THE COURT OF APPEAL

[109/23]
[110/23]

The President

McCarthy J.

Burns J.

BETWEEN

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

APPELLANT

AND

S.M.

RESPONDENT

AND

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

APPELLANT

AND

J.B.

RESPONDENT

JUDGMENT of the Court delivered on the 26th day of February 2024 by Birmingham P.

Introduction

1. On 22nd March 2023, both respondents were acquitted by direction of the trial judge on charges of attempted murder and of possession of a firearm with intent to endanger life contrary to s. 15 of the Firearms Act 1925, as amended. The respondent Mr. JB was also acquitted of a charge of damaging property contrary to s. 2(1) of the Criminal Damage Act 1991, as amended. They had stood trial charged with the attempted murder of a teenager at Eugene Street, Dublin 8, on 24th February 2021. The trial began on 6th March 2023. The opening of the trial followed on almost two weeks of pretrial hearings. The Director has appealed the directed acquittal to this Court pursuant to s. 23(1) of the Criminal Procedure Act 2010 (as amended). That section provides:

> "Where on or after the commencement of this section, a person is tried on indictment and acquitted of an offence, the Director, if he or she is the prosecuting authority in the trial, or the Attorney General as may be appropriate, may, subject to subsection (3) and section 24, appeal the acquittal in respect of the offence concerned on a question of law to—
>
> (I) the Court of Appeal, or
>
> (II) in the case of a person who is tried on indictment in the Central Criminal Court, the Court of Appeal or the Supreme Court under Article 34.5.4° of the Constitution."

2. The case against the respondents was based on circumstantial evidence. It was, beyond any question, a circumstantial evidence case. The application for a direction at trial contended that the evidence which had been adduced, while perhaps giving rise to suspicion, could not safely be left for consideration by the jury. On behalf of the then accused, now respondent, Mr. SM, there was a further argument to the effect that even if a jury could be satisfied that SM had been present at the time of the attempted murder, there was no evidence that he was party to a joint enterprise or common design to commit murder.

3. Having heard the submissions in relation to the application, the judge put the matter back overnight for consideration. Having considered the evidence, the following day, the judge was of the view that it would not be properly open to a jury to reach the inferences contended for by the prosecution. She indicated she was placing the evidence in category 2(a) of the *R v. Galbraith* [1981] 1 WLR 1039 test, being a situation where there was some evidence, but it was of such a tenuous character *e.g*. because of inherent weaknesses or vagueness, or because it is inconsistent with other evidence. It was the situation that the judge had come to the conclusion that the prosecution evidence, taken at its highest, was such that a jury, properly directed, could not properly return a verdict of guilty.

Background

4. The injured party in this case, a 17-year-old, was shot while a passenger in a taxi at Eugene Street, Dublin 8, on 24th February 2021, shortly before 11pm. In the immediate aftermath of the shooting, a black hatchback car was seen at speed on CCTV leaving the scene of the shooting. This was at 11.54pm, and there was then a flash of light visible on the CCTV footage from a nearby street at 11.55pm. On that nearby street, Gardaí located a hatchback Hyundai car which was on fire. On the back seat of the car there was a black Beretta 9mm pistol. At trial, there was evidence from a ballistics expert that the shots which were fired at the injured party had been discharged from that pistol.

5. There were no witnesses who put either of the respondents at the scene. However, there were a number of witnesses who saw or heard what happened. One witness, Mr. Joseph Kelly, indicated in his statement, which was read out in the trial that the men who were involved were under 20 years of age, and both were roughly five foot ten or 11 inches. The prosecution case was that the shooter was JB, who was 25 years of age at the time of the incident and had been measured by the guard who had detained him at the Garda station as being five foot nine inches in height. There was a suggestion on his behalf that he was in fact not this tall, that his actual height was five foot seven inches. Another witness, Ms. Yasmine Ryan, from inside her home, heard the words "Go on, finish him". Another witness, Mr. Joe McSweeney, thought he had heard the words "We got him", but expressed uncertainty in that regard. The prosecution attached some significance to these reported remarks – in particular, the urge to "finish him" – in the context of the question of whether there was a joint enterprise or common design. 20 minutes after the shooting, a black BMW saloon car was stopped by Gardaí on the M50 near the Finglas exit. There were three occupants in the car: the two respondents and a third man who was the driver. He was also charged but could not be located prior to trial. Garda evidence was that this black BMW has been observed driving in a dangerous manner. The Gardaí who stopped the vehicle believed that

the occupants were behaving suspiciously. It was noted that none of the occupants were wearing seatbelts correctly; rather, the seatbelts were fastened behind each occupant of the car, which would have prevented beeping, leading Gardaí to believe that this was a "job car" and that the occupants had prepared themselves to exit the car quickly. Different explanations were offered by the occupants of the car as to why they were in the area. The respondent, JB, said they were going to Four Star Pizza for food. The driver of the car told a different Garda that he was a delivery driver for a local Chinese restaurant. The Garda was struck by the nervous and suspicious demeanour of the occupants of the car and formed the view that there was perhaps a weapon in the car. In these circumstances, they were searched first for weapons and then for drugs. The occupants were brought to Finglas Garda station. The respondent, JB, was wearing two tracksuit bottoms. A snood was located in the car, but it was not seized. It should be appreciated that the Gardaí who encountered the car on the M50 were not involved in the investigation of the recent shooting in the Dublin 8 area. When searched in the Garda station, JB was found to have in his pocket red and black gardening gloves. These gloves were seized and later examined by a forensic scientist, Ms. Michelle Boyle, who gave evidence that the gloves seized contained a large population of firearm residue, containing 19 characteristic particles, which she stated would be considered a large number of characteristic particles, and which she felt assisted in her conclusion that there was extremely strong support for the view that the gloves were worn by the shooter in this incident, rather than the alternative view, that the gloves were not worn. When she spoke of extremely strong support, she, as a scientist, was assigning the highest level of support from the scale. The residue on the gloves contained the same range of elements as the residue from the discharged cartridge casings recovered from the scene of the shooting. She felt that firearm residue in itself is not that discriminatory; there are about six or seven types which are seen in this country. The one she was dealing with was one of the more uncommon ones that the Forensic Science Ireland did not see often.

6. The driver of the vehicle was found to be in possession of a Hyundai car key. He asked that this be returned to him, saying it was of sentimental value, this key did not feature any further; it may have been returned to the driver or may otherwise have gone missing in the Garda station. From the limited information we have provided about the circumstances of the shooting and the investigation, it will be evident that two vehicles, the black Hyundai hatchback, which was set on fire and which the Beretta pistol was recovered, and the black BMW saloon, which was stopped by Gardaí on the M50, had a central significance to the investigation. Much of the focus of the investigation and then of the evidence at trial was centred on tracing the movements of the two vehicles, before and after the shooting. This involved the examination of a large amount of CCTV footage, and that which was regarded as relevant was brought together in a number of compilations.

7. Part of the case that the prosecution advanced against the respondent, SM, was that they contended he had driven a black Hyundai hatchback from Finglas to Sandford Gardens, Dublin 8, on the afternoon of the attempted murder. It was not suggested that he could be seen in the Hyundai hatchback at any stage, but two men were identified running from the place where the Hyundai was last seen at Sandford Gardens, Dublin 8, approximately six hours prior to the shooting. One of the two was identified as SM. The prosecution said that the other person seen

running could be identified as a Mr. JO, a cousin of the respondent, SM. The identifications were made by a community Garda, Garda Niamh McCarthy. One aspect of the identification is that clothing worn by the first of the men who were running was seen to match distinctive clothing worn by SM in earlier CCTV footage harvested from the Pearse Street area earlier that day and which it was accepted at trial as having featured SM. The two men who were seen running were then tracked leaving the White Swan Business Park, travelling by taxi to Pearse House flats in Dublin 2. JO lives in Pearse House flats, while SM lives nearby in Leo Fitzgerald House.

8. Insofar as an important part of the prosecution case was establishing a connection between the BMW saloon and the Hyundai hatchback, there was further evidence which the prosecution contended was significant. The Hyundai had been registered in the name of a particular individual, a Mr. James Sweeney, on 25th January 2021, and the black BMW had been sold to a person who used the same phone number as James Sweeney in the month before the shooting. Mr. Joan Petra Lacacis had been the owner of a black BMW, and on 26th January 2021, sold it to a man who had made contact with him on phone number 085-1418565. During the course of the investigation, one of the investigation team was in telephone contact with a Mr. James Sweeney. That investigator was contacted by Mr. Sweeney on occasions on the same mobile phone number. The Director contends that a jury would be entitled to legitimately infer that both vehicles were sources from the same person as part of the plan for the attempted murder.

9. At trial, much time was spent by the prosecution in seeking to trace the movements of the two vehicles on the day of the shooting, and to a lesser extent, on the day prior to the shooting. The Garda who had responsibility for this aspect of the case gave evidence over four days, between 13th and 16th March 2023. The prosecution invited jurors to conclude that the vehicles shown in the footage were the vehicles of interest. On some occasions, though rarely, this was because the registration plate was visible, on other occasions, partial registration plates were visible, and on other occasions, the attention of jurors was drawn to particular characteristics of the vehicle on screen. In the case of the BMW saloon, particular attention was placed on the fact that the vehicle had alloy wheels, "M Sport" ten-spoke alloys, which were not the original wheels on this BMW SE model. In the case of the black Hyundai hatchback, the registration plate 07-TS-4838, was visible at a number of points. On another occasion, attention was drawn to what was said were distinctive features of the particular vehicle in question, including a low registration plate location on the bumper of the car, brake lights placed higher up and blue-coloured back light radio and dashboard.

10. In all, four CCTV compilations were shown to the jury. The first compilation, according to the prosecution, showed the movements of a Hyundai hatchback from the evening of 23rd February 2021 to 24th February 2021, ending at approximately 4.26pm. The second compilation showed movements and times of movements of both the Hyundai hatchback and a BMW saloon car on the evening of 24th February 2021. The third compilation commences at 10.19pm on 24th February 2021 and shows movements of a black hatchback and a black saloon car around the time of the shooting of the injured party. The fourth montage, which is less significant in the context of the appeal, is from the morning of 24th February 2021 in the Pearse Street area. It shows SM walking through the area. It was a building block towards the identifications later in the day.

11. We will refer to some, but not all, of the purported sighting of vehicles. We do so to provide context for the application at trial for a direction and for the appeal by the Director from the directed acquittal. Purported sightings were a significant element of the direction application and were also the subject of considerable attention during the course of this appeal hearing. CCTV footage from 23rd February 2021 shows some movements on the part of a black Hyundai. This car, along with another vehicle, a blue Mazda, are seen at the Applegreen service station on St. Margaret's Road, Dublin, where the registration number and plates of the black Hyundai, 12-TS-40920, are visible. The two vehicles are seen arriving at a particular location: Plunkett Crescent, Finglas. The blue car made a U-turn and the other car parked outside a particular dwelling: 61, Plunkett Crescent. Footage from the following afternoon shows a black hatchback leaving Plunkett Crescent at 3.56pm. Footage over the next hour or so shows a black hatchback travelling towards the city. At one point, on Dorset Street at approximately 4.12pm, the registration plate is partly visible, and the full plate is visible seven minutes later, at 4.19pm, on Thomas Court, Dublin 8. At that point, it is seen travelling behind a silver hatchback, that same sequence of silver hatchback followed by a black hatchback is shown on Marrowbone Lane, heading in the direction of Cork Street. At 4.24pm, a black hatchback travels along Susan Terrace towards the junction with O'Donovan Road and Sandford Gardens. Another camera shot shows a black hatchback crossing the junction from Susan Terrace onto Sandford Gardens. The next piece of footage shows a black hatchback travelling from Sandford Gardens up Merton Avenue, turning left onto Greenville Avenue, a road which leads to Sandford Gardens. Two males are seen running from this area a short time later. Garda Niamh McCarthy, a community Garda from Pearse Street Garda station, gave evidence that on viewing the CCTV footage for this period, she was able to identify SM and a second male, JO. At this stage of the purported identification, SM was wearing a black jacket with a white logo on the left chest and had a grey hood over his head. Garda McCarthy recognised him as SM of Leo Fitzgerald House. Footage from the Pearse Street area from earlier that morning had shown SM; there was no dispute about the fact that it was he, wearing a dark coloured jacket with a white logo on the left chest, a grey hood, grey tracksuit bottoms and black runners.

12. In relation to purported sightings of a black BMW 07-MH-10667, the jury were assisted by being shown photos of the vehicle taken after it was seized. These photos, which drew attention to the distinctive alloy wheels not standard with this model BMW, were available for comparison with footage of a vehicle of interest. At 6.26pm, a black saloon car is seen travelling along Harmony Row, Dublin 2. At this point, the number plate is partially visible. Footage then tracks a black saloon vehicle along Holles Street and Merrion Square North, Fitzwilliam Street, Baggot Street, crossing Leeson Street onto Adelaide Road, crossing the junction from Harcourt Street through Richmond Street onto Hartington Street, towards the South Circular Road. At various stages, including footage from Bastible restaurant, South Circular Road, at 6.34pm, it is contended the alloy wheels on the saloon are visible. At 6.36pm, from a camera located at a residence at Wolseley Street, a black saloon is seen to park at Sandford Gardens.

13. In the case of the black hatchback of interest, there is footage of a black hatchback at locations along Sandford Gardens, Susan Terrace, Ebenezer Terrace, Donore Avenue and Cameron Street. At 7.36pm, a registration plate is partly visible on the black hatchback, which at that stage was driving up Fingal Street, reversing back towards Cameron Street where it parks for a few

minutes. After parking for some six minutes, the black hatchback was on the move again and its movements were tracked at various locations in Dublin 8. At 7.50pm, a black hatchback is observed travelling to Sandford Gardens. There, a person can be seen walking towards a parked saloon car, which starts up shortly after and leaves the area. At 7.53pm, a saloon car parks in the same place. At 10.19pm, a black hatchback is seen travelling along Sandford Gardens, through the junction of O'Donovan Road onto Susan Terrace. At 10.50pm, a silver Toyota Prius taxi is shown arriving onto Cameron Street. It was suggested this was in order to collect the injured party from Eugene Street. There is no CCTV footage which captures the actual shooting, but at 10.54pm, immediately after the shooting, a black hatchback is seen to leave the scene at speed. At 22.55 hours, a black hatchback is seen travelling at speed along Sandford Gardens, turning onto Greenville Avenue. In the footage, a large flash of light is visible. Footage from the same camera, which captured the flash of light, the camera located at Wolseley Street, also appears to show individuals running towards a parked black saloon. In the aftermath of the shooting, the movements of a black saloon car are the subject of interest. There is footage of such a vehicle travelling at speed from Donore Avenue towards the junction at South Circular Road. Footage was shown from Clogher Road, Drimnagh Road, the Longmile Road, Walkinstown Road, and the approach to the Walkinstown roundabout. At 11.09pm, there is a still image from the M50 toll bridge. At this point, registration plates 07-MH-10667 are clearly visible on a black BMW. It is this vehicle, a few minutes later, when the manner of its driving was the interest of Gardaí, was stopped by Gardaí. At trial, the defence, in particular, JB, placed considerable emphasis on the fact that there was a lack of footage between the Walkinstown roundabout and the toll bridge. The defence was also critical of the fact that footage was not harvested from other roads which were available as exits from the Walkinstown roundabout.

The Judge's Ruling

14. Having heard submissions, following the close of the prosecution case and in relation to the application to withdraw the case from the jury, the judge considered the matter overnight and then ruled on the issue on 22nd March 2023, in the following terms:

> "This is a circumstantial evidence case. Circumstantial evidence is evidence of independent facts each of which in itself is insufficient to prove the main fact yet may either by their accumulative weight or still more by their connection one with the other as links in a chain prove the principal fact to the established.
>
> In considering this application for a directed verdict, the Court looks to that definition of circumstantial evidence and the law as articulated by the Court of Appeal in the case of [*DPP v. M* [2015] IECA 65] and to [paragraph 33] of that judgment and the statement of Lord Lane which articulates the [*R v. Galbraith* [1981] 2 All ER 1060] principles as follows. That, one, if there is no evidence that the crime alleged has been committed by the defendant, then there is no difficulty and the judge will of course stop the case. And category 2A that a difficulty arises where there is some evidence but it is of such a tenuous character, for example, because of inherent weaknesses or vagueness or because it is inconsistent with other evidence and where the judge comes to the conclusion that the

prosecution evidence taken at its highest is such that a jury properly directed could not properly convict upon it. It is the Court's duty on application being made to stop the case. Or, B, where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and where one possible view of the facts there is evidence upon which a jury could properly come to a conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It goes on to say that they will of course as always in this branch of law be borderline cases which can be safely left to the discretion of the trial judge.

Later in that judgment the Court of Appeal rejects the contention that the *Galbraith* principles are authority for the proposition that a case must be withdrawn from the jury if the prosecution evidence contains inherent weaknesses or is vague or contains significant inconsistencies. And says that the emphasis on *Galbraith* is on the primacy of the jury in the criminal trial process as a sole arbiter of issues of fact and that even if the prosecution's evidence contains inherent weaknesses or is vague or contains significant inconsistencies, it is for the jury to assess the evidence and make of it what they will, unless the state of the evidence is so [infirm] that no jury properly directed could convict upon it and say that *Galbraith* is concerned with fairness (*sic*).

Further the Court says that a withdrawal of a case from a jury should be an exceptional measure to which resort should only be had for the purposes of avoiding a manifest risk of an unfair, of a wrongful conviction.

It is also clear from another decision of the Court of Appeal, being [*DPP v. Taylor* [2018] IECA 74], which was referred to in the arguments to where the Court dealt with and approved the position articulated in *Blackstone*[*'s Criminal Practice*] in respect of circumstantial evidence and quotes relevant extracts from *Blackstone* that the question for the Court is and I quote, ['On the proper test in *Galbraith*, the prosecution are not required to show that the jury could not reasonably reach any
alternative inference contended for. The question is whether it is properly open to the jury to reach the inferences contended for by the prosecution.']

As stated this is a case of joint enterprise based on circumstantial evidence. Turning to joint enterprise, the Court was referred to chapter seven of [*The Judge's Charge In Criminal Trials*, Genevieve Coonan and Brian Foley]. In that textbook a concise statement of the law on joint enterprise is said to be found in *R v. Anderson and Morris* [[1966] 2 QB 110] as follows. 'Where two persons embark on a joint enterprise [,] each is liable criminally for acts done in pursuant of the joint enterprise[,] including unusual consequences arising from the execution of the joint enterprise[;] but if one of them goes beyond what has been tacitly agreed as part of the joint enterprise, the other is not liable for the consequences of that unauthorised act.'

Later in that text it states that, 'The agreement of the participants lies at the very heart of the doctrine of joint enterprise. In relatively [straightforward cases, it seems that] it will be sufficient for the trial judge to instruct the jury that it may convict the accused of the [offence] with which he is charged if it is satisfied beyond a reasonable doubt that [(a)] he

agreed with others to commit the offence [and (b) he, in fact,] played some part in its commission.' In other words, that each defendant shared the intention to commit the offence and took some part in it so as to achieve that aim.

As stated, this case relies on circumstantial evidence which does not give rise to direct evidence but rather to inferences. It is difficult to list every category of circumstantial evidence but some common examples would be evidence that establishes motive, evidence that establishes opportunity to commit the offence, evidence as to the state of mind of the accused at the time the offence took place, the commission of propriety acts, the possession of items that could be used to commit the offence, evidence of identification, fingerprints, DNA records, mobile phone records, establishing presence at a place or connection to an object, evidence of the commission of similar acts at a point close to time in the commission of the offence in question.

The attempted murder charge requires proof of an intention to kill and therefore as part of the joint enterprise a tacit agreement of intention to kill. The firearm charge requires an intention to endanger life and as part of a joint enterprise a tacit agreement to endanger life. This tacit agreement can be inferred from pieces of circumstantial evidence.

The Court does not intend to comprehensively traverse all of the evidence or arguments opened in this application save for the following. The gun found in the back of the Hyundai found burnt out nearby can't forensically be linked to the shooting of [the injured party]. However, there is no evidence to physically link either accused with this car. The prosecution seeks to draw an inference from the identification of [SM] by Garda [Niamh] McCarthy some six and a half hours earlier outside The White Swan industrial estate in the vicinity of where the Hyundai was originally parked as evidence that he organised the procurement of the Hyundai as part of the joint enterprise. There is no evidence to link either accused to the scene at Eugene Street or than witness statements describing two youths running from the area giving various descriptions and giving evidence of some conversation.

There's a partial view of the registration plate of a BMW leaving the Pearse Street area earlier in the day. That BMW cannot be positively identified again until it passes through the toll bridge on the M50 some 20 minutes after the shooting incident. Both accused are in the car at that time, this is the first sighting of [JB].

There is evidence of a car that appears to be a black saloon car parking near Wolseley Street in the vicinity of the Hyundai around the time it was burnt out and the CCTV footage shows three pairs of legs moving in the vicinity of that car. There is CCTV footage of a black saloon car at various points between that location and when a black BMW is identified going through the M50 toll bridge and is ultimately stopped by gardaí at the Finglas exit.

The prosecution seeks to draw an inference that the same black saloon is captured on all of that footage and point to the type of wheel on the car which can be seen on some of the footage. There is no footage showing any black saloon entering the M50.

When stopped at the M50 nothing was found on [SM]. A pair of gardening gloves were found on [JB], analysis of those gloves finds a large population of firearm residue on the

gloves which provides extremely support for the proposition that the wearer of those gloves was a shooter in an incident, but the gloves could not be definitively linked to the casings from the scene of the shooting of [the injured party] although they contained the same range of fragments as those recovered from the gloves.

The only evidence of a link between the BMW and the Hyundai and is that the buyer of the BMW at the relevant time and the registered owner of the Hyundai at the relevant time used the same mobile number, that number is not linked to the accused men.

While the prosecution contends that there is evidence of detailed planning, the only evidence in respect of propriety acts linked to the accused is the identification of [SM] some hours earlier in the area where the Hyundai was parked. Although there is no requirement for specific types of circumstantial evidence in any given case the Court notes that there is no other phone or social media evidence, no confession evidence, no evidence of motive.

As stated by the Court of Appeal in the case of *DPP v. Taylor* in a circumstantial evidence case upon a proper application of the test in *R v. Galbraith* as cited in the [All England Reports], the prosecution is not required is show that the jury could not reasonably reach an alternative inference contended for. The question is whether it is properly open to the jury to reach the inferences contended for by the prosecution.

Having considered the evidence, the specific charges before the Court and the arguments, the Court is satisfied that is not properly open to the jury to reach the inference contended for by the prosecution. And so the Court places the evidence in category 2A of the *Galbraith* test. That is that where there is some evidence but it is of such a tenuous character for example because of inherent weaknesses or vagueness, or because it is [in]consistent with other evidence and where the judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict upon it, it is the Court's duty on application being made to it to stop the case. And accordingly the Court accedes to the application on behalf of both accused in respect of all charges and will withdraw all charges from the jury."

The Application before this Court

15. Before this Court, the Director has contended that the trial judge erred in law in directing the jury to find the respondents to this application not guilty. The Director contends that the trial judge was in error in concluding that it was not properly open to the jury to reach the inference contended for by the prosecution. The Director submits that the judge erred in law in the manner she interpreted the *Galbraith* test, as explained by this Court in *DPP v. M* [2015] IECA 65. It is contended the judge was in error in holding that this case was one which fell under the principles under 2(a) of the *Galbraith* test rather than the principles under 2(b). It is said the evidence in this case was not objectively tenuous or weak or vague, but rather, depended entirely on the jury's assessment of all of the evidence taken together, in particular the CCTV footage which was exclusively a matter for the jury. The Director says that the trial judge came to a definitive conclusion on matters which were properly entirely within the province of the jury; matters where, on one possible view of the facts, there was evidence upon which the jury could act and properly

come to the conclusion that the respondents were guilty. The Director has rehearsed the various strands of the prosecution case and says that the trial Court failed to take account of the fact that there were multiple strands of evidence and to consider whether these strands, taken together, could lead to a conclusion of guilt by a properly charged jury. The Director says that instead of assessing the prosecution case at its highest, as the judge ought to have done, instead, she made her own assessment of the evidence as if she was the trier of fact. It is submitted on behalf of the Director that the trial judge was in error in the manner of her assessment of the various elements of the circumstantial evidence presented. This, it is said, saw the judge assess each piece of evidence separately and in insolation instead of considering whether all of the different strands of evidence, when taken together, supported a conclusion of guilt. The Director says that when all the strands of evidence are analysed together, they paint a vivid picture which would allow a properly charged jury to be satisfied of guilt and allow it to exclude the possibility that the two respondents were the victims of an extraordinary set of unfortunate coincidences.

16. Before this Court, both respondents have rejected any criticism of the trial judge's approach. It is said she made her ruling having heard the evidence in the case over a period of two weeks, and in addition, against a background of two weeks of trial motions. Both respondents say that the entitlement of the Director to appeal under s. 23 of the Criminal Procedure Act 2010, is to appeal on a question of law, but the respondents say that the Director has failed to identify a discrete error of law, and that in reality, this appeal is directed to errors of fact. The respondents, particularly JB, say that appeals of this nature involve a two-stage process. There is reference to a "binary" procedure. Such an approach demands, firstly, consideration of whether the directed verdict of not guilty or the exclusion of evidence was as a result of an error of law. If that stage is reached, it is then necessary to consider what was the state of the evidence and whether a properly directed jury could be satisfied of the guilt of the accused beyond reasonable doubt, and even if that stage is reached, it is still necessary to consider whether it would be proper to quash the acquittal and order a retrial. The Director is criticised for seeking to recast what is really an issue taken by her with factual findings on the part of the trial judge into a legal error. It is stressed that circumstantial evidence cases cannot be regarded as outside the principles of law to be found in cases such as *Galbraith* and *DPP v. M*. There can be no question of putting circumstantial evidence cases beyond judicial scrutiny.

17. For her part, the Director rejects any suggestion that all that is at issue here is that the Director disagrees with the trial judge in relation to findings of fact. The Director asserts that the decision to withdraw the case from the jury involved a clear error of law, relying on the case of *DPP (Breen) v. Valentine* [2007] IEHC 267, and says the case is authority for the proposition that the question of whether there was sufficient evidence in law to support a conviction was a question of law. The respondents say that the decision in question is of limited assistance to the Director. They say that cases cited in the course of the judgment in fact support their decision. They refer to the case of *The State (Turley) v. O'Floinn* [1968] 1 IR 245, and point out while that was referred to in *Breen*, the factual background could scarcely be more different, the former involving a refusal by the then President of the District Court to state a case arising from the decision to convict for the offence of using a place for public dancing without a public dancing licence. While it is true that the factual background was somewhat different, relating to the manner in which persons were

admitted to membership of Orwell Tennis Club, which the judge in the District Court had seen as a masquerade to avoid the provisions of the Public Dance Halls Act 1935, but the comments made by the Chief Justice dismissing an appeal from the President of the High Court, with which all other members of the Supreme Court agreed, was unambiguous. He said:

> "The ground of the District Justice's refusal to state a Case was that there was no question of law involved, but the question whether there is sufficient evidence in law to support a conviction is not a question of fact but a question of law."

Again, the respondents say that the decision in *Fitzgerald v. DPP* [2003] 3 IR 247, referred to in the course of *Breen* judgment, is in fact in their favour. It is indeed the case that Hardiman J. was of the view that different tests can apply when what is in issue is a decision to acquit, as distinct from a decision to convict. Hardiman J. commented as follows:

> "Many cases establish the proposition that a decision which is come to wholly without evidence to support it may be quashed by *certiorari.* A classic Irish decision in this area is *The State (Creedon) v. Criminal Injuries Compensation Tribunal* [1988] I.R. 51. As appears from that case, the test is whether the decision impugned was at variance with reason and common sense. That such a decision is invalid is undoubtedly a legal proposition, and a true one. But the question of whether in any particular case a decision to acquit is of that nature is a factual one which does not give rise to any 'question of law'. In this respect it is to be distinguished from a decision to convict because, as was held in *The State (Turley) v. Ó'Floinn* [1968] I.R. 245, *per* Ó'Dalaigh C.J. at p. 251, 'The question of whether there is sufficient evidence in law to support a conviction is not a question of fact but a question of law'. This is so because the ingredients of an offence are always known as ascertainable and the question of whether there is evidence to support the existence of each of them is a wholly legal question. But if the question raised related not to the existence of evidence, but to its credibility or to inferences of fact which could reliably be drawn from it, that would be a question of fact.
>
> A useful method of approaching the question of whether a particular issue, in a criminal case, is a matter of fact or of law, is to ask whether, if the case was being tried by judge and jury, the issue would be one for the judge or for the jury. In this case, it is hard to deny that the question of whether the applicant had drunk alcohol after driving but before the urine test, and what the effect of that alcohol was or might have been, would have been one for the jury."

18. The respondents, particularly JB, draw attention to the sentence "[b]ut if the question raised related not to the existence of evidence, but to its credibility or to inferences of fact which could reliably be drawn from it, that would be a question of fact."

19. For our part, if this matter was free of authority, we would have no hesitation in concluding that a submission of no case to answer and an application to withdraw a case from the jury is classically a matter of law. Every such application involves a submission that, as a matter of law, there is insufficient evidence to be considered by the jury and it is a case that should properly be withdrawn from the jury's consideration. As it happens, we do not think the matter is entirely free of authority. While most of the authorities arise by way of case stated from the District Court, it seems to us that the net effect of them is to provide additional support for the view that what is in

issue is a point of law. We are in no doubt that the decision of the trial judge in this case to withdraw the charges from the jury was based on a conclusion by her that as a matter of law, the evidence which had been adduced was insufficient to allow a properly directed jury convict. In the circumstances, we are of the view that we must address the merits of the Director's contention that the judge fell into error.

Discussion and Decision

20. As we have already noted at para. 15 above, the Director is critical of the trial judge for having come to a definitive conclusion on matters which were entirely within the province of the jury. It is said that in coming to the decision that she did, the trial judge failed to take account of the multiple significant strands of evidence which, when taken together, could lead to a conclusion of guilt. The Director contends that the trial judge, instead of assessing the prosecution evidence at its highest, made a conclusive assessment of the evidence. In particular, it is said she appears to have reached her own views on the probative value of the CCTV footage. Standing back from the ruling, the Director says the trial judge erred in that she appears to have assessed a piece or strand of evidence separately and in a vacuum, instead of asking whether all of the different strands of evidence, when taken together, could support a conclusion of guilt. The Director says there was ample evidence in this case upon which a jury could conclude that the accused men had carried out the shooting and were not the unfortunate victims of a series of coincidences.

21. Both respondents are dismissive of the suggestion that the judge did not approach her task properly. It was pointed out that the trial judge was a particularly experienced one and it was a matter of public record that she had presided over a number of high-profile circumstantial evidence cases. While she may not have specifically referred to the manner in which circumstantial evidence is to be considered, it was, in truth, inconceivable that she would not have approached her task in the correct manner. We think the point made by the respondents, in particular by the respondent JB, is a fair one. We would be slow to conclude that the trial judge approached her task in an incorrect manner. That said, it does seem, on a reading of the trial judge's ruling, that there was a focus on the frailties and limitations of individual strands of evidence. What is absent is a specific consideration of whether it was the case that the cumulative effect of the various strands of evidence, when taken together, was such that they required to be considered by a jury and that it was a case that ought not to have been withdrawn from the jury's consideration.

22. We will not rehearse the various strands again in any detail. Suffice to say that the CCTV footage available showed multiple purported sightings of both vehicles of interest. In most cases, the identification of a vehicle was by reference to a characteristic of the vehicle, such as the alloy wheels on the black BMW, rather than full or even partial registration plates. Any trier of fact would have to give careful consideration to the CCTV footage and would probably want to view it several times. It certainly seems to us that the footage, taken at its highest, could result in a conclusion that, beyond a reasonable doubt, the vehicles shown in the footage were those central to the investigation: the vehicle set on fire close to the scene of the shooting from which a pistol was recovered; and the vehicle in which the two respondents and another man were travelling when the vehicle was stopped by Gardaí. Linked to the footage of the vehicles is the identification of the respondent, SM, running from the Sandford Gardens area some minutes after the Hyundai

hatchback had been tracked to the area. A further significant strand of the case was the firearms residue on the gardening gloves in the possession of the respondent, JB, when he was stopped by Gardaí approximately 20 minutes after the shooting. At one level, this was direct evidence against the person in whose possession the gloves were found. However, the gloves also required consideration in the case of the respondent, SM. Was it beyond coincidence that he would be identified running from the Sandford Gardens area some minutes after the hatchback had been tracked to that area, where it would later be found burnt out in the immediate aftermath of the shooting, and after that shooting, he now found himself one of the occupants of a car in which there were gardening gloves bearing firearms residue, which residue contained the same range of elements as the residue from the discharged cartridge casings recovered from the scene of the shooting? Insofar as the prosecution sought to make a connection between the two vehicles of interest, there was the fact that both vehicles had been owned by the same person in the weeks before the shooting. A further strand was the failure to answer questions when the inference provisions were invoked. Neither respondent could be convicted by reason only of the failure to answer questions, but once the evidence was admitted, it had the potential to support the other evidence in the case. Overall, we are of the view, given the primacy of the role of the jury in a criminal trial, that the state of the evidence at the conclusion of the prosecution case was such that it required consideration by a jury, and this was not a situation where the case could properly be withdrawn from the jury.

23. In our view, withdrawal of the case from the jury amounted to an error in law, and in those circumstances, we quash the acquittal. In circumstances where the error of law identified was the withdrawal of a case from the jury, which should have been left to the jury, it follows that we must quash the acquittal. This we do and we will order a retrial.