



THE COURT OF APPEAL

Record No: 20/2019

**Birmingham P.
Edwards J.
Kennedy J.**

Between/

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

RESPONDENT

- AND-

SEAN LANE

APPELLANT

JUDGMENT of the Court delivered on the 7th day of November, 2022 by Mr Justice Edwards

Introduction

1. On the 19th of July 2018, the appellant was convicted by the unanimous verdict of a jury at Tralee Circuit Criminal Court of a count of causing serious harm to one Eamon Sheehy contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997; and also of a count of producing a weapon or article capable of inflicting serious injury, namely a baseball bat, in the course of a dispute and in a manner likely unlawfully to intimidate another person, contrary to s. 11 of the Firearms and Offensive Weapons Act, 1990.
2. The appellant was jointly tried with a co-accused, a Mr Jason Keane Broderick. However, Mr Broderick was not charged with the same offences as the appellant but rather was charged with a single count of possession of an article in a public place, namely a baseball bat, intended by him to unlawfully cause injury to, incapacitate or intimidate any person either in a particular eventuality or otherwise, contrary to s. 9(5) of the Firearms and Offensive Weapons Act, 1990.
3. The appellant was sentenced to a term of nine years imprisonment on the count of causing serious harm, and to three years imprisonment on the count relating to the

production of a weapon, the said sentences to be served concurrently and to date from 17/01/2018.

4. The appellant now appeals against his said convictions. While a number of grounds of appeal against his convictions were initially pleaded, he now seeks to rely solely upon a single net point, i.e., that the trial judge erred in refusing to direct that the appellant be tried separately from his co-accused Jason Keane Broderick.

Background to the case

5. By way of general background, the jury heard evidence that the appellant, his co-accused Jason Keane Broderick, and a Mr Cian Broderick were drinking in the Lane family home (otherwise Mary Lane's house) in the town of Castleisland on the night of the 13th/14th of January 2018. At some point between 4.00 am and 4:30 am on the 14th of January 2018 Jason Keane Broderick left the Lane family home to go to his own home. The jury was told that Jason Keane Broderick had been in a long-running dispute with another young man called Shane Fitzgerald. This was relevant because not long after leaving the Lane family home, Jason Keane Broderick returned there and informed the appellant and Cian Broderick that he had been chased by Shane Fitzgerald and another man called Thomas Barrett. It was agreed in consequence that all three would travel across town and seek to confront Shane Fitzgerald at his home at number 16 Meadow Court, Castleisland. Jason Keane Broderick carried with him a baseball bat, and would claim later that he did so because he was in fear of Shane Fitzgerald and Thomas Barrett. On arrival at the home of Shane Fitzgerald at approximately 4:45 am, the group of three called to him to come out, but he did not emerge. When they failed in their attempt to lure Shane Fitzgerald out the three men eventually left Meadow Court, ostensibly to return to the Lane family home. Enroute, they went through St. Stephen's Park and at approximately 5.20 am they targeted the home of Eamon Sheehy who lived with his grandfather Ned at No. 28, St. Stephen's Park, by throwing stones at the house.
6. There was evidence that there had also been a long-standing dispute between Eamon Sheehy and the appellant. Cian Broderick stated in his statement which was read to the jury under s. 21 of the Criminal Justice Act 1984, that "[t]he dispute between Eamon and Seany is going on for about a year with Eamon coming over to Mary's house [i.e., the Lane family home] shouting in the letterbox and throwing stones." The appellant himself also confirmed that relations between them were poor when he volunteered to a garda in the aftermath of his arrest and while he was under caution that Eamon Sheehy "*attacked me two months ago in Lidl.*" The jury further received evidence from Shane Fitzgerald in a statement which was read to the jury pursuant to s. 21 of the Criminal Justice Act 1984. Mr Fitzgerald attributed the animus between the appellant and Eamon Sheehy to the fact that the appellant was now going out with Mr Sheehy's ex-girlfriend, Katie Cotter. The jury further received evidence from Katie Cotter, again read to them pursuant to s. 21 of the Criminal Justice Act 1984, in which she set out how she had dated the appellant after finishing with Eamon Sheehy, and stated that the appellant had been extremely jealous and resentful towards Mr Sheehy.

7. It is uncontroversial that the targeting of No. 28, St. Stephen's Park by the throwing of stones at it in the early hours of the morning of the 14th of January 2018, led to the appellant becoming embroiled in an altercation with Eamon Sheehy. The evidence was that Eamon Sheehy had initially responded to the stone throwing by opening a window and remonstrating with the group, before emerging from his home armed with a golf club and a knife and confronting them. According to Cian Broderick, Eamon Sheehy spoke to him first, and then sprinted towards the appellant "*with the golf club over his shoulder and a knife in his hand.*" The co-accused Jason Broderick was still carrying the baseball bat at this point. According to Cian Broderick "*Sean got the bat off Jason and they [i.e., the appellant and Eamon Sheehy] both started swinging at each other.*" The appellant later admitted to being engaged in what he characterised as "*a swordfight*" with Eamon Sheehy, ultimately knocking the golf club out of Eamon Sheehy's hand and throwing it into a nearby garden. While thereafter the precise dynamics of the altercation were controversial at trial (the appellant contended in interviews that Eamon Sheehy had continued to come at him with the knife and that he had responded in self-defence, a contention that the jury must be considered to have rejected) it was accepted by the appellant in admissions made to the gardaí, and it was not disputed by him at trial, that he had hit Mr Sheehy with the baseball bat on the head.
8. There was overwhelming evidence that very considerable force was used by the appellant in striking Mr Sheehy on the head and that numerous blows to the head were struck. The jury heard from a Ms Eileen Bartlett who lived at 17 St. John's Park, Castleisland in a house very close to a pedestrian access to St. Stephen's Park. She was woken from her sleep on the morning of the 14th of January 2018 by a groaning sound coming from the direction of St. Stephen's Park. She got up and looked out her bedroom window. She described what she saw occurring outside No. 35 St. Stephen's Park. She saw one person lying on the ground and another person who was wearing a dark jacket and a white hood and who had "*something*" in his hand standing over the person on the ground and "*belting and belting*" that person. The person on the ground was moaning and groaning. The assailant moved away and said, "*get up*". When the figure on the ground didn't move, he pulled him up and let him fall down onto the path, banging his head against the footpath. The prosecution would later contend to the jury that the events seen by Ms. Bartlett were entirely inconsistent with any narrative suggesting that the appellant had acted in self-defence.
9. The injuries to Mr Sheehy were extensive. Once again, it would later be contended to the jury by the prosecution that they were not consistent with self-defence. The medical evidence of two doctors, an accident and emergency physician Dr Martin Boyd, and a neurosurgeon Mr George Kaar, who had both treated Mr Sheehy, was read to the jury under s. 21 of the Criminal Justice Act 1984. The jury heard that Mr Sheehy was deeply unconscious when admitted to University Hospital Kerry. There was a large laceration on the right area of the scalp and another on the left side of his forehead. There was haematoma of both eyes. An urgent CT brain scan was obtained. This showed an intercranial haematoma on the right side of the brain and haemorrhagic contusions bilaterally. He was sedated, intubated and ventilated, and subsequently transferred to

Cork University Hospital. On admission to Cork University Hospital, he remained sedated and ventilated. A follow-up CT brain scan was obtained, and this showed a 5.5 centimetre by 1.5 centimetre right-sided subdural haematoma, swelling in the surrounding brain and a right temporal lobe haemorrhage. There were multi-compartmental contusions in the right temporal lobe, right parietal lobe, left frontal lobe and right occipital lobe. There was four millimetres of midline shift. There was a small left frontal subdural haematoma. Comminuted displaced fractures of the right occipital and parietal bones were noted. One fracture extended to the right mastoid bone end base of the skull with opacification of the mastoid air cells and sphenoid sinus. The jury heard that the injuries had been life threatening and that Mr Sheehy would likely be left with permanent impairment in the function of the right side of his brain, as well as impairments in speech, personality, and higher mental function and that he would have an ongoing seizure tendency.

10. No knife or baseball bat was ever recovered. A golf club was recovered during a scene of crime examination from the garden of No. 35 St Stephen's Park. DNA trace material was found on the gold club matching the DNA profile of Eamon Sheehy.
11. The jury heard that the appellant was arrested on the 15th of January 2018 and that following caution he stated to the arresting officer, Detective Sergeant Henderson, "*I have talked to Dave Ramsay. He, Eamon came at us with a knife and a golf club. We were walking through St Stephen's Park and he came out of his house at us. I had to protect myself. I had a sword fight with him. Jason Keane had the golf club walking through the estate. I hit him with the bat in the head. He still came at me with the knife. I hit him again and we ran off. He hit the car two or three times with the golf club before I got it off him and threw it in the garden. Cian his cousin was there. We had a fight man to man. It was him or me. He attacked me two months ago in Lidl.*" These admissions were noted by Detective Sergeant Henderson in her notebook and were later put to the accused line by line in an electronically recorded formal interview commencing at 18.37 hrs on the 15th of January 2018. However, he did not on that occasion acknowledge making them, and refused to sign the notes.
12. The jury received further evidence from a number of friends of Jason Keane Broderick with whom he was in contact in the aftermath of the incident and to whom he had made admissions concerning his own involvement. It was later suggested by his counsel, and it appears to have been accepted by the prosecution, that he had been somewhat boastful to his friends and may have exaggerated the extent of his personal involvement in the incident. In that regard, the prosecution did not at any point during the trial allege a common design between the appellant and Jason Keane Broderick to cause serious harm, or indeed any harm, to the victim. However, as these witnesses are said by the respondent to be of some relevance in the context of the issue that arises on this appeal, it is proposed therefore to briefly review their evidence.
13. The first such witness was Dominic Keane. He was a cousin and best friend of Jason Kean Broderick. The prosecution lead from him that on the Sunday morning of the 14th of January 2018 at about 10.30 am Jason Keane Broderick had come to his house. Counsel

for the appellant cross-examined, and he agreed that there had been a conversation, which he had later told gardaí about, in which Mr Keane Broderick had admitted to him that he was in St. Stephen's Park earlier that morning with Cian Broderick and Sean Lane. Jason Keane Broderick had said to him that "*Eamon went for them with a golf club, and at some stage Cian Broderick ran off.*" He had also said that "*Seany Lane ran home and returned with a baseball bat.*" The witness related that Jason Keane Broderick went on to say "*Seany Lane hit Eamon with the baseball, but Eamon was okay after it, so Seany hit him again.*" Jason Keane Broderick went on to tell him that before Sean had come back, Jason was involved in a fight with Eamon and gave him a beating. The witness didn't believe him regarding the latter and stated in his evidence to the jury, "*that was something I didn't believe. Jason is the type of person that likes to make himself out to be the big man. When he told me of the assault, I didn't believe him.*" He went on in relaying the account to say that Jason had also said, "*Seaney did hit Eamon with a baseball bat, that Eamon was fine, injured, but able to stay up*", and that "*Seaney hit Eamon again with the baseball bat*". The witness told the jury, "*When Jason was talking to me, he thought they had killed Eamon.*"

14. Another friend of Jason Keane Broderick who testified was Aisling Cronin. The jury learned from her that Jason Keane Broderick had messaged her on Facebook on the morning of the 14th of January 2018. Although, the prosecution did not seek to adduce the content of the Facebook messages between Jason and Aisling, counsel on behalf of the appellant sought to put the content of those messages to her. Counsel for Jason Keane Broderick objected to this contending that the provenance of the material, which was evidence stored automatically in purely electronic form, had not been established and relying in that regard on *The People (DPP) v. Moran* [2018] IECA 176. The Judge initially ruled that in light of the *Moran* jurisprudence the evidence was not admissible, because there was insufficient evidence before the court as to proof of the provenance of the Facebook messages. Counsel for the appellant then applied to discharge the jury on the basis that if he could not cross-examine concerning the Facebook messages, he believed there was a real risk that his client would not receive a fair trial. In response to this the parties were allowed by the judge to discuss the matter further, following which agreement was reached whereby counsel for the appellant could cross-examine the witness as to whether Jason Kean Broderick had said something to her, without specifically referencing any Facebook message. For safety, the witness was initially deposed and cross-examined in a voir dire, at the conclusion of which, counsel for the appellant said, "*Well Judge if that is the way it is I am happy with that.*"
15. The witness was then recalled, and the exercise was repeated in the presence of the jury. The evidence she gave was that she had had a conversation by exchanging texts with Jason Keane Broderick on the morning of the 14th of January 2018, in which he had said, inter alia, to her, "*Aisling, he's dead*", that the witness had asked him "*You did it??*", to which he had replied "*yes*". She confirmed that she understood him to be referring to Eamon Sheehy. He was asked by the witness, "*why did you*", and he had replied, "*He came for me with a golf club. I had to do it*". He had also said "*I didn't do most of it*", and "*Can't talk, Aisling. If guards see this I'll do life.*"

16. Yet another such witness was Jade Keane. The Prosecution lead with the fact that she had had a conversation with Jason on the morning of the 14th of January 2018 but not its contents. Again, counsel for the appellant cross-examined her and elicited from her that Jason had said that he was up at Sean Lane's house, and that when asked what he was doing there he had said, "Look, he was after doing it. It was us". She had said to the gardaí, "I didn't believe him because he is full of crap." She told the jury of another conversation with Jason later that day in which she had asked him what happened, and he had told her, "He was at Seanie Lane's, so himself and Seanie left and walked down the back of Eamon Sheehy's house and Eamon was roaring out the window at him. It was about he was calling Seanie a rapist, but that he was having sex with his girlfriend now. And then Eamon said, 'Wait there, boys'. And he came out the house with a golf club. And Jason started running around and Eamon was chasing them with the golf club." She said, "He told me that Eamon was there on the ground and Seanie was hitting him with a baseball bat and Jason was hitting and kicking him. He said that Cian was there too, but that he ran away when the confrontation started." She said that Jason had told her not to tell anyone what he had told her, but she had not been prepared to do that, and had made a statement to the gardaí.
17. The jury heard that Jason Keane Broderick was also arrested on the 14th of January 2018 in connection with the incident and was interviewed on eight occasions while in garda custody. He initially denied knowledge of the crime before admitting in interviews No.'s 7, and 8, being present without taking part.
18. The substantive part of interview No. 7. comprised the following:
- Q: "You asked the last interview to cease?"
- A: "Correct."
- Q: "You're upset about something. Tell us in your own words what happened on Sunday morning, the 14th of January 2018?"
- A: "I don't know where to start."
- Q: "Take your time?"
- A: "I was walking up through the estate with Cian and Sean. Eamon Sheehy came out with a golf club and knife and went for Sean. He chased me around the car and told him to fuck off. Sean and him had a sword fight with the golf club. Sean hit the golf club out of his hand and Sean continued to hit him with the baseball bat. Cian and I ran. I could hear Eamon roaring, he was roaring. I ran back down to get Sean. 'Stop Sean, stop.' I kept on running. I went to my cousin Dominic's house. I shouldn't be here."
- Q: "Take your time. What happened then?"

A: *"I was being a bollocks, boasting. He threatened me with a golf club. I didn't touch him. I bragged about it until I realised the savageness of it."*

...

Q: *"What did you witness?"*

A: *"Witnessed him hitting once with the bat and I ran."*

Q: *"What you heard?"*

A: *"Eamon roaring 'Stop Sean, I'm done, I'm done.' When he stopped roaring, I went back." "Stop, start roaring?" And he replied "Stop".*

Q: *"Describe what you saw?" "I didn't look at Eamon. I told Sean to stop. He looked at me and he ran as well."*

Q: *"How many times did Sean strike Eamon?"*

A: *"I don't know."*

Q: *"How many did you see?"*

A: *"Five or six. When I was coming back towards him, he was hitting he was hitting him. I shouldn't have ran in the first place. I saw the first belt, I ran. My cousin, Cian ran, I ran. I shouldn't be in here."*

Q: *"You walked past Eamon's. He came out with a golf club and knife?"*

A: *"He then threatened Sean first. He chased me around the car. The sword fight was between two cars. He hit the golf club, the golf club went flying. He hit him, he stumbled back. I ran, Cian ran. I ran through the green gates, An Caisléan Mór."*

Q: *"You heard screaming 'Stop'?"*

A: *"Yeah."*

Q: *"You returned, saw Sean hit him four to five times?"*

A: *"Eamon was on the ground, cars were in the way, I stood in front of Sean, told him to 'Stop', we ran."*

Q: *"Describe the bat?"*

A: *"Normal baseball bat, black."*

Q: *"Timber or aluminium?"*

A: *"I don't know."*

Q: *"Any writing on the bat?"*

A: *"Don't know."*

Q: *"Had you seen it before?"*

A: *"No."*

Q: *"Size of it?"*

A: *"Don't know. It was a proper bat?"*

Q: *"Did you ever handle the bat?"*

A: *"I did."*

Q: *"When?"*

A: *"10 minutes before the situation."*

Q: *"Where were you?"*

A: *"Came through the Ivy Leaf ..."*

Q: *"In your own words, in the lead-up to Eamon coming out to you?"*

A: *"Walked down to Cian and Sean. Don't know the time. It was night time, Sean was drinking. We were sitting down watching TV. I should be making a statement just like my cousin, Cian."*

Q: *"Sean was drinking between there and Eamon's house?"*

A: *"When I was going home, a fella I don't get on with, he started to threaten me. I ran back over the wall. They were laughing at me. I asked them would they walk me home, they said he would -- Sean said he would bring the baseball bat."*

Q: *"Did you come across the two lads?"*

A: *"No. He was drunk. Met Eamon. They were fighting, all over a stupid whore. He shouldn't have done it."*

Q: *"After Ivy Leaf?"*

A: *"Past basketball court by Eamon's house."*

Q: *"What you did then?"*

A: *"Eamon opened the blinds, stuck up middle finger at Sean. Eamon opened the window roaring, 'Have I figged your woman?' Sean asked him to come out. Eamon came out with the golf club. He had the knife at this stage. I didn't know he had*

it. We kept walking. Sean was saying he was not going to come out. He came out, he was roaring at us. He was swinging the golf club off the ground. He was saying, 'You're dead boys.' He pulled out the knife, I went behind a car. We didn't want anything to do with him. He was banging the golf club off the ground."

19. At this point there was extensive questioning concerning what everyone was wearing. It was followed by questions concerning what Jason did after the incident. It is not proposed to review these portions of the interview. The questioning then reverted to the central events and the going through of an earlier account that Jason had provided.

Q: "You went from your girlfriend's to Sean?"

A: "No, home first and then I went down. It was about 11 pm, it was Saturday, I was bored. I didn't know what to do. I went down to the lads."

Q: "Who was in Sean's when you called?"

A: "Cian and Sean. His family came back after his mother, Mary, one of her sisters and one of her friends."

Q: "Aisling's until 11, then dropped to Castleisland?"

A: "I was earlier. Sean's at 11."

Q: "You went to Sean, you hung around, you were heading home, bumped into two fellas, don't get on with one."

A: "Don't know the other."

Q: "You went back to the lads?"

A: "I ran back to the wall and jumped over it."

Q: "You went back with Sean and Cian. You went for a stroll around Castleisland?"

A: "Through Ivy Leaf, island centre next to bookies. Went towards town as far as bookies."

Q: "Walked through St Stephen's Park, through basketball, front of house. Eamon stuck up finger. Words exchanged at back of house?"

A: "Stupid shit."

Q: "Anyone throw anything at window?"

A: "Don't think anyone did. I had no need to do it."

Q: "Remember anyone throwing?"

A: "No."

Q: *"You went out. Eamon followed you down towards the green gates. Banged golf club off ground numerous times."*

A: *"Car park. Open area, he was there but was nearly as far as green gates, but was away from him. I was where incident happened, where he was roaring."*

Q: *"You told him to cop on?"*

A: *"He hit the car with the golf club. He was swinging at me. The golf club hit the window, last house."*

Q: *"You saw Sean hit him with the baseball bat he had earlier in the night?"*

A: *"Yeah."*

Q: *"Cian took off running towards Stephen's, you to the green gates?"*

A: *"He ran before me."*

Q: *"You heard screaming?"*

A: *"He was saying, 'Look Sean, I'm done, I'm done.' I was near Caisl an, I had to go back."*

Q: *"They were between the cars?"*

A: *"That's where they started with the sword fight."*

Q: *"You saw Sean Lane strike Eamon four or five times?"*

A: *"As I was coming back, they were behind the car."*

Q: *"Describe the strikes?"*

A: *"He was swinging the bat violently. Sean, he was in a temper."*

Q: *"You stood in between them. Sean took off running, you after him?"*

A: *"I passed him before the green gates."*

Q: *"You over the wall?"*

A: *"I don't remember jumping it. I didn't stop and I didn't look back."*

Q: *"Then to Dominic's to smoke a few joints?"*

A: *"Wanted to tell him."*

Q: *"You walked around. Got sick on the green?"*

A: *"I'm not a violent person."*

20. At this point there was more questioning concerning what Jason Keane Broderick had done in the aftermath, and why he had said what he had said to Dominic Keane, Aisling Cronin and Jade Keane, respectively. It is unnecessary to review it, beyond stating that his explanation was, *"Being a retard. Thinking I'm being the big man."* The interview then continues:

Q: *"Why change your story now?"*

A: *"There was enough evidence to blame me. I was going to get the blame, which I probably still am. I was going on the advice of my solicitor."*

Q: *"All I wanted was a true account?"*

A: *"I didn't know whose advice I was to take"*

Q: *"Why your story now?"*

A: *"I'm sick of it."*

Q: *"It must be some relief to tell us?"*

A: *"It's a weight off my shoulders."*

Q: *"Did you kick him in the face?"*

A: *"No."*

Q: *"What was your motive to call to the house?"*

A: *"No. I explained what this is over. Sean is up in court over breaking his windows, Eamon Sheehy."*

Q: *"Are you changing story to satisfy us?"*

A: *"To satisfy myself. I'm sick of battling it. I don't think he realised what he did. I'm glad I came back, but I'm in this position because I did come back. I should be at home like my cousin, Cian."*

21. During the eighth and final interview with Jason Keane Broderick he was shown CCTV footage gathered in the course of the investigation, including footage of him carrying the baseball bat shortly before the incident. He was asked:

Q: *"Can you see three persons walking up the lane at the side of Sheehy's house?"*

A: *"Yes."*

Q: *"In the last interview, you told us it was Eamon Sheehy. Are you still going with that?"*

A: *[nods in agreement]*

Q: *"Tell us what happened?"*

A: *"I told you in the last interview."*

Q: *"Camera 2, 5.26. SL exits lane way first followed second, you who was still holding the bat. This is 15 seconds before ES, Eamon Sheehy, gets the beating of his life with a baseball bat. Why is the bat in your hand?"*

A: *"It's not in my hand."*

Q: *"At 5.26.03, you're carrying the bat to the scene of the assault. 43 seconds later, Cian Broderick is leaving the scene. At that time, Eamon Sheehy has been battered, 45 seconds after you had the baseball bat?"*

A: *"I didn't beat him with the bat. He must have taken it there."*

...

Q: *"You went to Shane Fitzgerald's. You couldn't get him out and then you went to Eamon Sheehy's and damn nearly killed him."*

A: *"I understand."*

Q: *"It looks like you carried the bat in town and brought it to the fight?"*

A: *"I didn't do that, man."*

[Jason recorded as becoming emotional]

Q: *"You knew what happened on the night. This is your chance?"*

A: *"I didn't beat him with no fucking bat."*

Q: *"You threw stones at the window, isn't that right?"*

A: *"In my last interview, I told you he started sticking up his middle finger."*

Q: *"Is that why you threw stones? Why had you the bat?"*

A: *"I don't know. None of the rest would carry it."*

Q: *"You had it outside River Island, the video evidence is there. You brought the bat into the gravel area. At what point did Sean Lane get the bat?"*

A: *"It was all so fast, it was a blur."*

Q: *"Did he take it from you?"*

A: *"Yeah."*

Q: *"He wouldn't carry the bat. When he needed it, he took it off of you?"*

A: *"Yeah."*

Q: *"Can you see Cian leaving?"*

A: *"That's when I ran. He was running when I saw him."*

Q: *"Why did you go to Fitzgerald's?"*

A: *"He was in my estate looking for me. That's when I ran from him. He was with the other fella looking for me."*

Q: *"Is it you and Sean went to Fitzgerald's house?"*

A: *"Yeah."*

Q: *"Was it you carrying the bat at River Island Hotel?"*

A: *"Yeah, correct. They wouldn't carry it. Of course, me being a mug then."*

Q: *"Was it you carrying the bat up the side of Eamon's Sheehy's house?"*

A: *"Yeah."*

Q: *"Was it you throwing stones at the front of the house?"*

A: *"On that video evidence, I throw the stone."*

Q: *"Was that you with Sean Lane at the back when Sean was throwing stones up at the house?"*

A: *"Yeah."*

The Applications for Separate Trials:

22. As has been stated the appellant and Jason Keane Broderick were jointly tried on the same indictment, albeit that they faced different charges. They were separately represented by different solicitors and counsel. There was no application for separate trials at the commencement of the joint trial. Moreover, in opening the case to the jury prosecuting counsel did not suggest to them that the two accused were party to a common design in respect of any of the charges.
23. The application for a separate trial came about in a circuitous manner and was not made until day 4 of the trial. It arose in the following circumstances. In an application made in the absence of the jury on day 4, counsel for Jason Keane Broderick asked the trial judge

to exercise his discretion to exclude evidence that his client had admitted to Dominic Keane, Aisling Cronin and Jade Keane that he had participated in assaulting Eamon Sheehy, on the basis that it was prejudicial and not probative of anything. He submitted:

"Now, it would seem that in the course of interviews had with Jason Broderick he told the police that he did not do what he had claimed he had done. So it would seem that the Director of Public Prosecutions, having investigated or, the investigating guards having investigated matters, put them before the Director of Public Prosecutions, it's implicit in the Director's indictment that the Director is accepting that these were false impressions. Otherwise, this case would have been opened on the basis that there was a joint enterprise between Sean Lane and Jason Broderick, and that is not the case.

Now, what arises then, Judge, is what is to be done with this alleged confessional material. In my respectful submission, it ought not to be adduced, because it entirely fails the probative prejudicial test. The Director is not seeking, in any way, to invite the jury to find Jason Broderick guilty of any offence of actual violence being perpetrated by him to the unfortunate Mr Sheehy. So, anything to the effect that and I submit that this was very foolishly said by this young man, for whatever reasons but anything of that nature in the circumstances is entirely prejudicial, and has no probative value whatsoever. And it is my respectful submission that it ought not to be adduced."

24. Prosecuting counsel had responded in reply:

"...the probative value of this evidence, we say, arises in relation to two contexts. One is: it is probative because it supports Cian Broderick's version of events, a version of events that has gone to the jury, that Jason Keane Broderick was present for a period of time, with a bat, in close proximity to Eamon Sheehy's house at the time of the incident. And it is also probative, from the prosecution's point of view, in relation to the background circumstances concerning allegations which have surfaced in this case, that there was a knife held by Mr Sheehy. So, it has a particular relevance in relation to whether or not that is, or might truthfully be considered to be, the situation.

So in the prosecution's view, there are essentially two strands in which this evidence can be said to be probative. Clearly, anything that is said in it in relation to Mr Broderick's own involvement: the jury are not stupid. Various directions can be given by you, Judge, in relation to the fact that clearly he is not charged with any offence other than an offence under the Firearms and Offensive Weapons Act. He is not charged with any offence in relation to the Non-Fatal Offences against the Person Act. And that's as plain as a pikestaff, and will be so for the jury in relation to the matters that they will consider on the issue paper."

25. In respect of the proposed testimony to be elicited from Dominic Keane and Jade Keane she said:

"...what we have here in relation to these two witnesses is a false conversation with Jason Keane Broderick in relation to an incident that occurred. It was an incident in which both he and Mr Lane were involved. And on the prosecution case, their individual and separate and distinctive roles are set out quite clearly for the jury, such that no prejudice could possibly arise to the detriment of Mr Keane Broderick."

26. She accepted that the evidence of Aisling Cronin was in a different category because it involved Facebook communications potentially giving rise to difficulties in proving provenance in accordance with the Moran jurisprudence if that were being insisted upon.

27. Then, in rejoinder, counsel for Jason Keane Broderick further submitted:

"All I am contending for is any words attributed to Jason Broderick, to the effect that he used violence by striking or kicking in any way the unfortunate Mr Sheehy, ought not to be adduced by the prosecution. Anything else ought to be. I cannot contend against it. But those words are effectively accepted by the Director to be false. It's a false confession. And therefore, the Director, who accepts that -- it's implicit in terms of the indictment -- ought not to adduce, and that's my everything else is clearly open, but that particular aspect of the evidence fails the it's of no probative value, and is entirely prejudicial. It does not in any way inhibit the Director's case within terms of providing, as the Director indicates, support for Cian Broderick's version of events, which I haven't I've accepted that, agreed to it being read, under section 21. That is, therefore, not something that I'm seeking to resile from, or to attack in any way. And the I do not in any way see how the adducing of this false confessional material in any way assists in dealing with the issue of a knife being had, being held by allegedly held by Mr Sheehy."

28. At this point, the court adjourned for lunch, and upon resuming the trial judge was then addressed by counsel for the appellant in these terms:

"... insofar as the contention made to the Court by Mr Sammon that the statements made to the various witnesses, and what's contained in the Facebook material, are manifest lies, and it is accepted by the Director of Public Prosecutions, nevertheless we find ourselves in the context of the joint trial. And in that context, the second named accused, Mr Keane Broderick, was arrested in the context of the investigation into the incidents that the Court is concerned about, and in that regard, he was interviewed, and during the course of the interview, he puts all of the blame over on my client. And this is proposed to be introduced as evidence by the prosecution against Mr Broderick, in respect of having a baseball bat, and yet it doesn't contain any admissions insofar as Mr Broderick was concerned, other than accusing my client of being the prime mover, so to speak. In that regard, the defence of Mr Lane has no opportunity of cross examining Mr Broderick in relation to the contents of his interview, would have no opportunity of cross examining the witnesses that the second named defendant is attempting to have excluded on the basis that they were manifest lies, if they were manifest lies, and who's to say that

what's contained on the statement isn't manifest lies as well? And in relation to the Facebook material, which clearly implicates Mr Broderick as a central figure in the incidents, but the circumstances applicable insofar as the overall trial is concerned, that, again, we have no opportunity of cross examining in relation to."

29. He continued:

"So for all of those reasons, I find myself in a predicament that either one engages in a so called "cut throat defence" to bring out the full circumstances to the jury, because they include Mr Broderick accepting that he kicked the injured party in the face, and that would account for part of the injuries that were sustained by the injured party himself.

So, for those reasons, I find myself in this predicament. Either I apply for a separate trial, in order to ensure that fairness is achieved and that this material that's coming in, in a sort of circuitous route, that's very damning insofar as my client is concerned, that the Court advising the jury that it's not evidence against me. Nevertheless, it doesn't seem to be evidence against Mr Broderick either, and the charge against them is a minor charge. So, it just seems to me that it's there for the purpose of bringing this prejudicial evidence into the equation against my client. And, in my respectful submission, the Court ought to intervene and put a stop to that. So, either the evidence is inadmissible, and I'm given an opportunity of cross examining in order to vindicate my client's position, or, alternatively, the Court accede to an application for separate trials.

JUDGE: I see. Well, so that I understand clearly and there's no misunderstanding, you are making a formal application for a separate trial?

MR O'CARROLL: I am, Judge."

30. In responding to this application, prosecuting counsel indicated that she wished to make very clear that she was not suggesting that the prosecution would not call Dominic Keane, Aisling Cronin or Jade Keane if counsel for the appellant required them, and stated:

"And, in my view, Mr O'Carroll is in a position to cross examine whoever he wishes, in whatever manner he wishes, in relation to whatever evidence he wishes, including Facebook material, which is, in fact, on the book of evidence. But even if it weren't any material that would be disclosed to him, he is entitled to, in the furtherance of his client's defence, cross examine any witness, and I am not proposing not to call those witnesses, and so, they will be available to him."

31. Counsel for the prosecution further submitted that the preferable course of action was to try both accused together *"unless, Judge, you are of the view, and it is a matter for your discretion, that it would amount to an unfairness"*. She further submitted that:

"... the Court must be fair to the prosecution as much as it must be fair to either or both accused men. And this is a joint trial, for reasons that are very obvious,

because the evidence is there in relation to the different roles that each played. And if one accused maintains that he has played a particular role, which, at the end of the day, the Director of Public Prosecutions has determined is not going to support a charge, then it is a matter for the other accused if he wishes to bring that into the case. He's entitled to do so. If he wishes to cross examine on it, he is entitled to do so. And I for one am not going to try to restrain him, or seek to shut him down in any way, should he determine that that is the best way to represent his client's interests."

32. She concluded by saying:

"I am in no way attempting to shut Mr O'Carroll down in relation to what he can or cannot advance by way of a cross examination. Were he to do that in a separate trial, there would be no containment on that, or no tempering of it to suggest that, in fact, that is not correct, or not representative of the correct situation. But in a separate trial, he could attempt to heap all of the blame upon Mr Broderick, Mr Keane Broderick, without Mr Keane Broderick being in a position to say good, bad, or indifferent in relation thereto. And that would result, in my submission to the Court, in an unfairness to the prosecution. In this case, it is appropriate, in my submission, that the jury hear all of it. If there were to be separate trials, they would have an unbalanced and an unfair, to the prosecution, view of what the case is about and what the surrounding circumstances are about.

Now, my friend refers to cut throat trials and whether or not he would be put to his election in terms of that. That happens. It happens frequently. This Court will be aware that there frequently are cases involving cut throat defences, and so be it. But a jury is entitled to hear that, it's entitled to hear what each person has to say in relation to it, and the prosecution is entitled to proceed with all of the evidence, provided the manner in which it proceeds does not create an injustice to either or both defendants. And in my submission to the Court, presenting it in the manner in which I propose to do would not result in such a situation of unfairness to the defence, but the ordering of a separate trial could result, and manifestly and palpably could result, in an unfairness to the prosecution, in relation to permitting one defendant to run a defence which he could not run in the same way in a joint trial, and which would be unrepresentative of the evidence in the case against him."

33. The trial judge ultimately ruled:

"Having listened very carefully to the submissions by both counsel for both accused, and having listened very carefully to the response of the State, and having had the opportunity to consider Professor Tom O'Malley's book on the Criminal Process, I am satisfied that despite the fact that the charges against each accused are different that it is appropriate in the circumstances of this case to let the joint trial proceed against both. I'm satisfied that in not granting the application that this will not lead to an unfair trial against either accused.

Insofar as Mr Broderick is concerned, I'm satisfied that the jury will have to be instructed accordingly that he faces one count and one count only, and that has not been charged with any assault on the victim. Insofar as any statements made to the gardaí, it is my view the defence will have more than the ample opportunity to test this evidence of its assertion of a false confession being made by his client, and any other relevant issues which the defence wish to raise. It is to be noted that there are two counts against Mr Lane and one count only against Mr Broderick, three counts in all, and the Court is satisfied that the jury will be able to deal with the charges against each accused in the appropriate manner."

The Chare to the Jury

34. For completeness, it should be said that, true to his word, the trial judge addressed the jury during his charge as follows:

"Ladies and gentlemen, during the course of this trial, we have heard evidence from Detective Garda Gilmartin in respect of the taking of the various statements from the co accused Jason Broderick. These are exhibit 12 and you were advised that this is effectively a memo of interview recorded over eight statements. These have all been read into evidence during the trial. During the course of these statements, reference has been made by the accused Jason Broderick to the co accused Sean Lane which tend to incriminate Sean Lane. However, it is very important that you understand that where reference is made by an accused in this case, Jason Broderick, in his statements, which refers to the role of the other accused, in this case, Sean Lane, in the alleged offence, that is not evidence against Sean Lane and must be completely disregarded by you. It would be entirely unfair, when considering the statement of one accused and deciding on his guilt or innocence, to use the information in that statement about another accused as evidence against that accused, in this case Sean Lane. When you consider the statements or memos of interview of the accused, Jason Broderick, you should apply the evidence in those statements to the guilt or innocence of the accused that made the statements, i.e. Jason Broderick, and to no other person. You are entitled to rely on the matters in those statements in respect of the guilt or innocence of the matter of those statements and not otherwise, in respect of Mr Broderick. Again, I remind you that there are different charges against each of the accused. You must carefully examine the evidence before you separately in respect of each of the accused, in respect of the different charges made against them. You must be satisfied that the State has proved beyond reasonable doubt the case against each of the accused. If you are not so satisfied that the State has proved its case beyond reasonable doubt against each accused, then there is a doubt and the accused, be it either of them or both of them, must be acquitted."

35. There was no requisition on this aspect of the judge's charge.

Submissions

Submissions on behalf of the appellant

36. It was submitted on behalf of the appellant that while the interests of justice ordinarily dictate that persons charged with the same offences or offences arising from the same incident are tried together, joint trials are preferred to ensure a situation where the jury have before them the complete picture and to guard against a situation where, if granted separate trials, each accused would be able to blame the other. This reasoning was set out by Kenny J. in *People (Attorney General) v. Murtagh* [1966] I.R. 361 at 363:

"[T]he fact that one of the accused has made a statement which incriminates another of the accused is not by itself a matter which compels the trial Judge to grant separate trials: this is always a matter for the discretion of the trial Judge. When two or more accused are charged in connection with one transaction, the interests of justice may require that they should be tried together even if a statement made by one of them incriminates another of them. When two or more persons are charged with a single transaction, it is possible for each of the accused to cast the entire blame for the transaction on the other if they are tried separately and this may result in the acquittal of both."

37. However, it was submitted, a trial judge may exercise his/her discretion to grant separate trials where "*desirable in the interests of Justice*". An accused person seeking a separate trial must do more than show mere embarrassment and merely being tried with a co-accused who implicates the other is not sufficient to compel a separate trial.
38. It was submitted that Jason Keane Broderick does not make admissions during his interviews but instead implicates his co-accused, the appellant, in the attack on Mr. Sheehy. It was further submitted that the content of Mr. Broderick's interviews goes beyond simply implicating Mr. Lane and goes into bad character evidence against his co-accused. The jury heard, through his memoranda, that Mr. Lane had "a temper" and had other matters pending before the courts.
39. It was submitted that in those circumstances the trial judge ought to have acceded to the application for separate trials. It was urged upon us that the evidence proposed to be adduced by the prosecution against Jason Keane Broderick had no probative value as against that accused but was demonstrably prejudicial to Sean Lane.
40. It is said that this was compounded later in the trial by counsel for Mr. Broderick eliciting from Garda James Hurley the fact that neither his client nor Shane Fitzgerald had previous convictions, thereby leaving them to speculate as to Mr. Lane's criminal history.
41. Counsel for the appellant further submitted that the 'interests of justice' may swing in favour of separate trials by reason of the manner in which a co-accused conducts their defence. We were reminded that the former Court of Criminal Appeal quashed a conviction in *The People (DPP) v. McGrath* [2013] IECCA 12 where the appellant, Ms.

McGrath's co-accused had sought to blacken her name throughout the course of the trial. Similarly, it was said in *The People (DPP) v. Roche, Roche and Freeman* [2019] IECA 317, that Mr. Freeman's conviction was overturned by this Court where counsel for one of his co-accused had linked him to the theft of a vehicle later used in the aggravated burglary before the trial Court.

42. It was submitted that in the present case, further prejudice arose as a consequence of the joint trial after the refusal of the application for separate trials which, it was submitted, must have prejudiced Mr. Lane's position in the eyes of the jury. Chief amongst them was the way in which counsel for Mr. Broderick dealt with Mr. Lane in his closing speech (which we will come to momentarily).

43. We were reminded that this Court considered the latitude which must be afforded to counsel in regard to a closing speech before a trial judge would be justified in intervening in *The People (DPP) v. Cawley & Da Silva* [2015] IECA 100. We said:

"A trial judge has no discretion to prevent a defence counsel commenting adversely on the case of a co-accused where it conflicts with that of the accused that he or she represents. Moreover, it is not improper for defence counsel to do so; indeed his or her duty to the client may require that kind of engagement and confrontation, but it must be conducted within the limits of what is fair."

44. It was submitted that the comments made by counsel for the co-accused exceeded the bounds of fair comment on Mr. Lane's defence. Mr. Lane did not deny that he had assaulted Mr. Sheehy or that serious harm had been occasioned. Although he contended, through his counsel, that his co-accused was responsible for some of the violence, his defence was one of self-defence and those comments were made in circumstances where his co-accused was not at risk of any type of conviction for violence.

45. By contrast, counsel for Mr. Broderick made a closing speech to the jury which in parts amounted to a second closing speech to the jury on behalf of the prosecution, made in even more forceful terms than counsel for the prosecution could, and in terms which came close to trespassing on the functions of the jury. On two occasions he stated to the jury that they would *"undoubtedly find Sean Lane guilty of"* the s. 4 assault charge.

46. In relation to Mr. Lane's defence of self-defence, counsel stated that the evidence:

"makes it quite clear that this violence meted out by Sean Lane had gone way beyond any understanding that anybody could have of legitimate use of use of legitimate force in self-defence."

47. And:

"But matters went far beyond, far beyond necessary self-defence, to an extent that he must have known that he had gone far beyond it."

48. Counsel for the co-accused told the jury:

"But what was done to Eamonn Sheehy, with all of his faults, was obnoxious, gross brutality, because it's a fundamental in terms of any type of fight that when a person is down and no longer a threat, if even there was a self-defence scenario at work, you don't do what Sean Lane did, bludgeon the man as described by Eileen Bartlett very graphically in the words she used, "belting, belting, belting".

49. Counsel also commented that:

"[It] actually must have been looked at the early stage by the investigators as a murder investigation, because the level of violence that was meted out to the unfortunate Eamonn Sheehy by Sean Lane brings it that close to the most serious case in our catalogue of crime."

50. It was submitted that the overall content of the speech was such that it went outside *"the limits of what is fair."*

51. In that regard, the appellant again places reliance on *DPP v. Roche, Roche and Freeman*, cited already, in which this Court held:

"Where co-defendants mount a cutthroat defence or indeed where a defence is pressed which could have the effect of prejudicial impact on another defendant, it is the common and preferred practice that the parties are alerted to this course and, if difficulties are anticipated, that such difficulties are the subject of a ruling by the trial judge. A situation such as arose in the present case is to be avoided at all costs. An approach by a defendant to deliberately prejudice another defendant's right to a fair trial, is to be deprecated. The approach adopted on behalf of Philip Roche was, at times, difficult to comprehend and the questions asked were on occasion, improper."

52. It was further submitted that another issue going to the question of whether a separate trial should have been ordered in the interests of fairness, arose due to the evidence of Katie Cotter, the ex-girlfriend of both Mr. Lane and Mr. Sheehy. While Ms. Cotter was a witness on the book of evidence, the prosecution acknowledged that *"the majority of what Ms Cotter says in her statement is likely to be prejudicial and therefore inadmissible."* Counsel for the co-accused asked that she be tendered and although finally, and by way of compromise only parts of her statement were read under section 21 of the Criminal Justice Act 1984, her evidence was evidence which would not have been called at all in circumstances where Mr. Lane was tried alone. (We must observe that we do not believe that this follows at all. Evidence of an ongoing dispute between the appellant and Eamon Sheehy, which was clearly probative in terms of providing motive for the targeting of Mr Sheehy's dwelling, came from various witnesses (including Ms Cotter), as we identified earlier in paragraph 6 of this judgment, the relevance of whose evidence on that aspect of the matter was in no way dependent on Jason Keane Broderick being jointly tried with the appellant.)

53. In conclusion it was submitted that the trial judge ought to have acceded to the application for separate trials. While it was accepted that the trial judge did give a warning to the jury during his charge that evidence from the interviews in controversy was admissible against Jason Keane Broderick only and not against Sean Lane, it was submitted that the comments by Mr. Broderick which were read to the jury were simply too prejudicial in nature and that when combined with the other factors outlined above, in particular the damning comments of Mr. Broderick's counsel in his closing speech, the result was a real risk that the trial was unfair, rendering the appellant's conviction unsafe.

Submissions on behalf of the appellant

54. Counsel for the respondent places reliance on the following passage from the judgment of Sullivan P. in *Attorney General v. Joyce* [1929] IR 526, at 537:

"Where... persons jointly indicted plead not guilty, the trial Judge may direct that they be separately tried if, in his opinion, separate trials are desirable in the interests of justice. The trial judge has a discretion in the matter which must be exercised judicially. The exercise of such discretion may be reviewed by this Court, and a re-trial directed, if we are satisfied that a refusal to direct separate trials has resulted in a miscarriage of justice."

55. We also had drawn to our attention a passage from 'The Criminal Process', by Thomas O'Malley, at paragraph 14.100 (which had also been opened to the trial judge), where the respected author says:

"A joint trial can doubtless prejudice an accused person's right to a fair trial, which means that applications for separate trials should always be treated seriously. Defenders of joint trials often rely on arguments of economy and convenience, matters that should, at best, be peripheral to decisions on severance....The general preference for joint trials stems undoubtedly from the legitimate concern that when two or more persons are charged in connection with a single transaction, each of them, if tried separately, would attempt to cast the entire blame on one or more of the others. Therefore, joint trials are permissible even where a statement made by one accused incriminates another. The fact that such a statement has been made does not in itself compel the trial judge to order joint trials. Nonetheless, before severance is refused the judge should always be satisfied that the applicant runs no meaningful risk of getting an unfair trial."

56. It was submitted that while Jason Keane Broderick had indeed made a statement which implicated the appellant, the latter was not in a position to show that there was any unfairness towards him, should the trial proceed against both accused. Indeed, the "confession" by Jason in his 7th interview was only in accordance with all the other evidence in the case, namely the evidence of Cian Broderick, and indeed the admission on arrest made by the appellant himself, as well as the evidence of Mrs Bartlett in relation to the level of force used. Given the other evidence in the case, some of which had already

been heard, counsel submitted that there was no reason to grant a separate trial simply because the confession of one accused incriminated another.

57. It was further submitted that it was of some importance that the trial judge subsequently met the immediate concerns of counsel for the appellant. While the prosecution did not lead the content of the messaging and Facebook material, counsel for the appellant was permitted to introduce the entirety of the same in the course of his cross examination of the prosecution witnesses. In this way, all of the evidence which the appellant sought to adduce (and to which counsel for the co-accused objected) was admitted.
58. Further, the trial judge in refusing separate trials had undertaken, and had made good on his undertaking, to give an unambiguous warning to the jury in his charge concerning how matters stated by the co-accused in his interviews was evidence only against the co-accused, and could not be used to support the prosecution case against the appellant.
59. In addressing the authorities relied upon by counsel for the appellant, counsel for the respondent sought to distinguish each of them, or to properly contextualise the passages on which reliance was being placed.
60. It was pointed out that in the case of DPP v. Roche, Roche and Freeman there was very prejudicial information contained in Mr Freeman's interviews about the character of his co-accused, Patrick Roche, in short an observation that he would have nothing to do with them as they went around killing people and had been arrested for tying someone up. This Court did not think that a failure to grant separate trials justified overturning the conviction. What we said was:-

"34. As we have observed, the trial judge must exercise his or her discretion judicially, the exercise of which may serve to take either the prosecution or the accused from the risk of prejudice should parties be tried together. It is the long-standing position that mere embarrassment on the part of an accused will not be sufficient to sever an indictment. More than that is required. The central issue is that of the interests of justice, this Court will only intervene if the refusal of an application for separate trials has resulted in a miscarriage of justice."

61. In relation to *The People (DPP) v. Cawley and Da Silva* [2015] IECA 100 prosecuting counsel sought to place the passage quoted at paragraph 43 above, and relied upon by the appellant, in its proper context by quoting the following, a considerably more extensive extract from our judgment in that case:

"105. There are particular potential difficulties where there are co-accused, represented by different counsel, who are running different defences, especially where the defences being run are of a cut-throat nature with one accused blaming the other, or where the defences being run are inconsistent with each other, or conflict with each other, in whole or in part. There is undoubtedly potential for one accused to prejudice the position of another accused. However, that is one of the normal hazards to be coped with in a joint trial."

106. A trial judge has no discretion to prevent a defence counsel commenting adversely on the case of a co-accused where it conflicts with that of the accused that he or she represents. Moreover, it is not improper for defence counsel to do so; indeed his or her duty to the client may require that kind of engagement and confrontation, but it must be conducted within the limits of what is fair. Accordingly, there should be no reference to alleged facts or other matters that have not been the subject of evidence – *Shimmin* (1882) 15 Cox CC 122, nor should evidence that was given in the trial be misrepresented. Defence counsel may advance hypotheses which go beyond his client's version of events, always provided that other evidence has been called which supports such hypotheses – see *Bateson* (1991) *The Times*, 10th April 1991 cited in *Blackstone's Criminal Practice* 2000. ...

107. This Court considers that in a criminal trial defence counsel must be afforded very considerable latitude concerning how he or she presents his client's case in closing. That having been said a trial judge has to ensure that the trial is fair. It is up to the trial judge to intervene if necessary, but we consider that the threshold for judicial intervention must be set at a reasonably high level, and that before a judge would be justified in intervening he should be of the view that what was said was manifestly unfair.

108. Moreover, it would only be in exceptional circumstances that a trial judge would be justified in intervening in the middle of counsel's speech. We agree with the view expressed in *Archbold*, 2014 ed., at paragraph 4-366, that although it might exceptionally be necessary for a judge to interrupt a speech by counsel in the presence of the jury, it is generally preferable for him not to do so; such interventions might disrupt the speaker's train of thought or inappropriately divert the attention of the jury; ideally, interventions for the purpose of clarifying or correcting something said, either by judge or counsel, should be made in the first instance in the absence of the jury and at a break in the proceedings, see *R. v. Tuegel* [2000] 2 Cr.App.R. 361, CA. In most cases, however, a judge will be content not to interrupt the speech but to attempt to address the balance with respect to any unfairness perceived by him as arising from counsel's remarks in the course of his charge.

109. The Court has little doubt that in the case of a truly egregious unfairness arising from remarks of counsel for a co-accused in a closing speech, a trial judge would have jurisdiction to discharge the jury with respect to the accused that was prejudiced, but considers that a case justifying so extreme a measure would be rare indeed."

62. And, counsel further pointed out the precise reasons why in that case the Court of Appeal had agreed with the trial judge that the impugned remarks were not so unfair as to have warranted his intervention :

"112. Counsel for the first named appellant was entitled to engage robustly with, and dispute or criticise, his co-accused's case to the extent that it conflicted with the case that he was running, and it was considered strategically necessary to do so. While the language used to do so in so far as the aspect of the second named appellant's case that had sought to impugn the credibility and reliability of Mr

Gomes's testimony was concerned was strident, and the perceived joke was arguably in bad taste and inappropriate to the context, the remarks were not manifestly unfair. While there was a reference to two planks, whereas in fact only one had been mentioned in evidence, the Court does not consider this inaccuracy to have constituted a material misrepresentation of the evidence. It mattered little whether there was one plank or two in terms of the point that was being made, namely that Mr Gomes had accepted in cross-examination that to remove an engine without a hoist would have required four people and that therefore he could not have been correct in his assertion that he and Wenio had been alone during this operation"

63. Counsel for the respondent also sought to firmly distinguish *The People (DPP) v. McGrath* on the basis that there was no attempt by the co-accused in the present case to blacken the name of the appellant such as had happened in that case.
64. Finally, we were referred by counsel for the respondent to *The People (DPP) v. Cummins and Davy* [2021] IECA 198. In that case, an application was made at the opening of a murder trial for separate trials which was deferred. During the trial an issue arose relating to the admissibility of a text message sent to James Davy by his girlfriend that suggested the deceased was a rapist. The prosecution did not wish to lead the evidence but counsel for Cummins wanted the prosecution to introduce it. Counsel for Davy did not. A further application for a separate trial was then made which was refused. Ultimately, the terms of the text message went before the jury because it was included in the memorandum of interview of the accused Cummins. Upholding the conviction this Court stated (with reference to the decision in *The People (Attorney General) v. Murtagh*):-

"34 The law has not changed since Kenny J. made those observations in 1966. The underlying principle for co-accused to be tried together is to ensure that the jury hear the totality of the relevant evidence. There are undoubtedly hazards for the accused involved in a joint trial and whether an application for severance should be granted is for the discretion of the trial judge. The overriding consideration is whether there is a real risk of unfairness to the accused."

65. It was submitted on behalf of the respondent that the trial judge was correct in his ruling. All of the evidence available suggested that it was the appellant who had inflicted horrendous injuries on the injured party using the baseball bat. There was no miscarriage of justice nor indeed any manifest unfairness at the trial either in the course of the evidence or during counsel speeches. In regard to what was stated by counsel for the co-accused, the trial judge had carefully warned the jury to treat the evidence against each accused separately and specifically warned them that what was said in interview by Jason Keane Broderick was relevant only in regard to the case against him and not in regard to the case against the appellant. In the circumstances counsel submitted there was no error of principle in how the court below dealt with the matter and the appeal should be dismissed.

Analysis and Decision

66. We are satisfied to uphold the decision of the trial judge not to have granted separate trials, and accordingly to uphold the appellant's conviction. We do not consider that his trial was unfair or that he has been done an injustice. As all of the authorities indicate, the question of whether an application for severance should be granted is for the discretion of the trial judge. The trial judge in this case carefully considered the arguments both for and against and exercised his discretion lawfully and within the limits of his jurisdiction.
67. The point is well made by counsel for the prosecution that the evidence was in effect all one way concerning who had inflicted the head injuries on the injured party using the baseball bat, and the manner in which those injuries were inflicted. While the record of the interviews with the co-accused also implicated the appellant, it did not put the matter any further than it had been put already in other evidence adduced by the prosecution. Moreover, we do not agree that the matters prejudicial to the appellant and of which he complains were of no probative value in so far as the case against Jason Keane Broderick was concerned. The case against Mr Broderick required the prosecution to demonstrate, as an ingredient of the offence with which he was charged, that the baseball bat of which he had been in possession until it was taken off him by the appellant at the commencement of, or at an early stage of the altercation with Mr Sheehy, *"was intended by him unlawfully to cause injury to, incapacitate or intimidate any person either in a particular eventuality or otherwise."* While Mr Jason Keane Broderick was not charged with assaulting Mr Sheehy, his presence during the event, how that came about and his precise role in it was clearly relevant to any consideration by the jury of whether he had the specific intention required to sustain an offence contrary to s. 9(5) of the Firearms and Offensive Weapons Act 1990. It was vital that the jury would hear the totality of the relevant evidence, including what he had to say not just about what he personally had done, or had not done, but in regard to the role of the other participants in the incident, so that the jury could get an overview of it and a full appreciation both of the dynamics of what had occurred and the states of mind of the relevant parties. Moreover, and as was stated by counsel for the respondent in the court below, the account given by the co-accused also supported the version of events of a key prosecution witness, namely Cian Broderick, in so far as it concerned the involvement of Jason Keane Broderick on the night, namely that Jason Keane Broderick was present for a period of time, with the baseball bat in his possession, in close proximity to Eamon Sheehy's house, just prior to the altercation commencing.
68. Insofar as it is complained that the interviews with Mr Broderick had unnecessarily introduced evidence that the appellant had a temper and was before the courts in regard to other matters, such as for breaking the victim's windows, this was not material introduced gratuitously by the prosecution. It formed part of what was said by Mr Keane Broderick in his interviews and was relevant in terms of providing context for why Mr Keane Broderick had earlier armed himself with the baseball bat, how the group had ended up outside the house of Mr Sheehy at 28 St. Stephen's Park, and why the house at 28 St. Stephen's Park had been targeted by the group. It was admitted by Mr Keane Broderick that he had participated in this targeting by throwing stones at the house. All

the evidence suggested that he was still in physical possession of the baseball bat at that point. Indeed, he expressly admitted that he was the person captured on the CCTV footage harvested from St. Stephen's Park who could be seen carrying the baseball bat up the side of Eamon's Sheehy's house. The entire context, including the relationships between the relevant parties, and how the incident began and developed, was potentially relevant to the jury's consideration of his state of mind.

69. It would be remiss of us not to observe that we consider there has been a distinct unreality to the ground of appeal which has been advanced by the appellant. It was an entirely appropriate case in which to have tried the accused together. While they had different roles, and the charges reflected that, they were inextricably linked to the incident that had unfolded. The overall evidence against the appellant, quite apart from anything said by his co-accused, was in our view overwhelming. However, notwithstanding that, we think the point is well made by counsel for the prosecution that there was a risk that if there had been separate trials the appellant might well have sought to make the case that he was in fact the minor actor in the drama and that the major actor was Jason Keane Broderick, in circumstances where it could have been elicited that Jason Keane Broderick had made the boastful claims to Dominic Keane, Aisling Cronin and Jade Keane that he in fact made in the aftermath, without the prosecution having the ability to effectively counter that narrative. The interests of justice cut both ways, and we reiterate that we are satisfied that this was an entirely suitable and proper case in which to have tried both the appellant and his co-accused together in the way that was done.
70. Moreover, the trial judge gave an impeccable and comprehensive instruction to the jury concerning how they might approach the co-accused's evidence. There is no reason to believe that the jury would have disregarded his clear instructions.
71. We would therefore dismiss the appeal.