[UNAPPROVED] **[NO REDACTION NEEDED]**

THE COURT OF APPEAL

[284/16]

Neutral Citation No: [2021] IECA 343

The President
McCarthy J.
Ní Raifeartaigh J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JAMES LAMMON

APPELLANT

JUDGMENT of the Court delivered (electronically) on the 21st day of December 2021 by Birmingham P.

1. On 27th October 2016, following a twelve-day trial in the Central Criminal Court, the appellant was convicted of the offence of murder. He had stood charged with the murder of Jason Doogue on 21st August 2015 in Athy, County Kildare.

2. The notice of appeal, as lodged by the solicitor who acted for the appellant at trial, raised eleven grounds of appeal which might be described as standard grounds arising from rulings delivered by the trial judge. What is unusual about the case is that the appellant has indicated that he wishes to abandon the grounds of appeal originally lodged, and instead, seeks leave to substitute a new ground of appeal and argue it. The new ground of appeal involves a complaint that his instructions were not followed by his lawyers at trial. Therefore,

the appeal is a somewhat unusual one, in that the focus is not on rulings delivered during the course of trial by the trial judge, but on the conduct of the defence legal team. Even in that context, this case is unusual; the issue raised is not the typical one of inadequacy of counsel, but rather, a keenly contested issue of fact.

3. For the purpose of this appeal, this Court has had before it affidavits from the appellant and from his new solicitor, as well as from his former solicitor who acted at trial. In the course of the appeal hearing, the appellant and his former solicitor were each cross-examined on their affidavits. Therefore, very unusually, the resolution of this appeal involves a determination by this Court on a disputed issue of fact.

Background Events

4. The prosecution case was that late in the afternoon of 21st August 2015, Jason Doogue was sitting on a wall outside a house in an estate known as "Greenhills" in Athy, when a cyclist, described by an eyewitness as "blacked out" (referring to a face covering of some kind), came on the scene. He cycled to where the late Mr. Doogue was sitting and produced a gun, which was fitted with a silencer, and shot him once, knocking him off the wall which he had been on. The cyclist shot him a second time, and then, as Mr. Doogue was still able to move as he sought to get away, the gunman shot him a third time. Evidence was given by an eyewitness, Calvin Cullen, that the build of the cyclist matched that of the appellant, who was very well known to him. Mr. Cullen said that he was "nearly 100 percent sure that it was [James] Lammon". Mr. Cullen explained that the gunman had been cycling on a bicycle which belonged to a nephew of the appellant. Mr. Cullen was one of two witnesses – the other being Joseph Brennan – who purported to identify the cyclist as the appellant. Mr. Brennan was fifteen years of age at the time of the incident, and gave evidence that he was "100 percent sure" that the cyclist was the appellant.

5. In the course of his closing address, counsel for the prosecution identified fourteen aspects of the evidence which he contended contributed to the prosecution case against the appellant. These were:

(i) The threats made by the appellant on 21st August 2015, the day of the murder, in Athy town centre, to kill Mr. Doogue;

(ii) The fact that about ten to fifteen minutes before the murder, the appellant's van was behind Rebecca Lammon's house (sister of the appellant);

(iii) The fact that a toolbox was delivered to Ms. Lammon's house, and brought in by Ms. Lammon at the same time as the van was outside, which contained cloths that were contaminated with firearms residue, and had DNA matching that of the appellant on them;

(iv) The evidence that the bicycle belonging to the appellant's nephew was seen leaving the green van that was behind Ms. Lammon's house not long before the murder;

(v) The fact that the gunman was riding the same bicycle;

(vi) The description of the gunman insofar as people were able to describe his build and height as fitting that of the appellant;

(vii) The fact that the appellant returned on foot to Ms. Lammon's house after the shooting had happened;

(viii) The fact that the bicycle was found "dumped" in the River Barrow close to where the black top that was contaminated with firearms residue was found;

(ix) The fact that the bicycle and the top contaminated with the firearms residue were both found close to where rubber gloves were discovered that were also contaminated with firearms residue, and had the appellant's DNA on them;

(x) The fact that the gun used to murder Mr. Doogue was found about ten or fifteen minutes' walk from the appellant's back yard;

(xi) The comment made by the appellant on the evening of the killing that Jamie Quinn was "next";

(xii) The comment made by the appellant while talking to Garda O'Shea in Kildare Garda Station to the effect that the bullet was intended for Mr. Quinn (this aspect is central to the present appeal);

(xiii) The explanation given by the appellant about the rubber gloves that had the firearms residue and his DNA on them, and whether that would be considered in any way credible or believable; and

(xiv) The CCTV footage which confirms the timeline of when all of these different events happened.

6. The appellant was arrested on 21st August 2015, and subsequent to his arrest, was detained for seven days. During the course of his detention, he was interviewed on numerous occasions, and for the most part, chose not to answer questions. However, he did, on occasion, put on the record a denial of any involvement in the shooting. In the usual way, there were rest periods during the appellant's detention, and there were also occasions when the appellant was provided with an opportunity to exercise. One such exercise session took place on the morning of 26th August 2015 in the yard at Kildare Garda Station, and was supervised by Garda Danny O'Shea who was acting as Member-in-Charge at the time. Garda O'Shea contends that the appellant engaged him in conversation. It is this alleged conversation – one which was recorded by Garda O'Shea in a memorandum, but denied by the appellant – that is central to the present appeal.

7. During the course of a subsequent interview, the contents of the memorandum created by Garda O'Shea were put to the appellant. He remained silent, in accordance with his

general approach. He also refused to sign the memorandum that was being made of the interview.

8. After that interview had concluded, the appellant had a telephone consultation with his then solicitor. He informed his solicitor of the remarks that were being attributed to him as having been made in the yard, and he denied making those remarks to his solicitor. His solicitor advised him to put his denials on record in the course of a formal interview, which he subsequently did.

9. Thereafter, the appellant was charged with murder and the trial was listed for a date in October 2016. Having been charged, the appellant was remanded in custody to Cloverhill Prison, where he was visited on numerous occasions for consultation purposes by his solicitor. On three occasions, the consultations were also attended by both senior and junior counsel.

10. The appellant now says (by way of sworn affidavit) that in the course of consultations with his solicitor, he was told that the alleged conversation would "never see the light of day". The solicitor who acted for the appellant at trial (who also swore affidavits and gave evidence before the Court in this appeal) denies that anything of the sort was ever said. In advance of the trial, senior counsel on behalf of the appellant prepared a detailed advice on proofs which contained an analysis of the issues. That document was made available to the appellant who returned it to his solicitor after a period of time as he did not wish for a document of such a sensitive nature to be lying around in his cell.

11. In a section of the advices headed "General Background", which offers an overview of the case, senior counsel makes reference to the comments allegedly made by the appellant in the yard of the Garda station in the following terms:

> "Client is also alleged to have made incriminating comments while exercising during his detention. These were not taped and he would not sign a note made by the garda

witness, David O'Shea. The effect of the comments is that Jamie Quinn was the intended target, but wasn't there, so Doogue was shot. The comments stop short of admitting the offence. Client instructs that he did not at any point say that he was going to kill anyone. He instructs that Garda O'Shea did prompt the conversation, saying that if he got out, Jamie Quinn would kill him. He suggested that client might admit something if Garda Andrea Gannon, who was a fine bird, was doing the questioning. Client responded by showing his wedding ring. They talked about Face[b]ook and email, the garda talking about his father and his son. There is certainly room to interpret the comments as showing only that client interpreted the events as a mistaken target, although it remains damaging even on this interpretation, in my view, that client might know who the target was or that he predicted that another man would be shot."

12. A number of matters in the paragraph quoted above are noteworthy: first is counsel's reference to the comments as stopping short of admitting the offence; second is the assessment that the remarks, even when interpreted in a manner favourable to the appellant, remain damaging; and third is that there is no indication of any expectation that the remarks attributed to the appellant would not form part of the trial.

13. In a section of the advices titled "The Strength of the Evidence", counsel observes that "[i]f all the witnesses swear up and none of the evidence is excluded", a conviction is "very likely", but adds that there are "good arguments" to exclude some of the evidence contained in the book of evidence, and that success in that regard will improve the client's chances of an acquittal.

14. Given its significance in the context of the present appeal, it is appropriate to refer to the notes of the conversation recorded by Garda Danny O'Shea:

"While in the course of being member in charge on the 26th of August 2015 at Kildare Garda Station at 8.50am, I brought the prisoner Mr. James Lammon to the yard at Kildare Garda Station for the purpose of exercising the prisoner during which I had a conversation instigated by Mr. James Lammon, d.o.b. 8/9/72 of 1084 Cardington Way, Athy, Co. Kildare. He said to me they'll never get a charge on me[,] they have nothing only stupid statements from Athy. They have a lad fully covered on bike my height and size and they think that will stick. He said I never taught [*sic*] I would live till [*sic*] 43[,] I taught [*sic*] I would be dead or in prison.

He said that Athy [was] becoming a shit hole [Mr. Lammon was then recorded as making very serious allegations of misconduct on the part of the deceased some two weeks earlier].

He said that Jason had held a lad down and that [another person] had slashed his face.

He said Jamie Quinn was the biggest problem in Athy. That he would sell to anyone, any age and that included heroin a drug he hated and that he would never sell.

He said the bullet was meant for Jamie Quinn. That it was all done over iphones through Facetime. We were stepping from concrete onto grass while walking in station yard, when Jimmy Lammon said to me Facetime is your eyes, if you said they asked if it was Jamie Quinn it wasn't, the next lad was Jamie Quinn. Jimmy Lammon said Jamie Quinn sells them green. Jimmy Lammon said Jamie Quinn was gone 10 seconds[,] someone had to be done.

He went on to say Jamie Quinn smashed the left window of the van. I was in the driver seat. He said he had a 22ml up his sleeve. He could see it. He said he jumped out of the van[,] the driver seat. He said to [*sic*] of his lads were in the back of the car. He said he jumped in and started fighting. He said I pulled one of them on top of me, he couldn't shoot[,] he could have shot his own. He said the Guards arrived[.] Jamie

Quinn handed the gun to one of the lads and he took off. He said I got a call to/from Dublin. He said Jamie Quinn was to be done within 48 hours. I told him to hold off[,] I was under too much pressure. He said 3 lads were to be done[,] hold off I couldn't handle the pressure when in custody. He said when I get out after 7 days, I'm going on holiday for a few days. He said Jamie Quinn will be done within 48 hours of me going.

At this point I returned the prisoner Jimmy Lammon to the cell area where he washed his teeth and was returned to cell at 9.08am."

15. The memorandum was not put before the jury, but rather, on day eight of the trial, extracts in edited form were put before the jury. The three extracts were as follows:

(a) "…they'll never get a charge on me, they have nothing only stupid statements from Athy. They have a lad fully covered on a bike my height and size and they think that will stick."

(b) "…Jason and another man who was there when the shooting happened had assaulted someone else earlier that day."

(c) "James Lammon said the bullet was meant for Jamie Quinn."

16. Insofar as the proceedings on day eight of the trial are concerned, it might be noted that the Court sat at 11.15am on that day. When the Court sat, prosecution counsel began as follows:

"[COUNSEL]: I'm obliged for the time, in fact we've been able to use it fruitfully again.

JUDGE: Good.

[COUNSEL]: We had anticipated today there was going to be an issue on -- not so much on detention as on the interviews, there were inference interviews and then there was a conversation between a guard and the accused while the accused was on

a break in between interviews, some of which we say was relevant. So we were going to have a long enough issue on that, I had 15 witnesses lined up. Now, in fact we've agreed a format for both the inferences and agreed effectively excerpts from what was said in the yard. So I'm going to deal with -- call two witnesses just to deal with that. That will resolve all of the issues in relation to interviews. I'll just explain in relation to what we'll call the verbals in the yard. Some of that deals with an issue that the defence have raised from time to time during the course of the trial, namely allegations that were made about other people in the trial. Now, we're anxious to not be unfair to the accused in any way, given that these -- given that this is what he said during the course of his detention in the Garda station, we have a formula that will allow the jury to hear, he is going to say --

JUDGE: Good.

[COUNSEL]: -- someone had -- someone -- Jason had been involved in an assault earlier in the day, given that it's his detention, he is saying it on the record, it seems to be a reasonable balance of the competing interests to permit of that.

JUDGE: Yes.

[COUNSEL]: So in effect, that will be the evidence for the day, because we had anticipated the entire day being taken up possibly with the issues, certainly with the issue on the evidence."

17. It is of some note that the trial judge, at a later stage, asked a question which made it clear that he had not fully appreciated that counsel was saying that the issue had disappeared.

18. When the jury was brought back to court, a Garda witness was called to deal with relevant extracts from the interviews. He was led through his evidence and the defence had no questions for him. Then, Garda O'Shea was called. He explained how he was involved in bringing the appellant to the yard for exercise during the course of his detention. In response

to a question from counsel, he said that it was correct that the appellant had voluntarily said certain things to him, and that he had made a note of what was said afterwards. He said that the first thing of relevance was that the appellant had said:

> "They'll never get a charge on me, they have nothing only stupid statements from Athy. They have a lad fully covered on a bike, my height and size and they think that will stick."

19. The Garda told counsel that it was correct that the appellant had also said that the late Mr. Doogue and another man who was there when the shooting happened had assaulted someone else earlier that day. He said the third thing of potential relevance to the jury was, "James Lammon said the bullet was meant for Jamie Quinn". Again, the defence had no questions for the witness.

20. Throughout the course of the trial, the defence sought to advance the suggestion that the deceased might have incurred the enmity of somebody else, perhaps involved in criminality in Athy. If the appellant did not murder Mr. Doogue, then somebody else did, and so this was an obvious strategy.

21. The defence also canvassed a suggestion that Mr. Doogue may not in fact have been the killer's target; that the actual target was Jamie Quinn; and that Mr. Doogue's death was a case of mistaken identity. The defence's interest in this theory was prompted by the fact that the appellant knew both Mr. Doogue and Mr. Quinn and would not have mistaken one for the other.

22. On days six and seven of the trial, the strategy suffered some setbacks. On day six, the defence had sought to introduce toxicology results from the post-mortem which would have shown that the deceased had consumed cannabis and cocaine. In light of the results, the defence had intended to suggest that this said something of his lifestyle: as someone who had been in prison, the defence had intended to infer that this was somebody who moved in

dangerous circles and may have had "a number of enemies". The prosecution position – which was ruled in favour of by the trial judge – was that the approach which the defence wished to pursue would have implications in terms of s. 33 of the Criminal Procedure Act 2010, and would result in the accused losing his shield. Then, on day seven, the defence lost an issue in relation to a witness on the book, Mr. Eoin Day. In his statement of evidence, the following sentence had appeared:

> "On 21st August 2015 I was at home at 28 Greenhills, Athy, County Kildare. I was off work. I'm in the middle of setting up a pub pool league in Athy, I'm the secretary, I was doing paperwork, I think it was about 3 o'clock. My mother roared up to me one of the neighbours said [a person] had stabbed someone. I couldn't find him and got talking to Jake."

23. The defence wished for this evidence to be adduced. The prosecution indicated that, in its view, this observation was what it characterised as "a double hearsay comment". It was said that it was "substantially and pre-eminently simply bad character evidence". The defence responded by saying that it was not seeking to prove that the person named had stabbed the alleged victim, as that would be "classic hearsay", but the interest was in establishing that this issue was so sufficiently talked about that Eoin Day had heard about it. As on the previous day, the judge ruled in favour of the prosecution position.

The Issue on Appeal

24. The appellant's case is that the putting of the edited extracts from the memorandum before the jury, with the agreement of the defence legal team, took place without his authority and was contrary to his instructions. For her part, the Director says that the appellant's assertion that he did not give instructions for what occurred is not credible.

25. It is in those circumstances that this appeal boils down to an issue of fact: did the defence legal team agree to the admission into evidence of edited extracts from the memorandum without the appellant's authority and contrary to his instructions? The Director holds a secondary, alternative position which maintains that even if the Court was to conclude that what occurred happened without the appellant's authority, this would still not call into question the fairness of the trial and the safety of the verdict. It is a case, it is argued, in which the *proviso* could be applied.

26. On behalf of the appellant, it has been suggested at various stages that even if the authority of the appellant had been obtained, agreeing to the admission of the edited extracts represented a very grave error of such magnitude that it meant that the then accused was without effective counsel. However, in the course of oral argument on appeal, senior counsel on behalf of the appellant, while making the point that counsel will always be reluctant to abandon any point, acknowledged that this was a case where, absent the issue about the defence legal team acting without instructions and contrary to instructions, it would not be possible to successfully advance a case based on ineffective counsel.

27. For our part, we do not agree with the Director's submission that if the Court was of the view that instructions had not been followed, that this is a case where it could consider applying the *proviso.* In our view, the issue of the memorandum, either as prepared or in edited form, was a significant one at trial. It was, perhaps, not quite of the significance that is asserted on behalf of the appellant. However, if it was the case that instructions were not followed, that would inevitably impact in a significant way on the question of whether the trial could be said to be a fair and satisfactory one. It is in those circumstances that we are convinced that the determination of this appeal involves – and will be determined by – the resolution of the disputed question of fact.

The Affidavits and Cross-Examinations Thereon

28. As previously mentioned, this is a case where, unusually, the appeal hearing before this Court involved the cross-examination of two witnesses: the appellant, and his solicitor at trial, Mr. David Gibbons of Murphy Gibbons Solicitors in Newbridge. Also before the Court was an affidavit from Mr. Gerard McNamara (solicitor) of KRW Law in Belfast.

29. In a situation where the appeal before this Court turns on questions of fact, it is necessary to consider those affidavits – specifically, the affidavits sworn by the appellant and by Mr. Gibbons – and the cross-examinations that were conducted.

The appellant's first affidavit

30. The appellant has sworn two affidavits. The first affidavit, dated 1st June 2018, is a short one, setting out the basic background, *i.e.* that he was convicted of murder and sentenced to life imprisonment, and that he was alleged to have had a conversation with a Garda O'Shea in the exercise yard while in Garda custody, which has been characterised as a confession by the prosecution. There is an assertion that "no such conversation" was had. The appellant explains that when the alleged conversation was initially put to him in interview, he remained silent, but that following contact with his solicitor at a later interview, he put a denial of having made any such remarks on record.

31. The section of the affidavit of direct relevance to this appeal is not lengthy and can conveniently be set out at this point:

> "13. In subsequent discussions with my solicitor I was told that the alleged conversation 'would never see the light of day'.
>
> 14. I do not believe that my lawyers have ever had access to that particular interview where I deny the alleged conversation.

15. In advance of the trial I consulted with my solicitor and counsel at Cloverhill prison and was again assured that the alleged conversation would not be part of the trial.

16. At trial when the alleged conversation went unchallenged I raised this immediately with my legal team.

17. My instructions at all times were to challenge the alleged conversation in the event that it was raised and I never changed from that position.

18. I as informed by counsel that she did not want to call Garda O'Shea a liar as it would not help with the trial."

32. In the context of the present appeal, the explicit and unequivocal assertion at paragraph 16 – that when the alleged conversation went unchallenged, the appellant raised this immediately with his legal team – is worthy of note.

Mr. Gibbons' first affidavit

33. Mr. Gibbons swore an affidavit on 12th December 2019. Similar to the appellant's first affidavit, it is relatively brief, extending to some twelve paragraphs. From the perspective of this appeal, the salient features are as follows.

34. First, there is a statement that prior to swearing the affidavit, it was shown to both junior and senior counsel, who had appeared for the defence at trial, and it is averred that the account of the factual matters set out in the affidavit not only accords with the deponent's memory of events, but also reflects the memory of both counsel.

35. Second, Mr. Gibbons says that he did not, at any stage, tell the appellant that the account given by Garda O'Shea of the alleged conversation in the yard would "never see the light of day". That was not his view on the admissibility of Garda O'Shea's evidence and he says that he would not have made any such comment. He goes on to say that if he had been of

the view that the account would "never see the light of day", then there would have been no need for him to advise that the appellant formally deny the comments.

36. Third, the affidavit deals with the suggestion by the appellant that Mr. Gibbons did not have access to the interview conducted with the appellant while he was in Garda custody whereby he denied the comments that were being attributed to him. Mr. Gibbons says that while he did not have his file available to him at the time of swearing of the affidavit, he is "quite sure" that this is incorrect.

37. Fourth, Mr. Gibbons deals with the fact that the appellant was remanded in custody up until the time of and throughout the trial, and he refers to the fact that he visited him on numerous occasions in Cloverhill Prison during that fourteen-month period. He avers that, at those consultations, all aspects of the prosecution case were discussed. Closer to the trial date, both senior and junior counsel attended on the appellant in Cloverhill Prison in conjunction with him. He asserts that at no time did he or either counsel advise the appellant that Garda O'Shea's comments "would not be part of the trial". He says that they certainly advised him that they would try to "limit the damaging evidence where possible", but that all were aware that the Garda O'Shea evidence might well be given, and so they would not and did not offer an assurance or view.

38. Fifth, Mr. Gibbons deals with the progress of the trial and records that he consulted with the appellant a number of times each day either in the courtroom, in the holding area off the courtroom, or in the cell downstairs. The deponent avers that the appellant remained "very much involved" with his legal team throughout the trial.

39. What Mr. Gibbons has to say on the specific issue of the evidence of Garda O'Shea bears quotation:

> "8. I say that I do recall the issue of Garda O'Shea's evidence arising. I say that a proposal was put by the Prosecution that they would be prepared to present Garda

O'Shea's comments in a limited manner if an agreement could be reached on that. The Prosecution presented us with a shortened and less harmful version of the Garda O'Shea allegations to which they would be prepared to limit themselves if it were presented by agreement. I say that Mr. Lammon's instructions were sought and taken on this issue by myself and Counsel together as it was a significant matter.

9. I say that Mr. Lammon was advised that there were now a number of options available to him in respect of the Garda O'Shea evidence. He could give evidence to contradict Garda O'Shea. Mr. Lammon maintained his position that he would not be giving evidence in the trial. We could challenge the admissibility of Garda O'Shea evidence, but if that challenge failed we would be left with the subsequent denial as a response to the alleged comments. The final option was to accept the Prosecution's proposal and agree a diluted version of the alleged comments. I say that, whilst the Garda O'Shea evidence was clearly unhelpful, it was never considered by the Defence or Mr. Lammon to amount to an actual confession to the offence, as is now being proposed in his appeal. Mr. Lammon, having considered the matter and having taken advice, gave his instructions to accept the proposal put by the Prosecution. Mr. Lammon gave those instructions fully aware that the agreed Garda O'Shea evidence would not then be challenged by Counsel or by the production of his denial in interview.

10. I say that I still have available to me an electronic copy of the Transcript of the trial and I see that this matter was dealt with at the commencement of day 8 of the trial on the 21st of October 2016. I say that it is quite clear from the comments of Mr. Naidoo, for the Prosecution, in the absence of the jury that he referred to the agreement that had been reached. I say that there was thereafter ample opportunity for Mr. Lammon to object, if matters were not proceeding according to his instructions,

or indeed to change his mind. I say that Mr. Lammon did not object or change his instructions and so the evidence was led according to the agreement that had been reached with his approval.

11. I say that no objection was raised by Mr. Lammon either before or after the evidence given by Garda O'Shea and paragraph 16 of his affidavit is incorrect in that regard. I say that the trial proceeded for a number of days thereafter without objection by Mr. Lammon on this issue. I say that I met Mr. Lammon in custody on a number of occasions after the trial, up until he dispensed with my services, and again he did not raise any objection to the manner in which the Garda O'Shea evidence had been dealt with by his legal team during the trial. Mr. Lammon did express some misgivings as to the decision he had made and the instructions he had given (as set out in para. 9 above) but never suggested that the issue had been dealt with other than in accordance with his instructions."

The appellant's second affidavit

40. The appellant swore a further and more extensive affidavit on 13th February 2020, and on this occasion, a number of documents are exhibited. Some of the affidavit involves repetition, in that it deals again with the circumstances of the appellant's arrest in August 2015, his detention at Kildare Garda Station, and subsequently his being charged with murder. He refers to the fact that, during the period of his remand in custody, he "vigorously took issue with the proposed evidence of Garda O'Shea" and he "unequivocally took issue" with the alleged admissions during consultations with solicitor, Mr. Gibbons, and also in the presence of counsel. He contends that he has a clear recollection of having been told by his legal representatives that the proposed evidence of Garda O'Shea regarding these false admissions "would not see the light of day". He says that it was his clear understanding that

his legal representatives would, in accordance with his explicit instructions, "vigorously challenge the admissibility of this particular portion of Garda O'Shea's proposed evidence."

41. The appellant goes on to say that he agrees with his then solicitor that, during the trial, he had a number of conversations with him and counsel, and that these conversations took place in the courtroom and/or in the holding cell area. However, he says that the conversations never concerned the proposed evidence of Garda O'Shea. The appellant accepts that Mr. Gibbons did seek clarity from him in relation to his instructions in respect of some proposed witness evidence; in that regard, he makes reference to an issue relating to a find of firearms and drugs in the general vicinity of where the alleged murder weapon was found. It seems that there were two schools of opinion as to how this should best be dealt with. One approach was to seek to exclude the evidence as the items found could not be linked to the appellant. The other view took the position that the find was helpful as it supported the suggestion that there were others in Athy involved in the drugs and firearms scene, and paved the way for the argument that there were, therefore, other possible suspects.

42. In respect of the Garda O'Shea evidence, the appellant says that he clearly recollects, and this is supported by the trial transcript, that "there was absolutely no attempt to challenge the admissibility of Garda O'Shea's evidence" by his legal representatives during the trial. He says: "I was and remain deeply dissatisfied that, notwithstanding my clear instructions, no attempt was made by [my] former legal team to impugn the leading of this falsified evidence at the court of trial". At para. 28 of the affidavit, he avers:

> "I am certain that after Garda O'Shea's evidence was led and went unchallenged at my trial, I raised my deep disappointment with Mr. Gibbons. However, I specifically recall being told by my legal representative that they 'didn't want to call Garda O'Shea a liar'. I do not recall receiving a satisfactory answer or explanation as to why my former legal representatives totally abrogated my explicit instruction in this

regard. In addition, the last time I spoke to [senior counsel for the defence] was on the day I was sentenced to life imprisonment."

43. At para. 29, the appellant goes on to say:

"I do recall Mr. Gibbons telling me, post-conviction, that they (my former legal team) would seek to have the matter addressed in the Court of Appeal by way of an application seeking leave to appeal. Had I known at the court of trial that I could discharge my legal representatives for a refusal to faithfully adhere to instruction and/or to properly put my defence to the charges, I would have done so without hesitation. However, my state of knowledge at the time, as a lay person, did not extend as far as to knowing what exactly I could or could not take issue with in respect of my legal representatives' strategic approach to my defence."

44. The appellant refers to the fact that post-conviction, he received a draft submission containing proposed grounds of appeal from Mr. Gibbons, and that he was deeply disappointed to note that the issue of Garda O'Shea's evidence did not feature anywhere in the proposed grounds. He says that to the best of his knowledge, he last spoke to Mr. Gibbons in "early summer 2017", after he had received the proposed grounds of appeal, but at that point, "and out of utter frustration due to a further failure to deal effectively with the issue of Garda O'Shea's evidence", he discharged Mr. Gibbons.

45. The affidavit then deals with the appellant's involvement with a legal firm in County Kilkenny, and avers that he had a consultation with a solicitor from that firm, along with junior counsel instructed by that office, in Portlaoise Prison on a couple of occasions in "late 2017 and early 2018". He says that he either posted or handed over written instructions in relation to his appeal. However, he avers that the solicitor and junior counsel were of the opinion that "no issue arose to be argued on appeal" in relation to the issue of Garda O'Shea's evidence and his former legal representatives' "failure to deal with same at trial".

Accordingly, he felt "it would be futile" to continue to avail of the services of that solicitor and counsel.

46. The appellant says that he first made contact with his current solicitors in July 2018, and that he wrote to the Kilkenny solicitors on 13th September 2018, requesting that they facilitate the transfer of his case file.

Documents exhibited in the appellant's second affidavit

47. The first document exhibited is headed: "Instructions on my Appeal[,] D.P.P vs. James Lammon". The document is dated "13/04/201" (*sic*), which is, presumably, a reference to 13th April 2021. The text of the document contains a reference to the fact that the appellant received full disclosure from the solicitors acting for him in December 2017, so it appears likely that the document was prepared for the benefit of the solicitors now on record. It runs to fourteen paragraphs, and is both a broad-ranging and detailed document. Among other issues, the affidavit deals with: (i) the conduct of the application to the District Court to extend the appellant's period of detention, which – the appellant indicates – he wants addressed in the High Court as soon as possible; and, (ii) issues in relation to gloves, a black jumper, and the question of cross-contaminated evidence (he indicates that he wants case law presented on this in the course of his appeal). At paragraph 4, he says that guns were brought into his case which had "no affiliation" to his case, and yet were presented in court. This, he avers, was "prejudicial towards [him] getting a fair trial". The appellant says that the guns were "mentioned the whole way through" the case by both the State and his legal team. He says that he wants this issue raised in his appeal as he is confident that this had "an adverse influence" on the final decision of the jury.

48. In the context of the present appeal, it is noteworthy that this issue relating to the guns sees the appellant making a direct criticism of the legal team that acted at trial.

49. Paragraph 5 of the document deals with Garda O'Shea's evidence in the following terms:

> "Garda Danny O'Shea's evidence was allowed in court when he said that a conversation took place between us out in the Garda yard. He claims I made certain accusations. He claims I said 'the bullet was meant for Jamie Quinn and that they will never get anything on me [,] that it was just a man in a black hoody with his face covered and on a bike'. Even though I strongly denied this ever happened on DVD in the interview room, why was this allowed as evidence when this never happened as this is fabricated evidence? I want this addressed in my appeal."

50. In the context of the present appeal, it should be noted that there is no express complaint in this document about the failure of the appellant's legal team to challenge the evidence of Garda O'Shea, nor is it suggested that the failure to challenge the evidence was contrary to his own express instructions to do so. It might also be noted that the appellant says that he wants this issue "addressed" in his appeal, whereas in respect of several other points, he indicates that he wants those "strongly addressed".

51. Paragraph 6 relates to a complaint that the trial judge erred in law in not allowing the appellant's senior counsel to see the jury when she asked to do so, and is one of the issues which he says he wants "strongly addressed" in his appeal. Paragraph 7 deals with how the trial judge summarised the evidence of a prosecution witness, Sergeant Rothwell, who had conducted a search of the appellant's house. This is another issue that the appellant says that he wants "strongly addressed". Paragraph 8 deals with remarks made by prosecution counsel in the course of his closing address, which, the appellant indicates, he wants "addressed" in his appeal. Paragraph 9 raises further questions about the trial judge's charge to the jury: once again, the appellant indicates that he wants this "addressed" in his appeal. At paragraph 10, he states that in the week leading up to the murder, he was involved in construction work at

home which involved using a "Hilti nail gun", and he says that this would provide a plausible explanation as to how gun residue could have ended up on the relevant gloves. He asks the rhetorical question, "[w]hy was this not addressed in my trial?", and says that he wants these forensically tested to show that these are the same particles as the gun residue that featured at trial. Paragraph 11 deals with the evidence of the State's ballistics expert, and asks whether his evidence should have been provided as fact, given what he had to say about the jumper and gloves being contaminated. Again, this is an issue which the appellant says he wants "strongly addressed". Paragraph 12 deals with authorisation for the taking of samples and indicates that the appellant "wants case [law] on this from the European courts" addressed in the course of the appeal.

52. Paragraph 13 is something of a catch-all and merits quotation:

> "I believe my constitutional right to a fair trial was violated on numerous grounds starting with the gloves being contaminated, as well as the witnesses indicating the gunman had black leather gloves on, the guns, drugs and bulletproof vests had nothing to do with me or the case. A black jumper being used as evidence even though the witnesses state the gunman had a hoody on ([b]lack or [g]rey) as well as the jumper being contaminated from being in the river and possibly coming into contact with gun residue. On these grounds I firmly believe my constitutional right to a fair trial was not upheld on behalf of the state."

In the context of the present appeal, it should be noted that this paragraph does not contain any reference to the issue about Garda O'Shea's evidence, and it most certainly does not contain any reference to the fact that evidence was not challenged, or that this failure to challenge was contrary to the appellant's instructions.

53. Finally, paragraph 14 raises an issue about disclosure, and involves a complaint that he never received full disclosure from the legal representatives who represented him at trial. He avers that he was simply given a book of evidence.

54. The second document exhibited by Mr. Lammon is a letter to his Kilkenny solicitors requesting that the papers be transferred to a Belfast firm of solicitors. In the course of the letter, he comments:

> "The reason why I have chosen to instruct a new legal team stems from the last consultation here at Portlaoise with yourself and [junior counsel]. At the consultation it was obvious to me that any instructions I gave you relevant to my appeal will not be adduced or pressed before the Court of Appeal, particularly in relation to how my trial was conducted by [senior counsel for the defence at trial]. In addition, I was furnished with the very same appeal papers containing the same grounds as drafted by former legal representatives."

55. While the second affidavit of the appellant was sworn on 13th February 2020, it was only served on the Director at the end of April 2021.

Mr. Gibbons' second affidavit

56. Mr. Gibbons responded to the delayed second affidavit of the appellant by way of a supplemental affidavit dated 7th May 2021. In the affidavit, he explains that on 30th April 2021, he had received by email a copy of the affidavit of the appellant sworn on 13th February 2020, but which it seemed was only served on the Director in recent days. He says that having considered the contents, he wrote by email to the appellant's new solicitor and to the Office of the Director of Public Prosecutions, stating that if he was to deal with the contents of the affidavit, as well as the affidavits of Mr. McNamara (solicitor), it would be his intention to refer to records of a number of attendances, together with two handwritten letters sent by the appellant to his office from prison dated 8th June 2017 and 13th June 2017. He

explains that he received a reply by email from KRW Law on 6th May 2021 and a response by email from the Director on 7th May 2021.

57. Mr. Gibbons then proceeds to address the contents of the appellant's affidavit. In the context of the present appeal, the most salient aspects of what he has to say are as follows.

58. He rehearses once more the initial engagement with the appellant in relation to the alleged conversation with Garda O'Shea. He refers to the fact that, in the months leading up to trial, senior counsel for the defence issued formal written advices dated 29th July 2016 (exhibited). The relevant portion of those advices has been set out earlier in this judgment. Mr. Gibbons points out that the advices deal with the comments that were allegedly made to Garda O'Shea under the heading "Voluntary Admissions". He says that the appellant is correct in saying that he took issue with the alleged comments, but that he is wrong in saying that any of his legal representatives ever suggested to him that these comments "would not see the light of day". Mr. Gibbons avers that the appellant was correct in saying that his instructions to his legal team were that the comments allegedly made to Garda O'Shea were to be contested. However, he says "that was in the context of Mr. Lammon maintaining at all times that it was not his intention to give evidence at trial and that it was very unlikely that this would change." He says it was made clear to the appellant by his legal representatives that there would be "great difficulty" in contesting the admissibility of the alleged comments made to Garda O'Shea on the basis of the evidence available.

59. Mr. Gibbons says that he attended Cloverhill Prison on 18th August 2016 (he exhibits a copy of an attendance in this regard) and makes the point that, as can be seen from the attendance note, they did discuss the comments allegedly made to Garda O'Shea. He says that he, along with both counsel, met with appellant at Cloverhill Prison on 20th September 2016, and he also exhibits a copy of that attendance note. I will return to these and other exhibits presently.

60. Mr. Gibbons says that the appellant is correct in saying that there were a number of conversations with him during the course of his trial, but is incorrect in saying that "the conversations never concerned the proposed evidence of Garda O'Shea". He avers that "[a]ll of the evidence in the case was discussed as the trial proceeded", and that included the alleged comments made to Garda O'Shea. Mr. Gibbons draws attention to what he had to say at paragraph 9 of his original affidavit (sworn on 12th December 2019). Having referred to the fact that the prosecution had presented the defence with a shortened and less harmful version of the Garda O'Shea allegations on which the appellant's instructions were sought, he averred that the appellant was advised that there were now a number of options available and had explained what those were. He had said that while the Garda O'Shea evidence was clearly unhelpful, it was never considered by the defence team or by the appellant to amount to an actual confession to the offence. Mr. Gibbons had averred that the appellant, having considered the matter and having taken advice, gave instructions to accept the proposals put by the prosecution, and that the appellant gave those instructions fully aware that the agreed Garda O'Shea evidence would not then be challenged by counsel.

61. Mr. Gibbons then comments that the appellant was correct in stating that the agreed version of Garda O'Shea's evidence was given and was not contested, and makes reference to the transcript of Friday 21st October 2016 in that regard. He refers to the fact that the transcript shows that prosecution counsel had outlined to the judge in the absence of the jury that an agreement had been reached, and that this would see a considerable amount of time saved that day. He comments that it is notable that the appellant did not object to this at that time, or, he says, on any occasion subsequently. He comments:

> "8. […] Mr. Lammon had been advised that the proposal put by the Prosecutor was very much worthy of consideration given the likelihood of the alleged comments being admitted in any case and Mr. Lammon had given his specific instructions to

accept the Prosecutor's proposals. At no time that day, or during any of the subsequent days of the trial, or in the course of any subsequent meeting or telephone conversation between this Deponent and Mr. Lammon, did Mr. Lammon ever suggest to me that the Garda Danny O'Shea evidence had been allowed in contravention of his instructions. The first notice that this Deponent received that Mr. Lammon was contesting those instructions was in the course of correspondence from his current legal team in September 2019 as disclosed in the Affidavit of Gerard McNamara solicitor sworn on 26th of November 2019.

9. I say it was never suggested to Mr. Lammon that the reason the Garda Danny O'Shea evidence went uncontested was that we 'didn't want to call Garda O'Shea a liar' as suggested in Paragraph 28 of his Affidavit. It was never suggested to Mr. Lammon that the question of allowing Garda Danny O'Shea's evidence to go uncontested was a mistake that we would seek to have addressed in the Court of Appeal as seems to be suggested in Paragraph 29 of his Affidavit."

62. Mr. Gibbons then takes the opportunity to point to the "potential evidence which was excluded" as a result of accepting the prosecutor's proposal, exhibiting the "Note of Conversation [,] Garda Danny O'Shea" (quoted earlier in this judgment) in that regard.

63. Mr. Gibbons refers to the fact that the appellant, in his affidavit, suggests that he continued to be disappointed after his trial that Garda O'Shea's comments were not forming part of his appeal. He says that following the trial, he met with the appellant in Mountjoy Prison on 23rd November 2016. He refers to a civil matter that was discussed, and says that he does not believe that the Garda O'Shea matter was raised by the appellant at that meeting. He says he does not believe that he is entitled to exhibit his attendance note from that meeting as he does not believe "that it is covered by the release from solicitor/client privilege" that had been provided by the appellant. Mr. Gibbons goes on to say that in March 2017, he had a

telephone conversation with the appellant where he mentioned a number of personal items that he was seeking to have returned to him. Mr. Gibbons says that the appellant did not mention the Garda O'Shea matter and he refers to notes from those telephone conversations.

64. On 24th April 2017, and again on 3rd May 2017, he received emails from his secretary informing him that the appellant had telephoned from prison and had raised certain issues that he wanted to discuss. Mr. Gibbons says that he subsequently spoke with the appellant on the telephone on 4th May 2017. He says that the appellant did not raise the Garda O'Shea matter either in the course of the two telephone conversations to his secretary, or in the subsequent telephone conversation that he had with the appellant. He again refers to his notes in this regard.

65. He says that on 11th May 2017, he met with the appellant in Portlaoise Prison and on this occasion, they did discuss the Garda O'Shea matter. He refers to notes of that meeting. In the context of this appeal, these notes are potentially very significant.

Documents exhibited in Mr. Gibbons' second affidavit

66. For ease of reference, we have reproduced the attendance note, highlighting (by way of our emphasis) the paragraph with specific relevance to this appeal:

> "Attendance Note
>
> Re: James Lammon
>
> Date: 11th May 2017
>
> I met today with Jimmy Lammon in Portlaoise Prison. He tells me that he wants to change his senior counsel. He wants to keep his junior but he will change his senior. He asked me to pick a new senior for him. [H]e also wants to see the submissions before they are lodged in court[. Jimmy Lammon] subsequently rang to tell me that he has changed his mind and he no longer wishes to change his senior counsel).

He feels now it may have been a bad idea to allow the evidence regarding the large find of guns and drugs being entered into evidence. I told him that was not our choice in any case. The odds are that it would have been likely have been admissible [*sic*]. However, we have [*sic*] discussed the matter at the time. His senior counsel felt that it was not a bad idea that the jury be allowed to believe that there was another criminal gang locally operating out of that area. There was nothing connecting Jimmy Lammon with the large find of drugs and guns. I pointed out to him that we had discussed this and agreed on that tactic at the time and it is now too late to change our minds.

He was very exercised about the potential contamination of the gloves by putting all four of them into the one bag. We discussed that again.

We discussed the fact that the Judge had allowed the DPP to continue serving additional evidence up to and during the start of the trial. I pointed out to him again that we had discussed this at the time. I had explained to him that we could object to it at the time in which case we might well have been offered a new hearing date to allow us time to consider the additional evidence. However, he himself had made the decision at the time that he did not want to do that and he wanted to proceed despite the fact that we were still be [*sic*] served with additional evidence. Again he will not now be allowed to backtrack on that decision.

He spoke about the fact that we had agreed some of the Garda Danny O'Shea evidence. I pointed out to him again that we had discussed this and made the decision about it during the course of the trial. [I]t was a good settlement at the time given what Garda O'Shea had to say. We all agreed at the time that we dealt with that issue very well and again he would not be allowed to reconsider that decision at this stage.

He asked if he would be allowed a new appeal in the event that he gathered new evidence. I told him that I thought that would depend on the nature and strength of the evidence.

We discussed the evidence of his neighbour Mr. Kehoe about the timing of when he saw Jimmy Lammon in his yard. I told him that from my recollection of Mr. Kehoe's evidence the timing was a little unclear and not overly helpful. I did not think that there would be a successful ground of appeal on that.

He is adamant that the green gloves found that were relied on at the trial were not connected with the shooting of Jason Doogue. He does not know how firearm residue got on those gloves.

David." (emphasis added)

67. Mr. Gibbons also exhibits a number of other attendance notes. The attendance note of a visit to the appellant at Cloverhill Prison on 18th August 2016 indicates that the advices (received from his then senior counsel) were discussed in detail; that the appellant retained those advices for a number of days; and that the appellant studied them before giving them back to his solicitor as he did not want them "lying around his cell". A considerable number of aspects of the expected evidence were discussed. In relation to Garda O'Shea, it is recorded:

"We discussed the Garda Daniel O'Shea statement. He remains adamant that what Garda O'Shea says is not accurate. In any case it seems to me that what Garda O'Shea reports falls somewhat short of an admission by James Lammon."

68. The note of 20th September 2016 records an attendance on the appellant by Mr. Gibbons, together with both senior and junior counsel. It records that it was explained to the client that the lawyers had been to Athy and had been shown around certain points of interest in relation to the prosecution. The attendance records that:

"It was discussed that the prosecution case is built on a number of small pieces of evidence. We will be looking to take out as many of those pieces of evidence as possible."

69. There is an attendance note dated March 2017, which records that the appellant had recently telephoned to say that there were a number of items being held by Gardaí that he was particularly interested in. Attached to that is an attendance note of 9th March 2017, recording the details of a conversation between Mr. Gibbons and the exhibits officer, Garda Scott Browne.

70. Also exhibited is an email from Ms. Elaine Dowling (secretary to Mr. Gibbons) sent to Mr. Gibbons on 24th April 2017, which has as its subject line: "Re: Jimmy Lammon – refusal to give DNA sample". The email records that the appellant had telephoned that morning to ask "if he should have been shown a letter of authorisation before the Gardaí took his DNA". There is a further email exhibited from Ms. Dowling to Mr. Gibbons, dated 3rd May 2017, stating that the appellant will be telephoning on Thursday 4th May at 2.30pm. Mr. Gibbons is asked that "if anything happens" and he cannot speak with the appellant, could he leave a message addressing whether any of the points listed below would have any bearing on his appeal:

- "Should he have been shown a letter of authorisation before the Gardaí took his DNA sample[?] [H]e had refused them the sample and Jimmy Lammon said that they never showed him any paperwork allowing them to take his DNA sample."
- "He wants to know why the prosecution were allowed bring up the fact that they found guns and bulletproof vests as they were not related to his case. He said that the Judge asked the prosecution if they were connected to this case and they admitted it was nothing to do with the trial. He thinks that this influenced the jury's perception of him and that they should never have been aware of it."

- "Jimmy said that the four gloves the Gardaí put in the same bag contaminated the evidence. He said that he maintained during his trial that the gloves came from himself and another gentleman."

71. In an attendance note of 4th May 2017 (the document is incorrectly dated 4th May 2016), Mr. Gibbons records that he spoke on that day with the appellant when he telephoned him. During the conversation, the appellant expressed two things of particular interest in the context of his appeal, recorded in the attendance note as follows:

1. "He [the appellant] is concerned about the fact that the murder weapon was found in the vicinity of a whole lot of other weapons and drugs. He feels that he was associated with those other weapons and drugs as a result and that this did not help. He also feels that the timing of the trial, in the context of a big drugs and weapons find, was unfortunate given the ongoing Kinahan/Hutch feud in Dublin at the time. He said that he felt that the jury were looking at him each day and were then reading in the papers about some other person getting killed as part of that feud. He says that he could not have got a fair trial at that time because of these factors. I told him that I did not think that point would be of any interest to the Court of Appeal and I pointed out to him the danger of contaminating good appeal points with frivolous ones."
2. "He [the appellant] is very committed to the idea that the Gardaí allowed for the potential contamination of evidence by bagging the two pairs of gloves in the one evidence bag. He felt that this should be raised as an issue in the appeal. He says that it is clear from the transcript that [senior counsel for the defence] raised this as an issue during the course of the trial. I told him that I would pass that on to his barristers."

The memo then records that the appellant raised the question of whether he would have been entitled to see the letter of authorisation given for the taking of DNA samples before the samples were taken. The note records that Mr. Gibbons replied that he did not believe that he was entitled to that, even though one of the Gardaí said that they would get it for him. Mr. Gibbons records that the appellant understood the point he was making.

72. The affidavit goes on to exhibit two handwritten letters sent by the appellant to Ms. Dowling (Mr. Gibbons' secretary), dated Thursday 8th June 2017 and Tuesday 13th June 2017. The letter of 8th June raises numerous, detailed points which the appellant wants raised with the defence forensic/ballistics experts. The second letter lists a number of items which the appellant wants "checked out" for "charcoal found in gunpowder". It might be said that some of the matters listed are indicative of some far-fetched theories.

The Cross-Examination of the Appellant

73. On 10th May 2021, having confirmed to his own counsel that he wished to adopt the contents of the two affidavits sworn by him as his evidence for the purpose of the appeal, the appellant was cross-examined by counsel for the prosecution. The transcript of the cross-examination amounts to just over fifty pages.

74. The cross-examination began by counsel referring the witness in brief terms to the contents of his two affidavits. The witness accepted that he had post-conviction exchanges with his former solicitor, Mr. Gibbons. Counsel put it to the witness that the account given by him, which was that his legal team had "never said anything, good, bad or indifferent" about an agreement with the prosecution to deal with the memorandum created by Garda O'Shea, was not credible.

75. The cross-examination then turned to what had occurred on day eight of the trial, the day on which Garda O'Shea was called to give evidence. The appellant maintained that he

had understood and expected that there was going to be a challenge to the admissibility of Garda O'Shea's evidence. The witness accepted that he had an appreciation of what was involved in challenging the admissibility of evidence as there had been a number of challenges to other aspects of the evidence – some successful – during the course of the trial.

76. The witness was then brought through the very short transcript of day eight of the trial. The witness' attention was drawn to the fact that the transcript opens with counsel for the prosecution saying, "I'm obliged for the time, in fact we've been able to use it fruitfully again". The witness' attention was also drawn to the fact that the transcript records counsel for the prosecution as saying that the parties had "agreed a format" for how two issues would be dealt with, and as a result, what had been expected to be a long day, with perhaps fifteen witnesses called, was now going to be a very short one involving just two witnesses.

77. In essence, the point that counsel was making was that express reference had been made to the fact that an agreement had been reached, and if that express reference was incorrect and there was no such agreement – or rather, no such agreement that the appellant had approved of – then the appellant had every opportunity to protest or record a disagreement at that stage. For our part, we will return to consider the significance of the transcript of day eight of the trial in due course.

78. The cross-examination then turned to the records that were available of contact between the appellant and his former solicitor, beginning with the record of conversations between the appellant and Mr. Gibbons' secretary on 3rd May 2017. It was pointed out to the appellant that while a number of matters relating to DNA samples and the finding of guns and bulletproof vests *etc* were mentioned, there was no mention of any concern about the Garda O'Shea memo. The appellant took the position that the interpretation being put to him by counsel was not correct, and that while it might be the case that on that specific day (3rd

May), he had not mentioned it, it was nonetheless an issue that he had brought up with his solicitor on numerous occasions after his conviction.

79. The appellant was then taken through a memo of a telephone conversation between himself and his former solicitor, during which various matters of concern were again raised, but without any reference to the Garda O'Shea memorandum. Counsel then turned to exhibit "DG8", the attendance note of 11th May 2017, to which there has already been detailed reference in the course of this judgment. The appellant's position was that the conversation recorded by Mr. Gibbons, and summarised by counsel as one where the appellant was told by his solicitor that they had agreed a deal with the prosecution, because it was a good deal, and that his solicitor did not think it would be possible to reconsider at this stage, was a conversation which never happened.

80. Counsel turned then to the handwritten letters sent by the appellant, dated Thursday 8th June 2017 and Tuesday 13th June 2017, raising multiple issues which he wanted addressed, but, once again, making no reference to the Garda O'Shea issue. Counsel moved on to address to a further attendance note (exhibit "DG10") which purports to record a conversation between the appellant and his then solicitor when he called from Portlaoise Prison. It records that the appellant had expressed regret about the decision taken in relation to the evidence as to the finding of a large quantity of guns and drugs, and that Mr. Gibbons had responded by saying that a decision had been made at the time, and that it would not now be possible to indicate to the Court of Appeal that his client now wished he had chosen otherwise. The appellant agreed that this was a correct record of the conversation. This note also did not contain any suggestion that the appellant had not agreed to the treatment of the Garda O'Shea evidence.

81. At that stage, the cross-examination turned to such record as there was of the appellant's contact with Mr. Chris Hogan (solicitor) of Poe Kiely Hogan Lanigan Solicitors.

The witness' attention was first brought to exhibit "JL1" (the document entitled "Instructions on my Appeal", referred to previously in this judgment), and he was asked about the fact that the reference to Garda O'Shea's evidence appears at point number 5 in the list of concerns rather than at number 1, and it was suggested that even at that stage, it had not been suggested that the former legal team had failed to follow instructions. The witness accepted that he had not raised that issue, however he did not accept that the reason he had not raised it was because they had *not* failed to follow instructions. Instead, he maintained that they had failed to follow instructions. The appellant's attention was drawn to the wrap-up paragraph, previously referred to in the course of this judgment, and to the fact that when highlighting and summarising the issues of concern, there was no reference to the Garda O'Shea issue. The appellant responded by indicating that it had already been dealt with in an earlier paragraph.

82. Prosecution counsel then explored with the witness the suggestion by Mr. Gibbons that, in essence, three options had been discussed in relation to the Garda O'Shea evidence. He was asked about his contention that when he raised the failure to challenge the evidence of Garda O'Shea, he was told that his senior counsel did not want to call Garda O'Shea a liar as it would not help with the trial. He was, in essence, asked how that could be, given that any challenge to Garda O'Shea's evidence would have been in the absence of the jury, and the witness' response was that he was not familiar with the technicalities of a challenge, but was expecting that there would be a challenge.

83. After the lunch break, counsel for the prosecution then turned his attention to the strategy that had been deployed by the defence at trial, including the extent to which the strategy experienced some setbacks, and the extent to which the admission of the O'Shea evidence in abbreviated form went some distance to advancing defence objectives.

The Cross-Examination of Mr. Gibbons

84. When it was the turn of Mr. Gibbons to be cross-examined, he explained to counsel for the appellant that he had been contacted by the appellant from custody on the Friday of a bank holiday weekend. He delayed a trip that he had planned for the bank holiday weekend and went to see the appellant on the Saturday morning in Kildare Garda Station. He had acted for the appellant previously, and, on this occasion, the appellant had specifically asked for Mr. Gibbons. He explained that on request, he had handed papers over to Poe Kiely Hogan Lanigan Solicitors. It was suggested to him that he had not in fact handed over his entire file because a number of exhibits referred to in the second affidavit had been retained by him. The witness said that these were attendances that did not form part of a client's file; they were written for his own convenience and memory, and to assist him in the future. Letters sent by the client were put in a file of correspondence that was developing. His understanding had always been that not all attendances prepared by a solicitor form part of the file that is then the property of the client. The demarcation might be that attendances were created for his own convenience, or as an *aide memoire* for himself, or for his own protection in the future.

85. Counsel then, referring to the telephone conversation that Mr. Gibbons had with the appellant wherein the appellant informed him of the exercise yard comments being attributed to him and Mr. Gibbons advised that the appellant formally deny making the comments, asked whether he considered that the comments were "important". Mr. Gibbons replied that he did view them as important, as they were comments that would have indicated that the appellant may at least have had some knowledge or been involved in the offence.

86. After the appellant was charged and remanded in custody, the witness attended at Cloverhill Prison on a number of occasions for the purpose of taking instructions and discussing the various elements of the evidence against his client. At no point, at that stage,

did the client accept that those conversations had taken place or any version of them. The appellant did tell him that there had been a conversation between himself and Garda O'Shea, but not the conversation that Garda O'Shea was relaying. The legal team's advices to the appellant, and the appellant's instructions, were to challenge the account of the conversation. He said, however, that senior counsel was not confident about a successful challenge.

87. When asked about the effect of the comments that Jamie Quinn was the intended target, the witness observed that his perspective was – and he felt that this was also the perspective of senior counsel – that the comments stopped short of admitting the offence. On day seven of the trial, his expectation (and that of senior counsel) was that, the following day, there would be a full day of evidence dealing with interviews, and dealing with the exercise yard conversation. That was the expectation until counsel for the prosecution put forward a proposal, which the witness thought was presented on Thursday evening, 20th October, after proceedings had finished up for the day.

88. He recollected senior counsel for the then accused informing him of the proposal in the Coffee Dock on Level 2 of the CCJ, where they generally went for a cup of coffee after court had finished. Mr. Gibbons said that his senior counsel had told him that the prosecution was prepared to reduce the evidence of Garda O'Shea to three particular points, and she told him what they were. He explained that he thought that it was a reasonable offer, and one that his client should accept, or certainly consider. Junior counsel was not present when Mr. Gibbons spoke to senior counsel, so they proceeded to inform him about it, before discussing it amongst all three of them for some minutes. The witness explained that it was absolutely the case that his understanding was that this could only happen if the appellant agreed to it.

89. The next day, the legal team spoke with the appellant, and he was given three options: accept the proposal; contest Garda O'Shea's evidence in its entirety, based purely on his subsequent denials in Garda interview, or, give evidence himself at trial. The advice that the

appellant was given was that the lawyers felt that the offer from the prosecution was a good offer, and was worthy of serious consideration. Counsel for the appellant asked the witness whether he saw any ethical issues surrounding the third option; Mr. Gibbons replied by indicating that there would have been ethical issues had he asked the appellant to tell him that he had, in fact, had the conversation with Garda O'Shea, but that this was not what he asked him. Mr. Gibbons confirmed that he had not located an attendance note of this conversation and he presumed that he did not make one. When asked why he did not make a note of such an important event, he explained that he does not make a note of every conversation that he has, and that was not the only important event that took place in the trial; there were other matters that were just as, and perhaps, even more important. He said that the client was not telling him then that he had had that conversation. What the client was telling him was that his defence team could accept the proposal that the evidence would be given and would not be challenged. He was asked whether he had confirmed specifically with the client that he accepted the conversation had taken place, and he said that he did not know if he had asked his client to confirm that specifically; perhaps not.

90. Counsel explored whether it was being suggested that the appellant had ever said explicitly, "I am accepting that I had that conversation and that I said those things". The witness did not contend that this was ever said explicitly, but he maintained that, in accepting the prosecution's proposal, his client had changed his instructions; it could not be otherwise. Counsel concluded his cross-examination by putting it to the witness that his evidence in two respects had not been truthful, namely with regard to: (i) his evidence that there had been a conversation with the appellant about how the Garda O'Shea evidence was to be treated; and, (ii) the witness' view that the instruction to accept the prosecution proposal involved, by necessary implication, a change of instructions away from denying the fact of the disputed conversation.

Discussion and Decision

91. We will preface our remarks by saying that the dispute as to fact is a very stark one. The divergence between client and solicitor that has emerged cannot be explained on the basis of a misunderstanding between the parties as to some nuance, such as, for example, as to whether a topic was simply being discussed or actually required a decision. Here, the appellant's former solicitor says he discussed and received clear instructions from the appellant to accept the prosecution proposal about Garda O'Shea's evidence, while the appellant says that he maintained his instruction for the evidence to be challenged in its entirety, that his legal team disobeyed his clear instruction, and that he complained during and after the trial to them about this. It seems to us to be an absolutely inescapable conclusion that only one can be telling the truth and that one must be telling an untruth.

92. In seeking to resolve the conflict, we would make the observation that occasions where solicitors specifically and intentionally refuse to follow their client's instructions, but instead choose to conduct a trial – but more specifically, a murder trial – in a manner contrary to their client's instructions must be very rare. One would like to think that is because their sense of professional obligation would ensure that they would never think of acting in such a fashion, but even if one puts that consideration totally to one side, it is the case that few solicitors would dare to do so, for the simple reason that they could not expect to get away with it.

93. In this case, there is a conflict as to what occurred when the Court rose following day seven of the trial and what occurred the following morning. Was the appellant informed of the prosecution proposal and did he instruct his legal team to accept it? We are of the view that this should be answered in the affirmative, for the following reasons.

94. In the first instance, it seems to us that the transcript of what happened when the Court sat on day eight provides strong support for the version of events advanced by Mr.

Gibbons. When the Court sat, and it is notable that it sat late that morning, counsel for the prosecution thanked the Court in the traditional manner for allowing the parties time, and commented that the time had been put to good use. Prosecution counsel then indicated that agreement had been reached, both in relation to the inference provisions and what he, by way of shorthand, described as the "verbals" issue. He explained that it had been envisaged that there would be a substantial *voir dire* (the prosecution had fifteen witnesses lined up), but because of the agreement that had been reached, it would not now be necessary to call them. It seems to us very hard, if not impossible, to believe that a client who had been told that a particular aspect of the evidence would "never see the light of day", and who had been led to understand that the admission of that evidence would be challenged that day, would have accepted its admission in edited form without demurral if that had not been agreed with him in advance. We have seen and heard the appellant give evidence and we have seen the detailed correspondence in which he has engaged with different solicitors, and the strong impression appears to be that the appellant is someone who is well capable of looking after his own interests and is not "behind the door" in doing so.

95. Secondly, we have considered the correspondence in which the appellant engaged post-conviction, to which we have referred earlier in the course of this judgment. It is clear that there were a number of issues that Mr. Lammon wanted to pursue at the appeals stage and it is clear that he had regrets or has second thoughts about some decisions of a tactical or strategic nature that were taken at trial. Strikingly, what is lacking is any complaint that his direct and specific instructions regarding Garda O'Shea's evidence were not followed, but rather, that evidence was, by agreement, admitted in edited form when his firm, specific, and unwavering instructions had been that objection should be taken.

96. In considering the significance, if any, to be attached to the interaction between solicitor and client post-conviction, we have had regard to the affidavit sworn by Mr.

Gibbons on 7th May 2021, and the documents exhibited therein. In the course of that affidavit, Mr. Gibbons refers to several contacts that he had – some face to face, some by telephone, and some as a result of conversations between the appellant and Mr. Gibbons' secretary – in the course of which the evidence of Garda O'Shea did not arise as an issue. However, more significantly still, Mr. Gibbons says that he met with the appellant at Portlaoise Prison on 11th May 2017, and on that occasion, the Garda O'Shea matter was discussed. He exhibits his notes of that meeting. It might be noted that on the basis of the attendance note, the evidence of Garda O'Shea was not the first matter discussed, nor was it top of the appellant's agenda.

97. The attendance note records that he raised issues about the admission of the find of guns and drugs, and about the potential for contamination when a number of gloves were put in the same bag, and only then does the note deal with the Garda O'Shea evidence issue. What the note records is potentially highly significant and bears quotation once more:

> "He spoke about the fact that we had agreed some of the Garda Danny O'Shea evidence. I pointed out to him again that we had discussed this and made the decision about it during the course of the trial. It was a good settlement at the time given what Garda O'Shea had to say. We all agreed at the time that we dealt with that issue very well and again he would not be allowed to reconsider that decision at this stage."

The reference to Mr. Gibbons pointing out to the appellant again that he would not be allowed to reconsider that decision at this stage should be viewed in the context that the memo in relation to the drugs and arms find states, "I pointed out to him that we had discussed this and agreed on that tactic at the time and it is now too late to change our minds", and the discussion of the fact that the Director was allowed to serve additional evidence up to and during the course of the trial records Mr. Gibbons as saying:

"I pointed out to him again that we had discussed this at the time… Again, he will not now be allowed to backtrack on that decision".

98. What Mr. Gibbons has to say about the meeting in Portlaoise Prison on 11th May 2017 is potentially very significant for the resolution of the conflict. If what Mr. Gibbons says happened on that occasion is accurate, and if the attendance note recording what had occurred (exhibited as "DG8") is authentic, then that, for all practical purposes, disposes of the issue. Indeed, in the course of cross-examination, the appellant, in effect, conceded as much while stoutly maintaining his position, which was that the conversation between himself and his solicitor while he was in prison never happened.

99. Unattractive as the idea is, we have had to consider the possibility that Mr. Gibbons has decided to perjure himself, and that the purported memoranda of conversation is a complete fabrication. Doing so involves addressing the fact that insofar as the memorandum purports to refer back to what had occurred during trial, the evidence has been left at the level of assertion by one witness (the appellant) and denial by the other witness (the former defence solicitor). Two potential witnesses, senior and junior counsel for the defence at trial, were not called as witnesses and have not given evidence.

100. In this regard, we note that the tone and content of what the appellant said, as recorded in the memorandum of 11th May 2017, is very consistent with the approach taken by the appellant in other communications. Issues that he is recorded as having raised on 11th May 2017 were issues that were of persistent concern, such as admitting the evidence relating to arms and drugs finds, the question of cross-contamination, and the tendency of the Director to serve additional evidence during the course of the trial.

101. Further, while it was put "very squarely" – to use the words of counsel – that there was no discussion on the morning of day eight of the trial about agreeing to admit the evidence of Garda O'Shea in a modified and edited form, Mr. Gibbons was not challenged in

cross-examination on the basis that no conversation as recorded in exhibit "DG8" ever took place.

102. Fourthly, we consider it helpful to consider the proposal made by the prosecution in the context of the trial as a whole. The appellant has contended that the decision not to challenge the admission of the modified evidence of Garda O'Shea was taken without his instructions, but he has also contended that the course of action followed was a very unwise one and not one that competent lawyers would have recommended. While the appellant's argument proceeded on the whole as if there was a binary choice between excluding the evidence of Garda O'Shea in its entirety and admitting the evidence in modified and edited form, that was never the situation. There was never any guarantee that if there was a *voir dire* in relation to the record of the conversation, that the evidence would be excluded; on the contrary, if he had lost, the memorandum might have been admitted in its entirety. If the choice is considered as being one between a full version of the Garda O'Shea memo and the shorter, edited version, then, undoubtedly, the shorter version rather than the full version represented a significant advance for the defence, particularly when one considers the defence strategy as a whole and the two setbacks this strategy had received in the preceding days, as described earlier.

103. The point has been made that, on Mr. Gibbons' version of events, there was no explicit change of instructions to one where the appellant was admitting making the remarks attributed to him. On one level, that is true, in that nobody is suggesting that the appellant ever explicitly conceded "I said those things", but there can be no doubt that if he was accepting that the evidence could be given without challenge, he was implicitly accepting that he had made the remarks that were being attributed to him.

104. Taking all of the above factors into account, we are of the view that the version of events to which Mr. Gibbons swore represents what actually happened.

105. This is a case where the onus rested on the appellant to persuade this Court that, on the balance of probabilities, his legal team acted contrary to his instructions. We are of the view that this threshold has not been reached. In fact, we would go considerably further and say that we are satisfied beyond all reasonable doubt that the evidence of Mr. Gibbons is correct; that the prosecution proposal about Garda O'Shea's evidence was discussed with the appellant; and, that the latter fully understood what was on offer, and instructed his team to accept the proposal. Given the options, that was a rational and informed decision on his part and we are in no doubt whatsoever but that that was what occurred.

106. Accordingly, we will dismiss this appeal.