice to do so. The matters to be taken account of in determining the latter are specified in s. 23(12), to which we will return.

44. It was confirmed at the hearing of this appeal that the error of law relied upon by the Director for these purposes is that identified at paragraphs 2 and 3 the Notice of Appeal. These are as follows:

> '*having ruled that statements made by [DC] ought to be admitted in evidence under section 16 of the Criminal Justice Act 2006 in circumstances where the said [DC]'s failure to answer questions created an unfairness of such a nature as warranted the withdrawal of the charges from the jury;*
>
> *The said decision of the learned trial judge is inconsistent with the terms of the said section 16 of the Act of 2006'*

45. In analysing the contention underlying this objection, it is important to distinguish between three separate jurisdictions in play at various different points in this trial. The first was the jurisdiction of the Court to withdraw the case from the jury in accordance with the test articulated in *Galbraith* and repeatedly restated in the Courts in this jurisdiction (*People (DPP) v. Leacy* Unreported Court of Criminal Appeal July 3 2002). The Court applied that test, and determined that it would not grant a direction on that ground. This was, for as long as the order made under s. 16 remained in place, clearly correct. The effect of the statements made by DC

and admitted by the trial Judge under that provision were, as he observed in the course of his ruling on the application of the Director to that end, sufficient to afford a basis on which the jury could convict.

46. The second jurisdiction followed from that. The trial judge had the power, having made an order under s. 16, to later reverse that order. This was confirmed in *DPP v. Campion* [2015] IECA 274 at para. 47, and – as noted above – the trial Judge specifically canvassed this possibility with counsel for the Director in the course of his submissions on the direction application. However, having canvassed that jurisdiction, the trial Judge did not purport to exercise it. At no point in the course of his judgment does he suggest that he was reconsidering his decision to make an order under s.16. If he had made such an order the effect would have been to result in a direction in accordance with *Galbraith.* The discharge of an order under s.16 would not itself result in the withdrawal of the case from the jury. Instead, the effect of the discharge would have been to remove from the case a significant part of the evidence upon which the prosecution relied and, to that extent, to have resulted in a situation in which there was no case to go to them. However, it is clear that this is not what the Judge did.

47. That leads to the basis on which the Court did make its order, namely that it was '*dangerous*' to allow the case to proceed to a jury and the stated view of the Judge that if a guilty verdict was brought in by the jury, he was not satisfied that that would have been a safe verdict. Although not described by the trial Judge in these terms, it is properly characterised as having been determined as a '*PO'C*' application, arising from '*the ... inherent jurisdiction to protect fair trial and due process*', and requiring '*matters ... which render a trial unfair, or the process unfair*' (*The People (DPP) v. PO'C* [2006] 3 IR 238, per Denham J. at pp. 245 and 247 respectively). As explained by O'Malley J. in *People (DPP) v. CC* at para. 45, by definition, this jurisdiction will arise even though the prosecution has in fact presented evidence

that should, by normal standards go to the jury but where for identified reason '*it is unfair to let the matter proceed*'.

48. This jurisdiction must be applied in a careful, restrained and focussed manner. It is, in particular, critical that the appeal in any given case of the indisputable proposition that a trial must not be unfair not obscure the starting point in the analysis and application of that requirement. In the case of a prosecution conducted in due accordance with law where the trial Judge is satisfied there is admissible evidence capable of being put to the jury and of sustaining a conviction, absent wholly extraordinary circumstances, that evidence should be put to the jury. In all but the most unusual of situations, fairness is achieved by due compliance with the statute and common law defining the offence and procedures by which the prosecution is initiated and conducted, the evidence by which that offence is proven, the criterion of admissibility governing the adducing of that evidence, and the transmission to the body vested with the constitutional role of resolving the facts determinative of guilt or innocence of the function of so doing. The intervention of a judicial role in withholding that case from and discharging the jury where there is evidence so adduced by which an offence so defined might result in a conviction by jury properly instructed in accordance with law must be entirely exceptional. This, indeed, is reflected in a recent clear formulation of the *POC* jurisdiction :

> '*The underlying principle is that the task of the courts is to administer justice, but circumstances may arise where it transpires that it is not possible to achieve an outcome that will be just, and that the process is not therefore the administration of justice*'
>
> *People (DPP) v. CC* [2019] IESC 94 per O'Malley J. at para. 1

49. We think it both instructive to its application, and correct as a matter of principle, that the jurisdiction has, on more than one occasion been expressly related to the power of the Court

to '*protect its process from abuse*' (*The People (DPP) v. DH* [2018] IESC 32 at para. 46 per O'Malley J.). Of course, the categories of case in which the process is so tainted by constitutional irregularity that a trial is '*not ... the administration of justice*' or that the maintenance of the prosecution represents an abuse of process or that there is such a fundamental unfairness that the trial must be arrested are not, and will never be, closed. However, the circumstances in which the jurisdiction has been identified – noting the sparsity of recorded instances of its actually being exercised – are limited in number and extreme in nature, with the authorities focussing in particular on the very specific issue that arises in cases in which there has been prejudice in the defence of the claim caused by delay. As described in *PB v. Director of Public Prosecutions* [2013] IEHC 401, at para. 59 (and indeed as noted by the trial Judge here) the power properly arises only in cases that are '*exceptional*'.

50. Where the trial Judge determines to accede to an application to withdraw a case from the jury on this basis, his decision is – clearly – subject to correction on appeal (see *People (Director of Public Prosecutions) v. CC* [2020] IESC 94 at para. 19 per O'Donnell J.). While the Judge is entitled to a margin of appreciation in the judgment thus reached on the facts and evidence before the Court, the decision is one of law, liable as such to review via *inter alia* the procedure adopted in this case pursuant to s.23 of the 2010 Act. In this case, the decision of the trial Judge was based on his view of the impact of a number of undisputed features of the case on the legal concept of fundamental fairness of process. He did not have to resolve any disputed question of fact to reach that conclusion, nor did he base his decision on an particular assessment of the oral evidence he had heard. Thus, this Court must assess the specific basis identified by the trial Judge as grounding such a decision and determine whether in fact those stated reasons amount in law to an unfairness necessitating the grant of a direction.

51. The basis for the trial Judge's decision to discharge the jury is captured in his statement that he did not believe that '*the right to cross examination has been vindicated in the light of the overall circumstances of the hearing*'. The circumstances to which he referred were as follows :

(i) The fact that DC refused to answer questions under cross examination;

(ii) The concern that the jury would '*act[..] on a statement alone in the circumstances I've outlined*' those circumstances being that there were various aspects of the statements in question that might be open to question having regard to the evidence as a whole (those circumstances being as summarised by me in para. 33 above), and

(iii) The fact that the witness had made comments about being in fear of his life and the consequent risk of '*almost a type of self corroboration*';

52. The trial judge was clearly correct when he said in the course of his ruling on the direction application that it could not be the case that a direction of the kind he made must follow if a witness simply refuses to answer questions in a blanket manner, even though this had the effect of inhibiting cross examination. He was also correct when he said in the course of his ruling on the application under s.16 that it was a matter for the jury in considering any statements admitted pursuant to that provision, to (as the trial Judge neatly put the matter) '*determine facts and credibility and inconsistency*'. He returned to that issue in the same ruling when he said of a statement admitted under s.16 :

'*in estimating the weight, if any, to be attached to the statement, regard should be had to all the circumstances from which any inference can reasonably be drawn as to its*

accuracy or otherwise and therefore those issues ... to me seem to be classically for the jury'

53. This mirrors the position explained by this Court in *The People (DPP) v. Campion* [2015] IECA 27 :

'It is quintessentially a matter for the jury to decide whether they can identify where the truth lies, and, if the view is that the truth is to be found in the earlier statement sought to be relied on by the prosecution, whether they can be sufficiently confident that that is the case and that they can proceed to return a verdict of guilty beyond reasonable doubt'.

54. Similarly, the Judge was correct when refusing to discharge the jury because they may have heard comments by DC to the effect that he was in fear of his life : as the Judge said it must be assumed that this is one of the contexts in which the Court will act to make an Order under s.16.

55. It is for the same reason that we believe the analysis by the trial Judge of the legal position on each of these issues to be correct, that we adopt the view that in subsequently granting the application for a direction on the basis that he did, the trial Judge erred. If it is the case that the blanket refusal of a witness to answer questions under cross examination does not in itself justify the grant of a direction (and it does not), if it is the case that it is a matter for the jury to determine whether the statements of that witness that have been admitted pursuant to s.16 are unreliable or inconsistent with the other evidence in the case (and it is), and if it is the case that the fact that the witness said within earshot of the jury that he was in fear did not merit a discharge (as is also the case), then it is impossible to our minds to see how the high threshold set by the authorities defining the *POC* jurisdiction can be said to have been met in this case,

whether through the combination of these circumstances or otherwise. This is not a situation in which the whole is greater than the sum of its parts.

56. In particular, we do not see any aspect of the context identified by the trial Judge in his ruling as differentiating this case in principle from any other prosecution in which orders are made under s.16 and the witness refuses to answer questions put to him when he gives evidence. It is the purpose of the provision to enable the admission of statements in that very situation. We fail to see how, were it correct to grant a direction in this case, a direction would not also be required in any case in which the admission of the statement under that section were to be combined with a refusal to answer questions where the statement is the only evidence in the case that could prove guilt and where there are other facts and circumstances that might question its correctness. Nothing in s.16 supports the proposition that it is inoperative in such circumstances and, if it did, the trial Judge would not have made an order under the provision in the first place. For as long as the section remains on the statute book, the issuing of a direction on this basis would fundamentally undermine the legislative framework put in place by the Oireachtas.

57. Having decided that the trial Judge erred in acceding to the application for a direction, and having determined that the trial Judge correctly decided that there was evidence such that a jury might reasonably be satisfied beyond a reasonable doubt as to the guilt of the accused as required by s.23(3)(b)(ii) of the 2010 Act, it is necessary to proceed to address the question of whether it is appropriate to direct a retrial. The 2010 Act (s.23(11)(a)(ii)) directs that this issue is governed by '*the interests of justice*'. Section 23(12) mandates that in determining this issue, the Court have regard to four considerations :

(a) whether or not it is likely that any re-trial could be conducted fairly,

(b) the amount of time that has passed since the act or omission that gave rise to the indictment,

(c) the interest of any victim of the offence concerned, and

(d) any other matter which it considers relevant to the appeal.

58. It is clear that a re-trial does not automatically follow from a determination that a directed verdict or ruling resulting in an acquittal was wrong. It is also trite that the application of these considerations will vary from case to case and that the determination of the Court under s.23(11) will be dependent on the particular circumstances (*The People (Director of Public Prosecutions) v. J.C (No.2)*[2015] IESC 50 per Denham J., at para. 27). While we have no reason to believe that a re-trial could not be conducted fairly in this case, we are of the view that it would be singularly inappropriate to order one. We say this having regard to the combined effect of a number of inter-related factors.

59. To begin with, were there to now be a retrial it would be not the second, but the third trial of these offences. This is the first important aspect of this case. In *J.C* it was said that that while (obviously) the legislation specifically envisaged a retrial, the question of double jeopardy '*forms a significant backdrop to this case'* (MacMenamin J. at para. 22). *J.C* presented the prospect of a second trial. The application of the appeal provision under the 2010 Act to produce a third trial requires, at the very least, that the Court scrutinise carefully the facts and circumstances to determine whether, in all of the circumstances such a direction is proportionate having regard to the public interest in the due and proper prosecution of offences in accordance with law, and the interests of the accused in obtaining a reasonable prospect of finality having been once acquitted of an offence and thus obtained an outcome which, generally, is a complete termination of the criminal process.

60. Second, any such retrial would be occurring at the earliest six years after the incidents in issue. That compares with *J.C* in which, in the situation presenting itself there, a retrial was refused when the period between offence and the decision of the Supreme Court was four years. Clarke J. (as he then was) stressed a point connected with one we have made earlier : a person who has had the prospect of a re-trial hanging over them for a substantial period is entitled to have that taken into account. Although there he was discussing the period between an *acquittal* and the retrial (which in *J.C* was three years) in this case the fact that the accused will have been facing these prosecutions since 2015 with the first jury discharged in November 2016 appears to us to present a significant factor weighing against an order that will have the effect of subjecting the accused to a third trial. In this regard it is important to emphasise – as indeed was stressed by the Court in *Director of Public Prosecutions v. T.N* [2020] IESC 53 (at para. 15) – the important question of the passage of time is distinct from the issue of whether a fair trial can be had because of the effluxion of time. The question of whether the trial is fair is addressed in s.23(12)(a). Because the time that has passed since the events the subject of the indictment is a distinct factor identified in s.23(12)(b), it follows that time alone – not merely the impact of delay on the ability to mount an effective defence to the charge – must be considered as a freestanding issue and factored as such into the assessment irrespective of its potentially prejudicial effect on any retrial.

61. Third, the fact that the case might come on again would result in the accused facing a trial in circumstances that had, from their perspective, changed adversely when compared with the position at the time of the first and second trials. In particular, DK (who had no previous convictions at the time of the first and second trials), is now in a situation in which having been since convicted of offences, his ability to drop his shield vis a vis DC (who had as of the earlier trials been convicted of other offences) has been impaired. MK cannot point to a similarly directly relevant change in her circumstances, but it is relevant to an assessment of the overall

balance of justice that she finds herself in situation in which DC having failed to give any evidence implicating her in the offence in the first trial, having undergone a second trial in which he refused to give any oral evidence, now faces a third trial based upon limited reference to her in the addendum to DC's first statement.

62. This leads to a final, critical and very particular, issue. Clearly, the interests of the victim of an offence looms large in the operation of the facility for with prejudice prosecution appeals. Even the prospect of a third trial following the effluxion of a significant period of time may be readily justified in the case of serious offences impacting on an identified victim. Indeed in *JC* the absence of any evidence as to the impact on the victim was noted by the Supreme Court. However here this Court is faced with an attempt by the prosecution to obtain the second retrial of an offence with one victim whose refusal to give evidence has given rise to the appeal in the first place. Although noting the explanation tendered by DC for not responding to questions, his contribution to the situation that has arisen means that the weight that would ordinarily be given to the interests of the victim cannot be applied here with the same force as it might in other cases.

63. In this case these factors – the fact that any trial directed would be the third, the fact that that third trial would be taking place at the earliest six years after the events giving rise to the prosecution, the fact that in the intervening period DK has lost a potential advantage in defending the case by reason of his intervening conviction, the particular circumstances of MK to which we have referred, and the consideration that all of this has occurred because of the refusal of the only victim of the alleged offence to give evidence at the second trial – combine to render this a case in which it would not be in the interests of justice, all things considered, to direct a retrial. It is important to emphasise that it is the combination of these circumstances,

not any one of them in isolation, that mandates this conclusion. For that reason, while noting the error in the trial Judge's decision to grant a direction, this appeal should be refused.