THE COURT OF APPEAL

Edwards J.
McCarthy J.
Kennedy J.

Record No: 147/2015

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

RESPONDENT

V

MARIUS GAIZUTIS

APPELLANT

JUDGMENT of the Court delivered on the 27th day of April 2020by Mr Justice Edwards.

Introduction

1. This matter comes before the court by way of an appeal by the appellant against his conviction for the offence of murder by a jury in the Central Criminal Court on the 1st of May 2015 following a five-day trial.

2. The appeal against conviction is based upon what is in substance a single ground of appeal which is cast in terms that:

> "1. The trial judge ought to have directed the jury to reach a verdict of 'guilty of manslaughter' given that the only evidence of the incident was my own account of it as given to An Garda Síochána in interview and as accepted as true and accurate by them insofar as they were in a position to independently verify it.
>
> 2. In all the circumstances the trial was unfair and unsatisfactory."

3. On the 20th of May, 2015, was sentenced to life imprisonment, back-dated to the 2nd of October, 2013, being the date he entered custody. The appellant filed a motion on the 13th of June 2016 seeking leave to amend his notice of appeal to add the ground:

> "The trial judge erred in imposing a sentence of life imprisonment on the assumption that same was mandatory."

The appellant further sought liberty in the said motion to challenge the constitutionality of section 2 of the Criminal Justice Act 1964 together with liberty to join the Attorney General as a party to the appeal. The motion was adjourned to the hearing of the appeal.

4. At the commencement of the appeal hearing before this court on the 25th of February 2020 we were informed that the appellant no longer wish to proceed with this motion. Accordingly, the sole issue before this court is the appeal against conviction on the single ground that has been indicated.

The evidence on foot of which the appellant was convicted.

5. On the 10th of September, 2013, emergency services were called to Mornington Beach, Co, Meath, where a half-naked body, later identified as being that of Mr Audrius Butkus, had been discovered by a fisherman. Immediately apparent were the severe head injuries on the body. Also discovered at the beach were drag marks which were consistent with having been made by if a pair of legs, and a bloodstained green plastic bag by the edge of the coastline. The scene was preserved and examined and in due course the body was removed to Our Lady of Lourdes Hospital in Drogheda for an autopsy.

Post-mortem results

6. The court heard evidence from State Pathologist Professor Marie Cassidy who conducted the post mortem as to what she had found upon examination of the body. She stated that the victim had suffered over 40 fresh injuries, including numerous abrasions, lacerations and bruising to his head and face, all inflicted within 24 hours of the death of the victim. The base of his skull was fractured, he presented bruising to the brain and his jaw was dislocated on the left side. Professor Cassidy was of the belief that the cause of many of the injuries, which were associated with rectangular or triangular marks on the body, were due to impact from an object with a rectangular projecting surface approximately 2.5 – 4 centimetres or 1 or 2 inches in size. Similar injuries with the same rectangular and triangular outlines were noted over the right shoulder area. The front of the trunk presented superficial scrape type injuries, some with possible drag marks, which were also present on the legs. Several abrasions, scratches and bruises covered the arms and legs, none of which Professor Cassidy regarded as defensive wounds, which were wholly absent.

7. Professor Cassidy indicated that the victim's breathing would have been adversely affected from blood pouring from the fractures of the base of the skull leaking into his airways. It was her belief that the head injuries were the cause of death, and that one blow in particular, resulting from a downward blow from a heavy object and dealt whilst the victim was upright, was likely to have been the first injury, and that it would have caused him to collapse to the ground. He would not have died immediately but could have been rendered unconscious by this initial strike. The examination suggested that the victim received 9 blows to the head and up to 9 blows to his back, and that these, with the exception of the initial blow, were probably sustained whilst he was face down on the ground.

8. There was a strong smell of alcohol from the deceased and an analysis of his blood alcohol and urine alcohol levels indicated that the victim was highly intoxicated at the time of death being at around ten times the level at which one could safely drive a car. Professor Cassidy indicated that such a degree of intoxication would have had an effect on the actions and reactions of the victim, including his ability to defend himself. His

enlarged fatty liver was symptomatic of chronic alcohol use, but the victim was otherwise healthy prior to the incident. Although it was possible that the effects of such an amount of alcohol could cause death, Professor Cassidy concluded that in the circumstances of the case the cause of death was brain injury and inhalation of blood as a result of instrumental blunt force trauma to the head, which would have proven fatal regardless of the level of sobriety of the victim.

9. Professor Cassidy was shown a camp axe (exhibit 13). She agreed that the blunt end of such an object could have caused most of the injuries present. There were a few lacerations on the back of the victim which could have been caused by the sharp end of the axe. There was no evidence of any defensive injuries to the arm area caused by such an implement, but Professor Cassidy concluded that the injuries present were the result of a sustained, violent assault. Professor Cassidy further accepted that the drag marks visible on the body could have resulted from the body being dragged across the shingle on the strand of Mornington beach, and that the victim would have been facing his assailant when he received the initial blow to the front of the top of the head.

Background and circumstances of victim

10. Enquires conducted in the course of the Garda investigation revealed that the victim was 44 years of age and originated from Latvia. He arrived in Ireland around 5 or 6 years before his death and had been homeless for some time.

11. The court heard evidence from Mr Lavidas Jockas, the cousin of the victim, who stated that the victim would "*shout a bit if he was drunk, but he would never fight or hit anyone, he was not aggressive*".

12. The court also heard evidence from Garda Kevin O'Rourke and Garda David Rothwell, who, on the 9th of September 2019, had encountered the victim drinking with a group of men outside a Tesco store in Drogheda. The gardaí requested under section 8 of the Criminal Justice (Public Order) Act 1994 that the group leave the area so as to not intimidate passers-by. This was the last recorded instance of anyone other than the appellant encountering the victim. It was accepted that the victim was known to the gardaí because of his issues with alcohol.

The residence of the appellant

13. The court heard evidence from a Mr Francis Caffrey, who stated that on the morning of the 10th of September 2019, he noticed pools of blood, approximately the size of golf balls, on the footpath outside 5 Marsh Road, Drogheda. Mr Caffrey also noticed blood on the double yellow lines on the road, which appeared to have been subjected to some attempt at cleaning. After hearing the news on the radio about the discovery of a body on Mornington beach, he reported the blood to Drogheda Garda Station.

14. Gardaí subsequently arrived at the premises and cordoned off the area as a crime scene. A full scene of crime examination was initiated. The court heard evidence from Mr Stephen Clifford from the Forensic Science Laboratory, who attended at the scene and who participated in its examination, and subsequently conducted a forensic analysis of samples taken, and material seized, at the scene.

15. Mr Clifford confirmed that, in addition to the blood found outside by Mr Caffrey, blood was splattered at multiple locations within the property, including the staircase leading down to the basement kitchen, as well as underneath the basement kitchen table and on the kitchen ceiling. Mr Clifford confirmed that a DNA profile generated from the numerous bloodstain samples taken from the scene were a match for the victim. Each of these splatters was a match for the victim. Mr Clifford was able to deduce from the distribution of blood stains and the presence of wipe marks that an attempt had been made to clean up the scene.

16. Amongst many items seized at the scene was a camp axe. This was subsequently examined by Mr Clifford who found blood in a hollow on it. Upon analysis of the blood found in the hollow of this camp axe, Mr Clifford determined that this came from the victim.

17. All blood found at the scene, or on items recovered from the scene, belonged to the victim.

18. The court heard evidence from the owner of the premises, a Mr Tony Halton, that he had let the premises to the appellant and his partner Guna Levsenkova in February, 2013, and that they had been residing at the premises since that date.

19. Enquiries had also established that a Mr Aivars Sonders, who was friendly with the appellant, also lived in the building.

Interviews with the appellant

20. On the 30th of September, 2013, the appellant presented himself at Drogheda Garda Station, under the advice of his solicitor, who accompanied him there. Upon arrival, he was arrested on suspicion of murder and cautioned by Detective Sergeant Liam Archibold. He was processed in the usual manner by Member-in-Charge Garda Michael Dickson and detained under section 4 of the Criminal Justice Act 1984. DNA samples were taken. The appellant, with the assistance of a translator, was interviewed by gardaí six times during his period of detention at the station.

The search for the appellant

21. At an early stage of the investigation the appellant was identified as a person of interest with whom the gardai wished to speak. However, he could not be located, and it subsequently transpired that he had left Drogheda in the early aftermath of the incident, had travelled initially to Castleblaney, County Monaghan, where he had turned up at the home of a friend, a Mr. Anton Zondaks, claiming to have had an argument with his partner Guna and asking to be allowed to stay. Strangely, from Mr. Zondak's perspective, the appellant declined an invitation to stay in a room in Mr Zondak's house, but instead elected to sleep in Mr Zondak's sauna which was located outside. After a short stay in Castleblaney the appellant then seemingly crossed the border into Northern Ireland by bus and proceeded to Belfast where, by his own account, he lived on park benches and in abandoned houses. During this time he was in contact with, and indeed met with, Mr. Sonders who kept him updated as to events back home. Eventually, almost 3 weeks later and on the advice of a friend in Newry, the appellant returned to the jurisdiction and

surrendered himself to Gardaí. Immediately upon doing so he was arrested on suspicion of murder and detained for the proper investigation of the offence for which he had been arrested. While in detention he was interviewed on six occasions.

Interview One

22. During his initial interview he confirmed that he was a mechanic from Latvia, who had arrived in the jurisdiction on the 2nd of October 2009. Since then, he had been living with his partner and five children at 5 Marsh Road, Drogheda, Co. Louth.

23. The appellant explained his movements on the 9th of September 2013. He stated that at around midday, whilst his children were at school, he began drinking at home with Mr Aivars Sondors, who lived on the fourth floor at 5 Marsh Road Drogheda. At some point before 3 p.m., the two men journeyed into town in Mr Sondors' car to purchase a bottle of rum. When the appellant's partner arrived home and discovered the rum, she screamed in anger at the appellant, as he had been drinking continuously for three days. The appellant's partner and children left for town, with his partner threatening to take the children to a shelter. The appellant began pursuing them but then desisted. He claimed not to remember where he then went to, saying "*I went in a different direction . . . Don't know, just somewhere*".

24. He opined that it would have been better to commit suicide than to come to the police, but that he turned himself in as his children were taken away from his partner, and that "*Every person on this earth must take responsibilities for his actions*". When asked where he had been for the past 20 days, the appellant informed the gardaí that he had been in Northern Ireland seeking work and accommodation. He had initially travelled to stay with a friend in Castleblaney before hitch-hiking his way to Newry. From there he travelled to Belfast, by bus, where he lived on park benches and in abandoned houses. He claimed to have sold his phone in order to buy food. On the advice of a friend in Newry, the appellant returned to the jurisdiction and surrendered himself to gardaí, because he knew they were looking for him and that he had nowhere to live. He claimed not to know the victim, and not to recognise his name.

Interview Two

25. During the second interview, the appellant recalled following his wife and children before losing them in Drogheda town, but claimed he could not remember anything past this point, owing to his state of intoxication. He maintained that his account was truthful, and that he honestly could not remember anything else. When asked if he remembered meeting Andrius Buskas he claimed not to know him, and asked "*who is he?*" When informed "*he is the man you killed*", the appellant responded, "*I don't know*". After being informed of the existence of CCTV footage showing himself and the victim walking up the street in the direction of his house, the appellant maintained that he did not recall encountering the victim or anyone else in the street, stating that he was drunk and speculating that he could have been on his own, or in a group of ten people.

Interview Three

26. During this interview the appellant claimed to have no recollection of the victim entering his home with him. He claimed to have no memory of events after the point at which his

wife had left his house but maintained that it would be out of character for him to invite strangers into his home. The appellant claimed to have been experiencing a total blackout, and that he did not remember meeting the victim in town, but admitted that he probably did something wrong, but that he could not remember anything. The appellant then speculated that his partner wanted to get rid of him and take his money, and had made "*some bullshit statement about me*". He further speculated that the victim may have been having an affair with his partner, explaining his presence in the house, and that his partner might have "whacked" the victim. He acknowledged the seriousness of the situation and requested time to think over events. When asked again what happened, the appellant responded with: "*Butkus is a dead man, he will not be able to go to the witness box and give evidence. You will not believe my story anyway*", before requesting more time. When further pressed by gardaí, the appellant disagreed with the outline put to him as to what the Gardai believed had happened, calling it "*unbelievable*". The appellant continued to elaborate: "*What was the purpose of me killing him. He is nothing, he is just a person of no fixed abode. There was absolutely no reason to kill somebody. As I have already mentioned, I have never met this person before. It would be extremely stupid to bring a person to the house and then kill*." Nearing the end of the interview, the appellant stated: "*Bring me to court and let's deal with this matter in court."*

Interview Four

27. In the course of this interview the appellant admitted that he did in fact meet the victim in town, when the victim had shared some cans of beer with him. The appellant stated that after his partner and children had left, he walked into town. He got into an altercation with an Irish man, whom he believed to have been on drugs. Three men intervened, all of whom spoke Russian but none of whom were in fact Russian. They were Polish or Czech. This group included the victim. The appellant joined these men in drinking outside Tesco. Gardaí arrived and ordered them to leave. He further stated:

> *"The Czechs or the Polish nationals left and I told the Lithuanian national who I now know as Butkus that I had a bottle of Captain Morgan's at home. It was my initiative to invite him to my house. He introduced himself but I did not remember his name. I did not pay attention. To be honest with you I met him around town a couple of times before that, his face was familiar. I invited him back to 5 Marsh Road to drink the bottle. We called to the house. I gave him something to eat, I cannot recall soup or something. He was hungry. Then I produced the bottle out of the fridge. I put some music on and we were sitting and drinking in the downstairs kitchen, the floor beneath the ground floor. At some stage he went to the toilet at some stage. There is a toilet beside the kitchen. Then I suddenly smelled smoke coming from the toilet. I opened the toilet door and he was sitting on the toilet asleep with a cigarette in his hand. He was sitting drunk, appeared to be very drunk or asleep. We would normally keep the chemicals in the toilet, paint, fire lighters, liquids for the car, in flammable liquids. I told him that he was not allowed to smoke in there, it was too dangerous. I told him to stop smoking. I told him if he wanted to stay overnight that it was no problem and I would show him where to stay. I don't mind what came into his mind, he told me to "fuck off". There was no*

reason why he would become so angry. After he told me to "fuck off" I punched him in the jaw. It is a bit over the top when somebody insults you in your own house. It became part of my nature I will never let anybody insult me. I told him to get the fuck out of here and opened the door of the toilet and told him to go. I don't know where he get a bottle but he had an empty beer bottle in his hand and as he was leaving the toilet he punched me in the head with the bottle. I can show you the scar on my head. There was a struggle at the toilet door and into the kitchen at the table. We started to fight. My head was bleeding and I told him to get out of the house while struggling with him."

Interruption while member in charge checks on the prisoner.

"He had the broken bottle in his hand and he was stabbing me with it. I injured my hand as I tried to protect myself as you can see from my left hand. I was trying to knock it out of his hand and take it off him. I was saying in Russian "get out, get out". I was saying it several times. Then he suddenly started to say that he knew my family, my five daughters, that he was going to burn my house to the ground and kill the members of my family. I took these threats really seriously and I was afraid for myself and my family's safety. I entered the toilet, I keep my tools in the toilet. I took an axe. He took a knife from the kitchen table, a kitchen knife. I punched him first and he did not get a chance to stab me. I punched him with the axe. And then I just snapped and I don't know what happened. I am not very sure how many times I punched him with the axe. I was scared of him because I think that he was not kidding. He was not moving anymore. I was in a frenzy, seeing so much blood. I was completely insane. Now I understand that it would've been a good idea to simply ring the Guards. But I was so shocked and so afraid my kids could see all the blood. I just made a decision to just clean up. And at some stage I understood that I need some help. I went upstairs to Aivars' bedroom. When he saw me he probably understood everything. Liga was asleep. I was all covered in blood. They probably could not hear us fighting because of the loud music but when he saw, he probably understood. Aivars turned pale when he saw. I just ordered him to help. He was just so very afraid that he could not say no. Aivars took the car keys and drove up to the front door. And I told him to get rid of the body. I don't remember if I checked the pulse or not but he was dead at this point. He took the body and dragged him up the stairs. He was a huge man, bigger than me, very heavy. We managed to, he was extremely heavy man and the body was slippy because of all the blood. We somehow managed to get him up the stairs and threw him into the boot of the car. I removed my T-shirt and wrapped it around my bleeding head. So we put the body in the boot and I ran back into the house to put a jacket on. It is a terrible story isn't it. When I came back to the front door I realised Aivars had already gone. I was standing at the front door looking around wondering where Aivars had gone. I went back into the house and started cleaning. I started with the handrail on the steps to the basement. In a while, I had lost track of time, Aivars had returned home. He started helping me with the cleaning. I did not even ask him where or how he had disposed of the body, where he dumped it.

It was already light. I assume it was around 4 or 5 o'clock in the morning. I suggested that we should get rid of certain items, such as carpet, clothes stained in blood etc. we actually put Aivars' jeans in the washing machine."

Further interruption while member in charge checks on the prisoner.

"We took the carpet from the stairs from the basement to the hall. We put the dirty clothes and carpet into the rubbish bags. We packed all the stained stuff into two rubbish bags. I am not familiar with the name of the street but you have already mentioned it. We threw these bags into the garden of some abandoned burnt house. I threw the bags over the fence. We returned back home. Aivars went to the shower, I went to the shower. It was already morning. Guna and her kids would call to the house at the moment. I went to bed and covered myself with a blanket and pretended that I was asleep. I remember Guna babbling something about the missing carpet. She dropped the kids to school and when she returned she was shouting and asking what had happened. So as I had said, the clothes I had put in the washing machine, Aivar's jeans and my light tracksuit bottoms, when cleaned I removed and I hung them out in the back garden to dry. Around half twelve Guna left the house in order to pick up the daughters from school. Then around 2 o'clock Aivars asked me out to have a drink in the park, a small one beside Liga's sons house.

Q: Do you accept that you unlawfully killed Audrius Butkas between the 9th and 10th of September 2013 at five Marsh Road, Drogheda, County Louth?

A: It was self-defense, I had no choice. I had no intention of killing him.

Q: Do you accept that your actions cause the death of Audrius Butkas?

A: Yes."

Interview Five

28. During the fifth interview, the appellant was presented with relevant exhibits and photographs. When presented with the camp axe (exhibit 8), the appellant claimed it as his own and accepted that he had used it in the incident, and stated that he had "punched the victim using this axe . . . when he had the knife in his hand".

29. The broken bottle which the appellant alleged in interview four was wielded against him was never found.

Interview Six

30. The appellant explained in the course of this interview that he had thrown several incriminating items, such as the broken bottle, bloodstained clothing and the t-shirt which had been wrapped around the head of the victim, into the bin of a neighbour. He informed the gardaí that he had shared the contents of the bottle of rum with the victim, which had been nearly full when they had begun to share it and which was nearly emptied by the time of the altercation.

31. Upon being requested to reiterate his version of events, the appellant confirmed that when he found the victim in the toilet he told them not to be smoking because of the kids and because of the chemicals that were kept in the toilet. The victim told him to fuck off. The appellant said "what" in the victim repeated "fuck off". The appellants then punched the victim in the face with his right fist, clarifying that it would better be described as a slap. He maintained that this was a response to the fact that the victim who was a guest in his house had not been grateful of the hospitality of the appellant. As the appellant was trying to exit the bathroom the victim had punched him with a bottle on his head. It was a beer bottle, a Budweiser bottle. He didn't know where the victim had got the bottle. The appellant stated that he turned around and the victim was confronting him with the broken neck of the bottle. It was a brown bottle. He was holding it by the neck and he was stabbing the appellant with the neck of the bottle. The appellant was shouting at him to get out and trying to defend himself and take the bottle from him. The appellant drew attention to two scars on his left hand under his index finger knuckle and one on the palm. The appellant identified these as having been sustained when trying to seize the broken bottle from the victim.

32. The appellant later clarified that when they got out of the bathroom and were in the kitchen he managed to seize the broken bottle from the victim, and that it was at this stage that the victim began wielding a knife. The victim had taken the knife from the kitchen table. When the appellant saw him taking the knife he ran into the toilet and took the axe. When he returned, he was met with threats to the lives of his family. He stated:

> *"He told me he would kill my family, I saw the knife. I cannot explain it, it was a spur of the moment. I started to hit him with the axe. I hit him all over his body with the axe, he was saying I will kill you and your family"*

33. The appellant could not recall how many blows he had struck before the victim fell down. He said it was hard to tell and that he wasn't counting "*but I continued to hit him after he fell until he was completely silent and motionless*". He acknowledged that he had hit him a lot of times. He was asked:

> *"Q: the time the fight started when you went to get the axe, did you go straight for it or was there an argument first?*
>
> *A: I got the axe, I saw him standing there brandishing the knife, he was threatening, I was holding the axe and I told him to get out, the first hit was in the forehead and I kept hitting him."*

The appellant explained that his rationale for taking the threats seriously was because Mr Sondors' partner's (i.e., Liga's) son had "*been badly beaten up by Lithuanians with baseball bats*". The appellant said he was scared and did not know how to stop the altercation. The appellant stated later that when threatening him, the victim had said "*we*" would return, rather than "*I*".

34. The appellant stated that the initial blow to the head caused the victim to drop the knife. He did not fight back, but continued to shout threats concerning the family of the appellant. The appellant could not remember how long the attack lasted. He added, "*I cannot find an appropriate word to describe the state of mind when you cannot control your mind and actions, I lost track of time.*"

35. The appellant suggested that the bottle that the victim had used was a bottle of Budweiser that he, the appellant, had previously "stashed" behind the toilet seat two or three days previously. He explained that he was in a state of shock after the incident and that he regretted not calling the gardaí at that stage. He said that his children seeing the blood in the room was an immediate concern of his at the time.

36. The appellant said that on the 10th of September, 2019, at around 7 a.m., his partner returned home. The appellant had pretended to be asleep. When his partner asked why the carpet was missing, the appellant claimed that their dog had defecated on it, necessitating its removal. After the departure of his partner, the appellant threw keys belonging to the victim in the bushes beside a nearby carwash and, after removing the battery, threw the mobile phone belonging to the victim into the River Boyne at a place adjacent to a nearby hotel. He explained that his motive in doing so was to "*hide the tracks*".

37. Before long, the residence of the appellant became the subject of garda investigation. This had prompted the appellant to journey to Northern Ireland, with the hopes of obtaining fake documentation and then fleeing by ferry. He said that he regretted leaving Drogheda and not going to the police, stating: *"[o]f course I regret it. I finally returned and surrendered. No documents, no money, hopeless and the language problems, it's like another plane "*.

38. When this final memorandum of interview was read over to the appellant and he was asked if he wished to have any alterations or additions made thereto, the appellant stated that a second bag was all missing [i.e. it was not amongst exhibits or photographs of exhibits which had been shown to him] which he claimed contained the shoes and clothing of the victim. This bag was not recovered.

Medical Evidence of Dr Nasser

39. On the 1st of October, 2013, gardaí requested Dr Jamal Nasser to attend Drogheda Garda Station to examine the appellant. Doctor Nasser attended and examined the appellant at 19.35 on that date. A photograph had been taken on the same date of a partially healed scalp wound, which the appellant himself characterised as a scar, and which he claimed was an injury he had sustained as a result of being hit on the head by the victim with a bottle. This photograph was produced before the jury, and Doctor Nasser was asked to comment on it. Injuries to the appellant's left hand which he claimed were defensive wounds from trying to retrieve the broken bottle from the victim had been similarly photographed and these photographs were also produced to the doctor in the presence of the jury and again he was asked to comment on them.

40. Dr Nasser testified to the court that during his examination of the appellant he was exhibiting the injuries shown in the photographs. The appellant had a wound on his scalp measuring approximately two centimetres, and this wound was swelling at that stage. The appellant also had two healed lacerations on the dorsum of his left hand, each measuring measuring approximately 0.5 centimetres. They were both healed well and were not fresh injuries. Dr Nasser estimated them to be more than two weeks old.

41. Under cross-examination, Dr Nasser opined that the wounds were consistent with the history given, namely that on the 10th of September the appellant had been hit with a broken bottle.

CCTV footage

42. CCTV footage from around Drogheda town, and shown to the jury, displayed the victim walking with another male, carrying cans of beer through the town in the direction of Marsh Road. Garda O'Rourke identified the victim by way of his unusual posture and gait, and it was accepted that the other male was the appellant.

43. The footage confirmed the account of the appellant in relation to his movements and those of his partner on the 9th of September, 2013.

Additional Evidence

44. A discarded bag found at a separate location in Drogheda contained several items such as clothing and a carpet, all bloodstained and containing traces of DNA belonging to the victim. Garda McLaughlin accepted under cross-examination that this tallied with what the appellant had said in his fourth interview. However, in so far as the appellant had claimed that the Budweiser bottle and some other items were discarded in the bin of a neighbour; these were never found. The car owned by Mr Sondors was inspected and the boot thereof was found to contain bloodstains which were DNA matched to the victim.

The Application for a Direction

45. At the close of the prosecution's case, defence counsel applied to the trial judge in the absence of the jury for a direction on the murder charge in reliance on the first leg of the test laid down in *R v. Galbraith* [1981] 1 WLR 1039. It was submitted that there was insufficient evidence to enable a jury properly charged to convict of murder. The case advanced in that regard was that there was no evidence of the specific intent required in order to convict of murder, namely an intention to kill or cause serious injury to some person whether the person actually killed or not.

46. The application was premised on the fact that the only account before the jury concerning how the appellant had come to kill Audrius Butkas was the appellant's own account. That account, it was suggested, did not support an intention to kill or cause serious injury. The appellant had himself variously suggested that he had acted in self-defence, that he may have been insane at the time (although the case was not being defended on the basis of insanity), and that he had totally lost self-control due to provocation.

47. The court was reminded that the appellant had pleaded not guilty to murder but guilty of manslaughter upon arraignment, but that this had not been acceptable to the Director of

Public Prosecutions who had insisted that the appellant's trial for murder should proceed. It was suggested that manslaughter represented the reality of the case, and that the court of trial having heard all of the prosecution's evidence the matter should be withdrawn from the jury at that point. If, however, the court was not prepared to withdraw the murder charge from the jury, the defence's fallback position was that the court should at least be prepared to allow the jury to consider the partial defence of provocation and whether the prosecution had proved beyond reasonable doubt that the appellant had not killed the victim in a situation where he had totally lost self-control due to provocation.

48. The trial judge refused the application for a direction stating:

> *"JUDGE: All right. Well, I had given the matter some thought and you know earlier on that I had asked for the interviews myself just to have had a look at the interviews. Mr O'Loughlin, I'm not disposed to granting your application with regard to a direction.*
>
> *MR O'LOUGHLIN: Certainly.*
>
> *JUDGE: I don't think that that's well founded in the case. There is an account given in interview four by Mr Gaizutis, these are my words, there's a somewhat embellished account given in interview six by Mr Gaizutis in relation to what he says occurred. There are no there is no independent evidence. There are no other witnesses. In my view I think it is a matter that can go to the jury with the warnings and particularly the passage as set out by Mr Justice Barrington in relation to what they have to consider and how they consider it.*
>
> *MR GAGEBY: May it please your lordship.*
>
> *MR O'LOUGHLIN: Very good. I'm obliged to you."*

49. The reference to Mr Justice Barrington refers to the late Supreme Court judge's remarks in his judgment in Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Kelly* [2000] 2 I.R. 1., to which the trial judge in this case had been referred in the course of submissions, concerning the appropriate instructions to be given to a jury about how they should approach the partial defence of provocation, including that "*the trial judge should relate these principles to the concrete evidence before the jury and to point out that there is a certain threshold of credibility*", and also the need to instruct the jury to take account of an accused's temperament, character and circumstances.

50. As was implicit in the remarks of the trial judge just quoted, she was prepared to accede to the application that the jury should be allowed to consider the partial defence of provocation; and that issue was duly addressed by both counsel in their closing addresses, and also by the trial judge in her charge. No complaint is made with respect to any of that.

Submissions on behalf of the Appellant

51. The essential point argued on the appeal is that the trial judge was wrong not to grant a direction.

52. Counsel for the appellant has submitted that only version of events that was presented to the jury as to what occurred at 5 Marsh Road, Drogheda, Co. Louth on the 9th and 10th of September 2013 was that given by the appellant in Garda custody. The appellant's version of events was not contradicted or in any way undermined by the other evidence in the case. On the contrary, the remaining evidence only served to bolster or otherwise support the appellant's version of events.

53. The appellant's explanation was that he was provoked by the victim into committing the murder. As such, it was the appellant's case that as a result of being attacked by the victim and having been threatened by him, the appellant suddenly lost control and that it rendered him so subject to passion that he was no longer master of his mind.

54. Once that defence was successfully raised, the onus was on the prosecution to disprove that to the satisfaction of the jury beyond a reasonable doubt.

55. The credibility of the appellant was not brought into question. His version of events was volunteered without the benefit of knowing the extent of the evidence against him. The appellant therefore could not be accused of manufacturing or tailoring a version of events that married with the remaining evidence.

56. In considering whether or not a defence of provocation is established, a jury should decide, having regard to the appellant's temperament, character and circumstances, whether the acts of the victim were such that they caused the appellant to totally lose his self-control. Again, the prosecution did not offer the jury any evidence as to the temperament, character and circumstances of the appellant that would help to negate or otherwise undermine the defence raised.

57. It was submitted that the trial judge was not in a position to point to any evidence that might be looked upon as undermining the credibility of the appellant. The trial judge in her charge was not in a position to point to any piece of evidence adduced by the prosecution that could possibly serve to defeat the defence of provocation.

58. It was further submitted that the trial judge had incorrectly taken the view that there was some embellishment on the part of the appellant. It is submitted that this was at variance with the view taken by the investigating gardai and that it was not consistent with the realities of the case. Any imprecision by the appellant in recounting, in exact chronological order, the events as they transpired that night was understandable, given the nature of what occurred. Nothing the appellant said was shown to be untrue.

59. It was stated to be not the appellant's contention that either the trial judge or this court ought to substitute its own view for that adopted by the jury, the tribunal of fact. Rather, it was the appellant's contention that a jury could only reach a verdict on the basis of the evidence presented to it. There was a complete lack of evidence to defeat or undermine,

in any way, the version of events given by the appellant. It was therefore incumbent upon the trial judge to recognise the insufficiency in the evidence, and to foresee the dangers of allowing a jury to consider the charge of murder in such circumstances and to direct the jury accordingly.

60. We were referred by counsel for the appellant to the cases of *The People (Director of Public Prosecutions) v. O' Callaghan* [2013] IECCA 46 and *The People (Director of Public Prosecutions) v. Alchimionek* [2019] IECA 49. The *O'Callaghan* case was relied on as being an example of a case in which there was a directed verdict where it was suggested that relevant evidence, notwithstanding that it was all one way, had been insufficient to support a conviction. The *Alchimonek* case was relied upon as being a case in which a jury had returned a perverse verdict in circumstances where the issue of insanity had been left to them notwithstanding that the evidence of the accused's insanity at the time of the crime was all one way.

61. In the *O'Callaghan* case, which concerned the armed robbery of a post office, the case against the accused, which was based on circumstantial evidence, had depended on three components. The first was the evidence of an eyewitness who encountered a number of men in balaclavas running away from the direction of the post office which was robbed. He saw one of them discard his balaclava and had pointed it out to Gardaí as well as providing them with a physical description the person who had discarded it. The second component to the case was an account given by the accused to the gardaí concerning his movements on the day of the robbery, which account the Gardaí were able to demonstrate was untrue; and the third component, characterized by the court of criminal appeal as being "the crucial one", was DNA evidence recovered from the balaclava. The Court of Criminal Appeal concluded that in circumstances where a person with a DNA profile of matching that of the accused and a number of other people with DNA profiles had been in contact with the material that made up the balaclava at some undetermined time prior to its having been discarded there was not a sufficient evidential basis from which a jury, properly directed, even if they accept the evidence before it, could conclude beyond reasonable doubt that the accused, rather than any of the other, unnamed, persons who had been in contact with the balaclava material committed the offence. Accordingly, the court concluded, a direction should have been granted and the appeal was allowed.

62. The *Alchimionek* case had an entirely different factual matrix. In that instance a jury had convicted an accused of manslaughter and assault causing harm, in circumstances where the defence of insanity had been advanced and psychiatric evidence adduced by both the prosecution and the defence had been essentially ad idem to the effect that the material time the accused had been suffering from a mental disorder, being either full psychosis or psychotic depression. Moreover, both legal teams had been in agreement that the appropriate verdict should be not guilty by reason of insanity. The trial judge had, however, felt compelled both by statute and on the basis of case law to leave the issue of insanity to the jury and the jury had returned verdicts of guilty on both counts. The Court

of Appeal quashed the verdict on the basis that the decision of the jury had been perverse and against the weight of the evidence.

Submissions of Respondent

63. In reply, the respondent takes issue with the contention of the appellant that since the only evidence of the incident was his own account, accepted as being true and accurate by the gardaí, the trial judge ought to have directed a verdict on the murder count of not guilty. The prosecution argued that it could not be that, simply because some factual matters in the accused's interviews chimed with other evidence, so much of his interviews as laid out a possible provocation defence ought to have been accepted as gospel thereby entitling him to a direction. Such an argument is fundamentally misconceived because there was a substantial case to justify murder going to the jury, as well as a legal and constitutional difficulty in suggesting that the jury has no role in assessing the provocation defence.

64. The respondent says the appellant's contention is wholly at variance with both the *Galbraith* test and any Irish cases approving it; moreover, the assertion that he is entitled to a directed verdict in his favour, wholly ignores the constitutional and legal imperative that the jury decide on the issues of fact where a possible partial defence of provocation is raised – not the trial judge.

65. The respondent accepts that once provocation is raised, the onus is on the prosecution to negative the defence. However, the contention that the appellant in this case was entitled, on the evidence presented to the Court and jury, to a directed acquittal on the charge of murder is firmly rejected. Provocation is but a partial defence to a murder charge.

66. We were reminded that the Irish courts have consistently and, on a number of occasions, adopted the principles in *R v. Galbraith* (see the cases of *DPP v. M* [2015] IECA 65, *DPP v. Choung Vu* [2015] IECA 257, *DPP v. E.C.* [2016] IECA 150 and *DPP v. Berry* [2017] IECA 135).

67. It was submitted by the respondent that when applying for a direction, the appellant was obliged to bring himself within a limb of the Galbraith formulation. At that stage in the prosecution of Mr. Gaizutis, the court had copious evidence that the deceased had returned to the appellant's residence, that a bloody and persistent assault had been visited on the deceased, with an axe; that the accused and Mr. Sondars, who lodged upstairs, had done a substantial clean-up of the premises, that they had bagged up incriminating material and dumped it elsewhere in the town, as well as throwing Mr. Butkus's body into the tide at Mornington beach. The scene of crime investigation had established the locus of the assault was the basement of No. 5 Marsh Road. Ultimately, the accused admitted the killing and, variously, characterised the motivation as self-defence, or a loss of control. He also suggested that at one point he had been insane. The only defence raised by counsel was that of provocation.

68. Given the forensic evidence and the accused's admissions, the respondent asks rhetorically, how could it be said that there was no, or insufficient evidence, to go to the jury on the murder count? The only stated basis was that the accused had latterly claimed provocation in the course of being interviewed and accordingly since, it was claimed, there was no one able to contradict him, the matter should not be entrusted to the jury. The respondent says that such an approach is not supported by case law and runs counter to the constitutional imperative of jury trial. In addition, it is suggested that because some parts of the accused's later admissions are consistent, or sit easily with the evidence, that the accused was entitled to a similar concession, or bounce, in relation to the live issue – that of provocation. Again, such an approach is not supported by case law and runs counter to the constitutional imperative of jury trial.

69. We were reminded that the role of the jury in considering the defence of provocation is referred to by O' Flaherty J. in the decision of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Mullane* (Unreported, Court of Criminal Appeal, 11th March, 1997). In dealing with an aspect of the decision in the older case *of DPP v MacEoin*, and specifically the direction to be given to a jury when provocation is raised, he says:

> *"[The] impugned sentence is capable of creating in the minds of a jury that they might approach the matter by reference to the standard of a reasonable person. That was not intended in the judgment: the trial judge is required to make it clear to the jury at all times that they must decide matters by reference to the state of mind of the accused. That is not to say, as the judgment makes quite clear, that simply because an accused asserts that he was provoked and lost control, that the jury must necessarily accept that. Of course, they are not required to accept such an assertion. They must make up their minds as to what credibility they afford to the version put forward by the accused, or any witnesses that he may call on his behalf".*

70. It was submitted that two things are clear from this passage: (1) the jury have a role to play in considering the defence of provocation; and (2) the evidence giving rise to the defence bears no greater weight than all of the other evidence adduced in a trial.

71. This position was endorsed by Barrington J. in the later case of *DPP v Keith Kelly* [2000] 2 IR 1 where he said the trial Judge should:

> *"…invite the jury to examine the evidence on which the plea of provocation is based. He will point out to them that they are not obliged to accept this piece of evidence any more than they are obliged to accept any other evidence in the case. They are obliged however carefully to consider it and to decide not whether a normal or reasonable man would have been so provoked by the matters complained of as totally to lose his self-control but whether this particular accused with his peculiar history and personality was so provoked. At the same time, they are entitled to rely upon their common sense and experience of life in deciding this as in deciding all other matters. If the reaction of the accused in totally losing his*

self-control in response to the provocation appears to them to have been strange, odd or disproportionate that is a matter which they are entitled to take into consideration in deciding whether the evidence on which the plea of provocation rests is credible".

72. It was urged upon us that Barrington J. had also dealt with the direction to be given to a jury when the defence of provocation was raised and said that they should be instructed that the loss of self-control must be total, that the reaction must come suddenly and before there has been time for the passion to cool, and that the reaction cannot be tinged by calculation. Counsel for the prosecution has submitted whether all or any of these things might be true in any particular case is exclusively a matter for the jury.

73. In this case, the respondent submits that a jury might well have taken the view that there was evidence of calculation on the part of the appellant; being that he, on his own account, left the kitchen area of the house during the course of the dispute and went back to the toilet to retrieve the murder weapon, an axe. This axe was produced in and around the time the appellant said the deceased was threatening him and his family and in and around the time the deceased lifted a knife from the kitchen table. The loss of control in response to what was said to be provocation had also to be considered in light of the following evidence (1) that the appellant was the aggressor in that he threw the first punch, (2) the fact that the levels of alcohol present in the blood of the deceased were such that it would likely have affected his actions and reactions, (3) the fact that there were no defensive injuries present on the hands of the deceased, (4) the fact that despite the injuries the appellant says he sustained to the head and hand, all of the blood found in the house from which DNA profiles were generated belonged to the deceased, (5) the fact that the deceased was said to have been someone who would '*shout a bit if he was drunk, but he would never fight or hit anyone, he was not aggressive*' and (6) the fact that, after performing a clean-up of the scene with the assistance of Mr. Sondors, and the body having been disposed of, the appellant left the home he shared with his partner and children and abandoned them in the immediate aftermath of the incident, notwithstanding that these were the people against whom he says the threats were made and which threats had so incensed him as to cause him to lose self-control and use the axe to kill Mr. Butkus. Some relevance may be found in the attempted clean up and disposal of evidence.

74. The respondent further submits that a jury may have found the evolving narrative of the accused in interview to be highly pertinent to the provocation issue.

75. In that regard it was submitted the accused's interviews cannot be characterised as wholly exculpatory. They are mixed statements. A jury could have considered some portions more deserving of weight than others.

76. Whilst it is correct to say the CCTV footage supported the appellant's ultimate account as to how he came to meet the deceased on the night in question, it was also common case that no one else was present in the basement at 5 Marsh Road at the time of the death of Mr. Butkus save for the appellant. This is acknowledged by him during the course of his

third interview with gardai when he said '*Butkus is a dead man, he will not be able to go to the witness box to give evidence*'. Gardai who conducted the interviews with the appellant acknowledged in cross examination that what was recorded in writing was what was said by the appellant but it is clear that nobody but the appellant knows what took place, and why.

77. Insofar as the appellant repeatedly makes the case that his account is true and was substantially accepted by the Gardaí, the respondent rejects any suggestion that the question of credit, or credibility, was so much in the appellant's favour that the trial judge was compelled to give a directed verdict of manslaughter, thus vacating the jury function.

78. It is conceded by the respondent that any reasonable construction of the transcript will indicate that the Gardaí did agree with defence counsel that most of the forensic evidence was consistent with the accused's narrative about how he disposed of the evidence, how he cleaned up the crime scene, and had washed the jeans. Further, that Mr. Gazutis, when interviewed three weeks after the event, had small injuries on his left hand and a head injury (which he ascribed to his being assaulted by the deceased). However, there was no concession, nor could there be, that the events which led to Mr. Gazutis bludgeoning Mr. Butkus to death happened in the way, and for the reasons stated by Mr. Gazutis. As Mr. Gazutis presciently offered "*Butkus is a dead man, he will not be able to go to the witness box to give evidence.*"

79. The respondent distinguishes the facts in the cases of *The People (Director of Public Prosecutions) v. O' Callaghan* and *The People (Director of Public Prosecutions) v. Alchimionek* from those in the instant case. In *O' Callaghan*, the application for a directed acquittal was based on a contention that there was insufficient evidence to put before the jury that the accused had committed the offences, this is not the position in this case as the appellant entered a plea to manslaughter having previously accepted in garda interviews that he was responsible for the unlawful killing of Mr. Butkus. In *Alchimionek*, both the prosecution and defence had contended for the special verdict of not guilty by reason of insanity, and the expert forensic psychiatrists, whose evidence was unchallenged, gave evidence of how the accused had been suffering from a mental disorder at the time of the offences. The jury returned guilty verdicts in the case which in the view of this Court went against the weight of the evidence and, as such, had to be regarded as perverse.

80. The respondent contends that the judgement of this Court in the *Alchimionek* case is useful insofar as it deals with the approach to be taken by appellate courts in considering an argument that a jury verdict is against the weight of the evidence. Giving the judgement of the Court, Birmingham, P. said:

> *"As has been made clear in cases such as DPP v. Tomkins [2012] IECCA 82 and DPP v. Nadwodny [2015] IECA 307, a decision to quash a verdict because it is perverse is a very exceptional one. This reflects the primacy 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, in 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".

81. The respondent says that the appellant has not pointed, and it was submitted cannot point, to any case in which the defence of provocation has resulted in a directed acquittal on a charge of murder. The respondent submits that granting such a direction would in this case and in any case in which the defence was raised involve a trespass into the function of a jury in determining all issues of fact.

Discussion and Decision

82. We have given careful consideration to the arguments on both sides but find that we are persuaded that those of the respondent are correct.

83. The starting point is Article 38.5 of the Constitution which provides that:

> "Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury"

None of the exceptions allowed for in section 2, section 3 or section 4 of Article 38 apply in this case.

84. In the light of the constitutional imperative contained in Article 38.5, it is only in cases where there is insufficient evidence to enable a jury properly charged to convict in any circumstances, alternatively such evidence as exists is so infirm that a jury properly charged could not safely convict on it in any circumstances, that a case should be withdrawn from the jury. The law as set out in *R v Galbraith*, although emanating from a jurisdiction which does not have a written Constitution containing a provision similar to that in Article 38.5, nonetheless fully reflects the position in Irish law. The *Galbraith* jurisprudence has been approved many times in this jurisdiction. Accordingly, the jurisdiction to withdraw a case where it is proper to do so exists but it is a power to be used sparingly.

85. The submissions made by counsel for the respondent have, in our view, eloquently demonstrated that even though the only account as to what occurred emanates from the appellant there are numerous decisions as to matters of fact that arise for consideration in any weighing or assessment of that evidence. It is manifest that the prosecution does not accept at face value every aspect of the case put forward by the defence. While it is true that some Garda witnesses accepted that aspects of the appellant's account were consistent with other evidence uncovered in the course of the investigation, the point is rightly made and justified upon a close inspection of the transcript, that at no point was there a concession that the account provided by the appellant concerning how he came to

kill Mr. Butkus was correct and that the killing necessarily happened in the way, and for the reasons stated by the appellant.

86. It has been correctly pointed out that the product of the interviews with the appellant were mixed type interviews. The jury were not obliged to accept every part of those interviews. For example, they would have been entitled, if they saw fit, to accept those parts of those interviews which were inculpatory and reject those which were exculpatory. In a criminal trial, and as a general rule, all relevant issues of fact must be left to the jury for their consideration and, as GW Hogan et al point out in their 5th edition of the seminal work entitled *Kelly:The Irish Constitution*, at para 6.5.428, *"[a]s a general rule, all relevant issues of fact must be left to the jury for their consideration and the shadow of unconstitutionality will hang over legislation [and we would add judicial intervention] which seeks to deprive the jury of any portion of their fact-finding role."* A properly granted a direction does not fall foul of this rule because in such a case there is an absence of evidence sufficient to convict on any view of the matter; alternatively an absence of evidence of sufficient quality and cogency to enable a jury properly charged to convict on any view of the matter. Neither of those positions obtains here. Yes, it is true that the only account as to what happened emanates from the appellant, and there is no express evidence that contradicts it. However, simply because there is no evidence tending to contradict the appellant's account does not mean that his account must in all respects necessarily be accepted and deemed to be credible and reliable. The account provided might or might not be correct, and it might or might not be credible and reliable. Moreover, it might be credible and reliable in some respects but not in others. A jury is uniquely qualified to assess such an account, to consider it in the context of such extrinsic direct and circumstantial evidence as is otherwise available and, applying their common sense and experience of life, to determine what is credible and reliable and what is not, and to assess what weight is to be afforded to the account as a whole or to different parts of it. These are issues of fact entirely within the competence of a jury to determine. They have not been predetermined and there is no reason why, in a case such as the present, a jury should not be allowed to deliberate upon them and make relevant determinations.

87. We are reinforced in our view by relevant case law to which allusion has already been made in the submissions. For example, in *The People (Director of Public Prosecutions) v. Mullane* (unreported, Court of Criminal Appeal, 11th of March 1997) O'Flaherty J, giving judgment for the court, stated:

> " … the trial judge is required to make it clear to the jury at all times that they must decide matters by reference to the state of mind of the accused. That is not to say, as the judgment [in *The People (Director of Public Prosecutions) v. McEoin* [1978] IR 27] makes quite clear, that simply because an accused asserts that he was provoked and lost control, that the jury must necessarily accept that. Of course, they are not required to accept such an assertion. They must make up their minds as to what credibility they afford to the version put forward by the accused, or any witnesses that he may call on his behalf."

88. Similarly, we draw support from the extract from the judgment of Barrington J in *The People (Director of Public Prosecutions) v. Kelly* which we quoted earlier in reviewing the submissions of the respondent.

89. Indeed, all of the case law on provocation is to the effect that where a trial judge is of the view that the low threshold for allowing a possible partial defence of provocation to be considered has been met, all of the factual issues arising thereafter in regard to the issue of provocation are exclusively matters for the jury to determine. The jury determines whether the provocation complained of actually existed, the jury considers whether or not the accused, with his particular temperament and character and in his particular circumstances might indeed have been provoked on the occasion in question; the jury considers whether there was in fact a loss of control and whether it was total; and the jury considers whether what was done was done before passions had time to cool; to list but some of the issues of fact for their determination. Moreover, they will approach these issues on the basis of assessing whether the prosecution have ultimately proved to the standard of beyond reasonable doubt that the accused was not provoked as he claims to have been. If they are satisfied that the prosecution has negatived to the standard of beyond reasonable doubt the possibility that the accused acted in circumstances where he had totally lost his self-control due to provocation they are then entitled to convict, and if they are not so satisfied they are obliged to acquit.

90. The ingredient of murder which the appellant contends was missing so as to entitle him to a direction on the murder charge in reliance on the first leg of the Galbraith test was proof that, in killing Mr. Butkus, he had intended to kill or cause serious injury to some person whether the person actually killed or not. This may be simplified to the intention to kill or cause serious injury to some person, as the doctrine of transferred malice has no relevance in the context of the present case. The starting point in that regard is that an accused is presumed to have intended the natural and probable consequences of his actions, although that presumption may be rebutted. Moreover, it is for the prosecution to prove beyond reasonable doubt that that presumption has not been rebutted. In normal circumstances it would be a matter for the jury to examine the evidence in the case to see if any of it tends to rebut that which is to be presumed. In this case there was a suggestion of possible self defence (although the defence did not press it), and there was also a suggestion of possible insanity (although again the defence did not press it). Nonetheless these were matters that a jury would have been entitled to at least consider, even if they were likely to quickly reject them. The defence actually contended for was the partial defence of provocation. It is fundamental to the defence of provocation that the accused actually intended to kill or cause serious injury, but that notwithstanding that he had such intention he should not be convicted of murder by virtue of having totally lost self-control in the face of a provocation. The partial defence of provocation is recognised as being anomalous and it is said to represent a concession to human weakness. What is significant, however, is that in a case where provocation is relied upon the fact that the killing may have taken place in such circumstances does not tend to rebut the presumption that the accused intended to kill or cause serious injury. On the contrary, it supports that which is to be presumed. The accused may be still be entitled to have a

verdict of manslaughter recorded rather than of murder, if the evidence is determined by the relevant tribunal of fact to support the claim of a total loss of self-control due to provocation, but the mere raising of the partial defence of provocation does not tend to rebut the presumption that the accused intended to kill or cause serious injury.

91. Accordingly, there was in this case a *prima facie* case of murder and it was for the jury to determine whether or not the appropriate verdict was in fact murder. The appellant had raised the partial defence of provocation and it is required to be established by the relevant tribunal of fact, i.e. the jury, whether he was entitled to the benefit of that defence. If the trial judge had adopted the approach commended by the appellant on this appeal, she would, in effect, have concluded that no reasonable jury could possibly question what the appellant had said in his interviews with An Garda Siochána with respect to how the killing occurred, and with respect to his claim of having been provoked. Such an approach would have been manifestly incorrect, and we believe that if the trial judge had withdrawn the case from the jury she would have been completely unjustified in doing so.

92. Accordingly, we find no error in the approach of the trial judge. She was right to allow the matter to go to the jury. We find no basis for believing that the trial was in any way unsatisfactory or that the verdict is in any way unsafe.

93. We therefore dismiss the appeal.