**THE COURT OF APPEAL**

**Record Number: 276/16 & 275/16**

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

**BETWEEN/**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**
**RESPONDENT**

**- AND –**

**MATTHEW CUMMINS**
**FIRST-NAMED APPELLANT**

**- AND -**

**JAMES DAVY**
**SECOND-NAMED APPELLANT**

**JUDGMENT of the Court delivered (remotely) on the 13th day of July 2021 by Ms. Justice Isobel Kennedy.**

1. This is an appeal against conviction. Following a 19-day trial which commenced on 11th July 2016 the appellants, along with a third co-accused, were convicted of the murder, on 12th February 2014 in Edenderrry, of Thomas (Toddy) Dooley.

**Background**

2. The prosecution case was that on 11th February 2014, Mr. James Davy came from Celbridge to Edenderry. On the afternoon and evening in question, he was drinking in a public house called Mangans. He went to this public house with his cousin, Sean Davy, and others. The prosecution case was that James Davy had a wooden baseball bat in his possession in the public house, and also, at a party he attended later in the evening. Ms. April Murray, a witness at trial, was in the public house during the time and, at some stage a decision was taken that they would go to the home of Ms. Murray at 178, The Sycamores, Edenderry. Matthew Cummins joined the party there. He had not been in the public house earlier. All three accused persons were said to have consumed alcohol and a white powder referred to throughout the trial as cocaine or methadrone (a head shop stimulant).

3. The three men were engaged in acts of criminal damage at the house of Ms. Murray and as a result, they were asked to leave. The evidence at trial indicated that they left the party at approximately 5.00am. The prosecution case is that the three accused then went to home of Thomas (Toddy) Dooley, and there, murdered him. The late Mr. Dooley was subsequently found on Sunday 16th February 2014, slumped in the armchair of his living room with severe head injuries. The pathologist recorded ten blows to his body; numerous injuries to his back and torso and burn marks where an attempt had been made to set him on fire. The evidence at trial included CCTV footage showing the three accused leaving the party in The Sycamores and heading in the direction of St. Senan's Court where Thomas Dooley lived. There was also later CCTV footage showing the three men disposing of articles at a recycling plant. A baseball bat and various other items were recovered from the recycling bin. Mr Dooley's blood was found on the baseball bat and his DNA was found on Mr Cummins' clothing.

4. The respondent advanced the case that the accused embarked on a joint enterprise and that each was criminally liable for Mr Dooley's death. The evidence adduced at trial was that the three accused had been together prior to the offence, had travelled to Mr Dooley's home in the early hours of the morning, Mr Cummins gained entry through a window and then let the other men into the house, James Davy was in possession of the baseball bat, all three were together in the house for some time, Mr Dooley was severely beaten, leading to his death and an attempt was made to burn the body. Having left the house, incriminating evidence was disposed of in a recycling bin, which was seen on CCTV footage and during interview, while each accused accepted they were present in Mr Dooley's home, each accused gave various accounts of their involvement.

5. The case for the defence turned upon the degree of participation of each of the accused in the death of Mr Dooley. Sean Davy admitted hitting the deceased and both James Davy and Mathew Cummins admitted being present at the scene but denied hitting the deceased.

**Grounds of appeal**

6. Matthew Cummins puts forward the following eleven grounds of appeal:-

(1) The learned trial judge erred in law and in fact in refusing to grant Mr Cummins a separate trial from his co-accused.

(2) The learned trial judge erred in law and in fact in refusing to accede to Mr Cummins's application for the charge to be dismissed pursuant to s.4E of the Criminal Procedure Act, 1967 as amended.

(3) The learned trial judge erred in law and in fact in refusing to grant a direction at the close of the prosecution case.

(4) The learned trial judge erred in her charge to the jury.

(5) The learned trial judge erred in law in failing to recharge the jury on the concept of joint enterprise and common design in the context of the prosecution against the appellant.

(6) The learned trial judge erred in law in failing to recharge the jury on the relationship between foresight and joint enterprise and in particular that foresight was a simply a factor to taken into consideration by the jury in assessing whether Mr Cummins processed the requisite mens rea at the relevant time.

(7) The learned trial judge erred in law in failing to recharge the jury that a text message sent from the phone of Chloe McBride to the phone of Mr Cummins's co-accused in December of 2013 was relevant to Mr Cummins's case and to his defence in circumstances where the learned trial judge had previously acceded to a prosecution request to recharge the jury that this text message was not relevant to the prosecution case.

(8) The learned trial judge erred in law in failing to recharge the jury that a black knife handle found at a scene close to where the weapon used to kill Thomas Dooley was also found was relevant to Mr Cummins's case and to his defence in circumstances where the learned trial judge had previously acceded to a prosecution request to recharge the jury that this knife handle was not relevant to the prosecution case.

(9) The learned trial judge erred in law and in fact in failing to draw the jury's attention or marshalling the evidence to any act committed by Mr Cummins and coupled with the requisite intention such as to allow the jury find Mr Cummins guilty of murder.

(10) The verdict of the jury is perverse having regard to all the circumstances of the case and the totality of the evidence adduced as summarised to the jury by the learned trial judge and having regard to the onus of proof required to be discharged by the prosecution.

(11) The trial was unsatisfactory and Mr Cummins was denied a fair trial in all the circumstances.

7. James Davy puts forward ten grounds of appeal as follows:-

(1) That the learned judge of the Central Criminal Court erred in law and in fact when, on the 20th June, 2016, he refused the pre-trial application to sever the indictment herein and to allow the appellant a separate trial from his co-accused;

(2) That the learned trial judge erred in law and in fact when, on the 11th July, 2016, she ruled that the application to sever the indictment herein and to allow the appellant a separate trial from his co-accused was premature;

(3) That the learned trial judge erred in law and in fact when, on the 18th July, 2016, she refused the application to sever the indictment herein and to allow the appellant a separate trial from his co-accused;

(4) That the learned trial judge erred in law and in fact when, on the 19th July, 2016, she refused the application to sever the indictment herein and to allow the appellant a separate trial from his co-accused;

(5) That the learned trial judge erred in law and in fact when, on the 28th July, 2016, she refused the application direct that the jury find the appellant not guilty of murder;

(6) That the learned trial judge erred in law in failing to direct the jury that it was not open to them to bring back a verdict of guilty on section 7(2) of the Criminal Law Act 1997;

(7) That the learned trial judge erred in law and in fact in refusing to accede to the defence requisition that she direct the jury that it was open to them to bring back a verdict of guilty on section 7(2) of the Criminal Law Act 1997;

(8) That the learned trial judge erred in law in misdirecting the jury on the principles of common design with reference to the charge of murder and the possible alternative verdicts;

(9) That the learned trial judge erred in law and in fact in finding that there was no basis on which to redirect the jury about the possibility of a verdict of manslaughter if they determined that there had been gross negligence or recklessness on the part of the appellant and in refusing to accede to the defence requisition that she redirect the jury on those issues;

(10) That in all the circumstances, the verdict is unsafe and unsatisfactory.

8. Ms. Biggs SC, who appears on behalf of the appellant Matthew Cummins says in oral submissions that there are three elements to her client's appeal. First, the failure to dismiss the charge pursuant to section 4(E) and to grant a direction, second, the failure to sever the indictment and third, the alleged deficiencies in the charge.

9. While this appellant has set forth eleven grounds of appeal, the grounds fall within those three areas. However, we will approach this appeal with reference to grounds common to both appellants and will group the grounds in terms of the elements identified by Ms. Biggs.

10. Similarly, Mr Dwyer SC for the second appellant, James Davy is advancing the refusal to sever the indictment, the refusal to grant a direction, and aspects of the judge's charge.

**Common grounds of appeal**

**Refusal to grant a separate trial**

**Matthew Cummins**
Ground 1

The learned trial judge erred in law and in fact in refusing to grant Mr Cummins a separate trial from his co-accused.

**James Davy**
Ground 2

That the learned trial judge erred in law and in fact when, on the 11th July, 2016, she ruled that the application to sever the indictment herein and to allow the appellant a separate trial from his co-accused was premature;

Ground 3

That the learned trial judge erred in law and in fact when, on the 18th July, 2016, she refused the application to sever the indictment herein and to allow the appellant a separate trial from his co-accused;

Ground 4

That the learned trial judge erred in law and in fact when, on the 19th July, 2016, she refused the application to sever the indictment herein and to allow the appellant a separate trial from his co-accused;

**Background**

11. Prior to the trial commencing each of the accused made an application to sever the indictment before McCarthy J. This application was refused and this application is not the subject of the within appeals.

12. During the trial the defence pursued by each accused involved placing the responsibility for the attack leading to Mr Dooley's death on each other. Both Matthew Cummins and James Davy denied striking Mr. Dooley with a baseball bat, claiming in interview that, in fact, he had been killed by a co-accused, Sean Davy. In addition, Matthew Cummins sought to rely on a text sent from the phone of a Chloe McBride to James Davy on the 7th December 2013 to persuade the jury that his two co-accused had a potential motive to inflict serious harm on Mr Dooley. Ms McBride was the girlfriend of James Davy at the time and this text message stated, "Toddy is a rapist, never going there again". Ms. McBride is the granddaughter of the deceased and it is important to note that the allegation did not concern her and, of even greater significance, the allegation in the text message was false and accepted at trial as being false.

13. The issue of separate trials was canvassed on the first day of the trial and the trial judge refused the application in circumstances where all parties agreed that it was premature. In those circumstances we do not find merit in ground 2 of James Davy and indeed an argument in respect of this ground is not advanced in submissions.

**Application for severance on Day 6 and Day 7**

14. The application was renewed on Day 6 and 7 of the trial. The background to the application is somewhat convoluted and the applications are interconnected. Applications

were made by Ms Biggs SC on behalf of Matthew Cummins and by Mr Dwyer SC on behalf of James Davy.

15. The application on behalf of Matthew Cummins appears to have been predicated in part on an expectation on behalf of Mr Cummins that the respondent would adduce evidence of the text message. It is said that this evidence was highly relevant to Mr Cummins in that when interviewed by the Gardaí, he contended, when he asked his co-accused Sean Davy why he struck the deceased, that Mr Davy responded that he had raped an individual with connections to him. Therefore, the text message, it is said was relevant to motive and also demonstrated consistency of account on the part of Mr Cummins. James Davy did not want this message introduced and sought a separate trial on that basis. It was contended on his behalf that where the respondent did not seek to rely on the message, but was aware that Mr Cummins intended to do so, the Director ought to consent to severance.

16. Ms. Biggs SC desired the respondent to introduce evidence of the text message itself as she did not want her client to be placed at hazard in terms of cross-examination as expanded upon hereunder.

17. We observe that the text message did form part of the trial, albeit not the actual text message itself, but was introduced into the case through Mr Cummins' interviews when re-arrested on the 10th June 2014. He was expressly questioned about the text message. The following was put to Mr Cummins:-

> "….I'm going to refer you to a text from Chloe McBride's from (sic) mobile 08XXXXXXXXX to the mobile of James Davy, 08XXXXXXXX and that was sent on the 7th December 2013…"

The content of the text message was then put to him.

18. At the point in the trial when it became clear that the respondent did not intend to adduce the evidence of the text message or to rely upon it in any way, Ms Biggs SC asserted that her client was severely prejudiced in that should she cross-examine on the text message, her client may lose the protection under section 1(f) of the Criminal Justice (Evidence) Act, 1924, as amended. In submissions, the appellant contends that the specific prejudice which arose was encapsulated by the following comment by Mr Treacy SC for the respondent:-

> "So, it's really if Ms Biggs wants this evidence adduced, Mr Dwyer doesn't want the evidence adduced."

19. It was further claimed that a joint trial would hamper the conduct of Mr Cummins' defence and it was submitted that the prosecution was required to identify the specific actus reus of murder being alleged against him. James Davy supported the application for separate trials for similar reasons citing concerns that his co-accused, Matthew Cummins was suggesting he had a potential motive for murder when the prosecution was

not. The potential need to adduce his co-accused's previous arson conviction was also relied upon as a basis for severance. In response, the prosecution reiterated the appropriateness, particularly in this case of joint enterprise, of trying all accused together. The trial judge refused the application and concluded that it was a classic case where there should be a joint trial.

**Submissions**
*The appellant -Matthew Cummins*

20. Whilst the above paragraphs set out the bases for the application, the appellant submits that counsel for the prosecution clearly implied during the application for severance on Day 1 that the text message evidence was to be introduced as part of the prosecution case and there was a reasonable expectation that the message and the motive therein would be introduced by the prosecution. It is said that a complete volte face had taken place when counsel confirmed that the message and motive would not form part of the prosecution's case and further made it clear that it viewed the introduction of such as making serious allegations of misconduct against the deceased giving rise to the second application for severance during the trial.

21. It is said that the trial judge was incorrect in her view that the application for separate trials had already been ruled upon as specific prejudice has arisen. The stance taken by the prosecution meant that not only was the text message not to be adduced as evidence but the Director was further asserting that the text message had no bearing on her case. The appellant had concerns regarding loss of the protection afforded by section 1(f) of the Criminal Justice (Evidence) Act, 1924.

22. The appellant submits that this is one of the rare cases where a separate trial should have been ordered to safeguard against unfairness on the part of Mr Cummins as this was a situation where the prosecution refused to lay cogent evidence before the jury and instead, repeatedly suggested to the jury that such evidence was of no relevance. The evidence was placed in a select way before the jury to the detriment of the appellant and to the benefit of James Davy.

23. The appellant submits that further prejudice was caused by the trial judge when she reinforced to the jury that the text message was not being relied upon by the prosecution.

*The appellant – James Davy*

24. This appellant submits that the trial judge took issue with the application for separate trials on the basis that the appellant was seeking to revisit issues which had already been ruled upon when in fact the appellant was simply availing of an opportunity to revisit the matter when it had initially been ruled as premature.

25. It is said that the refusal to order separate trials resulted in prejudice as the appellant was left in a position where evidence not being relied upon by the respondent was being relied upon by Matthew Cummins, that being the text message.

26. The appellant refers to the following passage from O'Malley in "The Criminal Process" at para 1498 onwards:-

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

*The respondent*

27. In respect of James Davy the respondent says there is no prejudice beyond that which would be expected and accepted to arise in any joint trial. The prosecution made clear that it was not relying on the text message and it was not advancing any motive for murder against James Davy.

28. In respect of Matthew Cummins, the respondent submits that there was no obligation on the prosecution to adduce the text message evidence. The respondent notes that the allegation in the text message was fully investigated by Gardaí and deemed to be without foundation. The respondent argues that the position adopted at trial was entirely reasonable and in accordance with legal principles and refers to Walsh on Criminal Procedure at para. 22-98:-

> "The DPP retains a discretion as to the prosecution of the offence, including the calling of witnesses. Equally, prosecution counsel retain a discretion as to how the prosecution will proceed, including over the calling of witnesses. However, it is a discretion that must be exercised fairly and on the basis of good reason, and it will be policed by the trial judge in the interests of securing a fair trial."

29. The respondent further submits that Matthew Cummins wanted to rely on the text message to demonstrate motive on the part of his co-accused and the absence of such on his part. However, it is said that motive did not form part of the respondent's case. Furthermore, the evidence of the text message featured prominently in the case as Mr Cummins exercised his right to have the portion of his interview containing reference to it adduced by the prosecution. It was further referred to repeatedly by counsel during the closing speech.

30. The respondent rejects the assertion that the prosecution's failure to lead the text message evidence hampered Mr Cummins for fear of dropping his shield. It is common case that an accused with previous convictions who wishes to raise a defence that necessitates casting imputations against the good character of a prosecution witness or a deceased can apply to the trial judge for a ruling on this issue. Such a ruling was never pursued by Mr Cummins and the prosecution witness was not asked a single question about the text message.

31. The respondent refers to several authorities which wholly support the trial judge's exercise of her decision to refuse to accede to the application for separate trials. This includes *The People (DPP) v. Brett* [2011] IECCA 12 where Murray C.J. stated as follows:-

> "In joint trials evidence may be given against one accused which is not admissible against another accused. For example one accused may have made a statement to the Gardaí implicating a co-accused in the crime. That evidence will be admissible as evidence against the person making the statement but not against the co-accused. Similarly, one accused may call witnesses for the defence to give an account of facts relevant to the commission of the crime and that becomes part of the evidence in the case even though unfavourable to another accused. The fact that such matters may occur in the course of a joint trial does not of itself create the risk of an unfair trial or result in a miscarriage of justice. It may do so. It all depends on the circumstances and context of each case. A witness called by one co-accused may be cross-examined by counsel for the other accused like any other witness. It is inherent in joint trials that such witnesses may be called by a co-accused. This does not render a trial unfair, particularly when the other accused has a fair opportunity to address and contest the evidence of such a witness."

32. The respondent further refers to *The People (DPP) v. Roche, Roche & Freeman* [2019] IECA 317 where the Court noted that in order to properly exercise his or her discretion, a trial judge must assess the evidence in the case and separate trials will not necessarily be ordered in circumstances where the content of a memorandum of interview of one accused implicates another accused. It is always a question of discretion and a reviewing court will only intervene if the refusal of the application results in a miscarriage of justice.

**Discussion and Conclusion**

33. The starting point for the issue of severance is the decision in *AG v. Murtagh* [1966] IR 361 where Kenny J. commented:-

> "When two or more accused are charged in connection with one transaction, the interests of justice may require that they should be tried together even if a statement made by one of them incriminates another of them. When two or more persons are charged in connection with a single transaction, it is possible for each of the accused to cast the entire blame for the transaction on the other if they are tried separately and this may result in the acquittal of both."

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

35. Insofar as Mr Cummins is concerned, this Court cannot agree that the decision of the respondent not to place reliance on the text message gives rise to an application for severance. Whether Mr Cummins' trial proceeded without his co-accused or with his co-accused would not alter the respondent's position. The evidence of the text message was not being relied upon to establish motive or for any other purpose.

36. Secondly, there was no obligation whatsoever on the respondent to adduce the evidence of the text message. It was acknowledged that the contents of the message were false, thus the respondent would adduce in evidence material which was patently unreliable.

37. Mr Cummins advances the argument that the *fact* the message was sent is relevant regardless of the truth of the contents, and therefore, it demonstrated consistency on his part insofar as his interviews are concerned and supplies motive to his co-accused. However, it is noteworthy, insofar as his interviews are concerned, that while this may have assisted Mr Cummins to some modest degree, the fact remains that he lied in his voluntary statement to the Gardaí, and repeatedly altered his position in interview.

38. Moreover, in the assessment of the fairness of the trial and the real risk of prejudice Mr Cummins had the benefit of the text message in evidence in any event, so even if any prejudice were to arise, which it must be said, we do not see, the fact is the jury had knowledge of this message and were in a position to assess it in light of this appellant's assertion regarding his co-accused's comments after the killing.

39. The fact that there was a concern that cross-examination on the issue would result in a loss of the protection conferred by section 1(f) of the 1924 Act, we are not at all persuaded that this in and of itself would form the basis of an application for separate trials. Again, should Mr Cummins have been tried separately, it would still have been open to the Director to seek to cross-examine on the appellant's prior convictions should that situation have arisen.

40. Insofar as Mr Davy's application is concerned, we are wholly satisfied that the introduction of the content of the text message was simply one of those factors which arise in the course of a joint trial. In many instances of a joint trial, one accused may incriminate another in his/her interviews with the Gardaí, such evidence is not admissible as against a co-accused and does not of itself give rise to a real risk of an unfair trial.

41. There are other instances of the hazards of a joint trial, but the fact that those hazards are present do not necessarily render a trial unfair. It is dependent on the circumstances

of each case and the context in which the issue arises. This was emphasised by Edwards J. in *The People (DPP) v. Cawley & Da Silva* [2015] IECA 100 when he said at para. 105:-

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

42. In the present case, we do not find any error in the trial judge's decision to refuse to grant separate trials, in fact we would go so far as to say that had she done so, the mischief it is sought to prevent by jointly trying co-accused would have been permitted. That is, each accused would have been in a position to blame the other and the jury would have been deprived of the totality of the evidence.

43. Accordingly, this ground fails.

**The refusal to direct acquittals on the murder charge**

**Matthew Cummins**

**Ground 3**

The learned trial judge erred in law and in fact in refusing to grant a direction at the close of the prosecution case.

**James Davy**

**Ground 5**

That the learned trial judge erred in law and in fact when, on the 28th July, 2016, she refused the application direct that the jury find the appellant not guilty of murder;

**Background**

44. Both appellants contend that the trial judge erred in refusing to grant a direction at the close of the prosecution case. Matthew Cummins argues that a previous application for a dismissal of the case pursuant to s.4E of the Criminal Procedure Act, 1967, as amended, was also wrongly refused. However, while we intend to focus on the above ground, the submissions made regarding the application for a dismissal under s.4E of the Criminal Procedure Act 1967 are of some relevance.

45. On Day 7 of the trial, 19th July 2016, Matthew Cummins pursued this application for a dismissal and in support of that application submitted that the respondent had failed to point to any specific conduct attributable to Matthew Cummins to establish the *actus reus* for murder or even a basis to suggest he had aided or abetted Sean Davy in causing the death of Mr Dooley. A separate trial argument was moved in tandem with the s.4E application. Both applications were refused

46. On Day 10 an application for direction was made on behalf of Matthew Cummins which application was refused.

"Well, this is an application for a direction on behalf of Matthew Cummins to take this matter from the jury on the basis, one, and I'm just going to find the test, that there is no case or no evidence that the crime alleged has been committed by him and, as Ms Biggs said, if she failed on that ground she was going to rely on the second ground as a secondary ground, that if the Court took the view that there was some evidence, it's been submitted by her that it's of such a tenuous character because of the inherent weakness or vagueness, that the matter should be taken from the jury and that's the basis on which the application has been made.

Now, in the making of the application then Ms Biggs has said, and she's gone through the evidence, and it comes back to the argument we had earlier in the case in relation to the actus reus and asking the Director to set out what the Director says is the actus reus as against her client and Mr Treacy did deal with that to some degree but he said he was giving a skeletal outline only because it had been raised again but saying that there was no obligation on the Director to do so in circumstances where the case had been opened in a particular way.

Now, in relation to the alternative counts to murder, I agree that that's a matter, if it is to be addressed, that can be addressed at a later stage. Mr Treacy in reply says that the standard which has to be reached in order for Ms Biggs to be successful in her application is a very high standard, a situation where it would be perverse for a jury to act on the evidence and the prospect of an unfair trial and indeed perhaps a wrongful situation. Now, whether or not Ms Biggs is mistaking causation with the principle of participation, well I'm not going to comment in relation to that one way or another. Mr Treacy accepts that there's no evidence that Matthew Cummins struck Mr Dooley and he goes further than that and he says there's no evidence, except from the admission apparently which I haven't yet heard but I'm told there's an admission by Sean Davey in his interview that he struck one blow to Mr Dooley. We do know from the evidence of Dr Cassidy that, as Mr Treacy said again, that there were at least 10 blows to the body of Mr Dooley but there's no evidence before the Court and no evidence before the jury that Matthew Cummins struck any of those blows.

But the case has been opened, and I go back to the application for separate trials, the case was opened very clearly by the prosecution on the basis that the prosecution case is that this is a case of joint enterprise on behalf of Matthew Cummins, Sean Davey and James Davey. The prosecution are not saying that one is more culpable than the other. They are saying each of them are culpable in bringing about the death of Mr Dooley and that's the prosecution case. There are other admissions in the interviews, the subsequent interviews, of Matthew Cummins in relation to what he said he did, both before and after Mr Dooley met his brutal death. But on the basis that the case has been opened to the jury by the prosecution that this is a case of common design, of joint enterprise, as has already been said a number of times, there's no denial that the three men were present in the room at the time, it's absolutely correct to say that mere presence is not

enough, that's absolutely correct, but no more than I said before, that it's a classic case, and I do actually think it's a classic case where the indictment should not have been severed, so it's appropriate that it should go to the jury as all three being tried together. I think this is actually a classic case that should also go to the jury for them to decide the facts in this case and the arguments that have been made by Ms Biggs in this application are no doubt arguments that will be put before the jury in due course for them to reach their determination in relation to the facts on the evidence and the inferences that they draw from the evidence which they are entitled to do.

Mr Treacy reminded me of the line that Mr Edwards has quoted in the M case and that is that a judge must always bear in mind the constitutional primacy of the jury and must not in any respect usurp the jury in its function in that respect and, as I say, given the manner in which the prosecution case has been opened, given the manner in which the prosecution case has been run and given the manner in which the prosecution case will be closed to the jury, and Mr Treacy made that clear in the application before separate trials, my view is that this is a classic case to go to the jury for them to determine, on the evidence that they have and from the inferences that they draw, what the facts of this case are. So, I'll refuse the application."

47. James Davy also sought a direction in respect of the murder charge, moving the application on Day 13 of the trial. It was argued that there was no evidence of a plan, agreement or discussion regarding killing Mr Dooley. It is said that bringing a baseball bat to the scene does not raise an inference of intention to commit murder and that mere presence at the scene when his co-accused spontaneously attacked and killed Mr Dooley also does not render him guilty of murder. Some knowledge or foresight of his co-accused's intent or actions is required and there was none. He also submitted that the allegations contained in the interviews of his co-accused were inadmissible against him. The trial judged refused this application in the following terms:-

"All right. Well, this is an application by Mr Dwyer and he bases his application on the first leg only of the Galbraith test, that is if there is no evidence that the crime alleged, and the crime alleged, let's be clear about it, the crime alleged is the murder of Thomas Dooley, and if there's 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.

Now, Mr Dwyer at the beginning of his application set out a number of the facts that he says are before the jury in relation to James Davy. He said that he came to Edenderry on that Tuesday, the 11th of February 2014, as on previous Tuesdays, that he collected the dole, that he met with Sean Davy and others, that he drank about six pints before a house party at April's, that he had the baseball bat in his possession and his evidence, and one other witness's evidence, is that he said it was for his personal protection, that James Davy admitted to criminal damage at

April's house, that they then that Matthew Cummins turns up at that house party and that they then leave and they go to Thomas Dooley's house, that there is, without doubt, an assault on Thomas Dooley, and the without doubt are my words, that Sean Davy admits to having assaulted him, that James Davy was interviewed and those interviews are part of the prosecution case and are all exculpatory in terms of James Davy's involvement in this crime of murder, the murder of Thomas Dooley.

Now, the prosecution is then criticised because it's said the prosecution hasn't identified the plan or the purpose for these three accused going to the house of Thomas Dooley and they haven't the prosecution haven't shown that there was any agreement to hurt or to kill Thomas Dooley. Mr Dwyer says that the most that can be said is that they went to drink, that Mr Cummins admits to maybe stealing the medication, but Mr Dwyer says there isn't a shred of evidence to suggest that there was any discussion about killing Thomas Dooley or inflicting serious harm.

I then go and then all of the case law in fact a great deal of the case law that was opened on Friday was opened again and similar passages were relied upon. I just go then to what Mr Treacy said in reply. He said that in relation to the application from Friday really that Ms Biggs had made there wasn't really a single difference in the application being made Toddy and the Court was in effect being asked to contradict its own ruling as of last Friday. What I will say in relation to that is, and I did say it to Ms Biggs, that there when Ms Biggs raised at the outset of the trial an issue with the prosecution, she wanted the actus reus of her client ruled out, Mr Dwyer did say that that was his application as well and I ruled against that and said that the prosecution case was as it had been opened and as I'm told it will be closed but without finding exactly what Mr Treacy said yes, he said the only substantive essence of Mr Dwyer's application in saying that there is no evidence that the crime alleged has been committed is that James Davy did not admit to hitting Mr Dooley.

Now, the prosecution case was opened on the basis that all three accused are equally culpable in the alleged murder of Thomas Dooley. It's not disputed that all three were there together. It's not disputed that all three left in and around the same time, although Sean Davy I now know in his interview says that he left first, James Davy in his interview said that he left first. All three left together. All three in fact identified themselves on the portions of CCTV that have been played at various points and all three were at the bins and there have been various admissions in relation to disposing of materials afterwards. But the evidence is there for the jury to determine the facts of the case and to infer from the evidence that they accept whether there was in fact a tacit agreement between these three people to do anything at all and then whether there was a tacit agreement between these three people to either kill or cause serious injury to Thomas Dooley and I would be very remiss in what I do if I were to accede to the application and take this trial from the jury. They have a wealth of evidence before them in relation to

really what happened before this incident. There is no direct account or independent account of what happened in Mr Dooley's home. All we have are the three interviews from the three accused. We know that they've told lies at various stages and it is for the jury to determine the facts of this case and to infer from the evidence whether in fact there was a tacit agreement, whether these three had either an agreement to cause serious injury or indeed to kill Mr Dooley and so I'll refuse the application."

**Submissions**
*The appellant – Matthew Cummins*

48. On behalf of this appellant it is submitted that there was no evidence of any actual act by Mr Cummins for the purpose of causing the death of Mr Dooley. The evidence that the prosecution sought to adduce to establish that Mr Cummins had the requisite intention at that time simply involved the consumption of drugs, behaviour at a house party and that James Davy was in possession of a bat.

49. Ms. Biggs brings some factual matters to the Court's attention. She says it was not unusual for young people to go to the deceased's house to socialise and consume alcohol, nor that there was anything unusual about the method of entry. Evidence of smoking and drinking was found in house. She draws our attention to the fact that James Davy had the baseball bat for the evening.

50. Ms. Biggs relies on Professor Cassidy's evidence under cross-examination that "the overall pattern of trauma and particularly the general appearance of the individual's injuries would suggest that all of the significant injuries to the head area were caused by the same instrument or by similar instruments and therefore it's most likely that one person inflicted the injuries in quick succession". While acknowledging the doctrine of common design, she says that this evidence is important in that there was no active participation in the attack by her client or James Davy and that the evidence given by Prof. Cassidy is relevant to the assessment of the content of her client's interviews. Ms. Biggs then highlights the events post-mortem which included that efforts were made to burn the body and that stilnoct taken from the deceased's house was located in green bins. When Mr Cummins' clothing was examined, his own blood was found.

51. On arrest, this appellant gave an account and said he went to the deceased's house to drink and that Sean Davy beat him to death.

52. Ms. Biggs says there are two problems with the State's case which illustrate an absence of evidence either in terms of joint enterprise or of secondary participation, specifically aiding and abetting. She says the most her client should have been convicted of on the evidence was an offence contrary to s.7(2) of the Criminal Law Act 1997, that is assisting an offender after the commission of an offence.

53. Ultimately in respect of all the acts suggested by the prosecution, it is said they occurred post death and in the absence of a motive being suggested per the text message, that

fundamentally there was no evidence to suggest that at the time that Mr Cummins brought the Davys to the house that Mr Cummins formed the requisite intention to kill or cause serious harm.

54. In essence, Ms Biggs argues in simple terms that there was insufficient evidence to convict the appellant of murder and that the judge ought to have directed the jury to return a verdict of not guilty of murder.

55. She further argues that the refusal of the DPP to particularise what constituted the *actus reus* of the appellant was a recurring theme throughout the trial as the prosecution rejected the contention that there was an obligation to set out or particularise the *actus reus*.

56. The importance of particularisation was considered in *The People (DPP) v. Synott* [2016] IECA 270 where the accused was prosecuted both as a primary participant and as a secondary offender. However at the outset, it was alleged that specific acts constituted the offending behaviour. The issue arose concerning how an indictment should be framed where an accused was prosecuted as both the sole offender and as a participant. This was in the context of a complaint that the defence was essentially caught by surprise during the trial that they would have to meet a case based on common design or derivative liability that was not apparent at the outset or from the indictment. While the Court did find that the indictment was compliant with the rules of pleading, it would have been preferable if the particulars thereto had in fact made clear the basis on which the prosecution was seeking to have criminal liability attributed to the appellant. In the instant case, it must be noted there was no particularisation in the indictment whatsoever. The prosecution case was one of joint enterprise first and secondary participation under s.7 of the Criminal Law Act, 1997 in the second instance. It was not the case that the prosecution maintained that Mr Cummins did a specific act which directly caused the death of Mr Dooley, namely by striking him with a blunt instrument.

57. It was accepted that the behaviour of Mr Cummins in assisting in the disposal of the various items, at a location where the items would inevitably be found, was reprehensible and amounted to a criminal offence under s.7(2) Criminal Law Act, 1997 as amended. It was always accepted that Mr Cummins was not entitled to be discharged from the indictment but rather it was Mr Cummins' case that the evidence only went towards an alternative count under s.7(2) of the 1997 Act.

58. The prosecution case can be distilled to the act of bringing the Davys to the house, being present in the course of the killing and then assisting in disposing of items post-mortem. The prosecution further sought to argue that the evidence of burn marks was evidence to be considered as against the marks on Mr Cummins at the time of arrest. This was a disputed fact but was also post-mortem. The prosecution were essentially seeking to attach liability in that regard to acts committed post-mortem for the *actus reus* of killing.

59. The appellant refers to Charleton and McDermott, *Criminal Law and Evidence*, and their consideration of *R v. Clarkson* [1971] 1 WLR 1402 and the learned authors' observation

that persons coming onto a scene, such as a rape as in the case of *Clarkson*, and not intervening, while behaving reprehensibly, they are not participating. An accused must demonstrate encouragement or participation in a manner which, it can be inferred, promotes the act.

60. Ultimately it is said that in circumstances where the prosecution was unable to attribute any specific acts to Mr Cummins beyond showing his co-accused where Mr Dooley lived, and recognising the prosecution contention regarding motive and the text message in that regard, it is said that the prosecution evidence at its height did not establish a *prima facie* case as against Mr Cummins beyond offences pursuant to s.7 (2) Criminal Law Act, 1997 as amended.

*The appellant James Davy*

61. This appellant says that despite being repeatedly asked to state what exactly was the case against the appellant, the prosecution case went no further than demonstrating that the appellant went to the deceased's house with his co-accused and during that time the deceased died.

62. Mr Dwyer says that the height of the respondent's case of common design is that they engaged in drunken and anti-social behaviour, when they went to the deceased's house, they went there to consume alcohol. His client had not been there before but Mr Cummins had and knew how to gain access. It is asserted that this action of going into the deceased's home through the window is not so incriminating when it is appreciated that access had been gained in this manner on previous occasions.

63. Equally, the possession of the baseball bat by James Davy would appear at first blush to be incriminating but the significance of entering the premises with the bat is much reduced when one considers that he held it openly for many hours beforehand. Mr Davy was openly displaying the baseball bat in the bar, he left it in the taxi on the way to Ms. Murray's house and gave an innocent explanation for possession of the bat in interview. Consequently, it is asserted that his arrival at the house with the bat loses significance.

64. James Davy says he was drinking and socialising when Sean Davy beat the deceased to death. Sean Davy admitted to the assault. Mr Dwyer relied on Professor Cassidy's evidence that only one assailant struck the blows and says this is lends credibility to his client's contention that Sean Davy struck the blows.

65. It is contended that the position adopted by the Director varied and that the respondent's case for joint enterprise never went beyond the assertion that the three men were together beforehand, went to house together and left together. Critically, it is said that the respondent failed to demonstrate that there was any agreement, tacit or otherwise, between the parties to kill or cause serious harm to Mr Dooley prior to going to his home.

66. Mr Dwyer contends that the most his client should have been convicted of is an offence contrary to s.7(2) of the 1997 Act. In that regard, he pointed at trial to his client taking possession of a white plastic bag on leaving the house and depositing it in a depot.

*The respondent*

67. It is submitted that the trial judge was entirely correct to refuse both applications to direct the jury to return verdicts of not guilty of murder. Firstly, Mr Treacy says that applications to withdraw charges from the sole arbiter of the facts is a power that should only be exercised in exceptional circumstances. In support of this submission the respondent relies on established principles in *Galbraith* and the recent observations of this Court in *The People (DPP) v. M* [2015] IECA 65. Secondly, in order to persuade a trial judge to withdraw a charge, the accused is required to engage with the prosecution case at its highest. It is submitted that both appellants failed to do this. Their applications were grounded on the assumption that their responsibility could only lie in secondary participation in circumstances where a co-accused, Sean Davy, admitted to striking Mr Dooley with the baseball bat. Equally, it was submitted that mere presence at the scene was insufficient without evidence of some participation. Both appellants failed to engage with the prosecution case which was that all three accused were intrinsically and jointly involved in bringing about the death of Mr Dooley.

68. The case was specifically opened squarely on the basis of joint enterprise and common design. It was contended that all three accused had been in each other's company prior to the crime; they had gone together to the home of the deceased and gained entry through a window, with all three being present together when Mr Dooley was murdered and when there was an attempt to set his body on fire. All three left the scene together and were together at a recycling centre when incriminating evidence was disposed of. They provided accounts in interview which were littered with lies and counter accusations against one another. The prosecution made it clear that it was not contending that one accused was more or less culpable than the other. The jury heard evidence that Mr Dooley suffered at least ten blows to the head and body. Professor Cassidy's evidence was to the effect that while the injuries were consistent with one instrument being used, in her opinion, they were also consistent with being inflicted by one or more persons. It must be borne in mind that Sean Davy only accepted responsibility for one of those blows. As such, the appellants' contention that their responsibility lay only in secondary participation was to entirely ignore and disengage with the prosecution case when taken at its highest.

69. In oral submissions Mr Treacy says the appellants' contention is that as only one of the appellants admitted to striking the deceased, the others are absolved from liability. He rejects this suggestion on the part of the Director and says all three men were intrinsically associated with the murder.

70. He says all three men were present for the entire thing and participated in the aftermath. This was a brutal murder – the evidence which is uncontroverted, the injuries sustained

by the unfortunate deceased included a comminuted fracture of the entire right side of the skull, multiple lacerations, a fracture to the breastbone and multiple rib fractures.

71. Mr Treacy says that Mr Cummins arrived at the party at Ms. Murray's house, used drugs, damaged her house and then left. He knew the deceased, he led the others to his home, opened the window to enable the others to gain admission, was present for the assault and the efforts to burn the deceased afterwards and assisted in the clean-up. He admitted to stealing stilnoct from the deceased's home. His blood was on his clothing. On the 17th February 2014, he signed a voluntary statement where he falsely stated he stayed in James Davy's house. The accused took a different route home to avoid CCTV and admitted to lying.

72. James Davy went drinking, provided a baseball bat, went to a house party and to the deceased's house thereafter. When interviewed – he admitted he had the bat. He said that he went home with Sean Davy. He admits doing something with furniture in the house. He tried to set the deceased on fire. Then he said he left and saw Mr Cummins trying to set fire to the man. He then says he carried a bag with the contents of items taken from the house.

**Discussion**

73. The core principles of common design or the doctrine of joint enterprise are as stated in the well-known decisions of *The People (DPP) v. Cumberton* (unreported, Court of Criminal Appeal, 5th December 1994) and *The People (DPP) v. Doohan* [2002] 4 IR 463 which decisions approved the dicta in *R v. Anderson and Morris* [1966] 2 QB 110 as summarised in the head note:-

> "Where two persons embark on a joint enterprise, each is criminally liable for acts done in pursuance 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 the unauthorised act."

74. The essence of the doctrine is that two or more persons agree to participation in a criminal act or acts and therefore will be responsible for acts committed to further that plan. The criminal responsibility is dependent on the existence of an agreement or a plan to take part in criminal acts. There must be evidence of such an agreement, which can be express or implicit. An example often given is an agreement between parties to take part in a bank robbery, one may remain outside in a getaway vehicle, two may have weapons inside the bank and one may act as a lookout, each is criminally responsible for the armed robbery and for any unusual consequences which may arise therefrom; the common design being armed robbery of the bank.

75. The respondent's case is that the three men had as their common design to attack Mr Dooley and that consequently each was responsible for the acts of the other in the execution of that enterprise. However, the issue is whether there was evidence, express or implicit ,of an agreement to, at a minimum, cause serious harm to Mr Dooley.

76. We do not intend to rehearse the evidence in any detail. Suffice to say that the respondent's case rested on James and Sean Davy socialising on the 11th February 2014 in a public house. James Davy had with him a baseball bat. Following this, the two men went to a Ms. Murray's house where they were joined by Matthew Cummins. All consumed alcohol and either cocaine or methadrone. Ms. Murray's house was significantly damaged by the men, from where they proceeded to Mr Dooley's home. Mr Cummins had been to Mr Dooley's home on previous occasions and gained access through a rear bedroom window and then opened another window, permitting the other two men to gain access.

77. James Davy brought the aforementioned baseball bat with him. The three men remained there for approximately an hour and a half and then left together. While the men were in the house, Mr Dooley was subjected to a vicious assault, leading to his death.

78. There was evidence of burns to the body where efforts had been made to set him alight.

79. The three men were observed on CCTV footage disposing of a bloodstained baseball bat in a recycling centre proximate to Matthew Cummins' home. Furthermore, items were retrieved from the recycling bins, which included sleeping medication which had been taken from the deceased's home. As stated the accused sought to place blame to one degree or another on each other.

80. In interview Matthew Cummins gave the following description of the events after the men left Ms. Murray's house and before arrival at Mr Dooley's house:-

> "Question: "The mood when you are leaving?" Answer: "We left no one was aggressive or anything with the girl. I think it was 3.30/4 am. James had the bat with him. We were leaving the estate. He stopped to piss, he gave the bat to me so I put it in my bottoms in case a car came. We walked to Sweeney's garage to get a mixer because we took the vodka with us. There was nearly half a bottle left. I don't know if it was a 70cl or a litre. We got to Sweeney's. I had taken the bat out at the hatch. I was, like, messing with it and I dropped it on the ground. I don't know if I picked it up but it was given back to James. When we left the shop we headed towards Killane. I thought we were going to Sean's auntie's. We went up the new road by the fire station. I asked James where are we going? I went back to the shop a second time. He said will you go back to the shop for rollies and Amber Leaf? I did and as I was running back Sean had his phone on his chest. The boys were talking as I crossed the road. James said you know that Toddy lad? I said yes but he'll be asleep at this time. James said aye stop. We kept walking on the road until the houses stop and there's grass on both sides up by the fire station. James said how do you get in the back way of Toddy's? I said he's probably asleep. James said come on just show us. It was the second time he asked me. I never thought anything about it, never dawned on me. Sean was still on the phone I think to Lisa Connolly. That's what I said about the phone, like that as if he did not want me listening. We went up to the wall back where all the houses are. We were sitting on the wall, me and James and I said it's that one

there pointing out Toddy's. James shouted back at Sean come on, this is the one. Sean got off the phone then. The three of us entered the back garden. The bathroom and bedroom lights were on. I said maybe he's awake. I went to knock on the bedroom, James said don't. I said why and then I noticed the bathroom window was open. James asked me first you get in the window and let us in the door. I said no, I'll knock and maybe he'll let us in. I said I will in my bollocks go in. Sean said you know him better. The boys thought I knew him better. I knew him as one of the boys. I said I don't know him as well as you think. We were talking shit. I said this is stupid. I climbed in the bathroom window and went in. I walked into the sitting room to let the lads in. The door was locked, the back door, so I opened the window so they got in the window, the sitting room/kitchen."

Concerning the events in the house, Matthew Cummins said:-

"Question: "Do you accept that you broke into the house?" Answer: "Yes." "Do you accept that you disposed of items?" Answer: "I helped to. I disposed of my clothes in a bag outside of my apartment." "Do you accept that you were an active participant?" Answer: "No, I did do stuff but I didn't hit the man." Question: "Didn't you know you were going to get caught and decided to try to get out of it as much as you can?" Answer: "I didn't hit him." Question: "Did they tell you before that he raped your cousin?" Answer: "No." Question: "Did you assist the boys before the event, before the murder showing them the house?" Answer: "Yes." Question: "Did you assist after the event?" Answer: "Yes, I helped get rid of the stuff." Question: "Did you assist in disposing of items used in the murder of Toddy Dooley?" Answer: "Yes." Question: "I am putting to you that the only reason you stayed in the house was that you actively participated?" Answer: "I am ashamed of being there but I didn't do anything."

81. This appellant denied any involvement in the striking of the deceased, but accepted he assisted in disposing of items in the aftermath.

82. Insofar as James Davy is concerned, there is no doubt but that he lied when interviewed by the Gardaí. In the fourth interview, having been shown CCTV footage, this appellant admitted being in Mr Dooley's house at the relevant time. He contended that one of the men struck him with the bat, but he denied striking a blow. He suggested that his co-accused, Sean Davy spontaneously struck the deceased:-

"Question: "Did you see Sean Davy hit him with the bat?" Answer: "Yes." Question: "How many times?" Answer: "A few times. I don't know." Question: "Why did he do it?" Answer: "Because he ..." Question: "Why, James?" Answer: "Just because he done something to his auntie or something."

The interview continues:-

"Question: And when did Sean tell you about this like? When did he tell you?" Answer: "He said it there." Question: "Just jumped up all of a sudden and said it

> or what?" Answer: "Just said it, yes." Question: "Can you remember what he said?" Answer: "Just said him, he done something to my auntie." Question: "He said he had done something to his auntie and where did he get the bat from?" Answer: "It was on the couch or something."

James Davy admitted to assisting in the conduct after the attack on Mr Dooley.

83. As stated, the respondent's case is that that all three were intrinsically involved in a common design and that all three bore the same degree of culpability and were equally responsible for the killing. It was contended that each of the three accused, acting in a joint enterprise, had the necessary intention for murder, namely the intention to kill or, at a minimum, to cause serious injury to Mr Dooley.

84. It is correct to say that all parties to a joint enterprise are considered to be principal offenders.

85. Common design requires proof of a common agreement to take part in criminal activity, which agreement may be express or tacit, and which may be inferred from the surrounding circumstances. As stated by Dunne J. in *The People (DPP) v. Dekker* [2017] 2 IR 1 at para. 74:-

> "[i]t will be relevant in a case of joint enterprise to consider what the participants in the crime had agreed to do, tacitly or expressly. To that extent issues of foresight are very relevant. Thus if an individual participates in an assault which they know is intended to cause serious injury and death occurs, given that the principal would be guilty of murder if death ensured, it seems to me that, having regard to the provisions of s.4, it follows as a matter of logic that the accessory should also be guilty of murder, even if the accessory did not realise that the principal actually assaulted the victim with intent to kill."

86. Mr Treacy contends that the jury were entitled to take account of the events which took place after the killing, that is the clean-up and the disposal of incriminating items and we are satisfied that he is correct in this respect.

87. However, the first issue in the context of a case of common design is the existence of an underlying tacit or express agreement to take part in a joint enterprise. There must be evidence that the agreement extended to the actual offence committed. At a risk of restating the obvious, such an agreement does not need to be expressly stated but may be inferred from the surrounding facts and circumstances. It is for the jury in any given case to decide if the facts disclose that there was an agreement and if so, whether the actions of each or any of the accused fall within that agreement.

88. In *The People (DPP) v. Cumberton* (unreported, Court of Criminal Appeal, 5th December 1994), Blayney J. at p.501 agreed that the direction given by the trial judge was substantially correct where the trial judge stated:-

> "If two or more people make an agreed plan to carry out some unlawful act, each of those persons is as liable as the other is for what eventually takes place that is within the reasonable contemplation of that plan."

89. However, Blayney J. went on to opine that the judge ought to have advised the jury that if one party goes beyond what is contemplated, then the other party is not criminally responsible. He then states the test as follows:-

> "The test is what was tacitly agreed **between** the parties and whether what happened was within the common design."

90. We quote this paragraph in that it is essential to the doctrine that there be evidence of an agreement before there can be a joint enterprise.

91. In effect the respondent's case is that the entry onto the property through the window and the introduction of the baseball bat together with the other factors identified made it quite clear that there was a tacit agreement to inflict serious harm on the deceased and thus there was evidence of a joint enterprise to which all three were a party and that the appalling assault on the Mr Dooley was in furtherance of that joint enterprise.

**Conclusion**

92. We cannot agree with this assessment of the evidence. Undoubtedly, in many situations, entering as a trespasser with a baseball bat onto the property of another would be cogent evidence from which an agreement to, at a minimum, inflict serious harm on the occupant or occupants could be inferred. However, in the present case it is simply not as clear cut. While each accused knew that James Davy was carrying the baseball bat, did that mean they foresaw that Sean Davy might act with a murderous intent? Ordinarily this would be for a jury to determine on the evidence. "As was pointed out in R. v A. [2010] EWCA Crim. 1622, [2011] Q.B. 841, if an accused knows that a co-accused is carrying a weapon then ordinarily that will mean that they realised (foresaw) that the principal might act with intent to kill or do really serious injury but it will be a matter for a jury to decide whether or not there is a proper evidential basis for asserting the possibility that the accused foresaw an intent to inflict no or minor harm and if, in fact, that was the situation." Ref: *The People (DPP) v. Dekker* [2017] 2 IR 1.

93. This is a finely balanced case and an unusual one. While certainly, the three men knew that James Davy was in possession of the baseball bat, we think that this is less significant and less sinister when viewed in the context of the evidence. The baseball bat was in the possession of James Davy and was visible at stages throughout the evening in question, it is not the position on the evidence that it was retrieved just prior or for the purpose of going to the deceased's home. In those circumstances, was there evidence from which the jury could infer that Matthew Cummins and James Davy realised or foresaw that Sean Davy might act as he did? We think not.

94. Secondly, the manner of entry is not as sinister as might ordinarily be the case, in that this also must be examined in the context of the circumstances. It is apparent from the

evidence that young people went into Mr Dooley's house to socialise and used the window as the means of entry.

95. The contents of the interviews of James Davy and Matthew Cummins do not shed any further light on any agreement, tacit or otherwise. In the ordinary course of events, an agreement may, notwithstanding denials or blame of another accused, be inferred from the surrounding circumstances. Direct involvement is not necessary to prove a person's guilt by virtue of the doctrine of common design, but what is essential is that there is evidence of an agreement between the parties. This is fundamental to a joint enterprise.

96. The conduct of James Davy and Matthew Cummins in the aftermath of the murder of Mr Dooley was reprehensible. The efforts to burn the body, the stealing of property and the disposal of incriminating items are all deeply unsavoury. However, while those factors could certainly be considered in inferring the existence of an agreement, they are not determinative. If the circumstances concerning the possession of the baseball bat and the entry into the house were different, then the conduct in the aftermath would certainly be additional factors lending weight to the existence of an agreement and acts done in furtherance of and in contemplation of that agreement. But, this is not the evidence in the present case.

97. In those circumstances, we find ourselves in agreement with the arguments advanced on the part of each appellant. There simply was an absence of evidence from which the jury could infer the existence of an agreement in the first instance. We find that the trial judge erred in failing to direct the jury to return verdicts of not guilty of murder. However, there is overwhelming evidence of guilt insofar as an offence under s.7(2) of the Criminal Law Act, 1997 is concerned.

98. In light of our findings, we do not propose to address the balance of the grounds of appeal.

97. We will allow the appeal and quash the conviction for murder, however, in accordance with section 3 (1) (d) of the Criminal Procedure Act, 1993, we will substitute a conviction for assisting an offender pursuant to s.7(2) of the Criminal Law Act 1997.

98. We will remit the matter for sentence before the Central Criminal Court.