Neutral Citation No. [2015] NICA 71 | *Ref:* **GIR9667**

Judgment: approved by the Court for handing down | *Delivered:* **04/12/2015**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

R

-v-

LOUIS MAGUIRE

Girvan LJ, Stephens J and Horner J

The Judgment of the Court

Introduction

[1] This is an application for leave to appeal against conviction brought by Louis Maguire ("the applicant") following his conviction on 17 February 2006 for murder and arson with intent to endanger life. A notice of appeal was lodged on 23 February 2006. Leave to appeal was refused by Gillen J acting as the Single Judge. The applicant was convicted of murder and arson with intent to endanger life following a trial before Morgan J sitting with a jury at Belfast Crown Court. The applicant was sentenced to life imprisonment with a tariff of 24 years for the offence of murder and to 12 years' imprisonment for arson with intent to endanger life. There is a separate application for leave to appeal that sentence.

[2] During the trial counsel for the applicant withdrew 21 days into the trial and thereafter the applicant represented himself for the remaining 54 days of the trial. The circumstances in which the applicant's counsel and solicitor withdrew from the case were central to the application for leave to appeal.

[3] Mr Fitzgerald QC appeared with Mr Moriarty for the applicant. Mr Mooney QC and Mr McKay QC appeared for the Crown. The Court is grateful to counsel for their helpful and detailed submissions.

Grounds of Appeal

[4] While there appear to have been several versions of the grounds of appeal the grounds of appeal relied on by the applicant before the court can be summarised as follows:

(a) The learned trial judge ("the judge") erred in allowing the trial to continue after counsel withdrew and in failing to carry out adequate inquiry into the reasons for the withdrawal of Counsel for the applicant. The applicant was deprived of his right to be defended by Counsel and accordingly did not have a fair trial.

(b) The judge erred in refusing to adjourn the trial following the withdrawal of counsel and violated the applicant's right to have adequate time and facilities to prepare and conduct his defence pursuant to Art 6 ECHR. In the result the applicant was deprived of a fair trial.

(c) The judge erred in admitting evidence of the applicant's previous conduct under Article 6(1) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order") as it did not relate to "matters in issue between the defendant and the prosecution" and the admission of same was likely to have, and did have, such an adverse effect on the fairness of the trial that it ought not to have been admitted.

(d) The judge erred in admitting evidence of the applicant's previous convictions under Article 6(1) of the 2004 Order as its admission was likely to have, and did have, such an adverse effect on the trial that it ought not to have been admitted.

(e) The judge erred in accentuating in an unnecessary fashion the applicant's bad character.

(f) The judge erred in allowing the trial to continue in circumstances where press reports created a real risk of prejudice to the applicant.

(g) The judge erred in allowing the trial to continue when the process had been infected with the appearance of bias.

(h) The judge erred in directing the jury that there had been no need for an identity parade to be held in circumstances where an identity parade would have afforded the applicant an opportunity to disassociate himself from a previous incident directed at the deceased.

(i) The judge erred in not discharging the jury when it became apparent that the Crown opening was misleading and inaccurate.

(j) The overall circumstances of the case and the refusal of the abuse of process application relating to the premature termination of the second trial without exploring the reasons of its termination and without explaining it created the perception of an unfair trial.

(k) The police failed to disclose to the Crown, the defence and the Court that DI Logan, a Crown witness who was involved in the investigation of the case and in particular in relation to the surveillance evidence, was suspected of criminality by the Police at least from 29 November 2005 onwards. He continued as case officer and gave evidence on 7, 15 and 16 December 2005 despite the fact that he was under investigation at that time. His suspected criminality was not revealed until after the judge had begun his charge. The trial judge wrongly limited questioning of DI Logan. The jury were not discharged even after DI Logan had been arrested. Instead he was recalled to give evidence causing an interruption in the completion of the charge to the jury.

(l) Justice was not seen to be done and the trial process was unfair for the following cumulative reasons:

i. There was unjustified overall delay.
ii. The aborting of the second trial remained unexplained and unexplored by the trial judge who wrongly declined to enquire into the reasons the abuse of process application.
iii. DI Logan remained as case officer and gave evidence despite his suspected criminality and gave evidence part way through the judge's charge to the jury.
iv. The Crown opened matters not borne out by the evidence.
v. There was prejudicial press coverage which could not be cured by judicial direction.
vi. The applicant was unrepresented throughout most of the trial due to improper advice from counsel.

The timetable of procedural steps in the proceedings

[5] The applicant was committed for trial at Belfast Crown Court on three counts namely on count 1 for the offence of murder; on count 2 for the offence of arson with intent to endanger life; and on an alternative count 3 for the offence of arson.

[6] The incidents giving rise to the charges occurred in January 2003 in relation to the arson charge and in March 2003 in relation to the murder charge. The applicant was charged with the offences in June 2003 and was returned for trial on 6 July 2004. A No Bill application was heard by Coghlin J on 8 October 2004 and refused. On 19 November 2004 at a review hearing before Coghlin J the trial date was fixed for 14 February 2005.

[7] At a review hearing before Coghlin J on 14 January 2005 Crown counsel informed the court that another case (R v Hill) was scheduled to commence on 31 January 2005. The Crown informed the court that the same police and legal personnel were involved in that case as in the case of R v Maguire. R v Hill was scheduled for four weeks and Crown counsel asked the judge to have the R v Maguire case listed to follow R v Hill. While initially reluctant to change the date Coghlin J said that he would raise the matter of the conflict of dates with Hart J and that Hart J would be dealing with the further listing of the case.

[8] Hart J, the High Court judge assigned to keep under review the scheduling of trials assigned for trial before High Court judges, on 21 January 2005 confirmed a new trial date for April 2005. Mr Donaldson QC who was the senior counsel acting for the applicant with Mr Boyd, stated that the defence was not happy with the moving of the trial date. He stated that the defence would be seeking further disclosure of documents and that the Crown had further exhibits and documents to serve. Mr Donaldson applied for bail for the applicant. Hart J said that he would hear the application the following Friday, 28 January 2005. On 28 January 2005 Mr Neville of Trevor Smyth & Co, the Solicitors assigned under the legal aid certificate to the applicant, applied to come off record as the applicant wished to represent himself in the bail application. Hart J granted the application. He heard the bail application on 31 January 2005 when the applicant expressed his objection to the delays in the trial process and to the way in which the police had carried out their investigation. Hart J gave his ruling on 4 February 2005. The applicant made clear that he was not dissatisfied by the representation provided by his counsel and solicitor. Hart J advised the applicant that it was in his best interest to engage new representation. When the matter was mentioned again on 18 February the applicant was still unrepresented. He did indicate that he accepted that he needed legal representation in respect of further disclosure applications.

[9] When the trial began before Coghlin J on 4 April 2005 a disclosure application was made by the defence. By this stage the applicant had re-engaged Mr Donaldson and Mr Boyd. As a result of the disclosure application at the request of the defence supported by the Crown, Coghlin J was invited to recuse himself. This he did but indicated that he would remain as the disclosure judge for the trial.

[10] The case was fixed to commence before McLaughlin J on 3 May 2005 but the case was taken out of the list on the application of the Crown. A new trial date was fixed for 12 September 2005.

[11] The trial commenced before McLaughlin J and a jury on 12 September 2005. The judge on 30 September 2005 announced that he was discharging the jury. He did not provide an explanation for taking this course. On 4 October 2005 he recused himself, having taken the question up with the Lord Chief Justice as to whether he should stay in the case.

[12] Morgan J was assigned to be the trial judge and the trial before him commenced on 10 October 2005. Various applications were heard and a number of rulings affecting the admission of evidence were given by the judge in the period between 10 October and 19 October 2005. These evidential rulings were made under the Criminal Justice (Evidence) (Northern Ireland) Order 2004 the relevant portions of which commenced on 18 April 2005 pursuant to the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (Commencement No. 2) Order 2005 made on 9 April 2005. On 19 October 2005 the jury was sworn. The applicant exercised his right to challenge potential jurors in person.

[13] On day 21 of the trial Mr Donaldson QC and Mr Boyd as counsel and Mr Neville as solicitor, with the leave of the court, withdrew from the case. The circumstances in which they did so were at the heart of the application for leave to appeal on the representation issue.

[14] Following the withdrawal of solicitor and counsel the applicant on 15 November 2005 requested an adjournment of two months to allow him to prepare for trial. The judge granted him six days to prepare for the trial which recommenced on 21 November 2005. The jury retired on 14 February 2006 on day 72. Verdicts were returned on 17 February 2006 on day 75. The applicant was convicted on counts 1 (murder) and 2 (arson with intent). A verdict on the alternative count 3 was not required.

[15] After receiving a pre-sentence report, the judge sentenced the applicant to life imprisonment, fixing a tariff of 24 years pursuant to the Life Sentences (Northern Ireland) Order 2001. He also sentenced him to 12 years' imprisonment on the count of arson with intent to endanger life.

The case against the applicant

[16] The shooting of the deceased occurred at 20c Brookvale Avenue, Belfast. At the relevant time the occupants, Paul Barnes and his late brother David (nicknamed Digger) ("the deceased") lived in the lower level therein. Just before 3.00 am on 8 March 2003 police officers were directed to go to the scene of a reported shooting at 20 Brookvale Avenue. When they arrived there the resident of an adjoining apartment assisted them in entering. A police officer saw a blood stained male person lying on his bed. Life was pronounced extinct at 03.25 am. A post mortem examination on the body of the deceased showed that death was due to a single gunshot wound to the head fired at close range. The front door of No 20c had been smashed open with the lock and the handle assembly being completely broken off. The door led to a hallway providing access to the bedrooms and bathroom. Investigation revealed a spent cartridge case and on top of the bed underneath the body a single bullet head. Ballistics expert evidence established that two separate firearms had been used in the shooting.

[17] The deceased and his partner Sharon Fleming shared the front bedroom on the night of the murder. The deceased was 39 years old at the time of his death. The deceased was a storeroom assistant at an Argos Shop in the Abbeycentre at Whiteabbey. Sharon Fleming had been in a relationship with the deceased for a period of approximately four months until his death.

[18] On 7 March 2003 after midnight the deceased and Sharon went to bed. Paul Barnes heard a bang. A very short time later his bedroom door opened. He was confronted by a small man wearing a balaclava, dark clothing and gloves. The intruder was holding a gun in his hand pointing directly at him. Paul Barnes could see down the hallway to his brother's room through the partially open door. There was another taller person at that door, dressed similarly to the smaller man. The bedroom door closed again. Soon afterwards Paul heard a gunshot. Sharon Fleming opened the door into Paul Barnes' room and told him that the deceased had been shot. According to Sharon Fleming's evidence she went to bed with the deceased after drinking in Paul's room. During the night she was woken by the light being switched on in the room. She sat up in the bed beside her sleeping companion and turned to her right. She saw two men, one holding the door open and another beside the bedside table. Both men were masked. She then heard bangs and then the door closed. When she turned to look at the deceased he was bleeding about the face.

[19] It was the Crown case that the deceased was defenceless when shot. The shooting was planned to occur at a time when the killers knew that they were unlikely to meet any resistance from residents or their victim. From the evidence of Paul Barnes it is clear that the killers knew the deceased and could distinguish him from his brother. The killers knew where the deceased lived; knew how to access the building where the flat was located; and knew that the deceased lived on the upper floor. The timing of the attack would also facilitate their easy escape from the area. The shooting was a planned attack and it could be inferred the target was deliberately selected.

[20] The deceased had been in a relationship with Maggie Maguire. It was the Crown case that the applicant had discovered that relationship. The deceased introduced his brother Paul to 'his new girlfriend,' introduced as Maggie Maguire, sometime around St Valentine's Day 1998. The relationship between the deceased and Maggie Maguire lasted about six months. She would often stay overnight at the flat in Brookvale Avenue and the couple appeared to be seeing each other regularly and frequently at the time. The relationship between the deceased and Maguire predated that introduction. Maggie's biological father and his wife in Newtownards saw him in her company. Maggie started calling with them in 1996/97 in the company of a man named David. They sometimes stayed overnight. During the same period she seems to have begun a relationship with the deceased.

[21] Maggie Maguire had a daughter Megan in 1999. After that she married the applicant in September 1999. Before the wedding, the applicant suspected that

Maggie was going out with the deceased. He called to Maggie's father Mr West and asked if he was aware that Maggie was going out with 'David'. The police seized photographs from the West family taken at the house in December of 1997. The evidence showed that Maggie Maguire renewed contact with the deceased before Christmas 2002. Evidence from those who were close to the deceased showed that it was his belief that Megan was in fact his biological child. Evidence also showed that he believed that Maggie Maguire became pregnant to him again when the affair resurrected and that he believed that she lost that child. The deceased kept photographs of Maggie Maguire and Megan in his bedroom. In December 2002, shortly before Christmas, the deceased bought a present for the child and together with Sharon Fleming he wrapped the present in the flat. He also received a Christmas card from Megan, which addressed him as daddy. His brother also received a card addressed as 'Uncle Paul from Megan'.

[22] From this period onwards evidence showed that not only did the applicant know about his wife's infidelity but he also claimed to believe that the deceased had molested his daughter. According to the Crown case this led to an intensive campaign of intimidation against the deceased and his family which eventually resulted in the shooting.

[23] The applicant was a serving prisoner in Magilligan Prison at the time of relevant events. At key times relevant to this case he was released on parole at different times for periods of some days. During this period the deceased believed that he was receiving threatening phone calls and he became increasingly concerned because of those calls. The prosecution case was that the applicant made phone calls on mobile phones to which he had access. The evidence showed that the applicant knew the deceased's mobile phone number. Calls were made from a mobile phone to the deceased at times when the applicant was on leave from prison on parole. There was also evidence that the deceased attempted to contact the deceased's mobile phone while he was in prison using a prison telephone.

[24] Evidence was adduced that the applicant began to target the deceased at his place of work at the Argos Store at the Abbeycentre Shopping Mall in Whiteabbey. He called at the centre himself on occasions accompanied by his wife and later by David 'Dee' Somers and Louis Maguire Jnr. According to the Crown case he gave instructions to others to call at the Abbeycentre, the inference being that he wished to find out the work patterns of the deceased at the Centre and to intimidate him. That evidence raised the inference that the applicant had an animus towards the deceased and that he harassed him and followed him to his place of work. The Crown contended that these actions were preparatory acts in the sequence of events which ended in the deceased's murder.

[25] The deceased's mother lived at 23 Conneywarren Lane, Ligoneil, North Belfast. In the early hours of 23 January 2003 she was awakened by the sound of a loud bang from the area of her front door. Her hallway was filled with black acrid smoke and the smoke alarms in the house were activated. She tried unsuccessfully

to dial '999'. She was trapped by the fire and could not get outside. She opened her bedroom window and called for help. She made her way through the smoke filled hall to another bedroom. She opened this window also and called again for help. She eventually heard the sound of people outside the house trying to help her. After some difficulty they got her out to safety from the room where she was trapped. The fire at Mrs Barnes' home was malicious. The Crown adduced evidence that on 14 January 2003 the applicant enquired as to the location of the house of the mother of a person to whom he referred as 'your man', a reference to the deceased according to the Crown. The Crown sought to infer that he was gathering information on the location of the deceased's mother's home. The applicant was released from Magilligan on home leave on Tuesday 21 January and did not return to prison until 1.00 pm on Friday 24 January. He therefore had the opportunity to set the fire. An analysis of phones to which the Crown said that the applicant had access showed that those phones were in use in the early hours of the morning of 23 January. Evidence showed that between 3.28am and 3.36 am on that morning a phone, to which the applicant could have had access, was being used in the vicinity of 23 Conneywarren Lane close to the time that the fire was set.

[26] Evidence was led to show that on 10 February 2003, Maguire believed that his daughter Megan had been 'molested' by Barnes who lived up by the Waterworks and that he had asked his daughter about this. Megan was three at the time. Brookvale Avenue is a short distance from Belfast Waterworks.

[27] The applicant was released from prison on home leave on 12 February 2003 and did not return until 17 February 2003. He would, therefore, have access to the phone that was used to make calls to the deceased's phone on 13-15 February 2003. On 13 February 2003 Sharon Fleming was in the Fountain Bar in Belfast city centre at approximately 7.00 pm with the deceased. He received a call on his mobile and handed it to Sharon, as he did not want to take the call. The caller who was agitated asked 'was this David Barnes' phone? There were then a further two calls by the same caller, both answered by Sharon Fleming. The same caller asked again about the deceased and identified the person he was trying to reach as being the deceased from the Antrim Road. On Friday 14 February the deceased and Sharon Fleming were again in the same bar. The deceased gave his phone to Sharon and she kept it. On the morning of Saturday 15 February she received a call from a withheld number when she and the others were in their flat. The caller asked for the deceased and Sharon gave the phone to him. He listened to the call for a couple of minutes and then put the phone down and went to his brother's room. The phone rang again within a minute and Sharon answered. She recognised the caller as the same person to whom she had spoken on the previous Thursday night. Among the things the caller said was "You lied to me, you said it was not his phone". This statement identified the caller as the man who was apparently trying to reach the deceased on his phone on 13 February 2003. The caller continued: "Did his ma like the wee fires?" He went on to say that he had been responsible for the fire. He also asked her "what was she doing with a child molester like him?" He said that his three-year-old daughter had told him and that she "should keep that child molesting

bastard away from her children." He also said – "I'm going to stiff that bastard and if you are with him I will stiff you too". He said that he would get into the flat somehow and "take him out." She told the deceased and his brother about the conversation and they were upset. The same caller made all those calls.

[28] It was the Crown case that evidence showed that the applicant had a motive for the attack on Mrs Barnes' home, namely to gain revenge for the alleged molestation by the deceased of his daughter and for carrying on with his wife and to support the vendetta on which he had embarked. The phone evidence when analysed showed that a phone to which he had access was active both at the time of the attack and at the approximate location of the attack. The further evidence of calls to the deceased and to Sharon Fleming on 13-15 February 2003 showed that the applicant was the caller and that he not only admitted to the attack upon Mrs Barnes but made further threats upon the life of the deceased and evinced an attitude of extreme hostility towards him. The same phone was active and in use in the vicinity of Mrs Barnes home as was used to make the calls to the deceased's phone on 13-15 February. On the Crown case this was further evidence from which it could be deduced that the applicant was the caller who made the calls and was in possession of the phones at Conneywarren at the time of the attack on Mrs Barnes' home.

[29] The applicant was released on home leave from Magilligan Prison on Monday 3 February 2003 at 9.50 am until his return on Wednesday 5 February at 1.05 pm. The deceased worked mainly in the stockroom at the Argos Store. The store was equipped with CCTV cameras, and there was a viewing monitor in the stockroom. Between 10.30 and 11.00 am on 3 February, a snowy day, a male person approached an employee of Argos in the store asking for the deceased. This employee went to the stockroom and told the deceased. The deceased looked at the monitor that showed him who was in the shop floor. When he saw who it was he was upset. He told the employee to say that he was not in the shop. The employee did this and the male person who had been looking for the deceased aggressively said words to the effect "Do you think he would be abusing kids in the snow?" Another employee witnessed this exchange. He saw a woman approach the man and they left the store. The woman was similar to Maggie Maguire. The deceased left work early by the rear door of the store.

[30] On 12 February 2003 the applicant was released again from prison on home leave at 10.00 am until 1.00 pm on 17 February. On 12 February a neighbour of the deceased in her flat at 18c heard a loud bang. She then went to the door and saw a man kicking the deceased's door. Her attention was also drawn to the presence of a girl going down the steps. She believed that this girl was a person to whom she had been introduced as the girlfriend of the deceased who was named Maggie. The man was small, thin build and clean-shaven. He was aggressive and shouted 'Is that child molesting bastard Digger Barnes in?' The description of the two persons is consistent with the description of the applicant and his wife Maggie. The Crown sought to rely on evidence that on 13 February Sharon Fleming spoke to a man on the deceased's mobile phone in the Fountain Bar in Belfast City centre and that she

received threatening calls from this same person at her home on 15 February during which the person called the deceased a child molester.

[31] The applicant was released from prison on home leave at 9.15 am on 3 March 2003 until 1.05 pm on Monday 10 March 2003. A mobile phone to which the applicant could have had access was active from the morning of 3 March and after he was released. It was the Crown case that two calls were made from that phone on the night of the 3 March to Dee Somers. That same phone was also active on 4 March and a number of the calls were made to the phone used by Somers.

[32] On 5 March 2003, the applicant, David Somers and Louis Maguire Jnr were all present at the Abbeycentre. A person answering the description of Louis Maguire Jnr went to the Argos Store and asked for the deceased. He entered the shop a second time and remained there for about ten minutes. The applicant, his son Louis Junior and David Somers were captured in the Abbeycentre on CCTV cameras. Maguire Jnr was captured in the Argos Shop on CCTV. The phone alleged to have been available to the applicant was active. In the afternoon calls had been made from that phone to David Somers before all three persons arrived at the Abbeycentre. The 'Maguire' phone was active in the Abbeycentre while all three were there. At one point the phone was seen in the hand of the applicant as he appeared to dial a number and then hand the phone to his son. After the trio left the Abbeycentre, that phone was used to make calls to a phone owned by the deceased. The phone used by Somers was active and making calls at about 6.30pm and 6.45pm in North Belfast which on the Crown case was consistent with his presence in the vicinity of Brookvale Avenue at that time. It is on that same date that one of the tenants of a flat at 18 Brookvale Avenue heard the sound of breaking glass coming from the window at the back door of the flats. The breaking of that window as found by the police after the murder would have allowed a person to put their hand through the broken window and open the door without difficulty.

[33] On 6 March 2003 both the applicant and his son Louis Jnr were at the Abbeycentre arriving by car about 1.00 pm. They were seen on CCTV at various points in the Abbeycentre in particular in the vicinity of the Argos shop. The applicant passed the Argos store on a number of occasions and as he did so the CCTV evidence indicated that he masked his face. The deceased was in the store on this occasion and fellow employees suggested to him that he should leave early because of the activity of these people. Maguire Junior appeared to be following the deceased and was also seen to be using a mobile phone. The phone analysis carried out in this case shows that a phone attributed to the applicant was active at the Abbeycentre at that time. On 7 March 2003 there was evidence of phone contact between the phones that the Crown contended were used by the applicant and the phone used by Somers. The Crown said that the evidence was significant. The phone contacts showed that calls were made and that Somers and Maguire were in contact with each other. The evidence showed that Somers' phone travelled from the Craigavon area to Belfast and was in the vicinity of Brookvale Avenue before the murder. Somers admitted that the phone was a phone which he used. Analysis of

the billing from that phone showed contact between that phone and that attributed to the applicant. Analysis of cell site data shows that the phone attributed to Somers moved from Craigavon to Belfast on 7 March 2003. Analysis of phone bills placed the phone attributed to Somers at the relevant time in the vicinity of the murder scene. The evidence showed that between 1.21 am and 3.25 am on the 8 March 2003 that phone was present under one mile from 20c Brookvale Avenue. After the shooting, the phone could be traced as returning to the area of Craigavon. There was no contact between the phones for a period before and after the murder.

[34] After the murder the police sought and were given permission to carry out surveillance of the conversations that the applicant was having with visitors at Maghaberry Prison. Among these visitors were Somers, Maggie Maguire and Daniel McGeough. It was part of the Crown case that conversations turned to the murder. The applicant was aware that he was a suspect. According to the Crown he said significant things. During a visit on 5 April 2003 at which Maggie Maguire was one of those present the applicant said to her 'It happened. We made it happen.' On a further visit on the 9 April 2003 at which Somers and Maggie Maguire were present there was discussion in which all took part about witnesses who were present at the Abbeycentre while the deceased and Somers were targeting Barnes. The Crown case was that the significance of the conversation was that they were concerned that those witnesses were acknowledging that there was a pattern of following Barnes for a sinister reason. In his charge to the jury the judge re-played several of the DVDs containing the surveillance of what was said by the applicant when talking to visitors during the prison visits. The judge told the jury in clear terms that "You won't find in any of these tapes an assertion that he got someone killed or something like that… there's nothing in these tapes that supports that contention or that view insofar as it was ever relied upon by the Crown." There was surveillance evidence played to the jury and replayed during the charge in respect of phone calls made by the applicant after the death of the deceased. The judge directed the jury to consider the way in which the applicant expressed himself and the jury had to be satisfied beyond reasonable doubt that it amounted to an admission about the circumstances in which he committed the crime.

[35] The Crown also relied on evidence of allegations made by the applicant against the stepfather of Maggie Maguire, a man named Edward Rice. Edward Rice lived in Newtownards together with Margaret Rice, the mother of Maggie Maguire. Mr Rice did not approve of the relationship between Louis Maguire and Maggie. Because of his disapproval he fell out with his step daughter and did not attend the wedding of the applicant to Maggie. Shortly after his expressed disapproval of the relationship in 1996 or 1997 he began to receive a series of threatening phone calls. He was accused of being a child molester. He eventually identified the author of these calls as the applicant and claimed that the motive behind the threats was his disapproval of the relationship between Maggie and the applicant. He and his wife reported the threats to the police. Mr Rice decided to confront the applicant and having found that he lived in Newtownards he went to confront him in the company of his wife. There was a confrontation and words passed between the two. The

applicant told him that he could probably beat him up but that he would get him sorted and shot.

[36] At the close of the Crown case there was a strong prima facie case against the applicant who did not go into the witness box to give evidence notwithstanding that the trial judge gave the appropriate warning in relation to inferences which could be drawn against him if he did not give evidence.

The issue of withdrawal of representation

Introductory synopsis of the parties' cases

[37] Mr Fitzgerald QC contended that the withdrawal of counsel (Mr Donaldson QC and Mr Boyd) and the solicitor Mr Clive Neville of Trevor Smyth & Company was improper. Counsel had acted in breach of the Code of Conduct of the Bar of Northern Ireland. As a consequence of the withdrawal of his counsel the applicant was left to deal with a multiplicity of complex issues and procedural difficulties over a protracted period. This was contrary to his right to a fair trial at common law and pursuant to Article 6 of the Convention. The judge made insufficient inquiry to establish the circumstances in which the applicant came to be unrepresented and, if he had carried out a proper enquiry, he would have realised that the withdrawal of counsel had been improper. Legal representation had to be practical and effective (Artico v Italy [1981] 3 EHRR paragraph 33). In this case having regard to its difficulty once counsel had withdrawn the applicant should have been given a longer period to prepare and present the case than the 6 days permitted by the judge. The applicant did not and would not have been expected to keep his own notes of the evidence before his trial team left. No matter how articulate and self-assured the applicant might be the requirements imposed by the judge that the applicant should be ready to continue the trial after 6 days gave manifestly insufficient time. The applicant bears no burden of proving actual prejudice (see X v United Kingdom [1970] 13 YB 690, Murphy v UK [1972] 43 CD 1 and R v Nangle [2001] CLR 506).

[38] Mr Mooney QC argued that the applicant decided to dismiss his legal representation of his own volition. This was against the background of his erroneous belief that the prosecution had acted improperly and that he was not getting a fair trial. His decision was informed by strong advice that his conviction was certain. He declined the opportunity to seek alternative representation on more than one occasion. His notice was tactical and designed to secure the discharge of the jury on the abandonment of the trial. Counsel relied on X v UK [1980] 21 DR 126 in which the Commission concluded that if counsel is called on to do something inappropriate and refuses any resultant inequality of arms is attributable to the defendant's own behaviour. Neither the conviction nor the court offers protection to a defendant who attempts to manipulate the proceedings with a view to achieving the abandonment of those proceedings. Such behaviour would be an abuse of the process of the court and an affront to justice. Counsel contended that the trial judge

had proceeded properly in dealing with the situation brought about by the applicant's decision to dispense with the services of a solicitor and counsel.

[39] By a ruling given by this court on 17 June 2014 the court concluded that there were triable issues to be dealt with during the appeal in relation to the circumstances in which the applicant's counsel and solicitor withdrew from the case. These issues related to the fairness of the trial. The court directed Mr Donaldson QC, Mr Boyd and Mr Neville to make affidavits in relation to the matters in issue in the appeal and concerning the circumstances in which they withdrew from the case. It was also indicated that the court might have to hear oral evidence from the applicant and the former legal team in the course of the appeal. We decided that in the interests of justice it was necessary to hear oral evidence from the applicant and the members of his former legal team. Having directed the legal representatives to swear affidavits in relation to the questions raised Mr Donaldson QC, Mr Boyd and Mr Neville were treated as witnesses called by the court.

The applicant's evidence

[40] The applicant provided an affidavit sworn on 13 June 2014 in support of this ground of appeal. According to that affidavit Mr Donaldson informed the applicant that he was not getting a fair trial; that counsel was not being given a chance to represent him properly; that the judge was making 'awful rulings'; that the applicant was being 'railroaded'; that the applicant was going to be convicted of murder and that he would be sentenced to 20 years' imprisonment. The applicant further averred that Mr Donaldson told him that he should represent himself for a period and then ask for a new legal team which would result in the collapse of the trial. The applicant stated that he did not sack his legal team. It was agreed that they would leave and that the applicant would represent himself. The applicant stated that one of the main reasons for the decision to represent himself was that during the second trial prosecuting counsel had spoken to the trial judge, McLaughlin J, behind closed doors in the absence of defence counsel. This concerned the applicant and reduced his confidence in the trial process. The applicant said that he felt overwhelmed by the volume of papers (there being 16 to 20 lever arch files of papers). He was only given six days to prepare his defence. He also complained of removal of legal papers by the police after confidential papers were sent to him in error. He stated that he had been led to believe by Morgan J that he had a right of appeal in respect of the rulings given in the course of the trial. This was, he claimed, a false safety net as he did not have an automatic right of appeal.

[41] In his oral evidence in chief the applicant said that Mr Donaldson said his position was becoming untenable because of parts of the trial being conducted in secret. He said that Mr Donaldson told him that it was unheard of for a judge to give no explanation for discharging the jury and stopping the trial. The accumulation of adverse rulings made counsel's role untenable. The applicant said counsel was adamant that he was not going to represent the applicant. He saw no point in continuing to act in the case. The applicant also made the point, not

previously mentioned in his affidavit, that he was told that if the applicant represented himself the prosecution could not close to the jury. He was told that this would be an advantage. Alternatively, if he asked for a new legal team it would cause the trial to collapse. The applicant said he did not dispense with counsel. Rather they dispensed with him. Mr Donaldson advised the applicant that the best thing the applicant could do was to represent himself. The applicant asserted that he had not shown any desire to represent himself. Mr Donaldson said that he had never had a client who had such a mastery of the papers. He also said that the applicant could say things which counsel could not say. The applicant said that he did not feel able to deal with the legal issues. The applicant referred to Mr Donaldson having previously commented on the estimated duration of the trial saying 'I don't know about you but by January I won't be here.' (This allegation had not been averred in his affidavit.)

[42] The applicant explained that he saw counsel during lunchtime on the day on which counsel withdrew. An abuse of process application supported by Mr Donaldson had been made by counsel on behalf of one of the other accused which was grounded on the alleged impropriety of McLaughlin J and prosecution counsel meeting in the absence of the defence. The judge had not yet ruled on that application which was supported by Mr Donaldson. The applicant said he told Mr Donaldson that he wanted to know the outcome. He denied that he gave any instructions to senior counsel to tell the judge that he had been instructed to take no further steps until the ruling was given, although that is what Mr Donaldson in fact told the judge.

[43] The applicant further claimed that Mr Donaldson had told him that the judge had been talking to other judges and that judges had regular meetings on a Thursday. Mr Donaldson told him that if the judge asked him whether he wanted new counsel the applicant should say no. Mr Donaldson also advised him that he would have a chance in the Court of Appeal to challenge adverse decisions. The applicant claimed that he was advised by counsel to act as he did. He claimed to be surprised when Mr Donaldson said he was not getting a fair trial. He also claimed that if the judge told Mr Donaldson that he should not withdraw then he would have carried on with Mr Donaldson and the legal team.

[44] In reply to questions posed by the court the applicant said that as he felt he was not going to get a fair trial anyway it would make no difference if he represented himself. He would be strategically better off doing the case himself. As a layman he could say things a lawyer could not. He was advised that he could stop the trial at any time if he asked for a new legal team, if he continued to act unrepresented the prosecution could not close. He could play things by ear. He thought that strategically he would be better placed without representation. He qualified those remarks by saying that this was based on the advice which he received. He did accept that he would not have minded getting rid of Morgan J as the trial judge. He did want the trial abandoned. He did hope that he could get a new and fair trial with a different judge and different prosecuting counsel.

[45] In cross-examination by Mr Mooney the applicant accepted that he had insisted on a preliminary investigation rather than a preliminary inquiry in the proceedings. This necessitated the calling of Sharon Fleming and Paul Barnes who, in fact, were not asked any questions. The Crown relied on this as an example of the applicant using legal intimidatory tactics against civilian witnesses. The applicant accepted that after the hearing date had been put back by Hart J he decided to temporarily dispense with the services of his legal team when applying to the Crown Court for bail. This was even though he had a legal aid certificate for two counsel. The applicant accepted that he had not discharged his legal team at that stage but he was so annoyed about the case being put back for trial that he wanted to vent his frustration by appearing in person before Hart J. The Crown relied on that evidence to demonstrate that the applicant used the legal system as he saw fit. The applicant said that his legal team did not see anything wrong with the course that he was taking in relation to the bail application.

[46] In relation to the trial before Coghlin J a section 8 disclosure application was made. This involved the judge having to look at a large number of documents. Both the Crown and defence counsel argued that Coghlin J should therefore recuse himself as trial judge. Notwithstanding this the applicant asserted that the Crown had improperly asked the judge to consider the documentation. The Crown relied on the applicant's attitude as demonstrating that the applicant claimed to see unfairness in perfectly fair procedures.

[47] The applicant asserted that there was serious procedural unfairness in the discharge of the jury and the recusal by McLaughlin J. He accepted in cross-examination the ruling by this court that, in fact, there had been no procedural impropriety. He still maintained, nevertheless, that Crown Counsel could have told the defence about the application and should have not 'sneaked in' to see the judge.

[48] Although Mr Donaldson told the judge that he had instructions to take no further part in the trial unless the judge gave a ruling on the abuse of process application the applicant said that he did not give such instructions. Mr Donaldson had taken the course which he did because according to the applicant 'barristers do things to get results'. While he thought Mr Donaldson was giving a false message to the court the applicant said that he was content for him to do so. He complained that he would have been happy to get on with the case if the judge did not rule on it. Furthermore, he rejected Mr Donaldson's description of the consultation in which the issue of abuse of process was discussed as 'urgent'. Following the adverse ruling on the abuse of process application it was Mr Donaldson who asked for a consultation with the applicant. It was during that consultation, according to the applicant, that Mr Donaldson said that the defendant was going to be convicted. The applicant said he had considered the case against him as a weak circumstantial case and claimed that Mr Donaldson had assured him in 2004 that he would not be convicted. Mr Donaldson told him that he was not getting a fair trial and that counsel could not take the case further. The judge was making bad rulings. The applicant would be better off representing himself. Mr Donaldson led him to believe

that it was tactically better for him to do the case himself. It did cross the applicant's mind that the judge might 'pull' the case. He appreciated that if a long adjournment was given to him by the judge to enable him to prepare the case that might very well lead to the discharge of the jury. It did cross his mind that it might be better to stop the trial in order to get better rulings in another trial. When asked why after the discharge of his legal team he did not ask for legal representation he said that he had been advised by Mr Donaldson that it was what he should do and that, according to Mr Donaldson, he had the option of later asking for legal representation and thus stop the trial. None of this was disclosed to the court by the applicant. He said that this was out of loyalty to Mr Donaldson and because of legal privilege. The applicant did accept that he knew that if the case was adjourned to the New Year the trial would effectively have to start again. He conceded that he may have had an aspiration to have a different judge. He did ask for a two month adjournment which he accepted, if granted, would have led to the jury having to be discharged. However, he did not accept that his primary motivation was to stop the trial.

[49] Following his conviction he did re-engage Trevor Smyth & Company to help him with an appeal. He moved from them to another firm J. D. Rice & Co for a while but he parted company with them. He then instructed his current solicitors in 2008.

[50] In concluding his evidence in cross-examination the applicant said 'Who does not employ strategy?' In re-examination he explained that comment saying that it was Mr Donaldson who came up with the idea of the applicant appearing on his own. It was counsel's strategy that he was talking about. In reply to the court he said while 'you could interpret it that Mr Donaldson and I worked a strategy to frustrate the trial' he was following counsel's advice. He said that Mr Donaldson told him that he could say things that might be helpful to his case which counsel could not. In fact in the course of the trial he did say things and introduced material which he thought would be helpful to his case.

The evidence of Mr Donaldson QC

[51] Questioned firstly by the Crown, Mr Donaldson described the applicant as being a very shrewd and intelligent individual who was clearly familiar with legal processes. For example, he was impressed by the fact that the applicant once described evidence as 'fruit of the poisoned tree', an unusual term for a lay person but one familiar to lawyers. The applicant was not behind the door in expressing opinions and this became more apparent later as his grievances with the trial developed. Mr Donaldson had no recollection of the legal team not being used when the applicant wanted to do his own bail motion. Mr Donaldson said the applicant was very interested in his own case and was kept informed throughout about everything; everything was discussed; and the implications of rulings on the development of the case were considered as the case proceeded.

[52] Mr Donaldson said that he was upset by the way Crown Counsel had approached McLaughlin J without informing him even on a confidential basis. He felt that if some explanation had been given that might have appeased the applicant. Counsel did recognise that there were possibly good reasons for the Crown to act as it did but he felt he should have been informed even on a confidential basis. The applicant claimed to believe it was sinister and fretted about what had happened. The applicant's sense of injustice built up as the various applications in the course of the trial were decided in favour of the prosecution. Mr Donaldson said that the defence team fought all the applications vigorously. The adverse rulings all resulted in the strengthening of the Crown case. Mr Donaldson said that the Crown case was a strong one from the outset. He never told the applicant at any stage that he would be acquitted. While he never told the applicant that he was not getting a fair trial Mr Donaldson said he did express some concern about the Crown winning the various applications. Mr Donaldson recognised that the law had changed and permitted the introduction of material which had been previously inadmissible and considered unfair evidence (for example, evidence in relation to previous convictions).

[53] According to Mr Donaldson, at the time of the abuse of process application the applicant's grievances about the trial were coming to a head. There was a build-up of frustration and annoyance on the part of the applicant. Following the adverse ruling on the abuse of process application there was a consultation during a 30 minute lunch break. The actual consultation possibly took 20 minutes. There was discussion about the case. Mr Donaldson advised the applicant that he was virtually certain to be convicted. Mr Donaldson denied telling the applicant that self-representation was the best course. He denied encouraging the applicant to take that course of action. He did not suggest the tactic of self-representation or to seek to abort the trial by later asking for a new legal team. Mr Donaldson never thought the judge would abort the trial. He had no recollection of saying that the applicant could say things counsel could not. He described the consultation as a rather intense affair. The applicant decided to go it alone and counsel agreed to that course in the sense of accepting it was the applicant's decision. If there had been a change of mind on the part of the applicant he would have gone back into the case. Mr Donaldson denied saying that the applicant was not getting a fair trial. He did not say that his position was untenable. He did not say the rulings given were awful though he was disappointed with the rulings. He did not say the applicant was being railroaded. Mr Donaldson said that he had never opted out of a trial for ulterior reasons. He denied suggesting that Morgan J was inexperienced. He denied telling the applicant to say no to the judge if he asked the applicant whether he wanted to bring in another legal team. Mr Donaldson in fact said that was a little flight of fantasy on the part of the applicant.

[54] Questioned by Mr Fitzgerald, Mr Donaldson was challenged on the failure of the lawyers to keep a proper note of what transpired in the consultation. Mr Donaldson said it never was his practice to take such a note. He expressed no regret as to the inadequacy of the note taking and seemed to be unconcerned by it.

[55] When asked about what options were open to the applicant, Mr Donaldson said that there were three options: to continue to be represented, to represent himself or to change his legal team. The last option was not going to make any difference to the applicant in his frame of mind. Mr Donaldson felt sure that he said to the applicant that he should be sure about his decision.

[56] Mr Donaldson took issue with Mr Neville's short note of the meeting. That note was in the following terms:

> *"AED You are aware of the most recent rulings*
>
> *I feel inevitable that you will be convicted*
>
> *In my view prosecution has seen judge and judge has seen other judges*
>
> *In my view **you** can't have a fair trial*
>
> *Question is what do you do?*
>
> *LM I am not getting a fair trial"*

Mr Donaldson accepted that he may have said that the prosecution had seen the judge. He rejected the proposition that he had said that the judge had seen other judges. He denied that he said that the applicant was not getting a fair trial, saying "Why would I say you are not getting a fair trial. I did not think at any time that he was not getting a fair trial." He said that the note was very incomplete. In any event the hand written note showed a correction of the word 'I' to 'you' (shown bold in the text above) in relation to the applicant not getting a fair trial. He rejected the suggestion that he was leaving the applicant with no choice.

[57] Mr Donaldson referred to the consultation which took place after the abuse of process application and before the judge ruled on it. He said that his solicitor was obviously present (though in fact Mr Neville subsequently said in evidence that he had no recollection of it and no note was kept of the consultation by counsel or the solicitor and Mr Boyd seemed pretty sure that he was not present at that consultation). He said that "a kind of firing shot was being fired there." It appeared to Mr Donaldson that there were indications that things were not going too well and it was a kind of threat that his instructions were not to proceed further with the trial until a ruling was given. He said "So it was building up. It wasn't just a surprise … suddenly out of the blue, we have a meeting and the decision is made that you are going to withdraw from the case."

[58] Mr Donaldson took issue with Ms Katie McAllister's (one of the present solicitors acting for the applicant) note of his brief and hasty conversation with her

on the telephone when she rang to inform him that he would be served with a copy of the affidavit of the applicant. The note was in the following terms:

> *"Morgan was admitting hearsay and everything was going against Maguire. I felt the decisions were too severe. I told Maguire that everything was going against him. It was clear that the judge was admitting all of the evidence. The situation was not going anywhere and I discussed this with him. I told him that I could not do anything more for him and his conviction was inevitable. We both agreed that I should come out of the case. The way hearsay was let in was appalling. Morgan sided everything against Maguire."*

Mr Donaldson did not accept that he had told the applicant that counsel could do nothing more for him. He denied describing the judge's ruling on hearsay as 'appalling' but he did say that he was not happy with the rulings. Mr Donaldson did not accept Mr Fitzgerald's suggestion that he, Mr Donaldson, was stoking the flames of the applicant's indignation about the unfairness of the trial.

[59] The judge in the course of the discussion in court with the applicant the day after counsel stood down did raise the question of asking counsel to return to explain the situation. Mr Donaldson said that if he had been asked to do so he would have gone back to explain the position to the judge but he was not asked to do so. He would not have accepted the applicant's claim that Mr Donaldson had said he was undermined by the prosecution's conduct and he would have told the judge that he was not.

[60] In relation to the question whether he explained to the applicant the pros and cons of self-representation Mr Donaldson could not recall what he said about the pros. He did not say to the applicant that he seemed to have a complete mastery of the papers in the case. He was not recommending him to appear for himself. Mr Donaldson said he could see no advantage to the applicant in doing so but the applicant was adamant that he was not getting a fair trial. He had no recollection of saying that he might have more success representing himself. He denied that he was encouraging the applicant to represent himself. He did not give any advice as to the reasons why self-representation was a bad idea.

[61] Replying to questions from the court Mr Donaldson said that he should probably have tried a bit harder to persuade the applicant that he was making a mistake in dispensing with his legal team. He said he was put off doing that because of the applicant's determination to follow that course and the applicant's mind was dominated by his belief that he was not getting a fair trial.

Evidence of Mr Clive Neville

[62] Mr Neville was questioned first by the Crown. He is a solicitor since 1984 and senior partner in Trevor Smyth & Company and gave evidence that he was instructed by the applicant and the co-accused in what was a serious murder case. The applicant was pleading not guilty and he was returned for trial. The papers were voluminous. The strength of the evidence against him would have been discussed with the applicant. The applicant was never told that he had a good chance of acquittal and Mr Neville never heard Mr Donaldson say that to him.

[63] Mr Neville was in court when Hart J informed the parties that the case was being taken out and put into April for hearing. Following an application for further disclosure which lasted some three weeks Coghlin J recused himself. Mr Donaldson was a party to the application to the judge to recuse himself. The case was fixed for trial in May and then it was put back to September to be heard before McLaughlin J with a jury. The trial before McLaughlin J ended abruptly.

[64] Mr Neville was aware of the tensions created by the termination of the trial before McLaughlin J. The applicant was expressing concern that he was not receiving a fair trial. Many of the defence teams were concerned. He considered that there were a number of unsatisfactory features in the handling of the case. In his view justice had not been seen to be done. He did accept that there might be good reason why an ex parte application could be made to the Crown to the trial judge. The applicant was concerned and the legal team could not fully explain the reasons for McLaughlin J's termination of the trial. As the trial before Morgan J progressed the applicant was becoming increasingly frustrated although he was never offensive or aggressive.

[65] Mr Neville had no recollection of the consultation at the lunch break leading to Mr Donaldson returning to court and telling the judge that he was instructed to take no further part until there was a ruling on the abuse of process application. In the trial transcript it was recorded:

> *"Mr Donaldson: My Lord … there is some difficulty here. Your Lordship was aware that before lunch we had to go and consult with our client in (a matter of) some urgency. My instructions are My Lord that I'm not ... to proceed further with the trial until a ruling is given in relation to the abuse of process matter. So therefore I would ask Your Lordship if it is at all possible to give a ruling on that eh as soon as possible."*

Mr Neville considered that Mr Donaldson's words spoke for themselves. It appeared that things were coming to a head and that Mr Donaldson may have been about to leave the case. Following the rejection of the abuse of process application there was a consultation. Mr Neville's belief was that as a defence team they were being asked to guarantee that the applicant would receive a fair trial. It was the

collective view of the legal team that he could not be guaranteed a fair trial. On the question as to whose decision it was that Mr Donaldson should leave the case, Mr Neville said that it was ultimately Mr Donaldson's decision although Mr Neville did say that he did not have a clear recollection of events. His recollection was based entirely on the note which he recognised was a very brief note. It did not reflect everything that was said and he said that we did not know the context of everything that was recorded as having been said. In his note he recorded that Mr Donaldson said '*In my view the prosecution has seen the judge and the judge has seen other judges'*. These were, he said, Mr Donaldson's words. He could not recall whether there was a discussion of the options open to the applicant. When Mr Donaldson said in court that he had been discharged he did not use the word 'dismissed' and Mr Neville did not consider that Mr Donaldson said anything misleading to the court. What was said in court was as follows:

> *"Mr Donaldson: My Lord I am sorry this took rather longer than expected but I have to say that we had a very stressful consultation with our client as a consequence of which he wishes to discharge counsel and I don't intend to say anything about the reason for that My Lord."*

Mr Neville said that no separate advice was given by him to the client and he left the case at the same time as counsel. He personally did not seek leave to withdraw. After the team withdrew the client's papers had to be delivered to him in his holding cell.

[66] Following the conviction of the applicant the applicant initially instructed Mr Neville to act for him in the appeal. One of the grounds of appeal was the lack of proper representation. Mr Neville acted for a while and then ceased to act although it is not apparent from the evidence why that happened.

[67] Mr Neville considered that the applicant was determined to represent himself when the legal team could not guarantee him a fair trial. It was ultimately his own choice and his decision was final. In cross-examination he said that Mr Donaldson could have said that his position was untenable. Mr Neville in examination-in-chief said that he had no recollection of Mr Donaldson saying that the position was untenable. Mr Neville denied that there was any talk about the defendant aborting the trial by asking for a new legal team.

[68] Mr Neville did not recall the applicant presenting a Crown Court bail application on his own after temporarily withdrawing instructions from his legal team.

[69] In reply to questions from Mr Fitzgerald Mr Neville said that the background to the view that the applicant could not get a fair trial was that the trial had been moved from February to April by which stage the new evidential rules in respect of bad character and hearsay had come into effect in April. McLaughlin J discharged

the jury and recused himself and the belief was that the prosecution had gone and seen the judge. This added to the misgivings. Senior counsel acting for the co-accused's wife was also telling her client that she could not get a fair trial and she might be better off representing herself.

[70] Mr Neville said that there would be no reason why in his note he would have attributed remarks to the wrong person. In the circumstances Mr Neville felt that it was Mr Donaldson who made the suggestion of self-representation and that the applicant would be better off doing the case himself because he could not guarantee a fair trial. It was Mr Donaldson who initiated the discussion in the consultation. Mr Neville considered that Mr Donaldson was recommending self-representation and that the applicant accepted the advice. Mr Donaldson was also implying that he was compromised by the prosecution team's actions. Mr Neville said that Mr Donaldson could have told the applicant that he could say things that counsel could not say. He denied hearing Mr Donaldson saying that if the applicant did not give evidence the prosecution could not close. He did not hear Mr Donaldson make any improper suggestions about "pulling" the trial. He accepted that no-one suggested to the applicant that it would be a crazy idea to represent himself. It was put to Mr Neville that there was strong reason for saying it was a very bad idea for the defendant to represent himself (for example, the jury could take an adverse view of the defendant, the law was complex, cross-examination of witnesses required to be carried out, and the defendant needed advice about whether he should or should not give evidence.) Mr Neville was not sure whether any of those issues were discussed.

[71] Mr Neville concluded his evidence saying that he was satisfied that he and counsel had discharged all their duties as officers of the court.

Mr Boyd's Evidence

[72] Mr Boyd was questioned first by the Crown. He acted as junior counsel on behalf of the applicant. He was an experienced junior in criminal matters. He stated that the contents of his affidavit sworn on 28 June 2014 were correct. He stated in paragraph 3 thereof that all the legal rulings went against the defendant and it was very clear that the case was not running well for the defence. This formed the background to the consultation which led to counsel ceasing to act. Mr Boyd's recollection of events was vague. He did recall discussing the various rulings and counsel's frustrations with them, the strength of the evidence and how the case was proceeding. A robust assessment of the defendant's chances of success was given. He said that Mr Donaldson 'suggested to Mr Maguire that we were frustrated by the various difficulties and told him that we were doing all we could and that Mr Maguire might have more success representing himself'. He also had a vague recollection about the abrupt ending of the trial before McLaughlin J. He accepted the applicant did not sack his legal team and that at the end of the consultation it was agreed that 'we should no longer act for him and that he would represent himself for the rest of the trial'.

[73] Mr Boyd said that the applicant was a hands-on client with forceful opinions. Mr Boyd would not go so far as to say he could not be shifted in his views. He was on top of the evidence and he never said that he considered that it was a weak case. Mr Boyd was in no doubt that the applicant knew the strength of the Crown case against him. Mr Boyd never heard Mr Donaldson say that there would be no conviction. Such a thing could never have been said with confidence. When Hart J took the case out of the list he did not give a reason. The significance of the change of date was that by the time when the trial started the new evidence law had come into effect. He said enquiries were made as to why the case was moved. They did not find out why. Mr Boyd said he did not take the view that Hart J had 'been got at' by the prosecution to change the date. However, the change in the legislation was devastating. Mr Boyd however recognised that even under the previous law the applicant was attacking the character of Crown witnesses and thus his shield was down. The applicant was advised of that.

[74] Mr Boyd said that one of the applicant's grievances related to the seizure from him of documents following the accidental delivery to him of sensitive material. He held a strong grievance that in the course of McLaughlin J's trial the prosecution had gone to see the judge secretly. Mr Boyd accepted that counsel did not explain to the applicant that there may have been legitimate reasons for that to happen. The applicant's sense of grievance increased because no explanation was provided.

[75] Mr Boyd said that there must have been a lunchtime consultation between the applicant and Mr Donaldson at which Mr Boyd did not recall being present. Mr Boyd considered that the next consultation leading to the withdrawal of counsel had to be seen in the context of that earlier consultation. At the second consultation Mr Boyd and Mr Neville were present and Mr Boyd did recall that Mr Donaldson said that the applicant might have better luck representing himself. The context following the earlier consultation leading to Mr Donaldson's remarks in court pressing for a ruling on the abuse of process application was 'Well this ruling has gone against you. Where do we go from here?' Mr Boyd could not recall the remark which Mr Neville noted 'the judge has seen other judges'. Mr Boyd said that would be a ludicrous thing to say and it would have been an allegation of impropriety. Mr Boyd was disappointed about leaving the case. Counsel left on the basis that there was a discussion which turned on the applicant having a better chance on his own. Mr Donaldson was not adamant in saying that he was not going to represent the applicant. If the applicant had asked him to stay he would have done so. Mr Boyd did not recall any discussion about the applicant representing himself and then asking for a new set out lawyers and aborting the trial; about the Crown not being able to close if the applicant did not give evidence; or about saying to the judge that he did not want new lawyers. He had a clear recollection that Mr Donaldson told the applicant he was not getting a fair trial. Mr Boyd said that in a sense he agreed with that advice bearing in mind the history of the events relating to the listing of the trial and the events before McLaughlin J, the disclosure issue and

the adverse rulings. He said looking back at it now he could not think what was actually unfair.

[76] Mr Boyd could not recall the reasons why the applicant presented a bail application to the Crown Court on his own. Mr Boyd did recall that the applicant wanted to do the jury challenges himself. He gained access to the jury list on Wednesday 19 October 2005.

[77] After conviction Mr Neville tried to instruct Mr Boyd in the appeal but Mr Boyd refused to take the brief because he had been part of the legal team formerly acting for the applicant.

[78] In reply to Mr Fitzgerald, Mr Boyd said that the applicant was never dissatisfied with the services being provided by counsel. Mr Boyd could not recall Mr Donaldson saying anything about the benefits or advantages of counsel staying in the case. Mr Boyd conceded that it was a very big decision and in retrospect it would have been better if the matter had been the subject of reflection overnight. He conceded that he thought Mr Donaldson possibly said something along the lines that he had been put in an impossible position. Mr Donaldson said that counsel had done all that they could and they could not take the matter any further in relation to the rulings. He had no recollection of Mr Donaldson saying that counsel had taken the case as far as they could. He said Mr Donaldson did say something like 'I suggest you would be better off representing yourself'.

[79] An attendance note of 30 November 2006 of a consultation between Mr Neville and the applicant prepared by Mr Neville was put to Mr Boyd:

> *"I had a frank discussion with Mr Donaldson QC and Mr Boyd BL. Mr Donaldson felt that due to justice being carried out in secret that it impinged upon his professionalism and he no longer felt that he could represent me properly and due to the prosecution going to the back door to see the judge and having the trial stopped.*
>
> *When the prosecution were not willing to disclose the reason as they obviously knew, Mr Donaldson felt that I was being railroaded, that I would be convicted and that the trial judge was more or less helping the prosecution in a disguised sort of way in relation to rulings etc.*
>
> *I went into court and told Judge Morgan that Mr Donaldson felt his position was untenable. When asked did I want new counsel, I enquired if the prosecution was going to tell the truth re: dealings with Mr Justice McLaughlin. I was told this would not be disclosed. I said that there was no point in being represented. In a nutshell Mr Donaldson told me that he felt he*

> *could not carry on to represent me in these circumstances. He advised me that I was being railroaded.*"

[80] Mr Boyd did not accept that the word railroaded was used as recorded in the note. He rejected the allegation by the applicant that Mr Donaldson had said that the trial judge was helping the prosecution in a disguised way in relation to the rulings.

[81] In reply to questions from the court Mr Boyd said that he did have misgivings about leaving the case. It was a formidable thing for a defendant to represent himself and it would be much better for a defendant to be represented. He did not at the time express his misgivings. Thinking back on it, he considered that his misgivings were offset by the applicant's withdrawal of his instructions. In retrospect a short adjournment and more rigorous investigation of the question of representation would have been better. Mr Boyd deeply regretted that he had not kept a full note. However, he did not think at the time that the applicant was unhappy with the situation and he was not blaming counsel. Mr Boyd did not interpret the applicant's actions as demonstrating that he was carrying out a manoeuvre for tactical reasons.

Ms McAllister's Evidence

[82] Ms McAllister on 13 June 2014 contacted Mr Donaldson following a review hearing in the Court of Appeal on 12 June 2014 in which it was directed that an affidavit from the applicant be served on Mr Donaldson. According to her evidence a spontaneous conversation took place over the phone with Mr Donaldson. She kept a note of the conversation, initially in handwriting and, after typing up the note, she disposed of the handwritten note. Ms McAllister accepted that in the course of the conversation Mr Donaldson may well have referred to the judge by his full title. Apart from that, she asserted that the note was fully accurate.

The Relevant Case Law

[83] In order to determine the outcome of the representation issue it is necessary to carefully analyse the clearly conflicting evidence given by the applicant and each of the members of the legal team. A conclusion on issues of fact must be made in order to determine the legal questions raised in this ground of appeal. It is necessary to understand the relevant principles to be applied in light of the established case law.

[84] In Randall v R [2002] 1 WLR 2237 Lord Bingham stated the following clear principle:

> "The right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross or so persistent or so prejudicial or so irremediable that an appellate court will

> have no alternative but to condemn a trial as unfair and quash a conviction as unsafe however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."

[85] Article 6 of the Convention provides:

> "Everyone charged with a criminal offence has the following minimum rights –
>
> (a) …
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or if he has not sufficient means to pay for legal assistance to be given it free when the interests of justice are required."

[86] In R v Nangle [2001] Crim Law Reports at 506 the Court of Appeal stated:

> "What Article 6 requires in this context is that the hearing of the charges against the accused should be fair. If the conduct of the legal advisors has been such that this objective is not met then the court may be compelled to intervene."

[87] Some guidance as to the relevant principles can be obtained from a number of Privy Council cases. These authorities must be read with caution since the context in which they were decided was somewhat different from the legal context arising in the present appeal. The constitutional provisions in the countries from which the appeals came do not give rise to rights which are identical to those arising under Article 6.

(a) In Robinson v R [1985] 1 AC 956 in a Jamaican murder trial counsel did not turn up on the first day of trial. On the second day of trial one of the counsel appeared but sought leave to withdraw because he would not act as counsel had not been fully paid. The judge offered counsel the legal aid assignment but he declined it. The defendant's counsel withdrew and the trial began without the defendant being represented. He was convicted and sentenced to death. The majority (Lords Keith, Roskill and Templeman) held that it was not necessary for an adjournment always to be granted in order to ensure that

any defendant in a criminal matter who desired legal representation was duly represented. The judge had to consider other relevant matters including the availability of witnesses. The defendant's situation was caused by counsel and also by the defendant's own failure to pay counsel. The judge's refusal to adjourn to enable the defendant to instruct an alternative counsel did not deprive the defendant of his right to be permitted to defend himself by a legal representative of his own choice. In a powerful dissenting judgment Lord Scarman and Lord Edmund Davies considered that there can be no greater public interest than that a man facing a death sentence has a proper opportunity of defending himself. This opportunity must include the option of defence by counsel.

They said:

> "It is difficult to imagine a more serious turn of events for an accused facing a capital charge than to be abandoned mid-trial by his legal advisors and to be denied by the court an opportunity of replacing them." (emphasis added)

There can be little doubt that the approach adopted by Lord Scarman and Lord Edmund Davies would stand up to greater scrutiny in an article 6 context than the opinion of the majority.

(b) In Dunkley v R [1995] 1 AC 419 counsel for the first defendant objected to the admissibility of a form relating to an identification parade. When the judge would not hear him on his objection he said that he was going to withdraw from the case to which the judge replied 'You may do as you please'. Counsel then withdrew. The judge did not consider whether an adjournment to enable the first defendant time to seek alternative representation should be given. The judge continued with the trial notwithstanding that the defendant complained that he was not capable of representing himself. The Privy Council held that while the Jamaican constitution did not confer an absolute right to a legal representative throughout a trial it was highly desirable that such a defendant should be continuously represented where possible; that the judge should do whatever was possible to persuade counsel not to withdraw during the trial. If the proposed withdrawal arose from an altercation the judge should consider whether to adjourn the trial for a cooling off period and, in any event, he should only permit withdrawal if satisfied that it would not cause prejudice to the defendant. If a defendant was left unrepresented through no fault of his own the interests of justice required that in all but the most exceptional cases there should be a reasonable adjournment to enable him to try to obtain another legal representative. Lord Jauncey delivering the reasoning of the Privy Council stated that:

> "The judge did not exactly encourage counsel to withdraw but he made no attempt to dissuade him and it does not appear that he considered the possibility of the first defendant trying to obtain alternative representation." (emphasis added)

Indeed, the judge allowed the trial to proceed as though nothing had happened without even so much as an adjournment. The Lordships stressed that there were three factors which led them to their decision to quash the conviction. Firstly, the judge made no attempt to persuade counsel to remain, allowed the case to proceed as though nothing had happened, gave no adjournment even to the next day and gave no opportunities to the defendant to obtain alternative representation. Secondly, the prosecution wrongly and improperly referred to identification evidence from a witness whom they did not call. The defendant did not appreciate his right to object and move for a retrial. Thirdly, the withdrawal of counsel deprived the defendant of the advantage of competently cross-examining a key witness. Lord Jauncey stated:

> "The cumulative effect of those three matters is such as to lead their Lordships to the conclusion that the conviction of the first defendant was unsafe and cannot be sustained. Their Lordships would, however, wish to make it clear that while the facts in this case warrant the foregoing conclusion it by no means follows that the same consequences would flow where the appellant's only complaint was that he had been left unrepresented at some stage in a trial." (emphasis added)

(c) In Mitchell v R [1999] 1 WLR 1679 the defendant in a capital murder trial was assigned to counsel under the Poor Prisoner Defence Act. On the second day of trial after the second witness for the prosecution had given evidence the defendant's leading counsel told the judge in the presence of the jury that the defendant wished to cross-examine the witnesses himself. She asked the judge to allow her to terminate her assignment. The judge told the defendant that if he rejected his existing counsel he would be on his own and that the judge would not provide him with different counsel. The defendant made allegations against his leading counsel and it became apparent that he did not wish to continue with either of his counsel and no longer wished them to represent him. He said that he would represent himself. He did not apply for an adjournment to investigate whether other counsel could act for him and he was not advised to do so by counsel or the judge. The judge permitted both counsel to withdraw and the trial proceeded without the defendant being legally represented. He was assisted by the judge in questioning witnesses but did not understand the correct court procedures and was at times confused. He had little opportunity to establish his alibi. He failed to indicate

two errors in the judge's summing up. The Privy Council quashed his conviction. On their analysis of what had happened at trial counsel's withdrawal could not be said to have been the result of any fault on the part of the defendant. One thing that was clear to the court was that his counsel in all the circumstances did not wish to act for him. He was not content to continue with them. Their Lordships rejected the prosecution argument that the criticism of counsel was all an attempt to manipulate the proceedings so as to get rid of counsel. To attribute all of the responsibility for what happened to the defendant as having of his own volition dismissed counsel seemed to the court to be putting it too heavily against the defendant. His comment that counsel did not want to defend him seemed accurate. The trial judge had told the defendant firmly that he would not provide alternative counsel. This meant that the defendant was left with no other choice than to continue either with the existing counsel or to do the case himself. The judge could not have been satisfied that the defendant would not or at any rate might not suffer prejudice by the withdrawal of counsel. Their Lordships were satisfied that there should have been an adjournment to see whether other counsel were able to represent him or at least to advise him as to the courses open to him. It was only after such advice that he could properly reflect on what he should do in the situation in which he found himself (per Lord Slynn at [1999] 1 WLR 1679 at 1688 A-B.)

(d) In Jahree v State of Mauritius [2005] 1 WLR 1952 counsel did not turn up at the trial at the first and second time of listing. The defendant sought time to find alternative counsel. The Magistrate refused to adjourn the trial and the trial proceeded. The defendant was convicted. The case was considered by the Privy Council to be a simple and straightforward one. The defence was not a denial of the basic facts proved by the prosecution but consisted of an allegation that counterfeit notes had been planted by another person in the appellant's van. The Privy Council concluded that the overall fairness of the trial had not been successfully impugned. Thus in that case the total failure of counsel to turn up at the trial was not in itself sufficient to establish that the trial had been an unfair one or that the resultant verdict was unsafe.

[88] We must now turn to consider the domestic case law. In R v Lyons [1979] 68 Cr App R 104 the appellant was charged with perjury. At the end of the prosecution case he applied to the trial judge to dispense with counsel's services. The appellant's counsel made clear that he was not forensically embarrassed in continuing to act for him. The judge refused to hear the appellant's reasons for making the application concluding that the judge had a discretion whether to release counsel. The appellant was convicted and appealed on ground that the judge wrongly exercised his discretion in refusing the appellant's application to dispense with his counsel's services during the trial. The Court of Appeal held that although in most cases a defendant would be allowed to give his reasons for making such an application which would be allowed it was ultimately a matter for the judge's discretion. In that case it was impossible to say that the exercise of the judge's discretion was

invalidated by not allowing the appellant to give his reasons. Waller LJ giving the judgment of the court said:

> "The appellant tried to give his reasons. The learned judge refused to allow him to give them and it is easy to visualise possible reasons why the judge did that. Matters might have come out which might have been extremely embarrassing for the judge. It may well be that in most cases the appellant would be allowed to state his reasons. But at the end of the day it is a matter for the discretion of the judge."

[89] Waller LJ's in referring to the trial judge being potentially embarrassed by the defendant giving his reasons no doubt had in mind the point made in a later judgment in R v Ulcay [2008] 1 Cr App R 27. In the context of dealing with the issues arising from a withdrawal of instructions from counsel Sir Igor Judge P said:

> "When the judge is addressing these problems it is incumbent on the judge to be more reticent. It does not need much imagination to envisage the likely response if he had suggested that the process was being abused or manipulated. It would have formed the basis for an application for a new and separate trial before a new jury and an 'unbiased' judge."

These words have a particular resonance in the present case since serious and false allegations were being made that the judicial system was biased against the applicant; that the original trial date had been deliberately moved to disadvantage the applicant; that Coghlin J had been induced to recuse himself by the Crown; that McLaughlin J had acted improperly in seeing Crown counsel in Chambers and had improperly discharged the jury and recused himself. It is clear that Morgan J was fully entitled and indeed bound to be circumspect in how he handled the investigation of the withdrawal of counsel and in how he expressed himself. He should have been able to rely on the good faith and honesty of senior counsel.

[90] The case of R v Ulcay provides a helpful analysis of the duties of counsel and solicitors and the course of events to be followed in the case of withdrawal of instructions. In that case the appellant was represented by two counsel and solicitors. They ceased to represent them. The trial proceeded to conclusion with the appellant being convicted. The appellant was unrepresented. It was the appellant's case that the judge mishandled the problem which arose when counsel withdrew and that the effect of his ruling produced an unfair trial. Immediately before the appellant's case was due to be presented both counsel and solicitors applied to withdraw on the grounds of professional embarrassment. Fresh counsel applied to the judge for a transfer of the legal aid representation order subject to the limits of legal professional privilege. The judge 'rightly required the most detailed

possible explanation of those developments'. New counsel informed the judge that she was instructed that the appellant wanted the trial to start again in front of a fresh jury with fresh representation. She stated that the defendant wished to withdraw the admissions which he had made thus far. The judge in some detail recorded his own assessment of the way in which the trial had been conducted. He did not feel it possible to expect counsel and solicitors to continue to act for the appellant as they were put in an impossible professional situation. He believed that the application was motivated by the appellant's wish to have a separate trial before a fresh jury. The new counsel withdrew from the case because they considered the judge's timetable to continue the trial was too tight. The new counsel appeared, seeking a 7 day adjournment and were given a 3 day adjournment. They subsequently applied for a 2 week adjournment. When the judge refused the application the new counsel withdrew again on the basis that there was insufficient time to prepare. Thus the trial recommenced with the defendant unrepresented.

[91] Sir Igor Judge P stated at paragraph 24:

> "Our attention was drawn to the convention rights provided by Article 6(3) given full effect at common law, summarised by Lord Bingham in R v Jones [2002] 2 Cr App R 9 128 at 133, that the defendant should have sufficient opportunity to prepare his defence, and thereafter to defend himself or be represented at trial by a competent lawyer. All this is axiomatic and elementary. It is however equally elementary that the processes designed to ensure the fairness of his trial cannot be manipulated or abused by the defendant so as to derail it and a trial is not to be stigmatised as unfair when the defendants seeking to derail it is prevented from doing so by robust judicial control. Such a defendant must face the self-inflicted consequences of his own actions."

He went on at paragraphs 28 and 29 to state:

> "[28] By the time the trial starts there should be no confusion about the defendant's factual account or explanation of every essential issue. There was none here. At the end of the prosecution case when the defendant completely changed his instructions counsel was presented with an impossible situation if he could properly do so, of course he had to continue to represent his client, but there are occasions, and this was one of them when he could not do so. It is for counsel to decide whether, consistent with his obligations to his client, and the court, and the rules of his profession, he is so professionally embarrassed that he cannot continue with

> the case. If so, again consistent with the duties of the court, but without contravening the legal privilege which underpins his professional relationship with his client, he should inform the court of the situation, providing such explanation as he can to enable the judge to decide how to proceed. It is difficult to imagine cases in which it would be appropriate for the trial judge to direct counsel that he must continue with the case or refuse him permission to withdraw on the grounds of professional embarrassment if, having heard counsel explain his position, counsel remains un-persuaded that he may properly continue to act, not least because counsel will almost certainly be better informed than the judge, in particular because there are likely to be considerations which he may be unable to reveal …
>
> [29] If it needed reinforcing, this approach is fortified by reference to earlier decisions which examined the responsibilities of counsel where a defendant absconded during the trial. In R v Jones [1972] 56 Cr App R 413 and R v Shaw [1980] 70 Cr App R 313 it was recognised that it was the responsibility of counsel, not the judge, to decide whether he could continue to represent the defendant. The same principles apply here. In the extremely unlikely event that the judge has grounds for believing that counsel was not acting in good faith and in accordance with the obligation owed to the court, counsel's conduct should be referred to the Bar Council. Plainly where the applicant in question is a solicitor the reference should be to the Law Society."

[92] At paragraph 31 the court went on to point out that claims of a breakdown in the professional relationship between lawyer and client are frequently made by defendants and are often spurious. If the judge intends to reject an application for a change of legal representative he may well explain to the defendant that the consequence may be that the case will continue without him being represented at public expense. The simple principle remains that the defendant is not entitled to manipulate the legal aid system and is no more entitled to abuse the process than the prosecution. If he chooses to terminate his lawyer's retainer for improper motives, the court is not bound to agree to an application for a change of representation. In the end the ultimate decision for the court is case and fact specific. It does not follow from the repeated indication of the mantra 'loss of confidence' that an application will be granted. In particular the court referred to the observations of Judge Wakerley QC Recorder of Birmingham in R v Khan [10 July 2001] where he said:

> "Only in extremely rare cases and where full particulars are given in the application will a general ground of loss of confidence or incompetence be entertained. It must further be pointed out that it will not be sufficient simply to say that there is a breakdown in the relationship between solicitor and client. Many breakdowns are imagined rather than real or as a result of proper advice."

[93] Sir Igor pointed out that judges should seek to find a common sense solution to the kinds of problems to which the withdrawal of counsel can give rise, clearing up possible misunderstanding and as best they can introducing the calm and balance which can evaporate in a forensic process. At paragraph 35 he stated:

> "It would rarely be right for the trial judge midway through a trial to be required to engage in a personal discussion with a defendant about his defence and whether it was changing, or the state of the professional relationship with his lawyers, and certainly not if satisfied that the defendant was attempting to manipulate the process. All that can be said is that the judge can be relied on to do his best to resolve any problems in the sensitive and delicate situation which has developed where the potential for subsequent judicial embarrassment is huge. For example the evidence of the manipulative defendant, if he gives a trial under cross-examination can be anticipated 'I only said that because the judge persuaded me to do so' or 'the judge would not let me change my mind' or 'the judge ordered me to keep my lawyers when I had lost confidence in him'. And if observations like these were not made in evidence they would certainly with an accretion of elegance form part of grounds against conviction."

[94] The court at paragraph 37 et seq dealt with the question of the responsibilities of counsel and solicitors instructed in a criminal trial. It pointed out that counsel cannot choose his clients or more accurately cannot refuse to accept the instructions of a solicitor to act on behalf of the individual because of the nature of the charges he faces or because of his character and reputation. The cab rank rule is essential to the proper administration of justice. The cab rank rule, and the rationale which supports it, applies whenever and however late the barrister is instructed. The absence of what he regards as sufficient time for the purposes of preparation does not constitute an exception. Counsel's duty is to soldier on. In the case of a solicitor once the client is taken on the solicitor must continue to act for him unless some good reason for ceasing to do so emerges. The court could see no reason why the professional position of the barrister and solicitor could be distinguished. Both owe a duty to the court, both should comply with it. Both must soldier on. It is not a

good reason for ceasing to act for a client that a lawyer disagrees with the decisions of the court even if he believes that the order has caused insuperable difficulties for him or his client in the conduct of the defence. Sir Igor's reference to soldering on is echoed in what was said in R v HM Coroner for Western District of East Sussex ex parte Hamberg (Divisional Court) CO – 1878 (92)). The way the court expressed the obligations was that counsel had a duty to remain steadfast and remain at the inquest even if there was a hostile tribunal.

[95] In Ulcay the court held that the decision by the new counsel to withdraw from representing the defendant was wrong. The fact that they had acted wrongly however did not result in the appellant succeeding in his argument that he had been deprived of a fair trial. At paragraph 46 the court concluded that the case against the appellant was overwhelming. The logical explanation for his determination to manipulate the trial process was that he understood perfectly clearly that the prospects of an acquittal were vanishingly slight. At the end of the prosecution case he sought to withdraw the formal admissions made on his behalf by competent lawyers acting on his instructions; he sought to change his story; and he sought to reject his defence statement. The court concluded that his trial was 'as fair as he allowed it to be'. The conviction is safe."

[96] We were also referred to R v Jisl (99-078391) in which there was discussion of the consequences flowing from the withdrawal of counsel. In that case the defendant in question was charged with other co-accused in relation to the unlawful importation of heroin. G was instructed as his solicitor. He instructed senior and junior counsel. The co-accused were also represented by senior and junior counsel. On the second day of trial the relevant defendant dismissed his counsel. The judge told him it would be far better to keep his team and he gave the defendant an opportunity to discuss the matter with his family. After lunch leading counsel told the court that he was still in the case and would carry on and follow his instructions except when they were completely wrong. Subsequently, in chambers counsel told the judge the defendant had hardened his attitude and if counsel continued to act on his instructions it would indicate professional incompetence. Nevertheless, the case did proceed with counsel remaining. On the following morning senior counsel told the judge that the defendant had sacked his entire legal team and rejected both his lawyers and the court. The judge explained to the defendant the gravity of the situation and the consequence of sacking his lawyers. Counsel continued to act for a time. On day 16 of the trial the defendant said he wanted to represent himself. He was not happy with his defence but he would be content if the solicitor stayed on the case. Again the judge did everything to persuade the defendant to retain his counsel. After lunch counsel read a statement by the defendant saying that he wished to dismiss his counsel. The judge accepted the statement and allowed G to stay in the case. Thereafter, the defendant represented himself with the solicitor's 'admirable and committed assistance'. Subsequently, on 23 September the defendant indicated the difficulties he was facing. He felt it was impossible to get his defence sorted out. The judge pointed out the previous opportunities he had had to have representation and said the case had to proceed. His solicitor then indicated

the defendant was seeking a new QC and junior and, if necessary, he would take back his original senior and junior to which the judge said "that frankly is history now". Following his conviction the defendant in his appeal contended that the judge erred in the manner in which he dealt with the situation. In particular he should have done more to persuade counsel to stay in the case and/or should have discharged the jury and adjourned the case to enable the defendant to seek alternative representation by senior and junior counsel. The judge presented the defendant with only one choice between his being represented by his solicitor or representing himself. He never raised the possibility of alternative counsel. The Crown argued that the defendant was an intelligent and resourceful man who chose to represent himself with the effective assistance of his solicitor. The judge had gone to considerable lengths to persuade counsel to remain.

[97] At the outset the court was attracted by the Crown's persuasive argument that the defendant had only himself to blame for the position in which he was. The judge had gone to considerable lengths to persuade experienced counsel to remain and advised the appellant and on several occasions had stressed the desirability of keeping his counsel and the danger he would face if he chose to go it alone. The court rejected any criticism of the judge between 8-22 September. The court concluded however that on 23 September there was a significant development. The court considered that warning lights were flashing and the judge should have reconsidered the situation. Two events had already occurred which should have alerted the judge to reconsider the situation. The defendant had not gone so far as to say that he did not want to be represented by any counsel. Later in the day he said that if he could not have any other barrister, and if that was the law, the original counsel in the case could stay. The court concluded that the defendant had not been allowed to make an application to be represented by other counsel and when he attempted to do so the judge dismissed his application summarily. The judge did not give this possibility sufficient consideration and indicated that his mind was closed. The judge should have considered the possibility of inviting original counsel to make the application or requesting the solicitor to instruct counsel to make such an application or make it himself. After making other criticisms of the conduct of the trial the court concluded that:

> "While fully recognising that to a large measure the defendant was the author of his own undoing we have come to the conclusion that his conviction is unsafe."

[98] What is apparent from this overview of the relevant authorities is that it is necessary to examine carefully the precise circumstances and facts in the individual case. The outcome of the individual case cannot be determined simply by finding that a defendant was unrepresented or simply by finding that his lack of representation was caused by the failure of counsel to represent him. What is called for in each case is a careful scrutiny of the actions of the defendant, the legal representatives and the trial judge.

The judge's approach to the representation issue

[99] We have already noted what Mr Donaldson said when he returned to court following the consultation when the applicant and counsel decided to part company. It is clear that counsel led the court to believe that the applicant wished to discharge counsel. It is unclear from the inaudible portion whether he went on to say that the applicant wanted to represent himself. Counsel said that he did not intend to say anything about the reasons to which the judge replied "No". The transcript then reads:

> *"Donaldson: But I think when it comes eventually I think that Louis Maguire himself will explain, eh, perhaps his reasons for that.*
>
> *Judge: Yes very well.*
>
> *Donaldson: So I would ask your Lordships' leave then to withdraw from the case.*
>
> *Judge: Yes I see no reasons to um not to give you that leave Mr Donaldson.*
>
> *Donaldson: As your Lordship pleases, thank you.*
>
> *Judge: Mr Maguire.*
>
> *Maguire: Your Lordship.*
>
> *Judge: Um I assume that eh your counsel has explained to you that eh it is entirely your decision as to whether or not you wish to be represented by counsel and solicitor, do you understand that?*
>
> *Maguire: Yes.*
>
> *Judge: And that insofar as you may influenced to any extent by an ruling that I made or any other judge made then you are aware that in the event that you were convicted of an offence that you have a right of appeal in relation to that and that any rulings that were in error either made by me or by another judge would be the subject of scrutiny by the Court of Appeal and eh corrected by them on appeal if it ever came to that, do you understand that also?*
>
> *Maguire: Yes My Lord.*

The judge went on later to say:

> *Judge:* *All I am pointing out is that, um, it is inevitably a matter entirely for you as to whether in order to ensure that you get a fair trial that you surround yourself with assistance of counsel and solicitors which as a legally aided person you are entitled to do in order to protect your position both here and on appeal if it ever came to it.*

He later said:

> *Judge:* *….I am anxious to ensure that you get your trial and I am also anxious to ensure that, eh, if your trial should be fair as you, um, as it should be. Now I obviously have no, eh, it's not my job to tell you how you should conduct yourself in your own best interest, that is a matter for you and you have had a long talk to your legal advisors. Do I take it that you do not wish to consult with them further in relation to this matter, you don't want to talk to them?*
>
> *Maguire:* *I think I've had, we've had our final resolution is that I would be here myself My Lord.*
>
> *Judge:* *Then let me come back then to ask you the question as to when do you think that you would be in a position to proceed with this trial in front of this jury?*
>
> *Maguire:* *Eh, the most My Lord I think would be into the New Year."*

The transcript for that day concludes at that point although it seems likely that more was said. The case appears to have been adjourned to the next day, Tuesday 15 November 2005.

[100] The transcript for that day includes the following comments from the applicant:

> *Maguire:* *Your Lordship I fully expected that a full and open explanation as to why senior counsel went to see the trial judge, Mr Justice McLaughlin, it's never be given. In light of what Mr McKay has said it's clear that happened. Therefore, I*

have no confidence in this Crown prosecution team. I made this decision in response to the judge refusal to force the prosecution to tell the truth not on the basis that I want to represent myself but on the basis that I cannot have a fair trial within this trial. There are a lot of factual and legal issues for me to deal with in order to prepare myself for cross-examination. I am anxious for an early trial but one that is properly prepared. These are the most serious allegations, I want justice to be done and seen to be done. If His Lordship is mindful to force me to continue within this trial then I submit that justice is being dealt an injustice. Twenty-four hours ago I had no way of foreseeing myself forced into this extraordinary position. I believe to reinstate Mr Donaldson and our legal advisors untenable. A cloud of secrecy concerning the actions of the Crown prosecution has undermined their effectiveness to represent me within this trial. This is a large and complex case which would take professional legal and experienced people some months to prepare and I am now requesting two months My Lord.

He went on to say:

Maguire: *I had a frank discussion with Mr Donaldson yesterday.*

Judge: *Well you realise that I…*

Maguire: *I can't tell you what that is.*

Judge: *I don't want to hear what happened.*

Maguire: *Which I am not at liberty to disclose.*

Judge: *Yes of course, but you haven't made any point to me that you are dissatisfied with the quality of his representation and the team's representation for you. I just want to be clear that I have got that right.*

Maguire: *Well up until yesterday Your Lordship after that I can't disclose what took place between me and Mr Donaldson.*

Judge: *No of course not but you can indicate to me whether, if you want to and only if you want to, whether you are dissatisfied with the representation that you have obtained from your legal team so far.*

Maguire: *Well I was satisfied Your Lordship as far as they could take the trial, but after a frank discussion with Mr Donaldson yesterday I merely leave you to infer that something did arise and Your Lordship I would like to add that it was agreed between myself and Mr Donaldson that he felt his position untenable and I felt this intolerable.*

Judge: *And the position remains that if I give you the opportunity to look for alternative legal representation you would not take up that opportunity. That's what you said to me yesterday.*

Maguire: *The position would be if I was to go and say find new legal representation, that person would then be given probably longer than it would take me to prepare the case.*

Judge: *Well don't worry too much about that but yesterday I had asked you the question as to whether you intended to seek alternative representation if you had the opportunity to do so. And one of the factors that I have to take into account is that persons facing serious criminal trials are entitled to be represented in relation to their hearing. So the starting point is for me to find out whether it is your intention to seek alternative legal representation if you are able to do so.*

Maguire: *First I would need to know if the prosecution are going to come clean or am I going to be starting off where I left off.*

Judge: *Well, let me then put it this way. The abuse of process application as you know was dismissed yesterday.*

Maguire: *That's correct.*

Judge: *The position is as it was yesterday, if the trial proceeds on that basis, can I ask you do you intend to seek alternative legal representation if you are given the opportunity to do so?*

Maguire: *No.*

Judge: *Assuming that the trial should proceed on this basis.*

Maguire: *No My Lord.*

Judge: *What I am recording is that you do not intend to seek further legal representation if the trial is to proceed on the basis of the present rulings. Is that fair?*

Maguire: *That's correct My Lord, yes."*

The judge then went on to refer to the contents of the Crown book in which the court clerk's recorded in brief form what had happened at individual hearings. He then considered the list of witnesses to be called. When asked by the judge if the applicant was in a position to deal with the witnesses the applicant replied, 'No'. He said a lot of work had been left to Mr Donaldson and that the applicant had concentrated on the surveillance evidence. He said he was not at the moment prepared. He said the witness's evidence was tainted as one of the witnesses, a manager in the Argos store, had influence over the rest of the witnesses. He was a brother-in-law of the deceased. The judge pointed out that the applicant had decided not to retain counsel and said that the applicant had made no complaint about the fact that he had done his the job properly. The applicant agreed with that. The judge then referred to the covert surveillance evidence. The applicant said that there were legal questions of admissibility. The judge pointed out that Mr Donaldson had made no submissions in relation to that and that if Mr Donaldson had been retained he would have been in a position to deal with that. The judge then turned to the edited telephone conversations from the prison. The applicant said that there were nearly 1,000 phone calls and the prosecution had been cherry picking the phone calls. He said that he had not received the transcripts. A further disclosure application would be necessary. The applicant said that it was unbelievable that he was going to be able to deal on his own with all this stuff while the trial was ongoing. The transcript at 331 then records:

"*Judge:* *Well you have elected to dispense with your counsel Mr Maguire, it's a matter entirely for you as to whether you want to continue to do that but if you placed yourself in this position by doing so and dispensed with counsel whom were*

able to deal with these matters I have to take that into account in deciding how to proceed. Do you understand that?

Maguire: *Yes My Lord.* ***But you understand My Lordship what I have said is that I ... it wasn't a choice that I wanted to get rid of counsel. This is something that has been forced on myself.*** (emphasis added)

Judge: *But it has been forced on you because you disagree with the rulings made by Mr Justice McLaughlin and by me.*

Maguire: ***No My Lordship it has been forced on me by the actions of the prosecution.*** *It is nothing to do…. Your Lordship is just, you don't know what the reasons are why Mr Mooney went and seen the judge.* (emphasis added)

Judge: *Yes, but you are dissatisfied with the fact (interrupted)*

Maguire: *I have no confidence, eh, Your Lordship in this prosecution team.*

Judge: *Yes.*

Maguire: *They have sneaked across the road to see the judge behind my counsel's back and therefore …*

Judge: *But your position is that this trial should now be stopped and this prosecution team should not prosecute you further as I understand it?*

Maguire: *That's correct My Lordship, I mean I think by their own actions.*

Judge: *Just let me get it down, I have to take a note and I mean can I ask you, and correct me if I am wrong, that your view is that the only effective way to secure that now from your point of view is to dismiss your own team and in effect leave the trial having to be abandoned.*

Maguire: *That's correct My Lord.*

Judge: *Yes.*

Maguire: *Your Lordship it's the prosecution who brought this to bear by going to see the trial judge without informing anybody that they were going anywhere. We were here. I was ready to go and the next thing the trial judge comes in and dismissed the jury, gives no reason, comes in on Tuesday and dismisses himself, no reason, he is quite within his rights to do that and I respect that but for the prosecution to go … the only word I can describe it Your Lordship is sneaking in the back door. And for this trial to be stopped without reasons given to me leads me to believe that all is not above board. I mean I asked for an open and fair trial as I am entitled to under Article 6 and as far as I feel and believe I am not getting it.*

At a later stage in this transcript at page 337 the applicant then stated that he was in no way prepared for the trial. He was facing is a life sentence with a tariff of 20 years and he should be given every opportunity to prepare himself in light of the fact that it was the act of the prosecution that had him in this position not himself. The judge then went on:

"Judge: *Well, the other side of that in a sense is that you could still retain your counsel and still make these points in relation to the prosecution as soon as you know what the reasons are.*

Maguire: *Your Lordship I can't tell you all what took part with me and Mr Donaldson but all I can say, Your Lordship you can draw an inference from this, there was a frank discussion with me and Mr Donaldson and we both agreed that Mr Donaldson be taken out of the case. It wasn't just my decision it's because Mr Donaldson feels undermined by the actions of the prosecution and feels that he cannot take me any further. And his professional integrity has been impinged upon but the actions of Mr, the prosecution team. Your Lordship I find myself in this …*

Judge: *Sorry, just again so that … I don't want to ask you anything that I shouldn't as you in relation to Mr Donaldson but I can I think ask Mr Donaldson if it is the position that he feels or*

felt unable to continue because he had been undermined by the actions of the prosecution team. That's what you are telling me?

Maguire: *Yes that would be a fair assessment Your Lordship he feels that he cannot continue to properly represent me. It wasn't like.*

Judge: *Again I don't want to as I say I don't want to impinge at all on the conversations that you may have had but can I tell you what I am minded to do is to ask him to come back to court and indicate to me if, because he didn't indicate that to me when he left, but to indicate to me whether he felt unable to continue to represent you because he was undermined by the actions of the prosecution team.*

Maguire: *That's fair enough Your Lordship yep.*

Judge: *And it will be a matter for him as to whether he wants to answer that or not.*

[101] Notwithstanding the judge's suggestion that he was minded to ask Mr Donaldson to come back before the court to indicate whether he felt undermined by the actions of the prosecution team, he did not in fact do so. It appears that the judge rose to prepare a ruling on the application for the 2 month adjournment sought by the applicant and he sat again at 1.15 and gave his ruling. He pointed out that if such an adjournment were granted the jury would inevitably need to be discharged. The jury had heard evidence from 57 witnesses so far and had been hearing the case since 20 October 2005 in respect of charges arising in January, March and June 2003. Both the first and second named defendants had been in custody for substantial periods. There was clearly a substantial public interest in continuing with the trial as long as the trial remained fair to the applicant and the other accused and the other accused had an interest in ensuring that the trial continued.

[102] He then considered the remaining evidence and pointed out that there was some outstanding disclosure issues which the applicant wished to raise with Coghlin J and he would need time to organise his papers and prepare himself. He recorded that the applicant had indicated that he would not avail of an opportunity to seek alternative legal representation. The judge said that he concluded that a fair trial could be secured within the context of the existing trial but it was necessary to make various allowances for the defendant to secure his position. He then gave certain directions about the future conduct of the trial.

Analysis of the Evidence

[103] There is a considerable conflict between the evidence of the applicant and that of Mr Donaldson, and to a lesser extent, the evidence of Mr Neville and Mr Boyd. Mr Donaldson's evidence in his affidavit and oral evidence is in significant respects inconsistent with what he said to Ms McAllister and in earlier communications.

[104] There is no satisfactory complete record of what transpired during either the last or penultimate consultations involving the applicant. The failure of the lawyers to properly record what was discussed and agreed at the consultations and what instructions were given by the applicant represented a serious breach of duty on their part. It is particularly important to keep a clear and precise note of consultations in which instructions leading or potentially leading to the withdrawal of instructions occur. In any case where a defendant is involved in discussions touching on dismissal of counsel or withdrawal of instructions from his solicitor or counsel a proper note should be kept recording accurately what is said by the client and by the members of the legal team, what advice is being given and what warnings had been given to the client as to the consequences of counsel's or solicitor's instructions being withdrawn. The client should be asked to sign the note as an accurate record of the discussion. Such a note should provide a clear and accurate record of what transpired. It may become a relevant document in a later case or in appellate proceedings. It will provide a protection for lawyers faced with a false allegation of incompetence or misleading advice. It will also provide a protection for a defendant who has, in fact, received misleading, inaccurate or improper advice from his lawyers. A trial judge faced with an application by counsel to withdraw or an application by the defendant to dismiss his legal team should always enquire from counsel whether a full and accurate note signed by the defendant has been kept of any discussions leading the application. If a defendant refuses to sign a consultation note his refusal should be noted and both counsel and solicitor should record (a) that the defendant has been asked to sign the document but has declined to do so and (b) any reasons given by the defendant for refusing to sign the note.

[105] If the foregoing steps had been taken in this case then this court would not have been faced with the task of trying to ascertain what actually transpired in either of the relevant consultations. It is clear that in the penultimate consultation no note was kept at all of what was said by the defendant or counsel. As far as that consultation is concerned we have reached the conclusion on the evidence that Mr Donaldson consulted with the applicant in the absence of junior counsel. Notwithstanding Mr Donaldson's evidence that Mr Neville was present, we also conclude that Mr Neville was probably not present. Mr Neville had no recollection of what was an important consultation. It was during that consultation that there were intimations of the possibility of counsel leaving the case.

[106] Mr Donaldson informed the court that he had instructions not to proceed further with the trial until a ruling was given on the abuse of process application.

While the applicant denied that he gave any such instructions he did make clear that he wanted a ruling before the case went any further. We are satisfied that he did make clear to Mr Donaldson that he should insist on getting a ruling before anything else was done in the trial. We are satisfied that Mr Donaldson accurately informed the court that his instructions were not to proceed until a ruling was given.

[107] We closely observed the applicant and his demeanour during his evidence in this court. We are satisfied that he is a very determined, intelligent, shrewd, cynical and manipulative individual. He lies when it suits him. Accordingly we must approach all his evidence with great caution. We are satisfied, as set out below, that he lied in relation to a number of aspects of his evidence. It is clear that he was familiar with the criminal legal process. He was able to refer to legal terms and concepts with ease and understanding. He had an evident understanding of legal tactics and ploys. He was no mere novice or ordinary lay man at sea in an unknown world. He knew his legal rights which he turned to his advantage when he wished to further his purposes or when he thought it would enhance his chances of securing an acquittal. Thus, for example:

(a) At the earlier stages of the proceedings he insisted on a preliminary investigation rather than a preliminary inquiry. This necessitated the calling of, inter alia, two eye witnesses who had actually witnessed the shooting of the deceased. Not merely would this requirement have caused them upset and worry at having to attend court and to relive the experience as witnesses the requirement that they attend would have been intimidatory since they would have known they were being required to attend court at the behest of the defendant who was believed to be the man who had murdered the deceased. Having been called as witnesses they were in fact asked no questions on behalf of the applicant. The applicant said that "that's the tactic deployed by most counsel … to keep their powder dry and keep the witnesses from the box".

(b) Notwithstanding that he had been assigned counsel and solicitor for the trial he decided to make a bail application before Hart J in the Crown Court in person. This he did in a perfectly competent way. He decided to represent himself because he thought that to do so would enable him to get his point across to the court in person more effectively than if he was represented.

(c) He decided to carry out the jury challenges himself at the beginning of the trial before Morgan J. He asserted that this was to ensure a fair trial but, if his evidence is to be believed, he said it was his intention to secure, if possible, a Catholic jury and to exclude Protestants. Thus to achieve a "fair" trial he was quite happy to manipulate the process to what he considered would be to his advantage. Another possible and likely interpretation of his decision to do the jury challenges in person is that that would bring to the notice of the members of the jury that he had seen their names and addresses in the jury list.

(d) He decided to present a judicial review in person in relation to the removal from him of legal papers following the unfortunate delivery to him of sensitive material (apparently sent to him in error by his solicitor). Although the sensitive material was returned unread by the other parties wrongly in receipt of it, he read the material.

[108] A recurring theme of complaint by the applicant throughout the legal process was that he was not getting "a fair trial" and that he was not being fairly treated. He sought to portray the events surrounding the listing of the trial; the assignment of trial judges; the adjournment of trial dates; the discharge of the jury by McLaughlin J and his recusal and that of Coghlin J as a conspiracy by the prosecution designed to undermine the fairness of the process and that they were aimed at improperly securing a conviction in a case where the evidence was weak and flimsy. What must be borne in mind is that the word "fair" conveys different things to different people. The reality of this case is that what the applicant resented was anything which, in his mind, reduced his chances of acquittal. Anything that did that was not, in his view, "fair." His idea of what was a fair trial was not the same as that of the fair minded and informed observer. A fair trial is a trial conducted fairly and lawfully in accordance with the existing rules of evidence, subject to ultimate review by the Court of Appeal charged with reviewing the legality and fairness of the trial process. We entirely reject he applicant's assertion that he always regarded and was advised that the case was a weak and flimsy one. We are satisfied on the evidence that he was never told by Mr Donaldson that he would be acquitted. The Crown case was a formidable case, as the applicant must have appreciated. We are satisfied that he was so advised by his legal team. Against the background of a strong case the applicant's resentment against the so called "unfairness" of the trial was in reality based on his resentment at the events and rulings during the trial which reduced his chances of acquittal as the case proceeded.

[109] The applicant's complaint that the process was unfair had no legitimate basis or justification, as counsel and the solicitors should have fully appreciated. As far as the change of date of trial is concerned the move was brought about because of clashes of trial dates, a common problem facing the listing judge. This had been made clear to Coghlin J as Mr Donaldson should have been aware since his instructing solicitor must have been clearly present before Coghlin J and the court note indicates the presence of at least one senior counsel for a co-accused. Accordingly, we reject Mr Neville's assertion that he never found out why the case was moved. As all practitioners fully appreciate, the fixing of criminal trial dates frequently present logistical and procedural difficulties. Hart J's decision to move the date was the kind of trial rescheduling that regularly happens without any sinister motivation. The move to 4 April evidenced no ulterior plan by the prosecution to reschedule the case to take advantage of the new bad character laws. The offensive proposition that Hart J had been "got at" to change the date to assist the prosecution, if it was ever believed, had no basis whatsoever. The subsequent recusal of Coghlin J was brought about by an application by both the Crown and the

defence following a late Section 8 application for disclosure brought by the defence which resulted in the judge having to see a substantial number of documents which led him to believe that he should not act as trial judge. His recusal was sought both by defence and prosecution. It is very regrettable that any counsel should have given any support or lent credibility to any allegation of wrong doing by any of the judges or the Crown.

[110] Much was made by the applicant of the discharge of the jury by McLaughlin J without the giving of reasons and his subsequent recusal. While counsel were fully aware that an ex parte application can be made by the Crown to the trial judge in certain circumstances leading to the discharge of the jury, they never made this clear to the applicant nor did they make clear that the Crown were to be presumed to be acting properly in the situation which led to the discharge of the jury. Mr Donaldson accepted that where the convention rights of others were an issue it would be proper for the Crown to bring the matter to the attention of the judge ex parte leading to a discharge of the jury. For the purpose of this appeal we have carefully considered the circumstances in which McLaughlin J did discharge the jury and we have already in an open judgment given our reasons why the decision of McLaughlin J was entirely proper and why there was no impropriety by the Crown affecting the fairness of the trial before Morgan J.

[111] There were no other justifiable complaints of unfairness in the trial process. While the trial judge made adverse evidential and procedural rulings in the course of the trial prior to the discharge of counsel all such rulings are subject to review by this court in the ordinary way. The judge's rejection of the abuse of process application arising out of McLaughlin J's discharge of the jury was entirely correct. Accordingly, notwithstanding the complaints so strongly voiced by the applicant and which counsel did nothing to dispel and much to encourage there was no procedural unfairness as at 14 November 2005. We are entirely satisfied that there is no substance in the argument that the trial judge wrongly failed to investigate the circumstances in which McLaughlin J discharged the jury and stood down as trial judge or in the argument that the trial judge should have insisted on the giving of reasons by McLaughlin J for his decisions. The trial judge had to make a judgment on the best way to handle the abuse of process application brought by the applicant in relation to the aborting of the second trial. He was entitled to rely on the presumption that the previous trial judge and the Crown acted lawfully and properly knowing that ultimately this court would be able and bound to review the entire process. The trial judge could foresee the real risk that further investigation by him would greatly enhance the risk of a further recusal application in the third trial as the judge would have become involved in the kind of closed hearing which this court had to conduct and would be open to the allegation that he, too, was being given access to material withheld from the defence. We are satisfied that the course adopted by the trial judge was entirely proper and has in fact resulted in no unfairness since the applicant had a trial with the right to challenge in this court all rulings, including those made by McLaughlin J in the course of the jury discharge application.

[112] Following the trial judge's refusal of the abuse of process application Mr Donaldson sought a brief adjournment to consult. We must now reach conclusions as to what transpired at that consultation. We can say at the outset that Mr Donaldson gave differing versions of the events which contained inconsistencies.

(a) According to his affidavit and oral evidence he asserted that he never felt Morgan J was not giving the applicant a fair trial; he never expressed such a view; he never said his position was untenable; he never said the judge's rulings were awful; he never said he did not have the chance to represent the applicant; he never used the word "railroad"; while the rulings on evidence were strict they were not in any way unfair. He did advise the applicant that he was bound to be convicted on the evidence. The applicant felt that there was little to be achieved by the defence team continuing and he could do no worse if he represented himself and it was agreed by all present that he could do so if that was his wish. Mr Donaldson had no recollection of telling him that he could ask for a new team which might result in a collapse of the trial.

(b) In an email of 14 June 2014 addressed to the applicant's solicitors Mr Donaldson said that the judge's evidential rulings evidenced draconian inflexibility unrelieved by the exercise of discretion. He admitted hearsay evidence from a person of dubious credibility, this particular ruling standing out "because of its striking unfairness".

(c) In his conversation with Ms McAllister he said that Morgan J's decisions were too severe and the way in which he let in hearsay was appalling.

[113] Mr Donaldson's evidence conflicted with that of Mr Neville in key aspects. Mr Neville said that it was the collective view of the legal team that the applicant could not be guaranteed a fair trial. He considered that it was Mr Donaldson's decision that he should leave the case. Mr Neville stood over his note that Mr Donaldson said that it was his view that the prosecution had seen the judge and that the judge had seen other judges.

[114] Mr Boyd's evidence was that there was discussion about the various rulings and counsel's frustrations with them and that Mr Donaldson suggested to the applicant that "we were frustrated by the various difficulties and told him we were doing all we could and that the applicant might have more success representing himself". There was a discussion which turned on the applicant having a better chance on his own. Mr Donaldson did say that the applicant was not getting a fair trial. Mr Donaldson possibly did say something along the lines that he had been put in an impossible position and that counsel had done all that he could and they could not take the matter any further in relation to the rulings. He thought Mr Donaldson did say that the applicant would be better off representing himself.

[115] In certain respects the evidence of Mr Boyd and Mr Neville support some of the allegations made by the applicant. However, the applicant added certain matters not supported by any of the legal team and some of which were not raised in his affidavit. He asserted that Mr Donaldson was adamant that he would not represent him. He claimed that he was advised that if he asked for a new legal team it would cause the trial to collapse. If he was asked by the judge if he wanted a new legal team he should say no and if he asked for it later he could cause the trial to collapse. He said Mr Donaldson said that he could say things which counsel could not and that he had a great mastery of the papers. He claimed that Mr Donaldson said he would not be available in January. When there is a factual dispute as to the applicant's evidence we need to look for some independent support for it before we can give his evidence credence.

Factual Conclusions

[116] We have reached the following conclusions and make the following findings in the light of our analysis of the evidence and our view of the witnesses:

(a) At the penultimate consultation between Mr Donaldson and the applicant, the applicant was clearly giving an indication that he expected counsel to follow his view as to the way in which the trial should be conducted, by obstructing progress if necessary. We are satisfied that the applicant was trying to manipulate the trial process to his own advantage.

(b) As a result of what had transpired in the penultimate consultation, following the adverse ruling Mr Donaldson felt the need to take further instructions from the applicant in the light of his attitude in the penultimate consultation.

(c) The applicant was in a belligerent frame of mind induced by yet another adverse ruling. He was vigorously maintaining that he was not getting a fair trial.

(d) Mr Donaldson did advise the applicant at the outset that he was going to be convicted on the evidence. He did say that the prosecution had gone to see the judge (a reasonable inference from the way in which he had put the matter before Morgan J.) He did say something along the lines that the judge had seen other judges. Even taking the most charitable view of Mr Donaldson's reason for saying that, he was doing nothing to defuse the applicant's allegation of a form of judicial conspiracy against him. Mr Donaldson did not say anything to emphasise that there was no evidence of any conspiracy or wrongdoing by the Crown or by judges. Nor did he remind the applicant that he could seek to challenge rulings and procedural steps in the trial in the Court of Appeal.

(e) He did say to the applicant that he was not getting a fair trial. Notwithstanding Mr Donaldson's denial of having said anything like that

both Mr Neville and Mr Boyd in their evidence did say that they thought that the applicant was not getting a fair trial or could not be guaranteed a fair trial. There were no justifiable grounds for saying that. In saying that he was not getting a fair trial Mr Donaldson was reinforcing what the applicant already was claiming. The applicant's conception of an unfair trial was one where things were going against the applicant and reducing his chances of acquittal.

(f) Mr Donaldson suggested in the consultation that the applicant might have better luck representing himself.

(g) Mr Donaldson did say something to give the impression that he considered himself to be in an untenable or impossible position because of the prosecution going to see McLaughlin J and not revealing what had been going on. He had no grounds for saying that.

(h) Mr Donaldson did lead the applicant to believe that he no longer felt able to properly represent the applicant.

(i) Mr Donaldson did not give any advice to the applicant as to the reasons why self-representation would be a bad or unwise course to take. He did nothing to persuade the applicant to continue with his legal team.

(j) We are not satisfied that Mr Donaldson said the applicant was going to be railroaded. Both the applicant and Mr Donaldson believed that on the run of the evidence and in the light of the rulings conviction was inevitable.

(k) We are not satisfied that Mr Donaldson did say in terms that the judge was more or less helping the prosecution in a disguised way in relation to rulings but we are satisfied that Mr Donaldson expressed himself in such a way as to imply that the judge was making adverse rulings that were producing unfair consequences to the applicant.

(l) We reject the applicant's evidence that senior counsel told him that if he asked for a legal team it would cause the trial to collapse or he could run the case himself for a while then ask for a new legal team and cause the trial to collapse. If senior counsel did say such a thing it would be tantamount to attempting to pervert the course of justice and conspiring with the applicant to pervert the course of justice. Both Mr Boyd and Mr Neville refuted the suggestion that that was said, as did Mr Donaldson himself. However, we are satisfied that Mr Donaldson knew that if the applicant took over representing himself it would create significant problems for the court in conducting the trial and he knew that problems could arise out of self representation resulting in the trial collapsing. The applicant who had considerable experience of criminal trials and who, on his own evidence, listened to prison gossip about trials would have fully appreciated how a defendant acting in person could try to manipulate the process to his own end. Mr Donaldson

would have understood that the applicant had sufficient understanding of the situation to appreciate all that.

(m) We are satisfied that Mr Donaldson did say to the applicant that if he was representing himself he could say things which counsel could not. Support for this conclusion can be found in the fact that senior counsel for the co-accused, Mrs Maguire, had said exactly that as recorded in the solicitor's much fuller note of the consultation between Mrs Maguire and her senior counsel during the same lunchtime break before the last consultation between Mr Donaldson and the applicant. It seems clear that counsel for all the co-accused were making common cause in relation to alleging unfair process and it is likely that Mr Donaldson and Mrs Maguire's senior counsel did have contact on these issues. Furthermore, Mr Neville was acting for all the co-accused. Mr Donaldson's comment was an encouragement for the applicant to go down the route of self-representation. It was advice aimed at persuading the applicant to go down the route of self-representation.

(n) We have not been persuaded that Mr Donaldson said that if the applicant represented himself and did not give evidence that would have the advantage of preventing the Crown from making a closing speech. The applicant did not make this allegation in his affidavit or mention it in his attendance note of 30 November 2006.

(o) We are satisfied that neither Mr Neville nor Mr Boyd said anything to the applicant during the consultation which was entirely led by Mr Donaldson.

(p) We are satisfied that Mr Neville did not consider the question whether he should remain in the case or whether, if he did so, he could assist the applicant in presenting his case even if the applicant felt determined or was persuaded to represent himself without counsel during the trial.

(q) While we are satisfied that no member of the legal team suggested that the applicant should carefully reflect on any decision to go down the route of self-representation, did not give the applicant time to reflect on the issue and gave him no grounds to think about before he committed himself to self-representation, we are satisfied that the applicant had made it clear that he was determined to go down that route. His answers to the judge as set out in the transcript make it clear that he regarded the decision as his own determined decision.

(r) We are satisfied that Mr Donaldson did praise the applicant for his command of the papers and the case and that he did so in order to encourage the applicant to feel that he could cope with self-representation.

(s) When Mr Donaldson returned to court he informed the court that his client wished to discharge counsel and that he did not intend to say anything about

the reasons. Mr Donaldson was aware that that was intended to be understood by the court as a coded message that his instructions had been withdrawn and that there were good professional reasons why Mr Donaldson felt he had to withdraw from the case. He did not have good professional reasons to withdraw. The client had not put counsel in any ethical dilemma nor had the client indicated that he had lost confidence in his counsel. Mr Donaldson's statement to the court implied the contrary to the judge. Mr Donaldson must have fully appreciated that the court would necessarily be reluctant to press counsel to divulge anything covered by legal professional privilege. He knew the court would be unlikely to press him to say much more. He knew that his status as a senior counsel was such that the court would assume that he was acting entirely properly. He was not.

(t) Following Mr Donaldson's withdrawal the judge said to the applicant that he assumed counsel had explained that it was entirely the applicant's decision as to whether he wished to be no longer represented by counsel or solicitor. The applicant stated that it was his own decision.

[117] The findings we have made impel us to the conclusion that neither senior counsel nor Mr Neville acted in a proper and acceptable professional manner during the last consultation. The quality of note taking was lamentable. In the absence of a full note Mr Donaldson and Mr Neville claimed not to have a clear recollection of the precise sequence of events and of what was said or not said. On occasions the witnesses could say with certainty that certain things were definitely not said (for example it was vehemently denied that advice was given about "pulling" the trial by asking for legal representation). On other occasions witnesses said that certain remarks could have been said (for example that the applicant could have been told that he could say things that counsel could not). We are satisfied that the witnesses must have had a clearer recollection of events in relation to what was a unique situation than they were prepared to concede.

[118] Mr Donaldson must carry the main responsibility for what happened as a result of the discussion in the last consultation. Mr Boyd and Mr Neville placed the main responsibility on Mr Donaldson's shoulders and sought to distance themselves from his advice to the applicant to represent himself. In the case of Mr Neville he completely overlooked his responsibility as the solicitor on record for the applicant. He provided no separate advice to the client. By his presence and by his tacit support for Mr Donaldson's approach he encouraged the applicant to represent himself. Quite apart from the problems and difficulties that this was going to create for the applicant himself the fact that he would be representing himself was bound to have implications for the co-accused for whom Mr Neville also acted. He failed to appreciate the potential conflict between the course being encouraged by Mr Donaldson and the interests of his other clients. In November 2006 he was willing to take on an appeal for the applicant in a situation at least partly of his making (one of the grounds of the appeal being that counsel had withdrawn from

the case improperly). This gave rise to an obvious conflict of interest. He tried to instruct Mr Boyd who properly recognised the conflict of interest.

[119] It is clear from Mr Boyd's evidence that he entertained misgiving as a result of the withdrawal of legal representation. It was, as he said, a formidable thing for a defendant to represent himself. It would, as he said, be a much better thing for the defendant to have someone to act for him and to be represented. Mr Boyd did not express his misgivings at the time to Mr Donaldson or Mr Neville and in retrospect he regretted not doing so. He 'sort of satisfied himself that it was the applicant's decision at the end of the day'. He accepted that in retrospect the suggestion of a short adjournment with a more rigorous consideration of the matter would have been much better for the applicant. He readily accepted the court's proposition that the fact that the applicant was strong minded and opinionated cut both ways because he might be the sort of man who had a particular need for good advice. An opinionated and strong willed individual may make bad decisions and jump to wrong conclusions and that he is, perhaps, the very sort of person who needs a clear and firm legal hand assisting him. He accepted that in retrospect that firm hand was not provided. When senior counsel is giving advice to a client junior counsel can find himself in a difficult situation when he is not in full agreement with his senior. He may feel constrained from saying anything in the presence of the client. This does not discharge him from the duty after the consultation to voice his concerns with senior counsel and ensure that his concerns are properly recorded in a note. Senior counsel in this case should have discussed with junior counsel and Mr Neville the course he was proposing to take during the consultation before he met the client. Mr Donaldson had already formed an intention before the consultation started to try to engineer his release from the case. There is no evidence that this strategy had been discussed with junior counsel before the consultation stated. It was open to Mr Boyd following the consultation to express his misgivings to his solicitor and senior counsel, to advise time for reflection and to seek to persuade senior counsel not to withdraw from the case until the parties had time to reflect on the matter overnight. As it was, an overnight adjournment was necessary and inevitable in any event.

[120] We must reach the conclusion that for some reason Mr Donaldson had decided that counsel should withdraw from the case. We do not know the precise reason for that. What is clear is that he had no proper or legitimate basis for allowing the situation to develop, as he did, to bring about his release from the case. We are satisfied that he did so. He started the consultation by telling the applicant that he was inevitably going to be convicted. In the light of the evidence and the rulings this advice could not be said to be wrong. He backed up that advice by attacking the integrity of the legal process and the prosecution feeding the applicant's sense of grievance. He supported it further by telling him in terms that he could not expect a fair trial. He encouraged the applicant to represent himself. He led the applicant to believe that there was nothing more counsel could do. He encouraged the applicant to believe that he could have better luck on his own and could achieve tactical advantages by doing so. In brief he sought to bring about a release of counsel from

the case in such a way as to throw the blame for that on the court and the prosecution.

[121] These conclusions and findings do not of themselves lead inevitably to the final conclusion that at the end of the day the defendant was denied a fair trial and that the verdict in the case was unsafe. It is necessary to analyse what thereafter transpired in the trial process. We must determine whether the applicant himself by his own actions manipulated the trial process in such a way that, absent other procedural and evidential unfairness, he cannot complain of unfairness arising from the fact that his counsel withdrew from the case and that he represented himself.

[122] Following the withdrawal of counsel, when asked by the court if counsel had explained that it was entirely his decision whether or not he would be represented by counsel and solicitor the applicant said yes. Thus he represented to the court that it was his own personal decision. The judge did allow the matter to be adjourned overnight. During that period while the applicant did not have legal advice he clearly did not change his mind on his decision to go down the route of representing himself. In requesting a 2 month adjournment, if granted, the applicant knew that it would result in the trial having to be stopped and a fresh jury called later. We consider that this was a ploy by the applicant to obstruct the trial and cause it to collapse. He was clearly given the opportunity by the judge to look for alternative legal representation and he deliberately declined to ask for such representation. There can be no suggestion that the judge was forcing the case on without allowing the applicant an opportunity to seek fresh representation. The applicant made a conscious decision, against the judge's offer, to insist on going on with the case on his own. In his evidence he accepted that he wanted the trial stopped and he wanted the prosecution team removed. He did accept that he considered the only effective way to secure that was to dismiss his legal team which he thought could lead to the trial having to be abandoned. His answer in this context to the judge as shown in the transcript indicates that he was knowingly pursuing a course of action which he hoped would obstruct the trial. While the applicant asserts that in approaching the case in that way he was following Mr Donaldson's advice we have already indicated that Mr Donaldson did not give him any direct advice to pursue that course. However, as we have noted, Mr Donaldson would have been well aware of the complications and difficulties that removal of professional representation would introduce into the trial process. These difficulties increased the chances of a collapse of the trial. The applicant would also have appreciated that self representation gave him freedom of action which could increase the chances of a mistrial occurring and could increase the likelihood of things happening which might improve the chances of an acquittal. Having regard to his exposure to the criminal process and to his evident knowledge of the criminal procedures, we are satisfied that the applicant was sufficiently experienced to appreciate that in a case in which the evidence was stacked against him he needed every tactical advantage to escape conviction. We are satisfied that far from being a mere victim of inappropriate legal advice and representation the applicant was a knowing participant in a scheme involving the withdrawal of counsel and self-representation which were designed to increase his

chances of escaping from what appeared to him to be inevitable conviction. Indeed the applicant in para 2 of his affidavit avers that he and Mr Donaldson were in effect parties to a conspiracy to pervert the course of justice. While he went down the route of self representation as a result of that conspiracy, he subsequently decided that there was no merit in collapsing the trial. The inference to be drawn from his own affidavit is that he must have considered that after he started to represent himself he was furthering his own interest by letting the trial continue. If the applicant's affidavit is correct, on his own admission he was prepared to manipulate the process of the court to his own tactical advantage. Even if, as we conclude, Mr Donaldson did not express himself in the way claimed by the applicant what the affidavit does demonstrate is that the applicant was in his own mind pursuing a course of action designed to manipulate the court's process for his own advantage. The applicant interpreted what was said by Mr Donaldson as a green light to pursue a course of action designed to manipulate the trial process.

[123] This was not a case like Robinson v R [1985] 1 AC 956 in which the applicant was denied by the court an opportunity to replace counsel who had withdrawn. Nor is it a case like Dunkley v R [1995] 1 AC 419 where the judge did not adjourn the case even briefly to allow the defendant to seek alternative representation. In the present case the judge offered on a number of occasions an opportunity to seek alternative representation and he did adjourn the matter for six days during which the applicant could have reconsidered the question of seeking fresh counsel. In Mitchell v R [1999] 1 WLR 1679 the Privy Council concluded that counsel's withdrawal could not be said to have been the result of any fault on the part of the defendant. Those circumstances do not pertain in this case. The withdrawal of counsel and the decision by the applicant to represent himself represented the outcome of a joint strategy emerging from their joint view that there was no chance of an acquittal on the evidence and in the light of the rulings. There was a consensus reached between counsel and the applicant that the applicant had nothing to lose by the withdrawal of counsel and the possibility of a potentially better outcome, even if that better outcome might be brought about by reason of the trial collapsing as a result of difficulties brought about by the defendant representing himself.

[124] We consider that it is now necessary to consider the other grounds of appeal before we reach a final conclusion in relation to the application for leave to appeal and accordingly we turn to those grounds.

Evidence of previous conduct

The Rice Evidence

[125] In relation to the applicant's alleged campaign of harassment against Edward Rice, the Crown sought to rely on that conduct as evidence of bad character and sought to introduce the evidence under Article 6(1)(d) of the Criminal Justice (Evidence) Order 2004 ("the 2004 Order"), that is to say on the ground that it was relevant to an important matter and issue between the defendant and the

prosecution. A similar application had been made to McLaughlin J and he admitted the evidence in his fifth ruling in the aborted trial.

[126] The trial judge noted that McLaughlin J's ruling did not bind him but that he was not obliged to hear the same point argued again if nothing material had changed. He did hear argument and he adopted the same approach to statutory interpretation as McLaughlin J. Both judges considered, properly in our view, that the evidence had the potential to show a clear disposition towards misconduct on the part of the applicant towards another person by the issuing of threats (including threats to kill) and to issue such threats by phone, by calling at the victims home, and all set against the background of perceived sexual abuse to someone close to the applicant.

[127] Before the trial judge the applicant sought to distinguish what happened in the episode involving Mr Rice and that involving the deceased. He denied that he acted anonymously in relation to Mr Rice but in fact there were three anonymous telephone calls made. Secondly it was claimed that the calls related to the treatment of the fourth defendant, Mrs Maguire, and not a child. The complaint arose in the context of alleged abuse while she was a child. Thirdly it is claimed that Mr Rice did not treat the threats seriously. However the trial judge correctly concluded that by virtue of Article 14 the prosecution should be assumed to be true. Fourthly, it was alleged that the applicant did not call at Mr Rice's home. In fact there was evidence of a visit to the house and the issue of threats to Mrs Rice. Fifthly after a period of six months an apology was given by the applicant. The trial judge concluded that that tended to confirm that some form of inappropriate behaviour had taken place. Sixthly Mrs Rice reported the matter to the police but sought no further police action. The trial judge correctly pointed out that that did not assist the applicant. The defence could make the point that the threats to Mr Rice ended in an apology and could argue that even if he made the threats it did not lead to the conclusion that he shot the deceased.

[128] The trial judge concluded:

(a) That the existence of the campaign against the deceased and the identity of the perpetrator thereof were important issues between the prosecution and the defence;

(b) That the evidence could be relied on by the prosecution to show a disposition towards misconduct by the applicant by making threats, threats to kill, using a phone to make those threats and by calling at the victims house and in the context of allegations of sexual misconduct by the victim of the intimidation to somebody close to the applicant.

(c) The evidence tended to support the Crown case that the applicant was the person carrying out the campaign of harassment and intimidation of the deceased.

[129] Mr Fitzgerald argued that the for purposes of Article 6(1)(d) bad character evidence could only be admitted if relevant to an important matter in issue between the defendant and the prosecution. Matters in issue between the defendant and the prosecution included the question whether the defendant had a propensity to commit offences of the kind with which he is charged. To be important the matter has to have substantial importance. It was argued that the evidence did not fall to be considered as being indicative of propensity and in any event was not of substantial importance in the context of the case as a whole. It was submitted that there were significant factors that distinguished the right allegations from the allegations relating to the deceased. Counsel relied on the points of distinction which had been raised before the trial judge and pointed out additionally that there was no targeting of Mr Rice at his work. It was contended that it behoved the trial judge to weigh up the cumulative difference between the two incidents before deciding upon the existence or otherwise of propensity. The conclusion that there was a striking similarity was wrong. Even if a previous campaign of intimidation and harassment could equate with propensity it was entirely incorrect to conclude that that propensity made it more likely that the applicant had carried out this campaign of intimidation and harassment. The previous campaign ended in an apology. The extent of the probative value that could be argued by the Crown was to the effect that it was likely that the applicant might have carried out a lower grade campaign but not one of the order alleged in the present case. In the circumstances while the behaviour was anti-social in nature in all the circumstances the prejudicial effect of the bad character evidence outweighed its probative value.

[130] In DPP v P [1991] 2 AC 447 the law was freed from the notion of an all purpose test striking similarity as a touchstone of admissibility. As Lord Mackay pointed out at 462(F)-(G):

> "The essential feature of evidence which is to be admitted is that its probative force in support of the allegations that an accused person committed the crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused to show that he was guilty of another crime."

He went on to point out that whether the evidence had sufficient probative value to outweigh its prejudicial effect would in each case be a question of degree. In R v Venn [2002] EWCA Crim. 236 Potter LJ at [35] pointed out that the nature of identifiable common features which may constitute a significant connection is bound to depend upon the context and the circumstances which could not be prescribed. The judge needs to be careful to direct the jury that the weight to be given to the matters relied on as being of marked similarity was a matter for them balanced against the countervailing points of distinction (see also the discussion of R v Nabi [2015] NICA 11).

[131] While there are points of distinction between the evidence of the intimidatory campaign conducted against Mr Rice by the applicant and the person involved in the intimidation and harassment of the deceased before his murder there were points of sufficiently marked similarity to make the evidence relevant on the issue of whether the person involved in the deceased's intimidation and harassment was the same person as involved in the campaign against Mr Rice. The points of distinction were duly noted and brought to the jury's attention and it was a matter for the jury to weigh the evidence in the overall context of the case. The very anti-social nature and extent of the intimidation of the Rices (which amounted to conduct unusual in its nature, context, duration and persistence) was evidence of propensity in relation to the applicant to which the jury in the context of the overall circumstances of the case was entitled to pay regard and to weigh in the balance. We find nothing in the judge's ruling on the issue or in his charge to the jury to indicate that he misapplied or misapprehended his discretion on the question of admitting the evidence and nothing to suggest that the jury may have failed to properly weigh the evidence in the whole context of the case.

The criminal record evidence

[132] The Crown initially sought to have admitted evidence of convictions of the applicant comprising nine previous convictions one for burglary (involving the theft of firearms and cartridges and the rest for robberies involving the theft of firearms or with the use of firearms). The Crown relied on two gateways for the admission of the evidence. Firstly, it relied on Article 6(1)(d) of the 2004 Order arguing that the convictions were relevant to an important issue namely the applicant's access to firearms. Secondly, the Crown also relied on Article 6(1)(g) which renders bad character evidence admissible if "the defendant has made an attack on another person's character". The applicant alleged that the deceased had conspired to have three UDR officers murdered by the IRA; that he had gone to the IRA to try and have the applicant murdered; that the deceased took drugs. He made allegations that the police had assaulted him and that police officers had murdered a friend of his. He also alleged that Paul Barnes and Sharon Fleming took and supplied class A drugs, that another witness was lying in respect of evidence given as to the alleged conduct of the applicant in 1997 and that the deceased was convicted of the offence of possession of information likely to be useful to terrorists.

[133] The trial judge ruled that all the convictions (apart from the offences committed in 1983 and 1987) could be admitted under Article 6(1)(d). He further admitted the evidence under Article 6(1)(d) on the issue of whether it was more likely that the applicant had access to firearms than the average person. He rejected the contention that the admission of the evidence adversely affected the fairness of the proceedings. He said that the defendant had never been convicted of an offence involving the discharge of firearms. To guard against inference and speculation by the jury that because of the convictions he was more likely to have a propensity to discharge firearms, the trial judge considered that any reference to the use of firearms should not be disclosed to the jury and the jury should be expressly told at

the time when the convictions were introduced in evidence that there was no evidence to suggest the applicant ever discharged firearms in connection with any of the crimes.

[134] Counsel argued that the trial judge had tacitly acknowledged that there was clear potential for prejudicial inferences to be drawn. The judge's guidance was unrealistic in its avowed aim and was apt to confuse. The capacity for the jury to divorce access to firearms from their use was limited. Given the amount of gun crime it was virtually inconceivable that a jury could have found access to a firearm to be an important matter in issue. The judge in his charge, Mr Fitzgerald contended, recognised that the evidence of access to firearms was of little probative value when he directed the jury that they "may think therefore at the end of the day, that is a matter for you, but you may think that these convictions are of little help in deciding whether he committed the murder". It was argued that this demonstrated that the evidence related to something which is not of substantial importance on any issue in the trial.

[135] The trial judge in his charge to the jury told the jury that in making his case in the course of the trial the applicant criticised the conduct of the interviews by the police and the question arose as to whether the applicant was or was not disrupting the interviews in a deliberate way. The judge told the jury that in deciding the truthfulness of the applicant's explanations or his answers to questions or his approach to questions the jury was entitled to take into account his bad character when coming to a view about that if the jury considered it appropriate to do so. He correctly warned them against assuming guilt or that he was lying because he had previous convictions.

[136] Under the Criminal Evidence Act 1898 Section 1(3) an accused who made an attack on another party could resist introduction of his own bad character evidence in retaliation because he was not putting his own character in issue merely that of the witnesses. It followed that his bad character was admissible only where specifically provided for by the Act and that was when he gave evidence. Under the 2004 Order however the accused's bad character may be deployed against him whether he gives evidence or not. Where the jury have to decide between competing versions of events the arguments that they need to know the character of the person making the attack is a strong one whether the accused testifies or declines to testify. The purpose of Article 6(1)(g) is identical to the corresponding provisions of the 1898 Act at which it was said it was only fair that the jury should have before them material in which they can form a judgment whether the accused is more worthy to be believed than those he has attacked (R v Jenkins [1945] 31 Criminal Appeal Reports 1) (see Blackstone paragraph 12.97).

[137] The level of the detail of the earlier crimes that it is legitimate to include by way of evidence calls for a balanced judgment on the context of individual cases. The judge admitted the details relating to the access of arms in relation to the robberies and did so on the basis that these were details which were admissible of

bad character evidence under Article 6(1)(d). He concluded as the Crown contended that the evidence of his access to arms supported the case that the defendant was more likely to have access to arms than other people. In fact the basis for admission of the evidence could have been expressed in wider terms. The evidence of involvement in a number of armed robberies showed that the applicant was an individual who was ready, willing and able to carry out extreme acts of intimidatory violence when it suited his own criminal purposes. It provided support for the Crown case that the applicant was the person who intimidated and harassed the deceased and was properly admitted under Article 6(1)(b) and (d). We detect no error of approach by the judge in the exercise of his discretion in deciding to admit the evidence. The judge's direction to the jury was extremely and possibly unduly favourable to the applicant. It was a matter for the jury to decide what weight if any they should put on the evidence of bad character which was properly before them.

Accentuation of the Applicant's Bad Character

[138] Mr Fitzgerald laid weight in what the judge said to the jury at day 68:

> "Now it might not be difficult to conclude that there was little love lost between Mr Maguire and the police. Some of the witnesses that you have seen showed that more than others. You may recollect a police officer felt it important that his back should be displayed towards Mr Maguire when he was giving evidence rather than beside. Mr Maguire's background may explain part of that. He's a man with a serious criminal record."

It was contended that the judge's comment was utterly unnecessary and prejudicial. Counsel sought to compare the comments to the impugned comments by the trial judge in R v Verrada [1989] 91 Criminal Appeals Report 131 where the judge described the allegations put to him about the prosecution witness as "really monstrous" and "wicked". It was argued that the comment by the trial judge in the present case was sandwiched between his direction on the robbery bad character evidence and the Rice bad character evidence. The underscoring of the applicant's background and bad character would have created the risk of drawing in a disproportionate fashion, the jury's attention to the applicant's record and bad character.

[139] The judge's comment must be read in the context of the entirety of the charge. It was made in the context of the tensions between the applicant and the police and came at a stage in the charge where the trial judge was dealing with the contention by the applicant that Detective Superintendent Frew had lied in his evidence about placing an article in a newspaper to enable the applicant to vindicate or incriminate himself. To state that the applicant had a serious criminal record was a statement of the obvious once the evidence had been admitted. The judge's comment in that

regard added nothing to the evidence. The judge had as we have already noted been favourable to the applicant in his charge in relation to what use they might make of the evidence. The statement that a police officer turned his back on the applicant was again a statement as to what had happened. It was a matter left to the jury to decide whether this indicated unfair police animosity to the applicant or indicate concerns arising out of the applicant's serious criminal record. We do not accept this ground of appeal.

Prejudicial press coverage

[140] On 8 December 2005 DVD evidence was played in court before the jury dealing with statements made between the applicant and his wife the fourth defendant, obtained by covert surveillance while the applicant was a prisoner in Magilligan Prison to which an audio track and transcription had been added. On 9 December 2005 the Belfast Telegraph, Belfast News Letter and the Irish News had published articles that reported the content of the DVD material in inaccurate and misleading terms to the effect that the applicant had blamed his wife for the murder. Application was made on behalf of Mrs Maguire to stay the proceedings against her on the basis that the press statements prevented a fair trial. In the course of his ruling the judge noted:

> "The first named defendant (the applicant) is unrepresented. I pointed out to him that the article tended to attribute to him the words 'it was down to you' after the words 'I didn't realise that you would shoot him in the head' and that this might well be construed as an admission. He indicated that he was concerned that the articles unfairly represented the evidence but was reluctant to find himself deprived of the current jury."

The fact the words "down to you" were used on the Crown case as relating to the development of a relationship between the fourth defendant, Mrs Maguire and the deceased. The words as reported were inaccurate and misleading and could have been construed as being an admission. The Court Service issued a bulletin to all news editors pointing out that the articles were inaccurate misleading and had the potential for prejudice against the accused.

[141] The trial judge ruled that such prejudice as might have occurred could be mitigated by careful direction to the jury and he refused to stay the proceedings. The guidance given to the jury by the judge did not specifically identify the offending articles or specific inaccuracies. No doubt he was carefully seeking to ensure that the inaccuracy was not repeated. The jury was warned that what appeared in the press articles was inaccurate and misleading. The judge in his charge made it abundantly clear that no admission had been made by the applicant.

[142] Inaccurate and unfair press coverage may make it necessary in appropriate cases to discharge the jury and direct a fresh trial (see cases such as R v McCann [1991] Criminal Appeal Reports 239 and R v Taylor [1994] 98 Criminal Appeal Reports 361). Those were extreme cases and as pointed out in R v Stone [2001] EWCA 297 it will rarely be the case that an appropriate direction to the jury will not suffice. In the context of a case involving inaccurate press reporting during the trial this court in R v Leslie stated:

> "Juries sitting through a lengthy and fraught trial such as this will in the course of the trial become very conscious of a decision-making judicial role as found as a fact. They will come to appreciate what is involved in the careful consideration and weighing up of evidence as properly presented and the need to bear in mind the two sides to the case. The jury system depends on a high degree of confidence that the twelve individuals acting as a jury will bring to the function a sense of corporate fairness and follow directions clearly given to them."

In R v McDonald [2010] EWCA 2352 it was discovered that a jury had access to various internet sites and downloaded information regarding (inter alia) chemicals used to cut cocaine and the sentences normally given. The appellant made an application to discharge the jury as the jurors had disregarded the judge's directions to them. The judge decided that a strongly worded direction would be sufficient and the Court of Appeal dismissed the appeal against conviction. The court at paragraph [29] stated that what had occurred was not itself a reason to discharge the jury unless there were grounds for believing that a jury had acquired information that might have led them to reach a verdict otherwise and on the evidence of the case or there were grounds for thinking that one or more of them might disregard a clear warning from the judge not to repeat the process.

[143] We are unpersuaded that the verdicts were rendered unsafe by reason of the inaccurate press reports. The judge dealt fairly and properly with the situation. In his directions to the jury the jury can have been left in no doubt that the press reports were inaccurate. The jurors were the persons who sat through and heard the relevant evidence and there is nothing to suggest that, contrary to their oath and in disregard to the courts directions, they would accept a press interpretation of evidence that they themselves had heard in the context of the whole trial in which they would have appreciated that they alone were the judges of fact. As pointed out by Sheil J giving the judgment of this court in R v Murray-Lacy (29 September 1996) a jury should not be discharged unless there is a high degree of need for discharging it. Whether or not a trial judge should discharge a jury is a matter lying within the discretion of the trial judge which discretion has to be exercised judicially. We discern no error of approach on the part of the trial judge in the exercise of his discretion on this issue.

The evidence of Natasha Conroy

[144] Natasha Conroy gave evidence about a menacing incident that occurred about a month before the shooting on 8 March 2003. She described a male person (who was with a female person who the witness believed was Mrs Maguire though she accepted her view was poor) as being about 5 feet 3 inches high without facial hair. She said she had never seen the person before. In cross-examination she said that she could see his face quite well although she did not think she would recognise him again and did not think she could identify him. She confirmed that she had not been asked to attend any identification parade.

[145] Counsel for the applicant said that it behoved the police to conduct an identification parade and that failure to do so deprived the applicant of the opportunity of establishing that he was not the person responsible. The judge in his charge pointed out to the jury that no question of an identification parade arose because she would not have been able to pick anybody out.

[146] In R v Forbes [2001] 1 AC 473 Lord Bingham stated that Code D paragraph 312 required an identity parade if:

(a) The police have sufficient information to justify the arrest of a particular person for suspected involvement in an offence.

(b) An eye witness has identified or may be able to identify that person.

(c) The suspect disputes his identification as a person involved in the course of the offence.

Lord Bingham did however state that if the witness could not identify the culprit it would probably be futile to invite that witness to attend an identification parade.

[147] Now Mr Fitzgerald argued that the witness might have been able to identify the applicant and therefore a parade was required. However this is a case in which a witness was saying that she did not think that she could identify the person. She said nothing to the police in her evidence to identify the applicant as the person. The condition in paragraph (c) in Lord Bingham's analysis of paragraph (3.12) did not arise. The applicant had not been identified in anyway by the witness. No possible injustice was suffered by the applicant in there not being an identification parade. Had she identified the applicant during such a parade that would not have assisted the defence case. If she had been unable to identify the applicant the case against the applicant on this issue would have been no stronger and no weaker since the failure to identify the applicant would have been entirely consistent with her evidence that she did not think she could identify the person concerned. The applicant was able to deploy all the arguments available to him to demonstrate that Mrs Conroy's evidence was insufficient to implicate him as the person involved in

the incident to which she was a witness. In the circumstances we find no substance in this ground of appeal.

The Crown opening

[148] It was opened to the jury by the Crown that there would be evidence to the effect that the phone attributed to the applicant was in the vicinity of the murder locus at the relevant time and it was also opened to the jury that the applicant could be heard to say "I had somebody killed. It happened. We made it happen." It was argued by the applicant that those representations were pivotal to what was otherwise a circumstantial case. The trial judge should have discharged the jury in the circumstances. The matters opened were unlikely to have been forgotten in the course of a 75 day trial, counsel argued. Furthermore the judge is wrong to revisit those attention grabbing pieces of the opening. Reminder of their non-existence was unwise and improper.

[149] We reject this last submission as being unsustainable. If the judge had omitted to direct the jury on the issue of what had been opened on those two points it is undoubtedly the case that the applicant would have challenged the omission to do so as giving rise to unfairness. The judge was going to be criticised either for referring to them or not referring to them. In the light of the Crown opening in relation to damaging and incriminating matters which were not made good in the course of the trial it was in the circumstances appropriate for the judge to comment as he did to ensure that the jury should clearly understand that the Crown had made two unsupported and insupportable contentions in the opening. This case differs from the circumstances pertaining in R v Jackson [1953] 1 All ER 872 where the Court of Appeal considered that the trial judge was right not to refer to the fact that counsel had in opening made reference to calling evidence in relation to other stolen property. Something which the Crown had not done and which was evidence peripheral to the case. In the present case the judge was faced with the question of how he should deal with two damaging allegations made in opening which were contradicted by the evidence. We concluded that he was right to raise the matter with the jury and that he fairly made clear to the jury that the Crown had not made good those allegations and that no admission had been made at all.

[150] We have already explained that the trial judge exercised a judicial discretion on the question of a discharge of the jury. We see no error of approach by the judge on the question of discharging the jury in the present case on that issue. We have also previously explained why in the absence of any persuasive countervailing factor it is right to proceed upon the basis that the jury will faithfully follow the directions given by the court. Accordingly, we reject this ground of appeal.

The issue of cumulative unfairness

[151] Mr Fitzgerald made a wider attack on the conduct of the trial and contended that as a result of a number of irregularities justice was not seen to be done. The

case had been long delayed because of the Crown pulling the case out of the list until after the R v Hill case. The discharge of the jury at the second trial remained unexplained and unexplored at the third trial in which the trial judge should have carried out a further investigation. The prosecution opening was unfair and the jury should have been discharged. There was unfair press coverage. The applicant was unrepresented after counsel's inappropriate withdrawal. DI Logan gave evidence in December despite the fact that the police had him under investigation from 29 November for dishonesty, a matter not disclosed to the court or the applicant until the trial judge was in the middle of his charge. This led to DI Logan having to be recalled and cross-examined by the applicant who had wanted to obtain legal representation on the issue but was unable to do so within the time constraints imposed by the court. The judge limited the conduct of the applicant's cross-examination of DI Logan. It was the applicant's case that the accumulation of short-comings in the course of the trial should lead to conclusion that justice is not seen to be done and that taken together the shortcomings and irregularities resulted in a trial process which was unfair.

[152] Leaving aside for the moment the question of DI Logan's evidence, in the course of this judgment we have carefully examined each of the applicant's complaints and grounds of appeal. We have not found any substance in the other individual grounds of appeal put forward. If those individual grounds of appeal fall to be dismissed we cannot see how taken together they can cumulatively result in a verdict which could be considered unsafe.

[153] However, the evidence relating to DI Logan raises other serious issues. In relation to DI Logan the applicant contends that the police wrongly failed to disclose that DI Logan was under investigation for dishonesty from at least 29 November. He continued as case officer and gave evidence on 7, 15 and 16 December and his suspected criminality was not revealed until after the judge had begun his charge. It was contended that the judge wrongly limited questioning of DI Logan when he was recalled. It was the applicant's case that the judge should have discharged the jury rather than direct the recall of the DI Logan to give evidence half way through the judge's charge.

[154] It appears that DI Logan fell under suspicion of theft from CID premises on 4 November 2005 and in addition it was believed that he was making false travel claims. Chief Inspector Price reported the matter to Detective Superintendent Hughes on 7 November 2005. Suspicions grew that DI Logan was the officer removing money from a tea kitty. A formal investigation was undertaken on 29 November 2005. Monitoring equipment was installed between 13 December 2005 and 15 January 2006 during which time DI Logan was recorded as removing money from a fridge on a number of occasions. CCTV footage of DI Logan removing the money was obtained between 16 December 2005 and 12 January 2006. DI Logan was arrested on 9 February 2006. The circumstances that led to the officer's arrest were brought to the attention of Senior Crown Counsel on the evening of 7 February 2006.

Senior Crown Counsel very properly and immediately brought the matter to the attention of the court and the defence the following morning.

[155] Mr Mooney on behalf of the Crown conceded that the matter should have been brought to the prosecution's attention on or before 29 November 2005. If that had been done there would have been indisputably disclosable material in relation to this information. This would have preceded the calling of DI Logan as a witness. Had the prosecution been made aware of the issue the Crown would have been bound to carry out a careful review of the evidence which was going to be adduced from DI Logan to review its reliability and accuracy and explore any question as to whether the evidence might in any respect be tainted by inaccuracy, dishonesty or distortion. The Crown would obviously have had to consider carefully the question of how DI Logan should be presented to the jury as a credit worthy witness. Since the prosecution was not alerted to the problem no such investigation was carried out and DI Logan was presented to the jury as a police witness worthy of belief.

[156] If the disclosure had been made on 29 November 2005 or shortly thereafter to the defence, as the Crown conceded it should have been, the applicant would have had some limited material on which to cross-examine DI Logan as to his credibility and honesty when he commenced his evidence on 7 December. When the problem arose later the applicant sought an opportunity to obtain legal assistance. In the context in which the request was made in the middle of the judge's charge it was not possible within the timescale imposed by the trial judge to find legal representation. It was understandable that given the stage the proceedings had reached that the trial judge would want to conclude them as soon as reasonably possible in order that the jury could consider its verdict. If the issue had arisen before DI Logan was called as a witness in December it is much more likely that alternative representation could have been obtained particularly if the court had given greater time for the purpose. However, it is important to look at this in context. While fellow police officers suspected DI Logan of dishonesty, there was little hard evidence of wrongdoing on his behalf when he began giving his testimony. It was the installation of the cameras and the monitoring of the fridge and the regular audits of the tea money between 13 December 2005 and 17 January 2006 which produced prima facie evidence of DI Logan's criminal behaviour. The jury could see the CCTV footage of what DI Logan was doing for themselves. The jury was told that the audits revealed a persistent shortfall in the kitty during this period. There was thus strong prima facie evidence of DI Logan's dishonesty. It was against this background that the jury had to weigh in the balance his claims that he always intended to repay what he had taken and the impact of whatever view the jury had formed on that issue on the other evidence that he had given in this trial. The applicant cross-examined DI Logan effectively with guidance from the trial judge. Indeed, it would appear that the applicant adopted the list of questions provided for him by the trial judge although he felt free to supplement them. In the course of the cross-examination the applicant put to DI Logan that he had been caught with "his fingers in the cookie jar", an expression that may well have resonated strongly with the members of the jury given what they had seen on CCTV.

[157] If the circumstances of suspected dishonesty of DI Logan had been brought to the attention of the accused and their representatives on or shortly after 29 November, and had the applicant obtained legal representation, then it is important to consider the course of DI Logan's testimony. Without the CCTV coverage and the subsequent audits, the defence would have had limited opportunity to persuade the jury of DI Logan's wrongdoing. The applicant with the benefit of the CCTV coverage, the audits and the trial judge's questions was in a much stronger position to persuade the jury of DI Logan's dishonesty even without legal representation. It is also important to understand that DI Logan's credibility arising from these disclosures was also attacked by the senior counsel for the two co-accused. All the defendants had common cause in attacking DI Logan's credibility. There are no good grounds for concluding that the applicant was in fact disadvantaged by the failure to make disclosure of DI Logan's dishonesty at the end of November 2005. Even if there was a basis for believing that separate legal representation of the applicant would have improved his position, which is not accepted for the reasons which we discuss later in this judgment, the applicant had only himself to blame. He had discharged his legal team in the hope of securing a tactical advantage. It is true that, R v Jisl demonstrates that even where the defendant has brought about his own lack of representation, circumstances can arise where justice and fairness may call for an additional effort to be made to persuade the defendant to obtain legal advice or grant a brief adjournment to enable an unrepresented defendant to obtain legal advice where he makes clear that he wishes to avail of the opportunity to obtain legal assistance at that stage notwithstanding his own earlier conduct in becoming self-representing. However, in this case the applicant in his attempt to undermine the credibility of DI Logan was able to rely on the CCTV and audit evidence, which spoke for itself; on the guidance he received directly from the trial judge; and on the questioning of DI Logan by the senior counsel for his co-accused. Mr Fitzgerald accepted that the trial judge in his charge directed the jury in an exemplary fashion in relation to DI Logan's evidence. We consider he was correct to so accept.

[158] The nature of the disclosure resulted in the information coming to light in the middle of the judge's charge to the jury. The court raised with the parties the question about whether there is any authority on the issues which arise if a judge has to interrupt his charge to the jury in order to direct the recall of a witness before he has concluded his charge. Neither side could find any authority on the point although the authorities do make clear that no fresh evidence can be adduced *after* the judge has completed his charge to the jury (R v Wilson [1957] 41 Criminal Appeal Reports 226, R v Owen 36 Criminal Appeal Reports 16. It is self-evidently undesirable for a judge's charge to be interrupted by the interjection of new evidence. It can confuse a jury and divert their attention away from the directions already given. It breaks the sequential and logical presentation of the judge's charge. It was a wholly undesirable development in the course of the trial and was one caused by the failure of the police to bring to the attention of Crown counsel relevant and disclosable material at the appropriate time. What transpired was on

any showing an irregularity in the course of the trial. However, the introduction of strong prima facie evidence about the alleged dishonesty of DI Logan, introduced as it was before the jury went out to consider its verdicts, and the timing of its introduction must inevitably have been prejudicial to the Crown case. It showed a senior police officer on CCTV apparently taking money from his fellow officers.

[159] An irregularity in the course of the trial does not inevitably result in the verdict being unsafe. The problems generated by the improperly late disclosure of the material relating to DI Logan had the following adverse effects:

(a) DI Logan was put forward as a reliable police witness and when he gave evidence originally the jury were not provided with any material from the Crown to call into question his reliability.

(b) He was not himself a witness as to primary facts. But he was one of the investigating team and played a role in relation to the generation, and collection of the surveillance material.

(c) When the material was disclosed the applicant indicated he wished to have legal representation on the issue. Had the material been disclosed at the proper time the trial judge would have had to raise with the applicant the question of legal representation in the light of the complex turn of events arising from the disclosure which affected an important Crown witness.

(d) There is a distinct possibility if not likelihood that the applicant would have sought and been granted the opportunity for legal assistance on this issue if it had emerged earlier. This would have affected the conduct of the cross-examination.

(e) The timing of the disclosure in the middle of the charge produced undesirable consequences in the completion of the trial and the logical sequencing of the charge.

(f) The trial judge's understandable desire to ensure that the charge could be completed and the jury sent out as promptly as possible resulted in the imposition of a time constraint that resulted in the applicant being unable to obtain legal assistance within the time constraints composed. There was a serious question whether, in the interests of procedural fairness to the applicant, the judge needed to make an adjustment to the timescale offered even if that resulted in a longer break in the completion of the charge.

(g) Recognising that the applicant was facing difficulties without legal representation on this issue the judge sought to assist the applicant in focusing his questions and did so by restricting them to the issue of the

thefts. He disallowed questions in relation to the issue of DI Logan's use of "poetic licence" in his journal entries. This only emerged when he was being investigated for his alleged dishonesties subsequent to 29 November 2005.

[160] However, when considering the potential for these problems to subvert the trial process and threaten the safety of the verdict, it is essential to consider them in context and to take into account all the relevant circumstances. So dealing with them in the same order, the following matters must be weighed in the balance.

(a) Inspector Superintendent Frew was in charge of the operation. DI Logan was his second in command. The day-to-day running of the operation appears to have been left to DS McParland.

(b) and (c) DI Logan gave limited evidence. DI Logan's evidence did not relate to any primary facts. He gave evidence inter alia of switching on the tapes to monitor the conversations the applicant had with the visitors, the removal and the labelling of those tapes. He gave evidence of handing them over to Constable Jenkins and then accepting their return. He dispatched them to AV Forensics where they are independently assessed by Mr McArthur, an independent expert. He also took possession of the Evidential Accommodation folder containing the floppy disc and the transcript of the prison visits. These were then handed over to the PPS. DI Logan did not prepare any of the transcripts of what was said. Initially they were prepared by the 3 police officers who were serving under his command. The transcripts used at the trial were prepared by Mr McArthur.

The applicant did challenge DI Logan on the issue of why, when he was arrested, the evidence on which the charges were grounded, was not put to him. DI Logan claimed that he had been prevented from doing so because the applicant was being obstructive. The applicant denied this. The jury was able to consider in the light of the alleged dishonesty of DI Logan whether the applicant's version that he was unjustifiably precluded from making his case at the earliest possible stage should be preferred to DI Logan's version that the applicant was being obstructive. Further, what, if any, difference this would have made given the strength of all the other evidence in this case against the applicant.

(d) It is accepted that the trial judge would have had to raise with the applicant the issue of legal representation when the issue was first drawn to his attention. This would have been at the end of November 2005. If the applicant had been granted legal representation, then it may have affected the way in which DI Logan was cross-examined. Counsel for the applicant may have chosen to ask different questions

than those included in the trial judge's list. However, at the end of November when DI Logan first came to give testimony there was no CCTV evidence of him taking coins from the kitty. The removal of the money appears to have been captured on CCTV for the first time on 16 December. Any counsel cross-examining on behalf of the applicant would be doing so without the benefit of evidence which on one view spoke for itself. The applicant was provided with questions prepared for him by the trial judge. He was not afraid to add to them. The other co-accused were represented by two experienced senior counsel, Mr Irvine and Mr Magee. It is difficult on reviewing the transcripts of the trial to conclude that they made any more headway than the applicant when cross-examining DI Logan on his behaviour. Many of the areas covered were essentially the same and the issues which the jury had to consider included the following:

(i) The question arose as to whether DI Logan had leaked information to the Sunday World before the visits to the applicant about the murder, so as to ensure that the murder was the subject of discussions at the prison meeting. DI Logan denied this. There was evidence that Inspector Superintendent Frew had contact Mr Jim McDowell, Editor of the Sunday World, at this time.

(ii) The question arose as to whether the transcript produced by members of the police serving under DI Logan was sent to Mr McArthur, the expert from AV Forensics. It was. However, Mr McArthur produced his own transcripts.

(iii) The question arose as to whether DI Logan had kept notes of the recordings and what had become of them. These notes were never put in evidence and DI Logan had not relied upon them.

(iv) The question arose as to why so little material had been gathered from such prolonged monitoring. DI Logan explained that on occasions the tape recording had malfunctioned. Further the police were also precluded from recording conversations of any persons not authorised under RIPA. He denied that there had been any "cherry picking". He pointed out that the Crown was content that the transcriptions of all the tapes be placed before the jury without any redactions. He said that the redactions had taken place at the request of the defence.

In addition the applicant explored the circumstances of his arrest and the way in which it was being alleged that he obstructed the police during the interview process. He also asked whether there had been

three different DNA profiles found at the scene, none of which matched his. DI Logan confirmed that this was correct.

(e) While the timing of the disclosure in the middle of the charge had the potential to produce undesirable consequences in the completion of the trial and in the manner in which the charge was given, it is unlikely that this would have adversely affected the defence case as opposed to the prosecution case. The overwhelming likelihood is that it would have been prejudicial to the Crown case. If the evidence was disclosed after the CCTV became available but before the charge was commenced this may have increased the chances of the applicant being able to obtain legal representations and would necessarily have prevented the charge being interrupted. However, in the light of our conclusions above, we do not consider this would have made a material difference.

(f) The trial judge was best able to consider whether there needed to be a longer break in the completion of the trial in the interests of procedural fairness. He had to balance the undesirability of a longer break in completion of the charge and whether this would have produced such procedural unfairness that the jury should be discharged. This was a long and complex trial and the trial judge is best placed to determine whether or not fairness required that it should be aborted at this stage. There is no evidence before this court to suggest that the trial judge acted unfairly in this aspect of the case.

(g) The issue of poetic licence as we have recorded emerged during the course of the investigation into DI Logan's alleged dishonesty. He said during an interview that he was going to be more careful about the amount of detail he put in his notebook because it could lead to "stacks and stacks of redactions" these could "come back and bite me". In the circumstances of this case there was nothing in his journal which implicated the applicant or which placed the applicant in jeopardy. In those circumstances it is scarcely surprising that the trial judge limited the further questioning at this stage of the trial to the issue of the thefts alone.

[161] DI Logan did not give direct evidence that implicated the applicant in the offences with which he was charged. His testimony related to the supervision and collection of the evidence and the monitoring of the conversations at the prison. Mr Fitzgerald relied on the general unfairness of the failure of the prosecution to disclose the information adverse to DI Logan in a timely fashion. However, there were four instances offered by Mr Fitzgerald as to how the late disclosure of DI Logan's alleged dishonesty made the trial unfair because it would have affected the questioning of DI Logan and the reliance the jury were able to place on his answers.

(i) A complaint (see page 42 of Book 8) was made that the police did not consider originally that the surveillance material was evidence. DI Logan explained that it was not intended that the transcripts prepared by the police should be used as evidence at the trial and that they had only been submitted to a High Court Judge during the course of the applicant's bail application. It was always the intention that this information would be dealt with by Mr McArthur, an independent witness. The intention or otherwise of DI Logan as to what to do with the surveillance evidence is irrelevant. This evidence was considered by an expert and it was placed before the jury. The members of the jury had the opportunity of listening to the relevant extracts of what was recorded.

(ii) Secondly DI Logan was challenged on the basis that he never put to the applicant the evidence which grounded the charges made against him (page 50).

(iii) Thirdly and related to (ii) above, DI Logan had blamed this omission on the attempts by the applicant to frustrate and disrupt the interview process and this was recorded in his journal (page 54). But in respect of both of these complaints, the jury had the evidence which the prosecution said proved the applicant's wrongdoing, before it for consideration. These were matters for the jury to weigh in the balance taking account of all the evidence including its view as to DI Logan's honesty.

(iv) Finally, there was the complaint (page 82) that DI Logan had leaked information to the Sunday World in the hope of provoking a discussion when the applicant's visitors met him at the prison. DI Logan denied this and there is evidence implicating Inspector Superintendent Frew. But it is important to remember that what was alleged to have been leaked to the Sunday World was not evidence against the applicant. The fact that this may have been given to the Sunday World by Inspector Superintendent Frew and/or by DI Logan did not make the trial unfair. The jury reached its verdict on the basis of the evidence adduced by the prosecution.

[162] There can be no doubt that even excluding the surveillance evidence, there was a case on which a jury would have been fully entitled to find the applicant guilty on both counts. Given DI Logan's limited role in the investigation, namely the supervision of the gathering of the surveillance evidence, it cannot be said that his alleged dishonesty undermined this aspect of the case. Lord Bingham said in Randal v R [2002] 1 WLR 2237 (see paragraph [84] above) the right to a fair trial is one to be enjoyed by the guilty as well as the innocent and defendants are presumed to be innocent until proved to be otherwise in a fairly conducted trial. There will

come a point in time when the departure from good practice is so prejudicial or irremediable that an appellate court will have no alternative but to condemn the trial as unfair and quash a conviction as unsafe however strong the grounds for believing the defendant to be guilty. In this case the line was neither been reached, nor crossed. Any unfairness arising from the failure to disclose DI Logan's alleged wrongdoing until the judge was charging the jury did not in all the circumstances of this case make the trial unfair. The failure to disclose DI Logan's alleged wrongdoing, either taken on its own or in conjunction with the other matters complained of, did not render the verdict of the jury unsafe.

[163] While we are satisfied that leave for appeal against conviction should be granted, for the reasons given we dismiss that appeal.