



THE COURT OF APPEAL

Record Nos: 215/18 & 216/18

**Edwards J.
McCarthy J.
Kennedy J.**

Between/

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

RESPONDENT

V

DEAN BRADLEY & JASON BRADLEY

APPELLANTS

JUDGMENT of the Court delivered on the 10th day of March, 2022 by Mr Justice Edwards.

Introduction

1. On the 12th of July 2018 the appellants were each convicted by a jury at the Central Criminal Court sitting at the Criminal Courts of Justice, Parkgate Street, Dublin 8, of a single count of murder contrary to common law and as provided for by s.4 of the Criminal Justice Act, 1964. They were each subsequently sentenced to the mandatory penalty of imprisonment for life.
2. Both appellants have appealed against their said convictions and this judgment addresses those appeals.

Some background, and a summary of the main evidence given at trial.

3. The deceased was a Mr Neil Reilly. He was killed in the early hours of the morning of the 18th of January 2017 at Esker Glebe in Lucan, Co Dublin. The appellants, Dean and Jason Bradley, who are brothers, were both present when he was killed, as was another brother Ryan Bradley, and the appellants' father Paul Bradley.
4. In broad outline, the prosecution's case was that earlier on that date the deceased, accompanied by another man, L. McN, had gone to the Bradleys' home at No 1 Liscarne Gardens, Lucan, which was in a housing estate, and at 3.51am had discharged a shotgun at the house, damaging a window. The deceased and his companion then fled the scene of the shooting in a Mazda car. Within minutes Mr Paul Bradley and his three sons, set off in two vehicles in search of the Mazda, which they quickly succeeded in locating. The Mazda was then pursued for a time by the Bradleys' vehicles and during this pursuit it subsequently crashed at Esker Glebe. The driver of the Mazda, who was not the

deceased, ran away from the scene of the crash. However, the deceased, who had been the passenger in the Mazda, was intercepted by one or more of the Bradleys, and failed to achieve a similar escape. The prosecution's case was that the deceased was then set upon by the Bradleys (who it was contended were acting in concert) and was assaulted in various ways, including being hit by chopping blows to the head with a sharp implement (admitted to by Jason Bradley, who sought at the trial to rely on provocation); by being kicked (admitted to by Paul Bradley); and being driven over in a vehicle (admitted to by Dean Bradley - although he maintained that he had done so by accident, a contention vehemently contested by the prosecution on the basis of other eyewitness accounts which maintained that Dean Bradley's vehicle had driven over the deceased two, or possibly three, times), as a result of all of which he sustained injuries, some of which were serious and led to his subsequent death.

5. At the trial there was evidence from a State Pathologist, Dr Michael Curtis. In his testimony he stated (*inter alia*):

"At post mortem examination, this man was seen to have been struck approximately seven blows with a chopping type implement. Two blows had been delivered to the head, one on either side and these were associated with underlying skull fractures and injuries to the brain. On the right side the brain was contused or bruised, while on the left side it was lacerated and contused. There were further wounds from a similar implement to the right upper arm region, the right forearm region, the left flank, the back of the right shoulder and the mid-line of the back... In addition, there was a severe crush injury to the pelvis consistent with his having been run over by a vehicle. This interpretation is reinforced by numerous parchmented or brush abrasions, otherwise known as friction burns on the body. These would indicate that he was dragged or rolled by a moving vehicle... In addition, there was evidence of crush injuries to the chest with fractures of the left clavicle and of multiple ribs on both sides of the chest, some at multiple sites. There was associated bilateral pulmonary contusional injury, or bruising to the lungs and multiple lacerations to the liver. In the context of the use of a mechanical resuscitation device these thoracic injuries and liver injuries may be attributable to attempts at resuscitation ... but it could also be due to it being crushed by a vehicle."

6. Dr Curtis confirmed that the cause of death was in the form of "chop injuries to the skull, along with sharp force injuries to the trunk and right upper limb and a crush injury to the pelvis." Probed as to whether the deceased could have been run over more than once, he said that this was possible although there was no evidence to indicate that. He further stated that the injuries sustained from either the chopping blows, or the running over, would have been sufficient alone to cause the deceased's death.
7. The evidence established that following the incident the Bradleys returned home, with Paul and Jason Bradley going directly there in one vehicle (a Mercedes jeep), and Dean and Ryan going there in the other vehicle (the vehicle which had been driven over the

deceased during the incident, a black BMW), but going indirectly via Rathcoole where they stopped over at the Bradley family's business premises, *Bravo Trans*. While there, they swapped vehicles (for another black BMW) before proceeding on to the family home at No 1 Liscarne Gardens. The routes used, and the times taken, by the vehicles involved, on their respective journeys from the Bradley family home to the scene of the killing at Esker Glebe, and back again in one case direct, and in the other case indirectly, were established in evidence using CCTV recordings harvested by the gardaí from cameras at various locations, and other evidence gathered in the course of the investigation.

8. The gardaí, who had received a report of the shooting, quickly suspected a link between it and the subsequent incident at Esker Glebe in which Neil Reilly suffered fatal injuries. In those circumstances the Bradleys became persons of interest in the investigation. All four made statements to the gardaí, in which they described the shooting incident at their family home. They then went on to demonstrably lie to the gardaí, by claiming that although they had set off in pursuit of the shooter's vehicle they had been unable to find it. Their lies in that respect were demonstrated by the prosecution, *inter alia*, through forensic evidence gathered during the garda investigation, with the deceased's blood being found on clothing and/or footwear belonging to Paul Bradley and Dean Bradley. Further, a DNA profile taken from blood found on the deceased's mobile phone, which had been found in the footwell of one of the Bradleys' vehicles (the Mercedes jeep), matched that of Jason Bradley. In his statement to gardaí, Jason Bradley initially stated that he had injured himself by falling on glass, but later admitted that he had been wounded during a struggle with the deceased. There was also evidence of text messages sent in the days after the incident, which were recovered from Paul Bradley's phone, which stated, "*I ran after them with his gun. I got him with no gun.*"
9. Mr Paul Bradley and his three sons, Dean, Jason and Ryan, were all subsequently charged with and tried for the murder of Neil Reilly. Both Dean Bradley and Jason Bradley were convicted by the jury, and their convictions are the subject of this appeal. Ryan Bradley was acquitted by direction of the trial judge, and Paul Bradley was acquitted by the jury.
10. The jury also received evidence as to the background to the shooting incident at No 1 Liscarne Gardens which preceded the incident in which the deceased was killed. The deceased was known to gardaí in circumstances where he had been previously convicted of an offence contrary to s.15A of the Misuse of Drugs Act 1977. The jury received evidence that some time before the fatal incident Jason Bradley had begun to dabble in drugs. Indeed, his father Paul had found drugs in the family home and had notified the gardaí of what he had found. There was evidence that Jason Bradley was believed to have been supplied with drugs by the deceased and had incurred a debt to him. The deceased had called out to the Bradleys' workplace in order to intimidate him. The evidence was that he subsequently called there a second time for the same purpose, apparently with a plan of shooting at the premises. The deceased's son is Dean Reilly who was friendly for a time with the Bradley brothers and was frequently in their home. However, relations between Dean Reilly and the Bradleys had cooled somewhat in the lead up to the killing of Neil Reilly. Nevertheless, Neil Reilly enlisted Dean Reilly to impress upon the Bradleys that

the drug debt remained outstanding and that he (Neil Reilly) expected it to be paid. There was evidence that in December 2017 the Bradleys' family home was burgled, resulting in the theft of goods and destruction of property. The Bradleys' home was, however, equipped with a CCTV system and this captured the burglary. Neil Reilly could be seen on the recording as having been present in the Bradley family home during the burglary, and carrying an implement, i.e., half of a hedge clippers. Paul Bradley's passport, which was taken during the burglary, was later found among the effects of Neil Reilly.

11. In addition to the evidence mentioned, there was evidence from a number of persons who claimed to have been eye-witnesses to various parts of the events described above. There were inconsistencies in aspects of their testimony on which the defence placed much reliance before the jury. The eye witness evidence can be summarised as follows:

- a) *Colin Dardis gave evidence that he lived at number 10, Esker Glebe, and confirmed that just after 4am on the 18th of January, 2017 he heard a man and a woman shouting and looked out about 3 minutes later when he saw a Jeep across the road, a man in the driver's seat shouting out the window and his neighbour Jackie Coughlin. He subsequently saw a man "staggering in the middle of the road" and somebody came over to him from the direction of the Jeep "and appeared to hit him on top of the head with something." The staggering man fell onto his knees. He then referred to a black car which had been stationary, moving up the road and hitting the man that was on the road. He recalled the car reversing back a bit, then "started up again and came up the road and drove over the man." As it hit the man the second time, there was no braking or deceleration that he could see. The car then drove on. It was suggested by Counsel on behalf of Dean Bradley that the car had come around the bend at speed and had collided with the deceased but that there had only been one continuous movement. Mr Dardis did not agree with this.*
- b) *Jackie Coughlin, who lived at No 9, Esker Glebe, stated in her evidence that in response to her daughter crying at around 4am on the 18th of January 2017, she jumped out of bed and looked out and saw a silver car and also a group of people at the corner. She initially thought that it was a group of people having an argument, maybe after a party, but then she saw some kind of a metal bar or something. The group was of men, and they were fighting. Somebody was striking somebody with the bar. She thought that the man who was struck had fallen to the ground. She opened the window and shouted to them to stop. Somebody shouted back. She was not sure what exactly was shouted but thought it might have been "Go in or we'll come back or something." She went on to indicate that she remembered a dark car which drove over the man on the road, stating: "he drove at him". When the others in the group had gone she called an ambulance and went to the man's assistance. She recalled he had moved closer to the verge and of him trying to get up. He had injuries to his back and head, and was moaning. There was a lot of blood.*

- c) *Laurence Bourke lived at 1B Esker Glebe and also gave evidence. He was awakened by a loud noise "a loud kind of crash noise" and looked out his window. He could remember seeing a car and shadows in between the trees. It appeared to him that there was one man on the ground and two men standing kicking him. He went back to bed, hoping that he was having a dream or something like that, but looked out again after he heard the next loud noise: when he looked out again, there seemed to be a BMW outside his house, and it sounded as if the car had hit the ramp (a concrete ramp leading to a path across a nearby grassed area).*
- d) *Brenda O'Connell gave evidence that she woke up to an altercation / disturbance outside, looked out the window and saw a silver car facing her. She had a good look around and then saw a black car coming from Griffeen Road, driving slowly. She stated, "It was driving towards the ramp, driving towards the centre of the road, and then, as it was driving slowly, then I heard crunching of what would have been a body." She went on to indicate that "it drove slowly over the body and then it reversed a small bit and then it went over the body again." She heard the victim groaning and "the crunching of the bones a second time around going over... slowly." It then drove off. In cross examination it was suggested on behalf of Dean Bradley that the car had "clipped" the man and he ultimately got dragged underneath it and that the car had then driven off but she disagreed with this, stating: "the car did reverse and it went over him again."*
- e) *Danielle Cusack, the admissibility of whose evidence was unsuccessfully challenged on behalf of the appellants, also testified before the jury. Ms Cusack, like Ms O'Connell, lived in the Esker Manor Apartments and woke up to a very loud bang. She stated that she looked out and the first thing that caught her eye was a car parked on the footpath and she also saw what looked like a man staggering around the road. She queried in her own mind whether he was drunk, or was after being involved in a collision. She then saw "guys coming down towards where this man was" and she thought maybe that they were his friends. "They were continuously laughing." As they got closer to the man, she felt that the man was trying to get away from them and the next memory she had was of a car coming up the road: it looked black to her and she thought at the time it was a BMW. She queried in her own mind whether the car was going to stop but it didn't stop. "The car hit that man. It hit that man." When the black car stopped, the men started to attack the man that was on the ground (she remembered there being 3 men), and then she saw two of the men pick the man up "and I seen the reverse lights on the car". She then stated:*

"And I don't know if anyone's ever heard that awful screech when a car is put like to reverse quite hard and it takes off quite hard. And the two guys held this man and they just let him go at the last second and the car drove over him again".

Ms Cusack's evidence was that when the car reversed and stopped, "the guys who were there went back to attack this man", and she remembered the driver of the car opening the door and stepping out of the car. The men on foot were beating him up. She tried to rouse her flatmate and felt that she was 2 or 3 minutes away from the window. However, she stated, "the car had hit this man a third time before I left to go to get Donal...The man in the car just, you know, drove the car forward and, you know, it took a good bit of – well, what I believe [was] a good bit of force to go over him. And then I just seen the car driving off..." At the time of the third impact, the other men were "just standing around watching."

12. Ms Cusack testified that she went to the assistance of the man who had horrific wounds and spoke to him. However, he indicated that he was "ready to go now" and she spoke to him about death. Towards the end of her direct evidence, she indicated that the men whom she saw were definitely younger than she was. In response to counsel for Paul Bradley, she indicated that she was 29 years of age.
13. Counsel for Jason Bradley also cross examined her as did counsel on behalf of Dean Bradley. In response to the latter, she confirmed that she didn't believe that what happened "was just an accident", and she also confirmed that the car did reverse and that it had driven over him a third time.
14. Neither the appellants, nor their co-accused (Ryan Bradley and Paul Bradley), gave evidence before the jury. Their statements to the gardaí were placed before the jury. Although the prosecution sought to rely on the inference provisions in s.18, s.19 and s.19A of the Criminal Justice Act 1984 in respect of certain of the interviews with the four accused, the trial judge declined to permit them to do so. In the case of Ryan Bradley this was because the court was not satisfied that he had had the mental capacity to understand the inference provisions of the relevant legislation, and in the case of the other three accused, in circumstances where their respective counsel had indicated an intention to make admissions before the jury pursuant to s.22 of the Criminal Justice Act 1984 in respect of the facts to which the relevant questions from the responses to which it was sought to invite inferences to be drawn, related. Extensive s.22 admissions were subsequently made on behalf of both of the appellants, and their father Paul Bradley.
15. In the case of Dean Bradley, it was admitted on day 23:

"1) that Dean Bradley was the driver of a black BMW registration No. 04D6040 at Esker Glebe at approximately 4 am on the 18th of January 2017; 2) that Dean Bradley drove that car up the Griffeen Road towards Esker Glebe; 3) on reaching the junction of Griffeen Road and Esker Glebe the car struck Neil Reilly with the result that Neil Reilly ultimately went under the car; 4) as the BMW approached Esker Glebe Neil Reilly was on the ground; 5) Neil Reilly's blood was on the BMW as a result of the collision; 6) the blood on Dean Bradley's top which is TB4 and shorts which are TB5 comes from contact with Neil Reilly's blood on the exterior of the BMW at Bravo Transit; 7) Dean Bradley drove the BMW to Bravo Transit; 8), and

finally, Dean Bradley's mobile phone, a black Huawei, H U A W E I, mobile phone was seized by gardaí at 1 Liscarne Gardens on the 18th of January 2017."

16. In the case of Jason Bradley it was admitted on day 24 that:

"The accused man, Jason Bradley, was present at home in the home address at 1 Liscarne Gardens proximate to 3.50 am on the morning of the 18th of January 2017. Jason Bradley was present in the same address when the windows were shot in and left the address in the company of his father in Mercedes jeep registration 07WW7390 at approximately 3.56 am. Mr Jason Bradley was the passenger in the same vehicle when, at approximately 3.56, on the Balgaddy/Lucan Road he passed the Divine Mercy School in circumstances where he was in the company of his father seeking the party they believed responsible for shooting in the family home windows. The defendant, Jason Bradley, arrived at The Glebe, Esker, Lucan, County Dublin as a passenger in the same vehicle at approximately 3.58 am. The defendant, Jason Bradley, sustained an injury to his left index finger and palm surface of his left hand on the 18th of January 2017 as a result of a struggle with the deceased, Neil Reilly. The defendant returned to No. 1 Liscarne Gardens at approximately 4.04 am on the morning of the 18th of January 2017 as a passenger in the Mercedes jeep driven by his father, registration 07WW7390. The defendant, Jason Bradley, was aware of the presence of a black Nokia mobile phone 0857555470 in the Mercedes jeep 07WW7390 on the 18th of January 2017 and had handled that phone in circumstances where his father had handed it to him believing it to be his, that is Jason Bradley's, Nokia phone. The defendant, Jason Bradley, was present as a passenger in the Mercedes jeep at approximately 3.54 am when his father rang the emergency services and ultimately An Garda Síochána."

17. A further admission was made on behalf of Jason Bradley on Day 25 in these terms:

"Mr Jason Bradley was responsible for the chop injuries sustained by the deceased, Neil Reilly."

18. In the case of Paul Bradley, who was ultimately acquitted by the jury, his counsel stated the following before the jury, on Day 23:

"One)[1] it is admitted that Paul Bradley drove the silver Mercedes jeep 07WW7390 on the 18/1/2017 between the hours of 3.51 am and sorry, when he left Liscarne Gardens until his return there at 4.04 am on the same date. Two)[2] that he called 999 on his mobile phone, 0872402068, at 3.55.42 am which call terminated at 3.58.39 am. Three)[3] that he was the driver of the said jeep at 3.56.23 when it met I'll try and go a little slower. That he was the driver of the said jeep at 3.56.23 when it met the Mazda car containing Neil Reilly and [L McN] outside the Divine Mercy School. Four)[4] that he turned the jeep and followed the Mazda and passed the CCTV at Griffeen Valley Nursing Home covering Esker Road at 3.58.40, a short distance behind the Mazda. Five)[5] that the Mazda crashed in the vicinity

of Esker Glebe and he crashed into it and broke his front driver's headlight, the glass from which was recovered at the scene and matched the remaining glass in his headlight. 6) that he left his jeep briefly after the crash and kicked Neil Reilly who was then involved in an altercation with Jason Bradley near the crashed Mazda. 7) that at 4.01.30 he was the driver of the jeep when it and another car passed Nos. 34 and 46 Elm Brook. Eight)[8] that the phone attributed to Neil Reilly was recovered from the passenger side footwell area of the jeep. Nine)[9] that the blood of Neil Reilly was found on his boots which are exhibit BS4 and the back left leg end of his jeans which are exhibit BS2. And finally that he lied to gardaí in his statement made on the night when he said he had not caught up with the shooter and told them the route that he drove that night and also in relation to his explanation of the damage which was visible on his jeep."

19. Although neither of the appellants personally gave evidence before the jury, evidence was adduced on behalf of Dean Bradley from a Ms Margaret Barrett, who was an Optometrist. She testified to having assessed Dean Bradley's sight and stated that, *"he was well below the standard required for driving unless he'd glasses on. With glasses he passed sight test requirements for driving."* She further stated that, *"he would need detail to be three times bigger than normal to see it at normal standards or the other way of putting it if he needs to be three times closer to it so he can see it clearly."* She had also diagnosed him as suffering from eye-strain which would have caused him problems with studying, although not with visual processing. She had stated in a written report that Dean Bradley was myopic, adding that *"All myopic people have larger than normal pupils and if a myop is driving without distance glasses they would be out of focus and would miss seeing detail far away."* She had added that, *"[d]ue to his large pupils, if he was driving at dawn or dusk with lighting conditions are lower again, this would make it even harder to see clearly."* Cross examined about this, she accepted that at 4am on a January morning it would be neither dawn nor dusk. Although robustly cross-examined about the condition she had diagnosed, the witness did not resile from the views she had expressed concerning its implications and at the end of her evidence asserted:

A. *"Okay. Well, I don't know but all I know is that if I didn't have my glasses on I couldn't see clearly. I could drive, below that it would be -- not legal but I could drive but I couldn't see clearly. So all I know is if Dean does or doesn't have glasses, he didn't have them on the day, so I don't know did he have them or not. If he drove with or without glasses; with glasses he would be clear, without them he would be foggy and blurry. It doesn't mean you can't drive but you can't see clearly."*

20. In so far as it was contended on behalf of Dean Bradley in his statement to Gardaí that he had driven over the deceased by accident, it was on the basis that due to his eye condition he had simply failed to see him. This explanation was ostensibly rejected by the jury.

The Grounds of Appeal

21. In the grounds of appeal filed by the appellants, there are some grounds in common and there are other grounds of appeal unique to one or other appellant. As some grounds not shared in common bore the same enumeration we have sought to differentiate them by adjustments to the numbering. Thus, by way of example, in circumstances where different grounds (not being grounds in common) were advanced by both appellants as "Ground No 7", we have sought to differentiate them by referring to one as "Ground No 7" and the other as "Ground No 7a".
22. The grounds put forward were as follows:

Ground No 1 (both appellants):

"The trial judge erred in law and fact in failing to discharge the jury when asked to do so by defence counsel for Jason Bradley in circumstances which were unfair to the accused where the court revisited the issue of a directed verdict in relation to Ryan Bradley and ultimately granting it after the closing speeches on behalf of the prosecution and the closing speeches on behalf of Paul Bradley, Jason Bradley and Dean Bradley."

Ground No 2 (both appellants):

"The trial judge erred in fact and law in upholding the extension of the detention of the accused granted by Chief Superintendent Lorraine Wheatley."

Ground No 3 (both appellants):

"The trial judge erred in law and fact in allowing Danielle Cusack to give evidence during the course of the trial having regard to the circumstances in which her account came about and the failures of disclosure in relation to it."

Ground No 4 (both appellants):

"The trial judge erred in law and fact in purporting to allow the 3D Scanner evidence to be admitted on a conditional basis and should have excluded it simpliciter."

Ground No 5 (both appellants):

"The trial judge erred in fact and law in failing to give a specific warning in relation to the evidence of Danielle Cusack."

Ground No 6 (Dean Bradley):

"The fairness of the trial process was vitiated by late disclosure and service of evidence by the prosecution which occurred shortly before and during the currency of the trial."

This ground of appeal was not ultimately pursued.

Ground No 7 (Dean Bradley):

"The trial judge failed or refused to recharge the Jury on the inappropriate example he gave in his charge in relation to the standard of proof; i.e. running over someone with a car."

Ground No 7a (Jason Bradley):

"The trial judge erred in fact and law in failing and/or refusing to charge the jury on Joint Enterprise."

This ground of appeal was also not ultimately pursued.

Ground No 8 (both appellants):

"The trial judge failed or refused to recharge the jury on the issue of the Griffeen Valley Nursing Home CCTV."

Ground No 8a (Jason Bradley):

"The trial judge erred in fact and law in failing to direct the jury on the defence of provocation in accordance with the request of counsel on behalf of Jason Bradley and with the agreement of counsel for the prosecution to the effect that the defence of provocation can arise where a defendant either has lost the capacity to form the requisite intent or has actually formed the requisite intent to kill or cause serious harm."

Ground No 9 (Dean Bradley):

"The trial judge erred in recharging the jury in relation to the expert evidence of the pathologist, Dr. Michael Curtis."

Ground No 10 (Dean Bradley):

"The trial judge erred in recharging the jury in relation to the verdicts which were open to the Jury."

Ground No 11 (Dean Bradley):

"The trial judge erred in the recharge on the evidence in relation to the number of impacts to the deceased and did so in a way that was prejudicial to the accused."

Ground No 12 (Dean Bradley):

"The charge and recharge of the trial judge in relation to the accused's defence of accident was deficient."

23. For convenience, grounds no's 3 and 5, respectively, will be dealt with together, as will grounds no's 9 to 12 inclusive.

Ground No 1: re a failure to discharge the Jury.

24. The application to discharge the jury was made on behalf of Jason Bradley on day 27 of the trial and arose in the following circumstances.

25. All four accused had been tried together. There had been no application at any stage to sever the indictment. The prosecution's evidence had concluded on day 25. As we shall see, it is of relevance to this ground that an unsuccessful application for a direction (on grounds of insufficiency of evidence) was made at this point in the trial by counsel for Ryan Bradley.
26. On day 26, which was a Friday, prosecuting counsel made his closing speech. During his closing, prosecuting counsel placed heavy reliance on the evidence of Danielle Cusack. Her evidence had been controversial in as much as she claimed to have witnessed details of the attack that no other witnesses had seen and had given by far the most comprehensive third-party account of what had occurred. If the jury could be satisfied that her evidence was credible and reliable, its potential effect was likely to be significant indeed and devastating from the perspective of at least some of the defendants. Understandably, in those circumstances, she had been subjected to very robust cross-examination, and there had also been (unsuccessful) attempts to have her evidence excluded on legal grounds. At any rate, she had claimed, *inter alia*, that two or possibly three men had attacked Neil Reilly and had held him up while the car was preparing to run over him. In that regard, it is accepted by the appellants in their written submissions that an accurate summary of the pertinent portion of her testimony was later provided to the jury by the trial judge in his charge, when he stated:

"Her next memory was of a car. She described the area as being very well lit. It was very clear. She could see. Her evidence was that the car was a big dark black car which she thought was a BMW. She first saw the lights of the car as it came from the Griffeen Road direction. She wanted to scream out to get the man off the road. She thought the car was going to stop. It did slow down. The car hit the man. There was a very loud bang. She got the impression that the car was dragging the man. She thought it would stop but it did not. She remembers an awful thump as the car went over him. Her evidence was that the impact was at the near side of the speed ramp. She said that the man ended up in or about the silver car. She said she heard banging, dragging and the awful thump of a car hitting the ground again after it had gone over him. She said these guys were just laughing. As the car was driving they were following the car on the road. There were definitely two of them at the beginning and three at the end. As soon as the black car stopped on the far side of the ramp three men started to attack the man on the ground. She saw two men picking the man up. The car was put into reverse. Two men let the man go at the last second and the car drove over him again. She said the man was behind the silver car on the near side of the speed ramp. She said that there was an awful sound when the car was put hard into reverse and she heard a screeching noise. She said that when they held him up it was one man on either side of the man. She did not know where the third man was. She said that the car hit him and reversed over him. Her evidence was that when the car hit him the first time the injured man was standing. She said that prior to the second impact the men were holding him up. He was struggling and shouting "Stop, please stop". The car reversed and she heard a crunching noise.

She said that when the car reversed over him it took a bit of force to go over him. The car ended up in front of the silver car facing up the road. Her evidence was that when the car had reversed over the man and stopped "The three guys came back to attack the man". She said they beat him up pulling at him, kicking him as he lay on ground in or about the silver car."

27. The point is made by the appellants that Ms Cusack's evidence was in marked contrast to evidence given by other witnesses, none of whom had seen two to three men attacking Neil Reilly. Ms Cusack had also gone on to say that the car hit him a third time which again nobody else saw. Further, Ms Cusack saw no jeep at the scene, although other witnesses had referred to this, and the presence of a silver Mercedes jeep had been admitted by Paul Bradley. She also saw no man aged between 40-50 years, which was Paul Bradley's age, and who again was admittedly there albeit that there was evidence that he had returned to his vehicle after kicking the deceased. Her evidence was that every one of the men she saw was in their early 20s, except the driver of the saloon car which ran over Neil Reilly, who was in his late 20s or early 30s. It was put to her in cross-examination that only one man attacked Neil Reilly, and she rejected that and repeated her contention.
28. The appellants maintain that this evidence had very significant implications. Paul Bradley had admitted kicking Neil Reilly, but there was evidence that he then returned to his car. Jason Bradley had admitted to administering chopping wounds during a fight with Neil Reilly. Dean Bradley had admitted to driving the BMW which ran over Neil Reilly. The only evidence tending to suggest that Ryan Bradley might have gotten out of the BMW passenger seat was the numbers given by Danielle Cusack. If she was correct in what she claimed to have seen, Ryan Bradley had to have been an active participant in the assault on Neil Reilly.
29. The prosecution closed its case against Ryan Bradley based on the contentions of Ms Cusack and prosecuting counsel made the nuanced concession that he could not make a case to the jury based on her evidence that one of the people she had seen attacking Neil Reilly was Paul Bradley. This was the first intimation of such a concession. It was a concession properly made since Paul Bradley was well outside of the age profile of the assailants as described by Danielle Cusack, and there was other evidence that Paul Bradley had returned to his vehicle after kicking Neil Reilly.
30. Following prosecuting counsel's closing speech there were then defence closing speeches on behalf of Paul Bradley, Jason Bradley and Dean Bradley respectively. However, in so far as Ryan Bradley was concerned, his counsel did not proceed to follow immediately with a closing speech on behalf of her client, but instead elected in the absence of the jury to renew her earlier application for a directed verdict of not guilty. The renewed application was presented on this basis

"[Counsel for Ryan Bradley]: if I don't do it now I'd be criticised. I know now for the first time that, through the closing speech of [Prosecuting Counsel], that he does not place Mr Paul Bradley as being up at the ramp at the time when Danielle

Cusack says he was there and therefore is to be excluded from the equation which leaves it now at two which was never, ever, ever something that was suggested earlier on in this trial and does so on the basis that obviously Mr Paul Bradley is not a man in his early 20s but Ryan Bradley is not a man in his early 20s either and the clear evidence from Danielle Cusack, under cross examination, is that she said the people who were the the people she saw at the beginning, as she believed to be two or three, that they were the people that followed the car, the saloon car as it came up the road and her perception of there being two or three arose in circumstances where the saloon car was never there. So, it seems to be, from the Director's perspective, a flip of a coin, I'm going to exclude one because he is not fitting the description of early 20s but I'm keeping another in even though he is a teenager and even though that goes against the clear evidence from Danielle Cusack that the people she saw at the beginning were the people that followed the car up and I think it's an extraordinary suggestion that one person is excluded on the basis of such evidence and it makes me very worried as to the status of Mr Ryan Bradley again going to the jury on a murder charge, now that there has been this change made clear in closing speech. If Mr Paul Bradley is entitled to the benefit of that from the Director's perspective, well why is Ryan Bradley not? And I have to revisit my application, Judge, in light of what seems to be the position now in relation to Paul Bradley. If that is a benefit to Paul Bradley from [Prosecuting Counsel]'s perspective, how can it not be for Ryan Bradley?

31. In his response prosecuting counsel emphasised that his concession had been highly nuanced, stating:

"I am not saying that Paul Bradley was not one of the three men referred to by Ms Danielle Cusack. I am not saying that. What I am saying is that I cannot make a case to the jury based on the evidence of Danielle Cusack that the men were in their 20s and I have to be very careful and very fair to Mr Paul Bradley in that context because I cannot tell the jury something which is inconsistent with the evidence of Danielle Cusack and I had to be very nuanced in relation to that and I was very careful in relation to what I said."

32. The trial judge then ruled as follows, and in doing so rejected the renewed application:

"JUDGE: Very good. The Court has given its ruling on this matter already on the basis that the evidence of Danielle Cusack is consistent with Ryan Bradley being one of the three men who twice attacked the deceased whilst he was on the ground after he had come in contact with the BMW. It seems to me that the matters raised don't in any way alter that. It seems to me that all that has happened is that [Prosecuting Counsel] has simply closed his case in accordance with the evidence. I don't think that the manner in which he has closed the case in any way renders Danielle Cusack's evidence inherently incredible or unreliable in relation to the discrete matters that arises which is the reasonable possibility that Ryan Bradley was present at the scene. So, I am refusing the application on that basis."

[Counsel for Ryan Bradley], these are all matters obviously which the jury must consider."

33. Following this ruling, which was given at a reasonably advanced hour on what was a Friday afternoon, the jury were then sent home for the weekend on the basis that they would hear the final closing address and the judge's charge on the ensuing Monday, following which they would then commence their deliberations.
34. Over the weekend the trial judge, having reflected further on the ruling he had given on the Friday evening, changed his mind. Accordingly, when the trial resumed on the Monday morning, which was day 27, the trial judge commenced by addressing counsel in the absence of the jury. He said:

"JUDGE: As you are aware [Prosecuting Counsel], [Counsel for Ryan Bradley], I, through the registrar, notified your respective solicitors that I wished to revisit my ruling and I'm now going to give my supplemental ruling in relation to the application that you made on Friday. I, as the trial judge of this case, have a continuing duty to ensure that each accused receives a fair trial and to ensure that the verdicts returned in all four trials against each of the accused are safe. It is in that context that I wish to revisit my ruling on Friday because of the indication I gave following my earlier ruling of last Thursday that I would charge the jury on the basis that if they had a reasonable doubt as to whether there were three attackers present at the material time they must acquit Ryan Bradley of murder.

[Prosecuting Counsel] closed the prosecution case as against Ryan Bradley on the basis that Dean Bradley was the driver of the BMW and that there were three men attacking the deceased, one of whom had, as a matter of logical implication, to be Ryan Bradley; however, [Prosecuting Counsel] did not close the prosecution case as against Paul Bradley on the basis that he was one of the three men. In the course of the discussion about verdicts which followed the closing speeches on Friday [Prosecuting Counsel] stated that he couldn't, on behalf of the prosecution, put Paul Bradley as one of the three men in the light of the evidence of Danielle Cusack. The only evidence that three men were attacking the deceased at the ramp arises from the evidence of Danielle Cusack. All of the other evidence is that there was either no men attacking the deceased in or about the ramp or that there was one man attacking the deceased at that time. The prosecution now say that they no longer seek a conviction against Paul Bradley on the basis that he was one of the three men allegedly seen by Danielle Cusack. The prosecution case, so modified, requires the jury either to find that there were only two attackers or that there was a third attacker who cannot be accounted for. Either way the proposition that Ryan Bradley had, of necessity, to be one of the three attackers has fallen away.

It seems to me that if Danielle Cusack is not reliable as to the number of attackers present in the trial of Paul Bradley the jury, as a matter of fairness, must be charged accordingly in the trial of Ryan Bradley. As there is no other evidence upon which the jury can properly find that Ryan Bradley was anything other than a

passenger in the vehicle I will direct the jury to acquit him of murder but will allow the jury to consider the alternative count of impeding for which there is sufficient evidence."

35. Following this supplemental ruling, and before counsel for Ryan Bradley made her closing speech to the jury, counsel for Jason Bradley interjected and made the application for a discharge of the jury that is the subject matter of the present ground of appeal. In that context, there were the following exchanges:

"[COUNSEL FOR JASON BRADLEY]: ... Judge, just arising from what has taken place, it leaves Mr Jason Bradley in a slightly anomalous position because the prosecution position is that of three persons under the age of Ms Cusack. Now, the Court had given its ruling and I closed my case on the basis of the defendants as they stood in toto. I gave, if I can use the expression, Ms Danielle Cusack's evidence a light role in circumstances where I suggested the jury will have a difficulty squaring that circle vis à vis her evidence vis à vis the evidence offered by all the other eyewitnesses. Undoubtedly if the case is proceeding on the basis of Danielle Cusack's observations there is a requirement for Jason Bradley to deal with that but that's in circumstances where it was understood that the person potentially most at risk from that would have been Ryan Bradley and therefore I didn't seek to overly engage with the factual discrepancies between Ms Cusack's evidence and that of the other witnesses and I suppose to a certain extent I closed my case on the basis of knowing, having engaged with other parties, as to where they would be directing their fire so to speak, and we have now lost a weapon from our artillery in terms of [Counsel for Ryan Bradley]'s closing speech

JUDGE: Well, [Counsel for Jason Bradley], if it's any comfort to you I will be confining my consideration of the case against your client by reference to the chopping injuries.

[COUNSEL FOR JASON BRADLEY]: May it please the Court. The difficulty is the jury may take a different view on that because I was express to communicate that Ms Cusack was a compelling and powerful witness, although not one to be relied upon. The Court can direct the jury, as entirely it will do appropriately, but the jury may take a view in terms of Ms Danielle Cusack's evidence and if it is not sufficiently undermined act upon it. Now, the Court has taken a view in relation to where Mr Ryan Bradley found himself apropos that evidence and the jury will not have the benefit of undoubtedly

JUDGE: What's your application, [Counsel for Jason Bradley]?

[COUNSEL FOR JASON BRADLEY]: Well, I think at this stage my application would have to be that the jury be discharged in relation to Jason Bradley's position because I have been compromised in terms of a tactical approach, so to speak, by virtue of this development late in the day.

JUDGE: Well, do you want a further opportunity to address the jury in relation to the matters that you say you would have addressed if you had been aware of the ruling that the Court was going to make?

[COUNSEL FOR JASON BRADLEY]: With respect

JUDGE: The Court will facilitate you in that regard if you wish.

[COUNSEL FOR JASON BRADLEY]: I am not sure that that's going to

JUDGE: Well, it will, [Counsel for Jason Bradley], in my judgment. If you say that you have been deprived of an opportunity of putting matters before the jury which they say they ought to consider in considering aspects of the prosecution case against your client, I am affording you that opportunity now.

[COUNSEL FOR JASON BRADLEY]: May it please you. Could I just take a moment to consider that and take an instruction on it, Judge?

36. Having taken instructions, counsel for Jason Bradley declined the offer of re-addressing the jury, stating:

"[COUNSEL FOR JASON BRADLEY]: I am in two minds to be perfectly honest, Judge. I am not sure that I can do that which I would want to do and I think there are ripple effects as a consequence of the Court's ruling that I can't actually properly address and Mr Ryan Bradley sorry, Mr Jason Bradley has had it explained to him and to be perfectly honest it's a bit of a bit Hobson's choice for him to be perfectly honest, Judge. In the circumstances I think it's probably just better left as it is. I appreciate the Court has given

JUDGE: Well, [Counsel for Jason Bradley], you will obviously hear my directions to the jury. If there's anything that you think I have overlooked in dealing with the evidence of Danielle Cusack you can remind me and perhaps that's the way to deal with it.

[COUNSEL FOR JASON BRADLEY]: May it please the Court. May it please the Court.

JUDGE: The Court will be of course sorry, the jury will be reminded of the cross examination of Danielle Cusack as well.

[COUNSEL]: May it please the Court. Thank you, Judge."

37. During the course of his subsequent charge, the trial judge set out the case against Jason Bradley. As he had previously indicated that he would, he dealt solely with the chop injuries inflicted by Mr Jason Bradley (on his own admission) and also dealt with the issue of provocation (in respect of which a separate ground of appeal has been raised).

38. After the charge had been concluded, prosecuting counsel requisitioned on the basis that the Court had addressed joint enterprise solely in the context of Paul Bradley and the trial judge indicated that the reason he had done that was because there was direct evidence of acts, whose natural and probable consequence was to cause serious injury and that, to his mind dealt with the matter. Initially, the trial judge was disposed to re-charging the jury, but counsel on behalf of Jason Bradley voiced his opposition to this. At a later stage, the trial judge indicated that he could say that it was the prosecution's case that there was a joint enterprise. Counsel for Jason Bradley objected to this in the following terms:

"Again, I think any introduction brings with it the risk that I have identified. I appreciate where [Prosecuting Counsel] is coming from and why he requires it or certainly seeks it. My concerns remain the same. The difficulty there is that you are looking at an umbrella of activities that commenced when the vehicle – sorry – that commence upon the arrival of the Mercedes and concluded upon the departure of both vehicles having turned down in the direction of Esker Glebe... And my concern is that umbrella of behaviour goes beyond that which the Court has specifically charged them on in relation to Mr Bradley, the basis upon which we have understood that that was going to take place and the basis upon which the Court has indicated clearly that the intent to kill or cause serious harm can be identified, may or may not be negated but that's the Danielle Cusack factor in the case... with the laughing and the unidentified parties, the numbers which are now considerably reduced, I think it carries with it potential exposure to Jason Bradley which in truth shouldn't arise and that is my concern."

39. Having heard both sides, the trial judge indicated that he was on balance against the prosecution's requisition.
40. In the context of the present appeal counsel for both appellants have argued that the trial judge was wrong not to have discharged the jury in the circumstances outlined. It has been argued that, while it is accepted that the trial judge was trying his best in all the circumstances to ensure that fairness was done to all parties, the unusual situation which arose left counsel for Jason Bradley with truly a Hobson's choice. He could avail of the trial judge's offer and make a further speech making a full-throated attack upon Ms Cusack's evidence when he had previously adopted an entirely different tone, and he would be doing so where there had been an intervening speech by counsel for Dean Bradley; or, he could refuse the offer, and leave Ms Cusack's evidence commented upon, but not thoroughly attacked in the way it was to be by counsel for Ryan Bradley, or it would have been by counsel for Jason Bradley or Dean Bradley if they had known Ryan Bradley would be out of the case. Neither choice was attractive, and both had distinct risks and inherent disadvantages. Further, the situation was not one created by counsel for either Jason or Dean Bradley. It was submitted that in these circumstances, the only fair and proper way of dealing with the problem that had arisen would have been to discharge the jury.

41. Counsel for the respondent on this appeal points to the extensive cross-examination of Danielle Cusack on behalf of all the accused, including on behalf of Jason Bradley. He emphasises that during his closing speech, counsel on behalf of Jason Bradley confirmed that he took "*all responsibility for all the chop or sharp force injuries.*" In refusing to discharge the jury the trial judge had said that he would be confining the consideration of the prosecution case against Mr Jason Bradley "*by reference to the chopping injuries*", and also gave an opportunity to counsel to further address the jury.
42. The point is made that not alone did Danielle Cusack not see anybody chopping the deceased Neil Reilly, she did not see anybody with anything in their hands. That being so and having regard to the judge's charge pertaining to Jason Bradley (which was confined solely to the chopping injuries admittedly inflicted by him), it is, says counsel for the respondent, difficult to discern how Jason Bradley was so disadvantaged by the direction given in respect of his brother Ryan Bradley (who had travelled to the scene in another car) that the jury required to be discharged.
43. Addressing the contention that counsel for Jason Bradley was faced with Hobson's choice, counsel for the respondent says that this submission ignores the fact that there had indeed been what can only be described as a significant attack on the evidence of Ms Cusack in the original closing speech. Moreover, it is not indicated what else could or would have been said by way of further attack on her evidence. Finally, the submissions fail to identify how Mr Jason Bradley was unfairly and irrevocably prejudiced by the direction given in respect of Ryan Bradley, against a background where the Judge directed the jury insofar as Jason Bradley was concerned solely in respect of the chopping injuries.
44. In so far as this ground is also relied upon by the appellant Dean Bradley, counsel for the respondent observes that:
- a) no concerns whatsoever were raised on behalf of Dean Bradley when the Judge revisited his ruling (not to grant a direction in respect of Ryan Bradley), and
 - b) after the Judge concluded his charge, no requisitions in this regard were raised on behalf of Dean Bradley.

The respondent says that in the circumstances the Cronin principle is applicable, but that in any event counsel for Dean Bradley also cross-examined Danielle Cusack and also made a closing speech in which he also addressed the evidence of Ms Cusack.

Decision on Ground of Appeal No 1

45. We are not disposed to uphold this ground of appeal. We are not persuaded that counsel for Jason Bradley was strategically embarrassed to the extent suggested, and that he was truly faced with Hobson's choice i.e., an apparently free choice when there is no real alternative. What occurred was simply one of the hazards of a joint trial. We accept that how the events unfolded perhaps limited the strategic choices available to counsel, and that indeed he was faced with difficult strategic choices. However, there was nothing unfair either in how this occurred or in how it was dealt with. We do not, however, accept

that he was faced with no real alternative. He could indeed have availed of the offer made to him by the trial judge to re-address the jury and have potentially done so effectively. We think the observations made by counsel for the respondent concerning the fact that Danielle Cusack had been robustly cross-examined on behalf of Jason Bradley, as well as on behalf of other defendants, and had been challenged on specific aspects of her evidence, are points well made. Further, counsel for the respondent is right in suggesting that counsel on behalf of Jason Bradley had already engaged in a significant attack upon her evidence in his first speech. It was well within the competence of counsel to present a renewed, coherent and further reaching attack on the witness's evidence, without causing the jury to believe that how he was approaching the case on behalf of his client was in any way schizophrenic or inconsistent or ill-thought out, on the basis of telling them that following legal argument in their absence he had been afforded the opportunity of addressing them further.

46. We think that the trial judge dealt with the issue entirely properly. He was taking great care to be fair to all sides and we think that he got the balance right. It was not an appropriate instance in which to discharge the jury. The proper course, and the one which he adopted, was to afford counsel the opportunity to further address the jury. Accordingly, we dismiss this ground of appeal in so far as it concerns Jason Bradley.
47. We further have no hesitation in also rejecting this complaint in so far as it relates to Dean Bradley. The point was never raised at trial, and prima facie the Cronin jurisprudence applies. However, and in any case, as has been pointed out, the evidence of Danielle Cusack was in fact challenged on behalf of Dean Bradley and we do not see what more could have been said to the jury in that regard on behalf of this appellant.

Ground No 2: re the rejection of a defence challenge to the lawfulness of extension to the appellants' detention

48. In the case of both appellants they were taken to a garda station following their respective arrests where, on the application of the arresting garda in each instance, they were initially detained by the member in charge pursuant to s.4 of the Criminal Justice Act 1984 ("the Act of 1984") for the proper investigation of the offence for which they were arrested. An initial detention under s.4 of the Act of 1984 is for a maximum of 6 hours from the time of arrest. The legislation as initially enacted provided (in s.4(3)(b)) for the possible extension of this initial period of detention for a further six hours if authorised by a garda officer not below the rank of Superintendent. Such extensions were granted in the case of both appellants by Superintendent Seán Campbell and they are uncontroversial.
49. The Act of 1984 was subsequently amended by the Criminal Justice Act 2006 ("the Act of 2006"), and amongst the amendments provided for was one in s.9(c)(i) of the Act of 2006 which inserted the following subsection after s.4(3)(b) of the Act of 1984:

"(bb) A member of the Garda Síochána not below the rank of chief superintendent may direct that a person detained pursuant to a direction under paragraph (b) be detained for a further period not exceeding twelve hours if he or she has reasonable

grounds for believing that such further detention is necessary for the proper investigation of the offence concerned."

50. In the case of both appellants their respective detentions were purportedly extended a second time on the authorisation of Chief Superintendent Lorraine Wheatley for a period of 12 hours, the second detentions to commence in each case on the expiration of 12 hours from the time of the relevant prisoner's arrest. The lawfulness of these extensions was unsuccessfully challenged at trial, and the issue of their lawfulness has been canvassed again before us.
51. The basis for the challenge is as follows. In her evidence to the court of trial, Chief Superintendent Wheatley stated, in respect of each appellant, that she extended their detention pursuant to the power provided for in s. 4 of the Criminal Justice Act 1984. It is uncontroversial that in principle she had the necessary power to do so under s.4(3)(bb) of the Act of 1984. However, in her evidence she did not identify that subsection with specificity when testifying in relation to her extension of the detention of either of the present appellants. She merely stated that her extension had been pursuant to "*section 4 of the Criminal Justice Act 1984*" and under cross-examination was unable to nominate the specific subsection relied upon. In her statement in the Book of Evidence she had stated that she had done so "*under s. 4(3)(bb) of the Criminal Justice Act 2006*". There is no such provision in the Act of 2006, and when confronted with this she accepted that that was so, but maintained that her statement had simply contained what she characterised as "*a typing mistake*", in that while it referred to the Act of 2006 she had intended to refer to the Act of 1984. She was adamant that she had nonetheless been clear in her mind that that she was operating under the Act of 1984, stating at one point that, "*I joined [An Garda Síochána] in 85. The Criminal Justice Act 1984, I suppose it's in our DNA and I understand – I understood I was operating under that Act, not the 2006. This is a typing mistake. It's not good enough I know.*"
52. Further, there was also evidence before the trial court that her authorisations were granted orally, and that a written record of these authorisations was made some time later. The Act of 1984 provides for this in s. 4(3)(c). However, the written records in each case, which were produced at the trial, also contained ostensible inaccuracies, in that they stated that the relevant extension had in each case been granted "*pursuant to s.4 of the Criminal Justice Act 1984 as amended by s.9(c)(i)(bb) of the Criminal Justice Act 2006.*" Again there is no such provision as s. 9(c)(i)(bb) of the Act of 2006. Rather, s. 9(c)(i) of the Act of 2006 amends s.4 of the Act of 1984 by providing for the insertion of a new sub-subsection (to be designated "(bb)") after the then existing s.4(3)(b). The witness accepted in cross-examination that the written record incorrectly described the amending provision. Her explanation for this was that she had resorted to a pre-prepared template form for the purpose of making the required written record of her authorisations. It was implicit in her evidence in that respect, although she did not articulate it expressly, that she had not adverted to the fact that whomever had originally prepared the template had seemingly misdescribed the relevant amending provision, but rather had simply filled in the blanks on the form, not noticing the misdescription in the pre-prepared text.

53. Chief Superintendent Wheatley was further robustly cross-examined concerning the inquiries she made concerning the status of the investigation and the extent to which she had sought to satisfy herself that a second extension of detention was in each case "necessary". She testified that the extensions were sought on the basis that further time was required to put exhibits and witness statements to the appellants. It was also intended to deploy the adverse inference provisions. She said, "*I was happy -- not happy, I was satisfied that there was insufficient evidence. There was no admissions at that stage to prefer a criminal charge.*"
54. In submissions to the trial judge on the issue it was argued that there was insufficient clarity in the evidence as to the legal basis on which the Chief Superintendent had purported to act. It was further argued that there had been a manifest failure to comply with s.4(3)(c) of the Act of 1984, and that the court should not be prepared to forgive that. Counsel for the appellants had placed reliance on *The DPP v. Henry Dunne*, (unreported, High Court, Carney J, 14th October 1994); *P.D. v. Clinical Director of Connolly Hospital* [2014] IEHC 58 and *A.M. v. Kennedy* [2007] 4 I.R. 667. These cases were cited as providing support for the proposition that where personal liberty was at stake a court should insist on strict adherence to formalities. Certain remarks of Peart J. in the *Kennedy* case were commended to the court as being particularly apposite, *i.e.*, that "*the greatest care must be taken to ensure that procedures are properly followed, and it ill serves those whose liberty is involved to say that the formalities laid down by statute do not matter and need not be scrupulously observed*", and that "*mistakes have legal consequences*" and that where they have occurred, they "*cannot simply be erased for the sake of convenience.*"
55. An additional point was and is made on behalf of Dean Bradley, that Chief Superintendent Wheatley made no express reference in her evidence to being made aware of Dean Bradley's detention having already been extended for six hours by Superintendent Campbell. That is the case. However, a similar challenge to the lawfulness of Chief Superintendent Wheatley's extensions was being pressed on behalf of all the defendants then before the court, and her evidence as regards the situations of the other three was that she had been made so aware.
56. The trial judge rejected the challenges to the lawfulness of Chief Superintendent Wheatley's extensions on the following basis:

"I am satisfied as a matter of statutory interpretation that the written records made of the directions given by Detective Superintendent Wheatley are not to be treated as being conclusive and determinative of this issue of fact in each case. It follows from this that the point at issue in this voir dire is materially different to that which arose in DPP v. Dunne and in the mental health cases cited before me where the legal consequences complained of flowed not from an oral direction already given but rather from the relevant erroneous documents which were under scrutiny.

After careful consideration of her oral testimony to this court I am satisfied that Detective Superintendent Wheatley at all times believed she was granting the

relevant extensions under section 4 of the Criminal Justice Act 1984. I do not consider that her inability or failure to parrot the relevant subparagraph in the witness box to be fatal in circumstances where her evidence makes plain that she was aware of the extension orders granted by Detective Superintendent Campbell and therefore her appreciation of the stage at which she was being asked to make the relevant extensions. I am further satisfied that she had reasonable grounds for extending the relevant periods of detention in each case, having regard to her evidence of the significant number of matters which remained to be put to each accused which she identified in some detail in respect of each accused. I am further satisfied that having regard to the considerable number of matters that remained to be put to each accused it was not unreasonable for Detective Superintendent Wheatley to extend the period of detention for a period not exceeding 12 hours in each case, a fortiori as this was a decision that she could only make once in each case. At all events there is no evidence before me that the periods of detention so granted were thereafter in any way abused. For the foregoing reasons I find that the relevant directions were lawfully made."

57. On this appeal we were asked by the respondent to dismiss this ground, effectively *in limine*, on the basis that it is misconceived. Although the respondent does not accept that the Chief Superintendent's extensions were in any way unlawful, and indeed contends that the trial judge was correct in his ruling; the point is made by the respondent that even if the extensions were unlawful the prosecution did not place before the jury any evidence gathered from the appellants during the extended period of detention at issue. The interviews conducted during this period were those in which the inference provisions in s.18, s.19 and s.19A of the Criminal Justice Act 1984 were deployed. However, in the circumstances outlined earlier in this judgment whereby the appellants were prepared to make s.22 admissions before the jury as to the matters in respect of which the prosecution had otherwise proposed to invite the jury to draw adverse inferences, no evidence was led concerning interviews conducted during the controversial period of extended detention. Moreover, no other evidence that might have been gathered during that period was adduced. It is in these circumstances that the case is made that this ground of appeal is misconceived. We think this point is one that is well made and valid, and we are prepared to dismiss ground of appeal No 2 on that account alone.
58. However, we should say that even if we are wrong in our view that the complaint is misconceived we would not have been disposed in any case to uphold it, for the following reasons.
59. Following a detailed consideration of the transcript of the evidence of Chief Superintendent Wheatley, and of the submissions made to us in this appeal, we find no error on the part of the trial judge in upholding the lawfulness of the appellant's extensions. While the Chief Superintendent failed in the case of Dean Bradley to state expressly that she had been made aware of Dean Bradley's detention having already been extended for six hours by Superintendent Campbell, we do not consider this to be fatal in circumstances where she was addressing the same objection on behalf of all four

suspects, and made clear when speaking about the other three that she was aware of the suspects' detention status, and that Superintendent Campbell had granted initial extensions. Her evidence had to be considered as a whole. It would have been better if she had given the same level of detail concerning the information ascertained by her with respect to each accused, but in circumstances where the extensions were all considered and granted on the same occasion, and in very similar circumstances, the trial judge was entitled to infer from the entirety of her evidence, as we are satisfied he did, that she had indeed become "*aware of the extension orders granted by Detective Superintendent Campbell*" in respect of all of the detained suspects including Dean Bradley, and appreciated in all cases "*the stage at which she was being asked to make the relevant extensions.*"

60. We are also satisfied that any breaches of s.4(3)(c) were of a technical nature rather than substantive. The record clearly shows that the power being relied upon derived from s.4 of the Act of 1984 as amended. It failed, however, to correctly identify the relevant amending provision in the Act of 2006, namely s. 9(c)(i) which had inserted s.4(3)(bb) into the Act of 1984, misdescribing it instead as s. 9(c)(i)(bb). When one looks at the Act it is easy to see from the layout of the provision how such a misdescription might have arisen. It provides:

9.— Section 4 of the Act of 1984 is amended—

(a) ...,

(b) ...,

(c) in subsection (3)—

(i) by the insertion of the following paragraph after paragraph (b):

"(bb) A member of the Garda Síochána not below the rank of chief superintendent may direct that a person detained pursuant to a direction under paragraph (b) be detained for a further period not exceeding twelve hours if he or she has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned."

The paragraph "(bb)" to be inserted might easily be mistaken on a cursory reading of the provision as being a sub, subsection of s.9 of the Act of 2006, notwithstanding that close and careful scrutiny reveals that in fact it is simply a wording, in quotation marks, of the text to be inserted in the principal Act (i.e., the Act of 1984) after s.4(3)(b) thereof.

61. The critical thing in so far as we are concerned is that Chief Superintendent Wheatley *de facto* had the power to grant the necessary extensions, and that her evidence was that she knew she had that power (even if she couldn't identify with specificity the statutory amendment which provided for it), that she had decided to exercise that power, and that she had in fact exercised it. We agree that the trial judge correctly distinguished a failure to comply with a formality which is fundamental to the valid exercise of a statutory power

from a failure to comply with a formality which is not fundamental to the valid exercise of a statutory power. The fact that the written records of the Chief Superintendent's oral authorisations contained the inaccuracies highlighted earlier in this judgment would not have impugned, *per se*, the validity of the authorisations. There was of course a breach of a statutory requirement in so far as the recording obligation was concerned, but the statute expressly envisages that the creation of the record of what was done orally may take place after the fact. An inaccurate record made after the fact concerning an otherwise valid oral authorisation could not, *per se*, serve to invalidate that which was otherwise valid. As to whether in another case there could be any other, or collateral, implications arising from a failure to strictly adhere to the letter of the statute in regard to the statutory recording obligation, would depend on the circumstances of the case, and the purpose and extent to which a party might be seeking to place reliance on the impugned record. We think it would not be helpful to speculate as to hypothetical scenarios that might arise in other cases. However, in so far as the present case is concerned, we are satisfied that the trial judge's decision on the validity of the extensions was not dependent on the accuracy of written records concerning what was done orally when made in purported compliance with s.4(3)(c) of the Act of 1984. His decision rested entirely on his acceptance of the Chief Superintendent's oral testimony as to what she in fact did, and as to the basis on which she did so, notwithstanding that the records made by her after the fact may indeed have alluded to a non-existent statutory provision. In that regard it is manifest there was an error in the record, but establishment of the true facts did not ultimately depend on the existence of an accurate record. We are therefore satisfied that the trial judge's ruling was one that was open to him on the evidence before him. He was fully entitled to accept the oral testimony of the Chief Superintendent as being both credible and reliable, and to act upon it.

Ground No's 3 & 5: re evidence of Danielle Cusack

62. Grounds 3 and 5 relate to Danielle Cusack. It is alleged in Ground 3 that the learned trial Judge erred in law and fact in allowing Danielle Cusack to give evidence "*having regard to the circumstances in which her account came about and the failures of disclosure in relation to it*", while in Ground 5 it was alleged that the learned trial Judge erred in fact and law in failing to give a specific warning in relation to her evidence.
63. Danielle Cusack was one of a number of eye witnesses to what occurred at Esker Glebe in the early hours of the morning of the 18th of January 2017. The first garda she had an encounter with was Garda Damien Reilly who was a member of the team of gardaí who investigated the incident in its aftermath. A colleague, Garda Cullen, had ascertained that Danielle Cusack was a possible witness and recorded her name, address and a contact number in the investigation jobs book. Garda Reilly was assigned the task of following up by seeking to speak with her and taking a statement from her. He called to the address on the jobs sheet, i.e., 42 Esker Manor, but got no reply. He then contacted the contact number and spoke with Danielle Cusack's father, Mr. John Cusack. Mr. Cusack informed Garda Reilly that his daughter was very, very traumatised having witnessed an incident outside her house and he stated that he did not want her directly contacted. Instead, he

provided his own contact details. Garda Reilly spoke with him again early on the morning of 23rd of January 2017 and Mr Cusack agreed that he would bring his daughter back to her apartment at 42 Esker Manor that evening so that Garda Reilly could meet with her there.

64. When Garda Reilly met with Danielle Cusack on the evening of 23 January 2017 she stated that she did not wish to make a statement at that juncture, that she had an awful lot going on in her personal life and that she was experiencing a lot of stress given that she was approaching her final exams as a veterinary student. She stated that she would give a verbal account at that point, that she was eager to help, but that she was not ready to give a statement. Garda Reilly testified that she appeared "visibly shaken" and that he felt that at any moment she could break down in tears. Garda Reilly said that he did not take notes because he felt it would have been counterproductive given that she was so visibly distressed. He had in fact asked her if he could take notes and she had become visibly distraught at that stage so he decided not to do so. Her demeanour when she started giving her account was quite good in fact, although once or twice during the process she broke down in distress, but then continued.
65. After he had spoken to Danielle Cusack on this occasion Garda Reilly returned to the garda station, which was only a short distance away, and on arrival there immediately typed up an internal garda report setting out his recollection of the account that had been given by her. This featured and was referred to as "the Reilly report" during a *voir dire* concerning the admissibility of Danielle Cusack's evidence in the trial. While the defence legal teams were made aware by the DPP in a letter dated the 12th of March 2018 that an account had been provided by Danielle Cusack on the 23rd of January 2017, they were regrettably not told of the existence of the 'Reilly report', which appears to have been treated as an internal garda document, until after the trial was underway. The appellants contend that they only learned of its existence for the first time on the 11th of June 2018, i.e., on day 8. It was accepted by a prosecution witness that its existence was of "*monumental significance*" to the defendants, and that it should have been disclosed.
66. Two days later, on day 10, it emerged that following the incident, but unbeknownst to the gardaí, Danielle Cusack had prepared a personal written *aide memoire* concerning the events she had witnessed. In circumstances where the existence of this document was unknown to the prosecuting authorities, it had not been disclosed either.
67. Returning to the chronology, the investigating gardaí were optimistic that Danielle Cusack would eventually be willing to make a formal statement, so Garda Reilly stayed in touch with her father and spoke with him periodically. In April 2017 Detective Superintendent Sean Campbell assumed the role of senior investigating officer in the case and he decided that if the opportunity arose to interview Ms. Cusack she should be interviewed using a technique known as enhanced cognitive interviewing ("ECI"). Giving evidence in the course of the *voir dire* he stated:

"I made that decision after a conversation with Detective Sergeant Woods, the Detective Sergeant from Lucan and the IRC. And it was – we were acutely aware of

the traumatic events that this witness had seen. We didn't want to re-victimise her, for want of a better expression, by making her sit through what could be a very lengthy interview. And we decided that if we video taped it – it was – it was a number of months on, that if the interview was video taped that you would – you'd be able to see exactly what happened, how the Guards acted in the interview room. It was transparent. It was open and all questions and all interactions with the witness would be video taped."

68. An opportunity arose to interview Danielle Cusack when Garda Reilly was contacted by her father in mid-August 2017 and was informed that Ms Cusack wished to speak with him. When Garda Reilly spoke to her she intimated that she was willing to make a formal statement and subsequently did so at a garda station on the 30th of August 2017. The interview was mainly conducted by Detective Sergeant Peter Woods, using ECI techniques. It was video recorded. The record of the interview was transcribed, and the transcribed record was subsequently read over to Danielle Cusack on the 10th of November 2017. This statement formed the basis of a Notice of Additional Evidence dated the 2nd of January 2018 which was served on all four defendants concerning the proposed evidence of Danielle Cusack to be adduced by the prosecution at trial
69. During the aforementioned *voir dire* concerning the admissibility of this proposed evidence the trial judge viewed the video of Ms Cusack being interviewed on the 30th of August 2017. Also during that *voir dire* the trial judge heard evidence via Skype from Professor Rebecca Milne, a professor of forensic psychology at the University of Portsmouth. Professor Milne had been studying the area for 25 years and is best known for her work on investigative interviewing, including Cognitive Interviewing (CI) and Enhanced Cognitive Interviewing (ECI). Her mentor was Professor Ray Bull, an early proponent of the procedure. She provided services and training to disparate bodies around the world including An Garda Síochána and hoped to continue providing training services. Professor Milne was called as an expert witness on behalf of the prosecution to, *inter alia*, explain what ECI involves and to illustrate, using the video of the interview conducted with Danielle Cusack, how the techniques involved were applied by the interviewer (Detective Sergeant Woods, whom she had trained) when Ms Cusack was being interviewed. In the course of her testimony she also described research studies concerning ECI that she had personally conducted during her career, as well as research conducted by others, and testified, *inter alia*, that using techniques "*like we have utilised that is the best way to get the most accurate and reliable information from a witness.*" She was cross-examined by counsel for all four accused, but it was not suggested to the witness that ECI lacked a scientific basis or that its techniques had not been properly engaged in during the interviewing of Danielle Cusack. The high water mark of it was a suggestion canvassed with her that ECI could be less effective in eliciting accurate and reliable information in circumstances where there was a degree of delay, and that in this case Ms Cusack was interviewed by Detective Sergeant Woods at a remove of approximately seven months from the event. The witness responded by saying that information about episodic memory did depreciate over time but that what was affected was quantity not quality.

70. Various grounds of objection to the admissibility of Danielle Cusack's evidence were advanced in the course of legal arguments presented in the *voir dire*. There were objections based on relevance, based on whether the witness's proposed evidence was more probative than prejudicial, and concerning whether it was evidence which should be automatically excluded (i.e., as of right) upon objection being raised to it by a defendant. Yet further objections were raised on the basis that the gardaí, having obtained Ms Cusack's statement of the 30th of August 2017, had not gone back to other eye witnesses to ascertain from them whether they had also seen the deceased being held up by his assailants as the car prepared to reverse back over him, as Ms Cusack claimed to have witnessed. Both Sergeant Detective Woods and Superintendent Campbell sought to address this in their evidence to the court on the *voir dire*, and the perceived dangers in doing so, from the perspective of the gardaí, were pointed out. Superintendent Campbell suggested under cross-examination that if they had done so they would likely be accused of trying to get witnesses to change their evidence, and face criticism on that account.
71. On day13 the trial judge ruled on the objections, rejecting them and declaring the evidence to be admissible. He stated:

"JUDGE: Objection has been made by the accused to the prosecution calling Danielle Cusack as a witness in this trial. The evidence and submissions of the parties on this issue are recorded and set out in the transcript. The proposed evidence of Danielle Cusack was served by notice of additional evidence dated the 2nd of January 2018. The notice, insofar as it is relevant to this issue, consists of the transcript of an interview that was conducted by the gardaí with Danielle Cusack at Tullamore on the 30th of August 2017 together with a statement dated the 10th of November 2017, which is signed by Danielle Cusack in which she stated that the transcript of interview had been read over to her, that it was correct and that she did not wish to make any further alterations or additions to it. It is not in dispute that Danielle Cusack is a competent witness or that her proposed evidence is relevant or that it has been taken and served in accordance with law. It is further not in dispute that the so-called enhanced cognitive interview technique or ECI was used by the gardaí when they interviewed Danielle Cusack at Tullamore on the 30th August 2017. It is common case that evidence so elicited from a prospective witness has never heretofore been used in an Irish court, whether because of a fear of the unknown or otherwise, it was initially suggested in somewhat pejorative terms that Danielle Cusack had been "subjected to ECI". Since hearing the expert evidence of Professor Milne on this issue, however, counsel for the accused have in fact made no criticism of ECI per se. It is unnecessary for me to decide whether ECI now represents best interviewing practice in this jurisdiction. It is sufficient for present purposes to decide, as I do, that there is nothing about ECI that would make its adoption and use by the gardaí in this jurisdiction incompatible with the constitutional guarantee of basic fairness of procedures or the right to a fair trial. The benefits of ECI are manifest and are set out in some detail in the evidence of Professor Milne. In summary, and unlike the

standard interview, ECI is witness led in order to avoid leading and misleading questions. But, above all else, it is completely transparent.

Wholly justified criticism has been made by Mr [Counsel for Paul Bradley] of the failure of the gardaí to disclose to the accused prior to trial the account attributed to Danielle Cusack in the garda report of the 24th of January 2017. Otherwise there has been no criticism of the gardaí by any of the accused insofar as they waited until the 30th of August 2017 to interview Danielle Cusack. The delay of 7 and a half months in interviewing Danielle Cusack has been explained and the explanation that has been offered to the Court is entirely reasonable.

Against this background, what remains in controversy are the following issues, first it is argued that ECI is only appropriate when it is used without delay. As there is nothing in the expert evidence of Professor Milne to support this contention I reject it.

Secondly, and by way of corollary of the first contention it is argued that the proposed testimony of Danielle Cusack should be excluded because of the fact that ECI was used after a delay of 7 and a half months. The mere fact that ECI is used optimally if it is used immediately after an event does not of course mean that it cannot thereafter be used to good effect. It is self-evident that the accuracy of memory does not improve with time and that the passage of time may well cause memory to degrade, not least because of exposure to external influences. However, as pointed out by Professor Milne, this is so regardless of whether a witness gives his or her statement by ECI or standard interview. As there is no time limit prescribed by law for the taking of a witness statement, I therefore reject this contention.

Thirdly it is argued that, as there is a major difference between her initial account and the account Danielle Cusack gave on the 30th of August 2017, the gardaí had a duty to put the earlier account to her and that their failure to do so should result in the exclusion of the entirety of her evidence. The initial account attributed to Danielle Cusack omits the allegation later made by her on the 30th of August 2017 to the effect that two or more men held up the deceased at the scene to enable him to be hit by a car. The fact of the matter is that the narrative she gave on the 30th of August 2017, which she affirmed on the 10th of November of that year, is Danielle Cusack's only statement in this case and more critically represents the evidence she proposes to give at trial. It is also the only proposed evidence upon which the prosecution can rely, notice of which must of course be given to the accused, which was done by the notice of additional evidence dated the 2nd of January 2018. More fundamentally, however, I am aware of no authority for the proposition that the prosecution must forgo a witness merely because the gardaí have failed to seek an explanation for differences in two or more accounts of an event, which that witness has given to the gardaí. In rejecting the suggestion that any such failure is wrongful, I reject the submission that on the facts of this case it

contravenes the constitutional guarantee of basic fairness of procedures or that it amounted to a trick or misrepresentation on the part of the gardaí such as would taint the evidence with impropriety.

Fourthly, it is argued that the gardaí had a duty to put her initial account to Danielle Cusack as part of their duty to seek out and preserve evidence. It is clear from the case law emanating from the decisions in Braddish and Dunne that the duty of the gardaí to seek out and preserve evidence arises primarily in relation to real evidence. Insofar as it applies also to the taking of witness statements, it is of course merely a duty to seek out and preserve the evidence that the witness proposes to give and not a duty to seek out and preserve explanations for such differences, inconsistencies and other discrepancies, as are to be found in the statement or statements of a particular witness.

Fifthly, it is argued that the gardaí had a duty to take further statements from the other four eyewitnesses in this case in order to establish whether they too had a recollection of two or three men elevating the deceased from the ground so that he could be struck by a car. As the relevant witnesses do not propose giving such evidence, it is far from obvious how such an approach could be of any material benefit to the accused, much less how the gardaí could make such an approach without being criticised for seeking to improperly influence witnesses in favour of the prosecution. Even if one could overcome both of these difficulties, I nonetheless reject the contention that there was a wrongful failure to revert to the relevant witnesses for such a purpose and in so ruling I adopt mutatis mutandis the same reasoning as I have applied to reject the third and fourth contention.

In so ruling, and for the avoidance of any doubt, I am unaware of no authority for the proposition that the prosecution must forego an eyewitness to an alleged crime merely because the gardaí have failed to put differences in that witness's proposed evidence to other relevant witnesses. I therefore reject the contention made that such failure constituted a failure of basic fairness of procedures or amounted to a trick or a misrepresentation or that it constituted a failure to seek out and preserve evidence.

At bottom, the matters raised by the accused go to the weight to be attached to the evidence of Danielle Cusack, the strength or weakness of which is ultimately a matter for the jury. I will accordingly allow Danielle Cusack to be called and to give evidence in accordance with her proposed evidence, subject to adjudication on such further issues as may arise in relation to disclosure and the order in which the relevant witnesses are to be called. In so ruling I note the undertaking of the prosecution not to lead any evidence to suggest that the credibility of Danielle Cusack was enhanced by the fact that she gave her statement by ECI and not by standard interview."

72. It was argued on this appeal that the trial judge was wrong to admit the evidence of Danielle Cusack, on the basis that her statement had been elicited by a technique based

on an untested scientific theory. While Prof Milne had not given evidence before the jury, counsel for the appellants argue that her evidence on the *voir dire* had provided the basis for the wrongful admission of contradictory evidence before the jury. It is contended that she had been provided with very limited information, including not having been informed that there had been a 7½ month delay in taking the account from Danielle Cusack, that there was a prior account given by her, as to what information was in the media, and as to what other eye-witnesses had seen. In addition, she was not informed of the findings of the pathologist Dr Curtis. It is suggested that the effect of this was that Professor Milne's evidence was proffered in a vacuum and should have been treated with caution by the trial judge.

73. We are also asked to note that in the report which formed the basis of her evidence in chief on the *voir dire*, Prof Milne had alluded to legal cases from a number of other jurisdictions in which witness evidence, based on interviews conducted using ECI, had been admitted. While being cross-examined on behalf of Ryan Bradley, Prof Milne had been asked about a case from the England and Wales jurisdiction, identified by her in her said report as "*R. v Hill*", which she had offered as an example. Up to that point, counsel had been unable to trace a report of the case in question. Counsel for the present appellants have since established that the case being alluded to was in fact the case of *R. v Samuel Clayton-Hill* (unreported Court of Criminal Appeal (Criminal Division), 1st December 1995), the neutral citation for which is, we are told, [1995] EWCA Crim J 1201-18; although we have not been able to independently confirm that this neutral citation is correct. At any rate, a copy of the unreported judgment has been included in the joint Book of Authorities furnished to us, and it has been submitted to us in this appeal that in that case the English Court of Appeal (Criminal Division) had in fact deferred ruling on an issue before them concerning the reliability of evidence based on ECI, and the case is not in fact authority for the proposition that evidence based on ECI has been accepted as being reliable in England and Wales.
74. We have read the approved unreported judgment in the *Clayton-Hill* case and find it to be of no meaningful assistance. It concerned a murder committed in the course of a wider incident of violent disorder. Arising out of that incident, numerous people were charged with various offences including violent disorder, assault causing actual bodily harm, causing grievous bodily harm with intent and, in the appellant's case, murder. The particular incident involved a retaliation attack in response to an earlier attack. It was said that a man named Smith had pursued the deceased with a baseball bat, striking him with it. Smith was then alleged to have handed the bat to the appellant Hill (or Clayton Hill) who was said to have struck a second violent blow to the back of the deceased's head. Smith was charged with and convicted of causing grievous bodily harm with intent to the deceased. The appellant was charged with and convicted of the appellant's murder. He was convicted before Winchester Crown Court on the 8th of December 1988. He subsequently appealed to the Court of Appeal (Criminal Division) claiming, *inter alia*, that there was fresh evidence to the effect that Smith had subsequently admitted killing the deceased rather than him, callously claiming to have "*finished him off*". The evidence

concerning Smith's alleged admission was admitted as fresh evidence but this evidence was rejected and the conviction was upheld.

75. Subsequently, a second appeal was brought to the Court of Appeal (Criminal Division) upon a reference by the Home Secretary pursuant to s.17 of the Criminal Appeal Act 1968. The judgement to which we have been referred relates to this second appeal. In the context of the Home Secretary's reference, the appellant's legal team put forward a large number of additional grounds of appeal; however, none of them specifically refers to evidence obtained by ECI. At page 14 of the unreported judgment (the judgment of Lord Justice Otton on behalf of the Court) a description is given of various directions made on the 14th of November 1995 in advance of the appeal hearing. These directions included the court's decision to receive the evidence of a list of named witnesses. The judgment then states:

"We declined to hear Dr Hunt. We postponed any ruling in respect of Dr Shepherd and Professor Bull's evidence."

76. No indication is given as to who Dr Hunt, Dr Shepherd and Professor Bull were, what their expertise was, what evidence it had been proposed they should give, or how it had been contended that they had potentially been relevant. However, it does appear from the evidence of Professor Milne in the present case that the Dr Shepherd and Professor Bull in question may have had expertise in ECI. Professor Milne mentioned a Professor Ray Bull several times in her evidence as having recognised expertise in ECI, and she repeatedly described him as being her mentor, stating inter alia that he had supervised her PhD. Further, when Professor Milne was being asked about the reference in her report to "R v Hill", the following exchange ensued:

"Q. Okay. Again, there's no specific citation for it. There are many cases of Hill but, again, we were not able to source it. Do ?

A. I can also get that, because

Q. You can get that, great. Yes, okay?

A. No, Eric Shepherd, who is the expert witness

Q. Yes?

A. and Ray Bull, my mentor in that case

Q. Yes. So ?

A. they were involved in it, so I can ask them. No problem."

77. At any rate, the remainder of the judgment of the Court of Criminal Appeal (Criminal Division) deals with various grounds of appeal put forward on behalf of the appellant (not all were proceeded with). It is unnecessary to review it, save to state that none of the

grounds of appeal related to evidence obtained or elicited through ECI and the Court of Appeal offers no views whatever in that judgment concerning how such evidence might be approached.

78. We have also been referred by the appellants to the Canadian case of *R. v Trochym* [2007] 1 SCR 239 in which the Supreme Court of Canada took the position that the trial court's gatekeeper function in relation to expert evidence applied equally to facts elicited by a scientific procedure as it did to the evidence of an expert. That case was concerned with post hypnosis testimony given at the trial by a witness whose memory was said to have been recovered through her hypnosis, at the behest of police interviewers. No expert evidence had been adduced at the trial concerning the reliability of post hypnosis evidence. Such evidence was presumptively inadmissible in Canada for evidentiary purposes. The Court held that when the factors for evaluating the reliability of novel scientific evidence were applied, it became evident that the technique of hypnosis and its impact on human memory was not understood well enough for post-hypnosis testimony to be sufficiently reliable in a court of law. Although hypnosis has been the subject of numerous studies, these studies were either inconclusive or drew attention to the fact that hypnosis can, in certain circumstances, result in the distortion of memory. The potential rate of error in the additional information obtained through hypnosis when it is used for forensic purposes was also troubling. They indicated that at that time (i.e., in 2007), there was no way of knowing whether such information would be accurate or inaccurate and contended that such uncertainty was unacceptable in a court of law.
79. While the present case is not concerned with hypnosis, the appellants seek to impugn ECI techniques by analogy, and place reliance on an observation of Deschamps J. in the *Trochym* case to the effect that "*a technique used to enhance memory must be approached with great caution.*"
80. The appellants also place reliance in this appeal on certain observations of the late Hardiman J, in the Irish Supreme Court case of *N.C. v The Director of Public Prosecutions* [2001] IESC 54. This was a case involving allegations of sexual abuse of a child, K, whose statement of complaint was based on memories recovered in the course of hypnosis carried out in 1970. A prosecution of the applicant had been initiated many years later and an application was brought by him in the High Court for an Order of Prohibition restraining the continuation of the prosecution on the grounds of delay. He alleged specific prejudice on various grounds, including that the hypnotist in question could no longer be traced or located. He was unsuccessful in the High Court and appealed to the Supreme Court which allowed his appeal. Giving judgment for the Supreme Court, Hardiman J. had observed:

"28. It seems to me that the hypnotist or other person conducting therapy in the course of which memory is recovered is an extremely important witness. This is particularly so in the present case where the memory is admitted to have been, in very important particulars, false or distorted. It is clear from the sources cited in my judgment in JL that a person charged with very old offences on the basis of

alleged recovered memory is both well advised, and entitled, to seek to inform himself about every aspect of the therapy. If this cannot be done then there is not effective test or control of the mechanism of alleged recovered memory. This is a situation fraught with risk of unfairness."

81. We have given careful consideration to all of the submissions made on behalf of the appellants with respect to the evidence of Danielle Cusack, and we are satisfied that the trial judge was correct to admit her evidence. The fact that there may have been inconsistencies between her testimony and that of other witnesses was quintessentially an issue for the jury to resolve. The cases of *Trochym* and *N.C.*, respectively, to which we have been referred, are both concerned with hypnosis. There is no suggestion that Danielle Cusack was subjected to hypnosis. The process of ECI was explained in the evidence of Detective Sergeant Woods and Professor Milne respectively. No evidence was adduced to the effect that ECI lacked a scientific basis or that the science behind it was controversial. As the trial judge observed, "[s]ince hearing the expert evidence of Professor Milne on this issue, however, counsel for the accused have in fact made no criticism of ECI per se." The trial judge properly considered how to approach the circumstances in which Ms Cusack's interview on 30 August 2017 had been conducted using enhanced cognitive interview techniques, and concluded:

"It is unnecessary for me to decide whether ECI now represents best interviewing practice in this jurisdiction. It is sufficient for present purposes to decide, as I do, that there is nothing about ECI that would make its adoption and use by the gardaí in this jurisdiction incompatible with the constitutional guarantee of basic fairness of procedures or the right to a fair trial. The benefits of ECI are manifest and are set out in some detail in the evidence of Professor Milne. In summary, and unlike the standard interview, ECI is witness led in order to avoid leading and misleading questions. But, above all else, it is completely transparent."

82. These were conclusions that were legitimately open to him having regard to the evidence that he had heard. While Professor Milne may have been incorrect in her understanding that there had been some endorsement of the validity of ECI as an interviewing technique by an English court in the case that she referred to as "*R v Hill*" (more correctly *R. v Samuel Clayton-Hill*), the trial judge in the present case does not appear to have been particularly influenced by that aspect of her evidence. His decision was based on his understanding that "*ECI is witness led in order to avoid leading and misleading questions. But, above all else, it is completely transparent.*"
83. It is clear that the trial judge gave careful consideration to each of the criticisms levelled by counsel for the appellant concerning the manner in which ECI was used in this case, including the delay of 7 ½ months between the event and the conducting of the interview, and was satisfied to reject them. His analysis of the evidence appears to us to have been sufficiently rigorous and his reasons for his conclusions are cogent.
84. In so far as there was non-disclosure, it is regrettable that the Reilly report was not disclosed sooner. However, the defence were in possession of it before Danielle Cusack

gave her evidence. In the circumstances, we do not consider that the fairness of the trial was compromised on account of the late disclosure. In so far as Danielle Cusack's own aide memoire was concerned, the situation here is analogous to that in the case of *The People (DPP) v M.W.* [2017] IECA 175 where this Court rejected a similar complaint on the basis that the DPP cannot be expected to disclose that of which she is simply unaware. Ms. Cusack had not informed anybody that she had made a personal aide memoir and we do not consider that there was culpable nondisclosure. In any case, the point can again be made that since the defence were in possession of the document in controversy by the time Danielle Cusack gave her evidence, the fairness of the appellant's trial was not ultimately compromised.

85. In conclusion on the admissibility issue, we re-iterate that we find no error of principle in how the trial judge conducted the voir dire. He considered all of the objections put before him, but was satisfied to reject them on the basis of the evidence that he had heard. There was a proper basis in evidence and in law for doing so and it seems to us that his rulings on the admissibility issue are unassailable.
86. In so far as it is complained that the trial judge failed to give a specific warning to the jury in relation to Danielle Cusack's evidence, we also reject the complaint. We have carefully considered the full charge to the jury by the trial judge, including his further remarks in response to requisitions raised, and consider that his instructions concerning same were appropriate. They were properly instructed as to the onus and burden of proof (we will be coming back to this as the charge concerning the burden of proof is the subject of a separate ground of appeal), as how to approach the weighing and sifting of evidence and concerning the need for care in assessing eyewitness testimony. We do not see that any more specific warning or instruction was required. In saying this, we consider it to be important that the jury was not made aware that Danielle Cusack had been interviewed using ECI techniques, lest they should consider that this would have the effect of rendering her evidence more credible. In that regard the trial judge very deliberately directed on day 12 that the prosecution should not seek to rely on the use of the ECI process to suggest that Danielle Cusack was more credible than the other witnesses and that her evidence should be preferred over theirs. In our view, this direction, which was complied with, was an entirely proper one made in the interests of ensuring fairness to the appellants. It is also of importance in our view to note that following the trial judge's charge to the jury he was later asked in a requisition on behalf of Jason Bradley to give a generic warning in relation to human frailty, and he did so. He recharged the jury that:

"... , you of course must assess the credibility of all of the witnesses that you have heard and in particular the eye witnesses to the event but in doing so you must bear in mind the frailty of human memory and the experience of the courts that witnesses who, although they endeavour to give accurate evidence, can nonetheless give inaccurate evidence because of the passage of time and the fact that memory is unreliable, even to persons who are doing their very best to retrieve memories of what happened."

87. It is clear to us from this, and the overall charge, that the trial judge was assiduous in endeavouring to ensure that the appellants received a fair trial, and we find no error of principle in his approach to instructing the jury.

88. We therefore dismiss grounds of appeal No's 3 and 5, respectively.

Ground No 4: re ruling on the admissibility of 3D Scanner evidence

89. This ground was not specifically addressed in oral submissions, and our understanding is that the appellants, to the extent that they may still be relying upon it, rest upon their written submissions, which essentially re-iterate arguments presented to the court below.

90. The prosecution sought to rely on 3D scans taken by Sergeant Paul Carney, on the January 18th 2017, at the locus, to establish lines of sight available from various locations from which witnesses were alleged to have seen relevant events occurring. The scanner used was a Trimble TX8 in conjunction with Trimble RealWorks software. Sergeant Carney conceded that he was unaware of any other criminal trial in which evidence based on these types of scans had been relied on.

91. The defence legal teams objected to the proposed evidence, contending that its accuracy and reliability had not been demonstrated and that in consequence the prejudicial value of the proposed evidence would outweigh its probative value. Moreover, they further contended that the proposed evidence would be partially hearsay on the basis that in their contention the process was not fully automated and involved human intervention, in respect of which the court would not have full evidence.

92. A *voir dire* ensued on the admissibility of the evidence, in the course of which the prosecution called a Mr Fran Mullally, a technical support analyst with a company called Korec, which had supplied the instrument in question. He explained how it worked, that it fires a pulse of laser light which hits an object. The light is then reflected back to the instrument which can calculate the angle and distance involved. The process is repeated millions of times per second, capturing millions of points allowing a 3D model to be recreated. It was accurate to the order of 2 millimetres in 120 meters. Calibration was done at the Trimble factory once a year, and the instrument used in this instance had been recently calibrated. He went on to explain aspects of the practical operation of the instrument, including the use of registration spheres to be placed by the operator. He further alluded to circumstances in which potential errors might arise, and how these are detected and avoided. He explained that once a scan was initiated by the operator, processing by the instrument was fully automatic and that there was nothing that an operator could do to interfere with or manipulate the data.

93. The actual scans were performed by Sergeant Paul Carney who also testified on the *voir dire*. He explained what he did on the day, including how he placed the registration spheres, and was extensively cross-examined about that. He also stated that photographs had also been taken "to show the scene as best as possible."

94. The court heard evidence that it was possible to take forward facing photographs, *i.e.*, facing the object of interest from the position of the scanner, but also reverse photographs facing the scanner from the position of the object of interest. However, only forward facing photographs had been taken.
95. In legal argument the prosecution offered *The People (Director of Public Prosecutions) v McD* [2016] 3 I.R. 123, as being the leading authority on the legal status of measurement performed by automated instrumentation. The prosecution contended that the 3D Scans at issue were relevant, probative and did not involve hearsay as they were properly to be regarded as real evidence.
96. The trial judge ruled as follows on the admissibility issue:

"JUDGE: At issue is whether 3D scans taken by Sergeant Paul Carney on the 18th of January 2017 at Esker Glebe should be admitted in evidence. The prosecution seek to rely on the relevant scans solely to establish the lines of sight available from various locations at which witnesses are alleged to have seen relevant events occurring at Esker Glebe at 4 am on the 18th of January 2017. The 3D scanner used was a so-called Trimble TX8 whose functioning has been comprehensively described by witnesses and set out in the transcript. The gardaí purchased the machine as new in 2016 and it has since been used on numerous occasions without fault or complaint. The evidence establishes that errors can occur if the registration spheres are located too far from the scanner or if they are obscured, otherwise the accuracy of the scanner's findings are proved and demonstrated by the coherence of the scan that is produced.

On these facts I am therefore satisfied that the scanner and its adjunctive computer were working at the time the relevant scans were taken. The unchallenged evidence of Sergeant Carney was that he did not and could not interfere with the integrity of the relevant data, save to deselect a non-registration sphere which he did in respect of one such sphere. There is no suggestion that this could or did have any effect on the reliability of the scan insofar as it shows a relevant line of sight. It follows that the scans are clearly not open to objection on the grounds that they constitute hearsay by reason of the fact that the scans are not the product of human intervention.

Whereas there are photographs to verify the scans as viewed from the scanner, there are as yet no photographs taken from the relevant locations of interest to the prosecution to verify the accuracy of the scans which it is proposed to put before the jury. The scans moreover make no allowance for lighting conditions and have the potential at least to mislead the jury into believing that the relevant witnesses could see everything that is within the plain of vision as shown in the relevant scan. To reflect these concerns I will admit the scans into evidence, provided there is a verifying photograph available, whether from the prosecution or defence, taken from the relevant location against which the accuracy of the relevant scan can be compared. In order to avoid any possibility of prejudice, I will only allow these

scans to be used as rebuttal evidence if it is suggested by the defence to a particular witness that he or she did not have a line of sight to the relevant location.

PROSECUTING COUNSEL: So just to clarify that last part of the ruling, effectively I'm not allowed to lead it at this point until such time, if at all, as issue is taken with what a witness says about their line of sight and then at that stage I can seek to adduce it as rebuttal evidence.

JUDGE: Yes. In other words what I am saying is that it's not as yet a relevant issue.

PROSECUTING COUNSEL: Very good.

JUDGE: If it becomes a relevant issue as to whether a particular local resident who did or did not have a line of sight, then it becomes rebuttal evidence in the case.

PROSECUTING COUNSEL: May it please the Court. So, at this stage it's effectively out until such time as it arises.

JUDGE: It's in if and when it becomes an issue in the case."

97. The appellants maintain that the trial judge was in error in ruling that the 3D scans might be conditionally admitted. However, in the legal submissions filed on behalf of the respondent in this appeal, the point is made, without prejudice to the respondent's contention that the trial judge's ruling was in any event correct, that ultimately no 3D scanner evidence was put before the jury. In those circumstances, the respondent says this ground of appeal is misconceived, and whether the ruling was legally correct or incorrect is in fact moot.
98. If, as the respondent maintains, and as seems to be the case, no evidence based on 3D scans was put before the jury then the respondent is correct in principle, and the issue is moot. However, we are satisfied that even if it were not moot the trial judge's ruling was in any event unassailable. The findings made by him were supported by the evidence, the leading authority, i.e., the *McD* case was opened to him, and although he did not allude to it directly in his ruling we are satisfied that he correctly applied it.
99. In the circumstances we are not disposed to uphold Ground of Appeal No 4.

Ground No 7: re the Judge's Charge in relation to the burden of proof

100. The complaint here involves a very net point. In charging the jury on the standard of proof the trial judge, as he is required to do, sought to contrast the standard applying in civil litigation with that applying in a criminal trial, to emphasise that the latter was a significantly higher standard. His instructions to the jury in that regard included the following passage to which objection was taken:

"Proof beyond all reasonable doubt could be contrasted with the lesser standard of proof that applies in civil cases where it is sufficient to prove one's case on the

balance of probabilities. It may well be that some or indeed all of you have had experience of suing in the civil courts whether arising in respect of a personal injury or otherwise but in such a case where, for example, you slip and fall or you're run over by a car or whatever, it is sufficient to prove your case on the balance of probabilities. So, if the in such a case the judge hears the case and puts the evidence of both sides on the scales and if the scales have tipped even by 1 % one way or the other that determines its outcome. That is not the standard of proof that applies in a criminal trial. The standard of proof that applies in a criminal trial is proof beyond all reasonable doubt which is a much higher standard of proof."

101. It is suggested that the reference to being "run over by a car" was a holy inapposite example to use of the type of issue that might arise in civil litigation, in circumstances where part of the factual matrix of this case was that the deceased was driven over by a car. It is suggested that because this example was used the jury might have thought that it was sufficient to apply the civil standard in judging that aspect of the case against the appellants.
102. Defence counsel raised a requisition asking the trial judge to readdress the jury on the standard of proof, but the trial judge opted not to do so on the grounds that it might serve to confuse the jury. The appellants complain that the trial judge erred in instructing the jury as he did, and in failing to recharge the jury upon being requested to do so.
103. We have considered the complaint being made, and have had regard to the context in which the instruction which it is sought to impugn was given. We think that there is no reality to the claimed apprehension that the jury could have applied the civil standard to that aspect of the case which concerned the deceased being run over. It is clear to us, and we are satisfied that it would have been equally clear to the jury, that in giving the example chosen, which we accept was not the most felicitous in the circumstances of the case, the trial judge was referring to a civil claim for damages arising out of a pedestrian being accidentally knocked down by a car and injured. The scenario he was conjuring up for the jury was a million miles away from that being presented by the prosecution in the case, namely that the deceased was deliberately driven at by Dean Bradley in the black BMW which struck him and then proceeded to drive over him several times, including by reversing, and in circumstances where in at least one instance he was said to have been physically held up by others as the car drove towards him, only to be released at the last minute so as to facilitate him falling in the path of the car and being driven over. We think it is fanciful to suggest that the jury could have misinterpreted the trial judge's example in the manner suggested, and we have no hesitation in rejecting this ground of appeal.

Ground No 8: re the Judge's Charge concerning Nursing Home CCTV footage.

104. The issue here relates to what the appellants contend was an ambush by prosecuting counsel, based on matters which he claimed had been established in the course of his re-examination of a witness, and which he later relied upon in seeking to resist an application for a direction on behalf of Ryan Bradley. It requires to be stated that prosecuting counsel vehemently disputes that he engaged in any ambush. Whether he is

right or wrong about that, defence counsel perceived an ambush, and we will sketch an outline of what occurred momentarily. While on one view of it, the issue only concerned Ryan Bradley directly, counsel for the appellants perceive, and they argue in their written submissions in this appeal, that it impacted on the fairness of their trial.

105. We alluded earlier in this judgment to the fact that routes used, and the times taken, by the vehicles involved in the incident, namely the Mazda driven by the deceased, the silver Jeep driven by Paul Bradley and the black BMW driven by Dean Bradley, on their respective journeys from the Bradley family home to the scene of the killing at Esker Glebe, and back again, were established in evidence using CCTV recordings harvested by the gardaí from cameras at various locations. One such recording emanated from a CCTV camera at Griffeen Valley Nursing Home, which looked in the direction of Esker Lane. Esker Glebe is further along and off Esker Lane.
106. At any rate, a piece of CCTV footage from the Griffeen Valley Nursing Home was played to the jury on day 3 of the trial, during the evidence of Garda Timmons, and no issue was taken with it on behalf of any of the defendants.
107. Much later in the trial, on day 17, another garda witness, i.e., Detective Garda Jennings, was tendered by the prosecution so that he might play certain segments of CCTV footage from various locations that the defence legal teams had requested should be shown. These included recordings harvested from the CCTV system at Griffeen Valley Nursing Home.
108. Detective Garda Jennings's evidence was introduced as follows by prosecuting counsel:

"At this stage, Judge, I understand that at the request of a couple of my colleagues, Garda Timmons is going to be replaying certain video footage, not replaying actually he's going to be playing it in longer length if I can put it this way. So if I can call actually it's Detective Garda [Jennings] and we're just going to play -

(Bracketed text inserted by the Court)

109. Detective Garda Jennings then proceeded to play a number of recordings from a variety of different locations at the request of counsel for Paul Bradley, who after each clip was played, asked him some questions in cross-examination. These included clips from the CCTV systems at Rowlagh Community Centre, Divine Mercy School, Griffeen Valley Nursing Home/ Esker Manor Apartments, and the Bradleys home.
110. Three CCTV clips were shown by him which were said to come from the CCTV system at Griffeen Valley Nursing Home.
111. Counsel for Paul Bradley cross-examined the witness with reference to these three clips. The witness was initially asked about the two cars that could be seen in one of the clips and which had passed an entrance with a pillar and railings at 03.58.40. The cross-examination in that respect went as follows:

Q. *[COUNSEL FOR PAUL BRADLEY]: I think in the distance we can see two vehicles coming from left to right at the top left hand corner of the screen; is that correct?*

A. *That's correct.*

Q. *And can I just before we ask you anything further about that, the time on this one is indicated to be -- it's the American calendar system, the month is first, 01/18/2018?*

A. *That's correct.*

Q. *Wednesday and the time that's stated is 03.58.38?*

A. *That's correct.*

Q. *And can you assist us in terms of the?*

A. *It was stated that when the CCTV harvested that the CCTV time was correct to real time.*

Q. *That it is correct to real time, very good. So that's at 3.58 sorry, if you can just play it on there? Is it possible to slow that down at all or?*

A. *No, there's no facility on the player to.*

Q. *All right. But if you could just play it again from the beginning I think we can see they appear to be coming at a fair clip, would that be fair to say?*

A. *That's correct. The footage is shown.*

Q. *Real time?*

A. *Real time and real speed.*

Q. *Yes?*

A. *Correct speed on the player.*

Q. *So on the top left hand corner and then the two vehicles appear to be quite close together, that's at 3.58.40, they pass that entrance there?*

112. This is followed by a discussion about the accuracy of the CCTV's clock, and the witness agreed with counsel that it was fast by between 30 and 36 seconds. Then returning to this first clip the cross-examination continues:

"A. *3.59.41 would be on the screen there at moment.*

Q. *3.59.41?*

A. *Yes.*

Q. *Very good, okay. And I think we just saw a black saloon type car passing; is that right, or a dark coloured saloon type car?*

A. *That's correct."*

113. Moments later, with reference then to the second, and subsequently the third, of the clips shown, there was this further cross-examination:

"Q. *There's dark coloured car passing at exactly 4.01; is that right?*

A. *That's correct.*

Q. *You can continue on, followed shortly afterwards by a jeep, that's at 4.01.02, a two second interval, I'm sorry, is it possible to see is the light are both lights working on that jeep?*

A. *It appears that there's only one working.*

Q. *All right. From that view there at 4.01.01 it appears only the ?*

A. *The driver, the driver side isn't working and the passenger side is working.*

Q. *The passenger side is working, all right, thank you. Continue, please?*

A. *This is just another camera on the same location.*

Q. *At the same - same location, so it has the same time, 4.01.01, the which car is visible in the screen there?*

A. *The large dark saloon car.*

Q. *Very well?*

A. *Followed by the jeep.*

Q. *The jeep, at 4.01.03, that's two cameras from there. Now, where is 46 Elmbrook with reference to 34 Elmbrook, is it the same road?*

A. *It's the same road, and the houses go in double, so it's only 12 six houses up.*

Q. *Well six houses up?*

A. *Six houses up.*

Q. *It's even houses on one side?*

A. *Even houses, that's correct.*

Q. *So six houses later, yes?*

A. *Six houses later.*

Q. *Okay. So just if you stop it there for one moment, 46 Elmbrook, the time must be wrong if it's 4.05.36?*

A. *I will have to check, yes, sorry about that, I never I'll have to check, yes.*

Q. *Well, we can we can check it?*

A. *Garda Timmons might be able to assist?*

Q. *We can call someone, it's four minutes fast, exactly four minutes; is that right, or perhaps it's a little bit more if the other one is it looks to be about four and a half minutes fast. In any event we can perhaps call evidence formally to deal with that. The same two vehicles are passing this location which is six doors away from the previous location?*

A. *Travelling in the same direction.*

Q. *And that direction is away from The Glebe, Esker?*

A. *The scene.*

Q. *The scene?*

A. *That's correct.*

Q. *All right. And consistent with both having come up Esker Lane; is that right?*

A. *That's correct. Heading towards Willsbrook Road."*

114. While other defence counsel then also cross-examined Detective Garda Jennings, nothing turns on their cross-examinations. However, when all cross-examinations of the witness had finished, prosecuting counsel then sought to re-examine him with specific reference to some of the footage he had shown from the Griffeen Valley Nursing Home. The transcript record of the re-examination is as follows:

"Q. *Thanks, the only clip of footage I want you to replay at this stage is from the Griffeen Valley Nursing Home, please?*

CCTV played in court

Q. *Can you just stop it there, please? I think we established that what we're about to see is at 03.58.38 is when it commences and that's correct to real time?*

A. *That's correct.*

Q. *And I think [Counsel for Paul Bradley] asked you about whether the car which we are about to see was coming at a fair clip, I think it was the question that was put to you. And we can see a car at 3.58.40 which is a dark car?*

A. *That's correct.*

Q. *But I just want you to slowly play the footage in question?*

CCTV played in court

Q. *Now, yes, go ahead, play it? Right, if we can go back to the beginning there, please? Now, can you do it frame by frame? Just stop it there, please? What can we see on the right hand side of the screen?*

A. *We can see a dark large saloon car coming into into the scene.*

Q. *All right. And in terms of its lights, can we see any lights?*

A. *There's lights on at the front and lights on at the rear.*

Q. *All right. If you can then move it forward, please? Now, what time is that at?*

A. *On the*

Q. *Just there?*

A. *it's 3.59.41.*

Q. *All right. And can we still see a light?*

A. *Yes. We can see the reflection of a light.*

Q. *Okay. And is it moving or stationary at that point in time?*

A. *It's stationary at the moment.*

Q. *All right. And will you just play it on, please? Now, at that stage where can that light be seen, is it going forward or back?*

A. *Just there it went back.*

Q. *Apart from that black car, have we seen any other car in the footage?*

A. *No.*

Q. *So if you can continue to play it, please? If you can go back to the beginning of it and just play it again?*

CCTV played in court"

115. There was no objection to the manner or substance of the re-examination at the time, or to the manner in which the CCTV footage was used during re-examination. Indeed, it was not the subject of any controversy at the time.
116. However, on day 24 a controversy concerning the re-examination, and how the replayed footage had been used in the course of it, developed in the following circumstances. At the close of the prosecution's case counsel for Ryan Bradley applied for a direction relying on the first limb of Lord Lane's celebrated statements of principle in *R. v Galbraith*, i.e., insufficiency of evidence. It was accepted that Ryan Bradley had been a passenger in the BMW, but it was suggested *inter alia* that there was no evidence that he had ever left the vehicle and in those circumstances such evidence as had been adduced fell short of establishing a sufficient degree of participation on his part to allow the court to conclude that he was acting in concert with those who had directly assaulted Mr Reilly, leading to his death. In responding to this application, prosecuting counsel pointed to his re-examination of Detective Garda Jennings concerning what was to be seen in the footage he had asked to have replayed during his said re-examination, and suggested that it had been demonstrated that the dark car about which he had questioned the witness had come to a halt, thereby providing an opportunity for Ryan Bradley to get out of the vehicle. This was the first time that such a suggestion had been advanced, leading to vehement protests from defence counsel, particularly from counsel for Ryan Bradley, on the basis that if it had been known that this was a part of the prosecution's case it would very likely have influenced their cross-examination of relevant prosecution witnesses.
117. Amongst other objections advanced was an objection that, although nobody had appreciated the significance of it at the time, the re-examination had indeed proceeded on a mistaken premise. Prosecuting counsel's gateway to re-examining Detective Garda Jennings had been:
- "Q. *And I think [Counsel for Paul Bradley] asked you about whether the car which we are about to see was coming at a fair clip, I think it was the question that was put to you. And we can see a car at 3.58.40 which is a dark car?*
- A. *That's correct."*
118. However, it was not one vehicle, but rather two vehicles, that had been characterised by counsel for Paul Bradley as travelling "at a fair clip", and it is now accepted that these were the vehicles of Paul Bradley and the deceased, respectively, and that neither of them was the BMW driven by Dean Bradley. In the circumstances, it was contended that the re-examination had proceeded on a mistaken premise and was unfair to both Dean Bradley and Ryan Bradley.
119. Be that as it may, what prosecuting counsel sought to do in responding to the direction application was to rely on the movements of a dark vehicle that was visible on one of the clips but to which little or no attention had been paid up to that point. He was suggesting in effect that this was the BMW and further that it could be seen to stop (thereby providing an opportunity for Ryan Bradley to get out of the vehicle). Prosecuting counsel

had sought to demonstrate this by having the witness replay the footage in controversy frame by frame.

120. Counsel for Dean Bradley responded that prosecuting counsel had exaggerated the significance of what was to be seen on the recording (it was not accepted that the vehicle to which prosecuting counsel was referring was seen to stop) and characterised it "as a piece of non-evidence in my submission." Counsel for Ryan Bradley re-iterated that it was unfair for the prosecution to advance the suggestion now being made, when relevant witnesses who might have been cross-examined about it, had concluded their evidence.

121. In initially addressing the objections raised the trial judge said:

"JUDGE: Well, the fact of the matter is the evidence was led at the request of [Counsel for Paul Bradley]."

PROSECUTING COUNSEL: Yes.

JUDGE: It was real evidence therefore whatever was there to be seen was seen.

[PROSECUTING COUNSEL]: Yes.

JUDGE: And if anyone thought it was being misdescribed by [Prosecuting Counsel] or indeed by [Counsel for Paul Bradley] or by anybody else, they had an opportunity there and then to take issue with whatever description was applied to what was to be seen.

122. The trial judge then said he would consider the matter overnight, and rule on the application on the following day. When the Court sat on day 25 the trial judge ruled that he was refusing the application for a direction. In providing detailed reasons for doing so, he made clear that he had not relied on the evidence adduced during the re-examination of Detective Garda Jennings in reaching his decision. At the end of his ruling, counsel for Ryan Bradley addressed the judge and said:

"COUNSEL FOR RYAN BRADLEY : I now have an application to discharge for Mr Ryan Bradley to be discharged in relation to this trial in light of the manner in which the prosecution proceeded in relation to issues dealing with CCTV footage. For the purposes of the application, Judge, I will ask you to consider viewing the montage which has already been shown and also original footage, I think there's about four seconds missing from the montage that was shown to the jury.

JUDGE: I take it your application is predicated on the fact that [PROSECUTING COUNSEL] will go to the jury on the basis that he is relying on the BMW stopping?

COUNSEL FOR RYAN BRADLEY: Whether or not he says it in his closing speech or otherwise, Judge, it is now part of the prosecution evidence in light of the re examination from D/Garda Jennings so unless

JUDGE: Mr [PROSECUTING COUNSEL], do you propose relying on the fact that the

PROSECUTING COUNSEL: I would be inviting the jury to look at all of the CCTV footage in general terms because it is part of the case. I certainly, in the light of the issue which has arisen, will be very careful, if I can put it that way, in relation to the point which arose during the course of discussions yesterday but I think I'm entitled to ask the jury to look at all of the CCTV footage.

JUDGE: Very good. Well, Ms [COUNSEL FOR RYAN BRADLEY], in fairness to you I must at least hear your application and

COUNSEL FOR RYAN BRADLEY: Yes. And my point is the damage is done, Judge."

123. The grounds put forward by counsel for Ryan Bradley can be briefly described. She contended that during the re-examination, Detective Garda Jennings had been asked to comment on the movements of the dark coloured vehicle in circumstances where the clip in question was being re-played frame by frame for the jury. However, by playing it in this way 4 seconds of the recording was lost, and an illusory impression was created that the vehicle had stopped. However, when Mr Ryan Bradley's defence team had re-watched the footage during the overnight adjournment, the illusion created by playing the clip in frame by frame mode was discovered. If the clip was played in free-flowing mode it was clear that the vehicle had not stopped. On the basis that prosecuting counsel had evinced an intention to ask the jury to consider all of the footage they had seen, including this footage which she maintained had been presented in an unfair way, counsel maintained that she had no choice but to seek to request a discharge of the jury in so far as her client was concerned. The trial judge was prepared to accept that the 4 seconds pointed to by counsel for Ryan Bradley were missing when the clip was played frame by frame, and that the video montage shown to the jury was therefore incomplete and misleading, in as much as when it was played in a free flowing way it showed continuous movement by the vehicle, whereas when it was shown frame by frame it suggested that it had stopped. However, he indicated in the course of the following exchanges that he felt the matter could be dealt with by an instruction to the jury (and that a discharge was not therefore required):

"COUNSEL FOR RYAN BRADLEY: It shows movement, Judge. It does show

JUDGE: Yes. No, I am accepting that but the jury can be told that.

COUNSEL FOR RYAN BRADLEY: Yes.

JUDGE: That it wasn't stationary at that time, that a mistake has been made.

COUNSEL FOR RYAN BRADLEY: Yes.

JUDGE: The position, Ms [Counsel for Ryan Bradley], is that this particular footage was shown not as part of the prosecution case but in circumstances where Mr

[Counsel for Paul Bradley] asked the prosecution to tender Garda Jennings and to reshoot footage that was of interest to him.

COUNSEL FOR RYAN BRADLEY: Yes.

JUDGE: And then in re examination this, as it were, tumbled out of nowhere.

COUNSEL FOR RYAN BRADLEY: Yes.

JUDGE: The footage does not show anyone getting out of the car.

COUNSEL FOR RYAN BRADLEY: No.

JUDGE: So, therefore its evidential relevance is extremely limited, even if the BMW did actually stop but it seems to me that if the jury are told that in fact the montage is not complete and in fact the vehicle didn't stop and that they should completely disregard it, that would seem to me to deal with the matter."

124. Counsel for the prosecution did not oppose dealing with the problem in the way proposed. He stated he had no difficulty and that he had not been aware (that by playing the clip frame by frame, a misleading impression was created). The trial judge then stated:

"JUDGE: So, I propose what I am going to do, Ms [Counsel for Ryan Bradley], is I'm going to charge the jury on the basis that there was no evidence that the car stopped or that anyone got out of it."

He subsequently added:

"JUDGE: But what I am going to do, Ms [Counsel for Ryan Bradley], and I think it's only fair that I should do it, is to neutralize that evidence and if I fail to do so in a way that is to your satisfaction you may bring the matter up with me after I have charged the jury.

COUNSEL FOR RYAN BRADLEY: Yes, Judge.

JUDGE: But I intend to charge the jury on the basis that there is no evidence.

COUNSEL FOR RYAN BRADLEY: Yes.

JUDGE: And just for the avoidance of any doubt I also propose charging the jury on the basis that if the jury have a reasonable doubt as to whether there were three attackers present at the material time, having regard to all the other evidence in the case, they must acquit your client of murder.

COUNSEL FOR RYAN BRADLEY: Yes, Judge. Yes, Judge.

JUDGE: So that would be the basis on which the case will be put to the jury by me.

COUNSEL FOR RYAN BRADLEY: And would the Court just give me the comfort of making it clear to the jury that insofar as any suggestion has been made of a car being stationary at 3.59.41 that that is something that they should take out of their minds absolutely, that there has been an error in relation to the way in which the footage was played.

JUDGE: Yes. I will deal with that”.

125. Subsequently, however, on day 27 the trial Judge revisited the earlier ruling he had made (refusing the application for a direction in respect of Ryan Bradley) and ultimately granted the direction. This being so, it was no longer necessary to address the concerns which counsel on behalf of Ryan Bradley had previously raised.
126. However, closing speeches had taken place on Day 26 and counsel for Dean Bradley had closed his case inter alia on the basis that: *“There's no reliable CCTV footage to support the suggestion made by the prosecution that the CCTV shows it stopping and reversing and going forwards.”*
127. When later on day 27 the trial judge came to charge the jury, who were still required to determine whether Paul Bradley, Dean Bradley and Jason Bradley were guilty as charged, the trial judge did not state that there was a continuous movement, or that the car did not stop or reverse, or highlight that there had been an error with the CCTV. Rather the trial judge instructed them that, *“You must also have regard to the following undisputed facts. First that the BMW was last observed on CCTV approaching The Glebe at speed.”*
128. That aspect of the judge’s charge was the subject of a requisition by counsel for Dean Bradley:

“COUNSEL: Judge, there is just two points. You will recall and I think it was Thursday last week when we had the incident over the CCTV footage from the furthest camera, I think it was camera 6, at the nursing home and what was being said and what the outcome of that was, I don't think there's any necessity to rehearse that. My note was that you would say you said at the time that the or someone said, the footage didn't show anyone getting out of the car, that there was four seconds missing and that my note of it is that you had said that you'd tell the jury to disregard that part of the CCTV footage.

JUDGE: Well, I think what I have told the jury is that on the evidence the BMW approached The Glebe at speed.

COUNSEL: Yes.

JUDGE: Can it get any better than that?

COUNSEL: That the

JUDGE: I mean if you want me to go back and invite them to parse and analyse the possibility that it did actually do a U turn at the nursing home I will but it's only going to invite them to suggest

COUNSEL: No, no. I am not asking for that at all and the benefit you gave the direction and I was nodding at the time."

129. Counsel for the appellants complain that they were prejudiced in as much as the trial judge failed or refused to neutralise the unfairness that was brought about by the introduction of CCTV on day 17 of the trial, notwithstanding direct statements from him on a number of occasions that he would do so. Particularly, there was no attempt to convey to the jury that they were to take it that the vehicle approached without stopping or reversing, in effect that the prejudicial CCTV should be ignored in their deliberations.
130. We are not disposed to uphold this ground of appeal. The primary potential unfairness consequent upon the illusion created by the playing of the video clip in a frame by frame mode during the re-examination of Detective Garda Jennings on day 17 was in respect of Ryan Bradley. However, Ryan Bradley was acquitted by direction, following which there could be no continuing unfairness to him. While the prosecution's case against the remaining defendants relied heavily on the evidence of Danielle Cusack who had said that she had seen two to three men attacking Neil Reilly, including holding him up to be driven over, and it was accepted by the prosecution that Paul Bradley could not have been one of that group (although it was accepted he was at the scene and had separately administered kicks to the victim), the fact remained that Dean Bradley was the admitted driver of the BMW which the witness said had driven over the victim, not just once but a number of times, including reversing over him, and Jason Bradley had also admitted being involved in an altercation with the deceased at the scene, in the course of which he had administered chopping blows to the victim. Prosecuting counsel did not suggest in his closing that the BMW had stopped on route to the Glebe. Neither did the trial judge who accurately described the evidence in stating that "*the BMW was last observed on CCTV approaching The Glebe at speed.*" Defence counsel, as he was entitled to do, had gone further and had told the jury that "*There's no reliable CCTV footage to support the suggestion made by the prosecution that the CCTV shows it stopping and reversing and going forwards.*" Accordingly, whatever about what had occurred on day 17, nobody was suggesting to the jury during the closing of the case that the BMW had stopped, or that if it had done so it was of any material significance at that stage, either in favour of the prosecution or the defence. Although counsel for Dean Bradley did requisition the trial judge and request him to tell the jury that the manner in which the CCTV had been replayed on day 17 had resulted in four seconds being missing (thereby creating the illusion that the car had stopped), he did not suggest how, if the jury had taken from this that the BMW might have stopped, it could have inured to the prejudice of his client. Neither did he explain how the requested clarification might have assisted his client in defending the charge. Moreover, neither in the appellants' written submissions, nor at the oral hearing of this appeal, did counsel for either of the appellants identify the specific basis on which it is said that their clients were potentially prejudiced. We therefore fail to

see how, even if the jury had concluded that the BMW had stopped in the clip shown during re-examination, it could have materially assisted the case against Dean Bradley or Jason Bradley.

131. We therefore reject ground of appeal No 8.

Ground No 8a: re the Judge's Charge on Provocation

132. The gravamen of the complaint here, which is confined to the case of Jason Bradley, is that in the manner in which he charged the jury on provocation, the trial judge failed to clearly communicate to the jury that, by virtue of the burden of proof and the placing of the obligation upon the prosecution, if they were not satisfied that the prosecution had excluded the reasonable possibility that Jason Bradley had been so provoked, he was entitled to be acquitted of the offence of murder and convicted of manslaughter.

133. We should say immediately that no requisition was raised in respect of the trial judge's charge on provocation, suggesting that those who heard it, i.e., senior counsel, junior counsel and solicitors for both the prosecution and for Jason Bradley saw nothing wrong with it. An explanation of sorts has been advanced for the non-raising of a requisition, in the submissions filed on behalf of this appellant which asserts that "*the absence of requisition was not a strategical or tactical position taken in a trial, but rather arose as a consequence of not having picked up upon the minutia of the charge itself in real time during the charge.*" However, we do not regard this explanation as remotely approaching one which would justify this court in departing from the well-established convention that an appeal court will not, without good reason, entertain a point that could have been, but which was not, raised in the court below.

134. We feel that we would only be justified in doing so if there was reason on the Court's part to apprehend that a failure to entertain the point at issue at this stage could result in a flagrant denial of justice. We therefore propose to examine the trial judge's charge in respect of provocation to see if in its terms it raises the possibility of there having been a flagrant denial of justice. However, absent manifest deficiency at that level, we will not be disposed to engage with the point now belatedly raised, in circumstances where there was no requisition.

135. In charging the jury on provocation, the trial judge said:

"The onus of proof is always on the prosecution to prove the accused's guilt. It follows from this that it is for the prosecution to satisfy you beyond reasonable doubt that it is not...that it is not a case of provocation. If, having considered the matter, you are satisfied that it is reasonably possible that Jason Bradley may have been provoked to the extent that he lost total control of his actions, you must acquit him of murder and return a verdict not guilty of murder, but guilty of manslaughter."

136. The complaint on behalf of Jason Bradley is that this instruction did not go far enough, and it is suggested that the jury should instead have been charged in terms that:

"If having considered the matter, you are not satisfied that the Prosecution have excluded the reasonable possibility that Jason Bradley may have been provoked to the extent that he lost total control over his actions, you must acquit him of murder and return a verdict of not guilty of murder, but guilty of manslaughter."

137. Two observations immediately occur. The first is that the charge in which it was given was a perfectly correct and adequate statement of the law. The second is that the alternative language proposed creates a distinction without a difference. To have told the jury that they should acquit of murder and record manslaughter instead "[i]f, having considered the matter, you are satisfied that it is reasonably possible that Jason Bradley may have been provoked to the extent that he lost total control of his actions", is in substance the same thing as saying they should do so "[i]f having considered the matter, you are not satisfied that the prosecution have excluded the reasonable possibility that Jason Bradley may have been provoked to the extent that he lost total control over his actions." There is a nuanced difference in the language used, in that in the first instance the instruction is couched in positive terms, i.e., in terms of what the jury must be satisfied of to proceed in that way, whereas in the second instance the instruction is couched in negative terms, i.e., in terms of how the jury should proceed if they are not satisfied as to certain matters. The meaning and effect is the same. In the first instance, the key criterion is satisfaction as to the existence of a reasonable possibility. In the second instance, the criterion is satisfaction that the existence of a reasonable possibility has not been excluded. It is not for this court to impose stylistic preferences on how a judge conveys an instruction in the course of his/her charge, although we would venture to suggest that most people find it intuitively easier to appreciate an instruction couched in positive rather than in negative terms.

138. At any rate, we think there was no stateable error in how the trial judge instructed the jury, much less one that could give rise to a flagrant denial of justice.

139. We are confirmed in our view, and take comfort from the fact that the trial judge revisited the issue at a later point in his charge stating:

"If you are sure that this is not a case of provocation resulting in total loss of self-control, you must return a verdict of guilty of murder. If you are satisfied on the evidence that it was reasonably possible that Jason Bradley was provoked to the extent that he lost control at the time of delivering the fatal blows, you must return a verdict of not guilty of murder, but guilty of manslaughter."

140. The instruction was pellucid in our view and beyond legitimate criticism. We therefore reject this ground of appeal.

Grounds No's 9 to 12 inclusive: re the Judge's Charge

141. Diverse complaints are made in these grounds of appeal, all of which relate to Dean Bradley only. The first relates to how the trial judge dealt with the evidence of the State's pathologist. Dr Curtis had testified that it was possible that a car had run over the victim

more than once but that he had found no indication of that. He said, *“one run over could have done it.”*

142. In reviewing the evidence of Dr Curtis, the trial judge told the jury:

“Also the defence further rely on Dr Curtis's evidence that although it was possible that the deceased had been run over more than once, there was no evidence apparent to him to indicate that he had been run over more than once.”

143. The trial judge was not requisitioned on what he had said in that respect by defence counsel. However, he was asked by prosecuting counsel to tell the jury, with reference to Dr Curtis's testimony, *“that expert evidence does not stand on a higher plateau than any of the other evidence in the case.”* In response, the trial judge indicated:

“JUDGE: Well, what I will tell them is that his evidence is not determinative of the issue whether there's more than one impact, that's all. In fairness to Dr Curtis he never said that. He said that [there] could have been more than one impact but he couldn't find any evidence that there was, that's all.”

144. The trial judge then recharged the jury in these terms:

“JUDGE: Madam Foreman, there are just four matters that I want to draw to your attention. First of all the evidence of Dr Curtis, Dr Curtis was of course called as a medical expert but his evidence, even though it is expert evidence is, not determinative on the issue as to how [many] impacts there were between the BMW and the late Neil Reilly. That is a matter that you must determine in the context of all of the evidence that you have heard. We don't have trial by expert. We have trial by evidence.”

145. It is now complained that in using that language, the trial judge conveyed a message to the jury that the expert evidence of Dr Curtis, on the issue of the number of impacts, was not of the same quality as the other evidence given in the trial, for example that of Danielle Cusack.

146. We have no hesitation in rejecting this contention. That was not what the trial judge was saying, nor in our view could what he said have been reasonably understood in that way. What the trial judge was saying in his supplementary instruction was that it was for the jury to determine issues of fact and that while they could take account of expert evidence, it enjoyed no special status. It was evidence they should take into account in their deliberations along with all the other evidence relevant to the issue in question. However, it was for the jury to decide how many impacts there were.

147. We find no unfairness in how the trial judge dealt with Dr Curtis's evidence and have no hesitation in dismissing Grounds of Appeal No's 9 and 11 which related to this issue.

148. Grounds of Appeal No's 10 and 12 relate to how the judge re-charged the jury in relation to the verdicts that were open to them, and specifically concerning how they should treat

Dean Bradley's claim of an accident. However, beyond asserting that the trial judge "erred in how he recharged the jury, in how the judge re-charged the jury in relation to the verdicts that were open to them," and that "the charge and re-charge of the learned trial judge in relation to the accused's defence of accident was deficient", the submissions filed are silent as to what is the basis of Dean Bradley's complaint or complaints.

149. We are at a complete loss to know what is said to have been wrong with the initial charge to the jury concerning Dean Bradley's defence of accident. The charge in that regard was in the following terms:

"Dean Bradley admits that the BMW hit the deceased once but contends that it was an accident or, if not, that it was the result of gross negligence on his part. In order to assess the relevant evidence in this case you are required to decide the following issues in the following sequence. First you must decide whether Dean Bradley's driving of the motorcar at the Glebe caused the pelvic injuries which caused or contributed to Neil Reilly's death. Secondly you must look at the relevant act or acts which was the driving of five series BMW over the body of a man who was either standing, kneeling or lying on the ground in order to decide whether death or serious injury was the natural probable consequence of the relevant act or acts. If it was, a presumption arises that Dean Bradley, by so driving, intended to kill or to cause serious injury. Thirdly, assuming that you are satisfied that the presumption arises that Dean Bradley intended to kill or cause serious injury by any of the acts of driving alleged against him, you must then decide whether the prosecution have proved that the presumption has not been rebutted which, on the facts of this case, means that the prosecution have satisfied you beyond a reasonable doubt that it is not reasonably possible that the injuries were caused by accident or gross negligence on the part of Dean Bradley. It is only if you are satisfied beyond all reasonable doubt that the presumption has not been rebutted that you can proceed to convict Dean Bradley of murder. Manslaughter is available to you as an alternative verdict to murder if you are satisfied that it is reasonably possible that the contact between the BMW and the deceased was accidental but you are nonetheless satisfied beyond reasonable doubt that the driving of Dean Bradley in causing such contact was grossly negligent. If you are so satisfied you may return a verdict of not guilty of murder but guilty of manslaughter. If, however, you are not satisfied that the contact was deliberate or caused by gross negligence and that you accept that it's reasonably possible that it came about by pure accident you must acquit Mr Bradley and return a verdict of not guilty.

In order to consider the possibility that the contact between the BMW and the deceased was accidental you must have regard not only to the eyewitnesses relied upon by the prosecution but also to all of the relevant facts and circumstances in the case and particularly those relied upon by [COUNSEL FOR DEFENCE] in his closing speech to you yesterday sorry on Friday, my apologies. You must consider the fact that the BMW arrived approximately 56 seconds after the Mazda and jeep had crashed at the Glebe and therefore that it arrived at a point where it

would appear the deceased was already out on the road. You must also have regard to the following undisputed facts. First that the BMW was last observed on CCTV approaching The Glebe at speed. Secondly that the deceased was apparently already out on the road when the BMW arrived at the Glebe. Thirdly the fact that Danielle Cusack thought that the first impact was an accident. Firstly [Fourthly] the fact that Jackie Coughlan and Laurence Burke didn't see the BMW reverse. Fifthly the fact that Danielle Cusack did not mention two men holding the deceased up to enable him to be struck by the BMW in her initial conversation with the gardaí or in her letter to herself. Sixthly the fact that although Danielle Cusack says the driver got out of the BMW before the alleged third run over occurred, no blood was found on Dean Bradley's shoes. Seventhly the fact that Dr Curtis did not find any so called bumper fractures to suggest that the deceased had been knocked down by a car in a standing position. Also the defence further rely on Dr Curtis's evidence that although it was possible that the deceased had been run over more than once, there was no evidence apparent to him to indicate that he had been run over more than once. And finally the defence further rely on the evidence of the optometrist, Dr Margaret Barrett, who tested Dean Bradley's eyesight on the 28th of March 2018 and told you that although he can see objects they are blurred and they would need to be three times closer if he were to be able to see them in detail.

It is on this basis that [COUNSEL FOR DEFENCE] says to you that it is reasonably possible that the collision was an accident which he contends was due to the reasonable possibility that the BMW arrived at the Glebe at speed, the reasonable possibility that Dean Bradley didn't see the deceased on the road and the reasonable possibility, [COUNSEL FOR DEFENCE] contends, that there was only one impact."

150. That aspect of the charge seems to us to have been impeccable.

151. As regards the recharge referred to, the context in which it occurred was as follows: Following a jury question on day 28 an issue was raised with the court by prosecuting counsel, giving rise to the following exchanges:

"PROSECUTING COUNSEL: One thought occurred to me, Judge, there seemed, in the light of the question towards the end read out by the jury foreperson, possibly to be a conflation between accident manslaughter and gross negligence manslaughter and of course the first one is not manslaughter at all and the Court gave a very careful direction to the jury in relation to that but she was speaking very quickly and I do think that she did refer to accident or negligence manslaughter and both Ms [prosecution junior counsel] and Ms [prosecution solicitor] confirm my initial impression in relation to that and that obviously would not be correct in law and I know the Court gave a very careful direction in relation to that so I just wanted to draw that to the Court's attention that in relation to Dean Bradley it's either murder or gross negligence manslaughter or accident in which case it's a verdict of not guilty.

JUDGE: Yes. Mr [Counsel for Dean Bradley], do you share that anxiety?

COUNSEL FOR DEAN BRADLEY: I do. She was speaking very fast and what [PROSECUTING COUNSEL] has articulated is broadly what I think I picked up but he has

JUDGE: Well, I have no difficulty in redirecting them on that for the avoidance of any doubt. There is no difficulty about that."

152. The trial judge then recharged the jury as follows:

"JUDGE: Madam Foreman, I'm going to send you to an early lunch with the promise that the relevant exhibits will be made available to you at 2 o'clock and just in relation to the last matter that you raised I want to, for the avoidance of any doubt, to remind you that in the case of Dean Bradley provocation is not available as a partial defence and that in his case there are three verdicts open to you. If you are satisfied beyond all reasonable doubt that there was an impact that was deliberate between the BMW and the late Neil Reilly you can consider a verdict of murder. If you are not so satisfied beyond reasonable doubt and you accept that it's reasonably possible that the alleged or any impacts were accidental you then must consider either of two verdicts; if you are satisfied beyond all reasonable doubt that in the case of an accidental contact between the vehicle and Mr Reilly that that contact came about due to gross negligence on the part of Dean Bradley you must return a verdict of not guilty of murder but guilty of manslaughter. If, on the other hand, you accept that it is reasonably possible that the alleged contact between the car and Neil Reilly was purely accidental and occurred without gross negligence of Dean Bradley you must return a verdict of not guilty simpliciter."

153. As mentioned, no details have been provided as to how this supplemental instruction is said to have been erroneous. There was nothing ostensibly wrong with it, or objectionable about it, in so far as we can see. In circumstances where the instructions given to the jury, during both charge and recharge, concerning Dean Bradley's asserted defence of accident, and concerning the possible verdicts that were required to be considered, appear to us to have been clear, cogent and legally sound, we must also dismiss the complaints in grounds of appeal No's 10 and 12 respectively.

Conclusion

154. We are satisfied that the appellants' respective trials were satisfactory and that the jury's verdicts with respect to the appellants are safe. The appeals must therefore be dismissed.