THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 107

Record Number: 17/19

Edwards J.
McCarthy J.
Kennedy J.

UNAPPROVED

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/

- AND -

DAVID O'LOUGHLIN

APPELLANT

JUDGMENT of the Court delivered on the 23rd day of March 2021 by Ms. Justice Isobel Kennedy.

1. On the 28th January 2019 the appellant was convicted of the murder of Liam Manley and sentenced to life imprisonment. The appellant now seeks to appeal against his conviction.

Background

2. The appellant was charged with the murder of Liam Manley on the 12th May 2013, at Garden City Apartments, Cork.

3. The deceased, Mr Manley, was 59 years old at the time. He had fallen on hard times and struggled with an alcohol dependency over the years and lived in sheltered accommodation provided by the Simon Community. On the night in question he was observed as being intoxicated but not causing any trouble.

4. Early in the morning of 12th May 2013, CCTV footage showed the appellant go to the McDonalds fast food restaurant and purchase some take-away food and bring it across the road to the deceased. At 4:23am CCTV footage showed the appellant and the deceased going back to the appellant's apartment.

5. CCTV footage showed a Mr David O'Mahony enter the appellant's apartment at 6:04am. At some stage after Mr O'Mahony arrived, the evidence disclosed that the appellant attacked the deceased in the apartment. According to the witness, the appellant punched the deceased full force a number of times to the head, which resulted in blood being splattered over the walls and couch in the living room in the apartment. At some stage between the hours of 6am and 8am the appellant took the deceased out of the apartment and put him head first into a rubbish chute at the top of the apartment. The evidence would suggest that there was a struggle on the part of the deceased before he was pushed head first down into the rubbish chute.

6. The accused returned to the apartment and evidence was given by various witnesses as to what transpired in the course of the day, including admissions made by the appellant to a number of persons by phone and who later called to the apartment where he indicated that he had "put the old man down the drain".

7. On Monday 13th May 2013, Michael Francis Ford, whose job was to put rubbish from the ground into the emptied bin, discovered that the rubbish chute was blocked. He used rods

to attempt to unblock it. A number of bags came down the chute followed by blood and eventually a body fell down from the chute.

8. The State Pathologist, Dr Margaret Bolster, gave evidence that the cause of death was a combination of traumatic and positional asphyxia and hypoxia.

9. Following the discovery of the body, the investigation began; CCTV footage was gathered by gardaí from around the centre of Cork City and, in due course the appellant was nominated as a suspect. The appellant was arrested on 21st May 2013 , and was interviewed on six separate occasions by members of An Garda Síochána. He ultimately accepted that the deceased had been in his apartment and that nobody else had been involved in any altercation or assault with the deceased.

10. The trial commenced on the 15th January 2019 and on the 28th January 2019, following a ten-day trial, the appellant was convicted of the murder of Liam Manley.

Grounds of Appeal

11. The appellant puts forward nine grounds of appeal in his notice of appeal, and while in written submissions he appears to rely on five grounds, it was clarified on the hearing of this appeal that he relies on all nine grounds, albeit grouped together. The grounds as set out in the notice of appeal recite as follows:-

(1) That the learned trial judge erred in law when allowing into evidence statements made by the appellant to Detective Garda Padraig Harrington and Detective Garda Brian Maher at his apartment on the evening of Monday 13th May 2013.

(2) The learned trial judge erred in law in refusing the appellant's application, at the close of the prosecution case, to direct the jury to find the appellant not guilty on the basis that the deceased's death was caused by an intervention which amounted to a *novus actus interveniens*.

(3) The learned trial judge erred in law in permitting the trial to proceed to the jury and in failing to remove the matter from the jury in circumstances where the evidence in the case did not warrant a conviction for murder.

(4) That the learned trial judge erred in law in failing to re-direct the jury on the grounds requisitioned by counsel for the defence.

(5) The learned trial judge erred in law in refusing the appellant's application for the jury to be discharged on the basis of the prejudicial nature of the evidence given by Detective Garda Padraig Harrington and the fundamentally unfair and prejudicial manner in which the evidence of Garda Harrington had been summarised to the jury by the learned trial judge in her charge to the jury.

(6) The learned trial judge erred in law in incorrectly charging the jury with regard to oblique intention and/or with regard to section 4(2) of the Criminal Justice Act 1964.

(7) The learned trial judge erred in law in incorrectly charging the jury with regard to the principles concerning an intervention which amounts to a *novus actus interveniens*.

(8) The learned trial judge erred in law and in fact in failing to properly charge the jury regarding the unreliability of the evidence given by the principal prosecution witness, David O'Mahony.

(9) The learned trial judge erred in law and in fact in her charge when she charged the jury that the denial by David O'Mahony of a question put to him in cross-examination constituted evidence.

12. Mr O'Higgins SC for the appellant clarified that Grounds 1 and 5 may be dealt with together, Grounds 2, 3, and 7 together, Grounds 8 and 9 together, Ground 6 concerns oblique

intent and, finally, Ground 4 relates to requisitions raised on issues the subject of various grounds of appeal.

13. In the course of the oral hearing Mr O'Higgins emphasised what he termed as the qualitative difference between the appellant's intention in putting the deceased into the rubbish chute and the actual consequences of his actions. It is said that it was not possible for the appellant to achieve his intention, which it is said was to put the deceased into the chute so that he would pass through and into the wheelie bin at the bottom. This was not possible because the chute had been blocked by rubbish bags, which became snagged in the chute largely due to the configuration of the chute. Consequently, it was impossible for the appellant to achieve his objective.

Application to amend Ground 7

14. In the latter stages of the oral hearing Mr O'Higgins sought to amend Ground 7. The ground as originally formulated reads as follows:-

> "The learned trial judge erred in law in incorrectly charging the jury with regard to the principles concerning an intervention [which amounts to a *novus actus interveniens*.]"

15. The appellant seeks to delete the portion in brackets, which application is opposed by the respondent.

Discussion

16. Order 86 Rule 10(1) of the Superior Court Rules as inserted by the Rules of the Superior Courts (Court of Appeal Act 2014) provides;-

> "10. (1) A notice of appeal, or any other document used in an appeal to the Court of Appeal, may be amended at any time on such terms as the Court of Appeal thinks fit.
>
> (2) An application for leave to amend shall be made by motion on notice to the other parties who would be affected by the amendment."

17. It is well settled that an application to amend at a late stage is depreciated, particularly where it is sought to amend the grounds of appeal so as to seek to rely on a new ground which was not raised in the course of the trial or referred to in the original grounds of appeal.

18. However, in the present case, the point sought to be argued was ventilated in the court below and indeed formed the substance of applications made on behalf of the appellant, albeit with emphasis on the issue of a *novus actus interveniens*. Mr O'Higgins now seeks to argue the ground on the basis that an intervention may include a pre-existing situation as distinct from a *novus actus interveniens*.

19. We are satisfied that the amendment sought is not of such a character so as to prejudice the respondent. The argument was made in the court below and the amendment sought simply seeks to make a more nuanced argument.

20. In the circumstances we will permit the amendment and proceed accordingly.

Ground 1

21. This ground is concerned with evidence of statements made by the appellant to Detective Garda Harrington and Detective Garda Maher at his apartment on the evening of Monday 13th May 2013.

22. On the 13th May 2013, following the discovery of the body of the deceased, Garda Harrington and Garda Maher were engaged in house-to-house enquiries in the immediate area. They called to the appellant's apartment and asked the appellant several questions. The appellant made a number of exculpatory statements on which the respondent subsequently relied as evidence of lies.

23. Counsel for the appellant argued that the statements made by the appellant to Gardaí Harrington and Maher on the evening of Monday 13th May 2013 ought not to be admitted as evidence on the basis that they were made in circumstances which were fundamentally unfair to the appellant and their prejudicial effect outweighed their probative value. In particular,

counsel for the appellant focused on the fact that the gardaí noticed blood on the floor and cuts on the appellant's hand, and yet they maintained that this did not lead to them forming suspicions about the appellant. Counsel for the appellant further took issue with the fact that the appellant was merely told an "incident" had occurred. The appellant was not cautioned and was not asked to read and sign the note taken of his statements.

24. In her ruling on the issue, the trial judge held that the statements were admissible:-

> "So all told, in terms of the information that they had, they were entitled to carry out the house to house enquiries. And on the basis of the information that they had, the accused clearly did not become a suspect in light both of the fact that they were unaware of the blood, but then secondly in relation to their knowledge of the accused themselves. So that then raises the issue as to whether any unfairness arises. And I am of the view that no unfairness arises to the accused, particularly having regard to the fact that there is no confession made by the accused, or indeed anything of a positive involvement in respect of his interaction with Mr Manley on the night in question. It's an exculpatory statement that he makes. But obviously the prosecution seek to rely on it in terms of lies having been told.
>
> …
>
> Mr McGrath is correct, this doesn't raise admissibility issues. It raises a problem for me and it's myself who will have to deal with it in terms of Lucas warnings. But with respect to the question as to whether this conversation can be admitted into evidence, well it most certainly can be admitted into evidence for the reasons that I've stated in respect of the ability and requirement on the guards to conduct such investigations. The nature that they conducted these in, the view that they had of the accused at the time, and the fact that I won't have regard, and shouldn't have regard to the actual quality and professionalism of the investigation."

Submissions of the appellant

25. The appellant submits that the consistent failure by the gardaí to offer the appellant the opportunity to sign Garda Harrington's note of the statements rendered the statements involuntary and constituted a breach of the Judges' Rules. It is said that the gardaí must have believed the appellant to be a suspect when he was questioned in the early course of the investigations given their observations of blood in the apartment and open cuts on the appellant's knuckle.

26. The appellant refers to *The People (DPP) v. McNally* (Court of Criminal Appeal, 16th February 1981) where the Court held that the failure by gardaí to make a note of alleged verbal statements made by the accused and their failure to afford the accused the opportunity to correct, amend or reject the note rendered the statements by the accused inadmissible.

27. The appellant, with reference to *The People (DPP) v. Shaw* [1982] IR 1, submits that the circumstances in which the statements were made to the gardaí and subsequently used by the gardaí were manifestly unfair.

28. The appellant argues that it is a breach of the constitutional fairness of procedures and should not be permissible for any answers elicited from an accused person by gardaí on the basis that they were merely investigating an "incident" as opposed to investigating a violent, unnatural and sudden death, to be used against the accused person at trial, particularly in circumstances where the accused person was, himself, unaware that any death had occurred at the time he answered said questions.

Submissions of the respondent

29. The respondent submits that the conversation between the appellant and Garda Harrington took place during the course of routine house-to-house enquiries and at a very early stage of the investigation. Enquiries involved several apartments in the relevant

complex including that of the appellant and putting questions to the residents of the apartments with a view to ascertaining whether any useful information might be obtained. There was no obligation to caution the appellant or any other resident of the apartment complex in circumstances where none of the said residents were suspected of involvement in any criminal offending and at a time prior to the Detective Garda 'making up his mind to charge' any of the said residents.

30. The respondent, with reference to *The People (DPP) v. O'Reilly* [2009] IECCA 18, argues that no breach of the Judges' Rules is identifiable in respect of the appellant in circumstances in which the Detective Garda had not made up his mind to charge the appellant and had not, unlike the circumstances of *O'Reilly*, considered the appellant a suspect.

31. The appellant was afforded every opportunity to comment on, impugn or disclaim the contents of the said conversation when formally interviewed under caution on the 21st May 2013 and having consulted with his legal advisors.

32. The respondent argues that *McNally* can be distinguished from the present case in that it concerned admissions, which attract particular protections and furthermore, *McNally* was concerned with a failure to document or take note of the statements made which is not the situation in the instant case.

33. The respondent says that the learned trial judge properly exercised her discretion in holding the details of the relevant conversation admissible.

Discussion

34. In essence, it is said on behalf of the appellant that when he made his statements to the gardaí on the 13th May 2013, the prevailing circumstances ought to have led the investigating gardaí to infer that he was a suspect and have caused a caution to be administered. It is said that the statements were taken contrary to the Judges' Rules, that their prejudicial effect

outweighed their probative value and moreover, that the circumstances in which the statements were made to the gardaí were fundamentally unfair. Consequently, it is said that the statements should have been deemed inadmissible by the trial judge.

The Evidence

35. The background to this ground is founded on the house-to-house enquiries made by the gardaí on the 13th May 2013. Detective Gardaí Harrington and Maher were tasked with carrying out enquiries at the relevant apartment block and as a consequence called to number 10, the appellant's residence. In direct testimony Detective Garda Harrington indicated that they arrived at 20:10 and met with the appellant. He said he informed the appellant that the gardaí were investigating a serious incident and asked if they could enter the apartment. There then followed a conversation which took approximately 30 minutes. Detective Garda Harrington indicated in evidence that he made notes of the conversation, initially on half-sheet and then recorded the notes in his official notebook approximately three hours later at the Bridewell garda station. In essence, his evidence disclosed that the appellant had informed them that he had been at home all weekend and had not left the apartment complex, that he had stayed at home partying and he did not hear anything suspicious.

36. The appellant was not asked to sign the note at the time and the explanation offered for this was that the appellant was not a suspect at that point. When the appellant was arrested in excess of one week later, on the 21st May 2013 the note was shown to him and the appellant said it was approximately 75 percent accurate. Moreover, there was a discrepancy in the note in that Detective Garda Harrington accepted that his contemporaneous note recorded that he informed the appellant that he was investigating an incident but he said the appellant would have been told that they were investigating a serious incident.

37. The gardaí, at approximately 20:45, called to the apartment next door and continued their enquiries, returning to number 10 at 22:00 to inform the appellant that the area outside

his apartment had been declared a crime scene. This information was conveyed to all the residents.

38. In cross-examination Detective Garda Harrington stated that he was aware that a body had been found and agreed that it was in his mind that the deceased did not go down the chute voluntarily. He agreed that he knew the appellant to be volatile and regarding his information said: –

> "[L]ike at that stage, all we were aware of was that a body had been found. We weren't aware that anybody had been assaulted, the circumstances. So all we were doing was carrying out enquiries to try and establish if anybody had heard anything"

39. He went on to say:-

> "We'd also be trained to keep an open mind, Judge, we were at the very initial stages of the investigation…
>
> [A]gain, all we were aware of was there was a body found, there was nothing to indicate that at that stage that Mr O'Loughlin had been involved."

40. No issue is taken with the fact of house-to-house enquiries, being a normal part of an investigation, however Mr O'Higgins' argument is more fundamental. He states that the superintendent, on his arrival at the scene at 18:45, formed the view that the deceased had met his death in sudden and violent circumstances. Consequently, it is said that the gardaí who carried out the house-to-house enquiries ought to have been aware of this, that the gardaí ought to have been properly briefed prior to making the door-to-door enquiries.

41. Secondly, Detective Garda Harrington gave evidence that while entering the apartment he noticed a smear of blood on the ground just inside the front door and also observed a cut to the appellant's knuckles. In the circumstances it is said that the gardaí could have had no doubt but that the appellant was at the time a suspect and ought to have been treated

accordingly. In the course of cross-examination the following was put to Detective Garda Harrington:-

"Q. Had there been any kind of case conference or…?

A. No, Judge, I would have been contacted by my Detective Sergeant Shane Bergin, I would have made my way in from home. I met Detective Garda Noel Maxwell at the Bridewell garda station and the two of us made our way over to the scene, Judge, where we met senior officers.

Q. And had he – he had told you obviously a body had been found?

A. Yes, Judge.

Q. And I also presume he told you that the man who unblocked the chute when Mr Manley descended, there had been some bleeding?

A. No, Judge, I was only aware at that stage that a body had been found.

Q. You were only aware that a body had been found. But in any event, it was enough, it's such an unusual occurrence, it was certainly enough to trigger an investigation?

A. That's correct, Judge, it was suspicious.

Q. And although one cannot rule out that people might engage in an act of self – harm, is certain – another possibility that had to be canvassed was that he didn't go down the chute voluntarily?

A. That would be correct, Judge, yes.

Q. And that was in your mind when you went there?

A. Yes, judge."

42. At a later stage in the cross-examination, the witness confirmed that they were aware that a body had been found, but they were not aware that anybody had been assaulted or the circumstances and he said: –

"No, Judge, like at that stage, all we were aware of was that a body had been found. We weren't aware that anybody had been assaulted, the circumstances. So all we were doing was carrying out enquiries to try and establish if anybody had heard anything."

43. When asked about the cut to the appellant's knuckles, the witness agreed that he noticed the cuts but he wasn't surprised, knowing the appellant as he did, to find that he had marks to his hands.

44. In the course of his testimony, the witness confirmed repeatedly that he had no idea when he entered the apartment that the deceased had been assaulted. He said that all he knew was that the deceased had been found in a chute and that that in itself was suspicious. The witness gave evidence that prior to his arrival at the complex he was informed by Detective Sergeant Bergin that a man had been found dead in suspicious circumstances and was directed to carry out enquiries regarding certain apartments.

45. When Detective Garda Harrington's colleague Detective Garda Maher was cross-examined he indicated that he did not have any knowledge of blood spattering or contact blood staining in or around the chute.

46. It is said, and was submitted at trial, that the proposition advanced by the respondent in the course of the voir dire was incoherent and completely incredible, namely that the cut to the hand and/or the smear of blood on the ground of the appellant's apartment, not alone failed to raise any questions in the minds of the gardaí who called to the apartment, but it is said that these findings were presented to the Court as pointing against his involvement due to his known character. Consequently, the appellant was not a suspect at the relevant time.

47. Moreover, that the absence of opportunity to sign the notes rendered the appellant's statements involuntary and thus inadmissible. It is also said that the entire process was manifestly and fundamentally unfair in circumstances where the appellant was answering questions without knowledge of the full picture and in the absence of a caution.

Discussion

48. Whilst the fundamental proposition advanced to the Court is one of fairness, the Judges' Rules provide a backdrop to the arguments advanced. The key issue centres on whether the appellant was a suspect at the time of questioning with the corresponding safeguards that such entails.

49. Rule 9 of the Judges' Rules provides:-

> "Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish."

50. Rule 1 of the Judges' Rules clearly provides that it is permissible for a member of An Garda Síochána to question any individual whom the garda believes may have useful information without caution. The rule provides as follows:-

> "When a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information may be obtained."

A caution must be administered where a member of the gardaí has decided to charge a person or where the suspect is in custody.

51. Rule 2 provides:-

> "Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions as the case may be."

52. For the sake of completeness rule 3 provides:-

> "Persons in custody should not be questioned without the usual caution being first administered."

53. In the present case, Mr O'Higgins argues in effect that it is quite extraordinary that the gardaí did not consider the appellant a suspect and consequently administer a caution before posing questions to him. Reliance is placed on rule 9 in that it is said that the gardaí failed to provide the appellant with the opportunity to correct, amend or reject or sign the note of his statements made to Detective Garda Harrington on the 13th May 2013. Moreover, no explanation was offered for this failure.

54. The gardaí have a duty to investigate criminal acts and are entitled to seek the assistance of the public in order to do so. A member of An Garda Síochána has the entitlement to ask questions of an individual whether that person is a suspect or not and there is no requirement to administer a caution unless the member has decided to charge the person or where the person is in custody. This type of questioning regularly occurs in the course of the initial enquiries as in the present case. The gardaí were tasked with house-to-house enquiries as part of the preliminary investigation and it was in this context that the appellant was asked and answered questions. Having questioned the appellant, the gardaí then continued to move from apartment to apartment carrying out the same function and calling again to the appellant to inform him that the area was a crime scene and he should make alternative accommodation arrangements. Thus, there was no distinction made between this appellant and the other occupants of the complex.

55. Furthermore, the transcript discloses that Detective Gardaí Harrington and Maher gave evidence that they were unaware of the circumstances leading to the deceased's death. This is significant in that it is said that the gardaí must have believed the appellant to be a suspect as blood smears were observed in his apartment as were recent injuries to his knuckles. The evidence that the gardaí were unaware of the details leading to the deceased's death, in particular that they were unaware of the blood in and around the chute where the deceased's body was found was accepted by the trial judge. The blood smears and the appellant's

injuries were therefore of limited, if any, significance regarding their assessment of his status as a suspect. The gardaí were conducting preliminary enquiries into a death where very little was known to them as to how Mr Manley ended up in the rubbish chute save that it was in violent and unusual circumstances.

56. In our view there was no obligation to caution the appellant as it is clear from the circumstances wherein the note was created that such did not fall within the ambit of the Judges' Rules and obviously, therefore, there can be no breach of the rules. The gardaí were entitled to question individuals as part of the investigation process, the gardaí had not made up their minds to charge the appellant, nor was he in custody, the fact that he later became a suspect and was arrested does not render his initial comments to the gardaí inadmissible. The comments made by the appellant were admissible subject to the issue hereunder, which is one of fairness and which in truth is the real issue on this ground.

Fairness issue

57. This argument encompasses procedural fairness but also raises the issue of whether the respondent should be permitted to take advantage of what is said to be incompetent police operations. In that respect, Mr O'Higgins advances the argument that the gardaí should have informed themselves before conducting enquiries regarding the manner of the deceased's death, such as the blood staining in and around the chute and that the State ought not be permitted to take advantage of what is said to be inadequate garda information.

58. At trial, Mr O'Higgins contended that the appellant did not even have an appreciation that Mr Manley had died, let alone any other information. Moreover, he says that the contemporaneous record said that the appellant was told the gardaí were investigating an incident as opposed to a *serious* incident and this serves to underscore the unfairness of the process leading the appellant to answer questions with a dearth of knowledge. It is said that the appellant's rights were infringed. In essence it is argued that it was self-evident that the

appellant was a suspect and if this is so, then the fairness of the interview at the apartment is in issue. It is at that point, that the absence of the complete record of the conversation and the opportunity to review the note falls for consideration.

Conclusion

59. It is readily apparent that the gardaí were conducting preliminary investigations. The appellant made exculpatory comments in response to their questions. The gravamen of the submissions on the part of the appellant focused on the overall fairness of the circumstances surrounding the statements made by the appellant and the alleged absence of opportunity to reject, amend or accept the contents thereof.

60. Firstly, insofar as it is said the appellant did not have the opportunity to correct, reject or accept the note, we do not agree with this submission. The appellant was arrested on the 21st May 2013 at 16.23. He was interviewed by the gardaí. The second interview commenced at 22.21 and during this interview, the contents of Detective Garda Harrington's' notebook were read over to him. When asked had he any comment to make on the notes he replied:-

A. "I've no comment to make, I don't think they are very accurate.

Q. Is that your version of events?

A. I don't think it's accurate, pretty much 75 percent of it.

Q. …[Y]ou were saying a percentage of my notes aren't accurate, can you tell me what parts?

A. I don't want to be going over it all…- over it at all."

61. We are aware that the note was made after the guard returned to the garda station, nonetheless, it cannot be said that there was a failure of opportunity to disclaim or agree to the contents thereof. In fact, when interviewed, the appellant agreed with 75% of the note,

which it must be said was exculpatory in nature. The appellant was furnished with the opportunity to respond to the note and did so. No issue can arise in this respect.

62. The evidential value of the note became evident as CCTV footage demonstrated that the appellant had in fact left his apartment during the weekend in issue, contrary to his assertion which was then relied upon by the respondent in terms of lies on the part of the appellant.

63. Reliance is placed on the well-known decision of the Supreme Court in *The People (DPP) v. Shaw* [1982] IR 1 where it was held that even where a statement is deemed to be voluntary, it may still be inadmissible on the basis of an absence of fundamental fairness. A trial judge retains a broad discretion to exclude unfairly obtained evidence, this may include situations of trickery, deception or some form of ruse which would render the process unfair. As stated by Griffin J. in *Shaw* at p.61:-

> "...[O]ur constitution postulates the observance of basic or fundamental fairness of procedures, the Judge presiding at a criminal trial should be astute to see that, although a statement may be technically voluntary, it should nevertheless be excluded if, by reason of the manner or of the circumstances in which it was obtained, it falls below the required standard of fairness."

64. The facts in this case are at some considerable remove from those in *The People (DPP) v. Breen* (Unreported, Court of Criminal Appeal, 13 March 1995), upon which the appellant seeks to rely. In the latter case, it was apparent that the applicant was on the verge of admitting his involvement in a crime and a caution was required. Rather than administering a caution, he was invited to tell the garda all about his involvement. The Court found a breach of fundamental fairness and said that the applicant ought not to have been encouraged to make an admission without being cautioned.

65. In the present case, the gardaí were engaged in preliminary enquiries, these took the form of house-to-house enquiries where the appellant was in no different a position than the other occupants of the complex. The gardaí clearly did not consider him a suspect at the time when he was questioned. The fact that he was unaware of the death of Mr Manley or the circumstances surrounding his death does not amount to a breach of fundamental fairness. The gardaí were aware that the deceased had died in violent and unusual circumstances; at the time, the investigation had just commenced, the fact that more information was not known to them is not surprising. One might say that the presence of a smear of blood might have caused some questions to be raised, but that in and of itself does not deprive the process of fairness.

66. Moreover, the appellant made an exculpatory statement, which only achieved significance in the context of CCTV footage which contradicted aspects of his account. The remarks made by the appellant were voluntary and exculpatory and we are not persuaded that any exceptional circumstances prevailed, so as to cause the trial judge to exercise her discretion and exclude an otherwise admissible statement on the part of the appellant.

67. Consequently, we reject this ground.

Ground 5

The learned trial judge erred in law in refusing the appellant's application for the jury to be discharged on the basis of the prejudicial nature of the evidence given by Detective Garda Padraig Harrington and the fundamentally unfair and prejudicial manner in which the evidence of Garda Harrington had been summarised to the jury by the learned trial judge in her charge to the jury.

Discussion

68. While the appellant seeks to rely on this ground, it is not the subject of written or oral submissions. Nonetheless, we have reviewed the transcript in order to address the issues raised, which appear to us to be twofold.

69. Firstly, the argument is advanced that the judge erred in refusing an application for the jury to be discharged on the basis of prejudicial evidence given by Detective Garda Harrington. The precise nature of the prejudicial evidence has not been identified and so we have proceeded on the basis that the entire content of his evidence before the jury was considered prejudicial.

70. On Day 7 the witness gave evidence regarding his involvement in the fourth interview with the appellant while he was detained in custody. No cross-examination ensued at that point. On Day 8, the witness was again called and gave evidence of calling to the appellant's apartment on the 13th May 2013. At 7pm on that date, he became aware of the suspicious death and was assigned by his superiors to conduct 'house-to-house' enquiries at numbers 6,7,8,9 and 10 of the apartment complex. When he and his colleague Detective Garda Maher called to the assigned apartments, only numbers 9 and 10 answered the door, number 10 being the appellant's residence.

71. The witness then gave evidence of his conversation with the appellant and said: –

> "… we would have told him that we were investigating an incident that had happened over the weekend just gone and we asked if he had been at home. He told us that he had been at home all weekend and had not left the apartment complex all weekend. He admitted us into the apartment, Judge. I asked him if he saw anything suspicious and he said no. I asked him what he had done all weekend."

72. The appellant admitted the witness and his colleague into the apartment and he conversed with him for approximately 30 minutes as set out above. The witness gave

evidence regarding the second interview with the appellant on the 22nd May 2013 and was cross-examined, *inter alia*, on the issue of the blood smear.

73. Following this evidence, no application was made to discharge the jury, however, on the conclusion of the case for the prosecution, application was made to direct a verdict of not guilty. This application did not encompass an entreaty to discharge the jury concerning the evidence of Detective Garda Harrington but concerned the issues of causation, *novus actus interveniens* and intent.

74. The judge refused the direction application and counsel addressed the jury. Prior to the conclusion of the defence closing arguments, a discussion ensued concerning the judge's charge wherein concerns were voiced on behalf of the appellant regarding the use of the alleged lies on the part of the appellant, in particular where it was said that the appellant was not informed of the event with respect to which the respondent now sought to rely on the comments by the appellant. Mr O'Higgins then continued his closing address.

75. Prior to the judge's charge, Mr O'Higgins canvassed the issue again and said:-

> "Well, what I want just highlighted is that he gave the answers that he did, but the jury should note that he wasn't appraised of the offence, he didn't know Mr Manley had died and his answer should be viewed in that light. And asked them to note that when he was arrested and he was specifically asked having been appraised that he was there to answer for Mr Manley's death, he accepted straightaway he was in the apartment. That's all."

76. Counsel for the respondent, Mr McGrath SC, indicated that that particular evidence was relevant to credibility rather than operating as corroboration.

77. The judge invited and heard further submissions on the issue including a Lucas direction and ultimately said: –

> "And to be warned if they make the finding that it is an intended lie, that people can lie for all kinds of reasons. And obviously in this case what I'd be referring to is fear and panic. But if they, having considered the context, having considered what was said, having considered that warning, they have to be able to do something with it then. And I am of the view, Mr O'Higgins, that should they get to that point and as I've indicated there's a number of factual issues that they'll have to determine to get to that point. But should they get to that point and they come to a determination that this was an intended lie, well then they can have regard to that in terms of support from the prosecution case. It seems to me that that must follow."

78. Only at this point was the issue of the discharge of the jury raised on behalf of the appellant in that Mr O'Higgins again reminded the judge that the submission had been made regarding the unfairness of the process adopted by the gardaí when conversing with the appellant in his apartment on the 13th May 2013. It was emphasised on behalf of the appellant that the consequences of the unfair process had now crystallised. The application was refused by the trial judge.

79. Mr O'Higgins rightly anticipated that the trial judge would not be disposed to discharging the jury. As is well known, the jury should only be discharged as a last resort. In circumstances where the trial judge had already ruled that she was satisfied that no issue of unfairness arose in the context of the conversation with the appellant, it would have been a step too far to discharge the jury and particularly so at that point in the trial. Moreover, the trial judge discussed at some length the manner in which she would address the jury on the issue of the conversation held with the appellant and agreed that she would explain the full context of the utterances made by the appellant at the relevant time, thus enabling the jury to discharge their function as finders of fact with her legal directions. This now brings us to

consider the second leg of Ground 5 which concerns the manner in which the trial judge addressed the jury in this respect.

80. Again we have examined the transcript of the trial judge's charge in which she addressed the house-to-house enquiries. In that respect, having assessed the content of the evidence concerning the conversation, the trial judge said as follows: –

> "Now, in relation to that, you'll note ladies and gentlemen of the jury, that when Detective Garda Harrington speaks with David O'Loughlin, he doesn't indicate what in fact the guards are investigating. What he is asking him is whether he saw anything suspicious. So there's no reference to the fact that a man's body has been found in the chute. And that's the context of the conversation that Detective Garda Harrington has with the accused. The accused has been asked whether he saw anything suspicious and he says no, and then he gives the account of having the party on a Friday, and not having been outside the apartment since. And he names Mahony, sorry, I thought he'd named the two girls, he just simply said that there were two girls in the apartment. Although I think somewhere else there is reference to Mary Fitzpatrick, I just don't see it quite directly in the transcript that I have here.
>
> Now, it's a matter for you as to how you assess that evidence, the prosecution submit to you that this is a lie and that it is therefore supportive of the prosecution case. It is a matter for yourselves, ladies and gentlemen of the jury as to how you assess this evidence. And I must give you some directions in relation to it. Firstly, you have to decide whether this was an intentional lie by the accused. It is submitted to you by the defence that the accused had very little recall of the events of the weekend, and you'll have the interview notes in front of you which show how his recollection in relation to the weekend goes in terms of the interview notes. And the accused says certain things in his first interview.

He does accept in his first interview that the old man was in his house. He accepts that Liam Manley was there and he accepts that he assaulted him. Then when CCTV footage is shown to him in the course of the second interview, you'll note that he gives further information in relation to his movements. And what the defence say is that this establishes that the CCTV jogs his memory in terms of his actions over the weekend.

So as I say, it is submitted to you by the defence that the accused had very little recall of the events of the weekend and it was only after the CCTV and other evidence was put to him in the course of the interviews that he began to recall matters. Accordingly, you first have to be satisfied that at the time when he speaks to the guards, remembering that he has asked whether he saw something anything suspicious over the weekend and not being told by the guards that in fact a man's body has been found in the rubbish chute and it is that that they are investigating.

Whether he is intentionally lying to the guards about his movement that's the first thing you have to decide, whether in fact he is intentionally lying to the guards when the house to house enquiries are being conducted. Remembering that he is only asked if he saw anything suspicious. He is not told that a body has been found and then having regard to the interview notes, perhaps particularly interview No. 1 and then interview No. 2 after the CCTV footage is shown to him. So if you are satisfied that the accused was intentionally lying, you must consider that people lie for all kinds of innocent reasons.

People lie out of panic, people lie out of fear. The mere fact that the accused told this, if you find it to be intended lie, does not mean that he is guilty of the offence. And in fact, you have an explanation from the accused in terms of why he said what he said during the house to house enquiries. ”

81. The judge then referred to aspects of the interviews and she repeated that the jury had to be satisfied that the appellant intentionally lied to the gardaí. She instructed the jury that even if they decided that it was an intentional lie, the matter did not rest there, it was incumbent on the jury to realise that people lie for all sorts of reasons and she emphasised those reasons.

82. That concluded the judge's charge on this aspect of the evidence and there followed several requisitions on the part of the appellant. In the context of this particular issue it was submitted on the part of the appellant that the jury ought to have been directed that had the appellant been informed from the start that he was being questioned in connection with the death of Mr Manley, he might not have given the same answers. If the jury could not exclude that possibility from their minds, then it was contended that the jury ought to have been informed that that was in effect indicative that the "deliberate lie test" was not satisfied. Moreover, the defence sought that the trial judge recharge the jury to clarify the issue of the CCTV footage and highlight the appellant's background to demonstrate how that may have influenced his actions.

83. The judge indicated that she had no difficulty in recharging the jury indicating that the appellant himself said that his memory improved on viewing the CCTV rather than it being a suggestion emanating from his legal team. She properly was of the view that she had addressed the entire issue in a very fair manner and refused to repeat her directions in this respect.

Conclusion

84. We have considered the transcript in great detail; which process was necessitated as it is difficult absent submissions to identify the specific concern on the part of the appellant. We have set out the extracts from the transcript which we believe relate to the requisitions raised on the part of the appellant and we do not see that any issue could possibly be raised

with the manner in which the judge addressed the evidence concerning the conversation held with the appellant on the 13th May 2013. Her charge to the jury on this aspect of the evidence, in the view of this Court, was a model of clarity and fairness and we have no hesitation in rejecting this ground.

Causation, *Novus Actus Interveniens* and Intention.

Grounds 2, 3 and 7 concern these issues and for ease of reference are as follows:-

Ground 2

The learned trial judge erred in law in refusing the appellant's application, at the close of the prosecution case, to direct the jury to find the appellant not guilty on the basis that the deceased's death was caused by an intervention which amounted to a *novus actus interveniens*.

Ground 3

The learned trial judge erred in law in permitting the trial to proceed to the jury and in failing to remove the matter from the jury in circumstances where the evidence in the case did not warrant a conviction for murder.

Ground 7 as amended

The learned trial judge erred in law in incorrectly charging the jury with regard to the principles concerning an intervention.

The issues in the case relating to the ingredients of murder

85. The appellant appeals against his conviction *inter alia* on the basis that the case ought to have been withdrawn from the jury for insufficiency of evidence. He further complains that the trial judge charged the jury incorrectly on certain legal principles potentially bearing on the jury's assessment of the evidence in terms of whether the ingredients of the offence were established beyond reasonable doubt.

86. Section 4 of the Criminal Justice Act 1964 ("the Act of 1964") provides:

(1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.

(2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted.

87. Accordingly, to secure a conviction of murder the prosecution was required to prove beyond reasonable doubt:-

(a) That there was a killing;

(b) That the killing was unlawful;

(c) That the killing was caused by the accused person;

(d) That the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not;

In the circumstances of the present case if the prosecution could prove (a) (b) and (c), but not (d) then the appropriate verdict would be one of not guilty of murder but guilty of manslaughter. However, if the prosecution were unable to prove at least (a), (b) and (c) then the accused was entitled to be acquitted outright.

88. When distilled to their essence, the basis of the appellant's complaints under this heading can be summarised as follows:

(i) Ingredient (a) was uncontroversial in that Mr Manley had clearly been killed in the sense of losing his life through the positive actions of some third party or third parties. There was no evidence that he had taken his own life or that he had suffered an accident for which he himself had been responsible. Indeed, the evidence was manifestly to the contrary.

(ii) However, in so far as ingredients (b) and (c) were concerned, the prosecution needed to establish that the circumstances in which the victim lost his life were

unlawful and that they were caused by the appellant. The appellant maintains that the evidence adduced by the prosecution, taken at its high-water mark, was not sufficient to allow a jury properly charged to be satisfied of either of those things to the standard of beyond reasonable doubt, and that in the circumstances the entire case should have been withdrawn from the jury, and the appellant should have been acquitted by direction of both possible homicide offences. Two related legal issues are therefore raised, namely lawfulness and causation.

(iii) In essence the case relied upon by the appellant is that while he may have assaulted Mr Manley, or otherwise have committed an unlawful and dangerous act, by dumping him in the refuse chute, that unlawful act or those unlawful acts were not what killed him. What killed him, says the appellant, was the fact that while sliding down the chute Mr Manley's body became obstructed by a blockage consisting of a build-up of rubbish bags that had become jammed at a bend in the chute and in consequence of this he experienced traumatic and positional asphyxia and hypoxia from which he died.

(iv) The appellant's case is that when he dumped Mr Manley into the refuse chute he did not know the chute was blocked nor had he any responsibility for the blockage. The blockage had been caused by the actions of an unknown third party and constituted, said the appellant, what is legally known by the Latin expression as a *novus actus interveniens,* or in English, a new intervening act, which had the effect of breaking the chain of causation. The first leg of the appellant's case before the court below, and reiterated before us, was therefore that while his action in placing Mr Manley into the refuse chute may have been unlawful, that unlawful action had not caused Mr Manley's death. Yes, he was killed but he was not killed by the appellant's unlawful action. The appellant had

not caused his death. (Henceforth we will refer to this argument as "the causation ground of appeal". There are several subsets to it, and we will examine these in detail in the next part of this judgment.)

(v) If the appellant is correct in respect of the causation ground of appeal he was entitled to be acquitted in full. The evidence would neither support a conviction for murder nor for manslaughter, as both ingredients (b) and (c) require to be proven beyond reasonable doubt to sustain a conviction for either of those offences.

(vi) The second, and alternative, leg of the appeal is premised on a situation where the causation ground of appeal has not found favour with the Court, and it is considered that a jury properly charged could have been satisfied on the evidence before it that ingredients (a), (b) and (c) had been established to the standard of beyond reasonable doubt. In that situation, the appellant says he should only have been convicted of manslaughter and not convicted of murder because the available evidence was insufficient to establish ingredient (d), namely that in causing Mr Manley to be unlawfully killed he had intended to kill him or at least to cause serious injury to him. While s.4(1) of the Act of 1964 refers to an intention to kill, or cause serious injury to, *some person, whether the person actually killed or not,* we are not concerned in this case with transferred malice and so the relevant specific intention, if it existed, could only have related to Mr Manley. (Henceforth we will refer to this argument as "the intention ground of appeal". Again, there are several subsets to it, and we will also examine these in detail later in this judgment)

(vii) If the appellant is correct in respect of the intention ground of appeal he was entitled to be acquitted of murder, but it would have been open to the jury to

record an alternative verdict of manslaughter. In the event of the intention ground of appeal being the only ground of appeal to succeed, this Court would have jurisdiction under s.3 of the Criminal Procedure Act 1993 to quash the conviction and sentence for murder, to substitute a verdict of manslaughter for the verdict of murder, and to remit the matter to the Central Criminal Court so that the appellant could be sentenced in relation to the manslaughter conviction.

Background

89. Counsel for the appellant applied for a directed acquittal. It is clear that in the first instance he was seeking a full acquittal on the murder charge, and that that would also apply to any possible alternative verdict of manslaughter that might fall to be left to the jury for their consideration. He was able to, and did, make a single argument of potential applicability to both possible homicide offences in respect of which his client was in jeopardy of being convicted. Those homicide offences had a common *actus reus*, comprising of the previously mentioned ingredients (a), (b) and (c). For his client to be convicted of either murder or manslaughter it was necessary for the State to prove beyond a reasonable doubt that the appellant had "caused" (in the legal sense) the death of Mr Manley. His case was that they had not done so, and indeed could not do so because the action(s) of a third party or third parties, in placing rubbish bags in the chute, which unknown to the appellant had blocked it, constituted, it was said, a *novus actus interveniens* breaking the causative link between the unlawful act of the appellant in placing the deceased in the chute and the death of the victim. In legal terms, this application for a directed acquittal in respect of all matters raised a "causation" argument and boiled down to a claim that the prosecution had failed to establish in evidence the common *actus reus* required for both murder or manslaughter. So far, so good.

90. Counsel for the appellant was also seeking, in the alternative, a directed acquittal on the murder charge only, on the basis that the prosecution had failed to prove beyond reasonable doubt that the appellant had had a specific intention to kill Mr Manley or to cause him serious injury when he placed him in the rubbish chute, and that indeed the available evidence suggested the contrary. In legal terms, this application for a directed acquittal on the murder charge only was based on an asserted absence of evidence sufficient to establish beyond a reasonable doubt that the appellant had had the required *mens rea* for murder. Again, so far so good.

91. However, in the course of making submissions in support of these applications, counsel for the appellant seemed to us to somewhat conflate the alternative cases that he was making. We say this because we understood him to be making the case that the appellant's subjective intention was somehow relevant to the causation issue, and we had, and continue to have, a difficulty in understanding how that could be so. In saying that, we do appreciate that the appellant was contending for a "natural consequences" test on the causation issue. Counsel for the appellant contended in that regard that it is counterintuitive that a person could be liable for punishment for something that they had never contemplated. However, in our view, to have couched the argument in those terms was to conflate causation with intention. They are separate issues and we intend to treat them as such. We will discuss the test appropriate to attribution of causation later in this judgment.

92. We also understand the case being made on behalf of the appellant to the effect that there should have been a direction on the murder charge, on the basis that he maintains that there was insufficient evidence on which a jury could have been satisfied beyond a reasonable doubt as to the existence of the necessary *mens rea* on the part of the appellant. Putting forward this argument, counsel suggested that the evidence was all one way to the effect that the appellant had been unaware that the chute was blocked when he had placed

Mr Manley in it, and counsel submitted that his intention ought therefore to be judged not by reference to what in fact occurred, but rather by reference to what the appellant was trying to achieve. In that regard there was at least some evidence on which it might be inferred that the appellant's likely expectation was that Mr Manley would pass through the chute without being seriously injured and land in a rubbish skip at the other end.

93. In refusing the defence's application, the trial judge stated that there were two evidential matters at hand: firstly, that the evidence in the case did not quite establish that the bags of rubbish blocked the fall of the deceased. Secondly, that the appellant thought that the deceased would fall down the chute and fall through into an awaiting bin. The trial judge noted that the evidence did not clearly establish that this was the intention of the appellant.

94. Having regard to *R v. Pagett* [1983] 76 Cr App R 279, the trial judge stated that the question that has to be addressed in relation to the issue of *novus actus interveniens* is whether the act of that third party is so independent of the act of the accused that it should be regarded in law as the cause of death. She observed that the reality of the situation was that the deceased met his death as a result of being placed in the chute by the appellant. Even if the defence application were taken at its highest point i.e. that the cause of death was due to the bags blocking the passage down the chute, it would still be the position that the deceased came to be in the chute as a result of the actions of the appellant.

Submissions of the appellant

95. The appellant submits that it could not reasonably be inferred from the evidence that the appellant had ever contemplated putting the deceased in a chute which might be blocked. The appellant argues that it was the appellant's clear intention that the deceased would pass through the chute and this intention was thwarted by the independent action of third parties who blocked the chute with rubbish bags. These independent actions caused the deceased's death and led to an outcome which was so dramatically different in degree to what the

appellant had anticipated as to break the causative link between the action of the appellant and the death of the deceased, thus constituting a *novus actus interveniens*.

96. The appellant argues that the kernel of the issue is that there was an unfairness visited on him by virtue of the fact that he was found to have the requisite *mens rea* when it was measured, not against the circumstances that prevailed in the chute which brought about Liam Manley's death, but on the basis of the action as originally contemplated by him.

97. Therefore, the conviction is based on the prosecution having made out an intention to cause serious injury and the existence of this intent was sufficient to satisfy the *mens rea* for murder with reliance on a set of circumstances which had never been contemplated by the appellant.

98. The appellant submits that there is no argument being made that the trial judge in this case was not entitled to direct the jury in accordance with *The People (DPP) v. Davis* [2001] 1 IR 146 but, it may well be the case that notwithstanding such compliance, it nonetheless was an erroneous direction in law. The appellant refers to the substantial cause test which was referred to by Birmingham J. (as he then was) in *The People (DPP) v. Joel* [2016] 2 IR 363 where he was of the view that in a manslaughter case, the test of *de minimus* is inadequate and instead, a jury ought to be directed on whether the actions or omissions of the accused was a 'substantial cause of the death'.

99. The appellant further refers to the natural consequences test which was utilised in the English case of *R v. Roberts* (1972) 56 Cr App R 95 where a natural consequence was defined in terms of that which could reasonably be foreseen to flow from the accused's act.

100. The natural consequences test was also considered in the context of escape by the High Court of Australia in *Royall v. The Queen* (1991) 172 CLR 37. Brennan J. stated that the accused's foresight, or the reasonable foreseeability of the result delimits the extent to which an accused is responsible for the consequences of his act.

101. In terms of both causation and *novus actus interveniens,* the appellant argues that there is a very strong argument that the natural consequences test should be employed as it is counterintuitive to punish a person in respect of an offence for which there is a very specific *mens rea*, based on a series of events which were never contemplated by him. This is compounded by the fact that once the issue of causation has been decided and the issue of the intervening act; the placing of the bags in the chute, deemed not to constitute a *novus actus interveniens,* the appellant is, by necessity, judged not by what occurred, but by reference to whether or not he intended to cause serious injury or death, at the time he put Liam Manley into the chute. This is so, notwithstanding that the action he intended to achieve had not occurred.

102. In his oral submissions, Mr O'Higgins states that there are in effect three issues to be considered. First, whether there is a significant qualitative difference between the action which the appellant *intended* to perform and the action that he *actually* performed. Second, he asks where the accused fits in terms of legal causation and third, Mr O'Higgins raises the issue of oblique intent which in fact forms the subject matter of Ground 6. **Submissions of the respondent**

103. The respondent argues that the act of placing the deceased in the rubbish chute made a significant contribution to the deceased's death and was related to his death in a more than minimal way.

104. The respondent submits that there was no sufficient intervention which served to break the chain of causation between the wrongful act of the appellant and the wrongful result which that wrongful act brought about.

105. The respondent notes that in arguing for a natural consequences test, the appellant refers to the English case of *R v. Roberts* (1972) 56 Cr App R 95. It is submitted that *Roberts* was decided in a jurisdiction with a legislative framework different to that which exists in

this jurisdiction. *Roberts* was decided against the backdrop of the Criminal Justice Act of 1967.

106. Aside from that point, *Roberts* and *Royall* are also of limited application as they are concerned with whether the victim's actions were a natural consequence of the accused's behaviour which does not arise in the instant case.

107. It is said that there has been no act contended for subsequent to the acts of the appellant which might serve to break the chain of causation between the placing, by the appellant, of Liam Manley in the rubbish chute and his untimely death.

Application for direction

108. It was argued that it was not possible for the appellant to achieve his intention which was for the deceased, through the appellant's actions, to pass through the chute and into the wheelie bin at the bottom. This was not possible to achieve as the chute had been blocked by other persons placing rubbish bags therein and this particular action of others constituted a *novus actus interveniens*, moreover, the chute itself was of a poor design and configuration whereby bags could snag on a displaced joint, thus impeding egress from the chute. Reference was made to the causes of death as given by Dr Bolster.

109. It was said at trial and on appeal that the appellant's arguments do not result in the appellant being immune from criminal liability, in that, the placing of the deceased in the chute constituted an assault which was more than trivial in nature, which amounts to manslaughter.

110. In the concluding stages of the direction application, in terms of the qualitative difference between the appellant's objective and the consequences of his actions, Mr O'Higgins briefly mentioned the issue of what he termed a failing of intent.

111. It is said that the trial judge erred in refusing the application to direct a verdict of not guilty and in particular reliance is placed on the judge's determination that the issue arising

on the appellant's application for a direction was whether the *actus reus* had been made out; whether the appellant's act had caused the death of the deceased and that the issue of what he intended to achieve was not relevant to her determination. This, it is said, is central to this appeal as the issue arose again in the course of the judge's charge.

The appellant's position

112. It is accepted on the part of the appellant that he placed the deceased into the rubbish chute. It is said that at the time he did this, he believes that the deceased would pass through the chute and into a bin placed at the bottom of the chute. His intention was frustrated by virtue of the presence of the rubbish bags and the combination of positional asphyxia, mechanical asphyxia and hypoxia, described by the Deputy State Pathologist as a "perfect storm", brought about his death.

The relevant evidence

113. David O'Mahony stated that the appellant said to the girls in the apartment on the night in question that Mr Manley would crawl out and go home. In the course of his interviews, the appellant acknowledged that he was aware the chute could become blocked, moreover, he adverted to the presence of signs indicating that large items should not be thrown into the chute due the possibility of becoming stuck therein. The specific portion of the fourth interview reads as follows:-

> "Question: the bin chute outside your door, do you know where that leads to?
>
> Answer: No.
>
> Question: Where do you think it leads to?
>
> Answer: I don't know.
>
> Question: Have you ever seen any bin trucks collect rubbish from the apartment?
>
> Answer: I did not.
>
> Question did you throw rubbish down there regularly?

Answer: yes, a couple of times a week.

Question: Would it be a big bag?

Answer: No, a small bag.

Question: Did you ever hear it hitting the bottom?

Answer: No.

Question: Describe the bin to me?

Answer: it's a square metal box thing with a door on the wall with metal inside.

Question: is it dark, can you see in there?

Answer: Only in the daylight.

Question: Does it go down?

Answer: I don't know.

Question: When you open the door, where does it go?

Answer: It goes down anyway.

Question: Did you ever throw glass bottles down?

Answer: no, only bags.

Question: And you never heard them hit the bottom?

Answer: No.

Question: Would that suggest the bottom is not close to you?

Answer: It could suggest a cushy landing.

Question: Did you ever see a refuse collector come and take rubbish? Answer: Did yeah, it gets blocked and they come up regularly and they take the rubbish away, there is signs up saying don't throw anything big down because it will get stuck.

Question: What floor is your apartment on?

Answer: No. 4.

Question: What do you estimate the drop is from your apartment to the floor?

Answer: 20 metres, I don't know.

Question: What do you estimate the drop is from the top of the bin chute to the ground floor?

Answer: 20 metres.

Question: Was there a bin there, a concrete path?

Answer: I would think there was a bin there.".

114. Mr Michael Ford gave evidence that in 2013 he worked for a company which managed various properties in Cork. He gave evidence regarding the procedure for refuse collection in the Garden City Apartments. His functions included cleaning the bin chute, emptying the bins and clearing the area of rubbish. Included in his tasks, and one which he had to do on a regular basis, was that of unblocking the chute. The chute had become blocked a number of times before the relevant date and he used rods in order to pull the rubbish down the chute. A bin would ordinarily be placed under the chute so that the rubbish would go straight down the chute into the bin.

115. On Monday, 13th May 2013, he was asked by his superior to go to the apartments as the bin chute had become blocked towards the latter stages of the previous week, leaving rubbish on the ground which needed to be addressed. When he arrived he discovered that the chute was blocked again and he contacted his superior, Mr O'Sullivan. Mr Ford obtained rods and returned to the apartments. He said that he used rods and more than one bag fell out of the chute which required him to continue with the unblocking exercise at which point the body of the deceased came from the chute.

116. In cross-examination he agreed that blockages were very regular and that sometimes residents were aware the chute was blocked as rubbish would be stacked outside the entrance door to the chute. He agreed that the situation could come to pass whereby it could take a

number of days before a blockage would be noticed. He also agreed that a bag could snag quite easily in the chute.

117. Mr O'Sullivan gave evidence that on Thursday, 9th May 2013 he received a call informing him that the refuse chute in the apartments was blocked and consequently he arranged for the chute to be cleared on that date. The employee who carried out this exercise cleared the chute and filled the wheelie bin with rubbish leaving an accumulation of refuse on the ground.

118. On Saturday the 11th May 2013, Mr O'Sullivan went to the apartments with the intention of filling the bin with the excess rubbish so that the refuse company could dispose of the rubbish the following Monday. He filled the bin with rubbish from the previous blockage and left the bin in the bin room. He also examined the chute in order to see whether it was clear and satisfied himself that it was. He confirmed that once all the rubbish was cleared the regular practice would be to replace the bin under the bin chute, however on this date as the bin was full any rubbish placed in the chute was going to land on the floor area thus requiring an additional collection. Therefore, as of Saturday, 11th May 2013 between noon and 13:00 hours, the chute was cleared of rubbish.

119. Finally Mr O'Sullivan confirmed that bags became blocked at the bottom of the curve in the chute. It seems from his evidence that most people would be unaware of the blockage as the rubbish would travel a distance, before becoming blocked but eventually the rubbish will come so far up the chute that when one opened the door of the rubbish chute the rubbish would be seen.

120. Dr Patrick McCarthy, a lecturer in physics in University College Cork, gave evidence in respect of the particular task he was assigned which was to ascertain the potential speed of impact in relation to the chute which involved dropping a mannequin down a chute of dimension and weight similar to the deceased in order to record the timing of the fall. The

witness carried out this exercise on 3rd October 2013 and a mannequin of 50 kg in weight with a maximum shoulder width of 450 to 460 mm was used. The fall time was estimated as 1.93 seconds.

121. In cross-examination he agreed that it was possible that the deceased might have become lodged in the chute as he went through the last curve even without bags blocking the chute. However he said that this was far less likely than the likelihood of a bag becoming snagged because of the heavier weight involved. He stated that the mannequin was dropped twice and went through twice. The deceased's weight was given in evidence by Doctor Bolster as 54.5 kg.

Causation

The causation ground of appeal

122. It has been indicated that there are several subsets to this issue. In that regard the pertinent questions are related. The first relates to whether the law recognises that more than one person may have contributed to a person's death; the second concerns whether the principle of *novus actus interveniens* applies in those circumstances, and if so how; the third and very much related question is, if it is the case that the actions of more than one person contributed to a death, what level of contribution is required under Irish law to ground potential criminal liability for the death i.e., is it a *de minimus* test, is it a natural consequences test, or is it a substantial cause/contribution test.

123. Causation is separate and distinct from the *mens rea* required for murder, which is an intention to kill or to cause serious injury. The purpose of causation is in order to assess whether the acts of an accused person caused the death of the deceased, it is an objective assessment, and one of fact for a jury. It is trite to say that before the person charged with murder can be convicted of that offence, the prosecution must prove beyond a reasonable doubt that not only did the acts of the person charged with the offence of murder cause the

death of the deceased but that at the time there coexisted the mental element for the offence of murder. Therefore, before a person charged with the offence of murder can be convicted of that offence, it must be shown that the acts of the accused person caused the death of the deceased.

124. It is said on the part of the appellant that the different tests have been developed in order to determine whether there is a causative link between the actions of an accused person and the death of the deceased. Those tests are the *de minimus* test, the substantial contribution test and the natural consequences test. Predominantly, it is said the approach has been a narrow one without reference to the state of mind of the individual which approach has been justified by the fact that an individual's state of mind will be considered when assessing whether the necessary *mens rea* was present at the relevant time for the relevant offence.

125. The *de minimus* test was applied by the Court of Criminal Appeal in the case of *The People (DPP) v. Davis* [2001] 1 IR 146 and the appellant contends that the remarks of the Court in *Davis* were obiter. In that regard, it is helpful to note what was said by Hardiman J. when he set out the three grounds of appeal relied upon, one of which was as follows:-

> "The grounds of appeal actually urged in the hearing before us may be summarised as follows:- there was insufficient evidence that the death of the deceased was caused by actions which could be attributed to the applicant…"

126. In *Davis,* the deceased had been assaulted by the appellant whereupon he carried her home over his shoulder but dropped her along the way. Moreover there was evidence that she had been chased by other men earlier in the evening, that she had fallen down the stairs in the house and that she had been injured during efforts to resuscitate her on her way to hospital when she suffered a heart attack en route. In considering the issue of causation Hardiman J. said at page 149:-

" The cause of death was heart failure secondary to severe shock which was itself the cumulative result of the injuries described and in particular the very severe pain associated with them. Of these, probably the most significant contributor was the bladder and pelvic injuries. It seems overwhelmingly probable the applicant's attack was the sole cause of all significant injuries. In point of law, however, it is unnecessary to go so far: it is sufficient if the injuries caused by the applicant were related to the death in more than a minimal way. There was ample evidence on which the jury could be satisfied beyond reasonable doubt that these injuries were the sole or principal cause of death and it is clear from the verdict that they were so satisfied. The only other cause of injury suggested remotely capable of serious effects is the alleged fall down the stairs and the jury were quite entitled to disbelieve the account of this given by the applicant to the gardaí. He did not give evidence at the trial."

127. Birmingham J. (as he then was) considered the *de minimus* test in *The People (DPP) v. Joel* [2016] 1 IR 146. *Joel* was a case with unusual facts, where the offence alleged was one of manslaughter. Birmingham J. considered that the jury ought to have been directed in terms as to whether the accused's actions or inactions were a 'substantial cause of death'.

128. It is, however, readily apparent that that case stood on its own facts and of course concerned the offence of manslaughter. In such cases, Birmingham J. stated that a direction in those terms was consistent with fundamental constitutional principles.

129. Insofar as the appropriate test is concerned, O'Malley J. in *Dunne v. DPP* [2017] 3 IR 1, referred to the general principles concerning murder and causation and stated that the test was settled in this jurisdiction as stated in *Davis*. At para.67 onwards, O'Malley J. stated:-

"The issue of causation in murder is addressed in the following terms in Charleton, McDermott and Bolger, Criminal Law (Butterworths, 1999) at p. 503 under the heading 'General statement':-

> '[7.23] The accused will legally have caused the death of the victim if his act, or acts, substantially contributed to the subsequent death, taking into account the time at which, and the manner in which the death occurred. It is a function of the judge to decide whether there is any evidence reasonably capable of supporting the conclusion that the accused's act was still a substantially contributing factor at the time when the victim died, having regard to the manner of his death.'

In their discussion of the issue the authors refer to *R. v. Wong Tat Chuen* [1997] H.K.L.R.D. 433 and to *Smithers v. The Queen* [1978] 1 S.C.R. 506. The former was a decision of the Hong Kong Court of Appeal in which it was held that a jury should be told that it was sufficient if the accused's act contributed "significantly" to the death and that it need not be the sole or principal cause. In *Smithers v. The Queen* the Supreme Court of Canada had ruled, at p. 519, that the accused should be held liable for the death where his or her act or acts were "a contributing cause … outside the *de minimis range*".

In this jurisdiction the test was settled by the Court of Criminal Appeal in the *People (Director of Public Prosecutions) v. Davis* [2001] 1 I.R. 146. The evidence of the pathologist in that case was that the death of the victim was due to heart failure secondary to severe shock, which was itself the cumulative result of injuries alleged to have been inflicted by the applicant. The applicant had suggested that she might have been assaulted by two other men earlier in the day, and that she had subsequently fallen down some stairs. Having regard to the evidence, the court observed that it seemed "overwhelmingly probable" that the attack on the deceased by the applicant was the sole cause of all significant injuries. The judgment continues at p. 149:-

> 'In point of law, however, it is unnecessary to go so far: it is sufficient if the injuries caused by the applicant were related to the death in more than a minimal way'

The appellant has not in this appeal pursued the argument that the Davis test was incorrect."

The test

130. The present case concerns the offence of murder and it is important to observe that the trial judge directed the jury in terms of the test in *Davis* with which no issue was taken at trial. It is quite clear from the decision of O'Malley J. that the test adopted in this jurisdiction concerning causation is that as stated by Hardiman J. in *Davis*, at p.149, that is:-

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

131. This is the position, notwithstanding the fact that that applicant in *Dunne* did not advance an argument that the test in *Davis* was incorrect. When we consider the judgment of O'Malley J. in *Dunne*, it is apparent that she emphasises the natural consequences approach to causation and does not consider foreseeability as a relevant test.

132. Whilst the preponderance of the application for a direction was predicated upon the concepts of causation and *novus actus interveniens*, the primary proposition posited by Mr O'Higgins was that the activity with which the appellant attempted to engage was not possible to achieve and whether this qualitative difference amounted to a *novus actus interveniens* or whether it amounted to a failing or a misalignment of intent, the trial judge ought to have directed the jury to return a verdict of not guilty on the offence of murder.

133. In the course of this hearing it is accepted on behalf of the appellant that he held a high degree of moral and legal culpability. It is submitted that the correct approach for this Court

to adopt is to permit the appeal in substituting a verdict of manslaughter in accordance with section 3 (1) (d) of the Criminal Procedure Act, 1993.

134. As we have stated previously, Mr O'Higgins approaches this aspect of the appeal on three bases set out above.

135. It was accepted at trial that the act of placing the deceased in the chute constituted an assault which was not a trivial assault, in effect constituting the offence of manslaughter. The position in law is quite clear; the intention of an individual has no bearing on the issue of causation, causation has no bearing on the mental element of the crime. Intention is a subjective concept which must be proven beyond reasonable doubt, consequently where a person is charged with murder, and the jury is not satisfied that the necessary murderous intent is proven to the required standard of proof, a manslaughter verdict is open to the jury.

Conclusion - Causation and *Novus Actus Interveniens*.

136. It is obviously essential for the prosecution, on a charge of murder to prove that an individual's actions give rise to the death the subject matter of the trial. We repeat that causation is not relevant and is entirely separate and distinct to the issue of intent; the issues are in effect mutually exclusive. Obviously if an individual causes the death of another but does not at the time possess the requisite murderous intent, then the person will not be guilty of murder. There must be a coincidence of the *actus reus* and the *mens rea*.

137. We are entirely satisfied that the test as stated by Hardiman J. in *The People (DPP) v. Davis* [2001] 1 IR 146 is the correct test on causation in this jurisdiction; that is 'it is sufficient if the injuries caused by the applicant were related to the death in more than a minimal way.'

138. In the second edition of Charleton and McDermott's *Criminal Law and Evidence*, (Dublin, 2020) the learned authors set out some propositions concerning causation at page 450 and we now quote those which are apposite to this appeal: –

"On a basic level, it may assist by stating some obvious propositions which subsequent analysis confirm as a sensible statement of the law:

- the accused's actions must be such that but for what he or she did the victim would not have died;
- [ ]
- [ ]
- the accused's actions must be a substantial, or not minimal, and operating cause of the death of the victim;
- [ ]
- [ ]
- similarly, a stricken person may make some bad choices as to what to do, but it is only if, at the time of death, the actions of the accused do not make a substantial contribution to the victim's death that the accused will not have caused it;
- [ ]"

139. The issue of causation is an issue of fact and therefore one for the jury to determine having been directed appropriately by the trial judge concerning the legal principles. Having examined the transcript of the charge in the present case, we observe at this point that the trial judge directed the jury in appropriate terms concerning the legal principles.

140. The judge determined on the conclusion of the prosecution evidence that there was sufficient evidence before the jury to enable the jury to conclude that the act of the appellant in placing the deceased in the chute, caused the injuries which were related to the death in a more than minimal way.

141. We are satisfied in the circumstances that the trial judge was correct in refusing the application for a direction on the grounds of a break in the chain of causation.

142. Insofar as it is said that an independent intervening act removed liability from the appellant, we are not persuaded that this ground is made out. As stated by the authors in *Criminal Law and Evidence*: –

> "The intervening cause will not break the chain of causation, so long as it is a natural consequence of the act or omission in question. However, if an intervening cause is a supervening and unconnected event it will break the chain of causation."

143. In the present case the independent act contended for on the part of the appellant is the placing of the rubbish in the rubbish chute. However, an intervening act is an act which occurs after the actions of the accused person. In the present case, no act on the part of any third party intervened so as to operate as a *novus actus interveniens*, thus relieving the appellant of criminal responsibility. An intervening act is a fresh act which intervenes so as to break the chain of causation. This did not arise in the present case.

Intention

144. Statutory assistance is provided by s.4 (1) & (2) of the Act of 1964. Additional submissions were requested by this Court to address specifically whether there was evidence of the requisite *mens rea* for murder in the present case.

Discussion

145. The offence of murder is a crime of specific intent and is distinguished from the offence of manslaughter by virtue of this specific mental element. In order to be found guilty of the offence of murder the jury must be satisfied that the individual intended to kill or to cause serious injury to the deceased. As we have repeatedly stated in this judgment, causation is an entirely separate concept to that of intention.

146. Section 4 of the Criminal Justice Act 1964 defines the mental element for the crime of murder, which is an intent to kill or to cause serious injury to some person. Subsection 2 operates as an aid to the jury in determining the intention of the accused person and the onus of proving that the presumption has not been rebutted rests with the prosecution.

147. As is known, the concept of intent is a subjective one and can be simply stated as meaning to do a particular act or actions.

148. Therefore, before an accused person may be convicted of the offence of murder the prosecution must prove not only that the accused person caused the death of the deceased at the relevant time but that also he or she had the requisite intent.

149. On the conclusion of the rejoinder to the application for a direction, Mr O'Higgins brought the issue of intention into focus when he stated, albeit briefly, as follows: –

> "Mr O'Higgins: Could I just add one thing, Judge, and I meant to say it, it was on my list. When you mentioned about intention, it does strike me, while it's not a matter simply of the intention of Mr O'Loughlin, but if you decide – sorry, I'll just wait for Mr McGrath.
>
> Judge: Sorry, Mr McGrath, would you just wait, Mr O'Higgins is just addressing me in relation to an intention aspect.
>
> Mr O'Higgins: I just want – if you decide that what my client intended to do was so radically different from what he was permitted to do by virtue of the blockage, whether you call it a Novus actus or whether you call it a failing of intent or a misalignment of intent because they are two separate things in law and it's the same result, in my respectful submission."

150. It is certainly the position that the focus of the application was not predicated upon the mental element of the crime separate from the aspects of causation and intervening acts of independent third parties. The issue was raised briefly before the trial judge in the latter

stages of the application for a direction. Nonetheless, we consider it necessary to examine whether the trial judge ought to have withdrawn the murder charge from the jury on the basis of an absence of evidence from which the necessary murderous intent could be inferred by the jury. It was in this respect that this Court sought additional submissions to enable the parties to elaborate, if necessary, on their submissions.

151. The trial judge considered the application for a direction and focused (as had counsel for the appellant) on the issues of causation and intervening acts. She properly identified the test in respect of causation and, as we have stated, correctly refused the application for a direction on the basis of a break in the chain of causation. No emphasis was laid on the standalone issue of intent by the appellant.

152. There is no doubt but that the circumstances were unusual. On the evidence it is apparent that the appellant was aware that rubbish regularly became stuck in the chute. It is also apparent that evidence was adduced before the jury that the appellant had stated that the deceased "will crawl out of there." Reliance is also placed by the appellant upon his interviews with the gardaí from which it is said on the part of the appellant that his intention was not to kill or to cause serious injury to the deceased. However, the interview relied upon did not state in specific or indeed even in opaque terms the appellant's intention, rather this is something which it is said can be inferred from the evidence as a whole.

153. Mr O'Sullivan's evidence clarified that the chute was clear on Saturday the 11th May 2013 between noon and 13:00 hours. The evidence of Dr McCarthy is also apposite as is the evidence of Mr Ford regarding the dislodging of some bags of rubbish before the deceased's body exited the chute.

154. There is no doubt about that the appellant assaulted the deceased and the evidence of Garda John Ford provides this material in addition to the evidence of Mr O'Mahony. Garda Ford, the scene of crime examiner, observed scuff marks inside the chute at the top end

together with hair attached to the outside of the chute door, blood spattering on the chute door and contact blood staining on the chute door area. Blood was also observed in the apartment by the gardaí who arrived at the scene conducting door-to-door enquiries and blood was observed on the wall to the right of the chute.

155. The principles concerning an application for a direction to acquit are set out in the well-known decision of *R v. Galbraith* [1981] 1 WLR 1039 which were elaborated upon by Edwards J. in *The People (DPP) v. M* [2015] IECA 65. Issues bearing on reliability or credibility are matters within the jury's domain and the trial judge is not concerned with those issues or with matters such as efficiency of proof but is concerned with the elements of the offence and whether those elements are reflected in the evidence. In *DPP v. Buckley* [2007] 3 IR 745, Charleton J said at page 753: –

> "In considering, at the close of the prosecution case, whether sufficient evidence has been adduced to allow the case to proceed to the defence case, or to submissions, a trial judge should be concerned to see whether the proofs necessary to make out the charge have been adduced in evidence. At that stage, the trial judge is not concerned with issues of credibility or with sufficiency of proof but with the technical nature of the elements of the offence and whether these have been reflected in evidence by proof. There can be exceptional cases where the nature of a necessary proof is found to be so tenuous that a trial judge would be compelled to make a conclusion that any consequent conviction would be unsafe. In those very rare cases the issue as to conviction might be withdrawn from the jury, or from the judge acting as the tribunal of fact."

156. In an appeal by the Director of Public Prosecutions against an acquittal by direction by the trial judge, Finlay P. (as he then was) in *The People (DPP) v. O'Shea(No 2)* [1983] ILRM 592 at p.594 said :-

> "One of the functions of a Trial Judge in a criminal trial is to reach a decision at the conclusion of the evidence tendered on behalf of the prosecution as to whether there is evidence which if accepted by a jury could as a matter of law lead to a conviction. This may frequently occur in practice in cases where there is a gap in the evidence tendered on behalf of the prosecution and where some vital link in the chain of proof is missing."

157. The real issue insofar as this Court is concerned is whether the trial judge ought to have withdrawn the offence of murder from the jury by reference to the requisite mental element for murder, that is whether there was evidence of this essential ingredient of the offence, which if accepted by the jury could lead to a guilty verdict.

158. Pursuant to section 4(2) of the 1964 Act, a person is presumed to have intended the natural and probable consequences of their conduct. This is, of course, a rebuttable presumption. As the test concerning intent is subjective, all matters relevant to the accused's state of mind will be considered.

Conclusion

159. This is a finely balanced case, the appellant did not give evidence, as of course is his entitlement but nonetheless, it must be said that this renders the evidential basis for the contention advanced somewhat thin. However, it must be borne in mind, on whom the onus of proof lies and of course, it is trite to say that not only must there be a coincidence of the mental element with the external element of the offence alleged, each element of the offence must be reflected in the evidence.

160. It is certainly the position that it was emphasised on the part of the appellant that it was not possible for the appellant to achieve his objective, which it is said was for the deceased to pass through the chute, due to the presence of rubbish. The focus of this submission rested with the concept of causation, rather than intention, which are quite separate and distinct

concepts however, as we have said, the issue of intent was raised, albeit briefly at trial and falls within Ground 3 of the grounds of appeal.

161. In the experience of this Court, in many a murder trial, the accused will claim that he/she did not intend to kill or to cause serious injury to the deceased, even though that person may have used a weapon in an attack, stabbed, shot or beaten an individual to death and so juries are instructed to look to the circumstances surrounding the event in order to determine the intention of the accused at the relevant time. There may be occasions where a person intends to do the impossible and obviously fails, but this does not deprive him/her of intent.

162. Intention does not have a statutory definition. In ordinary language the concept of intention means that an individual wants the consequences of his or her actions. So, the ordinary meaning of the word "intention" corresponds with desiring or having as an objective a particular outcome. As it is impossible to look into a person's mind to assess the state of mind at the relevant time, intention is assessed by the jury by taking into account all the evidence in the case in order to draw an inference of intention. This obviously includes the assessment of forensic evidence and circumstantial evidence, such as DNA, admissions, lies etc.

163. Intent may be inferred from the surrounding circumstances and the necessary intent can be inferred beyond reasonable doubt from the natural and probable consequences of the accused person's conduct. The presumption under s.4(2), operates as an aid to the assessment of the evidence. It is a rebuttable presumption, and should there exist on the entirety of the evidence material which might rebut that presumption, the prosecution must negative that material beyond reasonable doubt.

164. In the present case, the appellant's response was no different to that of many a person charged with murder in that he denied having the requisite intention. The evidence disclosed

that the deceased was put in the chute by the appellant, and his intent fell to be determined by virtue of the surrounding circumstances. Was death or serious injury the inevitable or unavoidable consequence of his actions? We think not.

165. This Court is persuaded that there was no evidence to prove an essential element of the offence. There is, in our view, an absence of evidence regarding the mental element for murder. It is quite clear from the trial judge's ruling that she focused on the issues of causation and intervening acts, which formed the substance of the application before her. The stand-alone issue of intent was, as we have stated, only touched upon very briefly on behalf of the appellant. Therefore no criticism can be laid at the door of the trial judge.

166. When we examine the circumstances surrounding the events which led to Mr Manley's tragic death, and which we have detailed above, and the specific action in putting the deceased in the chute, we are persuaded that the trial judge ought to have acceded to the application for a direction. Evidence of an essential element of the offence of murder was absent so as to render the conviction for murder unsafe.

Decision

167. In light of our findings, we do not propose to address the balance of the grounds of appeal.

168. We will allow the appeal and quash the conviction for murder, however, we will substitute a verdict of manslaughter in accordance with section 3 (1) (d) of the Criminal Procedure Act, 1993.

169. We consider that the appropriate approach is to remit the matter for sentence to the Central Criminal Court.